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Institutional Liability for Employees' Intentional Torts: Vicarious Liability as a Quasi-Substitute for Punitive Damages

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Articles

INSTITUTIONAL LIABILITY FOR EMPLOYEES' INTENTIONAL TORTS: VICARIOUS LIABILITY AS A QUASI-SUBSTITUTE FOR PUNITIVE DAMAGES

Catherine M. Sharkey[*]

Abstract

Modern day vicarious liability cases often address the liability of enterprises and institutions whose agents have committed intentional acts. Increasingly, when employers are sued, the line is blurred between the principal's vicarious liability for its agent's acts and its own direct liability for hiring and/or failing to supervise or control its agent.

From an economic deterrence perspective, the imposition of vicarious liability induces employers to adopt cost-justified preventative measures, including selective hiring and more stringent supervision and discipline, and, in some instances, to truncate the scope of their business activities. Negligence-based direct liability likewise induces employers to adopt cost-justified preventative measures (without constraining activity levels to the degree that strict liability does). This raises questions. Why doesn't direct employer negligence liability suffice, in terms of deterring employees' intentional torts? Or conversely, so long as there is vicarious liability, is there any need for direct negligence liability at all?

In this Article, I argue that, as a form of strict liability, vicarious liability will have an edge over direct employer negligence liability to the extent that there is a significant risk of under-detection of the failures of an employer's preventative measures. Traces of this under-detection rationale for vicarious liability can be found in the academic literature and court decisions, but it warrants further elaboration. The risk of under-detection provides a strong justification for the expansion of the scope of institutional or employer vicarious liability.

The under-detection rationale, moreover, has the potential to serve as a coherent framework for some modern doctrinal debates, including whether punitive damages should be imposed either vicariously or directly upon employers

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when their employees commit intentional torts. Specifically, I argue that the under-detection rationale correspondingly strengthens the case for punitive damages in direct negligence cases and weakens the case for punitive damages imposed in vicarious liability cases. Focusing on under-detection, vicarious liability acts as a quasi-substitute for punitive damages. And seen through this lens, Restatement (Second) of Torts § 909, Punitive Damages Against a Principal – *typically defended as a "complicity rule" limiting the imposition of vicarious punitive liability on fairness grounds – is justified on economic deterrence grounds by allowing punitive damages coupled with direct negligence liability but limiting its operation in the vicarious liability sphere.*

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I. INTRODUCTION

Vicarious liability of employers for employees' torts can be justified on economic deterrence grounds—namely, identifying the "cheapest cost avoider" to hold liable for the tortious conduct. The economic approach emphasizes both the ability of the employer to induce careful conduct by its employees and the potential that judgment-proof employees might escape direct personal liability. The conventional economic accounts compare vicarious liability of the employer (or principal) with direct

liability of the (typically) negligent employee (or agent).[1] But these conventional accounts do not address an emerging paradigm of institutional liability confronting the courts.

Modern day vicarious liability cases often address the liability of enterprises and institutions (such as churches, schools, and residential homes) in a context in which their agents have committed intentional acts. Increasingly, when an employer is sued, the line is blurred between the principal's vicarious liability and its own direct liability. My Article focuses exclusively on *employer* liability for employees' *intentional torts* and, in that context, compares vicarious liability with direct liability against the employer using an optimal deterrence framework.

The imposition of strict liability vicarious liability ("strict-vicarious liability") induces employers to adopt cost-justified preventative measures—including selective hiring and more stringent supervision and discipline of its employees—and, in some instances, to truncate the scope of their business activities. But there is a serious potential downside: when there is nothing the employer reasonably could have done to prevent an employee's tort—as may often be the case with intentional torts—then the imposition of strict liability has no benefit from a deterrence perspective and simply creates expensive lawsuits.

Negligence-based direct liability likewise induces employers to adopt cost-justified preventative measures (without constraining activity levels to the degree that strict liability does). This raises questions. Why doesn't direct employer negligence liability suffice in terms of deterring the commission of intentional torts by employees? Or, conversely, so long as there is strict-vicarious liability, is there any need for direct negligence liability at all?

"Scope of employment" stands as a doctrinal dividing line between the two approaches. The requirement that an employee act within the "scope of employment" to hold the employer strictly vicariously liable for the employee's torts is well established and, more than any other factor, determines whether a court applies strict or negligence-based liability against the employer.[2] But does it mark a logical and/or efficient boundary between the imposition of direct negligence and strict-vicarious liability? The conventional economic account has justified the "scope of employment" limitation as a proxy for enterprise causation.

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1 *See infra* Part II (discussing the conventional economic account of employer's vicarious liability, factoring in the employee's inability to pay, the employer's control over the employee's actions, and enterprise causation).

2 *See infra* Part III (looking at employer vicarious liability as whether or not the employee was acting within the scope of the employment).

But, apart from the strength of the causal nexus (which in some form must be satisfied for both strict liability and negligence-based liability), what justifies the choice between direct negligence and strict-vicarious liability against the employer? In this Article, I highlight as a significant factor the likelihood of detection of the failures of an employer's preventative measures.[3] To the extent that there is a significant risk of under-detection of the failures of an employer's preventative measures, strict-vicarious liability has an edge over direct employer negligence liability in terms of optimal deterrence. Traces of this under-detection rationale for vicarious liability can be found in the academic literature as well as court decisions, but it warrants further elaboration.

The under-detection rationale has the potential, moreover, to serve as a coherent framework for the significant modern doctrinal debates regarding whether punitive damages should be imposed either vicariously or directly upon employers for intentional torts committed by their employees. Focusing on under-detection, vicarious liability acts as a quasi-substitute for punitive damages.[4] Seen through this lens, several significant implications follow. The case for punitive damages on top of direct negligence actions emerges strong, whereas the case for vicarious punitive damages is comparatively weaker. I introduce a novel burden-shifting and information-forcing approach into this context to strike the right balance, allowing defendants facing strict-vicarious liability to immunize themselves against a direct negligence claim—and thereby punitive damages—by showing that suitable preventative measures are in place.[5] Finally, *Restatement (Second) of Torts § 909, Punitive Damages Against a Principal* ("*Restatement § 909*")—typically defended as a "complicity rule" limiting the imposition of vicarious punitive liability on fairness grounds—is justified on economic deterrence grounds by allowing punitive damages coupled with direct negligence liability but limiting its operation in the vicarious liability sphere.[6]

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3 *See infra* Part IV.A.

4 *See infra* Part IV.

5 *See infra* Section IV.B.3 (discussing this burden-shifting approach).

6 RESTATEMENT (SECOND) OF TORTS § 909 (AM. LAW INST. 1979). *See infra* Section IV.B.4 (analyzing the *Restatement*'s "complicity rule" alongside the newly proposed burden-shifting approach).

II. CONVENTIONAL ECONOMIC ACCOUNT OF EMPLOYER VICARIOUS LIABILITY

In two seminal articles, Alan Sykes sets forth the classic economic argument for employer vicarious liability.[7] In this Part, I summarize the solid underlying theory and more limited doctrinal application of Sykes's framework. While this will serve as a necessary foundation, I emphasize at the outset that the issues I explore in this Article fall largely outside of Sykes's core interest in pitting employer vicarious liability against employee personal liability, primarily in the context of negligence actions.

In his 1984 article, *The Economics of Vicarious Liability*, Sykes "inquires whether a rule of vicarious liability, under which the principal and agent are jointly and severally liable for the agent's wrongs, is economically efficient relative to a rule of personal liability, under which the agent alone is liable for his wrongs."[8] Sykes explicitly does not consider "rules that impose liability on principals for agent wrongs that are attributable to the principals' own malfeasance."[9] Sykes reiterates in his 1988 article, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, that "[t]he analysis throughout . . . contemplates the choice between a rule of personal liability, under which the employee alone is liable for his wrongs, and a rule of vicarious liability, under which the employer and employee are jointly and severally liable."[10]

The classic economic justification for employer vicarious liability rests on three pillars: (1) employee inability to pay; (2) employer control methods; and (3) enterprise causation.[11] First, Sykes's framework emphasizes that "the choice between vicarious liability and personal liability is a significant one whenever the employee is unable to pay

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7 *See* Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984) [hereinafter Sykes, *Economics*] (discussing the economics related to vicarious liability in employment relationships); 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 (1988) [hereinafter Sykes, *Boundaries*] (defining vicarious liability and how it relates to employees and employers in the workplace).

8 Sykes, *Economics*, *supra* note 7, at 1231–32 (footnotes omitted).

9 *Id.* at 1231 n.2. Sykes explained, "Rather, the Article deals with situations in which the principal does not contribute to the wrong except, perhaps, by his failure to monitor the agent or to design incentives that deter agent malfeasance." *Id.* But this caveat flags what I take up in this Article—whether actions such as the employer's failure to monitor or detect employee misconduct warrants the imposition of direct negligence liability and, if so, whether that alters the soundness of the imposition of vicarious liability.

10 Sykes, *Boundaries*, *supra* note 7, at 564.

11 *See id.* at 569, 581–82 (describing supporting economic factors for vicarious liability as the employee's inability to pay judgments, the employer's control methods over employment, and enterprise causation).

judgments in full under a rule of personal liability."[12] Second, the efficiency of vicarious liability rests not only on the potentially diminished incentives for judgment-proof employees to take adequate care but also on the potential for employers to be the cheapest cost avoiders in terms of taking cost-effective measures to induce their employees to take adequate care.[13] Third, Sykes's seminal contribution is his elaboration of "enterprise causation"—an employer "causes" its employees' torts to the extent that the probability of the employee committing the tort is increased due to the employment relationship.[14]

A. Employee Inability to Pay

Sykes's cost internalization framework starts with the Coasean insight that, absent transaction costs, the optimal allocation of risk "does not depend upon where the law initially places liability."[15] However, if the employee tortfeasor's assets are less than the potential judgment against him, the choice between employee personal liability and employer vicarious liability becomes significant.[16]

Given that employees and employers internalize future expected costs, where an employee may be (wholly or partially) judgment-proof, personal liability creates three inefficiencies: (1) the employee's incentive to avoid committing torts is suboptimal, given that he or she will not pay for the full consequences of his or her actions; (2) the employer's profitability is inflated, as it need not expend resources to monitor employees to minimize the risk of their committing torts (and indeed, some of the employees' torts may in fact serve the employer's bottom line); and (3) employees may be dissuaded from entering optimal risk-allocation agreements with their employers.[17] The imposition of vicarious liability upon the employer is presented as a solution that avoids the "inefficient expansion of the scale of business activity that results when the employee cannot pay judgments, . . . improve[s] the efficiency of risk-sharing by eliminating the incentive . . . to take advantage of [the employee's] inability to pay," and eliminates transaction costs incurred in negotiating private agreements for the employer to assume liability.[18]

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12 *Id.* at 566.

13 *See id.* at 591–92 (detailing the control that employers must have over their employees and how this control can be a cost-effective measure to induce employees to act with care in the workplace).

14 *See id.* at 571 (defining enterprise causation).

15 *Id.* at 566.

16 *See* Sykes, *Boundaries*, *supra* note 7, at 566 (emphasizing that vicarious liability accounts for judgments for plaintiff that may exceed the employee's assets).

17 *See id.* at 567–68.

18 *Id.* at 568.

B. Employer Control

The economic efficiency view of vicarious liability depends on "its effect upon employees' incentives to avoid wrongful conduct" where "[t]he effect of vicarious liability on such incentives depends in turn upon the devices available to the employer to induce careful behavior and the costs of those devices."[19]

Sykes sets forth the various ways in which employers can exercise such control. First, employers can directly observe their employees' activities and announce a desired standard of conduct.[20] Second, employers can structure compensation and promotion decisions to incentivize employees over the course of a long-term relationship.[21] Finally, in situations in which an employee, whose conduct is unobservable, is engaged only in a short-term relationship, an employer's "threat of an indemnity action against the employee" may be the only device available to dissuade misconduct.[22]

The *Restatement (Third) of Agency* provides a "control test" to determine the scope of employer vicarious liability for "its employee acting within the scope of employment."[23] The *Restatement* justifies the control test on economic grounds, stating that where an employee's tort was not within the scope of activity controllable by the employer, employer liability would not incentivize the employer to take steps to prevent such conduct, and an employer could not reasonably insure against risks that it cannot ascertain or quantify.[24] Overall, Sykes argues that the criteria are in line with the factors that determine the efficiency of vicarious liability—observability and the costs to the principal of monitoring loss-avoidance efforts.[25]

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19 *Id.* at 569.

20 *See id.* (noting direct observation as an inexpensive device available for employers).

21 *See id.* at 570 (discussing employer influence over pay and advancement as another inexpensive incentive available for employers).

22 Sykes, *Boundaries*, *supra* note 7, at 570.

23 RESTATEMENT (THIRD) OF AGENCY § 7.07(1) (AM. LAW INST. 2006) ("An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment."); *id.* § 7.07(2) ("[A]n employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct *subject to the employer's control*." (emphasis added)). By contrast, "[w]hen an agent is not an employee, the principal lacks the right to control the manner and means of the agent's physical conduct in how work is performed." *Id.* § 7.07 cmt. b.

