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All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment

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ALL IN A DAY'S WORK: EMPLOYERS' VICARIOUS LIABILITY FOR SEXUAL HARASSMENT

*Paula J. Dalley**

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I. INTRODUCTION

In 1998, the United States Supreme Court decided the question of employer liability for actionable sexual harassment under Title VII of the Civil Rights Act of 1964.¹ The Court stated that the question must be answered by

¹ The question was dealt with in a pair of companion cases. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). See also *infra* Part III.A.

reference to general agency principles of vicarious liability.² Under such principles, an employer is usually liable only if the employee is acting within the scope of employment in committing the tort.³ The most commonly cited test for the scope of employment asks whether the employee was “actuated by a purpose to serve” the employer in committing the tort.⁴ Because harassers act only to serve their own nefarious ends, harassment is not within the scope of employment.⁵ Fortunately, an obscure provision of the Restatement (Second) of Agency, when read a certain way, provides a separate ground for employer liability whenever the tortfeasor was “aided by the employment relationship” in committing the tort, even if the tort was not within the scope of employment.⁶ The Court relied on this provision to find that vicarious liability existed in some sexual harassment cases.⁷ Nevertheless, the Court was unwilling to impose “automatic” liability on employers.⁸ If automatic liability means strict liability, in the sense of liability without fault, then vicarious liability is by definition automatic.⁹ The Court avoided this “automatic” result by creating an affirmative defense which effectively permits an employer to escape vicarious liability in some situations based on the fact that she has exercised due care.¹⁰ This is not, of course, the usual sort of vicarious liability, which clearly applies no matter how careful the principal has been.

The Court’s decisions have been widely criticized as being too pro-employer and too pro-employee, which perhaps indicates that they struck the appropriate political balance.¹¹ The decisions are also, however, bad applications of imperfectly understood legal rules. It is unlikely that the Court’s deci-

² *Burlington Indus.*, 524 U.S. at 777.

³ *Id.* at 755-56 (citing RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958)).

⁴ *Id.* at 756-57.

⁵ *Id.* at 757.

⁶ RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

⁷ *Burlington Indus.*, 524 U.S. at 743-45.

⁸ *Id.* at 745.

⁹ The Court’s mandate to apply agency principles without creating automatic liability thus made no sense. If, on the other hand, automatic liability means liability without any factual inquiry into whether or not the harassment was within the scope of employment or aided by the agency relationship, then correct application of agency principles would be unlikely to result in automatic liability.

¹⁰ *Id.* at 765. In this Article, the principal or employer is referred to as “she,” while agents and employees are referred to as “he.” This convention not only provides clarity for pronouns and antecedents, but also recognizes that sexual harassers (the employees at issue here) are usually men.

¹¹ See Edward Felsenthal, *Rulings Open Way for Sex-Harass Cases*, WALL ST. J., June 29, 1998, at A3; Anita K. Blair, *Harassment Law: More Confused Than Ever*, WALL ST. J., July 8, 1998, at A14; Joan Biskupic, *This Term, Supreme Court Ruled to the Nation’s Beat*, WASH. POST, June 28, 1998, at A1.

sions will be overruled on that ground, but it is important to identify the errors in their vicarious liability analysis because state courts, which should have more familiarity with agency principles, are now borrowing vicarious liability analysis from the Supreme Court and lower Federal court cases.¹² This will result not only in the denial of recovery to those who would, under an appropriate analysis, be compensated, but also in the failure of employers to pay all the appropriate costs of their businesses. On a larger scale, if other courts begin taking the Supreme Court's "agency law" analysis seriously, a single instance of doctrinal confusion may eventually destroy a complex and carefully crafted body of law.

Before one can understand employer liability for sexual harassment, one must understand the vicarious liability doctrine generally. Vicarious liability is one doctrine among several in agency law intended to coordinate the costs, risks, and losses of a business with its benefits, advantages, and profits.¹³ The particular requirements of vicarious liability, such as the independent contractor exception and the scope of employment limitation, are designed to ensure that vicarious liability applies in such a way as to achieve that larger goal. Thus, specific questions about those doctrines, such as what test should be used to determine whether a tort is within the scope of employment, can be answered by reference to the broader principles and purposes of agency law.

Because vicarious liability, like most of agency law, asks whether a risk is inherent in the business, applying the doctrine requires some understanding of the causes of particular risks. Courts recognize this when they ask, for example, about the cause of the dispute in battery cases. It is equally necessary to inquire into the cause of the risk when the tort is sexual harassment. Once one does so, one discovers that the socio-psychological evidence indicates that harassment is not, in fact, generated by a mere desire to have sex or to entertain oneself with pictures of nude women. The precipitating causes of sexual harassment appear to be a psychological predilection on the part of the harasser combined with certain identifiable features of the workplace environment.¹⁴ This, then, is the factual background in which the appropriate legal rules must be applied. Not surprisingly, the resulting analysis would hold employers liable when their businesses increase the risk of the occurrence of the tort; it would be applied on an appropriately case-by-case basis, as is all vicarious liability analysis; and it would ensure that vicarious liability rules are applied in a coherent way so as to advance the general policies of agency law. Alas, the Supreme Court's analysis accomplishes none of these things.

This Article begins with a brief explication of agency law, including the rules and principles according to which principals are held liable for their agent's acts generally and for their servant's torts particularly. In the process, it

¹² See, e.g., *Bank One, Kentucky, N.A. v. Murphy*, 52 S.W.3d 540, 543-45 (Ky. 2001); *Parker v. Warren County Util. Dist.*, 2 S.W.3d 170, 171 (Tenn. 1999). See also *infra* Part III.B.

¹³ See *infra* Part II.

¹⁴ See *infra* Part IV.A.

provides an in-depth exploration of the purposes of vicarious liability and an analysis of the varying tests used in applying the scope of employment limitation. Part III provides an analysis and critique of the Supreme Court's 1998 rulings on employer liability for sexual harassment. Part IV first explores the nature of sexual harassment as a workplace risk and then concludes, finally, with the correct application of vicarious liability doctrine to sexual harassment.

II. THE LAW OF VICARIOUS LIABILITY

A. Agency Law Generally

The history of agency law generally, and vicarious liability specifically, has not been subjected to extensive study, and until such study has been undertaken, the origins of vicarious liability will remain somewhat obscure.¹⁵ As a modern body of law, however, agency is based in commercial convenience. If individuals did not have the power to act through agents, commerce, industry, and all the economic trappings of modern life would disappear. By regularizing the use of agents, the law enables enterprising individuals to carry out their businesses with greater certainty and fewer transaction costs. The law does this largely by imputing things, such as the agent's acts and state of mind, to the principal. Nineteenth-century law conceptualized that imputation through the identification doctrine, pursuant to which the principal and agent were identified as one person. The agent was treated essentially as an appendage of the principal; acting through an agent was the equivalent of using one's own hand.¹⁶ The identification doctrine, frequently expressed in the maxim *qui facit per alium facit per se*,¹⁷ solved a number of problems in agency law because it allowed the

¹⁵ The modern doctrine of vicarious liability is sometimes said to have been created by Chief Justice Holt. See J. DENNIS HYNES, *AGENCY, PARTNERSHIP, AND THE LLC: THE LAW OF UNINCORPORATED BUSINESS ENTERPRISES* 142 (5th ed. 1998); THOMAS BATY, *VICARIOUS LIABILITY* 25-26 (1916); John H. Wigmore, *Responsibility for Tortious Acts: Its History - II*, 7 HARV. L. REV. 383, 394-96 (1894). But see John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 330-36 (1894) (discussing the doctrine's origins in Germanic law). Alternatively, it is sometimes said to descend from the fact that, in Roman times, the *paterfamilias*, as owner of the corpus of the family's property, ultimately bore the financial responsibility for acts done by those under his *patria potestas*, such as his slaves and his sons. See RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (1958); David Johnston, *Limiting Liability: Roman Law and the Civil Law Tradition*, 70 CHI.-KENT L. REV. 1515, 1524-25 (1995). See also 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 288 (George E. Woodbine ed., Samuel E. Thorne trans., 1968), available at <http://supct.law.cornell.edu/bracton/Unframed/English/v2/288.htm> ("[A]n obligation is acquired [for us] . . . [b]y free men and the bondsmen of others in two cases [only], *ex operis suis* or *ex re possessoris*.").

¹⁶ Holmes compared the simplest agency relationship to that in which a messenger is sent to conclude a transaction. See Oliver Wendell Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 347-348 (1891).

¹⁷ The maxim translates as "[he] who acts through another acts himself." BLACK'S LAW DICTIONARY 1124 (5th ed. 1979).

agent's state of mind, as well as his actions, to be imputed to the principal. The identification doctrine is now largely ignored, except as an historical artifact, and there is no generally accepted grand theory of agency law.

As I argue below, however, one of the fundamental principles of agency law generally, and of vicarious liability in particular, is that all the incidents of business ownership belong to the principal, and that those incidents include risks, liabilities, and other losses as well as opportunities, profits, and other assets. Various doctrines of agency law (and, to some degree, the doctrines of partnership and corporate law which derive therefrom) embody and apply that principle, but for the purposes of responsibility for sexual harassment, this Article focuses on only those doctrines relating to the principal's liability for an agent's contracts and torts. A careful examination of the law in this area reveals the underlying agency law principle at work.

B. *Principal's Liability for Agent's Contracts*

Although liability for sexual harassment is a question of the principal's liability for her agent's torts, it is useful to examine the principal's liability in contract for purposes of comparison, and to illustrate the principles underlying the principal's liability for all her agent's acts.

1. Authority

Under agency law generally,¹⁸ a principal is liable for contracts entered into by an agent on the principal's behalf if the agent was authorized to enter into the contract.¹⁹ Authority can arise in several ways, and an agent can have the power to enter into contracts on his principal's behalf in some cases even without authority. Authority is based on the principal's manifestation of consent that the agent do an act on the principal's behalf. Actual authority is based on the principal's manifestations to the agent,²⁰ whereas apparent authority is based on her manifestations to a third party.²¹ Thus, where a principal instructs an agent to purchase supplies on her behalf, she has created actual authority for the agent to do so. Where the principal contacts the vendor to tell the vendor that the agent will be coming, the principal has created apparent authority. The manifestations must be made by the principal; an agent's assertion to a third party that the agent is authorized will not, without more, create apparent authority in the agent.²² Apparent authority, like actual authority, is based on the principal's

¹⁸ A principal may also be liable for her agent's contracts on non-agency grounds such as restitution or estoppel.

¹⁹ See RESTATEMENT (SECOND) OF AGENCY § 140 (1958).

²⁰ See *id.* § 7.

²¹ See *id.* § 8 cmt. a (1958).

²² The manifestations can, however, be made on the principal's behalf by an agent who is authorized to do so.

consent to be bound by the agent's acts.²³ Thus, the principal's liability is essentially contractual.²⁴

2. Estoppel

The principal can also be bound by an agent's contracts as a result of estoppel.²⁵ Estoppel applies where the principal knows or should know that a third party believes that the agent is authorized and the principal fails to take reasonable steps to correct the third party's belief.²⁶ If the third party changes her position, the principal is estopped from denying the agent's authority. The third party is only entitled to recover her actual damages, not to enforce the contract.²⁷ The principal's liability by estoppel is thus based on tort concepts of compensation for loss caused by fault.²⁸

3. Inherent Agency Power

Even where there is no authority or estoppel, a principal can sometimes be bound by her agent's contracts made with "inherent agency power," which subjects the principal to liability for

acts done on [her] account which usually accompany or are incidental to transactions which the agent is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and has no notice that he is not so authorized.²⁹

Inherent agency power is derived "solely from the agency relation" and is not based on contract, tort, or restitutionary principles.³⁰ Rather, it exists because, "in view of the relations of the parties or the subject matter involved, policy requires that the agent should have power to bind the principal."³¹ Because inherent agency power has no theoretical basis in tort or contract, it illus-

²³ The consent is evidenced by the principal's manifestations to the agent or third party; thus, consent is sometimes implied from the principal's actions, such as giving the agent a title. See RESTATEMENT (SECOND) OF AGENCY § 7 cmt. b (1958).

²⁴ See RESTATEMENT (SECOND) OF AGENCY § 8 cmt. d (1958).

²⁵ See *id.* § 8B.

²⁶ See *id.* § 8B (1).

²⁷ See *id.* § 8B cmt. b.

²⁸ See *id.*

²⁹ *Id.* § 161.

³⁰ See *id.* § 8A & cmt. a.

³¹ *Id.* § 140 cmt. a.

trates most clearly the fundamental principles of agency as an independent body of law. Inherent agency power is based on the notion that “[i]t would be unfair for an enterprise to have the benefit of the work of its agents without making it responsible to some extent for their excesses and failures to act carefully.”³² Although the direct beneficiary of the inherent agency power rule is the third party injured by or dealing with an unauthorized agent, the indirect beneficiaries are the business world and employers as a class; that is, those who rely on the use of agents, and the willingness of others to deal with them, to conduct business.³³ While the term “inherent agency power” is used most frequently when a third party is seeking to bind the principal in contract, the Restatement (Second) of Agency describes the principal’s vicarious liability for an agent’s torts as a variety of inherent agency power because “the liability rests solely on the relation”; it is not based on tort principles.³⁴ As the Restatement explicitly states,

if one appoints an agent to conduct a series of transactions over a period of time, it is fair that [she] should bear losses which are incurred when such an agent, although without authority to do so, does something which is usually done in connection with the transactions he is employed to conduct. Such agents can properly be regarded as part of the principal’s organization in much the same way as a servant is normally part of the master’s business enterprise. . . . In the case of the master, it is thought fair that one who benefits from the enterprise and has a right to control the physical activities of those who make the enterprise profitable, should pay for the physical harm resulting from the errors and derelictions of the servants while doing the kind of thing which makes the enterprise successful.³⁵

Inherent agency power is a somewhat controversial doctrine, and some commentators refuse to accept it as a basis for a principal’s contract liability.³⁶ Nevertheless, it is occasionally used to bind principals in contract where apparent authority or estoppel are not available.³⁷ The tentative draft of the Restate-

³² *Id.* § 8A cmt. a.

³³ *Id.*; *See also id.* § 161 cmt. a; *Kidd v. Thomas A. Edison, Inc.*, 239 F. 405, 408 (S.D.N.Y. 1917) (“The very purpose of delegated authority is to avoid constant recourse by third persons to the principal, which would be a corollary of denying the agent any latitude beyond his exact instructions. . . . [T]he very purpose of the relation demands the possibility of the principal’s being bound through the agent’s minor deviations.”).

³⁴ RESTATEMENT (SECOND) OF AGENCY § 8A cmt. b (1958).

³⁵ *Id.* § 161 cmt. a.

³⁶ *See generally* HYNES, *supra* note 15, at 331-32, 333-34.

³⁷ Recent cases applying the concept include *Cange v. Stotler and Co., Inc.*, 826 F.2d 581, 590-91 (7th Cir. 1987); *Family Partners Worldwide, Inc. v. SunTrust Bank, Atlanta*, 530 S.E.2d 742, 744 (Ga. Ct. App. 2000); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1212 (Ind. 8

ment (Third) of Agency eliminates the term but purports to retain the liability it creates by subsuming it into apparent authority and other doctrines.³⁸ To the extent the basic agency principles underlying the concept of inherent agency power are the same as those underlying vicarious tort liability, it will continue to be a useful concept.

4. Ratification

Finally, the principal will be liable if she ratifies her agent's contract.³⁹ As the Restatement makes clear, the concept of ratification is unique in the law and derives from necessity "in the prosecution of business," because, by allowing principals to correct technical defects in an agent's authority, it enhances the predictability and stability of contracts and prevents unnecessary lawsuits.⁴⁰

These doctrines illustrate that the basic goal of agency law is regularizing business transactions which underlies the principal's liability for her agent's contracts. In the ordinary case, a person employing, and likewise transacting, with an agent, intends the principal, not the agent, to be bound.⁴¹ The agent's ability to perform the contract is thus a matter of no importance to the third party.⁴² If the rules governing creation of authority are narrow, persons contracting with agents will incur costs in verifying either the existence of authority or the agent's ability to perform in the event the agent is not authorized and the principal is not bound. If the rules governing creation of authority are broad, however, third parties will contract with agents more freely but principals will incur costs monitoring their agents or taking other steps to ensure that limits on the agents' authority, especially unusual limits, are known to contracting third parties. The doctrines of apparent authority, estoppel, and inherent agency power, each of which tests the reasonableness of the parties' behavior in the context of the transaction in question, seek an appropriate balance for the breadth of the principal's liability for her agent's contracts in normal business

2000); *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1304 (Ind. 1998); *Grosberg v. Mich. Nat'l Bank-Oakland*, 362 N.W.2d 715, 716 n.3 (Mich. 1984); *Kahn v. Royal Banks of Mo.*, 790 S.W.2d 503, 508-09 (Mo. Ct. App. 1990).

³⁸ See RESTATEMENT (THIRD) OF AGENCY, ch. 2, introductory cmt. (Tentative Draft No. 2, 2001). Because apparent authority and inherent agency power have different theoretical bases, this change must entail a change in the understanding of one of those concepts. For a good discussion of the inherent agency power concept, see Kornelia Dormire, Comment, *Interent Agency Power, A Modest Proposal for the Restatement (Third) of Agency*, 5 J. SMALL & EMERGING BUS. L. 243 (2001).

