

# Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law

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## I. INTRODUCTION

Without much analysis, the United States Supreme Court has imported common law tort and agency principles to resolve questions of vicarious liability under Title VII. The most prominent context for this importation of common law principles has been sexual harassment cases, although the issue of employer vicarious liability comes into play in other types of anti-discrimination cases as well.<sup>1</sup> The development of vicarious liability, however, largely reflects the Court's unease with holding employers liable for sexual harassment, a form of behavior that some justices still approach as "personal" or "private" behavior, rather than job-related discrimination. As Sandra Sperino has mapped out in an earlier article,<sup>2</sup> the early Title VII opinions largely assumed that employers were responsible for discriminatory acts of their employees. It was only after the Court recognized sexual harassment as a cognizable harm that it came to express doubts about vicarious liability, doubts that have now spilled over to limit vicarious liability in other contexts as well.

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<sup>1</sup> See *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1191–92 (2011) (setting out requirements for employer liability based on the bias of subordinates in "cat's paw" cases involving discriminatory discharges).

<sup>2</sup> Sandra F. Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 ALA. L. REV. 773, 778 (2010).

Largely through the importation of agency principles, the Court has greatly reduced the scope of vicarious liability in Title VII cases, relegating it to the relatively minor role of securing liability only in cases of abuse of formal supervisory power. Notably, in instances in which employees abuse their informal power—a hallmark of ordinary Title VII cases—vicarious liability does not come into play. The slow erosion of vicarious liability has meant that many discrimination plaintiffs must now prove that their employers were negligent in failing to respond to proven incidents of bias, a challenging burden of proof that likely contributes to the low rate of success of employment discrimination cases generally.<sup>3</sup> This vanishing act with respect to vicarious liability is consequential: coupled with other notable pro-employer decisions issued by the Court in recent years,<sup>4</sup> Title VII has been reshaped from an enterprise liability scheme to a “statutory tort,” capable of redressing a limited number of wrongs done to individual employees, but largely incapable of achieving Title VII’s broad purpose of deterring and eradicating workplace discrimination.

This Article takes issue with both the Court’s importation of tort and agency principles and its reluctance to hold employers vicariously liable for discriminatory acts of employees. With respect to the Court’s decision to borrow agency principles, I argue in Part II that such a move was not required by the statutory language of Title VII and should not be understood as furthering congressional intent.<sup>5</sup> Part III then turns to the case law and tracks the Supreme Court’s importation of agency principles and the gradual erosion of vicarious liability in key decisions governing employer liability in the sexual harassment context.<sup>6</sup> Beyond the questionable move to rely on private law to determine the scope of Title VII liability, I show how the Court’s uptake of tort and agency principles has been selective and misguided, leading the Court to reach results that were neither inevitable nor desirable as a matter of policy.

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<sup>3</sup>See Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL’Y J. 547, 564 (2003) (observing that “employment-discrimination plaintiffs constitute one of the least successful classes of plaintiffs at the district court level, in that they fare worse there than almost any other category of civil case”); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 127–28 (2009) (finding that plaintiff win rate for employment discrimination cases (15%) was much lower than that for non-employment discrimination cases (51%) and that employment discrimination plaintiffs have won 3.59% of pretrial adjudications, while other plaintiffs have won 21.05% of pretrial adjudications).

<sup>4</sup>See, e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (rejecting mixed-motivation framework in retaliation cases); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009) (rejecting mixed-motivation framework for age discrimination cases).

<sup>5</sup>See *infra* Part II at notes 18–45.

<sup>6</sup>See *infra* Part III at notes 46–67.

Part IV examines the consequences of the Court's privileging of negligence over strict liability and sets out the narrative that has emerged in the cases to explain and justify the narrowing of employer liability.<sup>7</sup> In this narrative of similarity and continuity, Title VII violations are recast as "statutory torts," making it seem appropriate to rely on longstanding agency and tort principles to fashion a purportedly continuous body of law to determine employer responsibility for the wrongful conduct of employees.

The heart of my case contesting this narrative of similarity and continuity appears in Part V where I examine the crucial structural and historical differences between Title VII and tort law.<sup>8</sup> Part V begins by explaining the key structural dissimilarities in the two regimes.<sup>9</sup> While tort law is a system of dual liability in which both the offending employee and the employer are held liable for the employee's tortious conduct, Title VII visits liability only on the employer, a feature that makes it a true enterprise liability system.<sup>10</sup> This structural difference underscores why vicarious liability is such a pivotal feature of Title VII doctrine. In an enterprise liability scheme, such as Title VII's, vicarious liability does more than provide an additional deeper pocket from which to secure damages; without vicarious liability, a discrimination victim may have no remedy at all.

Even more notable is the difference in the identities of the plaintiffs in Title VII suits as compared to tort suits.<sup>11</sup> In tort litigation, vicarious liability comes into play only when an injured third-party plaintiff—not an employee of the defendant—seeks recovery against the employer of the actual tortfeasor. By way of contrast, vicarious liability arises in Title VII cases when employee plaintiffs attempt to hold their own employers liable for the discriminatory acts of other employees. Vicarious liability as a tort doctrine is thus specifically designed to compensate outsiders for losses incurred through their interactions with the enterprise and its employees and not to determine the responsibility employers owe to their own employees.

The difference in structure between tort and Title VII is partly the result of history. At common law, suits between employee and employer were placed into a different legal category than suits by "strangers" against employers of the offending employees.<sup>12</sup> Tellingly, the infamous "fellow-servant" rule, along with broad judicial interpretations of the defenses of assumption of risk and contributory negligence, prevented injured employees from recovering tort damages against their own employers.<sup>13</sup> To remedy this unfair "no liability" system, states enacted comprehensive workers' compensation laws that largely bypassed the tort system and instituted a radical new regime of no-fault

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<sup>7</sup> See *infra* Part IV at notes 68–83.

<sup>8</sup> See *infra* Part V at notes 84–141.

<sup>9</sup> See *infra* Part V.A at notes 84–90.

<sup>10</sup> See *infra* Part V.A at notes 84–90.

<sup>11</sup> See *infra* Part V.B at notes 91–100.

<sup>12</sup> See *infra* note 92 and accompanying text.

<sup>13</sup> See *infra* Part V.C at notes 101–15.

liability.<sup>14</sup> However, neither tort law nor workers' compensation ever comprehensively addressed harms stemming from discrimination. This gap was filled only in 1964 when Title VII was enacted on the heels of the civil rights movement and became the most significant piece of civil rights legislation in the twentieth century U.S. legal landscape.<sup>15</sup> As part of a national initiative to eliminate racial and other forms of discrimination in major sectors of American life, Title VII was quite far removed from the classic concerns of tort law and initially afforded only equitable relief to victims.

Reflecting on this history, Part VI maintains that the dominant narrative of similarity and continuity is misleading. In this section I tell a very different story about the relationship between Title VII law and tort and agency law—one of contrast and change—that emphasizes the distinct features of Title VII and resists the facile characterization of Title VII as a statutory tort. In this alternative story, rather than being as an appendage to private law, Title VII represents the second major intervention into the employer–employee relationship, on par in scope and significance to workers' compensation. Like workers' compensation, Title VII specifically addresses employee rights against their own employers and was needed largely because of the inadequacies of private law remedies.<sup>16</sup> Resituating Title VII in this way challenges the logic and the wisdom of borrowing tort and agency law to craft liability rules for Title VII, especially with respect to vicarious liability.

The Article concludes with a recommendation in Part VII calling on Congress to enact a new Civil Rights Restoration Act that would hold employers strictly liable for the discriminatory acts of their employees, free of any restrictions.<sup>17</sup> Such a reform has the virtue of simplifying Title VII doctrine and restoring the enterprise liability scheme contemplated in the 1964 Act. Most importantly, making vicarious liability a prominent feature of Title VII law would provide a reasonable incentive for employers to take the steps necessary to deter discrimination, while affording a fair measure of compensation to victims of discrimination.

## II. TITLE VII'S DEFINITION OF "EMPLOYER"

The text of Title VII contains no provision explicitly mandating or authorizing courts to apply agency or tort principles when they construe the Act. Instead, the textual basis for the importation of common law agency principles is said to be the definition section of Title VII which defines "employer" as "a person engaged in an industry affecting commerce who has

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<sup>14</sup> See *infra* Part V.D at notes 116–41.

<sup>15</sup> See *infra* Part VI at notes 142–61.

<sup>16</sup> See *infra* Part VI at notes 142–61.

<sup>17</sup> See *infra* Part VII at notes 162–63.

fifteen or more employees” . . . and “any agent of such a person . . . .”<sup>18</sup> The definition of “employer” is critically important because Title VII liability generally runs only against “employers.”<sup>19</sup> Thus, unless the defendant can meet the statutory definition of an “employer,” there is no liability.

Putting aside the question of whether a supervisory employee can be considered an “employer” for Title VII purposes and held individually liable, a question I discuss later,<sup>20</sup> courts have often been called upon to decide whether a corporate defendant or other employing entity can be held liable for the discriminatory acts of its supervisory employees. Early Title VII courts had little occasion to grapple with the issue of vicarious liability because many of the first cases involved challenges to discriminatory policies that clearly emanated from the employer as an entity.<sup>21</sup> Later, when courts began to confront claims of abuse by individual employees—such as terminations prompted by the biased actions of a supervisor—most courts simply assumed that the employer would be liable under Title VII, without stopping to decide the basis for such an imputation of liability.<sup>22</sup> In these cases, courts equated the supervisor’s actions with the action of the employer, even when the supervisor was not acting in accordance with company policy. Indeed, such an equation reflected the literal statutory language that treats the entity and “any agent” of the entity on an equal basis. Under this literal reading, the actions of the agent are the actions of the employer, a reading that reflects the fact that a corporation, as a legal entity, can only act through its agents.<sup>23</sup>

It was only when courts began to adjudicate sexual harassment claims that serious questions arose as to whether employers should be held responsible for acts of supervisors who harassed employees under their charge, often in violation of company policy. Employers argued that sexual harassment was different from other discriminatory actions—that sexual harassment stemmed from the purely personal motives of individual supervisors—and that

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<sup>18</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2012). The term “person” is further defined to include corporations and partnerships. 42 U.S.C. § 2000e(a).

