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"Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees

Rochelle Rubin Weber

A police officer observes a woman shoplift a package of cigarettes. He follows her outside to the parking lot where he identifies himself. He is in uniform, armed, and has a badge. Although he does not immediately arrest her, the officer tells the woman that he must take her to the police station. Instead of taking her to the station, he drives to an abandoned spot in the woods, where he rapes her. The woman can pursue criminal charges and can bring a civil action against the officer personally. Can she also hold the officer's employer liable under the doctrine of respondeat superior? The answer depends, in large part, on the state where the rape occurred.

Respondeat superior is a common law doctrine that holds

1. Respondeat superior, a form of vicarious liability, is defined as "[l]et the master answer." BLACK'S LAW DICTIONARY 1311 (6th ed. 1990). This means that under certain circumstances, the "master," or employer, is liable for the wrongful acts of the "servant," or employee. Id.


A number of other courts, however, have found employer liability for sexual assaults committed by employees. See, e.g., Simmons v. United States, 805 F.2d 1363, 1369-70 (9th Cir. 1986) (applying Washington law to a sexual encounter between a counselor and a patient); Mary M. v. City of Los Angeles, 814 P.2d 1341, 1349-52 (Cal. 1991) (applying California law to a rape by a police officer); Applewhite v. City of Baton Rouge, 380 So. 2d 119, 121-22 (La. Ct. App. 1979) (applying Louisiana law to a rape committed by a police officer).
employers liable for the torts of employees that occur within the employee's "scope of employment." Courts differ, though, in their interpretation of what "scope of employment" encompasses, particularly as applied to sexual assaults. The traditional view is that sexual assault is either personally motivated or so unusual that it is outside of the assailant's scope of employment. Recently, however, courts have shown an increased willingness to apply respondeat superior to sexual assaults, holding employers vicariously liable for sexual assaults committed by police officers, therapists, a state national guard

3. The concept of "scope of employment" was developed to protect employers from absolute liability. See T. BATY, VICARIOUS LIABILITY 22 (1916). The Restatement (Second) of Agency defines "scope of employment" more narrowly than do many states:

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

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master. RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

4. See infra notes 32-35 and accompanying text.


6. See Mary M., 814 P.2d at 1352; Applewhite, 380 So. 2d at 121-22; see also White v. County of Orange, 212 Cal. Rptr. 493, 496 (Cal. Ct. App. 1985) (finding that a rape committed by a sheriff could be within his scope of employment because use of authority was incidental to his duties).

7. See Simmons v. United States, 805 F.2d 1363, 1369-70 (9th Cir. 1986); see also Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 348-49 (Alaska 1990) (determining that sexual misconduct by a counselor was not outside the scope of his employment as a matter of law); Marston v. Minneapolis Clinic of Psychiatry & Neurology, 329 N.W.2d 306, 310-11 (Minn. 1982) (recognizing that sexual misconduct by a psychologist can be within the scope of employment).
recruiting officer, a deliveryman, and a hospital nursing assistant.

This Note provides a framework for determining when employers should be held vicariously liable for sexual assaults committed by their employees. Although this Note primarily considers public sector employers, the framework is equally applicable to private sector employers. Part I provides a historical overview of respondeat superior. Part II reviews the manner in which courts currently apply the “scope of employment” requirement to sexual assaults and demonstrates that a few courts have recently expanded the notion of “scope of employment” in the context of sexual assaults. Part III establishes that the traditional approaches taken by courts often entail mechanical application of a test that is based on antiquated standards. These mechanical applications undermine the underlying principles of respondeat superior. This Note concludes by suggesting that under respondeat superior, employers should be liable when sexual assaults by their employees result from the exercise of authority, power, or access that is created by the job.

I. THE EVOLUTION AND CONTINUED VIABILITY OF RESPONDEAT SUPERIOR

A. HISTORICAL DEVELOPMENT AND TRANSITIONS OF RESPONDEAT SUPERIOR

Under respondeat superior, an employer can be held vicariously liable for the tortious acts of an employee. The common

11. See infra note 66.
law standard for determining vicarious liability has vacillated over the centuries, moving back and forth between almost absolute liability and virtually no liability. In the doctrine's earliest formulation, the employer was held absolutely liable in a variety of contexts. For example, an owner of a slave or an animal that caused harm was absolutely liable. English common law reacted to such strict accountability by moving to the opposite extreme. By the sixteenth century the employer was held liable for his servants' actions only if he had specifically commanded them to act. Under the command standard the owner was rarely liable. As the eighteenth century neared, however, courts recognized an implied command to act, and


13. Professor Wigmore described the endeavors of courts to use various distinctions to assign responsibility for tortious conduct as "stand[ing] for an attempt (as yet more or less incomplete) as a rationalized adjustment of legal rules to considerations of fairness and social policy." Wigmore, supra note 12, at 316.

14. Legal historians are not in full agreement on the origins of vicarious liability in Anglo-American law. See Fleming James, Jr., Vicarious Liability, 28 Tul. L. Rev. 161, 164 (1954). Holmes thought that the doctrine of vicarious liability originated from Roman law notions that the owner surrenders the offending object or slave. Oliver W. Holmes, Jr., The Common Law 9, 15-20 (Little, Brown & Co. 1938) (1881). Wigmore, on the other hand, traced the doctrine to Germanic times, Wigmore, supra note 12, at 315-16, although both he and Holdsworth viewed the modern doctrine as rooted in policy. See id.; 8 Holdsworth, supra note 12, at 478. Standing apart is Thomas Baty, who believed that the doctrine appeared in English law in the late 17th century, and that it was without ancient roots. Baty, supra note 3, at 9.


16. Baty, supra note 3, at 9; Wigmore, supra note 12, at 383-82; see 3 Holdsworth, supra note 12, at 308-11; 8 id. at 472-82 (reviewing the historical development of vicarious liability); Prosser and Keeton, supra note 12, § 69, at 500.

17. Prosser and Keeton, supra note 12, § 69, at 500.

18. Walsh, supra note 12, at 322. Writing from 1765 to 1769, Blackstone observed that "the master is answerable for the act of his servant, if done by his command, either expressly given, or implied." 1 William Blackstone, Commentaries on the Laws of England *429; see also id. at *430 ("[W]hatever a servant is permitted to do in the usual course of his business, is equivalent to a general command.").

Although the "implied command" standard increased the scope of the employer's liability, the employer continued to escape liability in a wide range of circumstances. For example, intentional torts were not covered by the "implied command" standard. "Early American cases, following the old common law rule, imposed vicarious liability on a master based on the fiction of an 'implied command.' The effect was to deny vicarious liability for intentional torts of servants because it could not be implied that such acts were authorized." J. Terry Griffith, Note, Respondeat Superior and the Intentional Tort: A Short
from this standard developed the modern rule that an employer is liable for her employees' tortious acts if they are within the course, or scope, of employment.\textsuperscript{19}

As the modern standard for imposing liability under respondeat superior, "scope of employment" lends itself to a number of interpretations.\textsuperscript{20} Although courts may use varying language, they usually find acts to be within the scope of employment if the employee was motivated to serve the employer's interest rather than the employee's personal interest, the employer could foresee the employee's action, or some combination of these factors.\textsuperscript{21}

The modern "scope of employment" rule is plagued by the


19. Wigmore, supra note 12, at 399-402. The master may frequently be answerable for his servant's misbehavior, but never can shelter himself from punishment by laying the blame on his agent. 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; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong.

1 BLACKSTONE, supra note 18, at *432 (footnote omitted); see WALSH, supra note 12, at 322-23.

The first reported case to advance the general principle that the master is liable for the tortious acts of his servants that occur within the scope of employment was Hem v. Nichols, 91 Eng. Rep. 256 (1709). In Hem, the employer, a silk merchant, was held vicariously liable for an unauthorized, intentional tort committed by an employee who had fraudulently represented the silk as being of better quality than it was. \textit{Id}. Chief Justice Holt reasoned that someone had to be the loser as a result of the deceit, and it was better to place that burden on the employer, who hired and entrusted the agent, than on the stranger. \textit{Id}. \textit{But see BATY, supra note 3, at 9-14 (arguing that the tort claim in Hem was intertwined with a contract claim, and criticizing the use of the "course of employment" standard that evolved from the case). Historians agree that the "modern phase of the doctrine stems from dicta of Lord Holt." JAMES, supra note 14, at 165.}

20. Prosser describes the term "scope of employment" as "a highly indefinite phrase" that is "so devoid of meaning in itself that its very vagueness has been of value in permitting a desirable degree of flexibility in decisions." PROSSER AND KEeton, supra note 12, § 70, at 502.