³⁹ A principal may also ratify a tort. See RESTATEMENT (SECOND) OF AGENCY § 82 (1958).

⁴⁰ See *id.* § 82 cmt. d.

⁴¹ See *id.* ch. 6: Liability of Principle to Third Persons, Contracts, and Conveyances; Topic 2: Disclosed or Partially Disclosed Principal; Title A: Creation of Liability by Authorized Acts, introductory cmt.

⁴² See *id.*

practice.⁴³

On a more theoretical level, the fundamental premise that contracts are based on consent, however artificial, is carried through in the agency doctrines governing a principal's liability for her agent's contracts.⁴⁴ To be liable, the principal must manifest her consent to be bound by her agent's contracts (either to the agent or to the third party), or she must subsequently consent to be bound through ratification. Such doctrines thus satisfy the consensual requirement of contract theory while satisfying the needs of business by giving legal force to "normal" modes of transacting. The theoretical and practical foundations of the principal's liability in tort are completely different, and the doctrines of apparent authority and estoppel, which are rooted in the expectations of persons dealing with agents, have only a very limited role in the principal's vicarious tort liability.⁴⁵

5. Apparent Authority and Tort Liability

For apparent authority to exist, the third party must reasonably believe the agent to be authorized.⁴⁶ The principal will be liable in *tort* based on her agent's apparent authority only when the third party's reasonable belief as to the agent's authority enabled the agent to commit the tort. The Restatement limits these situations to what might be called "speech torts," that is, torts in which the harm arises from the presumed identity of the principal as the speaker. Such acts include misrepresentation, which depends on the agent's power to enter into the fraudulently induced contract; defamation, where the harm depends on the existence of the principal as the supposed speaker (such as where the credibility of the statement is based on the principal's supposed knowledge); and personal injury, but only where the agent's apparently authorized representations caused the harm (such as where the agent falsely tells a visitor that a portion of the principal's premises are safe).⁴⁷ An agent who is "apparently authorized" to drive across town in the company truck does not thereby subject his principal to liability when he runs someone down in the street.⁴⁸ First, apparent authority would not exist in such a case because the victim cannot be said to have relied

⁴³ See *id.* (discussing the "normal inferences" of actors in various types of transactions).

⁴⁴ See *id.* § 161 cmt. a.

⁴⁵ An early critic of vicarious liability argued that the supposed origin of the rule that a master is liable for her servant's torts, the case of *Jones v. Hart*, 90 E.R. 1255 (K.B. 1698), actually involved contract liability and so should not have been treated as establishing the rule of vicarious tort liability at all. See BATY, *supra* note 15, at 24-25.

⁴⁶ See RESTATEMENT (SECOND) OF AGENCY § 8 cmt. c (1958).

⁴⁷ See *id.* §§ 265-67.

⁴⁸ Of course, the principal might be liable based on other vicarious liability rules, as described below.

upon the principal's manifestations in crossing the street.⁴⁹ Second, a principal's manifestations of consent are irrelevant in creating tort liability, which is not based on consent to be liable.⁵⁰ Third, the law's goal in creating a principal's liability for contracts, regularizing business transactions based on the reasonable expectations of the parties, which underlies apparent authority, is not advanced by imposing liability on a principal for her agent's torts based on apparent authority (although, as I argue below, it is advanced by other vicarious liability doctrines). Finally, even if it were theoretically consistent with agency principles to base a principal's liability in tort on apparent authority, the law simply does not do so.⁵¹

C. *Principal's Liability for Agent's Torts*

As described further below, a principal is liable for an agent's torts if the agent is a "servant" and if the agent was acting in the scope of employment in committing the tort. Because the master's liability is not based on fault, the master's vicarious liability is sometimes regarded as anomalous in the law of torts. Commentators have therefore tried to justify the existence of vicarious liability using the social, economic, and moral justifications used for the law of torts generally.⁵² As I argue below, however, the law of torts fails to provide an adequate explanation for vicarious liability because it is not a tort law doctrine.

⁴⁹ There are cases in which the victim's reasonable reliance on the appearance of a master/servant relationship is permitted to create tort liability on the master despite the fact that there was no such relationship, but such cases are based on an apparent *relationship*, not the creation of apparent authority. *See supra* Part II.B.5.

⁵⁰ Rather, a principal's liability in tort for *authorized* acts by an agent is based on the rule that "one is liable for what he intentionally causes." RESTATEMENT (SECOND) OF AGENCY § 8A cmt. a (1958). *Cf. Primeaux v. United States*, 181 F.3d 876, 879 (8th Cir. 1999) (discussing apparent authority as a completely separate basis for vicarious liability).

⁵¹ *See* RESTATEMENT (SECOND) OF AGENCY § 265 cmt. b (1958); FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 1885 (2d ed. 1914).

⁵² *See, e.g.,* Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1740-49 (1996) (lamenting lack of vicarious liability material in tort casebooks and inattention to vicarious liability by tort law scholars); Steven P. Croley, *Vicarious Liability in Tort: On the Sources and Limits of Employee Reasonableness*, 69 S. CAL. L. REV. 1705, 1706-11 (1996) (discussing loss-spreading and deterrence as rationales for vicarious liability); Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1 (1994) (discussing vicarious liability in light of tort policies); Andrew Beckerman-Rodau, *A Jurisprudential Approach to Common Law Legal Analysis*, 52 RUTGERS L. REV. 269, 295-96 (1999) (discussing loss-spreading, deterrence and compensation as rationales for vicarious liability); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1234-36, 1240-41, 1244, 1246 (1984) (discussing economic explanations for loss-spreading, compensation, and deterrence policies).

1. Direct Liability Distinguished

The master's vicarious liability for the servant's torts must be distinguished from the master's direct liability for her own torts.⁵³ Like anyone else, a master is subject to tort liability for negligent acts, including negligently hiring an incompetent or dishonest servant, negligently entrusting a dangerous instrumentality to another, negligently supervising a servant, and causing or adopting the tortious act of another.⁵⁴ Thus, if a master directs her servant to commit a tort, the master will be directly liable for the tort based on her own act.⁵⁵ Similarly, if a servant commits a tort that the master later ratifies or adopts (for example, by accepting the benefits of the tort), the master will be liable directly.⁵⁶ This sort of direct liability does not raise special considerations because it is based squarely on the tort concepts applicable to all persons and all acts (or, in the case of ratification, on a contractual theory of consent). Vicarious liability, on the other hand, is based in the agency relationship itself and is not dependent on tort principles such as fault or on tort policies such as accident prevention.

2. Vicarious Liability Explained

Originally, vicarious liability was thought to be based on the "identification" theory, the idea that the master and servant are the same person in the eyes of the law,⁵⁷ but that formalistic view has been rejected for at least a century.⁵⁸ Today, the usual explanations for vicarious liability are versions of arguments from the law of torts⁵⁹ based on the policies of loss spreading, accident reduction, and compensation.⁶⁰ More recent economic analyses are similarly based on

⁵³ Professor Sykes characterizes this liability as "vicarious liability based on negligence," apparently because the liability is based on the principal's negligence while the injury itself was proximately caused by another person (the "vicarious" part). See 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, 590 (1988).

⁵⁴ See RESTATEMENT (SECOND) OF AGENCY §§ 212, 213.

⁵⁵ *Id.* at §§ 212, 219(2)(a).

⁵⁶ *Id.* at §§ 82, 83, 218.

⁵⁷ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 182 (Mark DeWolfe Howe ed., 1963).

⁵⁸ Holmes criticized it on numerous occasions. See *id.* at 181-82; Oliver Wendell Holmes, Jr., *Agency II*, 5 HARV. L. REV. 1, 14 (1892); see also P. S. ATIYAH, *VICARIOUS LIABILITY IN THE LAW OF TORTS* 6-7 (1967) (describing a similar English theory known as the "master's tort" theory).

⁵⁹ See BATY, *supra* note 15, at 146-48 (listing and rejecting nine alleged justifications for vicarious liability); Holmes, *supra* note 58, at 22-23 (arguing that judges have "striven to find more intelligible reasons" for the doctrine because it is based solely on a "survival of ancient traditions" that makes no sense in modern law); Young B. Smith, *Frolic and Detour I*, 23 COLUM. L. REV. 444, 452 (1923) (discussing the need for a theory to explain the law).

⁶⁰ See Beckerman-Rodau, *supra* note 52, at 295-96; Fleming James, Jr., *Vicarious Liability*,¹² <https://researchrepository.wvu.edu/wvir/vol104/iss3/6>

tort understandings of the law. Because they are tort theories, however, they are incapable of either explaining or justifying vicarious liability, a doctrine not based in the law of torts.

a. *Basic Tort Theories*

i. Loss Spreading

One of the justifications occasionally advanced for tort rules is that they permit losses to be spread over some large group better able to bear the loss, rather than resting solely on the victim.⁶¹ For example, strict products liability ultimately spreads losses among all consumers of the product in question. Similarly, commentators have argued that vicarious liability serves social justice by spreading losses to employers and, therefore, perhaps ultimately to consumers of whatever good the business is producing, or to the owners of that business.⁶² There are a number of problems with this rationale, both for torts and for vicarious liability. First, to the extent that the goal of loss spreading is simply to increase the number of persons bearing a loss, and thereby reduce the magnitude of the loss to each payor, the availability of insurance eliminates the need for the tort law to distribute losses, and probably spreads losses more efficiently than a litigation-based tort system.⁶³ Furthermore, in many cases both the plaintiff and the defendant will be in a position to spread losses.⁶⁴ Loss spreading as a rationale for strict tort liability is further subject to the criticism that it encourages carelessness by potential plaintiffs.⁶⁵ On the other hand, to the extent that the loss-spreading policy is another name for the externalities argument discussed below, the goal of which is to place the loss on the participants in the activity that caused the loss, not all defendants are equal: the goal of loss-spreading can only be achieved by ensuring that the appropriate activity bears the cost, which

28 TUL. L. REV. 161, 172 (1954); Rochelle Rubin Weber, Note, "Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by their Employees, 76 MINN. L. REV. 1513, 1518-20 (1992).

⁶¹ See JOHN J. SLAIN ET AL., AGENCY, PARTNERSHIP AND EMPLOYMENT: A TRANSACTIONAL APPROACH § 1 (1980) (discussing and rejecting the loss-spreading rationale).

⁶² See ATIYAH, *supra* note 58, at 22-27; Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1329 (1997); Smith, *supra* note 59, at 456-60.

⁶³ See ATIYAH, *supra* note 58, at 25-26; Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability For Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 625-33 (1998); Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 210 (1973).

⁶⁴ See, e.g., *Ira S. Bushey & Sons, Inc., v. United States*, 398 F.2d 167, 170-71 (2d Cir. 1968); Geistfeld, *supra* note 63, at 625-33 (discussing the relative merits of third-party and first-party insurance).

⁶⁵ This is one of the themes of Keating, *supra* note 62; see also ATIYAH, *supra* note 58, at 26-27.

will require analyses of the activities in question and the tort. As discussed below, agency law seeks to advance a similar policy: seeking to place losses on the business that benefits from the activity causing the loss. Unlike the tort law, however, agency law has developed a variety of complex rules and concepts that seek to identify those losses that are connected with a particular business. The rationale is not to spread the losses, rather it is to coordinate losses with benefits.

ii. Deterrence/Accident Reduction

As with tort liability, one of the most frequently stated policy reasons for vicarious liability is that it will result in fewer accidents.⁶⁶ The argument is that masters will seek to avoid liability by selecting, training, supervising, and equipping their servants so as to reduce the number of accidents, up to the point at which the marginal costs of such precautions exceed the probable liability they will prevent. This is the usual rationale for liability based on negligence, and if it is also used in a strict liability context, such as vicarious liability, there must be a further explanation for why the usual negligence regime, which would hold the servant personally liable for his torts, must be supplemented by the strict liability rule.⁶⁷ Several explanations have been proffered. First, because most servants have limited assets and cannot pay the full costs of the accidents they cause, they will not take due care.⁶⁸ Vicarious liability, by imposing liability instead on employers, causes the employer to use internal measures, such as discipline, training, and selection, to cause her employees to take due care.⁶⁹ Alternatively, because a tort verdict might strip a servant-defendant of all his assets, servants might be inclined to take too much care. Thus, vicarious liability causes employers to calculate the optimum level of care and cause their employees to take such care.⁷⁰ Others argue that, because proof of negligence following an accident is difficult, the relevant evidence is likely to be in the control of the master, and because it is also difficult to prove the direct negligence of the master in hiring and supervising the servant, it is appropriate to hold the master strictly liable.⁷¹

⁶⁶ See *Edwards v. Honeywell, Inc.*, 50 F.3d 484 (7th Cir. 1995); Holmes, *supra* note 58, at 14 (arguing that vicarious liability provides “a seemingly wholesome check on the indifference and negligence of great corporations”).

⁶⁷ See Geistfeld, *supra* note 63, at 659 (noting that where the negligence standard reduces risks to low levels, there is little likelihood that strict liability will further reduce accident rates).

⁶⁸ See Sykes, *supra* note 52, at 1244.

⁶⁹ See Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 42-43 (1972). *But see* Schwartz, *supra* note 52, at 1757 (rebutting this argument).

⁷⁰ See Bruce Chapman, *Corporate Tort Liability and the Problem of Overcompliance*, 69 S. CAL. L. REV. 1679, 1695, 1702-03 (1996).

⁷¹ See Schwartz, *supra* note 52, at 1760; ATIYAH, *supra* note 58, at 20-21. This also has been suggested as the rationale for strict liability for abnormally dangerous activities. See Ge-

One might ask, however, in the vicarious liability context, as in the strict liability context, why one would assume that strict liability would reduce accidents when a negligence regime has not been shown to do so.⁷² If the tort theorists are correct, servants driving on business should be either more or less careful than those driving for personal reasons. If an employee's lack of assets makes him difficult to deter from carelessness (and if he is uninsured), he should drive less carefully when driving for personal reasons because an accident victim will have no recourse, than when he is on his employer's business, when he will be subject to termination for carelessness. Alternatively, he may drive more carefully when on his own time, because he (or his insurance) will be paying any accident claims, than when he is on business. Some of the literature on strict liability suggests, however, that drivers do not behave this way:⁷³ it is possible, perhaps probable, that the driver will take care or fail to take care for reasons that have nothing to do with liability. A driver on business may be under greater stress, or may be more bored or inattentive, than a driver on a personal errand.⁷⁴ There is also reason to question the extent to which employers can effectively monitor and control their employees' behavior, given the agency problems that exist in any employment relationship.⁷⁵ Is the employer in any better a position to prevent or prove negligence by a truck driver, for example, than the legal system or other drivers?

rald W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 SAN DIEGO L. REV. 597, 630, 653-54 (1999); Geistfeld, *supra* note 63, at 633-38; *see also id.* at 664-65 (noting that employee shirking, leading to negligence, may be difficult for an employer to detect and difficult for a plaintiff to prove). The evidence problem could be solved, of course, by a rebuttable presumption of negligence rather than strict liability. *See Boston, supra*, at 647-49.

⁷² *See Geistfeld, supra* note 63, at 639; *see also* ATIYAH, *supra* note 58, at 16-17 (arguing that deterrence does not work as a theory if insurance is permitted).

⁷³ *See Croley, supra* note 52, at 1728-30.; Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381-87 (1994); *id.* at 393-97 (discussing automobile accidents); Fleming James, Jr., & John J. Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 769-77 (1950) (discussing phenomenon that most accidents involve "accident prone" individuals).

⁷⁴ In *Ira S. Bushey & Sons, Inc., v. United States*, 398 F.2d 167, 172 (2d Cir. 1968), Judge Friendly implicitly treated the oft-noted "proclivity of seamen to find solace for solitude by copious resort to the bottle while ashore" as a fact militating in favor of vicarious liability for a drunken seaman's acts because such drinking is a risk of the business.

⁷⁵ *See KIP SCHLEGEL, JUST DESERTS FOR CORPORATE CRIMINALS* 79 (1990); Croley, *supra* note 73, at 1714-19; Schwartz, *supra* note 52, at 1758-59; Catharine Pierce Wells, *Corrective Justice and Corporate Tort Liability*, 69 S. CAL. L. REV. 1769, 1769-70 (1996); Sykes, *supra* note 68, at 1237-39. Professor Schwartz also suggests, however, that the common law's reliance on control as a determinant of an employer's vicarious liability (in the context of the independent contractor exception discussed below) illustrates the "common law's assumption that employee negligence is to a considerable extent 'controllable'." Schwartz, *supra* note 52, at 1754. As I argue below, however, the independent contractor exception is not based on control per se and does not depend on any such assumption. *See infra* Part II.C.3.a.i.

