

A POLICY ANALYSIS OF INDIVIDUAL LIABILITY—THE CASE FOR AMENDING TITLE VII TO HOLD INDIVIDUALS PERSONALLY LIABLE FOR THEIR ILLEGAL DISCRIMINATORY ACTIONS

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INTRODUCTION

At age eleven, Wendy Lee Wilson was abducted and raped. Her attacker was arrested and is still in prison. Less than eight years later, Wendy was once again sexually violated, this time by her boss, Sheriff Leon "Buddy" Nutt. When Wendy turned to the courts for redress a second time, however, justice was more elusive. In *Wilson v. Wayne County*,¹ the court found that Wendy Wilson had been sexually harassed, but that the person who had harassed her could not be held personally liable for his actions.² Wendy Wilson's case highlights the stark reality that, regardless of the severity of sexual harassment to which a victim has been subjected, she or he may have no remedy under Title VII of the Civil Rights Act of 1964 (Title VII, or "the Act").³

The district court that heard Ms. Wilson's employment discrimination claim made the following factual findings:

. . . In the spring of 1992, Ms. Wilson began working as a dispatcher at the Wayne County Sheriff's Department. She was still a senior in high school and planned to go away to college in the fall. . . .

[Her supervisor, Sheriff] Leon "Buddy" Nutt [was] fifty-five years old. . . . When Ms. Wilson began working at the sheriff's department, Sheriff Nutt knew that she had been raped. He remembered the incident from the time it happened. He also discussed it with another sheriff's department employee, to whom he expressed his belief that Ms. Wilson was emotionally disturbed as a result of the rape.

. . . .

1. 856 F. Supp. 1254 (M.D. Tenn. 1994).

2. See *id.* at 1256.

3. Civil Rights Act of 1964 §§ 701-718, 42 U.S.C. §§ 2000e to 2000e-17 (1994).

On July 13, at approximately 1:30 in the morning, Sheriff Nutt arrived at headquarters. He went into the dispatch room, where Ms. Wilson was on duty, and the two engaged in conversation. . . . After Ms. Wilson mentioned that she was nearly out of complaint-cards, [sic] the sheriff got up and went to his office. He returned shortly and asked Ms. Wilson to join him in the office.

Ms. Wilson followed [him] into his office believing that he was going to show her where he kept the complaint-cards. [sic] [Instead, he] locked the door behind them and turned out the lights. Ms. Wilson was very surprised by the sheriff's actions, and she froze in fear. The sheriff then kissed her and put his hand on her breast. Ms. Wilson said nothing and did not resist. [Then he] put his hand on Ms. Wilson's crotch, and he took her hand and placed it on his own crotch. Still Ms. Wilson did not resist or tell the sheriff to stop, but she did withdraw her hand once he was no longer holding it against him. Sheriff Nutt then unzipped Ms. Wilson's jump-suit and told her to get on the floor. Ms. Wilson just stood there, until the sheriff pulled her down to the floor. The sheriff penetrated Ms. Wilson on the office floor. Afterwards, he told her not to tell anyone what had just taken place.

. . . .
Ms. Wilson believed she was being raped. However, she did not resist because she thought it would be futile. She had tried to resist when she was raped at age eleven but to no avail. Therefore, she thought it would be useless to resist against the sheriff.

After the incident in the sheriff's office, Ms. Wilson returned to the dispatch room. Sheriff Nutt went to his bed and fell asleep.

. . . Ms. Wilson called [a friend] at his home and told him that the sheriff had just raped her. . . .

Wendy Wilson never returned to work at the sheriff's department after [that night].⁴

Although the court had no doubt that Sheriff Nutt subjected Wendy to severe sexual harassment, it nonetheless ruled that under Title VII he was not legally responsible for his own actions.⁵ The *Wilson* court openly acknowledged that "the analysis used by other courts in concluding that there is no individual liability under Title VII" is "questionable."⁶ However, in the absence of "a clear statement to the contrary from the United States Court of Appeals for the

4. See *Wilson*, 856 F. Supp. at 1256-58.

5. See *id.* at 1256 ("Now, having heard all the evidence, the Court finds that Sheriff Nutt did sexually harass Ms. Wilson Nevertheless, the Court concludes that Title VII does not permit suits against individual defendants in their individual capacities. Accordingly, the court shall dismiss this action with prejudice.").

6. *Id.* at 1264.

Sixth Circuit or the United States Supreme Court,”⁷ the court refused to split with authority from the Fifth, Ninth, Tenth, and Eleventh Circuits and hold that Title VII included a cause of action against individuals.⁸ The consequence of this holding is that Sheriff Nutt, and others like him, will not be held legally liable for their illegal, discriminatory acts.⁹ While such a result seems counterintuitive, the majority of federal courts have now ruled that individuals cannot be held personally liable¹⁰ for the commission of discriminatory acts that violate Title VII.¹¹

Contrary to popular belief, a finding of unlawful discrimination does not guarantee that a victim will be compensated for his or her injuries. Instead, it is not uncommon for a court to find that some form of employment discrimination occurred, but that the employing entity¹² is not liable based on principles of respondeat superior.¹³ A further problem is posed in those cases where the institutional em-

7. *Id.* at 1265.

8. *See id.* at 1261 (“The greatest weight of recent authority concludes that there is no individual liability under Title VII.”) (citing *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993). *See also* *Miller v. Maxwell’s Int’l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (per curiam); *Harvey v. Blake*, 913 F.2d 226, 227-28 (5th Cir. 1990)).

9. Some readers may wonder why it is necessary for Wendy Wilson to have a civil remedy under Title VII when it seems obvious that the sheriff committed the criminal act of rape. Ms. Wilson did file a complaint against the sheriff for rape, but the grand jury, not surprisingly, refused to indict. *See Wilson*, 856 F. Supp. at 1258 n.6. In any case, the availability of a criminal remedy is not relevant to the issue of whether a victim is entitled to a civil remedy. This is true for two reasons. First, many sexual harassment victims may also have a claim for some type of criminal battery or assault, yet no one would seriously suggest that this obviates the need for a civil remedy under Title VII to redress the injuries they suffered. Second, in order for Title VII to accomplish its goal of eliminating employment discrimination, victims must be able to pursue a remedy that is designed to recognize the distinct, group-based nature of their injuries. *See infra* pp. 294-96.

10. The terms “personal liability” and “individual liability” will be used interchangeably throughout this article.

11. *See, e.g.*, *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1319 (2d Cir. 1995) (finding no individual liability for employer’s agent under Title VII based on Congress’s expressed statutory intent); *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1279 (7th Cir. 1995) (stating that there is no personal liability for individuals under ADA unless they independently meet ADA’s definition of “employer”); *Grant v. Lone Star Co.*, 21 F.3d 649, 651 (5th Cir. 1994) (holding no individual liability under Title VII); *Miller*, 991 F.2d at 587 (concluding that statutory scheme of Title VII indicates Congress did not intend to impose individual liability on employees).

12. The terms “employing entity,” “employer-entity,” and “institutional employer” will be used interchangeably throughout this article to distinguish the overall employer from individual supervisors, bosses, or co-workers who could be subject to individual liability under Title VII.

13. *See infra* notes 32-46 and accompanying text.

ployer is insolvent.¹⁴ If the victims in such cases cannot sue the individual perpetrators, they are unable to recover any damages despite the fact that they have suffered a legally cognizable harm. Additionally, victims are denied some measure of vindication when a court refuses to hold the perpetrators of discrimination responsible for their own acts.

The issue of individual liability is of vital significance not only to plaintiffs like Wendy Wilson, who would like to see their tormentors held personally accountable for their behavior,¹⁵ but also to victims of employment discrimination who may otherwise walk away empty handed.¹⁶ Vickie Coates's experience with sexual harassment, which was much less extreme than Wendy Wilson's, illustrates the pervasive nature of the problem. Vickie Coates's supervisor repeatedly offered her money for sex, called her at home and left "amorous" messages on her answering machine, and threatened to kidnap her and take her to Arkansas.¹⁷ When Ms. Coates sued her employer, Sundor Brands, the company conceded that she had been subjected to hostile work environment sexual harassment, but successfully argued that it was not liable for that harassment because it took prompt and appropriate remedial action upon learning of the harassment.¹⁸ Despite the fact that Ms. Coates endured two years of illegal harassment, the court found that Sundor could not be held liable.¹⁹ Therefore, no one was liable for Ms. Coates's injuries because, under the Eleventh Circuit's current approach, the individual that actually committed the illegal discriminatory acts is not subject to suit.²⁰

This article argues that, as currently construed by the majority of courts,²¹ Title VII has failed Wendy Wilson, Vickie Coates and others like them. Unlike other articles that have examined the issue of individual liability,²² this article assumes that courts are unlikely to back

14. See *infra* notes 135-36.

15. See *infra* notes 137-38 and accompanying text.

16. See *infra* notes 84-136 and accompanying text.

17. See *Coates v. Sundor Brands, Inc.*, 160 F.3d 688, 691 (11th Cir. 1998).

18. See *id.*

19. See *id.*

20. See, e.g., *Cross v. State Dep't of Mental Health*, 49 F.3d 1490, 1504 (11th Cir. 1995) (holding that individual acting in his individual capacity was not "employer" and thus was not subject to suit under Title VII); *Lomax v. Smith*, 45 F.3d 402, 407 n.13 (11th Cir. 1995) (finding that personal staff exceptions contained in Title VII and ADEA did not render individual immune from section 1983 liability because individuals would not be liable under those statutes).

21. See *infra* note 37, and Part I of this article.

22. See, e.g., Kathleen Dawson, *Supervisor Liability for Employment Discrimination Under Federal Law: Substantive Remedy or Procedural Issue?*, 41 WAYNE L. REV. 1875 (1995) (determining that Title VII does not impose liability on individu-

away from the “greatest weight of recent authority”²³ which excludes personal liability under Title VII. Thus, the primary focus of this article is a policy analysis that argues Congress should amend Title VII to clearly allow claims against individuals in order to ensure adequate compensation for victims of employment discrimination and to deter future violations of the statute. This article concludes that a refusal to include a cause of action against individuals is manifestly inconsistent with the underlying rationale and primary goals of the statute.

Part I examines the controversy over the construction of the term “employer” in Title VII and the ensuing circuit split regarding individual liability. Specifically, Part I explains how most courts have construed the current liability scheme in a manner that precludes holding individuals responsible for their discriminatory behavior. These courts interpret the statute to impose liability exclusively on employers. Part I also briefly examines the reasoning behind both the majority and minority rules.

Part II calls for congressional action to amend Title VII to include individual liability and argues that individual liability is imperative if the statute is to achieve its dual goals of deterrence and victim compensation. Further, it argues that such an amendment is consistent with the subsidiary goals of avoiding intrusion into family-run businesses and safeguarding the economy. Part II also explains how the current failure to hold individuals responsible for their discriminatory behavior has created loopholes in Title VII’s enforcement scheme through which the actual perpetrators may escape unpunished. This section concludes with an explanation of how a congressional amendment to Title VII could prevent such circumvention and increase the likelihood of both deterring discrimination and compensating victims.

als); Janice R. Franke, *Does Title VII Contemplate Personal Liability for Employee/Agent Defendants?*, 12 HOFSTRA LAB. L.J. 39 (1994) (arguing that individual liability should be imposed); Michael D. Moberly & Linda H. Miles, *The Impact of the Civil Rights Act of 1991 on Individual Title VII Liability*, 18 OKLA. CITY U. L. REV. 475 (1993) (arguing that imposing individual liability in some Title VII cases would be contrary to congressional intent); Scott B. Goldberg, Comment, *Discrimination By Managers and Supervisors: Recognizing Agent Liability Under Title VII*, 143 U. PA. L. REV. 571 (1994) (arguing in favor of individual liability); Christopher Greer, Note, “Who, Me?”: *A Supervisor’s Individual Liability for Discrimination in the Workplace*, 62 FORDHAM L. REV. 1835 (1994) (claiming that Title VII, if properly read, establishes liability for acts of discrimination committed by individuals in supervisory positions); Clara J. Montanari, Comment, *Supervisor Liability Under Title VII: A “Feel Good” Judicial Decision*, 34 DUQ. L. REV. 351 (1996) (concluding that the only sensible interpretation of Title VII does not impose liability on individuals serving in supervisory capacities).

23. See *Wilson v. Wayne County*, 856 F. Supp. 1254, 1261 (M.D. Tenn. 1994) (citation omitted).

I

THE ORIGIN OF THE CONTROVERSY AND THE RESULTANT JUDICIAL
IMPASSE REGARDING INDIVIDUAL LIABILITY UNDER TITLE VII

Title VII was enacted in 1964 as the legislative centerpiece of the United States' efforts to "eliminate" employment discrimination.²⁴ The statute, with few exceptions,²⁵ makes it unlawful for an employer to discriminate against employees and potential employees on the basis of race, color, religion, sex, or national origin.²⁶ "Employers" found to be in violation of the statute were originally subject only to equitable remedies which included back pay, attorneys' fees, and lost benefits.²⁷ In 1991, however, Congress expanded the range of remedies available to victims and amended the Act to provide for compensatory and punitive damages as well.²⁸ Congress's express intent in expanding the range of available remedies was to "strengthen existing remedies to provide more effective deterrence and ensure compensation commensurate with the harms suffered by victims of intentional discrimination."²⁹

Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person."³⁰ This definition, or the lack of specificity therein, has caused difficulty for courts addressing the issue of whether individual agents, such as Sheriff Nutt, can be held personally liable for discriminatory acts they commit while on the job. Lack of

24. The stated purpose of Title VII is to "eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin." H.R. REP. NO. 88-914, at 26 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401.

