BAD SAMARITANS MAKE DANGEROUS PRECEDENT: THE PERILS OF HOLDING AN EMPLOYER LIABLE FOR AN EMPLOYEE'S SEXUAL MISCONDUCT

I. INTRODUCTION

When Jane Doe went to Samaritan Counseling Center seeking psychological counseling, she set in motion the events which culminated in *Doe v. Samaritan Counseling Center*.[1] Doe claimed that her therapist, Dr. Garvin, fondled her during two counseling sessions, and then convinced her to cancel all further sessions and continue their sexual relationship outside the office.[2] Within a month this relationship culminated in sexual intercourse. Doe subsequently sued Dr. Garvin and Samaritan Counseling Center for the psychological harm she suffered as a result of their sexual intimacy. After the superior court rejected her respondeat superior claim against the counseling center, Doe appealed the summary judgment ruling to the Alaska Supreme Court.[3]

In reversing this ruling, the supreme court significantly expanded the boundaries of an employer's vicarious liability under Alaska common law. The perils of too readily expanding tort liability are especially evident for this tort doctrine, which holds one party liable for the torts committed by another party. As applied to *Samaritan*, this liability would be in addition to both Dr. Garvin's personal liability and the Center's potential liability for negligence in hiring and supervising Garvin. Restricting vicarious liability in this situation would have had no effect on Doe's recovery for actual negligence from the counseling center.

In the commercial setting, vicarious liability can be justified as a required cost of doing business. Vicarious liability in a non-commercial[4] setting, however, can threaten the very existence of enterprises

1. 791 P.2d 344 (Alaska 1990).

2. *Id.* at 345.

3. *Id.*

4. The distinction between "commercial" and "non-commercial" is an amorphous one. For the purposes of this Note, the distinction is based primarily on the social utility of the enterprise involved. In general, the marketplace appropriately determines the survival of profit-based business enterprises. Certain industries, however, are valued regardless of their ability to make a profit — day care centers, hospitals,

such as mental health clinics, schools and volunteer service organizations, because they have little or no ability to absorb the costs of such liability by passing increased costs on to consumers. *Samaritan's* expansion of vicarious liability has the potential to jeopardize such non-commercial enterprises. This Note argues that neither case precedent nor the rationale underlying liability for enterprises can support the expansion of vicarious liability in this manner. In fact, the *Samaritan* decision itself illustrates the inherent limitations of the enterprise liability theory.

Section II provides an overview of the terms and rationales associated with an employer's vicarious liability. Section III examines how the *Samaritan* court analyzed prior case law and the Restatement (Second) of Agency in determining the scope of an employer's vicarious liability. Section IV addresses the *Samaritan* majority's failure to consider that the purposes of the enterprise liability theory cannot be achieved without recognizing the dichotomy between commercial and non-commercial enterprises. Section V focuses on recent decisions that demonstrate the limits of the enterprise liability theory in non-commercial settings. Section VI concludes that *Samaritan* should be narrowly construed and suggests that the legislature may be in the best position to determine the precise boundaries of an employer's vicarious liability.

II. VICARIOUS LIABILITY AND THE ENTERPRISE LIABILITY THEORY

Vicarious liability has several guises. Under the law of agency, principals can be held vicariously liable for the torts of their agents.[5] Similarly, the common law doctrine of respondeat superior holds masters liable for torts committed by servants.[6] An employer's vicarious liability was traditionally based on a "control" theory, which extended the scope of liability only to those actions under the employer's control. The enterprise liability theory has now become widely accepted as the modern justification for an employer's vicarious liability, based

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Boy Scout organizations — and their demise would entail more than reducing consumer choice. Imposing economic hardship on these enterprises would curtail public access to necessities like affordable medical care, child care and volunteer services. This dichotomy between non-commercial and commercial enterprises will be significant in evaluating the need to impose liability on employers for their employees' sexual misconduct.

5. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

6. *See generally* PROSSER & KEETON ON THE LAW OF TORTS §§ 69-70 (5th ed. 1984 & Supp. 1988). Prosser and Keeton and others often use the antiquated terms "master" and "servant." *See, e.g., id.*

on the premise that losses incurred as a result of an enterprise's operation should be borne by the enterprise as a required cost of doing business.[7] According to this rationale, the employer who profits from the enterprise is in the best position to absorb and distribute losses by using price increases or liability insurance.[8]

Although the enterprise liability theory has tended to expand the scope of vicarious liability, this expansion has never resulted in strict employer liability for all employee torts. An important limitation on an employer's vicarious liability is that the employee's tort must be sufficiently associated with the enterprise to justify the imposition of liability. In other words, an employer is vicariously liable only for the conduct of employees that occurs within the scope of their employment.[9] As stated in section 228 of the Restatement (Second) of Agency, the employee conduct must be "actuated, at least in part, by a purpose to serve the master."[10] This standard, which excludes vicarious liability for an employee's personally motivated torts,[11] is generally recognized as the "motivation to serve" test.[12]

The Alaska Supreme Court has, since 1973, acknowledged that section 228 of the Restatement is "relevant" in determining whether an employee's misconduct is within the scope of employment.[13] *Samaritan,* however, significantly expanded the Restatement's "scope of employment" requirement by transforming the "motivation to serve" test into a much broader "reasonably incident" test. In order to preserve Doe's vicarious liability claim, the court concluded that the scope of Dr. Garvin's employment may have encompassed his sexual

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7. *Id.* § 69 at 500-01. Enterprise liability is "a rule of policy, a deliberate allocation of risk." *Id.* at 500.

8. *Id.* at 500-01.

9. *Id.* § 70 at 501. According to section 70, "scope of employment"

> refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment. . . . [I]n general the servant's conduct is within the scope of employment if it is of the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the master.

Id. at 502 (citations omitted).

10. RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (1958).

11. If the employee "acts from purely personal motives . . . in no way connected with the employer's interests, he is considered in the ordinary case to have departed from his employment, and the master is not liable." PROSSER & KEETON, *supra* note 6, § 70 at 506 & n.48.

12. *Id.* § 69.

13. Luth v. Rogers and Babler Constr. Co., 507 P.2d 761, 764 n.14 (Alaska 1973).

misconduct. If this decision is construed to permit liability for intentional employee misconduct,[14] vicarious liability in the employment setting will be extended beyond its inherent limitations. Such a result is inconsistent with Alaska precedent and the policies underlying enterprise liability.

