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Employer Sexual Harassment Liability Under Agency Principles:A Second Look at Meritor SavingsBank, FSB v. Vinson

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Employer Sexual Harassment Liability Under Agency Principles: A Second Look at *Meritor Savings Bank, FSB v. Vinson*

*Michael J. Phillips**

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I. INTRODUCTION

With its 1986 decision in *Meritor Savings Bank, FSB v. Vinson*,¹ the United States Supreme Court put its imprimatur on the Title VII² sexual harassment cause of action that had emerged over the preceding decade.³ Early commentary on the case tended to emphasize this aspect of the Court's decision⁴ or to speculate about *Meritor's* impact on the future course of Title VII sexual harassment litigation.⁵ Getting relatively short shrift in this early commentary, however, was the Court's command that "agency principles"—the common law of agency—be consulted to determine an employer's liability for harassment committed by its employees.⁶ As subsequent observers noted, the Court's recourse to agency law added considerable confusion to the employer liability issue.⁷ This aspect of *Meritor*, however, has rarely, if ever, been directly challenged.

After nearly five years of judicial floundering with agency principles, it seems time for such a challenge. This Article argues that *Meritor's* command to consult agency law on the employer liability question

1. 477 U.S. 57 (1986). *Meritor* is described *infra* at subpart II(C).

2. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-2000e-17 (1988).

3. See, e.g., *Meritor*, 477 U.S. at 64-67 (conceding tacitly that Title VII prohibits sexual harassment with tangible economic consequences, and holding that it proscribes some harassment without such consequences—so-called "work environment" harassment—as well).

4. See, e.g., Cooper & Hodgson, 'Meritor' Supports EEOC View of Sex Harassment, *LEGAL TIMES*, July 7, 1986, at 20.

5. See, e.g., Cook, *The New Bias Battleground: Sex Harassment*, *NAT'L L.J.*, July 7, 1986, at 1.

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

7. E.g., Levy, *The Change in Employer Liability for Supervisor Sexual Harassment after Meritor: Much Ado about Nothing*, 42 *ARK. L. REV.* 795, 823 (1989) (stating that "*Meritor* has only muddied the waters on the employer liability issue"); Note, *A View Against Strict Employer Liability Under Title VII for Sexually Offensive Work Environments Created by Supervisory Personnel: Meritor Savings Bank v. Vinson*, 91 *DICK. L. REV.* 1157, 1175 (1987) (asserting that *Meritor* has left the issue of employer liability for sexual harassment "in a state of turmoil" and "has produced confusion and inconsistent results"); Comment, *Inadequacies in Civil Rights Law: The Need for Sexual Harassment Legislation*, 48 *OHIO ST. L.J.* 1151, 1151 & n.7 (1987) (finding that in the employer liability and other contexts, *Meritor* "raised as many questions as it answered, and left the lower courts to wade through a swamp of ambiguities").

was a bad ruling from almost every conceivable angle. Part II briefly surveys the evolution of sexual harassment law and the rules courts have applied to determine employer liability. Part III examines in detail the agency law rationales that allegedly underlie those rules, finding them individually and collectively defective. This examination also suggests that agency law is not well suited to the task the Court assigned it. Part IV bolsters this suggestion in two different, though complementary, ways. First, it argues that the *Meritor* Court almost certainly was wrong when it ruled that Title VII requires courts to consult agency law when determining an employer's sexual harassment liability. Second, it argues that agency law is useless for resolving the policy questions underlying the debate about the scope of such liability. Although the main aim of this Article is to attack *Meritor's* command to employ agency principles, Part IV contains some tentative recommendations on the employer liability issue.

II. EMPLOYER LIABILITY FOR EMPLOYEE SEXUAL HARASSMENT: AN OVERVIEW

A. Title VII Sexual Harassment Claims

Because Title VII's ban on gender-based discrimination by employers⁸ was a late addition to the Civil Rights Act of 1964,⁹ little legislative history exists to assist courts in applying Title VII to sexual harassment claims.¹⁰ Despite Congress's failure to consider the subject, courts began to recognize sexual harassment claims¹¹ during the late 1970s.¹² By the

8. 42 U.S.C. §§ 2000e-2(a)(1)-(2), (d) (1988). For the definition of the term "employer," see *id.* § 2000e(b) and *infra* subpart IV(B)(1).

9. See, e.g., Note, *Between the Boss and a Hard Place: A Consideration of Meritor Savings Bank, FSB v. Vinson and the Law of Sexual Harassment*, 67 B.U. L. REV. 445, 449 n.16 (1987) [hereinafter Note, *Between the Boss and a Hard Place*]; Note, *Employer Liability Under Title VII for Sexual Harassment after Meritor Savings Bank v. Vinson*, 87 COLUM. L. REV. 1258, 1259 n.9 (1987) [hereinafter Note, *Employer Liability*] (both describing the history of this provision's addition to Title VII).

10. See, e.g., Comment, *supra* note 7, at 1152 (noting that Title VII's legislative history "shows absolutely no attempt to address the sexual harassment issues that courts and agencies are currently regulating under the Act"); see also *id.* at 1164-66.

11. Like most commentary on sexual harassment, this Article addresses only the paradigm instance of such behavior: sexual harassment visited upon women by their male supervisors or coemployees. But sexual harassment of men by women occasionally occurs, and it is actionable under Title VII. See, e.g., 1 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 41.63(f) (1991). In addition, some courts have recognized Title VII claims for homosexually-oriented harassment. See, e.g., *id.* § 41.63(g). At least one court has suggested, however, that employees of either gender who suffer harassment from a bisexual supervisor do not have a sex discrimination claim because the supervisor's actions would affect male and female employees alike. See *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977). Finally, some courts have recognized Title VII claims by employees who were denied an employment opportunity or benefit due to another employee's acquiescence in sex-related behavior. See, e.g., 1 A. LARSON & L. LARSON, *supra*, § 41.63(i); see also

early 1980s, courts,¹³ commentators,¹⁴ and the Equal Employment Opportunity Commission (EEOC)¹⁵ had embraced the now-familiar distinction between quid pro quo sexual harassment and work environment sexual harassment.¹⁶

Supervisor conduct that conditions an employee's tangible job status or job rewards on her submission to unwelcome sex-related behavior is quid pro quo sexual harassment.¹⁷ The link between submission and tangible job consequences may be overt.¹⁸ But liability for quid pro quo sexual harassment also exists when employers base employment decisions on an employee's refusal to submit, even though no express quid pro quo was proffered.¹⁹ In either case, courts generally agree that the

Equal Employment Opportunity Commission Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(g) (1990) [hereinafter EEOC Guidelines].

Employees who have been subjected to sexual harassment also may have various intentional tort claims against the offending individuals and their employer, and they may even have equal protection and RICO claims as well. See generally Dworkin, Ginger & Mallor, *Theories of Recovery for Sexual Harassment: Going Beyond Title VII*, 25 SAN DIEGO L. REV. 125 (1988). Finally, sexual harassment may be actionable under state employment discrimination laws. E.g., B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 428 (2d ed. 1983). These avenues of recovery are important because of the relatively limited remedies available to harassment victims under Title VII. Title VII remedies are primarily equitable in nature and normally do not include compensatory or punitive damages. See, e.g., 1 A. LARSON & L. LARSON, *supra*, § 41.66(c). Recently, however, Congress has attempted to amend Title VII to allow compensatory and punitive damages. See, e.g., H.R. REP. NO. 856, 101st Cong., 2d Sess. (proposing to allow punitive as well as compensatory damage awards for employer behavior that is malicious or recklessly or callously indifferent).

12. On the early development of sexual harassment claims under Title VII, see, e.g., Atanasio, *Equal Justice Under Chaos: The Developing Law of Sexual Harassment*, 51 U. CIN. L. REV. 1, 1-5 (1982); Comment, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328, 329-37 (1988).

13. See, e.g., *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983) (recognizing explicitly the distinction); *Henson v. City of Dundee*, 682 F.2d 897, 901-06, 908-13 (11th Cir. 1982) (considering each type of claim).

14. See, e.g., Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1454 (1984) and sources cited therein.

15. See EEOC Guidelines, *supra* note 11, § 1604.11(a) (recognizing both claims but not using these terms).

16. For somewhat varying accounts of how these two sexual harassment claims fit within Title VII's proof rules, see, e.g., Bryan, *Sexual Harassment as Unlawful Discrimination Under Title VII of the Civil Rights Act of 1964*, 14 LOY. L.A. L. REV. 25, 39-47 (1980); Note, *supra* note 14, at 1454-57; Note, *The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717, 1721 n.17 (1989).

17. Because supervisors have sufficient delegated power to leverage compliance with their sexual demands and coworkers do not, only supervisors are capable of quid pro quo harassment. See Note, *Employer Liability*, *supra* note 9, at 1260. The range of sex-related behaviors encompassed by quid pro quo sexual harassment is wide. See, e.g., EEOC Guidelines, *supra* note 11, § 1604.11(a) (announcing that unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature may constitute quid pro quo sexual harassment).

18. E.g., *Henson*, 682 F.2d at 900, 911 (employee who alleged that her boss told her that he would help her attend a police academy if she would have sexual relations with him stated a quid pro quo claim).

19. See, e.g., *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599 (7th

employee must have suffered some tangible job detriment to pursue a quid pro quo claim.²⁰

A tangible employment-related detriment, however, is not required in suits alleging work environment sexual harassment.²¹ In such cases, the harassment victim typically is subjected to unwelcome²² sex-related behavior²³ that has the purpose or effect of unreasonably interfering with her work performance or of creating an intimidating, hostile, or offensive working environment.²⁴ In the archetypal work environment case, a woman suffers a barrage of sex-related inquiries, jokes, slurs, propositions, touchings, and other forms of abuse.²⁵ For such behavior to violate Title VII, however, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.²⁶ Both supervisors and fellow employees may engage in work environment sexual harassment.

B. Employer Liability for Sexual Harassment Prior to Meritor

While they were fashioning the substantive standards for quid pro quo and work environment sexual harassment, courts also had to consider when employers should be liable for sexual harassment by super-

Cir. 1985), in which the plaintiff was fired for rejecting her supervisor's sexual advances, and the only utterances even approximating an express quid pro quo were statements by the supervisor that things would go "easier" with the plaintiff if she would "go out" with him and "get together with him." *Id.* at 601-02.

20. *E.g.*, *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989); *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986); *Jones v. Flagship Int'l*, 793 F.2d 714, 721-22 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); *Henson*, 682 F.2d at 909.

21. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-67 (1986). *See also* *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988) (excluding tangible job detriment from a list of elements required to recover for work environment harassment); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1557 (11th Cir. 1987) (same); *Henson*, 682 F.2d at 902 (obviating the requirement that an employee suffering work environment harassment prove that she has suffered a tangible job detriment).

22. Thus, an employee who welcomed, encouraged, or participated in the allegedly harassing conduct may not bring a work environment claim. *See, e.g.*, *Gan v. Kepro Circuit Sys., Inc.*, 28 Fair Empl. Prac. Cas. (BNA) 639, 641 (E.D. Mo. 1982).

23. Actually, the offensive conduct need not be sexual in nature so long as it would not have occurred unless its victims were of a particular gender. *See, e.g.*, *Hall*, 842 F.2d at 1013-14 (allowing a cause of action for calling one female employee "Herpes" and urinating into the gas tank of another's car because each incident, even though not sexual, was attributable to the gender of the victim).

24. *E.g.*, EEOC Guidelines, *supra* note 11, § 1604.11(a)(3); *see also Meritor*, 477 U.S. at 65-66 (quoting the Guidelines' formulation with approval); *Hall*, 842 F.2d at 1013 (quoting *Meritor* and the Guidelines).

25. For some fairly representative examples, *see, e.g.*, *Katz*, 709 F.2d at 254; *Bundy v. Jackson*, 641 F.2d 934, 939-40, 943-46 (D.C. Cir. 1981). For an especially striking example, *see Hall*, 842 F.2d at 1011-15.

26. *Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 904).

visors, employees, and other parties.²⁷ After some early uncertainty,²⁸ courts settled into a pattern that largely persists to this day.²⁹ For quid pro quo harassment by supervisors with authority to make employment decisions affecting the plaintiff, strict employer liability soon became the norm.³⁰ But the appropriate liability standard for work environment harassment by supervisors occasioned some dispute.³¹ The dominant view was that employers are liable for such harassment only when they had actual or constructive knowledge of it and failed to take appropriate corrective action.³² The minority view was that supervisory work environment harassment, like quid pro quo harassment, should subject employers to strict liability.³³ This dispute, however, did not ex-

27. Because the question has arisen infrequently, this Article does not consider employer liability for sexual harassment by nonemployees. The EEOC has declared that employers should be liable for such harassment when they (or their agents or supervisors) knew or should have known of it and failed to take immediate and appropriate corrective action. EEOC Guidelines, *supra* note 11, § 1604.11(e). On this subject, see 1 A. LARSON & L. LARSON, *supra* note 11, § 41.65(d) and cases discussed therein.

28. See, e.g., *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048-49 (3d Cir. 1977) (defining the apparent standard as employer's actual or constructive knowledge of the harassment and its failure to take prompt and appropriate remedial action); *Meyers v. ITT Diversified Credit Corp.*, 527 F. Supp. 1064, 1069 (E.D. Mo. 1981) (holding that standard is actual or constructive knowledge of harassment with no attempt to rectify situation and suggesting that no liability exists when plaintiff failed to avail herself of employer's internal complaint procedures); *Ludington v. Sambo's Restaurants, Inc.*, 474 F. Supp. 480, 483 (E.D. Wis. 1979) (holding that apparent standard is that employer must have sanctioned acts of its supervisory employees); *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1389 (D. Colo. 1978) (noting that although plaintiff need not prove an employer's discriminatory policy or practice, an employer that lacked knowledge of harassment is not liable if it had a policy or history of discouraging harassment and plaintiff failed to present her claim to a publicized grievance board; an employer also is not liable if it was aware of harassment and rectified it); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977) (holding that harassment must be pursuant to company policy or plan to be actionable). These cases did not expressly distinguish between quid pro quo and work environment harassment, and they did not indicate whether the liability standards they announced were applicable to all forms of harassment.

29. See generally *infra* notes 49-52 and accompanying text (describing employer liability after *Meritor*).

30. E.g., *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986) (failing to discuss *Meritor*, but decided after it); *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 604 (7th Cir. 1985); *Katz v. Dole*, 709 F.2d 251, 255 n.6 (4th Cir. 1983) (dictum); *Henson v. City of Dundee*, 682 F.2d 897, 909-10 (11th Cir. 1982); *Schroeder v. Schock*, 42 Fair Empl. Prac. Cas. (BNA) 1112, 1113-14 (D. Kan. 1986) (failing to discuss *Meritor*, but decided after it); see generally 1 A. LARSON & L. LARSON, *supra* note 11, § 41.65(a), at 8-190 & n.70 (finding that those circuits which have addressed the issue are unanimous in holding an employer liable for tangible economic detriment caused by a supervisor who uses authority vested in him to commit quid pro quo harassment; mainly citing pre-*Meritor* cases).

31. See, e.g., Note, *Employer Liability*, *supra* note 9, at 1262-63; Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1471-72 (1986) (noting and describing the disagreement).

32. E.g., *Jones v. Flagship Int'l*, 793 F.2d 714, 720 (5th Cir. 1986); *Katz*, 709 F.2d at 255; *Henson*, 682 F.2d at 905.