21. See \textit{ReStatement (Second) of Agency} § 228 (1958). The standard for imposing liability based on respondeat superior varies by state. In Utah, for example, there are three criteria for imposing liability: the employee's conduct must be of the general kind she is employed to perform, it must occur within the hours and spatial boundaries of the employment, and it must be motivated, at least in part, to serve the employer's interest. \textit{See Birkner v. Salt Lake County}, 771 P.2d 1053, 1056-57 (Utah 1989). In Minnesota, the standard for intentional torts is that ""an employer is liable for an assault by his employee when the source of the attack is related to the duties of the employee and . . . occurs within work related limits of time and place,'" Marston v. Minneapolis Clinic of Psychiatry & Neurology, 329 N.W.2d 306, 310 (Minn.
same problem as was its progenitors: where to draw the line
between no and absolute liability on the part of the employer. Courts continue to struggle with this issue, and have espoused a wide variety of views on what is within the reach of “scope of employment.” Because courts have had such difficulty determining what respondeat superior should encompass, it is helpful to consider the underlying justification for the doctrine.

B. RESPONDEAT SUPERIOR IS A DELIBERATE ALLOCATION OF RISK

The modern justification for respondeat superior is that

1982) (quoting Lange v. National Biscuit Co., 211 N.W.2d 783, 786 (Minn. 1973)). Motivation to serve the employer is not a factor. Id.

22. See BATY, supra note 3, at 81 (“Judges oscillate between the notion that an illegal thing resembling the lawful things that a servant was employed to do must necessarily be within the scope of his functions, and the view . . . that to do an illegal thing is evidently to step outside his employment.”).

23. See Seavey, supra note 12, at 453, 465 n.49 (arguing that “scope of employment” is a malleable term that is used by courts, when convenient, to hold employers liable); Jeffrey A. Burns, Comment, Employer Liability for Assaults by Employees, 48 Mo. L. Rev. 655, 656 (1983).

24. The historical justifications for respondeat superior are numerous. For example, one justification relates to notions of an employer’s “control” over the conduct of the employee. See Holmes, supra note 12, at 347 (“[I]t is plain good sense to hold people answerable for wrongs which they have intentionally brought to pass, and to recognize that it is just as possible to bring wrongs to pass through free human agents as through slaves, animals, or natural forces.”); see also ATIYAH, supra note 12, at 15-17 (discussing the effect of respondeat superior on accident prevention, because the employer is in the best position to take precautionary measures). Another reason for employer liability is that the employer derives benefits or profits from the employee’s actions. See BATY, supra note 3, at 32; see also Glanville Williams, Vicarious Liability and the Master’s Indemnity, 20 Mod. L. Rev. 220, 230 (1957) (“Just as liability for damage can be equitably balanced against the defendant’s fault, so it can be equitably balanced against his benefit.”). Similarly, scholars have justified the doctrine on the basis that the employer has chosen and trusted the employee, and thus should suffer for his misbehavior. See Holmes, supra note 12, at 348. Respondent superior has also been applied because the employer started the occurrence and is responsible for what follows. See Harold J. Laski, The Basis of Vicarious Liability, 26 Yale L.J. 105, 109 (1916). Another reason for employer liability may be that she has “deep pockets” and is able to pay. See BATY, supra note 3, at 154 (stressing deep pockets as the “real reason” that employers are held liable).

25. No general purpose for respondeat superior, other than perhaps the achievement of justice, has been agreed upon. This has led commentators to conclude that the doctrine must continue to endure because of its appeal to notions of justice:

It is difficult to believe, however, that a principle opposed to common sense should have existed so long and still be so vigorous. . . . [I]t may be noted that basic concepts are the most difficult to express, and that lack of power of expression often leads to specious reasons for sound
employers should bear all the costs that result from the risks of their enterprises. The employer is not held liable simply because he can distribute the losses, "but because he also embodies in one person all the other criteria of responsibility. Normally it is he who selects the servant, he who controls the work and gets the profits, his would usually be the deeper pocket, and it is he whose work is being done." Thus, it is just for employers, rather than innocent victims, to bear the cost of results. The fact that... the rule is constantly expanding without meeting substantial opposition during a time of searching analysis and self-revelation, is some evidence that it does not greatly depart from the common feeling of justice which it is the primary function of the law to satisfy.

Seavey, supra note 12, at 434.

Thomas Baty, however, has criticized the doctrine of respondeat superior as insupportable because “[a] doctrine which is accounted for on nine different grounds may reasonably be suspected of resting on no very firm basis of policy.” Baty, supra note 3, at 148. In response to Baty’s criticism, Professor Smith argues that it is the cumulative effect of the different justifications that must be considered:

[W]hy should a doctrine that has nine reasons to sustain it, assuming they are not mutually antagonistic, be less rather than more securely anchored than a doctrine that has only one? The sounder practice, though more difficult, in law as in extra-legal affairs, is to consider the cumulative effect of many reasons for a rule, or, indeed, to balance the cumulative effects of many reasons for and against.

Bryant Smith, Cumulative Reasons and Legal Method, 27 Tex. L. Rev. 454, 468 (1949); see also Atiyah, supra note 12, at 15-22 (criticizing Baty for failing to appreciate the significance of the justifications when considered together); Williams, supra note 24, at 231 (arguing that the value of the doctrine is not defeated simply because it “is the creation of many judges who have had different ideas of its justification or social policy, or no idea at all”).

26. PROSSER AND KEETON, supra note 12, § 69, at 500. Respondeat superior is “a rule of policy, a deliberate allocation of risk.” Id.; see Laski, supra note 24, at 111. Vicarious liability is recognized as a method of loss distribution. See Smith, supra note 12, at 444. According to Dean Smith, it is "socially more expedient to spread or distribute among a large group of the community the losses which experience has taught are inevitable in the carrying on of industry than to cast the loss upon a few." Id. at 456; see O.W. Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457 (1897). Holmes stated that the inclination of a very large part of the community is to make certain classes of persons insure the safety of those with whom they deal. . . . The torts with which our courts are kept busy to-day [sic] are mainly the incidents of certain well known business. . . . The liability for them is estimated, and sooner or later goes into the price paid by the public.

Id. at 466-67; see also Laski, supra note 24, at 112 (“If that employer is compelled to bear the burden of his servant’s torts even when he is himself personally without fault, it is because in a social distribution of profit and loss, the balance of least disturbance seems thereby best to be obtained.”).

27. Smith, supra note 25, at 466.
employee torts because the employers derive profits from exposing others to the risk-creating activities of their employees; employers are in a better position to absorb and distribute costs and shift them to society; and holding employers liable provides an incentive for exercising care in choosing, training, and supervising employees.

II. "SCOPE OF EMPLOYMENT" AND SEXUAL ASSAULTS

Courts diverge sharply on whether sexual assault can be within the scope of employment. Many jurisdictions focus on the personal nature of sexual assaults, or the unexpected and

28. Prosser and Keeton, supra note 12, § 69, at 500. Glanville Williams explained:

It is commonly felt that when a person is injured (particularly when the injury is a bodily one), he ought to be able to obtain recompense from someone; and if the immediate tortfeasor cannot afford to pay, then he is justified in looking around for the nearest person of substance who can plausibly be identified with the disaster. Williams, supra note 24, at 232.

29. Prosser and Keeton, supra note 12, § 69, at 500.

30. Id.; see Seavey, supra note 12, at 450 ("The bald statement that the master should pay because he can pay may have little more than class appeal . . . . [but] it is not unjust to have the burden of misfortune shared by those who benefit from the work in the course of which liability occurs.").

31. See Prosser and Keeton, supra note 12, § 69, at 501; James, supra note 14, at 168 (Employers "are among those strategically placed to promote accident prevention in connection with their operations. . . . Pressure of legal liability on the employer therefore is pressure put in the right place to avoid accidents."); Seavey, supra note 12, at 448 ("[R]espondeat superior results in greater care in the selection and instruction of servants than would be used otherwise. . . . Because of this financial liability, it appears safe to assume that an employer can and does bring a pressure to bear upon his employees . . . .").