III. ANALYSIS OF THE RESTATEMENT AND CASE LAW IN *SAMARITAN*

When determining Samaritan's liability for Dr. Garvin's sexual misconduct, the Alaska Supreme Court clearly articulated its reasons for expanding the standard used to measure the scope of employment. The "motivation to serve" standard that had been sanctioned by the Restatement and employed in the court's earlier decisions was rejected in favor of a new liability standard which transformed the "motivation to serve" standard beyond recognition. Under this new standard, a tort is committed within the scope of employment when "tortious conduct arises out of and is reasonably incidental to the employee's legitimate work activities."[15] The court chose not to adhere strictly to the Restatement's approach because strictly following the Restatement would result in a determination that "an employee's tortious sexual behavior [was] impelled by motivations other than a desire to further the interests of the employer."[16] This determination would sanction a "motivation to serve" test that, from the court's perspective, "too significantly undercut[s] the enterprise liability basis of the *respondeat superior* doctrine."[17]

The enterprise liability theory for an employer's vicarious liability is well established in the leading Alaska cases, all of which incorporated the "motivation to serve" standard. The *Samaritan* court quoted extensively from *Fruit v. Schreiner*,[18] the first case adopting the enterprise liability theory in Alaska, to emphasize that

> [t]he basis of *respondeat superior* has been correctly stated as 'the desire to include in the costs of operation inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefited by the enterprise.'
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> . . . .

14. *See Samaritan*, 791 P.2d at 350 (Moore, J., dissenting) (characterizing the therapist's actions as "intentional misconduct" that breaches the psychotherapeutic community's ethical standards); *id.* at 350 n.1 ("[I]t is generally agreed that therapist-patient sex is psychologically deleterious for the involved woman patient and is unethical for the male practitioner . . . .") (citing Davidson, *Psychiatry's Problem with No Name: Therapist-Patient Sex*, 37 AM. J. PSYCHOANALYSIS 43, 48-49 (1977)).

15. *Id.* at 348.

16. *Id.* (citation omitted).

17. *Id.* at 349.

18. 502 P.2d 133 (Alaska 1972).

> . . . Employees' acts sufficiently connected with the enterprise are in effect considered as deeds of the enterprise itself.[19]

Two crucial assumptions of the *Samaritan* decision regarding the enterprise liability theory are suspect. First, the *Samaritan* court underestimated the vital role of the "motivation to serve" test in *Fruit* and subsequent respondeat superior cases. The court's transformation of the "motivation to serve" test in *Samaritan* thus represents a significant departure from previous cases that followed the Restatement guidelines. Second, the court too readily assumed that enterprise liability policy would be strengthened by the court's drastic modification of the "motivation to serve" formulation. In fact, this modification undermines the policy objectives of enterprise liability.

Three supreme court cases prior to *Samaritan* — *Fruit, Luth v. Rogers and Babler Construction Co.*[20] and *Williams v. Alyeska Pipeline Service Co.*[21] — all indicate that the "motivation to serve" test, along with other "scope of employment" factors listed in section 228, was an integral element of the court's analysis in these decisions. In each case, the court considered the "scope of employment" factors set forth in section 228 as follows:

> (1) Conduct of a servant is within the scope of employment if, but only if:
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> (a) it is of the kind he is employed to perform;
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> (b) it occurs substantially within the authorized time and space limits;
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> (c) it is actuated, at least in part, by a purpose to serve the master, and
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> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
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> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.[22]

Significantly, the *Samaritan* court emphasized the centrality of the Restatement's factors by quoting section 228 in its entirety in the body of the opinion[23] rather than relegating the Restatement to footnotes, as had been done in the previous respondeat superior cases.[24] The court

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19. *Samaritan,* 791 P.2d at 349 (quoting *Fruit,* 502 P.2d at 141 (quoting Smith, *Frolic and Detour,* 23 COLUM. L. REV. 716, 718 (1923))).

20. 507 P.2d 761 (Alaska 1973).

21. 650 P.2d 343 (Alaska 1982).

22. RESTATEMENT (SECOND) OF AGENCY § 228 (1958) (cited in *Samaritan,* 791 P.2d at 347; *Williams,* 650 P.2d at 349 n.10; *Luth,* 507 P.2d at 764-65 n.14).

23. *Samaritan,* 791 P.2d at 347.

24. *Williams,* 650 P.2d at 349 n.10; *Luth,* 507 P.2d at 764-65 n.14; *cf. Fruit,* 502 P.2d at 140 (court does not explicitly incorporate the Restatement guidelines into its

then went on, however, to discount the importance of the Restatement by referring to its factors as mere "guidelines."[25]

Fruit involved an insurance salesman who, while attending a weekend convention required by his employer, injured a third party in a car accident.[26] The accident occurred when the salesman was returning to his hotel after an unsuccessful attempt to socialize with out-of-town salesmen.[27] Arguing that Fruit was traveling to a private destination, the employer requested a j.n.o.v. on the assumption that as a matter of law Fruit's drive to the hotel had no business purpose, nor was it under the employer's control.[28] In affirming the employer's vicarious liability, the supreme court rejected the "control theory," which limits an employer's liability to situations where the employer authorized, acquiesced, or ratified the employee's behavior.[29] Instead, the court adopted an enterprise liability theory which utilized a "motivation to serve" analysis. To support its decision that the employer may be vicariously liable in this situation, the court noted that "[t]here was evidence from which the jury could find that [Fruit] was at least motivated in part by his desire to meet with the out-of-state guests."[30]

This "motivation to serve" analysis was reiterated in *Luth.* The supreme court concluded that the standards established in section 228 of the Restatement were "indicative" of what conduct was within the scope of employment.[31] The *Luth* court determined that an employee involved in a car accident could be acting within the scope of his employment when he was returning home from a work site located a considerable distance from his home.[32] Although *Luth* expressly maintained that employer control and benefit were not prerequisites for liability,[33] the employee's motivation to serve played an integral role in the opinion.[34] The *Luth* opinion emphasized from the outset that the "scope of employment" rule should narrow an employer's liability.[35] For example, the court explicitly noted how the "scope of employment" standard for respondeat superior liability was more restrictive than the "arising out of and in the course of employment"

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analysis, but it clearly considers "motivation to serve" as an integral part of enterprise liability).