<sup>19</sup> The core prohibitions of Title VII prohibit “employers” from engaging in “unlawful employment practices.” 42 U.S.C. § 2000e-2(a) (2012). Additional provisions impose similar prohibitions on labor organizations and employment agencies. 42 U.S.C. § 2000e-2(b), (c).

<sup>20</sup> See *infra* text accompanying note 86.

<sup>21</sup> See Sperino, *supra* note 2, at 776–78.

<sup>22</sup> See Sperino, *supra* note 2, at 778; see also, e.g., *Slack v. Havens*, No. 72-59-GT, 1973 WL 339, at \*8 (S.D. Cal. July 17, 1973), *aff’d as modified*, 522 F.2d 1091 (9th Cir. 1975) (employer held liable for discriminatory termination by supervisor).

<sup>23</sup> Brief of Respondent Mechelle Vinson at 27, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979) (“so long as a circumstance is work-related, the supervisor is the employer and the employer is the supervisor. The employer does not become liable through the supervisor; for purposes of discrimination, the two are one.”); Brief of Amici Curiae Members of Congress in Support of Respondent at 16, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979) (“Thus, discriminatory actions of a supervisor, or ‘agent’, are the actions of the employer under the Title VII framework.”).

employers had no responsibility absent a showing of negligence on the part of the corporate entity.<sup>24</sup> One of the pressing questions of the day, for example, was whether sex discrimination (in the form of sexual harassment) should be treated on par with race discrimination for purposes of Title VII liability. Indeed, the grassroots movement against sexual harassment was predicated on the core notion that sexual harassment was a form of discrimination,<sup>25</sup> that it stemmed from abuse of power rather than purely private or personal sexual urges, and that courts should not exempt employers from responsibility for this species of workplace bias.<sup>26</sup>

In its influential 1980 Guidelines on Sexual Harassment, the Equal Employment Opportunity Commission (EEOC) accepted the arguments of grass roots advocates and issued rules imposing strict liability on employers for acts of “its agents and supervisory employees . . . regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence . . . .”<sup>27</sup> It is noteworthy that the EEOC Guidelines extended strict liability for all agents *and* supervisors of an employer, rather than trying to determine whether a particular supervisor was an “agent” under common law.<sup>28</sup> The rationale for the EEOC’s strict liability rule was a practical assessment of the realities of workplace bias rather than common law notions of employer responsibility. Under the Guidelines, employers were strictly responsible for the acts of persons who possessed job-created power, namely, those supervisors and agents who were cloaked with authority and power by virtue of their jobs. In contrast, with respect to the actions of other persons, such as co-employees, customers, suppliers or others present in the workplace, the employer shouldered the lesser responsibility of fulfilling its duty to act reasonably, by taking prompt corrective action once it knew or should have known of the harassment.<sup>29</sup> The EEOC’s approach was clear and workable: it imposed strict liability for the actions of supervisors and negligence liability for all others. Most importantly, it drew no distinction between formal and informal abuse of power and paved the way for recognizing both *quid pro quo*

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<sup>24</sup> Sperino, *supra* note 2, at 781 (discussing cases exempting employers from liability if the employer had a policy against harassment or corrected the harassment once discovering it).

<sup>25</sup> See Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN’S L.J. 37, 37–43 (1993) (discussing origins and early development of the sexual harassment claim); AUGUSTUS B. COCHRAN III, *SEXUAL HARASSMENT AND THE LAW: THE MECHELLE VINSON CASE* 45–48 (Peter Charles Hoffer & N.E.H. Hull eds., 2004) (discussing early 1970s feminist activism relating to sexual harassment).

<sup>26</sup> See Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 162–64 (2013) (discussing history of sexual harassment claims).

<sup>27</sup> 29 C.F.R. § 1604.11(c) (1997) (rescinded after *Ellerth/Faragher* rulings).

<sup>28</sup> *Id.* at § 1604.11(b) (providing that it would look to “the circumstances” to determine whether an individual was acting as a supervisor or an agent).

<sup>29</sup> 29 C.F.R. §§ 1604.11(d)–(e) (1997).

forms of harassment (“sleep with me or you’re fired”) and the more common kinds of hostile environment harassment that did not result in immediate economic harm.

Looking back, the turn to agency law in interpreting Title VII law is traceable to the election of Ronald Reagan in 1980. During the Reagan administration, civil rights enforcement efforts were steered in a pro-employer direction and government lawyers offered the courts new theories to curb Title VII liability. These new theories were on very much on display in *Meritor Savings Bank v. Vinson*,<sup>30</sup> the first Supreme Court case to address sexual harassment as a form of sex discrimination.

In an amicus brief filed on behalf of the United States and the EEOC, then-Solicitor General Charles Fried and then-Assistant Attorney General in charge of the Civil Rights Division William Bradford Reynolds, argued that agency principles should be used to limit employers’ liability for sexual harassment. Citing the *Restatement (Second) of Agency* and Prosser and Keeton’s hornbook on torts, the Solicitor General’s brief zeroed in on the word “agent” in Title VII’s definition section. In marked contrast to prior understandings of the definition of “employer,” which had read the section as an invitation to interpret “employer” expansively to include informal acts of individuals as well as formal actions of the corporate entity, the Solicitor General made the claim that use of the term “agent” actually had a narrowing effect on employer liability.

The Solicitor General’s brief proclaimed that “[o]ne of the fundamental principles of agency, as that term has traditionally been understood, is that a person who is another’s agent for some purposes does not therefore act as the other’s agent for all purposes.”<sup>31</sup> The brief went on to consider the agency and tort concept of acting “within the scope of the agent’s employment,” and noted that an agent is generally viewed as acting within the scope of his employment only when he exercises “authority actually vested in him,” save in rare cases of “apparent authority,” where conduct by the principal reasonably misleads thirds parties into believing that the agent possesses such authority. In language that would be repeated by the Supreme Court, Fried and his coauthors argued that

While such common-law principles are not necessarily transferrable in all their particulars to Title VII, Congress’s decision to use the term “agent,” rather than such words as “subordinate” or “supervisory employee,” surely evinces an intent to place some limits on the acts of

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<sup>30</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

<sup>31</sup> Brief for the United States & the EEOC as Amici Curiae at 22, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979).

employees for which employers under Title VII are to be held responsible.<sup>32</sup>

The reliance on agency principles predictably led the Solicitor General to argue against providing relief to the plaintiff in the case before it. Taking the position that employers ought to be liable in hostile environment cases only when they can be shown to have “tolerated” harassment, the Solicitor General’s brief urged the Court to impose liability only in cases where employers failed to provide victims with an avenue of complaint or were unresponsive to an employee’s complaint.<sup>33</sup> Particularly given the notorious reluctance of sexual harassment victims to report incidents of harassment to company officials,<sup>34</sup> the proposed limit would likely have had the effect of insulating the large majority of employers that adopt internal anti-harassment policies and grievance procedures.

The reasoning of the Solicitor General’s brief was considerably at odds with the strict liability stance taken by the EEOC in its Guidelines on Sexual Harassment. While the brief agreed that courts should recognize the hostile environment claim as a form of sex discrimination, its refusal to endorse vicarious liability threatened to undercut the practical significance of the claim. Notably, throughout the brief, the Solicitor General also expressed considerable skepticism toward sexual harassment charges in general, emphasizing the supposed “distinct” nature of the claim,<sup>35</sup> and repeatedly mentioning that sexual harassment cases presented “difficult problems of proof,”<sup>36</sup> involved “serious credibility issues,”<sup>37</sup> and could become “a tool by which one party to a consensual sexual relationship may punish the other.”<sup>38</sup> Absent were the feminist-inspired arguments about the deleterious effects of the abuse of job-created power on women’s employment opportunities or the equation of race and sex discrimination that had animated the grassroots movement against sexual harassment. In this respect, the Solicitor General’s brief represented an early backlash attempt to curtail Title VII coverage even before the Supreme Court formally endorsed sexual harassment claims.

The Court in *Meritor Savings Bank v. Vinson*<sup>39</sup> stopped short of endorsing the pro-employer positions espoused in the Solicitor General’s brief. Instead, it

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 26 (“[W]e propose a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee’s complaint.”).

<sup>34</sup> See generally sources cited *infra* note 78.

<sup>35</sup> Brief for the United States at 12–13, *Vinson*, 477 U.S. 57 (No. 84-1979).

