Santa Clara University School of Law

Santa Clara Law Review

Volume 30 | Number 2 Article 5

1-1-1990

Respondeat Superior: A Clarification and Broadening of the Current Scope of Employment Test

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RESPONDEAT SUPERIOR: A CLARIFICATION AND BROADENING OF THE CURRENT "SCOPE OF EMPLOYMENT" TEST

I. INTRODUCTION

How would you respond to the following situation? An extremely upset client comes into your office. She has just learned that her child was molested by his day care teacher. There is no real question of guilt because another day care center employee observed the molestation. In addition to the criminal charges which have already been filed, your client would like to pursue a civil action against the tortious teacher individually and against the day care center under the doctrine of respondeat superior.[1]

If you determined that the client did not have any realistic chance of success under respondeat superior, you would be in agreement with the majority of California courts.[2] However, the issue has yielded contradictory results in the past decade. As a result, if you answered that your hypothetical client did have a case under the respondeat superior doctrine, at least one California court[3] would agree with you, and, possibly, the Supreme Court of California. The California Supreme Court granted review of three appellate court cases which concern defining the parameters of the scope of employment in regard to the doctrine of respondeat superior. The court handed down a decision in the first[4] and remanded the second for an opinion consistent with the first.[5] However, it has yet to decide the

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1. A concise definition of respondeat superior is "[l]et the master answer." It means that in certain cases a master is held liable for the wrongful acts of his servant. BLACK'S LAW DICTIONARY 1179 (5th ed. 1979).

2. *See, e.g.*, Mary M. v. City of Los Angeles, 200 Cal. App. 3d 758, 246 Cal. Rptr. 487, *rev. granted sub nom.* Miller v. City of Los Angeles, ____ Cal. 3d ____, 756 P.2d 1348, 249 Cal. Rptr. 289 (1988) (reprinted for tracking pending review 213 Cal. App. 3d 1464); Jeffrey E. v. Central Baptist Church, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128 (1988); Rita M. v. Roman Catholic Archbishop, 187 Cal. App. 3d 1453, 232 Cal. Rptr. 685 (1986); Alma W. v. Oakland Unified School Dist., 123 Cal. App. 3d 133, 176 Cal. Rptr 287 (1981).

3. White v. County of Orange, 166 Cal. App. 3d 566, 212 Cal. Rptr. 493 (1985).

4. John R. v. Oakland Unified School Dist., 194 Cal. App. 3d 454, 240 Cal. Rptr. 319 (1987) (reprinted for tracking pending review 206 Cal. App. 3d 1473), *modified*, 48 Cal. 3d 438, 769 P.2d 948, 256 Cal. Rptr. 766 (1989).

5. Kimberly M. v. Los Angeles Unified School Dist., 196 Cal. App. 3d 1506, 242 Cal. Rptr. 612 (1987), *rev. granted*, ____ Cal. 3d ____, 244 Cal. Rptr. 905, 750 P.2d 786 (1988)

third.[6]

The problem is one of consistency. California courts have been interpreting the scope of employment in different ways which, in turn, produce different rulings in cases with very similar fact patterns.

This Comment first presents an historical background on the doctrine of respondeat superior including the current treatment of the scope of employment. Second, an analysis of the two-prong scope of employment test and the manner in which courts have applied it is presented. The analysis also discusses the policy rationales used to justify respondeat superior. Finally, this Comment makes a proposal for an amendment to the two-prong scope of employment test. The proposed change will add clarity and predictability to a test whose vagueness results in a very inconsistent and unpredictable application of the respondeat superior doctrine.

II. BACKGROUND

A. *Origins of the Doctrine of Respondeat Superior*

Historically, the concept of respondeat superior existed in the notion of responsibility for harmful results, and was based mainly on primitive superstition.[7] Liability was found to exist for both negligent and intentional acts. Some of the situations in which liability was imputed included: the individual was the actor of the resulting harmful act; he was the owner of an instrument which caused harm; or he was the owner of an animal or slave which caused the harm.[8]

In cases of the imposition of absolute liability on the master despite the fact that the master did not command the act, there was an emphasis on finding a visible source of responsibility for the resulting harm.[9] This ancient law was most often applied in a master-slave situation to make the master absolutely liable for the acts of his

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(reprinted for tracking pending review 209 Cal. App. 3d 1326), *transf. later op.*, 215 Cal. App. 3d 545, 263 Cal. Rptr. 619 (1989).

6. *Mary M.*, 200 Cal. App. 3d at 758, 246 Cal. Rptr. at 487.

7. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 317 (1894).

8. *Id.* Other instances in which liability was imputed were where an employer was strictly liable to relatives of an employee whose death was caused by his business; a judge was responsible for a mistaken judgment despite the fact he had acted in good faith; and a person who, even unknowingly, harbored or assisted a wrongdoer was guilty by virtue of associating himself with the evil of the wrongdoer. However, no liability was imputed where there was an unlawful intent, but no unlawful result. *Id.* at 317-18.

9. *Id.*

slaves.[10] However, this absolute liability disappeared after the Conquest, at the same time as common slavery in England.[11]

Liability based on a master's direct enlistment or procurement of the tortious act existed continuously from the earliest of times to present day.[12] However, where vicarious liability was sought against a master who did not procure or command the commission of the tort, the result was less clear.

By the 16th century, broad notions of master liability had already disappeared. The only instance in which a master was responsible for the torts of his servant was when he had actually ordered the commission of the tortious act.[13] As the 17th century approached, the realities of a growing commerce and industry warranted a broadening of this narrow rule.[14]

Thus, the basic principle of our current modern rule developed. The master or employer was held liable for that tortious conduct of his servant or employee which was determined to be on the master's behalf or in the course of the servant's employment.[15] Since the act was determined to be within the course of employment, the rule was justified by viewing the conduct as done under the general command of the master.[16] This remained the rule as English law in the area developed.

B. *English Law*

The first case under English law where this broader principle was applied was in *Hern v. Nichols*.[17] In this case, a silk merchant was held liable for the fraud committed by his agent in the sale of

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10. W. WALSH, A HISTORY OF ANGLO-AMERICAN LAW 321 (2d ed. 1932).

11. *Id.*

12. *Id.* at 320-21.

13. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 500 (5th ed. 1984).

14. W. WALSH, *supra* note 10, at 322. The narrow rule requiring that the master give a specific command in order to impute liability was justified by the immediate control the master had over his servants. With the great expansion of commercial life and the subsequent need for entrusting servants with broader responsibility, this justification no longer truly existed and business demanded that the master be held liable for the acts of his representatives. *Id.*

15. *Id.* at 322-23.

16. *Id.* Walsh quoted the commentator Blackstone who summed up the development of the rule: "In the same manner whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. The reason of this is still uniform and the same—that the wrong done by the servant is looked upon in law as the wrong of the master himself." *Id.* (footnote omitted) *See* WIGMORE, *supra* note 7, at 394-402 for a description of the cases and decisions exemplifying development of this rule.

17. 90 Eng. Rep. 1154 (1709) (opinion written by Chief Justice Holt).

goods. The court noted that if someone was to "lose" or suffer due to the agent's deceit, it was better that the person who employed the agent and put his trust and confidence in him suffer rather than the stranger who was defrauded.

An analysis of the case by the well-known commentator Baty noted the contractual nature between the merchant and agent in *Hern*.[18] The merchant had invited others to put their trust and confidence in his agent in order to make contracts with the merchant.[19] Therefore, he should expect to be responsible for any contracts made by his agent, including those entered into as a result of the agent's deceit and fraud.[20] However, as Baty noted, this case was decided on a contract as well as a tort basis.[21] The rule followed during this time period was explained by Holdsworth:[22] the servant himself was liable for any *unlawful* act he committed under the command or consent of his master, even if the act was committed while in the course of employment. However, if the servant committed a *lawful* act under the command or consent of his master, the master was then liable for any resulting harm.[23] In other words, the employer was held responsible for those wrongful torts committed by his employee, so long as the acts were committed within the scope of employment. The scope of employment was interpreted in the most narrow sense here. It was on this basis that the American law developed.

C. *American Adoption of English Law Principles*

Wright v. Wilcox[24] is a leading American case from the 19th century that followed this broad principle of liability for acts within the scope of employment. Wilcox, a wagon driver, was delivering goods for his employer when some boys attempted to board his moving wagon. Wilcox cracked his whip to cause his horses to go faster in order to prevent the boys from climbing aboard. As a result, one of the boys, the plaintiff, fell underneath a wagon wheel and suffered severe injuries.[25]

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18. *See* T. BATY, VICARIOUS LIABILITY 10 (1916).
19. *Id.*
20. *Id.*
21. *Id.*
22. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 384 (5th ed. 1942). Holdsworth noted that although generally the ancient doctrines tended to operate strictly in the area of civil liability, there was a tendency for this severity to diminish in regard to the master's liability for the acts of his servants. *Id.*
23. *Id.* Generally, the laws for civil liability paralleled those for criminal liability. *Id.*
24. 19 Wend. 343 (N.Y. Sup. Ct. 1838).
25. *Id.*

Although the court departed from the rule of the day and stated that a master was generally liable for a servant's negligent or incompetent actions,[26] the holding did not follow this principle. Rather, the court found that the tort in this case was intentional and, therefore, explicitly chose to follow established precedent and hold that the master was not liable for the willful tortious conduct of his servant.[27] It was determined that to impose liability on the master in cases, like the one at bar, which involved a willful tort, there must be an express assent by the master for the servant's tort. "[T]he law will not imply assent."[28]

The *Wright* court even went so far as to explicitly reject the policy argument that is presently accepted for respondeat superior. That argument is as follows: between two innocent persons, it is better that the employer of the tortfeasor pay for resulting harm rather than the innocent, injured third-party plaintiff.[29] Therefore, the wagon driver's employer was not found liable for the tortious conduct of his servant.

D. *Development of California Law*

1. *Early Broadening of the Scope*

California courts initially followed the principles set forth in *Wright* above.[30] Employers were not found liable for the intentional torts of their employees. These wrongful acts were, by definition,

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26. "[W]hen a servant does an act injurious to another, through *negligence or want of skill*, [the master's liability is based] on the principle that the master should at his peril employ servants who are skilful [sic] or careful." *Id.* at 346 (citations omitted).

27. *Id.* at 345. Although the servant may be engaged in a service for the master, the master is not liable for the servant's willful misconduct. A master is only responsible for those acts within the servant's scope of agency. *See* M'Manus v. Crickett, 102 Eng. Rep. 43 (1800) (master not liable where servant willfully drove carriage into another without master's direction or assent, but would have been liable had the servant acted negligently or unskillfully); Browcher v. Noidstrom, 127 Eng. Rep. 954 (1809) (captain of ship not liable where crew member cut away at another ship's sail to disentangle the two ships and captain did not direct the act); Croft v. Alison, 106 Eng. Rep. 1052 (1821) (servant negligently whipped horses causing collision with plaintiffs and, therefore, master is liable; different result where servant wantonly does same thing); all of which the court cited in support of this proposition.

28. *Wright*, 19 Wend. at 346.

29. *Id.* The *Wright* court simply found that this argument proves too much and would result in holding "the master accountable for every mischievous act of the servant." *Id.*

30. *See, e.g.*, Wade v. Thayer, 40 Cal. 578 (1871) (employer not liable for assault committed by employees in removing trespasser from premises because employees' actions constituted a wanton, malicious, and unprovoked assault); Andrews v. Runyon, 65 Cal. 629, 4 P. 669 (1884) (one who employs another to repair levee not responsible for the illegal removal of dirt from the highway where the necessity of removing dirt could not be inferred from the contract which the employer bound himself to).

outside the scope of employment. However, it was not long before California departed from strict adherence to this rule.

