

**CIVIL RIGHTS WITHOUT REMEDIES:  
VICARIOUS LIABILITY UNDER TITLE VII, SECTION 1983,  
AND TITLE IX**

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*The Supreme Court has taken an inconsistent approach to allowing vicarious liability under major civil rights statutes. In recent cases, the Court has permitted qualified vicarious liability for supervisors' sexual harassment under Title VII, but rejected vicarious liability under Title IX. Earlier, the Court rejected vicarious liability for local governments sued under Section 1983. In this Article, Professors Fisk and Chemerinsky describe the Court's inconsistent approaches and argue that they cannot be justified by the text or legislative history of these statutes. Professors Fisk and Chemerinsky argue that each of these statutes is meant to achieve the same purpose, deterring civil rights violations liability advances these goals, and that the Court, therefore, should interpret each of these important civil rights statutes to allow such liability.*

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INTRODUCTION

There is no single, omnibus civil rights statute in the United States. Rather, over the course of a century, Congress has enacted many different laws to protect specific aspects of civil rights from infringement. Section 1983,<sup>1</sup> for example, was enacted in 1871, as part of the Ku Klux Klan Act, to deal with racial violence in southern

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<sup>1</sup> 42 U.S.C. § 1983 (1994). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

*Id.*

states.<sup>2</sup> The 1964 Civil Rights Act<sup>3</sup> contains many crucial provisions prohibiting discrimination, including Title II, which prohibits discrimination by places of public accommodation;<sup>4</sup> Title VI, which limits discrimination by recipients of federal funds;<sup>5</sup> and Title VII, which prohibits discrimination in employment based on race, national origin, gender, or religion.<sup>6</sup> Title IX subsequently amended Title VI of the 1964 Civil Rights Act to prohibit gender discrimination by recipients of federal funds.<sup>7</sup> Many other federal civil rights laws exist, including the Age Discrimination in Employment Act ("ADEA")<sup>8</sup> and the Americans with Disabilities Act ("ADA").<sup>9</sup>

All of these laws share a key feature in common: they create civil liability for civil rights violations.<sup>10</sup> Each law imposes civil liability so as to deter wrongs and compensate injured individuals. Indeed, the United States Supreme Court has recognized expressly that each of these laws serves the twin goals of deterrence and compensation.<sup>11</sup>

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<sup>2</sup> See *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 685 (1978). For other discussion by the Supreme Court of the historical background of Section 1983, see also *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 503 (1982) (stating that Section 1983 was enacted to prevent states from depriving citizens of their federal rights); *Allen v. McCurry*, 449 U.S. 90, 98 (1980) (stating that the goal of Section 1983 was to counter the influence of the Ku Klux Klan over state governments); *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972) (stating that the purpose of Section 1983 was to enforce the Fourteenth Amendment); *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961) (stating that Section 1983 was enacted to provide a federal remedy for civil rights violations perpetrated by the states).

<sup>3</sup> 42 U.S.C. § 2000a *et seq.* (1994).

<sup>4</sup> See *id.* § 2000a.

<sup>5</sup> See *id.* §§ 2000d to 2000d-4. Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* § 2000d.

<sup>6</sup> See *id.* §§ 2000e to 2000e-5. See also *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (stating that the purpose of Title VII was to achieve equality of employment opportunities).

<sup>7</sup> See 20 U.S.C. § 1681 (1994). Title IX was added to the civil rights laws as part of the package of amendments known as the Education Amendments of 1972. Congress thought that the omission of sex from the list of protected traits covered under Title VI, which prohibits race discrimination by recipients of federal funds, resulted in unacceptable sex discrimination by certain educational institutions. Accordingly, Title IX, which is modeled closely on Title VI, prohibits sex discrimination by educational programs that receive federal funds. See *Cannon v. University of Chicago*, 441 U.S. 677, 694-95 n.16 (1979) (detailing the legislative history of Title IX).

<sup>8</sup> 29 U.S.C. §§ 621-34 (1994).

<sup>9</sup> 42 U.S.C. §§ 12101-12213 (1994).

<sup>10</sup> A private right of action is available under Title VI. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 594-95, *cert. denied*, 463 U.S. 1228 (1983).

<sup>11</sup> For example, the Court has stated expressly that Section 1983 goals are deterrence and risk spreading. See *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651 (1980).

As a result of the civil liability established, a common issue has arisen: whether employers should be vicariously liable when employees are found to violate the civil rights laws. The question seems identical for each law. Vicarious liability, often called respondeat superior liability, advances the goals of the civil rights laws. Employer liability deters wrongdoing because it provides an incentive to control employee behavior and to prevent violations.<sup>12</sup> This deterrence is the standard rationale for vicarious liability throughout tort law.<sup>13</sup> Moreover, vicarious liability helps to ensure compensation for injured victims of civil rights violations. An individual employee rarely will be able to pay significant damages; the deeper pocket of the employer greatly increases the likelihood that judgments will be paid.

Although the basic issue of vicarious liability is the same under each of these civil rights laws, the Court has, for the most part, rejected vicarious liability and has created several different rules for employer liability. In 1978, the Supreme Court rejected respondeat superior liability under Section 1983 and held that governments—the only possible entity defendant under the law<sup>14</sup>—are liable only for violations resulting from their own policies and customs.<sup>15</sup> In other words, cities are liable only on the basis of the fault of high-level policymaking officials. In contrast, last Term, in *Burlington Industries, Inc. v. Ellerth*<sup>16</sup> and *Faragher v. City of Boca Raton*,<sup>17</sup> the Supreme Court approved vicarious liability for employers under Title VII for sexual harassment by supervisors.<sup>18</sup> In these holdings, the Court qualified the vicarious liability rule by allowing an employer to prove, by affirmative defense, that it was not at fault when the harassment was unaccompanied by an employment action

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<sup>12</sup> See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 500-01 (5th ed. 1984); Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 569-70 (1988); J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 308-15 (1995); Kathleen A. Smith, Note, *Employer Liability for Sexual Harassment: Inconsistency Under Title VII*, 37 CATH. U. L. REV. 245, 259-61 (1987).

<sup>13</sup> See KEETON ET AL., *supra* note 12, § 69, at 500-01; John Dwight Ingram, *Vicarious Liability of an Employer-Master: Must There Be a Right of Control?*, 16 N. ILL. U. L. REV. 93, 93 (1995); see also *infra* text accompanying notes 24-41.

<sup>14</sup> Private entities, therefore, are not liable under Section 1983. Section 1983 applies when an action is under the color of law. The Supreme Court declared in *United States v. Price*: "In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *United States v. Price*, 383 U.S. 787, 794 n.7 (1966). In *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), the Court held that state governments cannot be sued under Section 1983 because they are not persons under that statute.

<sup>15</sup> See *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1978).

<sup>16</sup> 118 S. Ct. 2257 (1998).

<sup>17</sup> 118 S. Ct. 2275 (1998).

<sup>18</sup> See *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93.

such as a hiring, firing, promotion, demotion, or transfer.<sup>19</sup> However, in another decision last Term, *Gebser v. Lago Vista Independent School District*,<sup>20</sup> the Court rejected vicarious liability for sexual harassment under Title IX.<sup>21</sup> In that case, the Court concluded that employers may be found liable under Title IX only if they have actual knowledge of sexual harassment by employees and are deliberately indifferent to such harassment.<sup>22</sup>

This Article examines the puzzle of the inconsistency of these cases. What, if anything, explains why vicarious liability is allowed under some civil rights laws and not others? Each of these statutes is silent about this question. None has a legislative history addressing the issue. The thesis of this Article is that the inconsistency is a result of a misguided approach to statutory interpretation. In each area, the Court looked for some aspect of the statute's language or legislative background to decide the issue of vicarious liability. The preferable approach would have been for the Court to have undertaken a purposive analysis, considering whether vicarious liability best achieved the central goals of the legislation. From this perspective, the Court should have found in favor of vicarious liability under all of these statutes.<sup>23</sup>

Part I of this Article describes the Court's inconsistent approach to vicarious liability in civil rights cases. Part II discusses why vicarious liability should exist in civil rights cases and why a better approach to statutory interpretation supports this result for each of these laws. Finally, Part III considers the implications of our analysis for other areas of civil rights litigation.

Employer liability is enormously important in civil rights litigation. Often it will mean the difference between an injured plaintiff receiving compensation and getting nothing and between employers preventing civil rights violations and ignoring them. By limiting employer liability to cases in which high-level officials of the defendant city, school district, or employer knew of the civil rights violation (under Title IX) or knew or should have known (under Title VII), the Court has created a whole class of civil rights violations for which there will be no remedy. The fault-based standard long has vexed practice under Section 1983. The new adoption of a fault-based standard for Title IX and Title VII cases is likely to cause problems. Rather than moving Title VII and Title IX law in the direction of Section 1983, the Court should move Section 1983 and Title IX to the strict employer liability standard that courts applied in Title VII cases before the sexual harassment cause of action and the availability of punitive damages led some courts to conclude that employers should not be held automatically liable for workplace discrimination.

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<sup>19</sup> See *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93.

<sup>20</sup> 118 S. Ct. 1989 (1998).

<sup>21</sup> See *id.* at 1993.

<sup>22</sup> See *id.* at 2000.

<sup>23</sup> The focus of this Article is on three statutes: Section 1983, Title VII, and Title IX.

I. THE SUPREME COURT HAS BEEN INCONSISTENT IN ITS APPROACH TO  
VICARIOUS LIABILITY IN CIVIL RIGHTS CASES

A. *Vicarious Liability in Torts and Civil Rights Cases Compared*

Violations of federal civil rights laws are akin to torts. The civil rights statutes impose duties and provide causes of action for damages resulting from conduct that breaches a duty. Like tort law, the civil rights laws must determine the circumstances in which employers may be held liable for the wrongful conduct of its employees. The Supreme Court has taken three different approaches to employer liability under each of these statutes and has made employer liability much harder to establish in civil rights cases than it is under the law of agency used in tort cases. The Court's inconsistent methods of analysis and rules of employer liability have engendered confusion and unnecessary litigation and have thwarted enforcement of civil rights policies.

Employer liability is a problem in any cause of action that creates liability of an entity because the entity-defendant is not a living person and it does not act except through the living persons who work for it. The civil rights statutes at issue here speak, by and large, in terms of preventing discrimination by employers or entities that receive federal funds. Although Section 1983 speaks in terms of "persons," when the Supreme Court construed the term "person" to encompass a municipality,<sup>24</sup> the same problem resulted.

In assessing employer liability, it is important to distinguish between direct and vicarious liability. Direct employer liability is premised on the employer's own conduct: its condoning or failing to prevent the wrongful conduct of its employees or its negligent hiring or retaining of the tortfeasor employee(s).<sup>25</sup> The employer's liability for the conduct of the employee is based on the employer having breached a duty of care in the way it hired, trained, or supervised the tortfeasor employee(s). The employer's breach of this duty of care must have caused the harm to the plaintiff.

In vicarious liability cases, the focus is not on whether the employer breached a duty of care by something it did or failed to do. Rather, the focus is on the relationship between the tortfeasor employee(s) and the employer; usually, the issue is whether the employee was acting "within the scope of employment" at the time the tort was committed.<sup>26</sup> The employer's liability is vicarious in that the employer is liable for the wrongful conduct simply because the tortfeasor was its employee acting

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<sup>24</sup> See *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1978).

<sup>25</sup> See 1 RESTATEMENT (SECOND) OF AGENCY § 213(b) (1959) (stating that the principal is liable for its own negligence in employment of "improper persons or instrumentalities in work involving risk of harm to others"); *id.* § 219(2)(b) (stating that the master is liable for torts of its servants when "the master [is] negligent or reckless").

<sup>26</sup> See *id.* § 219(1)(b).

within the scope of employment. This concept also is known as respondeat superior liability.

Employer liability in torts sometimes is premised on an “alter ego” notion. Some employees are placed so highly in the firm that their actions are deemed by the law to be actions of the firm, which usually is a corporation and, thus, can “act” itself only through the behavior of its high-level employees, officers, or directors.<sup>27</sup>

To ensure adequate compensation of tort victims and to deter negligent and intentionally harmful conduct, the law of torts generously imposes vicarious liability when an employee injures a fellow employee or a third party.<sup>28</sup> Employers are liable under modern tort law for an employee’s intentional tort that clearly is contrary to employer policy, and are liable even when the employee is not motivated by the purpose of serving the employer.<sup>29</sup>

The wide scope of employer liability for employee conduct is reflected in the *Restatement (Second) of Agency*.<sup>30</sup> Section 219 of the *Restatement* lists six circumstances in which employers are liable for torts committed by their employees.<sup>31</sup> According to the *Restatement*, the employer is liable when (1) the employee acts within the scope of his or her employment;<sup>32</sup> (2) the employer intended the conduct or consequences;<sup>33</sup> (3) the employer was negligent or reckless;<sup>34</sup> (4) the conduct violated a nondelegable duty of the employer;<sup>35</sup> (5) the employee purported to act or speak on behalf of the employer and the victim relied on that apparent authority;<sup>36</sup>

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<sup>27</sup> See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2267 (1998).

<sup>28</sup> See *Sykes*, *supra*, note 12, at 589 (providing precedential examples of the imposition of vicarious liability on employers for injury caused by employees to other employees or third parties).

<sup>29</sup> See David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers For Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 89-90 (1995) (citing *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 733 (1995); *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991); *Waltman v. International Paper Co.*, 875 F.2d 468, 471-72, 482 (5th Cir. 1989) (parentheticals omitted) (noting the shift from the serving the master rule to a rule of foreseeability)); *Sykes*, *supra* note 12, at 589 (citing the same sources as Oppenheimer, *supra*); *Verkerke*, *supra* note 12, at 291 (“Many jurisdictions . . . have abrogated the business purpose test in favor of a more inclusive standard based on concepts of foreseeability and causation. This competing version of respondeat superior doctrine supports strict employer liability for all discriminatory conduct in the workplace.” (footnote omitted)).

<sup>30</sup> See RESTATEMENT (SECOND) OF AGENCY § 219 (1959).

<sup>31</sup> See *id.*

<sup>32</sup> See *id.* § 219(1).

<sup>33</sup> See *id.* § 219(2)(a).

<sup>34</sup> See *id.* § 219(2)(b).

<sup>35</sup> See *id.* § 219(2)(c).