<sup>36</sup> *Id.* at 15.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).



ruled mostly in favor of the plaintiff on liability,<sup>40</sup> simply noting the Solicitor General's position and leaving resolution of the standard of employer liability to another day. What has proved to be an enduring aspect of *Meritor Savings Bank*, however, is the Court's decision to turn to agency principles as the proper method to determine vicarious liability under Title VII. In the section of its opinion which cited language verbatim from the Solicitor General's brief,<sup>41</sup> the Court confidently concluded that "Congress wanted courts to look to agency principles for guidance in this area."<sup>42</sup> Even though Justice Marshall, in a concurring opinion, regarded the position taken in the Solicitor General's brief as "untenable," he too did not specifically take issue with the Court's reliance on agency principles and instead contended that the brief misread the law of agency.<sup>43</sup>

In rejecting the strict liability approach of the EEOC Guidelines, the Court set on a misguided course of following the common law to determine the scope of civil rights protections. Its confidence that Congress's use of the word "agent" provided warrant for taking in agency principles is unpersuasive, given the lack of legislative history and the likelihood that Congress never anticipated the difficult questions that would arise once claims such as sexual harassment were adjudicated. As mentioned above,<sup>44</sup> the definition provision could just as easily have been read to underscore the simple proposition that employer liability is triggered not only by formal discriminatory policies of the entity or enterprise, but also by more informal discriminatory acts of individual agents or supervisors, even if unknown to the higher-level managers in the organization. Indeed, in a later Title IX case, the Court ruled that because Title IX does not contain a similar reference to "agent," a school could not be held responsible for a teacher's sexual harassment of its students, absent actual knowledge by the defendant school district and deliberate indifference to such harassment.<sup>45</sup>

My more straightforward reading of the definition section of Title VII leaves open the issue of how courts should define "agent" for purposes of the Act, allowing the critical question of the scope of employer responsibility to be determined in light of the structure and history of the Act. Finally, it bears mentioning that, despite its textualist inclinations, the Supreme Court has not

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<sup>40</sup> *Id.* at 72–73 (stating that because Meritor Savings Bank did not have a specific policy addressing sexual harassment and required employees to complain first to their immediate supervisor, the bank was not in a good position to argue that it should be insulated from liability).

<sup>41</sup> *Id.* ("While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.')

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

<sup>43</sup> *Id.* at 76–77 (Marshall, J., concurring).

<sup>44</sup> See generally *supra* notes 20–23 and accompanying text.

<sup>45</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283–85, 290 (1998).

seen fit to emphasize the word “any” in the phrase “any agent” in Title VII’s definition section, a word that would seem to signal a broad, rather than restrictive, interpretation of employer liability.

### III. *ELLERTH* AND *FARAGHER*

In any event, the importation of agency principles authorized by *Meritor Savings Bank* was carried forward in a famous pair of hostile environment sexual harassment cases decided in 1998: *Burlington Industries v. Ellerth*<sup>46</sup> and *Faragher v. City of Boca Raton*.<sup>47</sup> In those cases, the Supreme Court partially relied on the *Restatement (Second) of Agency* to determine employers’ liability for sexual harassment committed by employees in supervisory positions.<sup>48</sup> It fashioned a complex doctrine which only selectively imposes vicarious liability on employers. First, the Court declared that automatic vicarious liability would arise only in cases in which the supervisor’s actions culminated in a tangible employment action, such as a firing, demotion, or cut in pay.<sup>49</sup> For all other cases of supervisor-created hostile environments, employers could escape vicarious liability by proving a judicially-created, two-pronged affirmative defense, i.e., that the employer acted reasonably to prevent and correct harassment and that the injured employee acted unreasonably in failing to report the harassment or otherwise to mitigate his or her injuries.<sup>50</sup> I call this strange animal “vicarious liability with a negligence-sounding defense.” Although these cases did not expressly speak to instances in which co-employees, rather than supervisors, create hostile work environments, the Court suggested—and has since explicitly stated—that vicarious liability will not be imposed in cases of co-worker harassment either.<sup>51</sup>

The upshot of the *Ellerth–Faragher* decisions has been to limit vicarious liability to a very narrow class of cases. No vicarious liability for co-employee-created hostile environments. No vicarious liability for supervisor-created hostile environments if the employer can establish the affirmative defense, which employers are often able to do, even at the summary judgment stage.<sup>52</sup> This leaves vicarious liability only in those instances in which a

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<sup>46</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

<sup>47</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>48</sup> *Id.* at 793; *Ellerth*, 524 U.S. at 755–56 (citing RESTATEMENT (SECOND) OF AGENCY §§ 219, 228 (1958)).

<sup>49</sup> *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765.

<sup>50</sup> *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765.

<sup>51</sup> *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 (2013).

<sup>52</sup> See John H. Marks, *Smoke, Mirrors, and the Disappearance of “Vicarious” Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor For Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1423 (2002) (indicating that “courts have effectively construed the defense as providing a summary judgment safe harbor against claims of supervisor

supervisor abuses his or her formal authority by firing, demoting or otherwise changing the formal status of an employee. Thus, the harms caused by informal abuse of power are treated as less worthy of redress and often left unaddressed, a regrettable outcome especially when you consider that sexual harassment is quintessentially a harm that flows from abuse of informal power and often does not culminate in economic injury.<sup>53</sup>

Without going into too much detail, suffice it to say that, in *Ellerth* and *Faragher*, the Court read the *Restatement (Second) of Agency* as generally authorizing vicarious liability only when an agent of the employer, i.e., a supervisor, acts within the scope of his employment.<sup>54</sup> Although they struggled with the issue bit,<sup>55</sup> the Court ultimately concluded that when a supervisor sexually harasses a subordinate, he should generally be regarded as acting outside the scope of employment.<sup>56</sup> The Court based this critical determination on an antiquated conception of sexual harassment that viewed such conduct as stemming from “personal motives” unrelated to the objectives of the employer. Citing the *Restatement*, the Court reasoned that because such a harassing supervisor rarely has a “motive to serve” the employer’s interest,<sup>57</sup> agency law dictated no liability.

In my view, this was the first mistake the Court made in transporting the law of agency into Title VII law. When you look more closely at cases in which plaintiffs have sought to hold employers vicariously liable for intentional torts, you find that the *Restatement*’s “motive to serve” formulation masks a split in the courts: thus, while many courts have retained the traditional “motive to serve” test, many other courts have rejected it and applied more liberal standards, centering on the risks created by the enterprise.<sup>58</sup> These more liberal courts ask, for example, whether the employer’s act was “engendered” by the employment, or was “foreseeable” in the sense that it was a “predictable risk,” an outgrowth of the employment and

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harassment”); David Sherwyn, Michael Heise & Zev J. Eigen, *Don’t Train Your Employees and Cancel Your ‘1-800’ Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 *FORDHAM L. REV.* 1265, 1288 (2001) (finding that employers won in the majority of sexual harassment cases in which they sought summary judgment).

<sup>53</sup> See Martha Chamallas, *Title VII’s Midlife Crisis: The Case of Constructive Discharge*, 77 *S. CAL. L. REV.* 307, 377–78, 381 (2004) (discussing importance of informal structures and culture of an organization).

<sup>54</sup> *Ellerth*, 524 U.S. at 756; *Faragher*, 524 U.S. at 797–98.

<sup>55</sup> In this respect, Justice Souter’s opinion in *Faragher* is more plaintiff-oriented than Justice Kennedy’s opinion in *Ellerth*. See Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983 and Title IX*, 7 *WM. & MARY BILL RTS. J.* 755, 767–73 (1999) (contrasting Kennedy and Souter opinions).

<sup>56</sup> *Ellerth*, 524 U.S. at 757 (“The general rule is that sexual harassment by a supervisor is not conduct within the broad scope of employment.”).

<sup>57</sup> *Faragher*, 524 U.S. at 793; *Ellerth*, 524 U.S. at 757.

<sup>58</sup> Chamallas, *supra* note 26, at 141–46.

not “unusual or startling.”<sup>59</sup> Given that sexual harassment is a pervasive and predictable feature of many working environments, one can readily see how the importation of this different test for determining “scope of employment” could have led to different results. Sexual harassment is sadly not unusual or startling and it is often acknowledged to be one of the risks of an enterprise, particularly when the enterprise confers power—whether formal or informal—on some employees who then exercise it over others.

Thus, the Court’s uptake of agency law was superficial and selective—what one scholar has dubbed “paraphrasing”—taking in some, but not all, of a body of law in a fashion that has the potential to distort and oversimplify the doctrine.<sup>60</sup> Notably, the Court could have reached a different conclusion in *Ellerth* and *Faragher* without abandoning common law agency principles. One reliable feature of the common law is that it is often indeterminate and contested. If we are being frank, we have to admit that incorporating common law is not likely to yield determinate results.

I should mention that the *Ellerth–Faragher* Court also considered a separate *Restatement* provision that imposes vicarious liability even when the agent is acting outside the scope of his authority.<sup>61</sup> The *Restatement* provision imposes liability when the agent is “aided in accomplishing” the wrong by the agency relationship,<sup>62</sup> a formulation that also potentially turns on enterprise risk creation and job-conferred power, rather than an employee’s motive to serve her employer’s interest. But rather than rely on this provision to impose vicarious liability for all supervisor-created hostile environments, the Court chose instead to fashion a doctrine out of whole cloth, adopting the vicarious liability with the negligence-sounding affirmative defense mentioned earlier.<sup>63</sup> This was the Court’s second mistake. Even though the Court nominally retained vicarious liability as the standard for supervisor-created harassment, in retrospect, we can see the gravitational pull of the negligence principle in these cases making it seem inappropriate to hold employers responsible in the absence of employer fault.

Since *Ellerth* and *Faragher*, things have only gotten worse for employees. The scope of vicarious liability narrowed even further when the Court declared in 2004 that constructive discharges prompted by sexual harassment would not

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<sup>59</sup> Chamallas, *supra* note 26, at 142.

<sup>60</sup> Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977, 990 (2014) (explaining how international trade agreements export the contours of U.S. law with subtle differences and distortions).

<sup>61</sup> *Ellerth*, 524 U.S. at 758 (citing RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958), which provides that “[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless[] . . . he was aided in accomplishing the tort by the existence of the agency relation.”).

<sup>62</sup> *Id.* Because the Restatement (Third) of Agency no longer contains a similar “aided in” provision, it is very difficult to predict how the Court’s reliance on agency principles will affect future cases. See RESTATEMENT (THIRD) OF AGENCY § 7.08 (2006).