33. These cases tended to assert that employers should be strictly liable for all sexual harass-

tend to work environment harassment by nonsupervisory coemployees. Employers were liable for this type of harassment only when they had actual or constructive knowledge of the harassment and failed to take appropriate corrective action.³⁴

C. Meritor Savings Bank, FSB v. Vinson

Before 1986, therefore, the only serious issue was the extent of employer liability for work environment harassment by supervisors. *Meritor Savings Bank, FSB v. Vinson* presented the Court with precisely this question.

In *Meritor* the plaintiff, Mechelle Vinson, sued her employer, the Capital City Federal Savings and Loan Association,³⁵ and her supervisor, Sidney Taylor, for Taylor's alleged sexual harassment. According to Vinson, Taylor fondled her during working hours, exposed himself to her, entered the women's restroom while she was there alone, compelled her to have sexual intercourse with him some forty to fifty times over a two-year period, and raped her on a few occasions. However, Vinson never complained about this behavior under Capital's grievance procedure or otherwise, allegedly because she feared Taylor. Both Taylor and Capital denied Vinson's allegations; Capital also argued that even if those allegations were true, the harassment did not occur with its knowledge, consent, or approval. It was undisputed that Vinson had received several promotions during her four years of employment.

The district court entered judgment for both defendants, finding that Vinson had not suffered sexual harassment.³⁶ The court concluded

ment by supervisors. *See, e.g.,* *Vinson v. Taylor*, 753 F.2d 141, 147-51 (D.C. Cir. 1985), *aff'd sub nom.* *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), discussed *infra* at notes 39-40 and accompanying text (holding the employer strictly liable for any form of sexual harassment by supervisors with appropriate authority); *Bundy v. Jackson*, 641 F.2d 934, 943, 947 (D.C. Cir. 1981) (holding, in a case involving supervisory work environment harassment, that the employer was liable for harassment by supervisors regardless of whether it knew or should have known of the harassment); *cf. Jeppsen v. Wunnicke*, 611 F. Supp. 78, 82-83 (D. Alaska 1985) (obviating the need for plaintiff to prove an employer's knowledge of the harassment in a claim for work environment harassment by supervisor). This also was the position taken by the EEOC. EEOC Guidelines, *supra* note 11, § 1604.11(c).

34. *E.g., Katz*, 709 F.2d at 255 (defining liability standard in case involving work environment harassment by both supervisors and nonsupervisors as employer's actual or constructive knowledge of environment and its failure to take prompt and adequate remedial action); *see also* Note, *Employer Liability*, *supra* note 9, at 1262 & n.29; Note, *Employment Discrimination—Defining an Employer's Liability Under Title VII for On-The-Job Sexual Harassment: Adoption of a Bifurcated Standard*, 62 N.C. L. Rev. 795, 806 n.109 (1984). The EEOC's 1980 Guidelines also took this position. EEOC Guidelines, *supra* note 11, § 1604.11(d). After quoting this provision, Larson declares: "A similar rule is generally applied by the courts. This is not a controversial area." 1 A. LARSON & L. LARSON, *supra* note 11, § 41.65(c), at 8-201.

35. Capital City later became the Meritor Savings Bank.

36. *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37, 40-43 (D.D.C. 1980).

that her promotions had been obtained on merit alone, that she had not been required to grant Taylor sexual favors to obtain them, and that any sexual relations between herself and Taylor were voluntary on her part.³⁷ It also held that Capital could not be liable because it had no notice of Taylor's alleged actions, and concluded that notice to an allegedly harassing supervisor like Taylor is not notice to his employer.³⁸

Although the district court's findings apparently disposed of any quid pro quo claim by Vinson, the court did not differentiate between quid pro quo and work environment harassment in its opinion. The District of Columbia Court of Appeals seized upon this omission in reversing the district court, holding that Vinson had stated a claim for work environment harassment.³⁹ More important for the purposes of this Article, the D.C. Circuit also held that Capital's failure to receive notice was irrelevant because Title VII makes employers strictly liable for discriminatory acts by supervisors.⁴⁰

The Supreme Court affirmed the appellate court's decision. But while it essentially agreed with the D.C. Circuit that Vinson had stated a claim for work environment harassment,⁴¹ it differed considerably on the employer liability question.⁴² Writing for the Court, Chief Justice Rehnquist "decline[d] . . . to issue a definitive rule on employer liability."⁴³ He asserted, however, that "Congress wanted courts to look to agency principles for guidance in this area."⁴⁴ In language strikingly similar to that used in the EEOC's amicus curiae brief,⁴⁵ he justified

37. *Id.* at 42.

38. *Id.* at 41-42.

39. *Vinson v. Taylor*, 753 F.2d 141, 144-46 (D.C. Cir. 1985). The court of appeals overcame the district court's finding that any sexual relations between Vinson and Taylor were voluntary by holding that the voluntariness of a victim's submission does not defeat her claim. *Id.* at 145-46.

40. *Id.* at 146-52.

41. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-67 (1986). On the voluntariness issue, the Court said: "[T]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" *Id.* at 68.

42. Justice Marshall's concurring opinion basically adopted the D.C. Circuit's rule of strict liability for supervisory harassment. *Id.* at 74-77 (Marshall, J., concurring). Justice Marshall was joined by Justices Brennan, Blackmun, and Stevens. Justice Stevens, however, also joined the majority opinion, mainly "[b]ecause I do not see any inconsistency between the two opinions." *Id.* at 73 (Stevens, J., concurring).

43. *Id.* at 72.

44. *Id.*; see also Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 22-24, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979) [hereinafter EEOC Brief]. As Justice Rehnquist noted, the EEOC's position in *Meritor* was "in some tension with the EEOC Guidelines, which hold an employer liable for the acts of its agents without regard to notice." 477 U.S. at 71. On the Guidelines' position, see EEOC Guidelines, *supra* note 11, § 1604.11(c).

45. Here, the Brief stated:

this resort to agency law by invoking Title VII's definition of the term "employer".⁴⁶

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. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors.⁴⁷

The Court also asserted that the absence of notice to an employer does not necessarily insulate it from liability, and that employers do not necessarily escape liability merely because they maintained a grievance procedure that the plaintiff failed to use.⁴⁸

D. Employer Liability After Meritor

The employer liability picture sketched earlier has changed remarkably little in the years since *Meritor* was decided. For example, courts continue to hold employers strictly liable for quid pro quo sexual harassment.⁴⁹ And they continue to find employer liability for work environment harassment by coemployees only when the employer had actual or constructive knowledge of the harassment and failed to take appropriate corrective action.⁵⁰ Moreover, post-*Meritor* courts continue

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 employees for which employers under Title VII are to be held responsible.

EEOC Brief, *supra* note 44, at 22.

46. *Meritor*, 477 U.S. at 72; see 42 U.S.C. § 2000e(b) (1988) (defining employer to include agent); *infra* subpart IV (B)(1).

47. 477 U.S. at 72 (citing RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958)).

48. *Id.* (conceding that these factors nonetheless are relevant). On the latter point, Justice Rehnquist noted that Capital's nondiscrimination policy did not specifically address sexual harassment and that its grievance procedure required an employee to complain first to her supervisor, in this case Taylor. Thus, "[the bank's] contention that [Vinson's] failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." *Id.* at 73.

49. *E.g.*, *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989); *Spencer v. General Elec. Co.*, 697 F. Supp. 204, 217 n.14 (E.D. Va. 1988) (dictum), *aff'd*, 894 F.2d 651 (4th Cir. 1990); *Sowers v. Kemira*, 701 F. Supp. 809, 824 (S.D. Ga. 1988); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 780-81 (S.D. Ohio 1988).

Some of these cases assert, probably wrongly, that *Meritor* announced a strict liability rule for quid pro quo harassment. Before telling courts to look to agency principles, the *Meritor* Court discussed the parties' various positions on the employer liability question, among them the EEOC's view that strict liability is appropriate in quid pro quo cases. *Meritor*, 477 U.S. at 70-71. Despite its general approval of the EEOC's approach, however, the Court did not explicitly endorse this rule. Also, quid pro quo harassment was not at issue by the time the Court decided the case.

50. See, *e.g.*, *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464-65 (7th Cir. 1990); *Baker v.*

to disagree about the appropriate liability standard for work environment harassment by supervisors. Although occasionally a court will use strict liability in such cases,⁵¹ most courts continue to apply the actual-or-constructive-knowledge standard.⁵²

Most courts employing this standard consider complaints to middle- or upper-level management sufficient to give an employer actual knowledge.⁵³ Even if an employer lacks actual knowledge, however, pervasive harassment usually creates constructive knowledge.⁵⁴ Of course, employers with actual or constructive knowledge can avoid liability by promptly taking corrective action⁵⁵ that is reasonably calculated to prevent further harassment.⁵⁶ Failure to take such action can doom an employer to liability.⁵⁷

Absent her employer's constructive knowledge, a victim who fails to report harassment to some responsible manager or supervisor will have difficulty recovering under the actual-or-constructive-knowledge

Weyerhaeuser Co., 903 F.2d 1342, 1344 (10th Cir. 1990); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1015-16 (8th Cir. 1988); *Kirkland v. Brinias*, 741 F. Supp. 692, 694 (E.D. Tenn. 1989); *Hunter v. Countryside Ass'n for the Handicapped, Inc.*, 723 F. Supp. 1277, 1278-79 (N.D. Ill. 1989).

51. *Ross v. Double Diamond, Inc.*, 672 F. Supp. 261, 273-74 (N.D. Tex. 1987) (following the EEOC's Sexual Harassment Guidelines and Justice Marshall's concurrence in *Meritor*); *cf. Volk v. Coler*, 845 F.2d 1422, 1436 (7th Cir. 1988) (stating flatly that an employer is strictly liable for sexual harassment by supervisory employees without differentiating between quid pro quo and work environment harassment; the case apparently involved both forms of harassment).

52. *E.g.*, *Brooms v. Regal Tube Co.*, 881 F.2d 412, 420-21 (7th Cir. 1989); *Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989), *aff'd & rev'd in part on different grounds*, 900 F.2d 27 (4th Cir. 1990); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989); *Ross v. Twenty-Four Collection, Inc.*, 681 F. Supp. 1547, 1552 (S.D. Fla. 1988), *aff'd*, 875 F.2d 873 (11th Cir. 1989).

53. *E.g.*, *Waltman v. International Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989) (holding that plaintiff can show actual notice by proving that she complained to higher management; a complaint to her supervisor apparently sufficed here); *Hall*, 842 F.2d at 1016 (finding complaints to a foreman sufficient).

54. *E.g.*, *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989); *Waltman*, 875 F.2d at 478; *Silverstein v. Metroplex Communications, Inc.*, 678 F. Supp. 863, 870 (S.D. Fla. 1988) (finding harassment not so pervasive as to put employer on constructive notice); 1 A. LARSON & L. LARSON, *supra* note 11, § 41.65(a), at 8-195; *see also Meritor*, 477 U.S. at 72 (noting that the trial court had yet to determine whether Taylor's harassment was so pervasive and continuous that the employer must have become conscious of it).

55. *E.g.*, *Hacienda Hotel*, 881 F.2d at 1515-16; *Hunter*, 723 F. Supp. at 1279; *Silverstein*, 678 F. Supp. at 870.

56. *Guess*, 913 F.2d at 465; *Brooms*, 881 F.2d at 421. Another possible requirement is that the remedial action leave the victim no worse off than she would have been had her work life been free of harassment. *Guess*, 913 F.2d at 465 (suggesting as examples of remedies that make the victim "worse off" transfers that reduce her wages, decrease the amenities of her work, or impair her prospects of promotion).

57. *See, e.g.*, *Waltman*, 875 F.2d at 478-81; *Hall*, 842 F.2d at 1016; 1 A. LARSON & L. LARSON, *supra* note 11, § 41.65(b), at 8-200 (noting also that a failure to investigate may subject an employer to liability).

standard.⁵⁸ Moreover, although the EEOC's Sexual Harassment Guidelines might be interpreted to require employers to adopt an antiharassment policy,⁵⁹ the courts apparently have been reluctant to require them to implement preventive measures.⁶⁰ Still, the courts generally seem to have followed *Meritor's* statement that a victim's failure to use an existing grievance procedure or antidiscrimination policy does not necessarily insulate her employer from liability.⁶¹

III. EMPLOYER LIABILITY UNDER AGENCY PRINCIPLES

Meritor did little to change the rules for determining employer liability in sexual harassment cases.⁶² But it has affected the way courts approach the question. Although agency law rationales occasionally appeared in pre-*Meritor* decisions on employer liability, they have become much more common since the case was decided.⁶³ This section details

58. *E.g.*, *Silverstein*, 678 F. Supp. at 870 (holding for the employer in suit for work environment harassment by a supervisor and coworkers when plaintiff failed to complain despite having the opportunity to do so, and harassment was not so pervasive as to put the employer on constructive notice).

59. The EEOC Guidelines provide:

Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

EEOC Guidelines, *supra* note 11, § 1604.11(f). The Guidelines do not state, however, that employers are liable under Title VII for failing to meet these obligations. On corporate antiharassment programs, see generally *infra* subpart IV(C)(2).

60. See 1 A. LARSON & L. LARSON, *supra* note 11, § 41.65(b), at 8-198 (stating that "[u]nder certain circumstances, an employer's failure to implement preventive measures may contribute to a finding of liability;" citing and discussing only one case in support of this statement). *But see Paroline*, 879 F.2d at 107 (stating that it will impose liability on an employer who anticipated or reasonably should have anticipated that the plaintiff would suffer sexual harassment, but failed to take action reasonably calculated to prevent such harassment).

61. See, *e.g.*, *Hacienda Hotel*, 881 F.2d at 1516 (holding that plaintiff's failure to use employer's internal procedures did not bar suit when employers did not specifically ban sexual harassment and required an initial report to a supervisor who engaged in or condoned the harassment); *Yates v. Avco Corp.*, 819 F.2d 630, 635 (6th Cir. 1987) (holding that employer's antiharassment policy failed to protect it from liability because it gave responsibility for reporting and correcting the harassment to supervisors who themselves might harass subordinates, it failed to work in practice, and it was vague). Properly constructed and implemented antiharassment policies, however, obviously can improve an employer's legal position in certain circumstances. See, *e.g.*, 1 A. LARSON & L. LARSON, *supra* note 11, § 41.65(b), at 8-198.

62. For the reasons why *Meritor* matters nonetheless, see *infra* subpart IV(B) & Part V.

63. Some post-*Meritor* decisions considering employer liability, however, contain no discernible discussion of agency law. See *Brooms*, 881 F.2d 412; *Paroline*, 879 F.2d 100; *Waltman*, 875 F.2d 468; *Spencer v. General Elec. Co.*, 697 F. Supp. 204 (E.D. Va. 1988), *aff'd*, 894 F.2d 651 (4th Cir. 1990); *Ross v. Double Diamond, Inc.*, 672 F. Supp. 261 (N.D. Tex. 1987). As the subsequent discussion reveals, however, agency rationales have been used to justify the standards applied in these cases.

the most important agency-based approaches courts have used to legitimate the employer liability rules they apply.⁶⁴ It then examines a set of agency principles that seem highly relevant to this question, but that have been ignored by courts, commentators, and the EEOC.

The courts' use of agency law in sexual harassment cases is deeply flawed in technical legal terms. Each rationale, approach, or set of rules discussed below forms a distinct basis of liability. Thus, courts should consider them seriatim.⁶⁵ Only occasionally, however, does this occur.⁶⁶ Instead, courts tend to emphasize particular rationales in particular liability settings, leading one to suspect that the rationale was chosen to generate a preordained result. The rationales themselves, moreover, are often dubious. Some have questionable roots in agency law, some misstate or misapply accepted agency rules, and some involve rules whose relevance to the employer liability issue is questionable.

