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Faragher, Ellerth, and the Federal Law of Vicarious Liability for Sexual Harassment by Supervisors: Something Lost, Something Gained, and Something to Guard Against

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**FARAGHER, ELLERTH, AND THE FEDERAL LAW OF
VICARIOUS LIABILITY FOR SEXUAL HARASSMENT BY
SUPERVISORS: SOMETHING LOST, SOMETHING GAINED,
AND SOMETHING TO GUARD AGAINST**

William R. Corbett*

In this Essay, the author faces his nightmare exam question: he must define "sexual harassment" to the satisfaction of several potential graders with different perspectives on sexual harassment law. His valiant effort to justify his response leads him to a discussion of the federal law of vicarious liability for sexual harassment by supervisors after the Supreme Court's recent rejection of tort law respondeat superior analysis for such claims under Title VII.

The author argues that, while the rejection of the tort standard for vicarious liability in Title VII claims removes the longstanding connection between Title VII law and state tort law, the result is appropriate given their different objectives. He further warns that, now that the ties between state tort law and Title VII have been severed, courts should not allow developments in sexual harassment cases to unduly influence state respondeat superior law.

* * *

I. INTRODUCTION: A NIGHTMARE EXAM ON SEXUAL HARASSMENT

The final exam in your law school Employment Discrimination course consists of one multiple choice question. You may select only one answer. If you wish, you may write an essay in support of the answer you select, but you are not required to do so. Your exam will be graded by one of the following persons, selected at random: Professor Catharine MacKinnon,¹ Justice Clarence Thomas,² Professor Anita Bernstein,³ or Judge Susan Webber Wright.⁴ The exam question is:

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¹ Professor MacKinnon argued that sexual harassment should constitute sex discrimination under federal law before courts generally accepted this view. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). She further argued that sexual harassment reinforces and expresses women's traditional and inferior role in the labor force. See *id.* at 4.

² Justice Thomas has argued that sexual harassment is not a free-standing tort, but rather is a form of employment discrimination and, so, should not be treated differently than other forms of sex discrimination. See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2275 (1998) (Thomas, J., dissenting).

³ Professor Bernstein advocates an adjudicative approach to sexual harassment law and

“Sexual harassment” is

- A) the subordination of women by men in the workplace;
- B) a type of employment discrimination based on sex, which is prohibited by public law, a federal statute;
- C) a type of employment discrimination based on sex, which is prohibited by a federal statute, but which is like private law, having many tort characteristics; or
- D) what a governor did to a state employee in 1991.

Law professors face this situation every year when they are writing and grading final exams. They have nightmares. Sometimes they dream they are law students taking exams and they encounter the worst exam imaginable. Well, the above exam is my nightmare. As an employment discrimination teacher, I am interested in the law of sexual harassment, and I occasionally think I have something mildly interesting to say about issues in this area of the law. It is daunting to write in this area, however, because the literature is vast and many writers on the subject fashion comprehensive theories of sexual harassment, including explanations for its occurrence and prevalence and prescriptions for how the legal system should address it. So, my exam nightmare requires a definition of sexual harassment. But because the spirits will not quit visiting my slumber⁵ until I answer the question they pose, I guess I must answer. I am tempted to live dangerously—mark an answer and hope I get the appropriate grader. But, I am a law professor and, accordingly, I am convinced that I can persuade anyone of anything through my cogent analysis. I will write. For good measure, I will put in a few footnotes; law professors cannot write without them. But which answer? My Essay has to say something topical—cutting edge. That means I should address the decisions of the Supreme Court on sexual harassment from the last term: *Burlington Industries, Inc. v. Ellerth*,⁶ *Faragher v. City of Boca Raton*,⁷ and *Oncale v. Sundowner Offshore Services*.⁸ Well, maybe not

has proposed a “respectful person” standard to protect respect for individuals. See Anita Bernstein, *An Old Jurisprudence: Respect in Retrospect*, 83 CORNELL L. REV. 1231 (1998) [hereinafter *Respect in Retrospect*]; Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 446 (1997).

⁴ Judge Wright presided over Paula Jones’s sexual harassment suit against President Clinton. See *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark.), *appeal dismissed*, 161 F.3d 528 (8th Cir. 1998). Judge Wright dismissed the quid pro quo claim because Jones failed to demonstrate “tangible job detriment,” *id.* at 669, and dismissed the hostile environment claim because the alleged contacts did not constitute the kind of severe or pervasive conduct that courts require, *see id.* at 674.

⁵ See CHARLES DICKENS, *A CHRISTMAS CAROL* (Airmont 1963) (1843).

⁶ 118 S. Ct. 2257 (1998).

⁷ 118 S. Ct. 2275 (1998).

⁸ 118 S. Ct. 998 (1998).

Oncale. If I write about the two related cases, *Ellerth* and *Faragher*, which deal with the issue of the basis for imposing liability on employers for supervisors' sexual harassment, then I can claim that the scope of my analysis is limited and that many issues are beyond it. If I say much about *Oncale*, I myself probably will have to propose an all-encompassing theory of sexual harassment. That is too risky. As I have suggested, I am not sure that I have such a theory, and, even if I could develop one, my grader might disagree with it.

Here goes: I pick answer C. Now, I think my grade from Professor Bernstein is safe, but just in case my grader is one of the others, I had better offer a good explanation.

II. STATE TORT LAW AND STATE RESPONDEAT SUPERIOR ANALYSIS⁹

On December 27, 1987, a female clinical technician at Humana Hospital-Brentwood in Shreveport, Louisiana, went into the second-floor nurses' lounge, sat down, and began her break.¹⁰ Not long after she sat down, a male nursing supervisor walked into the lounge, turned off the lights, and jumped on the clinical technician, mauling her. The clinical technician eventually pushed the nursing supervisor off of her and returned to work.¹¹ She later sued her employer, alleging that the nursing supervisor committed a sexual battery and that the hospital was vicariously liable for his tort.¹² Should the employer be held liable? Courts in Louisiana, as in many other states, usually determine an employer's liability for the torts of its employee by

⁹ I placed the title for my Essay at the beginning, instead of here. I know that does not seem reasonable, but, just in case my Essay is published, and—make one more leap with me—just in case somebody wants to cite it, I need a law review-like title at the beginning. Although this may seem like a bizarre Essay, the reader will note that the title is quite conventional, including the obligatory colon. I wish I had been able to work in the quintessential law review word "paradigm." Paradigm is one of the most favored words for law review article titles; a search of the Westlaw JLR database reveals 251 entries for articles with "paradigm" in the title. Another law review word that I would like to have used is "connexity." Although it does not appear in law review titles, this word, which is not included in any dictionary I have used, made 53 appearances in articles in the JLR database. Try as I might, however, I could not work "paradigm" and "connexity" in without choosing a title that suggests I am setting forth a complete theory of sexual harassment. For good measure, I also wish I could have used "new millennium." Consider, for example, the grandiose expectations that the following title would have generated: "*Faragher, Ellerth, and the Federal Law of Vicarious Liability for Sexual Harassment by Supervisors: A New Paradigm for a New Millennium Based on Disconnexity Between Federal Sexual Harassment Law and State Tort Law.*" See what I mean? I do not think this short Essay could fulfill whatever expectations would have been generated by such a powerful title.

¹⁰ See *Baumeister v. Plunkett*, 673 So. 2d 994, 994-95 (La. 1996).

¹¹ See *id.* at 995.

