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LIMITING RESPONDEAT SUPERIOR LIABILITY: A WOLF IN SHEEP'S CLOTHING?

Tracy E. Higgins*

Introduction

Professor Neuborne's provocative essay¹ on the future course of the Human Rights Commission challenges us both to consider the effective use of limited governmental resources and to rethink the moral underpinnings of entity liability² for human rights violations. I shall first address his elaboration of the moral arguments concerning respondeat superior liability. I will conclude by suggesting that, even if motivated by concern over limited resources, his proposal would have only a limited impact on employers and would undermine significantly the remedial purpose of human rights statutes.

I. Moral Ambiguity and the Persistence of Discrimination

In the opening paragraphs of his essay, Professor Neuborne refers to "the complexity and moral difficulty of third and fourth generation human rights issues."³ He explains that "[i]n first generation human rights cases, where bigotry is blatant, the vast bulk of American society rallies to a norm of decency. As issues get more complex, especially when effective remedies will cause real pain to many, support tends to erode for human rights."⁴ The implication is that the Human Rights Commission might conserve both its resources and its political capital by focusing on less controversial targets.

Although Professor Neuborne does not elaborate on this point, it is worth considering the precise ways in which both discrimination and support for human rights enforcement have diminished over time. It is true that the most blatant (and easily proved)

* Associate Professor of Law, Fordham University School of Law. A.B., Princeton University, 1986; J.D., Harvard Law School, 1990. I would like to thank my colleague Russell Pearce for helpful comments, and Daniella Paul for excellent research assistance.

1. Burt Neuborne, *Who's Afraid of the Human Rights Commission?*, 23 *FORDHAM URB. L. J.* 1139 (1996).

2. Neuborne defines classic entity liability as "respondeat superior liability on employers for human rights violations committed by employees." *Id.* at 1145.

3. *Id.* at 1140.

4. *Id.*

forms of *racial* discrimination are largely a thing of the past.⁵ However, other forms of blatant discrimination persist. Overt discrimination on the basis of sexual orientation is generally accepted by many and endorsed as sound public policy by some.⁶ The hostility toward undocumented workers—and by extension legal immigrants—continues to generate a politically acceptable form of overt discrimination.⁷ In such cases support for human rights enforcement may have declined, but the incidence of discrimination has not.

Even though explicit job segregation on the basis of race and gender has diminished, *de facto* job segregation is still an important problem throughout the American workplace, significantly affecting the economic opportunities of men and women of color and white women. For example, the unemployment rate among African-Americans remains over twice that for white Americans.⁸ Ninety-seven percent of senior managers in Fortune 1000 corporations are white men.⁹ Only 0.4% of senior management positions in Fortune 1000 companies are Hispanic.¹⁰ There are only two women CEO's in that group.¹¹ Closer to home, a study of lawyers who graduated from the University of Michigan Law School during the early 1970's reveals a significant wage gap between men and women fifteen years after graduation. Although women earned 93.5% of men's salaries during the first year after graduation, by

5. Although I do not want to underestimate the progress that has been achieved over the last decades in racial equality in this country, I hesitate to pronounce overt racial hostility a thing of the past, especially in light of the recent rash of arson attacks on African American Churches throughout the Southeast. See Emily Yellin, *Burning of Black Churches Tries the Souls of Southern Towns: For One Congregation, Trying to Regain a Sense of Confidence*, N.Y. TIMES, June 23, 1996, § 1, at 14.

6. For example, in his campaign for the Republican presidential nomination, Patrick Buchanan pledged not to hire openly gay individuals to his cabinet. See Christopher Matthews, *Buchanan: The Us Against Them GOP Candidate*, S.F. EXAMINER, Feb. 26, 1996, at B11. But see *Romer v. Evans*, 116 S. Ct. 1620 (1996) (striking down amendment to Colorado constitution designed to eliminate civil rights protections for gays and lesbians).

7. Anti-immigration sentiment helped fuel support for Buchanan's candidacy and, along with opposition to affirmative action, was a key issue in California Governor Pete Wilson's short-lived candidacy for the Republican nomination. Although Wilson failed to garner support for his presidential bid, Proposition 187, an anti-immigrant measure on the California ballot did pass. Similar legislation is pending in Congress. See James Sterngold, *Parallel Agonizing Over Immigration*, N.Y. TIMES, Mar. 23, 1996, § 1, at 8.