25. *Samaritan,* 791 P.2d at 347.
26. *Fruit,* 502 P.2d at 135.
27. *Id.* at 136.
28. *Id.* at 139.
29. *Id.* at 140.
30. *Id.* at 142.
31. Luth v. Rogers and Babler Constr. Co., 507 P.2d 761, 764-65 n.14 (Alaska 1973).
32. *Id.* at 765.
33. *Id.* at 764.
34. *Id.* at 764-65.
35. *Id.* at 764.

standard of workers' compensation.[36] By introducing the Restatement's "scope of employment" standard and emphasizing the restrictive nature of this standard, the *Luth* court indicated that a "motivation to serve" factor was an appropriate way to limit an employer's liability.

Williams also analyzed the issue of vicarious liability in terms of the employee's motivation to serve. In this case a union steward called a meeting to resolve the union members' personal grievances against an employee who belonged to another union.[37] The union members assaulted the employee, who then sued the union on the basis of vicarious liability for the steward's actions. The supreme court held that "the trial court was clearly erroneous in concluding that [the union steward] was acting outside the scope of his agency."[38] In reaching this conclusion, the court relied upon its finding that the union steward "was motivated, at least in part, to serve what he regarded as the purposes of the union."[39] As in *Fruit* and *Luth*, the Alaska Supreme Court considered the employee's motivation to serve an essential element in assessing whether the employee was acting within the scope of employment.

Thus, ever since the supreme court adopted an enterprise liability theory for the doctrine of respondeat superior, its opinions have progressively expanded the boundaries of an employer's vicarious liability to encompass social events, long rides home and job-related disputes. *Samaritan* represents a further extension of these boundaries in order to encompass sexual misconduct. Doe argued that the counseling center should be held liable for Dr. Garvin's sexual misconduct. This misconduct allegedly involved kissing and fondling that took place during the plaintiff's final counseling sessions but which did not escalate into sexual intercourse until the relationship was pursued outside the office after the counseling sessions had been terminated.[40] In determining that the counseling center may be held vicariously liable for such misconduct, the supreme court essentially rejected the "motivation to serve" restriction on the scope of employment used in *Fruit, Luth* and *Williams*.

Although *Samaritan* conceded that *Fruit* seemed to require a motivation to serve the employer,[41] the *Samaritan* court underestimated the important role the Restatement's guidelines served in *Luth* and *Williams*. In *Samaritan*, the court determined that neither *Luth* nor

36. *Id.* at 763.
37. Williams v. Alyeska Pipeline Serv. Co., 650 P.2d 343, 348 (Alaska 1982).
38. *Id.* at 351.
39. *Id.* at 350-51.
40. *Samaritan*, 791 P.2d at 345.
41. *Id.* at 346.

Williams considered such motivation a prerequisite for an employee's conduct to fall within the scope of employment.[42] The *Samaritan* majority stressed how *Luth* "expressly rejected" the Restatement's view that each element of section 228(1) must be satisfied as a prerequisite to recovery.[43] Similarly, the *Samaritan* opinion stated that *Luth* found control and motivation to be relevant, rather than determinative, factors in deciding whether the employee's act was sufficiently related to the employer's enterprise.[44] To further diminish the impact of the "motivation to serve" precedents, the *Samaritan* court noted that *Williams* considered the elements of section 228 of the Restatement to be merely " 'guidelines which are useful in making . . . the determination as to when an employee's tort will be attributed to the employer.' "[45]

The *Samaritan* decision did not accord due recognition to the fact that in all of the supreme court's precedents concerning enterprise liability,[46] the court considered the "motivation to serve" factor an integral aspect of its reasoning in favor of imposing vicarious liability upon the employer. Even though none of these decisions explicitly stated that such motivation was required for liability, its centrality in establishing liability indicates that a departure from this standard is a significant break with precedent.

The majority in *Samaritan* also examined the "motivation to serve" requirement in cases that directly addressed the sexual misconduct of employees. The supreme court noted that some courts that view "motivation to serve" as a prerequisite for recovery in respondeat superior have held that sexual misconduct is outside the scope of employment,[47] while others employing the same "motivation to serve" analysis "have concluded that employers may be held liable for the sexual behavior of their therapist employees towards their patients."[48] However, the cases which the court cited in support of its position do not employ the "motivation to serve" analysis in their reasoning. In fact, the courts in *Ira S. Bushey & Sons v. United States*[49] and *Marston*

42. *Id.* at 346-47.

43. *Id.* at 347.

44. *Id.; see also supra* notes 33-34 and accompanying text where *Luth* found that *control* and *benefit* were not decisive factors; the court made no such assertion with regard to *motivation.*

45. *Samaritan*, 791 P.2d at 347 (quoting Williams v. Alyeska Pipeline Serv. Co., 650 P.2d 343, 349 (Alaska 1982)).

46. *See supra* notes 20-21 and accompanying text.

47. *Samaritan,* 791 P.2d at 347.

48. *Id.*

49. 398 F.2d 167 (2d Cir. 1968). The *Samaritan* decision itself recognized that *Ira S. Bushey* discarded the "motivation to serve" test in favor of a foreseeability approach. *Samaritan,* 791 P.2d at 347-48.

v. Minneapolis Clinic of Psychiatry and Neurology, Ltd.[50] rejected this analysis altogether. Similarly, in *Simmons v. United States,*[51] the case upon which the Alaska Supreme Court relied most heavily, the Ninth Circuit's reasoning emphasized the employer's benefit rather than the employee's motivation.[52]

These decisions therefore do not reconcile the "motivation to serve" criterion with employer liability for sexual misconduct. Instead, they illustrate how a "motivation to serve" requirement is incompatible with imposing vicarious liability for sexual misconduct. This incompatibility undermines the Alaska Supreme Court's conclusion 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."[53]

The dissenting opinions in both *Marston* and *Samaritan* are more compatible with Alaska's "motivation to serve" precedents. In *Marston,* the dissent argued that as a matter of law a therapist's sexual misconduct[54] did not fall within the scope of his employment because this conduct could be distinguished from the kind of intentional torts which did warrant imposing vicarious liability on an employer. Unlike an assault resulting from an employment-related dispute, the therapist's deliberate sexual misconduct did not originate within the scope of his duties and thus did not have an employment-related " 'color and quality.' "[55] Essentially, the dissent reasoned that an employer should not be held liable when the source of an employee's act originated not in his duties as an employee but in his personal desires.[56]

Justice Moore in his *Samaritan* dissent similarly emphasized personal motivation. He argued that a therapist's sexual misconduct did

50. 329 N.W.2d 306 (Minn. 1983). The Minnesota Supreme Court in *Marston* noted that it had " 'abandoned' " the motivation test in an earlier decision. *Id.* at 310 (quoting Lange v. National Biscuit Co., 297 Minn. 399, 405, 211 N.W.2d 783, 786 (1978)).

