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## Formalism and Employer Liability Under Title VII

Samuel R. Bagenstos\*

### Introduction

Most lawyers, law professors, and judges are familiar with two standard critiques of formalism in legal reasoning. One is the unacknowledged-policy-making critique—that formalist reasoning purports to be above judicial policymaking but instead simply hides the policy decisions offstage.<sup>1</sup> The other is the false-determinacy critique—that formalist reasoning purports to reduce decision costs in the run of cases by sorting cases into defined categories, but that instead of going away the difficult questions of application migrate to the choice of the category in which to place a particular case.<sup>2</sup>

Last Term's decision in *Vance v. Ball State University*<sup>3</sup> demonstrates that the Supreme Court's complex doctrine on employer liability under Title VII amply deserves each of these critiques. The Court's formalistic reasoning conceals a series of unacknowledged, undefended, and dubious policy choices. Those choices stand behind the Court's resolution of the question that triggered

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\* Professor of Law, University of Michigan Law School. Thanks to the editors of the University of Chicago Legal Forum for inviting me to contribute to its symposium on the Civil Rights Act at 50 Years, and to the participants at that symposium for stimulating comments and conversation. I presented an earlier version of this paper at the Eighth Annual Colloquium on Current Scholarship in Labor and Employment Law; thanks to the participants at that colloquium for their very helpful feedback.

<sup>1</sup> One could find hundreds of citations illustrating this critique, but it is present at least as early as Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

<sup>2</sup> For a recent example of the false-determinacy critique, see Joseph William Singer, *The Rule of Reason in Property Law*, 36 U.C. DAVIS L. REV. 1369 (2013).

<sup>3</sup> 133 S. Ct. 2434 (2013).

substantial debate within the Court—how to define a “supervisor,” whose harassing acts trigger employer liability. They also stand behind the perhaps more important holding, hiding in plain sight, that an employer is liable for harassment by *nonsupervisory* coworkers only when the employer is itself negligent. To the extent that the Court offered any justification for its decision, that justification was one of crispness and determinacy of application. But, as is often the case with formalist reasoning, the Court’s promises of crispness and determinacy were almost transparently false.

In her dissenting opinion in *Vance*, Justice Ginsburg urged Congress to overturn the Court’s narrow interpretation of who is a “supervisor.”<sup>4</sup> Such an action would solve some of the problems with the Court’s opinion, but it would not go far enough. Rather, Congress should reconsider the entire employer liability structure the Court constructed in the landmark 1998 *Faragher* and *Ellerth* cases.<sup>5</sup> Congress might change that structure in a number of ways. The best approach, I argue, would be to declare employers liable whenever any of their employees engages in discriminatory harassment in violation of Title VII. Such a regime would not distinguish between harassment committed by supervisors and that committed by coworkers. Nor would it give employers the affirmative defense created by *Faragher* and *Ellerth*. A clean, certain rule of vicarious employer liability serves the key policies underlying Title VII, and it does so far better than do the alternatives.

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<sup>4</sup> See *id.* at 2466.

<sup>5</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

My argument proceeds as follows. Parts I and II discuss the *Vance* case itself. Part I elaborates the unacknowledged-policymaking critique. Part II elaborates the false-determinacy critique. I then turn, in Part III, to the question of how Congress should respond. My goal in this essay is therefore both to elaborate a critique of the current law and to channel the reformist energy unleashed by *Vance* into a more thoroughgoing direction than Justice Ginsburg's dissent suggests.

### I. The Unacknowledged Policy Choices

The Court granted certiorari in *Vance* to resolve a conflict in the circuits regarding who counts as a supervisor for purposes of its Title VII employer liability doctrine. In its landmark 1998 decisions in *Faragher v. City of Boca Raton*<sup>6</sup> and *Burlington Industries, Inc. v. Ellerth*,<sup>7</sup> the Court made supervisory status a trigger for a form of vicarious employer liability. If a supervisor committed discriminatory harassment, the Court held, the employer would be at least presumptively liable.<sup>8</sup> Where the supervisor accomplished the harassment through a “tangible employment action”—“a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits”—the employer would be absolutely liable.<sup>9</sup> Where the harassment did not include such an action, the Court held, the employer would still be presumptively liable

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<sup>6</sup> 524 U.S. 775 (1998).

<sup>7</sup> 524 U.S. 742 (1998).

<sup>8</sup> See *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

<sup>9</sup> *Ellerth*, 524 U.S. at 761.

but would be entitled to establish, as an affirmative defense, that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and that the employee-plaintiff “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>10</sup>

In adopting a narrow understanding of who counts as a supervisor, the *Vance* Court purported to ask what definition “best fits within the highly structured framework that [*Faragher* and *Ellerth*] adopted.”<sup>11</sup> But any number of ways of defining a supervisor might have fit within the “framework” of *Faragher* and *Ellerth*. To decide which of those definitions to adopt required consideration of *why* the Court adopted the framework and what definition best fit those reasons. The Court’s resolution of the definitional question is inconsistent with what I shall argue is the most attractive understanding of the reasons the Court adopted the *Faragher*/*Ellerth* framework. I discuss these points in Section A.

But the Court’s decision rested on an even more significant—and even more suppressed—policy judgment. That judgment is the determination that employers cannot be liable for harassment undertaken by nonsupervisory coworkers unless the employers are themselves negligent.<sup>12</sup> In *Faragher* and *Ellerth*, the Court had assumed that a negligence standard applied in such

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<sup>10</sup> *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

<sup>11</sup> *Vance*, 133 S. Ct. at 2446.

<sup>12</sup> What it means for an employer that is not a natural person, but that can act only through human agents, to itself be negligent is not an easy question, though the Court has shown no sign of appreciating the point. I discuss this issue in Part II.

circumstances, but it never held as much—and it certainly never sought to justify such a holding. In *Pennsylvania State Police v. Suders*,<sup>13</sup> decided six years after *Faragher* and *Ellerth*, the Court reiterated that it had not decided what standard of employer liability is appropriate in coworker harassment cases. *Vance* must be read as holding for the first time—without announcing the innovation—that negligence is the standard. Yet the *Vance* Court never once sought to justify adopting such a standard, and the arguments against a negligence rule are much stronger than the arguments for one. I discuss these points in Section B.

#### A. Defining Supervisor

When the Court granted certiorari in *Vance*, lower courts had adopted two distinct approaches for determining who constitutes a supervisor under Title VII. Some courts had defined a supervisor to embrace anyone who had been delegated authority by the employer “to exercise significant direction over [the plaintiff’s] daily work.”<sup>14</sup> Other courts, including the Seventh Circuit in *Vance* itself, had held that a supervisor must have “the power to hire, fire, demote, promote, transfer, or discipline the victim”—in other words, the power to carry out a “tangible employment action.”<sup>15</sup>

As Justice Alito’s opinion for the Court correctly noted, the plain meaning of the word “supervisor” could not resolve that disagreement.<sup>16</sup> “Supervisor,” after all, is a term with broader and narrower meanings. In ordinary usage and

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<sup>13</sup> 542 U.S. 129 (2004).

<sup>14</sup> *Vance*, 133 S. Ct. 2443.