<sup>63</sup> See generally *Faragher*, 524 U.S. 775; *Ellerth*, 524 U.S. 742.

be considered tangible employment actions giving rise to automatic vicarious liability.<sup>64</sup> The final nail in the vicarious liability coffin came in *Vance v. Ball State University* when the Court adopted a very narrow, very formal definition of a “supervisor.”<sup>65</sup> *Vance* held that for purposes of vicarious liability a “supervisor” is defined as an employee empowered by the employer to take tangible employment actions against an employee, i.e., has the power to hire, fire, or demote.<sup>66</sup> Thus, even if the employee controls the day-to-day schedules and assignments of other employees—the kind of employee we normally call a supervisor<sup>67</sup>—by stroke of the Supreme Court’s pen, that person has become a mere co-employee and the employer is not vicariously liable if he or she harasses subordinates.

#### IV. NEGLIGENCE V. STRICT LIABILITY

This narrowing of vicarious liability is not a mere doctrinal wrinkle. Instead, it marks a clear choice of negligence over strict liability and has fundamentally re-shaped the body of Title VII law. With respect to accomplishing Title VII’s primary goal of deterring discrimination,<sup>68</sup> the choice of negligence over strict liability is particularly regrettable. As Justice Ginsburg eloquently described in her dissent in *Vance*, the Court’s new emphasis on negligence has shifted the *Ellerth–Faragher* framework “in a decidedly employer-friendly direction,”<sup>69</sup> making it even more likely that harassment plaintiffs will lose their cases on summary judgment. Even when the harasser uses his or her job-created power to make a plaintiff’s life miserable, after *Vance*, the harasser may very well be classified as a co-employee, requiring the plaintiff to show that the employer was negligent through evidence that it “knew or should have known of the offensive conduct but failed to take appropriate corrective action.”<sup>70</sup>

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<sup>64</sup> *Pa. State Police v. Suders*, 542 U.S. 129, 148 (2004) (“But when an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the employer.”).

<sup>65</sup> *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013) (“We hold that an employer is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim . . .”).

<sup>66</sup> *Id.* at 2443 (defining a supervisor as a person empowered to “take tangible employment actions against the victim . . . such as hiring, firing, failing to promote, reassign[ing] with significantly different responsibilities, or a decision causing a significant change in benefits”).

<sup>67</sup> *Id.* (rejecting the “colloquial” meaning of term “supervisor”).

<sup>68</sup> *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 788 & n.6 (1976) (Powell, J., concurring in part and dissenting in part) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971)) (explaining that Title VII’s primary objective is ending discrimination by deterring discriminatory employment practices).

<sup>69</sup> *Vance*, 133 S. Ct. at 2463 (Ginsburg, J., dissenting).

<sup>70</sup> *Id.* at 2456.

In her dissent in *Vance*, Justice Ginsberg selected four illustrative cases from different circuits to drive home her point that a standard of employer vicarious liability, rather than negligence, was needed to respond to the “workplace realities” of contemporary sexual and racial harassment. In each case, the harassing employee was able to adversely affect the plaintiff’s working conditions or employment prospects, by, for example, denying the plaintiff overtime,<sup>71</sup> threatening negative performance evaluations,<sup>72</sup> meting out harsh job assignments,<sup>73</sup> or controlling work schedules to prevent plaintiffs from taking desired days off.<sup>74</sup> In Ginsberg’s view, the common denominator in these cases was the abuse of job-created power,<sup>75</sup> a feature that warranted imposition of vicarious liability, regardless of whether formal authority to hire, fire or promote was vested in the harassing individual.

The central problem with predicating Title VII on a negligence standard is that proof of an employer’s actual or constructive knowledge is often an onerous burden for a plaintiff to shoulder. Even when the harassment is severe or pervasive, it is not uncommon for employers to lack information about the conduct of its individual employees, given that the higher ups in the organization are often far removed from day-to-day occurrences in the workplace. Thus, as Justice Ginsburg pointed out in *Vance*, “[a]n employee may have a reputation as a harasser among those in the vicinity, but if no complaint makes its way up to management, the employer will escape liability under a negligence standard.”<sup>76</sup> The current scheme thus places a considerable premium on victims reporting their harassment to designated company officials, even though Title VII imposes no exhaustion-of-remedies requirement prior to filing suit.<sup>77</sup> The Catch-22 here is that, despite the expectations reflected in the legal doctrine, the social science research on employees’ responses to harassment has consistently found that very few victims pursue official complaints through employer grievance procedures.<sup>78</sup> By requiring plaintiffs to act in a way that departs from the response of most victims, the Court is thus able to circumscribe employer liability, while purporting to enforce the mandate against discriminatory workplace harassment.

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<sup>71</sup> *Mack v. Otis Elevator Co.*, 326 F.3d 116, 121 (2d Cir. 2003).

<sup>72</sup> *EEOC v. Crst Van Expedited, Inc.*, 679 F.3d 657, 685 (8th Cir. 2012).

<sup>73</sup> *Rhodes v. Ill. Dep’t of Transp.*, 359 F.3d 498, 505 (7th Cir. 2004).

<sup>74</sup> *Whitten v. Fred’s, Inc.*, 601 F.3d 231, 236 (4th Cir. 2010).

<sup>75</sup> *Vance*, 133 S. Ct. at 2460 (Ginsburg, J., dissenting) (harassers “wielded employer-conferred supervisory authority over their victims”).

<sup>76</sup> *Id.* at 2464 (citing BARBARA T. LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 1378 (C. Geoffrey Weirich et al. eds., 4th ed. 2007)).

<sup>77</sup> *See Patsy v. Bd. of Regents*, 457 U.S. 496, 498 (1982).

<sup>78</sup> *See Chamallas, supra note 53*, at 373–80 (discussing the empirical literature); L. Camille Hébert, *Why Don’t ‘Reasonable Women’ Complain About Sexual Harassment?*, 82 IND. L.J. 711, 731–34 (2007); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 25–36 (2005).

Finally, as applied by most courts, even if actual or constructive knowledge is proven, negligence liability will often require the plaintiff to pinpoint the particular precaution that the employer could have and should have taken that would have prevented or remedied the discrimination, for example, the specific screening, training, or monitoring of the offending employee that would have kept the harasser from targeting the plaintiff. As a practical matter, this kind of specific evidence of negligence can be very difficult for plaintiffs to come by, as such untaken precautions often lurk hidden in the background, known possibly only by the employer.<sup>79</sup> In this respect, the negligence inquiry stacks the deck against the plaintiff, constituting a “steeper substantive and procedural hill to climb,” as compared to strict liability, and making it likely that many victims “will find it impossible to obtain redress.”<sup>80</sup> It also reflects a highly individualistic approach to discrimination that is fixated on rooting out bad apples in the organization and is largely oblivious to systemic problems.

In contrast, strict liability provides greater incentives for employers to think system-wide and to address the culture of the organization. The Canadian Supreme Court expresses it this way:

Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration . . . can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of its employee may encourage the employer to take such steps . . . .<sup>81</sup>

From an efficiency standpoint, law and economic scholars, such as the late Gary Schwartz, have argued that “[t]he intriguing benefit of strict liability . . . is that it can do a better job than a negligence regime in achieving that regime’s own goal of encouraging the employer’s cost-justified risk-reducing measures.”<sup>82</sup>

I do not mean to suggest that the Court’s importation of agency principles was solely responsible for producing the outcomes in *Vance* and other cases that have narrowed the scope of vicarious liability. The Court was certainly capable of reaching the same results without resort to agency principles. But reliance on agency principles did lend a kind of legitimacy to the decisions.

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<sup>79</sup> See Chamallas, *supra* note 26, at 151–53.

<sup>80</sup> *Vance*, 133 S. Ct. at 2464 (Ginsburg, J., dissenting). Although the burden on harassment plaintiffs is most severe when they are harassed by employees not classified as supervisors, the negligence aspects of the affirmative defense also often pose a problem for plaintiffs in cases of informal supervisor harassment that does not culminate in a tangible employment action. See *supra* text accompanying note 52.

<sup>81</sup> *Bazley v. Curry*, [1999] 2 S.C.R. 534, 555 (Can.).

<sup>82</sup> Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1760 (1996).

Ironically, it also allowed the Court to deny its own agency. By relying on the common law, the Court in effect said, we are not narrowing Title VII protection because of our own beliefs or commitments; we are just following established rules set by others.

Overall, the story that emerges from the Title VII vicarious liability case law is a narrative of similarity and continuity: the main theme is that because Title VII is a “statutory tort”<sup>83</sup> it is appropriate to rest the Court’s judgments on longstanding common law agency rules that govern vicarious liability in tort cases. By doing so, it can be said that similar claims are treated similarly, with Title VII and the common law of agency forming a continuous body of law establishing employer responsibility for wrongful conduct. But, as I demonstrate in the next section, in the particular case of vicarious liability, this story does not hold up. In my view, the story of similarity and continuity is deficient in two respects. It significantly downplays major differences in the structure of tort and Title VII claims and it ignores history. This Article tells a different story of contrast and change that calls into question the Court’s readiness to resort to agency principles, and, in particular, its reliance on the *Restatement (Second) of Agency* for guidance in deciding Title VII cases.

## V. STRUCTURAL AND HISTORICAL DIFFERENCES BETWEEN TORT LAW AND TITLE VII LAW

The two principal reasons that agency law fails to provide a useful guide for determining employer liability under Title VII can be found in the underlying structure of the Act and the tortured history of employers’ legal responsibility toward injured employees. When we examine the contrasting structural models of liability found in tort versus Title VII and remind ourselves of tort law’s well-known propensity for insulating employers in employee suits for compensation, the wisdom of importing the common law is immediately called into question.