51. 805 F.2d 1363 (9th Cir. 1986).

52. *Id.* at 1369 (applying Washington agency law, in which the Washington Supreme Court has emphasized the importance of the benefit to the employer in determining whether an employee was acting within the scope of his employment).

53. *Samaritan,* 791 P.2d at 348.

54. The sexual advances occurred during separate therapy sessions with two of the psychologist's patients, whose cases were consolidated upon appeal. *Marston,* 329 N.W.2d at 308.

55. *Id.* at 313 (Peterson, J., dissenting) (quoting Lange v. National Biscuit Co., 297 Minn. 399, 404, 211 N.W.2d 783, 786 (1973) (quoting Gulf, C. & S.F. Ry. v. Cobb, 45 S.W.2d 323, 326 (Tex. Civ. App. 1931))).

56. *Id.*

not arise from the transference phenomenon,[57] but rather out of a personal desire to abuse the transference phenomenon intentionally.[58] According to Justice Moore, the majority erred in relying on *Simmons'* assessment of the transference phenomenon; the fact that transference is an essential element of psychotherapy does not mean that an intentional abuse of transference to derive personal sexual gratification is also essential to the therapy.[59] Justice Moore argued that even under the majority's revision of the "motivation to serve" standard, a therapist's deliberate sexual misconduct would not "arise out of" and be "reasonably incidental to" an employee's legitimate work activities.[60] A logical extension of Justice Moore's argument would be that an unintended abuse of the transference phenomenon would come within the scope of a therapist's employment, while a deliberate exploitation of the transference phenomenon solely for personal gratification could not be said to arise from, or be reasonably incidental to, the therapist's legitimate work activities.[61] The "motivation to serve" analysis abandoned by the *Samaritan* majority would recognize this crucial distinction.

A general survey of case law illustrates that differing interpretations of the "motivation to serve" test make vicarious liability for a therapist's sexual misconduct a very divisive issue. The Fourth Circuit[62] and Ninth Circuit[63] have split on this issue, and the state courts are similarly divided. While the Minnesota Supreme Court ruled that a clinic could be held vicariously liable,[64] four other state supreme

57. In *Simmons*, a case factually similar to *Samaritan*, the transference phenomenon was described as "the term used by psychiatrists and psychologists to denote a patient's emotional reaction to a therapist and is 'generally applied to the projection of feelings, thoughts and wishes onto the analyst, who has come to represent some person from the patient's past.' " *Simmons*, 805 F.2d at 1364 (quoting STEDMAN'S MEDICAL DICTIONARY 1473 (5th Lawyers' Ed. 1982)).

58. *Samaritan*, 791 P.2d at 352 (Moore, J., dissenting).

59. *Id.*

60. *Id.*

61. In fact, such exploitation is commonly recognized as sabotaging the very purpose of the therapist's work. *See supra* note 14.

62. Doe v. United States, 769 F.2d 174, 175 (4th Cir. 1985) (upholding summary judgment for the government because an Air Force social worker "clearly was acting for his personal gratification rather than within the scope of his employment" when he convinced the plaintiff that engaging in deviant sexual conduct was part of her treatment).

63. Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986).

64. Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd., 329 N.W.2d 306 (Minn. 1983).

courts in the last three years — Colorado,[65] Utah,[66] Hawaii[67] and Alabama[68] — determined that vicarious liability was not appropriate in cases involving an employee's sexual misconduct. In New Jersey[69] and New York,[70] state appellate courts have also refused to extend vicarious liability to therapist-patient relationships.

Although the emasculation of the "motivation to serve" test was the *Samaritan* court's most crucial departure from the Restatement's guidelines, the court's analysis of other section 228 factors deserves attention as well. A second factor considered by the court in *Samaritan* was whether the employee's conduct was "different in kind" from that authorized by the employer.[71] The majority argued that the therapist's conduct was not different in kind because it arose out of and was reasonably incidental to the counseling activities authorized by and beneficial to the counseling center.[72] Justice Moore disagreed

65. Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988) (upholding summary judgment for archdiocese because, as a matter of law, the archdiocese could not be held vicariously liable for the sexual misconduct of a priest who had been consulted in his professional capacity as a marriage counselor).

66. Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989). Using the Restatement (Second) of Agency for general guidance, the court determined that the employee's sexual misconduct was not motivated, even in part, by the purpose of serving the employer's interest. *Id.* at 1059. The court upheld a j.n.o.v. in which the county was not held liable under respondeat superior for a licensed social worker's sexual misconduct with his patient. *Id.*

67. Sharples v. State, 71 Haw. 404, 793 P.2d 175 (1990) (upholding summary judgment because the psychiatrist's sexual relations with his patient, which took place during their professional relationship, was, as a matter of law, not within the scope of his employment).

68. Doe v. Swift, 570 So. 2d 1209 (Ala. 1990). The court determined that even if the abuse of the transference phenomenon was not "purely personal" but instead constituted negligent counseling, *Simmons* was irrelevant to the present case because there was no time for the transference to develop. *Id.* at 1213. In addition, the court noted that there were "numerous other cases holding that sexual misconduct by an employee is purely personal and outside the line and scope of his employment." *Id.* at 1211 (footnote omitted).

69. Cosgrove v. Lawrence, 214 N.J. Super. 670, 520 A.2d 844 (Law Div. 1986), *aff'd*, 215 N.J. Super. 561, 522 A.2d 483 (App. Div. 1987) (upholding a summary judgment ruling that a mental health clinic was not subject to respondeat superior liability even though the defendant social worker therapist characterized his sexual misconduct as being in pursuit of his employer's ends).

70. Noto v. St. Vincent's Hosp. & Medical Center, 142 Misc. 2d 292, 537 N.Y.S.2d 446 (Sup. Ct. 1988), *aff'd*, 160 A.D.2d 656, 559 N.Y.S.2d 510 (N.Y. App. Div. 1990) (upholding summary judgment in favor of hospital in suit regarding vicarious liability for a psychiatrist's sexual misconduct with a former patient). The supreme court, appellate division, noted "[t]hat a hospital is not responsible under the doctrine of respondeat superior for sexual relations between professional employees and patients accords with the prevailing weight of authority in other jurisdictions." 160 A.D.2d at 656-57, 559 N.Y.S.2d at 511.