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

<sup>16</sup> *See id.* at 2444.

in the law, the term sometimes embraces any individual who has day-to-day authority to direct a subordinate's work, while it sometimes embraces only those individuals who have hiring and firing authority.<sup>17</sup> Moreover, as Justice Alito also correctly noted, it makes little sense to parse the word "supervisor" "as if [it] were a statutory term."<sup>18</sup> Congress did not use that word; the Court in *Faragher* and *Ellerth* came up with it "as a label for the class of employees whose misconduct may give rise to vicarious employer liability."<sup>19</sup>

So far, so good. Having established that the proper definition of supervisor cannot come simply from textual formalism, the sensible next step for the Court would have been to look behind the label and ask, based on the statutory policies that animated *Faragher* and *Ellerth*, precisely what is the "class of employees whose misconduct may give rise to vicarious employer liability." If supervisory status distinguishes those employees from the other employees whose misconduct does not trigger vicarious liability, we might ask what it is about supervisory status that makes employer liability appropriate. We might then use that justification as a guide to defining the category of supervisor. Rather standard, perfectly appropriate legal reasoning.

But that is precisely the road the *Vance* Court did not take. Having rejected formalism of the text as unhelpful and inapposite, the Court sought solace in a different formalism—the formalism of the "framework." Rather than

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<sup>17</sup> See *id.* at 2444-2446; see also Catherine L. Fisk, *Supervisors in a World of Flat Hierarchies*, 64 HAST. L.J. 1403 (2013) (discussing differences of opinion regarding definition of supervisor under the National Labor Relations Act).

<sup>18</sup> *Vance*, 133 S. Ct. at 2446.

<sup>19</sup> *Id.*

looking to what definition of the category best fits the *reasons* why *Faragher* and *Ellerth* held that employers are liable for the acts of their supervisors, the Court concluded that “the way to understand the meaning of the term ‘supervisor’ for present purposes is to consider the interpretation that best fits within the highly structured framework that those cases adopted.”<sup>20</sup> And the Court found it “implicit in the characteristics of [that] framework” that an individual cannot be a supervisor unless she has authority to take a “tangible employment action.”<sup>21</sup> The implication, the Court suggested, appeared in *Ellerth*’s statement that

“Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company *as a distinct class* of agent to make economic decisions affecting other employees under his or her control. . . . Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.”<sup>22</sup>

“The strong implication of this passage,” the *Vance* Court concluded, “is that the authority to take tangible employment actions is the defining characteristic of a supervisor.”<sup>23</sup>

But that reading of *Faragher* and *Ellerth* is a stretch. In the passage quoted by the *Vance* Court, *Ellerth* was explaining why tangible employment actions should trigger liability without any possibility that the employer could make out an affirmative defense. “When a supervisor makes a tangible employment decision,” the *Ellerth* Court explained just before the passage quoted in *Vance*, “there is assurance the injury could not have been inflicted absent the agency

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<sup>20</sup> *Vance*, 133 S. Ct. at 2446.

<sup>21</sup> *Id.* at 2448.

<sup>22</sup> *Id.* (quoting *Ellerth*, 524 U.S. at 762 (emphasis in *Vance*)).

<sup>23</sup> *Id.*

relation.”<sup>24</sup> But to say that we can be *certain* that the supervisor is aided by the agency relation when she undertakes a tangible employment action does not at all imply that a supervisor is *not* aided by the agency relation when she fails to undertake—or even lacks power to undertake—such an action. It is a completely sensible interpretation of the *Faragher/Ellerth* framework to say that we make employers automatically liable, with no affirmative defense, when discriminatory harassment results in a tangible employment action (because in such circumstances we know that the supervisor’s action was aided by the agency relation), but that we make employers liable for harassment by day-to-day supervisors who lack hiring and firing authority subject to the affirmative defense (because in those circumstances the harassment will often, but not always, have been aided by the agency relation, and the affirmative defense will appropriately sort the cases). As far as the *Faragher/Ellerth* framework goes, *both* the more employer-friendly reading adopted by the *Vance* Court and the more employee-friendly reading offered by the plaintiff would have fit.

The definition of supervisor the Court adopted in *Vance* thus was not dictated by statutory text or prior precedent. In choosing between a narrow and a broad definition, the Court was forced to make a policy decision regarding the extent to which employers should be responsible for the harassing acts of those employees they put in a position to direct other employees’ work. But the Court did not acknowledge this policy question, much less seek to defend the choice it made.

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<sup>24</sup> *Ellerth*, 524 U.S. at 761-762.

The Court's mode of proceeding in *Vance* contrasts sharply with its approach in *Faragher*. Although some commentators have criticized *Faragher* as itself driven by a wooden and formalistic analysis,<sup>25</sup> that decision contains a reasonably open and candid discussion of the policy choices the Court was called upon to make. Following the Court's prior statement that Congress intended courts to look to common-law agency principles as a starting point for deciding the scope of employer liability under Title VII<sup>26</sup>—a statement it believed to be confirmed by Congress's failure to alter the rules for employer liability in the Civil Rights Act of 1991<sup>27</sup>—the *Faragher* Court recognized that Congress required it to craft a liability scheme that implemented these principles while serving the statute's underlying policies.<sup>28</sup> The *Faragher* Court focused its analysis on the principle set forth in Section 219(2)(d) of the Restatement (Second) of Agency, that an employer is liable for torts of an employee who was "aided in accomplishing the tort by the existence of the agency relation."<sup>29</sup>

In determining that supervisors who harass are generally aided by the existence of their relationship with the employer, the Court focused on two

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<sup>25</sup> See Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755 (1999); Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for Faragher and Ellerth*, 36 SAN DIEGO L. REV. 41 (1999); see also Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3 (2003) (describing formalism of lower courts' interpretation of *Faragher* and *Ellerth*).

<sup>26</sup> See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

<sup>27</sup> See *Faragher*, 524 U.S. at 792.

<sup>28</sup> See *id.* at 802 n.3, 805-807.

<sup>29</sup> *Faragher*, 524 U.S. at 801-808. Note that the current Restatement no longer includes this language. See *Vance*, 133 S. Ct. at 2441 n.2.

salient points. First, the “agency relation affords contact with an employee subjected to a supervisor’s [discriminatory] harassment.”<sup>30</sup> But that alone, the *Ellerth* Court explained the same day, would not be enough for employer liability.<sup>31</sup> Second, and crucially, a supervisor’s power to retaliate against employees who complain about harassment may well make the victim “reluctant to accept the risks of blowing the whistle on a superior”:

When a person with supervisory authority discriminates in the terms and conditions of subordinates’ employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor’s abusive conduct the same way that she might deal with abuse from a co-worker.<sup>32</sup>

The *Ellerth* Court similarly observed that “a supervisor’s power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation.”<sup>33</sup>

The *Faragher* and *Ellerth* Court did not stop simply by noting the ways in which a supervisor’s conduct generally draws, if only implicitly, on the agency relation with the employer. The Court in those cases believed that it could not pursue that argument to its logical limit, and make employers vicariously liable for *all* of the harassing conduct committed by their supervisors, for three reasons. First, the Court pointed to its earlier statement in *Meritor* that employers are not “always automatically liable for sexual harassment by their supervisors.”<sup>34</sup> This

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<sup>30</sup> *Faragher*, 524 U.S. at 803.

<sup>31</sup> *See Ellerth*, 524 U.S. at 760.

<sup>32</sup> *Faragher*, 524 U.S. at 803.

<sup>33</sup> *Ellerth*, 524 U.S. at 763.

<sup>34</sup> *Meritor*, 477 U.S. at 69-70.

statement, *Faragher* and *Ellerth* concluded, was a holding—and one with strong stare decisis effect because Congress left it intact while making other changes to Title VII in the Civil Rights Act of 1991.<sup>35</sup> Second, *Ellerth* explained, “there may be some circumstances where the supervisor’s status makes little difference” to her accomplishment of the harassment.<sup>36</sup> Finally, both *Faragher* and *Ellerth* emphasized that the Court must take account of what it called “the statutory policy” of preventing, rather than simply compensating for, discrimination, as well as the “equally obvious policy” of encouraging victims of discrimination to mitigate damages.<sup>37</sup> The Court’s ultimate holding regarding the standards for employer liability reflected an unabashed balancing of these different policy considerations, as the Court made clear in the paragraph that it repeated verbatim in both *Faragher* and *Ellerth*.<sup>38</sup>

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<sup>35</sup> See *Faragher*, 524 U.S. at 804 & n.4.