¹² See *id.* at 996.

analyzing whether the employee's wrongdoing was in the course and scope of employment.¹³ In *Baumeister v. Plunkett*, the Supreme Court of Louisiana undertook a meticulous analysis of the state's vicarious liability,¹⁴ or respondeat superior,¹⁵ law. One gets the impression from reading the opinion that the court was writing about vicarious liability of employers for state law tort claims, while often pausing to think about sexual harassment claims under Title VII of the Civil Rights Act of 1964.¹⁶ Such a claim was not at issue in the case, but the spectre of such claims haunts the opinion.¹⁷

The Louisiana court divided the course-of-employment inquiry into two subfactors: time (hours of employment) and place (employer's premises).¹⁸ The court also divided the scope inquiry, the more complex of the two, into two subfactors: whether the tortious act "was primarily employment rooted" and whether the act "was reasonably incidental to the performance of the employee's duties."¹⁹ There was nothing new about these factors and subfactors, as the court had articulated them in an earlier Louisiana case addressing the vicarious liability of an employer for the

¹³ See *id.* (citing *Orgeron v. McDonald*, 639 So. 2d 224, 226 (La. 1994)).

¹⁴ "Vicarious liability" may be defined as the imposition of liability upon one party for a wrong committed by another party. One of its most common forms is the imposition of liability on an employer for the wrong of an employee or agent." Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 563 (1988) (citation omitted).

¹⁵ "Respondeat superior" comes from the Latin phrase "let the superior respond." EUGENE EHRlich, A DICTIONARY OF LATIN TAGS AND PHRASES 198 (1987). For discussion of the origins and rationales of respondeat superior, see RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 454-55 (6th ed. 1995); Rochelle Rubin Weber, Note, "Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees, 76 MINN. L. REV. 1513 (1992).

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

¹⁷ It is not clear to what extent the Supreme Court of Louisiana or any other state court needed to be concerned about the impact of decisions regarding state law respondeat superior analysis on Title VII sexual harassment claims. As will be discussed *infra*, some courts applied a scope-of-employment analysis that seemed to be a freestanding Title VII version of vicarious liability, not derived from state cases. Other courts used other bases of liability for sexual harassment by supervisors, such as negligence based on notice. See *infra* notes 34, 92-94 and accompanying text. Still, some courts applied the state law analysis to the federal statutory claims. See, e.g., *Alphonse v. Omni Hotels Management Corp.*, 643 So. 2d 836, 840 (La. App. 4th 1994) ("Under Title VII, liability attaches to the employer only if it is shown that the conduct occurred within the course and scope of the harasser's employment, and the employer failed to prevent or correct the situation."). Moreover, the state respondeat superior analysis influenced even the seemingly independent Title VII scope-of-employment analysis.

¹⁸ See *Baumeister*, 673 So. 2d at 999 (citing *LeBrane v. Lewis*, 292 So. 2d 216, 218 (La. 1974)).

¹⁹ *Id.*

intentional tort of its employee.²⁰ It was the application of the factors to conduct that would also constitute sexual harassment under federal employment discrimination law, however, that was interesting.

The court addressed the course of employment first and found that both subfactors were satisfied: the assault occurred during working hours and on the employer's premises.²¹ The court then moved to the more difficult scope analysis. Essentially, that analysis requires asking whether the risk of harm that befell a plaintiff is a risk that is associated with the employment; if so, then it is a risk for which the employer should bear the cost.²² The court concluded that neither of the scope subfactors was satisfied.²³ Regarding whether the act was reasonably incidental to employment duties, the court held that "[a] nursing supervisor's responsibilities do not include sexually oriented physical conduct with a co-employee," and such conduct was not foreseeable at the hospital during working hours.²⁴ Turning to whether the act was rooted primarily in employment, the court defined that subfactor as an inquiry into whether serving the employer's business motivated the employee to "any appreciable extent."²⁵ The court held that the employer's business did not actuate the nursing supervisor to any extent.²⁶ It was then that the court cast a cautious glance at sexual harassment law and added: "We do not mean to state, however, that all sexual acts are of a personal nature and might not sometimes be employment rooted."²⁷ Thus, the court left open a window for holding employers vicariously liable for supervisors' sexual assaults and batteries. In summary, the court concluded that, while there is "no magical formula" regarding course and scope that is necessary to impose vicarious liability, course alone will not be enough for an intentional tort: "There must additionally be at least some evidence that the intentional act was reasonably incidental to the performance of the employee's duties or that the tortious act was primarily employment rooted."²⁸

²⁰ See *LeBrane*, 292 So. 2d at 218.

²¹ See *Baumeister*, 673 So. 2d at 999.

²² See *Ermert v. Hartford Ins. Co.*, 559 So. 2d 467, 476-77 (La. 1990).

²³ See *Baumeister*, 673 So. 2d at 999.

²⁴ *Id.*

²⁵ *Id.* (quoting *Ermert*, 559 So. 2d at 476-77).

²⁶ See *id.*

²⁷ *Id.* at 1000. The Supreme Court of Louisiana earlier had recognized the relationship between sexual harassment and intentional tort theories of recovery in one of its two decisions involving the tort theory of intentional infliction of emotional distress. See *Bustamento v. Tucker*, 607 So. 2d 532, 541 n.13 (La. 1992) ("While because of the procedural posture of this case we do not reach the merits of [plaintiff's] tort claim, we note that courts in other jurisdictions have recognized that a pattern of harassment that creates a hostile work environment can constitute intentional infliction of emotional distress.").

²⁸ *Baumeister*, 673 So. 2d at 1000. The conclusion that a strong case on course is not by itself sufficient to impose vicarious liability is in contrast to the conclusion in some Louisiana cases evaluating the workers' compensation issue of whether a "personal injury by accident

There is nothing particularly remarkable about the Louisiana court's vicarious liability analysis for a state tort in *Baumeister*. Courts throughout the nation have reached divergent results in cases involving similar facts.²⁹ Although one reasonably can argue that the Louisiana court should have held otherwise, the respondeat superior analysis is certainly within the mainstream in the nation.³⁰ What is interesting about the *Baumeister* opinion, however, is its careful reservation of the possibility of the imposition of vicarious liability for conduct constituting sexual harassment.³¹ What would have been the result if the clinical technician had sued her

aris[es] out of and in the course of . . . employment." LA. REV. STAT. ANN. 23:1031(A) (West 1998). Although the language of the workers' compensation statute is different from the vicarious liability test, Louisiana courts have treated the two as interchangeable and have cited cases involving workers' compensation and cases involving respondeat superior interchangeably. *See, e.g.,* Benoit v. Capitol Mfg. Co., 617 So. 2d 477 (La. 1993) ("[T]he employment connection tort test is similar to that used in determining whether a compensation claim is one arising out of and in the course of employment." (citing LeBrane v. Lewis, 292 So. 2d 216, 218 n.4 (La. 1974))). Louisiana courts balancing the "arising out of" and "in the course of" employment factors in workers' compensation cases have stated that "when the employee is squarely within the course of his employment, virtually any risk . . . has been considered as arising out of employment." Mundy v. Department of Health & Human Resources, 593 So. 2d 346, 349 (La. 1992). In contrast, the court in *Baumeister* held that a finding that the attacking employee was squarely in the course of employment was not enough to impose vicarious liability. *See Baumeister*, 673 So. 2d at 1000.

I do not find objectionable this divergence between the respondeat superior test for tort liability and the test for workers' compensation coverage. I have long criticized the courts' treatment of the tests as interchangeable. The different policies undergirding tort law and workers' compensation support a more restrictive course and scope analysis for respondeat superior (imposing liability in relatively fewer cases) and a more expansive course and arises-out-of analysis for workers' compensation (imposing liability in relatively more cases). I elaborate on this point here because similar reasoning regarding state tort law and Title VII is the basis for my conclusion that the Supreme Court reached a good result in *Faragher* and *Ellerth* by developing a more expansive theory of liability for supervisors' sexual harassment than that offered by respondeat superior. *See infra* notes 97-101 and accompanying text.

