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Confusion in the Court: Sexual Harrassment Law, Employer Liability, and Statutory Purpose

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COMMENT

CONFUSION IN THE COURT: SEXUAL HARASSMENT LAW, EMPLOYER LIABILITY, AND STATUTORY PURPOSE

I. INTRODUCTION

Sexual harassment law has come a long way in the twenty years since the term "sexual harassment" first entered the lexicon.[1] The behavior once regarded as a normal if sometimes offensive part of human interaction is now, depending on the circumstances, redressable as illegal discrimination based on gender.[2]

In particular, more and more U.S. courts are holding employers liable for harassment in the workplace, especially when perpetrated by a supervisor. Indeed, one commentator recently remarked, "Considering how costly the federal government has made the practice, it's amazing that employers still hire women."[3]

Strong language, to be sure; one shudders to think how this commentator might have responded to any number of other decisions that have attempted to dismantle, with varying degrees of success, other discriminatory practices. Nonetheless, the questions arise: Has U.S. law gone too far in imposing employer liability for

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1. Professor Catharine MacKinnon is generally credited with coining the term "sexual harassment" and with pioneering much of the early thinking in this area. *See, e.g.*, CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).

2. Sexual harassment claims are generally brought under the aegis of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1994) (hereinafter Title VII or Civil Rights Act), as a form of gender-based discrimination. Guidelines promulgated by the Equal Employment Opportunity Commission (EEOC) have further defined sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature," under any of three sets of circumstances, including when:

> (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, . . . or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (1998).

3. Robyn Blumner, *Women Might Price Themselves Out of Jobs*, ST. PETERSBURG TIMES, Oct. 4, 1998, at 1D.

supervisory harassment? What factors should govern such an assessment? Public policy? Fairness? (And if so, to whom?) And what can we learn from the corresponding law of other countries, in particular the United Kingdom, with its familiar mix of legislative statute and judge-made law?

Interestingly, recent Supreme Court decisions in *Burlington Industries, Inc. v. Ellerth*[4] and *Faragher v. City of Boca Raton*[5] have brought U.S. and U.K. sexual harassment law into closer alignment, especially with regard to employer liability. Intriguing differences remain, however, promising mutual benefit from a careful comparison of the two bodies of law.

Part II below outlines the current state of sexual harassment law, beginning with a description of the development of sexual harassment as a legal concept, and then moving to the development of the two bodies of law this Comment proposes to compare: that of the United States and of the United Kingdom. Because both are common law countries,[6] this Comment relies heavily on the case law of each, although the developing law of the European Union[7] will figure in as well, sometimes in surprising ways.

Part III presents a comparison and analysis of U.S. and U.K. sexual harassment law, focusing on the underlying theories for employer liability. In particular, this section looks at how U.K. law, while initially following U.S. law, now appears to be leading the way.

Finally, Part IV begins by noting that U.S. and U.K. sexual harassment law have paralleled each other throughout their development and are now converging on essentially the same policy-based approach to employer liability for harassment by a supervi-

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4. 118 S.Ct. 2257 (1998).

5. 118 S.Ct. 2275 (1998).

6. *See, e.g.*, LAWRENCE M. FRIEDMAN, AMERICAN LAW: AN INTRODUCTION 30–31 (1998).

7. For example, a threshold question in a 1998 case considered whether certain statutory protections against sex discrimination applied to individuals who had undergone gender reassignment. The English court looked to the European Union's Equal Treatment Directive of 1976 as well as to rulings by the European Court of Justice and the European Court of Human Rights. *See* Chessington World of Adventures Ltd. v. Reed [1998] I.C.R. 97 (Eng.). See also Victoria A. Carter, *Working on Dignity: EC Initiatives on Sexual Harassment in the Workplace*, 12 NW. J. INTL. L. BUS. 431, 439–42 (1992), for a succinct, fascinating discussion of the various directives, resolutions and other legislation adopted by the European Union in its effort to combat sex discrimination and sexual harassment in the workplace.

sor. Both bodies of law regard sexual harassment in the workplace as an illegal form of gender-based discrimination with repercussions that are systemic. In response, both systems have moved toward a fairly strict form of liability, but one that gives the employer credit for taking reasonable steps to prevent and correct harassment.

Significantly, however, British case law has embraced legislative purpose almost exclusively in justifying its approach, while U.S. case law has attempted to reconcile legislative purpose with principles of agency.[8] As a result, U.S. law tends to be more confused and convoluted, with efforts to define brightline tests based on agency only adding to the confusion. Thus, this Comment recommends that Americans take a cue from the British and consider premising employer liability for sexual harassment on the underlying policy and intent of the Civil Rights Act, and not on nineteenth century tort law.

II. BACKGROUND

A. Sexual Harassment as a Legal Claim

Sexual harassment, the experience, is as old as human history.[9] Sexual harassment, the legal complaint, began doctrinally in 1979 with Catharine MacKinnon's provocative and still compelling work, Sexual Harassment of Working Women.[10] According to MacKinnon, "Sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power."[11] In addition, MacKinnon advanced the argument that sexual harassment was a form of sex discrimination[12] and, as such, was illegal under Title VII of the Civil

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8. Agency law is a set of principles that define the circumstances under which the wrongs of a servant (or employee) may be imputed to his master (or employer) for purposes of vicarious liability. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 69–70 (5th ed. 1984).

9. *See, e.g.*, Tanya Martinez Shively, *Sexual Harassment in the European Union: King Rex Meets Potiphar's Wife*, 55 LA. L. REV. 1087, 1088–89 (1995) (recounting the sexual harassment of Joseph by King Potiphar's wife, as told in the Old Testament of the Bible).

10. MACKINNON, *supra* note 1.

11. *Id.* at 1.

12. *See id.* at 4; *see also id.* at 143–49, 174–213 (presenting the heart of MacKinnon's argument that sexual harassment is a form of sex discrimination, whether such discrimina-

Rights Act of 1964.[13]

Under this theory, sexual harassment as an actionable form of illegal sex discrimination entered U.S. Supreme Court case law[14] with the 1986 case, *Meritor Savings Bank v. Vinson*.[15] Former bank employee Mechele Vinson complained that her supervisor, Sidney Taylor, made repeated demands on her "for sexual favors, usually at the branch, both during and after business hours. . . . In addition, [she] testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions."[16]

The *Meritor* Court observed that the conditions of the complainant's employment were affected by the demands made by her supervisor, and to which she submitted out of fear of losing her job. Relying on principles of agency,[17] the Court unanimously found the bank liable for "hostile environment" sexual harassment.[18] Rejecting the bank's view that illegal discrimination required the victim suffer some tangible job detriment, the Court noted, "[T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at

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tion is premised on a perceived "inequality" between the sexes or on one or more arbitrary "differences").

13. 42 U.S.C. 2000e (1994). Title VII reads in relevant part:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Id. 2000e-2.

14. Earlier cases treated sexual harassment as a "personal proclivity" of the harasser and not as conduct that affected the victim's employment, with the result that plaintiff's claim was rejected. *See, e.g.*, Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975).

15. 477 U.S. 57 (1986).

16. *Id.* at 60.

17. The Court cited the EEOC's contention that courts should draw from "traditional agency principles" in formulating the rules for employer liability. *Id.* at 70.

18. *See id.* at 59–60, 64–67 (citation omitted). In characterizing the discrimination suffered by Vinson as "hostile environment" sexual harassment, the Court relied on MacKinnon's distinction between "quid pro quo" harassment (an explicit or implicit requirement that the woman comply with a sexual demand or else suffer job-related detriment) and "hostile environment" harassment (unwanted sexual conduct so severe and pervasive that the work environment is made unbearable). *See* MACKINNON, *supra* note 1, at 32, 40.

the entire spectrum of disparate treatment of men and women' in employment."[19]

Since *Meritor*, the courts have witnessed an ever-increasing upsurge in the number of sexual harassment claims.[20] A 1991 bill allowing employees to sue for compensatory damages, and not simply back wages or injunctive relief, further increased the number of claims that reached the courts.[21] Even so, the circumstances under which an employer could be held accountable for harassment by a supervisor showed little sign of settling down. One reason may stem from early resistance by the courts to recognizing a claim whose very name had only recently entered the lexicon,[22] but surely another reason is that sexual harassment, as a social wrong and as a legal claim, has never fit neatly into the category of sex discrimination.[23]

In any case, a number of issues remain tantalizingly open, raising questions that have provoked whole new sets of issues and questions. For example, regarding the definition of sexual harassment: Is the requirement that the harassing conduct be "unwanted" simply a way of shifting focus to the victim and suggesting

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19. Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986).