71. *Samaritan*, 791 P.2d at 348 n.7.

72. *Id.*

with the majority's analysis, relying on his basic premise that if the authorized conduct was the psychotherapy itself, then the majority's argument was inaccurate because their approach assumed that the sexual misconduct arose from the transference itself rather than the abuse of transference.[73] Justice Moore concluded that no logical interpretation could hold that sexual misconduct was reasonably incidental to the therapist's authorized duties as a psychotherapist.[74]

The final factor of section 228's scope of employment test addressed by the court in *Samaritan* was that the employee's conduct could not be " 'far beyond . . . authorized time or space limits.' "[75] Justice Moore criticized the majority for incorrectly assuming that any tortious conduct within authorized time or space limits would suffice. Instead, section 228(1)(b) stated that such activity must occur "substantially" within these limits.[76] Because all but two minor incidents of sexual misconduct occurred outside the office and after the termination of therapy, Justice Moore reasoned that "[n]o reasonable trier of fact could conclude that the tortious conduct occurred substantially during therapy."[77]

IV. *SAMARITAN'S* "REASONABLY INCIDENT" TEST FAILS TO RECOGNIZE LIMITS OF ENTERPRISE LIABILITY THEORY

The most fundamental division between the majority and the dissent in *Samaritan*, however, concerns their basic assumptions regarding the enterprise liability theory. The majority viewed this theory in a purely functional manner as a means of achieving cost distribution. The dissent focused on the internal coherence of this tort theory, stressing that its legitimacy depended on whether the costs at issue were truly caused by and not merely incidental to the enterprise. In addition, Justice Moore argued that for this theory to function properly, the court should not simply assume that such liability would automatically result in appropriate cost distribution. This discrepancy between the majority's and dissent's basic assumptions is manifested by the majority's broad interpretation of the "scope of employment" criteria contained in section 228 and the dissent's correspondingly narrow interpretation. In rejecting a more restrictive interpretation of the scope of employment, the majority recognized the full implications of its choice: "we are of the view that the 'motivation to serve' test, so

73. *See supra* notes 58-61 and accompanying text.
74. *Samaritan*, 791 P.2d at 352 (Moore, J., dissenting).
75. *Id.* at 349 (quoting RESTATEMENT (SECOND) OF AGENCY § 228(2) (1958)).
76. *Id.* at 352 (Moore, J., dissenting).
77. *Id.*

construed, would too significantly undercut the enterprise liability basis of the *respondeat superior* doctrine."[78] The majority then cited *Fruit* as establishing the rationale for this doctrine, namely " 'the desire to include in the costs of operation inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefited by the enterprise.' "[79] Yet from Justice Moore's perspective, the majority's application of the Restatement criteria was "erroneous . . . when viewed in light of the *purposes* of respondeat superior liability."[80] Examining the underlying purposes of enterprise liability as articulated in *Fruit* will demonstrate that such purposes cannot be achieved through indiscriminate application of enterprise liability to all employment situations.

A. The Origins of *Fruit's* Enterprise Liability Theory

When adopting enterprise liability as the policy basis for its respondeat superior doctrine in *Fruit*, the Alaska Supreme Court based its decision on the rationale articulated by Professor Young B. Smith in *Frolic and Detour.*[81] The court reiterated this rationale in *Luth,*[82] *Williams*[83] and *Samaritan.*[84] The *Fruit* decision favored Professor Smith's analysis of enterprise liability because he "correctly stated" the basis of respondeat superior liability.[85] When Smith's analysis is read as a whole, it is clear that the *Samaritan* majority was misguided in assuming that a traditional "motivation to serve" requirement would significantly undercut the enterprise liability basis of Alaska's respondeat superior doctrine. In the portion of *Frolic and Detour* repeatedly cited in the court's opinions, Professor Smith argued that enterprise liability was justified because it internalized and redistributed the inevitable costs incident to operating an enterprise. The remainder of the passage, however, contained an important qualification which recognized the danger of applying enterprise liability indiscriminately. The passage in its entirety, with the portion cited by the supreme court appearing in italics, reads as follows:

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78. *Id.* at 349.

79. *Id.* (quoting Fruit v. Schreiner, 502 P.2d 133, 141 (Alaska 1972) (quoting Smith, *supra* note 19, at 718)).

80. *Id.* at 353 (Moore, J., dissenting) (emphasis added).

81. *Fruit*, 502 P.2d at 141 (quoting Smith, *supra* note 19, at 718).

82. Luth v. Rogers & Babler Constr. Co., 507 P.2d at 763 (noting that *Fruit* "adopted a modified 'enterprise theory' of *respondeat superior*").

83. Williams v. Alyeska Pipeline Serv. Co., 650 P.2d at 349 (quoting Smith, *supra* note 19, at 718).

84. Doe v. Samaritan Counseling Center, 791 P.2d at 349 (quoting Smith, *supra* note 19, at 718).

85. *Fruit*, 502 P.2d at 141.

> If, as suggested in the first part of this article, the justification for making the master liable for his servant's unauthorized torts is *the desire to include in the costs of operation inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefited by the enterprise*, it would seem desirable to impose liability upon the master in every case where the loss may fairly be regarded as an incident to carrying on the particular enterprise, provided the imposition of liability would not interfere with the conduct of the enterprise to such an extent as to create inconveniences which would outweigh the inconveniences of casting severe losses upon a few persons.[86]

The significance of the entire passage is its recognition that even when a loss could be regarded as incidental to an enterprise's operation, this fact should not automatically impose liability upon the enterprise. Professor Smith indicated that enterprise liability would be inappropriate if it interfered with the conduct of the enterprise to such an extent that the social costs to beneficiaries of the enterprise far outweighed the benefits to victims of enterprise related activity.

In the context of *Samaritan*, imposing liability on a mental health clinic for a therapist's sexual misconduct may significantly limit its ability to provide affordable counseling for those least able to pay. Based on Smith's result-oriented analysis, the debate over the transference phenomenon could well be moot. When the social costs of imposing enterprise liability outweigh any resulting benefits, it does not matter whether the transference phenomenon made the sexual misconduct incidental to the therapy.