²⁹ *See, e.g.,* Grozdanich v. Leisure Hills Health Ctr., Inc., 25 F. Supp. 2d 953, 978 (D. Minn. 1998) ("The Minnesota Courts have frequently addressed the relation of an employee's sexual assault to the scope of his employment, and have reached divergent results. . . . A brief survey of other jurisdictions demonstrates that there is no consensus on the application of *respondeat superior* to a sexual assault by an employee." (citations omitted)); *see also* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2286 (1998) (citing federal cases holding each way). *See generally* Weber, *supra* note 15 (surveying the divergent results reached by various courts and recommending a reformulation of the scope analysis).

³⁰ *See* Weber, *supra* note 15, at 1513 n.2 (discussing cases holding employers liable for sexual assaults committed by employees and cases not holding employers liable).

³¹ *See Baumeister*, 673 So. 2d at 1000 ("We do not mean to state, however, that all sexual acts are of a personal nature and might not sometimes be employment rooted.").

employer for sexual harassment under Title VII? Would a federal or state court have concluded that, although the conduct might constitute actionable sexual harassment, the employer would not be liable because the supervisor was not in the scope of his employment? Should a court reach that conclusion? Is a different result under Title VII and state tort law appropriate when the underlying conduct is the same?

For me, as a torts and employment discrimination teacher, *Baumeister* was a harbinger of the Supreme Court's rejection, two years later, of scope-of-employment analysis as a basis for employers' liability for supervisors' sexual harassment and the Court's fashioning of a distinct federal common law of vicarious liability.³²

I should state two clarifications before proceeding. First, respondeat superior scope-of-employment analysis is not the only basis on which an employer can be held liable for the torts of its employees. The *Restatement (Second) of Agency* provides other bases for the imposition of liability when an employee was acting outside the scope of employment: the employer intended the conduct or consequences; the employer was negligent or reckless; the conduct violated a nondelegable duty of the employer; the employee acted with apparent authority; or the employee was aided in accomplishing the tort by the agency relationship.³³ The respondeat superior course-and-scope analysis, however, has been the most pervasive basis for imposing liability on employers for the torts of their employees. Furthermore, the Supreme Court rejected this analysis—or the Title VII version of it—in *Faragher* and *Ellerth* as a basis for holding employers liable for sexual harassment by supervisors.

The second clarification is that I am not suggesting that all courts evaluating supervisor sexual harassment cases under Title VII have analyzed them under the scope-of-employment analysis, or that those that did so relied upon state court opinions applying the analysis to torts. Courts, instead, used several different bases to impose liability on employers.³⁴ Moreover, even when courts did use scope analysis for Title VII sexual harassment cases, they usually cited not to state court opinions involving torts, but to federal court opinions involving Title VII.³⁵ That

³² See *infra* notes 49-59 and accompanying text.

³³ See 1 RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

³⁴ See BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 62-67 (1992 & Supp. 1997) (classifying the approaches as scope-of-employment, apparent authority, and direct liability (breach of duty to prevent and remedy harassment)); see also *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103 (3d Cir. 1994) (analyzing all three theories). For a comparison of common law vicarious liability and agency law with the statutory approach to vicarious liability under federal employment discrimination statutes, see Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509, 526-45 (1996).

³⁵ See, e.g., *Jansen v. Packaging Corp. Of Am.*, 123 F.3d 490, 523 & n.9 (7th Cir. 1997) (Coffey, J., concurring in part and dissenting in part) (stating that all Title VII cases decided by federal courts treat the basis for employer liability as an issue governed by federal common law), *aff'd sub nom.* *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998);

being said, the respondeat superior analysis for state tort claims preceded the Title VII vicarious liability analysis, and it exerted an influence—indeed, so much so that the Supreme Court found it necessary to discuss it and reject it in *Faragher* and *Ellerth*.³⁶ It is worth noting that the fact that state courts can and do hear Title VII cases³⁷ and that federal courts can and do hear state tort cases³⁸ facilitates the cross-fertilization between state tort cases and Title VII cases that I am describing. Thus, I proceed to examine the Supreme Court's severance of the respondeat superior link between state tort law and Title VII sexual harassment law.

III. FEDERAL SEXUAL HARASSMENT LAW AND FEDERAL VICARIOUS LIABILITY ANALYSIS

In 1986, the United States Supreme Court declared, in *Meritor Savings Bank, FSB v. Vinson*,³⁹ that hostile environment is a type of sexual harassment actionable under Title VII.⁴⁰ The *Meritor* case also sowed the seeds of the difficult questions with which courts have struggled since the decision: (1) Under what circumstances is conduct severe and pervasive enough to be actionable as hostile environment sexual harassment?; and (2) On what basis is an employer to be held liable for conduct by an employee that constitutes sexual harassment? For almost a decade

Andrade v. Mayfair Management, Inc., 88 F.3d 258, 261 (4th Cir. 1996) (citing federal cases for the proposition that an employer is liable for a sexually hostile work environment created by a supervisor or other employee only if the employer knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action).

³⁶ See *Faragher*, 118 S. Ct. at 2287; *Ellerth*, 118 S. Ct. at 2265-66. Some would say that the Court rejected only the distinct Title VII version of scope-of-employment analysis, but the Court discussed the Title VII version and compared it with the tort version applied by state courts. See *Faragher*, 118 S. Ct. at 2287. The Court recognized that the best approach to reconciling Title VII cases holding sexual harassment to be outside the scope of employment and state tort cases applying a broad scope analysis to include sexual assaults is "to recognize that their disparate results do not necessarily reflect wildly varying terms of the particular employment contracts involved, but represent differing judgments about the desirability of holding an employer liable for his subordinates' wayward behavior." *Id.* The Court also quoted the preeminent torts commentators on the meaning of "scope of employment." See *Ellerth*, 118 S. Ct. at 2266 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 505 (5th ed. 1984)).

³⁷ Federal district courts and state courts have concurrent subject matter jurisdiction over Title VII claims. See *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 820 (1990).

³⁸ Federal courts often have subject matter jurisdiction over state tort claims under either diversity of citizenship, see 28 U.S.C. § 1332 (1994), or supplemental jurisdiction, see *id.* § 1367.

³⁹ 477 U.S. 57 (1986).

⁴⁰ See *id.* at 66-67.

after *Meritor*, the Supreme Court let the law develop in the lower courts. Not until 1995 did the Court revisit the first question in *Harris v. Forklift Systems, Inc.*⁴¹

Regarding the second question, *Meritor* probably made a later visit inevitable. The Court in *Meritor* declined to state a rule regarding the basis for employer liability but, instead, instructed the lower courts to look to agency principles.⁴² The Court cautioned that “such common-law principles may not be transferable in all their particulars to Title VII,” but the Court inferred from Congress’s use of the word “agent” in the definition of “employer” that Congress intended to place some limits on employers’ liability for sexual harassment.⁴³ The federal courts did not develop a consensus on a basis for employer liability. The context in which courts⁴⁴ and commentators⁴⁵ divided most sharply was the basis for employer liability for hostile environment harassment by supervisors.

The diversity of approaches reached its zenith—or nadir depending on your perspective—in the Seventh Circuit’s eight separate opinions (in addition to the per curiam opinion) in *Jansen v. Packaging Corp. of America*.⁴⁶ With the full court granting rehearing in two consolidated cases, *Jansen* was anticipated eagerly as a case that would solidify the “quagmire.”⁴⁷ Instead, the case produced a plaintive cry for help from the venerable Seventh Circuit.⁴⁸

⁴¹ 510 U.S. 17 (1993).

⁴² See *Meritor*, 477 U.S. at 72.

⁴³ See *id.*

⁴⁴ See *supra* note 34.