20. "According to a recent study, nearly 75% of medium and large firms reported sexual harassment claims in 1996—compared to a tally of just over 50% five years earlier." WILLIAM PETROCELLI & BARBARA KATE REPA, SEXUAL HARASSMENT ON THE JOB: WHAT IT IS & HOW TO STOP IT 3/35 (1998). *See also* Kirstin Downey Grimsley, *Worker Bias Cases Are Rising Steadily: New Laws Boost Hopes for Monetary Awards*, WASH. POST, May 12, 1997, at A1.

21. *See id.* at 1/23. Passed following the Anita Hill-Clarence Thomas hearings, this compromise version of a previously vetoed bill capped the total damages employees could recover at between $50,000 and $300,000, depending on the size of the company. *See id. See also* Grimsley, *supra* note 20.

22. MacKinnon notes, "Until 1976, lacking a term to express it, sexual harassment was literally unspeakable, which made a generalized, shared, and social definition of it inaccessible" (footnote omitted). MACKINNON, *supra* note 1, at 27.

23. For example, the first and third elements of the discrimination claim require that the victim be a member of a protected class and that the harassing behavior have been based on that membership, respectively. Initially, meeting these elements required some logical and semantic juggling, including the argument that, but for her sex, the claimant would not have been the victim of the alleged conduct. This led to the odd result that, while heterosexuals and homosexuals could harass in a way that qualified as illegal sex discrimination, bisexual harassers could not. *See, e.g.*, Katherine S. Anderson, Note, *Employer Liability Under Title VII for Sexual Harassment after* Meritor Savings Bank v. Vinson, 87 COLUM. L. REV. 1258, 1259 n.13 (1987) (noting the "apparent consensus that bisexual harassment is not covered by Title VII because such harassment is not 'based on sex'").

that she "asked for it"?[24] Or does it acknowledge the sexual autonomy of women and their ability to make their own sexual choices?[25] What about use of the "reasonableness test" to determine whether hostile environment harassment was sufficiently severe and pervasive to interfere with the terms and conditions of a victim's employment: Is this fair, or does such a test, by being tied to a notion of societal consensus, merely perpetuate the status quo?[26] Moreover, must sexual harassment even be sexual in nature?[27] Or would gender-based hostility toward women (or men) also qualify as sexual harassment?[28] Finally, given a consensus that sexual harassment exists and can be defined as a legal harm, who should bear the cost of harassment in the workplace: the victim? the harasser? the employer? If the employer, what is the underlying theory of liability?[29] And what should be the remedy?[30]

Equally interesting, perhaps, are the ways in which the legal

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24. *See, e.g.*, Ann C. Juliano, Note, *Did She Ask for It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558 (1992).

25. *See, e.g.*, Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998). *See also* Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 746–47 (1997) ("The requirement that the plaintiff prove the sexual conduct was unwelcome clearly presupposes a degree of female agency in these contexts.")

26. *See, e.g.*, Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1178 (1990) ("Why, for example, in the context of anti-discrimination statutes designed to reform society, is a standard that is explicitly tied to the status quo thought to be a proper vehicle for identifying discriminatory behavior?") (footnote omitted).

27. *See* Schultz, *supra* note 25, at 1689 (arguing that the focus of sexual harassment law "should not be on sexuality as such. The focus should be on conduct that consigns people to gendered work roles that do not further their own aspirations or advantage").

28. *See, e.g.*, Jeffrey Toobin, *The Trouble with Sex*, NEW YORKER, Feb. 8, 1998, at 48. Toobin describes Professor Vicki Schultz as having "demolish[ed] the claim that there is no harassment without sex. Such a view, she writes, seriously understates the amount of real sexual discrimination in the workplace." *Id.* at 55. *But see, e.g.*, Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 820 (1991). Estrich writes: "[Harassment] cases are such a disaster in doctrinal terms precisely because, as with rape, they involve sex and sexuality." *Id.*

29. *See generally* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66 (1995); Ronald Turner, *Title VII and Hostile Environment Sexual Harassment: Mislabeling the Standard of Employer Liability*, 71 U. DET. MERCY L. REV. 817 (1994).

30. *See, e.g.*, Marlisa Vinciguerra, Note, *The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717, 1723 (1989) ("Plaintiffs proving hostile environment harassment are confined to injunctive relief and reinstatement because the hostile environment claim specifically seeks to redress non-economic injuries.") (footnote omitted).

definition of sexual harassment, the basis for liability, and the allowed remedy have interacted over time. For example, it seems plausible that confusion over exactly what constituted sexual harassment[31] was a factor in the courts' early resistance to finding employers liable—and perhaps even in the reluctance on the part of the political branches to provide for compensatory damages once an employer was found liable.[32] Thus, the 1998 Supreme Court decisions regarding employer liability for workplace harassment, particularly in *Burlington Industries* and *Faragher*, bring a curious hope: that as the definition of sexual harassment settles, the basis for finding employer liability will be clarified as well, and further, that the relief granted will be brought into line with the injury done.

B. Sexual Harassment Law in the United States

1. The Early Cases

U.S. courts initially refused to recognize sexual harassment as a legal claim under Title VII, in part because the statute itself, while covering discrimination based on gender, said nothing about sexual harassment.[33] Indeed, the early courts typically found that the conduct on which a victim based her sexual harassment claim might well be offensive but that it constituted a "personal proclivity"[34] of the offender or even "social patterns that to some extent are normal and expectable."[35] Courts worried that the difficulty of distinguishing among "invited, uninvited-but-welcome, offensive-but-tolerated and flatly rejected advances," placed an unfair bur-

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31. *See, e.g.*, Richard Cohen, *What's Harassment? Ask the Woman*, WASH. POST, July 5, 1988, at A19.

32. *See* Vinciguerra, *supra* note 30, and accompanying text. But see also *supra* note 21 and accompanying text, for recent changes in the law regarding compensatory damages for sexual harassment claims.

33. Moreover, as has been noted by numerous authors on the subject, gender-based discrimination by employers was added late to the Civil Rights Act of 1964 in an attempt by the bill's opponents to derail its passage; thus, there is little legislative history to guide the courts in their consideration of sexual harassment claims. *See, e.g.*, Turner, *supra* note 29 at 818; Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at* Meritor Savings Bank, FSB v. Vinson, 44 VAND. L. REV. 1229, 1231 (1991).

34. Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975).

35. Barnes v. Costle, 561 F.2d 983, 1001 (D.C. Cir. 1977) (MacKinnon, J., concurring).

den on employers.[36] At least one commentator expressed the view that "relations between the sexes may be chilled if men fear that behavior offensive to a sensitive woman may be actionable in court."[37]

After the Equal Employment Opportunity Commission (EEOC) published its guidelines on sexual harassment (EEOC Guidelines)[38] in 1980, U.S. courts began to recognize sexual harassment as grounds for a claim of sex discrimination.[39] Coverage extended to both quid pro quo harassment, in which an employer or supervisor attempts to extort sexual favors from another employee in exchange for some promised work-related benefit, and hostile environment harassment, in which more general conduct of a sexual nature serves to create a hostile or offensive work environment for other employees.[40]

In 1982, the court in *Henson v. City of Dundee*[41] used agency principles in conjunction with the EEOC guidelines to define a two-tiered approach to employer liability for sexual harassment by a supervisor.[42] In the case of quid pro quo harassment, the Court said, where the supervisor "relies upon his apparent or actual authority to extort sexual consideration from an employee,"[43] the harassing conduct is considered within the supervisor's scope of employment and as such may be imputed to the employer.[44] The

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36. *Id.* at 999 (MacKinnon, J., concurring).

37. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1458 (1984).

38. 29 C.F.R. § 1604.11 (1998).

39. *See* Nicolle R. Lipper, *Sexual Harassment in the Workplace: A Comparative Study of Great Britain and the United States*, 13 COMP. LAB. L. 293, 307 (1992).

40. See *supra* note 2 for relevant EEOC Guideline provisions; see also *supra* note 18 for Catharine MacKinnon's distinction between quid pro quo and hostile environment harassment.

41. 682 F.2d 897 (11th Cir. 1982).

42. The *Henson* Court relied on the EEOC Guidelines' distinction between quid pro quo and hostile environment harassment described in *supra* note 2.

43. *Henson*, 682 F.2d at 910.