Professor Smith's analysis of enterprise liability also provides alternative grounds for rejecting or limiting vicarious liability for an employee's sexual misconduct. Even though Smith advocated an expansive approach to respondeat superior liability, he nonetheless realized that an employer should not be held liable for all possible acts of his employees.[87] Instead, the court should consider the threshold issue of "whether the conduct of the master's business was a contributing cause of the servant's act . . . . If not, the master is not liable."[88] Only if this threshold is met should the court examine whether the misconduct was probable enough to justify liability.[89] When the misconduct resembles authorized conduct, the determining factor would be whether the employee's "objective is some goal he was employed to attain."[90] To explain this distinction, Professor Smith used the following illustration:

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86. Smith, *supra* note 19 at 718 (citation omitted) (emphasis added); *see Fruit*, 502 P.2d at 141.

87. Smith, *supra* note 19, at 724.

88. *Id.*

89. *Id.*

90. *Id.* at 721.

> If it be said that, at the time of the accident, the chauffeur's sole motive in driving was to reach an unauthorized objective . . . , there would be no more justification for holding the master liable than if the chauffeur had started in the opposite direction . . . . The mere coincidence that he was traveling the identical path he would have traveled had he been headed for the authorized objective . . . should not change the result.[91]

This illustration suggests that a clinic should not be vicariously liable for a therapist's sexual misconduct simply because the transference phenomenon the therapist manipulates is a common factor in both a responsible and irresponsible relationship with a patient. The real issue is whether his sole motive in manipulating this phenomenon is for his personal gratification. The very nature of a therapist's deliberate sexual misconduct indicates that his motive is purely personal because such behavior completely undermines his authorized role as a counselor.[92]

By relying on the *Frolic and Detour* passage from *Fruit* to correctly state the rationale for respondeat superior liability,[93] the *Samaritan* majority implicitly endorsed Professor Smith's conceptualization of enterprise liability. However, a reading of the article as a whole reveals that Smith's conceptualization involves limitations on the scope of enterprise liability. Professor Smith's approach recognizes the need for a balancing test to weigh the social costs and benefits resulting from the imposition of enterprise liability. In addition, this approach notes that tortious conduct arising from purely personal motives should not subject an employer to vicarious liability, even if the employee's misconduct closely resembled authorized conduct. Both of these qualifications illustrate how limitations on the scope of enterprise liability are compatible with the origins of Alaska's enterprise liability doctrine. This compatibility indicates that the supreme court in *Samaritan* was departing from, rather than reinforcing, precedent when the court assumed that a motivation to serve requirement would "too significantly undercut the enterprise liability basis of the respondeat superior doctrine . . . previously articulated."[94]

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91. *Id.* at 725.

92. The facts in *Samaritan* support this observation. The patient's affidavit indicated that both she and the therapist recognized the harmful aspects of such conduct: "I confronted him about his conduct and he agreed he was wrong." *Samaritan*, 791 P.2d at 345; *see also supra* note 14.

93. *Samaritan*, 791 P.2d at 349.

94. *Id.*

B. Two Standards for Vicarious Liability: The Commercial/Non-Commercial Dichotomy

Recent commentaries on enterprise liability also demonstrate that restricting the scope of enterprise liability is consistent with the rationale of internalizing and redistributing the costs associated with operating an enterprise. One such restriction arises when the enterprise in question is not a commercial operation. Because profit-generating entities can internalize and redistribute their costs, expanding their vicarious liability is consistent with the rationale of enterprise liability. The same is not true for non-commercial entities, which cannot readily absorb and pass on the costs of vicarious liability; such liability produces serious side effects when imposed on entities that are not aimed at generating profits. This dichotomy suggests that restrictions on enterprise liability are appropriate for non-commercial enterprises.

1. *Restrictions on Enterprise Liability for Non-Commercial Enterprises.* Current evaluations of vicarious liability stress that indiscriminately imposing vicarious liability on all employers is inappropriate. For instance, Professor William Baxter advocates distinguishing between private and public enterprises when determining whether enterprise liability should apply.[95] Professor Baxter concludes that the deterrence rationale for enterprise liability, which assumes that businesses are better able than victims to reduce the harms associated with their operation, does not apply to public entities.[96] By linking a business' profit to its ability to reduce the magnitude of the harm associated with its operation, enterprise liability can force a business to achieve a socially optimal reduction in output. To the extent that modifications in input and internal processes could not entirely reduce the harm, the price of the outputs would rise and sales would fall. All of this requires a fairly elastic demand curve, something which does not exist for public operations. Instead, in a public setting, output price is either nothing or bears no specific relationship to cost; profit incentives for cost-minimizing are also very weak. Under these circumstances, enterprise liability cannot function properly.[97]

Professor Lewis Kornhauser also argues in favor of restricting enterprise liability.[98] Although enterprise liability produces greater levels of care in the private sector, Professor Kornhauser concludes that the level of care issue is irrelevant in the public sector: "[t]he key

95. Baxter, *Enterprise Liability, Public and Private*, 42 LAW & CONTEMP. PROBS. 45 (Winter 1978).

96. *Id.* at 51.

97. *Id.*

98. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345 (1982).

question with respect to public enterprise is whether [to] impose liability on the public enterprise or public servant at all."[99] Both Professor Kornhauser's and Professor Baxter's arguments indicate that a fundamental premise of enterprise liability is that the success of an enterprise depends upon its ability to generate profits. Certain enterprises, like those in the public sector, focus on providing a beneficial public service rather than on maximizing profit. These service-oriented entities violate a fundamental premise of enterprise liability, thus demonstrating inherent limitations in how effective this form of respondeat superior liability can be.