25. 42 U.S.C. § 2000e-2(e) provides an exception under which sex may be shown as a bona fide occupational qualification, and 42 U.S.C. § 2000e-2(h) excepts bona fide seniority and merit systems. *See* 42 U.S.C. § 2000e-2(e), (h) (1994).

26. Title VII provides in relevant part:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1994).

27. *See* 42 U.S.C. § 2000e-5(g), (k) (1994).

28. *See* Civil Rights Act of 1991, 42 U.S.C. § 1981a (1994).

29. H.R. REP. NO. 102-40(I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556.

30. 42 U.S.C. § 2000e(b) (1994).

clarity within the “agent” provision has spurred controversy as to its intent, generating the current federal circuit split on the issue of individual liability.³¹

A. *The Current Trend and Majority Rule*

Some courts interpret the phrase “and any agent” in the definition of employer as a mere codification of respondeat superior liability.³² According to this view, the agent provision simply defines the scope of an employing entity’s vicarious liability for the acts of its agents; it does not provide a justification for extending liability to individuals. The doctrine of respondeat superior, which means literally “let the master answer,” provides that employers are liable for the torts of employees committed during the course of their employment.³³ Thus, according to this construction of the definition, the agent provision exists only to clarify that employers will be liable not only for their own acts, but also for acts their employees commit during the course of employment.³⁴

Unfortunately, the majority of recent authority agrees that the purpose of the agent provision is “to ensure that courts [will] impose respondeat superior liability upon employers for the acts of their agents,” not to extend liability to individual agents.³⁵ The rallying cry of these courts has been legislative intent.³⁶ More than half of the circuits have held that fellow employees and supervisors cannot be

31. See *infra* notes 37, 47-48 and accompanying text.

32. See, e.g., *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1282 n.10 (7th Cir. 1995) (emphasizing holding “only applies directly to the ADA, though it also affects the resolution of the very similar questions under Title VII and the ADEA”); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1315 (2d Cir. 1995); *Lenhardt v. Basic Inst. of Tech.*, 55 F.3d 377, 381 (8th Cir. 1995); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994) (arising under ADEA, but basing result on analogy to Title VII and cases arising thereunder); *Miller v. Maxwell’s Int’l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993).

33. See RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) [hereinafter RESTATEMENT]. Respondeat superior literally means “let the master answer.” BLACK’S LAW DICTIONARY 1311-12 (6th ed. 1990).

34. While this basic explanation makes it appear as if the employer would be liable for any discriminatory act committed by its employees, the “course of employment” language creates an exception to vicarious liability. An employer will not be held liable when an employee commits discriminatory acts outside the “course of employment.” For further explanation, see *infra* notes 60-62 and accompanying text.

35. See *AIC Sec. Investigations*, 55 F.3d at 1281.

36. See, e.g., *Tomka*, 66 F.3d at 1314 (reasoning that individual liability under Title VII “would lead to results that Congress could not have contemplated”); *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1525 (M.D. Ala. 1994) (“Congress could not have intended the odd circumstances that would result from a scheme of individual liability.”).

held personally liable for their discriminatory conduct.³⁷ These courts point to the statutory scheme and the remedial provisions of the Civil Rights Act as proof that Congress could not possibly have intended that individuals be held liable under Title VII.³⁸

The emerging majority position generally follows the Ninth Circuit's reasoning in the seminal case *Miller v. Maxwell's International, Inc.*³⁹ While the *Miller* court admitted that the arguments for construing Title VII to include personal liability were "not without merit," it nonetheless declined to interpret the statute accordingly.⁴⁰ The *Miller* court suggested two main reasons why the proper construction of Title VII precludes individual liability. First, the court reasoned that the statutory scheme, which limits liability to entities with fifteen or more employees, is indicative of congressional intent to protect small employers from the high costs of discrimination litigation.⁴¹ The court concluded that it is "inconceivable" that a Congress concerned with protecting small employers would simultaneously allow liability to run against individual employees or supervisors.⁴² Second, the remedial provisions of the statute were also cited as indicative of congressional intent to protect individuals from liability.⁴³ The Ninth Circuit reasoned that because the Civil Rights Act of 1991 calibrated the max-

37. See *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995); *Tomka*, 66 F.3d at 1313-17; *Gary v. Long*, 59 F.3d 1391, 1400 (D.C. Cir. 1995); *Cross v. State Dep't of Mental Health*, 49 F.3d 1490, 1504 (11th Cir. 1995); *Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir. 1993); *Miller*, 991 F.2d at 587-88. Other courts, while not specifically addressing the issue of individual liability under Title VII, have interpreted similarly worded statutory definitions of "employer" to exclude individual liability. See, e.g., *Lenhardt v. Basic Inst. of Tech.*, 55 F.3d 377 (8th Cir. 1995) (supervisor is not "employer" under Missouri statute similar to Title VII); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir. 1994) (arising under ADEA, but reasoning via analogy to Title VII statutory definition and cases).

38. See *infra* notes 39-46 and accompanying text.

39. 991 F.2d 583 (1991).

40. See *id.* at 587.

41. See *id.*

42. See *id.* This reasoning led some commentators to argue that, when enacting Title VII, Congress was concerned not only with eradicating workplace discrimination, but also with the seemingly contradictory policy of absolutely protecting small businesses. Thus, the commentators conclude that the courts must mediate between these two concerns when it comes to issues such as individual liability. See, e.g., *Dawson, supra* note 22, at 1902 (stating that Congress's decision not to extend statutory protection to all employers reflected compromise between elimination of discrimination and protection of small businesses).

43. The Civil Rights Act of 1991 amended Title VII's remedial scheme to allow the recovery of compensatory and punitive damages. See 42 U.S.C. § 1981a(a)(1), (b) (1994). Prior to the enactment of the Civil Rights Act of 1991, Title VII had provided only the equitable remedies of injunctive relief, reinstatement, and back pay. 42 U.S.C. § 2000e-5(g)(1) (1994).

imum allowable damage award to the size of the employer-entity⁴⁴ and failed to repeal the exemption for employers with less than fifteen employees, Congress must have intended to shield individuals from liability.⁴⁵ Thus, the court concluded that in light of the legislative intent revealed by the statutory scheme and remedial provisions, the agent clause functions *solely* to incorporate the principle of respondeat superior.⁴⁶

B. *The Minority Rule*

A minority of the circuits reject the respondeat superior interpretation. These courts hold that the term “employer” has always been construed to include vicarious liability and, thus, the agent provision must have an independent function within the definition of “employer.”⁴⁷ These courts reason that the language should be literally construed to mean that “‘agents’ of those who employ more than 15 workers are ‘employers’ and thus liable under the statute.”⁴⁸ Proponents of this interpretation argue that Title VII clearly subjects individual agents as well as institutional employers to liability.⁴⁹

44. The statute provides in relevant part: “[T]he complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section” 42 U.S.C. § 1981a(a)(1) (1994). However, these damages are limited according to the number of employees in the employer’s workforce. Subsection (b) provides:

[T]he amount of punitive damages awarded under this section, shall not exceed, for each complaining party— (A) in the case of a respondent who has more than 14 and fewer than 101 employees . . . \$50,000; (B) . . . who has more than 100 or fewer than 201 employees . . . \$100,000; (C) . . . who has more than 200 and fewer than 501 employees . . . \$200,000; and (D) . . . who has more than 500 employees . . . \$300,000.

42 U.S.C. § 1981a(b)(3)(A)-(D) (1994).

45. *See* Miller v. Maxwell’s Int’l Inc., 991 F.2d 583, 588 (9th Cir. 1993).

46. *See id.*

47. *See, e.g.,* Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989) (holding an individual is an “employer” if “he or she serves in a supervisory position and exercises significant control over the plaintiff’s hiring, firing or conditions of employment”); Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986) (permitting individual liability under § 1981). *See generally* Bertoncini v. Schrimpf, 712 F. Supp. 1336, 1339-40 (N.D. Ill. 1989) (summarizing relevant case law).

48. *See* Bishop v. Okidata, Inc., 864 F. Supp. 416, 423 (D.N.J. 1994) (arising under ADA, but reasoning through analogy to Title VII).

49. While it is outside the scope of the present discussion, a related issue exists regarding the breadth of the term “agent.” It is unsettled whether mere co-workers can be held liable, or whether only supervisors qualify as agents. Under a scheme of individual liability, courts will be charged with the task of determining which employees will be deemed agents for liability purposes. Most courts have interpreted the term “agent” to include only those employees who are “in a supervisory position and exercise[] significant control over the plaintiff’s hiring, firing or conditions of employment.” *Paroline*, 879 F.2d at 104. *See also* Levandos v. Stern Entertainment, Inc., 909 F.2d 747, 752 (3d Cir. 1990) (finding agent includes any person who partici-

Adherents to the minority rule read the plain language of the statute to include a cause of action against both employers and their agents.⁵⁰ While the plain language of the statute should be dispositive on the issue,⁵¹ courts that find individual liability go on to buttress their interpretation by pointing to the existence of a congressional mandate to broadly construe Title VII in order to afford victims maximum protection.⁵² Notwithstanding the statutory scheme and the remedial provisions of the statute, these courts argue that such a mandate clearly indicates that legislative intent actually supports an interpretation that holds individuals liable for their discriminatory acts.⁵³ These courts

pates in discriminatory decision-making process); *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360, 362 (6th Cir. 1982) (finding agent includes only "supervisory or managerial employee to whom employment decisions have been delegated"). Courts have generally been reluctant to hold co-workers personally liable for their discriminatory conduct. *See, e.g., Guyette v. Stauffer Chem. Co.*, 518 F. Supp. 521, 525 (D.N.J. 1981) ("[R]esearch has disclosed no case which squarely holds that a non-supervisory employee may or may not be an 'agent' of his employer in a Title VII action for sexual harassment.").

Any amendment to Title VII which clarifies that agents can be held personally liable under Title VII should specifically address the question of how broadly the term "agent" is to be defined. Congress should consider the excellent arguments in support of holding both supervisors and non-supervisory co-workers liable for discriminatory actions. If Congress does not clarify this particular issue, the current trend towards limiting individual liability to supervisory employees will likely become the majority rule.

50. *See, e.g., Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir. 1990) (arguing that plain language of ADEA, which is analogous to Title VII, could only mean that individuals should be held liable).

51. *See, e.g., United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[T]here is generally no need for a court to inquire beyond the plain language of the statute."); *Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); *United States v. Oregon*, 366 U.S. 643, 648 (1961) (explaining that when interpreting statutes, courts must determine whether statute's language is ambiguous before turning to legislative history and, if language is not ambiguous, courts should apply statute according to its plain language, without looking to legislative intent).

52. *See, e.g., Johnson v. University Surgical Group Assocs.*, 871 F. Supp. 979, 986 (S.D. Ohio 1994).

53. *See, e.g., Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) ("[G]iven a finding of unlawful discrimination . . . [remedy] should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination . . . and making persons whole for injuries suffered through past discrimination."); *Hamilton v. Rodgers*, 791 F.2d 439, 442 (5th Cir. 1986) ("Title VII 'should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination.'") (citation omitted); *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888, 891 (5th Cir. 1970) ("It is . . . the duty of the courts to make sure . . . the intent of Congress is not hampered by a combination of strict construction of the statute and a battle with semantics."); *Lamirande v. Resolution Trust Corp.*, 834 F. Supp. 526, 528-29 (D.N.H.

quite reasonably conclude that an interpretation of Title VII that precludes personal liability will encourage individual employees “to believe that they may violate Title VII with impunity.”⁵⁴

Courts construing Title VII to include individual liability find the common law doctrine of respondeat superior inapplicable and instead employ agency principles to determine the meaning of the agent clause. According to the *Restatement*, “principal and agent can be joined in one action for a wrong resulting from the tortious conduct of an agent . . . and a judgment can issue against each.”⁵⁵ Thus, these courts reason that agency principles require shared liability by all responsible parties. In situations where both the institutional employer and the individual are found liable, joint and several liability is generally imposed.⁵⁶ Even if the employing entity escapes liability, the agent is still personally liable.⁵⁷ The result is that victims with meritorious claims can proceed either against the employer-entity, the individual discriminator, or both.

The courts have reached an impasse on the issue of individual liability. While they point to the same evidence—standards of statutory construction, the plain language of the statute, legislative intent, and precedent—they divine its meaning differently. Absent intervention from either the Supreme Court or Congress, the issue is unlikely to be resolved and the current circuit split, with its attendant uncertainty and lack of uniformity, will prevail throughout the foreseeable future. The Supreme Court has twice passed on the opportunity to settle this issue.⁵⁸ Thus, Congress must speak in order to clearly answer the question of whether victims can bring a claim against individuals under Title VII. The focus of the next section turns to a discussion of exactly how Congress should answer that question.

1993) (reviewing “unequivocal” intent of Congress in passing the 1972 amendments to Title VII).

54. *Hamilton*, 791 F.2d at 443.

55. *RESTATEMENT*, *supra* note 33, § 359C(1).

56. *See, e.g.*, *Taylor v. Central Pennsylvania Drug and Alcohol Servs. Corp.*, 890 F. Supp. 360, 364 (M.D. Pa. 1995) (awarding back pay and other remedies to former female employees who were subjected to sexual harassment); *Johnson*, 871 F. Supp. at 986 (holding both medical practice where plaintiff worked and plaintiff’s supervisor liable).