<sup>36</sup> *Ellerth*, 524 U.S. at 763.

<sup>37</sup> *Faragher*, 524 U.S. at 806; see also *Ellerth*, 524 U.S. at 764.

<sup>38</sup> The paragraph reads:

In order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII’s equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding . . . . An employer is subject to vicarious liability to a victimized employee for an actionable hostile 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, see Fed. Rule Civ. Proc. 8(c). 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. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy

How might the *Vance* Court have addressed the question of defining a supervisor consistent with the mode of analysis in *Faragher* and *Ellerth*? In keeping with *Faragher* and *Ellerth*'s conclusion that harassment by supervisors is often aided by the agency relation because its victims fear retaliation, the Court might have asked, as an empirical matter, what are the acts a supervisory employee could take that would make a threat of retaliation effective. Alternatively, the Court might have asked whether a particular definition of supervisor would serve or disserve the statutory policies of prevention and encouraging victims to mitigate damages.

But the *Vance* Court did not engage any of these questions. The Court did assert, in a single sentence, that “[i]t is because a supervisor has th[e] authority [“to inflict direct economic injury”]—and its potential use hangs as a threat over the victim—that vicarious liability (subject to the affirmative defense) is justified.”<sup>39</sup> There can be no doubt that the power to inflict direct economic injury is one mode by which a superior employee can retaliate against an individual who complains about harassment. The *Faragher* Court itself pointed

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suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

*Faragher*, 524 U.S. at 807-808; *Ellerth*, 524 U.S. at 764-765.

<sup>39</sup> *Vance*, 133 S. Ct. at 2448.

to the power “to hire and fire” as one of the characteristics that make it difficult for a worker to “check a supervisor’s abusive conduct the same way that she might deal with abuse from a coworker.”<sup>40</sup> But *Faragher* also referred to the authority “to set work schedules” as one of the means by which a supervisor might effectively retaliate.<sup>41</sup> And the Court’s own Title VII retaliation cases have recognized that employers can effectively deter complaints about discrimination even if they take actions that fall well short of tangible employment actions. In *Burlington Northern v. White*,<sup>42</sup> the Court expressly rejected any limitation of Title VII’s anti-retaliation provisions “to so-called ‘ultimate employment decisions.’”<sup>43</sup> Rather, the Court recognized that a broader array of employment actions—including schedule changes, exclusion from training lunches, and the like—will deter employees from complaining about discrimination.<sup>44</sup> The *Burlington Northern* Court specifically held that a “reassignment of duties” can constitute retaliation even where “both the former and present duties fall within the same job description.”<sup>45</sup> Because “[a]lmost every job category involves some responsibilities that are less desirable than others,” the Court explained, “one good way to discourage an employee . . . from bringing discrimination charges

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<sup>40</sup> *Faragher*, 524 U.S. at 803 (quoting Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 854 (1991)).

<sup>41</sup> *Id.* (quoting Estrich, *supra* note 40, at 854).

<sup>42</sup> *Burlington Northern & Santa Fe R. Co. v. White*, 548 U.S. 53 (2006).

<sup>43</sup> *Id.* at 67.

<sup>44</sup> *See id.* at 69.

<sup>45</sup> *Id.* at 70.

would be to insist that she spend more time performing the more arduous duties.”<sup>46</sup>

The *Vance* Court did not engage with, much less dispute, this point.<sup>47</sup> And the Court could hardly have denied that the power of a superior employee to make day-to-day assignments of work can effectively deter the victim of harassment from complaining. Instead, the Court must have implicitly concluded that the cost of employer liability for harassment committed by employees who lack the power to hire and fire outweighs the additional protection that employer liability would give those victims who are deterred from complaining by a superior employee’s ability to make work assignments. But the Court never even acknowledged, much less sought to justify, that choice.

And the Court’s implicit policy choice was a dubious one at best. Extensive sociological and psychological evidence demonstrates that people who complain about harassment and discrimination provoke “widespread dislike” and “pervasive[] . . . retaliation” within their workplaces.<sup>48</sup> This dislike and retaliation is a key deterrent that keeps individuals from taking action to stop discrimination and harassment perpetrated against them.<sup>49</sup> The evidence does not suggest that the likelihood or effectiveness of retaliation depends on the formal job duties of the harasser. Rather, as Deborah Brake shows in her review

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<sup>46</sup> *Id.* at 70-71.

<sup>47</sup> It is notable that Justice Alito, who wrote the Court’s opinion in *Vance*, rejected the Court’s analysis in *Burlington Northern*. See *id.* at 73 (Alito, J., concurring in the judgment).

<sup>48</sup> Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 902-903 (2008).

<sup>49</sup> See *id.* at 904.

of the literature, the likelihood and effectiveness of retaliation depends much more on the relative status of the perpetrator and the target within an institution.<sup>50</sup> Because designation as a supervisor is one index of higher status within an organization, targets of harassment perpetrated by individuals who are so designated can legitimately fear retaliation, regardless of whether the supervisors have the power to take “tangible employment actions” as defined in *Faragher* and *Ellerth*. As I argue below, the same sociological and psychological evidence suggests that the Court should not draw a firm line between supervisors and coworkers for purposes of triggering employer liability. But assuming such a line makes sense, there are substantial reasons to doubt that the line should be drawn at the place where an individual has the power to take a tangible employment action.<sup>51</sup>

### *B. Making Negligence the Baseline Rule*

But there is even a more significant aspect to the *Vance* holding. That is the Court’s conclusion that an employer is liable for the discriminatory harassment of nonsupervisory employees only if the employer is itself negligent. This aspect of the holding was a bit hidden, because it was not the basis for the disagreement between the majority and the dissent. But it was hiding in plain sight. There can be no doubt after *Vance* that employers are liable for harassment perpetrated by nonsupervisory workers only if the employers themselves are negligent. As the *Vance* Court squarely stated, “[n]egligence provides the better

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<sup>50</sup> See Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 40-42 (2005).

<sup>51</sup> See *Vance*, 133 S. Ct. at 2454-2466 (Ginsburg, J., dissenting).

framework for evaluating an employer's liability when a harassing employee lacks the power to take tangible employment actions."<sup>52</sup> But the Court made no effort to justify this aspect of its holding—in *Vance* or in any of its earlier cases—and the arguments for it are weak.

In its pre-*Vance* cases the Court never held that a negligence standard of employer liability applied to coworker-on-coworker harassment. *Faragher*, to be sure, seemed to *assume* that a negligence standard applied in such circumstances. In holding that supervisors who harass are not always acting in the scope of their employment, the *Faragher* Court pointed to the “uniform[]” view of lower courts that “co-worker harassment” was to be “judged under a negligence standard.”<sup>53</sup> The Court found it “quite unlikely that these cases would escape efforts to render them obsolete if we were to hold that supervisors who engage in discriminatory harassment are necessarily acting within the scope of their employment.”<sup>54</sup> But the *Faragher* Court offered no affirmative argument that coworker harassment *should* be assessed under a negligence standard.<sup>55</sup> Any such argument would have been dicta in any event. *Faragher*, like *Ellerth*, was a case involving harassment by a supervisor, not a coworker, so the standard of employer liability for coworker harassment was not squarely presented. And in its only discussion of the issue between *Faragher*/*Ellerth* and *Vance*, the Court expressly stated that the standard for coworker harassment remained an open question: “*Ellerth* and

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<sup>52</sup> *Vance*, 133 S. Ct. at 2448.