⁴⁵ Compare Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66 (1995), with J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273 (1995). Professor Oppenheimer argues that courts have misapplied agency law to hostile environment situations. See Oppenheimer, *supra*, at 141-43. He contends that a supervisor usually is within the scope of his employment—time, place, business purpose, incidental to duties of the job—when he commits sexually harassing conduct. See *id.* Applying agency standards, Professor Oppenheimer argues for strict liability in hostile environment claims when based upon the conduct of supervisors. See *id.* at 153. Professor Verkerke, in contrast, argues that courts should impose liability on an employer for both quid pro quo and hostile environment sexual harassment (other than systemic harassment) only when the employer has been put on notice and had an opportunity to act. See Verkerke, *supra*, at 279.

⁴⁶ 123 F.3d 490 (7th Cir. 1997) (en banc), *aff’d sub nom.* Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998).

⁴⁷ Oppenheimer, *supra* note 45, at 76. Professor Oppenheimer so described the focus on basis for liability, a collateral matter, when courts should be focusing on the central issues of sexual harassment law: whether harassment occurred and what the remedy should be if it occurred. See *id.*

⁴⁸ The per curiam opinion on two noncontroversial issues closed with the following:

The court’s inability to forge a majority position with regard to the proper standard for evaluating an employer’s liability for sexual harassment by a

The Supreme Court answered the distress call. In 1998, the Court, in *Burlington Industries, Inc. v. Ellerth*⁴⁹ and *Faragher v. City of Boca Raton*,⁵⁰ announced a standard for imposing liability on employers for supervisors' sexual harassment. In those cases the Court took an agency theory from the *Restatement (Second) of Agency*⁵¹ and fashioned a uniform vicarious liability standard, which is "not federal common law in 'the strictest sense.'"⁵² The Court instead called it "[a] federal rule, based on a body of case law developed over time, [that] is statutory interpretation pursuant to congressional direction."⁵³ In fashioning this law from the approaches available in section 219 of the *Restatement*,⁵⁴ the Court rejected scope-of-employment as the only basis for imposing employer liability for supervisors' sexual harassment of employees.⁵⁵ The Court based the new law instead on the "aided-by-

supervisory employee means that panels of the court that have similar cases in the future, and the district judges of this circuit on remand in these cases and in similar future cases, will have to determine and be guided by the narrowest grounds for the decisions in these two cases. Perhaps in some future case this court will be able to forge a majority position; perhaps the Supreme Court will bring order to the chaotic case law in this important field of practice.

Jansen, 123 F.3d at 494-95 (per curiam) (citation omitted). Several of the opinions in *Jansen* debated whether the basis for liability for hostile environment created by supervisors should be decided as a matter of federal common law or state law. See *infra* note 90 and accompanying text.

⁴⁹ 118 S. Ct. 2257 (1998).

⁵⁰ 118 S. Ct. 2275 (1998).

⁵¹ See 1 RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

⁵² *Ellerth*, 118 S. Ct. at 2265 (quoting *Atherton v. FDIC*, 519 U.S. 213, 218 (1997)).

⁵³ *Id.* Whatever it is, its development is what Judge Easterbrook objected to in his opinion in *Jansen*. See *Jansen*, 123 F.3d at 552-56 (Easterbrook, J., dissenting in part). Judge Easterbrook, looking to state agency principles, stated: "*Meritor* tells us to 'look to,' not 'make up,' agency principles. One can 'look to' principles only in an existing body of law, . . . for there is no free-floating common law." *Id.* at 553 (Easterbrook, J., dissenting in part) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)).

⁵⁴ The Court felt bound by *Meritor* to stick with this source. See, e.g., *Faragher*, 118 S. Ct. at 2291 n.4 (stating that the Court was bound to honor *Meritor* on this point because of the high value of stare decisis in statutory interpretation and because of Congress' reliance on *Meritor* in revising Title VII); *Ellerth*, 118 S. Ct. at 2270 ("Congress has not altered *Meritor*'s rule even through it has made significant amendments to Title VII in the interim."). For an argument that the Court gave *Meritor* more weight than it was due and misapplied the principle of enhanced stare decisis in statutory interpretation, see *The Supreme Court, 1997 Term—Leading Cases*, 112 HARV. L. REV. 313, 313-14 (1998) ("The Court's approach should have been limited by a rule that . . . enhanced stare decisis in statutory interpretation should apply only when relevant precedent has sent a clear signal to the legislature.").

⁵⁵ See *Faragher*, 118 S. Ct. at 2290; *Ellerth*, 118 S. Ct. at 2267. In *Ellerth*, the Court concluded that part of its opinion with what may prove to be unfortunate dictum: "The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment." *Id.* at 2267. Courts employing respondeat superior analysis for tort claims

agency-relation” basis of section 219(2)(d).⁵⁶ Under this new federal law of vicarious liability, an employer is liable for the hostile environment created by a supervisor with immediate or higher authority over the plaintiff employee.⁵⁷ If the employer took a “tangible employment action” against the plaintiff employee, there is no escape from liability.⁵⁸ If the employer has taken no such employment action, then the employer may avoid liability if it can establish an affirmative defense, consisting of two components: the employer exercised reasonable care to prevent and promptly correct the sexual harassment; and the plaintiff unreasonably failed to take advantage of the opportunities provided by the employer or otherwise failed to avoid harm.⁵⁹

IV. FEDERAL SEXUAL HARASSMENT LAW AND STATE TORT LAW

After the Court decided *Faragher* and *Ellerth*, I received a call from an attorney who told me that those cases had overruled *Baumeister v. Plunkett*.⁶⁰ I asked him to explain what he meant. He told me that his client was suing her employer for an employee’s sexual battery and that the law that would determine whether the employer could be held liable was that announced in the recent Supreme Court decisions rather than *Baumeister*. The first problem with the attorney’s argument was that it is not clear that the employee who committed the battery was a supervisor. *Faragher* and *Ellerth* did not change the standard applied to determine employer liability for sexual harassment perpetrated by nonsupervisors, which the courts generally have agreed is a negligence standard of whether the employer “knew or should have known and failed to take prompt and appropriate remedial action.”⁶¹

should not be guided by this statement made in the context of a Title VII case. See *infra* notes 102-04 and accompanying text.

⁵⁶ See *Ellerth*, 118 S. Ct. at 2267; *Faragher*, 118 S. Ct. at 2290. The *Restatement* section states:

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

....

(d) the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

1 RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

⁵⁷ See *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93.

⁵⁸ *Ellerth*, 118 S. Ct. at 2268-69; *Faragher*, 118 S. Ct. at 2292-93. “A tangible employment action [is] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Ellerth*, 118 S. Ct. at 2268.

⁵⁹ See *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

⁶⁰ 673 So. 2d 994 (La. 1996). For a discussion of *Baumeister*, see *supra* notes 10-28 and accompanying text.

⁶¹ *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953 (D. Minn. 1998).

The second problem was that the attorney was wrong in asserting that *Faragher* and *Ellerth* apply to state tort claims.⁶²

The attorney's argument about state claims, Title VII sexual harassment claims, and the vicarious liability analyses was wrong. But I must admit that I paused and seriously entertained his argument before I told him he was incorrect.⁶³ His argument struck a chord with me, however, causing me to reflect on the relationship between

Although neither of these Supreme Court decisions speaks directly to this issue, the presumably still-valid law of this Circuit holds that, if [the harasser] and the Plaintiff were merely co-employees, [the employer] is liable only if it "knew or should have known of the harassment and failed to take immediate and appropriate action."

Id. at 970 (quoting *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378 (8th Cir. 1996) (citing *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 966 (8th Cir. 1993))).