33. See Doe v. United States, 769 F.2d 174, 175 (4th Cir. 1985) (employer not liable for sexual misconduct of an Air Force social worker because he was "acting for his personal gratification"); Andrews v. United States, 732 F.2d 366, 370 (4th Cir. 1984) (employer not liable under South Carolina law for sexual
misconduct of a counselor); Rabon v. Guardsmark, 571 F.2d 1277, 1279 (4th Cir.) (employer not liable for a rape by a private security guard, cert. denied, 439 U.S. 866 (1978); City of Green Cove Springs v. Donaldson, 348 F.2d 197, 203 (5th Cir. 1965) (employer not liable under Florida law for an assault and rape committed by a police officer); Grimes v. B.F. Saul Co., 47 F.2d 409, 410 (D.C. Cir. 1931) (apartment building owner not liable for an attempted rape of a tenant by an employee who gained access to the apartment to conduct an inspection); Hunter v. Countryside Ass'n for the Handicapped, 710 F. Supp. 233, 239 (N.D. Ill. 1989) (no employer liability for rape and beating by an employee because "sexual assault cannot be interpreted as furthering Countryside's business"); Dockter v. Rudolf Wolff Futures, Inc., 684 F. Supp. 532, 536 (N.D. Ill. 1988) (employer not liable because an employee's "sexual misbehavior was committed entirely for his own enjoyment and benefit; he neither intended to nor did benefit" his employer), aff'd, 913 F.2d 456 (7th Cir. 1990); Valdez v. Church's Fried Chicken, Inc., 683 F. Supp. 596, 610 (W.D. Tex. 1988) (employer not liable for a sexual assault committed by a team leader because it was personal and not in furtherance of the employer's business); Padilla v. d'Avis, 580 F. Supp. 403, 408-09 (N.D. Ill. 1984) (health facility not liable for a sexual assault by a physician during a gynecological exam); Doe v. Swift, 570 So. 2d 1209, 1213 (Ala. 1990) (state not liable for a sexual assault by a psychologist of an involuntarily committed patient because the assault was personal and thus not within the scope of employment); Hendley v. Springhill Memorial Hosp., 575 So. 2d 547, 550-51 (Ala. 1990) (employer not liable for an unauthorized vaginal exam performed by a physical therapy service vendor because it was personally motivated and a "gross deviation" from the employee's duties); Jeffrey Scott E. v. Central Baptist Church, 243 Cal. Rptr. 128, 130 (Cal. Ct. App. 1988) (church not liable for a sexual assault by a Sunday school teacher because the employee "was not employed to molest young boys. . . . [The employee's] acts were independent, self-serving pursuits unrelated to church activities."); Rita M. v. Roman Catholic Archbishop, 232 Cal. Rptr. 685, 690 (Cal. Ct. App. 1986) (church not liable for the sexual misconduct of a priest); Alma W. v. Oakland Unified Sch. Dist., 176 Cal. Rptr. 287, 290 (Cal. Ct. App. 1981) (school not liable for the sexual assault of a student by a janitor); Destefano v. Grabrian, 763 P.2d 275, 287 (Colo. 1988) (archdiocese not liable for the sexual misconduct of a priest during marriage counseling); Rawling v. City of New Haven, 537 A.2d 439, 444 (Conn. 1988) (city need not indemnify a police officer for costs of defending himself against a sexual assault charge which was dismissed, noting that "sexual assault is generally viewed as foreign to the scope of employment"); Gutierrez v. Thorne, 537 A.2d 527, 530-31 (Conn. App. Ct. 1988) (Department of Mental Retardation not liable for a rape of a retarded client committed by an employee); Boykin v. District of Columbia, 484 A.2d 560, 562 (D.C. 1984) (city not liable for a program coordinator's sexual assault of a blind, deaf, and mute student); Duyser v. School Bd., 573 So. 2d 130, 131-32 (Fla. Dist. Ct. App. 1991) (school not liable for sexual abuse of students by a teacher); Big Brother/Big Sister of Metro Atlanta, Inc. v. Terrell, 359 S.E.2d 241, 243 (Ga. Ct. App. 1987) (no liability for the sexual abuse of child by a volunteer); Randi F. v. High Ridge YMCA, 524 N.E.2d 966, 969, 971 (Ill. App. Ct. 1988) (employer not liable for a sexual assault of a three-year-old by a day care teacher's aide); Webb v. Jewel Cos., 485 N.E.2d 409, 412-13 (Ill. App. Ct. 1985) (supermarket not liable for a sexual assault of a young girl that was committed by a security guard); Hoover v. University of Chicago Hosps., 356 N.E.2d 925, 929 (Ill. App. Ct. 1977) (hospital not liable when a doctor raped a patient); Smothers v. Welch & Co. House Furnishing Co., 274 S.W. 678, 679 (Mo. 1925) (employer not liable for attempted rape by a furniture store employee because
extraordinary nature of such assaults, to determine that employers cannot be held liable. Recently, however, some courts have taken a broader view of what “scope of employment” entails by concentrating on whether the assault occurred as a result of job-created power or authority. These courts have


34. See Bates v. United States, 701 F.2d 737, 741-42 (8th Cir. 1983) (employer not liable for rapes and murders committed by a military police officer in light of his “outrageous and criminal” conduct); Gambling v. Cornish, 426 F. Supp. 1153, 1155 (N.D. Ill. 1977) (rapes by police officers were “too outrageous” to impose liability on their employer); Bates v. Doria, 502 N.E.2d 454, 457 (Ill. App. Ct. 1986) (rape by a sheriff was outrageous and thus beyond the scope of employment); Desotelle v. Continental Casualty Co., 400 N.W.2d 524, 530 (Wis. Ct. App. 1986) (sexual assault by a sheriff was “extraordinary and disconnected” from contemplated services), review denied, 407 N.W.2d 560 (Wis. 1987).

35. See Simmons v. United States, 805 F.2d 1363, 1369-70 (9th Cir. 1986) (Indian Health Service liable for sexual misconduct of a counselor); Lyon v. Carey, 533 F.2d 649, 651, 655 (D.C. Cir. 1976) (Reinstating a jury verdict against an employer, the court recognized that deliveryman gained access to a customer’s apartment “by means of a badge of employment,” but still the court required that the rape be motivated by a business related dispute.); Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 348 (Alaska 1990) (reversing a summary judgment granted to the employer on the basis that “it could reasonably be concluded that the resulting sexual conduct was ‘incidental’ to the therapy” (footnote omitted)); Mary M. v. City of Los Angeles, 814 P.2d 1341, 1349-52 (Cal. 1991) (reinstating a jury verdict holding an employer liable for a rape committed by a police officer); Kimberly M. v. Los Angeles Unified School District, 242 Cal. Rptr. 612, 620-21 (Cal. Ct. App. 1987) (holding that a suit against a school district for a teacher’s sexual abuse of a child was improperly dismissed because “governmental entities should be held liable for the intentional torts committed within the scope of employment by public employees . . . who are entrusted with great authority”), opinion vacated, 252 Cal. Rptr. 393 (Cal. Ct. App. 1989) (reconsidered in light of John R. v. Oakland Unified Sch. Dist., 769 P.2d 948 (Cal. 1989)); White v. County of Orange, 212 Cal. Rptr. 493, 495 (Cal. Ct. App. 1985) (holding that a summary judgment in favor of an
found that sexual assaults may be within the "scope of employment," and thus the employers liable, if the sexual assaults were committed by employees through the use of job-created power.

A. TRADITIONAL APPROACHES

1. Focus on Employee Motivation

To determine the employer’s liability, many courts consider only the employee’s motivation for acting.\(^{36}\) The "motivation to serve" test requires that the employee’s actions be at least partly motivated to serve the employer’s business interest in order to be within his scope of employment.\(^{37}\) Because it is almost inconceivable that a sexual assault furthers any employer’s interest, no liability results on the part of the employer. For example, in Gutierrez v. Thorne,\(^{38}\) the Connecticut Department of Mental Retardation escaped liability for a male employee’s rape of one of its clients. The department had as-
signed the employee to supervise the living conditions of the plaintiff, a retarded woman living alone in an apartment, and supplied him with a key to her apartment for use in emergencies.\textsuperscript{39} While on duty, the employee used the key to enter the client's apartment and sexually assault her on four occasions, threatening her with loss of benefits if she told anyone. The court found no employer liability because the employee "was not furthering the defendant's business interests when he sexually assaulted the plaintiff."\textsuperscript{40}

\begin{enumerate}
\item[39.] Id. at 529-30. The employee's position required that he supervise the plaintiff in such matters as "how to keep her apartment, shop for her needs, budget her expenses, and perform other aspects of daily living." Id. at 529.