<sup>53</sup> *Faragher*, 524 U.S. at 799.

<sup>54</sup> *Id.* at 800.

<sup>55</sup> See Fisk & Chemerinsky, *supra* note 25, at 769; Harper, *supra* note 25, at 53.

*Faragher* expressed no view on the employer liability standard for co-worker harassment. Nor do we.”<sup>56</sup>

Although the Court had at best assumed that a negligence standard applies to coworker harassment—and had never offered a substantive defense of that proposition—the *Vance* Court treated negligence as the undisputed baseline rule for employer liability. Thus, *Vance* began its discussion of employer liability standards by stating that “we have held that an employer is directly liable for an employee’s unlawful harassment if the employer was negligent with respect to the offensive behavior,” but that *Faragher* and *Ellerth* “held that *different rules apply* where the harassing employee is the plaintiff’s ‘supervisor.’”<sup>57</sup> And it later referred to *Faragher* and *Ellerth* as having “created a *special rule* for cases involving harassment by ‘supervisors.’”<sup>58</sup>

That is simply an incorrect statement of what *Faragher* and *Ellerth* held. As I have shown, those cases did *not* hold that negligence is the baseline standard for employer liability under Title VII, but that “special rules” apply where supervisors do the discriminating. Because those cases involved discrimination undertaken by people who were concededly supervisors, the question of employer liability for nonsupervisors’ conduct was simply not presented. All the

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<sup>56</sup> *Suders*, 542 U.S. at 143 n.6.

<sup>57</sup> *Vance*, 133 S. Ct. at 2441 (emphasis added). To support its statement that the Court had “held” that negligence is the baseline standard, the *Vance* Court cites page 789 of the *Faragher* opinion. *See id.* But on that page, *Faragher* does nothing more than discuss the lower-court decisions applying a negligence standard. *See Faragher*, 524 U.S. at 789. Although the *Faragher* Court may have *assumed* that those decisions were correct, it never *held* as much.

<sup>58</sup> *Vance*, 133 S. Ct. at 2442 (emphasis added).

Court decided was that, where supervisors are the harassers, the employer is vicariously liable (subject to an affirmative defense in the absence of a tangible employment action). Although the Court may have *assumed* that negligence was the standard in other contexts, it had never *held* as much—as the Court itself noted in *Suders*.

*Vance* thus marks the first time the Court held that a negligence standard applies to discriminatory harassment committed by a nonsupervisory coworker. One would think that the Court would have felt the need to offer some substantive defense of the negligence standard in terms of the policies that underlie Title VII. But *Vance* offered no such defense. To be sure, the Court sought to parry Justice Ginsburg’s suggestion in dissent that negligence leaves victims of harassment without a remedy<sup>59</sup>—a parry that, as I discuss below, was not especially persuasive—but the Court made absolutely no effort to show that a negligence standard best serves the statutory policies and purposes.

Any such effort would have been extremely challenging, for at least two reasons. First, most of the policy rationales offered by the *Faragher* and *Ellerth* Court for employer liability for supervisors’ actions (subject to the affirmative defense) suggest that employer liability is appropriate on the same terms for coworkers’ actions. As Professor Harper argued shortly after *Faragher* and *Ellerth*, “[t]he prevention-based cost internalization [argument], as well as the remediation arguments for employer liability for co-worker discriminatory

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<sup>59</sup> See *id.* at 2453; *id.* at 2463 (Ginsburg, J., dissenting).

harassment, are as strong as those for employer liability for supervisory harassment.”<sup>60</sup>

The *Faragher* Court, to be sure, noted two distinctions between supervisors and other employees that seem relevant here—notably “that supervisors have special authority enhancing their ability to harass, and that the employer can guard against their misbehavior more easily because their numbers are by definition fewer than the numbers of regular employees.”<sup>61</sup> But there is less to these distinctions than initially appears. The suggestion that supervisors’ conduct is generally easier for employers to monitor is empirically dubious, as many supervisors will have greater opportunities than other coworkers to commit harassing acts out of the sight of witnesses.<sup>62</sup> The other possible distinction is stronger but not, I think, sufficient. Supervisors do have special power to harass, because of their ability to threaten retaliation. But the difference between supervisors and ordinary employees in this regard is one of degree rather than kind. As Professor Harper noted, there are many circumstances in which the victim of harassment will rationally fear retaliation for reporting the violation even when the perpetrator is not a supervisor.<sup>63</sup> The harasser may be a top income producer for the employer, for example, or otherwise have higher

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<sup>60</sup> Harper, *supra* note 25, at 82; see also Fisk & Chemerinsky, *supra* note 25, at 757 (arguing that strict vicarious liability “advances the goals of the civil rights laws” by promoting deterrence and compensation). For further discussion of the policy question of what rule of employer liability makes sense, see Part III below.

<sup>61</sup> *Faragher*, 524 U.S. at 800-801.

<sup>62</sup> See Harper, *supra* note 25, at 83 n.155.

<sup>63</sup> See *id.* at 83-84.

status in the company than does the victim.<sup>64</sup> As Professor Brake's work demonstrates, these kinds of status differences, and not the formal lines of authority, are likely to be key in promoting retaliation.<sup>65</sup>

Alternatively, the victim may simply fear that an employer that has not implemented an effective policy against harassment will respond negatively to complaints regarding the discrimination it has tolerated. If, as Professor Schultz argues, much harassment aims to enforce pre-existing workplace norms of segregation,<sup>66</sup> this fear will be particularly rational.<sup>67</sup> And as for the other policies identified by *Faragher*—prioritizing prevention over compensation, and encouraging victims to mitigate damages—vicarious liability plus the affirmative defense serves these policies just as well in the coworker context as in the supervisor context.

Second, contrary to the Court's protestations, a negligence standard will leave many employees without a remedy when their coworkers harass them in ways that violate Title VII. One wonders why the Court even protested. After all, the whole point of adopting a negligence standard instead of a standard of

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<sup>64</sup> This may be true for third-party or customer harassment as well. See, e.g., Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477, 505 (2011) (describing testimony in one case against a drug company "regarding a firm culture that permitted and tolerated sexual advances by doctors on the female sales representatives").

<sup>65</sup> See Brake, *supra* note 50, at 40-41.

<sup>66</sup> See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); see also Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 838-841 (2005) (reviewing evidence demonstrating that the predictors of harassment are organizational, rather than individual, in nature).

<sup>67</sup> See Brake, *supra* note 50, at 41-42 (explaining that retaliation is particularly prevalent in workplaces "with a high tolerance for, and incidence of, discrimination").

strict liability is to limit the circumstances in which employers will be liable for the wrongful actions of their employees.<sup>68</sup> And, under Title VII, employers are the only potential defendants in town.<sup>69</sup> If the victims of discriminatory harassment cannot recover from their employers, they cannot recover at all for a violation of their rights under Title VII. Moreover, there is a substantial and unresolved question whether the victim of discriminatory harassment could recover *damages* in any event, even if she could prove that her employer was negligent. The Civil Rights Act of 1991, which authorized the award of damages for violations of Title VII, limits such awards to cases “against a respondent who engaged in unlawful intentional discrimination.”<sup>70</sup> Although discriminatory harassment is a form of intentional discrimination,<sup>71</sup> the respondent in Title VII cases is the employer. Where the employer is vicariously liable for an employee’s discrimination (as in *Faragher*), it seems to follow that the discriminating employee’s intent should be imputed to the employer, and that the victim can therefore recover damages. But where the employer is liable directly for its own negligence—whatever “its own negligence” means—the argument that the employer itself “engaged” in intentional discrimination (as required for a damages remedy under the Civil Rights Act of 1991) seems much

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<sup>68</sup> This is not to deny that there might be good *reasons* for limiting employer liability—though the *Vance* Court did not offer any—but is simply to say that the inevitable result of a rule limiting employer liability is less employer liability.