### A. *Dual Liability v. Enterprise Liability*

In tort law, vicarious liability has historically been reserved for claims brought by an injured third party against the employer of the actual tortfeasor. In tort, the prototypical claim involves a stranger hurt by the tortious act of an employee. The doctrine of respondeat superior then comes into play to hold the employer vicariously liable. Importantly, in such cases, the injured party also has a claim against the actual tortfeasor.<sup>84</sup> The regime is one of dual

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<sup>83</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O’Connor, J., concurring) (indicating that Title VII created a statutory tort).

<sup>84</sup> *See, e.g., P.L. v. Aubert*, 545 N.W.2d 666, 667–68 (Minn. 1996) (claims against former teacher for sexual misconduct allowed although school district and principal were granted summary judgment); *see also* Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and*



liability. Although rarely exercised, it is important to remember that the employer possesses a common law right of indemnity against its employee to recoup the damages paid to the injured party.<sup>85</sup> The employer thus functions mainly as a deep pocket, with the ultimate legal responsibility residing with the party at fault, namely, the employee.

Unlike the dual liability scheme of tort law—where both the employer and the employee may be sued—Title VII claims may be brought only against the employer.<sup>86</sup> Although the Supreme Court has not yet expressly ruled on the issue, the prevailing view in the appellate courts is that an offending supervisor or individual harasser cannot be held liable under Title VII. The lower courts have reasoned that because small employers with fewer than fifteen employees are exempt from Title VII coverage, it is inconceivable that Congress intended to allow civil liability to run against individual employees.<sup>87</sup> Additionally, Congress's decision in 1991 to authorize a sliding scale of damages against employers based on the number of employees in the enterprise, without specifying any similar cap on individual defendants, suggests that Congress did not contemplate individual liability.<sup>88</sup> This scheme comes as a big surprise to many lawyers who are used to the tort model of dual liability. And, of course, under Title VII, the employer has no right of indemnity when it pays a judgment based on the discriminatory act on the part of the employee. Thus, Title VII is at bottom an enterprise liability scheme.<sup>89</sup> It is structured to hold employing entities—not individuals—accountable for discrimination within the organization. Vicarious liability is thus central to Title VII's operation, rather than serving as an ancillary doctrine in a system predicated on individual fault.

This structural feature of Title VII is often overlooked, especially now that plaintiffs are allowed to recover capped compensatory and punitive damages, in addition to equitable relief.<sup>90</sup> Many mistake this superficial resemblance to

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*Constituencies*, 59 SMU L. REV. 55, 63 (2006) (“[C]ases filed by victims include two types of viable claims—claims against assailants themselves and claims against third parties.”).

<sup>85</sup> DAN B. DOBBS, *THE LAW OF TORTS* §333 (2000).

<sup>86</sup> See *Fantini v. Salem State Coll.*, 557 F.3d 22, 30 (1st Cir. 2009) (determining that employees are not individually liable under Title VII); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587–88 (9th Cir. 1993) (indicating that employees have no personal liability under Title VII); *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 181 (4th Cir. 1998) (noting that “every circuit that has confronted this issue . . . has rejected claims of individual liability”); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077–78 (3d Cir. 1996) (en banc) (indicating no liability for individuals who are not themselves the employing entity).

<sup>87</sup> See *Fantini*, 557 F.3d at 29–30.

<sup>88</sup> See *Sheridan*, 100 F.3d at 1077–78.

<sup>89</sup> Laura Oren, *Section 1983 and Sex Abuse in Schools: Making a Federal Case Out of It*, 72 CHI.-KENT L. REV. 747, 804 (1997) (comparing Title VII to contemporary common law theories of enterprise liability).

<sup>90</sup> Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(1) (2012) (authorizing punitive and compensatory damages for Title VII claimants).

tort law to mean that Title VII and tort are basically the same. And, likely because tort law is most familiar to lawyers, the distinctive features of Title VII somehow get lost in the process.

### B. *Identity of the Plaintiffs*

Another significant structural dissimilarity between tort and Title VII law has to do with the identity of the plaintiffs. As mentioned above, in tort law, vicarious liability was reserved for claims brought by injured third parties against the employer of the actual tortfeasor.<sup>91</sup> Unlike Title VII, vicarious liability in tort was never meant to govern an employee's rights against his or her own employer. Instead, suits between employees and employers were placed in a different legal category than vicarious liability claims brought by strangers, a distinction that has persisted to some extent to this day.<sup>92</sup>

Known by its Latin name, *respondeat superior*, vicarious liability of employers is in fact a very old doctrine that, oddly enough, is not derived from agency law.<sup>93</sup> Some scholars believe that the doctrine of *respondeat superior* has ancient roots, perhaps an outgrowth of a Roman law principle that held masters liable for the acts of their slaves.<sup>94</sup> Another theory posits that vicarious liability of employers in tort law is linked to a very old, rather hostile attitude toward paid employment that once held that, in an ideal world, people should do their own work. Under this reasoning, it was only by the "indulgence" of the law that individuals were allowed to employ other individuals to do their work for them and that "part of the price employers had to pay for this indulgence" was to accept liability for their servants' acts.<sup>95</sup>

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<sup>91</sup> See RESTATEMENT (THIRD) OF AGENCY §2.04 cmt. b (2006) ("The doctrine [of *respondeat superior*] establishes a principle of employer liability for the costs that work-related torts impose on third parties.").

<sup>92</sup> Notably, even the drafters of new Restatements maintain the distinction. Third-party claims against employers based on vicarious liability are covered in the Restatement of Agency, while employee suits against their own employers are covered in the new Restatement of Employment. RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006); RESTATEMENT OF EMPLOYMENT LAW § 4.01 (Tentative Draft No. 6, 2013).

<sup>93</sup> See, e.g., *Jensen v. S. Pac. Co.*, 109 N.E. 600, 604 (N.Y. 1915) (clarifying that "it must be remembered that [the doctrine of *respondeat superior*] does not rest on the doctrine of agency").

<sup>94</sup> See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 15–17 (1945) (positing that the doctrine developed from rules governing Roman masters and their slaves, requiring the master to sell the slave or buy off the victim if a slave injured another).

<sup>95</sup> See P.S. ATIYAH, *VICARIOUS LIABILITY IN THE LAW OF TORTS* 21 (1967); see also *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 446 (N.Y. 1911) (citing famous maxim: *qui facit per alium facit per se* ("[h]e who acts through another acts himself")); see also John H. Wigmore, *Responsibility for Tortious Acts: Its History—II*, 7 HARV. L. REV. 383, 404–05 n.1 (1894) (speculating that vicarious liability is grounded on the notion that employers use "substitutes" more or less at their own peril).

Regardless of its origin, the important point is that respondeat superior was not designed as a vehicle for determining an employer's responsibility toward its own employees. Instead, before the nineteenth century, employer–employee relations were governed by a traditional regime of master–servant which broadly defined a “servant” as a person who worked for another, whether or not they lived in the master's household.<sup>96</sup> This relationship of master–servant, like that of husband–wife, was primarily a relationship of status, not subject to tort or other private law rules governing relations between strangers.<sup>97</sup> Thus, in early modern Anglo-American law, servants could not sue their masters for damages suffered because of the master's negligent or intentional actions.<sup>98</sup> Instead, a special duty of maintenance was often imposed upon masters, by which they were required to provide for the care of sick or injured servants, a charity-like obligation typically administered by parish or church wardens.<sup>99</sup> It was only after the nineteenth century, when the Enlightenment ideology of free will and free labor challenged the traditional conception of master–servant relationships, that it became possible for employees to sue their employers for injuries sustained on the job.<sup>100</sup> This development emerged, however, long after respondeat superior was established in law. Tellingly, even after it was clear that injured workers, as owners of their own labor, could bring suit against their employers, courts continued to apply restrictive doctrines to prevent recovery in such cases. As the next section details, in marked contrast to cases involving injured non-employees, vicarious liability never took hold in employee–employer litigation.

### C. *The Fellow-Servant Rule*

In the nineteenth century, employees who sued their employers for injuries sustained on the job rarely recovered in tort. The principal obstacle to recovery was a doctrine known as the “fellow-servant rule” that insulated employers from liability in cases arising from the negligence of a co-employee of the plaintiff.<sup>101</sup> Established in the United States in the infamous case of *Farwell v.*

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<sup>96</sup> See Evelyn Atkinson, *Out of the Household: Master-Servant Relationships and Employer Liability Law*, 25 YALE J.L. & HUMAN. 205, 209 (2013).

<sup>97</sup> *Id.* at 208.

<sup>98</sup> *Id.* at 229.

<sup>99</sup> *Id.* at 225.

<sup>100</sup> *Id.* at 210–14. The shift in language used to describe this relationship reflected the changing ideology. See Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 235 n.2 (1914) (noting the shift in language used in English statutes from 1867 to 1875 in which “employer” and “workman” replaced “master” and “servant,” the latter terms more “familiar to the common law”).

<sup>101</sup> See, e.g., *Murray v. S.C. R.R. Co.*, 26 S.C.L. (2 McMull.) 385, 400 (1841) (holding that a fireman of a railroad company injured by an engineer cannot recover from the railroad because the company is not liable to one employee for the misconduct of another) see also Edgar G. Miller, Jr., *Fellow-Servants*, 34 AM. L. REG. 481, 481 (1886) (“[A]

*Boston & Worcester Rail Road Corp.*,<sup>102</sup> this huge exception to vicarious liability barred recovery in the vast number of cases where the employer could not be found to be personally at fault. In tandem with two other defenses—contributory negligence and assumption of risk—which focused on the plaintiff’s behavior, this “unholy trinity”<sup>103</sup> of defenses spelled defeat for most injured workers.<sup>104</sup>

A recent historical study by Evelyn Atkinson concludes that the adoption of the three defenses served to preserve the earlier restrictions on servants suing their masters that had characterized the traditional master–servant regime.<sup>105</sup> Thus, even though workers attained a new legal identity as free actors in the market, and even though contract replaced status as the governing feature of employer–employee relations, the prospects of securing compensation for industrial injuries did not substantially change. Atkinson regards this as an example of “preservation through transformation,” in which even substantial changes in legal rules and rhetoric do little to change basic hierarchies of power.<sup>106</sup> Under this account, the fellow-servant rule and the other tort defenses actually served to legitimize the status quo by casting the doctrine in a more palatable, updated form.