2. *More Expansive Enterprise Liability for Commercial Enterprises.* Inherent limitations on enterprise liability are even acknowledged in a policy evaluation that advocates vicarious liability for personally motivated torts. According to Alan Sykes,[100] if an employee's sexual harassment "is 'caused' by the employer's enterprise, this fact weighs in favor of strict vicarious liability. Liability based on negligence is more efficient if the causal relation between the enterprise and the harassment is weak but the employer can nonetheless adopt inexpensive, effective incentive devices to dissuade employees from misconduct."[101]

Sykes' expansive view of enterprise liability is qualified by its reliance on the commercial attributes of enterprises. For instance, his basic rationale for an employer's vicarious liability is that "the efficiency of resource allocation is enhanced if each business enterprise bears the incremental social costs associated with its operation."[102] Significantly, Sykes describes the entity subject to vicarious liability as a "business enterprise" rather than an employer. This description conforms with Sykes' initial observation that the best risk bearers are those that can diversify the risk and obtain liability insurance more readily.[103] The implicit assumption is that an enterprise can finance such insurance by increasing the price of its products. Such an assumption demonstrates the limits of Sykes' argument in favor of extending the boundaries of vicarious liability to encompass personally motivated misconduct. Few non-commercial employers can pass along increased costs by increasing the price of their product, nor is insurance a viable option in all liability situations. In addition, Sykes does not factor in the social costs associated with the curtailment or

99. *Id.* at 1380.

100. 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).

101. *Id.* at 606.

102. *Id.* at 573.

103. *Id.* at 568 n.14.

elimination of such enterprises when they cannot raise prices to buy insurance. Even though Sykes advocates the expansion of vicarious liability, his analysis demonstrates the same fundamental limitation of enterprise liability recognized by Professor Baxter and Professor Kornhauser: unrestricted enterprise liability is effective only for commercial entities.

V. PROPER APPLICATION OF ENTERPRISE LIABILITY THEORY TO NON-COMMERCIAL ENTITIES IN SEXUAL MISCONDUCT CASES

When faced with a teacher's sexual misconduct in *John R. v. Oakland Unified School District,*[104] the California Supreme Court chose to implement fundamental limitations on enterprise liability. The California court determined that the objectives of enterprise liability cannot be achieved in the public sector, specifically in regards to public schools. *John R.* held that a school district could not, as a matter of law, be held vicariously liable for a high school teacher's sexual misconduct which took place during authorized extracurricular activities.[105] The California Supreme Court found that none of the "underlying justifications for the respondeat superior doctrine would be served by imposing vicarious liability" for a teacher's sexual misconduct with one of his students.[106] Justice Moore came to a similar conclusion in *Samaritan* regarding the clinic's liability for its therapist's misconduct: "[t]he same considerations [recognized by *John R.*] apply with even more force in the case of mental health employers."[107]

Even though the majority opinion in *Samaritan* dismissed the reasoning of *John R.*,[108] Justice Moore's dissent relied heavily on its reasoning to analyze the policy objectives for imposing vicarious liability on employers: accident prevention, compensation and cost spreading.[109] These policy objectives are common to an employer's vicarious liability under both the Alaska and California common law.

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104. 48 Cal. 3d 438, 769 P.2d 948, 256 Cal. Rptr. 766 (1989).
105. *Id.* at 441, 769 P.2d at 949, 256 Cal. Rptr. at 767.
106. *Id.* at 452, 769 P.2d at 956, 256 Cal. Rptr. at 774.
107. *Samaritan,* 791 P.2d at 353 (Moore, J., dissenting).
108. *Id.* at 348 n.8.
109. *Id.* at 353-54 (Moore, J., dissenting). Significantly, California cases cited in *John R.* relied on the same general tort treatises which have guided Alaska precedents. *See John R.,* 48 Cal. 3d at 450-51, 769 P.2d at 955-56, 256 Cal. Rptr. at 773-74 (citing 5 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 26.5, at 21 (2d ed. 1986); W. PROSSER, LAW OF TORTS 471 (3d ed. 1964)); *see also Fruit,* 502 P.2d at 139.

In terms of accident prevention, because clinics and schools are held directly liable for their negligence in hiring and supervising employees, vicarious liability deters no more sexual misconduct than liability based on negligence.[110] The only impact vicarious liability has in this regard is negative. Schools would be forced to curtail extracurricular activities where close supervision was not possible, and clinics would be encouraged "to invade the privacy of the therapist-patient relationship."[111]

The compensation objective of vicarious liability is also hard to accomplish in cases involving an employee's sexual misconduct. Both the *John R.* majority and the *Samaritan* dissent found that liability insurance is a scarce, expensive commodity which would become even harder to obtain if employers became liable for their employees' sexual misconduct. Even assuming that such insurance could be obtained, the costs in terms of funds diverted from classrooms and medical treatment may be too great a price for society to pay.[112]

Cost spreading among beneficiaries of the enterprise is another objective that, according to the California decision and Justice Moore's dissent, would not be accomplished by making employers vicariously liable for sexual misconduct.[113] Because personally motivated sexual misconduct is outside the scope of employment, the costs of such misconduct should not be passed on to the employer and the ultimate consumers.[114] Justice Moore and the California majority maintain that psychiatric patients and school students as a whole should not have to bear the costs of misconduct having no connection to a therapist's or teacher's attempt to fulfill authorized duties.[115]

An Alaska Superior Court ruling subsequent to the *Samaritan* decision also demonstrates the limits of enterprise liability in a noncommercial setting. In *Ciarochi v. The Boy Scouts of America,*[116] Judge Jahnke granted a summary judgment motion denying a claim of vicarious liability for an agent's sexual misconduct.[117] *Ciarochi* involved a scoutmaster's sexual misconduct with a ten year-old scout who attended scouting activities supervised by the scoutmaster.[118]

110. *Samaritan,* 791 P.2d at 353 (Moore, J., dissenting); *John R.*, 48 Cal. 3d at 451, 769 P.2d at 956, 256 Cal. Rptr. at 774.

111. *Samaritan,* 791 P.2d at 353 (Moore, J., dissenting).

112. *Id.* at 353-54 (Moore, J., dissenting); *John R.*, 48 Cal. 3d at 451, 769 P.2d at 956, 256 Cal. Rptr. at 774.

113. *Samaritan,* 791 P.2d at 354 (Moore, J., dissenting); *John R.*, 48 Cal. 3d at 451-52, 769 P.2d at 956, 256 Cal. Rptr. at 774.

114. *See supra* notes 87-92 and accompanying text.

115. *Samaritan,* 791 P.2d at 354; *John R.*, 48 Cal. 3d at 451-52, 769 P.2d at 956, 256 Cal. Rptr. at 774.

116. No. 1KE-89-42 CI, slip op. (Alaska Super. Ct. August 6, 1990).

117. *Id.* at 27.

118. *Id.* at 1-2.