Otis Elevator Co. v. First National Bank[31] is an early example of this departure. In *Otis*, the plaintiff's employee forged a check and fraudulently received the amount due from the defendant bank. Although normally a bank pays on forged checks at its own risk of possible loss, the court in *Otis* found the plaintiff, holder of the account, responsible for the loss.[32] The routine manner in which checks were normally paid out to the employee was emphasized and, ultimately, the wrongful, fraudulent conduct of the employee was imputed to the employer.[33]

The *Otis* court stated that an employer's liability for both the negligent and intentional torts committed by an employee, either "in or as part of the transaction of such business," is a general principal of law.[34] It was not claimed that the employee acted in furtherance of the employer's business or under his authority in committing the particular act of forgery.[35] Rather, the court based its decision on the general proposition that the employer holds out the employee as capable and trustworthy. Accordingly, the employer must be held liable when the employee fails to act consistent with these characteristics.[36] The matter in *Otis* was found to be within the scope of employment. Thus, liability was imputed to the employer, due to the fact that this particular employee was the individual who routinely cashed the checks in the normal course of business.

The court in *Ruppe v. City of Los Angeles*[37] also found the employer liable for an intentional tort committed by its employee. A city employee in *Ruppe* was assigned to wire a building and set the meters in order to provide electricity to the building. The plaintiff,

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31. 163 Cal. 31, 124 P. 704 (1912).

32. *Id.* at 31-34, 38, 124 P. at 705, 707. The general rule is applied strictly in cases of simple forgery, but it is modified when some negligence on the part of the customer contributes to payment by the bank or other facts are present which demand a different, more equitable remedy. *Id.* at 38, 124 P. at 707.

33. *Id.* at 39-40, 124 P. at 707-08.

34. *Id.* at 39, 124 P. at 707. The court reasoned that the application of respondeat superior is required in order to ensure the safety of third parties when dealing with either the principals or their agents. *Id.*

35. *Id.* at 40, 124 P. at 708. The *Otis* court recognized the fact that the employee was not acting within the scope of his authority to cash only valid checks. However, as far as the bank was concerned, the employee was acting within the direct scope and course of his employment which consisted of preparing and presenting checks for his employer. *Id.*

36. *Id.* at 39, 124 P. at 707. In effect, by holding the employee out as such, the employer "warrants his fidelity and good conduct in all matters within the scope of his agency." *Id.* (citation omitted).

37. 186 Cal. 400, 199 P. 496 (1921).

who was in charge of the building in a capacity similar to that of a caretaker, refused to let the employee enter the building at the advice of her employer.[38] Subsequently, the city employee forced his way into the building and assaulted the plaintiff in an effort to do the work assigned to him.

Although the city employee's actions were determined to be clearly contrary to the express instructions of his employer, the court determined it was immaterial whether the assault had been expressly authorized by the city.[39] Rather, the court stressed that the act was done in the course of employment. The court found that in such situations the master is responsible although the act is unauthorized or even contradictory to express orders.[40]

In dicta, the *Ruppe* court acknowledged that no employer liability would be imputed under respondeat superior where the employee had completely "step[ped] aside from his employment."[41] However, the act could still be determined as within the scope of employment even where it was malicious or willful.[42]

In the case at bar, the court did not premise the employer's liability on any notion of authorization, but rather on the fact that the employer had "empowered . . . [the employee] . . . in the sense that he ha[d] entrusted him with the performance of a duty in whose performance it [was] possible for him to break the law."[43] This idea of empowerment is one that recurs throughout this Comment.

2. *The 1930's: Period of Strict Interpretation of "Scope"*

Following the above period of expansive interpretation of the scope of employment, California courts refrained from a further broadening of the scope. This strict interpretation can be seen in two

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38. *Id.* at 401, 199 P. at 496.

39. *Id.* at 402, 199 P. at 496. The court reasoned that the act was committed by the employee "in the course of doing that which he had been sent to the building by the city to do, and in furtherance of its doing." *Id.* This constituted an act done in the course of employment. *Id.*

40. *Id.* Citing Otis Elevator Co. v. First National Bank, 163 Cal. 31, 124 P. 704 (1912), the court stated that acts of an employee done on behalf of the employer are the same as if they were done by the employer himself. Any question of authority in regard to the particular act is irrelevant. *Id. See also* Johnson v. Monson, 183 Cal. 149, 190 P. 635 (1920) (saloon owner liable for bartender's assault of patron due to bartender's general authority to maintain order in saloon).

41. *Ruppe*, 186 Cal. at 402, 199 P. at 496.

42. *Id.* at 402, 199 P. at 497. If done in furtherance of the purpose of the employee's employment, the act will be found within the scope of employment, regardless of whether it is intentional, and the employer will be liable. *Id.*

43. *Id.* at 403, 199 P. at 497.

leading decisions from the 1930's.[44] These decisions resulted in findings that the employees' intentional torts were independent acts, outside the scope of employment.[45]

The employee in *Yates v. Taft Lodge No. 1527*[46] was hired by the defendant lodge to collect admission fees and control admission of the general public at a benefit picnic. When the employee refused admission to some hired musicians who should have lawfully been admitted, the plaintiff landlord and the employee became involved in a dispute. The employee subsequently assaulted the plaintiff.[47]

The *Yates* court initially acknowledged the general rule of employer liability for an intentional tort committed by an employee acting within the scope of employment.[48] However, the court further noted that where the employee departs from the employer's business, no liability is imputed under the respondeat superior doctrine.[49] The authority this particular employee had been vested with in *Yates* extended only to taking admission fees and controlling crowd admissions. The force he used against the plaintiff was unrelated to this authority and the duty he was obligated to fulfill.[50] The tort was committed as a result of a dispute over the contract or concession situation, which was not one of the employee's duties. Thus, the use of force in connection with this ancillary problem could not be found within the scope of employment.[51]

An equally strict line was drawn in *Lane v. Safeway Stores Inc.*,[52] where a store clerk's "roughhousing" with a boy resulted in an alleged assault and injuries to the boy. The court found the employee was hired to perform only sales functions for the store. Thus, roughhousing with the boy had a purpose independent from the employment.[53] Because this was the employee's own independent pur-

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44. Yates v. Taft Lodge No. 1527, 6 Cal. App. 2d 389, 44 P.2d 409 (1935); Lane v. Safeway Stores Inc., 33 Cal. App. 2d 169, 91 P.2d 160 (1939).

45. 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 138 (9th ed. 1987).

46. 6 Cal. App. 2d 389, 44 P.2d 409 (1935).

47. *Id.* at 390, 44 P.2d at 409-10.

48. *Id.* at 390, 44 P.2d at 410. The court also recognized the difficulty in applying the settled general rule to the facts of a particular case. *Id.* at 391, 44 P.2d at 410 (citing Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 P. 234 (1892); Rahmel v. Lehndorff, 142 Cal. 681, 76 P. 659 (1904)).

49. *Yates*, 6 Cal. App. 2d at 390, 44 P.2d at 410. Once the employee departs from the employer's business, the employee is held to have his own independent purpose. *Id.*

50. *Id.* at 391, 44 P.2d at 410. The plaintiff was already on the grounds. Therefore, the employee did not commit the act in relation to his duty of controlling admissions . *Id.*

51. *Id.* at 391-92, 44 P.2d at 410.

52. 33 Cal. App. 2d 169, 91 P.2d 160 (1939).

53. *Id.* at 173, 91 P.2d at 162.

pose, the employer was not held liable.[54]

3. *Carr and Its Progeny*

The 1940's brought increased liability for the employer under respondeat superior. The California Supreme Court addressed the issue twice in less than one year. The result was two leading cases on the respondeat superior doctrine: *Carr v. Wm. C. Crowell Co.*[55] and *Fields v. Sanders.*[56] Both cases involved assaults by employees while they were engaged in their employment.

In *Carr*, the tortfeasing employee worked for a general contractor and the plaintiff was employed by a subcontractor on a large construction job. The employee and plaintiff became embroiled in a dispute over the correct procedure for laying the floor of a building. The general contractor's employee threw a hammer at the plaintiff which struck him in the head and resulted in serious injuries.[57]

The *Carr* court found that the assault was an outgrowth of the employment.[58] The risk of such an "emotional flare-up" was to be expected in those situations which require people to work together.[59] Since this foreseeable risk arose out of the employment, it was just to hold the employer liable for the resulting injury.[60] However, the court noted that if an employee inflicts an injury due to personal malice, not originating from the employment, the employer is not liable under the doctrine of respondeat superior.[61]

Thus evolved the two-prong analysis for the respondeat superior scope of employment that is still used by courts today. It is important to note that satisfaction of only one of the two prongs is sufficient to impose vicarious liability. The first prong analyzes

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54. *Id.* The requisite employer-employee relationship did not exist in regard to the roughhousing due to the independent purpose. Therefore, where no such relationship existed, the employer could not be held liable under respondeat superior. *Id.* (citing Stephenson v. Southern Pac. Co., 93 Cal. 558, 563, 29 P. 234, 235 (1892)).

55. 28 Cal. 2d 652, 171 P.2d 5 (1946).

56. 29 Cal. 2d 834, 180 P.2d 684 (1947).

57. *Carr*, 28 Cal. 2d at 653, 171 P.2d at 6.

58. *Id.* at 656, 171 P.2d at 8.

59. *Id.*

60. *Id.* at 656, 171 P.2d at 7-8. The court reasoned that "[m]en do not discard their personal qualities when they go to work." *Id.* at 656, 171 P.2d at 7. While employees bring their "good" personal attributes such as intelligence and skill, they also bring "bad" ones such as a tendency to be careless or a tendency towards emotional flare-ups. The risks that go along with these characteristics are inseparable from working together and are risks inherent in the working environment. *Id.* at 656, 171 P.2d at 7-8.

61. *Id.* at 656, 171 P.2d at 8 (citing Yates v. Taft Lodge, 6 Cal. App. 2d 389, 390, 44 P.2d 409 (1935) (other citations omitted)).

whether the act was done on behalf of the employer or can be determined as incidental to the employee's duties. In *Carr*, the court found neither part of this first prong was satisfied.[62]

The second prong addresses the question of whether the action taken by the employee in *Fields* was foreseeable in light of his duties to the employer. As explained above, in *Carr*, this resulted in the employer's liability under respondeat superior because of the foreseeability that an emotional flare-up might arise out of the work situation.[63]

The facts in *Fields v. Sanders* are similar to those in *Carr* to the extent that an assault resulted directly from an employee's performance of his duties. The employee worked as a truck driver for the defendant company. He and the plaintiff became involved in an altercation that arose when the employee allegedly ran the plaintiff off the road. The employee was in the process of transporting a load of oil at his employer's request when the incident occurred. The employee hit the plaintiff with a two and one-half foot wrench in the heat of the ensuing argument.[64]

In determining liability under respondeat superior, the court found the proper inquiry to be not whether the specific act was authorized, but rather, whether the act was part of a series of acts which were authorized by the employer as a whole.[65]

The *Fields* court emphasized a number of factors which led to its decision. First, the employee had a duty by law to stop after the collision occurred. Second, the argument and subsequent injury to the plaintiff arose out of the employee's work performance. Lastly, the employee immediately returned to his truck and proceeded with his assignment following the assault.[66] Thus, the assault was one in a series of authorized acts and met the requirements of the court as falling within the scope of employment.