The deterrence rationale may have more explanatory force if liability is viewed as a way to deter hazardous *activities* rather than carelessness. Thus, a business that is forced to bear the tort losses it generates will continue in business only as long as the benefits of that business outweigh the liability costs. This rationale is discussed below as “Benefit Theory/Externalities.”⁷⁶

iii. Compensation

Because employers usually have more assets than their employees, one reason to hold employers liable, from the plaintiff’s point of view, is to ensure a recovery.⁷⁷ Early commentators argued that the corporation’s dominance of the business world required that corporations be held vicariously liable for their employees’ torts. Corporations, by virtue of their public status, had a public duty to pay for the injuries they caused, and without such liability, the families of the injured would experience great hardship.⁷⁸ In other words, vicarious liability is like workers’ compensation: it is simply a social policy.⁷⁹

Although a pure compensation rationale is, perhaps, no more justifiable than theft,⁸⁰ when viewed as corrective justice it is a legitimate goal of the tort system.⁸¹ But corrective justice requires that the payor be in some sense responsible for the injury. Responsibility may arise from fault,⁸² from a failure to act with “due regard for the autonomy of others,”⁸³ or from community standards as expressed by a jury.⁸⁴ In each case, however, the relevant question will be the connection between the tort and the employer, a question which requires a business law, rather than a tort law, analysis.⁸⁵

⁷⁶ See *infra* Part II.C.2.b.i.

⁷⁷ See STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* §§ 4:1, 4:2 (1983); MECHEM, *supra* note 51, § 1856; Glanville Williams, *Vicarious Liability and the Master’s Indemnity*, 20 MOD. L. REV. 220, 232 (1957); BATY, *supra* note 15, at 154.

⁷⁸ See Harold Laski, *The Basis of Vicarious Liability*, 26 YALE L. J. 105, 111-15, 122-26 (1916); James, *supra* note 60, at 170-71.

⁷⁹ See Laski, *supra* note 78, at 126-30.

⁸⁰ See Williams, *supra* note 77, at 232.

⁸¹ See generally Symposium, *Corrective Justice and Formalism: The Care One Owes One’s Neighbors*, 77 IOWA L. REV. 403 (1992).

⁸² See Wells, *supra* note 75, at 1770 n.2 (citing Jules Coleman, *Moral Theories of Torts: Their Scope and Limits, Part II*, 2 L. & PHIL. 5, 6 (1983)).

⁸³ See *id.* at 1773-74 (citing Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 L. & PHIL. 37, 40 (1983)).

⁸⁴ See *id.* at 1777-78 (citing Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990)); see also Geistfeld, *supra* note 63, at 647-51 (considering and rejecting compensation as a rationale for strict liability for ultrahazardous activities).

⁸⁵ See *infra* notes 123-129 and accompanying text; *infra* Part II.C.3.b.iii.

b. *Economic Theories*

In addition to traditional tort theories, two further bases for tort liability and vicarious liability have been advanced by advocates of an economic analysis of the law.

i. *Benefit Theory/Externalities*

Basic economic analysis suggests that an actor must be made to bear all the costs of her activities, including those that, in the natural course of things, would fall upon third parties, in order to provide an incentive for the actor to engage only in cost-justified activities. Thus, making a cement factory compensate its neighbors for the injuries they sustain from the dust, noise, and vibrations from the factory ensures that cement will be produced only if the revenues it creates exceed all the costs of production.⁸⁶ In economic parlance, tort liability can force an actor to internalize the costs of such "externalities" and thus lead to more efficient activity levels. This argument is sometimes applied to justify vicarious liability: the employee's torts are an externality of the employer's business, and the employer must be made to bear these losses.⁸⁷ This analysis begs an important question: which torts are externalities of the business and why? The answer to that question again forces one into business law principles. At the same time, the externalities argument incorporates the fundamental business principle that a business owner must bear all the costs, as well as receive the benefits, of her business. If externalities are connected to the benefits the business receives, they must be included in the costs of doing business. Thus, one might say that the master is liable because she benefits from the tortious conduct.⁸⁸ Strictly speaking, the master probably does not benefit, on a net basis, from the tortious conduct *per se*, although she may benefit from the activity giving rise to the tortious conduct, such as the delivery of her goods giving rise to a traffic accident or the collection of her debt giving rise to a battery. Even more fundamentally, however, the master benefits from *the existence of the agency relationship in the first place*. If the master did not hire the servant, she would be forced to deliver the goods or collect the debt herself. She might, in such a case, have a better chance to prevent the tort (although there is no particular reason to believe she would be less negligent or prone to violence than

⁸⁶ This example is, of course, based on the law school chestnut, *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970).

⁸⁷ See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 514, 543-45 (1961).

⁸⁸ See HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* § 7.5 (3rd ed. 1992); SLAIN ET AL., *supra* note 61, § 1. Another version of this argument maintains that, where a tortfeasor uses the power or authority of her employment to commit a tort, the master should be liable because the master benefits from the grant of power or authority and thus should bear the costs of that grant. See Weber, *supra* note 60, at 1535-41; *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1349-50 (Cal. 1991).

her servant),⁸⁹ but she would incur the opportunity cost of not being able to engage in other business activities. Thus, if the master is rational, she has considered the costs and benefits of hiring agents and servants *ab initio*, as well as of engaging in this particular activity and of engaging in business generally.⁹⁰ Even where the employer is a large corporation, it is reaping the benefits of employing agents because without employees large, efficient, integrated businesses could not exist. Identifying those torts that ought to be included in the costs of a business is a complex process. As described further below, agency law has developed a number of vicarious liability doctrines that seek to identify such torts.

ii. Enterprise Liability

In the past few decades, some torts scholars have espoused enterprise liability,⁹¹ variously described as the principle that “business enterprises ought to be responsible for losses resulting from products they introduce into commerce,”⁹² as “corporate liability for [the] acts of its agents,”⁹³ and as the proposition that “business activities should be governed by strict liability.”⁹⁴ If enterprise liability is taken to mean that businesses should bear the burdens, as well as the benefits, of their activities,⁹⁵ it is simply a new word for the common law of agency.⁹⁶ The concept is usually used, however, to justify broader liability than regular vicarious liability, including strict products liability,⁹⁷ and it is

⁸⁹ See *supra* note 72 and accompanying text.

⁹⁰ See also SEYMOUR D. THOMPSON, COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS § 6298 (1894) (observing that, under a rule that relieves a master of liability when her servant commits an intentional tort, “it would always be more safe and profitable for a man to conduct his business vicariously than in his own person. . . . Meanwhile, the public, obliged to deal or come in contact with his agents, for intentional injuries done by them, might be left wholly without redress.”), *quoted in* Lange v. Nat’l Biscuit Co., 211 N.W.2d 783, 785 (Minn. 1973).

⁹¹ In the early part of the twentieth century this concept was known as the “entrepreneur theory.” See William O. Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584, 585-86 (1929); see also *id.* at 586 n.6 (citing BATY, *supra* note 15; Smith, *supra* note 59; F. TIFFANY, HANDBOOK OF THE LAW OF PRINCIPAL AND AGENT 100-05 (2d ed. 1924); Laski, *supra* note 78; and A. WILLET, THE ECONOMIC THEORY OF RISK AND INSURANCE 58, 140 (1901)); *id.* at 595-98 (discussing the entrepreneur theory in the context of the independent contractor exception); see also Lange v. Nat’l Biscuit Co., 211 N.W.2d 783, 785 (Minn. 1973).

⁹² George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 463 (1985).

⁹³ Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 692 n.1.

⁹⁴ Geistfeld, *supra* note 63, at 613.

⁹⁵ See Keating, *supra* note 62, at 1269; Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 280 (1987).

⁹⁶ See *infra* Parts III.C.2.c.ii, III.C.3.

⁹⁷ See Nolan & Ursin, *supra* note 95, at 257; Wells, *supra* note 75, at 1775-76; Exner v.

sometimes based on some supposed structural difficulty in the way tort law applies to large corporations. For example, enterprise liability is justified as a way to offset the “shareholder primacy norm” popular with corporate decision-makers, pursuant to which corporations are operated to maximize shareholder wealth, rather than, say, social welfare.⁹⁸ Alternatively, enterprise liability is said to be desirable because, unlike individuals, firms usually are rational decision-makers that engage in sophisticated cost-benefit analysis.⁹⁹ Whatever enterprise liability is, however, it too requires an understanding of the nature and extent of the “enterprise” and thus is subject to the same limitations as the other tort theories. As further described below, agency law, properly understood, provides such an understanding through legal doctrines that identify both the persons and the activities that can appropriately be considered part of the enterprise.

c. *Business Theories*

Several of the theories described above simply use different terms to articulate the basic agency law principle that risk and loss must be borne along with benefit and profit, thereby illustrating the basic and enduring nature of those principles. Most agency law commentators have adopted one of two theories. The control theory, an older and more mechanical concept, is still sometimes applied by courts. The risks-and-benefits-of-the-business theory has largely supplanted the control theory among commentators and is more widely reflected in the Restatement (Second) of Agency.¹⁰⁰

i. *Control Theory*

Some commentators define the essence of the agency relationship to be control. Control is one of the elements of the agency relationship generally, and it is an important factor in determining whether an agent is a servant.¹⁰¹ Similarly, some commentators argue that vicarious liability is based on the master’s “implied power to control the actor’s conduct.”¹⁰² At one level, control is said to give rise to liability because the master, by virtue of her control, is in a position

Sherman Power Const. Co., 54 F.2d 510, 514 (2d Cir. 1931); *Green v. Gen. Petroleum Corp.*, 270 P. 952, 955 (Cal. 1928).

⁹⁸ See Wells, *supra* note 75, at 1778-79.

⁹⁹ See Croley, *supra* note 73, at 1733-37.

¹⁰⁰ The Restatement, in fact, contains references to both theories, although the risks-and-benefits-of-the-business theory appears more frequently and more generally underlies the Restatement’s version of the law. See *infra* notes 190-191 and accompanying text.

¹⁰¹ See *infra* Part III.C.3.a.i. See also James, *supra* note 60, at 165.

¹⁰² PERRITT, *supra* note 88, § 7.5. Such implication presumably arises from the fact that the agent must have passed the control test to be a servant.

to prevent, or at least to reduce the frequency of, accidents.¹⁰³ Alternatively, control gives rise to liability because there is an element of dormant fault in the fact that the accident occurred. If the employer has control, it must ultimately be her fault if an accident happened.¹⁰⁴

Most commentators, however, accept that control, even in the employer-employee context, is largely illusory, especially in large or decentralized businesses.¹⁰⁵ To the extent that actual control exists and can be proven, the employer will be directly liable and vicarious liability will be irrelevant.¹⁰⁶ If control is only theoretical or cannot be shown, vicarious liability must rest on some other basis. As argued below, control is better understood as *an incident of ownership* of a business,¹⁰⁷ and it is relevant in determining liability only because liability is, or should be, a concomitant incident of such ownership. This is the risks-and-benefits-of-the-business theory.

ii. Risks and Benefits of the Business Theory

Agency law is based on the fundamental premise that the principal retains all the incidents of ownership of the enterprise:¹⁰⁸ ultimate (although perhaps not day-to-day) control; the benefit of profits, revenues, and opportunities arising from the business; ownership of (and exclusive right to use) business property; responsibility for financial losses; and liability for tort and contractual obligations of the business. For example, a principal may not retain the benefits of a contract while disclaiming the authority of the agent who entered into it. A principal may also not hold out an agent as authorized, or even avail herself of an agent's services, and then escape the obligations entered into by the agent in accordance with that authority or with accepted business practices.¹⁰⁹ Thus, although the agency relationship is often said to have three elements – consent by both the principal and the agent, control by the principal, and the agent's acting on the principal's behalf¹¹⁰ – it is inappropriate to separate the latter two defini-

¹⁰³ See Keating, *supra* note 62, at 1343-45.

¹⁰⁴ This is the reasoning attributed to ancient rules holding owners liable for animals and dangerous objects. See John H. Wigmore, *Responsibility for Tortious Acts: Its History III*, 7 HARV. L. REV. 441, 451-55 (1894). For a variation on this theme, see Keating, *supra* note 62, at 1357-58 (arguing that control over incidence of accidents leads to moral responsibility for those accidents).

¹⁰⁵ See *supra* note 75.

¹⁰⁶ See *supra* Part III.C.1. See also James, *supra* note 60, at 165-67.

¹⁰⁷ See *infra* Parts III.C.2.c.ii, III.C.3.a.i.

¹⁰⁸ In fact, it is the separation of some of these incidents from ownership that creates special issues for corporate law not relevant here. See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 5-10 (Transaction Publishers 1991) (1932).

¹⁰⁹ See *supra* Part III.B.

¹¹⁰ See RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

tional elements. The control comes from and is incident to the fact that the business is being operated on the principal's behalf. It is part of the concept of ownership.

In most cases, both the principal and the agent benefit from the relationship. It is a consensual relationship and the agent must derive a benefit from it or he would not agree to subject himself to the agent's fiduciary obligations.¹¹¹ The principal also derives a business benefit from the act of employing agents generally, because without agency, her business would be limited to those activities she could personally undertake. In short, the use of agents makes business possible.¹¹² It is therefore not inaccurate to characterize the principal as receiving a benefit from the relationship beyond that received by the agent.¹¹³ Each party receives a financial benefit in the exchange of labor for compensation, but the principal receives the additional benefit of being able to use agents generally.¹¹⁴

Tort liabilities are therefore only one of a variety of liabilities and responsibilities that the law imposes on the principal because they are, "in fairness," part of her business.¹¹⁵ Thus, when the agent is an independent contractor, his acts are part of his own business, not the principal's, and the principal is not vicariously liable for those acts.¹¹⁶ Courts frequently invoke this fundamental notion of fairness in the business context,¹¹⁷ and commentators have found some moral philosophical basis for it in Kantian and Aristotelian thought.¹¹⁸ For the purposes of this Article, however, it is enough to note that the law *in fact* reflects a continuing attempt to coordinate the benefits and burdens of business, and any effort to explain business law must be based on that concept.¹¹⁹ For

¹¹¹ *See id.*

¹¹² *See* 1 WILLIAM BLACKSTONE, COMMENTARIES 418 ("[W]ithout such a doctrine as [respondere superior], no mutual intercourse between man and man could subsist with any tolerable convenience.").

¹¹³ *Cf.* MECHEM, *supra* note 51, § 1856 (arguing that because both the principal and agent benefit from the relationship, vicarious liability *cannot* be based solely on the fact that the principal benefits from the agency relationship).

¹¹⁴ *Cf.* ATIYAH, *supra* note 58, at 19 (arguing that principals get "residual" benefits from the use of agents); *see also* BATY, *supra* note 15, at 147 (discussed in ATIYAH, *supra* note 58, at 21) (discussing the idea that principals are held liable for their agents' torts because they are permitted to use agents).

¹¹⁵ *See* Keating, *supra* note 62, at 1269, 1273, 1326; RESTATEMENT (SECOND) OF AGENCY § 8A (1958).

¹¹⁶ *See infra* Part III.C.3.a.i.

¹¹⁷ *See* ATIYAH, *supra* note 58, at 28.

¹¹⁸ *See* Keating, *supra* note 62, at 1273, 1326 (arguing that the best way to balance competing liberty and security interests is to connect benefits and burdens).

¹¹⁹ There are other business law doctrines, besides vicarious liability, that reflect this philosophy. For example, one of the usual elements required before a court will pierce the corporate veil is "an overall element of injustice or unfairness," *Harper v. Del. Valley Broadcasters, Inc.*, 743 F. Supp. 1076, 1085 (D. Del. 1990). This is often proved by a showing of unjust en-

example, the borrowed servant doctrine in agency, which deals with the situation where one employer's employee is temporarily acting as another's, places vicarious liability for the employee's torts on the employer *whose business the employee was benefitting* at the time of the occurrence of the tort.¹²⁰ Where both businesses are benefitting, both employers are liable.¹²¹ Similarly, a principal must indemnify an agent for expenses incurred on the principal's behalf, but need not indemnify an agent for the costs of *the agent's own* business. For example, the practice is for clients to reimburse attorneys for telephone calls, photocopying and telecopying, and travel undertaken directly in the client's service, but not for "overhead" expenses such as office space, record-keeping, utilities, and library expenses.¹²²

Once one accepts that the point of agency law generally, and of vicarious liability in particular, is to coordinate the burdens and benefits of a business, the tricky question is identifying those burdens and benefits that go with the business. This can sometimes be based on the customs and practices of an industry,¹²³ as is the case with the determination of independent contractor status discussed below.¹²⁴ In other cases, courts and commentators look to concepts of causation and foreseeability, although not in the tort-law sense.¹²⁵ For example, Professor Sykes has elaborated a scheme to determine when an enterprise can be said to have "caused" a tort, based upon the extent to which the employment relationship "increases the probability" of the occurrence of the tort.¹²⁶ This test, although compelling, raises a question about the generality of the analysis. Is it the probability of the specific tort, including the identity of or category of the plaintiff (such as assault of a customer), or of the category of the tort (such as assault), or of torts generally, that must be considered? Sykes appears to apply his test to the category of the plaintiff. He uses as an example the probability of negligent repairs in the case of employment of a service station attendant.¹²⁷

richment, such as a corporate shareholder's diverting assets from the corporation to herself, thus leaving the corporation unable to meet its obligations. *See Sea-Land Servs., Inc. v. Pepper Source*, 993 F.2d 1309, 1312 (7th Cir. 1993).

¹²⁰ *See James, supra* note 60, at 196-97 n.156.

¹²¹ *Id.*

¹²² My support for this is largely anecdotal. *See also HYNES, supra* note 15, at 83; WARREN A. SEAVEY, *LAW OF AGENCY* 266 (1964) (discussing real estate agents); *Cory Bros. & Co. v. United States*, 51 F.2d 1010, 1014 (2d Cir. 1931) (noting that "[t]he risks of an independent contractor's business are his own").

¹²³ *See SEAVEY, supra* note 122, at 266.