24 *See id.* § 7.07 note b (justifying vicarious liability when the employer has a degree of control over the employee's actions).

25 *See* Sykes, *Economics*, *supra* note 7, at 1262 (discussing observability and costs of monitoring loss-avoidance).

C. Enterprise Causation

The most innovative feature of Sykes's framework is his elaboration of the notion of enterprise causation to forge the link between an employer's business activity and its employees' torts: "An enterprise 'fully causes' the wrong of an employee if the dissolution of the enterprise and subsequent unemployment of the employee would reduce the probability of the wrong to zero."[26] And vicarious liability "will [thus] force the enterprise to bear a greater proportion of the cost of the accidents that it 'causes.'"[27]

Applying Sykes's notion of enterprise causation ensures that each business "bears the incremental social costs associated with its operation."[28] Furthermore, it demonstrates the inefficiency of holding an employer vicariously liable for all employee torts even when the employer cannot affect either the likelihood that the employee commits a tort or the likely amount of damages.[29] Thus, where the enterprise is fully responsible for the harm, it "will operate at an efficient level of output only if it bears, directly or indirectly, all liability for the employee's [tort]."[30] Whereas, where "[t]he probability of a [tort] thus depends upon whether the employee is employed or not, but (by hypothesis) cannot be affected by the employer once the employee has been hired," it is inefficient to impose either the full value of the tort or no liability on the enterprise.[31]

III. EMPLOYER LIABILITY FOR EMPLOYEE INTENTIONAL TORTS: "SCOPE OF EMPLOYMENT" AS A DIVIDING LINE

We turn now from the conventional economic account—with employer vicarious liability pitted against employee personal liability, primarily in the context of employee negligence torts—to my main focus, namely comparing and contrasting different forms of employer liability in the context of employee intentional torts.[32] Moreover, I begin with an exposition of the doctrine of "scope of employment" as it has emerged as

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[26] Sykes, *Boundaries*, *supra* note 7, at 572.

[27] *Id.* at 584. Sykes thus departs from the *Restatement (Third) Agency*, which specifically rejects a "foreseeability" test and any tests that look to whether the fact of employment "increased the [likelihood] that the tort would occur." RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. b (AM. LAW INST. 2006).

[28] Sykes, *Boundaries*, *supra* note 7, at 573.

[29] *See id.* at 573–75 (pointing out that vicarious liability for all employee torts may be inefficient).

[30] *Id.* at 576.

[31] *Id.* at 575.

[32] *See, e.g.*, *infra* Part III.A (targeting vicarious liability); *infra* Part III.B (focusing on direct negligence).

a dividing line between employer vicarious liability and direct negligence liability in the context of employee intentional torts before proceeding to offer a theoretical criticism and posit an alternative approach.

The "scope of employment" doctrine has emerged as a sharp dividing line separating vicarious employer liability from direct negligence liability for employee intentional torts in a significant number of jurisdictions.[33] Employers can be held vicariously liable for employees who commit intentional torts while acting within the scope of employment, whereas employers can be held directly liable for their own negligence in situations in which employees commit intentional torts outside the scope of employment. For example, "New Jersey would not permit Plaintiff to proceed on her claim of negligent hiring, training, supervision, and retention in light of Defendants' admission that [the employee] was acting within the course and scope of his employment."[34] And in Florida, courts

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[33] *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 7.05 cmt. b (AM. LAW INST. 2006) (noting that jurisdictions differ as to whether direct negligence theories can be applied where the employee acted within the scope of employment and that, in some jurisdictions, punitive damages may be appropriate on one theory but not the other).

Indeed, the doctrinal confusion goes even deeper. There are myriad examples of courts that have altogether confused the requirements and purposes of vicarious liability with direct liability. *See, e.g.*, Bishop v. Miller, Nos. 4-97-30, 4-97-31, 1998 WL 135802, at *3 (Ohio Ct. App. Mar. 26, 1998) (dismissing a claim of negligent supervision on the ground that the alleged sexual battery was "not within the scope of [defendant's] employment" as is required for respondeat superior); Cook v. Greyhound Lines, Inc., 847 F. Supp. 725, 732 (D. Minn. 1994) ("[U]nder the rubric of negligent supervision, in order to successfully state a claim against an employer, the claimant must establish that the employee who caused an injury did so within the scope of his or her employment."). *See generally* Paula Dalley, *Destroying the Scope of Employment*, 55 WASHBURN L.J. 637 (2016) (discussing the technical errors courts make in deciding employer liability cases).

I am not taking on this even "lower hanging fruit" doctrinal confusion for two reasons. First, it is not theoretically very interesting (although may nonetheless be important to correct, given the stakes of these cases). Second, it does not appear to be as widespread an issue, in part given ample evidence that appellate courts often correct trial courts that make this mistake. *See, e.g.*, Doe v. Borromeo, No. 305162, 2012 WL 4215032, at *4–5 (Mich. Ct. App. Sept. 20, 2012) (remanding a case to trial court for failing to address plaintiff's negligent supervision claim and only addressing vicarious liability); Minnis v. Or. Mut. Ins. Co., 48 P.3d 137, 144 (Or. 2002) (noting the danger of confusion); Byrd v. Faber, 565 N.E.2d 584, 588–89 (Ohio 1991) (pointing out that the appellate court had conflated negligent hiring and respondeat superior).

[34] Lee *ex rel.* Estate of Lee v. J.B. Hunt Transp., Inc., 308 F. Supp. 2d 310, 315 (S.D.N.Y. 2004). *See also id.* at 313 ("Although New Jersey has indeed recognized the tort of negligent hiring/retention, its rationale for doing so appears to rest upon a 'concern for the safety and welfare of the general public, and the need to assess liability for the vicious acts of employees, *in the absence of respondeat superior liability*.'" (quoting 18 N.J. PRAC. EMPLOYMENT LAW § 12.34 (West 1998))); Bennett v. T & F Distrib. Co., 285 A.2d 59, 60 (N.J. Super. Ct. App. Div. 1971) ("If [the employee] had been acting within the scope of employment when he assaulted [the customer], it would be immaterial whether [the employer] was negligent in hiring [the

have likewise restricted employer direct liability claims to realms in which the employee commits an intentional tort while acting outside the scope of employment.[35] Thus, "Florida law requires that a claim for negligent retention allege acts committed outside the course and scope of employment."[36]

Moreover, *Restatement (Second) of Torts § 317, Duty of Master to Control Conduct of Servant* ("*Restatement § 317*") seems to embrace this approach as well.[37] *Restatement* § *317* provides that "[a] master is under a duty to exercise reasonable care so to control his servant while *acting outside the scope of his employment* as to prevent him from intentionally harming others . . . ."[38] Indeed, the commentary clarifies that "[t]he rule stated in this Section is applicable only when the servant is acting outside the scope of his employment. If the servant is acting within the scope of his employment, the master may be vicariously liable under the principles of the law of Agency."[39]

Significant practical implications flow from scope of employment forging a doctrinal dividing line between vicarious and direct employer liability. First, an employer might have a strategic reason to concede that an employee's intentional tort falls within the "scope of employment" so as to foreclose a direct liability claim, especially if the latter is either the sole or probable route to recovering punitive damages.[40]

Second, the division has implications for the type of evidence that can be admitted to support the claim. The South Carolina Supreme Court, for example, acknowledged:

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employee], for in such instance [the employer] would be liable on the theory of *respondeat superior*."), *cert. denied*, 289 A.2d 795 (N.J. 1972).

35 *See, e.g.*, Belizaire v. Miami, 944 F. Supp. 2d 1204, 1214 (S.D. Fla. 2013) (emphasizing that direct liability can only be applied to employers when the employee commits an intentional tort outside the scope of employment).

36 *Id.* at 1215. Defendant's motion to dismiss a negligent retention claim was granted on the grounds that "the officers here were acting within the scope of their employment." *Id*.

37 Note, however, that such an interpretation of *Restatement (Second) of Torts* § 317 is in tension with *Restatement (Second) of Agency* § 213 cmt. h ("In a given case the employer may be liable both on the ground that he was personally negligent and on the ground that the conduct was within the scope of employment."), and *Restatement (Third) of Agency* § 7.07 cmt. b (explaining that an employer, even when not in control of an employee's actions, may be liable via direct negligence or fault theories). *See, e.g.*, Pruitt v. Pavelin, 685 P.2d 1347, 1359–60 (Ariz. Ct. App. 1984) (awarding compensatory and punitive damages on a scope-of-employment theory and compensatory damages on a negligent hiring theory).

38 RESTATEMENT (SECOND) OF TORTS § 317 (AM. LAW INST. 1965) (emphasis added).

39 *Id.* § 317 cmt. a.

40 *Cf.* RESTATEMENT (SECOND) OF AGENCY § 213 cmt. h (AM. LAW INST. 1958) (noting that in "cases [where the employer is liable on direct negligence and vicarious liability theories], the fact that the employer was personally negligent may be important, however, in jurisdictions in which punitive damages are awarded").

> [T]he admission of evidence which must be offered to prove a negligent hiring, training, supervision, or entrustment claim—evidence such as a prior driving record, an arrest record, or other records of past mishaps or misbehavior by the employee—will be highly prejudicial if combined with a stipulation by the employer that it will ultimately be vicariously liable for the employee's . . . acts.[41]

But the court nonetheless concluded:

> [T]he argument that the court must entirely preclude a cause of action to protect the jury from considering prejudicial evidence gives impermissibly short-shrift to the trial court's ability to judge the admission of evidence and to protect the integrity of trial, and to the jury's ability to follow the trial court's instructions.[42]

Should an employer's direct negligence liability thus be reserved only for situations in which an employee's intentional tort falls outside the scope of employment? To the extent courts expand the realm of "scope of employment" for employee intentional torts, should they concomitantly limit the range for direct negligence-based liability?

A. Vicarious Liability for Intentional Torts "Within the Scope of Employment"

Courts are, by and large, willing to consider imposing vicarious liability on employers for employees' intentional torts so long as they are acting "within the scope of employment."[43] But to date, courts have typically construed "within the scope of employment" extremely narrowly in the context of employee intentional torts—primarily only those actions employees take in the service of their employer's purposes, typically where they have acted with apparent or actual authorization by their employer.

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41 James v. Kelly Trucking Co., 661 S.E.2d 329, 331 (S.C. 2008).

42 *Id.* Nor was the court satisfied with the rule coupled with a "punitive damages exception"—as this would lead to a rule of "little utility" or else force a judgment regarding the employer's conduct by the court based only on the pleadings. *Id*. at 332.

43 *See, e.g.*, Blair v. Def. Servs., 386 F.3d 623, 627–28 (4th Cir. 2004) (finding intentional torts are not always outside the scope of employment under vicarious liability in Virginia, but employee's intentional actions fell outside scope of employment); Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 347 (Alaska 1990) (imposing vicarious liability on an employer for an employee's intentional tort "within the scope of employment").

The classic *Ira Bushey & Sons* case and one of its progeny, *Taber v. Maine*, are the exceptions that prove the rule.[44] Two visionary Second Circuit judges (applying the law of admiralty and Guam/California, respectively), Henry Friendly and Guido Calabresi, articulated a much broader rationale for a military employer's vicarious liability for its serviceman employee's intentional tort, based on economic theories of enterprise causation and employer control.[45]

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[44] Ira Bushey & Sons, Inc. v. United States, 398 F.2d 167 (2d Cir. 1968); Taber v. Maine, 67 F.3d 1029 (2d Cir. 1995). For cases citing *Ira Bushey* but nonetheless adopting the "motive test," see Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 347–48 (Alaska 1990) (holding, in the context of a therapist's abuse of a patient, that the employer could be vicariously liable, given that "where tortious conduct arises out of and is reasonably incidental to the employee's legitimate work activities, the 'motivation to serve' test will have been satisfied"); Sharkey v. Lasmo, 992 F. Supp. 321, 329 (S.D.N.Y. 1998) ("[I]n order to be within the scope of employment, the tort must have been committed in part to benefit the employer and the employer must have received some benefit. . . . [A]s the Court of Appeals has recognized [in *Ira Bushey*], 'courts have gone to considerable lengths to find such a purpose.'" (citations omitted)); U.S. v. Davis, 666 F. Supp. 641, 643 (S.D.N.Y. 1987) ("Under the doctrine of respondeat superior an employer can be held vicariously liable for damages caused by its employees when the employee was acting within the scope of employment [as per *Ira Bushey*]. An employee acts within the scope of employment when he or she furthers the employer's interest."); Dashner v. Hamburg Ctr. Dep't Pub. Welfare, 62 Pa. D. & C.4th 380, 387 (Pa. C.P. Berks July 7, 2003) ("[A] claim for vicarious liability cannot stand where a servant's intentional torts are actuated by personal motives only and are not in furtherance of the interests of his employer."); Avery v. United States, 434 F. Supp. 937, 942 (D. Conn. 1977) ("[T]he relevant question is whether the employee acted from a personal motive or with a motivation to serve his employer's interests.").