The defendant in *Fields* claimed that the employee's work as a truck driver was such that it was not foreseeable that the employee

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62. *Carr*, 28 Cal. 2d at 656, 171 P.2d at 8. The employee did not act on his employer's behalf by throwing the hammer. Neither can it be said that throwing the hammer was incidental to the employee's duties as a construction worker. *Id.*

63. *Id.* at 656-57, 171 P.2d at 8. *See supra* note 60. The *Carr* court found that not only did the argument arise directly from the performance of the employee's duties, but, in fact, the entire association between the employee and the plaintiff arose out of the construction performed for the employer. *Id.* at 657, 171 P.2d at 8.

64. Fields v. Sanders, 29 Cal. 2d 834, 836-38, 180 P.2d 684, 686-87 (1947).

65. *Id.* at 839, 180 P.2d at 688.

66. *Id.* at 839-40, 180 P.2d at 688-89. The employee's "entire course of action was inextricably intertwined with his service to his employer." *Id.* at 840, 180 P.2d at 689.

would come into contact with third parties or that the employee would subsequently become emotionally upset and commit a tort.[67] The court dismissed this argument and concluded that the employee's tortious conduct was within the scope of employment as defined in respondeat superior.[68]

Carr and *Fields* are still considered leading cases in the field of respondeat superior for their treatment of employees' intentional torts. Both are commonly cited for the proposition that an employer's responsibility under respondeat superior extends to liability for intentional torts which are actually beyond his control.[69] In fact, as a result of the great precedential value given to these decisions, at least one court has held that *Yates* and *Lane* no longer have any significant precedential value.[70]

Rodgers v. Kemper Constr. Co.[71] is a fairly recent example of a decision following the reasoning set forth in *Carr* and *Fields*. The facts in *Rodgers* involved a fight between the defendant general contractor employees (Kemper) and the plaintiff employees of a subcontractor on the same large construction job.[72] On the day the tort was committed, the Kemper employees had finished their shift, but stayed on the construction site to drink beer, socialize and work on one of the two defendants' personal vehicles.[73]

In their efforts to borrow money for more drinking, the Kemper employees asked one of the plaintiffs for a ride on the bulldozer he was operating. When the plaintiff refused, the defendants beat

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67. *Id.* at 841, 180 P.2d at 689.

68. *Id.* The *Fields* court cited its decision in *Carr*, emphasizing the foreseeability of the risk of altercation and injury when an enterprise requires people to interact. The *Fields* court further affirmed its recognition in *Carr* of the employer's responsibility for any tortious conduct that arose out of the interaction required by the employment. *Id. See supra* note 60.

69. *See* Hinman v. Westinghouse Elec. Co., 2 Cal. 3d 956, 471 P.2d 988, 88 Cal. Rptr. 188 (1970); Rodgers v. Kemper Constr. Co., 50 Cal. App. 3d 608, 124 Cal. Rptr. 143 (1975).

70. *Rodgers*, 50 Cal. App. 3d at 623-34, 124 Cal. Rptr. at 151-52. *See infra* notes 71-83 and accompanying text.

71. 50 Cal. App. 3d 608, 124 Cal. Rptr. 143 (1975).

72. Note the similarity between the facts here and in *Carr*. *See supra* text accompanying notes 57-63.

73. *Rodgers*, 50 Cal. App. 3d at 615, 124 Cal. Rptr. at 146. On the evening in question, much of the employees' time after their shift was spent in the "dry house" which Kemper made available to its employees. The dry house was a trailer which had a shower room and employee lockers where employees would normally shower and change after a shift. Additionally, beer was often kept in the dry house with Kemper's knowledge, although it was not supplied by the employer. The employees would often socialize and drink in the dry house after a shift. This arrangement served Kemper as well as the employees because in the event additional workers were needed for a particular shift, these workers could usually still be found in the dry house after their shift was finished. *Id.* at 615, 619-20, 124 Cal. Rptr. at 146-49.

him.[74] Then the beaten plaintiff enlisted the help of the other plaintiff in discovering the identities of the Kemper employees. Another fight broke out resulting in severe injuries to both plaintiffs.[75] First, the court dismissed Kemper's contention that liability under respondeat superior was precluded because the assault took place after the Kemper employees' work hours. Due to the factors surrounding the dry house[76] and, in particular, the fact that Kemper benefited from the workers' presence at the job site after the end of their shifts, the court found this argument lacked merit.[77]

The *Rodgers* court then dismissed the defendants' next contention that the assault arose out of personal malice unrelated to the employment. Citing *Carr*, the court acknowledged that an assault motivated by personal malice alone would not result in vicarious liability for the employer.[78] However, the plaintiffs in *Rodgers* were complete strangers to the defendants and there was evidence that the dispute arose out of the employment relationship which was the proximate cause of the assault.[79] The court determined this was sufficient evidence that the assault was not merely motivated by personal malice.

Finally, the court found Kemper's reliance on *Yates*[80] and *Lane*[81] groundless. Admitting *Yates* had never been technically overruled, the *Rodgers* court nonetheless found the decision inconsistent with subsequent case law. As a result, *Yates*' precedential value had been eroded.[82] The court went on to state that the decision in *Lane* was principally based upon a case which *Carr* expressly overruled.[83]

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74. *Id.* at 615, 124 Cal. Rptr. at 146.

75. *Id.* at 615-16, 124 Cal. Rptr. at 146-47.

76. *See supra* note 73 for a full description of the dry house.

77. *Rodgers*, 50 Cal. App. 3d at 619-20, 124 Cal. Rptr. at 149-50. As indicated above, the benefit to Kemper was that workers were routinely available after their shifts were over if there was a need for overtime workers. *Id.* at 619-20, 124 Cal. Rptr. at 149.

78. *Id.* at 621, 124 Cal. Rptr. at 150. The test, as stated by the court, is "[i]f the assault was motivated by personal malice not engendered by the employment, the employer is not vicariously liable; but otherwise, liability may be found if the injury results from 'a dispute arising out of the employment.' " *Id.* (citation omitted).

79. *Id.* at 621-22, 124 Cal. Rptr. at 150-51.

80. *See supra* notes 46-51 and accompanying text.

81. *See supra* notes 52-54 and accompanying text.

82. *Rodgers*, 50 Cal. App. 3d at 623, 124 Cal. Rptr. at 151-52.

83. *Id.* at 623-24, 124 Cal. Rptr. at 152-53. The *Rodgers* court stated that *Carr* overruled Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 P. 234 (1892), because the *Stephenson* holding had been contradicted by the findings of subsequent courts. *Id.* at 623-24, 124 Cal. Rptr. at 152-53. In *Stephenson*, the act of a railroad engineer was held to be outside the scope of employment when the engineer moved a railroad car with the intent of frightening passengers in a nearby street-car. *Id.* at 562, 29 P. at 235. The court held that the intent to frighten

Accordingly, Kemper was found liable for the torts committed by its employees under the doctrine of respondeat superior.

E. *Current Judicial Interpretation of "Scope"*

Numerous California cases have followed the line set out above in finding the employer liable for employees' intentional torts.[84] While the California courts have generally followed a fairly liberal interpretation of the scope of employment as applied to respondeat superior, currently there is inconsistency in the manner in which courts are handling the issue. The following cases demonstrate this disparate treatment.

First, however, the modern policy justifications for the respondeat superior doctrine, expressed by the California Supreme Court in 1970 should be noted. The *Hinman v. Westinghouse Elec. Co.*[85] case was essentially concerned with the "going and coming" rule.[86] The facts of the case are, therefore, not pertinent to this Comment.[87]

However, the *Hinman* court's statements as to the policy justifications for respondeat superior are relevant to this discussion. The court stated first, that the modern justification is a "rule of policy, a deliberate allocation of [those] risks . . . which as a practical matter are sure to occur in the conduct of the employer's enterprise."[88] The employer's assumption of the burden of these risks is simply seen as a cost added to those generally required of the employer in doing business.[89] Some of the decisions that follow cite the *Hinman* policy justifications in the court's opinions, and all of the courts appear to

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was an unlawful purpose independent of the employer's purpose. *Id.*

84. *See* Clark Equipment Co. v. Wheat, 92 Cal. App. 3d 503, 154 Cal. Rptr. 874 (1979) (fraudulent misrepresentations made by employees in their various capacities for the sale of a forklift found to be both reasonably foreseeable and within the scope of employment; employer liable under respondeat superior); McKay v. County of San Diego, 111 Cal. App. 3d 251, 168 Cal. Rptr. 442 (1980) (the county, employer of an investigator for the district attorney's office, was found liable when the investigator fraudulently procured and obtained an arrest warrant and personally arrested plaintiff, committing the intentional tort of false arrest).

85. 2 Cal. 3d 956, 471 P.2d 988, 88 Cal. Rptr. 188 (1970).

86. "Under the . . . rule, an employee who is going to or coming from work is generally not . . . considered to be acting in the course or scope of his employment for purposes of . . . respondeat superior." BLACK'S LAW DICTIONARY 622 (5th ed. 1979). *See also* 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW §§ 129-134 (9th ed. 1987) for a general survey of California law on the going and coming rule.

87. In *Hinman*, an employee was involved in an automobile accident on the way home from work in a company owned vehicle. At issue was whether the accident had occurred in the scope of the employee's employment. *Hinman*, 2 Cal. 3d at 956, 471 P.2d at 988, 88 Cal. Rptr. at 188.

88. *Id.* at 959, 471 P.2d at 990, 88 Cal. Rptr. at 190.

89. *Id.* at 960, 471 P.2d at 990, 88 Cal. Rptr. at 190.

support the general idea presented in *Hinman* that the underlying policy of the respondeat superior doctrine is one of allocation.

1. *Use of the Carr Test*

Alma W. v. Oakland Unified School District[90] is the first in a line of decisions which has interpreted the scope of employment under the doctrine of respondeat superior inconsistently. The facts in *Alma W.* are as follows: an 11 year-old alleged that a custodian at her school sexually molested and raped her in the custodian's office. The girl's mother brought suit against the school principal and the school district under the doctrine of respondeat superior.[91] The *Alma W.* court used the two-prong test originally set forth in *Carr*[92] to determine whether the custodian's act was within the scope of employment.[93]

Although the court noted that occupational duties are generally defined broadly, it ultimately concluded that a substantial deviation from work related matters would not result in employer liability under the respondeat superior doctrine.[94] In the instant case, the court found the relationship between the employee's act and assigned duties too attenuated to hold the employer liable.[95]

Additionally, the court determined that the fact that the assault took place on the defendant school district's property and during working hours was not determinative. Concluding with regard to the first prong, the court found the custodian's act was not done on be-

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90. 123 Cal. App. 3d 133, 176 Cal. Rptr. 287 (1981).

91. It should be noted that *Alma W.* and the other California cases that follow which involve torts committed by government employees are controlled by California Government Code § 815.2. Section 815.2(a) provides:

> A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

CAL. GOV'T. CODE § 815.2 (West 1980). A court must look then to the common law for an interpretation of what constitutes the "scope of employment" after determining that liability may be imputed based on section 815.2. *Alma W.*, 123 Cal. App. 3d at 138-39, 176 Cal. Rptr. at 289.

92. *See supra* text accompanying notes 62-63.