¹²⁴ *See infra* Part II.C.3.a.i.

¹²⁵ *See, e.g., MECHEM, supra* note 51, § 1883 (arguing that the principal should be liable where she puts the agent into a position requiring the agent to use his own judgment).

¹²⁶ *See Sykes, supra* note 53, at 572.

¹²⁷ *Id.*

Professor Keating uses a similar analysis: does the business activity increase the probability of this type of tort beyond its base-line, "background," probability in the world at large.¹²⁸ Most commentators argue that such increased risk-causation must also be reasonably foreseeable, in the common sense of the term.¹²⁹ This requirement makes sense in the business context because a well-run business will calculate the interplay of risks and rewards, but can only be expected to do so for those that are foreseeable. It is worth noting that, although the coordination of burdens and benefits is a fundamental principle of agency law, it is closely analogous to the law of strict liability for ultrahazardous activities.¹³⁰ The Restatement (Second) of Torts provides:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to . . . another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.¹³¹

Thus, liability is premised on the risk the defendant has created, but the harm resulting from the risk must be, in a sense, foreseeable.¹³² The "fairness" policy rationale for vicarious liability also resonates in the context of ultrahazardous activities. As Learned Hand wrote in one ultrahazardous activity case, "The extent to which one man in the lawful conduct of his business is liable for injuries to another involves an adjustment of conflicting interests."¹³³ In the words of Holmes,

The same reasoning which would make a man answerable in

¹²⁸ See Keating, *supra* note 62, at 1280, 1287-88. See also ATIYAH, *supra* note 58, at 28, 172. Cf. Nolan & Ursin, *supra* note 95, at 290-291 (discussing a non-reciprocal risk test for enterprise liability); Keating, *supra* note 62, at 1328 (arguing against such a test).

¹²⁹ See Keating, *supra* note 62, at 1288 n.68; ATIYAH, *supra* note 58, at 172; *Ira S. Bushey & Sons, Inc.*, 398 F.2d at 171-72. See also HOLMES, *supra* note 57, at 75-76, 116-17, 127-28 (discussing the importance of foreseeability in attributing legal responsibility for risks generally).

¹³⁰ See ATIYAH, *supra* note 58, at 21-22 (comparing vicarious liability to liability for animals and leaking reservoirs).

¹³¹ RESTATEMENT (SECOND) OF TORTS § 519(2) (1977).

¹³² See *Green v. Gen. Petroleum Corp.*, 270 P. 952, 955 (Cal. 1928); RESTATEMENT OF TORTS § 519 (1938); Boston, *supra* note 71, at 617 (describing limited change to foreseeability requirement in Restatement (Second) of Torts).

¹³³ *Exner v. Sherman Power Const. Co.*, 54 F.2d 510, 514 (2d Cir. 1931); cf. *Langan v. Valicopters, Inc.*, 567 P.2d 218, 223 (Wash. 1977) (holding that in a case involving strict liability for an abnormally dangerous activity, "there can be an equitable balancing of social interests only if appellants are made to pay for the consequences of their acts").

trespass for all damage to another by force directly resulting from his own act, irrespective of negligence or intent, would make him answerable in case for the like damage similarly resulting from the act of his servant, in the course of the latter's employment.¹³⁴

In sum, the best explanation for vicarious liability lies in agency law generally: it forces the owner of a business to pay costs, including tort liabilities, associated with her business. An examination of vicarious liability doctrine reveals not only that this is the underlying policy of the law, but also the answer to the continuing question, what costs can be said to be associated with a business and therefore the responsibility of the owner of the business?

3. Vicarious Liability Doctrine

The fact that there is no accepted theoretical basis for vicarious liability has left the specific rules governing liability in some confusion, although the general framework is clear. First, the law of vicarious liability is the same whether the underlying tort is an intentional tort, an act of negligence, or a strict liability tort,¹³⁵ a fact that in itself indicates that the doctrine is not about torts at all. Whatever the nature of the underlying tort, the principal will be liable only if the tortfeasor was a servant, rather than an independent contractor, and only if the tort was committed within the scope of the servant's employment.

a. *The Master/Servant Relationship*

The requirement that there be a master/servant relationship between the defendant and the tortfeasor is sometimes known as the "independent contractor exception,"¹³⁶ reflecting the fact that vicarious liability is an agency law doctrine that applies only to some agents. Agents who are independent contractors, rather than servants, are excepted from the rule.¹³⁷

i. The Independent Contractor Exception

The distinction between a "servant" and a non-servant agent (an independent contractor) is often said to be based on the degree of control the princi-

¹³⁴ HOLMES, *supra* note 57, at 73. See also Keating, *supra* note 62, at 1289-93 (comparing rationale for strict liability for ultrahazardous activities with vicarious liability).

¹³⁵ See ATIYAH, *supra* note 58, at 263.

¹³⁶ See HYNES, *supra* note 15, at 157.

¹³⁷ This, again, reflects the fact that vicarious liability is not a tort law doctrine. If it were, not only independent contractors would be excepted, but the entire world other than masters and servants.

pal exerts over the agent's performance of his duties.¹³⁸ In fact, this control test is only a proxy for a more basic, but harder to define, idea: either the agent is employed in the principal's business,¹³⁹ in which case the agent is a servant, or the agent is engaged in a business of his own, in which case he is an independent contractor.¹⁴⁰ As the Restatement puts it, the servant is "an integral part of his master's establishment,"¹⁴¹ whereas the non-servant "aids in the business enterprise but is not a part of it."¹⁴²

The Restatement provides a set of factors that are to be used in determining whether an agent is an independent contractor.¹⁴³ The factors are

- (a) the extent of control which . . . the master may exercise over the details of the work;
- (b) whether or not the [agent] is engaged in a distinct occupation or business;
- (c) . . . whether . . . the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether [the principal or the agent] supplies the instrumen-

¹³⁸ The Restatement describes an independent contractor as someone who "contracts with another to do something for [her] but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." RESTATEMENT (SECOND) OF AGENCY § 2(3) (1958). A servant, on the other hand, is someone "whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." *Id.* § 2 (2).

¹³⁹ See RESTATEMENT (SECOND) OF AGENCY, ch. 7: Liability of Principal to Third Persons; Torts, Topic 2: Liability for Authorized Conduct or Conduct Incidental Thereto; Title B: Torts of Servants, Introductory Note (1958). The Restatement also defines a servant as someone within the "business household of the principal," a strange concept that appears to be a remnant of the alleged ancient Roman roots of vicarious liability in the liability of the Roman *paterfamilias* for the acts of all those within his *patria potestas*, a concept sometimes loosely defined as a household. See *id.* at 478.

¹⁴⁰ As Holmes noted, the exception is based on the fact that "the independent contractor acts in his own name and on his own behalf." Holmes, *supra* note 58, at 15.

¹⁴¹ RESTATEMENT (SECOND) OF AGENCY, ch. 7: Liability of Principal to Third Persons; Torts, Topic 2: Liability for Authorized Conduct or Conduct Incidental Thereto; Title B: Torts of Servants, Introductory Note (1958).

¹⁴² RESTATEMENT (SECOND) OF AGENCY, ch. 7: Liability of Principal to Third Persons; Torts, Topic 2: Liability for Authorized Conduct or Conduct Incidental Thereto; Title B: Torts of Servants, Introductory Note (1958). *cf.* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 71, at 509 (5th ed. 1984) (discussing argument that even in the case of an independent contractor, "the enterprise is still the employer's").

¹⁴³ RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

talities, tools and the place of work . . . ;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relationship of master and servant; and

(j) whether the principal is or is not in business.¹⁴⁴

Some of those factors seem to define the concept of “physical control,”¹⁴⁵ but they are more clearly a way of determining when someone is engaged in his own independent business.¹⁴⁶ Ownership of tools, control over time and location, and payment on a per-job basis are all characteristics of an independent business owner. Factors (a), (b), (e), (g) and arguably (h) are directed at the common sense view of “whose business is this?” rather than “who’s in control here?” If, as I argue, vicarious liability is best understood as a means to ensure that a business bears both its benefits and its burdens, then the point of the independent contractor exception is to exclude those burdens, or risks, that are not part of the defendant’s business (because they are in fact risks of another business – the independent contractor’s).¹⁴⁷

ii. Vicarious Liability by Estoppel or “Apparent Agency”

¹⁴⁴ *Id.*; see also ATIYAH, *supra* note 58, at 50-69.

¹⁴⁵ Holmes, for instance, thought the independent contractor exception provided a common sense limit on vicarious liability, because it eliminated liability where the principal did not control the acts of the agent. See Holmes, *supra* note 58, at 15-16. He also thought the use of other factors was “evidence of the want of any more profound or logical reason” for the exception. *Id.*

¹⁴⁶ See Sykes, *supra* note 68, at 1262, 1269-71 (arguing that the independent contractor exception is an attempt to limit vicarious liability only to situations in which the tortfeasor’s conduct was “observable” by the defendant, and therefore where the defendant’s policies would be able to deter tortious conduct); Posner, *supra* note 69, at 43 (arguing that the independent contractor exception is an attempt to limit vicarious liability only to situations in which the defendant would be able to prevent the tortious conduct and, additionally, to situations in which the tortfeasor is likely to be judgment-proof and therefore not likely to be deterred by liability); Smith, *supra* note 59, at 460-61 (arguing that the independent contractor exception is an attempt to impose vicarious liability on the party best able to spread the loss).

¹⁴⁷ See James, *supra* note 60, at 193-201, 196-97 n.156.

The independent contractor exception is itself limited by the strange doctrine of “vicarious liability by estoppel” or “apparent agency.”¹⁴⁸ This doctrine occasionally permits a tort plaintiff to reach the principal despite the fact that the tortfeasor was not a servant.¹⁴⁹ Frequently used to create hospital liability for the acts and omissions of emergency room physicians who are, as a legal matter, clearly independent contractors, the doctrine holds a principal liable if the plaintiff can show that she was unaware of the doctor’s status as an independent contractor, that the hospital held itself out as providing emergency room care, and that she relied on the hospital, rather than any particular physician, to provide health care.¹⁵⁰ Like other instances of vicarious tort liability based on apparent authority,¹⁵¹ the “apparent agency” doctrine is based on the element of misrepresentation contained in the principal’s statements, combined with the plaintiff’s reliance thereon.¹⁵² It is also consistent with the general principle of vicarious liability described above, that a business should bear both its burdens and benefits. If a business is *holding out* independent contractors as servants, it is seeking to “have its cake and eat it too” by avoiding liability while appearing to offer full service and responsibility. Just as there are some duties that one is not permitted to delegate,¹⁵³ one is not permitted, *vis-a-vis* third parties, secretly to contract out of the master-servant relationship.¹⁵⁴

b. *The Scope of Employment*

A master is only liable for torts of a servant that occur while the servant is acting within the “scope of employment.”¹⁵⁵ This is a natural enough rule,¹⁵⁶ but the definition of the scope of employment is open to considerable contro-

¹⁴⁸ The quotation marks here indicate that this is not apparent authority in the usual sense of the word, described *supra* Part III.B.1.

¹⁴⁹ See RESTATEMENT (SECOND) OF AGENCY § 267 (1958). The doctrine has also been used to hold defendants liable where the tortfeasor was not an agent at all. See *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156 (4th Cir. 1988) (allowing plaintiffs to reach franchisor upon showing of reliance).

¹⁵⁰ See *Gilbert v. Sycamore Mem’l Hosp.*, 622 N.E.2d 788, 794-96 (Ill. 1993).

¹⁵¹ See *supra* Part III.B.1.

¹⁵² See RESTATEMENT (SECOND) OF AGENCY §§ 265-267 (1958).

¹⁵³ See RESTATEMENT (SECOND) OF AGENCY § 214 (1958). See also *infra* note 281.

¹⁵⁴ See *James v. Ingalls Mem’l Hosp.*, 701 N.E.2d 207, 212 (Ill. App. 1998) (holding that hospital was not vicariously liable where plaintiff’s testimony clearly indicated that the relationship between the hospital and its physicians was not a factor in her decision to go to that hospital).

¹⁵⁵ See RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

¹⁵⁶ Cf. *Holmes*, *supra* note 58, at 15-16 (describing the scope of employment limitation as a common sense limitation on a rule – the identification of principal and agent – that was too broad).

versy. There are several tests for determining when the servant is acting within the scope of his employment.

i. Restatement “Purpose to Serve”

The Restatement provides that

(1) Conduct of a servant is within the scope of employment if, but only if:

- (a) it is of the kind he is employed to perform;
- (b) it occurs substantially within the authorized time and space limits;
- (c) it is actuated, at least in part, by a purpose to serve the master; and
- (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.¹⁵⁷

Additionally, “conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.”¹⁵⁸ The most important part of this test in difficult cases is the requirement that there be a “purpose to serve” the master. Most American states accept this as the basic test for evaluating whether an act was committed within the scope of employment,¹⁵⁹ but its limita-

¹⁵⁷ RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

¹⁵⁸ *Id.* at § 229(1).

¹⁵⁹ See *Fisher v. Townsends, Inc.*, 695 A.2d 53 (Del. 1997); *Peachtree-Cain Co. v. McBee*, 327 S.E.2d 188 (Ga. 1985); *Sandman v. Hagan*, 154 N.W.2d 113 (Iowa 1967); *Podolan v. Idaho Legal Aid Serv., Inc.*, 854 P.2d 280 (Idaho Ct. App. 1993); *Gaffney v. City of Chicago*, 706 N.E.2d 914 (Ill. App. Ct. 1998); *Doe v. Louisiana Mun. Ass’n*, 746 So. 2d 179 (La. Ct. App. 1999); *Leek v. Cohen*, 38 A.2d 460 (Me. 1944); *Schlichte v. Granite Sav. Bank*, 662 N.E.2d 238 (Mass. App. Ct. 1996); *Brinkman v. Zuckerman*, 159 N.W. 316 (Mich. 1916); *National Convenience Stores, Inc. v. Fantauzzi*, 584 P.2d 689 (Nev. 1978); *Wilson v. Peverly*, 2 N.H. 548 (1823); *Di Cosala v. Kay*, 450 A.2d 508 (N.J. 1982); *Sheridan v. Charlick*, 4 Daly 338 (N.Y. Com. Pl. 1872); *Lourim v. Swensen*, 977 P.2d 1157 (Or. 1999); *Vargas Mfg. Co. v. Friedman*, 661 A.2d 48 (R.I. 1995); *Tennessee Farmers Mut. Ins. Co. v. Am. Mut. Liab. Ins. Co.*, 840 S.W.2d 933 (Tenn. Ct. App. 1992); *Poplaski v. Lamphere*, 565 A.2d 1326 (Vt. 1989); *Courtless v. Jolliffe*, 507 S.E.2d 136 (W. Va. 1998); *Thiery v. Bye*, 597 N.W.2d 449 (Wis. Ct. App. 1999). An alternative formulation of the test focuses on whether the employee was acting “in furtherance of the business” of the employer. See *Ex parte Atmore Cmty. Hosp.*, 719 So. 2d 1190 (Ala. 1998); *Porter v. Harshfield*, 948 S.W.2d 83 (Ark. 1997); *Grease Monkey Int’l, Inc. v. Montoya*, 904 P.2d 468 (Colo. 1995); *Hankard v. Town of Avon*, 1999 Conn. Super. LEXIS 1679 (Conn. Super. Ct. June 21, 1999); *Sebastian v. District of Columbia*, 636 A.2d 958 (D.C. 1994); *Gowan v. Bay County*, 744 So. 2d 1136 (Fla. Dist. Ct. App. 1999); *Wong-Leong v. Hawaiian Indep. Refinery, Inc.*, 879 P.2d 538 (Haw. 1994); *City of Fort Wayne v. Moore*, 706

tions are obvious. First, assessing the motives of the servant may be a difficult matter.¹⁶⁰ The Restatement reports that the test is a subjective one: the question is the state of mind of the servant at the time of committing the tort, although the actions and statements by the servant should be used as evidence of state of mind.¹⁶¹ Problems frequently arise in applying this test. In one leading case, the tortfeasor's behavior in turning some valves on a drydock was inexplicable, there had been no witnesses to the tort, and the tortfeasor had disappeared prior to trial; his motives were therefore completely unknown.¹⁶²

Furthermore, because a mixed motive is usually sufficient to place an act within the scope of employment, plaintiffs stretch to find ways in which the servant might have thought he was serving the master in committing the tort.¹⁶³ In many battery cases, what appears to have begun as an attempt to serve the master degenerates into a personal grudge. Courts have difficulty determining whether there was a purpose to serve the master in such cases,¹⁶⁴ although plain-

N.E.2d 604 (Ind. Ct. App. 1999); Shedd Brown Mfg. Co. v. Tichenor, 257 S.W.2d 894 (Ky. Ct. App. 1953); Lovelace v. Anderson, 730 A.2d 774 (Md. 1999); Hentges v. Thomford, 569 N.W.2d 424 (Minn. Ct. App. 1997); Odier v. Sumrall, 353 So. 2d 1370 (Miss. 1978); Maryland Cas. Co. v. Huger, 728 S.W.2d 574 (Mo. Ct. App. 1987); Ellinghouse v. Ajax Live Stock Co., 152 P. 481 (Mont. 1915); Plock v. Crossroads Joint Venture, 475 N.W.2d 105 (Neb. 1991); Childers v. Southern Pac. Co., 149 P. 307 (N.M. 1915); B.B. Walker Co. v. Burns Int'l Sec. Serv., Inc., 424 S.E.2d 172 (N.C. Ct. App. 1993); Bodle v. Wenner, 266 N.W. 894 (N.D. 1936); Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991); Iandiorio v. Kriss & Senko Enter., Inc., 517 A.2d 530 (Pa. 1986); Lane v. Modern Music, Inc., 136 S.E.2d 713 (S.C. 1964); Drew v. Stanton, 603 N.W.2d 79 (S.D. 1999); Lyon v. Allsup's Convenience Stores, Inc., 997 S.W.2d 345 (Tex. Ct. App. 1999); Roughton Pontiac Corp. v. Alston, 372 S.E.2d 147 (Va. 1988); Thompson v. Everett Clinic, 860 P.2d 1054 (Wash. App. 1993); Beard v. Brown, 616 P.2d 726 (Wyo. 1980).