8. *Good for Business: Making Full Use of the Nations' Human Capital: A Fact-Finding Report of the Federal Glass Ceiling Commission*, March 1995.

9. *Id.*

10. *Id.*

11. *Id.*

year fifteen, women's earning had dropped to 61%. After controlling for grades, hours of work, family responsibilities, experience, and choice of field, the earnings gap was still 13%.¹²

Perhaps the most direct evidence of continuing discrimination comes from audit studies in which white and minority job seekers are given similar resumes and sent to the same employers to apply for jobs. These studies continue to reveal significant rates of discrimination: Employers are less likely to interview or offer a job to men and women minority applicants and white women than to white men.¹³ Less direct evidence of the persistence of discrimination comes from comparing earnings of African-Americans and whites, or men and women. Even after adjusting for characteristics that affect earnings (such as years of education and work experience), studies show that African-American men and women are paid significantly less than their white counterparts and that women generally earn less than men.¹⁴ The intersection of categories of discrimination aggravates the disparity. For example, the average income for Hispanic women with college degrees is less than the average for white men with high school degrees.¹⁵

President Clinton's recent review of affirmative action reported that last year alone the federal government received over 90,000 complaints of employment discrimination.¹⁶ 64,423 additional complaints were filed with state and local Fair Employment Practice Commissions, bringing the total last year to over 154,000.¹⁷ Thousands of other individuals filed complaints alleging racially motivated violence and discrimination in housing, voting, and public accommodations, just to name a few.¹⁸ For most of the claims, neither the moral clarity of the cause nor the importance of a remedy has diminished.¹⁹

12. See Robert Wood et al., *Pay Differentials Among the Highly Paid: The Male-Female Earnings Gap in Lawyer's Salaries*, J. LABOR ECON. (July, 1993).

13. See, e.g., David Neumark et al., *Sex Discrimination in Restaurant Hiring: An Audit Study*, NBER Working Paper No. 5024 (1995).

14. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *THE STATUS OF EQUAL OPPORTUNITY IN THE AMERICAN WORKFORCE* (1995).

15. *Id.*

16. *Affirmative Action Review: Report to the President* 21 (1995).

17. *Id.*

18. *Id.*

19. At the Symposium, Professor Neuborne clarified his reference to the moral complexity of human rights standards by focusing on the controversy over affirmative action and the fairness of imposing a burden on a particular subset of workers to remedy societal discrimination generally. Certainly affirmative action has become highly controversial; however, most human rights claims do not involve the so-called reverse discrimination of affirmative action but rather traditional discrimination. The

II. A Modest Proposal

A. The "Problem" of Overdeterrence

Although I am less convinced than Professor Neuborne that human rights claims have become more morally complex, I agree that reexamining our processes for adjudicating and remedying such claims is a worthwhile endeavor. It is this reexamination that leads Professor Neuborne to question the efficacy of damage awards either to compensate the victim or to deter illegal conduct. Focusing on the connection between "post-event sanctions" and pre-event behavior, he criticizes our current reliance on the deterrence value of damage awards. He writes:

Instead of expending significant resources to alter pre-event behavior by education, inducement or amelioration, we often drift into a post-event mentality, expending huge sums on detection, adjudication, collection and human warehousing in the hope that fear of post-event sanctions will deter unwanted pre-event behavior.²⁰

Professor Neuborne offers as an example of this danger our current war on drugs, in his words, "a failed enterprise that pours vast resources into an effort to stop drug use by focusing almost exclusively on post-event sanctions."²¹ He also cites the effort to deal with illegitimacy by cutting off welfare payments.²²

I find these two examples interesting in the context of a discussion of anti-discrimination law because, unlike civil rights cases, the consequences of overdeterrence in the examples are visited disproportionately on people on the margins of political power. This is not generally true, of course, when we focus on the purported risks of overdeterrence that civil rights enforcement poses to employers.²³ The targets of overzealous enforcement are not inner-city youth facing harsh sentences for selling small amounts of drugs or welfare mothers punished for exercising their reproductive choice.

remedies sought by plaintiffs do not address societal discrimination but specific, targeted acts against individuals.