A. The Henson "Authority" Rationale

Although employer liability for work environment harassment by supervisors continues to provoke disagreement, an actual-or-constructive-knowledge standard predominates in this area.⁶⁷ Perhaps the most important argument against this standard is that because Title VII makes employers strictly liable for discrimination by supervisors, and because courts impose strict liability when supervisors engage in quid pro quo harassment, supervisory work environment harassment should therefore be treated similarly.⁶⁸ The actual-or-constructive-knowledge standard's main justification, on the other hand, employs agency law concepts. The most influential statement of this justification appears in the Eleventh Circuit's 1982 decision in *Henson v. City of Dundee*.⁶⁹

64. For a few others that have not been widely used, see EEOC: Policy Guidance on Sexual Harassment, 8 Lab. Rel. Rep. (BNA), 405:6681, 6693-99 (March 19, 1990) [hereinafter EEOC Policy Guide].

65. In *Meritor* Justice Rehnquist cautioned that "such common-law principles may not be transferable in all their particulars to Title VII." 477 U.S. at 72. But if courts are allowed to pick and choose among the smorgasbord of agency rationales presented below, the "guidance," *id.*, presumably provided by agency law is no guidance at all.

66. See *Fields v. Horizon House, Inc.*, No. 86-4343, 1987 U.S. Dist LEXIS 11315 (E.D. Pa. 1987) (conducting such a seriatim review). In addition, a March 19, 1990 EEOC policy guide for its field office personnel employs what is arguably a seriatim approach while attempting to impose some order on the confusion generated by *Meritor* and apparently trying to inch the EEOC toward tougher employer liability standards. See EEOC Policy Guide, *supra* note 64, at 6693-99.

67. See *supra* notes 31-33, 51-52 and accompanying text.

68. *E.g.*, *Meritor*, 477 U.S. at 75-77 (Marshall, J., concurring).

69. 682 F.2d 897 (11th Cir. 1982). A similar rationale appears in *Meritor*, 477 U.S. at 70-71, where the Court quoted with apparent approval, but did not expressly adopt, the reasoning contained in the EEOC Brief, *supra* note 44, at 23-24, which in turn cited *Henson*. For still other rationales of this kind, see, *e.g.*, *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989); EEOC Policy Guide, *supra* note 64, at 6694 (using the rationale only to justify strict

In *Henson*, which involved both quid pro quo and work environment harassment by a supervisor, the court justified its bifurcated liability standard in the following fashion:

The environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, . . . coworkers, . . . or even strangers to the workplace. The capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual. When a supervisor gratuitously insults an employee, he generally does so for his reasons and by his own means. He thus acts outside the actual or apparent scope of the authority he possesses as a supervisor. His conduct cannot automatically be imputed to the employer any more so than can the conduct of an ordinary employee.

The typical case of *quid pro quo* sexual harassment is fundamentally different. In such a case, the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. Therein lies the *quid pro quo*. In that case, the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose. He acts within the scope of his actual or apparent authority to "hire, fire, discipline or promote." . . . Because the supervisor is acting within at least the apparent scope of the authority entrusted to him by the employer when he makes employment decisions, his conduct can fairly be imputed to the source of his authority.⁷⁰

Although this statement gives arguments for imposing strict liability in quid pro quo cases and for treating supervisory work environment harassment differently, it does not justify any particular standard in the latter situation. In a footnote, however, the court concluded that an employer's liability for work environment harassment by supervisors "is coextensive with its liability for the acts of an employee," and that under the EEOC Guidelines this liability is determined under an actual-or-constructive-knowledge standard.⁷¹

Two distinct contentions lie beneath *Henson's* superficially plausible argument. Both involve the familiar agency concept of authority. Of authority's many applications in agency law, probably the most important is its use to determine a principal's liability on contracts made by an agent.⁷² In such cases, of course, the contract binds the principal if the agent acted within her actual or apparent authority.⁷³

liability in quid pro quo cases).

Henson has been cited fairly frequently in Eleventh Circuit cases adopting the actual-or-constructive-knowledge test for work environment harassment by supervisors. *E.g.*, *Steele*, 867 F.2d at 1316; *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988); *Ross v. Twenty-Four Collection, Inc.*, 681 F. Supp. 1547, 1552 (S.D. Fla. 1988), *aff'd*, 875 F.2d 873 (11th Cir. 1989); *Silverstein v. Metroplex Communications, Inc.*, 678 F. Supp. 863, 870 (S.D. Fla. 1988); *see also Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983) (citing *Henson*).

70. 682 F.2d at 910 (citations and footnotes omitted).

71. *Id.* at 910 n.20 (quoting EEOC Guidelines, *supra* note 11, § 1604.11(d)).

72. *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 140-211 (1958).

73. *E.g., id.* § 140 (suggesting that a principal's liability to a third person on a transaction conducted by an agent may be based on, *inter alia*, the fact that the agent was authorized or was apparently authorized).

The *Restatement (Second) of Agency* generally defines authority as an agent's ability to affect his principal's legal relations.⁷⁴ Authority may be express, implied, or apparent. Express authority flows from the principal's actual words to the agent.⁷⁵ Implied authority may be inferred from the principal's words and other conduct, from the nature of the agency business and business customs, and from the circumstances and relations of the parties.⁷⁶ Express authority and implied authority together comprise actual authority.⁷⁷ Apparent authority results from communications of the principal to third parties that cause those parties to form a reasonable belief that an agent has authority.⁷⁸

The *Henson* court mistakenly applied these concepts of authority when it argued that supervisory quid pro quo harassment should be treated differently than supervisory work environment harassment. The latter, the court suggested, is outside a supervisor's actual or apparent authority and thus cannot be imputed to his employer, while the former involves a supervisor's actual or apparent authority to hire, fire, and promote and thus can be imputed to his employer.⁷⁹ But the point of the *Henson* exercise is to determine an employer's liability for sexual harassment. Although supervisors who commit quid pro quo harassment generally have actual and apparent authority of the kinds just listed, rarely do they have authority to use these powers to harass subordinates.⁸⁰ Employers are extremely unlikely to confer such authority

74. See *id.* §§ 7-8.

75. "It is possible for a principal to specify minutely what the agent is to do. To the extent that he does this, the agent may be said to have express authority." *Id.* § 7 cmt. c; see also *id.* § 26 (suggesting that authority can be created by principal's written or spoken words to agent, reasonably interpreted).

76. "[M]ost authority is created by implication. . . . These powers are all implied or inferred from the words used, from customs and from the relations of the parties. They are described as 'implied authority.'" *Id.* § 7 cmt. c; see also *id.* §§ 26, 33-35, 43 (discussing the creation and interpretation of, *inter alia*, implied authority).

77. *E.g.*, H. REUSCHLEIN & W. GREGORY, *AGENCY AND PARTNERSHIP* 36 (1979). The *Restatement* calls actual authority "authority." See *RESTATEMENT (SECOND) OF AGENCY* § 7 (1958) and its comments.

78. *RESTATEMENT (SECOND) OF AGENCY* § 27 (1958) (suggesting that apparent authority is created as to a third person by words or other conduct of the principal that, reasonably interpreted, cause the third person to believe that the principal consents to have an act done on his behalf by the agent or a person purporting to act as an agent).

79. It should be noted that under the *Restatement*, at least, employees always are agents. *E.g.*, *id.* § 2 ("A servant is an agent."); *id.* § 25 cmt. a ("[A] servant is an agent of a special kind."); see also *id.* § 218 Introductory Note (noting the definition of servants in § 2 based on theory that they are a particular kind of agent). Thus the employer-employee relationship is a principal-agent relationship as well.

80. The traditional doctrine of employment at will, which says that employees not hired for a definite term can be fired at any time for any reason, is of no use to those who would urge the contrary. First, many states now recognize various exceptions to the doctrine; in some of those states an employee terminated for refusing to engage in sex-related behavior may have a wrongful discharge claim. See, *e.g.*, Dworkin, Ginger & Mallor, *supra* note 11, at 144-46. More important,

expressly.⁸¹ Claims that a supervisor had implied or apparent authority to harass almost certainly will fail if, as is increasingly common today,⁸² the employer maintains an antidiscrimination or antiharassment policy.⁸³

Thus, because quid pro quo harassment is so infrequently within a supervisor's actual or apparent authority, *Henson's* reasoning actually suggests that, like employer liability for work environment harassment, employer liability for quid pro quo harassment should be governed by the actual-or-constructive-knowledge standard. The *Henson* court, however, derived this standard from the EEOC's Sexual Harassment Guidelines rather than from agency law.⁸⁴ But if employer liability depends wholly on agency law, and if the authority rules just discussed are the only appropriate agency principles, it seems to follow that employers should never be liable for sexual harassment.

The *Henson* court also attempted to distinguish quid pro quo and work environment harassment by noting that with the former, a supervisor uses his authority as a lever to extort sexual favors. Although this distinction has little significance under the law of agency, to the *Henson* court it creates a second, practical justification for treating supervisory quid pro quo harassment differently than supervisory work environment harassment. Although in the former case the supervisor uses his authority to compel submission, in the latter, according to the court, it does him little good: "The capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual."⁸⁵ But as even the EEOC's *Meritor* brief conceded, the *Henson* court's statement "is contrary both to common sense and to practical experience."⁸⁶ The same delegated authority that gives supervisors

the present question is not the employer's inherent power to fire, but the authority it gives its supervisors.

81. *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (10th Cir. 1987) (asserting that sexual harassment is not within job description of any supervisor or worker in any reputable business).

82. For some survey data on the frequency with which employers are adopting antiharassment policies, see *infra* note 203 and accompanying text.

83. Implied authority cannot be inconsistent with the principal's express statements. *E.g.*, H. REUSCHLEIN & W. GREGORY, *supra* note 77, at 42. When an employer has communicated an antidiscrimination or antiharassment policy, subordinates are unlikely to form a reasonable belief that their supervisors have authority to harass, thus making apparent authority unlikely. See *infra* notes 107-09 and accompanying text. However, implied or apparent authority to harass might be possible where no relevant policy exists and the employer has allowed supervisors to harass subordinates over a period of time. See *infra* notes 110-13 and accompanying text.

84. Actually, the court could have justified this standard under the direct liability rules discussed *infra* at subpart III(D).

85. *Henson*, 682 F.2d at 910; see *supra* text accompanying note 70.

86. EEOC Brief, *supra* note 44, at 25 n.15.

leverage in quid pro quo cases also assists them in committing work environment harassment. Even though the powers that comprise this authority—firing, promotion, assignments, job perquisites, and so on—are not made part of an articulated trade, they still enable supervisors to retaliate against subordinates who resist their behavior.⁸⁷ Thus, *Henson's* second argument for distinguishing supervisory quid pro quo harassment from supervisory work environment harassment also rests on specious grounds.

B. *Respondeat Superior*

The *Henson* court stated that plaintiffs in quid pro quo and work environment cases must prove respondeat superior as one element of the sexual harassment claim.⁸⁸ Presumably the court meant to say imputed or vicarious liability, for the actual doctrine of respondeat superior did not figure in its opinion. The doctrine delineates some of the situations in which an employer is liable for the work-related torts of employees.⁸⁹ The *Restatement (Second) of Agency* formulates it as follows: "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."⁹⁰ Employees or servants, who always are agents under the *Restatement*,⁹¹ include those customarily described as "employees," as well as supervisors and high-level managers.⁹² Under the *Restatement's* formulation of the notoriously imprecise scope-of-employment test, an employee's conduct is within the scope of employment only if it is of the kind she is employed to perform, it occurs substantially within the authorized time and space

87. *E.g.*, Note, *Between the Boss and a Hard Place*, *supra* note 9, at 459. On some of the innumerable ways in which supervisors can make life miserable for subordinates who resist, see Levy, *supra* note 7, at 810-13.

88. 682 F.2d at 905, 909. Other courts sometimes do the same. See *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) (citing some examples while criticizing this tendency).

89. See W. SEAVEY, *LAW OF AGENCY* 141 (1964).

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

91. See *supra* note 79.

92. The *Restatement (Second) of Agency* provides:

The word "servant" does not exclusively connote a person rendering manual labor, but one who performs continuous service for another and who, as to his physical movements, is subject to the control or to the right to control of the other as to the manner of performing the service. . . . Thus, ship captains and managers of great corporations are normally superior servants, differing only in the dignity and importance of their positions from those working under them. The rules for determining the liability of the employer for the conduct of both superior servants and the humblest employees are the same; the application differs with the extent and nature of their duties.

RESTATEMENT (SECOND) OF AGENCY § 220 cmt. a (1958); see also *id.* § 220 (listing the factors considered when determining whether one is a servant). As the preceding quotation suggests, by far the most important of these factors is the principal's control over, or right to control, the physical details of the agent's work.

limits of the employment, and the employee at least partially intends the conduct to serve the employer.⁹³

Employers should virtually never be liable for sexual harassment if respondeat superior is the agency principle of choice because such behavior is rarely, if ever, within the scope of employment under the *Restatement's* criteria. The most important reason is the last scope-of-employment requirement: that the employee at least partially intends the conduct to serve the employer.⁹⁴ As Judge Richard Posner once remarked: "It would be the rare case where . . . harassment against a co-worker could be thought by the author of the harassment to help the employer's business."⁹⁵ Because sexual harassment hardly seems within the scope of an employee's employment, courts and commentators often conclude that employer liability cannot be justified under respondeat superior.⁹⁶

For this reason, one would think, courts should simply decline to

93. *Id.* § 228(1). If one employee intentionally uses force against another, the use of that force only falls within the scope of employment when it was "not unexpected" to the employer. *Id.*

As the text suggests, scope of employment and authority, while related, are distinct concepts under the *Restatement*. More precisely, under § 228(1) it appears that some elements of the scope-of-employment test depend upon an employee's authority, but some do not. This point seems to have escaped the authors of the EEOC's brief in *Meritor*, which asserted that: "An agent's actions are generally viewed as being within the scope of his employment if they represent the exercise of authority actually vested in him, or of authority which third parties reasonably believe him to possess by virtue of his principal's conduct . . ." EEOC Brief, *supra* note 44, at 22 (citing §§ 7-8 of the *Restatement*, which define an agent's actual and apparent authority, not an employee's scope of employment).

94. The *Restatement* provides: "An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed." RESTATEMENT (SECOND) OF AGENCY § 235 (1958). However, some courts may have abandoned this test. *See, e.g.,* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 504 (5th ed. 1984) [hereinafter PROSSER & KEETON]; Levy, *supra* note 7, at 800 & n.19.

In any event, there are other reasons why sexual harassment probably is outside the scope of employment. It is at least questionable whether sexual harassment is conduct of the kind an employee is employed to perform. *E.g.,* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1417-18 (10th Cir. 1987) (holding that sexual harassment is not within the job description of any supervisor or worker in any reputable business). Also, in cases where the harassment involves an intentional application of force, see *supra* note 93, it may not always have been "expectable" by the employer. However, because forbidden acts may fall within the scope of employment under *Restatement* § 230, an antidiscrimination or antiharassment policy would not necessarily insulate an employer from respondeat superior liability. Also, criminal or tortious acts may sometimes be within the scope of employment. RESTATEMENT (SECOND) OF AGENCY § 231 (1958).

95. Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1422 (7th Cir. 1986) (referring to racial harassment).

96. *E.g.,* Hall v. Gus Constr. Co., 842 F.2d 1010, 1015-16 (8th Cir. 1988); Hicks, 833 F.2d at 1406, 1418 (finding that the *Restatement's* respondeat superior provision gives "scant assistance"); Barnes v. Costle, 561 F.2d 983, 995-96 (D.C. Cir. 1977) (MacKinnon, J., concurring); Fields v. Horizon House, No. 86-4343, 1987 U.S. Dist LEXIS 11315 (E.D. Pa. Dec. 8, 1987); Note, *Between the Boss and a Hard Place*, *supra* note 9, at 460.

use respondeat superior in sexual harassment cases. Not all courts, however, have acted so sensibly. For example, several have used idiosyncratic formulations of the doctrine to find employers liable for employee sexual harassment.⁹⁷ On the other hand, a few courts have applied the doctrine conventionally to deny employer liability.⁹⁸ Of course, Chief Justice Rehnquist's *Meritor* opinion did caution that agency principles "may not be transferable in all their particulars to Title VII."⁹⁹ And perhaps it could be argued that the disarray just depicted reflects the courts' sensitivity to the equities of particular cases. But the result is a standardless discretion that is problematic for interpreting a national employment discrimination statute for which predictability surely has some value. Even if such discretion is desirable, it can be accomplished without resort to agency law.

C. *Restatement Section 219(2)(d)*

Courts that find respondeat superior inapplicable in sexual harassment cases sometimes turn to *Restatement (Second) of Agency* Section 219(2),¹⁰⁰ which contains certain exceptions to the doctrine. One such exception, Section 219(2)(d), provides:

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 to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.¹⁰¹

This provision contains two distinct bases of liability, each of which has been employed by courts in Title VII sexual harassment cases.

97. See *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987) (reading the *Restatement* as saying that the scope-of-employment determination requires courts to examine factors such as when the act took place, where it took place, and whether it was foreseeable); *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 605 (7th Cir. 1985) (finding supervisor's acts within scope of employment because due to employer's delegation of power to him, supervisor and employer "essentially merged" and because risk allocation policies used by modern courts to justify broad respondeat superior liability also justify limiting the scope-of-employment exception); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 781 (S.D. Ohio 1988) (finding harassment within scope of employment when it took place during working hours at the office and was carried out by someone with the authority to hire, fire, promote, and discipline the plaintiff).

98. See *Bennett v. Corroon & Black Corp.*, 517 So. 2d 1245, 1248 (La. Ct. App. 1987) (deciding under a state employment discrimination statute whose interpretation was governed in part by Title VII cases). Also, the district court opinion, preceding the Eleventh Circuit's reversal in *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987), found the employer not liable because the harassment in question was not actuated by some purpose to serve the employer, and because none of the exceptions to respondeat superior were applicable. See *Sparks*, 830 F.2d at 1558-59.

99. 477 U.S. at 72.

100. *E.g., Hicks*, 833 F.2d at 1418.

101. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958).

1. Apparent Authority

Restatement Section 219(2)(d) imposes liability when an employee purports to act on behalf of his employer, and another party is injured while relying on authority apparently residing in the employee. After citing this portion of Section 219(2)(d),¹⁰² the EEOC recently argued that employers should be liable for work environment harassment by supervisors if they fail to maintain an adequate antiharassment policy. The EEOC concluded that employees could reasonably believe an employer will ignore or tolerate the harassing supervisor's actions if the employer does not maintain a widely disseminated and consistently enforced policy against sexual harassment. Thus, the EEOC generally will find liability for work environment sexual harassment by a supervisor when the employer "did not have a reasonably available avenue by which victims of sexual harassment could complain to someone with authority to investigate and remedy the problem."¹⁰³ Evidently, however, this apparent authority only can arise when no appropriate policy exists. As the EEOC later asserts, "an employer can divest its supervisors of this apparent authority by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure. When employees know that recourse is available, they cannot reasonably believe that a harassing work environment is authorized or condoned by the employer."¹⁰⁴

Although the EEOC's effort to stimulate the adoption of antiharassment policies is admirable,¹⁰⁵ the present question is whether its

102. This portion of § 219(2)(d), however, probably is not sufficiently broad to support the reading the EEOC gives it. Significantly, the section only applies to situations in which "the servant purported to act or speak on behalf of the principal." Those who engage in sexual harassment normally do not purport to act on their employer's behalf while doing so. Even in quid pro quo cases, supervisors generally do not assert that the trade they offer is intended to advance their principal's interests.

Just as important, § 219(2) only lists and incorporates a number of specific exceptions to respondeat superior that are contained elsewhere in the *Restatement*. The *Restatement* provisions to which it refers appear largely to limit § 219(2)(d). As comment e to § 219 declares:

Clause (d) includes primarily situations in which the principal's liability is based upon conduct which is within the apparent authority of a servant, as where one purports to speak for his employer in defaming another or interfering with another's business. See §§ 247-49.

Apparent authority may also be the basis of an action of deceit (§§ 257-64), and even physical harm. See §§ 265-67.

Id. § 219 cmt. e. The cited sections involve situations in which the principal's liability is based on some statement by his agent. Admittedly, however, comment e also cautions that "[t]he enumeration of such situations is not exhaustive." *Id.*

103. EEOC Policy Guide, *supra* note 64, at 405:6697; see also Levy, *supra* note 7, at 802-03.

104. EEOC Policy Guide, *supra* note 64, at 405:6697.

105. See *infra* note 208 and accompanying text (urging a different means for accomplishing essentially the same goal).

suggested rule¹⁰⁶ finds support in agency law. For apparent authority to exist, a principal must have done something to give third parties a reasonable belief that his agent has authority.¹⁰⁷ In the sexual harassment context, the principal's actions must have given the victim a reasonable belief that the perpetrator of the harassment had authority to harass. For this reason, apparent authority seems an unlikely basis for employer sexual harassment liability.¹⁰⁸ Apparent authority is an equally unlikely basis for liability in the situation hypothesized by the EEOC, in which the employer has communicated nothing about harassment to its employees. At first blush, therefore, there appears to be little basis in agency law for the EEOC's suggested rule.¹⁰⁹

However, a principal's acquiescence in an agent's course of conduct can create apparent authority.¹¹⁰ Thus, an employer who lacks an anti-harassment policy and who acquiesces in its supervisors' work environment harassment might be liable on this basis.¹¹¹ But it is likely that such apparent authority exists only when the employer has knowledge or reason to know of its supervisory agent's conduct.¹¹² Employers,

106. That rule seems to hold only for work environment harassment by supervisors. But much of what is said *infra* probably applies both to quid pro quo harassment and to work environment harassment by coemployees.

107. See *supra* note 78 and accompanying text.

108. This is suggested by *Fields v. Horizon House, Inc.*, No. 86-4343, 1987 U.S. Dist. LEXIS 11315 (E.D. Pa. Dec. 8, 1987), a supervisory hostile environment case in which it appeared that the employer had no anti-harassment or antidiscrimination policy. Rejecting employer liability under § 219(2)(d), the court first suggested that apparent authority is unlikely when the agent's conduct is extraordinary or unusual. "Thus," it continued, "it would surely be rare under traditional agency principles where in non-quid pro quo sexual harassment cases an employer could be found to have communicated to his employee that the employee's supervisor had the authority to sexually harass the employee by creating an [sic] hostile working environment." *Id.* at *14. Applying these generalizations to the case before it, the court concluded that the conduct of the supervisor was clearly "for his own gratification." *Id.* at *12. See also *Barnes v. Costle*, 561 F.2d 983, 996 (D.C. Cir. 1977) (MacKinnon, J., concurring) (rejecting § 219(2)(d)'s application because employee could not have reasonably believed that supervisor's demands derived from employer).

109. At one point, the EEOC argues that in this context apparent authority results merely from an employer's grant of authority to a supervisor: "This apparent authority of supervisors arises from their power over their employees, including the power to make or substantially influence hiring, firing, promotion, and compensation decisions." EEOC Policy Guide, *supra* note 64, at 405:6697. But no reasonable employee would conclude merely from such a grant of authority that a supervisor also had authority to harass.

110. See RESTATEMENT (SECOND) OF AGENCY § 43(2) (1958) (suggesting that principal's acquiescence in a series of acts by his agent indicates actual authority to perform similar acts in future); *id.* § 49 (asserting that rules applicable to interpretation of actual authority generally apply to the interpretation of apparent authority).

111. One also could speculate about how agency principles would handle employers who promulgate an appropriate policy but then acquiesce in supervisory harassment. Such unanswered questions, however, are among the reasons that courts should reject agency law when determining employer liability.

112. "If such conduct of the agent is known to a third person, as the principal has reason to know, and the principal makes no manifestation of his objection thereto, although he could easily

then, should escape liability unless the supervisor's harassment is either known to middle- or upper-level managers, or is so repeated and flagrant as to create constructive knowledge on their part.¹¹³ Thus, employers who fail to adopt an antiharassment policy are not invariably liable on the basis of apparent authority. Once more, therefore, agency law seems not to support the EEOC's rule.

2. Employee Aided in Accomplishing the Harassment by the Existence of the Employment

Section 219(2)(d) also states that employers are liable for employee torts committed outside the scope of employment when the employee "was aided in accomplishing the tort by the existence of the agency relation."¹¹⁴ Read literally, this Section would support strict liability for all forms of sexual harassment. Every harassing employee derives some assistance from his employment in accomplishing the harassment.¹¹⁵

In apparent recognition of this problem, courts using this portion of Section 219(2)(d) to find employers liable have done so only in quid pro quo cases.¹¹⁶ In these cases, the causal link between the agency relation and the accomplishment of the harassment seems strongest because the supervisor overtly relies on the authority he obtains through the agency relation.

However, because Section 219(2) is intended to incorporate a number of exceptions to respondeat superior that are scattered throughout the *Restatement*, the second portion of Section 219(2)(d) probably is

do so, apparent authority is thereby created." RESTATEMENT (SECOND) OF AGENCY § 43 cmt. c (1958).

113. See *supra* notes 53-54 and accompanying text and *infra* note 125 and accompanying text. Also, the offending supervisor's knowledge of his own harassment might be imputed to his employer. On this possibility, see *supra* note 38 and accompanying text and *infra* notes 126-27 and accompanying text.

114. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958).

115. As one judge pointed out:

Concerning the second part of the [§ 219(2)(d)] exception, at first reading it seems to argue too much. In every case where vicarious liability is at issue, the agent will have been aided in some way in committing the tort by the position that he holds. In this case, the male supervisor would not have been in a position to ask petitioner for an "after-hours affair" were it not for his position as her immediate "boss."

Barnes, 561 F.2d at 996 (MacKinnon, J., concurring).

116. See *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559-60 & nn.8-9 (11th Cir. 1987) (using rule derived from this portion of § 219(2)(d) to establish genuine issue of material fact as to employer's liability in case in which evidence suggested that supervisor was engaged in quid pro quo harassment, and claim based exclusively on work environment harassment was not at issue); *Sowers v. Kemira, Inc.*, 701 F. Supp. 809, 824 (S.D. Ga. 1988) (using § 219(2)(d) and *Sparks* to make employer liable for quid pro quo harassment); *Schroeder v. Schock*, 42 Fair Empl. Prac. Cas. (BNA) 1112, 1114 (D. Kan. 1986) (basing rule of strict employer liability for quid pro quo harassment on, inter alia, § 219(2)(d)).

limited by these specific exceptions.¹¹⁷ In this instance, the limitation seems severe. Section 219, comment e suggests that the aided-in-accomplishing-the-tort exception applies when the employee causes harm because of his position as agent. For example, a telegraph operator may create liability for his employer by sending false messages purporting to come from third persons. Likewise, the manager of a store may create liability for the owner by using her position to cheat the customers.¹¹⁸ Both examples mentioned in *Restatement* comment e are not analogous to any form of sexual harassment. Thus, the courts' use of this portion of Section 219(2)(d) in quid pro quo cases is questionable.¹¹⁹

D. Direct Liability

Restatement Section 219(2) states various other exceptions to the doctrine of respondeat superior. For the purposes of this analysis, the most important exception is contained in Section 219(2)(b), which states that an employer who is negligent or reckless may be liable for the torts of an employee acting outside the scope of employment.¹²⁰ This direct liability stems from the principal's own fault.¹²¹ Such liability can be based on, among other things, a principal's negligent or reckless orders to or regulations of his agents, employment of improper persons, supervision of his agents, or failure to prevent negligent or other tortious conduct by his agents.¹²²

A negligence-based version of this direct liability rule readily supports the actual-or-constructive-knowledge test that now prevails in

117. See *supra* note 102.

118. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (1958). Section 261, the "telegraph operator" provision, makes the principal liable for fraud committed by a servant or other agent while apparently acting within his authority, if the principal has put him in a position to commit the fraud. Section 222, the "store manager" provision, only covers undisclosed principals—principals of whose existence the third party lacks notice. See *id.* § 222; *id.* § 4 (defining undisclosed principals). Victims of harassment plainly do not lack notice of their employer's existence. However, comment e to § 219 also says that its enumeration of situations is not exhaustive. See *supra* note 102.

119. See *Barnes*, 561 F.2d at 996 (MacKinnon, J., concurring) (interpreting this portion of § 219(2)(d) to implicate only torts accomplished by an instrumentality, or through conduct, associated with the agency status, and apparently regarding almost all forms of sexual harassment as outside its scope).

120. RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) (1958).

121. *E.g.*, *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1016 (8th Cir. 1988) (quoting *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1421-22 (7th Cir. 1986)); EEOC Policy Guide, *supra* note 64, at 405:6695-96.

122. RESTATEMENT (SECOND) OF AGENCY § 213 (1958). Comment b makes this rule applicable to situations in which an employee sues her employer for harm arising from the acts of a coemployee. *Id.* at cmt. b. The rules that specifically deal with such suits, however, are discussed *infra* at subpart III(E).

work environment sexual harassment cases.¹²³ A negligence-based rule would hold employers who know or have reason to know that their supervisors or employees are harassing other employees yet fail to take appropriate corrective action liable for negligent supervision or, in some cases, failure to prevent tortious conduct.¹²⁴ The *Restatement's* rules for imputing knowledge from agent to principal probably embody the accepted standards for determining whether an employer has actual or constructive knowledge of the harassment.¹²⁵ Those rules, however, also seem to provide a negative answer to a question addressed by the district court in *Vinson v. Taylor*, the predecessor to *Meritor*:¹²⁶ whether a harassing supervisor's knowledge of his own actions can be imputed to his employer.¹²⁷

As the preceding discussion suggests, courts have used direct liability to justify adopting an actual-or-constructive-knowledge test in work environment cases.¹²⁸ Although apparently no court has ruled on the issue,¹²⁹ direct liability probably would justify the same test in quid pro quo cases. Because the various liability rules should be considered seria-

123. On the prevalence of this rule, see *supra* notes 50-52 and accompanying text.

124. See, e.g., *Davis v. Utah Power & Light Co.*, 53 Fair Empl. Prac. Cas. (BNA) 1331, 1334-35 (D. Utah 1990) (holding that in sexual harassment case, plaintiff's claim that employer failed to train and instruct supervisors in certain policies and procedures was sufficient to satisfy *Restatement* § 219(2)(b) and to defeat employer's motion for summary judgment). On sexual harassment as a source of intentional tort liability, see generally Dworkin, Ginger & Mallor, *supra* note 11. In some cases, moreover, an employer might be liable for negligently hiring the harasser.