93. The test applied by the court was "whether or not: 1) the act performed was either required or 'incident to his duties' [citation], or 2) the employee's misconduct could be reasonably foreseen by the employer in any event [citations]." *Alma W.*, 123 Cal. App. 3d at 139, 176 Cal. Rptr. at 289 (quoting Clark Equipment Co. v. Wheat, 92 Cal. App. 3d 503, 520, 154 Cal. Rptr. 874, 882 (1979)).

94. *Alma W.*, 123 Cal. App. 3d at 139, 176 Cal. Rptr. at 289.

95. *Id.* at 139-40, 176 Cal. Rptr. at 289-90. The court stated that sexual molestation was in no way related to custodial duties such as mopping floors and cleaning rooms. *Id.*

half of his employer nor incidental to his duties, but rather was an independent act unrelated to his work duties.[96]

The court next addressed the foreseeability prong of the *Carr* test.[97] The plaintiff argued that the enactment of particular sections of the California Education Code in order to prevent or safeguard students from sexual offenses was an acknowledgement that sexual assaults of students by school employees were foreseeable.[98] However, the *Alma W.* court found this stretched the foreseeability argument "beyond its logical limits," noting that ultimately the tort must be determined as "characteristic of the enterprises' activities . . . [and it] defies every notion of fairness to say that rape is characteristic of a school district's activities."[99]

Lastly, the court rejected the plaintiff's contention that liability for the school district was the most effective manner in which to spread the risk because the employer was generally best able to bear the loss. Assuming arguendo that the school district was best suited for carrying this burden, the court nonetheless found that a sexual assault did not fall within the category of losses which should be reasonably borne by the employer.[100]

Four years later, a different California appellate court found that the tortious conduct of a police officer was within the scope of

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96. *Id.* at 141, 176 Cal. Rptr. at 291. The decision in *Fields* was quoted in support of the conclusion that the fundamental issue is whether the act was committed in the course of a series of authorized acts. However, "where an agent . . . has ceased to serve his principal, he alone is responsible for his acts during the period of cessation [citation omitted]." *Id.* (quoting Fields v. Sanders, 29 Cal. 2d 834, 839, 180 P.2d 684, 687 (1947)).

97. *Alma W.*, 123 Cal. App. 3d at 141, 176 Cal. Rptr. at 291. The court applied the *Carr* test as it was articulated in *Rodgers*. Foreseeability in this context is distinguished from foreseeability in a negligence case where it is used to determine if a reasonably prudent individual would take precautions in guarding against the occurrence of a particular event. *Id.* Foreseeability with regard to respondeat superior is used to determine if an employee's act is so startling as to make it seem unfair to hold an employer responsible for the loss. It follows then that liability for the employer will more often result under the respondeat superior doctrine than it does in a pure negligence context. *Id.* at 141-42, 176 Cal. Rptr. 291, (citing Rodgers v. Kemper Constr. Co., 50 Cal. App. 3d 608, 618-19, 124 Cal. Rptr. 143, 148-49 (1975)).

98. *Alma W.*, 123 Cal. App. 3d at 142, 176 Cal. Rptr. at 291. These education codes attempted to set up a "screening mechanism to safeguard the school system against those with a history of sexual offenses." The plaintiff claimed the existence of these codes alone indicated the Legislature foresaw sexual assaults of school children by teachers. However, the court refused to find that this altered the characterization of sexual assaults as aberrational acts. *Id.*

99. *Id.*

100. *Id.* at 143-44, 176 Cal. Rptr. at 292-93. The court determined that the justifications for respondeat superior did not dictate imputing liability as simply an easy way to reach the deepest pocket or spread the loss. Regardless of the ability to compensate, the employer can only be charged with the burden of risks directly attributable to the enterprise. *Id.*

employment in *White v. County of Orange*.[101] The plaintiff, White, was stopped by a deputy sheriff, an employee of the defendant county, who was on patrol in a marked police vehicle. The deputy sheriff placed White in his patrol car without any explanation, took her to a secluded area where he threatened to rape and murder her.[102] After driving her around for several hours and continuing to threaten her, he eventually took White back to her car after she promised to go out with him.

Recognizing that its interpretation of "incident to his duties"[103] would be determinative, the *White* court focused on the authority which the county had entrusted in the deputy sheriff.[104] The court found that because "the police officer carrie[d] the authority of the law with him into the community," the case was distinguishable from the employment of the custodian in *Alma W.*[105]

The way in which the police officer dealt with the authority given to him by his employer was determined not only incidental to his duties as a police officer, but integral to them.[106] Therefore, the wrongful acts were found to have directly flowed from the exercise of his authority.[107] Consequently, if White were able to prove the factual allegations of her claim at trial, the county would be held liable under the respondeat superior doctrine because, as the employer, it had placed the officer in the position of authority enabling him to commit the act.

The next decision which contributed to this judicial ambiguity is *Rita M. v. Roman Catholic Archbishop*.[108] The plaintiff was a sixteen year old female parishioner who had been convinced by a number of parish priests to have sexual intercourse with them. Rita was told these acts were both ethically and religiously permissible by these priests whom she greatly admired and respected. The conspiracy among the priests continued for over two years until Rita be-

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101. 166 Cal. App. 3d 566, 212 Cal. Rptr. 493 (1985).

102. *Id.* at 568, 212 Cal. Rptr. at 494.

103. *Id.* at 571, 212 Cal. Rptr. at 496. The court expressly stated that it was following *Alma W.* and applied the *Carr* test as that court did. "Incident to his duties" is the first prong of the test for scope of employment. *See supra* notes 62-63.

104. *White*, 166 Cal. App. 3d at 571, 212 Cal. Rptr. at 496. The court noted that a police officer "is supplied with a conspicuous automobile, a badge, and a gun to ensure immediate compliance with his directions." *Id.*

105. *Id.*

106. *Id.*

107. *Id.* The court reasoned that White stopped only because she had been ordered to by a deputy sheriff, in uniform, in a marked patrol car, who used his flashing lights. In sum, she yielded to the sheriff's apparent authority. *Id.*

108. 187 Cal. App. 3d 1453, 232 Cal. Rptr. 685 (1986).

came pregnant. Swearing her to secrecy, the priests sent Rita to the Philippines to have the baby.[109]

The court used the *Carr* two-prong test[110] to determine whether the priests' acts were within the scope of employment.[111] The court quickly dismissed the "incidental to duties" prong and then proceeded to find that the foreseeability test was not satisfied either. The court followed the *Alma W.* decision, finding no difference between it and the instant case.[112] Accordingly, no liability was imputed to the Archbishop under the respondeat superior doctrine.

Similarly, in *Jeffrey E. v. Central Baptist Church,*[113] the repeated sexual molestation of a boy by his sunday school teacher was held outside the scope of employment for respondeat superior purposes. Using the familiar two-prong test, the court found the teacher's acts were not required, not incidental to his duties, and not foreseeable.[114]

Although the plaintiff used *White* to analogize the authority given to a police officer with that given to a sunday school teacher, the court found reliance on *White* was misplaced. The *Jeffrey E.* court determined the wrongful acts did not flow from the exercise of actual, "official" authority as they did in *White.*[115] Much of the authority the teacher had over Jeffrey came from their relationship through contacts other than sunday school and the church. The court went on to note that these other contacts had actually been sanctioned by Jeffrey's mother.[116]

The court found the abuse of authority in *Jeffrey E.* was more akin to that in *Rita M.* The court found no basis on which it could distinguish the situation of a Catholic priest from a Protestant sunday school teacher.[117] In conclusion, the relationship between the wrongful act and the duties was too attenuated to impute liability.

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109. *Id.* at 1456-57, 232 Cal. Rptr. at 687-88.

110. *See supra* notes 62-63 and accompanying text.

111. *Rita M.*, 187 Cal. App. 3d at 1461, 232 Cal. Rptr. at 690.

112. *Id.* The court cited *Alma W.* for the proposition that in order for an event to be foreseeable, it must be characteristic of the activities of the enterprise. *Id.*

113. 197 Cal. App. 3d 718, 243 Cal. Rptr. 128 (1988).

114. *Id.* at 722, 243 Cal. Rptr. at 130. The court's justification was that there was no evidence the assaults took place during sunday school and no evidence the conduct was done with the purpose of serving the church. The acts were independent and self-serving. In addition, the court found the acts both startling and highly unusual and, thus, not foreseeable at all. *Id.*

115. *Id.* at 723, 243 Cal. Rptr. at 131. The court also found it significant that a sexual assault did not actually take place in *White* as it did in *Jeffrey E. Id.*

116. *Id.*

117. *Id.* at 724, 243 Cal. Rptr. at 132.

Another example of judicial refusal to impose vicarious liability can be found in *Mary M. v. City of Los Angeles.*[118] The plaintiff, Mary, was stopped by a police officer employed by the defendant city for suspicion of drunk driving. The police officer proceeded to give Mary a series of sobriety tests and threatened to take her to jail when Mary did poorly on them.[119] Mary became very upset at this prospect and the officer, without explanation, ordered her to get into his patrol car. He then took the plaintiff to her home and raped her.[120]

As the courts before it, the *Mary M.* court found that according to settled precedent an employee's wrongful act must fall within either prong of the two-prong test in order to impute liability.[121] Although the *White* decision was heavily relied upon by the plaintiff, the court refused to follow it as binding precedent.[122]

The court noted that occupational duties should be defined broadly under the respondeat superior doctrine. However, it also stated that every action taken by an employee would not result in employer liability. Citing both *Alma W.* and *Yates*, the court held that the rape committed by the police officer in *Mary M.* was an "aberrational act" in no way related to his duties, completely not work-related, and a substantial deviation from the employee's duties.[123] Subsequently, the rape constituted an individual act for which the employer was not liable.[124]

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118. 200 Cal. App. 3d 758, 246 Cal. Rptr. 487, *rev. granted sub nom.*, Miller v. City of Los Angeles, ___ Cal. 3d ___, 756 P.2d 1348, 249 Cal. Rptr. 289 (1988) (reprinted for tracking pending review 213 Cal. App. 3d 1464).

119. *Id.* at 762, 246 Cal. Rptr. at 489-90.

120. *Id.* at 763, 246 Cal. Rptr. at 490. It bears noting that when the victim screamed, cried, and otherwise resisted the rape, the police officer threatened to take her to jail if she did not stop resisting. *Id.*

121. *Id.* at 766, 246 Cal. Rptr. at 492.

122. *Id.* at 767, 246 Cal. Rptr. at 493. The court cites five reasons for not following *White*: 1) *White* emanated from a court of equal justice and did not bind the *Mary M.* court; 2) *White* failed to follow and apply well-established principles of case law; 3) the decision created a new theory for vicarious liability which the *Mary M.* court interpreted as imposing strict liability; 4) the court found the *White* decision unpersuasive; and 5) it was determined that *White* was factually distinguishable. *Id.* Note, that the *Jeffrey E.* court also factually distinguished *White*, in part, on the basis that a sexual assault did not actually occur in *White* as it did in *Jeffrey E. See supra* note 115. *Jeffrey E.*, 197 Cal. App. 3d at 723, 243 Cal. Rptr. at 131.

123. *Mary M.*, 200 Cal. App. 3d at 770-72, 246 Cal. Rptr. at 495-96.