For cases rejecting *Ira Bushey* outright, see Patterson v. Blair, 172 S.W.3d 361, 371–72 (Ky. 2005) (rejecting *Ira Bushey*); Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1043 n.32 (Utah 1991) (declining to apply the "premises rule" from *Ira Bushey*); Kuehn v. White, 600 P.2d 679, 683 (Wash. Ct. App. 1979) (noting that if vicarious liability is to be expanded, it should come from the legislature); Pickering v. Daniel J. Keating Co., 460 F.2d 820, 823 n.7 (3d Cir. 1972) (finding no *Ira Bushey*-style expansion of vicarious liability under New Jersey law); Sandman v. Hagan, 154 N.W. 2d 113, 118–19 (Iowa 1967) ("If employer [vicarious] liability is to be extended [as in *Ira Bushey*], we believe it should come from the legislature . . . .").

The U.S. Supreme Court, citing *Ira Bushey*, recognized that "[t]he concept of scope of employment has not always been construed to require a motive to serve the employer," but nonetheless rejected this approach under Title VII sexual harassment. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 757 (1998) ("The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment."). *See also* Faragher v. Boca Raton, 524 U.S. 775, 793–802 (1998) (describing the factors involved in determining liability for torts committed by employees outside the scope of their employment).

[45] *See Ira Bushey*, 398 F.2d at 170 (finding that the motive analysis was not the proper test for imposing vicarious liability on the employer in this case); Taber v. Maine, 67 F.3d 1029, 1031 (2d Cir. 1995) ("California has taken the lead in developing the modern law of *respondeat superior* even before *Bushey*. And, so, rounding out the circle, we now reach the same conclusion as did Judge Friendly, twenty-six years ago.").

1. Narrow Recognition by Courts

Most jurisdictions hold that employee intentional torts can only be considered within the scope of employment under extremely limited circumstances. As one court aptly summed up, "As a general rule, it is not within the scope of an employee's employment to commit an assault upon a third person."[46]

The majority position is that intentional torts are only within the scope of employment when committed to serve the employer's interest, namely:

> the act is one which is "fairly and naturally incident to the business," and is done "while the servant was engaged upon the master's business and [is] done, although mistakenly or ill advisedly, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business."[47]

By contrast, courts have held that "[w]hen 'an assault is purely personal to the servant, having no real connection with the master's business, the doctrine of respondeat superior is inapplicable to fasten liability upon the master.'"[48] Jurisdictions often cabin vicarious liability in this manner by deploying the actual or apparent agency doctrine:

> To recover under a theory of vicarious liability such as actual or apparent agency, it must be shown that the agent or apparent agent's conduct was motivated, at least in part, by the purpose of serving the employer. It is entirely clear that responsibility for the intentional wrongful acts of a servant-employee may be visited upon his master-employer under the doctrine of *respondeat superior* only when that conduct in some way furthers the interests of the master or is at least motivated by a

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46 Rodebush *ex rel.* Rodebush v. Okla. Nursing Homes, Ltd., 867 P.2d 1241, 1245 (Okla. 1993).

47 *Id.*

48 Ayers v. Wal-Mart Stores, Inc., 941 F. Supp. 1163, 1169 (M.D. Fla. 1996). Moreover, courts reach mixed conclusions on whether to recognize respondeat superior in the hybrid situation in which "an employee commits an intentional tort with the dual purpose of furthering the employer's interest and venting personal anger." Sunseri v. Puccia, 422 N.E.2d 925, 930 (Ill. App. Ct. 1981).

> purpose to serve those interests, rather than the employee's own.[49]

2. Whither Enterprise Causation Rationale?

In the context of employee intentional torts, courts seem especially wary of the imposition of vicarious employer liability. As described above, courts typically recognize vicarious liability only in the more limited situations in which the employee acts to serve the employer's purposes under some variant of actual or apparent authority. But this essentially transforms vicarious liability into a form of direct liability (which would apply in situations in which the employer authorized the employee's act). In any event, it is a far cry from Sykes's notion of enterprise causation.

Against this backdrop, two cases stand out in terms of their endorsement (implicit and explicit, respectively) of the enterprise causation rationale.[50] The first is the classic case *Ira Bushey & Sons v. United*

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[49] *Ayers*, 941 F. Supp. at 1169.

[50] The Second Circuit appears to be a hotbed for the enterprise causation rationale for vicarious liability. *See* Cronin v. Hertz Corp., 818 F.2d 1064, 1067–69 (2d Cir. 1987) (adopting the *Ira Bushey* approach in a case applying Connecticut law). New York state and federal courts cite *Ira Bushey* frequently. *See, e.g.*, Riviello v. Waldron, 391 N.E.2d 1278, 1281 (N.Y. 1979) ("Among the factors to be weighed are: [1] the connection between the time, place and occasion for the act; [2] the history of the relationship between employer and employee as spelled out in actual practice; [3] whether the act is one commonly done by such an employee; [4] the extent of departure from normal methods of performance; [5] and whether the specific act was one that the employer could reasonably have anticipated." (citing *Ira Bushey*)).

The *Ira Bushey* case and enterprise causation rationale also resonates in the Seventh Circuit. *See, e.g.*, Wilson v. Chi., Milwaukee, St. Paul & Pac. R.R. Co., 841 F.2d 1347, 1353–56 & n.2 (7th Cir. 1988) (directing "the factfinder to determine if '(a) the tort arose during an errand of the sort that probably would not have occurred absent the existence of the employment relationship, or (b) for some other reason, the probability of the tort was substantially increased by the existence of the employment relationship" (quoting Sykes, *Boundaries*, *supra* note 7, at 587)); Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc., 755 F.2d 599, 605 (7th Cir. 1985) ("The reasoning behind this rule [of vicarious liability] is rarely articulated, though the more modern cases tend to rely on a risk allocation theory: the employer, not the innocent plaintiff, should bear the cost of the torts of its employees as a required cost of doing business, insofar as such torts are reasonably foreseeable and the employer is a more efficient cost avoider than the injured plaintiff." (citations omitted)).

It has also been embraced in a few additional jurisdictions. *See, e.g.*, Leafgreen v. Am. Family Mut. Ins. Co., 393 N.W.2d 275, 280–81 (S.D. 1986) (adopting a modified foreseeability test wherein "foreseeable" means that "the employee's conduct must not be so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business"); Richard v. Hall, 874 So.2d 131, 137–38 (La. 2004) (noting that "[i]n determining whether a particular accident may be associated with the employer's business enterprise, the court must essentially decide whether the particular accident is a part of the more or less inevitable toll of a lawful enterprise," and that "the scope of employment test examines the employment-related risk of injury," such that "[t]he inquiry requires the trier

States, in which the Second Circuit, applying admiralty law, affirmed the imposition of vicarious liability on the Coast Guard for vandalism by a drunken seaman.[51] In this famous decision, Judge Henry Friendly rehearsed various justifications for vicarious liability, including the narrowest "serves the master's purpose" and cheapest cost-avoider rationales (which he disparaged, though as a purely theoretical matter, not on the basis of any empirical evidence), before landing (implicitly) on an enterprise causation rationale—inquiring whether the risk is "characteristic of [the] activities" of the enterprise, where "the activities of the 'enterprise' do not reach into areas where the servant does not create risks different from those attendant on the activities of the community in general."[52]

A quarter-century later, drawing upon *Ira Bushey*, Judge Guido Calabresi (applying the law of Guam, which looks to California law for guidance) explicitly endorsed the enterprise causation rationale in *Taber v. Maine*.[53] The court held that the United States was vicariously liable for

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of fact to determine whether the employee's tortious conduct was so closely connected in time, place and causation to his employment-duties as to be regarded a risk of harm fairly attributable to the employer's business, as compared to conduct motivated by purely personal considerations entirely extraneous to the employer's interests"); Carroll Air Sys., Inc. v. Greenbaum, 629 So.2d 914, 916–17 (Fla. Dist. Ct. App. 1993) ("The underlying philosophy which holds an employer liable for an employee's negligent acts is the deeply rooted sentiment that a business enterprise should not be able to disclaim responsibility for accidents which may fairly be said to be the *result* of its activity." (emphasis added)); Rodriguez-Rivera v. United States, Case No. 8:12-cv-856-T-30TBM, 2014 WL 12625781, at *4–5 (M.D. Fla. Apr. 24, 2014) (holding U.S. government vicariously liable for damage caused by a Marine's drunk-driving car accident, given that, but for his employment, the accident would not have occurred).

[51] *See* Ira Bushey & Sons, Inc. v. United States, 398 F.2d 167, 172–73 (2d Cir. 1968) (endorsing the enterprise causation rationale for vicarious liability imposed on employers).

[52] *Id*. at 171–72. *See also* Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1281 n.45 (1997) (discussing Sykes's definition of enterprise causation as "very similar to Friendly's characteristic risk criterion").

[53] Taber v. Maine, 67 F.3d 1029, 1031 (2d Cir. 1995) (citing *Ira Bushey*). "California has adopted the rationale that the employer's liability should extend beyond his actual or possible control over the employees to include risks inherent in or created by the enterprise because he, rather than the innocent injured party, is best able to spread the risk through prices, rates or liability insurance." Rodgers v. Kemper Constr. Co., 50 Cal. App. 3d 608, 618 (Cal. Ct. App. 1975) (citing *Ira Bushey*). *See also* Mary M. v. Los Angeles, 814 P.2d 1341, 1343–44 (Cal. 1991) (citing *Ira Bushey* and noting that vicarious liability can be justified by the need to ensure that the victim's losses are distributed amongst those who benefit from the enterprise that gave rise to the harm); Toyota Motor Sales U.S.A., Inc. v. Super. Ct. L.A. Cty., 220 Cal. App. 3d 864, 878 n.10 (Cal. Ct. App. 1990) (reasoning that "[i]n the context of the good faith motion, [one] must be deemed exposed to the possibility of full vicarious liability to the plaintiff" when there is an act or omission occurring within the scope of employment); Harris v. Trojan Fireworks Co., 120 Cal. App. 3d 157, 163 (Cal. Ct. App. 1981) (stating that "liability is frequently determined by who is best able to spread the risk of loss through the prices charged").

injuries caused by a Navy serviceman's drunk-driving accident.[54] According to Judge Calabresi, the vicarious liability doctrine is "concerned with the allocation of the cost of industrial injury," and thus its applicability should turn on the "relationship between the servicemember's behavior and the costs of the military enterprise."[55] Moreover, Judge Calabresi reasoned, "[G]iven the pervasive control that the military exercises over its personnel while they are on a base, it is totally in keeping with the doctrine of respondeat superior to allocate the costs of base operations to the government."[56]

B. Direct Negligence Liability for Intentional Torts "Outside the Scope of Employment"

We move now from employer liability for employees' commission of intentional torts "within the scope of employment" to those committed "outside the scope of employment." *Restatement § 317* ("Duty of Master to Control Conduct of Servant") provides the contours under which "[a] master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them."[57] Section 317 liability attaches when the servant "(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master."[58] Not all jurisdictions have expressly adopted § 317, but all jurisdictions seem to recognize some form of direct liability against the employer for negligent hiring, supervision, or retention.[59]

1. Narrow Recognition by Courts

Courts have recognized direct employer liability for employees' intentional torts committed outside the scope of employment in very limited situations.[60] As succinctly summarized:

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54 *See Taber*, 67 F.3d at 1050.

55 *Id.* at 1036–37 (emphasis omitted).

56 *Id.* at 1037 (citing William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 914–15 (1981).

57 RESTATEMENT (SECOND) OF TORTS § 317 (AM. LAW INST. 1965).

58 *Id.* § 317(a)(i)–(ii).

59 *See, e.g.*, 53 N.Y. JURIS. EMP. REL. § 391 (explaining when direct liability is imposed on employers for negligent hiring, supervision, and retention).

60 *See generally* RESTATEMENT (SECOND) OF TORTS § 317 (AM. LAW INST. 1965).

> [C]ases that rely on [*Restatement (Second) of Torts*] section 317 generally involve rather *obvious* acts of negligence on the part of the employer—for example, the knowing retention of an incompetent employee or the knowing allowance of dangerous practices by an employee even though relatively inexpensive measures could have stopped the practices.[61]

The two prongs of direct employer liability, whether pursuant to causes of action based on § 317 or negligent hiring, supervision, or retention—knowledge and identification of preventative measures—are demanding threshold requirements and thus constitute formidable barriers to employer direct liability.

a. Knowledge Requirement

The knowledge requirement, as construed by the courts, presents a seemingly insuperable barrier to employer direct liability in the context of employee intentional torts. In case after case, courts have dismissed such direct liability claims against employers in a variety of settings, including ones in which employers provide services to vulnerable populations (and thus might be thought to have fiduciary duties above and beyond any duty to take reasonable care)—such as rehabilitation centers, schools, and churches—on the grounds that the employer lacked knowledge of the risk posed by the employee.[62] Moreover, courts have insisted upon an exacting type of particular knowledge of the specific risks involved.[63] Even where the employer was on notice regarding an employee's prior acts of misconduct (such that the employer might have been expected to

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[61] Sykes, *Boundaries*, *supra* note 7, at 591 (emphasis added).