125. See *supra* notes 53-57 and accompanying text. Courts usually regard complaints to middle- or upper-level management as sufficient for actual knowledge. See *supra* note 53 and accompanying text. RESTATEMENT (SECOND) OF AGENCY § 272 (1958) states that "the liability of a principal is affected by the knowledge of an agent concerning a matter . . . upon which it is his duty to give the principal information." Presumably managers of the kind just described have such duties. See *id.* § 381 (describing an agent's duty to give information to his principal).

Pervasive harassment usually gives rise to constructive knowledge on the employer's part. See *supra* note 54 and accompanying text. When the harassment is pervasive, at least some middle- or upper-level managers probably either were aware or should have been aware of it. If there was actual awareness, knowledge can be imputed to the employer under the rule stated in § 272 of the *Restatement*. Comment b of § 272, however, also imputes a supervisor's constructive awareness to the employer.

126. See *supra* note 38 and accompanying text (stating the answer of the district court).

127. RESTATEMENT (SECOND) OF AGENCY § 280 (1958) states: "If an agent has done an unauthorized act or intends to do one, the principal is not affected by the agent's knowledge that he has done or intends to do the act." But see *infra* note 137 (stating a different rule under a different set of agency principles).

128. See *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) (addressing supervisory harassment); *Hall*, 842 F.2d at 1015-16 (addressing harassment by coworkers); *Hunter*, 797 F.2d at 1421-22 (addressing racial harassment by coworkers); EEOC Policy Guide, *supra* note 64, at 405:6695-96.

129. Commentators, however, occasionally urge that strict liability not obtain in quid pro quo cases. E.g., Conte & Gregory, *Sexual Harassment in Employment: Some Proposals Toward More Realistic Standards of Liability*, 32 DRAKE L. REV. 407, 413 (1982-83) (proposing a uniform across-the-board negligence standard).

tim, however, an actual-or-constructive-knowledge test could be avoided if there is a convincing agency law rationale for adopting the strict liability that now prevails in quid pro quo cases.¹³⁰ The agency theories that courts and commentators most frequently use have failed to provide such a rationale.

E. The Agency Principles No One Uses

To readers who have some familiarity with agency law, the rules discussed thus far share a troublesome feature: they mainly are used to determine a principal's liability to third parties, not to his own agents or employees.¹³¹ *Restatement* Section 473, however, indicates that the status of the injured party as an employee rather than a third party does not diminish the employer's liability for his other employees' acts, "except that he has non-delegable duties of care to servants acting in the scope of employment."¹³² Thus, it appears that most of the rules

130. On the prevalence of strict liability in quid pro quo cases, see *supra* notes 30, 49 and accompanying text.

131. Except for authority, all the agency principles discussed above fit within Chapter 7 of the *Restatement*, which is entitled "Liability of Principal to Third Person; Torts." And authority's main application is in determining a principal's contract liability to third parties. See *supra* notes 72-73 and accompanying text.

132. RESTATEMENT (SECOND) OF AGENCY § 473 (1958); see also *id.* § 472 (subjecting principal to same liability to a nonservant agent for servants' or other agents' torts, as he is to third persons).

A portion of § 473 omitted in the text reads: "except where he is not liable for the conduct of fellow servants, in accordance with the fellow servant rule." *Id.* § 473. Thus, the rules delineating an employer's tort liability to third parties do not govern its liability to its employees in cases in which the fellow servant rule blocks liability. The fellow servant rule says that employers are not liable for injuries caused solely by the negligence of a coemployee or fellow servant. *E.g.*, PROSSER & KEETON, *supra* note 94, at 571. The rule, of course, is one of the "unholy trinity" of nineteenth-century common-law defenses—the others being contributory negligence and assumption of risk—that often allowed employers to escape liability to injured employees. *Id.* at 569. By now the rule has largely been extinguished by statutory regulation of the employment relation (especially by workers' compensation), and is looked upon with disfavor by courts even when it still might apply. *E.g.*, *id.* at 573, 575-76. In light of this history, it seems strange—some readers might say insane—to read Title VII as forcing the fellow servant rule's consideration in sexual harassment cases. But § 473 plainly makes the rule relevant for determining an employer's liability under agency principles. In fact, the fellow servant rule occupies some 18 sections in the second *Restatement*. See RESTATEMENT (SECOND) OF AGENCY §§ 474-491 (1958).

In any event, the fellow servant rule probably does not block employer liability for sexual harassment even if Title VII somehow makes it relevant. First, the rule seemingly applies only to coemployee negligence, *e.g.*, *id.* § 474; PROSSER & KEETON, *supra* note 94, at 571, and sexual harassment is more akin to an intentional tort. Second, the fellow servant rule eventually became inapplicable to the negligence of "vice-principals," who are supervisory employees charged by the master with performing his nondelegable common-law duties to employees. PROSSER & KEETON, *supra* note 94, at 572. Thus, the fellow servant rule most likely would not cover sexual harassment by supervisors even if the rule covers other culpable behavior besides negligence. Finally, the fellow servant rule applies only when the injury was caused solely by the negligence of a coemployee. *E.g.*, RESTATEMENT (SECOND) OF AGENCY § 474 (1958); PROSSER & KEETON, *supra* note 94, at 571.

considered earlier also govern an employer's liability to its own employees.¹³³

This Section of the *Restatement*, however, introduces another set of agency principles: an employer's nondelegable duties of care toward employees who act within the scope of their employment. The words "except that" in Section 473 seem to indicate that these duties supplement the bases of liability discussed earlier. However, various state and federal laws regulating the workplace, especially workers' compensation laws, largely have displaced the duties in question.¹³⁴ Given this history, readers may wonder how Title VII could possibly be construed as counseling recourse to such a body of common-law rules. But if the *Restatement (Second) of Agency* constitutes a font of agency principles, these rules clearly qualify for consideration under *Meritor*.¹³⁵ Indeed, they comprise some twenty-nine sections and fifty-three pages within the *Restatement*.¹³⁶ More important, these duties originally were formulated to govern the employer-employee relationship rather than the principal's relations with third parties. Of the various agency principles that might be brought to bear in sexual harassment cases, therefore, the employer's common-law nondelegable duties arguably are the most relevant.¹³⁷

Thus, it does not block employer liability when the employer itself was at fault. *E.g.*, RESTATEMENT (SECOND) OF AGENCY § 213 cmt. b (1958); *id.* § 470 cmt. d. In particular, the rule does not prevent employers from being liable for breach of the nondelegable duties discussed below. *See id.* § 474 cmts. b-c. Thus, even if the fellow servant rule somehow prevents employers from being liable to their employees under the rules governing their liability to third parties, employers still might be liable for breach of a nondelegable duty.

133. Because it may not be a tort rule, *Henson's* "authority" rationale conceivably is an exception.

134. *See, e.g.*, PROSSER & KEETON, *supra* note 94, at 572-80; H. REUSCHLEIN & W. GREGORY, *supra* note 77, at 223-34.

135. To this, quibblers might object that *Meritor* only referenced §§ 219-237 of the second *Restatement*. 477 U.S. at 72. But these sections sit within a chapter entitled "Liability of Principal to Third Person; Torts." Section 473 addresses whether these sections govern an employer's liability to its employees, *see supra* text accompanying note 132. And while § 473 may not compel consideration of the master's nondelegable duties, it makes them difficult to ignore. Also, a comment to *Restatement* § 219 cross-references these duties. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. b. (1958) (referring to §§ 473-528).

136. *See* RESTATEMENT (SECOND) OF AGENCY §§ 492-520 (1958). This does not include the defenses to suits based on these duties, which total another eight sections. *See id.* §§ 521-528. These duties also are discussed in at least one agency treatise. *See* H. REUSCHLEIN & W. GREGORY, *supra* note 77, at 207-34.

137. In addition to the matters discussed below, the *Restatement's* nondelegable duty rules provide a rationale for imputing a supervisor's knowledge of his own harassment to his employer and for obligating employers to take suitable corrective action on this basis alone. The *Restatement* charges an employer with notice of facts affecting the safety of employees if such notice comes to "a servant or other person whose duty it is to act upon them in the performance of the master's duty to protect his servants." RESTATEMENT (SECOND) OF AGENCY § 496 (1958).

Knowledge of dangerous workplace conditions obligates the employer to take action. *E.g., id.*

An employer's nondelegable duties to its employees resemble those imposed under the aegis of direct liability, but they also have a few twists of their own. Because of these twists and the confusion they create, it is unlikely that the nondelegable duties would expose employers to significant liability in sexual harassment cases.

The *Restatement* articulates the general duty rule in Section 492. Under that Section, an employer must provide working conditions that are reasonably safe for its employees. Alternatively, the employer may warn employees of risks of unsafe conditions that they might not discover by exercising due care.¹³⁸ To elaborate on this bifurcated general duty standard, the *Restatement* then delineates many specific duties including the duty to provide a sufficient number of competent fellow servants, the duty to supply competent supervisors, and the duty to promulgate and enforce suitable employment rules.¹³⁹ Each of these duties seems extensible to the sexual harassment context, and each could lead to employer liability if applied in that context. The *Restatement*, however, states the general duty rule in the alternative, with the master retaining an option to warn his workers of dangerous conditions rather than correcting those conditions. Evidently the rule means what it says, for an employer generally "has no duty to use care to make conditions safe if he gives warning of the risks to the servants."¹⁴⁰ In the sexual harassment context this rule suggests that employers could insulate themselves from liability by warning employees about actual or potential harassers. To reinforce the point, the *Restatement* also affords employers an assumption of risk defense that applies when an employee continues in the employment with knowledge of the risk.¹⁴¹

cmt. a. The knowledge imputed to the employer under this rule almost certainly includes knowledge possessed by supervisors, because they presumably have a duty to protect their subordinates. Cf. *id.* cmt. a, illus. 1-2. Thus, even the employer who lacks actual knowledge of relevant facts faces a duty to act once a supervisor acquires knowledge that would trigger the duty. Under this rule, therefore, a supervisor's knowledge of his own harassment would obligate his employer to take suitable corrective action—even if the harassment was unknown to everyone except the perpetrator and the victim.

The rule, however, clearly does not extend to notice by coemployees. "A master is not liable to a servant merely because a fellow servant whose duties do not include the performance of a non-delegable duty of the master discovers facts which, if known to the master, would subject him to a duty to take action." *Id.* cmt. b.

138. *Id.* § 492.

139. *Id.* §§ 505, 507-508; see also PROSSER & KEETON, *supra* note 94, at 569 (mentioning the first and third of these duties, among others).

140. RESTATEMENT (SECOND) OF AGENCY § 492 cmt. f (1958). This rule does not apply, however, when a statute provides otherwise, the servant is not free to choose, or it is understood that the master is to assume the risk. Moreover, other authorities present no counterpart to this rule. PROSSER & KEETON, *supra* note 94, at 568-83 and H. REUSCHLEIN & W. GREGORY, *supra* note 77, at 207-23.

141. The *Restatement* asserts:

To further confuse the picture, finally, the *Restatement* fails to indicate whether an employer should be liable for the intentionally harmful acts of employees to whom the employer has "entrusted the duty of making working conditions safe."¹⁴² Sexual harassment generally is intentional behavior, and supervisors presumably are people to whom employers entrust the duty of making working conditions safe. Thus, the *Restatement's* nondelegable duty rules may not speak to supervisory harassment at all.

IV. THE IRRELEVANCE OF AGENCY LAW IN DETERMINING EMPLOYER LIABILITY FOR SEXUAL HARASSMENT

A. *An Introductory Review*

The wearying path trod by the preceding section creates major reservations about using agency law to determine employer liability for sexual harassment. Of course, some of the problems just described are attributable to certain courts' weak grasp of agency law. But the difficulties run deeper than this. Several sets of agency rules might conceivably govern the employer liability determination. But some of these principles—respondeat superior and authority in particular—can have absurd consequences if applied as they usually are applied in the agency context. Perhaps those rules' poor fit with sexual harassment law occurs because they normally are used to determine a principal's liability to third parties, not an employer's liability to its employees. But the agency principles that speak directly to the latter situation, the employer's common-law nondelegable duties, produce confusing results when applied to sexual harassment. And interpreting Title VII to compel recourse to these nineteenth-century rules seems ridiculous in any event.

In addition, none of the agency rules examined in the previous section produces completely satisfactory results.¹⁴³ Perhaps for this reason, courts tend to apply different rules in different settings, often in an

In the absence of a statute or an agreement to the contrary, a master is not liable to a servant for harm caused by the unsafe state of the premises or other conditions of the employment, if the servant, with knowledge of the facts and understanding of the risks, voluntarily enters or continues in the employment.

RESTATEMENT (SECOND) OF AGENCY § 521 (1958) (emphasis added). Also, even when the employer neglectfully or intentionally fails to perform his duty, an employee who "becomes aware of a dangerous condition of employment ordinarily has no cause of action for harm thereby suffered." *Id.* § 492 cmt. f (citing § 521).

142. *Id.* § 492 caveat.

143. The one possible exception is direct liability, which should produce an across-the-board actual-or-constructive-knowledge test. But this would involve jettisoning a rule on which almost all observers agree: strict liability for quid pro quo harassment. In addition, such a test seems vulnerable on policy grounds. See generally *infra* subpart IV(C).

apparently manipulative, result-oriented fashion. This is most evident when courts resort to direct liability, the set of agency principles whose application to sexual harassment produces fairly coherent results.¹⁴⁴ Some courts have used this agency rationale to justify imposing an actual-or-constructive-knowledge standard in cases involving work environment harassment by both supervisors and coemployees. But apparently no court has employed similar reasoning when considering quid pro quo harassment, where strict liability routinely is applied.¹⁴⁵ This omission would not matter if courts applied the various agency law rationales seriatim and if one of those rationales supported strict liability in quid pro quo cases. However, there is no convincing agency law rationale for such strict liability.¹⁴⁶

B. Vicarious Liability Under Title VII

Because, despite *Meritor*, the actual standards for determining employer liability have undergone little or no change over the past several years,¹⁴⁷ the problems just described, while perhaps aesthetically troubling, arguably have little practical consequence.¹⁴⁸ According to this

144. The same is true of the portion of *Restatement* § 219(2)(d) that makes a principal liable when the agency relation assisted the agent in committing the tort. This provision has been used to justify strict liability in quid pro quo cases. But while the provision conceivably could have the same effect in work environment cases, apparently no court has applied it there. See *supra* notes 114-16 and accompanying text.

145. See *supra* subpart III(D).

146. The two most common bases for strict liability in quid pro quo cases are the *Henson* rationale and the portion of *Restatement* § 219(2)(d) making a principal liable where the agency relation assisted the agent in committing the tort. On the problems with each, see *supra* subparts III(A) & III(C)(2).

147. See *supra* notes 28-34, 49-52, 62 and accompanying text.

148. Another version of the none-of-this-really-matters argument asserts that courts actually apply some kind of de facto strict liability in all three employer liability contexts. For example, one observer contends that "courts presently apply strict liability for both claims of sexual harassment [quid pro quo and work environment] when plaintiffs establish the other four elements of the respective prima facie cases." Note, *supra* note 16, at 1730. But this statement means little more than that employers routinely are found liable when the other four elements are present. *E.g., id.* at 1730-31 nn.91-92. In most such cases, plainly, courts do not apply strict liability; rather, they find the defendant liable under various rationales.