20. Neuborne, *supra* note 1, at 1142.

21. *Id.* at 1142-43.

22. *Id.* at 1142 n.12.

23. One qualification should be made: To the extent that penalties in promotion cases are larger and more certain than in failure to hire cases, employers are less likely to hire protected workers. See John J. Donohue III and Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991). In this sense, the consequences of zealous enforcement of the rights of one group of minority workers (those denied promotion) are visited indirectly on another class of minority workers (those seeking employment).

Rather, the targets of purported overzealous enforcement are corporations. This might explain why Professor Neuborne is not able to cite any concrete examples or data that tend to establish that such overzealous enforcement is happening in civil rights cases.²⁴ To the extent that post-event sanctions do not properly deter prevent conduct, it is more likely due to under- rather than over-enforcement.

B. Employers, Employees, and the Division of Responsibility

Although I am not convinced that we face any particular risk of overdeterrence or distortion of the purposes of human rights, I do believe that it is worth asking whether we might modify our system of incentives and sanctions to increase its deterrent value without significantly diminishing its compensatory value. To this end, Professor Neuborne suggests that, at least for cases brought by the human rights commission,²⁵ responsibility should be placed primarily upon the actor who commits the violation and only secondarily on the entity (whether public or private) that employs the actor. Moreover, that entity would bear derivative liability only in the absence of a commission-approved plan designed to prevent violations of human rights.²⁶

Professor Neuborne makes practical as well as moral arguments in support of his proposal. I shall focus first on the former. As to the first component of the proposal, imposing liability on the individual wrongdoer, I agree that a strong moral argument can be

24. Of course, examples abound of employers complaining that they are the victims of false accusations of discrimination, and the media is more than willing to publicize such complaints by focusing on the occasional high damage award in a marginal case. See, e.g., Dominic Bencivenga, *Glass Ceiling Verdict: Employment Bar Jolted by \$5 Million Award*, N.Y. L.J., Nov. 16, 1995, at 5. Nevertheless, careful studies of damage awards in civil rights cases reveal that they are quite low relative to average awards in personal injury cases generally. See, e.g., Shea and Gardner, *Analysis of Damage Awards Under Section 1981*, (reviewing and documenting the low level of damages awards in section 1981 cases during the 1980s) [unpublished report on file with the author]; *Securities Industry Employers Usually Winners in Discrimination Claims*, 1996 DAILY LABOR REPORT 49 (Mar. 13, 1996) (noting that employers won between 60 and 70 percent of discrimination claims arbitrated in the securities industry over the past 5 years).

25. Professor Neuborne suggests that his proposal may not apply to suits brought by plaintiffs represented by private lawyers. But, it is not clear how such an affirmative defense will have the desired effect if limited to a single enforcement mechanism. Given the variety of sources of law governing these violations, such a limitation would lead to the worst sort of forum-shopping in which the availability of the forum depends upon the resources of the injured party. See *infra* at 1193.

26. Professor Neuborne says very little about what such a plan might look like and how it might be approved.

made.²⁷ Professor Neuborne makes this case most effectively by offering four examples of egregious acts by groups or individuals in violation of an individual employee's human rights.²⁸ He then asks why the employer and not the perpetrator of the bad acts should be held legally liable.

In such cases, when an injured employee can establish employer liability under human rights laws, she will often bring a claim against the employer directly, whether or not the individual wrongdoer might be held personally liable.²⁹ Although in theory the employer may be permitted to seek reimbursement from the individual employee wrongdoer, the employer will often decide, for the same reasons the individual plaintiff chose not to sue that individual, that the recovery is not worth the effort.³⁰ If both the plaintiff-employee and the employer choose not to pursue the individual perpetrator, that individual will not be held accountable for his actions. In short, his bad acts will go unpunished. I agree with Professor Neuborne that this is a bad result. The individual wrongdoer ought not to escape financial responsibility for his acts by shifting responsibility to the employer. Thus, I would support a