44. *See, e.g.*, KEETON, *supra* note 8, § 70 at 502. The authors describe "in the scope of employment" as a

> highly indefinite phrase, which sometimes is varied with 'in the course of . . . employment,' [and which] is so devoid of meaning in itself that its very vagueness has been of value in permitting a desirable degree of flexibility in decisions. . . . It refers to those acts which are so closely connected with what the servant is employed to do . . . that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employ-

employer is then held strictly liable for the supervisor's conduct under the agency doctrine of respondeat superior.[45]

Hostile environment harassment, on the other hand, because it is done for the supervisor's own reasons (according to the *Henson* Court), occurs "outside the actual or apparent scope of the authority he possesses as a supervisor."[46] Thus, employer liability for environmental harassment could be neither strict nor automatic but should depend on whether the employer had actual or constructive knowledge of the harassing conduct.[47]

In short, the *Henson* Court approach to employer liability for supervisory harassment turned on whether the supervisor acted within the scope of the authority delegated to him and, if he did not, whether the employer had knowledge of the conduct. Interestingly enough, for all the confusion expressed over what constitutes sexual harassment and who should pay for it, this bifurcated approach to employer liability survives to this day, albeit in somewhat modified form.

Thus, as just noted, findings of quid pro quo harassment tend to turn on whether the harassing supervisor acted within the scope of his authority, while findings of hostile environment harassment tend to turn on whether the employer had knowledge of the harassing conduct. This distinction informed many of the decisions that followed *Henson*, including most notably *Meritor*. Moreover, although the *Burlington Industries* and *Faragher* Courts rejected premising the standard of employer liability on a distinction between quid pro quo and hostile environment harassment, they drew a similar line with regard to whether the harassment resulted in "tangible employment action."[48]

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ment.

Id.

45. *See, e.g.*, KEETON, *supra* note 8, § 69 at 499. The authors note that the principle by which the negligence of a wrong-doer may be imputed to another person for purposes of liability is generally called either vicarious liability or, using its Latin name, *respondeat superior*. *Id.*

46. *Henson*, 682 F.2d at 910.

47. *See id.*

48. In general, harassment resulting in "tangible employment action" tends to line up with quid pro quo harassment, while harassment without such a tangible result tends to fall into the hostile environment category. *See also infra* note 139 and accompanying text.

2. *Meritor* and Its Progeny

As noted in the previous section, the landmark Supreme Court decision in *Meritor Savings Bank v. Vinson*[49] heralded the true beginning[50] of employer liability under Title VII for sex-based harassment in the workplace. In *Meritor*, the Supreme Court unanimously found that sexual harassment that created a "hostile or offensive environment"[51] was actionable under Title VII, even without tangible job detriment and even if the victim voluntarily complied with the harasser's demands.[52] The correct inquiry, said the Court, was not whether the victim's conduct was "voluntary" but whether the victim indicated that the harasser's advances were unwelcome.[53]

On the issue of employer liability, however, the *Meritor* Court offered a more mixed holding. Quoting the *Henson* decision with apparent approval,[54] it nonetheless rejected both absolute liability for supervisory harassment and a requirement of actual knowledge.[55] According to the Court, Title VII's use of agency terms in its definition of employer[56] indicated congressional intent to limit the scope of employer liability for acts by its employees.[57] As a result, Justice Rehnquist declined to rule definitively on employer liability and referred the lower courts to agency principles for guidance.[58] Nevertheless, the Court found the Meritor Savings Bank liable, noting that even the victim's "failure to use [the bank's] established grievance procedure, or to otherwise put it on

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49. 477 U.S. 57 (1986); *see also* text accompanying *supra* notes 14–15.

50. An earlier case, *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), also acknowledged the merits of using Title VII as a basis for sexual harassment claims, but emphasized the retaliatory nature of the supervisor's conduct in its finding of harassment. *See* Lipper, *supra* note 39, at 305.

51. *Meritor*, 477 U.S. at 67.

52. *See id.* at 64, 68–69.

53. *See id.* at 68.

54. *See* Phillips, *supra* note 33, at 1240, n.69.

55. Sharon T. Bradford, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 YALE L.J. 1611, 1614, n.28 (1990). Note, however, that by not distinguishing between quid pro quo and hostile environment harassment, the *Meritor* Court may not be in direct conflict with the *Henson* decision.

56. *See* 42 U.S.C. 2000e(b) (1994).

57. *See Meritor*, 477 U.S. at 72.

58. *See id.* The EEOC, in an amicus curiae cited in the *Meritor* decision, "contend[ed] that courts formulating employer liability rules should draw from traditional agency principles." *Id.* at 70.

notice of the alleged misconduct," did not insulate the bank from liability for the harasser's wrongdoing.[59]

In the decade following *Meritor*, several intertwined themes began to emerge in the treatment of sexual harassment claims. Employer liability continued to be premised on agency principles, most often the strict liability doctrine of respondeat superior.[60] At the same time, courts often mitigated the harshness of respondeat superior by requiring actual or constructive knowledge on the part of the employer, at least in the case of hostile environment harassment.[61] Indeed, the *Sims* Court rejected strict liability outright and declared that "whether making out a claim for hostile work environment or quid pro quo type sexual harassment, a plaintiff must prove that the employer knew or should have known of the harassment in question. . . ."[62]

Furthermore, although the *Meritor* Court concluded that "the mere existence of a grievance procedure and a policy against discrimination" did not automatically insulate an employer against liability,[63] many courts have looked favorably on the existence of

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59. *Id.*

60. Shortly after *Meritor*, the *Rabidue* Court echoed the *Henson* Court in declaring the existence of respondeat superior liability an element of the hostile environment harassment claim. *See* Rabidue v. Osceola Refining Co. 805 F.2d 611, 619–20 (6th Cir. 1986). The following year, the *Yates* Court used scope-of-employment to require examination of such factors as when and where the harassing conduct took place and whether it was foreseeable. *See* Yates v. Avco, 819 F.2d 630, 636 (6th Cir. 1987). Similarly, in 1992, the *Kauffman* Court relied on agency principles to determine the scope of a supervisor's authority, as well as the foreseeability of his harassing conduct. *See* Kauffman v. Allied Signal, Inc., 970 F.2d 178, 184 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992).

61. Although the *Karibian* Court, echoing *Meritor*, opined that lack of notice did not always insulate employers from liability, *see* Karibian v. Columbia Univ., 14 F.3d 773, 779 (2d Cir.), *cert. denied*, 114 S.Ct. 2693 (1994), the *Silverstein* Court held for the employer because the victim failed to report the harassment, in spite of having the opportunity to do so, and because the harassment "was not so pervasive as to put [her employer] on constructive notice of the conduct," Silverstein v. Metroplex Communications, Inc. 678 F. Supp. 863, 870 (1988).

62. Sims v. Brown & Root Indus. Servs., Inc., 889 F. Supp. 920, 925 (1995). In general, however, proof of employer knowledge was not required for claims of quid pro quo harassment —nor, in some courts, for claims of hostile environment harassment by a supervisor. Indeed, a 1994 guide to filing sexual harassment claims advised, "Where sexual harassment has quid pro quo as well as hostile environment characteristics, it may be beneficial to allege quid pro quo harassment, since employers will be held strictly liable for a supervisor's conduct only under this type of claim" (footnote omitted). ANJA ANGELICA CHAN, WOMEN AND SEXUAL HARASSMENT: A PRACTICAL GUIDE TO THE LEGAL PROTECTIONS OF TITLE VII AND THE HOSTILE ENVIRONMENT CLAIM 17 (1994).

63. *Meritor*, 477 U.S. at 72.

such procedures and policies.[64] The *Sims* Court, for example, in a case of quid pro quo harassment by a supervisor, held for the employer after it took prompt remedial action in response to the victim's complaint.[65]

Even so, courts continued to express confusion as to what should be the appropriate standard of employer liability for harassment by a supervisor. In 1995, the Seventh Circuit attempted to bring some clarity to sexual harassment law by hearing two cases en banc.[66] The result was "eight separate opinions, each differing on exactly what liability standard to apply. . . ."[67] Not surprisingly, the panel urged the Supreme Court to "bring order to the chaotic case law in this important field of practice."[68]

3. *Burlington Industries*[69] and *Faragher*[70]

The Court attempted to do just that in the summer of 1998, handing down decisions in two cases that dealt with the specific circumstances in which an employer could be held liable for harassment by a supervisor.

In *Burlington Industries*, the Court considered the case of respondent Kimberly Ellerth, who had been subjected to "constant sexual harassment" by her supervisor, a mid-level manager at Burlington Industries.[71] After fifteen months, Ellerth left her job and filed a claim against her employer under Title VII.[72] The District Court granted summary judgment for the employer, finding that Ellerth had suffered no "tangible job detriment" and had left her job without making use of the company's grievance procedures or informing anyone in authority of her supervisor's conduct.[73] The Court of Appeals then reversed en banc, "produc[ing] eight

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64. *See Kauffman*, 970 F.2d at 184 (looking to the efficacy of the employer's response to a complaint of hostile environment sexual harassment by a supervisor).