When holding in an employer's favor, moreover, many courts explicitly rely on the standard actual-or-constructive-knowledge test. See, e.g., *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) (work environment harassment by a foreman who apparently was regarded as a coworker; the employer took prompt and effective remedial action); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (work environment harassment by a supervisor; the employer knew of the harassment and took prompt remedial action); *Kirkland v. Brinias*, 741 F. Supp. 692, 693-94, 698 (E.D. Tenn. 1989) (work environment harassment by a coworker; evidence that the employer recognized or should have recognized harassment "did not preponderate in favor of the plaintiffs"); *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 618-21 (W.D. Tex. 1988) (work environment harassment by an assistant manager; no liability because the balance of credible evidence indicated that plaintiff did not complain and the harassment was not pervasive);

view, the courts have fashioned sensible consensus standards on the employer liability question, and the means they use to reach those standards are irrelevant. But the obvious flaw in this argument is its assumption that the employer liability rules the courts now follow are the ones they should follow. Surely those rules remain controversial.¹⁴⁹ Commentators still urge that strict liability should apply when supervisors engage in work environment harassment.¹⁵⁰ At least one observer argues for extending strict liability to work environment harassment by coworkers.¹⁵¹ Commentators at the other end of the spectrum have propounded an across-the-board negligence standard.¹⁵²

The proper tests for determining an employer's sexual harassment liability, then, remain a live issue. Unfortunately, *Meritor's* command to consult agency principles does little to promote a rational evaluation of the competing alternatives. Although agency law might be used to justify any number of approaches to the employer liability question, it does little to demonstrate the superiority of one approach over another. Instead, it merely gives courts a smorgasbord of rationales for achieving predetermined results without having to defend those results on their merits.

Defenders of *Meritor*, however, can argue that the blame for this situation, if any, lies with Congress rather than with the Court. Agency law, they would maintain, is relevant to the employer liability question simply because Title VII makes it relevant. As the Court stated in *Meritor*: "Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."¹⁵³ For better or worse, therefore, it seems that agency law controls, and that the courts' task is to make the best selections from the array of available agency rationales. This dilemma, however, is a false one, for Section 701(b) of Title VII almost certainly does not compel recourse to the common law of agency.

Silverstein v. Metroplex Communications, Inc., 678 F. Supp. 863, 870 (S.D. Fla. 1988) (work environment harassment by supervisor and coworkers; plaintiff failed to complain and harassment not so pervasive as to put employer on constructive notice).

149. As one observer noted in 1989, the employer liability question "continues to spawn academic debate." Note, *supra* note 16, at 1730.

150. *E.g.*, Levy, *supra* note 7, at 797.

151. *E.g.*, Note, *Between the Boss and a Hard Place*, *supra* note 9, at 467.

152. Conte & Gregory, *supra* note 129, at 413.

153. 477 U.S. at 72 (some punctuation omitted).

1. Title VII and Agency Principles

Title VII's Section 703(a) states that "[i]t shall be an unlawful employment practice for an employer" to engage in employment discrimination on the bases of "race, color, religion, sex, or national origin."¹⁵⁴ In relevant part, Section 701(b) defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."¹⁵⁵ Persons, in turn, include individuals, various state and local governmental bodies, labor unions, partnerships, corporations, and certain other business entities.¹⁵⁶ According to Title VII's plain language, therefore, agents of these persons are employers if the person in question has fifteen or more employees for the statutorily prescribed period.¹⁵⁷ For this reason, sex discrimination by such agents is an unlawful employment practice.

Therefore, Section 701(b) employs the term "agent" to identify a class of persons or entities who qualify as Title VII employers and who consequently can be liable for the employment discrimination it proscribes. It does not state whether or when employers are liable for discrimination by their employees, nor does it claim that agency law should determine such questions. In other words, Section 701(b) is an individual liability provision,¹⁵⁸ not a vicarious liability provision under which agents' discriminatory actions are imputed to their employers.

Despite some confused opinions treating Section 701(b) in the latter fashion,¹⁵⁹ innumerable courts have used the Section to hold agents

154. 42 U.S.C. § 2000e-2(a) (1988). For some other relevant provisions pertaining to employers, see *id.* § 2000e-2(d) to (j).

155. *Id.* § 2000e(b) (emphasis added).

156. *Id.* § 2000e(a).

157. B. SCHLEI & P. GROSSMAN, *supra* note 11, at 1002-03 (arguing that an agent is an employer by virtue of its agency relationship with another employer who meets the number-of-employees requirement, and need not itself meet that requirement).

158. "Title VII provides that an employer's agent can be individually liable for his discriminatory acts by specifically including agents in the definition of employer." 1 A. LARSON & L. LARSON, *supra* note 11, § 5.34, at 2-62. Of course, the term "agent" includes other entities besides natural persons. See, e.g., B. SCHLEI & P. GROSSMAN, *supra* note 11, at 1002 & n.128.

159. See, e.g., *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1558 (11th Cir. 1987) (holding that under § 701(b), if a supervisor was acting as an agent of the employer when he sexually harassed a subordinate, the employer is directly liable to the subordinate for his conduct); *Scott v. City of Topeka Police & Fire Civil Serv. Comm'n*, 739 F. Supp. 1434, 1438 (D. Kan. 1990) (holding that the city's delegation of power to hire applicants to a commission made that commission the city's agent and thus an employer; therefore, the city was liable for employment discrimination by the commission); *Zentiska v. Pooler Motel Ltd.*, 708 F. Supp. 1321, 1325-26 (S.D. Ga. 1988) (holding the defendant employer "directly liable" for sex discrimination by an agent because Title VII's definition of employer extends to agents of covered employers); *Hallquist v. Max Fish Plumbing & Heating Co.*, 46 Fair Empl. Prac. Cas. (BNA) 1855, 1859-60 (D. Mass. 1987), *aff'd*, 843

individually liable.¹⁶⁰ Presumably, agency law would be helpful to these courts, but only for determining who is an agent, not for determining when agents bind their principals. Perhaps because it seems to make all employees agents,¹⁶¹ however, the courts in question almost totally ignore the common law of agency. Freed of this limitation, they normally restrict individual liability to employees with some degree of decision-making power.¹⁶² The same is true in sexual harassment cases, in which employees with sufficient supervisory power may be personally liable under Title VII.¹⁶³

F.2d 18 (1st Cir. 1988) (finding that because a superintendent is an agent of the employer and thus fits within § 701(b)'s definition of employer, the employer is liable for his actions); *see also* Terbovitz v. Fiscal Court, 825 F.2d 111, 116 (6th Cir. 1987) (reading § 701(b) as making an employer liable for acts of its agents).

160. *See infra* notes 162-63.

161. The *Restatement*, at least, takes this position. *See supra* note 79.

162. *See, e.g.*, Hamilton v. Rogers, 791 F.2d 439, 442-43 (5th Cir. 1986) (holding employees liable as agents under § 701(b) if they participate in the decisionmaking process that forms the basis of the discrimination); Williams v. City of Montgomery, 742 F.2d 586, 588-89 (11th Cir. 1984) (classifying a personnel board as an agent of city and therefore itself liable under § 701(b)), *cert. denied*, 470 U.S. 1053 (1985); Kolb v. Ohio, 721 F. Supp. 885, 891 (N.D. Ohio 1989) (holding employees responsible for making or contributing to employment decisions for their employer liable as agents under § 701(b)); Perry v. Manocherian, 675 F. Supp. 1417, 1425 (S.D.N.Y. 1987) (holding partners of partnership and certain policymaking managers, but not a nonpolicymaking employee, individually liable under § 701(b)); Duva v. Bridgeport Textron, 632 F. Supp. 880, 882 (E.D. Pa. 1985) (stating that supervisory employees are agents of employers and as such may be proper defendants under Title VII); *see generally* 1 A. LARSON & L. LARSON, *supra* note 11, § 5.34; Annotation, *Meaning of Term "Employer" in § 701(b) of Title VII of Civil Rights Act of 1964, as Amended*, 69 A.L.R. FED. 191, § 6 (1984). Note that many of the cited cases were decided after *Meritor*.

Coemployees, on the other hand, generally are not "agents" for Title VII purposes and thus are not individually liable. *See* 1 A. LARSON & L. LARSON, *supra* note 11, § 5.34, at 2-66 to -67.

163. *See, e.g.*, Harvey v. Blake, 913 F.2d 226, 227 (5th Cir. 1990) (imposing liability on a defendant city employee in her official capacity because immediate supervisors are employers under § 701(b) when their employer's traditional rights such as hiring and firing are delegated to them); Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989) (defining an individual as an employer under Title VII if he serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing, or conditions of employment; but total control not needed and defendant need not be plaintiff's actual supervisor), *aff'd in part & rev'd in part on other grounds*, 900 F.2d 27 (4th Cir. 1990); Howard v. Temple Urgent Care Center, 53 Fair Empl. Prac. Cas. (BNA) 1416, 1416-17 (D. Conn. 1990) (holding that under § 701(b) supervisor is employer if he participates in managerial decisions or significantly affects access to employment opportunities, even if he lacks direct power to hire and fire); Burrell v. Truman Medical Center, Inc., 721 F. Supp. 230, 232 (W.D. Mo. 1989) (holding that to be an agent and an employer under § 701(b), a person must be supervisory or managerial employee of a Title VII employer, with responsibility for some employment decisions); Hendrix v. Fleming Cos., 650 F. Supp. 301, 302 (W.D. Okla. 1986) (holding that to be an employer under Title VII, one must be an officer, director, or supervisor of a Title VII employer, or otherwise involved in managerial decisions); *cf.* Hall v. Gus Constr. Co., 842 F.2d 1010, 1016 (8th Cir. 1988) (holding foreman liable along with his employer because he knew of sexual harassment and failed to take steps to correct it; no discussion of § 701(b)); Morris v. American Nat'l Can Corp., 730 F. Supp. 1489, 1496-97 (E.D. Mo. 1989) (holding a supervisor liable because he failed to respond to plaintiff's complaints about harassment; no discussion of § 701(b)),

Nothing in this well-settled interpretation of Section 701(b) suggests that the Section makes covered employers vicariously liable for their agents' actions. That an employee is an agent of a covered employer and therefore may be personally liable for his own discriminatory acts implies nothing about his employer's liability for those acts.¹⁶⁴ Although Section 701(b) clearly makes agents of covered employers liable in their own right, it says nothing about those covered employers' liability for discrimination by their agents.

2. Determining Vicarious Liability Under Title VII

On occasion, courts erroneously reading Section 701(b) as a vicarious liability provision justify their position by asserting that employers should not escape Title VII liability by delegating discriminatory actions to others.¹⁶⁵ This sound observation suggests a problem with the argument just advanced: if Section 701(b) provides no basis for imputing agents' discriminatory acts to their principals, just how is this necessary imputation to be accomplished?

In his *Meritor* concurrence, Justice Marshall noted the general Title VII rule that acts of supervisory employees or agents are automatically imputed to their employers.¹⁶⁶ The cases so holding do not rely on Section 701(b). Indeed, they do not provide any consistent rationale for the imputation. Some of the decisions employ weak analogies to agency law,¹⁶⁷ some combine these with appeals to Title VII's purposes,¹⁶⁸ and

aff'd, No. 90-1235, 90-2289, 1991 WL 153135 (8th Cir. Aug. 14, 1991).

As a general matter, courts applying these tests do not impose liability on nonsupervisory coemployees. *See, e.g.*, *Smith v. Prudential Financial Servs., Inc.*, 739 F. Supp. 1042, 1043 (D.S.C. 1990) (holding an employee not liable because he worked in a nonmanagerial, nonsupervisory capacity and had no authority over the plaintiff); *Bush v. Metro Transit Auth.*, 51 Fair Empl. Prac. Cas. (BNA) 1217, 1220 (D. Kan. 1989) (holding coworkers were not employers under § 701(b) because they were not supervisors and did not participate in any employment decisions regarding the plaintiff); *Flowers v. Rego*, 691 F. Supp. 177, 178-79 (E.D. Ark. 1988) (holding that nonsupervisory employee is not employer under Title VII and is not personally liable); *see also* 1 A. LARSON & L. LARSON, *supra* note 11, § 41.65(d), at 8-204.

164. Similarly, the fact that an agent generally is liable for her own torts, *see generally* W. SEAVEY, *supra* note 89, § 129.33, by itself implies nothing about her principal's liability for those torts.

165. *E.g.*, *Terbovitz v. Fiscal Court*, 825 F.2d 111, 116 (6th Cir. 1987); *Scott v. City of Topeka Police & Fire Civil Serv. Comm'n*, 739 F. Supp. 1434, 1438-39 (D. Kan. 1990).

166. *Meritor*, 477 U.S. at 75 (Marshall, J., concurring); *see also* *Barnes v. Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977) (generally charging employers with Title VII violations by supervisory personnel); *Bryan*, *supra* note 16, at 45-46 (noting that in areas other than sexual harassment, employers generally have declined to argue that they are not responsible for the acts of supervisory employees, and courts have rejected such attempts when made).

167. *E.g.*, *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977) (holding defendant liable as principal for any violation of Title VII by foreman in his authorized capacity as supervisor in case alleging racially discriminatory discharge); *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144 n.7 (5th Cir. 1975) (forbidding defendant from disclaiming liability for

some just flatly announce the rule.¹⁶⁹ Significantly, though, nothing in any of these cases compels recourse to the common law of agency.

If these cases do little to justify the imputation of Title VII liability from employees to employers, perhaps the generally accepted techniques of statutory interpretation might provide some help.¹⁷⁰ As for Title VII's plain meaning, this Article has argued at length that Section 701(b) simply is not a vicarious liability provision, and nothing else in the statute appears to address this question.¹⁷¹ Moreover, as the D.C. Circuit observed in *Meritor*, "[t]he legislative history of Title VII is virtually barren of indications, one way or the other, of a vicarious responsibility for employers."¹⁷²

Turning from this narrowly focused concept of congressional intent

supervisor's apparently authorized actions in alleged constructive discharge based on religious discrimination).

168. For example, in *Tidwell v. American Oil Co.*, 332 F. Supp. 424, 436 (D. Utah 1971), in which the plaintiff allegedly was fired for refusing to engage in racial discrimination against a job applicant, the court held the defendant employer liable for the acts of a supervisor. It reasoned that "[t]he modern corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual employee action." *Id.* (citation omitted).

169. *E.g.*, *Ostapowicz v. Johnson Bronze Co.*, 369 F. Supp. 522, 537 (W.D. Pa. 1973) (determining in class action involving alleged sex discrimination that the defendant is not necessarily responsible for acts of all its employees, but is responsible for acts of supervisory personnel), *aff'd in part & vacated in part*, 541 F.2d 394 (3d Cir. 1976), *and cert. denied*, 429 U.S. 1041 (1977).

170. Of course, a strict version of the general rule that authoritative prior interpretations of statutes should be followed, *see, e.g.*, E. LEVI, AN INTRODUCTION TO LEGAL REASONING 6-7, 54-57 (paperback ed. 1949), would make *Meritor's* command to consult agency principles absolutely binding on subsequent courts and would preclude their consideration of alternatives. But the position of this Article is that this holding should be changed by whatever institutional means are appropriate.

171. Occasionally, however, it has been argued that because Title VII liability requires intentional discrimination, 42 U.S.C. § 2000e-5(g) (1988), employers should be liable only when they know or have reason to know of the harassment. *See, e.g.*, Note, *supra* note 7, at 1165-68, 1176-77. But this conclusion does not follow from its premise. Presumably, most sexual harassment involves intentionally discriminatory behavior by the offending employee. This intent is potentially imputable to the employer. But the statutory requirement of intent does not imply any particular rule for making the imputation from employee to employer. For example, the requirement is consistent with a rule asserting that a harassing employee's intent to harass should always be imputed to his employer. Such a rule would effectively make employers absolutely liable for all actionable harassment by their employees.