In a recent case, the Eleventh Circuit extended the *Faragher* and *Ellerth* analysis to a case in which the claim was that "the supervisor's inaction with respect to a hostile work environment created by coworker sexual harassment facilitated, prolonged, or otherwise failed to arrest the harassment where the supervisor knew or should have known of it." *Coates v. Sundor Brands, Inc.*, 160 F.3d 688, 693 (11th Cir. 1998), *withdrawn and superseded by* 164 F.3d 1361 (11th Cir. 1999). The Eleventh Circuit subsequently withdrew the opinion and substituted one reaching the same result that made no reference to *Faragher* and *Ellerth*. *See Coates v. Sundor Brands, Inc.*, 164 F.3d 1361 (11th Cir. 1999), *superseding* 160 F.3d 688 (11th Cir. 1998). *Coates* and other early post-*Faragher* and -*Ellerth* decisions demonstrate that courts are uncertain how far the vicarious liability principles of the Supreme Court decisions should be extended. *See also infra* note 79 (discussing the Fifth Circuit's short-lived extension of the *Faragher* and *Ellerth* analysis to punitive damages for discriminatory termination in *Deffenbaugh-Williams v. Walmart Stores, Inc.*, 156 F.3d 581 (5th Cir. 1998), *vacated and reh'g en banc granted*, No. 97-10685, 1999 WL 107104 (5th Cir. Feb. 6, 1999)).

⁶² *See, e.g., Grozdanich*, 25 F. Supp. 2d at 981 (applying respondeat superior scope-of-employment analysis to intentional tort claims of assault, battery, and intentional infliction of emotional distress, after applying *Faragher* and *Ellerth* to Title VII claims); *Youngblood v. Alliance Pharm.*, No. Civ.A.95-2796, 1998 WL 676800, at *5-*6 (E.D. La. Sept. 30, 1998) (applying state respondeat superior analysis to state tort claims and noting that *Ellerth* did not involve vicarious liability for state law claims); *Duran v. Flagstar Corp.*, 17 F. Supp. 2d 1195, 1200 (D. Colo. 1998) ("*Faragher*, a Title VII action . . . had no binding or precedential value in evaluating plaintiffs' Colorado tort claims for assault and outrageous conduct."); *Kelley v. Worley*, 29 F. Supp. 2d 1304 (M.D. Ala. 1998) (applying the *Faragher* and *Ellerth* decisions to deny defendant's motion for summary judgment on Title VII claims and applying state law to grant defendant's motion for summary judgment on state invasion of privacy claim); *Seepersad v. D.A.O.R. Sec., Inc.*, No. 97 Civ.2086(SS), 1998 WL 474205 (S.D.N.Y. Aug. 12, 1998) (denying defendant's motion for summary judgment on sexual harassment under *Faragher/Ellerth* analysis and granting defendant's motion for summary judgment on intentional tort theories under a respondeat superior analysis).

⁶³ I should have paused even longer perhaps because he quickly told me that it was I who was wrong. Lawyers, like law professors, are never wrong; thus, the quandary when a law professor and a lawyer accuse each other of being wrong.

sexual harassment law under Title VII and state common law tort claims. Those reflections helped me to define sexual harassment in terms of its evolving relationship to tort law. They also helped me to decide whether what the Supreme Court did in *Faragher* and *Ellerth*—creating a federal law of vicarious liability for a type of sexual harassment—was a good development.

A. *Before Faragher and Ellerth*

I began studying and teaching sexual harassment law under Title VII several years after the Supreme Court's landmark decision in *Meritor*. I had already taught and studied torts. As one examining federal sexual harassment law in the mid-1990s, I noted many of the difficulties of the hostile environment theory⁶⁴ and wondered why these injuries were not left to state tort law. State tort theories exist that would apply to the worst of the conduct, such as assault, battery, intentional infliction of emotional distress ("IIED"), and invasion of privacy. Indeed, many plaintiffs in the 1990s were joining tort claims with their Title VII sexual harassment claims.⁶⁵ This was, to the best of my recollection, my "gut reaction" before I read the writings of commentators who favored a tort approach to sexual harassment.⁶⁶

I now believe that my first impression was wrong because it did not take into account the historical development of the law. State tort law was not a viable avenue

⁶⁴ These difficulties include: how bad conduct must be for a court to consider it actionable and when conduct is "because of sex" within the meaning of Title VII. The second problem is the one on which I focused my attention as I read cases and commentaries addressing same-sex sexual harassment and issues such as "equal opportunity sexual harassers." See, e.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (holding that equal opportunity harassment is not gender discrimination), *cert. denied*, 481 U.S. 1041 (1987); Michelle Ridgeway Peirce, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1096 (1989) (noting that victims of equal opportunity harassment suffer the same effects of sexual harassment as victims of opposite sex sexual harassment).

⁶⁵ Cf. *Sample Sexual Harassment Complaint*, in *SEXUAL HARASSMENT LITIGATION 1995*, at 465 (PLI Litig. & Admin. Practice Course Handbook Series No. H-520, 1995) (including claims for battery, assault, intentional infliction of emotional distress, negligent retention, and negligent supervision). See also LINDEMANN & KADUE, *supra* note 34, at 351-70 (describing common law theories asserted in sexual harassment cases); Michael Barrier, *Sexual Harassment*, *NATION'S BUS.*, Dec. 1, 1998, at 19 (quoting labor lawyer David Copus as saying that state tort claims are "where the megabucks are going").

⁶⁶ Professor Paul criticized the coverage of sexual harassment under Title VII and favored replacement of that regime with a tort of sexual harassment regime. See Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 *YALE L. & POL'Y REV.* 333 (1990). Professor Epstein followed Paul, proclaiming the superiority of common law coverage of sexual harassment, in his lightning rod work, *Forbidden Grounds*. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 350-66 (1992).

of recovery for plaintiffs before federal courts recognized sexual harassment claims under Title VII.⁶⁷ Federal law under Title VII first recognized sexual harassment as actionable, and state tort law followed that lead.

In 1976, a federal district court, in *Williams v. Saxbe*,⁶⁸ held for the first time that sexual harassment was actionable under Title VII. The case was based on the quid pro quo theory of sexual harassment.⁶⁹ The Equal Employment Opportunity Commission ("EEOC") promulgated guidelines prohibiting sexual harassment, both quid pro quo and hostile environment, in 1980.⁷⁰ Then, in 1986, the Supreme Court, in *Meritor*, followed lower courts in holding that hostile environment sexual harassment is actionable under Title VII.⁷¹ After the federal courts placed their imprimatur on the actionability of sexual harassment under a federal statute, courts began recognizing that sexual harassment also was actionable under state tort law.⁷² Professor Gergen describes a "flood" of IIED claims in the late 1980s, after these claims "got swept up in the current of Title VII litigation" in the late 1970s and early 1980s.⁷³ Now, leading commentators on tort law maintain that sexual harassment on the job does constitute IIED,⁷⁴ and some commentators argue that such conduct

⁶⁷ See John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583 (1992). Criticizing Epstein's analysis, Professor Donohue states:

Perhaps these tort doctrines could have supplied the basis for a legal action for a woman who was confronted by what we now call hostile environment and quid pro quo sexual harassment, but there seems to be no evidence of any such cases being successfully prosecuted, and Epstein does not cite a single one in his book. In the face of the "inexorable zero," it seems that Catherine [sic] MacKinnon's claim that "sexual harassment has been not only legally allowed; it has been legally unthinkable," is a more accurate description of the reality faced by women prior to the emerging federal law of sexual harassment than that afforded by Epstein's dry recitation of the Restatement of Torts.

Id. at 1610-11 (quoting MACKINNON, *supra* note 1, at xi) (citations omitted).

⁶⁸ 413 F. Supp. 654 (D.D.C. 1976).

⁶⁹ See *id.* at 657-61.

⁷⁰ See 29 C.F.R. § 1604.11 (1998).

⁷¹ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986). For a history of sexual harassment law, see 1 ALBA CONTE, *SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE* 15-83 (2d ed. 1994); LINDEMANN & KADUE, *supra* note 34, at 3-43.

⁷² See Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693, 1709-10 (1996).

⁷³ *Id.* at 1709.