In its time, the fellow-servant rule was understandably quite the controversial doctrine. Scholars and courts debated the proper theoretical foundation of the rule. Some believed it was grounded in contract principles and implied assumption of risk, reasoning that one of the risks that an employee assumed upon taking the job was that another employee might be negligent.<sup>107</sup> Under this view, presumably the employee had already received

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master is not liable to his servant for an injury caused by the negligence of a fellow-servant.”).

<sup>102</sup> *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. 49, 55–61 (1842) (adopting fellow-servant rule) (opinion by Chief Justice Lemuel Shaw).

<sup>103</sup> See, e.g., KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11*, at 42 (2008) (referring to the fellow-servant rule, contributory negligence, and assumption of risk as the commonly-known “unholy trinity” of defenses).

<sup>104</sup> See Edmund Ursin, *Holmes, Cardozo, and the Legal Realists: Early Incarnations of Legal Pragmatism and Enterprise Liability*, 50 SAN DIEGO L. REV. 537, 546 (2013) (“[T]hese stalwarts of traditional tort theory often left injured workers with no legal remedy . . . and thus without any practical hope of compensation”).

<sup>105</sup> Atkinson, *supra* note 96, at 231–32 (noting that the fellow-servant rule provided “a clear analogue” to the former household relationship of master-servant); see also Francis M. Burdick, *Is Law the Expression of Class Selfishness?*, 25 HARV. L. REV. 349, 368–69 (1912) (arguing that the fellow-servant rule “did not deprive the employee of any right theretofore accorded him by English law”).

<sup>106</sup> Atkinson, *supra* note 96, at 232 (citing Reva Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996)).

<sup>107</sup> See Albert Martin Kales, *The Fellow Servant Doctrine in the United States Supreme Court*, 2 MICH. L. REV. 79, 82 (1903).

a payment for assuming this risk which was reflected in his wages.<sup>108</sup> Others envisioned the fellow-servant rule as a kind of limited duty rule that narrowly restricted the scope of employers' duties to "permanent" conditions of safety only, such as the duty to provide safe tools and appliances.<sup>109</sup> From the outset, however, courts were careful to note that there was no incongruity between denying recovery to an injured employee while affording recovery to a similarly injured non-employee. To their mind, respondeat superior was founded on a "distinct principle" and "stands on its own reasons of policy" that were applicable only "to the case of strangers."<sup>110</sup>

Equally controversial was the legitimate scope of the fellow-servant doctrine. In an eerie resemblance to contemporary Title VII cases debating the definition of "supervisor,"<sup>111</sup> early courts ruled that some supervisors and managers were "vice-principals," and, as the "alter ego" of the employer, were not properly considered fellow-servants.<sup>112</sup> However, many other courts refused to accord this "vice-principal" status to such employees, even if they were of higher rank than the plaintiff and even if they had the power to direct and control the plaintiff's activities. In these jurisdictions, unless the supervisor possessed the formal power to hire or fire the plaintiff, he was classified as a mere co-employee, triggering the fellow-servant doctrine.<sup>113</sup>

What was not debated, however, was the significance of the fellow-servant rule in American tort law. One law review writer in 1886, for example, declared it to be "[o]ne of the most important rules in the law of negligence . . . ."<sup>114</sup> Writing in 1910, famed labor activist Crystal Eastman also recognized the outsized role played by the doctrine, calling it "the most vital distinction between the general law of negligence, and the law of negligence between master and servant."<sup>115</sup>

Thus, at common law, vicarious liability gave outsiders rights against the employer of the wrongdoer and did not appreciably affect the obligations employers owed to their own employees. Employee claims against their own employers were not decided on agency principles, but instead reflected the legacy of a master-servant regime that left employees largely unprotected against injury. So it seems strange, to say the least, for the Court to borrow vicarious liability principles for use in Title VII cases when the imported principles never really governed employee claims against their own employers. This kind of borrowing takes agency principles out of context and,

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<sup>108</sup> *Fifeld v. N. R.R.*, 42 N.H. 225, 238–39 (1860) (discussed in Burdick, *supra* note 105, at 365).

<sup>109</sup> *Kales*, *supra* note 107, at 94.

<sup>110</sup> *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. 49, 61 (1842).

<sup>111</sup> *Vance v. Ball St. Univ.*, 133 S. Ct. 2434, 2439 (2013).

<sup>112</sup> *See Miller*, *supra* note 101, at 483.

<sup>113</sup> *Id.* at 484–86.

<sup>114</sup> *Id.* at 486.

<sup>115</sup> CRYSTAL EASTMAN, *WORK-ACCIDENTS AND THE LAW* 172–73 (Paul Underwood Kellogg ed. 1910).

not surprisingly, often fails to appreciate the special features of the employer–employee relationship that set it apart from other business arrangements.

#### D. *The Workers' Compensation Movement*

As the preceding section suggests, the story of similarity and continuity also ignores history. To provide recovery for employees injured by the wrongful conduct of fellow employees, states did not just tinker with the fellow-servant rule around the margins. Instead, in a dramatic departure from common law, states enacted comprehensive workers' compensation statutes, a radical social reform predicated on the special responsibility of employers toward their workers.

Modeled after the English Workmen's Compensation Acts of 1897 and 1906, the new American statutes were regarded at the time as "revolutionary legislation,"<sup>116</sup> embodying an approach that was thought by legal scholars to be "founded largely upon a theory inconsistent with the fundamental principle of the modern common law of torts."<sup>117</sup> Although workers' compensation provides monetary compensation to workers, it is quite dissimilar to tort. It represented a major intervention into the employer–employee relationship, marking change rather than continuity. Instead of simply lifting or softening the defenses of fellow-servant, assumption of risk, and contributory negligence, the workers' compensation schemes provided recovery for injury irrespective of the employer's (or any fellow servant's) fault.<sup>118</sup> The result was a form of enterprise liability, a precursor to more contemporary forms of strict liability.<sup>119</sup>

Perhaps because workers' compensation today is a taken-for-granted part of the legal landscape, and is often criticized as inadequate,<sup>120</sup> we have lost sight of its special place in the history of labor relations and workplace injury law. Workers' compensation laws did not emerge from quiet legal reform efforts, but instead were the product of a long political struggle and a vigorous

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<sup>116</sup>Smith, *supra* note 100, at 240–41. See also DOUGLAS BRODIE, ENTERPRISE LIABILITY AND THE COMMON LAW 2–3 (2010) (emphasizing the "radical nature" of workmen's compensation legislation).

<sup>117</sup>Smith, *supra* note 100, at 235.

<sup>118</sup>*Id.* at 240.

<sup>119</sup>Ursin, *supra* note 104, at 541 (noting that workers' compensation provided the "inspiration for the enterprise liability doctrines," such as strict products liability, that emerged decades later).

<sup>120</sup>For contemporary criticisms of workers' compensation including its insufficient incentives for employers to improve workplace safety, see Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 Hous. L. Rev. 119, 243–44 (1994). For criticism of the lengthy delays and inconsistent rewarding of benefits, see Edward D. Berkowitz & Monroe Berkowitz, *Challenges to Worker's Compensation: An Historical Analysis*, in WORKERS' COMPENSATION BENEFITS: ADEQUACY, EQUITY, AND EFFICIENCY 158, 163 (John D. Worrall & David Appel eds., 1985).

social movement. Indeed, in scope and intensity, the social movement that preceded legal changes to the workplace injury laws rivaled the civil rights struggle of the 1960s.

The impetus for the change in the approach to injury compensation was a crisis in workplace accidents, the number of which had risen exponentially in the U.S. following the Industrial Revolution. Historian John Fabian Witt has described the U.S. accident crisis as one of “world-historical proportions,”<sup>121</sup> and one that was “vastly greater” than that experienced in European nations.<sup>122</sup> In the American consciousness, Witt explains, the number of industrial deaths and injuries seemed even to “overshadow the casualties of modern warfare.”<sup>123</sup>

A major milestone in the workers’ compensation movement was a study conducted by Crystal Eastman for the Russell Sage Foundation.<sup>124</sup> In 1907, Eastman went to Pittsburgh, one of America’s most important industrial cities,<sup>125</sup> to document the toll taken by industrial accidents in the steel mills, coal mines, and railroad yards.<sup>126</sup> In a highly detailed fashion, complete with charts and graphs, Eastman poignantly told the stories of thousands of industrial accident victims, inspecting their workplaces as well as talking to victims, fellow workers, families, relatives and neighbors.<sup>127</sup> Her study revealed that most widows of workers killed on the job received no compensation at all and that injured workmen who survived their accidents fared no better.<sup>128</sup> She recommended that Pennsylvania and other states adopt the no-fault workmen’s compensation model then in place in Western Europe.<sup>129</sup>

Following the publication of Eastman’s study, the idea of workmen’s compensation spread like a “prairie fire,” according to commentators of the time, and Eastman herself was appointed to an influential commission in New York that drafted the nation’s first major workers’ compensation statute in 1910.<sup>130</sup> This significant legislative change in the relationship between employers and their workers, however, was first resisted by the courts which were extremely reluctant to impose new financial obligations on businesses. Mirroring the turmoil in the larger society, the New York courts initially

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<sup>121</sup> JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 22 (2004).