27. One reservation I have with respect to this aspect of Professor Neuborne's proposal is that it has the effect of dividing lower-ranking workers, pitting them against each other and reducing worker solidarity. One manifestation of this effect is the struggle within unions over a union's responsibility to workers involved in co-worker sexual harassment claims. See Leslye M. Fraser, *Sexual Harassment in the Workplace: Conflicts Employers May Face Between Title VII's Reasonable Woman Standard and Arbitration Principles*, 20 N.Y.U. REV. L. & SOC. CHANGE 1, 20 (1992) (noting that arbitrator may refuse, on grounds of industrial due process, to enforce employer's decision to discharge employee and may reinstate employee or reduce discharge to suspension); Douglas E. Ray, *Sexual Harassment, Labor Arbitration and National Labor Policy*, 73 NEB. L. REV. 812, 815 (1994) (arguing for the need for judicial review of arbitration awards in light of the conflict among workers, plaintiffs, and employers). See also Marion C. Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1167 (1991) (discussing similar emerging problems in the context of union protection of workers).

28. Neuborne, *supra* note 1, at 1161-62.

29. The degree to which the individual perpetrator can be held legally liable directly to the injured party (as opposed to derivatively to the employer) varies. Title VII gives plaintiffs a cause of action only against the employer. See *Tomka v. Seiler*, 66 F.3d 1295, 1314 (2d Cir. 1995). However, common law tort claims or state statutory claims may be available against the individual. See *id.* at 1312-13 (construing section 296 of the New York Human Rights Law to allow discrimination claims to be asserted against individuals). For a discussion of the implications of this decision, see Bertrand C. Sellier and Felice J. Batlan, *Individual Liability for Employment Discrimination*, N.Y. L.J., Jan. 4, 1996, at 1.

30. See Neuborne, *supra* note 1, at 1145 n.16; Sellier and Batlan, *supra* note 29 (noting power of employees to pressure employers to settle suits when individual employees are named as defendants).

system by which a portion of the principal liability is imposed on the wrongdoer himself.

Despite my general agreement with the first component of Professor Neuborne's proposal, I do not think that the second necessarily follows. Imposing liability directly on the individual wrongdoer does not require a *shifting* of direct liability away from employers altogether. At best, an employer should be understood as sharing responsibility with the individual discriminators in his employ. Professor Neuborne suggests, however, that employer liability should be considered only if the perpetrator is unable fully to compensate the victim.³¹ In such a case of inadequate compensation, the employer should be held liable if the employer is itself morally culpable.³² If, however, the employer is not morally culpable, the employer should be liable only in the absence of a commission-approved plan.³³ This neat formulation avoids the fundamental question at stake in every case in which employer liability is alleged: What does it mean for an employer to be morally responsible?

Professor Neuborne's theory turns on accepting the notion that the employer's liability for discriminatory acts of his employees is *respondeat superior* liability—that is, derivative rather than direct liability. Yet, describing the bulk of employer liability as derivative misconceives the issue in this sense: it posits a false separation between the employer (usually a corporate entity consisting of individuals with a range of interests from workers, to managers, to shareholders) and the people in the position to commit discriminatory acts.

Support for this conceptual separation of employer and employee tortfeasors can be found in traditional agency principles governing a master's derivative liability for the torts of his servants. According to common law agency principles, the master "is not subject to liability for the torts of his servants acting outside the scope of their employment."³⁴ For torts committed within the scope of employment, the doctrine of *respondeat superior*, literally "let the master answer,"³⁵ is invoked. These principles grew out of a conception of the employer and employee (master and servant),

31. Neuborne, *supra* note 1, at 1146.

32. *Id.*

33. *Id.*

34. RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958).

35. *Id.* at § 219(1).

as two individuals between whom moral and legal culpability could be divided.