<sup>36</sup> See *id.* § 219(2)(d).

and (6) the employee was aided in accomplishing the tort by the existence of the agency relation.<sup>37</sup>

The trend in tort law has been to expand the scope of employers' vicarious liability.<sup>38</sup> Vicarious liability is justified by the need to ensure adequate compensation for tort victims, to provide incentives for employers to control employees, and to spread the cost of harmful conduct to consumers and other employees.<sup>39</sup>

The rules for employer liability in civil rights cases are radically different from those in tort cases. Under Title VII, the Supreme Court and lower courts have begun to require proof of employer fault as a basis for liability in many harassment cases, although employers are held vicariously liable for discriminatory hiring, firing, promotion, and demotion decisions regardless of fault. Under Section 1983, the Supreme Court has insisted upon proof of employer fault as the only basis for employer liability<sup>40</sup> and, under Title IX, the standard is actual notice plus deliberate indifference.<sup>41</sup>

The result that employer liability should be much harder to establish in civil rights cases than it is in tort cases is wrong as a matter of policy. The traditional policies underpinning broad vicarious liability in torts—compensation and deterrence—also call for broad liability in civil rights cases. Moreover, there is no reason, based on policy, statutory language, or legislative intent, to have three different standards for employer liability under Title VII, Title IX, and Section 1983.

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<sup>37</sup> See *id.* In addition, section 317 of the *Restatement (Second) of Torts* imposes on employers the duty to exercise reasonable care in controlling employees outside the scope of employment to prevent the employees from intentionally harming others, provided that the employee is on the employer's premises or using the employer's property. See 2 RESTATEMENT (SECOND) OF TORTS § 317 (1965).

Similar vicarious liability rules apply when an employee injures a fellow employee (the tort analog to Title VII) as when the employee injures a third party (the usual tort analog of Title IX and Section 1983). The branch of tort law dealing with coworker harms has been subsumed by workers' compensation law which is the exclusive remedy for an employee injured at work by another employee. In most states, workers' compensation laws have provided an expansive notion of vicarious employer liability for harms employees inflict upon one another. See 1 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 4.30 (1998).

<sup>38</sup> See KEETON ET AL., *supra* note 12, § 69, at 500-01.

<sup>39</sup> See 5 FOWLER V. HARPER ET AL., *THE LAW OF TORTS* § 26.5, at 21 (2d ed. 1986); KEETON ET AL., *supra* note 12, § 69, at 500-01; Oppenheimer, *supra* note 29, at 90-91.

<sup>40</sup> See *infra* text accompanying notes 125-60.

<sup>41</sup> See *infra* text accompanying notes 161-88.

## B. *Vicarious Liability in Title VII*

Title VII prohibits discrimination by an employer or its agents<sup>42</sup> in the terms or conditions of employment on the basis of race, color, religion, national origin, or sex.<sup>43</sup> Though the statute defines covered employers to include any “agent” of the employer,<sup>44</sup> the statute does not address vicarious liability.<sup>45</sup> That omission is not surprising when one considers that the kind of discrimination Congress had in mind when it enacted Title VII would, without doubt, form the basis of employer liability. When the employer entity has a practice of discrimination in hiring, firing, promotion, or demotion, or in establishing pay scales, assignments, or job categories, such discrimination is attributable to the employer under any theory of agency. This is true even if “the employer” (a corporation or its officers or directors) has policies explicitly forbidding discrimination in employment.<sup>46</sup> Because such practices were the paradigmatic form of discrimination prior to 1964, Congress simply did not anticipate employer liability would be a big problem, and in many Title VII cases it has not been one.

The development of a Title VII cause of action for sexual harassment, however, as well as the availability of compensatory and punitive damages under the Civil Rights Act of 1991, have made employer liability a very big problem. Employers began to persuade courts that the bias of their managers and employees—whether in harassment cases or in individual disparate treatment hiring, promotion, or firing cases—was not the bias “of the employer” but simply the private views of an errant bad actor for which the firm could not be held liable. Many courts thus held that, unless high-level officials of the firms knew or should have known of the discriminatory conduct and failed to take reasonable action, firms were not liable to victims of sexual harassment.<sup>47</sup> A few courts even held that employers were not liable in hiring/firing/promotion cases for compensatory or punitive damages without

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<sup>42</sup> See 42 U.S.C. § 2000e(b) (1994).

<sup>43</sup> See *id.* § 2000e-2.

<sup>44</sup> See *id.* § 2000e(b).

<sup>45</sup> See *infra* notes 189-211 and accompanying text.

<sup>46</sup> See, e.g., *Quinones v. City of Evanston*, 58 F.3d 275, 278 (7th Cir. 1995) (“If some rogue supervisor refuses to hire persons protected by the ADEA, or gives them lower salaries, the municipality—the employer under the Act—is liable even if the supervisor acted in the teeth of the city’s policy.”); cf. *KEETON ET AL.*, *supra* note 12, at 502 (“A master cannot escape liability [for his servant’s torts] merely by ordering his servant to act carefully. If he could, no doubt few employers would ever be held liable.”).

<sup>47</sup> See, e.g., *BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW* 226, 231, 241-42 (1992); *id.* at 62-68 (Supp. 1997); *Oppenheimer*, *supra* note 29, at 66 (citing *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 733 (1995); *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991); *Waltman v. International Paper Co.*, 875 F.2d 468, 471-72, 482 (5th Cir. 1989) (parentheticals omitted)).



proof that the biased decision-maker was a high-level official.<sup>48</sup> This view is not without some support in the law of agency in tort cases. The employer in some jurisdictions is not liable for the torts of its employees motivated by personal concerns rather than some desire to serve the employer. Although some individual discrimination might be motivated by a desire, albeit misguided, to serve the employer (such as hiring only men in the belief that they are more competent), other incidents might be motivated only by jealousy or personal animosity (e.g., “the new management resented her [the most successful life insurance agent in the office] for being a successful woman and set out to undermine her, humiliating her personally with sexist remarks and crude sexual advances,” which cost the company substantial loss of business).<sup>49</sup>

This new rule carved a hole in Title VII’s protections. Because most courts have rejected individual liability under Title VII (as well as under the ADEA and the

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<sup>48</sup> See, for example, *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 944 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 767 (1997), in which the Fifth Circuit Court of Appeals declined to hold an employer liable for punitive damages for intentional discrimination by a manager (the plaintiff’s supervisor) because the manager was not a “corporate officer.” In light of the recent *Faragher* and *Ellerth* decisions, the Fifth Circuit modified the rule established in *Patterson* by allowing punitive damages against employers in hiring/firing cases when the person who discriminatorily hired or fired had the authority to do so. See *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 593 (5th Cir. 1998), *vacated and reh’g en banc granted*, No. 97-10685, 1999 WL 107104 (5th Cir. Feb. 6, 1999); *cf. Willis v. Marion County Auditor’s Office*, 118 F.3d 542, 546 (7th Cir. 1997) (holding that the decision-maker, as opposed to the subordinates, must harbor a desire to terminate an employee for engaging in protected activity or due to general racial animus for liability to accrue); *Dennis v. County of Fairfax*, 55 F.3d 151 (4th Cir. 1995) (finding that the county remedied allegedly discriminatory unfair discipline by taking prompt corrective action); *Wilson v. Stroh Co.*, 952 F.2d 942, 952 (6th Cir. 1992) (questioning whether the discriminatory remarks or desires of intermediate-level supervisors is sufficient to establish a prima facie case of discrimination when the decision to terminate is made by an upper-level official); *Montgomery v. Campbell Soup Co.*, 647 F. Supp. 1372, 1378 (N.D. Ill. 1986) (holding that to establish a case of discrimination, someone at the decision-making level in the corporate hierarchy must have committed the wrong). Some courts of appeals rejected the argument that district courts had accepted. Some held that, as long as the decision-maker was biased, the bias would be imputed to the employer and the employer would be liable both for back pay and for punitive damages. See *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1100 n.12 (3d Cir. 1995) (holding that the bias of “second level manager” who was the final decision-maker on the selection of people for termination is imputed to the company both for the purpose of determining whether the ADEA was violated and for the purpose of determining liability for double damages for willful violation); *Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747, 751 (3d Cir. 1990) (holding restaurant employer liable for sex discrimination toward female maitre d’ by general manager and chef because they were agents of the employer).

<sup>49</sup> *Durham Life Ins. Co. v. Evans*, Nos. 97-1683, 97-1712, 1999 WL 16779, at \*43 (3d Cir. Jan. 15, 1999).

ADA),<sup>50</sup> if the employer is not liable for the employee's conduct in harassment cases, there is no Title VII liability at all, no matter how egregious the discriminatory behavior. If courts were to accept the same limits on vicarious liability in hiring/firing cases that they have accepted in hostile environment sexual harassment cases, firms presumably still would be held vicariously liable for back pay, but no punitive damages would be awarded unless the plaintiff could prove bias on the part of the corporate officers, in addition to bias on the part of the person who did the discriminatory hiring or firing.

The Supreme Court first addressed vicarious liability for supervisor harassment in *Meritor Savings Bank, FSB v. Vinson*.<sup>51</sup> The Court devoted most of its opinion to the issue of whether the conduct constituted sex discrimination actionable under Title VII.<sup>52</sup> Having determined that it was actionable sex discrimination, the Court left to the lower court to decide whether the employer would be held liable for the harassment.<sup>53</sup> Part of the problem in *Vinson* was that the Equal Employment Opportunity Commission ("EEOC") appeared to present two conflicting positions on employer liability. The EEOC Guidelines to Title VII provided for strict employer liability for all supervisory harassment, whether or not it was accompanied by adverse job action. But the EEOC took a more employer-friendly position in the litigation, arguing that employers should be strictly liable only for supervisory quid pro quo harassment, and that employer liability for supervisory hostile environment harassment should depend on whether the employer had an adequate complaint procedure and whether the plaintiff unreasonably failed to use this procedure. Noting that the EEOC's two positions were "in some tension," the Court declined "to issue a definitive rule on employer liability," and simply instructed the lower court on remand to use traditional principles of agency law.<sup>54</sup> In *Meritor*, the Court rejected,

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<sup>50</sup> See, e.g., *Wathen v. General Elec. Co.*, 115 F.3d 400, 404-05 (6th Cir. 1997); *Haynes v. Williams*, 88 F.3d 898, 901 (10th Cir. 1996); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1078 (3d Cir. 1996); *Smith v. Lomax*, 45 F.3d 402, 403 (11th Cir. 1995); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir.), *cert. denied*, 516 U.S. 1011 (1995); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-14 (2d Cir. 1995); *Williams v. Banning*, 72 F.3d 552, 554 (7th Cir. 1995); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir. 1994); *Miller v. Maxwell's Int'l*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994) (imposing no individual liability under Title VII or the ADEA). See generally Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509, 529-30 (1996) (arguing that the employer should be held vicariously liable for hostile work environments when a supervisory employee discriminates against subordinates and that making individuals liable ultimately would undermine the enforcement of the statutes).

<sup>51</sup> 477 U.S. 57 (1986).

<sup>52</sup> See *id.* at 63-69.

<sup>53</sup> See *id.* at 73.

<sup>54</sup> *Id.* at 71-72.

however, the possibility that employers are “always automatically liable for sexual harassment by their supervisors.”<sup>55</sup>

After *Meritor*, lower courts reached a general consensus that employers would be liable for harassment by coworkers only if there was direct liability, which means they would be liable only for their own fault in failing to prevent or remedy harassment.<sup>56</sup> Except when the harassment involved actual adverse employment action, for which the firm would be liable under the “alter ego” theory, employers persuaded many courts that sexual harassment by a supervisor was akin to a tort committed outside an employee’s scope of employment because the harassment was not part of the employee’s job description, was prohibited by employer policy, and was motivated by the harasser’s sexual desire or misogyny.<sup>57</sup> In other words, employers were vicariously liable for supervisory harassment that was a “quid pro quo” for keeping or getting a job benefit, but not for harassment that simply created a hostile workplace environment. Furthermore, although courts held employers vicariously liable when the supervisory harassment involved an actual adverse employment decision,<sup>58</sup> it was unclear whether a threatened job action was enough to establish vicarious liability if the threat was never carried out.<sup>59</sup> In other words, courts were confused as to whether a threatened quid pro quo should be treated as such, or whether it should be treated as creating a hostile environment, for which most courts held the employer liable only for its own negligence in failing to prevent,

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<sup>55</sup> *Id.* at 72.

<sup>56</sup> *See, e.g.,* *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 804 (6th Cir. 1994); 1 BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 811-12, 822-24 (citations omitted).

<sup>57</sup> *See* *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2287 (1998) (citations omitted) (stating that sexual harassment creating a hostile environment is outside the scope of employment of supervisors); *Gary v. Long*, 59 F.3d 1391, 1398 (D.C. Cir.) (finding that employer’s policy prohibited harassment), *cert. denied*, 516 U.S. 1011 (1995); *Hirschfeld v. New Mexico Corrections Dep’t*, 916 F.2d 572, 576 (10th Cir. 1990) (holding that sexual harassment is not part of the job description); *see also* LINDEMANN & GROSSMAN, *supra* note 56, at 812 (stating that “[h]ostile environment sexual harassment normally does not trigger respondeat superior liability because sexual harassment rarely, if ever, is among the official duties of a supervisor” (citing *Parks v. Hawyard’s Pit*, No. 93-2387-JWL, 1993 WL 545231, at \*1 (D. Kan. 1993); *Salley v. Petrolane, Inc.*, 746 F. Supp. 61, 63 (W.D.N.C. 1991)); and noting that most courts have determined that employers are liable for hostile environment harassment by supervisors only on the basis of negligence).

<sup>58</sup> *See* *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2264-65 (1998) (citing *Davis v. Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106-07 (3d Cir. 1994); *Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir. 1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989)).

<sup>59</sup> *See* *Ellerth*, 118 S. Ct. at 2265.

stop, or remedy the action.<sup>60</sup> Law review literature has been critical both of the strict limits on employer liability and of the confusion about when vicarious liability would be found and when it would not.<sup>61</sup>

The Supreme Court attempted to resolve confusion about employer liability for supervisory harassment in two cases from the 1997-1998 Term: *Faragher v. City of Boca Raton*<sup>62</sup> and *Burlington Industries, Inc. v. Ellerth*.<sup>63</sup> In both cases, the Court held that the employers were vicariously liable for supervisory harassment that involved an adverse job action.<sup>64</sup> Thus, the employers were found liable for supervisory harassment unaccompanied by adverse employment action only on the basis of fault (i.e., direct liability). Although the burden of proving the absence of employer fault is on the employer, it nevertheless is a fault-based standard.