124. Additionally, the *Mary M.* court held that as a matter of policy, the risk of injury due to a sexual assault could not be allocated to the employer police department. The court cited *Hinman*, *see supra* notes 85-89 and accompanying text, for establishing three predicates to liability under respondeat superior: "(1) the existence of a profitmaking, business enterprise; (2) a history of employee torts causing harm to others arising out of the profitmaking enter-

The court addressed the second prong of the test, using both *Alma W.* and *Rita M.* in support of its finding that the prong was not satisfied.[125] The police officer's wrongful act was not only found uncharacteristic of, but also "antithetical" to, his duties as a police officer.[126]

2. *John R. and Kimberly M.*

Two other California appellate court cases were decided within three months of one another and both resulted in the employees' intentionally tortious conduct being found within the scope of employment. However, the California Supreme Court modified one of these cases, *John R. v. Oakland Unified School District*[127] and transferred the other, *Kimberly M. v. Los Angeles Unified School Dist.*,[128] back to the appellate court for an opinion consistent with the *John R.* holding. It should be emphasized that the supreme court did overturn the appellate courts directly on the respondeat superior issue. However, due to the legal theories developed therein, the appellate opinions are worthy of examination and will, accordingly, be discussed below.

a. *Appellate Court Holdings*

In *John R.* a fourteen year old boy was sexually assaulted by his math teacher and his parents sued the school district under the doctrine of respondeat superior. The plaintiffs in *John R.* relied upon *White*, while the defendant cited *Rita M.* and *Alma W.* in support of its case. The court distinguished the latter two cases on the basis of the lack of actual authority given to the tortfeasors in both matters.[129] The teacher's authority and control over John in the in-

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prise; and (3) the ability of the enterprise to absorb the losses through prices, rates, or liability insurance." *Id.* at 772, 246 Cal. Rptr. at 496. Accordingly, in addition to the finding that the assault did not satisfy either of the *Carr/Alma W.* prongs, the *Mary M.* court also found that it did not meet the prerequisites to imposing vicarious liability. *Id.*

125. *Id.* at 772-74, 246 Cal. Rptr. at 497-98. It is a police officer's duty to prevent rapes, not to commit them or other felonies. Therefore, the officer's act was seen as highly startling and unusual. *Id.*

126. *Id.* at 773, 246 Cal. Rptr. 497.

127. 194 Cal. App. 3d 1454, 240 Cal. Rptr. 319 (1987) (reprinted for tracking pending review 206 Cal. App. 3d 1473), *modified*, 48 Cal. 3d 438, 769 P.2d 948, 256 Cal. Rptr. 766 (1989).

128. 196 Cal. App. 3d 1506, 242 Cal. Rptr. 612 (1987), *rev. granted*, ___ Cal. 3d ___, 750 P.2d 786, 244 Cal. Rptr. 905 (1988) (reprinted for tracking pending review 209 Cal. App. 3d 1326), *transf., later op.*, 215 Cal. App. 3d 545, 263 Cal. Rptr. 612 (1989).

129. *John R.*, 194 Cal. App. 3d at 1467-68, 240 Cal. Rptr. at 327. The *John R.* court concluded that neither the custodian in *Alma W.*, nor the priests in *Rita M.*, had any *actual*

stant case was found analogous to the sheriff's control over the plaintiff in *White*.[130] Therefore, the appellate court reversed the judgment for nonsuit and found that the plaintiffs had stated a valid claim under respondeat superior.

Similar to *John R.*, *Kimberly M.* is another school-child molestation case where the appellate court found the assault was within the scope of employment. Five year old Kimberly was sexually molested after a teacher ordered her to undress. After giving a substantial history on the treatment of respondeat superior liability for employees' intentional torts, the court focused on the control and authority given school teachers over their students.[131]

Again, *Alma W.* was distinguished by the court with an emphasis on the difference between teachers and custodians. The court stated that school teachers are "certified employees, charged with the duty of supervising, teaching and protecting children," and custodians are not.[132]

Rita M. was also distinguished by the *Kimberly M.* court based on the finding that the priests did not have actual, express authority over Rita as this teacher did over Kimberly.[133] In conclusion, the court found that a broad definition of the scope of employment was required here. This broad definition, along with the emphasis on the complete control given teachers in the classroom, warranted a finding that the school district was liable under the respondeat superior doctrine.

b. *California Supreme Court Treatment of John R. and Kimberly M.*

There were two major issues before the supreme court in *John R.*: the timeliness of the claim and the vicarious liability issue.[134]

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authority over their victims. Therefore, they did not accomplish the assaults through the exercise of job-created authority. *Id.*

130. *Id.* at 1469, 240 Cal. Rptr. at 328. The court focused not on whether a teacher's sexual assault on a student was characteristic or foreseeable, but rather on whether "the assault arose out of the exercise of job-created authority over the plaintiff student." *Id.*

131. *Kimberly M.*, 196 Cal. App. 3d at 1517-19, 242 Cal. Rptr. at 619-20.

132. *Id.* at 1518, 242 Cal. Rptr. at 620. The court noted that a statutory relationship exists between a teacher and a student. For example, under California Penal Code section 11165, a teacher has a duty to report any suspected cases of child abuse and neglect. *Id. See* Note, *Reporting Child Abuse: When Moral Obligations Fail*, 15 PAC. L.J. 189 (1983), for a discussion of this statutory relationship.

133. *Kimberly M.*, 196 Cal. App. 3d at 1519, 242 Cal. Rptr. at 620. As did the *John R.* court, the *Kimberly M.* court found that priests had no actual authority over Rita and did not commit their assaults through the exercise of their job-related duties. *Id. See supra* note 128.

134. 48 Cal. 3d 443, 769 P.2d 948, 256 Cal. Rptr. 768.

Regarding the former, it need only be noted that the court held that the claim did survive the timeliness question.[135]

The court began its discussion of the respondeat superior issue by initially noting that, under the traditional analysis, no liability would be imposed under the circumstances in *John R.*[136] The court admitted that the facts of *John R.* could be "made to fit a version of the respondeat superior doctrine."[137] However, the court instead chose to focus on the underlying policy rationale for respondeat superior and concluded that no liability would be imputed to the school district.[138]

Quoting its decision in *Perez v. Van Groningen & Sons, Inc.*,[139] the *John R.* supreme court considered the following reasons for imposing liability on an enterprise for the risks incident to that enterprise:

> (1) [I]t tends to provide a spur toward accident prevention; (2) it tends to provide greater assurance of compensation for accident victims [;]and (3) at the same time it tends to provide reasonable assurance that like other costs, accident losses will be broadly and equitably distributed among the beneficiaries of the enterprises that entail them.[140]

The court quickly discarded the first two reasons as irrelevant to the case at hand. The court found that the goal of encouraging accident prevention played an insignificant role in the allocation of liability for the sexual misconduct of employees.[141] Neither did the court find that the second reason, assurance of compensation for accident victims, would be properly invoked by imputing vicarious liability.[142]

However, the *John R.* court did find that the third reason, the policy of spreading risk of loss among the beneficiaries of a particu-

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135. *Id.* at 446, 769 P.2d at 952, 256 Cal. Rptr. at 770.

136. *Id.* at 448, 769 P.2d at 953, 256 Cal. Rptr. at 771.

137. *Id.* at 450, 769 P.2d at 955, 256 Cal. Rptr. at 773.

138. *Id.*

139. 41 Cal. 3d at 967, 719 P.2d at 676, 227 Cal. Rptr. at 108.

140. *John R.*, 48 Cal. 3d at 451, 769 P.2d at 955, 256 Cal. Rptr. at 774 (quoting *Perez*, 41 Cal. 3d at 967, 719 P.2d 676, 227 Cal. Rptr. 108).

141. *John R.*, 48 Cal. 3d at 451, 769 P.2d at 956, 256 Cal. Rptr. at 774. The court determined that encouraging the careful selection of such employees and the close supervision of their conduct would better be achieved by simply holding the districts to a level of due care and only subjecting them to liability for acts involving negligence. *Id.*

142. *Id.* In particular, the court expressed its concern that insurance was a scarce resource for school districts. Imposing liability under these circumstances would make insurance even harder to obtain, possibly leading to the diversion of necessary classroom funds to pay the increased costs. *Id.*

lar enterprise, might point towards the imposition of vicarious liability.[143] However, ultimately, the court found there was a lack of nexus. The connection between the authority given to teachers and the abuse of that authority to carry out personal sexual misconduct is "too attenuated to deem a sexual assault as falling within the range of risks allocable to a teacher's employer."[144]

The supreme court's reversal of the appellate court's ruling on the respondeat superior issue is clear and unambiguous. However, the court was also very clear in limiting its decision to the teacher-student sexual molestation scenario. While the court subsequently transferred *Kimberly M.* to the Second Appellate District with directions to vacate and reconsider in light of its decision in *John R.*,[145] the court also expressly declined to overrule *White*.[146] It distinguished the authority of a police officer over a motorist from that of a teacher over a student finding that the former clearly surpassed the latter.[147]

There were two separate dissents on the respondeat superior issue. The first, written, by Justice Mosk, was primarily an affirmance of the appellate court's opinion. Justice Mosk distinguished *Alma W.* and *Rita M.* on a factual basis and then proceeded to analogize the facts to those in *White*, finding them analytically symmetrical.[148] Concluding, the Justice reiterated that the focus of the inquiry should be on whether the assault arose out of the exercise of job-created authority and found that clearly it did.[149]

Justice Kaufman wrote a separate dissent in which he initially admitted that it is a rare case in which a school district should be held vicariously liable for a teacher's sexual molestation of a student.

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143. *Id.* at 451-52, 769 P.2d at 956, 256 Cal. Rptr. at 774. It was admitted that school districts and the community at large benefit from conferring authority on teachers which aids them in carrying out their duties. *Id.* Additionally, the court conceded that it could be "argued that the consequences of an abuse of that authority should be shared on an equally broad basis." *Id.*

144. *Id.*

145. 261 Cal. Rptr. 685 (1989).

146. *John R.*, 48 Cal. 3d at 452, 769 P.2d at 956-57, 256 Cal. Rptr. at 774-75. In fact, the court refused to comment at all on the general applicability of respondeat superior to torts committed by police officers. *Id.*

147. *Id.*

148. *Id.*

149. Citing the Third Amended Complaint as his source, Justice Mosk found that the teacher in *John R.*, "through the use of his authority to administer grades, to assign extracurricular work projects, and, significantly, by utilizing the school-approved work experience program, . . . procured the student's presence in his home facilitating the opportunity for the assault." *Id.* at 454-55, 769 P.2d at 958, 256 Cal. Rptr. at 776.

However, he found that *John R.* is such a rare case.[150] Additionally, Kaufman's dissent admitted that, at first glance, it seems unfair to include this liability as a cost of the employer's business. However, Justice Kaufman subsequently found that sexual assaults and molestations in the workplace are not uncommon and, therefore, not so "unusual or startling that it would be unfair" to impose liability upon the employer.[151] Justice Kaufman condemned the majority for not addressing the above realities and urged for a narrow, fact specific decision holding the district liable for the teacher's assault.[152]

Finally, Justice Kaufman addressed the policy rationale used by the majority and concluded that " 'public policy' militates strongly in *favor* of vicarious liability in this case."[153] In conclusion, Kaufman found that the nexus between the teacher's misconduct and the risks inherent in the district sanctioned program is clear and direct. Accordingly, it is only fair, just, and consistent with the theory of respondeat superior that the district bear the cost of resulting losses.[154]

The Second Appellate District opinion in *Kimberly M.*, subsequent to the supreme court transfer of the case, was quite brief and merely reiterated the higher court decision in *John R.*[155] Specifically, the court noted that the policy reasons for respondeat superior did not support a finding of liability for the school district in a teacher

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150. *Id.* at 463, 769 P.2d at 964, 256 Cal. Rptr. at 782.