57. *See supra* notes 48-53 and accompanying text.

58. *See Birkbeck v. Marvel Lighting Corp.*, 30 F.2d 507 (4th Cir. 1994), *cert. denied*, 513 U.S. 1058 (1994); *Miller v. Maxwell’s Int’l, Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied sub nom. Miller v. La Rosa*, 510 U.S. 1109 (1994).

II

POLICY ANALYSIS: AN EXAMINATION OF INDIVIDUAL LIABILITY IN LIGHT OF TITLE VII'S PUBLIC POLICY OBJECTIVES⁵⁹

It is an inescapable reality that many victims of employment discrimination fall through the cracks in Title VII's liability scheme because of courts' reliance on the respondeat superior theory of liability. According to principles of respondeat superior, an institutional employer is not liable for its employee's discriminatory acts that are outside the legitimate scope of the employee's authority.⁶⁰ Specifically, the institutional employer is not liable if the employee acts independently and unexpectedly.⁶¹ Thus, even if a court finds that discrimination has occurred, if these exceptions apply, neither the employer nor anyone else will be held liable and the victim will not be compensated.⁶²

59. While the focus of this article is on analyzing individual liability with regard to how it affects the stated policies behind Title VII, allowing claims against individuals under Title VII produces another noteworthy benefit: increased uniformity across civil rights statutes and other similar statutes. The Civil Rights Act of 1871, 42 U.S.C. § 1981 (1994), better known as "section 1981," has been unanimously construed to allow individual agent liability. See Ming K. Ayvas, Note, *The Circuit Split on Title VII Personal Supervisor Liability*, 23 *FORDHAM URB. L.J.* 797, 819 (1996). Section 1981 indirectly prohibits workplace discrimination by prohibiting interference with minorities' rights to make and enforce contracts. See 42 U.S.C. § 1981. This is especially relevant since one of the purposes in enacting the Civil Rights Act of 1991 was to make the remedies available under Title VII coextensive with those available under section 1981. See H.R. REP. NO. 102-40(II), at 24-30 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 717-23.

Similarly, 42 U.S.C. § 1983 allows private causes of action against "persons" who deprive others of their constitutional rights while acting under color of law. In *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), the Supreme Court held that supervisors who participate in discriminatory behavior can be held personally liable.

Finally, individual liability suits appear to be available under the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2619, 2631-2654, 6381-6387 (1994). See, e.g., *Johnson v. A.P. Prods. Ltd.*, 934 F. Supp. 625, 629 (S.D.N.Y. 1996); *Knussman v. Maryland*, 935 F. Supp. 659, 664 (D. Md. 1996); *Waters v. Baldwin County*, 936 F. Supp. 860, 863 (S.D. Ala. 1996); *Freemon v. Foley*, 911 F. Supp. 326, 329-31 (N.D. Ill. 1995).

60. See RESTATEMENT, *supra* note 33, § 219(2)(d). See also RESTATEMENT, *supra* note 33, §§ 228, 235 (respondeat superior liability applies only to acts committed in contemplation of some benefit to employer).

61. See *id.* § 229 (stating that whether master has reason to expect that act will occur is key factor in determining whether servant acted within scope of employment). This will be referred to as the "actual or constructive knowledge" standard in Part II.

62. According to the *Restatement*, agents can be held personally liable for actions taken without the apparent, actual, or implied authority of the employer. See *id.* § 359C(1). Thus, even assuming imposition of respondeat superior liability is the correct interpretation of Title VII, it is still a mystery why courts refuse to hold indi-

Congressional action to resolve the current judicial schism over who may be named as a defendant in a Title VII case is uniquely appropriate because, at their core, all of the competing arguments regarding standards of statutory construction, the plain language of the statute, and legislative intent revolve around public policy determinations. How a given court rules on the issue of individual liability inevitably turns on which theory the court concludes best effectuates all of the goals of the statute.

This section will focus on the public policy objectives that underpin Title VII. Initially, each of the policy goals implicated by the inclusion or exclusion of individual liability will be identified and examined. Fortunately, while there is no agreement on the availability of individual liability under the current language of Title VII, there is virtual unanimity regarding which policy considerations must factor into the decision calculus.⁶³ The same four public policy concerns feature prominently in every discussion of the issue. Commentators generally agree that Title VII has two main goals: to compensate victims and to deter discrimination.⁶⁴ Additionally, it is commonly recognized that when enacting Title VII, Congress was concerned with two subsidiary policy issues as well: that the statute should not unduly interfere with the operations of small family-run businesses⁶⁵ and that it should not have an adverse impact on the economy.⁶⁶ Finally, the desirability of individual liability will be examined in light of Title VII's policy objectives. This examination reveals that individual liability is not only consistent with those objectives, but is imperative if the Act's primary goals of deterrence and compensation are to be realized.

Title VII's primary purposes and driving policies are easy to divine. There is irrefutable evidence that one of Congress's main purposes in passing the Act was to end employment discrimination. The bill that became Title VII was introduced in the House of Representatives in 1963 as "A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age."⁶⁷ The Act's stated purpose is to "eliminate, through the utilization of formal and informal remedial procedures, discrimina-

individuals liable for discriminatory acts that are outside their legitimate scope of authority; however, that discussion is beyond the scope of this article.

63. See *infra* notes 67-83 and accompanying text.

64. See *infra* notes 67-78 and accompanying text.

65. See *infra* notes 79-81 and accompanying text.

66. See *infra* notes 82-83 and accompanying text.

67. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 433 (1966).

tion in employment based on race, color, religion, or national origin.”⁶⁸

The Supreme Court has repeatedly recognized that the main purpose in enacting Title VII was to “eliminate” discrimination in the workplace.⁶⁹ Subsequent congressional acts have reaffirmed this strong commitment to eradicating employment discrimination. The Equal Employment Opportunity Act of 1972⁷⁰ and the Civil Rights Act of 1991⁷¹ each strengthened Title VII’s protections. Specifically, the Civil Rights Act of 1991 was meant to legislatively overturn several Supreme Court decisions that had weakened workers’ protection against discrimination⁷² and to “strengthen existing remedies to provide more effective deterrence”⁷³ Thus, Congress made its commitment to ending discrimination in the workplace crystal clear. Hereinafter, this aspect of Title VII will be referred to as its “deterrence goal.”

There is also ample evidence of Title VII’s second main goal, which is to compensate victims of employment discrimination. As previously noted, Title VII has always provided that victims of employment discrimination are entitled to remedies such as back pay, lost benefits, attorneys’ fees and reinstatement.⁷⁴ In 1991, Congress amended Title VII to also allow victims to recover compensatory and punitive damages for intentional violations of the statute.⁷⁵ The express intent behind the Act was to “ensure compensation commensurate with the harms suffered by victims of . . . discrimination.”⁷⁶ The Supreme Court and several federal appellate courts have recognized this goal.⁷⁷ The Supreme Court advised lower courts to “avoid interpretations of Title VII that deprive victims of discrimination of a rem-

68. H.R. REP. NO. 88-914, at 26 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401.

69. *See, e.g.,* International Bhd. of Teamsters v. United States, 431 U.S. 324, 348 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

70. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 5 U.S.C. §§ 5108, 5314-5316, 42 U.S.C. § 2000e to 2000e-17 (1994)).

71. 42 U.S.C. § 1981 (1994).

72. *See* H.R. REP. NO. 102-40(II), at 2-4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694-96.

73. H.R. REP. NO. 102-40(I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556.

74. *See* 42 U.S.C. § 2000e-5(g), (k) (1994).

75. *See* 42 U.S.C. § 1981a (1994).

76. H.R. REP. NO. 102-40(I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556.

77. *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 765 (1979) (Blackmun, J., concurring); Owens v. Rush, 636 F.2d 283, 287 (10th Cir. 1980); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971).

edy, without clear congressional mandate.”⁷⁸ This second, yet no less important, objective of Title VII will hereinafter be referred to as its “compensation goal.”

The debates surrounding the passage of Title VII and its subsequent statutory scheme are evidence that Congress considered other policies to be relevant as well. Title VII’s exemption for businesses with less than fifteen employees (the numerosity requirement)⁷⁹ and the caps placed on damage awards (the graduated damages provision)⁸⁰ provide evidence of some of the subsidiary policies which also guided Congress in its enactment of Title VII. It is generally agreed that the numerosity requirement and the graduated damages provision suggest two policy considerations. First, the Act’s exclusion of small businesses and its imposition of graduated damage caps imply a concern with protecting small businesses from excessive compliance and liability costs because of the importance of small businesses to the health of the economy.⁸¹ This policy will be referred to as the “economic protection goal.” Second, there is also support for the view that Congress wanted to protect against undue intrusion into family-run businesses and “personal affinity in small-business employment decisions.”⁸² There is sufficient legislative history to support the view that Congress wanted to forestall excessive regulation of small businesses

78. *County of Washington v. Gunther*, 452 U.S. 161, 178 (1981).

79. Title VII applies to “a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person.” 42 U.S.C. § 2000e(b) (1994).

80. See 42 U.S.C. § 1981a. See also *supra* note 44.

81. See, e.g., *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995); 110 CONG. REC. 13,088 (1964) (remarks of Sen. Humphrey) (noting significance of small businesses to economy); Ayvas, *supra* note 59, at 813-14.

82. Davida H. Isaacs, Note, *It’s Nothing Personal—But Should It Be?: Finding Agent Liability for Violations of the Federal Employment Discrimination Statutes*, 22 N.Y.U. REV. L. & SOC. CHANGE 505, 538 (1996). See also *Armbruster v. Quinn*, 711 F.2d 1332, 1337 n.4 (6th Cir. 1983) (citing remarks of Senator Fannin, 118 CONG. REC. 2409-10 (1972), and remarks of Senator Ervin, 118 CONG. REC. 3171 (1972), reprinted in SUBCOMMITTEE ON LABOR-SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1375 (Comm. Print 1972)); *Lamirande v. Resolution Trust Corp.*, 834 F. Supp. 526, 528 (D.N.H. 1993) (holding that “[t]he size restriction contained in section 2000e(b) was intended to protect small family-run businesses from discriminatory hiring claims based on their preference for hiring friends and relatives”); Steven K. Sanborn, Note, *Employment Discrimination—Miller v. Maxwell’s International, Inc.: Individual Liability for Supervisory Employees Under Title VII and the ADEA*, 17 W. NEW ENG. L. REV. 143, 173 (1995) (stating that reasoning that Title VII does not provide for personal liability is “flawed” because of definition of employer used in statute).

employing family and friends.⁸³ This policy will be referred to as the “protection of family-run businesses goal.”

The remainder of this section argues that individual liability is not only desirable, but essential to accomplishing Title VII’s compensation and deterrence goals. Further, an examination of the specific effects of allowing suits against individuals reveals that such a policy is completely consistent with, and even furthers, Title VII’s subsidiary policies of protecting family-run businesses and safeguarding the economy.

A. *The Necessity of Individual Liability for the Achievement of Title VII’s Compensation Goal*

Individual liability for employment discrimination is essential to ensure that an entire class of victims receives just compensation for the discrimination they endure. Because employers may escape liability for the actions of their agents through a variety of loopholes, the failure to hold individuals liable for their discriminatory actions risks compromising Title VII’s goal of redressing employment discrimination. In addition to failing to provide financial compensation in many cases, the current scheme also eliminates any hope that victims may have of receiving the personal vindication of having their tormentors held personally accountable by the court.

1. *Recovery of Monetary Damages*

Obviously, victims of employment discrimination will not be compensated if no one is legally liable for their discriminatory treatment. While it is hard to imagine that courts would interpret Title VII in a manner that creates whole categories of cases where it is impossible for victims to recover damages, this is exactly what the majority of courts have done. This unfortunate reality is apparent in cases of sexual harassment, as well as in cases of racial harassment. An examination of the law governing when employers are vicariously liable for the actions of their employees illustrates the problem.

A plaintiff suing for harassment under Title VII may proceed under one of two theories: *quid pro quo* or hostile work environment.⁸⁴ *Quid pro quo* is a form of sexual harassment that occurs when an employer explicitly conditions job advancement or other job bene-

83. See, e.g., 110 CONG. REC. 13,085-86 (1964) (remarks of Sen. Cotton) (urging that small businesses employing family and friends should not be subject to excessive government regulation).

84. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

fits on compliance with sexual demands.⁸⁵ A claim of a hostile work environment, however, can arise from either racial or sexual harassment. The hostile work environment theory of sexual harassment arose by analogy from cases of racial harassment.⁸⁶ Hostile work environment harassment occurs when an employer's actions have "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."⁸⁷

In *Meritor Savings Bank v. Vinson*,⁸⁸ the Supreme Court made it clear that it is not always appropriate to hold employers liable for the conduct of their employee-agents.⁸⁹ There are three potential standards for determining whether or not an employer-entity will be held liable for harassment that occurs in the workplace. Which standard the court will apply turns on such factors as whether or not the plaintiff suffered a tangible job. consequence, whether the harasser was a supervisor or a co-worker, and whether the responses of the employer-entity and the plaintiff were reasonable under the circumstances. The Supreme Court's recent decisions in *Burlington Industries, Inc. v. Ellerth*⁹⁰ and *Faragher v. City of Boca Raton*⁹¹ are instructive on which standard will be applied.