[62] *See, e.g.*, Total Rehab. & Med. Ctrs., Inc. v. E.B.O., 915 So. 2d 694, 695, 696–97 (Fla. Dist. Ct. App. 2005) (holding that a patient in a rehabilitation center who was allegedly raped in a company-owned van during the course of an employee's assigned responsibility to transport the patient between facilities did not establish a negligent supervision claim against the center because the employer was not on notice that the employee was prone to commit the tortious or criminal act); Stephenson v. Sch. Bd. Polk Cty., 467 So. 2d 1112 (Fla. Dist. Ct. App. 1985) (holding that a school board was not liable for negligent supervision because "there was no indication from the record that [it] was put on notice of the harmful propensities of [its] employees"); Willis v. Dade Cty. Sch. Bd., 411 So. 2d 245, 246 n.1 (Fla. Dist. Ct. App. 1982) ("[T]o state a cause of action for the tort of negligent hiring or retention recognized in Florida, a plaintiff must allege facts showing that the employer was put on notice of the harmful propensities of the employee." (citations omitted)); Iglesia Cristiana Casa Senor, Inc. v. L.M., 783 So. 2d 353, 358 (Fla. Dist. Ct. App. 2001) (holding that a church was not liable for sexual assault of a minor by a pastor because "it [did not have] constructive or actual notice that [he] was unfit to work as a pastor at the [c]hurch").

[63] *See Total Rehab. & Med. Ctrs.*, 915 So. 2d at 696 (giving an example where specific risks and particular knowledge were analyzed in the context of employer liability).

take extra precautionary measures), courts have rejected negligent hiring, supervision, and retention claims where such prior bad acts were different in kind from the type of intentional tort committed in the case at hand.[64]

b. Specification of Preventative Measures

Moreover, even if the knowledge barrier is overcome, negligence-based employer direct liability forces the plaintiff to specify the preventative measures that should have been taken. Placing this burden on the plaintiff serves in practice to restrict the domain of measures considered by the court. Consider, for example, *Roman Catholic Bishop v. Superior Court of San Diego County*, a California case in which a fourteen-year-old girl and her family sued a church because of a priest's alleged molestation of the girl.[65] Given that the priest had no criminal history of child molestation, a background check alone would not have uncovered his propensity to commit such an act.[66] The plaintiffs identified specific preventative measures that the church nonetheless failed to take, including: (a) an investigation of the priest's background to determine if the priest previously had sexual relationships with adults; and (b) requiring the priest "to undergo a psychological evaluation before hiring him."[67] The court refused to impose a duty upon the church either to undertake such an investigation or to require a psychological evaluation because both measures would have unacceptably interfered with the priest's privacy.[68] And, having considered the specific untaken precautions alleged by the plaintiffs, the court ended its analysis.[69]

Many jurisdictions combine stringency on the knowledge requirement with exacting specification of preventative measures. For

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64 *Dibrill v. Normandy Assocs., Inc.*, 383 S.W.3d 77 (Mo. Ct. App. 2012), is illustrative. In that case, an employer defendant was granted summary judgment in a negligent hiring claim "because employe[e]'s prior acts of misconduct—which involved slapping his wife and a physical altercation with a co-worker—did not 'put him at risk to commit the sexual offense on plaintiff' such that the employer could be held liable for negligent hiring." *Id.* at 88. The court also affirmed summary judgment in favor of the employer on plaintiff's negligent retention and supervision claims "because the combination of the employee's pre-employment assaults and a sexually harassing comment he made during his employment did not 'put employer on notice that [the employee] had dangerous sexual propensities that it would be foreseeable that [the employee] would sexually assault a building visitor." *Id.* For further consideration of the costs of relaxing this "knowledge of the precise risk" prong, see *infra* note 106.

65 *See* Roman Catholic Bishop v. Super. Ct. San Diego Cty., 50 Cal. Rptr. 2d 399, 400–01 (Cal. Ct. App. 1996).

66 *See id*. at 404–05.

67 *Id.* at 405–06.

68 *See id*.

69 *See id*. (concluding summary judgment in favor of priest was proper on negligent hiring and supervision).

example, to make out a prima facie case for negligent hiring in Florida, a plaintiff must demonstrate:

> (1) the employer was required to make an appropriate investigation of the employee and failed to do so; (2) an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and (3) it was unreasonable for the employer to hire the employee in light of the information he knew or should have known.[70]

In *Malicki v. Doe*, another church abuse case, the Florida Supreme Court evaluated whether the defendants could be held liable for negligent hiring in light of their failure "to make inquiries into [the priest's] background, qualifications, reputation, work history, and/or criminal history prior to employing him in the capacity of Associate Pastor."[71] The upshot is that, typically, only in the most blatantly obvious cases of an untaken precaution—for example, where employers completely fail to inquire into the employee's background—do courts recognize employer negligence in the context of employee intentional torts.[72]

2. Rationale for Limitations on Direct Employer Liability

Courts have reasoned that *Restatement § 317* must impose a narrow duty on employers—or else a tight causal link between the employer's acts or omissions and the employee's tort or crime—in order to prevent employers from becoming guarantors of their employees.[73] As one court elaborated:

> The limitations expressed in § 317(a)(i) are intended to restrict the master's liability for a servant's intentional acts outside the course and scope of employment to situations where either the master has some degree of control of the premises where the act occurred or where the master, because of the employment relationship, has

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70 Malicki v. Doe, 814 So. 2d 347, 362 (Fla. 2002).

71 *Id.* The court also examined whether "the Church Defendants negligently placed [plaintiffs] under the supervision of Malicki [the priest], when the Church Defendants either knew or should have known that Malicki had the propensity to commit sexual assaults and molestations." *Id.*

72 *See, e.g.*, Blair v. Def. Servs., Inc., 386 F.3d 623, 629 (4th Cir. 2004) (concluding a jury could find employer negligent for failing to run a background check on the employee).

73 *See* Watson v. Hialeah, 552 So. 2d 1146, 1150 (Fla. Dist. Ct. App. 1989) (reaffirming the causal link between employer's action and the crime).

> placed the servant in a position to obtain access to some premises that are not controlled by the master.[74]

Similar to the enterprise causation rationale, "Such limitations serve to restrict the master's liability for a servant's purely personal conduct which has no relationship to the servant's employment and the master's ability to control the servant's conduct or prevent harm."[75]

In this way, direct liability claims often intersect with acts considered within the scope of employment due to the requirement that liability attaches to acts occurring at the employer's business location or committed during the conduct of the employer's business. As the Tenth Circuit noted, in cases of employer direct liability:

> [T]he existence of a duty to the injured party was based on actions against a customer or co-worker which took place on the working premises during the time employment services were normally rendered. In none of such cases was the employee not acting in the course of employment, nor was the injurious action removed from the employer's premises or without any nexus to the employer's operations.[76]

But, once again, courts have read these limitations very broadly. For example, in *Napieralski v. Unity Church of Greater Portland*, Napieralski was allegedly sexually assaulted by a minister while meeting with him at the minister's church-provided home.[77] The meeting was neither for church business nor spiritual counseling.[78] Napieralski argued that the church was negligent in supervising its employee, but the Maine Supreme Judicial Court rejected this argument, partly because "[w]here an employer does provide a residence for employees, it is very different from the employer's premises as addressed in the Restatement. The employee retains rights of privacy and quiet enjoyment in the residence that are not subject to close supervision or domination by the employer."[79]

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74 Weaver v. African Methodist Episcopal Church, Inc., 54 S.W.3d 575, 582 (Mo. Ct. App. 2001).

75 *Id.* at 582–83.

76 Girard v. Trade Prof'ls, Inc., 13 F. App'x 865, 869–70 (10th Cir. 2001) (emphasis omitted).

77 *See* Napieralski v. Unity Church of Greater Portland, 802 A.2d 391, 392 (Me. 2002).

78 *Id.* at 393.

79 *Id.*

C. *Revisiting "Scope of Employment" as a Dividing Line*

The doctrinal concept of "scope of employment" acts as a proxy for causal nexus or employer control—some notion of which must exist across both employer vicarious liability and direct negligence liability realms. In this Part, I challenge the theoretical and empirical soundness of the courts' use of "scope of employment" as a dividing line between the availability of vicarious liability and direct negligence claims against employers for employee intentional torts.

First, we consider the extent to which the doctrine of vicarious liability, with its insistence upon an employee acting within the "scope of employment" as a prerequisite for employer vicarious liability, comports with an economic efficiency justification. Recall that Sykes argued that the "scope of employment" limitation on employer vicarious liability was efficient so long as it aligned with his notion of "enterprise causation."[80] As we have seen above, however, Sykes's conception of "enterprise causation" is very broad as compared with the courts' (Friendly, J. and Calabresi, J., notwithstanding) extremely narrow recognition of what falls within the "scope of employment," particularly with respect to employee intentional torts.[81]

Second, with respect to the choice between employer vicarious liability and employer direct negligence, Sykes claimed that "[w]hen the 'causal' relationship between the activities of the entity subject to vicarious liability and the prospective wrong is weak . . . vicarious liability based on negligence [i.e., direct negligence liability] is superior to strict vicarious liability."[82] Thus, considering § 317 direct liability, Sykes concluded that "if the scope of employment is circumscribed to encompass only those torts substantially 'caused' by the business enterprise, section 317's approach to torts committed outside the scope of employment is clearly efficient."[83] In other words, if scope of employment serves as a proxy for enterprise causation, where this causal link is weak, it makes sense to impose the heightened requirements of negligence-based liability (namely knowledge and identification of preventative measures).[84] In this way, the

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80 *See* Sykes, *Boundaries*, *supra* note 7, at 571.

81 *See id.* at 587. Sykes likewise discovered a divergence between doctrine and theory when he examined (to a limited extent) the scope of employment rule in the context of the "frolic and detour" motor vehicle tort cases at the rule's boundary. *Id.* (describing how courts decided whether the employee acted outside the scope of employment in a "frolic or detour" by examining either the length of the detour or else the foreseeability of the detour). *See also* Sykes, *Economics*, *supra* note 7, at 1265 (noting, in the context of service station torts, that courts used "indicia of control [that] appear[ed] to have little or no economic significance").

82 Sykes, *Boundaries*, *supra* note 7, at 579.

83 *Id.* at 590–91.

84 *Id.* at 577, 590–91.

heightened duty requirements in some sense compensate for the weaker causal link.

But, apart from the strength of causal link, are additional factors relevant when choosing between vicarious liability and direct negligence approaches? Here, we return to the basic (though sometimes overlooked) point that vicarious liability is a form of strict liability and thus the foundational differences between strict liability and negligence pertain. Sykes alluded to one of these—namely administrative costs:

> One must always be alert to the possibility that one liability rule may be cheaper to administer than another or may tend to produce fewer meritless suits. With respect to the choice between strict vicarious liability and vicarious liability based on negligence, the negligence approach probably leads to incrementally higher administrative costs associated with the need to litigate the employer's negligence, whereas the strict liability approach probably leads to incrementally higher administrative costs associated with a higher number of lawsuits.[85]

Curiously missing, however, is any consideration of another potentially significant factor—risk of under-detection of employer preventative devices. We thus turn to consider the theoretical and practical relevance of this fundamental factor, which then sets the stage for our re-examination of the rationales for employer liability for employee intentional torts.

IV. VICARIOUS LIABILITY AS A QUASI-SUBSTITUTE FOR PUNITIVE DAMAGES

In this Part, I highlight under-detection of employer preventative measures as a significant factor in the choice between strict-vicarious liability and direct negligence theories.[86] More ambitiously, I then connect deterrence theory and the under-detection rationale to the doctrines governing employer liability (vicarious and direct, including punitive damages) for employee intentional torts.[87] Several novel implications follow.

First, strict-vicarious liability may be more efficient than direct negligence liability where there is a significant risk of under-detection of potential employer preventative measures. Thus, where such significant

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85 *Id.* at 579.

86 *See infra* Part IV.A.

87 *See infra* Part IV.B.

risk of under-detection exists, the scope for strict-vicarious liability—regardless of "scope of employment"—should be expanded in the context of negligent hiring, supervising, and retention scenarios.[88]

Second, courts should recognize calls for punitive damages predicated on claims for negligent hiring, supervising, or training (*e.g.*, § 317 direct negligence claims). Such punitive damages should be awarded where compensatory damages will under-deter, including where the employer's failures to exercise reasonable care will likely be under-detected. Indeed, the risk of under-detection seems particularly salient in this context of employee intentional torts, where vicarious liability claims (at least "within the scope of employment") are justified at least in part on this rationale.