<sup>69</sup> See Fisk & Chemerinsky, *supra* note 25, at 763-764 (collecting cases).

<sup>70</sup> 42 U.S.C. § 1981a(a)(1).

<sup>71</sup> See, e.g., *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78-80 (1998).

more dicey.<sup>72</sup> Victims of coworker harassment thus may be limited—even if they can prove employer negligence—to declaratory and injunctive relief, and backpay only in cases of actual or constructive discharge.<sup>73</sup> The *Vance* Court’s protests that negligence does not leave employees without a remedy thus seem doubly flawed.

The discussion of the Civil Rights Act of 1991 suggests a third possible problem with the adoption of a negligence standard: Holding an employer liable for its own negligence fits uneasily with the formal structure the Supreme Court has erected for Title VII claims. The Court has created two distinct frameworks for bringing and adjudicating race and sex discrimination claims under the statute: disparate treatment and disparate impact.<sup>74</sup> A disparate treatment claim

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<sup>72</sup> The argument for damages liability would be that the negligence rule is not a rule of direct liability for the employer’s “own” conduct but rather an attribution rule that determines when a nonsupervisory worker’s intentional discrimination will be attributed to the employer. An employer, then, has “engaged in unlawful intentional discrimination,” 42 U.S.C. § 1981a(a)(1), whenever it has been negligent with respect to the unlawful intentional discrimination of its employees. There is nothing wrong with that argument as a formal matter. But one should not place much hope for a broad interpretation of the Civil Rights Act of 1991 in a Court that is as willing as was the *Vance* Court to read the definition of supervisor narrowly to limit employer liability.

<sup>73</sup> See 42 U.S.C. 2000e-5(g); *Suders*, 542 U.S. at 141-143.

<sup>74</sup> See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 577-578 (2009). Title VII’s text does create special rules, for particular forms of discrimination, that fall outside of these two frameworks. The Pregnancy Discrimination Act (PDA), for example, provides that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.” 42 U.S.C. § 2000e(k). The Court has made clear that this language must be enforced as written, and it has not tried hard to shoehorn the language into either the disparate-treatment or the disparate-impact category. See *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 204-205 (1991). Similarly, Title VII’s religion provisions require an employer to “reasonably accommodate to an employee’s or prospective employee’s religious observance or practice” so long as there is no

requires proof of what we often call discriminatory intent—that the defendant treated the plaintiff adversely because of race or sex.<sup>75</sup> A disparate impact claim requires proof that some policy or practice implemented by the employer has a substantial adverse effect on a class of employees defined by race or sex, though the employer can defend against such a claim by showing that the practice is job-related and consistent with business necessity.<sup>76</sup> The Court has characterized discriminatory harassment claims as a form of disparate treatment, because the harasser targets an employee because of her race or sex.<sup>77</sup> But if the harasser’s intent is not attributed to the employer through vicarious liability doctrine, it is difficult to see how the employer should be liable for *intentional* discrimination simply on proof of *negligence*.

Professor Zatz argues that Title VII’s protection against harassment by individuals (like customers, contractors, and, after *Vance*, coworkers) whose acts do not trigger vicarious liability is best understood as a reasonable accommodation requirement.<sup>78</sup> Professor Zatz’s argument fits well with the baseline negligence rule adopted by the Court in *Vance*. But it fits poorly with Title VII’s text, which expressly imposes a reasonable accommodation

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“undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j). As with the PDA, the Court has applied this provision according to its text, without attempting to fit it into the disparate-treatment or the disparate-impact category. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71-76 (1977).

<sup>75</sup> See *Ricci*, 557 U.S. at 577.

<sup>76</sup> See *id.* at 577-578.

<sup>77</sup> See *Oncale*, 523 U.S. at 78-81.

<sup>78</sup> See Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357 (2009).

requirement only in religion cases.<sup>79</sup> A better reading of Title VII, I suggest, would be to hold the employer responsible whenever discriminatory harassment by *anyone*—supervisor, coworker, contractor, customer, or third party—is sufficiently severe or pervasive to alter the terms and conditions of employment. An act of harassment cannot violate Title VII unless it so alters terms and conditions,<sup>80</sup> and I would contend that discriminatory terms and conditions are properly attributed to the employer. But whether or not one agrees with *that* argument, the important point for my purposes is that the Court did not engage with—or even acknowledge—these complexities.

In the end, *Vance's* adoption of a negligence rule for coworker harassment, combined with the case's narrow definition of who constitutes a supervisor, seems to be driven by an unstated sense that discriminatory harassment is typically a deviant act. At least presumptively, the Court seems to believe, employees who harass other employees do so for their own individual purposes—purposes that are not shared by, and cannot be attributed to, the enterprise.<sup>81</sup> This point has been a theme of the Court's opinions since *Faragher* and *Ellerth*. Declaring a "general rule" that "sexual harassment by a supervisor is not conduct within the scope of employment," *Ellerth* stated that "[t]he harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer."<sup>82</sup> *Faragher*, with more

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<sup>79</sup> See 42 U.S.C. § 2000e(j).

<sup>80</sup> See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); *Meritor*, 477 U.S. at 67.

<sup>81</sup> For a discussion of how widespread is this understanding of harassment in the courts and elsewhere, see Lawton, *supra* note 66.

<sup>82</sup> *Ellerth*, 524 U.S. at 757.

handwringing, said much the same thing.<sup>83</sup> The Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*<sup>84</sup> also paints discrimination by lower-level supervisors as deviant and not attributable to the employer.<sup>85</sup>

But there is good reason to doubt that discriminatory harassment is really so deviant. As Professor Schultz and others have shown, sexual harassment—like racial harassment—often seeks to defend and reinforce pre-existing workplace hierarchies and norms.<sup>86</sup> If discriminatory harassment persists in a workplace to the extent that it is sufficiently severe or pervasive to alter the terms and conditions of employment, one can reasonably conclude that it serves the employer's own perceived interests. Otherwise, the employer would not tolerate its continuation.

In any event, the *Vance* Court left all of these policy judgments implicit. In concluding that employers could be liable for coworker harassment only if the employers were themselves negligent, the Court failed to confront any of these questions. Its decision thus rests on unacknowledged, undefended, and quite dubious policy judgments.

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<sup>83</sup> See *Faragher*, 524 U.S. at 793-801.

<sup>84</sup> 131 S. Ct. 2541 (2011).

<sup>85</sup> See *id.* at 2554 (“To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements. And still other managers may be guilty of intentional discrimination that produces a sex-based disparity.”) (citation omitted).

<sup>86</sup> See sources cited in note 66, *supra*.

## II. The False Determinacy

To the extent that the *Vance* Court offered a rationale for choosing the definition of supervisor it picked, that rationale had nothing to do with the statutory policies identified in *Faragher* and *Ellerth*: prevention of harassment, protection against retaliation, and encouraging the mitigation of damages. Rather, it rested on the supposed ease of application of the Court's preferred definition. The definition of supervisor proposed by the plaintiff and the EEOC, by contrast, was one that the Court believed was not easy to apply.