The facts of both *Faragher* and *Ellerth* involved employees who were harassed by their mid-level supervisors.<sup>65</sup> *Faragher* was a lifeguard employed by the Marine Safety Division of the Department of Parks and Recreation of the city of Boca Raton.<sup>66</sup> *Faragher* asserted that her supervisors, the chief of the Marine Safety Division and his subordinate, a Marine Safety lieutenant, repeatedly harassed her.<sup>67</sup> Although she complained to another lifeguard supervisor at the beach, she never complained to any officials outside the Marine Safety Division.<sup>68</sup> Thus, the city claimed that no city officials higher than the relatively low-level lifeguard supervisors knew of the harassment.<sup>69</sup> Arguing that the city should be liable under Title VII for the harassment only for its own fault (that is, if it knew or should have known of the harassment, and failed to stop or remedy it), the city contended that the plaintiff's

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<sup>60</sup> See *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir. 1994).

<sup>61</sup> See, e.g., Maria M. Carrillo, *Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41, 84-92 (1992-1993); Oppenheimer, *supra* note 29, at 92-94; Smith, *supra* note 12, at 259-61; Glen Allen Staszewski, *Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor's Hostile Work Environment Sexual Harassment*, 48 VAND. L. REV. 1057, 1100-04 (1995); Henry P. Ting, *Who's the Boss?: Personal Liability Under Title VII and the ADEA*, 5 CORNELL J.L. & PUB. POL'Y 515, 548 (1996); White, *supra* note 50, at 543-45; Rachel E. Lutner, Note, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L. REV. 589, 609-12 (1993).

<sup>62</sup> 118 S. Ct. 2275 (1998).

<sup>63</sup> 118 S. Ct. 2257 (1998).

<sup>64</sup> See *id.* at 2268; *Faragher*, 118 S. Ct. at 2284. One could debate whether such action by the supervisor is vicarious or "alter ego" liability, but the important point is that employer liability is automatic.

<sup>65</sup> See *Ellerth*, 118 S. Ct. at 2262; *Faragher*, 118 S. Ct. at 2280.

<sup>66</sup> See *Faragher*, 118 S. Ct. at 2280.

<sup>67</sup> See *id.* at 2281.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

failure to complain to high-level city officials precluded liability.<sup>70</sup> Similarly, Ellerth was a salesperson in one of Burlington's divisions in Chicago.<sup>71</sup> She was harassed by her boss' supervisor, who worked in New York.<sup>72</sup> Although Ellerth knew that Burlington had a policy against sexual harassment, she did not inform anyone of the harassment.<sup>73</sup>

In both *Ellerth* and *Faragher*, the Court based its conclusions about vicarious liability partly on the language of Title VII.<sup>74</sup> The Court said in *Meritor*,<sup>75</sup> and reiterated in *Ellerth*, that the definition of "employer" to include an "agent" of the employer represented Congress' decision that the common law of agency should govern vicarious liability for sexual harassment.<sup>76</sup> The Court then analyzed the various provisions of section 219 of the *Restatement (Second) of Agency* to determine when, under its definition of agency, an employer is vicariously liable for sexual harassment by supervisors.<sup>77</sup>

The Court began its analysis in *Ellerth* by deciding that the scope of employment concept of section 219(1) means acting with a purpose to serve the master.<sup>78</sup> Because an employee seldom is motivated to harass a subordinate or co-employee sexually for the purpose of serving the employer, the Court, in an opinion written by Justice Kennedy, concluded that "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment."<sup>79</sup>

Justice Souter's opinion for the Court in *Faragher* took a different approach to this point.<sup>80</sup> Justice Souter at least acknowledged that the vicarious liability rules that have evolved in tort cases are broader than the vicarious liability rule the Court adopted for sexual harassment under Title VII, and he attempted to justify the difference.<sup>81</sup> He began by noting that, in *Meritor*, the Court rejected "automatic liability" for supervisory harassment.<sup>82</sup> Justice Souter invoked the importance of stare decisis as a justification for adhering to that aspect of *Meritor*, even though the rest of his analysis pointed toward vicarious liability.<sup>83</sup> He then analyzed three bases

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<sup>70</sup> See *id.* at 2290.

<sup>71</sup> See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2262 (1998).

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *id.* at 2264; *Faragher*, 118 S. Ct. at 2283.

<sup>75</sup> See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

<sup>76</sup> See *Ellerth*, 118 S. Ct. at 2265.

<sup>77</sup> See *id.* at 2266-68.

<sup>78</sup> See *id.* at 2266.

<sup>79</sup> *Id.* at 2267.

<sup>80</sup> See *Faragher*, 118 S. Ct. at 2286-88.

<sup>81</sup> See *id.* at 2286-87.

<sup>82</sup> See *id.* at 2285.

<sup>83</sup> See *id.* at 2286.

for vicarious liability based upon supervisory harassment.<sup>84</sup> The first is the scope of employment rule of *Restatement* section 219(1).<sup>85</sup> Outside the area of sexual harassment, Justice Souter noted, courts have found all sorts of outrageous employee misconduct to be within the scope of employment—the drunken sailor who inexplicably opened a valve on his ship in dry dock, causing a flood and damaging both the ship and the dry dock; employees injured in scuffles with coworkers; and the many employees who have raped customers, clients, or members of the public—all of these were acting within the scope of employment.<sup>86</sup> Noting that federal courts have concluded that sexual harassers acted outside the scope of employment,<sup>87</sup> Justice Souter remarked: “An assignment to reconcile the run of the Title VII cases with those just cited would be a taxing one.”<sup>88</sup> He rejected the notion that sexually harassing employees act within the scope of employment not because it is a well-established tort principle, as Justice Kennedy suggested in *Ellerth*, but because it would provide for employer liability in too many circumstances.<sup>89</sup>

This aspect of the opinion is puzzling because the bulk of the Court’s analysis points to the opposite conclusion than the Court ultimately reached. The rest of the opinion does little to solve the puzzle. “The proper analysis,” the Court admonished, “calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement, . . . but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor’s employment, and the reasons for the opposite view.”<sup>90</sup> Justice Souter then identified reasons for holding employers liable for all supervisory harassment. First, “[t]he supervisor directs and controls the conduct of the employees, and the manner of doing so may inure to the employer’s benefit or detriment.”<sup>91</sup> Second, harassment is both foreseeable and a cost of doing business “to be charged to the enterprise rather than the victim.”<sup>92</sup> But the opinion offered no response to either of these arguments.

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<sup>84</sup> See *id.* at 2286-93.

<sup>85</sup> See *id.* at 2286.

<sup>86</sup> See *id.* at 2287.

<sup>87</sup> Some courts did conclude that supervisors acted within the scope of employment, even when they engaged in outrageous conduct specifically prohibited by employer policy, such as sexual assault in the workplace. See *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1352 (4th Cir. 1995).

<sup>88</sup> *Faragher*, 118 S. Ct. at 2287.

<sup>89</sup> See *id.* at 2288.

<sup>90</sup> *Id.* (citations omitted).

<sup>91</sup> *Id.* (quoting *Faragher v. City of Boca Raton*, 111 F.3d 1531, 1542 (1997) (Barkett, J., concurring in part and dissenting in part)).

<sup>92</sup> *Id.*

Justice Souter then suggested two reasons to find that the harassment was not within the scope of employment.<sup>93</sup> First, he saw no reason to suppose that Congress intended to use the more liberal modern approach to scope of employment, rather than the older rule which held most forms of misconduct to be outside of the scope of employment.<sup>94</sup> Second, the policies of foreseeability and internalizing costs of business favoring a determination that supervisory harassment is within the scope of employment point equally toward respondeat superior liability for co-employee harassment.<sup>95</sup>

Both of these arguments are weak. As to the first, Justice Souter suggested no reason why Congress *did not* intend courts to use the modern rule of employer liability for employee wrongdoing. At the time Congress enacted Title VII, the broad rule of employer liability for employee torts was well-established. Ordinary principles of statutory construction would lead to the conclusion that Congress intended Title VII principles of employer liability to reflect those in other areas of law. Given the remedial purposes of Title VII, there is no reason to believe that Congress would have chosen an outdated rule of limited employer liability that would restrict enforcement of the civil rights laws.

The Court's approach to the second argument for limiting employer liability—that lower courts had rejected vicarious liability for coworker harassment—also is unpersuasive. The Court did little more than note the unanimity of the lower courts.<sup>96</sup> As the Court noted, however, this unanimous view is squarely at odds with well-established tort rules.<sup>97</sup> Moreover, the unanimity of a view is not by itself a justification for it. The Court noted elsewhere in its opinion that employers have more opportunity to scrutinize, monitor, and train supervisors than nonsupervisory employees;<sup>98</sup> but this is not necessarily true and, in any event, is a weak justification for refusing to hold employers liable for all supervisory harassment.

Having rejected the possibility that sexual harassment falls within the scope of employment and, thus, that the employer would be liable under subsection (1) of section 219 of the *Restatement (Second) of Agency*, the Court's opinions in *Ellerth* and *Faragher* analyzed the various provisions of the second subsection of section 219.<sup>99</sup> The first of these is subsection (2)(a).<sup>100</sup> In *Ellerth*, Justice Kennedy determined that an employer is liable under section 219(2)(a) only when the harasser

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<sup>93</sup> See *id.* at 2288.

<sup>94</sup> See *id.* at 2288-89.

<sup>95</sup> See *id.* at 2289.

<sup>96</sup> See *id.*

<sup>97</sup> See *id.* at 2287.

<sup>98</sup> See *id.* at 2291.

<sup>99</sup> See *id.* at 2290-91; *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2267 (1998).

<sup>100</sup> See 1 RESTATEMENT (SECOND) OF AGENCY § 219(2)(a) (1959) (stating that "the master intended the conduct or the consequences").

is such a high-ranking person that his actions—whatever they are—can be deemed to be acts of the employer under an alter ego concept.<sup>101</sup> In *Faragher*, the Court did not address this provision. In neither *Ellerth* nor *Faragher* did the Court dwell on section 219(2)(b) (“the master was negligent or reckless”), because this narrower basis of liability is accepted uncontroversially (and is the only basis of employer liability for coworker harassment).<sup>102</sup>

Section 219(2)(c) provides for employer liability for employee conduct outside the scope of employment when “the conduct violated a non-delegable duty of duty of the master.”<sup>103</sup> Section 219(2)(c) of the *Restatement* recognizes that, in some instances, the law imposes automatic liability on employers for harms caused by their agents, irrespective of employer fault, by stating that employers have a nondelegable duty to protect certain persons from certain harms.<sup>104</sup> Usually, the nondelegable duty rule reflects a notion that a special relationship between the employer and the victim requires strict liability for harms the employer’s agents may cause.<sup>105</sup> Some

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<sup>101</sup> See *Ellerth*, 118 S. Ct. at 2267.

<sup>102</sup> See *id.*; *Faragher*, 118 S. Ct. at 2278.

<sup>103</sup> 1 RESTATEMENT (SECOND) OF AGENCY § 219(2)(c).

<sup>104</sup> See *id.* Section 214 of the *Restatement* defines the nondelegable duty as:  
[a] master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty.

*Id.* § 214.

<sup>105</sup> See *Ellerth*, 118 S. Ct. at 2267. The special relationship includes, in some jurisdictions, the common carrier-passenger relationship, see, e.g., *Gilstrap v. Amtrak*, 998 F.2d 559, 561-62 (8th Cir. 1993) (applying Washington law to find a railroad vicariously liable for the sexual assault of a passenger by an employee of the railroad); *Nazareth v. Herndon Ambulance Serv., Inc.*, 467 So. 2d 1076, 1081 (Fla. Dist. Ct. App. 1985) (finding an ambulance service vicariously liable for the sexual assault of a patient by an ambulance attendant); *St. Michelle v. Catania*, 250 A.2d 874, 878 (Md. 1969) (finding a taxicab company vicariously liable for the sexual assault and robbery of a passenger by a cab driver employed by the company), the relationship of a long-term health care facilities to their minor patients, see, e.g., *Stropes v. Heritage House Children’s Ctr. of Shelbyville, Inc.*, 547 N.E.2d 244, 253-54 (Ind. 1989) (determining that a long-term care facility was vicariously liable for the sexual assault of a minor patient/resident by a nurse’s aide); cf. *California Ass’n of Health Facilities v. Department of Health Servs.*, 940 P.2d 323, 332, 335 (Cal. 1997) (interpreting a statute regarding the licensing of long-term care facilities), the relationship of schools to students, see, e.g., *Eversole v. Wasson*, 398 N.E.2d 1246, 1247-48 (Ill. App. Ct. 1980) (finding a school vicariously liable for an assault by a teacher of a student that resulted from a personal and nonschool-related dispute); *Carabba v. Anacortes Sch. Dist. No. 103*, 435 P.2d 936, 948 (Wash. 1968) (determining that a school was vicariously liable for injuries caused due to the negligence of a referee during a school-sponsored wrestling match), and even the relationship of a county jail to its inmates needing medical attention, see, e.g., *Robinson v. Washington County*, 529 A.2d 1357, 1361-62 (Me. 1987) (holding that a jail



commentators have argued that Title VII imposes such a duty to provide a workplace free from harassment, but courts have declined, without much analysis, to read Title VII as providing for such automatic liability for harassment.<sup>106</sup> In *Ellerth*, Justice Kennedy rejected out of hand the notion that the employer has a nondelegable duty to provide a workplace free of harassment and, thus, should be liable under section 219(2)(c).<sup>107</sup>

The agency principle that *Ellerth* and *Faragher* deemed most relevant in assessing vicarious liability for supervisory sexual harassment is stated in section 219(2)(d): the employer is liable when the tortfeasor "was aided in accomplishing the tort by the existence of the agency relation."<sup>108</sup> Recognizing that the "agency relation" aids most employee wrongdoers in the sense that it produces "[p]roximity and regular contact,"<sup>109</sup> the Court in *Ellerth* concluded that the agency relation aids supervisors in harassing subordinates when they threaten or inflict adverse employment action, but doubted that the agency relation aids threats of adverse action that are never carried out.<sup>110</sup> The Court's explanation for this is opaque:

On the one hand, a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation. . . . On the other hand, there are acts of harassment a supervisor might commit which

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may be vicariously liable for an injury to a pretrial detainee caused by the denial of necessary medical care).