The first standard applies in cases where a supervisor conditions job benefits on compliance with sexual demands and the plaintiff suffers adverse employment consequences when he or she refuses to submit to those demands.⁹² Until recently, the standard for employer liability turned solely on whether a plaintiff was claiming hostile work environment harassment or quid pro quo harassment. If a plaintiff could prove quid pro quo harassment the employer-entity would be held strictly liable.⁹³ However, in *Burlington*, the Court disclaimed the usefulness of the traditional distinction between quid pro quo and

85. See, e.g., *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 (11th Cir. 1987).

86. Courts initially developed hostile work environment sexual harassment law by analogizing such claims to racial harassment claims, such as the landmark case of *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971). Many cases cite *Rogers* for this proposition. See, e.g., *Meritor*, 477 U.S. at 65-66; *Henson v. Dundee*, 682 F.2d 897, 901 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 944 (D.C. Cir. 1981).

87. *Meritor*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a)(3) (1985)).

88. 477 U.S. 57 (1986).

89. See *id.* at 72 (stating that Congress wanted to place some limits on employer liability).

90. 118 S. Ct. 2257 (1998).

91. 118 S. Ct. 2275 (1998).

92. See generally *Burlington*, 118 S. Ct. at 2257.

93. See *id.* at 2264 ("If the plaintiff established a *quid pro quo* claim, the Courts of Appeals held, the employer was subject to vicarious liability.") (citations omitted).

hostile work environment sexual harassment as a tool for determining whether an employer-entity should be held vicariously liable.⁹⁴ Instead, the Court announced a new rule: employers are subject to strict liability only in cases where supervisors explicitly condition job advancement or job benefits on compliance with sexual demands *and* the plaintiff actually suffers some tangible job detriment, such as demotion or firing.⁹⁵

This new rule significantly erodes a plaintiff's chances to recover damages for the very real discrimination that he or she has suffered. Regardless of whether a victim is actually fired or demoted for refusing to submit to the sexual demands of a superior, it is undeniable that sex discrimination has occurred. Even worse are cases where victims feel that they have no choice but to submit to their superiors' sexual demands for fear of losing their jobs.⁹⁶ This category of cases arguably constitutes the most humiliating and degrading sexual harassment to which an individual may be subjected. Yet, unless the victim can prove that some adverse job consequence resulted from the harass-

94. The *Burlington* court stated:

The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive. The distinction was not discussed for its bearing upon an employer's liability for an employee's discrimination.

Id.

If a plaintiff could prove only hostile work environment sexual harassment, then the employer-entity would be held liable only if the plaintiff could also prove that the employer-entity was somehow negligent. See *infra* notes 109-14 and accompanying text.

95. See *Burlington*, 118 S. Ct. at 2270 (explaining that for employer, "[n]o affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment"). See also *Faragher*, 118 S. Ct. at 2292-93.

96. The Court did not address the possible situation of a plaintiff submitting to a superior's sexual demands for fear of losing her job. In fact, in the *Burlington* opinion, Justice Kennedy narrowly framed the question presented to avoid addressing this scenario:

The question presented for certiorari asks: 'Whether a claim of *quid pro quo* sexual harassment may be stated under Title VII . . . where the plaintiff employee *has neither submitted to the sexual advances* of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?'

118 S. Ct. at 2265 (emphasis added). Nonetheless, the natural consequences of the Court's new rule, that institutional employers are only strictly liable if a plaintiff suffers some "tangible effect," is that there will not be strict liability in cases where a plaintiff submits to sexual demands because the plaintiff will have suffered no such tangible effect on her job benefits.

ment, it is very possible that neither the employer-entity nor the individual harasser can be held liable.⁹⁷

The second standard for determining an employer's liability for the acts of its agents applies when a supervisor harasses an employee but the employee suffers no tangible job detriment. The Court stated the rule as follows:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.⁹⁸

Thus, employers will not be liable for otherwise actionable sexual harassment if they can prove that they took "reasonable" measures to prevent and correct any sexual harassment that occurred and that the plaintiff acted "unreasonably."

The result of this new rule is that whenever an institutional employer successfully pleads an affirmative defense, a victim will recover no damages, regardless of the severity of the discrimination to which the victim has been subjected. Furthermore, employer-entities may have little difficulty mounting this affirmative defense. Specifically, the new standard raises at least two issues of concern for plaintiffs.

First, many practitioners agree with Justice Thomas's statement in his dissenting opinion that "[a]lthough the Court recognizes an affirmative defense . . . it issues only Delphic pronouncements and leaves the dirty work to the lower courts . . ." ⁹⁹ Practitioners argue that it is unclear who qualifies as a "supervisor"¹⁰⁰ and what consti-

97. The employer-entity can escape liability by successfully pleading an affirmative defense as per the new rule set forth in *Burlington* and *Faragher*. The individual harasser will also probably escape liability because of the trend against individual liability in Title VII cases.

98. *Burlington*, 118 S. Ct. at 2270 (citation omitted); *Faragher*, 118 S. Ct. at 2292-93 (citation omitted).

99. *Burlington*, 118 S. Ct. at 2274 (Thomas, J., dissenting).

100. See, e.g., Debra Cassens, *A Constitutional Siesta*, A.B.A. J., Sept. 1998, at 38, 39 (recognizing that while *Burlington* and *Faragher* "made [it] clear that employers

tutes a “tangible job loss.”¹⁰¹ Further, they question the precise legal contours of such terms as “reasonable care,” “correct promptly,” and “unreasonably failed.”¹⁰² The lack of clarity in these terms may create a host of barriers to recovery for victims of sexual harassment.¹⁰³ If lower courts interpret these terms in an employer-friendly manner, plaintiffs may find it even harder to recover damages than they did under the previous standard. Justice Souter’s application of this standard to the facts in *Faragher* did establish a floor for the standard of “reasonable care” to which employers will be held.¹⁰⁴ As a matter of law, if an employer fails entirely to distribute a sexual harassment policy, makes no attempt to track the conduct of its isolated supervisors, and provides no assurances that harassing supervisors can be bypassed in the complaint process, then the employer cannot meet its burden of raising an affirmative defense.¹⁰⁵

The Court’s decision that Ms. Faragher’s employer could not meet even the most basic requirements of proving the affirmative defense is little comfort to plaintiffs. The facts of *Faragher* were particularly egregious. Thus, it is reasonable to assume that most employers will be able to point to the existence of at least some anti-harassment policy and minimal oversight of their supervisors and employees. Lower courts may decide that the mere existence of a policy and some minimal oversight is enough to meet the employer’s burden of exercising reasonable care. In fact, Justice Souter specifically states that an employer does not necessarily even need to prove that it had a harassment policy and an established complaint procedure.¹⁰⁶ He further elaborates that a defendant’s demonstration that an employee failed to use a complaint procedure established by the employer “will normally suffice to satisfy the employer’s burden under the second

are vicariously liable for sexual harassment by supervisors, even if there is no tangible harm [Professor] Chemerinsky asks who qualifies as a supervisor?”).

101. See, e.g., Beverly W. Garofalo, *Recent Decisions on Harassment Leave Many Questions Unanswered*, 13 No. 2 CORP. COUNS. 1, July 1998, available in WESTLAW.

102. See, e.g., *id.*; Eric D. Randall, *Sexual Harassment*, No. 7 Affirmative Action/EEO Personnel Update 25 (1998), available in LEXIS, Human Resources Library, AEPUPD File.

103. But see Garofalo, *supra* note 101 (discussing how dissents in *Burlington* and *Faragher* “predicted that the majority’s failure to . . . define terms such as ‘tangible job loss’ . . . will render it nearly impossible for an employer to obtain summary judgment.”).

104. See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998).

105. See *id.*

106. See *id.* (stating that “proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law”).

element of the defense.”¹⁰⁷ These statements may be interpreted by lower courts to set a very low burden of proof for employers who wish to assert an affirmative defense.

The second cause for concern arises from the first prong of the affirmative defense, which states that an employer will be exempt from liability if it can establish that it took reasonable measures to prevent and “correct promptly” any sexually harassing behavior that occurred in its workplace. The implications of relieving employer-entities of liability when they respond appropriately are discussed in more detail below.¹⁰⁸ For now, it is sufficient to point out that the fact that an employer responds appropriately once sexual harassment has occurred in no way negates the very real harm that the victim has already suffered.

The third standard for determining whether an employer will be held liable for the discriminatory actions of its employees applies in cases where plaintiffs claim they were sexually harassed by a co-worker (rather than a supervisor).¹⁰⁹ This third approach to employer liability is most often referred to as the “negligence standard.” Despite the overwhelming case law discussing the negligence standard, its precise application is less than clear. In *Meritor Savings Bank*, the Supreme Court refused to set down a definitive standard for determining when an employer will be liable for a hostile work environment.¹¹⁰ Instead, the Court directed lower courts to use agency principles, as formulated in the *Restatement*, to guide their decisions on this matter.¹¹¹

Judge Richard Posner explicates the application of the *Restatement* standards as follows:

107. *Id.*

108. See *infra* notes 125-34 and accompanying text.

109. See generally *Faragher*, 118 S. Ct. at 2275; *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). Although the Supreme Court reversed the Eleventh Circuit’s decision in *Faragher*, the Court did so by announcing a completely new standard for determining employer liability. The Court did not, however, fault the Eleventh Circuit’s application of the actual or constructive knowledge standard. Thus, this author assumes that *Faragher* is still good law on the issue of how to apply that standard. Furthermore, the Eleventh Circuit’s application of the actual or constructive knowledge standard is instructive because it is representative of other circuits’ application of the standard.

110. See *Meritor*, 477 U.S. at 72 (“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.”).

111. See *id.* at 73 (“As to employer liability, we conclude that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.”).

Discrimination is an intentional tort and . . . an employer is liable for the intentional torts of an employee only if they are in furtherance (though possibly misguided) of the employer's business, implying some relation between the tort and the business. If one low-level employee makes sexual advances to another, his conduct is so unrelated to the employer's business that the employer will ordinarily be excused from liability under the doctrine of respondeat superior; the employer's own fault must be shown.¹¹²

More specifically, according to the approach that flows from the importation of agency principles into this area of law, employers may be held directly liable for their own negligence in hostile work environment cases.¹¹³

The negligence approach has its own set of problems. Under that approach, an employer-entity will be held directly liable for the actions of agents that create a hostile work environment only if "it knew, or upon reasonably diligent inquiry should have known, of the harassment and failed to take immediate and appropriate corrective action."¹¹⁴ This standard is commonly referred to as the "knew or should have known" standard or as the "actual or constructive knowledge" standard. The result is a two-step test that provides the employer-entity with a dual defense to liability. If the employer did not have actual or constructive knowledge of the harassment, or took prompt and appropriate remedial action once it became aware of the harassment, then the employer will not be liable.

112. *Shager v. Upjohn*, 913 F.2d 398, 405 (7th Cir. 1990).

113. *See, e.g., Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (en banc), *rev'd*, 118 S. Ct. 2275 (1998). *See supra* note 109 for a discussion of this author's analysis of the Supreme Court's reversal of the Eleventh Circuit.

114. *Faragher*, 111 F.3d at 1535. *See also* *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 107 (3d Cir. 1994) (finding that "prompt and effective action by the employer will relieve it of liability"); *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 63 (2d Cir. 1992) (stating that "plaintiff must prove that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it"); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515-16 (9th Cir. 1989) (stating that "employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management level employees knew, or in the exercise of reasonable care should have known"); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (finding respondeat superior to be only avenue for corporate liability, which is solely "where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against supervisor") (citations omitted); *Lipsett v. University of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988) (applying Title VII principles to resolve Title IX case); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982). The "knew or should have known" standard is derived from the principles enunciated in the *Restatement*. *See* RESTATEMENT, *supra* note 33, § 219(2)(b) (stating that employers may be held liable if negligent or reckless).

A close look at how courts are applying the “knew or should have known” standard reveals that the liability gap may be even wider than it appears at first glance. Some courts make it quite difficult to prove that the employer-entity had actual notice.¹¹⁵ In addition, courts increasingly apply the constructive knowledge standard in a manner that requires the plaintiff to demonstrate that the employer-entity had “actual” knowledge of the harassing behavior. Only a few courts have held that a plaintiff can demonstrate the existence of constructive knowledge by showing the pervasiveness of the harassment was such that it is reasonable to infer that, in the exercise of reasonable care, the employer should have known about it.¹¹⁶ Most courts decline to impute liability to employers in the absence of proof that the employer had actual knowledge that the harassing behavior was occurring.¹¹⁷ This is true despite the Supreme Court’s admonition in *Meritor Savings Bank* that a plaintiff’s failure to file a complaint with the employer should not be dispositive.¹¹⁸ This narrowing of the actual knowledge standard and the reluctance to apply the constructive knowledge standard will leave even more plaintiffs without a remedy. This tendency is especially troubling in light of the evidence, discussed below, that the grievance procedures established to deal with discrimination complaints are generally ineffective.¹¹⁹

An empirical example highlights the problems with the actual or constructive knowledge standards. The Eleventh Circuit addressed this issue in *Faragher v. City of Boca Raton* and found that the City did not have actual knowledge of the sexual harassment, even though the plaintiffs had complained to the head supervisor in their office.¹²⁰ The court’s rather strained reasoning was that “[the supervisor] did not receive that information as the City’s agent; he received it as a friend held in high repute by his colleagues.”¹²¹ Such a maneuver implies that courts are even narrowing the actual knowledge standard. It may signal a trend towards refusing to find actual knowledge unless the

115. See *infra* notes 120-22 and accompanying text.

116. See, e.g., *Waltman v. International Paper Co.*, 875 F.2d 468, 478-79 (5th Cir. 1989); *Swentek v. USAir, Inc.*, 830 F.2d 552, 558 (4th Cir. 1987).