¹⁶⁰ See THOMPSON, *supra* note 90, § 6298 (criticizing a rule that "made a certain mental condition of the servant the test by which to determine whether he was acting about his master's business or not"), *quoted in* Lange v. National Biscuit Co., 211 N.W.2d 783, 785 (Minn. 1973).

¹⁶¹ See RESTATEMENT (SECOND) OF AGENCY § 235 cmt. a (1958). See also MECHEM, *supra* note 51, § 1900 (stating that the master may be liable for a servant's deviation that is made to enable the servant to accomplish "some incidental purpose of his own, if, notwithstanding this, his main end and purpose was still the performance of his master's business").

¹⁶² See *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 169-70 (2d Cir. 1968).

¹⁶³ See *Overton v. Ebert*, 580 N.Y.S.2d 508, 509 (N.Y. App. Div. 1992) (rejecting plaintiff's argument that employee going to store to get soda and snack was within scope of employment because he "was furthering the course of his employment by replenishing himself with food which would give him the energy to continue the back-breaking work he endured as a yardman"); *Rivas v. Nationwide Personal Sec. Corp.*, 559 So.2d 668, 670 (Fla. App. 1990) (finding sufficient evidence to support verdict that employee was acting within scope of employment where he began choking the store manager and then struck the cashier, who was screaming for help, to silence her and thus defuse a disruptive situation in the store).

¹⁶⁴ See *Lange v. Nat'l Biscuit Co.*, 211 N.W.2d 783, 785 (Minn. 1973) ("[W]e reject as the basis for imposing liability the arbitrary determination of when, and at what point, the argument and assault leave the sphere of the employer's business and become motivated by personal animosity.").

tiffs sometimes prevail.¹⁶⁵ In sexual assault cases, on the other hand, courts routinely find that there was no purpose to serve the master,¹⁶⁶ despite the fact that the motives for sexual assaults are no better understood than the motives for violent, nonsexual ones. Second, it is not clear why the servant's subjective motivation for committing the tort should matter.¹⁶⁷ In the negligence cases, for example, a servant who is engaged on a "detour" – a minor deviation from his job – is deemed to be acting within the scope of employment while a servant engaged in a "frolic" is not. In both cases, the servant is acting, by definition, for his own purposes; the difference is the distance, literally and figuratively, which the servant has traveled outside his regular duties. Thus, even in traditional *respondeat superior* analysis motive is not always the determining factor. The Restatement itself places the defining principle in scope of employment analysis elsewhere: "the ultimate question is whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed."¹⁶⁸ In sum, the purpose-to-serve test, like the control-based version of the independent contractor exception, is only a means to determine whether the tort occurred within the master's enterprise, and it should be applied with that principle in mind.¹⁶⁹

Finally, if the purpose-to-serve test is intended to present a bright-line rule, it fails to do so.¹⁷⁰ For one thing, evidence of the servant's motives will be subject to manipulation after the fact. Depending on the master's response to the occurrence of the tort, the servant may find his recollections biased in one direction or the other. Also, modern psychology provides ample opportunity to muddy the waters of motivation. As discussed below,¹⁷¹ actions that may appear to be motivated solely by a desire for personal gratification may in fact be motivated by complex considerations generated by the employment environment and

¹⁶⁵ See, e.g., *Carr v. Wm. C. Crowell Co.*, 171 P.2d 5 (Cal. 1946); *Lange v. Nat'l Biscuit Co.*, 211 N.W.2d 783 (Minn. 1973); *Rodebush v. Oklahoma Nursing Homes, Ltd.*, 867 P.2d 1241 (Okla. 1993); *Clark v. Pangan*, 998 P.2d 268 (Utah 2000). But see *KEETON ET AL.*, *supra* note 142, § 70 n. 48 (collecting cases where violent assaults were held to be outside the scope of employment, even though there was a purpose to serve the principal).

¹⁶⁶ See *infra* Part III.B.

¹⁶⁷ Mechem also rejects the purpose-to-serve test as missing the point: "The relation of the means to the end, and the question of the ordinary or extraordinary nature of the act would be more material [than an intention to benefit the master]." MECHEM, *supra* 51, § 1882. Other commentators have argued that the question should be whether the conduct is a "mode of carrying out" the authorized act, not what the servant's purpose was in selecting that mode. See *ATIYAH*, *supra* note 58, at 197-200.

¹⁶⁸ RESTATEMENT (SECOND) OF AGENCY § 229 cmt. a (1958).

¹⁶⁹ See *James*, *supra* note 60, at 183 ("[T]he servant's motive is significant only to the extent that it sheds light on whether his conduct may fairly be regarded as a risk of his master's business.").

¹⁷⁰ See *ATIYAH*, *supra* note 58, at 191-97.

¹⁷¹ See *infra* Part IV.A.1.

even by a desire to “improve” the workplace. As Judge Friendly noted, the purpose-to-serve test has been applied in a “highly artificial way,” as “courts have gone to considerable lengths to find such a [purpose]” and impose liability.¹⁷²

ii. Engendered by the Employment

A somewhat different test recently revitalized by the California Supreme Court is the “engendered by the employment” test.¹⁷³ Under this test, an act is within the scope of employment if there was a “causal nexus” between the tort and the employment relationship.¹⁷⁴ The causal nexus must be more than that the work provided the opportunity for interaction between the victim and the tortfeasor. Rather, the incident must be an “outgrowth” of the employment.¹⁷⁵ Thus, where a hospital employee sexually assaulted a patient, the act would be within the scope of employment only where the employee’s duties involved “work-related emotional involvement”¹⁷⁶ or “intense emotions” on the part of either the employee or the patient,¹⁷⁷ or where the “motivating emotions” of the tort were otherwise “fairly attributable to work-related events or conditions.”¹⁷⁸ Other courts and commentators have proposed similar tests.¹⁷⁹ The engendered-by-the-employment test is generally used where the servant has committed an assault or battery, a situation where the purpose-to-serve test is frequently difficult to apply, and the test reflects an attempt to determine

¹⁷² *Ira S. Bushey & Sons, Inc., v. United States*, 398 F.2d 167, 170 (2d Cir. 1968). Judge Friendly cited the “well-known opinion” of a case in which a seaman who routed another seaman from his bunk and proceeded to engage in a fight was held to be within the scope of employment because the seaman “might have thought he was acting in the interest of the ship.” *Id.* (citing *Nelson v. American-West African Line*, 86 F.2d 730 (2d Cir. 1936)). For another criticism of the application of the scope-of-employment requirement, which he attributes to the basic unworkability of the identification doctrine, see *Holmes*, *supra* note 58, at 16-19.

¹⁷³ *See Lisa M. v. Henry Mayo Newhall Mem’l Hosp.*, 907 P.2d 358, 361 (Cal. 1995), *citing Carr v. Wm. C. Crowell Co.*, 171 P.2d 5 (Cal. 1946).

¹⁷⁴ *Lisa M.*, 907 P.2d at 361.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 364.

¹⁷⁷ *Id.* at 365.

¹⁷⁸ *Id.* at 364.

¹⁷⁹ *See Rodebush By and Through Rodebush v. Oklahoma Nursing Homes, Ltd.*, 867 P.2d 1241 (Okla. 1993), *quoting Russell-Locke Super-Service, Inc. v. Vaughn*, 40 P.2d 1090, 1094 (Okla. 1935) (finding liability where the tort arose “from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master’s business”); *Lange v. Nat’l Biscuit Co.*, 211 N.W.2d 783, 786 (Minn. 1973) (finding liability where the “precipitating cause” of an argument leading to an assault “concerned the employee’s conduct of his work”); *Sykes*, *supra* note 53, at 572, 588 (advocating a rule that imposes liability where the enterprise “causes” the injury by increasing the probability that the tort will occur). *See also KEETON ET AL.* *supra* note 142, § 70, at 507.

whether the risk of assault is “typical of or broadly incidental to the enterprise.”¹⁸⁰ It is therefore best understood as a specific application of the risk-of-the-enterprise test described below.

iii. Risk of the Enterprise/Foreseeability

The fundamental principle underlying the scope of employment requirement is that a master should be liable only for torts that are in some sense a part of her business,¹⁸¹ just as the fundamental principle underlying the independent contractor exception is that a principal should be liable only for torts committed by those who are working as part of her business. Thus, the scope of a servant’s employment should be determined by reference to a test that seeks to identify the risks of the enterprise and compares those risks to the servant’s acts in the particular case.¹⁸² One such test¹⁸³ asks whether the risk of harms of the kind involved¹⁸⁴ is characteristic of the enterprise. Identification of such characteristic risks is in turn based on foreseeability.¹⁸⁵

Judge Friendly’s opinion in *Ira S. Bushey & Sons, Inc. v. United States*¹⁸⁶ is the source usually cited as the origin of the characteristic risk test.¹⁸⁷ Friendly noted that the doctrine of *respondeat superior* is based not on tort principles, but rather on the “deeply rooted sentiment that a business enterprise can-

¹⁸⁰ *Lisa M.*, 907 P.2d at 362 (quoting *Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988, 990 (Cal. 1970)).

¹⁸¹ As Mechem describes it, “the question is . . . whether . . . , at the time of the injury, [the servant was] really engaged upon his master’s business or his own.” MECHEM, *supra* note 51, § 1895. See also *id.* § 1896 (noting the fundamental issue is whether “the business can fairly be called the master’s”); HENRY H. PERRITT, JR., *WORKPLACE TORTS: RIGHTS AND LIABILITIES* § 10.30 (1991) (stating that the important question is “was the actor engaged in the employer’s business or on a personal matter”); RESTATEMENT (SECOND) OF AGENCY § 229 cmt. a (1958) (“[T]he ultimate question is whether or not it is just that the loss resulting from the servant’s acts should be considered as one of the normal risks to be borne by the business in which the servant is employed.”); *id.* § 229 illus. 4, 5 (noting that the key question is whether the act occurred during the performance of a part of the defendant’s business).

¹⁸² See ATIYAH, *supra* note 58, at 171-72; KEETON ET AL., *supra* note 142, § 69 at 500; see generally SLAIN ET AL., *supra* note 61, at Ch.II § 1; James, *supra* note 60, at 182.

¹⁸³ The “engendered-by-the-employment test” is also sometimes described as an attempt to determine whether the risk ought to be borne by the business. See *Lisa M.*, 907 P.2d at 362.

¹⁸⁴ The question focuses on the general class of injury, not on the specific incident. See *Ira S. Bushey & Sons, Inc., v. United States*, 398 F.2d 167, 172 (2d Cir. 1968); ATIYAH, *supra* note 58, at 172.

¹⁸⁵ Cases applying foreseeability analysis include *State v. Schallock*, 941 P.2d 1275 (Ariz. 1997); *Lisa M.*, 907 P.2d 358; *Commerce Bank of St. Joseph, N.A. v. State*, 833 P.2d 996 (Kan. 1992).

¹⁸⁶ 398 F.2d 167 (2d Cir. 1968).

¹⁸⁷ Fleming James strongly advocated the test, in exactly the same language used in *Ira S. Bushey & Sons, Inc.*, about a decade earlier. See James, *supra* note 60, at 175-77.

not justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.”¹⁸⁸ Characteristic risks are those that are foreseeable in a very specific sense: the ordinary operation of the business enterprise increases the risk in question.¹⁸⁹ Foreseeability in this context does not require that the risk be avoidable with due care.¹⁹⁰ Rather, a risk is foreseeable if one should perceive that harm is “likely to flow from [one’s] long run activity in spite of all reasonable precautions.”¹⁹¹ This rule follows from the fact that the foreseeability requirement is intended not to deter carelessness, but rather to force the operator of an enterprise to include in her costs of doing business liability for all the risks created by the business.¹⁹² A determination of foreseeability thus requires an inquiry into what deviations from instructions might “reasonably be expected on the part of servants similarly employed.”¹⁹³ Although Friendly’s characteristic risk analysis was a new way of looking at the scope of employment that has not been widely adopted in the courts, the Restatement includes foreseeability as a factor to be considered in determining whether an act was within the scope of employment.¹⁹⁴ Also, Judge Friendly’s understanding of the fundamental principles of both *respondeat superior* and of the scope of employment requirement are directly embodied in the Restatement.¹⁹⁵

¹⁸⁸ *Ira S. Bushey & Sons, Inc.*, 398 F.2d at 171. One commentator has criticized Friendly’s characteristic risk theory on the ground that it has never been accepted “by the tort system as a whole,” Schwartz, *supra* note 52, at 1750, which was of course Friendly’s point.

¹⁸⁹ See *Ira S. Bushey & Sons, Inc.*, 398 F.2d at 171-72; HOLMES, *supra* note 57, at 75-76; James, *supra* 60, at 175; Keating, *supra* note 62, at 1280, 1287-88.

¹⁹⁰ See James, *supra* note 60, at 176; Keating, *supra* note 62, at 1288, 1295. In this respect, Holmes had a different conception of foreseeability in mind. See HOLMES, *supra* note 57, at 76-77 (noting that foreseeability permits a defendant to take precautions to avoid an accident).

¹⁹¹ James, *supra* note 60, at 176. See also RESTATEMENT (SECOND) OF AGENCY § 230 cmt. b (1958) (noting that the master must expect the servant to occasionally deviate from instructions); ATIYAH, *supra* note 58, at 172.

¹⁹² See ATIYAH, *supra* note 58, at 172, 263; HOLMES, *supra* note 57, at 127-28; James, *supra* note 60, at 175. See also *Edwards v. Honeywell, Inc.*, 50 F.3d 484, 490 (7th Cir. 1995). The foreseeability requirement also solves some of the problems raised by general liability without fault. Even Holmes, who criticized much of the law of agency for being contrary to common sense, noted that, “according to the ordinary canons of legal responsibility,” a man would be liable when “he has induced the immediate wrong-doer to do acts of which the wrong, or, at least, wrong, was the natural consequence under the circumstances known to the defendant.” Holmes, *supra* note 58, at 14. See also HOLMES, *supra* note 57, at 75-76; Schwartz, *supra* note 52, at 1747 (discussing Holmes’s views on foreseeability in vicarious liability).

¹⁹³ KEETON ET AL., *supra* note 142, § 70, at 504.

¹⁹⁴ See RESTATEMENT (SECOND) OF AGENCY § 229 cmt. b (1958); *id.* § 231 cmt. a (noting that criminal acts are often outside the scope of employment because they are unexpected); *id.* § 245 cmts. a, c (noting that the liability of the principal will depend on the “likelihood of a battery” in a given business, based on the kind of result to be accomplished, the customs of the enterprise, the nature of the persons usually employed in the work, and human nature).

¹⁹⁵ See RESTATEMENT (SECOND) OF AGENCY § 161 cmt. a, § 229 cmt. a (1958).
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In sum, the scope of employment doctrine is intended to limit a principal's vicarious tort liability to those situations where the tort was an incident of her business activity, rather than of ordinary life. The purpose-to-serve test, the engendered-by-the-employment test, and the characteristic risk/foreseeability test are all attempts to capture that notion, and each, if applied with the fundamental principle in mind, will usually lead to results that in fact coordinate tort liability with the enterprise that created or materially enhanced the risk of harm. The scope of employment doctrine thus advances the larger goal of agency law: coordinating the risks and benefits of business enterprises.¹⁹⁶

c. *Conduct Outside the Scope of Employment:
Restatement § 219(2)*

The Restatement provides one basis¹⁹⁷ for vicarious tort liability where the conduct giving rise to the tort did not occur within the scope of the servant's employment: if "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."¹⁹⁸ The grammar of this section has led to considerable confusion. In the Title VII cases, the Supreme Court treated the second clause of the sentence as completely independent of the first. In other words, the Court held that a master is liable for her servant's conduct outside the scope of employment if the servant was aided in accomplishing the tort by the existence of the agency relation.¹⁹⁹ Such a rule would vastly expand vicarious tort liability, and would make the scope of employment requirement largely superfluous because in almost every case where the tort is within the scope of employment the tortfeasor will have been aided in commission of the tort by the agency relationship.

As the comment to Section 219(2) makes clear, however, the second clause of the sentence is intended to be an alternative only to the second part of the first clause, "there was reliance upon apparent authority." In other words, the second situation in which a master may be liable under Section 219(2)(d) exists where the servant purported to act or speak on behalf of the principal and he was aided in accomplishing the tort by the existence of the agency relationship.²⁰⁰

¹⁹⁶ See SLAIN ET AL., *supra* note 61, Ch. II § 1; James, *supra* note 60, at 182.