151. *Id.* Justice Kaufman found the reluctance to recognize sexual assaults expected and understandable. However, the sad reality is that they are not uncommon occurrences. *Id.* It should be noted that the *John R.* majority found Justice Kaufman's conclusion "an unduly pessimistic view of human nature." *Id.* at 450 n.9, 769 P.2d at 955 n.9, 256 Cal. Rptr. at 773 n.9.

152. Justice Kaufman emphasized that:

> The district did not require that a student obtain the written permission of his parents to participate in the IWE program at the teacher's home, nor did it require that other students or adults be present during the home instruction. In effect, the district-sanctioned IWE program virtually guaranteed that the teacher could act with impunity, free from the fear of interruption or discovery, fully assured of complete privacy and secrecy.

Id. at 465, 769 P.2d at 965, 256 Cal. Rptr. at 783.

153. *Id.* at 466, 769 P.2d at 966, 256 Cal. Rptr. at 784. Justice Kaufman contended that imposing vicarious liability would act as a spur to accident prevention by inducing, not preventing, the creation of well-planned and properly-executed extracurricular programs. *Id.* Additionally, Kaufman found that "the assurance of fair compensation for tort victims by spreading the risk of losses through insurance carried by the *responsible* enterprise as a cost of doing business . . . [citation omitted] amply justify the imposition of vicarious liability." *Id.* Kaufman also noted that insurance coverage would be available pursuant to Insurance Code section 533 regardless of the intentional nature of the torts. *Id.* at 466 n.2, 769 P.2d at 966 n.2, 256 Cal. Rptr. at 784 n.2.

154. *Id.* at 466, 769 P.2d at 966, 256 Cal. Rptr at 784.

155. Kimberly M. v. Los Angeles Unified School Dist., 215 Cal. App. 3d 545, 263 Cal. Rptr. 612 (1989).

molestation of a student.[156] In addition, it was noted that the nexus between the authority granted a school teacher to carry out his duties and personal sexual misconduct is too attenuated to impose vicarious liability.[157]

A separate opinion by Associate Justice Johnson concurred with the majority's result due to the binding effect of *John R.* upon the appellate court. However, Johnson took issue with the supreme court's *John R.* opinion, urging that court to reconsider the breadth of the holding as applied to the facts in *Kimberly M.*[158]

Due to the age difference between John R. and Kimberly M. and what he found to be an unnecessarily broad rule in *John R.*, the Associate Justice urged the supreme court to reconsider and narrow the *John R.* decision using *Kimberly M.* as a means of doing so.[159] However, as of yet, the court has failed to do so.

F. *Interpretation of the Scope of Employment in Other Jurisdictions*

As with many areas of law, the California judiciary is more liberal than most other jurisdictions in allowing liability under the respondeat superior doctrine. Generally, courts can be divided into two broad categories: those which apply a broad standard of interpretation and those which apply a more narrow one.[160] A court may apply its own particularized standard, but will generally apply the respondeat superior doctrine within its self-prescribed margins.[161]

As indicated above, the majority of jurisdictions are quite strict in determining that the commission of an intentional tort is within the scope of employment. For example, the Fourth Circuit Court of Appeals found that a security guard's rape and assault of a woman was outside the scope of employment in *Rabon v. Guardsmark.*[162] The *Rabon* court justified its decision on the basis that the act was not in furtherance of the employer's business and, in fact, was the converse of the guard company's purpose to protect.

The doctrine of respondeat superior was held inapplicable by

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156. *Id.* at 549, 263 Cal. Rptr at 614.

157. *Id.*

158. *Id.*

159. *Id.* at 550, 263 Cal. Rptr. at 615.

160. Note, *Owner Liability for Intentional Torts Committed by Professional Athletes Against Spectators*, 30 BUFFALO L. REV. 565, 571-72 (1981).

161. *See generally, id.* for an explanation of different standards used with each of the general categories.

162. 571 F.2d 1277 (4th Cir.), *cert. denied*, 439 U.S. 866 (1978).

the Southern District Court of New York in *Vargas v. Correa*.[163] The court determined that a prison guard's attack on an inmate over which television program would be watched was not a job-related dispute. Therefore, the attack was outside the scope of employment.

The state of Louisiana's interpretation of the scope of employment, however, has been expansive. State courts in this jurisdiction routinely find intentional torts committed by employees within the scope of employment for respondeat superior purposes.

In *Applewhite v. City of Baton Rouge*,[164] a police officer and a corrections officer took a woman into custody, forced her to engage in oral copulation and raped her. The police officer alone was criminally convicted and Applewhite sued both the perpetrators, as individuals, and the city of Baton Rouge, under the doctrine of respondeat superior.[165]

The court found the city vicariously liable and noted that the "officer was on duty in uniform and armed and was operating a police unit at the time" of the assault.[166] Of particular significance was the fact that the officer was able to separate Applewhite from the friends she had been walking with because of the force and authority his position as a police officer gave him.[167]

In summary, the *Applewhite* court stated, "where it is found that a law enforcement officer has abused the 'apparent authority' given such persons to act in the public interest, their employers . . . [will be] required to respond in damages."[168]

The Louisiana Court of Appeals found a sexual assault by a National Guard recruiting officer within the scope of employment in *Turner v. State*.[169] The recruiting officer had come to the home of three young women, at their request, to interview them for induction into the National Guard. During the course of the interview, the officer deceived them into believing he had the authority to perform physical examinations on them which, subsequently, the women permitted him to do.[170] The women filed suit against the state as the

163. 416 F. Supp. 266 (S.D.N.Y. 1976).

164. 380 So. 2d 119 (La. Ct. App. 1979).

165. *Id.* at 120.

166. *Id.* at 121.

167. *Id.* The court further explained that due to the considerable public trust and authority given public servants, policy required that these public employers be responsible for the actions of their employees. This would be true even if the action taken is somewhat removed from the employee's usual duties. *Id.*

168. *Id.* at 122.

169. 494 So. 2d 1292 (La. Ct. App. 1986).

170. *Id.* at 1294.

officer's employer after learning they were not admitted into the Guard, and that the officer was not authorized to conduct the physical examinations.

The court found the recruiting officer's actions "were closely connected in time, place, and causation to his employment duties."[171] The officer was allowed into the women's home solely because of his position as a National Guard recruiting officer. He misled the women into believing that conducting physical exams was part of his duties as a recruiting officer. The court concluded his actions were so closely related to the employment that the employer, who put the officer in a position of trust and authority for the purpose of contacting and recruiting young people into the National Guard, was held liable.[172]

While other jurisdictions may also be expanding their interpretations of the respondeat superior doctrine,[173] Louisiana's interpretation most closely parallels that which some of the California courts have followed and the state as a whole may be moving towards.

III. IDENTIFICATION OF THE LEGAL PROBLEM

The problem that has developed in this area is one of uniformity. An analysis of the case law indicates that a ruling made by a California court on the scope of employment cannot be predicted with any certainty. Cases which are not significantly factually distinguishable have resulted in contradictory holdings. Each court has decided to follow different, conflicting precedent.

The *White*[174] and *Mary M.*[175] decisions are an example of this uncertainty. Both employees were law enforcement officials who stopped and detained the plaintiffs while on duty. This initial action was unquestionably done in the performance of their prescribed du-

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171. *Id.* at 1295. The court cited a Louisiana Supreme Court case for establishing four factors to be considered when determining whether the respondeat superior doctrine should apply. The factors are: "(1) whether the tortious act was primarily employment rooted; (2) whether the act was reasonably incidental to the performance of the employee's duties; (3) whether the act occurred on the employer's premises; and (4) whether it occurred during the hours of employment." *Id.* (citing LeBrane v. Lewis, 292 So. 2d 216 (La. 1974)).

172. *Id.* at 1296. The court found the officer's tortious conduct "reasonably incidental to the performance of his duties" despite the fact that the conduct was unauthorized and "obviously motivated by his personal interests." *Id.*

173. *See* Note, *Williams v. Alaska Pipeline Services: Alaska Extends Its Modified Enterprise Theory of Respondeat Superior to Intentional Torts*, 19 WILLAMETTE L. REV. 819 (1983).

174. *See supra* notes 101-07 and accompanying text.

175. *See supra* notes 118-26 and accompanying text.

ties. The officers in both cases then put the plaintiffs in their police cars without officially arresting them. Thus, both of the plaintiffs were falsely imprisoned.

The only factual distinction that can be made between the two cases is that the plaintiff in *White* was not raped and remained in the patrol car during the time she was held. However, in *Mary M.*, the officer took the plaintiff to her home where he raped her.[176]

Each court has a substantial amount of discretion in making its rulings and has no obligation to follow the decision of a court of equal justice. However, there is undisputably a problem when two cases with almost identical legal issues are decided differently within the same state. A certain amount of predictability and consistency is both desired and necessary in order for the judiciary to operate in an efficient manner.

However, probably the strongest indicator that a problem exists in this area is evidenced by the fact that the California Supreme Court is reevaluating the issue in *Mary M.*[177]

IV. ANALYSIS

Although there is considerable disagreement over defining the parameters of the scope of employment under the doctrine of respondeat superior, California courts have at least agreed on the test to be applied when determining these parameters. With few exceptions, the two-pronged test originally set forth in *Carr* has consistently been used by the California courts discussed in this Comment.[178] It must be remembered that the *Carr/Alma W.* test is applied on an "either-or" basis. Only *one* prong need be satisfied in order to impute liability under the doctrine of respondeat superior.

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176. The court in *Mary M.* found this distinction was very important and pointed out that the *Jeffrey E.* court, which was the same court that decided *White*, noted that there were no sexual acts committed in *White*, thus, explaining the inconsistent decisions. Mary M. v. City of Los Angeles, 200 Cal. App. 3d 758, 768-69, 246 Cal. Rptr. 487, 494 n.3, *rev. granted sub nom.*, Miller v. City of Los Angeles, ___ Cal. 3d ___, 756 P.2d 1348, 249 Cal. Rptr. 289 (1988) (reprinted for tracking pending review 213 Cal. App. 3d 1464).

177. As of May 4, 1990, *Mary M.* is still in the briefing stage. Telephone interview with Bridget Newman, Clerk, California Supreme Court (May 4, 1990).

178. Those exceptions are *John R.* and *Kimberly M.* The California Supreme Court essentially used a policy argument in its decision in *John R.* and the Second Appellate District followed this policy rationale in the *Kimberly M.* decision. *See supra* notes 134-59 and accompanying text. An analysis of these decisions will follow the general analysis of the two-prong test. *See infra* notes 208-14 and accompanying text.

A. *The First Prong*

1. *Strict Interpretation of First Prong*

A strict interpretation of the "incident to his duties" prong allows employers to escape liability for the intentional torts committed by an employee. In *Alma W.*, the court found the relationship between the act and the custodial duties too attenuated for the prong to be satisfied.[179] The *Alma W.* court reasoned that the rape was not an integral part of a course of action undertaken by the janitor on behalf of his employer, the school district.[180] The act committed was distinguished as an "independent, self-serving pursuit" completely unrelated to the janitor's employment duties.[181]

In the case of a police officer assaulting a detainee, a strict reading of the "incident to duties" prong provided the court with the guidance which lead to a determination that no respondeat superior liability would be found in *Mary M.*[182] The court emphasized that the duties of a police officer were "to Protect and to Serve"; rape does not fit within this succinct description of an officer's duties.[183]

In *Rita M.*, any possible "incident to his duties" claim is dismissed in a single sentence. The court stated that the plaintiff "could not seriously contend that sexual relations with parishioners are either required by or instant to a priest's duties."[184]

It seems clear then that a strict interpretation of this first prong will render the respondeat superior doctrine inapplicable in most cases. It can always be argued that any time an intentionally tortious act is committed, particulary one of violence, the employee is not acting strictly within his prescribed duties. Violent, tortious acts are rarely, if ever, sanctioned and authorized by employers. A strict application of the prong will, therefore, result in a great restriction in liability for intentional torts under the respondeat superior doctrine.