Occasionally the nondelegable duty is assumed by contract, as in contracts of bailment, *see, e.g.*, *Joseph v. Mutual Garage Co., Inc.*, 270 S.W.2d 137, 142 (Mo. Ct. App. 1954) (finding a garage liable for damages to a car driven by a garage employee outside the scope of his employment), insurance contracts, *see, e.g.*, *Walter v. Simmons*, 818 P.2d 214, 223 (Ariz. Ct. App. 1991) holding that an insurer's duty of good faith nondelegable and, therefore, the insurer is vicariously liable for the intentional torts of a nonemployee insurance adjuster), and other contracts for the provision of services, *see, e.g.*, *Lou-Con, Inc. v. Gulf Bldg. Servs., Inc.*, 287 So. 2d 192, 201 (La. Ct. App. 1973) (finding a janitorial services firm liable for arson committed outside the scope of employment by one of its janitors).

Other jurisdictions, however, decline to recognize nondelegable duties and, thus, reject vicarious liability in these sorts of cases for torts committed outside the scope of employment. *See infra* note 269.

<sup>106</sup> *See* Oppenheimer, *supra* note 29, at 94-97; Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 122, 1252-55 (1991); 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, 742-48 (1995).

<sup>107</sup> *See Ellerth*, 118 S. Ct. at 2267 ("There is no contention . . . that a nondelegable duty is involved.").

<sup>108</sup> 1 RESTATEMENT (SECOND) OF AGENCY § 219(2)(d).

<sup>109</sup> *Ellerth*, 118 S. Ct. at 2268.

<sup>110</sup> *See id.* at 2269.

might be the same acts a co-employee would commit, and there may be some circumstances where the supervisor's status makes little difference.<sup>111</sup>

In the statement above, the Court incorrectly assumed that the agency relation never aids coworker harassment. Rather than justify this assumption in terms of the policy or precedent in civil rights or tort cases, the Court simply said that it "is a developing feature of agency law," and then abruptly abandoned it as a guiding principle.<sup>112</sup>

In the rest of its analysis in *Ellerth*, the Court failed to explain why supervisors are not aided by the agency relation in accomplishing harassment that involves only unfulfilled threats of retaliation, or no explicit threats at all. Instead, the Court simply quoted language from *Meritor*<sup>113</sup> that "'Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible,'" and then observed that Congress has not amended Title VII to overrule *Meritor*.<sup>114</sup> The Court identified Title VII policies that encourage employers to develop antiharassment policies, favor conciliation rather than litigation and purport to draw from them a new rule creating presumptive employer liability.<sup>115</sup> Such liability would be subject to the affirmative defense that the employer had a reasonable harassment policy and the victim unreasonably failed to use it.<sup>116</sup> The Court never explained how this rule flows from the "aided in the agency relation" rule. Thus, the Court created out of whole cloth a more restrictive vicarious liability rule than tort law uses while purporting to draw the rule from the *Restatement*.

In *Faragher*, as in *Ellerth*, the Court recognized that the "aided in the agency relation" standard would point to employer liability for all supervisory harassment.<sup>117</sup> "The agency relationship affords contact with an employee subjected to a supervisor's sexual harassment, and the victim may well be reluctant to accept the risks of blowing the whistle on a superior."<sup>118</sup> Employer liability for supervisory harassment makes sense because the employer has "opportunity and incentive to screen them, train them, and monitor their performance."<sup>119</sup> The only reason given in *Faragher* for limiting employer liability is Title VII's supposed "primary objective," which "is not to provide redress but to avoid harm."<sup>120</sup> Citing EEOC

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<sup>111</sup> *Id.* (citation omitted).

<sup>112</sup> *Id.*

<sup>113</sup> 477 U.S. 57 (1986).

<sup>114</sup> *Ellerth*, 118 S. Ct. at 2270 (quoting *Meritor*, 477 U.S. at 72).

<sup>115</sup> *See Ellerth*, 118 S. Ct. at 2270.

<sup>116</sup> *See id.*

<sup>117</sup> *Id.* at 2268; *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2290 (1998).

<sup>118</sup> *Faragher*, 118 S. Ct. at 2291.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 2292.

regulations “advising employers to ‘take all steps necessary to prevent sexual harassment from occurring,’”<sup>121</sup> the Court concluded Title VII policy would be served best by “giv[ing] credit here to employers who make reasonable efforts to discharge their duty.”<sup>122</sup> The Court also justified the employer’s affirmative defense by relying on a “policy imported from the general theory of damages” that required the plaintiff to make reasonable efforts to avoid or to mitigate the harm.<sup>123</sup>

The *Faragher* and *Ellerth* majority opinions were creative in their method of statutory interpretation, but unsatisfying in their reasoning. Both did a better job of laying out the reasons, drawn both from torts and from Title VII, that would support broad vicarious liability than they did of refuting these reasons. The decisions place significant reliance on the stare decisis of *Meritor*, a case that disclaimed any intent to interpret definitively the statute and, thus, was almost devoid of analysis. In both cases, the Court looked to the general policies of Title VII to design an employer liability rule.<sup>124</sup> The Court may be faulted for picking a rule that invokes some Title VII policies while ignoring others and honors the wrong ones at the expense of the right ones. The method of statutory interpretation, however, acknowledges the indeterminacy of the statute and the responsibility of the judiciary for designing a rule.

### C. Section 1983

The Court took a very different approach to the issue of vicarious liability under Section 1983, rejecting respondeat superior liability entirely. Under Section 1983, the only possible entity defendants are municipalities. Section 1983 applies only to actions under “color of law” which means that there must be state action; private entities generally cannot be sued for violation of this law.<sup>125</sup> For example, in *Lugar v. Edmondson Oil Co.*,<sup>126</sup> the Supreme Court explained: “it is clear that in a § 1983 action brought against a state official, the statutory requirement of action ‘under color of state law’ and the ‘state action’ requirement of the Fourteenth Amendment are identical.”<sup>127</sup> Nor can state governments be sued for violating Section 1983. In *Will*

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<sup>121</sup> *Id.* (quoting 29 C.F.R. § 1604.11(f) (1997)).

<sup>122</sup> *Faragher*, 118 S. Ct. at 2292.

<sup>123</sup> *Id.* (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982)).

<sup>124</sup> *See Faragher*, 118 S. Ct. at 2290-91; *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 1257, 2268-70 (1998).

<sup>125</sup> *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989); *United States v. Price*, 383 U.S. 787, 794 n.7 (1966).

<sup>126</sup> 457 U.S. 922 (1982).

<sup>127</sup> *Id.* at 929. *See West v. Atkins*, 487 U.S. 42, 49 (1988) (“[I]f a defendant’s conduct satisfies the state-action requirement of the Fourteenth Amendment, ‘that conduct [is] also action under color of state law and will support a suit under § 1983.’” (quoting *Lugar*, 457 U.S. at 935)).

v. *Michigan Department of State Police*,<sup>128</sup> the Court held that state governments are not persons under Section 1983 and, thus, may not be sued even in state court under this statute.<sup>129</sup> The Court said that it “cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent.”<sup>130</sup>

Therefore, the issue of vicarious liability is narrower under Section 1983 than under other civil rights statutes because the question is solely when, if at all, municipalities can be found liable on a respondeat superior basis. The Court’s answer has been to reject respondeat superior liability in Section 1983 claims, holding that municipalities are liable only for violations resulting from their own policies.<sup>131</sup>

The Court based this conclusion on its reading of the unusual history of Section 1983. The Court initially read this history to reject *any* municipal liability under Section 1983. In 1961, in *Monroe v. Pape*,<sup>132</sup> the Supreme Court held that municipal governments may not be sued under Section 1983.<sup>133</sup> In *Monroe*, the plaintiffs sought damages both from individual officers and from their employer, the city of Chicago, for allegedly unconstitutional police conduct. Although the Court upheld the potential liability of the officers, it concluded that “Congress did not undertake to bring municipal corporations within the ambit of [Section 1983].”<sup>134</sup>

The Court in *Monroe* based this conclusion on its reading of the legislative history of Section 1983.<sup>135</sup> When the statute that contained Section 1983 was debated before the Senate, Senator Sherman of Ohio proposed an amendment that would have created municipal liability for certain acts of violence, even though the city and its officials did not participate and were not responsible directly.<sup>136</sup> The apparent objective of the Sherman Amendment was to overcome municipal inaction in the face of widespread Klan activities by giving cities a powerful monetary incentive to

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<sup>128</sup> 491 U.S. 58 (1989).

<sup>129</sup> See *Will*, 491 U.S. at 65-66. The Eleventh Amendment bars states from being sued in federal court. In *Quern v. Jordan*, the Court ruled that Section 1983 does not override a state’s Eleventh Amendment immunity. See *Quern v. Jordan*, 440 U.S. 332, 345 (1979).

<sup>130</sup> *Will*, 491 U.S. at 67.

<sup>131</sup> Section 1983 is the exclusive remedy for violations of the rights guaranteed under Section 1981 and, thus, the official policy rule applies to Section 1981 claims too. See *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735-36 (1989).

<sup>132</sup> 365 U.S. 167 (1961), *overruled by* *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978).

<sup>133</sup> See *Monroe*, 365 U.S. at 187.

<sup>134</sup> *Id.*

<sup>135</sup> See *id.* at 188, 191.

<sup>136</sup> See CONG. GLOBE, 42nd Cong., 1st Sess. 663 (1871).

prevent violence. Although the Senate approved the Sherman Amendment, the House rejected it; and a Conference Committee deleted it.<sup>137</sup>

Justice Douglas, writing for the majority in *Monroe*, concluded that the rejection of the Sherman Amendment reflected a desire to immunize cities from liability.<sup>138</sup> Furthermore, the Court rejected the argument that the Dictionary Act,<sup>139</sup> which defined "person" to include "bodies politic and corporate," was a basis for holding cities liable.<sup>140</sup> Justice Douglas concluded that the definition in the Dictionary Act was "merely an allowable, not a mandatory, one."<sup>141</sup> Thus, in *Monroe* the Court precluded all municipal liability under Section 1983, whether for damages or equitable relief.<sup>142</sup>

*Monroe's* review of Section 1983's legislative history has been sharply criticized.<sup>143</sup> In 1978, in the landmark decision of *Monell v. Department of Social Services*, the Supreme Court expressly overruled *Monroe's* limitation on municipal liability.<sup>144</sup> *Monell* involved a suit against the city of New York challenging a policy requiring pregnant teachers to take unpaid leaves of absences.<sup>145</sup> The Supreme Court again reviewed the legislative history of Section 1983 and concluded that the *Monroe* Court had erred in preventing municipal liability.<sup>146</sup> Justice Brennan, writing for the majority, stated that the rejection of the Sherman Amendment was meant to prevent municipal liability for the wrongful acts of others; it was not intended to preclude municipalities from being held liable for their own violations of the Fourteenth Amendment.<sup>147</sup> The Sherman Amendment would have created an affirmative duty for cities to stop violence within their borders; its defeat was meant to prevent new

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<sup>137</sup> See *Monroe*, 365 U.S. at 188; Robert J. Kaczorowski, *Reflections on the Legislative History of Monell v. Department of Social Services*, 31 URB. LAW. (forthcoming Spring 1999).

<sup>138</sup> See *Monroe*, 365 U.S. at 191.

<sup>139</sup> Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431 (1871). The Dictionary Act was enacted a few months before the Civil Rights Act of 1871, which contained Section 1983.

<sup>140</sup> See *Monroe*, 365 U.S. at 190-91.

<sup>141</sup> *Monroe*, 365 U.S. at 191.

<sup>142</sup> See *id.*; see also *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973) (citing *Monroe* which held that equitable relief and damages are not allowed against municipalities under Section 1983); *Moor v. County of Alameda*, 411 U.S. 693, 701-03 (1973) (stating that monetary relief is not allowed against municipalities); *Aldinger v. Howard*, 427 U.S. 1, 16-17 (1976) (finding that pendent party jurisdiction could not be the basis for Section 1983 suits in federal court against municipalities).

<sup>143</sup> See, e.g., Don B. Kates, Jr. & J. Anthony Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 134-36 (1972); Ronald M. Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483, 1519-31 (1977).

<sup>144</sup> See *Monell v. Department of Social Servs.*, 436 U.S. 658, 663 (1978).

<sup>145</sup> See *id.* at 661.

<sup>146</sup> See *id.* at 683.

<sup>147</sup> See *id.*

liability from being created for private acts, not to totally immunize cities. Furthermore, the Court emphasized that the Dictionary Act of 1871, enacted only months before the Civil Rights Act containing Section 1983, defined “persons” to include “bodies politic and corporate.”<sup>148</sup>

Thus, the Court in *Monell* declared that “Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.”<sup>149</sup> However, the Court imposed a substantial limitation on this liability: Municipal governments may be sued only for their own unconstitutional or illegal policies but not for the acts of their employees. The Court stated:

[T]he language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.<sup>150</sup>

In limiting municipal liability to instances of official policy or custom, the Court focused on the language of Section 1983, which imposes liability on “[e]very person who . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities.”<sup>151</sup> The Court in *Monell* concluded that this language meant that cities could be held responsible only for the actions their policies caused.<sup>152</sup> Additionally, the Court said that although respondeat superior liability might deter wrongdoing or spread costs among the larger community, the rejection of the Sherman Amendment was a repudiation of deterrence and risk spreading as the goals for Section 1983.<sup>153</sup> Thus, the Court’s holding in *Monell* was clear:

a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.<sup>154</sup>

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<sup>148</sup> *Id.* at 688 (citing *Northwestern Fertilizing Co. v. Hyde Park*, 18 F. Cas. 393, 394 (C.C.N.D. Ill. 1873) (No. 10,336)).

<sup>149</sup> *Monell*, 436 U.S. at 690.

<sup>150</sup> *Id.* at 691.

<sup>151</sup> 42 U.S.C. § 1983 (1994).

<sup>152</sup> *See Monell*, 436 U.S. at 694.

<sup>153</sup> *See id.* at 693-94.

<sup>154</sup> *Id.* at 694.