<sup>122</sup> *Id.* at 29.

<sup>123</sup> *Id.* at 24.

<sup>124</sup> See EASTMAN, *supra* note 115, at 28.

<sup>125</sup> WITT, *supra* note 121, at 126 (describing Pittsburgh as “the nation’s most important industrial city”).

<sup>126</sup> *Id.* at 126 (describing Eastman’s Pittsburgh study).

<sup>127</sup> EASTMAN, *supra* note 115, at 6–7 (describing the method of the Pittsburgh study).

<sup>128</sup> *Id.* at 119–31.

<sup>129</sup> *Id.* at 209–20.

<sup>130</sup> WITT, *supra* note 121, at 127.

struck down the workers' compensation statute before finally succumbing to the political winds of change.

In 1911, a year after the enactment of the law, the Court of Appeals of New York invalidated the New York workers' compensation statute in *Ives v. South Buffalo Railway Co.*,<sup>131</sup> on the ground that the statute amounted to an unconstitutional taking of property in violation of employers' state and federal due process rights. Echoing the *Lochner* philosophy that had stymied other progressive pieces of legislation,<sup>132</sup> the Court refused to allow the legislature "to subvert the fundamental idea of property"<sup>133</sup> by upholding what it deemed to be a "plainly revolutionary" enactment, as "judged by our common law standards."<sup>134</sup>

The public response to *Ives* was swift and disapproving, denounced at the time as "the greatest court controversy since *Dred Scott*."<sup>135</sup> The workers' rights movement was also propelled by the tragedy of the Triangle Shirtwaist fire which killed 146 workers in New York City one day after *Ives* was decided.<sup>136</sup> Thus, in 1913, the voters of New York enacted a state constitutional amendment specifically authorizing the state legislature to pass workers' compensation legislation and lawmakers quickly did so.<sup>137</sup> By the time the new legislation reached New York's highest court, the legal tide had turned, in large part due to the addition of new more progressive judges, including Benjamin Cardozo.<sup>138</sup> Finally, in 1915, in an abrupt reversal, the New York Court of Appeals upheld the new legislation, ruling that it did not violate the federal constitution.<sup>139</sup> Rather than worry that the legislature was not hewing closely enough to principles of common law, the Court admired the new compulsory scheme of insurance through which, the Court reasoned, there would be assurance that injured workers and their dependents would not become "objects of charity."<sup>140</sup> The new law was not seen as simply amending the common law but as promoting "the public welfare as directly as does insurance of bank depositors from loss."<sup>141</sup>

What was significant about the events in New York, later paralleled in other parts of the country, is the dramatic break they represented from the common law tradition. Importantly, workers' compensation laws rejected negligence law as a fair or adequate route to providing injured workers with

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<sup>131</sup> *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 448 (N.Y. 1911).

<sup>132</sup> See *Lochner v. New York*, 198 U.S. 45 (1905); see also Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 877 (1987).

<sup>133</sup> *Ives*, 94 N.E. at 440.

<sup>134</sup> *Id.* at 436.

<sup>135</sup> See WITT, *supra* note 121, at 152; Ursin, *supra* note 104, at 541.

<sup>136</sup> WITT, *supra* note 121, at 175.

<sup>137</sup> *Jensen v. S. Pac. Co.*, 109 N.E. 600, 602 (1915).

<sup>138</sup> Ursin, *supra* note 104, at 541-42.

<sup>139</sup> *Jensen*, 109 N.E. at 604.

<sup>140</sup> *Id.* at 603.

<sup>141</sup> *Id.*



the resources they needed to cope with workplace injuries. Instead, through a system of employer-provided insurance, enterprises for the first time were routinely required to compensate employees for the risks of injury they faced at the workplace. The history behind the struggle for workers' compensation thus suggests that there is little to support the narrative of similarity and continuity that the Supreme Court has projected and instead much to indicate contrast and change.

In light of this history, it seems anomalous to borrow from the common law of agency or tort to determine employee rights to compensation against their employers. Instead, we might take a page from history and import the lesson that the common law has definitively proven to be inadequate when it comes to employee rights. There is really little of value to borrow here.

## VI. TITLE VII: THE SECOND MAJOR INTERVENTION

The foregoing discussion of workers' compensation laws is meant to show only that tort law is not the best source of guidance for Title VII cases and is not meant to suggest that injuries for sexual harassment or other forms of discrimination are currently compensable or should be compensable under state workers' compensation laws. Despite the fact that both workers' compensation and Title VII address compensation for injuries, the scope of each is decidedly different. Notably, workers' compensation schemes have never been expanded to provide secure and adequate recovery for discriminatory harms. They generally cover only injuries arising from "accidents,"<sup>142</sup> with many states providing no compensation for victims of sexual harassment or other discriminatory harms arising from the wrongful conduct of supervisors and co-workers.<sup>143</sup> Moreover, given that recovery for sexual harassment claims under workers' compensation laws is so meager in those states that do provide coverage, it is generally employers, rather than employees, who have taken the position that workers' compensation is the proper venue for such claims.<sup>144</sup> Finally, because such discriminatory injuries are most often non-physical or economic in nature, there is still very little

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<sup>142</sup> See ARTHUR LARSON & LEX K. LARSON, 2 LARSON'S WORKERS' COMPENSATION LAW § 42.01 (2004) ("The requirement that the injury be accidental in character has been adopted either legislatively or judicially by the overwhelming majority of states.").

<sup>143</sup> See, e.g., *King v. Consol. Freightways Corp.*, 763 F. Supp. 1014, 1017 (W.D. Ark. 1991) (holding that sexual harassment claim does not fall within scope of workers' compensation); *Kerans v. Porter Paint Co.*, 575 N.E.2d 428, 434–36 (Ohio 1991); see also Ruth C. Vance, *Workers' Compensation and Sexual Harassment in the Workplace: A Remedy for Employees, Or a Shield for Employers?*, 11 HOFSTRA LAB. L.J. 141, 146 (1993) (explaining that workers' compensation was not meant to address individual rights violated by sexual harassment but instead "has as its policy the redressing of industrial injuries").

<sup>144</sup> See Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 TUL. L. REV. 1363, 1384 (1993).

protection under tort law, which provides full recovery mostly for physical harms.<sup>145</sup>

In my story of contrast and change, this is the point at which Title VII comes into play. I regard the passage of Title VII as the second major intervention into the employer–employee relationship, marking another radical social reform on par with workers’ compensation. Title VII came into being in part because private tort law was inadequate and could not be counted upon to provide adequate relief against discriminatory harms. Under this account, it simply turns history on its head to think of Title VII claims as mere statutory torts.

Not unlike the genesis of workers’ compensation, Title VII owes its existence to a larger social movement and was understood by all at the time to represent a dramatic break from the past.<sup>146</sup> Fifty years later, Title VII and the other portions of the Civil Rights Act of 1964 still stand out as signature legislative accomplishments of the twentieth century that were necessary precisely because the law in the United States, including the common law, did little to protect African-Americans from discrimination, particularly in the private sector.<sup>147</sup> The objective of the Civil Rights Act of 1964, and the civil rights movement more generally, was sweeping in its scope: it was aimed at nothing short of transforming racial relations across the country. To break with the Jim Crow legacy of the post-Reconstruction South and the myriad forms of racial discrimination present in the rest of the nation, civil rights proponents enlisted the national law to attack pervasive racial hierarchy and subordination.<sup>148</sup> As one scholar put it, “[i]f ever any piece of legislation showed the power of the central government to change deeply entrenched patterns of behavior, it was the Civil Rights Act of 1964.”<sup>149</sup>

The idea that private employers would no longer be allowed to select employees on the basis of race or to structure their workplaces and compensation systems along racial lines was an idea strongly resisted by

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<sup>145</sup> See MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 78–81 (2010) (discussing obstacles to recovery in tort-based sexual harassment suits for intentional infliction of emotional distress); Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2124–25 (2007) (discussing the privileging of “physical” harm in tort law and the reluctance to provide recovery for “discriminatory conduct that does not produce a physical injury”).

<sup>146</sup> See TODD S. PURDUM, *AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964*, at 6 (2014) (describing civil rights movement as a “grassroots effort, involving tens of thousands of black and white citizens . . . that made the Civil Rights Act of 1964 possible”).

<sup>147</sup> See ROBERT BELTON, *THE CRUSADE FOR EQUALITY IN THE WORKPLACE: THE GRIGGS V. DUKE POWER STORY* 12–19 (2014) (describing prior laws to eradicate employment discrimination based on race as limited and inadequate).

<sup>148</sup> *Introduction to LEGACIES OF THE 1964 CIVIL RIGHTS ACT* 1 (Bernard Grofman ed., 2000).

<sup>149</sup> *Id.* at 1–6.

Southerners and many other foes of civil rights who had been successful in beating back fair employment laws in Congress for quite some time.<sup>150</sup> This status quo would likely have persisted well into the latter half of the twentieth century were it not for the success of the civil rights movement. Only after President Kennedy was pressured to respond to calls for legislation on the heels of the high profile confrontation in Birmingham, Alabama, between supporters of Reverend Martin Luther King, Jr. and those of Eugene “Bull” Connor, Birmingham’s infamous police commissioner, did passage of a strong civil rights bill become feasible.<sup>151</sup> A bitter fight in Congress followed, complete with a classic filibuster in the Senate, all occurring alongside tumult in the larger society, including the March on Washington and the assassination of President Kennedy. In the end, while civil rights proponents did not get all that they had hoped for, the legislation that finally passed was broader than that originally proposed and contained a significant title—now referred to simply as Title VII—that was considered the liberals’ “biggest prize.”<sup>152</sup> As the “most contentious, controversial, and longest title in the 1964 Act,”<sup>153</sup> Title VII ushered in what scholars have described as a new direction in employment discrimination law, giving courts significant new power to define “discrimination” in ways that responded to workplace realities.<sup>154</sup> In short, Title VII was a major achievement, envisioned not as an appendage to private law, but as a bold initiative aimed at changing longstanding customs and practices.