Third, where strict-vicarious liability is justified on the basis of under-detection, then vicarious liability for punitive damages may over-deter. Punitive damages—at least imposed to force internalization of the total costs of harms due to under-detection—would not seem warranted. This could provide a rationale for courts' refusal to recognize negligence-based claims where an employer has conceded that its employee committed an intentional tort within the scope of employment. However, a better strategy would be for courts to deploy a burden-shifting approach to force the employer to come forward with information regarding the precautionary preventative measures in place in order to foreclose punitive damages.[89]

With these three propositions in mind, we can re-examine the complicity rule for employer liability for punitive damages (*Restatement § 909, Punitive Damages Against a Principal*).[90] It appears to mitigate the risk of over-deterrence by requiring some degree of employer fault—namely employee actions are "authorized" per § 909(a) or "ratified or approved" per § 909(d).[91] It limits "scope of employment" liability to agents acting in a "managerial capacity" per § 909(c).[92] Finally, punitive damages per § 909(b) ("reckless[ly]" employing an "unfit" agent) is akin to punitive damages under § 908 ("Punitive Damages") with direct negligence liability as a predicate.[93] Seen in this light, § 909 can be defended on efficiency grounds.

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88 *See infra* Section IV.B.1.

89 *See infra* Section IV.B.3 (elaborating on this novel proposed burden-shifting approach).

90 *See* RESTATEMENT (SECOND) OF TORTS § 909 (AM. LAW INST. 1979) (listing the requirements for punitive damages in a vicarious liability case).

91 *Id.* § 909(a), (d).

92 *Id.* § 909(c).

93 *Id.* § 909(b). *See also id.* § 908 (explaining that the purposes of punitive damages are to punish and to deter); *infra* Section IV.B.2.b (discussing *Restatement (Second) of Torts § 908, Punitive Damages*).

A. Under-Detection of Employer Preventative Measures

Under-detection of employers' failures to take measures to prevent their employees' intentional torts may be prevalent, especially within large employers and institutions with a complex internal organization.[94] As a theoretical matter, where such under-detection is a concern, strict liability will have an edge over negligence liability in terms of inducing the employer to more carefully screen, monitor, and train its employees.[95] Alternatively, punitive damages may be warranted to induce the employer to take requisite care.[96]

1. Vicarious Liability

Gary Schwartz (in an under-appreciated article) was perhaps the first to highlight the practical and theoretical argument for strict-vicarious liability.[97] Schwartz concluded that "[t]he intriguing benefit of strict liability . . . is that it can do a better job than a negligence regime in achieving that regime's own goal of encouraging the employer's cost-justified risk-reducing measures."[98]

Schwartz makes two primary claims. First, Schwartz picks up on the administrative costs issue, noting that "strict liability spares the legal system the costs of investigating and then litigating the negligence issue."[99] As Martha Chamallas further elaborates, "[S]ome victims will be able to establish that employers were independently negligent for failing to screen, train, or monitor the offending employee. Such a direct

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94 *See infra* Section IV.A.1 (discussing strict-vicarious liability's edge over direct employer negligence in such situations).

95 There is vast economic literature on the choice between strict liability and negligence regimes on the basis of myriad factors, injecting more complications into the equation, such as legal uncertainty. *Compare, e.g.*, John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 986 (1984) ("[U]ncertainty can produce incentives to over- or undercomply even when damages are calculated exactly."), *with, e.g.*, Marcel Kahan, *Causation and Incentives to Take Care Under the Negligence Rule*, 18 J. LEGAL STUD. 427, 427–47 (1989) (arguing that once the issue of causation is factored into negligence liability, it is more likely that individuals will take too little care rather than too much care).

My aim here is not to make a theoretical contribution to this literature. Rather, my goal is simply to draw attention to a well-established factor—under-detection—that remains relatively unexplored in the debate surrounding employer liability for employee intentional torts.

96 *See infra* Section IV.A.2.

97 *See* Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1740–41 (1996) (pointing out that "the strict liability doctrine of vicarious liability" is often ignored in negligence cases).

98 *Id.* at 1760.

99 *Id.*

negligence claim, however, is far more difficult and costly to prove . . . ."[100] In sum, direct negligence liability is more uncertain and difficult to prove than strict liability.

Second, Schwartz highlights that an employer's failure to adopt cost-justified precautions might not be detected.[101] If employers anticipate this, they will lack adequate incentives to take care.[102] Moreover, it seems likely that when the defendant is a large institution, such failures will be especially difficult for the court to identify.[103] Jennifer Arlen and Reinier Kraakman have elaborated on this under-detection rationale in the context of the choice between negligence and strict liability regimes in controlling corporate misconduct.[104]

At the same time, there are public policy concerns about strict liability going too far.[105] Indeed, the threshold knowledge requirement of § 317 direct negligence liability—especially if it is deployed in situations with a weak causal link—promotes efficiency to the extent that it avoids inducing

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[100] Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 136 (2013); *id.* at 153 ("Vicarious liability under this account saves the cost of investigating the existence of the untaken precaution and then litigating the negligence issue.").

[101] *See* Schwartz, *supra* note 97, at 1760–64.

[102] *Id.* at 1756.

[103] *See id.* at 1764.

[104] *See* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997). Arlen and Kraakman share my main focus on institutional liability (namely "how should the law structure the liability of the firm?"), and highlight under-detection as a significant factor in the optimal regime choice for inducing preventive measures. *Id.* at 689, 705. They advocate a mixed regime that includes elements of both strict liability and negligence in the context of corporate misconduct. Their main goal is to create proper incentives for companies to monitor, investigate, and report employee wrongdoing. *See id.* at 694 ("Strict liability clearly dominates where corporate liability is deployed to encourage the private sanctioning of corporate agents, and is weakly preferable where it is a means of inducing firms to adopt preventive measures. However, duty-based liability is generally better able to induce firms to undertake optimal policing measures such as monitoring, investigating, and reporting.").

[105] *See* Kirlin v. Halverson, 758 N.W.2d 436 (S.D. 2008). In *Kirlin*, the court did not hold an employer liable for failing to fire an employee with a criminal record because:

> Such a risk of liability might make employers hesitant to hire those people, severely limiting employment opportunities. Halverson's history of *violence* only includes a single conviction which resulted from a domestic, not workplace, confrontation and an assault charge that was dismissed. Requiring employers to fire employees or face liability under these circumstances is untenable, especially considering Halverson's minimal contact with others. "Such a rule would deter employers from hiring workers with a criminal record and 'offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community.'"

Id. at 453–54 (footnote omitted) (citations omitted).

employers to take excess precautionary measures to prevent hypothetical wrongs.

2. Punitive Damages

Law and economics theories of punitive damages have focused primarily on under-enforcement, a key component of which is the influence of the probability of detecting the wrongful conduct.[106] While critics reject the viability of this non-retributive rationale for punitive damages, it has emerged unscathed from the U.S. Supreme Court's attack on punitive damages and holds considerable sway with a number of courts.[107]

One economic rationale for punitive damages is a cost-internalization theory focusing on the likelihood of under-detection of a defendant's wrongdoing. Robert Cooter pioneered this theory.[108] And A. Mitchell Polinsky and Steven Shavell elaborated in a seminal article, *Punitive Damages: An Economic Analysis*, in which they argued that "the proper magnitude of damages is the harm the defendant has caused, multiplied by a factor reflecting the probability of his escaping liability."[109] As they further explained, the use of a multiplier and excess damages over compensatory damages "will make defendants pay on average for harm actually done and thus will lead to socially desirable behavior in terms of precautions and participation in risky activities."[110]

Others have elaborated on the role of punitive damages to respond to under-detection and under-enforcement more generally. In *Punitive Damages as Societal Damages*, I extended the rationale beyond under-detection to include a broader array of factors that might lead

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[106] For discussion of the various economic theories of punitive damages, see Catherine M. Sharkey, *Economic Analysis of Punitive Damages: Theory, Empirics, and Doctrine*, *in* RES. HANDBOOK ECON. TORTS 486, 488 (Jennifer Arlen ed., Edward Elgar Publishing, 2013) [hereinafter Sharkey, *Economic Analysis*] ("The predominant law and economics theory of punitive damages is based upon optimal deterrence or loss internalization and focuses on the under-enforcement problem: supracompensatory damages are needed when under-detection of harms or other factors leads to inefficiently low expected liability, which is insufficient to induce optimal care. Other contenders include gain elimination or disgorgement and inducement of voluntary transfers, also known as the property rights perspective.").

[107] *See id.*

[108] Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1148 (1989) ("In general, the punitive multiplier should equal the reciprocal of the enforcement error for the sake of deterrence, which I call the 'rule of the reciprocal.'").

[109] A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887 (1998) (emphasis omitted).

[110] *Id.* at 887–88.

compensatory damages to underestimate the total social harms inflicted by the defendant's actions.[111]

There is a continuing debate regarding whether the economic theory for punitive damages has had any durable influence on the courts. As judges, Richard Posner and Guido Calabresi led the way toward recognition of the economic deterrence rationale by emphasizing the significance of the defendant's likelihood of escaping liability. Thus, in *Kemezy v. Peters*, Judge Posner reasoned almost straight out of the law and economics theorist's playbook:

> When a tortious act is concealable, a judgment equal to the harm done by the act will underdeter. Suppose a person who goes around assaulting other people is caught only half the time. Then in comparing the costs, in the form of anticipated damages, of the assaults with the benefits to him, he will discount the costs (but not the benefits, because they are realized in every assault) by 50 percent, and so in deciding whether to commit the next assault he will not be confronted by the full social cost of his activity.[112]

And in *Ciraolo v. New York*, a case involving city-wide illegal police strip-searching policies, Judge Calabresi proclaimed that "[s]uch a [multiplier]

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[111] Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 369 (2003) ("[T]he punitive multiplier, which focuses on underenforcement error due to nondetection of harms, is in some sense a subset of the broader economic deterrence goal of internalization of total costs."). *See also* Sharkey, *Economic Analysis*, *supra* note 106, at 489 ("Under-enforcement results from a variety of factors including under-detection of wrongful conduct, failure to sue, plaintiffs' inability to prove negligence and causation, and error."); Joni Hersch & W. Kip Viscusi, *Saving Lives Through Punitive Damages*, 83 S. CAL. L. REV. 229, 242 (2010) (arguing that probability of detection should be combined with value of statistical life to determine the appropriate level of punitive damages to optimally deter harmful behavior).

[112] Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996). *See also* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003) (Posner, J.) ("The award of punitive damages in this case . . . serves the . . . purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is 'caught' only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away."). The economic rationale for punitive damages seems especially live and well in the Seventh Circuit. *See* Zazú Designs v. L'Oréal, S.A., 979 F.2d 499, 508 (7th Cir. 1992) ("Punitive damages are appropriate when some wrongful conduct evades detection; a multiplier then both compensates and deters."); FDIC v. W.R. Grace & Co., 877 F.2d 614, 623 (7th Cir. 1989) ("The most straightforward rationale for punitive damages . . . is that they are necessary to deter torts or crimes that are concealable. Suppose the average defrauder is brought to book only half the time. To confront him with a sanction that will make fraud worthless to him and thus deter him, it is necessary that when he is caught he be made to pay twice as much as his profits.").

conception of punitive damages, again, is not new, and it has been recognized by courts as well as scholars."[113]

Critics have nonetheless argued that the U.S. Supreme Court has flat-out rejected the under-deterrence rationale for punitive damages. In *State Farm v. Campbell*, the Court maintained that "the argument that State Farm will be punished in only the rare case . . . had little to do with the actual harm sustained by the Campbells."[114] Indeed, according to the Court, such an argument would be "a departure from well-established constraints on punitive damages."[115] The Court, however, provided scant reasoning here. Indeed, in almost the same breath in which it criticized the punitive multiplier approach, the Court echoed its statement from *BMW v. Gore* that a higher ratio of punitive to compensatory damages might be necessary where "the injury is hard to detect."[116]

Moreover, in prior work, I have argued:

> By reconceptualizing these underdeterrence damages as societal compensation, as opposed to quasi-fines or penalties, the societal damages approach would seem to survive the retributive-punishment-focused due process constraints of *State Farm* . . . . Moreover, the approach would favor a new kind of distributive scheme that would attempt either to compensate society directly for the imposition of those harms or else to direct compensation to some proxy that would attempt to compensate categories of individuals likely harmed by a defendant's similar wrongdoing.[117]

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113 Ciraolo v. New York, 216 F.3d 236, 237, 245 (2d Cir. 2000).

114 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 427 (2003).