65. "Brown & Root acted as a responsible, exemplary employer by processing Sims' complaint swiftly, seriously, and, upon gathering the evidence in a thorough manner, decisively and justly." *Sims*, 889 F. Supp. at 931.

66. *See* Jansen v. Packaging Corp. of Am., 123 F.3d 490 (7th Cir. 1997).

67. Stacey Dansky, Note, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, 76 TEX. L. REV. 435, 443 n.31 (1997).

68. *Jansen*, 123 F.3d at 494–95.

69. Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257 (1998).

70. Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998).

71. *See Burlington Industries*, 118 S.Ct. at 2262.

72. *See id.* at 2263.

73. *See id.* at 2262–63.

separate opinions and no consensus for a controlling rationale."[74]

In *Faragher*, meanwhile, the Court considered the case of petitioner Beth Ann Faragher, who had been subjected to ongoing hostile environment harassment from two of her immediate supervisors while working as a part-time and summer lifeguard over a period of five years.[75] Although Faragher and several other female lifeguards complained informally to one supervisor about the harassment, the remoteness of the lifeguard station from their employer made formal complaint difficult.[76] The District Court found for Faragher and her co-workers on her Title VII claim and awarded nominal damages, which the appellate court later reversed.[77] The Court of Appeals said that while it agreed with the lower court that Faragher's supervisors had created an "objectively abusive work environment," their behavior had been outside the scope of their employment and therefore could not be imputed to their employer.[78]

Thus, in both *Burlington Industries* and *Faragher*, the Court confronted the issue of employer liability. Specifically, the Court asked the question: Under what standard of liability, and in what circumstances, can the harassing conduct of a supervisor be imputed to the employer? Writing for the *Faragher* majority, Justice Souter noted,

> Since our decision in *Meritor*, Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees. While following our admonition to find guidance in the common law of agency, . . . the Courts of Appeals have adopted different approaches. . . . We granted certiorari to address the divergence. . . .[79]

Briefly,[80] the Court declared that employers are subject to vicarious liability for hostile environment sexual harassment by su-

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74. *Id.* at 2263. The Seventh Circuit consolidated for decision the appeals reargued the same day on behalf of plaintiffs Jansen and Ellerth. *See Jansen*, 123 F.3d at 492.

75. *See Faragher*, 118 S.Ct. at 2280.

76. *See id.* at 2280–81.

77. *See id.* at 2281.

78. *Id.*

79. *Id.* at 2282.

80. The *Faragher* and *Burlington Industries* decisions will be discussed in greater detail *infra* Part III.

pervisors.[81] Where the harassing conduct results in a tangible job detriment, that liability may be considered strict.[82] Where there is no tangible detriment, however, the employer may assert an affirmative defense based primarily on its having "exercised reasonable care to prevent and correct promptly any sexually harassing behavior."[83]

It remains to be seen, of course, whether this most recent articulation of an employer liability standard will bring the desired clarity to sexual harassment law or only add to the confusion by defining yet another set of factors (i.e., "tangible employment action" and "reasonable care" to prevent the harassment) to be considered. Justice Thomas, in his dissenting opinion in *Burlington Industries*, predicted "a continuing reign of confusion. . . ."[84] Even so, comparison of U.S. law to that of the United Kingdom gives reason to hope that clarity, fairness and effective policy will indeed be the result.

C. Sexual Harassment Law in the United Kingdom

1. Legislation and Early Case Law

The development of sexual harassment law in the United Kingdom has paralleled that of the United States in a number of ways. Indeed, one commentator observed in 1991 that Britain's jurisprudence in the area of sexual harassment was "largely based on American federal law."[85]

For example, Britain's Sex Discrimination Act (SDA) 1975[86] models Title VII closely, declaring unequivocally that gender-based discrimination in employment is illegal and supporting employer liability for job-related detriment.[87] Moreover, although

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81. *See Faragher*, 118 S.Ct. at 2292–93.
82. *See id.* at 2293.
83. *Id.*
84. *Burlington Industries*, 118 S.Ct. at 2273 (Thomas, J., dissenting).
85. David Pannick, *The Euro Guide on Sexual Harassment*, TIMES (London), Oct. 29, 1991.
86. Sex Discrimination Act 1975, ch. 65 (Eng.).
87. *See* Lipper, *supra* note 39, at 315. Lipper notes:

> Just as Title VII prohibits an employer from discriminating in the terms and conditions of employment on the basis of sex, section 1(1) of the [Sex Discrimination] Act provides that: 'A person discriminates against a woman in any circumstances relevant for the purposes . . . of [the] Act if: (a) on the

the SDA does not mention sexual harassment specifically, it has been used since 1986 as the primary legislative "vehicle for promoting the redress of sexual harassment claims as unlawful sex discrimination."[88]

Decided in the wake of *Meritor*, *Strathclyde Regional Council v. Porcelli*[89] recognized quid pro quo harassment as constituting a job-related detriment within the meaning of the SDA.[90] Moreover, the court rejected the lower tribunal's finding that the specific conduct complained of in this case was based on "dislike for [the complainant] as a colleague"[91] rather than on her gender. Nonetheless, because the employer accepted responsibility for the harasser's conduct, the lower court did not reach the issue of employer liability and left that open for another day.[92]

2. Scope of Employment and Reasonable Steps

Just as with U.S. cases, scope of employment as a basis for employer liability continued to be argued throughout the following decade. For example, the conduct of a postman who wrote ethnic slurs on mail addressed to his African-Jamaican neighbors was found to be outside the course of his employment and thus not imputable to his employer.[93]

In 1997, however, in a case that reached the English Court of Appeal,[94] the court overturned a majority decision below that determined the racially harassing conduct by employees in a shoe factory to be outside the scope of their employment and thus not

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> ground of her sex he treats her less favourably then he treats or would treat a man.'

Id.

88. *Id.* at 317 (referring to the first sexual harassment case to reach the British appellate courts).

89. [1986] I.C.R. 564 (Scot.).

90. *See id.* at 576; *see also* Lipper, *supra* note 39, at 317.

91. *Strathclyde Regional Council* [1986] I.C.R. at 569.

92. *See* Porcelli v. Strathclyde Regional Council [1985] I.C.R. 177, 181 (Scot.). Nor was the issue of employer liability raised on appeal; rather, the employer claimed the harassment suffered by the complainant was based on personal dislike rather than gender. *See Strathclyde Regional Council* [1986] I.C.R. at 569.

93. *See* Irving & Irving v. The Post Office [1987] I.R.L.R. 289, 290–91 (Eng.). Note that British case law typically refers to "course of employment" rather than "scope of employment." In any case, the terms are generally regarded as interchangeable. *See supra* note 44.

94. Jones v. Tower Boot Co. Ltd. [1997] 2 All E.R. 406 (Eng.).

imputable to their employer.[95] The court deemed it error to rely on the common law concepts of vicarious liability and course of employment, rather than on the avowed purpose of the statute authorizing the plaintiff's claim.[96]

Even so, the British courts continued to consider such tort concepts as foreseeability, awareness, and control in their attempts to determine employer liability. In a 1987 case, for example, the court declared that the conduct complained of was unforeseeable and that, as a result, the employer could be not held accountable.[97]

In a more recent case, however, the court viewed with disapproval the import of negligence principles into "the statutory torts of racial and sexual discrimination."[98] Focusing on statutory intent rather than common law, the court reframed the issue as "whether the event in question was something . . . sufficiently under the control of the employer that he could, by the application of good employment practice, have prevented the harassment or reduced the extent of it. If such is the finding, then the employer has subjected the employee to the harassment."[99]

In another 1997 case, the court looked to both control and awareness of the harassing conduct to find an employer liable for the harassment of an employee who had undergone gender reas-

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95. *See id.* at 409–10. Jones, a sixteen-year-old boy of racially mixed heritage, gave evidence that during his month of employment fellow workers burned him with a hot screwdriver, whipped him on the legs, threw metal bolts at him, tried to force his arm into a lasting machine, and abused him verbally with ethnic slurs. *See id.* at 408–09. Note that Jones was harassed by co-workers rather than by a supervisor. Nonetheless, the court's finding appears to turn on scope or course of employment rather on the position of the harassers. Indeed, the court quoted from the governing provision of the Race Relations Act: "'Anything done by a person in the course of his employment shall be treated for the purposes of this Act . . . as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.'" *Id.* at 408.