In the years since *Monell*, courts have developed an elaborate and complicated body of doctrine limiting local government liability under Section 1983.<sup>155</sup> Increasingly, some of the Justices are indicating dissatisfaction with this approach. It now appears that four justices—Stevens, Souter, Ginsburg, and Breyer—are ready to overrule *Monell* and to allow respondeat superior liability for municipalities under Section 1983. In *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*,<sup>156</sup> Justice Breyer, in a dissenting opinion joined by Justices Stevens and Ginsburg, sharply criticized *Monell* and declared that “the case for reexamination is a strong one.”<sup>157</sup> Justice Breyer argued that neither the language of Section 1983 nor its legislative history supports *Monell*’s preclusion of vicarious liability.<sup>158</sup> Moreover, Justice Breyer stated that “*Monell*’s basic effort to distinguish between vicarious liability and liability derived from ‘policy or custom’ has produced a body of law that is neither readily understandable nor easy to apply.”<sup>159</sup> Justice Breyer also argued that “relevant legal and factual circumstances may have changed in a way that affects likely reliance upon *Monell*’s liability limitation. The legal complexity . . . makes it difficult for municipalities to predict just when they will be held liable based upon ‘policy or custom.’”<sup>160</sup> For now, however, the law remains that respondeat superior liability cannot be imposed on local governments under Section 1983.

#### D. Title IX

The Court has taken yet a third approach to the vicarious liability problem in Title IX cases. In doing so, the Court adopted the most restrictive vicarious liability rule of the three. In *Gebser v. Lago Vista Independent School District*, the Court held that school districts are vicariously liable for harassment by employee teachers only if the school district has *actual notice* of the harassment and is *deliberately indifferent* to the conduct.<sup>161</sup> Presumably, the same actual notice plus deliberate indifference standard will apply to racial harassment cases under Title VI, as the Supreme Court noted in *Gebser* that Title IX “was modeled after Title VI” and that the two statutes are “parallel,” with Title IX covering gender discrimination and Title VI covering race discrimination in federally funded education programs.<sup>162</sup> Additionally, the Court relied on *Guardians Association v. Civil Service*

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<sup>155</sup> See 1 MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION 428-40 (2d ed. 1991).

<sup>156</sup> 520 U.S. 397 (1997).

<sup>157</sup> *Id.* at 437 (Breyer, J., dissenting).

<sup>158</sup> See *id.* at 430-33 (Breyer, J., dissenting).

<sup>159</sup> *Id.* at 433 (Breyer, J., dissenting).

<sup>160</sup> *Id.* at 436 (Breyer, J., dissenting).

<sup>161</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1999 (1998).

<sup>162</sup> *Id.* at 1997.

*Commission*,<sup>163</sup> a Title VI case holding that relief in cases alleging unintentional discrimination should be prospective only,<sup>164</sup> to support the conclusion that school district liability requires district officials to have actual knowledge of an employee's discriminatory conduct.<sup>165</sup>

Title IX prohibits sex discrimination in any education program receiving federal funds.<sup>166</sup> The Court found a private right of action for Title IX violations in *Cannon v. University of Chicago*,<sup>167</sup> and held, in *Franklin v. Gwinnett County Public Schools*,<sup>168</sup> that victims of discrimination prohibited by Title IX may recover monetary damages.<sup>169</sup> In *Franklin*, the Court held that school districts are liable under Title IX for damages for teacher harassment of students.<sup>170</sup> In finding sexual harassment of students actionable under Title IX, the Court in *Franklin* relied on and quoted *Meritor*:

Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex." . . . We believe the same rule should apply when a teacher sexually harasses and abuses a student.<sup>171</sup>

Relying on *Franklin*'s analogy between Title VII and Title IX, the plaintiff and the United States, as amicus curiae, argued in *Gebser* for school district liability based on the aided-by-the-agency-relation standard.<sup>172</sup> The Court, however, declined to hold the district liable in every case where the teacher's authority facilitates the harassment.<sup>173</sup>

The Court began its defense of a more limited liability rule by distinguishing the language of Title IX from that of Title VII. Title VII, the Court pointed out, defines an employer to include agents of the employer, whereas "Title IX contains no

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<sup>163</sup> 463 U.S. 582 (1983).

<sup>164</sup> See *id.* at 598.

<sup>165</sup> See *Gebser*, 118 S. Ct. at 1998 (citing *Guardians*, 463 U.S. at 598).

<sup>166</sup> 20 U.S.C. § 1681 (1994) ("No person in the United States shall . . . be subjected to discrimination under any education program . . . receiving Federal financial assistance.").

<sup>167</sup> 441 U.S. 677, 709 (1979).

<sup>168</sup> 503 U.S. 60 (1992).

<sup>169</sup> See *id.* at 76.

<sup>170</sup> See *id.* at 75.

<sup>171</sup> *Id.* (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (citation omitted)).

<sup>172</sup> See Brief for Petitioner, 1998 WL 19745, at \*36, *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998) (No. 96-1866); Brief for United States as Amicus Curiae, 1998 WL 24199, at \*12, *Gebser* (No. 96-1866).

<sup>173</sup> See *Gebser*, 118 S. Ct. at 1999; *id.* at 2003-04 (Stevens, J., dissenting).



comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles."<sup>174</sup> Of course it does not; Title IX, as written, provides for no liability whatsoever. Because the statute as written provides only for administrative actions against school districts, Congress did not need to consider the circumstances when schools would be liable for the acts of their employees. The Court suggested that because Title IX does not, unlike Title VII, provide explicitly for a private right of action for monetary damages, Title VII cannot be analogized to Title IX.<sup>175</sup> The Court's analysis, however, does precisely that.

In *Gebser*, the Court identified two main reasons for limiting employer liability under Title IX to employer fault. First, vicarious liability under Title IX would provide a greater damages recovery than is available under Title VII, because Title VII contains damages caps (imposed by the Civil Rights Act of 1991) and Title IX does not (because the right of action is implied).<sup>176</sup> The Court thought it odd to allow unlimited recovery under the implied right of action when Congress limited the amount of recovery under the express right of action.<sup>177</sup>

The Court found a second reason for rejecting any form of vicarious liability in Title IX's "contractual framework."<sup>178</sup> Title IX, as written by Congress, conditions receipt of federal funds upon a promise not to discriminate.<sup>179</sup> The "central concern" of such a contractual framework is "ensuring 'that the receiving entity of federal funds [has] notice that it will be liable for a monetary award.'"<sup>180</sup> In support of the notion that notice to the employer is crucial, the Court observed that the express form of implementation of Title IX—agency enforcement—requires the agency to give notice to the funds recipient before cutting off federal funds.<sup>181</sup>

It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice.<sup>182</sup>

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<sup>174</sup> *Id.* at 1996.

<sup>175</sup> *See id.*

<sup>176</sup> *See id.* at 1997.

<sup>177</sup> *See id.*

<sup>178</sup> *See id.*

<sup>179</sup> *See* 20 U.S.C. § 1681 (1994).

<sup>180</sup> *Gebser*, 118 S. Ct. at 1998 (quoting *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74 (1992) (alteration in original)).

<sup>181</sup> *See Gebser*, 118 S. Ct. at 1998.

<sup>182</sup> *Id.* at 1999.

Having made notice of the crucial issue, the Court easily rejected employer liability in the absence of actual notice.<sup>183</sup>

The Court in *Gebser* also drew from the agency enforcement provisions of Title IX the requirement that plaintiffs suing on the implied right of action prove not only actual notice but also deliberate indifference.<sup>184</sup> The Court analogized this to the standard when the agency enforces Title IX in which the recipient must be given an opportunity to come into compliance before funding is terminated.<sup>185</sup>

As Justice Stevens' dissenting opinion, which three justices joined, pointed out in *Gebser*, the Court's drastic limit on liability represented a very sharp restriction on the cause of action implied in *Cannon* for which the Court unanimously had concluded in *Franklin* that damages are an available remedy.<sup>186</sup> Once the Court decided, in *Franklin* and *Cannon*, that individual victims of sex discrimination could sue schools for damages under Title IX,<sup>187</sup> the limits relevant to agency enforcement of the statute no longer were limits on the relief available to private plaintiffs. The Court's notion in *Gebser* that the administrative enforcement scheme operates as a limit on the remedies available in a private right of action is inconsistent with *Franklin*. It also is inconsistent with Congress' intent, which implicitly approved a damages remedy when, after *Franklin*, it amended Title IX to abrogate the States' Eleventh Amendment immunity. Congress' abrogation of the immunity was necessary to allow a damages recovery in Title IX cases because the defendant public school districts are state government instrumentalities. Congress approved the private right of action for damages when it amended the statute.

The very purpose of a private right of action for damages is to allow a remedy in circumstances when the express statutory enforcement scheme would not. Indeed, in allowing such a remedy in *Franklin*, the Court noted that the agency had declined to cut funding in that case.<sup>188</sup> What the agency required of the school district simply was considered irrelevant in *Franklin* to the questions whether the plaintiff should be compensated for the harm she suffered and whether, by awarding damages, the implied right of action would provide an additional and alternative financial incentive for schools to ensure that students suffer no discrimination. By the Court's decision in *Franklin* which found that there is a private right of action for damages under Title IX, it rejected the position that damages liability for discriminatory actions is inconsistent with Title IX's purpose or policy. The resulting question then should

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<sup>183</sup> See *id.* at 2000.

<sup>184</sup> See *id.* at 1999.

<sup>185</sup> See *id.*

<sup>186</sup> See *id.* at 2005 (Stevens, J., dissenting) (citing *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 71 (1992)).

<sup>187</sup> See *Franklin*, 503 U.S. at 75; *Cannon v. University of Chicago*, 441 U.S. 677, 694-98 (1979).

<sup>188</sup> See *Franklin*, 503 U.S. at 64 n.3.

be: When does vicarious liability advance the Title IX purpose of eliminating sex discrimination in schools?

## II. WHY VICARIOUS LIABILITY SHOULD EXIST IN CIVIL RIGHTS CASES

### A. *The Statutory Interpretation Problem*

Neither Title VII, Title IX, nor Section 1983 contains language that dictates unambiguously the scope of employer liability for civil rights violations committed by employees. Not surprisingly, the Supreme Court's approach to the statutory lacunae reflect the changing fashions in methods of statutory interpretation and the changing composition of the Supreme Court. The language of Title VII sheds little light on the vicarious liability issue. That statute makes it unlawful for an "employer" to discriminate in the terms or conditions of employment<sup>189</sup> and defines "employer" to include "agents."<sup>190</sup> Although the Supreme Court stated in *Ellerth* that by including the term "agent" in the statutory definition of employer, "[i]n express terms, Congress has directed federal courts to interpret Title VII based on agency principles,"<sup>191</sup> one might be forgiven for thinking that this was something less than an express, unambiguous direction to use "traditional agency principles" to discern the proper scope of employer liability.<sup>192</sup>

Indeed, it is possible to read the language of Title VII as providing for employer liability for unfair practices by "any person" not just employers' "agents." Throughout the statute, Title VII states that a charge or a suit may be filed against an "employer" or "respondent." Sections 703 and 704 make it an unlawful employment practice for "an employer" to discriminate.<sup>193</sup> Section 706(b) provides that "[w]henever a charge is filed . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission" must notify "such employer."<sup>194</sup>

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<sup>189</sup> 42 U.S.C. § 2000e-2(a)(1) (1994). Section 703(a) of Title VII provides, in pertinent part: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." *Id.* Other subsections of sections 703 and 704, the sections of Title VII that prohibit specified discriminatory practices, are written in similar terms.

<sup>190</sup> Section 701(b) of Title VII provides, in pertinent part: "The term 'employer' means a person engaged in an industry affecting commerce . . . , and any agent of such a person . . ." *Id.* § 2000e(b).

<sup>191</sup> *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998).

<sup>192</sup> In *Meritor*, the Court assumed that the use of the term "agent" "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

<sup>193</sup> See 42 U.S.C. §§ 2000e-2(a), e-3(a).

<sup>194</sup> *Id.* § 2000e-5(b).

Section 706(f) authorizes the Commission or the person filing a charge to bring an action against a “respondent,”<sup>195</sup> and “respondent” is defined in section 701 to mean “an employer.”<sup>196</sup> Furthermore, section 706(g)(1) states that back pay is “payable by the employer . . . responsible for the unlawful employment practice.”<sup>197</sup>

The few instances in which Title VII refers to “person” instead of employer, however, suggest a more expansive rule of employer liability. For instance, section 706(a), which gives the Commission its enforcement authority, states: “The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section [703] or [704] of this title.”<sup>198</sup> “Person” is defined in section 701 to include “one or more individuals.”<sup>199</sup>

Because Congress carefully distinguished between “persons” and “employers” in the definition section<sup>200</sup> and stated clearly in section 706(g)(1) that back pay is payable by “the employer,” one can conclude that Congress, when using the broader term “person” in section 706(a), meant to suggest that the enforcement actions against “employers” or “respondents” authorized under the rest of section 706 are intended to prevent “individuals” from committing unfair employment practices. In short, while it is true that employers are defined in the definition section (section 701) to include “agents,”<sup>201</sup> the enforcement section (section 706) states that enforcement activities are to stop any “person” (not just “agents”) from discriminating.<sup>202</sup> Thus, even if only “employers” can be sued and are liable for back pay under Title VII (or damages under the Civil Rights Act of 1991<sup>203</sup>), the very first section of the enforcement provision makes clear that enforcement against employers is intended to stop “any individual” from discriminating. This theory means that the statute makes employers liable for discrimination by any person, not just by “agents.”

<sup>195</sup> *See id.* § 2000e-5(f)(1).

<sup>196</sup> *See id.* § 2000e(n).

<sup>197</sup> *Id.* § 2000e-5(g)(1).

<sup>198</sup> *Id.* § 2000e-5(a).

<sup>199</sup> *Id.* § 2000e(a). Additionally, section 706(e)(1) provides that a charge “shall be served upon the person against whom such charge is made.” *Id.* § 2000e-5(e)(1). This requirement is a bit harder to square with the rest of section 706, because section 706(b) states that when “a charge is filed . . . alleging that an employer . . . has engaged in an unfair employment practice, the Commission shall serve a notice of the charge . . . on such employer.” *Id.* § 2000e-5(b). Apparently, the Commission is supposed to notify the “employer” of the charge, but the charging party is supposed to serve the charge on a “person.”

<sup>200</sup> *See id.* §§ 2000e(a)-(b).

<sup>201</sup> *See id.* § 2000e(b).

<sup>202</sup> *See id.* § 2000e-5(a).