The real aim of such a recommendation, however, apparently is to limit employer liability to those situations in which it can plausibly be argued that the employer itself (*i.e.*, its higher-level managers) actually had the requisite intent. But the actual-or-constructive-knowledge test cannot be justified in this way. It is possible to know of someone else's harassment, and even to acquiesce in it, without intending that it be undertaken. More important, high-level management's constructive knowledge of the harassment does not usually indicate an actual intent to harass. In other words, limiting employer sexual harassment liability to situations in which high-level managers had an actual intent to discriminate would mean very limited liability for employers—more limited than the author of the suggestion or anyone else has recommended.

172. *Vinson v. Taylor*, 753 F.2d 141, 148 (D.C. Cir. 1985), *aff'd sub nom. Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

to Congress's broader purposes¹⁷³ in enacting Title VII's ban on sex discrimination, courts often assert that Congress intended "to strike at the entire spectrum of disparate treatment of men and women" in employment.¹⁷⁴ Because in the corporate setting such disparate treatment is accomplished by the artificial corporate person's employees or other agents, some rule of vicarious liability is necessary to achieve Congress's purpose. But it is doubtful that the congressional purpose dictates any particular rule. Furthermore, because it is unlikely that striking at the entire spectrum of gender-based disparate treatment is Title VII's only purpose, courts might have to balance that purpose against the statute's other aims in particular cases.¹⁷⁵ Moreover, judges sometimes interpret statutes in the light of general public purposes extraneous to those statutes.¹⁷⁶ Thus, in the employer liability context, Title VII apparently leaves courts to their own devices and the statute's interpretation evidently differs little from outright policymaking.

C. *Toward Better Liability Standards*

Because Title VII seems not to address the employer liability issue, general policy must determine which standards are most desirable. This determination is difficult to make because it depends on ethical issues that are controversial and on empirical questions that have not been resolved. Thus, while this Article makes some recommendations on the subject, they are only tentative. All this uncertainty, moreover, could give *Meritor's* defenders a last-ditch argument for allowing agency law some role in determining the best employer liability rules. Although Title VII does not command the use of agency law, they might argue, agency principles could still fill the void created by Congress's failure to address the vicarious liability issue. Despite being almost useless as a legal guide, these principles might still embody a set of policies that courts can utilize when grappling with employer liability questions.

As it turns out, however, agency law speaks with more than one voice at the ethical level as well as the legal level. Ultimately, then, it is useless even as a policy guide for fashioning employer liability rules.

173. "Purpose" means the overall end, aim, or object of the legislation rather than some congressional conclusion about the meaning of particular words. *See, e.g., United Steelworkers v. Weber*, 443 U.S. 193, 200-08 (1979) (upholding a voluntary minority preference as consistent with Title VII's purpose of minority assimilation although the literal language of Title VII and Congress's likely conclusions about that language's meaning would forbid the preference).

174. *Meritor*, 477 U.S. at 64 (citation omitted).

175. For an attempt to do something like this in the sexual harassment context, see *Barnes v. Costle*, 561 F.2d 983, 998-1001 (D.C. Cir. 1977) (MacKinnon, J., concurring).

176. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 596-99 (1983) (using the general public policy against racial discrimination in education as one justification for denying tax-exempt status to a private university that discriminated on the basis of race).

Thus, although this section fails to resolve the employer liability question conclusively, it at least reaches one firm conclusion: Courts should avoid the common law of agency when determining an employer's Title VII liability for sexual harassment.

1. Two Objections to Strict Employer Liability for Sexual Harassment

In his dissent from the D.C. Circuit's refusal to grant an en banc hearing in *Meritor*, Judge Robert Bork remarked that "[i]n this case, the employer could not have done more to avoid liability without actually monitoring or policing his employees' voluntary sexual relationships."¹⁷⁷ Judge Bork's statement might mean that it is inherently wrong to penalize employers for employee sexual harassment when the employer did not intend for harassment to occur and was neither negligent nor reckless in allowing it.¹⁷⁸ Implicit in this reading is the familiar view that liability should be imposed only on actors who are morally at fault. In the sexual harassment context, of course, most of the relevant actors are corporations. This raises a problem that has been widely discussed in the business ethics literature: Is the artificial corporate person also a "moral person" to whom notions like blame, duty, conscience, dignity, and rights can attach?¹⁷⁹ If not, basing corporate employers' liability on moral fault might mean that they would never be liable simply because corporations are not the sorts of entities to which moral fault can attach.¹⁸⁰ Then again, if corporations are not moral persons, perhaps the law can treat them however it likes because they lack the rights natural persons possess.¹⁸¹ The most important objection to a

177. *Vinson*, 760 F.2d at 1331 n.3 (Bork, J., dissenting). Echoing Judge Bork on the employee privacy point are, for example, Note, *supra* note 7, at 1177-78, and Note, *Employer Liability*, *supra* note 9, at 1278. *But see infra* note 188 and accompanying text (noting how infrequently restrictions on employee privacy are advocated in the business literature on preventing sexual harassment).

178. *Cf. Conte & Gregory*, *supra* note 129, at 412 n.18 (arguing that application of strict liability for acts of supervisors may be "manifestly unfair" to the employer when a supervisor acted outside authority and without the employer's knowledge).

179. *See generally* the essays in SHAME, RESPONSIBILITY AND THE CORPORATION (H. Curtler ed., 1986). Perhaps the most widely cited article on this subject, John Ladd's *Morality and the Ideal of Rationality in Formal Organizations*, 54 *MONIST* 488 (1970), emphatically takes the view that corporations are not moral persons.

180. Because the question is whether it is right to punish corporations, I doubt that imputing managers' fault to the firm would avoid this conclusion. If one assumes that entities only should be penalized if they individually are at fault, and if *A* is not the sort of entity to which terms like fault apply, how is it just to penalize *A* by imputing *B*'s fault to it?

181. One might argue that it is wrong to impose strict liability on corporations because the resulting costs may be passed on to such presumably innocent parties as shareholders, employees, consumers, local communities, and so forth. *Cf. Metzger & Schwenk, Decision Making Models, Devil's Advocacy, and the Control of Corporate Crime*, 28 *AM. BUS. L.J.* 323, 327-32 (1990). This

completely fault-based theory of sexual harassment liability, however, is that it absolutizes the moral intuition that penalties should be imposed only on the blameworthy and ignores the attendant consequences.¹⁸² For example, such a theory makes it impossible even to consider whether strict employer liability might reduce the incidence of sexual harassment.

But Judge Bork probably did not argue that it is intrinsically bad to impose liability without fault; rather, he most likely suggested merely that doing so has unfortunate consequences in the sexual harassment context.¹⁸³ After asserting that the bank could not have done more to prevent harassment without invading employee privacy, he added: "Aside from the very outrageousness of such policing, it would be a very high cost way, undoubtedly the highest cost way, of solving the problem."¹⁸⁴ Judge Richard Posner shares Judge Bork's view that a strict liability standard is unworkable in the sexual harassment context. Judge Posner remarked in one case that:

The rule that falls out of *Meritor* and the cases following it is less a derivation from the statutory language than a recognition of the unrealism of expecting an employer to be able to purge every trace of sexual harassment from the workplace; so strict liability would add nothing to liability based on fault.¹⁸⁵

Presumably, strict liability would "add nothing" because imposing it would not purchase a significant reduction in the incidence of sexual harassment.

argument, however, would defeat much or most corporate civil liability if it were taken seriously.

182. In the terminology sometimes used by ethicists, this view basically is a deontological moral theory. Such theories generally assert that the morality of certain acts depends at least in part on factors other than their consequences. See, e.g., W. FRANKENA, *ETHICS* 14 (1963). Indeed, the straw man this Article sets up carries this approach to an extreme by asserting that moral fault is the only factor to be considered in imposing legal liability.

Due to their anticonsequentialism, extreme deontological theories naturally have come under criticism. For example, John Rawls, himself widely regarded as a deontologist, once observed: "All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would be simply irrational, crazy." J. RAWLS, *A THEORY OF JUSTICE* 30 (1971). Indeed, Immanuel Kant may be the only completely uncompromising deontologist. See, e.g., J. RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY* 104 (1986).

183. On this reading, the statement would be expressing a teleological or consequentialist moral orientation. See, e.g., W. FRANKENA, *supra* note 182, at 13 (arguing that in a teleological theory, the ultimate standard or criterion of an action's rightness or wrongness is the amount of net value of goodness that it brings into being). The most important contemporary teleological or consequentialist ethical theory is utilitarianism. E.g., *id.* at 29. And under utilitarian criteria, society may impose punishment when doing so would maximize net aggregate satisfaction. For this reason, punishment may be imposed irrespective of fault. E.g., J. RACHELS, *supra* note 182, at 121 (asserting that nothing in the idea of utilitarianism limits punishment to the guilty or its amount to the amount "deserved").

184. *Vinson*, 760 F.2d at 1331 n.3.

185. *Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir. 1990).

2. Programs for Reducing Sexual Harassment

The basic thrust of Judge Bork's and Judge Posner's statements is that while strict liability for employee sexual harassment might stimulate employers to eliminate it from the workplace, this result either cannot be achieved or can be accomplished only at excessive human and financial costs. The facts of *Meritor* highlight the fallacy of this position. Although the bank in that case had a policy against discrimination, the policy did not specifically address sexual harassment.¹⁸⁶ The distinction is important because the business literature consistently emphasizes the need for employers to adopt comprehensive programs aimed specifically at workplace sexual harassment.¹⁸⁷

Policing employees' voluntary sexual relationships does not figure prominently within these recommended programs.¹⁸⁸ Instead, the literature consistently entreats employers to: (1) adopt a written, communicated policy defining and forbidding sexual harassment; and (2) establish a grievance procedure through which the policy can be enforced.¹⁸⁹ Although the point is not emphasized as often and as emphatically as it should be,¹⁹⁰ presumably these policies and procedures would involve sanctions against demonstrated harassers.¹⁹¹ Employers

186. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72-73 (1986).

187. See, e.g., Bahls, *Stopping Sexual Harassment*, BUS. CREDIT, July-Aug. 1988, at 53, 54-55; Bradshaw, *Sexual Harassment: Confronting the Troublesome Issues*, PERSONNEL ADMIN., Jan. 1987, at 51, 52-53; Deane, *Sexual Harassment—Is Your Company Protected?*, BUS., Apr.-June 1986, at 42, 43-44; Frierson, *Reduce the Costs of Sexual Harassment*, PERSONNEL J., Nov. 1989, at 79, 79-83 (proposing more or less comprehensive antiharassment programs).

188. Indeed, the suggestion appears infrequently in the literature, and normally is made with trepidation. See, e.g., Bahls, *supra* note 187, at 55 (suggesting that employers consider a policy against employee dating); Deane, *supra* note 187, at 44 (noting that sexual harassment claims by third parties due to affairs between supervisors and coemployees may make it advisable for employers to monitor the work environment to detect consensual sexual relations, but terming the problem "delicate" and stating no guidelines for resolving it); cf. *Ending Sexual Harassment: Business is Getting the Message*, BUS. WK., Mar. 18, 1991, at 98, 99 [hereinafter *Getting the Message*] (reporting that some firms are auditing work areas for nude pinups).

189. See, e.g., Bahls, *supra* note 187, at 55; Bradshaw, *supra* note 187, at 52; Deane, *supra* note 187, at 43-44; Frierson, *supra* note 187, at 79-80; Kandel, *Sexual Harassment: Persistent, Prevalent, but Preventable*, 14 EMPLOYEE REL. L.J. 439, 441-46 (1988); Terpstra, *Who Gets Sexually Harassed?*, PERSONNEL ADMIN., Mar. 1989, at 88, 111; Thornton, *Sexual Harassment, 1: Discouraging It in the Work Place*, PERSONNEL, Apr. 1986, at 22, 24-25; Woods & Flynn, *Heading Off Sexual Harassment*, PERSONNEL, Nov. 1989, at 48-49. On the handling of sexual harassment complaints by personnel managers, see, e.g., Bradshaw, *supra* note 187, at 52-53; Connell, *Investigating the Sexual Harassment Complaint*, 77 MGMT. REV., Apr. 1988, 45, 46-48; Frierson, *supra* note 187, at 80-82; Kandel, *supra*, at 444-46.

190. An exception is Thomann & Strickland, *Line Managers and the Daily Round of Work: The Front-Line Defense Against Sexual Harassment*, INDUS. MGMT., May-June 1990, at 14, 15 (arguing that "line managers must be willing to withhold pay raises, promotions, and other valued rewards when subordinates fail to conform to acceptable standards . . . of social-sexual conduct").

191. It appears that many existing antiharassment programs impose such sanctions, at least on occasion. See *infra* note 194.

may also screen for potential harassers during job interviews, emphasize the firm's antiharassment policies during orientation, implement employee education in its various forms, involve line managers in the effort to stem harassment, and inquire in exit interviews whether departing employees left because they were harassed.¹⁹²

If widely adopted, antiharassment programs of this sort could have several beneficial effects. They could drastically reduce employees' propensity to harass by sensitizing them to the offensiveness of behavior they once regarded as innocent fun, and by creating a corporate culture in which harassment is taboo. If employees actually have the option to use viable grievance procedures and employers actually enforce antiharassment policies, the firm itself might eliminate much unwelcome sex-related behavior, sparing all concerned the costs and frustrations of litigation. Firms might also reduce the costs resulting from lower job performance, absenteeism, and turnover—all problems that often flow from sexual harassment in the workplace.¹⁹³ These benefits are particularly likely if firms impose strict sanctions on the most consistent and egregious offenders.¹⁹⁴ Moreover, if those firms' enforcement procedures maintain confidentiality and make accurate determinations of guilt, such offenders are unlikely to succeed in defamation or wrongful discharge suits.¹⁹⁵

192. See, e.g., Bahls, *supra* note 187, at 55 (discussing exit interviews); Bradshaw, *supra* note 187, at 52 (advocating educating employees about both harassment and firm's policies and procedures); Frierson, *supra* note 187, at 80 (same); *Getting the Message*, *supra* note 188, at 99 (advocating holding role-playing sessions and distributing booklets spelling out inappropriate conduct); Thomann & Strickland, *supra* note 190, at 14-15 (discussing screening during job interviews, educating during orientation, and involving line managers); Woods & Flynn, *supra* note 189, at 48-49 (suggesting comprehensive employee education about nature of sexual harassment and its legal implications, as well as company policies on subject).

193. See, e.g., Thomann & Strickland, *supra* note 190, at 14; Thornton, *supra* note 189, at 22; see also Licata & Popovich, *Preventing Sexual Harassment: A Proactive Approach*, TRAINING & DEV. J., May 1987, at 34 (discussing Office of Management and Budget estimates that sexual harassment cost the federal government \$189 million due to turnover during 1978-1980 period); Sandroff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN, Dec. 1988, at 69, 71 (asserting, without any stated basis, that "[s]exual harassment costs a typical Fortune 500 company with 23,750 employees \$6.7 million per year in absenteeism, low productivity and employee turnover").