96. The court observed:

> [A]n inevitable result of construing 'course of employment' in the [common law context of vicarious liability] will be that the more heinous the act of discrimination, the less likely it will be that the employer would be liable . . . . [This] cuts across the whole legislative scheme and underlying policy of section 32 [of the Race Relations Act 1976].

Id. at 414–15. Moreover, the court declared that the preference for purposive statutory construction applied to cases brought under the Sex Discrimination Act as well as the Race Relations Act. *See id.*

97. *See* Balgobin & Another v. Tower Hamlets London Borough Council [1987] I.C.R. 829, 833–34 (Eng.).

98. Burton & Rhule v. De Vere Hotels [1997] I.C.R. 1, 10 (Eng.).

99. *Id.*

signment.[100] The court declared, "It is abundantly clear . . . [that] the appellant was aware of the campaign of harassment directed towards the respondent, but took no adequate steps to prevent it, although it was plainly something over which it could exercise control."[101]

Finally, in another interesting parallel to U.S. law, the British courts have considered whether the employer took all reasonable steps to prevent and correct workplace harassment. Indeed, the court's attention to whether the employer had control over the situation or conduct complained of is typically couched in terms of prevention and correction. In *Burton & Rhule*, for example, the court noted that the respondent was a "large organisation operating about twenty hotels. It [had] a personnel department and a personnel and training manual covering, inter alia, equal opportunity policy in respect of both race and sex discrimination."[102] Moreover, the employer told the tribunal that "he would never allow young female staff to go into a function where he knew a performer might tell sexually explicit jokes."[103] Nonetheless, the court found that the employer had given insufficient thought to the events under his control and that his lack of thought "subjected" the appellants to the racial and sexual harassment they suffered.[104]

In short, British law has moved steadily toward a standard of strict employer liability for sexual harassment of an employee, whether that harassment is perpetrated by a supervisor, a coworker or, it seems, a third party. In the absence of tangible job

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100. Chessington World of Adventures Ltd. v. Reed [1998] I.C.R. 97 (Eng.). In determining that the SDA applied to individuals who had undergone gender reassignment, the English court looked not only to its own case law, but to the European Union's Equal Treatment Directive of 1976, as well as to rulings by the European Court of Justice and the European Court of Human Rights. *See id.* at 101–04.

101. *Id.* at 104–05.

102. *Burton & Rhule* [1997] I.C.R. at 3.

103. *Id.* at 10.

104. *See id.* at 10–11. Note that this is a case of third-party rather than supervisory or even employee harassment. By rejecting negligence principles and focusing on whether the employer had control over the *situation* in which the harassment occurred, the court avoided the issue of whether the *conduct* by the harassers was the employer's responsibility. Thus, the court was able to find direct liability where vicariously liability was, presumably, not available. Moreover, the *Chessington* Court's citing of the *Burton* Court's "control" test suggests this case may have wider applicability than simply third-party harassment. *See Chessington* [1998] I.C.R. at 105.

detriment,[105] the harshness of this standard is mitigated to some extent by an affirmative defense that turns on such negligence-type principles as whether the employer took "reasonable steps" to prevent the harassment—although recent decisions suggest there may be limits to its availability.

III. ANALYSIS: COMPARISON OF SEXUAL HARASSMENT LAW IN THE UNITED STATES AND THE UNITED KINGDOM

A. The Emerging Standard of Employer Liability

As noted above, the development of sexual harassment law in the United States and the United Kingdom followed remarkably similar paths. First, both sets of law began as case law "piggy-backed" onto anti-discrimination statutes that did not explicitly mention sexual harassment as a form of gender-based discrimination. Second, courts in both countries rejected early workplace harassment claims, finding that the conduct complained of was a personal proclivity of the harasser and not a form of discrimination for which an employer could be held liable. Finally, once workplace harassment was recognized as an actionable claim, courts in both countries experienced some degree of confusion, even while hammering out what specifically constituted sexual harassment and under what circumstances an employer could be held accountable for harassment in the workplace.

Interestingly, while the United States initially led the way in the area of anti-discrimination and sexual harassment law, the United Kingdom quickly caught up.[106] Indeed, the case that moved U.K. law toward a fairly strict form of employer liability for workplace harassment, *Burton & Rhule v. De Vere Hotels*,[107] preceded similar rulings by the U.S. Supreme Court by almost two years. Furthermore, while U.S. courts are still attempting to rec-

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105. In the case of tangible job detriment resulting from harassment by a supervisor or fellow employee, the employer may be held directly liable without recourse to the statutory defense. In the absence of such detriment, the employer may be held vicariously liable, subject to the statutory defense. *See, e.g.*, *Chessington* [1998] I.C.R. at 100–01.

106. The Civil Rights Act of 1964 preceded the United Kingdom's Sex Discrimination Act by eleven years, while the landmark U.S. Supreme Court case, *Meritor Savings Bank v. Vinson*, preceded the U.K. case, *Strathclyde Regional Council v. Porcelli*, by mere months.

107. [1997] I.C.R. 1 (Eng.).

oncile sexual harassment law with variously understood agency principles, U.K. courts appear to have moved away from agency law and are basing their decisions on legislative intent and underlying policy.

In any case, the emerging standard for employer liability in both countries appears to be fairly strict, at least at first glance. England's *Burton* court, for example, applied section 32 of the Race Relations Act 1976,[108] which provides for vicarious liability of employers for "[a]nything done by [an employee or agent] in the course of his employment,"[109] and held the defendant liable for "harassment . . . in circumstances in which he can control whether it happens or not."[110] Moreover, lest its point be unclear, the court took pains to note in obiter dicta, "It is undesirable that concepts of the law of negligence should be imported into the statutory torts of racial and sexual discrimination."[111]

Nonetheless, the *Burton* Court did speculate on the amount of forethought the defendant could have given to the situation in which young black waitresses in his employ were harassed by unruly dinner guests, and on the actions he could have taken to prevent the harassment.[112] In so doing, the court seemed to allow for the possibility of a "reasonable steps" defense. Indeed, in a case decided the following year, the court premised liability explicitly, at least in part, on the lack of "adequate steps" taken to prevent the harassment in question, even though it was a situation over which the employer had control.[113]

Similarly, the U.S. Supreme Court, in *Burlington Industries* and *Faragher*, held that "[a]n employer is subject to vicarious liability . . . for an actionable hostile environment created by a supervisor. . . ."[114] But, where the victimized employee did not suffer tangible employment action, the Court went on to define an affirmative defense comprised in part of "reasonable care [by the employer] to prevent and correct promptly any sexually harassing

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108. Race Relations Act 1976, ch. 74 (Eng.).
109. *Id.* pt. IV, § 32(1).
110. *Burton & Rhule* [1997] I.C.R. at 10.
111. *Id.*
112. *See id.*
113. *See* Chessington World of Adventures Ltd. v. Reed [1998] I.C.R. 97, 105 (Eng.).
114. Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257, 2270 (1998).

behavior. . . ."[115]

Thus, both U.S. and U.K. courts have moved toward a strict standard of employer liability for supervisory harassment, recognizing to varying degrees the underlying legislative intent of the governing anti-discrimination statutes to prevent the harm of discrimination in the workplace.[116] At the same time, the courts of both countries have recognized, again to varying degrees, the importance of considering "reasonable steps" taken by the employer to prevent discrimination, either in the interest of fairness to the employer[117] or to further effect legislative intent by providing employers with an incentive to implement anti-harassment policies and grievance procedures.[118]

B. Agency Principles vs. Legislative Intent

1. Scope of Employment

Since virtually the beginning of sexual harassment law, U.S. and U.K. courts concerned themselves with the meaning of the term "scope of employment."[119] A major reason, no doubt, is simply that the notion of employer liability for harm caused by an

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115. *Id.*

116. The *Burlington Industries* Court noted, "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms." *Id.* Similarly, the *Burton* Court stated that "an employer will be guilty of unlawful discrimination under section 4(2)(c) [of the Race Relations Act] if he 'subjects' the employee to racial harassment or racial abuse serious enough to amount to a detriment." *Burton & Rhule* [1997] I.C.R. at 6.

117. The *Faragher* Court noted the importance of "giv[ing] credit . . . to employers who make reasonable efforts to discharge their duty." *Faragher*, 118 S.Ct. at 2292.