115 *Id.*

116 *Id.* at 425. In *BMW v. Gore*, Justice Stevens (for the majority) and Justice Breyer (in concurrence) embraced under-detection as a rationale for punitive damages. 517 U.S. 559, 582 (1996) (Stevens, J.) ("A higher ratio [of punitive damages to compensatory damages] may also be justified in cases in which the injury is hard to detect . . . ."). Justice Breyer's concurrence in *Gore* mentions economic theories of punitive damages that focus on ensuring that a wrongdoer pays for "the total cost of the harm caused." *Id*. at 592–93 (Breyer, J., concurring). He interprets these theories as permitting juries "to calculate punitive damages by making a rough estimate of global harm, [and] dividing that estimate by a similarly rough estimate of the number of successful lawsuits that would likely be brought." *Id*. at 593.

117 Sharkey, *Punitive Damages as Societal Damages*, *supra* note 111, at 401–02. *See also* Sharkey, *Economic Analysis*, *supra* note 106, at 496 ("Despite its criticism of the optimal deterrence rationale and its silence with respect to the alternative gain-elimination or market-circumvention rationales, it would be wrong to conclude that the U.S. Supreme Court has closed the door entirely on economic rationales of punitive damages.").

Thus, to my mind, the economic deterrence rationale for punitive damages persists—not only as a theoretical matter but also as a practical reality in the courts.[118]

As a doctrinal matter, punitive damages can be imposed for punishment or deterrence—by which I mean non-retributive, economic deterrence. Punitive damages under *Restatement (Second) of Torts § 908, Punitive Damages* ("*Restatement § 908*"), though typically characterized as serving as retributive punishment, can also serve a deterrent function justified by under-detection (as a means of internalization of total societal costs).[119] The same holds true in the context of employer liability for punitive damages based on employee intentional torts. Indeed, "[w]hile the policy most often mentioned for requiring [employer] ratification or authorization is punishment of the wrongdoer, the supposed deterrent effect of punitive damages is frequently cited by courts not requiring intentional acts."[120]

B. Re-assessing Employer Liability for Employee Intentional Torts

In this Part, I explore how bringing the under-detection rationale to the fore shapes the theoretical choice between employer strict-vicarious liability and direct negligence liability for employee intentional torts.[121] I then widen the focus to include the role of punitive damages. The stakes

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[118] Moreover, as I have argued (quite exhaustively, in the face of numerous critics' protestations to the contrary), this conception of punitive damages as societal damages can likewise withstand the Court's further attack on punitive damages in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). *See* Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of* Philip Morris v. Williams, 46 WILLAMETTE L. REV. 449, 468–69 (2010). *See also* Sharkey, *Economic Analysis*, *supra* note 106, at 495 ("The U.S. Supreme Court, amidst its forays—or incursions—into the state law realm of punitive damages, has always insisted that its analysis begins with the legitimate state interests served by punitive damages. To date, the Court has given a quick nod to state-defined goals of punishment and deterrence, before diving headlong into an analysis that, by and large, has emphasized retributive punishment goals. But the states have, in essence, enabled the Court to go down this path. They have, as yet, not exploited their power to redirect the Court—and thus the evolution of punitive damages doctrine." (emphasis omitted)).

[119] *Restatement § 908* provides:

> (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
>
> (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.

RESTATEMENT (SECOND) TORTS § 908(1)–(2) (AM. LAW INST. 1979).

[120] William T. Curtis, *Liability of Employers for Punitive Damages Resulting from Acts of Employees*, 54 CHI.-KENT L. REV. 829, 842 (1978).

[121] *See infra* Sections IV.B.1, IV.B.2.

of a case (including likelihood of inducing settlement) increase dramatically when employers can be held liable for punitive damages if initially found liable for employee intentional torts. I explore the various rules governing the viability of punitive damages in the vicarious liability setting as well as with respect to direct negligence claims.[122] Each of these variants has been defended on deterrence grounds. To date, little work has been done on assessing the salient differences between the approaches.

1. The Case for Expanding Strict-Vicarious Liability

As discussed above, strict liability may be more efficient than direct negligence liability where there is a significant risk of under-detection. Thus, the case for employer vicarious liability is stronger where there is a significant risk of under-detection of potential employer preventative measures. It is difficult to evaluate the prevalence of the under-detection rationale in light of the lack of empirical data—or really prospects for measuring—the relevant fraction of cases (or incidents) in which the concern is rife.

That said, as we have seen, in employer direct liability cases, the threshold knowledge and specification of preventative measures requirements train the court's focus on the prospect of cost-justified precautions that the employer failed to take.[123] And, in the words of the Canadian Supreme Court:

> Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a *vast area* where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of its employee may encourage the employer to take such steps . . . .[124]

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122 *See infra* Sections IV.B.2.b, IV.B.3.

123 *See generally* Malicki v. Doe, 814 So. 2d 347 (Fla. 2002) (discussing several cases in which the courts analyze preventative measure requirements).

124 Chamallas, *supra* note 100, at 152–53 (quoting Bazley v. Curry, [1999] 2 S.C.R. 534, para. 33 (Can.) (emphasis added)). According to Chamallas, "The innovative aspect of *Bazley* is its application of 'enterprise risk' to the realm of intentional torts and sexual abuse in particular." *See id.* at 181. The *Bazley* court also noted: "In many cases evidence will be lacking or have long since disappeared. The proof of appropriate standards is a difficult and uneven matter." Bazley v. Curry, [1999] 2 S.C.R. 534, para. 32 (Can.). Here, I highlight instead the under-detection rationale.

To illustrate, recall the *Malicki v. Doe* church abuse case discussed above.[125] It seems fair to say that the court considered only a "narrow band of employer conduct" when it decided to impose a fairly limited duty upon the church.[126] In so doing, it failed to consider myriad other "imaginative" precautions that might have been taken or potential methods of controlling employee behavior. For example, assuming there is a long-term relationship between the church and its pastor, the church could structure its bonus, promotion, and termination schemes to focus on creating an environment attuned to preventing abuse as an institutional matter. Or consider another case, *Total Rehabilitation & Medical Centers, Inc. v. E.B.O.*, in which the court rejected a negligent supervision claim brought by a rehabilitation center patient who was allegedly raped in a company-owned van during the course of an employee's assigned responsibility to transport the patient between facilities.[127] Employers have plenty of supervision and punishment methods available to discourage tortious—and even criminal—behavior like this. Perhaps the van could have been rigged with cameras, or employer policies could prevent employees from being alone with a patient.

In sum, strict liability could thus promote as-yet-unimagined and currently untaken preventative measures.[128] In each of these cases, a motivated and innovative employer could find ways to investigate employees' past conduct more thoroughly and supervise their present conduct more comprehensively. Moreover, courts might increasingly rely

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125 *See supra* text accompanying notes 70–72 (evaluating, in the context of sexual assault on a minor, whether a church could be liable for negligent hiring for failing to look into a priest's background).

126 *Compare* Bazley v. Curry, [1999] 2 S.C.R. 534, para 33 (Can.) ("Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community."), *with* Malicki v. Doe, 814 So. 2d 347, 364–65 (Fla. 2002) (highlighting the requirement that the employer "knew or should have known of the tortious conduct").

127 *See* Total Rehab. & Med. Ctrs., Inc. v. E.B.O, 915 So. 2d 694, 695, 696–97 (Fla. Dist. Ct. App. 2005) (rejecting a negligent supervision claim brought by a patient allegedly raped by a company employee during the course of his responsibilities). *See also supra* note 62 (listing cases in which the court rejected claims against organizations providing services to vulnerable populations).

128 *See* Bruce Feldthusen, *Vicarious Liability for Sexual Torts*, *in* TORTS TOMORROW: A TRIBUTE TO JOHN FLEMING 221, 226 (Mullany & Linden eds., 1998) ("It often requires expensive, profession-specific research studies to identify cost-effective measures. Absent vicarious liability, there may be no incentive for the employer to contribute to this body of knowledge. If employers are better positioned than plaintiffs, judges[,] or juries to identify the efficient deterrence measures, then strict liability is the standard that will best encourage them to do so.") (footnote omitted).

on outside experts who bring a wealth of experience in terms of identifying the prevalence of certain types of under-detected harms in various institutions and proposed strategies for preventing and mitigating employee misconduct. For example, regarding sexual abuse in the educational context, courts might take notice of the empirical evidence of the prevalence of abuse as well as the existence of manuals and guidelines for the detection and prevention of such abuse to substantiate claims that there is a significant risk of under-detection of employer preventative measures.[129]

2. The Case for Expanding Direct Liability

Here I explore the possibility that, as an alternative to expanding the scope for strict-vicarious liability, direct negligence liability could be tweaked specifically to allow for more flexibility in terms of widening the range (and imagination) of preventative measures considered by the courts.[130] Or, punitive damages could be added on top of existing negligence liability to address under-detection.[131]

a. Expanding Direct Negligence Claims

An alternative way to address, directly, the courts' extremely narrow interpretation of direct negligence liability and, indirectly, the under-detection issue would be to lower the burden on plaintiffs to establish direct negligence liability to include a more flexible notion of preventative measures.[132] In other words, negligence-based direct liability might give enough flexibility to courts without resorting to strict liability to take up the slack.

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[129] Sexual misconduct in the educational context has been "long documented to be widespread and prevalent in the United States." Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2042 (2016) ("Sexual harassment in education, which includes rape and other sexual assault, is a recognized form of gender-based violence long documented to be widespread and prevalent in the United States." (citing, inter alia, Charol Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, U.S. DEP'T EDUC. (2004), http://www2.ed.gov/rschstat/research/pubs/misconductreview/report.pdf [https://perma.cc/7GE3-ZCJ9] (documenting an alarming incidence of teacher-on-student and other adult-on-student sexual misconduct and abuse in all levels of public schools))). *See also* Charol Shakeshaft, *Know the Warning Signs of Educator Sexual Misconduct*, PHI DELTA KAPPAN 8, 9 (Feb. 2013), https://filestore.scouting.org/filestore/nyps/2013/pdf/Shakeshaft-Kappan20138.full.pdf [https://perma.cc/8WCB-CSWR].

[130] *See infra* Section IV.B.2.a.

[131] *See infra* Section IV.B.2.b.

[132] Below, I also introduce a novel burden-shifting framework in the context of avoidance of punitive damages. *See infra* Section IV.B.3.

Several courts have acknowledged the need for some flexibility inherent in the negligence standard in the institutional liability setting. Thus, for example, courts have adjusted the degree and even necessity for background checks based on the likely contact the employee will have with the public.[133] In a similar vein, courts have considered potential preventative measures that go beyond background checks and screening employees based on past actions. Consider, for example, *Hicks ex rel. Nolette*, a New York case in which a fourteen-year-old was sexually assaulted while residing at a youth detention facility.[134] The court dismissed the vicarious liability and negligent hiring causes of action against the facility but allowed the claims of negligent training and supervision to proceed.[135] Even though the plaintiff had to identify the untaken precautions, the court applied a far-reaching inquiry into the reasonableness of the facility's actions. To begin, the court credited the:

> record testimony [that] indicate[d] that defendant provided staff members, including Williams [the alleged assaulter], with written training manuals regarding proper interaction with troubled youth, including instructions on maintaining adequate interpersonal boundaries. The facility director stated that she attempted to hold staff meetings "on a regular basis" to review the facility's programmatic goals, and Williams similarly testified that he was subject to regular assessments by supervisory staff.[136]

But the court then probed the extent of these measures, finding that: (1) "there was a general reluctance on the part of several staff members to report policy violations to supervisors or register complaints regarding staff conduct"; (2) "[o]ther complaints to supervisors regarding Williams' improper conduct appear to have gone unaddressed"; and (3) defendant did not test or otherwise ensure that its staff members were

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133 *See, e.g.*, Kirlin v. Halverson, 758 N.W.2d 436, 447–53 (S.D. 2008) ("[W]here job requirements bring an employee into frequent contact with the public, or individuals who have special relationships with the employer, the inquiry required expands beyond the job application and personal interview to an investigation of the applicant/employee's background."); Connes v. Molalla Transp. Sys., Inc., 831 P.2d 1316, 1321–22 (Colo. 1992) ("The scope of the employer's duty in exercising reasonable care in a hiring decision will depend largely on the anticipated degree of contact which the employee will have with other persons in performing his or her employment duties.").

134 Hicks *ex rel.* Nolette v. Berkshire Farm Ctr. Servs. Youth, 999 N.Y.S.2d 879, 881 (App. Div. 2014).

135 *Id.* at 881–82.

136 *Id.* at 881.

knowledgeable and compliant with its written policies and instructional materials.[137]

In another case, *Foradori v. Harris*, the Fifth Circuit noted that an employer could be liable for negligent supervision when it took "a rather passive managerial approach" that avoided directly asking employees about an assault that occurred during business hours and failed to "adequately inform [the employee] of the adverse consequences which would result if he behaved in a violent manner towards a customer."[138] Among the actions the employer could have taken to avoid liability for the employee's intentional tort were: (1) "steps to train and discipline its employees to take reasonable precautions to control and defuse customer-related altercations on its premises"; and (2) adequate training of managers to comply with work rules and manuals that gave instructions for how to deal with employee misconduct.[139]

A New Jersey court likewise took an expansive view of employer direct negligence liability by recognizing a corporation's duty to monitor employee usage of office computers in order to prevent the uploading of child pornography.[140] Relying on *Restatement § 317*, the court found that the employer "was under a duty to exercise reasonable care to stop [its e]mployee's activities," which federal lawmakers determined constituted a threat to children forced to engage in such activities.[141] Specifically, the court held that "defendant had a duty to report [e]mployee's activities to the proper authorities and to take effective internal action to stop those activities, whether by termination or some less drastic remedy."[142]

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137 *Id.* at 882.