In *Meritor Savings Bank v. Vinson*,³⁶ the Supreme Court specifically imported agency principles into Title VII doctrine, adopting the argument made by the Equal Employment Opportunity Commission in its amicus brief.³⁷ Without providing much guidance, the Supreme Court seemed to rule out both the imposition of strict liability on the employer for acts of its employees³⁸ and the position that an official policy and grievance procedure could insulate the employer from liability when a victim fails to invoke such procedures.³⁹ In support of its ill-defined middle position, the Court explained that "Congress' decision to define 'employer' to include any 'agent' of an employer, surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."⁴⁰ Thus, the Supreme Court's treatment of employer liability, at least in the context of hostile work environment sexual harassment,⁴¹ reflects an agency-inspired separation of the employer and its employee-agents, whether supervisors or co-workers.

Notwithstanding the *Meritor* decision, I believe that invocation of this tort-based conception is problematic in the context of employment discrimination for at least two reasons. First, discrimination is not a tort in the traditional sense. Anti-discrimination law does not impose a duty that an employer can discharge by taking the appropriate level of care.⁴² Conversely, a finding of employer liability does not necessarily imply a finding of fault in the traditional tort-based sense. Properly understood, anti-discrimination statutes define a right of the employee to be free from the harm of discrimination. The focus is on remedying the consequences to the employee-victim, not on the moral fault of the employer. Thus, in

36. 477 U.S. 57 (1986).

37. It is worth noting that this brief was filed by the E.E.O.C. under Clarence Thomas; however, the agency's position in *Meritor* was inconsistent with its earlier position reflected in its guidelines. Under the E.E.O.C. guidelines at the time of the *Meritor* decision the employer was deemed liable for the acts of its agents without regard to the employer's notice of those actions. 29 C.F.R. § 1604.11(c) (1985).

38. 477 U.S. at 72.

39. 477 U.S. at 73.

40. 477 U.S. at 72.

41. Under current federal law, an employer is directly liable for all discriminatory acts committed by employees except for harassment. In other words, when a supervisor discriminates in hiring, wages, hours, or working conditions, the employer is liable whether or not the employer approved, knew, or should have known about the action. See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 853 (1991).

42. See *id.*

disparate impact cases, we impose liability even absent any showing of discriminatory intent.⁴³ The employer must compensate victims for the discriminatory consequences, whether or not the employer intended or anticipated those consequences.

Second, whatever the problems of using tort principles generally to interpret anti-discrimination law, the relationship between the employer and employee is considerably more complicated than the master/servant relationship that gave rise to the principles of respondeat superior. For example, when may relationships *among* employees be understood as employer/employee relationships? When an employee discriminates against another employee (or potential employee), he acts both *on behalf of* and, in an important sense, *as* the employer.⁴⁴ He incurs liability as the employer in a direct rather than a derivative sense. This seems certainly appropriate when the employee acts by virtue of power derived from his position within the corporate entity.

I will grant that the issue of employer liability is more complex when the discriminator is in a nonhierarchical relationship with the discriminatee. Increasingly, hostile environment sexual harassment cases involve this situation. In such cases, a majority of courts, following *Meritor*, have imposed liability on the employer only when the employer knew or should have known about the harassing conduct.⁴⁵ This is the context in federal employment discrimination law that most nearly approaches the framework for employer liability that Professor Neuborne suggests. Under current case law, in hostile work environment cases involving coworkers, an employer may be able to cut off respondeat superior liability by creating mechanisms within the workplace to encourage

43. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

44. This problem has been recognized by lower courts attempting to apply the agency principles of *Meritor*. For example, the Eleventh Circuit has held that an employer will be liable for the acts of the supervisor when the supervisor's authority is delegated by the employer. See *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1557 (11th Cir. 1987). In such situations, the supervisor acts as the employer. See *Huddleston*, 845 F.2d at 904.

45. See, e.g., *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464-65 (7th Cir. 1990) (focusing on actual or constructive knowledge); *Sparks*, 830 F.2d at 1557 (requiring that plaintiff show that employer knew or should have known about the harassment and failed to take remedial action); *Huddleston*, 845 F.2d at 904 (interpreting *Meritor* as imposing a negligence standard requiring actual or constructive knowledge).

reporting of sexual harassment and then demonstrate that they were not utilized.⁴⁶

It is no coincidence therefore that three of the four cases Professor Neuborne cites in support of his proposal to separate "perpetrator" liability from "entity liability" involve sexual harassment allegations. In sexual or racial harassment cases, the argument that the employee is acting outside the scope of his employment is at its most compelling. After all, in what sense is harassment ever within the scope of an individual's employment? In such cases, a negligence standard—the employer know or should have known of the conduct—is arguably an appropriate prerequisite to employer liability. Professor Neuborne's proposal, however, would extend a version of this respondeat superior analysis beyond hostile environment harassment cases to *all* cases of workplace discrimination brought by the human rights commission.