117. See, e.g., *Faragher v. City of Boca Raton*, 76 F.3d 1155, 1167 (11th Cir. 1996) (heard by Cox, J., Dyer, J., and Goettel, J.); *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 320 (7th Cir. 1992).

118. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986).

119. See *infra* notes 160-61, 174-76 and accompanying text.

120. See *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1538 n.9 (11th Cir. 1997) (en banc). See *supra* note 109 for a discussion of this author’s analysis of the Supreme Court’s reversal of the Eleventh Circuit.

121. *Id.*

plaintiffs can demonstrate that they complained to high level managers, in their official capacity, through standard grievance procedures.

The court's treatment of the constructive knowledge standard is equally distressing. As Judge Barkett argues in a dissenting opinion,

[t]he majority seems to collapse the two distinct inquiries of actual knowledge and constructive knowledge into one, effectively requiring actual knowledge before imposing liability. For example, in rejecting the district court's finding of constructive notice the majority notes that 'the City had no knowledge' of [the harassers'] conduct; that there was no 'factual basis for concluding that the City should have known of their conduct'; that the [employees] 'were stationed at a remote location and had little contact with City officials; that Faragher never told her friend who was also a [co-worker]; and that the Recreation superintendent was never told about the sexual harassment. . . . These factors inform an actual knowledge inquiry, not a constructive knowledge inquiry.¹²²

The court seems to have forgotten that the relevant inquiry for constructive knowledge is whether the employer, *by exercising reasonable care*, should have known of the discriminatory behavior.¹²³ Thus, the court appears to have dispensed with the requirement that employers exercise reasonable care to make themselves aware of discrimination occurring in their workplace. In *Faragher*, the employer was found not to have constructive knowledge precisely because the plaintiffs were working in a remote location and the City was not exercising any care whatsoever to ensure that sexual harassment was not occurring.

Faragher is a perfect example of how a court's application of the "knew or should have known" standard can leave a plaintiff uncompensated. While the district court held that Faragher had been subjected to severe and pervasive sexual harassment, the court of appeals nonetheless dismissed her Title VII claim against the employer-entity because she could not prove that the employer had actual or constructive knowledge of the harassment.¹²⁴ Thus, such a plaintiff's only hope for recovery under Title VII turns on whether or not she can proceed against her harassers individually.

The exemption from liability for employers who take appropriate remedial action also merits attention. The clear consensus is that an employer can avoid liability if it takes appropriate remedial actions

122. *Id.* at 1540-41 (citation omitted).

123. *See supra* note 114 and accompanying text.

124. *See Faragher*, 111 F.3d at 1534.

upon learning of the discriminatory conduct.¹²⁵ The obvious result of this approach is that it focuses exclusively on employers' conduct after the sexual harassment has already occurred. Thus, despite the fact that a harm has already occurred, the employer is not liable. Once again, if individuals cannot be held liable, then no one will be, despite the fact that an injury has been inflicted.

An empirical example illustrates the unfortunate consequences of this approach. In *Kauffman v. Allied Signal, Inc.*,¹²⁶ the plaintiff took medical leave from her job of ten years in order to have breast implant surgery.¹²⁷ When she returned to work, her supervisor touched her breasts and demanded that she expose herself to him.¹²⁸ When she refused to do so, the supervisor temporarily reassigned her to a more physically arduous task.¹²⁹ Additionally, the supervisor encouraged a co-worker to tell the plaintiff "to show you her tits."¹³⁰ The plaintiff was approached by twenty co-workers in less than three days, each of whom made comments about her new appearance.¹³¹ The plaintiff complained and the supervisor was fired.¹³² The plaintiff subsequently suffered a nervous breakdown, which a psychiatrist attributed to the sexual harassment she experienced.¹³³ When the plaintiff sued, her claim was dismissed because Allied Signal had taken appropriate remedial measures upon learning of the harassment.¹³⁴ The plaintiff in *Kauffman* was left with no remedy. Clearly, if she could have proceeded against her supervisor, she would have had a chance of recovering at least some monetary damages.

Finally, even if employers were always held liable for the actions of their agents, individual liability would still be necessary to ensure the fulfillment of Title VII's compensation goals in those cases where the institutional employer is insolvent,¹³⁵ cannot pay the whole judgment,¹³⁶ or no longer exists. While it is true that employers will gen-

125. See *supra* note 116 and accompanying text.

126. 970 F.2d 178 (6th Cir. 1992).

127. See *id.* at 180.

128. See *id.*

129. See *id.*

130. *Id.* at 181.

131. See *id.*

132. See *Kauffman*, 970 F.2d at 181.

133. See *id.*

134. See *id.* at 180-85.

135. See, e.g., *Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769, 785-86 (N.D. Ill. 1993) (specifically noting necessity of individual liability in cases of employer insolvency to ensure outcome consistent with broad remedial purposes of Title VII).

136. See, e.g., *Zakutansky v. Bionetics Corp.*, 806 F. Supp. 1362, 1365 n.7 (N.D. Ill. 1992) (recognizing that individual liability might be necessary "to deal with the con-

erally have a “deeper pocket” than individuals, this will not always be the case. Victims of employment discrimination by employees of bankrupt companies are no less deserving of compensation than any other victims. Amending Title VII to include a cause of action against individuals would give victims an additional avenue of recourse, which in many instances will be crucial to their chances of receiving any compensation for their injuries.

2. *Personal Vindication*

As stated earlier, the express purpose of the Civil Rights Act of 1991 was in part “to strengthen existing remedies to . . . ensure compensation commensurate with the harms suffered by victims of intentional discrimination.”¹³⁷ The goal of ensuring compensation commensurate with the harms suffered by victims should not be construed in a narrow economic sense. The psychological vindication of having the individual identified as morally culpable should not be undervalued.¹³⁸ Some victims attach great importance to forcing their tormentors to face the public condemnation their actions deserve. They see this as so important that they will pursue a suit against the individual even after they have settled with the “deep pocket” employer-entity.¹³⁹ A desire to see individuals held personally responsible for their illegal actions is not unique to victims of discrimination. Personal accountability is one of the driving principles behind our common law tort scheme and our criminal codes. This is one explanation of why holding an individual personally responsible for their illegal acts is crucial to our sense of legal and moral justice. At the very least, victims of employment discrimination deserve to leave the lawsuit with some sense that justice has been done.

tingency that [the employer] could prove financially incapable of satisfying [the plaintiff's] entitlement”).

137. H.R. REP. NO. 102-40(I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556.

138. *See* Isaacs, *supra* note 82, at 532 (stating that personal liability allows victim to put name of individual accused of harassment on face of complaint, giving victim opportunity to challenge harasser directly and publicly); Phillip L. Lamberson, Comment, *Personal Liability for Violations of Title VII: Thirty Years of Indecision*, 46 BAYLOR L. REV. 419, 420-21 (1994) (stating plaintiff may not feel fully vindicated unless harasser is individually joined as part of suit); Robert Lukens, Comment, *Workplace Sexual Harassment and Individual Liability*, 69 TEMP. L. REV. 303, 361 (1996) (noting evidence that most harassment suits are brought to eradicate misconduct and not for monetary gain).

139. *See, e.g.*, *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583 (9th Cir. 1993) (describing plaintiff who had already settled her suit with employer and was only pursuing claim against those individuals responsible); *Wilson v. Wayne County*, 856 F. Supp. 1254, 1256 (M.D. Tenn. 1994) (same).

3. *A Consideration of Potential Objections*

One very serious objection to allowing suits against individuals is that it would result in “a full-scale assault” on vicarious liability.¹⁴⁰ This objection is especially relevant in the area of quid pro quo sexual harassment where, if the plaintiff has suffered a tangible adverse employment action, most courts hold employers strictly liable for the actions of their supervisors.¹⁴¹ The concern is that:

employing entities may argue that they are not ‘the employer’ responsible for the unlawful employment practice and thus may not be held liable A certain tension exists between reading the statute to impose direct liability on agents and holding employers vicariously liable for their agents’ wrongdoing. Both cannot be *the* responsible employer.¹⁴²

This concern is particularly serious because employer liability is so essential to the accomplishment of Title VII’s compensation goals. In the majority of cases, it will be the employer that has the financial resources to provide the most complete compensation. Additionally, the employer is in the best position to institute and post workplace prohibitions on discrimination, put grievance procedures in place, inform workers of their rights, and investigate and eradicate discriminatory conduct. Thus, it is crucial that the economic incentives that do exist for employers to deter discrimination are not weakened or eliminated altogether.

A related and equally serious objection is that:

those calling for individual liability frequently stress the personal fault or ‘blameworthiness’ of the agent, suggesting that as between the vicariously liable employer and the directly liable employee, it is the agent who is the true wrongdoer [T]his fault-based approach to liability may aid vicariously liable employers arguing for apportionment of damages or for escape altogether from punitive damage awards.¹⁴³

140. See Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509, 561 (1996).

141. See, e.g., Ayvas, *supra* note 59, at 825-26 (advocating suits against individuals in order to shield employers from liability).

142. White, *supra* note 140, at 561. See also Goldberg, *supra* note 22, at 585 (noting that agent liability probably increases overall deterrence).

143. White, *supra* note 140, at 560-61. Currently, it is unclear whether a court can apportion damages between individuals and employers who are found jointly and severally liable. However, it should be noted that in some cases allowing individual liability, it was also assumed that it is appropriate to apportion damages. See, e.g., *EEOC v. AIC Sec. Investigations, Ltd.*, 823 F. Supp. 571, 579 (N.D. Ill. 1993).

This lack of clarity regarding damage apportionment under Title VII stems from similar uncertainty as to whether damages can be apportioned at common law:

If apportionment is permitted, employers' vicarious liability for employee wrongdoing could be reduced significantly. Such a result would undermine the likelihood that victims will actually recover their full damage award because employers are more likely to have the deep pockets or liability insurance that may be necessary to cover a large damage award. Additionally, employers should not escape punitive damages if they have some culpability for the occurrence of the discriminatory action.

While these objections are quite serious, they are also quite easily dealt with by Congress. Instead of reasons to reject a policy of individual liability, they are simply potential problems that Congress must take care to forestall. Congress should make it clear that the allowance of individual liability is not a license to exculpate employers from liability or to further weaken current employer liability standards. Specifically, Congress should provide for a liability scheme under which the employer and the individual are jointly and severally liable for the full extent of a plaintiff's damages.¹⁴⁴ Damage apportionment should be forbidden in accord with common law tort principles of joint and several liability, which do not apportion damages in cases of vicarious employer liability.¹⁴⁵ Such a scheme would recognize the offending individual as liable for engaging in the proscribed conduct and the organization as liable for failing to prevent or respond appropriately to the proscribed conduct.

A final point made by courts in rejecting the need for individual liability is that, in those cases where plaintiffs have no redress against the employer, they can pursue a tort claim under state law.¹⁴⁶ This

At common law, joint tortfeasors whose wrongdoing combined to cause a plaintiff's indivisible harm were jointly and severally liable for the full extent of the plaintiff's damages. Modern tort reform, however, has rejected or modified this rule in a majority of states In many states, a tortfeasor now is legally responsible *only* for his [or her] own share of culpability. On the tort front, however, this reform generally has not been extended to cases of *vicarious* liability. Instead, it has been applied only when both tortfeasors have been found *directly* liable for wrongdoing. Thus, it is curious that apportionment of damages between vicariously liable employers and discriminating employees has been assumed by some courts to be appropriate under Title VII

White, *supra* note 140, at 555-56 n.229 (citation omitted).

144. A scheme of joint and several liability is consistent with agency principles, which provide that employers and their agents may be joined in an action for any wrongs committed by the agents, and that judgment may be entered against both employers and agents. See *RESTATEMENT*, *supra* note 33, § 217(B)(1).

145. See *supra* note 143.

146. See, e.g., *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995) (explaining that, in some circumstances, Congress may have intended that plaintiffs turn to traditional tort remedies for redress).

position assumes that the harms of sexual harassment and other types of employment discrimination are such that they can be easily translated to fit into traditional tort theories. If this were so, it is unlikely that Congress would have found it necessary to enact federal anti-discrimination statutes to begin with. Moreover, this argument ignores the reality that sexual harassment does not affect individuals in the same way that one of the various torts might. Thus, plaintiffs forced to seek a remedy under traditional tort theories will face difficulty in trying to make what is a unique and distinctive harm fit into one of the cognizable harm categories defined by common law tort theories.¹⁴⁷ This is the old problem of trying to stick a square peg into a round hole.