\item[40.] Id. at 530. The court further stated that the employee "was engaging in criminal conduct which had no connection to the defendant's business of providing supervision and training to mentally retarded persons regarding daily living skills." Id.
\end{enumerate}

A number of other courts have similarly allowed the employer to escape liability by focusing on whether the employee was motivated to serve the employer. In City of Green Cove Springs v. Donaldson, 348 F.2d 197 (5th Cir. 1965), a police officer raped a woman he had stopped for speeding. Although the police officer was on duty, in uniform, and the rape occurred in a police car, the court found that the officer "stepped aside from his employment to accomplish his own, rather than the City's purpose," and thus the city was not liable. Id. at 203; see also Rabon v. Guardsmark, 571 F.2d 1277, 1279 (4th Cir.) (employer not liable because a private security guard was furthering his independent purpose when he assaulted and raped the plaintiff at a building he was hired to protect), cert. denied, 439 U.S. 866 (1978); Webb v. Jewel Cos., 485 N.E.2d 409, 412-13 (Ill. App. Ct. 1985) (supermarket was not liable for sexual molestation by its security guard on its premises because the assault was a "deviation having no relation to the business of Jewel or the furtherance thereof"); Cosgrove v. Lawrence, 520 A.2d 844, 848-49 (N.J. Super. Ct. Law Div. 1986) (a sexual relationship between a therapist and a patient was outside the scope of employment because it was not the type of conduct the therapist was employed to perform, went beyond authorized space limits, and was "too little actuated by a purpose to serve the master"), aff'd, 522 A.2d 483 (N.J. Super. Ct. App. Div. 1987).

The court in Rawling v. City of New Haven, 537 A.2d 439 (Conn. 1988), conceded that, under certain circumstances, an assault can occur within the scope of employment, but it noted that "an assault can also be viewed as a personal frolic unwarranted by the work environment." Id. at 444 (citations omitted). The court then addressed sexual assaults, finding that they are "generally viewed as foreign to the scope of employment." Id.

In Lyon v. Carey, 533 F.2d 649 (D.C. Cir. 1976), the court required that a sexual assault be motivated by a business-related dispute in order to hold the employer liable. In Lyon, a deliveryman raped a customer's representative after arguing over the method of delivery and payment. Id. at 651-52. The court held that the employer would be liable only if the assault was "triggered off or motivated" by a dispute over the employer's business and not the result of the employee's "propinquity and lust." Id. at 655. The court reinstated the jury verdict holding the trucking company liable. Id.
2. Focus on the Outrageousness of Sexual Assaults

A number of courts have held that if the employee's conduct is outrageous, it is necessarily outside the scope of employment. Consequently, the employer is not held liable. For example, the Eighth Circuit Court of Appeals, in Bates v. United States, declined to hold the United States government liable for the actions of an on-duty military policeman who stopped, raped, and murdered teenagers on a military base. The court found that the federal government was not liable because the military policeman's actions were "so outrageous and criminal—so excessively violent as to be totally without reason or responsibility."

3. Focus on Policy Reasons

The California Supreme Court has looked to respondeat superior's justifications in recent sexual assault cases. In John R. v. Oakland Unified School District, the court recognized

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41. See supra note 34. According to the "outrageous conduct" rule, "[t]he fact that the employee has acted in an outrageous manner is evidence that he departed from the scope of employment." Bates v. Doria, 502 N.E.2d 454, 457 (Ill. App. Ct. 1986).

42. 701 F.2d 737 (8th Cir. 1983).

43. The military policeman had authority to detain civilians and make arrests, was driving a military police vehicle that was clearly marked, was in full uniform, and was issued a United States Army pistol and ammunition. Id. at 739. The officer stopped a civilian vehicle carrying four teenagers, handcuffed the two male teenagers, placed them in the back seat of his military jeep, and shot both of them through the chest. Id. He next ordered the two female teenagers into his jeep, drove them to a cabin, raped them, and then shot them. Id. at 739-40.

44. Id. at 741-42. Similarly, in Desotelle v. Continental Casualty Co., 400 N.W.2d 524 (Wis. Ct. App. 1986), review denied, 407 N.W.2d 560 (Wis. 1987), the county was not held liable for the sexual assault committed by an on-duty sheriff in his squad car. The assault occurred when he brought the plaintiff to his car to question her about underage drinking. The court wrote that it was reasonable for the trier of fact to find that the employee's "conduct was so extraordinary and disconnected from the type of services ordinarily contemplated that it was done outside the scope of his employment." Id. at 530.

Some courts use the "outrageousness" test in conjunction with the "motivation to serve" test. These courts reason that if the employee's conduct is outrageous, then she could not have been motivated to serve her employer, and no specific inquiry of motivation is necessary. See, e.g., Gambling v. Cornish, 425 F. Supp. 1153, 1155 (N.D. Ill. 1977) (employees' actions were outrageous and were motivated "solely by a desire to gratify their personal interests"); Doria, 502 N.E.2d at 457 (reasoning that outrageous behavior is evidence that the employee acted for purely personal reasons).

45. 769 P.2d 948 (Cal. 1989). The teacher asked John R., then a junior high school student, to participate in the school's work-experience program, in which high-performing students assist teachers. Id. at 949. The program al-
that respondeat superior principles could apply in a school setting because of the significant authority a teacher has relative to a child. Addressing a student’s claim that a teacher sexually molested him, the *John R.* court determined that the school district could not be held vicariously liable. The court focused on the primary justification for the doctrine, risk allocation, as well as two of the supporting policies, accident prevention and assurance of compensation. The court decided that accident prevention was inappropriate because imposing liability might discourage school districts from allowing one-on-one associations between students and teachers. It determined that assurance of compensation was inapplicable because insurance would be difficult to obtain and compensating victims might divert funds from the classroom. The court also reasoned that risk allocation was not relevant. It found that the connection between a teacher’s authority and the “abuse of that authority to indulge in personal, sexual misconduct is simply too attenuated” to include such abuse within the risks allocated to a teacher’s employer.

46. The court stated that “[w]e agree that in the eyes of a child, a teacher’s authority can be very great.” *Id.* at 955. The court proceeded, however, to downplay the power of a teacher over a student, stating that the teacher’s authority “is simply not great enough to persuade us that vicarious liability should attach” for the teacher’s sexual misconduct. *Id.* at 956-57.

47. *Id.* at 956.

48. *Id.* at 955 (citing *Perez v. Van Groningen & Sons, Inc.*, 719 P.2d 676, 678 (Cal. 1986)). Although the California Supreme Court acknowledged that risk allocation is the primary modern justification for respondeat superior, the court used loss distribution as a proxy for risk allocation, thereby treating risk allocation, accident prevention, and assurance of compensation as coequal justifications. See *id.* at 955-56.

49. *Id.* at 956.

50. *Id.*

51. *Id.* Because the California Supreme Court refused to apply respondeat superior, it did not address whether the conduct came within the teacher’s scope of employment. Two years later, however, the same court in *Mary M. v. City of Los Angeles*, 814 P.2d 1341 (Cal. 1991), found the justifications for respondeat superior applicable to a rape committed by a police officer. It applied the doctrine and reinstated a jury verdict finding the employer liable. The plaintiff, Mary M., was driving home at approximately 2:30 a.m. when she was stopped for erratic driving by Sergeant Schroyer of the Los Angeles Police Department. *Id.* at 1342. Schroyer was in uniform, driving a marked police car, and equipped with badge and gun. *Id.* Mary M. had been drinking, and after performing poorly on a field sobriety test, she started to cry and begged the officer not to take her to jail. *Id.* The officer drove her
B. THE JOB-CREATED AUTHORITY STANDARD

In contrast, some courts have emphasized the role of job-related power or authority to determine employer liability for sexual assaults. Job-related power refers to authority or control gained through employment. For example, in Applewhite v. City of Baton Rouge, the Louisiana Court of Appeals held the City of Baton Rouge liable for a rape committed by a police officer. The court emphasized that the police officer was on duty, armed, in uniform, and that he was "able to separate the plaintiff from her companions because of the force and authority of the position which he held." The court also reasoned that police officers, as public servants, are given "considerable public trust and authority... [W]here excesses are committed by such officers, their employers are held to be responsible for

home where he demanded "payment" for his leniency, and then raped her. Id. at 1342-43.

As in its opinion in John R., see 769 P.2d at 955-56, the California Supreme Court considered the policy justifications for applying respondeat superior. Mary M., 814 P.2d at 1343-45. In Mary M., however, the court decided that the justifications compelled application of respondeat superior and a finding of liability. It reasoned that deterrence would be served because imposing liability "creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented.'" Id. at 1347 (quoting Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 116 (1927)). The Mary M. court also approved of the imposition of vicarious liability as an "appropriate method to ensure that victims" are compensated. Id. at 1348. As for the proper allocation of risk, the court emphasized the "extraordinary power and authority" that police officers have over residents, stating that "[i]nherent in this formidable power is the potential for abuse." Id. at 1349. The court concluded that the community should bear the cost of the misuse of power because of "the substantial benefits that the community derives from the lawful exercise of police power." Id. Thus, the court stressed that misuse of job-related power could fall within the scope of employment, and the risk could be fairly allocated to the employer. Id. at 1349-52.