194. This appears to be happening to some degree. For example, an article reporting on a survey of 160 Fortune 500 firms claims that more than half include a description of investigation procedures and possible disciplinary actions in their written antiharassment policies. It asserts that eight out of ten offenders are given a verbal or written warning; that two in ten are eventually discharged; and that transfer, suspension, probation, and demotion are used in less than six percent of cases. Sandroff, *supra* note 193, at 72.

195. Such suits apparently are becoming increasingly common. See, e.g., 1 A. LARSON & L. LARSON, *supra* note 11, § 41.65(c), at 8-201 (noting the occurrence of defamation suits by men who were fired or transferred after being accused of sexual harassment); Bradshaw, *supra* note 187, at 52 (arguing that employers should ensure that they are not trading a sexual harassment suit for a wrongful termination suit by insisting on strong evidence that alleged offender actually engaged in harassment).

Given all of this, it might appear that the law should encourage firms to adopt antiharassment policies by imposing across-the-board strict liability.¹⁹⁶ But this approach is unlikely to appeal to those who feel strongly that liability should be based on fault.¹⁹⁷ The issues underlying the disagreement between such people and those who approach liability consequentially are difficult and cannot be resolved here.¹⁹⁸ What is certain, however, is that agency principles contribute nothing to the resolution of these questions. It is true that certain rules of agency law embody each of the two views sketched earlier. For example, direct liability and the employer's traditional nondelegable duties are clearly fault-based.¹⁹⁹ Respondeat superior, on the other hand, creates a species of strict liability which is based on a risk-spreading rationale that emphasizes the consequences of liability.²⁰⁰ But as these examples illustrate, agency law does not speak with one voice on the question of whether the law should adopt fault-based liability standards or consequentialist standards. More important, it does not tell us how to resolve the ethical issues that underlie this choice.

Agency law also is useless in resolving various empirical issues that bear on the desirability of using strict liability to reduce harassment by stimulating employers to adopt the recommended programs. An article in a major management journal recently observed that sexual harassment has received little empirical research attention; most studies on the subject are surveys attempting to assess harassment's frequency.²⁰¹ Thus, little evidence exists about the overall effectiveness of sexual harassment programs.²⁰² Currently, however, some three-quarters of the

196. Although not necessarily endorsing across-the-board strict liability, observers often note that imposing it will have a useful stimulative effect on employers. See, e.g., Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 607 (1988); Note, *Between the Boss and a Hard Place*, *supra* note 9, at 457-58; Note, *supra* note 14, at 1462.

197. One way to counter this objection is to argue that employers who fail to adopt appropriate antiharassment policies are morally at fault. But this argument depends on the effectiveness of such policies, and their effectiveness is uncertain. See *infra* notes 201-04 and accompanying text.

198. See *supra* notes 182-83, which hopefully suggest as much.

199. See *supra* notes 120-22, 138-39 and accompanying text.

200. As one treatise explains:

The rule tends to foster safety measures. The master is likely to be more careful in the selection and supervision of servants if responsible for their conduct. . . . [H]e can readily procure liability insurance which removes any substantial risk of personal disaster and, in business ventures, the premiums are, in the end, borne by those whom the business serves.

W. SEAVEY, *supra* note 89, § 83A, at 141.

201. York, *Defining Sexual Harassment in Workplaces: A Policy-Capturing Approach*, 32 ACAD. MGMT. J. 830 (1989).

202. See, e.g., Champagne & McAfee, *Auditing Sexual Harassment*, PERSONNEL J., June 1989, at 124, 132 (noting that few organizations appear to have systematically evaluated the effectiveness of their programs, and the next step is for them to begin audits of their antiharassment policies). But see Frierson, *supra* note 187, at 80 (finding that many companies find a long-run

country's larger firms have adopted antiharassment policies, and they have done so mainly because they fear legal liability.²⁰³ Nonetheless, several commentators have suggested that some of the programs already adopted lack features essential to their optimum functioning or are not properly implemented.²⁰⁴ This observation could suggest the futility of using the law to reduce the incidence of sexual harassment by stimulating employers to adopt programs for curtailing it. Then again, it could argue for redoubled efforts—including strict liability—for clubbing employers into line.

3. Some Conjectures About Preferable Employer Liability Standards

The main contention of this Article is that agency law should play little or no role in determining an employer's Title VII liability for employees' sexual harassment. Among the many reasons for rejecting agency principles are the incoherent legal guidance they provide and their utter failure to address the policy issues the employer liability question presents. Lest this analysis be accused of the same failings, some conclusions about desirable employer liability standards are in order. For all the reasons stated earlier, however, those conclusions are tentative. With that qualification in mind, the preferred approach is for courts to apply strict liability for all forms of supervisory harassment while continuing to use the actual-or-constructive-knowledge test for work environment harassment by coemployees.

As suggested earlier, the courts' differing treatment of supervisory quid pro quo harassment and supervisory work environment harass-

decrease in sexual harassment complaints after adopting their policies). Neither of these sources cited any data to support their conclusory statements. A very recent article in *Business Week* noted the antiharassment efforts made by many firms, but did not discuss their effectiveness. See *Getting the Message*, *supra* note 188.

203. See, e.g., Champagne & McAfee, *supra* note 202, at 132 (stating that most medium- and large-sized firms have taken the EEOC's sexual harassment guidelines seriously by developing policies and programs dealing specifically with sexual harassment); Sandroff, *supra* note 193, at 70 (reporting that 76% of 160 Fortune 500 firms surveyed have written policies banning sexual harassment as of 1988, and another 16% ban harassment through their antidiscrimination policies; 66% of those surveyed said EEOC Guidelines prompted their policies and 54% said general fear of legal exposure also contributed to this decision); see also Frierson, *supra* note 187, at 79 (describing a 1987 Bureau of National Affairs survey showing that about three-fourths of the relevant firms had adopted their antiharassment policies for legal reasons).

204. See, e.g., Champagne & McAfee, *supra* note 202, at 132 (reporting that some firms have only given lip service to the EEOC Guidelines); Frierson, *supra* note 187, at 79 (arguing that many companies have ineffective policies that fail to provide fair and prompt investigations, protect against false accusations, effectively discipline harassers, and educate employees); *Getting the Message*, *supra* note 188, at 99 (finding that some companies adopted "one-shot" approach by merely putting appropriate boilerplate in employee handbooks, but failing to publicize those policies or circumventing them); see also *supra* note 195 (suggesting some problems in disciplining harassers).

ment lacks justification.²⁰⁵ The question becomes, then, which standard—strict liability or the actual-or-constructive-knowledge test—should apply in these two cases? For several reasons, strict liability seems preferable. First, Title VII generally imposes strict employer liability for the actions of supervisors,²⁰⁶ interpreting a statute consistently throughout all its applications is certainly a desirable legal goal. Second, strict liability for supervisory harassment may be economically more efficient than the alternatives.²⁰⁷ The most important reason for applying strict liability, however, is its tendency to make employer anti-harassment programs more effective. For such programs to be effective, employers probably need all the stimulus the law can provide.²⁰⁸

In the case of work environment harassment by coworkers, however, this stimulus may prove ineffective. In many instances of supervisory harassment, it is possible to penalize the perpetrator without unduly disrupting the organization's functioning.²⁰⁹ Because sexual harassment charges can damage careers²¹⁰ and because supervisors presumably comprise a relatively ambitious and rational group, supervisory harassment might be more or less deterrable. Work environment harassment by coemployees, however, may sometimes be another story.²¹¹

205. The main legal prop for this distinction has been *Henson's* "authority" rationale. On that rationale and the problems it presents, see *supra* subpart III(A).

206. See *supra* notes 30, 49 and accompanying text.

207. See Sykes, *supra* note 196, at 606-08.

208. This stimulus might increase if strict liability were supplemented by a rule under which employers that adopt and enforce suitable anti-harassment programs would have their liability determined under the actual-or-constructive-knowledge test instead. *Cf. id.* at 608 (advocating a similar rule for work environment harassment by coemployees). By giving complying employers a "plum" for their labors, this rule could further stimulate the development of suitable programs. It also could augment the effectiveness of such programs by giving victims an incentive to report harassment, thus maximizing employers' opportunities to correct it. The incentive would exist because unless middle- or high-level managers independently acquire actual or constructive knowledge of harassment, victims who fail to report it will be unable to hold their employers liable under Title VII if those employers have adopted a suitable policy. This suggested rule has an additional bonus: because it rewards especially virtuous employers, it might appeal to those for whom fault is the decisive consideration in fashioning vicarious liability rules.

The benefits just enumerated, however, must be balanced against the possibility that some victims may fail to recover either because they fear retaliation if they invoke their employer's procedure or because they simply are ignorant of the rule. Finally, because the rule only relieves firms that adopt and enforce suitable policies, courts would have to evaluate the appropriateness of both a firm's program and its enforcement. For these reasons, the rule could be difficult to administer.

209. *Cf. Sandroff, supra* note 193, at 72 (discussing sanctions imposed within some Fortune 500 firms). As this discussion suggests, however, this may not be true when the harasser is a "star."

210. *Id.* (asserting that "today a charge of harassment can damage a promising career").

211. *Cf. Ford & McLaughlin, Sexual Harassment at Work, Bus. HORIZONS, Nov.-Dec. 1988*, at 19 (suggesting that sexual harassment policies have not been particularly effective in dealing with hostile environment harassment, but not distinguishing between supervisors and coworkers in this connection); *Getting the Message, supra* note 188, at 99 (noting that while *quid pro quo* suits

Not infrequently such harassment results from the injection of women into "extraordinarily complex male dominated subcultures where loyalty to the crew often takes precedence over all else and is seen as a prerequisite for survival on the job."²¹² The attitudes characterizing such subcultures may be relatively impervious to change from outside. Although individually the harassing coworkers probably are unimportant to their employers, collectively they may sometimes be indispensable and not easily replaced.²¹³ Thus, it is possible that making employers strictly liable for work environment harassment by coworkers would purchase relatively little reduction in this form of harassment. Under these circumstances, the conceded undesirability of imposing liability without fault becomes the decisive factor in the moral equation and tips the balance toward an actual-or-constructive-knowledge standard rather than a strict liability standard.²¹⁴ But this conclusion depends on an empirical assumption—the difficulty of eliminating coworkers' environmental harassment—that is anything but certain. Nonetheless, what is certain is that agency principles contribute nothing to resolution of the question.

V. CONCLUSION

Writing in 1964 Warren Seavey led off the preface to his agency treatise by observing that:

Agency has attracted very few writers. There are few law review articles and, aside from the Restatement, no very recent texts. Perhaps for this reason, it has been given diminishing attention in law schools; the time given to it now is far less than its intrinsic importance warrants, since practically all of the world's business

have leveled off, work environment suits have increased).

212. Spann, *Dealing Effectively with Sexual Harassment: Some Practical Lessons from One City's Experience*, 19 PUB. PERSONNEL MGMT., Spring 1990, at 53, 64 (mentioning firefighters, police officers, bus drivers, and maintenance workers as examples).

213. This problem could arise, for example, when city governments confront work environment harassment among their firefighters or police forces. See *supra* note 212 and accompanying text. See also Spann, *supra* note 212, at 64-68 (raising this problem but not satisfactorily resolving it). Another example is presented by *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988), in which the defendant's road construction crew subjected three female "flag persons" to a pattern of egregious work environment harassment. In each case, is firing all or some of the offenders a genuine option for their employers? When it is not a real option, how likely are the employers to use other sanctions and how often will such sanctions be effective?

214. Assuming they are accurate, however, the arguments in this paragraph suggest a problem with even this standard: if employers are unlikely to eliminate coworkers' work environment harassment because the task is so daunting and the costs so great, why impose liability on them at all? One reason is simply to provide harassment victims with another avenue of relief. Also, in at least some cases firms that fail to correct work environment harassment probably can be regarded as morally at fault, and thus deserving of the punishment Title VII liability imposes. For example, firms may negligently fail to discover correctable harassment, may knowingly fail to correct such harassment, or may fail to do all that they reasonably might when it is uncertain whether corrective actions would work.

involves agents and in most important transactions, an agent on each side. This in turn results in a poor understanding of its characteristic features.²¹⁵

Perhaps this poor understanding helps explain the actions of the EEOC and the Supreme Court in *Meritor*, as well as the post-*Meritor* courts' uneven performance.²¹⁶ Of particular importance here is the ubiquitous but rarely articulated myth that agency law comprises a simple set of basic principles that find easy application in many contexts. Of course, the EEOC's and the Court's resort to agency law might be explained in other ways as well. Such explanations usually presume that agency principles are less tough on employers than the liability standards that would be imposed in their absence. This desire to limit employer liability may reflect the ambivalence some courts feel about the sexual harassment cause of action,²¹⁷ which Congress surely did not contemplate when it banned sex discrimination in Title VII. It also may reflect a general animus toward government regulation and a related desire to allow employers to reassert certain traditional prerogatives. Viewed in this way, *Meritor* can be regarded as a harbinger of the Court's controversial 1988-1989 employment discrimination decisions.²¹⁸

Whatever its motivation, *Meritor's* command that courts consult agency principles to determine employer sexual harassment liability was most unfortunate. The main reason is agency law's inapplicability both to sexual harassment cases and to the policy issues sexual harassment presents. Although it may have erred when it called respondeat superior a tort rule, the D.C. Circuit's *Meritor* opinion basically got things right when it said:

Title VII is a mandate from Congress to cure a perceived evil—certain types of

215. W. SEAVEY, *supra* note 89, at ix (footnote omitted). It seems safe to say that little has changed since Seavey wrote these words. *E.g.*, Farber & Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903, 917 (1985) (stating that "[b]ecause agency law has all but disappeared as a separate legal discipline, attorneys, judges, and law clerks are ill-equipped to perceive agency issues").

216. For an argument that the EEOC should bear most of the blame, see Levy, *supra* note 7, at 816 (asserting that due to the EEOC's confusion on agency law, it is little wonder that the *Meritor* majority was determined to say as little as possible on the employer liability question). Although Professor Levy probably is too easy on the Court, the EEOC's *Meritor* brief is a font of misinformation on agency law. *See, e.g., supra* note 93.

217. "Believing that the [sexual harassment] cause of action should be limited, many courts have fettered it with requirements that have no basis in the language of Title VII, its legislative history or its judicial interpretations." Attanasio, *supra* note 12, at 5.

218. *See, e.g., Patterson v. McClean Credit Union*, 109 S. Ct. 2363, 2373-75 (1989) (interpreting 42 U.S.C. § 1981 (1988) as applying only to discrimination in the making and enforcement of private contracts, including employment contracts); *Martin v. Wilks*, 109 S. Ct. 2180, 2184-88 (1989) (holding that parties who are affected by a consent decree following Title VII litigation can later challenge the decree, even though they were not parties to the litigation out of which it arose); *Ward's Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2121-27 (1989) (toughening the requirements for recovery in Title VII disparate impact cases).

discrimination in employment—in a prescribed fashion. Rules of tort law, on the other hand, have evolved over centuries to meet diverse societal demands by allocating risks of harm and duties of care. Without clear congressional instruction, we think it unsafe in developing Title VII jurisprudence to rely uncritically on dogma thus begotten.²¹⁹

The Supreme Court believed that Title VII's Section 701(b) is a "clear congressional instruction" to use agency law for determining employer liability, but the Court almost certainly was wrong. For this reason, and all the others this Article presents, agency law is irrelevant to employer liability for sexual harassment. Courts should abandon its use forthwith.

219. *Vinson v. Taylor*, 753 F.2d 141, 150-51 (D.C. Cir. 1985) (footnote omitted), *aff'd sub nom. Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).