138 Foradori v. Harris, 523 F.3d 477, 493 (5th Cir. 2008).

139 *Id.*

140 *See* Doe v. XYC Corp., 887 A.2d 1156, 1167–68 (N.J. Super. Ct. App. Div. 2005) (discussing the duty to monitor usage of company computers).

141 *Id.*

142 *Id.* The court's recognition of a fairly expansive set of preventative measures that should have been taken was, nonetheless, in a case in which the court had no difficulty finding that the employer was sufficiently on notice of the specific risk posted by its employee:

> [D]efendant was on notice of Employee's pornographic related computer activity by early 2000. By late March 2001, defendant had knowledge, through its supervisory personnel, that Employee had visited a variety of "porn sites" including one that suggested child pornography. Yet, despite being reported to high level management, no action was taken. A reasonable fact-finder could conclude that an appropriate investigation at that time would have revealed the extent of Employee's activities and, presumably, would have led to action to shut down those activities.

Id. at 1169.

Thus, while there are manifold cases in which the employer's lack of knowledge of the precise risk of the employee's intentional tort is an insuperable barrier to recovery, in others, courts have exercised discretion and considered fairly wide-ranging potential precautions the employer could take to reduce the likelihood of harm.

b. Adding Punitive Damages

Moreover, if the risk of under-detection is significant, punitive damages can also be awarded in cases of direct employer negligence liability. Because *Restatement § 317* imposes direct liability on an employer for its own negligence, punitive damages may be justified under *Restatement § 908*.[143]

In *Hutchison ex rel. Hutchison v. Luddy*, the Pennsylvania Supreme Court held that punitive damages could be awarded against employers found liable in § 317 direct negligence claims.[144] The court applied its traditional direct punitive damages analysis, motivated by the primary concern of deterring future outrageous conduct.[145] Moreover, the court made clear that "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his *reckless indifference* to the rights of others."[146]

The court noted:

> It may be that, as a practical matter, it proves more difficult to sustain a claim for punitive damages against the "master" in the negligent supervision context than it might be with other negligence-based torts, given that the more direct harm (which, as here, may well involve an

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[143] *See* RESTATEMENT (SECOND) OF TORTS § 908 (AM. LAW INST. 1979) (explaining when punitive damages are justified).

[144] Hutchison *ex rel.* Hutchison v. Luddy, 870 A.2d 766, 773 (Pa. 2005) ("We see no reason . . . to distinguish between claims sounding under Section 317 and other actions sounding in negligence for purposes of punitive damages.").

[145] *Id.* at 771 ("The only purpose of punitive damages is to deter outrageous conduct.").

[146] *Id.* at 770 (emphasis added) (first quoting Feld v. Merriam, 485 A.2d 742, 747 (Pa. 1984); and then quoting RESTATEMENT (SECOND) OF TORTS § 908(2) (AM. LAW INST. 1979)). Here, I take "reckless indifference" to open up room for the award of non-retributive societal damages. *See* Sharkey, *Punitive Damages as Societal Damages*, *supra* note 111, at 369. Admittedly, this may stretch what the court had in mind. The court noted that because punitive damages are intended to punish the tortfeasor for outrageous conduct and to deter him and others like him from similar conduct in the future, "The state of mind of the actor is vital. The act, or the failure to act, must be intentional, reckless or malicious." *Hutchison*, 870 A.2d at 770. *See also id.* ("[P]unitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct.").

> intentional tort) will usually have been inflicted directly by the "servant." But, that is a matter for proof that attends the particular case; there is no general proscription in law against pursuing punitive damages in the Section 317 context, where the facts so warrant.[147]

Several courts applying Pennsylvania law and *Restatement § 908* have held that punitive damages may be awarded in § 317 negligent supervision cases. In *Reichert v. Pathway School*, John Doe was repeatedly sexually abused by an older student, T.Y., on the premises of Pathway School.[148] The plaintiff sued the school, alleging negligent supervision of the abusive older student.[149] The court allowed punitive damages to proceed in the case, given that the plaintiff put forth sufficient facts to support a finding of the school's "reckless indifference to John Doe's safety."[150] And likewise in *White v. Punita Group, Inc.*, punitive damages were allowed to go forward in a case in which the plaintiff alleged the employer was reckless or grossly negligent for failing to exercise reasonable care in hiring, training, and supervising an employee.[151] In that case, defendant Punita Group sent its employee to a gun show without supervision or training on "handl[ing] firearms and ammunition despite the fact that his job required handling both items."[152]

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147 *Hutchison*, 870 A.2d at 773 (emphasis omitted).

148 Reichert v. Pathway Sch., 935 F. Supp. 2d 808, 812 (E.D. Pa. 2013).

149 *Id.*

150 *Id.* at 825. Admittedly, the court elaborated factors evincing "reckless indifference" that seem to approximate "reprehensibility" under the circumstances, especially given the school's fiduciary relationship to students. According to the court:

> These facts relate to violations of school policies, the physical circumstances surrounding the sexual acts, and [the school's] understanding of the behaviors of John Doe and T.Y. Of particular note is the fact that T.Y.'s disciplinary record reflected over one hundred discipline citations, including incidents of a sexual nature and numerous elopements. In addition, many of the sexual encounters occurred over a period of up to thirty minutes and took place in a bathroom located a few feet away from John Doe's classroom.

Id.

151 White v. Punita Grp., Inc., No. 1:15-CV-1195, 2016 WL 1117476, at *5 (E.D. Va. Mar. 18, 2016).

152 *Id.* The court concluded: "It is too early to determine where Punita Group's alleged conduct falls on the spectrum between negligence and reckless indifference. At this stage, Plaintiffs have sufficiently pled a claim for punitive damages. Whether it remains viable will depend on discovery." *Id.* at *6.

3. The Weak Case for Vicarious Liability Punitive Damages and a Novel Burden-Shifting Approach

As we have just seen, one strategy for addressing significant under-detection in the institutional liability context is to recognize punitive damages on top of direct negligence liability.[153] But, if instead, strict-vicarious liability is imposed (as opposed to direct negligence) to address under-detection, then the case for imposing punitive damages vicariously is comparatively weaker. Thus, through the lens of under-detection, vicarious liability serves as a quasi-substitute for punitive damages.

This view of vicarious liability as a quasi-substitute for punitive damages could lend support to the courts' enforcement of a doctrinal dividing line between vicarious and direct employer liability—albeit not based on "scope of employment" but instead on avoidance of over-deterrence in situations in which vicarious liability has been imposed when plaintiff could not identify specific untaken precautions (or meet the heightened threshold knowledge requirement) in an institutional context where the risk of under-detection is significant. Nonetheless, it is not clear that the choice of the type of liability should rest with the defendant. Given the "scope of employment" doctrinal dividing line, an employer might have a strategic incentive to concede that its employee's actions fall within the "scope of employment" so as to foreclose a direct liability claim that could be combined with punitive damages. Courts might respond in such a circumstance by shifting the burden to the defendant to demonstrate that it has suitable preventative measures in place.

The "pure" vicarious liability punitive damages rule—recognized in some jurisdictions—recognizes punitive damages so long as the employee acts within the scope of employment.[154] In other words, it extends strict-

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153 *See supra* Section IV.B.2.b.

154 *See, e.g.*, Potomac Leasing Co. v. Bulger, 531 So. 2d 307, 311 (Ala. 1988) (reaffirming the scope of employment rule in the face of a challenge based on the *Restatement*'s complicity rule); J.B. Hunt Transp. v. Doss, 899 S.W.2d 464, 469 (Ark. 1995) (reaffirming longstanding scope of employment rule); Wiper v. Downtown Dev. Corp. Tucson, 372 P.2d 200, 201 (Ariz. 1987) ("Arizona has specifically rejected the Restatement view in favor of a rule allowing punitive damages against an employer for acts of its employees 'so long as committed in the furtherance of the employer's business and acting within the scope of employment.'"); Goddard v. Grand Trunk Ry., 57 Me. 202, 224 (1869) (adopting the scope of employment rule for corporations as well as individual employers); Embry v. Holly, 442 A.2d 966, 969–71 (Md. 1982) (declining to adopt the *Restatement* rule favoring a broad scope of employment for holding an employer vicariously liable for punitive damages); Ray v. Detroit, 242 N.W.2d 494, 496 (Mich. Ct. App. 1976) (affirming the scope of employment rule); Tietjens v. Gen. Motors Corp., 418 S.W.2d 75, 88 (Mo. 1967) (same); Bierman v Aramark Refreshment Servs., 198 P.3d 877, 884 (Okla. 2008) (declining to adopt *Restatement* rule); Beauchamp v. Winnsboro Granite Corp., 101 S.E. 856, 858–59 (S.C. 1920) (articulating the scope of employment rule);

vicarious liability to punitive damages without requiring ratification or authorization by the employer. The rule has been defended on deterrence grounds "especially in the case of corporations, who can only act through their agents."[155] As one court reasoned, "if such damages will encourage employers to exercise closer control over their servants for the prevention of outrageous torts, that is sufficient ground for awarding them."[156]

But critics, most notably William Curtis, have resisted the theory:

> [E]ven if it is assumed that an employer should be liable for all the acts of his employees in the scope of their duties, there is nothing to indicate that employers are generally aware of such liability, or that considerations of liability have any more effect upon hiring practices than do ordinary business considerations. This broad rule of liability could, however, significantly increase a plaintiff's chances of a larger recovery, since it is generally easier to establish liability when no voluntary act is required other than the initial hiring of the employee. A sizeable judgment for punitive damages, however, does not necessarily mean that the policy of holding employers responsible for their employees' conduct has had the intended effect. The prudent employer will insure against such losses, add the cost of the premiums to his cost of doing business, and thereby transfer the risk to the ultimate consumer of his product.[157]

It is not necessarily the case, however, that the insurability of vicarious liability punitive damages thwarts the deterrence cost-internalization mechanism. To the extent that insurance can play a risk-management role—providing oversight of institutional and employer policies regarding hiring, training, and supervising employees—then the deterrence function persists. Insurance companies can also engage in experience rating of their premia to further bolster the deterrence effect. Moreover, the very fact that states allow for insurability of vicarious liability punitive damages (even some states that foreclose insurance for direct punitive damages as against public policy) signals (at least an

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Odom v. Gray, 508 S.W.2d 526, 533 (Tenn. 1974) (affirming a lower court decision which reaffirmed the longstanding scope of employment rule).

155 Stroud v. Denny's Rest., Inc., 532 P.2d 790, 793 n.2 (Or. 1975) (quoting PROSSER ON TORTS 12, § 2 (4th ed. 1971)).

156 *Id.*

157 Curtis, *supra* note 120, at 847 (footnote omitted).

implicit) embrace of the deterrent (non-retributive) function of punitive damages in this area.[158]

But—as we have seen—if the justification for imposing strict-vicarious liability on the employer is to mitigate the risk of under-detection and thus enhance deterrence,[159] then the imposition of strict liability punitive damages (at least on the grounds of under-detection) would over-deter. However, before allowing a defendant to immunize itself from punitive damages by, for example, conceding vicarious liability (*i.e.*, stipulating that its employee acted "within the scope of employment," no matter how much of a stretch), it is worth considering whether courts should impose some affirmative burden on the defendant to come forward with evidence that it has preventative precautionary measures in place.

This novel burden-shifting approach would be information-forcing in the sense that evidence of the institutional culture and precautionary preventative measures are likely to be within the exclusive control of the employer. Under this scheme, the employer must demonstrate to the court that it has such preventative measures in place in order to avoid negligence-based liability that could serve as a predicate for the imposition of punitive damages.

As far as I know, no court has applied such a burden-shifting approach. Instead, as described above, the courts' approach to the "scope of employment" as a doctrinal dividing line between vicarious liability claims and direct negligence has been theoretically justified, if at all, on enterprise causation grounds. There is an analogous information-forcing affirmative defense imposed on employers in the Title VII vicarious liability sexual harassment context.[160] But whereas in the Title VII context the employer's setting forth of preventative policies in place would constitute an affirmative defense to the strict liability claim, the burden-shifting paradigm I am proposing here would not immunize the employer from strict-vicarious liability but instead only foreclose the addition of direct negligence claims and punitive damages.

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158 For discussion of the insurability of punitive damages generally, as well as in the context of vicarious liability punitive damages, see Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409 (2005).

159 *See supra* Part IV.A (discussing under-detection as a basis for imposing strict-vicarious liability on employers).