52. See supra note 35. A number of courts have considered job-created authority in the context of sexual assault cases, but they have not regarded this issue as determinant. See, e.g., Gambling v. Cornish, 426 F. Supp. 1153, 1155 (N.D. Ill. 1977); John R. v. Oakland Unified Sch. Dist., 769 P.2d 948, 956-57 (Cal. 1989).


54. Id. at 121. The plaintiff, Ms. Applewhite, was walking with two female friends along a highway at approximately 10:00 p.m. when she was stopped by Officer Crowe, who was on duty, in uniform and accompanied by Still, a corrections officer. Id. at 120. Crowe threatened to arrest the three women for vagrancy if they were not quickly off the streets; as they hurried toward their destination, Crowe stopped them a few blocks further. Id. After flipping a coin to determine whom he would arrest, Crowe ordered Applewhite into the police vehicle. Id. He then drove her to a stadium, where he sexually assaulted her. Id.

55. Id. at 121.
their actions even though those actions may be somewhat removed from their usual duties. Thus, the Applewhite court did not confine itself to determining whether the officers were "motivated to serve" their employer, but instead evaluated the role of job-created authority in making the sexual assaults possible. Even the California Supreme Court, despite its earlier ruling in John R., 58 determined in Mary M. v. City of Los Angeles that the city should be liable for a rape committed by a police officer because of the "extraordinary power and authority" police officers have over residents.

Although the Applewhite and Mary M. courts' reasoning may be easiest to apply in the context of police officers, not all courts have so limited it. Courts have found sexual assaults to

56. Id. The same reasoning extends to cases of excessive force by police officers. In Cheatham v. Lee, 277 So. 2d 513 (La. Ct. App.), writ denied, 279 So. 2d 696 (La. 1973), an off-duty officer was hired to chaperon a school dance. After clearing the employment with his supervisor, the officer appeared in full uniform and armed with his pistol and a "slap jack." Id. at 514-15. The court held the city liable for the excessive force used by the officer in breaking up an alleged fight, stressing that the officer had filed all necessary papers and obtained approval from his supervisor, and was in full uniform. Id. at 516. Because the officer "possessed the apparent authority to represent the City in his law enforcement capacity," the city was liable for injuries resulting "from the tortious act of its employee while in the course and scope of his employment." Id. at 517; see also Bourque v. Lohr, 248 So. 2d 901 (La. Ct. App. 1971) (holding the city liable for assaults committed by off-duty police officers).

57. Applewhite, 380 So. 2d at 121-22. The California Court of Appeals similarly imposed liability on the employer in White v. County of Orange, 212 Cal. Rptr. 493 (Cal. Ct. App. 1985). In White, a county deputy sheriff drove the plaintiff, Ms. White, to a secluded orange grove where he allegedly threatened to rape and murder her. Id. at 494. White alleged that the officer then drove her around for a number of hours, continuing with his threats, and finally returned her to her car when she promised to go out with him that weekend. Id. In finding that the officer's actions were "incidental to his duties" and thus within his scope of employment, the court held that the employer, by placing him in a position of authority, would be liable if the plaintiff's allegations were proven. Id. at 496. Of significance to the court was White's reliance on the officer's apparent authority: She would not have stopped, and the subsequent events would not have occurred, if he was not a deputy sheriff, in uniform, in a marked vehicle using flashing red lights. Id. Echoing a sentiment shared by the Applewhite court, the White court wrote that the county "enjoys tremendous benefits from the public's respect for that authority. Therefore, it must suffer the consequences when the authority is abused." Id.

58. See supra notes 45-51 and accompanying text.


60. Id. at 1349.

be incidental to employees' duties, and therefore within the scope of employment, when committed by a state national guard recruiting officer, psychologists and therapists, a deliveryman, and a hospital nursing assistant. Courts have

948 (Cal. 1989)). The Kimberly M. court noted that “the modern trend in cases involving tortious assaults by employees [is] to define scope of employment broadly.” Id. at 619 (citing Berger v. Southern Pac. Co., 300 P.2d 170 (Cal. Dist. Ct. App. 1955)). This trend, though heralded for many years, appears to be slow moving. See Griffith, supra note 18, at 240 (citing RESTATEMENT (SECOND) OF AGENCY § 245 reporter's notes, at 391 (1957)).

62. Turner v. State, 494 So. 2d 1292, 1296 (La. Ct. App. 1986). The Turner court found that the tortious conduct of a state national guard recruiting officer, who deceived four female potential recruits into believing he was authorized to perform physical examinations, was incidental to his duties “although totally unauthorized by the employer and obviously motivated by his personal interests.” Id. “[T]he risk of harm faced by the young women was fairly attributable to his employer, who had placed the sergeant in a position of trust and authority . . . .” Id.

63. See supra note 7. The Supreme Court of Alaska expanded its conception of scope of employment in Doe v. Samaritan Counseling Center, 791 P.2d 344, 348 (Alaska 1990). Doe involved a sexual relationship between a reverend/doctor who was employed by the Samaritan Counseling Center, and a patient. Id. at 345. In declining to follow the courts that view tortious sexual conduct as solely motivated by personal interest, the Doe court determined that construing the “motivation to serve” test in this way would too severely undermine the rationale of respondeat superior. Id. The court reasoned:

“Scope of employment” as a test for application of respondeat superior would be insufficient if it failed to encompass the duty of every enterprise to the social community which gives it life and contributes to its prosperity . . . . The basis of respondeat superior has been correctly stated as “the desire to include in the costs of operation inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefited by the enterprise.” Id. at 349 (quoting Fruit v. Schreiner, 502 P.2d 133, 140-41 (Alaska 1972)).

The court found that the essential consideration is whether the “tortious conduct arises out of and is reasonably incidental to the employee's legitimate work activities.” Id. at 348. Applying the standard used by the Ninth Circuit Court of Appeals in Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986), the Doe court stated that sexual conduct could reasonably be found to be “incidental” to therapy, and remanded the case to determine how closely connected the sexual relationship was to the misuse of the transference phenomenon. Doe, 791 P.2d at 349.

Similarly, in Marston v. Minneapolis Clinic of Psychiatry & Neurology, 329 N.W.2d 306 (Minn. 1982), the Minnesota Supreme Court held that a clinic could be liable for a sexual relationship between a psychologist and a client. Id. at 311. The court stated that “the employee's motivation should not be a consideration for imposition of vicarious liability.” Id. Rather, the key factor is whether the assault is related to the employee's duties and “occurs within work related limits of time and place.” Id. at 310 (quoting Lange v. National Biscuit Co., 211 N.W.2d 783, 786 (Minn. 1973)).


been particularly reluctant to attribute tortious conduct to the employer, however, when the employer is a governmental entity.⁶⁶

III. TOWARD A REASONED APPROACH

A. TRADITIONAL APPROACHES ARE INCONSISTENT WITH THE PRINCIPLES OF RESPONDEAT SUPERIOR

The standard for imposing liability on the employer has gone through many transitions over the centuries.⁶⁷ From virtually absolute liability on the one hand to the necessity of an actual command on the other, courts arrived at “scope of employment” as the modern test for respondeat superior. The “scope of employment” standard should ensure that employers bear the costs of risks associated with their enterprises.⁶⁸ In the context of sexual assaults, however, the doctrine’s justification is frequently undermined when courts use the “motivation to serve” or the “outrageousness” tests to determine if actions are within the scope of employment.

1. Employee’s Motivation

Instead of using the “motivation to serve” test as a guide to help determine whether conduct should fall within the scope of

⁶⁶. See Peter H. Schuck, Suing Government ch. 2 (1983) (addressing tort immunity in the public sector, and the disparity between the public and private sectors with respect to liability). The Federal Tort Claims Act covers suits against the federal government. See Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1988). It makes the government liable “in the same manner and to the same extent as a private individual under like circumstances.” Id. § 2674. There are, however, a number of exceptions relieving the government of liability that do not similarly protect private parties. See id. § 2680.