¹⁹⁷ Section 219(2) also provides that a master will be liable, even if the servant is acting outside the scope of employment, if the master is herself at fault. See RESTATEMENT (SECOND) OF AGENCY § 219(2)(a)–(c) (1958). I do not include such liability within the category of vicarious liability because it is based on general tort law, not agency law, principles. See RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (1958).

¹⁹⁸ RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958).

¹⁹⁹ See *infra* notes 215–19 and accompanying text (describing Supreme Court's use of section 219(2)(d)).

²⁰⁰ Interestingly, the same concept is phrased slightly differently, and more clearly, in the comment to section 228: "[A] master may be liable if a servant speaks or acts, purporting to do

The examples given in the comment illustrate such situations: "where a telegraph operator sends a false message" or where the manager of a store cheats a customer.²⁰¹ In both cases, the commission of the tort involves both the fact of the agency relationship and the fact that the servant was purportedly acting in his capacity as servant.²⁰² Thus, in a situation where a servant is aided in the commission of the tort by the existence of the agency relationship, but where the commission of the tort does not involve the servant's capacity as a servant, there should not be liability under Section 219(2)(d).²⁰³ Such a rule supports the general principle that a master should be liable for torts that are incidents of the business, but not those that merely coincide with the operation of the business. The basis of liability described in Section 219(2)(d) thus does not detract from or conflict with the general principles of the scope of employment doctrine or of vicarious tort liability generally.

III. VICARIOUS LIABILITY FOR SEXUAL HARASSMENT UNDER TITLE VII

A. *The Supreme Court's Title VII Decisions*

In 1998, the United States Supreme Court set forth the rule²⁰⁴ for an employer's vicarious liability for sexual harassment by supervisory employees under Title VII of the Civil Rights Act of 1964.²⁰⁵ That rule provides that an

son on behalf of his principal, and there is reliance upon his apparent authority or he is aided in accomplishing the tort by the existence of the agency relation." RESTATEMENT (SECOND) OF AGENCY § 228 cmt. a (1958).

²⁰¹ *Id.* § 219 cmt. e.

²⁰² The analysis is somewhat complicated by the fact that, where there is no apparent authority, as in the case where the store manager is acting for an undisclosed principal, the servant cannot be said to have expressly "purported" to act for the principal. *See id.* Nevertheless, the identification of the servant with the principal, or at least with the business, is an essential feature of the tort. Section 219(2)(d) is thus intended to apply to "speech torts," as discussed above. *See supra* § II.B.5; *see also* RESTATEMENT (SECOND) OF AGENCY § 235 cmt. e., § 237 cmt. c (noting applicability of rule to torts such as defamation).

²⁰³ For example, where the employee of an insurance company used company records to identify persons with expensive jewelry and then robbed them, the insurance company would not be vicariously liable for assault. *Cf. Leafgreen v. Am. Family Mut. Ins. Co.*, 393 N.W.2d 275 (S.D. 1986). Of the many cases citing section 219(2)(d), almost all involve sexual harassment. A few involve other sex torts, but only one, in which section 219(2)(d) was alleged to apply to a shooting by an off-duty deputy sheriff whose job required him to carry his gun at all times, concerned a tort not involving sex. *See Graves v. Wayne County*, 333 N.W.2d 740, 743 (Mich. Ct. App. 1983) (denying summary judgment). This suggests courts are using section 219(2)(d) to hold employers liable when a simplistic application of the purpose-to-serve test to sex torts denies liability.

²⁰⁴ *See Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

²⁰⁵ Pub. L. No. 88-352, 78 Stat. 253 (1964) (current version codified at 42 U.S.C. § 2000e et seq. (1994)).

employer will always be vicariously liable for harassment that involves a tangible employment action.²⁰⁶ In cases not involving a tangible employment action, the employer will also be vicariously liable, but such liability is subject to an affirmative defense that (a) “the employer exercised reasonable care to prevent and correct . . . harassing behavior,” and (b) “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”²⁰⁷ The reasoning by which the Court reached this result is interesting, although misguided.

The Court began with basic agency principles, as directed by Congress and Supreme Court precedent,²⁰⁸ but in doing so the Court relied primarily on lower Federal courts’ analyses of the relevant agency law, despite the fact, recognized by the Court, that such analysis often failed to reflect actual agency law.²⁰⁹ The Court thus began, and ended, its analysis of agency law with Section 219 of the Restatement. As described above,²¹⁰ Section 219 sets out the general rule that a master is vicariously liable only for torts committed within the scope of employment, unless the master is herself at fault or unless the servant purported to act for the principal and was apparently authorized or was aided in committing the tort by the existence of the agency relationship. The Court observed that sexual harassment has generally been held, by the lower Federal courts, to be outside the scope of employment because it is not motivated by a purpose to serve the employer but rather by the personal impulses and desires of the harasser.²¹¹ Although the Court acknowledged that there are other tests for the scope of employment besides the purpose-to-serve test,²¹² it did not conduct any analysis about the appropriateness of applying one test rather than another. It also did not conduct its own analysis of whether sexual harassment satisfies the purpose-to-serve test, other than to note that a harassing supervisor “may not be actuated by a purpose to serve the employer.”²¹³ The

²⁰⁶ See *Burlington Indus., Inc.*, 524 U.S. at 762.

²⁰⁷ *Id.* at 765.

²⁰⁸ See *id.* at 754 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986)). The Court stated that “basic agency principles” means the “general common law of agency,” as opposed to actual state law. *Id.* at 754; see also *Faragher*, 524 U.S. at 791-92.

²⁰⁹ See *Faragher*, 524 U.S. at 793-96. The Court in *Faragher* discussed a rule adopted by lower Federal courts in sexual harassment cases that where the harasser is sufficiently high up in the organization, the employer will be vicariously liable because the harasser is the “organization’s proxy.” *Id.* at 789-90. Such a rule appears to have no basis in agency law, but it somewhat resembles the “vice-principal” exception to the fellow servant rule, described *infra* note 259.

²¹⁰ See *supra* Part III.C.3.c.

²¹¹ See *Faragher*, 524 U.S. at 793-94; *Burlington Indus., Inc.*, 524 U.S. at 756-57.

²¹² See *Faragher*, 524 U.S. at 794-96. The Court in *Faragher* also described the scope of employment doctrine as a “bare formula” to cover decisions about the expediency of holding the employer liable. *Id.* at 796 (citation omitted).

²¹³ *Id.* at 756 (citation omitted); see also *Faragher*, 524 U.S. at 794 (noting that “courts have

Faragher Court expressly rejected the Restatement scope of employment analysis in favor of “an enquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor’s employment.”²¹⁴ Thus, the Court resorted to Section 219(2)(d) to find vicarious liability,²¹⁵ which it incorrectly read, as explained above,²¹⁶ in the complete disjunctive: either the employee purports to act for the principal and has apparent authority, or the employee is aided by the agency relationship in accomplishing the tort.²¹⁷ Because apparent authority, according to the Court, applies only where the employee “purports to exercise a power which he or she does not have,” it is generally irrelevant in the harassment context.²¹⁸ So, an employer’s vicarious liability must rest on the fact that the harasser was aided by the agency relationship. Such a rule, of course, is much too broad. Most workplace torts occur in part because of the “[p]roximity and regular contact” of the workplace, which provides “a captive pool of potential victims,” and are therefore in some sense aided by the agency relation.²¹⁹ But, having jettisoned all the carefully crafted limitations on vicarious liability provided by the scope of employment requirement and the first part of Section 219(2)(d), the Court was left to create new limitations on liability, which it proceeded to do based not on the policies of agency law but on the policies of Title VII.

1. Tangible Employment Action

The Court divided sexual harassment into two categories: harassment involving a tangible employment action and harassment involving a hostile work environment. “A tangible employment action constitutes 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.”²²⁰ Harassment involving a tangible employment action results in vicarious liability, according to the Court, because “the injury

emphasized that harassment . . . is motivated solely by individual desires and serves no purpose of the employer”).

²¹⁴ 524 U.S. at 797. The Court then rejected, however, a ruling based on the policy that harassment is a cost of the employer’s operation of the workplace, because Congress did not indicate an intention to ignore the old agency scope of employment doctrines. *Id.* at 797-98.

²¹⁵ The Court also noted that an employer might be liable for her own negligence under section 219(2)(b). *Burlington Indus., Inc.*, 524 U.S. at 758-59.

²¹⁶ See *supra* Part III.C.3.c.

²¹⁷ See *Burlington Indus., Inc.*, 524 U.S. at 759.

²¹⁸ See *id.* at 759-60; cf. *supra* Parts II.B.1, II.B.5 (explaining the concept of apparent authority).

²¹⁹ *Burlington Indus., Inc.*, 524 U.S. at 760 (citation omitted).

²²⁰ *Id.* at 761.

could not have been inflicted absent the agency relation.”²²¹ Also, a tangible employment action “requires an official act of the enterprise, a company act.”²²² Thus, the tangible employment action “becomes for Title VII purposes the act of the employer.”²²³ The Court reasoned that whatever else “aided by the agency relation” may mean, it surely applies where a harassing supervisor takes a tangible employment action against a subordinate.²²⁴

Because the Court relied solely on Section 219, it failed to make the obvious argument that a principal is vicariously liable for a tortious action that she has actually authorized, and a tangible employment action must be actually authorized to be effective.²²⁵ Such liability is based squarely in general agency law, and exists whether or not the agent is a servant and whether or not the agent is acting within the scope of employment.²²⁶ Thus, despite having misunderstood the rule it did apply (Section 219(2)(d)), having mistakenly misapplied the scope of employment principle by relying blindly on the purpose-to-serve test, and having failed to apply the appropriate rule and principle about liability for authorized acts, the Court reached the right conclusion that sexual harassment involving a tangible employment action results in vicarious liability.

2. Hostile Environment

With respect to sexual harassment not involving a tangible employment action,²²⁷ the Court applied a different analysis. Such harassment does not necessarily depend upon the harasser’s authority as a supervisor, although such authority frequently “invests his or her harassing conduct with a particular threatening character.”²²⁸ The Court focused on this feature of such harassment because it had limited its analysis to the aided-by-the-agency-relation test. As the Court noted, the aided-by-the-agency-relation test is not well-defined,²²⁹ and is therefore not easy to apply in any given situation. The Court also noted that

²²¹ *Id.* at 761-62.

²²² *Id.* at 762.

²²³ *Id.*

²²⁴ *Id.* at 762-63; *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 790-91 (1998).

²²⁵ *See* RESTATEMENT (SECOND) OF AGENCY § 215 (1958) (“A master or other principal who unintentionally authorizes conduct of a servant or other agent which constitutes a tort to a third person is subject to liability to such person.”).

²²⁶ *Id.* § 215 cmt. a.

²²⁷ Such harassment is sometimes designated “hostile work environment” harassment, although the Court does not expressly adopt such terminology. *Id.*

²²⁸ *Burlington Indus., Inc.*, 524 U.S. at 763.

²²⁹ The Court characterized the rule as a “developing feature” of agency law. *Id.* at 763. In fact, it was almost never discussed or applied until it was picked up by the Federal courts in the Title VII cases. *See supra* note 199.

prior case law required that there be some limit on an employer's vicarious liability for sexual harassment.²³⁰ Left without a useful principle or body of case law, and feeling free, in the Title VII context, to deviate from agency principles if appropriate,²³¹ the Court turned to policy. The policy of Title VII is to deter harassment, to encourage employers to adopt anti-harassment policies, and to encourage establishment and use of internal grievance mechanisms.²³² The Court adopted its vicarious-liability-subject-to-affirmative-defense rule as a response to such policies.²³³ The new rule would provide incentives to employers to prevent harassment and excuse them from liability if they took reasonable steps to do so, a result that is completely contrary to agency law's insistence that employers pay the costs of their employees' torts whether preventable or not.²³⁴ Thus, to the extent the Court was basing its analysis on agency law or principles,²³⁵ it failed utterly. Only by rejecting agency principles and adopting a rule based solely on Congressional intent could the Court justify its holding.

3. The Thomas Dissent

Justice Thomas dissented from the Court's opinion and rejected the vicarious-liability-subject-to-affirmative-defense rule. He began, as did the majority, with the assumption that creation of a hostile work environment is necessarily outside the scope of employment, first, because it is "antithetical to the inter-

²³⁰ The Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986), argued that the reference to "agents" in Title VII "surely evinces a [Congressional] intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Faragher*, 524 U.S. at 792, 804.

²³¹ *Burlington Indus., Inc.*, 524 U.S. at 764.

²³² *Id.*; *Faragher*, 524 U.S. at 805-06. Such deterrence-based policies are quite different from those of either general agency law or vicarious liability. *See supra* Part III.C.2.

²³³ The Court in *Faragher* noted that one of the advantages of the aided-by-the-agency-relation test is that it is more likely to impose vicarious liability in cases of supervisor harassment, where the employer has a "greater opportunity to guard against misconduct," than in cases of co-worker harassment. 524 U.S. at 803.

²³⁴ *See supra* Parts II.C.2.a.ii and II.C.2.c.ii.

²³⁵ In *Meritor Savings Bank*, 477 U.S. at 72 (1986), the Court, although declining to issue a definitive rule on employer liability for sexual harassment, stated,

[W]e . . . agree with the [Equal Employment Opportunity Commission] that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define 'employer' to include any 'agent' of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.

The Court in *Burlington Industries, Inc.* and *Faragher* interpreted this language to require that agency principles be applied to the employer liability issue. *Faragher*, 524 U.S. at 791-92; *Burlington Indus., Inc.*, 524 U.S. at 754.

est of the employer,"²³⁶ and second, because employers cannot prevent harassment even with due care.²³⁷ Justice Thomas then correctly observed that Section 219(2)(d) is not an all-encompassing aided-by-the-agency-relation test at all, but is limited to cases where the employee purports to act for the employer.²³⁸ Thus, he concluded that there was no basis for finding an employer vicariously liable for sexual harassment.²³⁹

4. Conclusions

Had *Burlington Industries* and *Faragher* been decided strictly under Title VII, applying employment discrimination principles and precedents and relying on statutory construction, the Court could have provided a coherent system of liability. Unfortunately, however, the Court in both cases discussed and purported to apply general vicarious liability rules from the law of agency. In the process, it failed to understand the principles of vicarious liability.²⁴⁰ By ignoring the rich and complex scope of employment requirement, the Court failed to consider, and consequently failed to advance, the underlying cost-allocation principle of agency law. As I argue at greater length below, a full analysis of the scope of employment requirement indicates that even hostile work environment harassment may in some cases be within the scope of employment. Application of the complex laws of agency to a complex set of social behaviors such as sexual harassment requires a sophisticated understanding of both issues. Lacking such an understanding, the Court was forced to resort to crude policy-based law-making, thereby depriving both the law and the business community it serves of a careful application of fundamental legal principles.

B. State Law Sexual Harassment and Assault Cases

Like the Supreme Court, courts applying state law considering vicarious liability for sexual harassment frequently reach the wrong result as a result of

²³⁶ *Burlington Indus., Inc.*, 524 U.S. at 769 (Thomas, J., dissenting). This is, of course, a misstatement and a misapplication of the purpose-to-serve rule, which does not require the tort to have been in the *interest* of the master. *Id.*

²³⁷ *Id.* at 770 (Thomas, J., dissenting). Again, this is a misunderstanding of the principle of vicarious liability, which holds employers liable not in spite of the fact that, but rather, because they cannot prevent the tortious behavior. See *supra* Part III.C.2.c.ii.

²³⁸ *Id.* at 772 (Thomas, J., dissenting).

²³⁹ He concluded by arguing that sexual harassment is not a "freestanding federal tort," and therefore should not subject an employer to vicarious liability. *Id.* at 774. In other words, the vicarious liability scheme should not apply to sexual harassment at all.

²⁴⁰ Oddly enough, the Court created a rule perfectly consistent with German principles of vicarious liability, which excuses an employer from vicarious tort liability if she can show she was not negligent. See § 831 BGB.

misunderstanding the law.²⁴¹ In Michigan, for example, the court rejected employers' vicarious liability for hostile environment harassment because "the supervisor acts outside 'the scope of actual or apparent authority to hire, fire, discipline or promote.'"²⁴²

The more common issue in state courts is employers' vicarious liability for sexual assaults by employees.²⁴³ Such cases were the setting for the California courts' refinement of the engendered-by-the-employment test for scope of employment, pursuant to which an employer will be vicariously liable for an employee's sexual assault only if the employment relationship has a causal nexus with the impulse underlying the tort.²⁴⁴ Thus, where the employment re-

²⁴¹ See *Mackey v. Milam*, 154 F.3d 648 (6th Cir. 1998) (applying *Faragher*-type analysis to sexual harassment claims under state law).