118. The *Burlington Industries* Court observed that recognizing "an employer's effort to create [grievance] procedures, . . . would effect Congress's intention to promote conciliation rather than litigation, . . . and the EEOC's policy of encouraging the development of grievance procedures." *Burlington Industries*, 118 S.Ct. at 2270 (citations omitted). Similarly, the *Burton* Court stated that a tribunal should consider:

> [W]hether the [harassing] event in question was something which was sufficiently under the control of the employer that he could, by the application of good employment practice, have prevented the harassment or reduced the extent of it. If such is their finding, then the employer has subjected the employee to the harassment.

Burton & Rhule [1997] I.C.R. at 10. Left unanswered, however, was whether an employer who had applied good employment practice might still be held liable if the harassment occurred anyway.

119. *See supra* note 44 and accompanying text.

employee seemed so clearly to invoke the tort law agency doctrine of respondeat superior.[120] But there were other reasons as well.

For U.S. courts, the very language of Title VII appeared to import at least some portion of agency law when it defined as unlawful the discriminatory employment practice of an employer "and any agent."[121] Indeed, the *Meritor* Court referred lower courts to agency principles in their efforts to define employer liability.[122] Similarly, the court in *Gary v. Long*[123] stated explicitly that Congress' purpose in using the words "and any agent" was to incorporate respondeat superior liability.[124]

As a result, from the earliest cases, U.S. courts struggled to determine whether a harasser's conduct was furthering his employer's enterprise in some way and thus within the "scope of employment."[125] Broad interpretations of this term resulted in findings of employer liability, while narrow interpretations resulted in findings of no liability. Finally, in *Burlington Industries* and *Faragher*, the Court attempted to lay this struggle to rest.

Looking again to agency law,[126] the *Burlington Industries* Court noted, "The concept of scope of employment has not always been construed to require a motive to serve the employer."[127] Nonetheless, according to the Court, "The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment."[128] Thus, although the Court went on to find employers liable for hostile environment sexual harassment on the basis of a different agency principle,[129] the Court clearly defined

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120. *See supra* note 45 and accompanying text.

121. 42 U.S.C. 2000e(b) (1994).

122. *See Meritor*, 477 U.S. at 72.

123. 59 F.3d 1391 (D.C. Cir. 1995).

124. *See id.* at 1399.

125. In *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), for example, the court found a harasser's conduct to be "nothing more than a personal proclivity, peculiarity or mannerism" and therefore outside the scope of his employment. "Certainly no employer policy is here involved," the court declared; "rather than the company being benefited in any way by the conduct of [the harasser], it is obvious it can only by damaged by the acts complained of." *Id.* at 163.

126. The Court stated, "We turn to principles of agency law, for the term 'employer' is defined under Title VII to include 'agents.' In express terms, Congress has directed federal courts to interpret Title VII based on agency principles." *Burlington Industries*, 118 S.Ct. at 2265 (citations omitted).

127. *Id.* at 2267.

128. *Id.*

129. The *Burlington Industries* Court described an agency principle called the "aided

hostile environment sexual harassment by a supervisor as outside the scope of his employment.

The U.K. experience initially mirrored that of the United States. In a 1986 case,[130] the court cited the governing statutory provision's definition of liability of employers and their principals: "Anything done by a person in the course of his employment shall be treated for the purposes of this Act . . . as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval."[131] As a result, early decisions often turned on the finding of whether the harassing conduct was within the scope (or course) of the harasser's employment.[132]

By 1996, however, the English court had apparently tired of defining "course of employment" in terms of common law agency doctrine. As noted above, the Court of Appeal, in *Jones v. Tower Boot Co. Ltd.*,[133] overturned a lower tribunal's finding of no employer liability because the complained-of harassment had been outside the harassing employees' course of employment. Specifically, the appellate court found no justification for reading the term "course of employment" as "subject to the gloss imposed on it in the common law context of vicarious liability."[134] Instead, the court opined that "a statute is to be construed according to its legislative purpose, with due regard to the result which it is the stated or presumed intention of Parliament to achieve and the means provided for achieving it."[135]

Thus, although the U.S. and U.K. courts appear to be converging on a similar, relatively strict standard of employer liability for harassment by supervisor, they part company when it comes to the underlying rationale. U.S. courts, bound perhaps by the

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in the agency standard." *See id.* at 2268. This standard is defined in section 219 of the Second Restatement of Agency, which states in relevant part: "(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . (d) the servant . . . was aided in accomplishing the tort by the existence of the agency relation." RESTATEMENT (2d) OF AGENCY § 219(2) (1984).

130. De Souza v. The Automobile Association [1986] I.C.R. 514 (Eng.).

131. Race Relations Act 1976, ch. 74, pt. IV, § 32(1) (Eng.).

132. In *Irving & Irving v. The Post Office* [1987] I.R.L.R. 289 (Eng.), the conduct of a postman who wrote ethnic slurs on mail addressed to his African-Jamaican neighbors was found to be not within the course of his employment and thus not imputable to his employer. *See id.* at 290–91.

133. [1997] 2 All E.R. 406 (Eng.).

134. *Id.* at 414.

135. *Id.* at 413.

Meritor Court's advisement to "look to agency principles" to determine employer liability,[136] have attempted to base liability on the very common law principles that the English courts have eschewed in favor of public policy and legislative intent.[137]

Nonetheless, when strict interpretation of a favored agency principle fails to mandate a finding of employer liability, U.S. courts have proved creative in finding other, more obscure agency principles to justify their findings. One such example is the Court's use in *Burlington Industries* and *Faragher* of the "aided in the agency relation standard."[138]

The *Burlington Industries* Court first identified "a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate."[139] Where there is no tangible job detriment, however, the Court declined to issue a definitive ruling, noting that the agency relation standard "is a developing feature of agency law."[140] Relying instead on the *Meritor* decision, which held that

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136. *Meritor*, 477 U.S. at 72. Intriguingly, one recent commentator asserts:

> The *Faragher* and *Burlington [Industries]* Courts failed to test the conceptual and factual assumptions underlying the principle of enhanced stare decisis in statutory interpretation, and consequently misconstrued the significance of the *Meritor* decision and the 1991 amendments to Title VII. . . . The Court's misapplication of the principle of enhanced statutory stare decisis in *Faragher* and *Burlington [Industries]* demonstrates the need for establishing a limitation of the principle: it should apply only to conclusive judicial statements that send a clear signal to legislators.

Note, *Leading Cases*, 112 HARV. L. REV. 313, 318 (1998).

137. Indeed, the appellate court in *Jones v. Tower Boot* carefully noted that it was not bound by the finding in another case, Irving & Irving v. The Post Office [1987] I.R.L.R. 289 (Eng.), that the harassing conduct of a postal employee was outside the course of his employment. Observing that the *Irving* Court never referred to a governing statute, the appellate court in *Jones* concluded that "*Irving* does not decide that 'course of employment' in [the Race Relations Act] incorporates the common-law concept of vicarious liability and we are not accordingly bound so to hold." Jones v. Tower Boot Co. Ltd. [1997] 2 All E.R. 406, 411 (Eng.).

138. *See Burlington Industries*, 118 S.Ct. at 2268; *see also supra* note 129 for the Restatement definition of the "aided in the agency relation" standard cited by the *Burlington Industries* Court.

139. *Burlington Industries*, 118 S.Ct. at 2268. The Court further defines "tangible employment action" as constituting "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* The Court also observes that, in most cases, tangible employment action "inflicts direct economic harm." *Id.* at 2269.

140. *Id.*

agency principles "constrain[ed] the imposition of vicarious liability,"[141] the Court defined an affirmative defense that employers could assert in the absence of direct economic harm.[142]

In short, the *Burlington Industries* Court "split the baby." Using agency principles to justify finding an employer liable for harassment by a supervisor, the Court then retreated a bit and used agency law to justify restricting employer liability—all the while giving the impression that it knew where it wanted to go but was required to use agency law to get there. Finally, the Court settled on a standard of vicarious liability with an affirmative defense, similar to the standard established by the English courts without the use of agency law.

2. Tangible Employment Action

In its attempt to define a uniform standard of employer liability,[143] the *Burlington Industries* Court rejected use of the distinction between quid pro quo and hostile environment harassment as a basis for determining whether to apply strict or negligence-based liability, respectively.[144] Such a rule, said the Court, "encouraged Title VII plaintiffs to state their claims as quid pro quo claims, which in turn put expansive pressure on the definition."[145]

Unfortunately, by defining a standard of vicarious liability with an affirmative defense that can be asserted only in the absence of tangible employment action,[146] the *Burlington Industries* and *Faragher* Courts have, arguably, simply shifted the focus of future litigation. Where plaintiffs previously sought to characterize their complaints as quid pro quo harassment, they will surely now seek to define the harm they have suffered as "tangible employ-

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141. *Id.* at 2270.