The reluctance of courts to hold municipalities liable may stem from the concern that they are unable to pass the costs to customers in the way that for-profit businesses can, or that liability will divert tax funds from public objectives. See Prosser and Keeton, supra note 12, § 131, at 1051-52. Governmental entities do pass on the costs to “customers,” however, in the sense that the community of taxpayers are the customers, or beneficiaries of the services, and costs are passed on by way of taxes. Because “[i]t is almost always agreed” that concerns over profit-making or tax fund diversion “are not sound” reasons for allowing the government to escape liability, “there has been a large movement to abolish the municipal immunity or to restrict it severely.” Id. For a discussion of enterprise liability and the question of immunity in the public sector, see William F. Baxter, Enterprise Liability, Public & Private, 42 Law & Contemp. Probs. 45 (1978); Jerry L. Mashaw, Civil Liability of Government Officers, 42 Law & Contemp. Probs. 8 (1978).

⁶⁷. See supra notes 12-19 and accompanying text.

⁶⁸. See supra notes 24-31 and accompanying text.
appropriate for use in determining what conduct is within the scope of employment, but courts should not limit the test to narrow groups of employees, such as therapists or police officers. Depending on the factual setting, a social worker, priest, or supervisor may just as easily be in a position of power over a victim. Courts also have not addressed how the job-created power standard applies to situations that involve job-created access rather than authority, such as when an apartment building manager uses a key to enter an apartment and then rapes a tenant.

Once a court has decided to use the job-created power stan-

v. Van Groningen & Sons, Inc., 719 P.2d 676, 680 (Cal. 1986) (citations omitted). This reasoning should apply to school teachers. The control a teacher is able to exercise over a young student is almost indistinguishable from that exercised by a police officer over an adult. "A schoolteacher alone at his home with an impressionable child has as much power and opportunity to commit a sexual assault against the child, especially one of tender years, as a police officer has to commit an assault against a citizen." Id. at 1361 (Baxter, J., concurring in the judgment). Like a police officer, a teacher is able to isolate students and manipulate them because of job-created power and authority. The teacher in John R. was acting within the scope of his employment when he encouraged the student to participate in the work-experience program and required the student to work for him at his home. It is contradictory for the court to find that a sexual assault by a police officer is within the scope of employment, but to find differently when the assailant is a teacher. See Recent Case, Respondeat Superior—Vicarious Liability—California Supreme Court Holds Police Department Vicariously Liable for Rape Committed by On-Duty Police Officer, 105 HARV. L. REV. 947 (1992) (criticizing the California Supreme Court for not applying the standard used in Mary M. to the John R. case).

96. Some courts may limit the job-created power standard to specific factual situations. See Simmons v. United States, 805 F.2d 1363, 1364-66, 1368-71 (9th Cir. 1986) (suggesting that employer liability for sexual assaults may be limited to the counseling setting because of the role transference plays); Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 348 (Alaska 1990) (citing Simmons with approval); Marston v. Minneapolis Clinic of Psychiatry & Neurology, 329 N.W.2d 306, 311 (Minn. 1982) (stating that sexual misconduct by a psychologist may be within the scope of employment because it is a hazard of the profession); see also St. Paul Fire & Marine Ins. Co. v. Asbury, 720 P.2d 540, 542 (Ariz. Ct. App. 1986) (stating that sexual abuse by a gynecologist was "intertwined with and inseparable from" services ordinarily provided); Mary M., 814 P.2d at 1347-49 (holding an employer liable for rape by a police officer, but reiterating that school districts should not be held liable for the sexual molestation of students by teachers).

97. For example, a priest may have a great deal of power over a teenager who belongs to his parish and believes he must obey the priest for religious reasons. Yet the same priest may have no or significantly less power over another teenager who is not of the same faith and is met in a nonchurch setting, such as at a public park or library. The degree of authority depends on the specific factual situation.
Furthermore, requiring the employer, or community, to include the cost of such abuse as an expense of doing business ensures that the loss is distributed among the beneficiaries of the services—in the case of public employers, the community in general. Holding employers liable also provides an incentive for employers to exercise care in choosing, training, and supervising their employees, and thereby promotes prevention. If only the employee is liable, the employer has no incentive to take preventative measures or reform unsafe practices.9

C. REDEFINING “SCOPE OF EMPLOYMENT” CAN RESULT IN CONFLICTING OUTCOMES

Although a few courts have adopted the job-created power standard, the ideas behind the approach are not fully developed. Thus, as currently applied, the standard may lead to inconsistent results.95 The job-created power standard is

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94. As Jaffe explained, “police tactics are often institutional and awards against the state may modify institutional practices.” Id. at 229-30.

95. The California Supreme Court, for example, has adopted a job-created authority standard, but applies it inconsistently. The court based its distinction between teachers in John R. v. Oakland Unified School District, 769 P.2d 948 (Cal. 1989), and police officers in Mary M. v. City of Los Angeles, 814 P.2d 1341 (Cal. 1991), on questionable grounds. Imposing liability in both situations would encourage employers to “take measures to prevent recurrence of the tortious conduct.” See Mary M., 814 P.2d at 1348. If the school district is not liable, but only the teacher individually is liable, there is no incentive for the school to take preventative steps.

Although the court in John R. was concerned that imposing liability on the school district would discourage close relationships between students and teachers, 769 P.2d at 956, schools might instead take steps to ensure the safety of students while continuing to encourage close relationships, such as by requiring that meetings occur at school during regular hours, or by requiring the presence of a third person. Indeed, allowing the school district to escape liability may have an effect opposite of what the court intended: If parents feel that they cannot trust the school to ensure the safety of their children while in special programs, parents may be unwilling to let their children participate in the programs.

In holding that it is not appropriate to allocate the risk of a teacher’s tortious sexual conduct to a school district, id. at 956-57, the John R. court failed to consider the vast amount of authority vested in teachers, the benefit the community derives from giving that authority to teachers, and the question of whether it is more just for the community, rather than the innocent victim, to bear the cost. Yet allocation of risk did not trouble the court in Mary M., which found it “neither startling nor unexpected” that the power of police officers might be misused. 814 P.2d at 1350. The Mary M. court also indicated that the employee’s conduct as a whole should be considered, not just the tortious act. Id. “[T]he proper inquiry is not ‘whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal.’” Id. at 1351 (quoting Perez
Minneapolis profit by providing employees such as security guards or
building managers with authority or power. If these businesses did not
grant authority to their employees, the businesses would be much more
costly to operate. By bestowing authority upon the employees, therefore, the
employer realizes a financial gain. Similarly in the public sector, communities
profit from the authority granted employees such as police officers or
teachers. Communities benefit when citizens respect the authority of police
officers to stop and detain motorists or to question witnesses in an investiga-
tion. In this way, drunken drivers are stopped from driving, murders are solved, and the
community is a safer place to live. Similarly, communities benefit from teachers having authority to control classrooms and educate students.

Because communities derive benefits from the authority afforded their teachers and police officers, the communities should bear the burden of liability when that authority is mis-
used. By allocating the costs of the enterprise to those who benefit from the enterprise, rather than requiring the innocent victim to absorb the full cost, courts will require employers to
pay the full cost of their enterprises and provide compensation to the least culpable parties, the assault victims.

805 F.2d 1363, 1369 (9th Cir. 1986)). The California Supreme Court similarly
found:

In view of the considerable power and authority that police officers
possess, it is neither startling nor unexpected that on occasion an of-

cifer will misuse that authority by engaging in assailtive conduct.
The precise circumstances of the assault need not be anticipated, so
long as the risk is one that is reasonably foreseeable.

Mary M. v. City of Los Angeles, 814 P.2d 1341, 1350 (Cal. 1991).

92. See Mary M., 814 P.2d at 1352 (“It is, after all, the state which puts
the officer in a position to employ force and which benefits from its use.’”
(quoting Louis L. Jaffe, Suits Against Governments and Officers: Damage Ac-
tions, 77 HARV. L. REV. 209, 229 (1963))); White, 212 Cal. Rptr. at 496 (“The
use of authority is incidental to the duties of a police officer. The County en-
j oys tremendous benefits from the public’s respect for that authority. There-
fore, it must suffer the consequences when the authority is abused.”). Thomas
Baty argues that when a municipality is the employer, there is even more rea-
son to favor liability. BATY, supra note 3, at 195-97. “The great power wielded
by such [municipal] organizations may induce us to prefer the principle of
their responsibility in all cases. It is not merely that the municipality is pow-
erful; but it is likewise ineluctable. It confronts the private person at every
turn . . . .” Id. at 197.