<sup>203</sup> *See id.* § 1981a(a)(1) (“In an action . . . under section 706 . . . of the Civil Rights Act of 1964 . . . against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and punitive damages.”); *id.* § 1981a(b)(1) (“A complaining party may recover punitive damages under this section against a respondent.”).

When the Court essayed to develop employer liability rules in *Ellerth* and *Faragher*, it overlooked the enforcement section of Title VII, focusing instead on just a part of the definition. Perhaps it did so because it believed it was constrained in its statutory interpretation by the stare decisis effect of *Meritor*. Ironically, *Meritor* disclaimed any intent to declare a definitive rule, except that “courts . . . [should] look to agency principles for guidance in this area” and that “the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors.”<sup>204</sup> Justice Rehnquist provided no justification for his conclusion that the statutory definition of “employer” as including “agent” reflects “an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.”<sup>205</sup> For the reasons just given, other statutory language supports a broader liability rule. But even if one relies only on the language quoted by Justice Rehnquist, it does not follow necessarily that employers are *not* strictly liable for *supervisory* harassment, as opposed to harassment by coworkers or customers.

Congress’ intent in enacting Title VII and its various amendments also leaves much to the imagination. At the time it was enacted in 1964, no doubt sexual harassment was not on the minds of many, if any, of the legislators who voted for it. They probably wanted to eliminate all forms of discriminatory working conditions—not just hiring and firing, but also “quality of life” conditions like de facto and de jure job segregation and, indeed, a whole culture of racial insults and subordination. They obviously knew that such things were accomplished not just by formal policies dictated by the corporate headquarters. If pressed, they might have recognized that a workplace culture of racial inequality is perpetuated not only by the formal decisions of managers and supervisors, but also by the conduct of coworkers. But that reality says little about what sort of employer liability rules they would have deemed necessary to eradicate pervasive inequality. By the time the most recent amendments to Title VII were adopted in 1991, Congress obviously was more sophisticated about sexual harassment than when Title VII was adopted originally. But courts imposed most of the limits on vicarious and individual liability after 1991. Thus, one honestly cannot infer much from Congress’ failure to address vicarious liability.

Section 1983 is no more clear on vicarious liability than Title VII. The statute, as noted above, speaks in terms of “any person.”<sup>206</sup> The rejection of the Sherman Amendment leads to the conclusion that municipalities were not to be held liable for violence by private citizens. It leaves open, however, the possibility that Congress intended municipal liability under Section 1983 to be vicarious for their employees’ actions, as vicarious liability was the norm in other areas of municipal law at that

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<sup>204</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

<sup>205</sup> *Id.*

<sup>206</sup> See *supra* note 204 and accompanying text.

time.<sup>207</sup> Leaving open the possibility, of course, is a far cry from compelling the conclusion. Thus, nothing in the language, legislative history, or any other evidence of congressional intent provides clear direction on the scope of employer liability under Section 1983. Congress neither provided for nor precluded vicarious liability for the harms caused by their employees.

Although Title IX's language may be the least helpful of all on the question of vicarious school damages liability for teacher harassment of students, Congress' intent that school districts be liable for damages for sex discrimination by teachers and other school employees is luminously clear from the Title IX amendments which followed *Franklin v. Gwinnett County Public Schools*.<sup>208</sup> When Congress abrogated the Eleventh Amendment immunity for Title IX actions, it must have intended school districts to pay damages for the discriminatory acts of their employees. What other reason would there be to abrogate the Eleventh Amendment immunity? After all, schools are not people and they only act through their employees. More specifically, Congress probably thought it was clearing the way for school districts to pay damages in cases like *Franklin*, in which the school district officials knew about the harassment and did nothing about it.

The problem is that Congress did not state, and probably did not consider, what other kinds of sex discrimination, by which employees, would form the basis of damages liability, or whether it was essential that the school district know about it or be somehow at fault in failing to prevent or remedy it. As Justice Stevens pointed out in dissent in *Gebser*, there is no reason to believe that Congress intended to allow vicarious liability *only* on facts like those in *Franklin*.<sup>209</sup> Thus, for Title IX, as for Section 1983 and Title VII, one must go beyond the language and legislative history to analyze the proper scope of employer liability. Statutory purpose is the other source of guidance help. We turn to that below.

Before examining legislative purpose, however, it is worth remarking on the significant differences in reasoning that the Court used to develop its disparate rules under Section 1983, Title VII, and Title IX. Whereas in *Monell* the Court depended heavily on the legislative history of Section 1983,<sup>210</sup> the Court paid no attention to the legislative history of Title VII in *Faragher* and *Ellerth* and only slight attention to the legislative history of Title IX in *Gebser*. The obvious explanation for the different methods of reasoning is that, since *Monell*, the Court has become noticeably less likely to rely on legislative history as its principal justification in a decision on a question of statutory interpretation.<sup>211</sup> Of course, the changing fashion in the

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<sup>207</sup> See Kaczorowski, *supra* note 137.

<sup>208</sup> 503 U.S. 60 (1992).

<sup>209</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 2003 n.6 (1998) (Stevens, J., dissenting).

<sup>210</sup> See *Monell v. Department of Social Servs.*, 436 U.S. 658, 665-90 (1978).

<sup>211</sup> See, e.g., Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme*

methods of statutory interpretation does not necessarily account for the different results. Brennan's opinion for the Court in *Monell* cannot be interpreted to mean that cities would not be vicariously liable simply because of the legislative history. One may surmise that there simply were not five votes for full municipal vicarious liability no matter what the legislative history might have been thought to show. Indeed, after completely rejecting municipal liability in *Monroe*, allowing it, but without vicarious liability, was seen as a major victory for civil rights plaintiffs. And, for the reasons suggested above, the Court likely would not have reached a different outcome in *Gebser* if it had studied the legislative history of Title IX.

### B. *Purposes Served by Vicarious Liability*

Vicarious liability for tortious conduct of employees serves three purposes. First, it reduces the incidence of tortious conduct by providing a financial incentive for employers to prevent it by exercising care in hiring and disciplining employees and supervisors.<sup>212</sup> Second, it assures adequate compensation for victims harmed by harassment who often have no reasonable possibility of collecting from an alleged harasser who is judgment-proof.<sup>213</sup> Third, for the unavoidable harms, vicarious liability spreads the risk to the shareholders, if the cost of tort claims reduces profits, or to all employees, if the cost of tort claims results in lower wages,<sup>214</sup> and/or to consumers, if the costs are reflected in higher prices for the employer's goods or services.<sup>215</sup>

The arguments for respondeat superior liability are as forceful in civil rights cases as they are in ordinary tort cases. The civil rights law, no less than tort law, regards adequate compensation to victims and deterrence of violations as preeminent goals.

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*Court*, 30 ARIZ. ST. L.J. 275, 277 (1998); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 356 (1994); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 754-62 (1995).

<sup>212</sup> See HARPER ET AL., *supra* note 39, § 26.5, at 21; KEETON ET AL., *supra* note 12, at 501. Some economic analyses of vicarious liability have questioned whether such liability efficiently serves these purposes in all cases. See Sykes, *supra* note 12, at 565-70. Nevertheless, Sykes concludes that vicarious liability does efficiently serve the functions of deterrence and compensation efficiently under some circumstances. See *id.* at 569-70.

<sup>213</sup> See Sykes, *supra* note 12, at 567-70 (discussing circumstances in which vicarious or personal liability rules may create incentives for employers and judgment-proof employees to engage in hazardous conduct).

<sup>214</sup> See HARPER ET AL., *supra* note 39, § 26.5, at 22.

<sup>215</sup> See KEETON ET AL., *supra* note 12, at 500-01; Oppenheimer, *supra* note 29, at 90, 92. For a discussion of the policies served by vicarious liability in sexual harassment cases, see *id.* at 90-94; Verkerke, *supra* note 12, at 286-316.

## 1. Vicarious Liability Serves the Purposes of Title VII

The purposes of Title VII are compensation and deterrence.<sup>216</sup> Vicarious liability is not only consistent with those statutory purposes, it is necessary to achieve them. Without vicarious liability, many victims of discrimination would have no cause of action at all (because the majority of courts reject individual liability),<sup>217</sup> and employers would have little incentive to vigorously prevent discriminatory actions by low-level supervisors and employees.

Indeed, the Supreme Court has recognized that compensation for persons injured by unlawful discrimination is appropriate even when the employer acted in good faith.<sup>218</sup> In rejecting a rule that would limit the availability of back pay when the employer acted in good faith, the Court said that to deny recovery

would read the “make whole” purpose right out of Title VII, for a worker’s injury is no less real simply because his employer did not inflict it in “bad faith.” Title VII is not concerned with the employer’s “good intent or absence of discriminatory intent” for “Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.”<sup>219</sup>

But in *Ellerth* and *Faragher*, the Court thought that limits on vicarious liability served statutory purposes.<sup>220</sup> Thus, the question arises whether vicarious liability or the Court’s affirmative defense scheme better serves Title VII’s purposes.

If statutory language, structure, or history often is frustratingly indeterminate on questions of interpretation, resort to statutory purposes often is little more

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<sup>216</sup> See *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982) (“The ‘primary objective’ of Title VII is to bring employment discrimination to an end.”); *id.* at 230 (“Title VII’s secondary, fallback purpose is to compensate the victims for their injuries. To this end, section 706(g) aims “to make the victims of unlawful discrimination whole” by restoring them, “so far as possible . . . to a position where they would have been were it not for the unlawful discrimination.”” (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (quoting 118 Cong. Rec. S7168 (daily ed. Mar. 6, 1972) (statement of Sen. Williams)))); *Albemarle*, 422 U.S. at 417 (“[T]he primary objective [of Title VII] was a prophylactic one.”); *id.* at 418 (“It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.”); Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, Nov. 21, 1991, 105 Stat. 1071 (“The Congress finds that—(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace.”).

<sup>217</sup> See *supra* note 50 and accompanying text.

<sup>218</sup> See *Albemarle*, 422 U.S. at 422.

<sup>219</sup> *Id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

<sup>220</sup> See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2291 n.4 (1998).



constraining on judicial discretion. Most statutes can be said to have a range of purposes, and the outcome on particular issues can depend on which of the several statutory purposes the court chooses to pursue. Vicarious liability for sexual harassment under Title VII is a perfect example of this problem. In limiting vicarious employer liability for supervisory harassment unaccompanied by adverse job decisions, the Court in *Ellerth* and *Faragher* asserted that it was promoting the purposes of Title VII.<sup>221</sup> In particular, the Court said that when employer liability depends on whether the employer has a sex harassment policy and complaint procedure, the employer has an incentive to create such policies and employees have incentives to use them.<sup>222</sup> This result, the Court claimed, “would effect Congress’ intention to promote conciliation rather than litigation in the Title VII . . . context and the EEOC’s policy of encouraging the development of grievance procedures.”<sup>223</sup>

Barring vicarious liability when the employee fails to use a complaint procedure, the Court thought, “could encourage employees to report harassing conduct before it becomes severe or pervasive,” which “would also serve Title VII’s deterrent purpose.”<sup>224</sup> Thus, the way to serve the purposes of Title VII was to limit liability.<sup>225</sup>

There are three principal problems with the Court’s analysis of Title VII purposes. First, it ignores the compensatory purpose of Title VII. Some victims of egregious sexual, racial, or religious harassment will have no remedy. At least since the Civil Rights Act of 1991, compensation of injured employees has been a core purpose of Title VII.<sup>226</sup> Some law and economics literature supports the propositions that employees will not be compensated in the form of higher wages for the risk of harm from sexual harassment and that employer liability is necessary to compensate those victims.<sup>227</sup>

A second problem with the Court’s reasoning about statutory purposes is its reliance on shaping incentives for employees. The average sexual harassment victim probably is not going to read *Ellerth* and *Faragher*, so she will never know that, if she wants to file a lawsuit later, she had better register a complaint with her employer first. By the time she consults a lawyer, she probably no longer will be working for the employer, and it will be too late.

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<sup>221</sup> See *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292.

<sup>222</sup> See *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292.

<sup>223</sup> *Ellerth*, 118 S. Ct. at 2270 (citations omitted).

<sup>224</sup> *Id.*

<sup>225</sup> See *id.*

<sup>226</sup> One of the crucial provisions of the Civil Rights Act of 1991 made compensatory and punitive damages available in Title VII suits. See 42 U.S.C. §§ 1981a(a)(1), (b) (1994). In so amending Title VII, Congress made findings that additional remedies were necessary to deter harassment and intentional discrimination and, thus, stated the purpose of the statute was to provide “additional remedies” for them. Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(1), Nov. 21, 1991, 105 Stat. 1071.

<sup>227</sup> See Sykes, *supra* note 12, at 605-08.

The third flaw is the Court's approach to the question of shaping incentives for employers. The employer liability scheme that best shapes incentives to prevent intentional harm long has been the subject of hot debate among scholars.<sup>228</sup> To the extent that harassment is preventable through better hiring, supervision, or training, employer liability creates incentives to expend resources in those tasks. If no vicarious liability for harassment unaccompanied by adverse job action exists, employers have no incentive to eliminate the harassment. An employer only needs to maintain and to publicize a policy against sexual harassment and a complaint procedure, to take action on the complaints it receives and to try to prevent supervisors from discriminating in hiring and firing. Beyond that, Title VII, as construed by the Court in *Ellerth* and *Faragher*, gives the employer no incentive to find out for itself which supervisors are harassers. As long as the supervisor separates harassment from its job decisions that have economic repercussions, the employer need not worry. Nor is the employer encouraged to make it easy for employees to file complaints (as long as it is not so difficult to complain that a jury might conclude that the employer's policy was unreasonable or that a plaintiff was reasonable in failing to make a complaint).

But what about employer liability for harassment that it could *not* prevent? It seems probable that some supervisors and other employees will harass workers no matter what the employer does to prevent it (at least until the employer fires them). As to this category of "unavoidable" harassment, the only incentive employer liability creates is to avoid litigation by doing whatever it takes to appease the victim after the incident. Prompt and effective remedial action may mollify some victims; others may sue no matter what the employer does to remedy the situation.