The Court made these points so often that workability is easily the dominant theme of the Court's opinion. Thus, the Court argued that the EEOC's definition "would make the determination of supervisor status depend on a highly case specific evaluation of numerous factors."<sup>87</sup> It dismissed the EEOC's definition as "nebulous,"<sup>88</sup> "abstract,"<sup>89</sup> "ill-defined,"<sup>90</sup> and "a study in ambiguity"<sup>91</sup>—indeed, not just ordinary ambiguity but "remarkable ambiguity."<sup>92</sup> The Court also said that "[t]he Seventh Circuit's understanding of the concept of a 'supervisor,' with which we agree, is easily workable," while the "alternative, in many cases, would frustrate judges and confound jurors."<sup>93</sup> The Court expanded on the point later in the opinion:

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<sup>87</sup> *Vance*, 133 S. Ct. at 2443.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 2449.

<sup>92</sup> *Id.* at 2450.

<sup>93</sup> *Id.* at 2444.

The interpretation of the concept of a supervisor that we adopt today is one that can be readily applied. In a great many cases, it will be known even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser's status will become clear to both sides after discovery. And once this is known, the parties will be in a position to assess the strength of a case and to explore the possibility of resolving the dispute. Where this does not occur, supervisor status will generally be capable of resolution at summary judgment.<sup>94</sup>

The ability to resolve the question of supervisor status before trial, the Court explained, was a crucial advantage of the definition it adopted.<sup>95</sup>

There are two essential problems with the Court's analysis on this point. First, the Court far overstated the determinacy of its definition of supervisor—and the ability of that definition to avoid difficult jury questions. The Court spoke of the “authority to inflict direct economic injury” as if that “authority” was a unitary thing that either exists or does not.<sup>96</sup> Indeed, it insisted that “those possessing the authority to effect a tangible change in a victim's terms or conditions of employment” made up “a unitary category of supervisors.”<sup>97</sup> But a shrinking proportion of employers adopt a hierarchical model of supervision in

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<sup>94</sup> *Id.* at 2449.

<sup>95</sup> *See id.* at 2450:

Under the definition of “supervisor” that we adopt today, the question of supervisor status, when contested, can very often be resolved as a matter of law before trial. The elimination of this issue from the trial will focus the efforts of the parties, who will be able to present their cases in a way that conforms to the framework that the jury will apply. The plaintiff will know whether he or she must prove that the employer was negligent or whether the employer will have the burden of proving the elements of the *Ellerth/Faragher* affirmative defense. Perhaps even more important, the work of the jury, which is inevitably complicated in employment discrimination cases, will be simplified. The jurors can be given preliminary instructions that allow them to understand, as the evidence comes in, how each item of proof fits into the framework that they will ultimately be required to apply.

<sup>96</sup> *Id.* at 2448.

<sup>97</sup> *Id.* at 2443.

which the hiring and firing authority resides in a single “unitary” person or category.<sup>98</sup> As Professor Sperino notes, “[i]n many instances, one individual is not responsible for employment decisions,” but “multiple individuals” instead “act either independently or as a group to make a final decision.”<sup>99</sup> In such circumstances, the person who has the titular authority to make the tangible employment action will often rely to a large extent on the evaluations, recommendations, or actions of other employees. In workplaces like these, courts have found it quite difficult to determine who counts as the decisionmaker for Title VII purposes.<sup>100</sup> Even the Supreme Court’s own effort to address the issue in *Staub v. Proctor Hospital*<sup>101</sup> “left a number of unanswered questions” regarding the scope of employer liability in circumstances where multiple employees contribute to an ultimate employment decision.<sup>102</sup>

The Court recognized this problem, but its response fatally undermined the claim that its supervisor definition was workable and readily applied at summary judgment. The Court explained that if an employer “confine[s] decisionmaking power to a small number of individuals, those individuals will

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<sup>98</sup> See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 10-11 (2006). For a good general discussion, see KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67-116 (2004).

<sup>99</sup> Sandra F. Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 ALA. L. REV. 773, 788-789 (2010).

<sup>100</sup> See Steven F. Befort & Alison L. Olig, *Within the Grasp of the Cat’s Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Antidiscrimination Statutes*, 60 S.C. L. REV. 383 (2008).

<sup>101</sup> 131 S. Ct. 1186 (2011).

<sup>102</sup> Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1448 (2012); see also Theresa M. Beiner, *Subordinate Bias Liability*, 35 U. ARK. LITTLE ROCK L. REV. 89, 105-107 (2012) (detailing these unanswered questions).

have a limited ability to exercise independent discretion” when undertaking a tangible employment action; they will thus “likely rely on other workers who actually interact with the affected employee.”<sup>103</sup> “Under those circumstances,” the Court allowed, “the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies.”<sup>104</sup>

This “effectively delegated” standard is every bit as “nebulous,” “abstract,” and “ill-defined”—and “depend[ent] on a highly case specific evaluation of numerous factors”—as was the definition of supervisor that the *Vance* Court rejected. But when Justice Ginsburg’s dissent suggested that the Court’s rule was itself ambiguous,<sup>105</sup> the Court responded with simply an authoritative-sounding epithetic assertion (“it is indisputable that our holding is orders of magnitude clearer than the nebulous standard [the dissent] would adopt”) combined with a wave of the hand (“[e]mployment discrimination cases present an almost unlimited number of factual variations, and marginal cases are inevitable under any standard”).<sup>106</sup> Those responses are hardly sufficient. It is far from “indisputable” that the “effectively delegated” standard the Court adopted is at all easier for a judge or jury to grasp than is the authority-to-direct-daily-work standard that the Court rejected. And far from being “marginal cases,” circumstances in which multiple individuals have a role in the ultimate

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<sup>103</sup> *Vance*, 133 S. Ct. at 2452.

<sup>104</sup> *Id.*

<sup>105</sup> *See id.* at 2462 (Ginsburg, J., dissenting).

<sup>106</sup> *Vance*, 133 S. Ct. at 2449 n.12.

employment decision are extremely common. The Court's decision thus will predictably lead to uncertainty in practice—exactly the opposite of what the Court purported to seek.

Second, if ease of application by judges and juries is the key interest, the Court could have served that interest much more readily by simply adopting the same employer liability standard for supervisory and co-worker harassment. By imposing different standards of liability depending on whether the harasser is a supervisor or an ordinary co-worker, the Court's decision requires judges and juries first to determine how to characterize the harasser before moving on to decide the merits of the harassment claim. If the Court had simply held that the employer is liable for discriminatory harassment perpetrated by any employee, it could have avoided this extra step—and the uncertainty and difficulties of application that it creates.

To be sure, the Court could equalize the standard for supervisory and co-worker harassment in two different ways. It could level up (by making employers vicariously liable for the harassment of any employee) or level down (by limiting an employer's liability for harassment to negligence in any case). For all the reasons set forth in the previous Part, however, a rule of vicarious liability serves the statutory policies better than does a negligence rule. Moreover, it is striking that the Court, so critical of standards that “depend on a highly case specific evaluation of numerous factors” when rejecting the EEOC's definition of supervisor,<sup>107</sup> ultimately adopted a negligence rule. Indeed, in

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<sup>107</sup> *Id.* at 2443.

parrying the dissent's argument that its standard would leave victims unprotected, the *Vance* Court itself emphasized the numerous case-specific factors that a jury should consider under it: "the jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent."<sup>108</sup> The Court explained that "[t]he nature and degree of authority possessed by harassing employees varies greatly," and it argued that that the negligence standard is well suited "to deal with the variety of situations that will inevitably arise."<sup>109</sup> And the Court went on to state that "[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant" to the determination whether the employer was negligent.<sup>110</sup> That's a lot of case-specific factors for a Court that doesn't want judges and juries to have to engage in "a highly case specific evaluation of numerous factors"!