²⁴² *Radtke v. Everett*, 501 N.W. 2d 155, 169 n. 46 (Mich. 1993) (citation omitted). The court went on to state, cryptically and without explanation, that "[c]orporate liability, therefore, exists only through *respondere superior*; liability exists where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor." *Id.* An example of both the underlying vicarious liability principle and the lack of understanding of that principle is provided by a recent case involving a law firm associate who, while driving home one night, struck and killed a pedestrian. See Jennifer Myers, *Suit Puts Law Firm on the Line*, LEGAL TIMES, June 25, 2001, at 1. The family of the victim sued the law firm-employer for wrongful death, alleging that the associate was acting within the scope of her employment because she was making business calls from her cell phone before, after, and around the time of the accident. See *id.* If she was, in fact, conducting her employer's business from her car at the time of the accident, and thus acting to benefit her employer and in furtherance of its business, then she was acting within the scope of her employment. The fact, noted by one attorney-commentator, that the firm did not "direct . . . her to make cell phone calls from her car while driving [fifty] miles per hour," is no more relevant than the fact that a trucking firm does not "direct" its drivers to exceed the speed limit. *Id.* (quoting Frank Winston Jr.). Similarly, the plaintiffs would not, as another commentator stated, have to "prove that [the associate's] phone calls were the proximate cause" of the death. *Id.* (quoting Richard Hikey). The employer's liability is premised upon the fact that the employee, while acting within the scope of employment, committed a tort (which of course must proximately cause injury to result in liability). It is not necessary to prove that the employment caused the injury. The fact that the employment gave rise to the tort is relevant to a determination whether the tortfeasor was acting within the scope of employment, but the analysis is one of assessing whether the employment increased the risk that the tort would occur, not one of proximate cause. See *supra* Part III.C.3.b.ii.

²⁴³ See, e.g., *Nazareth v. Herndon Ambulance Serv.*, 467 So. 2d 1076 (Fla. Dist. Ct. App. 1985); *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344 (Alaska 1990); *Regions Bank & Trust, N.A., v. Stone County Skilled Nursing Facility, Inc.*, 38 S.W.3d 916 (Ark. App. 2001); *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.* 907 P.2d 358 (Cal. 1995); *Mary M. v. City of Los Angeles*, 814 P.2d 1341 (Cal. 1991); *John R. v. Oakland Unified Sch. Dist.*, 769 P.2d 948 (Cal. 1989); *Brown v. Argenbright Sec.*, 782 A.2d 752 (D.C. 2001); *Baumeister v. Plunkett*, 673 So. 2d 994 (La. 1996); *Doe v. Purity Supreme, Inc.*, 664 N.E.2d 815 (Mass. 1996); *Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905 (Minn. 1999); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991); *N.H. v. Presbyterian Church (U.S.A.)*, 998 P.2d 592 (Okla. 1999); *Lourim v. Swensen*, 977 P.2d 1157 (Or. 1999); *Birkner v. Salt Lake County*, 771 P.2d 1053 (Utah 1989); *Thompson v. The Everett Clinic*, 860 P.2d 1054 (Wash. Ct. App. 1993).

²⁴⁴ See *Lisa M.*, 907 P.2d at 365.

quires the employee to become intimately involved with the victim, the employer might be subject to vicarious liability.²⁴⁵ Other courts, however, have flatly rejected any suggestion that a sexual assault could be within the scope of employment because such assaults are considered to be motivated by a purpose to serve only the tortfeasor's carnal desires, and no purpose of the employer.²⁴⁶ Similarly, in cases involving sexual assaults or molestation by church or youth counselors, some courts have focused on the "personal" motives of the tortfeasors in denying vicarious liability,²⁴⁷ while at least one court has found such assaults to be within the scope of employment.²⁴⁸ In short, the state law of vicarious liability for sexual torts, while being more varied in both the tests used and the results of application of those tests, is also fairly incoherent.

IV. VICARIOUS LIABILITY FOR SEXUAL HARASSMENT

A thorough understanding of the doctrine of vicarious liability is necessary but not sufficient to determine whether employers should be vicariously liable for sexual harassment. The presence or absence of vicarious liability in most cases depends upon the determination of whether harassment is within the scope of employment, and the tests for scope of employment depend upon an understanding of the nature of the tort. Therefore, one must examine the nature of sexual harassment as a tort²⁴⁹ before deciding whether an employer should be

²⁴⁵ See *id.* at 364.

²⁴⁶ See *Primeaux v. United States*, 181 F.3d 876, 882 (8th Cir. 1999) (applying South Dakota law); *Birkner v. Salt Lake County*, 771 P.2d 1053, 1058 (Utah 1989); *Thompson v. Everett Clinic*, 860 P.2d 1054, 1058 (Wash. App. 1993); see also, e.g., *Cooke v. Stefani Mgmt. Servs., Inc.*, 250 F.3d 564, 569 (7th Cir. 2001) (arguing that "the supervisor directly perpetrated the harassment through a series of rogue acts motivated by a desire to amuse himself, not benefit his employer"); cf. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 83-92 (1979) (describing courts' treatment of sexual harassment as "personal" or "natural" (and thus not discriminatory or work-related) as a reason for denying liability under Title VII).

²⁴⁷ See *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991); *N. H. v. Presbyterian Church (U.S.A.)*, 998 P.2d 592 (Okla. 1999). Interestingly, the court in *N. H.* applied the purpose-to-serve test despite the fact that the scope of employment rule in Oklahoma is a variation on the engendered-by-the-employment relationship test. See *Rodebush v. Oklahoma Nursing Homes, Ltd.*, 867 P.2d 1241, 1245 (Okla. 1993).

²⁴⁸ See *Fearing v. Bucher*, 977 P.2d 1163 (Or. 1999) (applying a combination of the engendered-by-the-relationship and purpose-to-serve tests to find that jury could find assault to be "the culmination of a progressive series of actions" that originated in a motive to serve the employer); *Lourim v. Swensen*, 977 P.2d 1157 (Or. 1999) (applying the same combination).

²⁴⁹ Although sexual harassment is not a common law tort, courts have generally treated it as a tort for vicarious liability purposes. See *Mackey v. Milam*, 154 F.3d 648 (6th Cir. 1998); *Arizona v. Schallock*, 941 P.2d 1275 (Ariz. 1997). But see *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 774 (1998) (Thomas, J., dissenting) ("Popular misconceptions notwithstanding, sexual harassment is not a freestanding federal tort, but a form of employment discrimination."); *Chambers v. Trettco, Inc.*, (Mich. 2000) (treating harassment as a civil rights violation); cf. MACKINNON, *supra* note 246, at 171 (arguing that "tort is conceptually inadequate to the

vicariously liable.

A. Understanding Sexual Harassment

Most courts and legal commentators assume that sexual harassment, especially harassment that attempts to trade employment benefits for sexual favors, is motivated by the sexual desires of the harasser.²⁵⁰ Psychological studies suggest, however, that harassment is a more complicated phenomenon.²⁵¹

1. Causes

Psychologists have developed several models attempting to explain the causes of and aggravating factors for sexual harassment.²⁵² One such model is

problem of sexual harassment to the extent that it rips injuries to women's sexuality out of the context of women's social circumstances as a whole"). To the extent sexual harassment results in an obligation not based on consent to be bound, it seems appropriate in light of general legal principles to treat it as a tort. *Id.*

²⁵⁰ See Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 698-701 (1997) (describing the "Biological" model, which understands harassment as the natural result of a sexually integrated workplace).

²⁵¹ Even if harassment is motivated by a desire for sex, it may be a more complicated phenomenon than at first appears. Recent highly controversial literature suggests, for example, that rape (and perhaps other sexual coercion) is a naturally occurring biological mating strategy, arising in part from, although not consciously motivated by, the desire to procreate. See, e.g., Randy Thornhill & Craig T. Palmer, *Why Men Rape*, THE SCIENCES, Jan.-Feb. 2000, at 30; see also Kimberly A. Tyler et al., *Coercive Sexual Strategies*, 13 VIOLENCE & VICTIMS 47 (1998) (examining various coercive "strategies" used by men in college); *id.* at 54 (noting a positive correlation between men who had had sex in the past six months and those willing to use verbal coercion and alcohol or drugs to obtain sex). Other scientists assert, however, that rape has its origins in a violent desire to assert power and dominance and exercise control. See *Just Why Do Men Rape?*, THE SCIENCES, May-June 2000, at 3 (collecting responses to Thornhill and Palmer).

²⁵² Some legal commentators have argued, with little or no empirical support, that sexual harassment is a way to put women in their place by sexualizing and feminizing them. See Franke, *supra* note 250, at 764; Elizabeth Grauerholz, *Sexual Harassment in the Academy: The Case of Women Professors*, in SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES 29, 43 (Margaret S. Stockdale ed., 1996) [hereinafter SEXUAL HARASSMENT IN THE WORKPLACE]. Harassment is said to be an attempt to "sexually subordinate" female co-workers. See Franke, *supra* note 250, at 725-29 (discussing MACKINNON, *supra* note 246, at 70); Jeanette N. Cleveland & Melinda E. Kerst, *Sexual Harassment and Perceptions of Power: An Under-Articulated Relationship*, 42 J. VOCATIONAL BEHAV. 49, 54-58 (1993) (describing sexual harassment as a strategy to devalue women and acquire or retain power). Although such an explanation probably resonates with many working women, it has not been demonstrated by sociological or psychological study. MacKinnon notes that sexual harassment of women in positions of power may be, in Gloria Steinem's prose, "taming of the shrew syndrome," but that many, if not, most victims of sexual harassment are perceived as powerless. See MACKINNON, *supra* note 246, at 253 n.55. Although MacKinnon notes that powerlessness makes women vulnerable, she does not suggest that powerlessness might be a causal factor in the harasser's decision to harass, because she focuses exclusively on

the “Socio-Organizational” or “Person X Situation” model, which indicates that men²⁵³ who have a psychological tendency to harass (denominated in the literature as “high LSH” or “likely to sexually harass”)²⁵⁴ are more or less likely to act on those tendencies based on the environment in which they work.²⁵⁵ For example, sexual harassment is more common in some organizational contexts than in others.²⁵⁶ Experimental and survey evidence shows that harassment is more likely to occur when a man who is likely to harass is in a situation where the local norms are favorable to harassment;²⁵⁷ for example, in sexualized environments,²⁵⁸ in environments where managers or other role models appear to tolerate or condone harassment,²⁵⁹ or in environments where a tolerant norm has arisen from the spontaneous interaction of peers (for example, where there is a large number of high LSH men or where a minority behaves consistently and persistently in a given way).²⁶⁰ Other relevant environmental factors include the rarity or token status of women in the workplace, the fact that women lack power in the workplace hierarchy, and the general tolerance of non-professional behavior.²⁶¹ Although the propensity of the harasser to harass is an important causal factor, the presence of that factor alone far less frequently results in harassment than the presence of that factor in a conducive work environment. In

the experience of victims. She does, however, note that submissiveness is *generally* seen as an attractive or erotic trait in women. *See id.* at 156-58. MacKinnon’s argument, made before sexual harassment was generally accepted as actionable under Title VII, is that sexual harassment is employment discrimination that serves to oppress women as a group. *See id.* at 208-13. Other commentators have suggested an explanation for harassment that takes the form of a request for sex is that it is a way for high-status men to signal their sexual attractiveness, and provides an opportunity for high-status women to signal their choosiness by rejecting such advances. *See* Gertrude M. Fremling & Richard A. Posner, *Status-Signaling and the Law, with Particular Application to Sexual Harassment*, 147 U. PA. L. REV. 1069, 1081-83, 1093 (1999). This theory suggests that sexual harassment may be offensive because it represents an implicit assertion by the harasser that the victim is of low status. *See id.* at 1081-82. This theory is also unsupported by empirical evidence.

²⁵³ The research focuses exclusively on men as harassers and women as victims.

²⁵⁴ *See* John B. Pryor et al., *A Social Psychological Model for Predicting Sexual Harassment*, 51 J. SOC. ISSUES 61, 74-78 (1995).

²⁵⁵ *See* Margaret S. Stockdale et al., *The Sexual Harassment of Men: Evidence for a Broader Theory of Sexual Harassment and Sex Discrimination*, 5 PSYCHOLOGY, PUB. POL’Y, & L. 630, 637 (1999).

²⁵⁶ *See* John B. Pryor et al., *A Social Psychological Analysis of Sexual Harassment: The Person/Situation Interaction*, 42 J. VOCATIONAL BEHAV. 68, 69 (1993).

²⁵⁷ *See id.* at 69, 76-77.

²⁵⁸ *See id.* at 69.

²⁵⁹ *See id.* at 69-70, 73, 77.

²⁶⁰ *See id.* at 79.

²⁶¹ *See id.* *See also* *Experts on Sexual Harassment Prove Helpful to Title VII Plaintiffs*, 59 U.S.L.W. 2527, 2528 (1991) (hereinafter *Experts on Sexual Harassment*).

one experiment, men with high LSH scores engaged in sexually harassing behavior eighty-nine percent of the time when there was a harassing role model, but only twenty-two percent of the time with a non-harassing role model.²⁶² Additionally, men who are psychologically likely to sexually harass are more likely to do so when situations for sexual interaction present themselves, as, for example, where a supervisor has occasion to peer closely over a subordinate's shoulder at a computer screen.²⁶³ This model, among others,²⁶⁴ seeks to explain the phenomenon that harassment is more likely to occur in a workplace dominated by men, especially where such dominance exists not only numerically but in terms of the traditionally male-oriented nature of the work.²⁶⁵

The psychological characteristics underlying a likelihood to sexually harass include a cognitive association between sex and power that also interacts with the work environment.²⁶⁶ A cognitive association between sex and power exists when the idea of power becomes habitually linked with the idea of sex in the individual's mind.²⁶⁷ When a man with such a cognitive association is placed in a supervisory position (in other words, a position of power) over a woman, he is more likely to view her as sexually attractive.²⁶⁸ When asked about his behavior, he will ascribe it to purely sexual motives, such as the woman's attractiveness or perceived receptivity to his advances, because he will not recognize that his sexual thoughts have been primed by the power relationship.²⁶⁹

²⁶² See Pryor, *supra* note 256, at 77.

²⁶³ See Pryor, *supra* note 254, at 74-75.

²⁶⁴ See *infra* at notes 273-78 and accompanying text (discussing the Sex-Role Spillover model); Fremling & Posner, *supra* note 252, at 1085 (1999) (arguing that men in traditionally male jobs have their status bound up in the manliness of their work and therefore are more likely to resent women integrating the workplace).

²⁶⁵ See Louise F. Fitzgerald et al., *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 82 J. APPLIED PSYCHOL. 578, 586 (1997).

²⁶⁶ See John A. Bargh & Paula Raymond, *The Naive Misuse of Power: Nonconscious Sources of Sexual Harassment*, 51 J. SOC. ISSUES 85, 88-89 (1995).

²⁶⁷ See *id.* at 87.

²⁶⁸ See *id.* at 87-91; see also Frank E. Saal, *Men's Misperceptions of Women's Interpersonal Behaviors and Sexual Harassment*, in *SEXUAL HARASSMENT IN THE WORKPLACE*, *supra* note 252, at 67, 82 (noting that the data does not indicate that men who make unwelcome sexual advances are misinterpreting women's behavior, and arguing that such men are instead reacting to some feminizing characteristic such as powerlessness); MACKINNON, *supra* note 246, at 156-58 (noting that powerlessness is generally viewed as an attractive trait in women).

²⁶⁹ See Bargh & Raymond, *supra* note 266, at 90; see also Franke, *supra* note 250, at 743 (stating that sexual harassment is "a way to express power, not desire"). *But cf.* Fremling & Posner, *supra* note 252, at 1088 (treating sexual harassment as the result of the attractiveness of the victim). Fremling and Posner note that young women are more likely to be harassed than middle-aged women. *Id.* at 1080 n.13 and accompanying text (citing DAVID M. BUSS, *THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING* 160 (1994)). Because youth tends to be an indicator of both attractiveness and powerlessness, the fact that young women are more likely to be harassed would support both the harassment-as-sex and the harassment-as-power

The “Sex-Role Spillover” model suggests that harassment results from the “carryover of gender-based expectations . . . into the workplace.”²⁷⁰ According to this model, men harass women at work because they are incapable of thinking of women in non-sexual terms.²⁷¹ They may expect women to conform to traditional female roles, such as mother, wife, or sex-object.²⁷² This model posits that harassment will be more likely to occur in workplaces where there are substantially more men than women, because the women in such workplaces will “stick out,”²⁷³ and where sexuality “thrives” for other reasons, such as an unprofessional ambience or a sexualized environment.²⁷⁴ A related model argues that harassment represents a form of gender policing; that is, it is a way to enforce traditional norms of gender behavior against those, such as women in traditionally male occupations or effeminate men, who deviate from those norms.²⁷⁵

2. Sexual Harassment, Workers’ Compensation, and the Fellow Servant Problem

A further unusual feature of sexual harassment is that, unlike most torts for which employers may be vicariously liable, it is usually committed by one employee against another. At common law, the fact that the tortfeasor and victim were both servants of the same master would have eliminated liability on the part of the employer.²⁷⁶ The modern law has largely abandoned this “fellow servant” rule and replaced it with workers’ compensation statutes.²⁷⁷ Workers’ compensation applies to any injury “arising out of and in the course of employment.”²⁷⁸ Generally, the scope of workers’ compensation coverage is closely

hypotheses.

²⁷⁰ Stockdale et al., *supra* note 255, at 638.

²⁷¹ *See id.*

²⁷² *See id.*

²⁷³ *See id.*

²⁷⁴ *See id.*; *see also* Barbara A. Gutek, *Sexual Harassment at Work: When an Organization Fails to Respond*, in *SEXUAL HARASSMENT IN THE WORKPLACE*, *supra* note 252, at 272, 285 (noting that harassment is more common in academic environments where sexual relationships between teachers and students is the norm); *Experts in Sexual Harassment*, *supra* note 261, at 2528 (describing expert testimony noting four categories of preconditions that “enhance the presence of stereotyping” in the workplace).