Under the Court's rule, an employer easily could discourage employees from complaining without incurring liability. The person in charge of receiving complaints might say to an employee:

I can't promise you that the investigation will preserve your anonymity.  
[This is a true statement.] Nor can I promise you that we'll discipline the alleged harasser, because we might conclude that the allegations of harassment aren't well-founded or that the incidents were so minor that discipline is unwarranted. [This is also true and permissible.] Thus, it's

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<sup>228</sup> See, e.g., *id.* at 565 & n.1 (citing Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CAL. L. REV. 1345 (1982); Reinier H. Kraakman, *Corporate Liability Strategy and the Cost of Legal Controls*, 93 YALE L.J. 857 (1984); Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J. L. ECON. & ORG. 53 (1986); William M. Landes & Richard A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517 (1980); Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984)).

possible that at the end of all this, you'll still be working for the person whom you say harassed you, that he'll know you registered a complaint against him, and that he'll hold a grudge against you. [This is also true.]

Now, an employee might well decide not to run the risk of poisoning a relationship and possible retaliation (that could not be shown to violate Title VII's antiretaliation provision). If she needs the job, she might decide it is better to endure the harassment. If she later decides to sue, a court might find that her failure to initiate a complaint was unreasonable, even if the harassment was egregious. Many cautious plaintiffs' lawyers would decline to take a case on such facts.

Courts could adopt a rule of vicarious employer liability under Title VII for sexual (and other forms of) harassment relying on the traditional agency principles favored by the Supreme Court in *Meritor*, *Ellerth*, and *Faragher* by holding that Title VII imposes a nondelegable duty to protect employees from harassment.<sup>229</sup> As noted above, *Restatement (Second) of Agency* section 219(2)(c) imposes liability on a master for harms of a servant acting outside the scope of employment when the master has a nondelegable duty to protect against such harms.<sup>230</sup> Section 214 of the Restatement defines the scope of that nondelegable duty as being "a duty to provide protection for or to have care used to protect others or their property."<sup>231</sup> Courts have imposed such nondelegable duties on common carriers, ambulance services, hotels, hospitals, facilities providing care for mentally disabled children, and employers with respect to providing employees a safe workplace, among others.<sup>232</sup>

Nothing in the concept of the nondelegable duty doctrine itself identifies the universe of harms for which employers should be held vicariously liable when their employees are acting outside the scope of employment. The nondelegable duty concept itself is essentially just a statement of a conclusion (of vicarious liability) rather than a rule explaining when the conclusion is warranted. Moreover, state courts are far from unanimous in their conclusions about when employers are vicariously liable under the nondelegable duty rule. Nevertheless, Title VII, and indeed, Section 1983 and Title IX too, fit the profile of the type of harm and the type of victim that courts have considered worthy of vicarious employer liability under the nondelegable duty concept.

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<sup>229</sup> See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986); *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2285 (1998).

<sup>230</sup> See *supra* notes 102-07 and accompanying text; 1 RESTATEMENT (SECOND) OF AGENCY § 219(c) (1959).

<sup>231</sup> 1 RESTATEMENT (SECOND) OF AGENCY § 214.

<sup>232</sup> This nondelegable duty theory of vicarious liability is discussed *infra* notes 252-63 and accompanying text.

## 2. Vicarious Liability Serves the Purposes of Section 1983

The Court's justification for rejecting municipal liability under Section 1983 is highly questionable. In *Monell*, the Court concluded that, although deterrence and risk spreading would be served by allowing respondeat superior liability, the defeat of the Sherman Amendment evidences a rejection of these policies.<sup>233</sup> The Court's error was in interpreting the legislative history of Section 1983 to answer a question—When can municipalities be held liable for the actions of their employees?—that it did not address. The Sherman Amendment, as discussed earlier,<sup>234</sup> would have made local governments liable for private acts of violence within their territory. The defeat of the Sherman Amendment, however, as the Court in *Monell* noted, was only a refusal to create an affirmative duty for cities to keep the peace by making them monetarily liable for the actions of private citizens.<sup>235</sup> Just because deterrence and risk spreading were not accepted as sufficient to justify municipal liability for private actions does not mean that deterrence and risk spreading were repudiated completely as underlying objectives of Section 1983.

In fact, two years after *Monell*, the Supreme Court held that municipalities do not have good faith immunity under Section 1983 because such immunity would frustrate the objectives of deterrence and risk spreading.<sup>236</sup> In *Owen v. City of Independence, Missouri*, the Court held that local governments are liable even when their constitutional violations are a result of actions taken in good faith.<sup>237</sup> In that case, a city council fired the police chief without providing him any procedural due process protections.<sup>238</sup> The firing occurred shortly before the Supreme Court's major procedural due process decisions established a right to protections under such circumstances.<sup>239</sup> The city claimed immunity because its actions were taken in good faith.<sup>240</sup>

The Court in *Owen*, however, held that the fact that city officials acted in good faith did not protect a municipal government from liability under Section 1983.<sup>241</sup> The Court emphasized that there was no indication in the legislative history that Congress intended to accord municipal governments any form of immunity; in fact,

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<sup>233</sup> See *Monell v. Department of Social Servs.*, 436 U.S. 658, 693-94 (1978).

<sup>234</sup> See *supra* notes 136-48 and accompanying text.

<sup>235</sup> See *Monell*, 436 U.S. at 673.

<sup>236</sup> See *Owen v. City of Independence, Mo.*, 445 U.S. 622, 650-52 (1980).

<sup>237</sup> See *id.* at 624-30.

<sup>238</sup> See *id.* at 625-29.

<sup>239</sup> See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sinderman*, 408 U.S. 593, 601-02 (1972) (finding that due process is required if a state creates a liberty or property interest in a job).

<sup>240</sup> See *Owen*, 445 U.S. at 634.

<sup>241</sup> See *id.* at 650.

local governments generally had no such immunity under the common law in 1871.<sup>242</sup> Furthermore, the Court noted that to allow cities good faith immunity would frustrate the deterrence and risk-spreading purposes of Section 1983.<sup>243</sup> The Court rejected the assertion that the absence of immunity would chill municipal officials' exercise of their discretion.<sup>244</sup> Because the individual officials had good faith immunity to their personal liability, the existence of damage remedies against the municipality should not have an adverse effect on government operations. The Court, however, reasoned that allowing municipal liability would create an incentive for local governments to prevent constitutional violations.<sup>245</sup>

It thus is clearly established that Section 1983 has as its primary goals deterrence of civil rights violations and compensation of victims. This result is hardly controversial; it is the classic reason for creating liability for infringements of rights, whether common law, constitutional, or statutory. As explained earlier, vicarious liability unquestionably serves these goals. Had the Court used a purposive analysis to interpret Section 1983, respondeat superior liability would be imposed. A clear and simple vicarious liability rule would be preferable to the current doctrinal disarray involving literally thousands of decisions trying to define when cities can be held liable. The underlying goals of Section 1983 would have been served best by the Court's allowing vicarious liability.

### 3. Vicarious Liability Serves the Purposes of Title IX

The Court's rule that school districts are liable only in cases of actual notice and deliberate indifference does not serve the two purposes of Title IX that the Court identified when it created the private right of action in *Cannon*: "First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices."<sup>246</sup> The Court thought that the first purpose "is generally served by the statutory procedure for the termination of federal financial support,"<sup>247</sup> but that the funds cut-off procedure did not serve the second purpose because it was too draconian to be used often and an inefficient and cumbersome response for an isolated instance of discrimination.<sup>248</sup> "The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully

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<sup>242</sup> See *id.* at 638-39.

<sup>243</sup> See *id.* at 651.

<sup>244</sup> See *id.* at 650-51.

<sup>245</sup> See *id.* at 651-52.

<sup>246</sup> *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).

<sup>247</sup> *Id.*

<sup>248</sup> See *id.* at 705.

consistent with—and in some cases even necessary to—the orderly enforcement of the statute.”<sup>249</sup>

Established precedent from the law of agency used in tort cases supports vicarious liability. The general rule is usually stated as providing for employer liability for the tortious conduct of their employees only when the employer is itself at fault or when the employee acted within the scope of employment. A tort, even if intentional, is within the scope of employment if it has some (however misguided) aspect of serving the master’s purpose.<sup>250</sup> Courts also hold employers vicariously liable for the torts of employees that are motivated entirely by personal concerns when the employer “by contract or otherwise, has entered into some relation requiring him to be responsible for the protection of the plaintiff.”<sup>251</sup> The *Restatement (Second) of Agency* articulates this concept as one when the employer owes a “nondelegable” duty.<sup>252</sup> The nondelegable duty concept makes common carriers, in some cases, hospitals, inkeepers, and schools vicariously liable for their employees’ intentional and negligent torts committed outside the scope of employment against passengers, patients, guests, and students.<sup>253</sup>

The rationale for the nondelegable duty doctrine, when it does not flow from an express contract between the plaintiff and the employer, is that the plaintiff was entirely in the control of the defendant and is especially vulnerable to harm.<sup>254</sup> Title IX seems to define the quintessential circumstance in which the employer has a nondelegable duty, in the language of the *Restatement*, to provide a learning

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<sup>249</sup> *Id.* at 705-06.

<sup>250</sup> See KEETON ET AL., *supra* note 12, at 505.

<sup>251</sup> *Id.* at 506 (citations omitted).

<sup>252</sup> See 1 RESTATEMENT (SECOND) OF AGENCY §§ 214, 219(2)(c) (1959).

<sup>253</sup> See, e.g., *Gilstrap v. Amtrak*, 998 F.2d 559, 561-62 (8th Cir. 1993) (applying Washington law, the court found the railroad vicariously liable for sexual assault of passenger by an employee of the railroad); *Nazareth v. Herndon Ambulance Serv., Inc.*, 467 So. 2d 1076, 1081 (Fla. Dist. Ct. App. 1985) (holding ambulance service vicariously liable for the sexual assault of a patient by an ambulance attendant); *Eversole v. Wasson*, 398 N.E.2d 1246, 1247-48 (Ill. App. Ct. 1980) (finding a school vicariously liable for an assault by a teacher of a student that resulted from a personal and nonschool-related dispute); *Stropes v. Heritage House Children’s Ctr.*, 547 N.E.2d 244, 253-54 (Ind. 1989) (ruling that a long-term care facility was vicariously liable for the sexual assault of a minor patient/resident by a nurse’s aide); *cf.* *California Ass’n of Health Facilities v. Department of Health Servs.*, 940 P.2d 323, 332, 335 (Cal. 1997) (interpreting a statute regarding licensing of long-term care facilities); *Robinson v. Washington County*, 529 A.2d 1357, 1361-62 (Me. 1987) (determining that a jail may be vicariously liable for an injury to a pretrial detainee caused by the denial of necessary medical care); *St. Michelle v. Catania*, 250 A.2d 874, 878 (Md. 1969) (holding a taxicab company vicariously liable for the sexual assault and robbery of a passenger by a cab driver employed by the company); *Carabba v. Anacortes Sch. Dist. No. 103*, 435 P.2d 936, 948 (Wash. 1968) (finding a school vicariously liable for injuries caused due to the negligence of a referee during a school-sponsored wrestling match).

<sup>254</sup> See sources cited *supra* note 253.

environment free from sexual harassment and abuse. The case law discussing nondelegable duty stresses that the duty arises from a special relationship between the offender's employer and the victim.<sup>255</sup>

If ever there were a "special relationship" deserving of legal recognition, it must be the relationship between a school and the children entrusted to its care. School children are at the mercy of the schools in a way that employees and most other victims of discrimination are not.<sup>256</sup> A student who is victimized by discrimination by school employees does not have the option employees do, as Justice Souter said in *Faragher*, of "walk[ing] away or tell[ing] the offender where to go."<sup>257</sup> Students cannot quit school, they cannot refuse to attend class, and they cannot tell their teachers "where to go." Although they can tell harassing classmates "where to go," if words alone are ineffective to stop the harassment, or if the students are too intimidated, they cannot distance themselves from harassing classmates by switching classes or transferring themselves to another school.<sup>258</sup> Indeed, in one case, the victim of peer harassment was not even permitted to switch seats in the classroom. She was forced to sit next to her harasser for months.<sup>259</sup> The Court's holding in *Gebser v. Lago Vista Independent School District*<sup>260</sup> essentially says that schools usually are not responsible for the harms students suffer at school. This holding is astounding given that the victims of the harm are children and that the law requires them to spend most of their waking hours in the school's care.

The jurisdictions that have declined to recognize the nondelegable duty doctrine, or that have declined to extend it to schools, group homes or hospitals, have questioned the usefulness of the notion of special vulnerability in differentiating among cases in which the employer ought to be held vicariously liable for the personal torts of employees from those in which courts impose liability because the employee acted within the scope of employment or because the employer was itself at fault.<sup>261</sup> While the notion of special vulnerability may be problematic with respect

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<sup>255</sup> See sources cited *supra* note 253.

<sup>256</sup> See *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1193 (11th Cir. 1996), *cert. granted*, 119 S. Ct. 29 (1998); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993).

<sup>257</sup> *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2291 (1998).

<sup>258</sup> This has been the rationale for holding police departments vicariously liable for sexual assaults committed by on-duty officers. As the court reasoned, "[a] police officer is entrusted with a great deal of authority. . . . The officer is supplied with a conspicuous automobile, a badge and a gun to ensure immediate compliance with his directions." *White v. County of Orange*, 212 Cal. Rptr. 493, 496 (Cal. Ct. App. 1985). *But cf.* *John R. v. Oakland Unified Sch. Dist.*, 769 P.2d 948, 956-57 (Cal. 1989) (holding a school not liable for teacher's molestation of student because, in part, the "teacher's authority is different in both degree and kind" from a police officer's authority).

<sup>259</sup> See *Davis*, 74 F.3d at 1189.

<sup>260</sup> 118 S. Ct. 2000 (1998).

<sup>261</sup> See, e.g., *Kennel v. Carson City Sch. Dist.*, 738 F. Supp. 376, 379 (D. Nev. 1990)

to common carriers,<sup>262</sup> it does usefully distinguish schools or hospitals that are responsible for the care of children from all other types of employers.<sup>263</sup> Minor students are vulnerable in ways that no other tort victims are. In this respect, the rationales the Court offered in *Ellerth* and *Faragher* for insulating an employer from liability if the victim fails to complain—the duty of victims to minimize harm and the desire to create incentives for employees to use employer-provided reporting mechanisms to resolve problems without litigation—cannot seriously be applied to children who are the victims of sexual harassment and abuse by teachers. Whatever one may think reasonable for an employee to do when harassed—to overcome her fears of retaliation, to be responsible about investigating how to register a complaint, and to report it—would be unreasonable to expect from a child. It takes greater resourcefulness and maturity than we should expect from children to identify certain behavior as illegal sexual harassment and to report it.