142. *See infra* text accompanying note 158.

143. Citing the *Meritor* Court's finding that Title VII was intended to evoke agency principles, the *Burlington Industries* Court stated, "[W]e conclude a uniform and predictable standard must be established as a matter of federal law." *Burlington Industries*, 118 S.Ct. at 2265.

144. "The terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility." *Id.* at 2264.

145. *Id.* at 2265.

146. *See supra* text accompanying notes 140–142.

ment action."[147]

In any event, it is instructive to consider how English case law has handled the issue of job detriment. In the 1986 case of *Strathclyde Regional Council v. Porcelli*,[148] the appellate court left untouched the lower court's definition of job-related detriment, agreeing that "suspension, warning, [or] enforced transfer"[149] fell within the meaning of the Sex Discrimination Act. In another 1986 case, however, the court found the *Porcelli* Court's definition of job-related detriment too limited and observed instead, "If . . . the discrimination was such that the putative reasonable employee could justifiably complain about his or her working conditions or environment,"[150] that could constitute sufficient detriment "whether or not the working conditions were so bad as to . . . amount to constructive dismissal."[151]

Indeed, by 1996, it appeared well-settled in English case law that job detriment required neither disciplinary employment action by the employer nor direct economic harm to the plaintiff. In *Burton & Rhule*, for example, the court of first instance stated it had "no doubt"[152] that two young black waitresses who endured racial and sexual slurs from an unruly dinner audience had suffered a detriment "within the meaning of the [governing statute]."[153] The appellate tribunal agreed and found the waitresses' employer responsible.[154]

Thus, just as it did with "course of employment," the English court relied on a commonsense understanding of the term "job detriment." Moreover, by not premising employer liability (or the assertion of an affirmative defense) on whether "tangible employment action" exists, U.K. courts have avoided some of the

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147. Indeed, two commentators have already noted, "[I]t is rare, and about to become rarer, that a court will be asked to decide a case that boasts absolutely no adverse employment action. Complaints will now sprout language like: denied overtime, denied promotional opportunities, received no raise or bonus, etc." Robert D. Lipman & David A. Robins, *Court's Harassment Rulings Provide Ammunition for Both Sides*, N.Y.L.J., Oct. 1, 1998, at 1.

148. [1986] I.C.R. 564 (Scot.).

149. Porcelli v. Strathclyde Regional Council [1985] I.C.R. 177, 183 (Scot.).

150. De Souza v. The Automobile Association [1986] I.C.R. 514, 524 (Eng.).

151. *Id.*

152. Burton & Rhule v. De Vere Hotels [1997] I.C.R. 1, 5 (Eng.).

153. *Id.* at 5–6.

154. *See id.* at 11.

more fact-intensive inquiries that plague U.S. courts.

3. Reasonable Steps and Avoidable Consequences

U.S. and U.K. law have apparently agreed on the use of such negligence principles as reasonable steps and avoidable consequences to soften what might otherwise be considered strict employer liability. Even so, recent decisions in both countries represent a shift away from, rather than toward, negligence-based liability, at least for hostile environment harassment by a supervisor.

Until *Burlington Industries* and *Faragher*, for example, most U.S. courts required either actual or constructive knowledge before an employer could be held accountable for hostile environment harassment.[155] Indeed, some commentators have proposed a notice liability standard for all types of sexual harassment.[156] Not surprisingly, the dissents of both the *Burlington Industries* and *Faragher* decisions lamented the Court's move toward strict liability. Justice Thomas wrote,

> In such circumstances [in which a supervisor creates a hostile work environment], an employer should be liable only if it has been negligent. That is, liability should attach only if the employer either knew, or in the exercise of reasonable care should have known, about the hostile work environment and failed to take remedial action.[157]

Nonetheless, although both decisions articulated a relatively strict standard of liability, all was not lost. By allowing the employer to assert an affirmative defense under certain circumstances, the Court left the door ajar to the very negligence principles Justice Thomas decried losing. Specifically, the Court defined an affirmative defense comprised of two necessary elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff

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155. Michael J. Phillips has noted that "an actual-or-constructive-knowledge standard predominates in this area," in spite of the fact that "Title VII makes employers strictly liable for discrimination by supervisors." Phillips, *supra* note 33, at 1240. Citing the 1982 decision *Henson v. City of Dundee*, Phillips further observes that the main justification for this standard relies on agency law. *Id.*

156. *See generally* J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273 (1995); *see also* Dansky, *supra* note 67.

157. *Burlington Industries*, 118 S.Ct. at 2272–73 (Thomas, J., dissenting).

employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[158]

Note, however, that lack of knowledge is no longer relevant. Moreover, the burden is now on the employer to show he acted with reasonable care, rather than on the plaintiff employee to show that the employer did not act with such care. Thus, the message is now clear: the employer who wishes to protect his interests will promulgate an anti-harassment policy with a well-defined set of complaint procedures and communicate both to his employees.[159]

Interestingly, in creating a liability standard that includes the possibility of an affirmative defense, the Court finally turned to policy and statutory purpose. Noting first that the *Meritor* Court intended agency law to limit the imposition of employer liability,[160] the *Burlington Industries* Court stated, "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms."[161] Thus, premising employer liability on an employer's efforts to create such policies and procedures would effect congressional intent.[162]

Moreover, according to the Court, the second element of the defense also served congressional intent. Borrowed from another area of tort law, the "avoidable consequences" doctrine allows a defendant to assert an affirmative defense if the plaintiff has unreasonably failed to take saving action.[163] Thus, the Court observed, "To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose."[164]

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158. *Id.* at 2270.

159. Many commentators have noted the clear message to employers to implement effective anti-harassment polices. *See, e.g.*, Reynolds Holding, *No, Bosses Aren't Always Liable for Workplace Harassment*, S.F. CHRON., Oct. 4, 1998, at 3/Z1; Marcia Heroux Pounds, *Small Firms Need Sex-Harass Policies*, SACRAMENTO BEE, Oct. 4, 1998, at E2.

160. *See Burlington Industries*, 118 S.Ct. at 2270.

161. *Id.*

162. *See id.*

163. *See, e.g.*, KEETON, *supra* note 8, § 65 at 458. The authors define the doctrine of "avoidable consequences," which "denies recovery for any damages which could have been avoided by reasonable conduct on the part of the plaintiff." *Id.*

164. *Burlington Industries*, 118 S.Ct. at 2270.

Similarly, although U.K. courts often looked to whether the employer knew, or reasonably should have known, of the alleged harassment, they also considered whether the employer took reasonable steps to prevent the harassment from occurring in the first place. In a 1987 case,[165] for example, the court observed that management had acted promptly to conduct an inquiry in response to allegations of harassment, that supervision was proper and adequate, and that the employers had "made known their policy of equal opportunities."[166] Thus, the court concluded, "it [is] difficult to see what steps in practical terms the employers could reasonably have taken to prevent that which had occurred from occurring."[167]

Unlike U.S. courts, however, English courts have not had to struggle to define the contours of an affirmative defense to a sexual harassment complaint. Indeed, section 41(3) of the Sex Discrimination Act establishes as a defense that the employer "took such steps as were reasonably practicable to prevent the [harassing] employee from doing [the complained-of] act."[168] Thus, from its earliest decisions, U.K. sexual harassment law has, at least with regard to affirmative defenses, relied on statutory language and legislative purpose rather than on interpreting and applying common law tort principles.

No doubt Parliament had such tort principles as "reasonable steps" and "saving action" in mind when it drafted the affirmative defense provisions of the Sex Discrimination and Race Relations Acts.[169] Nonetheless, the benefit of having a codified defense cannot be overestimated: U.K. case law on this issue has been clear and coherent from the beginning.

Indeed, in a 1998 case,[170] the court concluded that the appellant-employer had not made out the statutory defense under sec-

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165. *See* Balgobin & Another v. Tower Hamlets London Borough Council [1987] I.C.R. 829 (Eng.).

166. *Id.* at 832.

167. *Id.* at 833–34.

168. Sex Discrimination Act 1975, ch. 65, pt. IV, § 41(3) (Eng.).

169. In language virtually identical to section 41(3) of Sex Discrimination Act, the statutory defense section of the Race Relations Act states: "[I]t shall be a defence for [the employer] to prove that he took such steps as were reasonably practicable to prevent the [harassing] employee from doing [the complained-of] act." Race Relations Act 1976, ch. 74, pt. IV, § 32(3) (Eng.).