²⁷⁵ *See* Stockdale et al., *supra* note 255.

²⁷⁶ *See* KEETON, *supra* note 142, at 571-72. Some states recognized a “superior servant” or “vice principal” exception for torts committed by supervisory employees, who were deemed to be representing the master. *See* WILLIAM A. MCKINNEY, *A TREATISE ON THE LAW OF FELLOW SERVANTS* §§ 43, 70 (1890)

²⁷⁷ *See* KEETON, *supra* note 142, at 575-76.

analogous to the scope of employment limitation in vicarious liability. An injury occurring in the course of an activity is in the course of employment "if, in view of the nature of the employment environment, the characteristics of human nature, and the customs or practices of the particular employment, the activity is in fact an inherent part of the conditions of the employment."²⁷⁹ Most states also require that an injury occur "by accident," which generally means that it is unexpected, not that it is unintentional.²⁸⁰ Injuries arising from assaults, for example, are treated like other injuries – they are covered if there is a causal link between the employment and the assault or if the employment creates an increased risk of assault.²⁸¹ A few courts have held that sexual harassment is covered by state workers' compensations statutes,²⁸² and some of the considerations underlying the issue of whether sexual harassment should be covered by such statutes, such as whether the injury occurred in the course of employment, are similar to considerations relating to whether sexual harassment is within the scope of employment.²⁸³ Thus, the analysis described below might be useful in determining whether sexual harassment should be compensable under workers' compensation statutes.

A few commentators have suggested that, because all the parties to a sexual harassment claim are in contractual privity with one another, there might be a market solution to the problem. For example, women working in environments where sexual harassment occurs could demand higher wages, and employers would be encouraged to prevent sexual harassment because of the increased costs it imposes on their businesses.²⁸⁴ This is, of course, a not particularly updated version of the fellow servant rule.²⁸⁵ Most commentators suggesting that there might be a market solution for co-worker torts also acknowledge

(2000).

²⁷⁹ *Id.* at § 20.01.

²⁸⁰ *See id.* §§ 42.01, 42.02.

²⁸¹ *See id.* § 8.01.

²⁸² *See Franke, supra* note 250, at 700 n.26 (collecting authorities).

²⁸³ *See id.* For a general comparison of vicarious liability and workers' compensation schemes, see Priest, *supra* note 92, at 478.

²⁸⁴ *See Fremling & Posner, supra* note 252, at 1088-91; Kathy Hanisch, *An Integrated Framework for Studying the Outcomes of Sexual Harassment: Consequences for Individuals and Organizations*, in *SEXUAL HARASSMENT IN THE WORKPLACE*, *supra* note 252, at 174. Such increased costs include not only the higher wages female employees demand, but also potential inefficiencies as a result of employees being promoted or sanctioned as a result of their responses to sexual overtures rather than based on merit or productivity, and lost productivity from emotional injury and job dissatisfaction. *See Fremling & Posner, supra* note 252, at 1088-91. *See also* Charles L. Hulin et al., *Organizational Influences on Sexual Harassment*, in *SEXUAL HARASSMENT IN THE WORKPLACE*, *supra* note 252, at 127, 145.

²⁸⁵ *See MCKINNEY, supra* note 246, § 4 (describing basis of fellow servant rule in concept of free markets); *id.* § 10 (describing policy of rule arising from belief in free market and freedom of contract).

that imperfect information and other transaction costs may make such a solution impracticable, and therefore ultimately adopt a vicarious liability analysis.²⁸⁶ Thus, the fact that sexual harassment occurs between employees of the same employer should not matter for vicarious liability analysis.

B. *Vicarious Liability for Sexual Harassment*

Assuming there is a cause of action against the harasser for sexual harassment under Title VII, state statute or state common law, determining whether the employer is vicariously liable is a matter of applying the usual agency law analysis: the employer will be vicariously liable if the tort was committed by a servant acting within the scope of his employment.²⁸⁷ Because applying the servant-independent contractor analysis to a sexual harasser does not raise any special issues, the important issue in determining an employer's vicarious liability for sexual harassment is likely to be whether the harassment was within the scope of employment. As explained above, the definition of the scope of employment that most comports with the underlying agency principles is the risk-of-the-enterprise test. However, because state courts vary in their definitions of scope of employment, I will consider each test in turn.

1. Purpose to Serve

The Restatement purpose-to-serve test requires that the servant be acting, at least in part, to serve the interests of the employer. The test is a subjective one, and, as a result, application of the test must be made on a case-by-case basis. Plaintiffs and employers should be permitted to introduce evidence indicating the actuating force for the harassment. Although in some cases a harasser

²⁸⁶ See Fremling & Posner, *supra* note 252, at 1090-10; Keating, *supra* note 62, at 1296-1308; Sykes, *supra* note 53, at 606.

²⁸⁷ One might also argue for employers' strict liability for sexual harassment by analogy to the law of nondelegable duties. If an employer is under a duty to provide a safe environment or otherwise protect the plaintiff, the employer will be liable even when the injury is caused by an employee not acting in the scope of employment or by an independent contractor. See KEETON ET AL., *supra* note 142, § 70. Nondelegable duties can arise from a special relationship (such as acting as an innkeeper or common carrier) or when the employer has entrusted the employee with a "dangerous instrumentality" (that is, "one involving a high degree of risk to others"). See *id.*; see also MECHEM, *supra* note 51, § 1923. In the employment context, Title VII places a duty upon covered employers to provide a workplace free of discrimination on the basis of sex. One might argue that such a duty, akin to the duties of common carriers, cannot be avoided by delegating it to employees. See James, *supra* note 60, at 203 (noting that "duties imposed by statute" are often found to be nondelegable); EEOC v. Indiana Bell Tel. Co., 256 F.3d 516, 521-523 (7th Cir. 2001) (noting that employer cannot escape liability for sexual harassment under Title VII by entering into a collective bargaining agreement or by delegating firing decisions to an arbitrator, and stating that "[o]nce the employer has been put on notice. . . it must act to protect other employees and bear the consequences of failure.") Such a rule might be said to better advance the policy goals of Title VII than the tortured rule adopted by the Supreme Court. See *supra* Part III.A.

may be acting out of personal animosity or desire, in other cases the harasser may misguidedly believe that his acts will advance the employer's interests by driving out female employees who are perceived to be incompetent or disruptive.²⁸⁸ Courts in the assault and battery cases have indicated, for example, that incidents that arise from foreseeable workplace disputes may be "actuated by a purpose to serve the master," even if the assault itself is not intended to advance the employer's interests. If, as studies indicate, harassment is at least in part the result of workplace interactions between men who are likely to sexually harass²⁸⁹ and women over whom they have power, it cannot be said, as a matter of law, that sexual harassment is outside the scope of employment under the purpose-to-serve analysis. Furthermore, because psychological studies suggest that harassers do not accurately identify their own motives, applying the purpose-to-serve test correctly will be even more difficult; this is, as stated above, one of the reasons why the purpose-to-serve test is unsatisfactory.²⁹⁰

2. Engendered by the Employment

The engendered by the employment test asks whether there was a causal nexus between the employment relationship and the tort. The application of this test to sexual harassment is simple, once harassment is properly understood. Because men who are likely to sexually harass tend to do so only when they are in an environment where harassment is tolerated, the data suggests that more often than not harassment will in fact be causally related to the employment. Furthermore, if, as the studies suggest, the likelihood to sexually harass is often at least in part the result of the placement of a man with a cognitive association between power and sex in a position of power over a woman, again the harassment can be seen to be engendered by the employment. Just as the intimate relationship involved in psychological counseling may give rise to sexual impulses,²⁹¹ so the power relationship involved in many workplaces may give rise to harassing impulses.

Furthermore, if, as commentators suggest, sexual harassment is used to

²⁸⁸ See Fremling & Posner, *supra* note 252, at 1084-85; Stockdale et al., *supra* note 255, at 643; BARBARA LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 812-813 (3d ed. 1996); cf. Faragher v. City of Boca Raton, 524 U.S. 775, 798-77 (1998) (discussing hypothetical supervisor's firing minority workers to keep peace in the workplace).

²⁸⁹ See *Ira S. Bushey & Sons, Inc., v. United States*, 398 F.2d 167, 171 (2d Cir. 1968), quoting *Hartford Accident & Indemn. Co. v. Cardillo*, 112 F.2d 11, 15 (D.C. Cir. 1940) ("Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional make-up. . . . These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.").

²⁹⁰ See *supra* Part II.C.3.b.i.

²⁹¹ See *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 907 P.2d 358, 365 (Cal. 1995).

accomplish sexist goals and enforce norms of gender behavior,²⁹² a different causal nexus may exist between harassment and the employment relationship. For example, behavior motivated by a desire to drive women out of an integrated workplace is directly caused by the nature of the workplace and the work-related interactions that occur there. The California court stated that “a sexual tort will not be considered engendered by the employment unless its motivating emotions were fairly attributable to work-related events or conditions.”²⁹³ Research indicates that sexual harassment will usually satisfy this test.

3. Risk of the Enterprise

As described above, the risk-of-the-enterprise test asks whether the risk of a particular injury is so characteristic of the enterprise that the enterprise should bear that risk. The determination is based on the foreseeability of the risk in light of the nature of the enterprise; in other words, does the ordinary operation of the enterprise increase the risk of the harm, and is the risk one that the employer should perceive is “likely to flow from [her] long run activity.”²⁹⁴ The test incorporates the fundamental principle of agency law that the risks of an activity should be borne by the enterprise that receives the benefits of that activity.

Here again, the application to sexual harassment is relatively simple once harassment is properly understood. At a high level of generality, enterprises derive enormous benefits from the use of employees and from the delegation of authority to those employees. The existence of supervisory relationships, the discretion given to supervisors, and the creation of decentralized workforces and close working relationships all benefit the employer,²⁹⁵ and the risks-and-benefits-of-the-business theory dictates that the employer should bear the losses that arise from those characteristics of the business. More specifically, research indicates that the incidence of and risk of harm from sexual harassment is directly correlated to certain kinds of business decisions about the operation of the workplace made by the employer: Men who are psychologically likely to harass are more likely to act on that tendency when their workplaces and superiors are tolerant of sexual harassment, and the impact on the victims of harassment is higher in such workplaces.²⁹⁶

²⁹² See Franke, *supra* note 250, at 693; Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCHOLOGY, PUBLIC POLICY, AND LAW 665, 668-77 (1999); Saal, *supra* note 268, at 68.

²⁹³ *Lisa M.*, 907 P.2d at 364.

²⁹⁴ See *supra* note 189.

²⁹⁵ See Fremling & Posner, *supra* note 252, at 1098-01; cf. Schwartz, *supra* note 52, at 1764-67 (arguing that employers do not seek indemnification from employees who commit torts is because they want to encourage vigorous decision-making and risk-taking).

²⁹⁶ See Stockdale et al., *supra* note 255, at 640; *supra* Part VI.A.1.

The existence of a climate of tolerance is a matter of perception by harassers and victims which will not necessarily coincide with the absence of harassment-prevention policies. Rather, organizational culture is a complex, still not fully understood web of shared perceptions of "contingencies between specific behaviors and their consequences, both private and public, positive and negative."²⁹⁷ Thus, even if the Supreme Court's *Faragher - Burlington Industries* affirmative defense were intended to capture the idea of a tolerant organizational climate in an effort to determine whether the harassment occurred within the scope of employment,²⁹⁸ it would fail to do so because it is based only on the employer's direct efforts at prevention and correction and does not take into consideration the myriad indirect decisions and attitudes that in fact encourage or deter harassing behavior.

For example, one commentator has noted the following factors contributing to the incidence of and damage from sexual harassment in one case study: (a) the attitudes of the individuals to whom the incidents were first reported; (b) the "lack of clearly specified human resources responsibilities" in the organizational structure; (c) the "lack of clearly defined role relationships among organizational members,"²⁹⁹ which, combined with unequal levels of power, lead to lines of authority being "overlooked or minimized"; and (d) "facilitating conditions", such as the distribution of men and women in employment roles and a workplace norm tolerant of sexual relationships between people of unequal status.³⁰⁰ Of these, only the second, the organization of the human resources department, would be relevant to *Faragher-Burlington Industries* affirmative defense analysis. But all these factors reflect decisions about the operation of the business, and the risks-of-the-enterprise test requires that the risk of harassment that such decisions create be borne by the enterprise which presumably benefits from those decisions.³⁰¹

²⁹⁷ Hulin et al., *supra* note 284, at 133.

²⁹⁸ The Title VII rule is not so designed; rather, it is intended to effectuate Title VII's deterrence policies. See *supra* Part III.A.

²⁹⁹ The case study involved a music college, and individuals often served several functions: Students were often also employees, and faculty and students were often equal participants in musical activities that brought them together in the evenings. See Gutek, *supra* note 274, at 284.

³⁰⁰ *Id.* at 284-85. Other commentators have argued that sexualized work environments and environments in which employees feel that sexual behavior among their coworkers is none of their business lead to ethical climates in which harassment is encouraged or tolerated. See Lynn Bowes-Sperry & Gary N. Powell, *Sexual Harassment as a Moral Issue: An Ethical Decision-Making Perspective*, in *SEXUAL HARASSMENT IN THE WORKPLACE*, *supra* note 252, at 105, 115 (citing J. B. Pryor et al., *A Social Psychological Analysis of Sexual Harassment: The Person/Situation Interaction*, 42 *J. OF VOCATIONAL BEHAV.* 68 (1993) and E. Haavio-Mannila et al., *The Effect of Sex Composition of the Workplace on Friendship, Romance, and Sex at Work*, in 3 *WOMEN AND WORK* 123 (B. A. Gutek et al., eds., 1988)); *id.* at 121.

³⁰¹ For a recognition of this principle in a Title VII sexual harassment action, see *EEOC v. Indiana Bell Tel. Co.*, 256 F.3d 516, 525 (7th Cir. 2001) (en banc), which stated that, in making reasonable workplace decisions, "[a] firm may consider those vicissitudes that the human con-

The characterization of sexual harassment as a risk of the enterprise should not, however, depend on the introduction of evidence indicating that the enterprise consciously adopted policies that increased that risk. The risk-of-the-enterprise test asks only whether the risk is one that the employer should expect to result from her long-term operation of the business. Nevertheless, the nature of the business is relevant to the analysis, and whether any particular case of sexual harassment is within the scope of employment must be judged based on the enterprise in question. A court considering the question should inform itself of the circumstances that have generally been found to increase sexual harassment and inquire into the nature of the enterprise. Sexual harassment is likely to be foreseeable in enterprises with male-dominated work environments, for example, for the same reason that property damage caused by drunken employees is foreseeable in the Coast Guard.³⁰² When work-related disputes flare into violence, the risk-of-the-enterprise test holds the employer liable if such disputes are foreseeable in the operation of the business. The analysis for incidents of sexual harassment should be no different.³⁰³

V. CONCLUSION

The doctrine of vicarious liability is one of many agency law doctrines intended to accomplish one of the principal goals of agency law: coordinating the risks and benefits of business enterprises. That basic principle informs both the independent contractor exception, which eliminates a principal's vicarious liability for torts committed by agents not truly employed in her business, and the scope of employment requirement, which limits vicarious liability to acts that foreseeably arise in the operation of the business. Courts generally agree that agency law principles should be applied to determine whether employers are vicariously liable for sexual harassment under Title VII or state law. This means, first, that courts must understand the relevant agency doctrines and principles, and second, that they must inquire at least as deeply into the origin of an incident of sexual harassment as a tort as they do into the origin of an assault. A rote application of an overly-simplified purpose-to-serve test to determine that harassment is necessarily outside the scope of employment applies the wrong law to the wrong facts.³⁰⁴ Although the Supreme Court's Title VII rulings have

dition presents to any thoughtful employer. But it may not justify its actions as reasonable in the light of avoidable costs created or increased by its own decisions."

³⁰² See *Ira S. Bushey & Sons, Inc., v. United States*, 398 F.2d 167, 171-72 (2d Cir. 1968).

³⁰³ A single rule declaring that sexual harassment is or is not within the scope of employment as a matter of law in all cases would help to conserve judicial resources but would unfortunately be contrary to the basic principles of agency law and torts, which require that liability be determined based on the facts of each case.

³⁰⁴ For a particularly egregious example of this, see *LINDEMANN & GROSSMAN*, *supra* note 288, at 812:

At common law, an employer was liable for the torts of a servant com-

effectively ensconced incorrect rules and analysis in the Federal law, the states continue to have the opportunity to get the law right and apply that law correctly, in the context of sexual harassment, sexual assault, or other intentional torts.³⁰⁵

mitted within the scope of the servant's employment. Under that rule, an employer will be liable for harassing conduct that is within the scope of the supervisor's *actual* authority. Hostile environment sexual harassment normally does not trigger respondeat superior liability because sexual harassment rarely, if ever, is among the official duties of a supervisor.

³⁰⁵ See RESTATEMENT (SECOND) OF AGENCY § 245 cmt. a (1958) (stating that whether an intentional tort is within the scope of employment “depends upon the likelihood of a battery or other tort in view of the kind of result to be accomplished, the customs of the enterprise and the nature of the persons normally employed for doing the work”).