For example, applying the hypothetical set forth in the Introduction, your client would certainly not have a valid respondeat superior cause of action against the day care center. The sexual moles-

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179. *See supra* notes 90-100 and accompanying text.

180. Alma W. v. Oakland Unified School Dist., 123 Cal. App. 3d 133, 141, 176 Cal. Rptr. 287, 291 (1981).

181. *Id.*

182. Mary M. v. City of Los Angeles, 200 Cal. App. 3d 758, 246 Cal. Rptr. 487, *rev. granted sub nom.* Miller v. City of Los Angeles, ___ Cal. 3d ___, 756 P.2d 1348, 249 Cal. Rptr. 289 (1988) (reprinted for tracking pending review 213 Cal. App. 3d 1464).

183. *Id.* at 771, 246 Cal. Rptr. at 496.

184. Rita M. v. Roman Catholic Archbishop, 187 Cal. App. 3d 1453, 1461, 232 Cal. Rptr. 685, 690 (1986).

tation of a pre-schooler is certainly not in *any* day care teacher's job-description. Therefore, although the center has impliedly, if not expressly, held out the teacher as a competent and reliable provider of child care, there will be no respondeat liability imputed for the sexual molestation by those courts using a strict interpretation.

2. *Broad Interpretation of First Prong*

Other California courts are more expansive in their interpretation of what constitutes actions "incident to [an employee's] duties." These courts focus on whether the tortious act arose out of the exercise of authority granted by the employer.

Thus, the court in *White* held the employer liable for the tortious acts of its employee, a deputy sheriff.[185] The court found that White justifiably relied upon the apparent authority of the sheriff. Because the county enjoys tremendous benefits from the public's reliance on and respect for this authority, the court concluded that the county "must suffer the consequences when the authority is abused."[186]

Following the *White* court's rationale, the appellate courts in both *John R.*[187] and *Kimberly M.*[188] also found that job-created authority was pivotal in imposing liability under respondeat superior for teachers' sexual molestations of students. In *John R.*, the teacher told John that "the sexual conduct was part of his role as a teacher designed to help . . . [him] with his problems."[189] The *Kimberly M.* court emphasized that a five year old child has no control over what transpires in the classroom and must, generally, acquiesce to the authority of the teacher.[190]

These courts interpret the coverage of the first prong as

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185. *See supra* notes 101-07 and accompanying text.

186. White v. County of Orange, 166 Cal. App. 3d 566, 571-72, 212 Cal. Rptr. 493, 496 (1985).

187. John R. v. Oakland Unified School Dist., 194 Cal. App. 3d 1454, 240 Cal. Rptr. 319, *modified*, 48 Cal. 3d 438, 769 P.2d 948, 256 Cal. Rptr. 766 (1989). The court found the case at bench was analytically symmetrical with *White* due to the fact that the teacher was able to commit the assault only through exercising his official authority. *Id.* at 1468-69, 240 Cal. Rptr. at 328.

188. Kimberly M. v. Los Angeles Unified School Dist., 196 Cal. App. 3d 1506, 242 Cal. Rptr. 612 (1987), *rev. granted*, ____ Cal. 3d ____, 750 P.2d 786, 244 Cal. Rptr. 905 (1988) (reprinted for tracking pending review 209 Cal. App. 3d 1326), *transf., later op.* 215 Cal. App. 3d 545, 263 Cal. Rptr. 619 (1989). Although, the *Kimberly M.* court acknowledged that the "trappings of authority" were not as great with a teacher as they were with a police officer. *Id.* at 1517, 242 Cal. Rptr. at 619.

189. *John R.*, 194 Cal. App. 3d at 1468, 240 Cal. Rptr. at 328.

190. *Kimberly M.*, 196 Cal. App. 3d at 1517-18, 242 Cal. Rptr. at 619.

broader. The focus here is on the job-created authority and control which are given to the employee and the subsequent manner in which they are exercised. As is evidenced above, it is assumed, and often *required*, that the public will submit to and rely upon officially exercised authority. Therefore these courts consider it unjust for the public to both be required to submit to the authority and pay the consequences of possible abuses of that same authority. Many more employers will be found liable under the respondeat superior doctrine in courts following this rationale, including the day care center in the original hypothetical.

B. *The Second Prong*

In order to base liability on the second prong of the scope of employment test, it must be determined that the employee's conduct is foreseeable, regardless of whether it is considered incidental to the employee's duties. Those courts strictly interpreting the first prong also apply the second prong in this same strict manner. However, those courts that broadly interpret the "incidental to duties" test, do not appear to even reach the second prong in their analysis.

1. *Strict Interpretation of Second Prong*

In *Alma W.*, *Rita M.*, and *Mary M.*, the courts all found that the acts in question did not meet the foreseeability prong of the test. The *Alma W.* court determined that the proper test was "whether the employee's act is foreseeable *in light of the duties* the employee is hired to perform."[191] Accordingly, while the court considered it foreseeable that a janitor might become involved in a dispute over his custodial duties, a sexual assault would be highly unusual and very startling.[192] Thus, the sexual assault was not forseeable.

Both the *Rita M.* and *Mary M.* courts applied the second prong in this same manner and subsequently concluded that the foreseeability prong was not met. The *Rita M.* court stated that it "[d]efies all logic and fairness" to find sexual activity between a priest and a parishioner characteristic of the Roman Catholic Archbishop.[193] The court in *Mary M.* reasoned that a rape was not only uncharacteristic

191. Alma W. v. Oakland Unified School Dist., 123 Cal. App. 3d 133, 142, 176 Cal. Rptr. 287, 291 (1981).

192. *Id.* at 142-43, 176 Cal. Rptr. at 291-92.

193. Rita M. v. Catholic Archbishop, 187 Cal. App. 3d 1453, 1462, 232 Cal. Rptr. 685, 690 (1986).

of the duties of a police officer, but antithetical to them.[194] The act was, therefore, determined to be clearly outside the scope of employment.

2. *Absence of Judicial Treatment of Second Prong by Those Courts Broadly Interpreting First Prong*

Those courts which use a broad interpretation of the first prong of the test appear to almost disregard the second prong. Because the *Carr/Alma W.* test is an "either-or" proposition, both prongs need not be satisfied to impute liability. It logically follows then that those courts imposing respondeat superior liability on the basis of the first prong will not find it necessary to use the second prong.

In *White*, the court based the employer's liability on the first prong and, consequently, did not consider whether or not the act was foreseeable.[195] The appellate court in *John R.* expressly chose to focus on the job-created authority aspect in regard to the first prong rather than foreseeability.[196] Similarly, the first appellate decision in *Kimberly M.* focused on this authority aspect in reaching its decision.[197]

C. *Modern Justifications for Respondeat Superior*

1. *Hinman Justifications as Policy Rationale*

An analysis would not be complete without including a discussion of modern courts' justifications for respondeat superior. The court in *Hinman v. Westinghouse Elec. Co.*[198] is credited with expressing the justifications which had actually been followed for years previous to the *Hinman* decision.[199] These justifications can best be explained as a rule of policy involving the deliberate allocation of risk.

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194. Mary M. v. City of Los Angeles, 200 Cal. App. 3d at 773, 246 Cal. Rptr. at 497. *See supra* text accompanying note 182.

195. White v. County of Orange, 166 Cal. App. 3d 566, 571, 212 Cal. Rptr. 493, 496 (1985). The court expressly applied the *Carr/Alma W.* two-prong test which would result in liability for the county if the allegations made were actually proven. However, as the court noted, the decision turned on the interpretation of the first prong. *Id.*

196. John R. v. Oakland Unified School Dist., 194 Cal. App. 3d 1473, 1482, 240 Cal. Rptr. 319, 328. The court stated: "[w]e focus not on whether the school teacher's sexual activity with a student is either 'characteristic' or foreseeable, but rather on whether the assault arose out of the exercise of job-created authority over the plaintiff student." *Id.*

197. *Kimberly M.*, 196 Cal. App. 3d at 1518-20, 242 Cal. Rptr at 620-21. *See supra* text accompanying note 190.

198. 2 Cal. 3d 956, 471 P.2d 988, 88 Cal. Rptr. 188 (1970).

199. 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW §115 (9th ed. 1987).

The *Hinman* policy reasons for deliberate allocation of risk include: because the employer is engaged in a business which will, on the basis of past experience, cause others harm through an employee's torts; the employer rather than the innocent injured plaintiff should bear the risks; and, the employer is better able to absorb them or pass them off to another (*e.g.* to the consumer through price increases).[200] Furthermore, the court noted that the employer may spread the risk through insurance and include the cost as part of the general cost of doing business.[201]

In the decisions above, courts occasionally used the *Hinman* rule as support for their holdings. The court in *Alma W.* quoted the *Hinman* rule as set forth above and determined that, a sexual assault was not a risk that should be allocable to an employer.[202] The express terms of the *Hinman* rule were interpreted to only result in the application of the respondeat superior doctrine for those losses which are *sure* to occur in the carrying on of the employer's business. The implication made by the court was that a sexual assault is *not sure* to occur in the enterprise of a public school district.

The *Mary M.* court refused to even apply the *Hinman* rule. The court stated that "since a police department does not satisfy the *Hinman* prerequisites for vicarious liability, [no liability is found] in the case at bench."[203] In addition, the act of rape by a police officer is not "sure to occur," but rather the court found it is "highly unlikely to occur."[204]

Although the original *Kimberly M.* appellate court decision did not specifically refer to the *Hinman* rule, the court sought to, and believed it succeeded in, deliberately allocating the risk as a matter of policy.[205] The court expressly concerned itself with the protection of both innocent teachers and innocent students and parents.[206] Con-

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200. Hinman v. Westinghouse Elec. Co., 2 Cal. 3d 956, 959-60, 471 P.2d 988, 990, 88 Cal. Rptr. 190.

201. *Id.* (quoting Johnston v. Long, 30 Cal. 2d 54, 64, 181 P.2d 645, 651, (1947)).

202. *Alma W.*, 123 Cal. App. 3d at 144, 176 Cal. Rptr. at 292-93. *See supra* text accompanying note 191.

203. *Mary M.*, 200 Cal. App. 3d at 772, 246 Cal. Rptr. at 496. *See supra* text accompanying note 194. *See also supra* note 123 for a list of the *Hinman* prerequisites.

204. *Id.* Such a criminal act was found to be highly unlikely to occur in light of the extensive screening procedures used by the Los Angeles Police Department in its hiring process. *Id.*

205. *Kimberly M.*, 209 Cal. App. 3d at 1340, 242 Cal. Rptr. at 621. *See supra* text accompanying note 197.