⁷⁴ See DAN DOBBS ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 18 (Supp. 1988) ("Sexual harassment on the job is undoubtedly an intentional infliction of emotional distress."). *But see* *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1487 (3d Cir. 1990) (stating that, under Pennsylvania law, sexual harassment alone generally is not sufficiently outrageous to constitute a claim of IIED).

should be held outrageous per se.⁷⁵ Thus, state tort law has followed the development of Title VII sexual harassment law.

Although I came to reject my initial impression that Title VII need not have covered sexual harassment, there remains a separate question of whether sexual harassment law still needs Title VII. In light of tort law's development, why do we still need Title VII coverage of sexual harassment? One cannot deny that sexual harassment, and other types of harassment in employment, are more tort-like than other types of employment discrimination.⁷⁶ Indeed, the Civil Rights Act of 1991,⁷⁷ adding compensatory and punitive damages, made Title VII as a whole more tort-like.⁷⁸ I agree, however, with many commentators who argue that Title VII sexual harassment and tort law also are different.⁷⁹ The call for tort versions of sexual

⁷⁵ See Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1482-83 (1986).

⁷⁶ Professor Bernstein, a torts and employment discrimination teacher and scholar, describes this idea:

Sexual harassment falls within the judicial framework of tort law and tortlike actions under Title VII. The post-1991 version of the statute fits closely within this paradigm, but the 1964 original . . . also affirms the power of private litigation.

Title VII is not a tort statute . . . but the statute does depend on the players, practices, and strengths of citizen-initiated litigation.

Bernstein, *Respect in Retrospect*, *supra* note 3, at 1242-43.

⁷⁷ Pub. L. No. 102-166, 105 Stat. 1071 (codified principally in 42 U.S.C. § 1981a (1994)).

⁷⁸ Cf. Cheryl Krause Zemelman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 193-97 (1993) (recognizing the different purposes of Title VII and tort law and decrying the "privatization" of Title VII). Professor White suggests that the addition of compensatory and punitive damages may call into question the heretofore unquestioned vicarious liability imposed for employment discrimination other than hostile environment sexual harassment. See White, *supra* note 34, at 512-13.

⁷⁹ See, e.g., Oppenheimer, *supra* note 45, at 93 ("Sexual harassment is not merely a common-law tort, such as assault, battery, defamation, or intentional infliction of emotional distress; it is also a statutory wrong for which Congress has provided free government investigations, federal jurisdiction, and attorneys' fees as well as legal damages."). Justice Thomas stated this principle in his dissenting opinion in *Ellerth*: "Popular misconceptions notwithstanding, sexual harassment is not a freestanding federal tort, but a form of employment discrimination." *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2275 (Thomas, J., dissenting). The proposition for which Justice Thomas was arguing was that a distinct standard of employer liability for sexual harassment should not be adopted. Believing that racial harassment and other forms of employment discrimination require that employers be "truly at fault," Justice Thomas argued that all forms of employment discrimination under Title VII should be treated equally. *Id.* Justice Thomas's concerns are curious in light of the fact that there is nothing in *Faragher* or *Ellerth* to prevent the extension of the vicarious

liability analysis to other types of harassment by supervisors. For example, one federal district court extended the *Faragher/Ellerth* holdings to racial harassment. *See Booker v. Budget Rent-a-Car Sys.*, 17 F. Supp. 2d 735 (M.D. Tenn. 1998). Also, a Fifth Circuit panel extended *Faragher/Ellerth* in a way that could have broader impact if the panel's approach is adopted by the en banc court on rehearing. *See Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581 (5th Cir. 1998), *vacated and reh'g en banc granted*, No. 97-10685, 1999 WL 107104 (5th Cir. Feb. 26, 1999).

In *Deffenbaugh*, the Fifth Circuit panel held that the new standard applied to the issue of whether a supervisor's discriminatory termination of an employee could be attributed to the employer for the purpose of satisfying the heightened requirements for punitive damages. *See id.* at 592-93. The lower court reasoned that the employer could not be liable for the supervisor's "malicious" or "reckless" conduct when it did not know nor should it have known of the conduct. *See id.* at 593-94. The Fifth Circuit panel reversed, interpreting *Faragher* and *Ellerth* as follows: "In adopting this standard, the Court's purpose apparently was not to state a standard solely for sexual harassment claims Accordingly, it appears that the Court intended to apply these same agency principles to all vicarious liability inquiries under Title VII for acts by supervisors, including racial discrimination." *Id.* at 593. On rehearing, the en banc Fifth Circuit may not extend the *Faragher/Ellerth* vicarious liability analysis to liability for punitive damages. In a recent opinion, the Eleventh Circuit disagreed with the vacated Fifth Circuit panel decision in *Deffenbaugh*. *See Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1323 n.8 (11th Cir. 1999) ("Given the requirement of notice or knowledge for punitive damages in this Circuit, . . . we are doubtful that *Faragher*, which is not about punitive damages, can (or was intended to) overrule our pre-*Faragher* punitive damages precedent.").

It is interesting that the extension of the sexual harassment liability principles to another Title VII vicarious liability issue in the vacated panel decision in *Deffenbaugh* produced a favorable result for a plaintiff. Professor Rebecca Hanner White warned that the liability analysis applied to hostile environment cases should not affect other vicarious liability issues under the federal employment discrimination laws. *See White, supra* note 34, at 536-38. Her cautionary note was delivered at a time when the employer-liability analyses for sexual harassment imposed limitations on liability. The *Faragher/Ellerth* analysis discards most of the limitations of the former analyses and effects the almost automatic vicarious liability applicable to other discriminatory actions. *See id.* at 510. Professor White may not be wholly comfortable, however, with the extension of the liberalized sexual harassment standard to the issue of punitive damages. As she explains, the amendment of the Civil Rights Act of 1991 to provide for compensatory and punitive damages may call into question heretofore generally accepted vicarious liability principles under the employment discrimination laws; courts that impose vicarious liability, without hesitation, on employers for equitable relief may hesitate to impose such liability for compensatory and punitive damages. *See id.* at 512-13. Professor White's analysis calls into question whether the *Faragher/Ellerth* analysis is well suited to all vicarious liability issues under the discrimination acts, particularly the issue of liability for punitive damages addressed in *Deffenbaugh*.

The vacated *Deffenbaugh* panel decision and the Eleventh Circuit panel's withdrawal of its opinion extending *Faragher/Ellerth* to supervisor inaction in *Coates v. Sundor Brands, Inc.*, 160 F.3d 688 (11th Cir. 1998), *withdrawn and superseded by* 164 F.3d 1361 (11th Cir. 1999), illustrate the uncertainty of courts regarding the breadth of applicability of the new

harassment have not abated, although some would replace Title VII coverage,⁸⁰ while others would augment Title VII coverage with a new tort.⁸¹

Even if one concludes that sexual harassment has a certain "tortiness" about it and that some tort theories generally are applicable to such conduct, that does not lead necessarily to the conclusion that Title VII coverage is superfluous and should be eliminated. As Professor Martha Chamallas has explained, tort law, because of its wariness of emotional distress, is not an adequate substitute for Title VII coverage.⁸²

Finally, the relationship between federal sexual harassment law under Title VII and state tort law leads me to conclude that the Supreme Court did a good thing by announcing a federal law of vicarious liability in *Faragher* and *Ellerth*. Words of caution, however, are in order. The Court's holdings in those cases changed only the law of vicarious liability for Title VII sexual harassment, and those cases should not affect respondeat superior analysis under state tort law.