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(holding that school does not owe nondelegable duty to student intentionally injured by another student during athletic event); *Sebastian v. District of Columbia*, 636 A.2d 958, 966 (D.D.C. 1994) (declining to recognize a nondelegable duty of liability of common carrier and ruling that ambulance service was not liable for sexual assault committed by ambulance attendant outside scope of employment); *Worcester Ins. Co. v. Fells Acres Day Sch., Inc.*, 558 N.E.2d 958, 968 (Mass. 1990) (finding group day school for mentally disabled not liable for sexual assault of minor); *Maguire v. State*, 835 P.2d 755, 758-59 (Mont. 1992) (declining to hold state hospital liable under nondelegable duty doctrine for sexual assault of minor patient by employee); *Greening v. School Dist. of Millard*, 393 N.W.2d 51, 57 (Neb. 1986) (ruling that school does not owe a nondelegable duty to student injured by unlicensed physical therapist employed by state); *Adams v. New York City Transit Auth.*, 666 N.E.2d 216, 220 (N.Y. 1996) (declining to recognize a nondelegable duty of common carriers and, thus, holding that transit authority is not liable for intentional tort by subway employee); *Cornell v. State*, 389 N.E.2d 1064, 1065 (N.Y. 1979) (ruling that state hospital is not liable under nondelegable doctrine for sexual assault of minor patient by attendant); *Niece v. Elmview Group Home*, 929 P.2d 420, 428-31 (Wash. 1997) (holding group day school for mentally disabled not liable for sexual assault); *cf. John R.*, 769 P.2d at 953-57 (finding school not vicariously liable for a teacher's sexual assault of student because the incident occurred outside the scope of employment; nondelegable duty doctrine not discussed); *Bratton v. Calkins*, 870 P.2d 981, 986 (Wash. Ct. App. 1994) (ruling that school is not liable for sexual assault of student by teacher which occurred outside the scope of employment).

<sup>262</sup> See, e.g., *Adams*, 666 N.E.2d at 220 (finding a transit authority not liable for an intentional tort committed by employee against a passenger).

<sup>263</sup> Some courts, particularly in cases involving school liability for teachers' sexual assaults, have rejected employer liability because they thought it would shift scarce resources away from other students to the victim and would shift resources away from education and toward the purchase of insurance. See *John R.*, 769 P.2d at 956. This proves too much, for it really is an argument for rejecting vicarious employer liability in all cases, or at least in all cases in which the employer is not at fault.



### III. IMPLICATIONS OF ADOPTING VICARIOUS LIABILITY IN CIVIL RIGHTS CASES

We propose that employers be held liable under respondeat superior, that is, automatically liable without regard to employer fault, for all discrimination under Title VII and all deprivations of civil rights under Section 1983. Schools should be vicariously liable for all teacher harassment of students under Title IX and should be liable on a fault basis for student harassment of students. This result would significantly expand vicarious liability in civil rights cases. Furthermore, we propose that the same standard advocated here for Title VII be applied to other employment discrimination statutes, such as the ADEA and the ADA. The same standards we propose for Title IX should be applied to race discrimination cases under Title VI. In addition, the standard should be the same under Section 1981 as it is under Section 1983.

#### A. Title VII

We propose that employers be held strictly liable for all supervisory and coworker sexual harassment, and for any other discriminatory conduct that violates Title VII. The Supreme Court should abandon that part of the *Meritor* holding in which it stated that employers are not “automatically” liable for supervisory sexual harassment. It also should reject the position of the EEOC and federal courts of appeals which hold that employers are liable for coworker harassment only if the employer (a) did not have an adequate policy prohibiting harassment and procedure for reporting harassment, or (b) failed to take prompt and effective remedial action once it was aware of the harassment.

Vicarious liability would simplify Title VII litigation by eliminating the difficult issues that have been created by the Court’s different employer liability rules for coworkers (fault-based; burden of proving fault on plaintiff), for supervisors who cause an adverse employment action (vicarious liability), and for supervisors who cause no adverse employment action (fault-based; burden of proving absence of fault on employer). The *Ellerth-Faragher* rule requires the parties to litigate who is a supervisor; it also requires the parties to litigate whether there was an adverse employment action (did the victim freely quit or was she constructively discharged?). Further, *Ellerth* and *Faragher* may create the bizarre situation that two employees whose supervisor says “sleep with me or you’re fired” will have different vicarious liability rules depending on whether the victim tests the threat. The one who says no and is fired can establish vicarious employer liability. The employee who, fearing for her job, says yes and then later quits may not be able to establish vicarious liability because she may have suffered no “adverse employment action.” Unless being forced to have sex or later quitting the job is an adverse employment action chargeable to the employer, the employer could establish the affirmative defense that it had a sexual harassment policy that the plaintiff unreasonably failed to use.

### B. *Section 1983*

Adoption of vicarious liability would be desirable under Section 1983. Municipalities would be liable, under the same principles as other employers, for the harms caused by their employees' violations of the Constitution and federal laws. At the very least, this would greatly simplify the law. Currently, a plaintiff seeking to prove municipal liability must show the existence of a municipal policy such as by showing deliberate indifference in training or a decision by a person with final decision-making authority or a custom that caused the violation.<sup>264</sup> As Justice Breyer recently noted, the law has become extraordinarily complex and has produced a body of law "that is neither readily understandable nor easy to apply."<sup>265</sup> Allowing vicarious liability for municipalities would eliminate the need for these complex tests and replace them with the traditional tort law principles that are well-established and vastly simpler.

Moreover, allowing local governments to be held vicariously liable for the acts of their employees would advance the compensation and deterrence goals of Section 1983. Without municipal liability, injured individuals often cannot recover. Individual officers, the other possible defendant, are protected by immunities—sometimes absolute, otherwise qualified—that often make recovery impossible.<sup>266</sup> Local governments, in contrast, are not accorded such immunities.<sup>267</sup> Even when individual officers cannot succeed with an immunity defense, they are unlikely to have the resources to pay a judgment. The deeper pockets of municipalities tremendously increase the likelihood that an injured person will be compensated.

Vicarious liability also gives municipalities a greater incentive to monitor, supervise, and control the acts of their employees. Local governments, with inherently scarce resources, obviously want to minimize the amount of their budget that is lost to paying damages. Therefore, with vicarious liability, they have a significant reason to prevent violations from occurring.

### C. *Title IX*

For all the same reasons that school districts should be strictly liable for teacher sexual harassment of students, schools should be held liable for pupil-on-pupil harassment on the basis of negligence. Title IX guarantees students a learning

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<sup>264</sup> See ERWIN CHERMERSKY, *FEDERAL JURISDICTION* 478-88 (3d ed. 1999) (describing ways of establishing municipal liability).

<sup>265</sup> *Board of County Comm'rs v. Brown*, 520 U.S. 397, 431 (1997) (Breyer, J., dissenting).

<sup>266</sup> See CHERMERSKY, *supra* note 264, at 500-22 (describing absolute and qualified immunity).

<sup>267</sup> See *Owen v. City of Independence, Mo.*, 445 U.S. 622, 638-50 (1980) (holding that local governments do not have immunity in Section 1983 suits).

environment free from sex discrimination. Rampant and unremedied sexual harassment by students can interfere with the equal educational opportunity as seriously as can sexual harassment by teachers.

Schools cannot credibly claim that they are unable to prevent or remedy sexual harassment by students of which they are made aware. Students accused of harassment can be disciplined, transferred, suspended, or expelled from school. Alternatively, victims of harassment can be transferred.

The more compelling argument against strict liability for pupil-on-pupil harassment is that it is more difficult to detect and prevent. Public schools have more students than employees, they cannot screen students before allowing them into the school, and they cannot choose which students to admit.

Vicarious liability for schools is essential to create the necessary incentives for the institutions to act to prevent and remedy sexual harassment by students of other students. Indeed, if the Supreme Court, in dealing with peer harassment, follows the same approach as it used in *Gebser* in dealing with teacher harassment, it would give schools every incentive to avoid gaining knowledge of problems. Under *Gebser*, a school district is liable only if it has actual knowledge and is deliberately indifferent. Therefore, a school district that remains ignorant of sexual harassment never is liable.

Dealing with sexual harassment, especially by students, often will require schools to take the initiative to uncover the problem. The *Gebser* approach gives schools every reason not to do so. The preferable approach is to hold schools liable if they knew *or should have known* of the harassing behavior. Much of what occurs between students is simply unknowable to teachers and administrators. Schools should have an incentive to investigate when they have information that justifies action, but it would not serve the goals of Title IX to hold schools liable in circumstances where they have no reason to suspect a problem. Thus, notice liability—creating liability where the school knew or should have known—is preferable to strict liability, and certainly better than the *Gebser* approach.

#### D. *Individual Liability*

An additional benefit of automatic employer liability would be the elimination of the need for individual liability. This rule would simplify litigation of discrimination suits.<sup>268</sup> It would eliminate the confusion and conflict in current law

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<sup>268</sup> The majority of courts that have considered the issue of individual liability have held that individuals cannot be sued under Title IX for sexual harassment. *See Bustos v. Illinois Inst. of Cosmetology, Inc.*, No. 93 C 5980, 1994 WL 710830, at \*2 (N.D. Ill. Dec. 15, 1994) (mem.) (“Thus, the goal of Title IX is to prevent institutional discrimination; consequently, the implied right of action created by Title IX extends only to institutional actors.”); *Slaughter v. Waubensee Community College*, No. 94 C 2525, 1994 WL 663596, at \*2-\*3 (N.D. Ill. Nov. 18, 1994) (mem.) (dismissing action against college professor for quid pro

as to whether individual harassers can be sued under Title VII and other employment discrimination statutes.<sup>269</sup> There exists additional uncertainty as to whether, if an individual is liable under Title VII, the employer has a duty to defend and indemnify the individual defendant. When a victim of discrimination sues, she is likely to sue both the employer and one or more individuals. The employer (or, as is increasingly likely, the employer's insurer) must decide whether to defend and indemnify the individual defendant. Often, the employer and the individual defendant may have conflicting interests, and joint representation presents serious conflict of interest

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quo sexual harassment on the basis that only institutions may be sued under Title IX); *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994), *modified sub nom.* *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996) (dismissing plaintiff's claims against individuals under Title IX because only federally funded institutions can be held liable under that statute); *Garza v. Galena Park Indep. Sch. Dist.*, 914 F. Supp. 1437, 1438 (S.D. Tex. 1994) (dismissing a Title IX claim against individual defendants); *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1522-25 (M.D. Ala. 1994) (dismissing Title IX Claims against an individual through analysis of claim under Title VII law); *Seamons v. Snow*, 864 F. Supp. 1111, 1116 (D. Utah 1994) (dismissing claims against individual defendants because neither was an "education program or activity" within the meaning of the statute); *Hastings v. Hancock*, 842 F. Supp. 1315, 1317 (D. Kan. 1993) (noting that an educational institution is the proper defendant in a Title IX action).

One court has held that individuals may not be defendants under Title VI. *See Jackson v. Katy Indep. Sch. Dist.*, 951 F. Supp. 1293, 1298 (S.D. Tex. 1996).

The Supreme Court's decisions in *Gebser* and *Franklin* left open the possibility of individual liability in Title IX cases. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1994-96 (1998); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 68-71 (1992). But the standard for individual liability, if such liability exists, is almost certainly the same actual notice plus deliberate indifference standard for institutional liability.

This raises the question whether victims of harassment are better off suing the individuals under Section 1983. One commentator has suggested:

a plaintiff may find it easier to prove that the principal, superintendent, or school district were responsible for a teacher's misconduct under Section 1983, which generally requires a showing of gross negligence, than under Title IX, which requires a showing of actual knowledge plus a deliberate indifference on the part of supervisory officials and institutions.

Michael A. Zwibelman, Comment, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465, 1466-67 (1998). But this commentator noted that the lower courts are in conflict as to whether the existence of a claim under Title IX precludes any claim under Section 1983. *See id.* at 1465.

Individual government officials can be sued in their personal capacity for monetary damages, although not for certain other kinds of relief. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 65-66 (1998). For a discussion on personal liability under Section 1983 in sexual harassment cases, see generally Cheryl L. Anderson, "Nothing Personal:" *Individual Liability Under 42 U.S.C. § 1983 for Sexual Harassment As an Equal Protection Claim*, 19 BERK. J. EMP. & LAB. L. 60 (1998).

<sup>269</sup> *See supra* note 50.

questions. At times, separate representation may be necessary or advisable. If the employer declines to defend the individual defendant, the risk of litigation over that decision arises as well. All of this may be good news for lawyers, but it is bad news for discrimination victims, bad news for employers, and a waste of all parties' resources.

Creating respondeat superior liability for civil rights violations would eliminate, or at least greatly reduce, the pressure to create individual liability. The drive to establish individual liability is motivated in large part by plaintiffs seeking full recovery when the absence of vicarious liability poses the risk that the employer may not be liable. Individual liability can complicate the relationship of the employer to its supervisory employees who may be potential defendants.

### CONCLUSION

Over the past decade, there has been almost unprecedented attention to the method of statutory interpretation. Coincidentally, the law of sexual harassment has developed during this same time. Not surprisingly, in deciding important issues regarding the law of sexual harassment, questions of interpretive methodology have arisen. The Supreme Court's recent decisions in *Faragher v. City of Boca Raton*, *Burlington Industries, Inc. v. Ellerth*, and *Gebser v. Lago Vista Independent School District* all turn on interpreting civil rights laws to determine whether vicarious liability should be allowed.

The Court's approach to vicarious liability under major civil rights laws has varied. The Court has accepted limited vicarious liability under Title VII, but rejected it under Title IX and Section 1983. Yet, nothing in the statutory language or legislative history of these laws justifies the differences in the Court's treatment of respondeat superior liability under these statutes.

The preferable approach would be for the Court to interpret these civil rights statutes to further the underlying goals that they were meant to achieve: deterrence of violations of civil rights and compensation for injuries. The tort law long has recognized that vicarious liability is a crucial tool for attaining deterrence and compensation. Holding employers liable for their employees actions creates an incentive for employers to prevent wrongful conduct. Additionally, employers are much more likely to have the resources to pay damage judgments than individual employees.

Thus, our conclusion is that the standard for vicarious liability should be the same under Title VII, Title IX, and Section 1983. Under each statute, the Court should allow vicarious liability of employers to further the underlying goals for the statutes.