III. Discrimination in the Modern Private Workplace

Professor Neuborne's proposal to shield the employer from liability if the employer had adopted a Commission-approved plan for preventing discrimination is potentially radical and far-reaching.⁴⁷ Yet, the scope of his proposal is not particularly clear. At the end of his article, Professor Neuborne adds the limitation that he would cut off respondeat superior liability only in cases where the employer is not morally responsible; however, he offers no suggestions as to what such a case might look like. Through a series of examples of my own, I want to explore briefly what it means for the employer to be morally responsible. Drawing that line should tell us the degree to which Professor Neuborne's proposal departs from current law and what the costs of such a departure might be.

Consider the following cases:

1. *Company policy is "African Americans need not apply."* Professor Neuborne correctly observes that this is a type of discrimination that is rarely seen in today's workplace (except perhaps discrimination based on sexual orientation). If this were the company policy, presumably the employer (meaning the company

46. The Supreme Court seemed to suggest as much in *Meritor* but made clear that procedures in place must have been reasonably calculated to encourage reporting of the conduct. See *Meritor*, 477 U.S. at 72-73.

47. Once again, Professor Neuborne offers very little in the way of describing the possible requirements of such a plan; however, if the discriminator is found liable, then the plan failed on this occasion despite Commission certification.

itself) would be directly liable for damages. In this sense, the case is analogous to the public employment context.⁴⁸

2. *White hiring manager refuses to hire African Americans, resulting in an all-white work force.* Here the policy derives from the discriminatory inclinations of a white manager, not an explicit company policy. Presumably, under Professor Neuborne's scheme, this type of case would lead to liability imposed on the individual wrongdoer and on the company-employer for one of two reasons: First, the employer may be deemed morally responsible because of his knowledge of the discriminatory hiring pattern. Second, the employer may be held liable because, under a properly-functioning Commission-approved plan, such a pattern could not exist.

3. *Based on his own racist attitudes, a white manager passes over an African American employee for a promotion. Instead, he promotes an equally qualified white employee.* Here the pattern of hiring and promotion might not be apparent to the employer. We cannot assume that knowledge of the discriminatory decision extends beyond the individual supervisor. Is this a case in which we can say the employer is morally responsible? Or, is the employer's liability here merely derivative? Should the manager's actions be understood as actions of the employer? Surely racially discriminatory hiring is not within the scope of the manager's job in the traditional sense.

Perhaps this is a case in which, under Professor Neuborne's scheme, the plaintiff's recovery would be limited to the individual discriminator, not the company, assuming that the employer has a properly functioning, Commission-approved plan. On the other hand, if we assume that it is impossible for a discriminatory act of this sort to have occurred under a properly functioning plan, Professor Neuborne's scheme offers no greater protection to the employer than the current scheme under title VII and therefore no greater reward for taking preventive action.

4. *Co-workers consistently engage in racially threatening and insulting behavior toward African American workers.* Here again we might hold the co-workers principally liable and seek compensation from the company only secondarily. Under title VII, an employer will be liable if he "knew or should have known" of the harassing conduct. If, under Professor Neuborne's scheme, the company can avoid this liability by having in place a Commission-approved plan, the plaintiff is undercompensated. After all, the

48. Neuborne, *supra* note 1, at 1155-56 (discussion of public employment).

discriminatory acts occurred despite the existence of a plan. If, on the other hand, we take the occurrence of discrimination as evidence of the inadequacy of the plan, once again, Professor Neuborne's model offers no greater protection than existing law.