B. *Severing The Ties of Title VII Sexual Harassment Law and Tort Law: Something Lost, Something Gained, and Something to Guard Against*

Make no mistake about it—*Faragher* and *Ellerth* represent a significant severing of ties between Title VII sexual harassment law and tort law. While Title VII sexual harassment case law was shaping the contours of tort theories, particularly IIED,⁸³ tort law was giving something to sexual harassment law—its respondeat superior vicarious liability analysis. As a torts and employment discrimination teacher, I viewed this symbiotic relationship favorably. It seems appropriate that Title VII should have given meaning to the element of outrageous conduct under IIED. The *Restatement (Second) of Torts* defines "extreme and outrageous conduct" as conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community."⁸⁴ Federal civil rights legislation seems a good gauge of what society deems intolerable.

The second part of the relationship—the loaning of respondeat superior by tort law to Title VII sexual harassment—however, was a less comfortable fit. The

vicarious liability analysis. For a discussion of *Coates*, see *supra* note 61.

⁸⁰ See Mark McLaughlin Hager, *Harassment As a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375 (1998). Significantly, Professor Hager would substitute tort coverage for Title VII coverage only for co-employee sexual harassment. See *id.*

⁸¹ See Schoenheider, *supra* note 75, at 1485-94.

⁸² See Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 515-17 (1998).

⁸³ See *supra* notes 72-75 and accompanying text.

⁸⁴ 1 RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

Supreme Court recognized this in *Faragher* and *Ellerth* and appropriately severed the ties. As a result, something was lost, something was gained, and the cases left courts something to guard against.

1. Something Lost

In *Jansen*,⁸⁵ Judge Easterbrook disagreed with his colleagues about developing a new federal standard of vicarious liability for supervisors' sexual harassment.⁸⁶ He objected that, when a federal statute does not specify a standard or rule, the courts are to look to state law, unless applying state law would interfere with or undermine the objective of the federal law.⁸⁷ Judge Easterbrook did not see anything in the respondeat superior analysis of Illinois or other states that frustrated the purposes of Title VII.⁸⁸ Evaluating the law in that way, Judge Easterbrook thought that something significant would be lost by developing a federal common law of vicarious liability for Title VII sexual harassment. He explained that loss: "Why should an act of sexual harassment by a supervisor be attributed to the firm under state law but not under Title VII (or under Title VII but not state law)? Federal common law achieves horizontal but not vertical uniformity."⁸⁹ Thus, Judge Easterbrook favored a state of the law in which employers would be liable or not liable under both federal and state law; that is, the result would be the same under Title VII and under state law. It is not clear from his opinion whether Judge Easterbrook was being descriptive or prescriptive. Judge Coffey, in another of the many *Jansen* opinions, contended that such a state of the law had never existed, positing, instead, that the courts had been using federal common law, not state vicarious liability law, to decide liability under Title VII.⁹⁰

The debate between Judges Easterbrook and Coffey (and others) calls for an answer to a question: Before *Faragher* and *Ellerth*, what was the law regarding the basis for employers' Title VII liability for supervisors' hostile environment sexual harassment? Did the courts follow state respondeat superior law or did they create law? The answer is that Judge Coffey presented a fairly accurate picture when he

⁸⁵ *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997), *aff'd sub nom. Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998). *Jansen* was one of two consolidated cases before the en banc Seventh Circuit; *Ellerth* was the other.

⁸⁶ *See id.* at 552 (Easterbrook, J., concurring in part and dissenting in part).

⁸⁷ *See id.* at 553 (citing *Atherton v. FDIC*, 117 S. Ct. 666, 670 (1997)).

⁸⁸ *See id.* at 554-56.

⁸⁹ *Id.* at 553.

⁹⁰ *See id.* at 552 (Coffey, J., concurring in part and dissenting in part); *see also id.* at 563-65 (Manion, J., concurring in part and dissenting in part) (describing Judge Easterbrook's approach as "unusual" and inconsistent with the scope and purpose of Title VII); *id.* at 506-10 (Posner, C.J., concurring in part and dissenting in part) (arguing that courts must develop liability principles as a matter of federal common law).

stated: "Out of the vast constellation of Title VII cases decided by the federal courts, . . . I have been unable to locate a *single* precedent that supports the unique position of Judges Easterbrook and Wood on this choice of law question."⁹¹ Courts applied several different bases for determining liability,⁹² and those rationales did not derive obviously from state law; that is, the courts usually cited other federal court decisions.

Given this state of pre-*Faragher* and pre-*Ellerth* law, then, what has been lost? The vertical uniformity favored by Judge Easterbrook never existed. It never was true that if an employer was liable (or not liable) for a supervisor's hostile environment harassment, it also would be liable (or not liable) under applicable state tort theories. Would sexual harassment plaintiffs have benefited from such a state of the law? Asked differently, if the Supreme Court had instructed courts to look to state respondeat superior law as the basis for employer liability for supervisors' sexual harassment, would plaintiffs have benefitted? The answer is probably not, under the state of the law as it existed then.⁹³ State courts, however, probably softened their scope-of-employment analyses on some torts claims in light of the nebulous link between the bases for liability for sexual harassment and for state torts.⁹⁴ Moreover, if the Supreme Court had directed courts to employ state

⁹¹ *Id.* at 523. Judge Coffey's statement may be a bit too much. In one case, the Fourth Circuit applied state respondeat superior principles and relied on Virginia cases in its discussion of the employer's liability for the supervisor's sexual harassment. *See* *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995). The court in *Martin* did qualify its analysis, however, by saying that it was "[a]ssuming, without deciding, . . . that these common law agency principles establish the proper standard." *Id.* at 1351. Furthermore, state courts also decide Title VII sexual harassment cases, and some have applied state respondeat superior analyses. *See, e.g.*, *Alphonse v. Omni Hotels Management Corp.*, 643 So. 2d 836, 840 (La. App. 4th 1994) ("Under Title VII, liability attaches to the employer only if it is shown that the conduct occurred within the course and scope of the harasser's employment, and the employer failed to prevent or correct the situation.").

⁹² *See* sources cited *supra* note 34; *see also* Justin S. Weddle, Note, *Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty to Prevent a Hostile Workplace*, 95 COLUM. L. REV. 724, 734-37 (describing the circuits' approaches). After describing the different approaches, one commentator offered the following criticism: "[N]one of the agency rules . . . produces completely satisfactory results. Perhaps for this reason, courts tend to apply different rules in different settings, often in an apparently manipulative, result-oriented fashion." Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229, 1255-56 (1991) (citation omitted).

⁹³ *See* *Weber*, *supra* note 15, at 1514 ("The traditional view is that sexual assault is either personally motivated or so unusual that it is outside of the assailant's scope of employment.").

⁹⁴ The Supreme Court of Louisiana seemed to do this in *Baumeister v. Plunkett*, 673 So. 2d 994 (La. 1996), although the court ultimately did not impose liability. For further discussion of the case, *see supra* notes 10-31 and accompanying text. *Cf.* *Faragher v. City*

respondeat superior analysis to sexual harassment cases, I think it is reasonable to assume that state courts would have softened their state analyses further. If courts had employed a softer respondeat superior analysis permitting plaintiffs to recover under Title VII and state tort theories, plaintiffs would have benefited. State tort theories offer the advantage of damages that are not capped, as they are under Title VII.⁹⁵

I do not argue that vertical uniformity would have been a good result, even if it had benefited sexual harassment plaintiffs. The result reached in *Faragher* and *Ellerth* is appropriate for the reasons discussed below.

What has been lost is a nebulous tie between Title VII sexual harassment law and state tort law. This is appropriate, yet strangely saddening, given the history the two bodies of law have shared.⁹⁶

of Boca Raton, 118 S. Ct. 2275, 2287 (1998) (citing state cases that employed “an expansive sense of scope of employment” in state tort claims). Consider, for instance, the fact that some Florida state courts interpreted a Florida Supreme Court opinion as collapsing the “stricter” respondeat superior principles under Florida law with the “lesser” respondeat superior elements of Title VII. *See Sparks v. Jay’s A.C. & Refrigeration, Inc.*, 971 F. Supp. 1433 (M.D. Fla. 1997) (rejecting this proposition as an incorrect interpretation of the Florida Supreme Court’s opinion).