170. *See* Chessington World of Adventures Ltd. v. Reed [1998] I.C.R. 97 (Eng.).

tion 41(3) of the Sex Discrimination Act. It was clear, the court said, that the employers were "aware of the campaign of harassment directed towards the [employee], but [they] took no adequate steps to prevent it."[171] In a curious note, however, the court added that the harassing situation "was plainly something over which [the employers] could exercise control."[172]

This last observation is apparently an attempt to reconcile the finding of strict liability in *Burton & Rhule*[173] with the statutory defense of section 41(3). It remains to be seen what the English courts will do with the *Burton* decision. But, if the language of the *Chessington* Court is any indication, the question of whether the employer has control over the situation in which the harassment occurred may become simply a gloss on the statutory defense.

IV. PROPOSED: A POLICY-BASED APPROACH TO SEXUAL HARASSMENT LAW

In summary, U.S. and U.K. sexual harassment law have arrived at similar standards of employer liability for sexual harassment by a supervisor. Essentially, the standard is one of strict or vicarious liability, but with the possibility of an affirmative defense if the employer can show he took reasonable steps to prevent the harassment from occurring. In both countries, this defense is available only if the harassment did not result in a tangible job detriment.

In the United Kingdom, this defense is defined by statute: section 41(3) of the Sex Discrimination Act of 1975[174] for sexual harassment claims, and section 32(3) of the Racial Relations Act of 1986[175] for racial harassment claims. By contrast, the United

171. *Id.* at 105.

172. *Id.*

173. [1997] I.C.R. 1 (Eng.). The *Burton* Court based its finding of liability on the fact that the employer "permit[ted] the racial harassment to occur in circumstances in which he can control whether it happens or not." *Id.* at 10. The Court decreed further: "[Although] we can see that on occasions what the employer knew or foresaw might be relevant to what control the employer could exercise . . . foresight of the events or the lack of it cannot be determinative of whether the events were under the employer's control." *Id.* Strikingly, the *Burton* Court did not mention or cite to the available statutory defense, although it did note the allegation by plaintiff's counsel that the employer took no steps to prevent the harassment that occurred. *See id.* at 7.

174. Sex Discrimination Act 1975, ch. 65 (Eng.).

175. Race Relations Act 1976, ch. 74 (Eng.).

States has only recently, in *Burlington Industries* and *Faragher*, defined an affirmative defense to an otherwise strict liability standard.[176] Furthermore, both the *Burlington Industries* and *Faragher* Courts have declared that, where there is "tangible employment action," there is no defense.[177]

But however the standard is defined, whether by statute or by case law, strict liability with an affirmative defense may well prove to be an effective standard. As noted by a number of commentators,[178] both the strict liability standard and the "reasonable steps" affirmative defense provide incentive to employers to implement effective anti-harassment policies with well-defined grievance mechanisms. In addition, the second element of the defense, requiring unreasonable failure by the plaintiff-employee to take saving action to avoid the harm, should encourage employees to make use of those grievance mechanisms.

Moreover, as the Court itself noted, the resulting incentives and rewards serve the Title VII goals of deterring sexual harassment through the development and use of anti-harassment policies and grievance procedures, and of promoting conciliation rather than litigation as a means of solving those problems that do arise.[179] Thus, as also noted by commentators, the Court has "stepped into a policy-making role . . . recogniz[ing] that employers are in the best position to prevent . . . sexual harassment and, therefore, should have the burden of ensuring that supervisory staff do not abuse the power entrusted to them."[180]

This policy-making role is not unlike the role of the U.K. courts in the development and application of their own sexual harassment law. Yet, consider for a moment some of the contortions

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176. Note, however, that the notion of placing the burden of proof on the defendant to show that, in effect, he was not derelict in his duty of reasonable care is not without precedent in cases of intentional discrimination. See, for example, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–03 (1973), for a description of the "order and allocation of proof in a private, non-class [employment discrimination] action" under Title VII. *Id.* at 800.

177. Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257, 2270 (1998).

178. *See, e.g.*, Debra S. Katz & Lynne Bernabei, *Sex Harassment Cases Create Uncertainties*, TEX. LAW., July 20, 1998, at 28. "In *Burlington* and *Faragher*, the Court created a standard of liability to provide a significant disincentive to employers who refuse to put into operation appropriate procedures to prevent and correct sexual harassment and who attempt to escape liability by claiming that they were unaware of the objectionable conduct." *Id.*

179. *See Burlington Industries*, 118 S.Ct. at 2270.

180. Katz & Bernabei, *supra* note 178.

and convolutions so apparent in U.S. decisions as courts struggle to effect Title VII goals even while fitting their rulings to agency law.[181]

In *Burlington Industries*, for example, the Court observed, "In express terms, Congress has directed federal courts to interpret Title VII based on agency principles."[182] Pages later, after much discussion of agency law as well as the underlying purpose of Title VII, the Court returned to *Meritor* and declared, "[W]e are bound by our holding in *Meritor* . . . . Congress has not altered *Meritor*'s rule even though it has made significant amendments to Title VII in the interim."[183] Similar observations and declarations punctuate the *Faragher* Court's discussion of agency law and Title VII's underlying purpose.[184]

It is no doubt foolhardy to speculate on what the Court meant by all this invocation of *Meritor* and signals from Congress regarding the application of agency principles. But it seems possible that the Court, in both the *Burlington Industries* and *Faragher* decisions, has issued a plea to Congress to free it from those very principles.[185] Let Congress decide how, and to what extent,

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181. Consider also the fact that one result of attempting to fit Title VII goals to nineteenth century tort principles is case law that does not always make sense. For example, while U.K. statutes define the same standard of liability, and the same affirmative defense for sexual and racial harassment, *see supra* notes 174–175; U.S. law has diverged for these two causes of action. As Justice Thomas observed in his *Burlington Industries* dissent, "[E]mployer liability under Title VII is [now] judged by different standards depending on whether a sexually or racially hostile work environment is alleged. The standard of employer liability should be the same in both instances." *Burlington Industries*, 118 S.Ct. at 2271 (Thomas, J., dissenting).

182. *Id.* at 2265.

183. *Id.* at 2270.

184. The *Faragher* Court declared:

> *Meritor*'s statement of the law is the foundation on which we build today. Neither party before us has urged us to depart from our customary adherence to stare decisis in statutory interpretation . . . . And the force of precedent here is enhanced by Congress's amendment of liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding.

Faragher, 118 S.Ct. at 2286 (citations omitted).

185. Intriguingly, at least one U.S. Supreme Court observer has noted the Court's recent

> [retreat] from the political landscape. As it increasingly evades disputes desperately in need of resolution, the [C]ourt has become remote, content to let conflicts play out without definitive resolution. . . . Gone is a vision of the Supreme Court as a guardian of civil rights and liberties, ready to play a leading role in resolving heated social conflicts.

agency doctrine can serve Title VII goals—and then codify the result. Let the courts then apply that law, ensuring as they do that they have given effect to what ideally is a clear statement of congressional intent.

*Lynn Evans**

David M. O'Brien, *Justice in Absentia*, L.A. TIMES, Mar. 21, 1999, at M1. In *Burlington Industries* and *Faragher*, it seems evident that the Court did in fact attempt to resolve the issue of employer liability for sexual harassment by a supervisor. Nonetheless, its strict adherence to the *Meritor* Court's advisement to the lower courts to rely on agency principles, rather than on the statutory purpose of the 1964 Civil Rights Act under which sexual harassment claims are brought, is very much in keeping with this trend away from involving itself in social controversy or in setting public policy. See also Professor Cass Sunstein's thoughtful argument for what he calls "judicial minimalism." CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). According to Professor Sunstein:

> [L]eaving 'fundamental issues undecided' in cases dealing with questions 'on which the nation is currently in moral flux'—his major examples are the right to die, affirmative action, discrimination based on sex and sexual orientation, and regulation of communication technologies like the Internet—the [Supreme] Court is promoting this country's 'highest aspirations without preempting democratic processes.'

Lincoln Caplan, *They Don't Want to Get Involved*, N.Y. TIMES BOOK REV., May 30, 1999, at 18. Thus, "by avoiding engagement with broad questions and applying a case-by-case approach, the Justices encourage elected officials to deliberate on contentious matters and to test their answers before the voters." *Id.*

* J.D. Candidate, Loyola Law School, 2000; B.A., Psychology, University of Virginia, 1974. I dedicate this Comment to everyone who has ever wondered why things are not simpler or the lines brighter. Special thanks also to Professor Marcy Strauss for her insightful comments and suggestions.