Specifically, Title VII took aim at the heart of the U.S. private enterprise system, limiting the at-will system of employment and cutting into management’s “prerogative” to decide how to run a business.<sup>155</sup> While Title VII only forbids discrimination in employer decisionmaking on the basis of the five grounds specified in the Act, there is little question that it has altered the basic terms of the employer–employee relationship in a significant way.<sup>156</sup>

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<sup>150</sup> See David B. Filvaroff & Raymond E. Wolfinger, *The Origin and Enactment of the Civil Rights Act of 1964*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 9, 14 (Bernard Grofman ed. 2000) (noting that none of the previous fair employment bills had passed even one house of Congress); JOHN J. DONOHUE III, FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 3–5 (1997) (explaining that prior to World War II, the idea that employment discrimination should be prohibited was virtually nonexistent).

<sup>151</sup> Filvaroff & Wolfinger, *supra* note 150, at 9–13.

<sup>152</sup> *Id.* at 20.

<sup>153</sup> BELTON, *supra* note 147, at 22.

<sup>154</sup> Paul Burstein, *The Impact of EEO Law: A Social Movement Perspective in LEGACIES OF THE 1964 CIVIL RIGHTS ACT* 129, 135–36 (Bernard Grofman ed., 2000).

<sup>155</sup> See Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177, 1194 (2003).

<sup>156</sup> Indeed, Title VII and similar laws have created “inflated expectations” in the mind of the public, causing a large percentage of people (89%) erroneously to believe that employers have no legal right to discharge an employee out of unsavory motives such as personal animosity. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of*

It bears mentioning that, absent such legislation, private employers are presumably free to act unreasonably—to hire, fire, or otherwise adversely affect their employees for good reason, bad reason, or no reason at all.<sup>157</sup> The effect of Title VII, and similar anti-discrimination legislation, was to curb employers' discretion in matters that the common law generally had not seen fit to regulate, even though securing and retaining employment is vital to most individuals. For this reason, it is anomalous to regard Title VII as a statutory tort, continuous with the prior body of common law. Rather, as a new body of public law, Title VII established a new civil right of equal job opportunity, representing a clear break with the de-regulatory common law regime that was partly responsible for its birth.

With respect to sexual harassment claims in particular, it is ahistorical to regard Title VII claims as statutory torts. Unlike claims for discriminatory discharges, discriminatory failures to hire or promote, or wage discrimination that were the staple of early Title VII lawsuits, claims for discriminatory harassment did not emerge until well into Title VII's second decade.<sup>158</sup> As mentioned earlier,<sup>159</sup> the cause of action for sexual harassment had grassroots origins, developed by feminist academics and activists in the late 1970s. They were moved to action because they recognized that neither tort law, nor existing Title VII law, provided relief for working women who suffered reprisals for refusing the sexual advances of their supervisors or were confronted with sexually humiliating and disparaging remarks and behavior on a regular basis. Indeed, Catharine MacKinnon, a key figure in the feminist movement based her case for recognition of sexual harassment as a Title VII civil rights violation in large part by demonstrating that tort law had failed miserably to protect women from such harms.<sup>160</sup> She argued that sexual harassment claims should be redirected away from the “disabling (and cloying) moralism” of tort law<sup>161</sup> and adjudicated under the statute that puts women's equality concerns front and center.

As a result of such pressure, the significant development of sexual harassment as a legal claim has largely proceeded under Title VII, with tort law playing only a supplemental role. Although some feminists, including

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*Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110–11 (1997).

<sup>157</sup> Derum, *supra* note 155, at 1182.

<sup>158</sup> See Sperino, *supra* at note 2, at 780–81; see also Chamallas, *supra* note 25, at 37, 43.

<sup>159</sup> Chamallas, *supra* note 25, at 37.

<sup>160</sup> Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 817 (2002) (explaining that before Title VII recognized a legal cause of action for sexual harassment, only “a handful” of tort cases had dealt with the subject, and most such cases were rejected).

<sup>161</sup> See CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 171–74 (1979); see also Ann Scales, *Nooky Nation*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 307, 307–12 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (discussing the shortcomings of tort law).

myself, have argued for a greater role for tort law in redressing harassment, this is a far cry from considering harassment claims to be quintessentially statutory torts.<sup>162</sup> The move by the Supreme Court to do so belies the origin of the claim and subtly undermines the core notion that sexual harassment is not simply an individualistic injury but a weapon of inequality that perpetuates and reinforces women's inferior status in the workplace.

## VII. A NEW CIVIL RIGHTS RESTORATION ACT

Although fundamentally misleading and distorting, the narrative of similarity and continuity and the designation of Title VII claims as statutory torts is already quite well entrenched in the Supreme Court precedents.

Although the Court created this state of affairs, I do not think it can easily fix it at this point, even if a future Court were so inclined. As this Symposium so well documents, the tort label has infiltrated a variety of key Title VII doctrines and has done particular damage with respect to vicarious liability. I fear that a majority of the Court has lost sight of the primary goal of Title VII—to prevent discrimination in the workplace—and has forgotten that Title VII is an enterprise liability scheme designed to put pressure on employers to root out discriminatory practices, largely because the employer is in the best position to do so. Instead, the path it has chosen since *Ellerth* and *Faragher* commits itself to treating formal structures and the exercise of formal power as more important than informal structures and informal power, even though those who study organizations will tell you that informal structures and the culture of the organization are better guides to predicting how individuals will behave in the organization.

As has been the case in the past,<sup>163</sup> there is a need for Congress to step in and pass yet another Civil Rights Restoration Act. In 2016, it will have been twenty-five years since the last big fix in 1991, a generation that has not been kind to Title VII law. In particular, it is high time that we finally bury the fellow-servant rule, and with it, the fundamentally wrong-headed policy that employers should not be held responsible for the injuries caused to their employees by other employees on the job. There is no longer any reason to pretend that employees are already compensated for such risks of employment through their wages, nor any reason to pretend that such risks are not a regularly-occurring outgrowth of their jobs. Because the enterprise exposes

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<sup>162</sup> See Martha Chamallas, *Beneath the Surface of Civil Recourse Theory*, 88 IND. L.J. 527, 538–40 (2013) (arguing against the classification of sexual harassment as a statutory tort).

<sup>163</sup> See Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e (1972) (permitting government agencies to be sued; strengthening powers of EEOC); Civil Rights Acts of 1964, 42 U.S.C. § 2000e(k) (amended 1978) (prohibiting discrimination based on pregnancy); Civil Rights Act of 1991, 42 U.S.C. § 1981a(a) (1991) (revising disparate impact and mixed-motivation claims and permitting damages and jury trials for intentional discrimination).

employees to these extra risks, providing secure compensation is the best way to ameliorate the hardship to injured employees and deter future discrimination.

This time I hope Congress keeps it simple. Any new Civil Rights Restoration Act should hold employers strictly liable for discriminatory acts of their employees—pure and simple.<sup>164</sup> Given the structure of the Act and limits on remedies, we do not need further restrictions on vicarious liability. As they operate now, the threshold requirements for determining which acts are discriminatory will continue to serve as adequate liability limiting devices—employers will continue to be liable only when the discriminatory acts of their employees cause economic harm<sup>165</sup> or when they create a hostile environment, defined as severe or pervasive harassment,<sup>166</sup> a very high threshold that is difficult to prove. Employees who are discharged or quit their jobs will continue to be required to mitigate their losses by seeking comparable employment.<sup>167</sup> And, last but not least, compensatory and punitive damages will likely continue to be capped at a sum designed to avoid disproportionate liability.<sup>168</sup> Imposing any additional restrictions on liability is overkill; it defeats the central aim of deterrence of discrimination and reduces Title VII to a puny weapon in the civil rights arsenal.

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<sup>164</sup> Although the case for imposing strict liability for supervisor-created hostile environments is the strongest—given that the employers cloak such employees with job-created power—Congress would be well-advised to impose strict liability even in cases of hostile environments created by co-workers. Employers also need incentives to devise ways to deter such injuries and are in the best position to do so. Imposing strict liability on employers whenever employees are able to poison the working environment would also eliminate the need to define who is a “supervisor” and finally rid the law of vestiges of the fellow-servant rule that required fine distinctions between “vice-principals” and “fellow-servants.” See Miller, *supra* note 101, at 482–86; see also Fisk & Chemerinsky, *supra* note 55, at 795 (proposing that strict liability be applied for all supervisor and coworker sexual harassment).

<sup>165</sup> Prior to the 1991 Civil Rights Act, only equitable relief was permitted, making backpay (and sometimes frontpay) generally the only form of monetary relief available to plaintiffs. See Chamallas, *supra* note 53, at 320.

<sup>166</sup> See LINDEMANN & GROSSMAN, *supra* note 76, at 1334–35.

<sup>167</sup> 42 U.S.C. § 2000e-5(g) (2012) (providing that any back pay award shall be reduced by “[i]nterim earnings or amounts earnable with reasonable diligence”).

<sup>168</sup> 42 U.S.C. § 1981a(b)(3) (2012) (For employers with more than 14 but less than 101 employees, the sum of punitive and compensatory damages are capped at \$50,000; for employers with more than 100 and less than 201 employees, \$100,000; for employers with more than 200 and less than 501 employees, \$200,000; for employers with more than 500 employees, \$300,000).