Although sexual harassment law is not necessarily the reason, the Virginia Supreme Court adopted a plaintiff-friendly standard of respondeat superior in *Plummer v. Center Psychiatrists, Ltd.*, 476 S.E.2d 172 (Va. 1996). Under that standard, once a plaintiff establishes an employer-employee relationship, the burden shifts to the employer to prove that the employee was not acting in the scope of his employment. *See id.* at 174. If the evidence leaves the question in doubt, then it becomes a jury question. *See id.* Although *Plummer* was not an employment sexual harassment case, it involved a claim by a plaintiff that her psychologist had sexual intercourse with her during a counseling session. Plaintiff sued on theories of assault and battery. *See id.* at 173; *see also Kidwell v. Sheetz, Inc.*, 982 F. Supp. 1177, 1187 (W.D. Va. 1997) (interpreting and applying the *Plummer* standard).

⁹⁵ *See* LINDEMANN & KADUE, *supra* note 34, at 128 (Supp. 1997); Barrier, *supra* note 65, at 19 (quoting labor lawyer David Copus as saying that state tort claims are “where the megabucks are going”). Title VII, as amended by the Civil Rights Act of 1991, caps the total of compensatory and punitive damages at \$50,000, \$100,000, \$200,000, or \$300,000, depending on the number of employees the employer has. *See* 42 U.S.C. § 1981a(b)(3) (1994). Plaintiffs still may be able to recover uncapped damages under state fair employment practice acts. It remains to be seen whether the courts will apply the *Faragher/Ellerth* standard under such acts. *See Veco, Inc. v. Rosebrock*, Nos. S-7080, S-7120, 1998 WL 881190, at *6 n.17 (Alaska Dec. 18, 1998) (leaving this question open); *Steele v. Superior Home Health Care*, No. 03A01-9709-CH-00395, 1998 WL 783348, at *6 n.6 (Tenn. App. Nov. 10, 1998) (leaving the question to the Tennessee Supreme Court). The Kentucky Court of Appeals adopted *Faragher/Ellerth* for its fair employment practice act. *See Hill v. Gateway Reg’l Health Sys., Inc.*, No. 97-CA-1130-MR, 1998 WL 412623, at *11 n.2 (Ky. App. July 24, 1998). In states in which the state act specifies the standard for imposing liability, adoption of *Faragher/Ellerth* is not an issue. *See, e.g., Webb v. Lustig*, 700 N.E.2d 220 (Ill. App. Ct. 1998), *appeal denied*, 182 Ill.2d 573 (1999).

⁹⁶ *See supra* notes 64-82 and accompanying text.

2. Something Gained

Something has been gained in the unleashing of the basis of liability analysis for supervisor hostile environment sexual harassment from states' respondeat superior analysis—although that leash may have been long already. As the Supreme Court recognized, trying to hold employers liable for sexual harassment under course-and-scope analysis was straining and, in some cases, distorting that analysis.⁹⁷ Title VII is public law, not a common law tort, having as its principal purpose not redress of injuries, but deterrence of sexual harassment in the workplace and eradication of such conduct.⁹⁸ To effect that policy, courts must, in most cases, hold employers accountable for the conduct of their supervisors. Tort law, in contrast, focuses much more on compensation for injuries. Generally, respondeat superior analysis addresses the issue of whether a particular risk “should be considered as one of the normal risks to be borne by the business.”⁹⁹ The Court concluded that state agency law under course-and-scope analysis could not be relied upon to impose liability on employers often enough.¹⁰⁰ The *Faragher/Ellerth* standard should result in more victories for plaintiffs, whether they come in the form of judgments or settlements.¹⁰¹

⁹⁷ See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2266-67 (1998); *Faragher*, 118 S. Ct. at 2288-90.

⁹⁸ See *Faragher*, 118 S. Ct. at 2292 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

⁹⁹ Sykes, *supra* note 14, at 563 (quoting 1 RESTATEMENT (SECOND) OF AGENCY § 229 cmt. a (1958)); see also Oppenheimer, *supra* note 45, at 78-79 (discussing rationales for respondeat superior liability).

¹⁰⁰ A federal district court applying Minnesota's respondeat superior analysis to state law claims of assault, battery, and IIED, explained the difficulties of holding employers liable for sexual assaults in *Grozdanich v. Leisure Hills Health Center*:

We recognize the paradox presented by a foreseeability standard for *respondeat superior* liability, especially in cases, such as this one, where the tort involves a sexual assault. Naturally, the more outrageous the employee's tortious act should be, the less likely it could be described as foreseeable, and the less likely that the employer could be required to assume responsibility for the act, as a general risk of the employer's business. In fact, this paradox has prompted one commentator to remark: “It is a curious state of affairs, in which the less badly treated a complainant has been, the better are his prospects of getting damages!”

Grozdanich v. Leisure Hills Health Ctr., 25 F. Supp. 2d 953, 979 (D. Minn. 1998) (quoting T. BATY, VICARIOUS LIABILITY 193 (1916)).

By adopting a standard of liability for statutory sexual harassment by supervisors distinct from that applied under tort law, the United States Supreme Court followed the example of the Supreme Court of Canada. See *Robichaud v. The Queen*, 40 D.L.R.4th 577 (1987) (rejecting the application of the tort standard to supervisor sexual harassment cases under the Canadian Human Rights Act, R.S.C., ch. H-6 (1985) (Can.)).

¹⁰¹ Defendant employers are less likely to win summary judgments on the issue of basis

What has been gained is a standard that is likely to effectuate the objectives of Title VII. Moreover, uniformity has been gained in response to the pleas of the lower courts.

3. Something to Guard Against

In *Faragher* and *Ellerth*, the Court severed a link between state tort law and Title VII. Now courts (federal and state)¹⁰² can go about their business in supervisor hostile environment sexual harassment cases without concerning themselves with the respondeat superior analyses of the states or federal variations of those analyses. On the other side, courts (state and federal)¹⁰³ also should be wary of letting developments in the sexual harassment cases unduly influence their analysis of state respondeat superior law. That is not to say that state courts should adopt more restrictive tests for respondeat superior. Rather, courts applying state respondeat superior analysis are free now to do as they please to accomplish the objectives of tort law without the brooding spectre of sexual harassment law. Courts should heed the underlying message of *Faragher* and *Ellerth* that vicarious liability analyses are not “one size fits all” items. Indeed, the federal courts are now struggling with the idea that the new vicarious liability analysis of *Faragher* and *Ellerth* may not fit all issues that arise under federal sexual harassment law.¹⁰⁴

V. CONCLUSION

That is it. That is all I can write. I hope my grader is lenient (viewed from a plaintiff’s perspective), applying a standard akin to the Court’s in *Faragher/Ellerth*. I know I have not really answered the exam question, but remember, I admitted I did not have an overarching theory of sexual harassment. I merely wanted to ruminate on the relationship between federal sexual harassment law and state tort law after two landmark Supreme Court cases. Although the *Faragher* and *Ellerth* decisions created a disconnexity between sexual harassment law and tort law, I do not perceive the cases as having created a new paradigm for the new millennium—whatever that means.

Perhaps those spirits will let me rest now. Exams are over.

of liability. For a debate on whether the foregoing is true, see the majority and concurring opinions in *Lissau v. Southern Food Service, Inc.*, 159 F.3d 177 (4th Cir. 1998). See also, e.g., Grozdanich, 25 F. Supp. 2d 953 (denying summary judgment on a Title VII sexual harassment claim under the *Faragher/Ellerth* standard and granting it on state law claims for assault, battery, and IIED).

¹⁰² See *supra* note 37 and accompanying text.

¹⁰³ See *supra* note 38 and accompanying text.

¹⁰⁴ See *supra* notes 61 and 79.