93. See Jaffe, supra note 92, at 229. “If the award is in favor of the plain-
tiff, the state should . . . accept financial responsibility for the injury, whether
mere false arrest or gross brutality. It is, after all, the state which puts the
officer in a position to employ force and which benefits from its use.” Id.
(footnote omitted).
foreseeable as a general risk of an enterprise.\textsuperscript{86}

The absurdity that results from applying the “outrageous-
ness” standard is that a city might be held liable if an officer
uses excessive force to beat someone during an arrest but not if
he also rapes the person, based on the fact that the rape is more
outrageous than, and not as specifically foreseeable as, the beat-
ing.\textsuperscript{87} As one well-known commentator observed: “It is a cu-
rious state of affairs, in which the less badly treated a
complainant has been, the better are his prospects of getting
damages!”\textsuperscript{88}

\section*{B. Focusing on the Role of Job-Created Power or
Authority}

The best way to ensure that employers bear the costs asso-
ciated with their enterprises\textsuperscript{89} is to consider the degree that
job-created power or authority assists employees in committing
sexual assaults.\textsuperscript{90} Many of the courts that have found sexual
assaults to be outside of the scope of employment have failed to
consider the benefit that employers receive from granting
power to their employees.\textsuperscript{91} Private employers operate and de-

\textsuperscript{86.} Under respondeat superior, as contrasted with negligence, “we are not
looking for that which can and should reasonably be avoided, but with the
more or less inevitable toll of a lawful enterprise.” \textit{Id.} at 176.

\textsuperscript{87.} \textit{See} Mathurin v. Government of V.I., 398 F. Supp. 110 (D.V.I. 1975),
aff’d, 527 F.2d 645 (3d Cir. 1976). The Mathurin court found that beatings of
prisoners by Virgin Island government officers were within the scope of the
officers’ employment. \textit{Id.} at 116. The court stated that “the actions of the po-
ice officers were not so outrageous and excessively violent as to be outside
the scope of their employment.” \textit{Id.} If the “maltreatment” had reached a “level of
outright torture or brutality,” however, the officers would have been acting
outside the scope of employment. \textit{Id.} Thus, while holding the employer liable
under respondeat superior for the beatings of prisoners, the court might not
have imposed liability if the assaults also included rape because of its higher
level of “brutality” or outrageousness.

\textsuperscript{88.} \textit{Baty, supra} note 3, at 193; \textit{see} Atiyah, \textit{supra} note 12, at 201-02.

\textsuperscript{89.} \textit{See supra} notes 24-31 and accompanying text.

\textsuperscript{90.} “[I]t would be unjust in some circumstances to require an individual
injured by official wrongdoing to bear the burden of his loss rather than dis-
tribute it throughout the community.” White v. County of Orange, 212 Cal.
Sch. Dist., 359 P.2d 465, 467 (Cal. 1961)).

\textsuperscript{91.} \textit{See supra} notes 33-34, 36-44 and accompanying text. The fact that the
specific act of the employee does not benefit the employer should not be the
end of the inquiry. As the court in Doe v. Samaritan Counseling Center, 791
P.2d 344 (Alaska 1990), recognized, “[t]he counselor] was employed to provide
mental health counseling and although he was not authorized to become sexu-
ally involved with his clients, that contact occurred in conjunction with his le-
gitimate counseling activities.” \textit{Id.} at 348 (quoting Simmons v. United States,
2. The “Outrageousness” Standard

The “outrageousness” standard suffers from problems similar to those of the “motivation to serve” standard in that it is often mechanically applied. If the employee’s actions are “outrageous,” the employer escapes liability without regard to whether the conduct should be considered to be within the scope of employment. The result is that courts neglect the critical issue of whether the outrageous behavior is related to employment conditions or duties, thereby evading a determination of whether the action is a risk that should be allocated to the employer.83

When courts use the outrageousness standard, they are asking whether the risk is foreseeable, or whether it is so unusual or outrageous that it should not be characterized as part of the job.84 Courts that use this standard often unwittingly rely on negligence principles rather than on respondeat superior.85 Negligence focuses on what can reasonably be avoided. For example, under a negligence standard a school district would be liable if it hired a convicted child molester as a teacher without investigating his background. Respondeat superior, on the other hand, focuses on the risks of an enterprise; it is foreseeable that a teacher may abuse his authority, even though the precise manner in which he does so may not be specifically foreseeable. Foreseeability is relevant to respondeat superior only in an evaluation of what is a general foreseeable risk of a business. Thus, that which is a reasonably foreseeable risk for purposes of negligence is quite different from that which is

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83. See supra notes 24-31 and accompanying text.

84. See, e.g., Gambling v. Cornish, 426 F. Supp. 1153, 1155 (N.D. Ill. 1977) (employer not liable for rapes committed by police officers because the conduct was outrageous and not “expectable”); Desotelle v. Continental Casualty Co., 400 N.W.2d 524, 530 (Wis. Ct. App. 1986) (no employer liability for a sexual assault by an on-duty sheriff because such conduct “did not conform with that required and expected of a police officer” and was “disconnected from the type of services ordinarily contemplated”), review denied, 407 N.W.2d 560 (Wis. 1987).

85. Although “foreseeability is an expanding concept,” it is clear that “this kind of inquiry should not be involved where the question is one of vicarious liability.” James, supra note 14, at 175. The use of an outrageousness standard is a limitation on vicarious liability that comes “from a narrow concept of what is foreseeable, which would be appropriate enough on an issue of the master's negligence but [is] out of place in determining the scope of his servant's employment.” Id. at 189.
People are rarely employed to commit torts, but employers may put employees in positions where they can do so. For example, employing a therapist who will use transference, which places the patient in a vulnerable position, necessarily entails the danger of misuse and therefore should be considered a cost of doing business. The therapist was not employed to have a sexual relationship with the patient, but the therapist was placed in a position by the employer where he could abuse the patient's trust. Therefore, the risk of abuse is a cost associated with its enterprise and the employer should be liable. The fact that an assault is an intentional, rather than an unintentional, tort is not relevant. Either way, the employer creates a situation where the employee can commit a tort. As a matter of distributive justice, the employer, rather than the innocent victim, should bear the cost, because it is the employer who puts the employee in a position to commit an assault. Furthermore, imposing liability on the employer creates a strong incentive for the employer to exercise care in training and supervising employees.

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79. The Indiana Supreme Court stated:
The fact that this was a sexual assault is not per se determinative of the scope of employment question. A blanket rule holding all sexual attacks outside the scope of employment as a matter of law because they satisfy the perpetrators' personal desires would draw an unprincipled distinction between such assaults and other types of crimes which employees may commit in response to other personal motivations. . . . Other courts have recognized that the resolution of the question does not turn on the type of act committed or on the perpetrator's emotional baggage accompanying the attack. Rather, these courts indicate that the focus must be on how the employment relates to the context in which the commission of the wrongful act arose. Stropes v. Heritage House Childrens Ctr. of Shelbyville, Inc., 547 N.E.2d 244, 249 (Ind. 1989).

80. Indeed, in a case that was factually similar to Cosgrove v. Lawrence, discussed supra at notes 74-77, the Supreme Court of Alaska abandoned a strict "motivation to serve" test because it failed to effectuate the purpose of respondeat superior. See Doe v. Samaritan Counseling Ctr., 791 P.2d 344 (Alaska 1990). The Doe court recognized that the test "would too significantly undercut the enterprise liability basis of the respondeat superior doctrine" because the employer would not have to include such losses as a cost of its business. Id. at 349.

81. Under the "implied command" standard employers were never liable for the intentional torts of their employees because "it could not be implied that such conduct was ever authorized." Prosser and Keeton, supra note 12, § 70, at 505 (footnote omitted). Under the modern standard, however, "intentional torts may be so reasonably connected with the employment as to be within" the scope of employment. Id.

82. Although negligent supervision and hiring are torts separate from respondeat superior, it has been argued that liability based on respondeat supe-
derived by the employer in the initial grant of authority, such as when a landlord gives keys to an apartment building manager, these courts require the employer impliedly to command the sexual assault in order for there to be liability.