Finally, forcing plaintiffs to proceed under tort theories obscures the gendered nature of the defendant's actions. It takes what should rightly be publicly tried as a discrimination claim, and allows it to be tried as a mere tort. As Professor Catharine MacKinnon, one of the prime forces behind the creation of sexual harassment law, forcefully argues:

Most broadly considered, tort is conceptually inadequate to the problem of sexual harassment to the extent that it rips injuries to women's sexuality out of the context of women's social circumstances as a whole. In particular . . . the tort approach misses the nexus between women's sexuality and women's employment, the system of reciprocal sanctions which, to women as a gender, become cumulative. In tort perspective, the injury of sexual harassment would be seen as an injury to the individual person, to personal sexual integrity, with damages extending to the job. Alternatively, sexual harassment could be seen as an injury to an individual interest in employment, with damages extending to the emotional harm attendant to the sexual invasion as well as to the loss of employment. The approach tends to pose the necessity to decide whether sexual harassment is essentially an injury to the person, to sexual integrity and feelings, with pendent damages to the job, or whether it is essentially an injury to the job, with damages extending to the person. Since it is both, either one omits the social dynamics that systematically place women in these positions, that may coerce consent, that interpenetrate sexuality and employment to women's detriment [precisely] because they are women.¹⁴⁸

Professor MacKinnon continues that it is essential for the law to recognize the gender bias inherent in acts of sexual harassment:

147. See Lukens, *supra* note 138, at 360.

148. Catharine A. MacKinnon, *Sexual Harassment as Discrimination*, in *SEXUAL HARASSMENT: CONFRONTATIONS AND DECISIONS* 144 (Edmund Wall ed., 1992).

Unsituated in a recognition of the context that keeps women secondary and powerless, sexual injuries appear as incidental or deviant aberrations. . . . The essential purpose of tort law . . . is to compensate individuals . . . for mischief which befalls them as a consequence of the one-time ineptitude or nastiness of other individuals. The occurrence of such events is viewed more or less with resignation, as an inevitability of social proximity. . . . Sexual harassment as [it should be] understood. . . . is a group-defined injury which occurs to many different individuals regardless of unique qualities or circumstances, in ways that connect with other deprivations of the same individuals, among all of whom a single characteristic—female sex—is shared. Such an injury is *in essence* a group injury. The context which makes the impact of gender cumulative—in fact, the context that makes it injurious—is lost when sexual harassment is approached as an individual injury. . . . Tort law considers individual and compensable something which is fundamentally social and should be eliminated.¹⁴⁹

As noted earlier, the law against employment discrimination is designed not only to compensate individual victims for their injuries, but also to eradicate the social phenomenon of employment discrimination. Professor MacKinnon elaborates on the necessity of pursuing discrimination claims under Title VII, as opposed to under common law tort theories:

The law against sexual harassment is a practical attempt to stop a form of exploitation. . . . The existence of a law against sexual harassment has affected both the context of meaning within which social life is lived and the concrete delivery of rights through the legal system. The sexually harassed have been given a name for their suffering and an analysis that connects it with gender. They have been given a forum, legitimacy to speak, authority to make claims, and an avenue for possible relief. . . . This matters.¹⁵⁰

Professor MacKinnon's arguments lead to the conclusion that employment discrimination law generally, and sexual harassment law in particular, is central to legitimizing victims' injuries and delegitimizing the victimization and abuse of workers based on their race or gender. If harassers are called only as defendants in tort cases, they are subject to much less approbation and stigma. This situation not only thwarts the plaintiff's entitlement to vindication, but may also undermine Title VII's deterrence goal.

There are other drawbacks to proceeding under state tort laws. The outcome may be less favorable and there is more risk for plaintiffs

149. *Id.* at 144-45.

150. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 103-04 (1987).

who sue under tort theories. Title VII provides that successful plaintiffs can recover attorneys' fees and punitive damages that will probably not be available under tort law.¹⁵¹ The absence of attorneys' fees and punitive damages for common law torts may serve as a heightened disincentive to bringing suits against individuals because they tend to have fewer assets than institutional employers do. Finally, because tort law varies from state to state, a victim's ability to proceed may turn on a factor as random as the state in which he or she resides. Such a lack of uniformity, with its attendant uncertainties, is unlikely to fill the gap created by a scheme that precludes individual liability.

In summary, the ability of Title VII's statutory scheme to compensate victims of employment discrimination has been severely compromised by the judicial preclusion of individual liability. Because employers may often escape liability and because individuals cannot be held liable, a class of victims has been created for which Title VII provides no remedies. Instead of the compensation and vindication Congress intended these victims to receive, they find themselves walking away empty handed regardless of the fact that they have been subjected to illegal discrimination. Certainly, the easily addressed logistical problems cited by the opponents of individual liability are no excuse for allowing this failure of justice to continue.

B. The Necessity of Individual Liability for the Achievement of Title VII's Deterrence Goal

Individual liability for employment discrimination is essential if the deterrence goals of Title VII are to be met. Despite the hope that employer liability would create a system in which employees are deterred from committing discriminatory acts for fear of employer reprisal, employer liability simply has not induced the climate of intolerance necessary to effectively address employment discrimination. This unfortunate fact is true for a variety of reasons including a lack of incentives for appropriate employer action, the failure of employers to respond to such incentives when they do exist, and finally, the simple inability of employers to respond effectively in certain circumstances of discrimination. The establishment of individual liability overcomes these failures by holding individuals directly responsible for their actions. Instead of relying on a "trickle down" deterrence scheme, individuals will face considerable incentives for compliant behavior regardless of how their employer responds to the threat and occurrence of employment discrimination.

151. See 42 U.S.C. § 2000e-5(g), (k) (1994).

1. *The Inability of Employer Liability Alone to Deter Employment Discrimination*

Proponents of individual liability under Title VII argue that individual liability provides an added and necessary deterrent to employment discrimination.¹⁵² In rejecting this rationale, some courts and commentators have responded that employer liability will sufficiently deter individual conduct because employers subjected to the costs of liability will discipline the responsible employees, thereby deterring discriminatory behavior.¹⁵³ Supporters of this argument are unclear as to whether their contention is that employer liability provides sufficient incentives to stop discrimination before it ever occurs, or if employers are only able to deter continued discrimination once a complaint has been lodged or a lawsuit has been filed. Both possibilities are considered in the analysis that follows. When subjected to closer scrutiny it becomes clear that there are multiple flaws in the argument that a liability scheme which holds only employer-entities liable for Title VII violations will sufficiently deter individual agents from engaging in discriminatory behavior.

There are three assumptions implicit in the argument that economic incentives exist that will induce employers to appropriately address and prevent employment discrimination. First, it is assumed that strong economic incentives for the employer to act appropriately always exist. Second, it is assumed that these economic incentives will induce employers to take appropriate action—that is, that employers are rational economic actors who will always act in accordance with their own economic best interests. Third, it is assumed that the risk of being disciplined by the employer is sufficient to deter individuals from engaging in discriminatory behavior. Upon close examination each of these assumptions break down.

a. *Flaws in the Assumption that Strong Economic Incentives to Avoid Discrimination Always Exist*

In many cases there is no economic incentive to prompt the employer to respond appropriately to employment discrimination. As ar-

152. See *infra* Part II.B.2.

153. See, e.g., *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995) (concluding employer liability provides sufficient deterrence); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 588 (9th Cir. 1993) (“An employer that has incurred civil damages because one of its employees believes he can violate Title VII with impunity will quickly correct that employee’s erroneous belief.”); *Johnson v. Northern Indiana Pub. Serv. Co.*, 844 F. Supp. 466, 469 (N.D. Ind. 1994) (arguing that potential termination from liable employers exists as effective deterrent); Montanari, *supra* note 22, at 370-71.

gued in detail above, institutional employers are not always subject to liability when their agents commit discriminatory acts.¹⁵⁴ In those situations, the employing entity suffers no economic detriment and, hence, the asserted economic incentive to punish the offending employee is absent. If the offending employee is not punished, other employees within the organization will be sent a clear signal that harassment will be tolerated so long as the employer is not subjected to liability as a result. Additionally, many employer-entities now carry liability insurance that protects them against claims of intentional discrimination.¹⁵⁵ The widespread use of such insurance spreads the costs of defending discrimination suits to consumers and employees.¹⁵⁶ Thus, employers are insulated against any real impacts on their businesses. At worst, an employer-entity faces the prospect of higher insurance premiums. The argument that employer liability alone is a sufficient deterrent loses much of its force when it becomes clear that the economic incentives, which supposedly ensure that employers will root out all noncompliant behavior, either do not exist or are insubstantial in many cases. As a result, Title VII no longer carries the strong economic deterrent that Congress intended.

b. Flaws in the Assumption that Employers Will Always Act in Accordance with Their Own Economic Incentives

Even if economic incentives to deter discrimination exist, there is no guarantee that employers' actions will be driven by those incentives. It is telling that advocates of this argument present no empirical evidence to support their claim. In reality, employers do not always behave in the most economically rational manner. There are many reasons why an employer might not take appropriate actions in response to discrimination that is occurring in its workplace. An employer may not even appropriately discipline or chastise an employee

154. See *supra* Part II.A.

155. See Isaacs, *supra* note 82, at 525 (arguing employers are especially unlikely to respond appropriately when damage awards are covered by liability insurance). Cf. Lamberson, *supra* note 138, at 421 n.7 (noting that this insurance coverage "frequently does not extend to individual employees named as defendants").

156. The trend towards allowing employer-entities to insure against the costs of liability for acts of intentional discrimination has been the subject of much comment recently. Several insurers have begun to offer insurance designed especially to cover employees against claims of wrongful employment practices. See generally Amanda D. Smith, "Supervisor" Hostile Environment Sexual Harassment Claims, *Liability Insurance and the Trend Towards Negligence*, 31 U. MICH. J.L. REFORM. 263 (1997) (undertaking extensive analysis of connection between Title VII's ability to deter potential discriminators and ability of employers to insure against costs of liability claims).

who subjected it to a lawsuit and a damage award. Thus, the second assumption implicit in the argument that employer liability alone is sufficient to deter discrimination is also flawed.

One reason why employers will not always respond appropriately to instances of discrimination, even when it is in their economic interests to do so, is because employer-entities are often subject to the same biases as the individuals who are directly responsible for the discrimination. One simple manifestation of such bias is the failure of employers to recognize discriminatory behavior when it occurs. As Bruce Smith argues, “[m]anagement’s misconceptions about the nature and scope of sexual harassment also hinders the effectiveness of grievance procedures.”¹⁵⁷ It stands to reason that regardless of the strength of the economic incentives, an employer will not take appropriate action to deter behavior that it does not view as violating Title VII.

Employers’ misconceptions about exactly what behavior Title VII prohibits may only be symptomatic of the larger problem, however, which is that persons at the highest level of the company itself may hold the same prejudicial attitudes as the employee who acts in violation of the statute. If the upper management of a company holds sympathetic attitudes towards discriminatory behavior it may not respond appropriately even in the face of a complaint.¹⁵⁸ As Davida Isaacs argues, “Anti-discrimination statutes were enacted ‘against the backdrop of employment activities . . . that, by their very nature, were not economically rational: failure to hire or promote the most qualified candidate due to his or her race, gender, disability, etc. is not the conduct of a rational economic actor.’”¹⁵⁹ Thus, employers could very well act according to their irrational biases instead of according to economic incentive. The existence of such biases can serve as a powerful counter-incentive to employers.

Prejudices within the upper management of an institution not only can cause an employer-entity to outright refuse to discipline individuals who discriminate, but also can manifest themselves in behavior which signals a tolerance for discriminatory behavior. For

157. Bruce Chandler Smith, Comment, *When Should an Employer Be Held Liable for the Sexual Harassment by a Supervisor Who Creates a Hostile Work Environment? A Proposed Theory of Liability*, 19 ARIZ. ST. L.J. 285, 293 (1987).

158. See Isaacs, *supra* note 82, at 525 (“[T]he discriminator’s supervisors may concur with her prejudice, and thus simply refuse to punish her.”); Lukens, *supra* note 138, at 341 (explaining that employer’s prejudicial behavior may constitute ordinary behavior and thus, preclude “self-correcting” mechanisms of corporation).

159. Isaacs, *supra* note 82, at 526-27 (quoting *Jendus v. Cancer Treatment Ctrs. of Am., Inc.*, 868 F. Supp. 1006, 1011 (N.D. Ill. 1994)).

example, there is the tendency of employers to dismiss complaints as being based on misperceptions or as the product of an overly sensitive nature.¹⁶⁰ In many instances the employing entity will not appropriately respond to complaints because it believes that such reports are generally greatly exaggerated.¹⁶¹ If employers are not taking complaints seriously, for whatever reason, it is unlikely that they are taking appropriate actions to address current statutory violations and deter future violations.

In some circumstances employers are subject to yet another counter-incentive to responding appropriately to complaints of discrimination. Opponents of individual liability assert that once an employer discovers discrimination that may subject it to liability under the theory of respondeat superior, it has strong economic incentives to take corrective measures and discipline the offending employee. In fact, an employer's economic interests may have the opposite effect. Empirically, if there is no individual liability scheme, the employer may have more of an incentive to refuse to discipline the offending employee-agent so that it can assert his or her innocence as a defense at trial and thus attempt to escape an adverse judgment.¹⁶² The rationale is that, under a scheme of individual liability, the employer-entity and the individual offender could be held jointly and severally liable. In such a situation, the employer has some chance of recouping a portion of an adverse judgment by seeking indemnification from the offending individual. Absent individual liability, an employer will always bear the entire cost of an adverse judgment, creating an incentive to deny both institutional *and* individual guilt. This is exactly what occurred in the case of *Pratt v. Brown Machine Co.*¹⁶³ In *Pratt* it came to the court's attention that while in public the employer-defendant denied a supervisor's culpability, in private that same employer admitted the supervisor's guilt.¹⁶⁴ The court presumed that the

160. See Ayvas, *supra* note 59, at 814-15.

161. See Eliza G. Collins & Timothy B. Blodgett, *Sexual Harassment . . . Some See It . . . Some Won't*, 59 HARV. BUS. REV. 76, 91 (1981).