My point in these examples is to demonstrate that the degree to which Professor Neuborne's scheme increases the employer's incentive to take preventive action is *precisely* the degree to which it decreases the plaintiff's compensation. Simply stated, under current law, employers who want to avoid discrimination can put in place an excellent anti-discrimination plan and thereby reduce the amount of discrimination. Their incentive to do so is the economic gain they will enjoy by avoiding potential damage awards in those discrimination suits avoided by eliminating discriminatory acts. Under current federal law, however, employers still have to pay when their plan fails and discrimination occurs.⁴⁹

Under Professor Neuborne's proposal, in contrast, employers who have an excellent, Commission-approved, plan in place would not have to pay even when it fails (as it inevitably will on occasion). Thus, plaintiffs are somewhat undercompensated, but employers have an added incentive to create such plans. That plaintiff compensation will be diminished should not lead us necessarily to reject the proposal. Nevertheless, by focusing on the consequences to the plaintiff, we can re-frame the initial question concerning the effective use of commission resources: Do the gains likely to be achieved by increasing employer incentives to prevent discrimination outweigh the costs of undercompensating plaintiffs who suffer injury when such plans fail?

IV. Practical Considerations in a Less Than Ideal World

Having committed much of his professional life to the cause of civil rights, Professor Neuborne offers his proposal in response to a urgent need to make the best use of contracting resources. These questions are indeed pressing and worthy of serious consideration. How do we increase employers' incentive to prevent discrimination in an imperfect world of limited resources? Can we make better use of deterrence and enforcement dollars? It is in a spirit of pragmatic reflection that Professor Neuborne offers several practical

49. The Court alluded to a possible exception to this general rule in *Meritor*. If an employer has in place a plan that is well-calculated to prevent hostile environment sexual harassment and to encourage the reporting of such incidents, an employer might not be deemed liable for unreported acts of harassment. See *Meritor*, 477 U.S. at 72-73.

considerations in support of his proposal. I find these practical considerations more convincing than his moral arguments about employer liability. Nevertheless, even in the face of serious budgetary constraints, I am not persuaded of the wisdom of the proposed safe harbor provision for employers. Thus, in conclusion, I examine the likely effect of the components of Professor Neuborne's proposal and offer my own practical reasons for offering only partial support.

1. *Shifting primary liability to the offending individual.* Under current law, the employer has an incentive to reduce the incidence of discrimination as much as possible by policing personnel and firing discriminators. Shifting the primary responsibility to the individual discriminator reduces the employer's incentive somewhat, but it does so in a constructive way. It places the burden on the party in the best position to avoid the harmful conduct—the individual making discriminatory decisions.

2. *Shielding employers from respondeat superior liability through a Commission-approved plan.* There are advantages to this scheme—employers are encouraged to take particular types of steps to avoid discrimination. The Commission can encourage positive and creative steps such as educational programs and worker training rather than ham-fisted steps designed to avoid liability rather than discrimination. Nevertheless, the costs to such a scheme must also be considered and those costs are paid by plaintiffs. I am not convinced that the benefits of managed prevention would outweigh the undercompensation of individuals harmed by discrimination.

3. *Making the best use of the resources of the Commission.* If Professor Neuborne's proposal is limited to cases brought before the Commission, it is not likely to have much effect on employer conduct—private law suits are still very much a possibility and the employer would not be shielded from liability in those cases. On the other hand, to the extent that it has an effect, this effect, as I have argued, depends on reducing plaintiffs' compensation. If this cost is imposed only on plaintiffs who file their cases with the Commission, plaintiffs who can afford private attorneys will simply seek a forum that will be able to give them complete relief. The proposal would thus lead to the worst kind of forum-shopping—the kind in which the adequacy of relief depends on the victim's ability to pay.

Conclusion

Notwithstanding any gains in deterrence that might be wrought by manipulating the parameters of employer liability for worker conduct, Professor Neuborne's proposal sends a troubling message about employers' responsibility for workplace conditions. By reinforcing the idea that discrimination is a harm that is principally committed by one individual against another, the proposal treats it as an isolated wrong rather than a condition that must be combated in a sustained way throughout the workplace. The adoption of a Commission-approved plan is an important step for an employer to take in controlling discrimination; however, holding the employer responsible for discriminatory harm to its employees provides a necessary incentive for innovation in the struggle to eliminate bias on the job. More importantly, imposing shared liability emphasizes that that struggle belongs to us all.