The implied command standard is inappropriate and obsolete. It was replaced by the "scope of employment" standard because it did not comport with modern notions of justice; 73 the implied command standard allowed employers to avoid liability simply because they did not impliedly command an assault, thereby defeating the justification of ensuring that enterprises pay the costs associated with the risks of their businesses. Without actually considering whether the assault is a risk of the employer's business, courts applying the implied command standard to sexual assaults automatically find no employer liability. For example, the court in Cosgrove v. Lawrence 74 recognized that the sexual misconduct of a therapist "began as a result, in part, of the mishandling of 'transference,'" 75 a psychotherapeutic phenomenon in which a patient projects "feelings, thoughts and wishes onto the analyst, who has come to represent some person from the patient's past." 76 Even though the assault grew out of legitimate treatment practices, the Cosgrove court found no employer liability because the defendant "was not employed to have sexual intercourse with patients." 77

Such reasoning is inconsistent with the justification for respondeat superior: "that the employer should be liable for those faults which may fairly be regarded as risks of his business, whether they are committed in furthering it or not." 78

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73. See supra notes 18-19 and accompanying text.
75. Id. at 845.
76. Stedman's Medical Dictionary 1622 (25th ed. 1990). In Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986), a clinical psychologist testified that a symbolic parent-child relationship exists in therapy; as the transference relationship progresses, "the client comes to experience the therapist as a powerful, benevolent parent figure." Id. at 1365. Successful transference is therefore crucial to the therapeutic process. Id.
77. Cosgrove, 520 A.2d at 847.
78. James, supra note 14, at 182. Professor James has criticized the tendency "to overemphasize individual items among these factors at the expense of underlying principle." Id.
employment, many courts apply the test in a narrow and mechanical way that ultimately thwarts the justification for respondeat superior. The motivation test helps courts determine whether the employee's actions are job related rather than personal, but courts frequently err in applying the test on a specific rather than a general level.

Courts that require the specific tortious conduct be "motivated to serve" the employer's interest are in effect reverting to the antiquated "implied command" standard. This is evident from modern cases in which courts recognize that the tortious activity began as a legitimate use of an employee's authority, but found no liability because of a lack of evidence that the sexual assault was authorized. Instead of focusing on the benefit

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69. See Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968) (respondeat superior rests on "a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities. It is in this light that the inadequacy of the motive test becomes apparent.").

70. The courts do not seem to have as much difficulty in sexual harassment cases. See Dias v. Sky Chefs, Inc., 919 F.2d 1370, 1375 (9th Cir. 1990) (stating, in the context of sexual harassment claims, that "the specific egregious act giving rise to an intentional tort claim will itself rarely be 'of a kind which the employee was hired to perform'; the appropriate inquiry is whether the employee committed the tort while performing, or in connection with, his job responsibilities"), vacated on other grounds, 111 S. Ct. 2791 (1991). Other courts have similarly rejected the claim that, because it is personally motivated, sexual harassment is outside of the scope of employment. See, e.g., Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc., 755 F.2d 599, 604-05 (7th Cir. 1985) (supervisory power used to enable sexual harassment is within the supervisor's scope of employment and the employer is liable); Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (in cases of quid pro quo sexual harassment, the employer is liable for the supervisor's conduct because "the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose"); Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979) ("We conclude that respondeat superior does apply here, where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy.").

71. According to the implied command standard, employers were liable for the actions of their employees only if an implied command from general authority could be inferred. See supra note 18 and accompanying text.

72. See Bates v. United States, 701 F.2d 737 (8th Cir. 1983). In Bates, the court recognized that the defendant, a military police officer, was on duty, had authority to detain civilians, and could make arrests "on any and all parts of the Army base." Id. at 739. Although the defendant stopped four teenagers to question them about a fabricated robbery, the court stated that even if this was construed to be within the scope of his employment, the ensuing rapes and murders could not possibly further his employer's business and thus the employer was not liable. Id. at 742; see also Padilla v. d'Avis, 580 F. Supp. 403, 408-09 (N.D. Ill. 1984) (no employer liability for a sexual assault committed by
standard, the standard should be applied to all situations involving sexual assaults by employees. Juries should decide whether the employee's position assisted the employee in committing the sexual assault. The court should not simply find respondeat superior inapplicable and refuse to apply the test, as the California Supreme Court did in John R., thereby depriving a jury of the opportunity to evaluate the impact of job-created authority.

IV. "SCOPE OF EMPLOYMENT" SHOULD ENCOMPASS SEXUAL ASSAULTS MADE POSSIBLE THROUGH JOB-CREATED POWER, AUTHORITY, OR ACCESS

Courts should adopt a definition of "scope of employment" that includes torts committed as a result of and during the exercise of job-created power or authority. This approach is consistent with some courts' present application of the job-created power standard.

In addition, "job-created power" should include "job-created access"—the power to gain access to the victim which the employee would not have had in the absence of his position. Requiring that the employee gain access in a way that the general public cannot ensures that the employer is held liable for costs associated with its enterprise but not for all acts of its employees. Thus, if the employee could have committed the sexual assault even if not employed, the assault would be unrelated to employment and not within the "scope of employment." On the other hand, if solely because of his job the employee gains access to an area from which the general public is barred, and if he subsequently uses that access to commit a sexual assault, then his tortious conduct is within the scope of his employment because he would not have been able to commit the act but for his status as an employee.

If job-created power is defined in this way, the test differs from the approach taken by a number of courts because it is applicable to a broad range of employment situations, not just to police officers or therapists. For example, it would apply to plumbers or electricians who gain access to a person's home through their employment.

The proposed standard best comports with the modern justification for respondeat superior by ensuring that employers are held liable for the harms that result from the risks of their
enterprises. Innocent victims would not bear the entire cost of an employee's sexual assault. Instead, employers would be required to take responsibility for the occasions when employees abuse job-created power. This is justified because employers derive benefits from the power granted to employees.

Employers also derive benefits from providing access to employees. Because the access is part of the job, any misuse of the access is a cost of doing business, and should therefore be absorbed by the employer. This standard ensures that employers, whether businesses or governmental entities, bear the costs of employee torts when related to employment.

Although courts would move closer to absolute liability by adopting this standard, imposing liability for sexual assaults made possible by power acquired through a job is not equivalent to absolute liability. A sexual assault can occur without job-created power even though the employee is on duty. The employer would not be liable in such a case. For example, if a gas station attendant sexually assaults a customer while pumping gas, the assault is not within the scope of his employment. The attendant has no job-created power over the customer and he has no job-created access to her because he could have acted in the same way even if he was not employed by the gas station.

Conversely, a uniformed police officer in a marked car is acting within the scope of his employment when he sexually assaults a motorist after using the authority of his position to pull her vehicle over and gain physical control over her. This would be true whether the officer was on or off duty. If a police officer is off duty, but uses his gun, badge, and thus the authority of his position as an officer to sexually assault a person, he is still using job-created authority in the commission of a tort. The employer would not be liable, however, for the sexual assault committed by an on-duty undercover police officer if the officer does not make use of the power of his position. Similarly, a teacher would also be acting within the scope of his employment if he molests a student and is able to do so because of the control he has through his position. A school janitor who assaults a student on a playground, however, would not be acting within the scope of his employment because the tortious

99. See supra notes 24-31 and accompanying text.
100. See supra notes 29, 91-93 and accompanying text.
101. Just as it is a risk for the employer to bear that an on-duty officer may abuse his power, there is a risk that an off-duty officer will do the same.
conduct would not be related to power derived from the job.102

An apartment building owner who employs a manager and gives him keys to all apartments would be liable if the employee uses the key to enter an apartment and sexually assaults a tenant. The employee has access to the apartment because of his position. Thus, the assault is made possible by the job-created power. If, on the other hand, the employee breaks into an apartment and assaults a tenant, the assault would not be in the scope of his employment because he was not assisted by his position and could have done the same thing in the absence of his employment.103

CONCLUSION

Courts are perplexed about whether sexual assaults by employees are risks that should be allocated to employers. Recent decisions have taken a more expansive view of what is within the scope of employment by focusing on whether the tortious conduct was related to job-created authority or power. Even these courts, however, have not applied the standard to all employers.

Courts should adopt the "job-created power" standard and apply it to all employers. They should define "job-created power" to include access to victims that employees would not have had in the absence of their positions. By focusing on job-created authority, courts will not draw arbitrary and ultimately contradictory distinctions between different types of employees. Instead, courts will ensure that employers bear the costs of their enterprises, thus assuring that employers have an incentive to take preventative measures, that costs are distributed among the enterprise's beneficiaries, and that innocent victims of sexual assaults will not also be victimized by lack of financial redress.

102. This example assumes that the assault did not occur because the janitor had access to an area that he otherwise would not have had.

103. Similarly, the employer would not be held liable if her employee, a pizza server, sexually assaults a customer at the restaurant, because the pizza server could do the same thing even if he was not an employee; the general public has access to the area. If the pizza server instead delivers the pizza to the customer's home, gains entry to her house because of his position, and then sexually assaults the customer, the employer would be liable if it is found that the employee would not have been able to gain access to the victim but for his employment position.