162. See, e.g., Ayvas, *supra* note 59, at 813; J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 354 (1995) (finding that employer-only liability may force employers to spend "too little on detecting . . . and too much on concealing agent wrongdoing"); Douglas L. Williams, *Individual Liability and Defending Individual Co-Defendants (Defendant's Perspective)*, ALI-ABA Course of Study, Advanced Employment Law and Litigation, Nov. 30, 1989, at 218, available in WESTLAW, C463 ALI-ABA 205.

163. 855 F.2d 1225 (6th Cir. 1988).

164. See *id.* at 1231-32.

employer's duplicity was motivated by a desire to avoid respondeat superior liability.¹⁶⁵

It may be argued, however, that even if employers do not generally take action to ensure that the workplace is discrimination-free, and even if they do not respond to internal complaints in a manner designed to deter such behavior in the future, employers will do an abrupt about-face once they are actually sued and subjected to a damage award. This assumption has several problems as well. Being sued and forced to pay a damage award does not automatically cure the problems of bias that can exist within the highest levels of a company. Instead, once a company has been forced to defend a suit, these biases may manifest themselves in a slightly different manner, but with the same effect—the employer does not appropriately discipline the individual discriminator.

First, the process of mounting a defense to a discrimination suit has cognitive consequences for the upper management of an employer-entity. Widely accepted principles of social psychology reveal that once an employer has supported an individual agent in the process of defending against a discrimination claim, that employer may have cognitive difficulties with disciplining the offending employee-agent.¹⁶⁶ Psychologists posit that people generally attempt to preserve “psychological consistency” between their beliefs and their actions.¹⁶⁷ Thus, when people engage in behavior that is inconsistent with their beliefs, they will try to alter either their beliefs or their actions so that the two are once again consistent.¹⁶⁸ These cognitive consistency theories have important implications within the realm of employment discrimination. Obviously, the action of publicly defending against a discrimination claim and publicly defending the employee-agent who is responsible for the claim could be viewed as inconsistent with the belief that the responsible employee-agent should be disciplined.

At least one court has recognized other ways that cognitive consistency theories can have important implications within the realm of employment discrimination suits. In *Jendus v. Cancer Treatment Centers of America*,¹⁶⁹ the court concluded that “more often than not” employer-entities fail to discipline supervisors even after a jury finds

165. *See id.* at 1231.

166. *See* REUBEN M. BARON & WILLIAM G. GRAZIANO, *SOCIAL PSYCHOLOGY* 230 (1991) (discussing consistency theories to explain why people maintain or change attitudes).

167. *See id.*

168. *See id.*

169. 868 F. Supp. 1006 (N.D. Ill. 1994).

that the supervisor committed discriminatory acts.¹⁷⁰ The court explained this failure to appropriately discipline offending employees as follows:

[M]ore often than not, employers who lose an employment discrimination suit walk away from the courthouse believing that an injustice has been worked against them at the hands of a jury sympathetic to [the] . . . plaintiff. The court does not believe that these employers, convinced that their employment decisions were motivated by legitimate non-discriminatory justifications . . . will automatically discharge or otherwise discipline the responsible supervisory personnel. This is especially true if the individual employees involved are high ranking corporate officials¹⁷¹

If employers really believe that an adverse judgment is an “injustice,” they are unlikely to punish the individual employee who is responsible for the suit.

Second, while it is obvious that an employer-entity would be very displeased at being sued, it is not clear what the exact source of that displeasure would be. This concern is relevant because, as Davida Isaacs succinctly argues,

[an employer’s] disapproval is more likely to be connected to having been “caught” than with the act itself. Such censure is more likely to be more limited in scope than that related to condemnation of bias; in any case, such a basis for punishment does not serve the purpose of the federal employment statutes, which is to deter discrimination, not to teach people to hide such action better.¹⁷²

Thus, if employers are more upset about “getting caught” than about the discriminatory behavior itself, it is unlikely they will convey the proper sense of disapproval and intolerance to their other employees. These employees may get the signal that they can do as they wish, so long as they leave no evidence. This is hardly a signal that is likely to result in widespread deterrence.

As illustrated by the above discussion, an employer-entity may have several counter-incentives to behaving in an economically rational manner. The real issue, however, is how employers *actually* behave. Do they take appropriate measures to deter and address instances of discrimination within their workplace? As Professor Katharine Franke has noted:

According to the [EEOC], sexual harassment is the fastest-growing area of employment discrimination. In fact, the annual number of

170. *See id.* at 1012.

171. *Id.*

172. Isaacs, *supra* note 82, at 527.

sexual harassment complaints filed with the EEOC has more than doubled in the last six years. No one, or at least no one who has given this problem her serious attention, can deny that workplace sexual harassment is [still] a grave problem and that it significantly impedes women's entrance into many sectors of the wage labor market.¹⁷³

If the alarming increase in the number of sexual harassment claims is any indication, Title VII is simply not sending a strong enough message.

Empirical evidence suggests that not only are employers remiss at responding to inappropriate behavior when they see it, but they also respond inappropriately when victims lodge complaints. The *Harvard Business Review* conducted a study in which it posed the following hypothetical to a group of top level managers and asked them how they would respond:

The president of a company walks into the office of his sales manager to congratulate him on setting a new record in sales. When he enters the office, he finds the sales manager standing very close to his secretary, who looks upset and flustered. If you were president what would you do when you were alone with the sales manager? Sixty-three percent of those responding said that they would merely suggest to the sales manager that even the appearance of sexual behavior was unwise. Thirty percent would do absolutely nothing, not knowing what had happened. Only four percent would either express strong disapproval or suggest that if such behavior continued, it would have an adverse effect on the supervisor's career.¹⁷⁴

The reality is that the majority of employers do not send clear signals to their employees that discriminatory behavior is unacceptable and will result in discipline. There is also evidence that employers do not respond appropriately in the face of complaints. A study performed by the Working Women's Institute reported that one in six women who had been sexually harassed were fired for failing to go along with, or for complaining about, the sexual harassment.¹⁷⁵

As if this were not enough evidence that employer liability alone is not adequately deterring discrimination, studies also suggest that procedures for filing sexual harassment complaints are generally ineffective. Women are hesitant to complain for a variety of reasons, including: (1) they do not think they will be believed; (2) they believe they will be punished for reporting the behavior; or, (3) they believe

173. Katherine M. Franke, *Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams*, 83 CORNELL L. REV. 1245, 1245 (1998).

174. Smith, *supra* note 157, at 293 (citation omitted).

175. *See id.* at 291.

fellow employees will ostracize them.¹⁷⁶ If employers are sending signals to victims that they will not be believed and that they will be punished for complaining, it flies in the face of logic to also suggest that they are sending the appropriate signals to their employees that discrimination will not be tolerated.

c. The Insufficiency of the Risk of Employer Discipline as a Deterrent

In order for discipline to have the proper deterrent effect on the offender and on other employees in the workplace, it stands to reason that an employer must actually be capable of punishing the offender. However, in a society with an increasingly mobile work force, the discriminator may no longer be with the company. This is not a mere hypothetical. In *House v. Canon Mills Co.*,¹⁷⁷ the court took notice of the fact that the individuals who had committed the discriminatory acts were no longer with the company and, thus, employer punishment of the offenders was impossible to administer.¹⁷⁸ One federal district court concluded that “if the person most responsible for invidious discriminatory actions . . . [is] shielded from personal liability, that person may never be sufficiently punished or deterred.”¹⁷⁹ If the offending individual is no longer with the company, not only does he or she escape discipline, but a signal is sent to other employees that there are no consequences to engaging in discriminatory behavior. This concern becomes even more pressing when one realizes that there are more scenarios in which a perpetrator may avoid discipline. These scenarios include cases where the responsible employee-agent has retired, where the business has dissolved, or where the employer-entity has gone bankrupt.

Additionally, individual employees will not be sufficiently deterred unless they believe that there is a reasonable risk of being caught and disciplined. The evidence in Part II.B. above indicates that employers may not discipline offenders appropriately. It is reasonable to assume that employees will have some hint when their employer is likely to be tolerant of discriminatory behavior. Thus, some employees may not be deterred because they do not believe that there is any

176. *See id.* at 292.

177. 713 F. Supp. 159 (M.D.N.C. 1988).

178. *See id.* at 161 n.3.

179. EEOC v. AIC Sec. Investigations, Ltd., No. 92-C7330, 1993 WL 427454, at *9 (N.D. Ill. Oct. 21, 1993). *See also* Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 786 (N.D. Ill. 1993) (“[I]f the people who make discriminatory decisions do not have to pay for them, they may never alter their illegal behavior and the wrongdoers may elude punishment entirely. . . .”).

real risk of a penalty or that any discipline will be minor. At best, this creates a climate of uncertainty regarding the sanctions that a discriminator will face. At worst, it sends a permissive signal to potential discriminators. In any case, the strong message of intolerance that Congress intended Title VII to broadcast is not being received.

In summary, the argument that employer liability alone will sufficiently deter employment discrimination fails for three reasons. First, it fails to recognize that employers do not always have strong incentives to punish discriminators. Second, it does not account for the likelihood of economically irrational behavior within a company. Third, it erroneously assumes that individuals will be deterred by the risk of employer punishment. These shortcomings significantly undermine the strength of this argument. Recognition of the economically irrational nature of discrimination highlights the importance of attacking it at every possible level. If deterrence might break down on one front, it makes sense to add a second level of protection. It also illustrates the dubiousness of relying on such an indirect method of deterrence. While it is true that employment discrimination must be addressed at an institutional level, this does not mean that it should not also be addressed at the individual level. The next section turns to a discussion of the enhanced deterrence that would result if individuals could be held personally liable for their illegal actions.

2. *Individual Liability Fills the Gaps and Increases Deterrence*

Individual liability would serve as a much needed front line defense in the effort to eradicate workplace discrimination. If, as argued above, there are situations where employers are not taking appropriate action to deter their employees from discriminating, it is imperative that something be done to fill the gap. Potential discriminators must be disabused of any notion that they can escape discipline for their illegal behavior. They must be aware that, regardless of whether they face intra-organizational sanctions from the employer, they will definitely face extra-organizational sanctions from the courts.¹⁸⁰ Regardless of an institutional employer's refusal to discipline an individual, regardless of whether the individual has retired, is about to retire, or has changed jobs, the threat of personal liability should have a strong deterrent effect.¹⁸¹ Individual liability will serve as a strong added

180. See *Jendusa v. Cancer Treatment Ctrs. of Am., Inc.*, 868 F. Supp. 1006, 1011 (N.D. Ill. 1994). See also Goldberg, *supra* note 22, at 585-86 (arguing individual liability is essential if Title VII is to have its full deterrent effect).

181. See White, *supra* note 140, at 547-48 ("While an employer's discipline often does serve as a deterrent to its agents' discrimination, discipline will not always be

deterrent to those who believe they can escape intra-organizational discipline because it is a direct penalty.¹⁸² Finally, it makes sense to institute a double-tiered remedy that is cognizant of the role of both the individual and the employer in the occurrence of employment discrimination.

Of course, for some individuals, the mere existence of a statute that places severe personal consequences on discriminatory behavior may not be enough, and some violations of Title VII will still occur. The goal then must be to ensure that, when Title VII violations do occur, the individual and the employer are dealt with in a manner that sends an appropriate message of intolerance to the employer, the individual(s), all remaining employees, and any other observers. This additional layer of Title VII's deterrent goal merits attention as well.

Holding individuals personally liable for their actions would serve as a very real example to other potential discriminators and would send an unequivocal message that workplace discrimination will not be tolerated and that individuals who engage in such behavior will not escape the consequences. It is logical that, "any remedy afforded by the courts ultimately will have a lasting impact on the conduct of indirectly-affected employees only if the remedy appropriately sends a resounding message about further violations."¹⁸³ As argued above, under a scheme that does not allow individual liability, an individual who discriminates may not be appropriately disciplined either because of employer bias or because the individual at fault no longer works for the employer. The message sent by such a scheme undermines the deterrent effect of the statute.¹⁸⁴ It shows all onlookers that there are not always consequences to discriminatory behavior. As one court noted, "[t]o hold otherwise would encourage supervisory personnel to believe that they may violate Title VII with impunity."¹⁸⁵ Obviously, this is a gap that individual liability can fill so that even in the absence of organizational sanctions, the full opprobrium of the law will come down upon those individuals who perpetrate discrimination.

effective, particularly if the responsible individuals are nearing retirement or have left or are leaving the employer for other positions.").

182. See Lukens, *supra* note 138, at 363.

183. See *id.* at 342.

184. See *Matthews v. Rollins Hudig Hall Co.*, 874 F. Supp. 192, 195 (N.D. Ill. 1995), *rev'd*, 72 F.3d 50 (7th Cir. 1995) (reasoning that employment discrimination statutes were designed "not only to compensate victims of discrimination but to deter potential discriminators, and the latter goal is undermined when people who make discriminatory decisions do not have to pay for them").

185. *Hamilton v. Rodgers*, 791 F.2d 439, 443 (5th Cir. 1986).