If anything, I have understated the uncertainties in applying a negligence standard of employer liability. That standard makes an employer liable for "its own" negligence, but what does it mean for the employer itself to be negligent? Unless the employer is an individual, an employer cannot act on "its own." It can act only through its agents.<sup>111</sup> To apply a rule that says that an employer is

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<sup>108</sup> *Id.* at 2451.

<sup>109</sup> *Id.* at 2451-2452.

<sup>110</sup> *Id.* at 2453.

<sup>111</sup> *See, e.g.,* Fisk & Chemerinsky, *supra* note 25, at 759 ("Employer liability is a problem in any cause of action that creates liability of an entity because the

liable for “its own” negligence thus requires a determination of *which* acts, by *which* agents, the law will treat as the employer’s “own” acts. But the *Vance* Court offers absolutely no guidance on how to go about making this determination. Surely the category of an employer’s own acts is not limited to official resolutions of a corporation’s board<sup>112</sup> or even the acts of employees who serve in such high-level positions that they may be understood as the alter ego of the corporation.<sup>113</sup> If the category were so limited, any sizeable enterprise would be effectively immune from claims of coworker harassment, because it would be very unlikely that the highest-level officials of such enterprises would or should know about harassment taking place among rank-and-file employees. Instead, the category of the employer’s own acts must extend to the acts of some lower-level supervisory personnel. And, indeed, the *Faragher* Court expressed approval of lower-court decisions that found employers liable for coworker harassment in cases where supervisors knew about the harassment but did nothing about it.<sup>114</sup> But is it enough that any supervisor (under the *Vance* definition of supervisor) knew about and failed to stop the harassment? Or is employer negligence liability limited to acts and omissions by those supervisors

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entity-defendant is not a living person and it does not act except through the living persons who work for it.”).

<sup>112</sup> Cf. *Board of County Comm’rs v. Brown*, 520 U.S. 397, 405-406 (1997) (formal decision by a city council is an act of the city itself that triggers municipal liability under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978)).

<sup>113</sup> Cf. *Faragher*, 524 U.S. at 789 (describing “the president of the corporate employer” as “indisputably within that class of an employer organization’s officials who may be treated as the organization’s proxy”).

<sup>114</sup> See *id.* (citing *Katz v. Dole*, 709 F. 2d 251, 256 (4th Cir. 1983); *Hall v. Gus Constr. Co.*, 842 F. 2d 1010, 1016 (8th Cir. 1988)).

who *should* know about and take steps to stop acts of harassment? If the latter, how are we to determine what class of supervisors should know about those acts? Is this simply a matter for the trier of fact to decide, taking into account all of the circumstances? The Court's strong reliance on a negligence standard of employer liability sits extremely uneasily with its emphatic rejection of standards that require juries to make highly fact-specific determinations.

In short, the *Vance* majority promised that its formalist approach would afford more determinacy than would alternative rules. But, as is often the case with formal rules, the promise of determinacy was a false one.

### III. The Path Forward

In her dissenting opinion in *Vance*, Justice Ginsburg called on Congress "to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today."<sup>115</sup> Justice Ginsburg has a successful track record in such calls for Congress to overturn the Court's restrictive civil rights decisions.<sup>116</sup> Given current partisan alignments in the House and Senate, she is less likely to be successful this time.<sup>117</sup> Nonetheless, *Vance* presents an important opportunity to rethink the employer liability structure the Supreme Court has created for workplace harassment. Even if Congress is unlikely to overturn *Vance* in the near term, it is important for civil

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<sup>115</sup> *Vance*, 133 S. Ct. at 2466 (Ginsburg, J., dissenting).

<sup>116</sup> See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

<sup>117</sup> See, e.g., THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012); Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205 (2013).

rights advocates to plan now for the moment when an opportunity arises. And *Vance* has, as I argued above, exposed deep flaws in the Court's employer liability doctrine.

But it would be a shame if any effort to overturn *Vance* were limited to the Court's definition of employer. As I have argued, reliance on a distinction between supervisors and coworkers for purposes of employer liability will itself undermine key statutory policies. Coworker harassment frequently draws on the implicit sanction of the employer and carries with it the implicit threat of retaliation against those who complain. Applying a lesser standard of employer liability to coworker harassment thus threatens the policy, recognized in *Faragher* and *Ellerth*, of protecting employees against harassment that is made more powerful by workplace norms that support the harassers.

Applying different standards to coworker and supervisory harassment also undermines the statutory policy, emphasized in *Vance* itself, of clarity and ease of administration. Because the lines of authority in modern workplaces are often so complex and overlapping, the determination whether a harasser is properly characterized as a supervisor or a mere coworker will in a wide array of cases be uncertain and require extensive litigation. As Justice Alito explained in his *Vance* majority, this was true of the supervisor definition pressed by the EEOC and Justice Ginsburg.<sup>118</sup> And, as I have shown, it is also true of the definition Justice Alito's majority opinion itself adopted. Particularly because supervisory status—however defined—at best only loosely correlates with the

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<sup>118</sup> See *supra* Part II.

statutory policies that justify employer liability, there is no good reason to create the uncertainty and litigation that would attend to making that status a trigger for liability.

It is not enough, however, simply to eliminate *Vance's* distinction between supervisors and coworkers. Any congressional effort to revisit employer liability standards under Title VII should confront the problems that have emerged with the *Faragher/Ellerth* affirmative defense. There is a substantial argument that Congress should eliminate that defense entirely. When it created the defense, the Court justified it as serving two important policies: encouraging employers to adopt measures that prevent, and do not merely compensate for, discrimination; and encouraging employees to mitigate damages by reporting, and therefore helping bring to an end, discrimination against them.<sup>119</sup> But experience shows that the *Faragher/Ellerth* defense has not served these interests in practice.

As for encouraging preventive action by employers, a rule of strict vicarious liability should serve the policy at least as well as the *Faragher/Ellerth* rule of vicarious-liability-plus-an-affirmative-defense-of-reasonableness. A standard justification of strict liability is that, so long as it imposes liability on the cheapest cost avoider, it will encourage parties to take the efficient level of precautions.<sup>120</sup> If an employer is forced to internalize the costs of discriminatory harassment committed by its employees, it will, on standard economic theory, invest in precautions up to the point where they are no longer cost justified. And

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<sup>119</sup> See *Faragher*, 524 U.S. at 805-807.

<sup>120</sup> For a classic statement of the point, see Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L. J. 1055, 1060 (1972).

the certainty that the employer will be required to internalize those costs sends a clearer deterrent signal than does a negligence rule (or the *Faragher/ Ellerth* rule of strict liability with a non-negligence defense), which subjects the parties to the risk that a trier of fact will err in determining what precautions are in fact cost justified.<sup>121</sup>

Rip Verkerke agrees that a rule of strict vicarious liability makes sense in cases in which harassment is systemic within a workplace.<sup>122</sup> Consistent with the analysis I have offered above, he also would not distinguish between supervisory and coworker conduct in triggering employer liability.<sup>123</sup> But he argues that, in cases of *individual* harassment, liability should turn on actual or constructive notice to the employer (because the target of the harassment in such cases has information that is not available to the employer without the employer's taking unduly costly steps to acquire it).<sup>124</sup> One can accept Verkerke's broad analysis while still concluding that strict vicarious liability is the appropriate rule to impose in discriminatory harassment cases. As Professors Schultz and Lawton have shown, discriminatory harassment typically draws on

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<sup>121</sup> See, e.g., Guido Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L. J. 656, 660-661 (1975).

<sup>122</sup> See J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273 (1995).