206. *Id.* The concern for teachers involved those who may have to provide their own defense if a school district would not provide one for them since the district itself was free from liability. The court was also concerned with those innocent parents and students who would

cluding, the appellate court noted that both school districts and the community in general enjoy a great number of benefits from the "students respect for the authority placed in teachers. Therefore, it must suffer the consequences when the authority is abused."[207]

It seems clear then that the components of the *Hinman* rule can be interpreted either to prohibit or permit liability under the respondeat superior doctrine. As the *Mary M.* decision demonstrates, a strict interpretation of the rule and doctrine will result in no liability to the employer unless the tort committed was of the type certain to occur in the type of business engaged in.

A more expansive interpretation will result in liability for the employer in those situations where the general policy concerns exhibited in the *Hinman* rule will best be served. As indicated above, the basic consideration of the rule is the allocation of risks to the party who is best able to bear them. This allocation can best be achieved through a liberal application of the rule rather than a strict, technical one.

Returning to the case of the hypothetical day care center, because a sexual molestation is not "sure to occur," there will be no respondeat superior liability imputed strictly following the predicates of the *Hinman* rule. However, more broadly interpreting both the predicates and the policy involved will allow the hypothetical client to bring a cause of action based upon the respondeat superior doctrine. This would best serve the "spirit" of the *Hinman* rule in terms of appropriately allocating the risk to those who benefit from the enterprise in question.

2. *Perez Reasons as Policy Rationale*

The California Supreme Court's rationale in *John R.* and the *Kimberly M.* decision which followed it require an analysis separate from that under the *Carr/Alma W.* test. The primary reason for the separate analysis is that the *John R.* court did not use the two-prong test in its analysis. Rather, the *John R.* court expressly based its decision on the underlying rationale for the respondeat superior doctrine.[208]

As did those courts discussed in the above section, the *John R.*

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have a much greater chance of recovery against the school district which can distribute the loss more easily than an individual teacher. *Id.*

207. *Id.*

208. *John R.*, 48 Cal. 3d at 450, 769 P.2d at 955, 256 Cal. Rptr. at 773. Explaining the focus on the policy rationale, the court made it clear that the decision would not be drawn from any applicable precedent. *Id. See supra* note 196 and accompanying text.

court extensively quoted the *Hinman* decision for the proposition that " 'the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk.' "[209] Additionally, the court analyzed the *John R.* facts in terms of their relationship to three enumerated reasons for imposing vicarious liability. Those three reasons are:

> (1) [I]t tends to provide a spur toward accident prevention; (2) it tends to provide greater assurance of compensation for accident victims[;] and (3) at the same time it tends to provide reasonable assurance that, like other costs, accident losses will be broadly and equitably distributed among the beneficiaries of the enterprises that entail them.[210]

The court found that none of these reasons would be served by imposing vicarious liability on the school district for the teacher's molestation.[211]

The *John R.* court's use of the *Perez* policy reasons should not be interpreted as, altering in any significant way, previous case law for two reasons. First, the *Perez* reasons are not substantively different than the language contained in *Hinman* and that used for years by California courts as the justification for respondeat superior. Both the *Hinman* and *Perez* versions demonstrate a concern for providing victims with adequate compensation[212] and the desire to require beneficiaries of an enterprise or employment bear any risk of or actual loss.[213]

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209. *Id.* (quoting *Hinman*, 2 Cal. 3d at 959-60, 471 P.2d at 990, 88 Cal. Rptr at 190. *See supra* note 200.).

210. *Id.* at 451, 769 P.2d at 955, 256 Cal. Rptr. at 773-74 (quoting Perez v. Van Groningen & Sons, Inc., 41 Cal. 3d 962, 967, 719 P.2d 676, 678, 227 Cal. Rptr. 106, 108 (1986)).

211. *See supra* notes 137-43 and accompanying text.

212. In *Hinman*, the supreme court stated that it "is just that [the employer], rather than the innocent injured plaintiff, should bear" the losses caused by torts committed by employees. *Hinman*, 2 Cal. 3d at 960, 471 P.2d at 990, 88 Cal. Rptr. at 190. In *Perez*, the court found that imposing liability on the employer for an employee's torts "tends to provide greater assurance of compensation for accident victims." *Perez*, 41 Cal. 3d at 967, 719 P.2d at 678, 227 Cal. Rptr. at 108.

213. The *Hinman* court places losses on

> the employer because [he has] engaged in an enterprise which will, on the basis of past experience, involve harm to others and [seeks] to profit by it . . . and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.

Hinman, 2 Cal. 3d at 960, 471 P.2d at 990, 88 Cal. Rptr. at 190. The *Perez* court found that imposing liability "tend[ed] to provide reasonable assurance that, like other costs, accident losses will be broadly and equitably distributed among the beneficiaries of the enterprises that

While the *Hinman* version does not expressly justify imposing liability as a spur toward prevention of loss or harm as in the *Perez* reasons, it seems clear that this can be implicitly found in the *Hinman* justification. By placing the burden of any resulting loss on the employer, it is only logical to assume that the prudent businessperson will attempt to prevent any injuries in order to reduce his own risk of loss. Thus, it is evident that the use of the *Perez* reasons in addition to the *Hinman* justification in the *John R.* analysis does not constitute any substantial deviation from the traditional policy rationale for the respondeat superior doctrine.

Furthermore, and perhaps most importantly, the *John R.* court does not expressly overrule anything except the appellate court decision of that case. Therefore, although the court focused on policy in its analysis, no indication was given that the *Carr/Alma W.* test is not still the prevailing mode of analysis for respondeat superior cases. Absent any express language mandating an overruling, of the prevailing test, one should certainly not be inferred.

Accordingly, it can only be assumed that due to the majority's interpretation of unique facts surrounding the imposition of liability on a school district for a teacher's sexual molestation,[214] the *John R.* court refused to impose such liability. It follows that the *John R.* and *Kimberly M.* decisions should only be considered an aberration from the typical California judicial analysis of respondeat superior under the *Carr/Alma W.* test.

While, it is certainly true that the above decisions must be followed as valid California precedent, they should not be interpreted as having changed the course of respondeat superior law. Additionally, because the court did not follow the established analysis, these decisions may be more vulnerable to overruling by subsequent courts. When an issue is decided by a court based on a policy rationale as opposed to the application of an established test, the issue may be more vulnerable to overruling, particularly when the political make-up of the court or the general social/political climate changes. Regardless, as stated above, the *John R.* decision is binding in terms of prohibiting the imposition of vicarious liability on a school district for a teacher's sexual molestation of a student. However, the language clearly limits the holding to these particular circumstances.

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entail them." *Perez*, 41 Cal. 3d at 967, 719 P.2d at 678, 227 Cal. Rptr. at 108.

214. *See supra* notes 134-47 and accompanying text.

V. PROPOSAL

There is a clear need for a more definitive test for the scope of employment. In order for an efficient analysis of the scope of employment to be achieved, the test must be free from as much ambiguity as possible, thereby preventing interpretations which may yield contradictory results.

The two-prong test originally set forth in *Carr*,[215] which more recent courts have adopted as the *Alma W.* test, can partially be salvaged without jeopardizing clarity. In fact, the second foreseeability prong need not be altered at all. This part of the test may remain intact to impute liability to an employer when the tort is foreseeable to the extent that it is characteristic of the enterprises' activities.[216]

However, the first prong of the test needs to be amended. As it exists now, vicarious liability will result for the employer for any act done on behalf of the employer or which can be determined incidental to the employee's duties. The first portion of this prong needs no further clarification. Any act required by the terms of employment or apparently done on the employer's behalf will result in liability for the employer.

The "incident to his duties" portion, however, should be defined more clearly and expansively. A more expansive interpretation is justified. Employers profit, as well as society as a whole, from vesting certain employees with a great deal of control and authority to aid them in carrying out their duties.[217]

This benefit derived by both the employer and society is not necessarily a monetary one. Rather, it is the benefit that comes from entrusting particular employees with control and authority in order for their duties to be carried out in a manner the employer and society believe is most efficient. The control and authority in these situations are so extensive and unusual that it has permitted the employee to commit the tort in a manner which he clearly could not otherwise achieve.

Situations in which such control and authority are vested in employees only occur in a very narrow range of occupations. The most obvious of these occupations are police officers and teachers, case examples of which can be found in the background above. The addition of one phrase to the first prong would be sufficient to effect the

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215. *See supra* notes 62-63 and accompanying text.

216. Thus, this would even permit retention of the narrower interpretation of foreseeability as articulated in *Alma W. See supra* notes 97-99 and accompanying text.

217. *See supra* notes 164-72 and accompanying text.

needed change. With the proposed change the *Carr/Alma W.* test will now read:

> An act committed by an employee will be considered as in the scope of employment if either 1) the act performed was either required or 'incident to his duties,' **including an act done in the course of exercising job-created control and authority which are incidental to the employee's duties**, or 2) the employee's misconduct could be reasonably foreseen by the employer in any event.[218]

This language is narrow enough to ensure that the broadening of employer liability will be limited to those situations where the job-created control and authority[219] actually facilitated the commission of the tort.

For example, in *Turner*,[220] the National Guard recruiting officer convinced the plaintiffs that he was authorized to conduct physical examinations only by virtue of his apparent authority in carrying out his recruiting duties. The National Guard benefitted from giving the officer the control and authority he abused. In fact, it is *necessary* for the National Guard to vest some authority in a recruiting officer in order to continue as an enterprise. The Guard is receiving a tangible benefit as a result of vesting this authority in the officer.

An example of an act that would not be considered in the scope of employment under the proposed addition would be if the same recruitment officer in *Turner* assaulted the women outside any recruitment context. The officer would not be committing the tort as a result of job-created control and authority even if he had done it while he was on duty and even in uniform. Therefore, no liability would attach under respondeat superior.

By implementing the proposed change, the hypothetical day care center would clearly be held liable for the tortious conduct of its teacher. The sexual molestation was performed with the facilitation of the job-created control and authority over children. In contrast,

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218. Alma W. v. Oakland Unified School Dist., 123 Cal. App. 3d 133, 139, 176 Cal. Rptr. 287, 289 (1981). The proposed change is denoted with bold face type.

219. The phrase "job-created control and authority" is used to denote that control and authority which the employee enjoys as a result of his employment. It may typically be visible in a badge, gun and uniform in the case of a police officer. However, it could only be apparent relative to the position the employee enjoys, for example, a teacher's apparent authority and control over children in the classroom.

220. 494 So. 2d 1292 (La. Ct. App. 1986). *See supra* notes 169-72 and accompanying text.

the center would not be held liable under the doctrine for any acts performed by the same teacher not required by the employer, not incident to the teacher's duties, not performed with the exercise of job-created control and authority, and not foreseeable.

VI. CONCLUSION

This Comment has traced the development of the respondeat superior doctrine, beginning with the early stages of its development and ending with the present state of the law in California. The two-prong test which has emerged as the prevailing judicial mode of analysis has been discussed in detail. Furthermore the inconsistency that results from different courts' application of the test to nearly identical fact patterns has been demonstrated.

It is evident that the present test needs amendment in order to add clarity to an apparently murky area of the law. The amended test proposed in this Comment not only provides this needed clarity and uniformity, but it also ensures that the risks and burdens incident to a particular enterprise are carried by those who reap the benefits of that same enterprise.

The proposed change in the language will not result in a great increase in employer liability under the doctrine. Employers will not be liable for *any* tort committed by their employees, but only those that are committed through the exercise of job-created control and authority.

Those employers that would be affected by the proposed change would only be those who entrust in their employees a large amount of control and authority in order to carry out their employment duties. The employers, and society as a whole, benefit from the vesting of this authority. It is only just that those who enjoy the benefits also bear the burden.

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