Individual liability would also serve as a stronger deterrent to potential discriminators because of the stigma that is attached to being named as an actual party in a lawsuit. Absent individual liability, those who are directly responsible for the lawsuit participate merely as witnesses instead of as defendants. As one commentator argues:

[I]t is imperative that there be wider publicity of an employee's acts than merely through office gossip. While any lawsuit brought against a company is likely to generate some notoriety, the lay notion that non-parties are merely witnesses to the incidents generating the lawsuit allows the offender to downplay his role in any action. In contrast, naming the discriminator as a defendant tends to expose the fact that she was directly and significantly responsible for the acts at issue. If the plaintiff wins her suit, the discriminator's status as a party increases the chance that non-employees and other community individuals will appropriately castigate the individual, re-confirming, to the discriminatory employee and others, the general sentiment that such behavior is improper.¹⁸⁶

The point is well taken. Under a scheme where only the employer is liable, individuals can escape not only the legal consequences of their actions, but the social consequences as well. A desire to avoid being labeled a "sexual harasser" or a "racist" by one's friends and colleagues may serve as a strong deterrent to some individuals. Additionally, a verdict finding that an individual had personally perpetrated discriminatory acts would likely have more adverse consequences on an individual's career prospects than a reprimand in their personnel file or even a dismissal.¹⁸⁷

186. Isaacs, *supra* note 82, at 545.

187. Allowing claims against individuals may increase deterrence in another way as well. If individual discriminators were named as parties to discrimination suits, prospective employers would have an additional means of determining whether they were hiring individuals who had a history of such behavior. While it is impracticable to find out the names of individual discriminators who participate in lawsuits as mere "witnesses," it would be relatively easy to find out the names of those who were actually named as defendants. One might argue that such "background checks" are unnecessary because prospective employers need only inquire into the personnel records and check the references of job applicants to determine if the applicants have such a history. Unfortunately, these standard methods are less than foolproof. As this article notes, there are all too many instances where employers do not discipline employees who discriminate. See *supra* Part II.B.1. For myriad reasons, they do not always place notes in the offending employee's personnel file. Additionally, in some cases, companies may allow the offending individuals to resign quietly. Finally, some employers are now instructing their personnel offices to give only minimal information regarding previous employees—such as their title and their dates of service—in order to avoid being sued by those employees.

Taken together, these practices point to a notification or warning problem. If employers could simply search court records using an employee's name, the employer

Individual liability also works to improve deterrence by encouraging meritorious lawsuits. Allowing victims to bring suits against individuals would encourage them to file lawsuits in several ways. First, as discussed above, under an individual liability scheme a victim has a better chance at recovery in those cases where the institutional employer has no vicarious liability, cannot pay the whole damage award, or is insolvent. Indeed, despite its conclusion that the current statutory language of Title VII precludes claims against individuals, the Seventh Circuit conceded that increasing the number of potentially liable defendants would increase deterrence and victims' compensation.¹⁸⁸ Furthermore, many victims may be just as interested in the personal vindication that would accompany a public condemnation of the responsible individual.¹⁸⁹ Thus, a chance to confront the responsible individual in court may increase the number of victims willing to file suit.¹⁹⁰

The establishment of individual liability would significantly increase the deterrent effect of Title VII. Not only would employees face the status quo's deterrent mechanisms, but they would also face the additional deterrent of direct legal reprisal and all of the attending economic and social consequences such a reprisal may carry. Furthermore, individual liability will increase the incentives for victims to bring suit against their tormentors. When the failure of employers to respond appropriately to employment discrimination is considered in light of the high rate at which such incidents are occurring, it is apparent that strengthening Title VII's punitive scheme is a necessary step in the effort to eliminate workplace discrimination.

C. Individual Liability's Promotion of Title VII's Subsidiary Goals of Protecting Family Businesses and Safeguarding the Economy

Many commentators and courts that have considered the issue of individual liability have questioned whether it is consistent with Title VII's subsidiary goals of protecting family-run businesses and safe-

could at least be on notice of who they are hiring. Ideally, victims of employment discrimination would eventually be able to claim that such searches are part of the minimal duties that employers have to keep their workplace discrimination-free. If employers choose to hire individuals who have previously been held liable for discrimination, the employer should have a special obligation to monitor those employees more closely to ensure that the discriminatory behavior does not recur.

188. See *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995).

189. See *supra* Part II.A.2.

190. See Isaacs, *supra* note 82, at 532 ("The rare occasion to challenge directly and publicly the persecuting employee presents the victim with a personal method of re-priming that may be more appealing than suing the entity, and may encourage more claims than would otherwise be raised.").

guarding the economy.¹⁹¹ It is important to note that these commentators and courts were considering the issue of individual liability from a very different perspective. Most discussions of the issue have focused on whether Congress *intended* to include a cause of action against individuals when it enacted Title VII or the Civil Rights Act of 1991.¹⁹² Thus, the discussions tend to revolve around legislative histories and specific statutory provisions that are indicative of congressional intent. The focus of this section is not whether Congress originally intended to include individual liability, but whether such inclusion is counter to the subsidiary policies of the statute irrespective of Congress's original intent. Hence, this discussion will revolve around the effects, if any, that individual liability would have on the goals of safeguarding the economy and avoiding government intrusion into family businesses. Approached purely from a policy perspective—irrespective of original intent—it is clear that individual liability is completely consistent with, and in some cases actually furthers, the subsidiary policies of Title VII.

As noted above, many commentators have taken the existence of the numerosity requirement and the graduated damages provisions as evidence of a congressional intent to protect family-run businesses.¹⁹³ Some legislative history supports this view. The concern among members of Congress was that many small businesses were family owned and operated, and that government intrusion into such businesses would be undesirable.¹⁹⁴ Senator Humphrey, the main supporter of Title VII in the Senate, stated that the reason for the numerosity requirement was that larger businesses generally have a more substantial impact on commerce, and that once they have twenty-five or more employees, they lose most of the intimacy associated with a small business.¹⁹⁵

Some opponents of individual liability may argue that allowing suits against individuals would indirectly subvert this goal of noninterference by allowing individuals employed by these businesses to be held liable. That assertion is blatantly wrong. Title VII provides for liability only against "a person . . . who has 15 or more employees . . . and any agent of such a person."¹⁹⁶ Thus, as long as Congress maintains the numerosity requirement in Title VII's definition of employer,

191. See *supra* note 82; *infra* notes 200-02.

192. See *supra* note 22.

193. See *supra* note 82.

194. See *id.*

195. See 110 CONG. REC. 13,088 (1964).

196. See generally 42 U.S.C. § 2000e(b) (1994) (defining "employer").

not only are businesses with less than fifteen employees exempt, but their “agents” are clearly exempt as well. Furthermore, if Congress really perceives this to be a problem, it should include a provision in the amendment that individuals working for exempted businesses are also exempt.

This concern raises a second problem as well. As argued above, individual liability is not inconsistent with the goals implied by the existence of damage caps,¹⁹⁷ but courts are confused as to how the damage caps should apply in cases where the plaintiff is suing both the employer-entity and the individual perpetrator.¹⁹⁸ For example, are each of the defendants liable for the full cap amount or can a plaintiff never recover more than the cap amount regardless of how many defendants are found liable?¹⁹⁹ Any amendment to Title VII should clarify this question in order to avoid confusion and inconsistency in the application of the damage caps.

Another, more popular argument made by opponents of individual liability is that it is inconsistent with Title VII’s goal of safeguarding the economy. They argue that the numerosity requirement and the graduated damage provisions are indicative of an intent to protect businesses from crushing liability.²⁰⁰ Senator Humphrey wanted to ensure that there would not be widespread job loss as a result of employer liability driving businesses into bankruptcy.²⁰¹ He was also concerned because he believed small businesses were key to job stimulation in a weak economy.²⁰² The argument that individual liability is inconsistent with this goal is groundless. In fact, individual liability would promote the goal of safeguarding the economy.

Individual liability is not inconsistent with the goal of protecting the economy because individual liability does not have the same economic effects as employer liability. The purposes behind the damage caps and numerosity requirement do not apply to individuals. Congress has never indicated that it believes individuals are key to job stimulation in a weak economy or that widespread job loss would re-

197. See *supra* notes 193-95 and accompanying text.

198. See, e.g., *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1315 (2d Cir. 1995); *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1525 (M.D. Ala. 1994).

199. See *Saville*, 852 F. Supp. at 1525 (“If both the offending employee and the employer were to be liable for monetary damages, Congress would have provided some guidance [about] . . . whether a plaintiff could collect the full cap amount from both the employer and the individual. And if the discrimination . . . involved several co-employees, would each be liable for the cap amount, based on the size of the employer?”).

200. See *Ayvas*, *supra* note 59, at 813-15.

201. See 110 CONG. REC. 13,088 (1964).

202. See *id.*

sult even if an individual, hit hard by a liability judgment, is forced to declare bankruptcy. In reality, individuals have only a miniscule impact on the economy and Congress was not concerned with their exposure to liability.²⁰³ The overall economic impact of liability on small businesses is simply not analogous to the impact of liability on individuals. Thus, individual liability is not inconsistent with Title VII's goal of maintaining economic health.

Additionally, individual liability unarguably provides at least some measure of increased deterrence, which actually promotes economic health in two ways. First, improved deterrence will lead to a decrease in the incidence of employment discrimination, which is in and of itself economically inefficient behavior and has overall negative economic impacts. The decreased productivity, medical costs, legal costs, and misuse of talents and ideas caused by employment discrimination take a very real toll on the profits of American businesses.²⁰⁴ For example, the U.S. Merit Systems Protection Board estimated that, for one two-year period alone, the cost of sick leave for federal employees who stayed on the job despite being sexually harassed was \$14.9 million.²⁰⁵ The total estimated cost of sexual harassment to the federal government for the same two-year period was \$327.1 million.²⁰⁶ Second, improving deterrence is economically efficient because preventing employment discrimination is cheaper than correcting it.²⁰⁷

203. See, e.g., *Lamirande v. Resolution Trust Corp.*, 834 F. Supp. 526, 528 (D.N.H. 1993) (taking issue with Ninth Circuit's conclusion that numerosity requirement was intended to "protect 'small entities' rather than small businesses"); 110 CONG. REC. 13,088 (1964).

204. See NANCY DODD McCANN & THOMAS A. MCGINN, HARASSED: 100 WOMEN DEFINE INAPPROPRIATE BEHAVIOR IN THE WORKPLACE 96 (1992).

205. See U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE 26 (1995).

206. See *id.*

207. See, e.g., Lukens, *supra* note 138, at n.232. The assumption implicit in this argument is that it is economically damaging for an employer-entity to be subjected to a discrimination suit and an adverse judgment. As noted earlier, Congress had some concerns about the effect of such damaging suits on the health of the economy. Some readers may perceive tension between this argument and the previous statement that individual liability would increase the number of victims who were willing to bring such discrimination suits. A more specific examination of the claim regarding increased lawsuits resolves this tension. The precise argument is that individual liability will stimulate meritorious lawsuits that are not brought in the status quo due to the lack of a viable defendant. That is, it will stimulate suits against individuals, not employers. As argued above (see *supra* note 203 and accompanying text), subjecting individuals to liability does not have a noteworthy effect on the health of the American economy.

While the lawsuits stimulated by the addition of individual liability would at most have a negligent effect on the economy, they would have a resounding impact on

Hence, in this instance, Title VII's primary goals of deterrence and compensation are not in competition with the subsidiary goals of protecting family-run businesses and safeguarding the economy. However, even if the Act's primary and subsidiary goals were at odds with each other, the primary goals and stated purpose of eradicating workplace discrimination and compensating victims should decide the issue. The purpose of the Act as a whole must be controlling. Otherwise, the tail will wag the dog and the goal of a small exception will subvert the Act's central purpose.

CONCLUSION

The failure to hold individuals liable for their discriminatory actions has denied an entire class of victims just compensation and has undermined the overall deterrent effect of Title VII. The breakdown in the compensation scheme is fairly apparent. In cases where employers escape liability for employment discrimination, victims are unable to pursue their only remaining target for legal redress—the individual. Such a failure creates a class of powerless victims for whom there is no legal compensation available, regardless of whether they have faced the most severe discrimination imaginable. Furthermore, the exclusion of individual liability suits denies plaintiffs the vindication of seeing their tormentors held personally accountable for their actions. Standing alone, this failure of Title VII to meet one of its primary objectives is enough to warrant a congressional amendment to allow individual liability. When the additional and related failure of the current scheme to sufficiently deter employment discrimination is also considered, the case for such an amendment becomes overwhelming. Employer liability has not proven to induce the desired employer response to employee discrimination and, even when it has, this response may still have been ineffective. The establishment of individual liability is a solution to both of these problems. It closes the loophole that allows individuals to escape the consequences of their actions and, as a result, increases the likelihood that these individuals will be deterred from taking such discriminatory actions in the first place.

the deterrent effect of Title VII. Individual liability would decrease the overall incidence of employment discrimination, while at the same time increasing the percentage of victims who file suit and recover damages in those instances where deterrence still breaks down and discrimination does occur.

Title VII's two main purposes—compensating victims of employment discrimination and deterring future discrimination²⁰⁸—simply cannot be fulfilled unless the Act is amended to include a cause of action against individual discriminators. Absent individual liability, wrongdoers can elude punishment entirely. If there is neither institutional nor personal accountability, the statute's effectiveness as a deterrent is undermined. Furthermore, too many victims of employment discrimination will be denied any recovery, despite a court finding that, like Wendy Wilson, Vickie Coates, Ms. Kauffman, and many others, they were humiliated and violated in the workplace.

208. *See* *Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769, 785 (N.D. Ill. 1993) (“Title VII always has served two purposes: to compensate victims of discrimination . . . and to deter discrimination in the future.”).