<sup>123</sup> See, e.g., *id.* at 279. In this regard, Professor Verkerke (in my view, persuasively) rejects Alan Sykes's argument, Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 606-608 (1988), that supervisory harassment is caused by the enterprise in a way that coworker harassment is not. See Verkerke, *supra* note 122, at 309-310.

<sup>124</sup> Verkerke, *supra* note 122, at 364-365.

and even enforces a workplace culture of discrimination.<sup>125</sup> In other words, discriminatory harassment is typically “systemic” in the sense that Verkerke uses the term. Even on Verkerke’s analysis, then, strict vicarious liability is the appropriate rule to apply in the run of cases.

Moreover, experience with the *Faragher/Ellerth* defense demonstrates that it has not provided employers with an incentive to adopt effective policies to prevent, detect, and stop harassment. Joanna Grossman has shown that the *Faragher/Ellerth* regime “has overemphasized compliance with prophylactic rules at the expense of effecting real change in preventing the problem of sexual harassment in the workplace.”<sup>126</sup> She argues that the regime rewards employers “for paying lip service to the regime by enacting standard-issue policies and procedures, regardless of whether those efforts actually reduce harassment or compensate victims.”<sup>127</sup> This is exactly the sort of misplaced reward that a

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<sup>125</sup> See Schultz, *supra* note 66; Lawton, *supra* note 66.

<sup>126</sup> Grossman, *supra* note 25, at 4.

<sup>127</sup> *Id.* at 3-4; see also Bagenstos, *supra* note 98, at 24-25 (“Under the prevailing approach [in the lower courts], employers can avoid liability for harassment simply by adopting and distributing policies that formally prohibit harassment and creating a grievance process that allows an employee to file a complaint with someone other than the individual who harassed her. This is true even absent any indication that the process set up by the employer has been effective at that or any other workplace.”); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 198 (2004) (“[T]he lower federal courts have interpreted the elements of the affirmative defense so as to reward employers for engaging in behaviors that have little effect on the incidence of workplace harassment. The courts reward employers for developing and distributing nicely worded harassment policies and procedures and, in some cases, providing sexual harassment training to their employees. The empirical literature does not support the federal courts’ assumption that paper policies and procedures, even when coupled with training, deter sexual harassment in the workplace.”). For a recent empirical assessment of courts’ application of the *Faragher/Ellerth* defense, which

negligence rule sometimes creates but a strict liability rule avoids.<sup>128</sup> If employers were required to internalize the costs of discriminatory harassment perpetrated by their employees, they would have the incentive to adopt internal policies that actually work to reduce harassment—rather than policies that simply are likely to impress a judge or jury.

As for encouraging mitigation of damages, the *Faragher/Ellerth* defense fails to provide appropriate incentives. That is because of the interaction between the way lower courts have applied the second prong of the defense and the rules governing Title VII retaliation claims. As Professors Brake and Grossman have shown, lower courts tend to conclude that targets of harassment have “unreasonably failed to take advantage of . . . preventive or corrective opportunities,”<sup>129</sup> and that their employers are therefore not liable, when they fail to invoke their employers’ internal complaint procedures within a few days or weeks from the first harassing incident.<sup>130</sup> As they note, “[e]mployees who experience harassment and then wait to see if harassing behavior continues or to gather more evidence before complaining are often deemed unreasonable” by the courts.<sup>131</sup> But employees who complain at the first significant incident of harassment may find themselves unprotected against retaliation. Title VII’s

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concludes that the courts are not applying the defense according to the terms set forth by the Supreme Court (but is sympathetic to the courts for acting as they do), see Zev J. Eigen, Nicholas F. Menillo & David S. Sherwyn, *When Rules are Made to Be Broken* (unpublished manuscript, on file with author).

<sup>128</sup> See Lawton, *supra* note 127 (making this point).

<sup>129</sup> *Faragher*, 524 U.S. at 807.

<sup>130</sup> See Brake & Grossman, *supra* note 48, at 879-884.

<sup>131</sup> *Id.* at 881.

“opposition clause” prohibits employers from retaliating against workers who complain about discrimination, but only if the workers “reasonably believe” that the discrimination that they report violates the statute.<sup>132</sup> Professors Brake and Grossman describe a “plethora of court decisions” that have found “employees’ beliefs that they were opposing unlawful harassment to be unreasonable because they complained of harassment too soon, before enough incidents had occurred to create a hostile environment.”<sup>133</sup>

The intersection of these two doctrines places the targets of harassment on the horns of a dilemma. They must “promptly report acts of harassment through employer channels in order to preserve their right to later challenge the harassment under Title VII,” but at the same time they “risk *lawful* retaliation by employers if they complain too soon, before the offending conduct comes close enough to an actionable hostile environment.”<sup>134</sup> However employees respond to this dilemma, it should be clear that the *Faragher/Ellerth* defense is not appropriately encouraging the targets of harassment to mitigate damages. Rather than relieving the employer of liability if the target of harassment failed to complain in what a judge or jury later determines was a sufficiently prompt fashion, the better way to encourage mitigation of damages is to have a strong,

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<sup>132</sup> Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001).

<sup>133</sup> Brake & Grossman, *supra* note 48, at 923-924.

<sup>134</sup> *Id.* at 924. Problems like these have led some scholars to advocate eliminating the “reasonable belief” requirement. See Brianne J. Gorod, *Rejecting ‘Reasonableness’: A New Look at Title VII’s Anti-Retaliation Provision*, 56 AM. UNIV. L. REV. 1469 (2007); Lawrence D. Rosenthal, *To Report or Not To Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII’s Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127 (2007).

clear, and effective protection against retaliation. Harassment is an unpleasant thing to experience—especially harassment that is “severe or pervasive enough to create an objectively hostile or abusive work environment.”<sup>135</sup> Its targets have ample incentive to take steps to end the abusive conduct even without a rule that limits their recovery if they fail to complain. What stops many workers from complaining is the understanding that if they complain they may lose their jobs.<sup>136</sup>

When Congress takes up Justice Ginsburg’s invitation in *Vance*, then, it should not limit itself to the narrow issue that was before the Court in that case. Instead, it should adopt a rule of strict vicarious employer liability for any unlawful harassment perpetrated by any employee, and it should abandon the *Faragher/Ellerth* affirmative defense. That defense was based on a set of expectations—about how employers and employees would react to it, and about how lower courts would apply it—that have not held true in practice. A rule of strict vicarious liability, perhaps bolstered by a beefed-up antiretaliation regime, is likely to serve the policies identified by the *Faragher/Ellerth* Court better than the affirmative defense the Court created in those cases.

### Conclusion

The Supreme Court’s decision in *Vance* exemplifies two of the key critiques of formalism in law. But, more important for the future, it presents an opportunity—an opportunity to rethink the entire approach to employer liability

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<sup>135</sup> *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

<sup>136</sup> See, e.g., *Brake & Grossman*, *supra* note 48.

in workplace harassment cases that the Court adopted in *Faragher* and *Ellerth*. That approach has failed to serve the Title VII policies that the Court itself identified in those cases. It has not protected the targets of harassment against retaliation, it has not encouraged employers to adopt effective policies to prevent and address harassment, and it has not been necessary to encourage mitigation of damages. Congress should take up Justice Ginsburg's call to overturn *Vance*, but it should not stop there. Congress should adopt a general rule that employers are liable for any discriminatory harassment in their workplaces that is sufficiently severe or pervasive to alter terms and conditions of employment. That is the rule that best accommodates the Title VII policies that the Court itself sought to implement in *Faragher* and *Ellerth*, but that the rule adopted in those cases has failed to serve.