Although Judge Jahnke factually distinguished the *Samaritan* decision,[119] the court endorsed the *John R.* decision because the California Supreme Court had rejected a "formulaic analysis" in favor of "an examination of the fundamental policies underlying vicarious liability."[120] The *Ciarochi* opinion itself provides an in-depth policy analysis of enterprise liability, which Judge Jahnke described as "an inquiry somewhat broader in scope and detail than the inquiry in *John R.*"[121]

The court formulated its liability rule in light of considerations identified by commentators such as Sykes and Professor Kornhauser.[122] Like the Moore dissent in *Samaritan*, the *Ciarochi* opinion found that vicarious liability would not deter sexual misconduct to any greater extent than liability based on negligence:

> strict vicarious liability is probably ineffective to foster any greater care post-hire than liability based on negligence since the compliance of the agent is extremely hard to monitor; beyond the care the enterprise might take in hiring the agent, there is little more the enterprise can do to monitor the agent's performance in the social service context absent fundamental changes in the nature of the enterprise.[123]

These comments concerned sexually inappropriate conduct toward children, but they apply equally well to inappropriate conduct toward adult patients. In doctor-patient and authority-child relationships, relying on the deterrent effect of inspection procedures, risk sharing and personnel actions is not feasible because sexual misconduct is invariably surreptitious and rarely foreseen.[124] In essence, "[c]onventional incentives and disincentives used by enterprises simply do not work to deter compulsive sexual misconduct."[125]

The *Ciarochi* opinion also emphasized the dichotomy between commercial enterprises and social service enterprises in determining whether enterprise liability was appropriate. Citing Sykes' article, the court recognized that "[i]n a profit-seeking enterprise, it may be socially optimal to impose the cost of liability judgments for agents' torts

119. *Id.* at 12 (distinguishing *Samaritan* because the transference phenomenon made sexual misconduct "foreseeable"). *But see Samaritan*, 791 P.2d at 353 (Moore, J., dissenting). Justice Moore argued that the sexual misconduct in *Samaritan* is analogous to that involved in *John R.* even though the teacher-student relationship in *John R.* does not involve the transference phenomenon. According to expert testimony presented during the *Samaritan* trial, Justice Moore noted that "the counselor/counselee relationship could be described psychologically as similar to a parent authority figure and a child dependent relationship." *Id.* at 353 n.4.

120. *Ciarochi*, No. 1KE-89-42 CI, slip op. at 19-20.

121. *Id.* at 20.

122. *Id.*

123. *Id.* at 22.

124. *Id.*

125. *Id.*

on the enterprise to prevent excess profits or excess production."[126] Yet in the non-commercial setting, the *Ciarochi* court recognized, as Justice Moore and the *John R.* majority had previously determined,[127] that such liability would only reduce beneficial social services.[128]

When addressing the issue of victim compensation, the *Ciarochi* court admitted that even in the context of sexual misconduct, vicarious liability still achieved its goals of compensation and risk spreading.[129] However, the cost of achieving these goals was too high when "the victim can be compensated by the social service enterprise only at a cost of the reduction or elimination of services to . . . [other] social service recipients."[130] This argument was especially powerful in the context of the *Ciarochi* case, which involved a charitable social service enterprise largely run by volunteers.[131] Such an argument also applies to mental health providers like the Samaritan Counseling Center, whose increased liability would result in denying services to those who could least afford to pay for psychological counseling.[132]

VI. CONCLUSION

The *Samaritan* majority assumed that the Restatement's "motivation to serve" test would undermine the enterprise liability theory for an employer's vicarious liability.[133] When this assumption is measured against Alaska precedent, theoretical assessments of enterprise liability, and other states' approaches, the supreme court appears to have assumed too much. The precedents established in *Fruit, Luth* and *Williams* all utilized a "motivation to serve" standard which corresponded to the Restatement's definition of the scope of employment.[134] The *Samaritan* majority also failed to consider the inherent limitations of enterprise liability theory. Non-commercial enterprises cannot distribute burdens among those benefited by the enterprise without exacting an unacceptably high social cost. Both theoretical commentaries[135] and judicial opinions[136] illustrate how limitations on an employer's vicarious liability in the non-commercial context are

126. *Id.* at 23 (citation omitted).
127. *See supra* notes 104-115 and accompanying text.
128. *Ciarochi*, No. 1KE-89-42 CI, slip op. at 23.
129. *Id.* at 25.
130. *Id.* at 26.
131. *Id.*
132. *See Samaritan*, 791 P.2d at 354 (Moore, J., dissenting); *see also John R.*, 48 Cal. 3d at 451, 769 P.2d at 956, 256 Cal. Rptr. at 774 (arguing that the availability of education services would be similarly vulnerable).
133. *Samaritan*, 791 P.2d at 349.
134. *See supra* notes 20-24 and accompanying text.
135. *See supra* notes 95-103 and accompanying text.
136. *See supra* notes 104-132 and accompanying text.

consistent with the fundamental premises of the enterprise liability theory. In general, these authorities indicate that a "motivation to serve" requirement would not undermine enterprise liability to the extent assumed by the Alaska Supreme Court.

Even in Alaska there is no clear consensus on this issue, as indicated by the Legislative Affairs Committee's latest recommendations.[137] This committee suggested that the Seventeenth State Legislature review *Samaritan* to determine whether the legislature should enact legislation to alter the common law determined by the court. At some point the need to hold enterprises liable for the total costs of their operation has to be reconciled with support for enterprises considered socially beneficial regardless of market considerations. The legislature may be in the best position to determine which enterprises — such as schools, day care centers, hospitals, churches — deserve to be exempt from an expansive enterprise liability rule originally designed for commercial enterprises.

All these factors suggest the *Samaritan* holding should, at most, only carve out a special exception to the "motivation to serve" requirement, based on the recognition that the transference phenomenon makes the resulting sexual misconduct uniquely "incidental" to therapy. This approach was adopted by *Ciarochi,*[138] but even such a limited exception violates the rationale for an employer's vicarious liability. "Scope of employment" has no meaning if the employer is held liable when the employee acts for purely personal motives; the employer then becomes liable for acts which have no link to the employee's legitimate duties. Vicarious liability for a therapist's sexual misconduct illustrates how paradoxical enterprise liability becomes in such situations.

Cliona Mary Robb

137. LEGISLATIVE AFFAIRS COMMITTEE REPORT TO THE SEVENTEENTH LEGISLATURE 1 (Nov. 1990).

138. No. 1KE-89-42 CI, slip op. at 12 (Alaska Super. Ct. August 6, 1990).