160 *See, e.g.*, Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545–46 (1999) (holding that, where an employer engages in a good-faith effort to comply with Title VII, it cannot be held liable for punitive damages).

4. The Efficiency Case for the *Restatement*'s Punitive Damages "Complicity Rule"

Restatement § 909 ("Punitive Damages Against A Principal") marked a departure from an approach of strict-vicarious liability for punitive damages incurred as a result of an employee tort committed within the scope of employment, to a fault-based rule requiring some complicity in the wrongful act by the employer.[161] States that allow punitive damages are roughly evenly divided on whether to allow for "pure" vicarious liability for punitive damages as opposed to a more restrictive "complicity" rule, requiring some element of fault on the part of the employer.[162]

Restatement § 909 provides:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if[:] (a) the principal or a managerial agent authorized the doing and the manner of the act[;] or (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him[;] or (c) the agent was employed in a managerial capacity and was acting in the scope of employment[;] or (d) the principal or a managerial agent of the principal ratified or approved the act.[163]

Known as the "complicity rule," § 909 is a kind of hybrid falling between the poles of the pure vicarious liability rule and no vicarious liability rule, but designed to limit the scope of the pure vicarious liability rule.

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[161] *See* RESTATEMENT (SECOND) OF TORTS § 909 (AM. LAW INST. 1979) (detailing when punitive damages can be assessed against a principal).

[162] *See* Briner v. Hyslop, 337 N.W.2d 858, 863 (Iowa 1983) ("Of the fifty states and the District of Columbia, twenty-two states follow either the Restatement or a more restrictive rule; twenty states follow the course of employment rule; four states do not allow punitive damages; four states have not addressed the issue; and the rule in Iowa is in question."). *See also* Michael F. Sturley, *Vicarious Liability for Punitive Damages*, 70 LA. L. REV. 501, 513 (2010) ("[T]he majority rule (or at least the plurality rule) may be that the normal respondeat superior standard for tort liability also applies to the imposition of punitive damages, meaning that an employer can be liable in punitive damages for the misconduct of any employee acting in the scope of his or her employment—without any complicity whatsoever." (footnote omitted)).

[163] RESTATEMENT (SECOND) OF TORTS § 909 (AM. LAW INST. 1979). Section 909 also requires that the underlying act of the employee "must be of a character subjecting the agent to liability for exemplary damages before the master can be held vicariously liable for such damages." Montgomery Ward & Co. v. Marvin Riggs Co., 584 S.W.2d 863, 867 (Tex. Civ. App. 1979).

a. Fairness Justification

The *Restatement* complicity approach was motivated by—and is typically justified on account of—fairness or morality considerations. While the employer is not required to have acted with willful disregard or wantonness to be liable for punitive damages, *Restatement § 909* arose from fairness concerns, "which make it improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously."[164] As Clarence Morris wrote in 1960, the complicity rule "wisely protects corporations from vicarious liability for punitive damages when a properly supervised and disciplined employee acts outrageously; and it wisely allows for punitive damages awards against some corporations whose *institutional conscience* should be aroused."[165] The Supreme Court of Iowa has likewise embraced the *Restatement* rule as:

> more consistent with the purpose of punitive damages than is the course of employment rule. Although there are arguments in favor of the course of employment rule, the weakening of the deterrence effect, the increase in the cost of legitimate activities, and the *injustice of punishing the innocent*, all outweigh whatever benefits the course of employment rule might present.[166]

b. Efficiency Justification

On occasion, courts have justified the *Restatement § 909* complicity rule on deterrence grounds:

> To the extent that it appears that a corporation might have been able to prevent wrongful conduct by an employee, the corporation should be liable for punitive damages. Indeed, the threat of punitive damages should be an incentive to the corporation to take precautions with its employees. If, on the other hand, the corporation could have done nothing to prevent the employee's wrongful

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[164] RESTATEMENT (SECOND) TORTS § 909 cmt. b (AM. LAW INST. 1979). *See also* Enright v. LuBow, 493 A.2d 1288, 1301 (N.J. Super. Ct. App. Div. 1985) (adopting the *Restatement* rule on fairness grounds "based on the notion that it would be improper ordinarily to award punitive damages against one who is personally innocent and therefore liable only vicariously").

[165] Clarence Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216, 222 (1960) (emphasis added).

[166] *Briner*, 337 N.W.2d at 867 (emphasis added).

> conduct, punitive damages can have little deterrent effect, either to that corporation or as an example to other employers. This distinction is recognized by the complicity rule which in assessing punitive damages for reckless hiring or retaining of an unfit employee provides an incentive for taking care in selecting and training personnel.[167]

Less well recognized is the fact that *Restatement § 909* provides a very broad definition of complicity, "extend[ing] employer liability to employee conduct which it would be difficult to show was authorized, but for which the employer is at least partially blameworthy because he employed an unfit person."[168] But "blameworthy" may overstate the case.

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[167] *Id.* at 865–66. *See also* Dahl v. Sittner, 474 N.W.2d 897, 903 (S.D. 1991) (characterizing the *Restatement* approach as focusing on deterrence, specifically § 909(b), which "in assessing punitive damages for reckless hiring or retaining of an unfit employee provides an incentive for taking care in selecting and training personnel").

[168] *Briner*, 337 N.W.2d at 866. Several states, however, have explicitly rejected liability on this basis (namely, hiring an unfit employee), insisting instead that the principal must have participated in, authorized, or ratified its agent's acts. *See, e.g.*, Jenkins v. Whittaker Corp., 551 F. Supp. 110, 112 (D. Haw. 1982) ("Punitive damages may be recovered against a corporate defendant only if the corporation expressly or impliedly authorized or ratified the tortious act of its agent."); Hatfield v. Max Rouse & Sons Nw., 606 P.2d 944, 957 (Idaho 1980) ("It is well established in Idaho that punitive damages may not be assessed against a principal based on the acts of an agent absent a clear showing that the agent had managerial status or that the principal ordered or ratified the acts in question."); Openshaw v. Oregon Auto. Ins. Co., 487 P.2d 929, 32 (Idaho 1971) ("To be entitled to an award of punitive damages against a corporation the complaining party must show that the principal . . . participated in or authorized or ratified the agent's acts."); Brashear v. Packers, 883 P.2d 1278, 1280 (N.M. 1994) ("The long-standing rule in New Mexico is that an employer is liable in punitive damages for the acts of its employee only in cases in which the employer 'has authorized, participated in[,] or ratified the acts of the employee.'"); Albuquerque Concrete Coring Co. v. Pan Am World Servs., 879 P.2d 772, 775 (N.M. 1994) ("It is a well-established rule in New Mexico that a principal may be held liable for punitive damages when the principal has in some way authorized, ratified, or participated in the wanton, oppressive, malicious, fraudulent, or criminal acts of its agent."); AAA Pool Serv. & Supply v. Aetna Casualty & Sur. Co., 479 A.2d 112, 116 (R.I. 1984) (requiring that the principal have participated in, ratified, or authorized a tortious act before punitive damages may be imposed). *See also* KAN. STAT. ANN. § 60-3701(d)(1) (Westlaw through 2018) ("In no case shall exemplary or punitive damages be assessed . . . against: (1) [a] principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer."); KY. REV. STAT. ANN. § 411.184(3) (Westlaw through 2018) ("In no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question."); Saint Joseph Healthcare, Inc. v. Thomas, 487 S.W.3d 864, 873 (Ky. 2016) (clarifying that, under Kentucky statute § 411.184(3), punitive damages may not be granted against an employer for conduct of an employee "unless the offensive conduct was 1) authorized by the employer; 2) anticipated by the employer; or 3) ratified by the employer").

There is no explicit requirement that the employer's act be sufficiently reprehensible to meet the given state's punitive damages standard.[169] Section 909(b) requires employers to have been "reckless" in hiring an unfit individual.[170] And some states employ a standard nearly indistinguishable from negligence.[171]

We are now ready to appreciate that the *Restatement*'s complicity rule for punitive damages can be justified not only on fairness grounds but also from an efficiency perspective. Punitive damages per § 909(b) ("reckless[ly]" employ "unfit" agent) are thus akin to punitive damages under § 908 with direct negligence liability as a predicate (at least where states have interpreted "recklessly" as akin to "negligently").[172] Punitive damages on top of direct negligence liability, moreover, can be theoretically justified by the risk of under-detection and under-deterrence.

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169 *See, e.g.*, Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545, 549 (Fla. 1981) ("Although the misconduct of the employee, upon which the vicarious liability of the employer for punitive damages is based, must be willful and wanton, it is not necessary that the fault of the employer, independent of his employee's conduct, also be willful and wanton. It is sufficient that the plaintiff allege and prove some fault on the part of the employer which foreseeably contributed to the plaintiff's injury to make him vicariously liable for punitive damages.").

170 *See* RESTATEMENT (SECOND) OF TORTS § 909(b) (AM. LAW INST. 1979).

171 *See, e.g.*, Holland Furnace Co. v. Robson, 402 P.2d 628, 631 (Colo. 1965) (holding that a corporation can be held vicariously liable for punitive damages where it "*failed to exercise proper care* in selecting its servants") (emphasis added); *Mercury Motors Express, Inc.*, 393 So. 2d at 548 (noting that punitive damages against the employer were "justified . . . because the plaintiff alleged and proved not only willful, wanton, or outrageous conduct on the part of the employee but also *negligence* on the part of the employer which contributed to the plaintiff's injury" (emphasis added)); Gray v. Allison Div., Gen. Motors Corp., 370 N.E.2d 747, 752 (Ohio Ct. App. 1977) ("It is well established in Ohio that punitive damages may not be recovered against a corporation in the absence of evidence that the corporation . . . was *negligent* in the selection of its employees." (emphasis added)).

Other states, however, employ a more stringent standard than recklessness. *See, e.g.*, CAL. CIV. CODE § 3294(b) (Westlaw through 2018) ("An employer shall not be liable for [punitive] damages . . . based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others . . . ."); MINN. STAT. ANN. § 549.20 subd. 2(2) (Westlaw through 2018) ("Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if . . . (2) the agent was unfit and the principal deliberately disregarded a high probability that the agent was unfit . . . ."); NEV. REV. STAT. ANN. § 42.007(1)(a) (Westlaw through 2017) (stating that an employer is only vicariously liable for punitive damages if "[t]he employer had advance knowledge that the employee was unfit for the purposes of the employment and employed the employee with a conscious disregard of the rights or safety of others"). *See also* Countrywide Home Loans, Inc. v. Thitchener, 192 P.3d 243, 255 (Nev. 2008) (noting that "conscious disregard" under the Nevada statute requires more culpability than recklessness).

172 *See, e.g.*, Bryant v. Livigni, 619 N.E.2d 550, 557 (Ill. App. Ct. 1993) (reasoning that § 909(b) liability is based upon "the wrongful conduct of the employer itself," not on a vicarious liability theory).

Moreover, with respect to the imposition of vicarious liability punitive damages, the *Restatement*'s complicity rule mitigates the risk of over-deterrence by requiring some degree of employer fault (*i.e.*, "authorized" per § 909(a); or "ratified or approved" per § 909(d)).[173] Finally, it limits the pure vicarious "scope of employment" liability to agents acting in "managerial capacity" per § 909(c).[174]

V. CONCLUSION

The overall reluctance to find institutional liability for employees' intentional torts may have fueled the doctrinal puzzle whereby "scope of employment" has emerged as a dividing line between employer vicarious liability and direct negligence liability. Perhaps the courts' attempts to narrow the scope of vicarious liability and negligence causes of action, respectively, have led to further confusion whereby such causes of action are also treated as mutually exclusive, characterized by which side of the "scope of employment" line the employee's intentional tort falls.[175]

But unpacking this doctrinal puzzle is only the prelude to the wider ambition of my Article, which is to reconsider the choice between alternative institutional liability approaches. In particular, with a renewed focus on the under-detection of employer preventative measures, I have set forth a framework for reassessing the comparative strength of different forms of institutional liability, namely strict-vicarious liability and direct negligence theories, with or without the imposition of punitive damages.

Several key insights follow from this framework. If employer vicarious liability is imposed at least in part for under-detection of preventative measures, then perhaps vicarious liability should be considered as a quasi-substitute for punitive damages in direct liability situations, likewise imposed for under-detection purposes. Such recognition would simultaneously strengthen the case for punitive damages in direct negligence (§ 317) claims and weaken the case for vicarious liability punitive damages. Moreover, *Restatement § 909*—typically defended as a "complicity rule" limiting the imposition of vicarious-punitive liability on fairness grounds—is justified on economic deterrence grounds by allowing punitive damages coupled with direct negligence liability but limiting its operation in the vicarious liability sphere.

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173 RESTATEMENT (SECOND) OF TORTS § 909(a), (d) (AM. LAW INST. 1979).

174 *Id.* § 909(c).

175 *Cf.* Feldthusen, *supra* note 128, at 224 ("[O]nce intentional employee wrongdoing is in issue, some inexplicable doctrinal slippage occurs.").