REFORMULATING VICARIOUS LIABILITY IN TERMS OF BASIC TORT DOCTRINE: THE EXAMPLE OF EMPLOYER LIABILITY FOR SEXUAL ASSAULTS IN THE WORKPLACE

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The most common form of vicarious liability subjects an employer (or principal) to liability for the torts an employee (agent) commits within the scope of employment. Under the motive test, an employee's tortious misconduct is outside the scope of employment when wholly motivated by personal reasons—a rule that almost invariably prevents the victims of sexual assaults from recovering against the employer, regardless of whether the employment relationship created the conditions that enabled the employee's wrongdoing. A few alternative approaches have reformulated vicarious liability to overcome the limitations of the motive test, which is based on agency law, but each one has largely foundered. The motive test rules the land.

Neither courts nor commentators have adequately considered whether vicarious liability can be reformulated in terms of basic tort doctrine independently of agency law. As a matter of established tort principles, the scope of vicarious liability is limited to the injuries caused by a tortious risk—one which the employment relationship foreseeably created. The tort formulation recognizes that the employment relationship creates a foreseeable risk that employees will be careless or overzealous and can commit torts while motivated to serve the employer, even if the employer did not authorize the tortious misconduct. When an employee's unauthorized tortious behavior is motivated solely by personal reasons, it would still be foreseeable and within the employer's scope of vicarious liability if the employment relationship elevated the foreseeable risk of such misconduct over the background level of risk that exists outside of the workplace. Sexual assaults can accordingly be foreseeable within certain types of employment settings, subjecting the employer to vicarious liability as a matter of basic tort doctrine.

The problem of sexual assaults in the workplace shows why the tort formulation of vicarious liability relies on a more realistic account of employee behavior as compared to its agency counterpart, which cannot persuasively explain why vicarious liability applies to any *form of employee behavior the employer did not authorize. Vicarious liability is best formulated as a doctrine of tort law, not as a component of agency law with its question-begging treatment of motive in the workplace.*

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INTRODUCTION

Recently, the Utah Supreme Court affirmed the dismissal of a chronic-pain patient's tort claim against the employer of a physician's assistant who allegedly "touched her sexually without permission and threatened to withhold medication if she did not perform sexual acts with him."[1] The employer was not vicariously liable for the employee's alleged sexual misconduct, the court concluded, because the employee's

[1] Burton v. Chen, 532 P.3d 1005, 1008 (Utah 2023).

tortious acts were not of the "general kind" he was "employed to perform."[2]

The court's ruling is unexceptional. Under the common-law doctrine of respondeat superior, an employer is vicariously liable only for the torts an employee commits within the scope of employment. As the U.S. Supreme Court observed in 1998, "[t]he general rule is that sexual harassment . . . is not conduct within the scope of employment" that can subject an employer to vicarious liability.[3]

In addition to the type of work, courts rely on the employee's motive for determining whether a given action was within the scope of employment.[4] Employees who sexually assault someone in the workplace rarely do so in order to serve their employers' interests, further shielding employers from vicarious liability.[5]

This inquiry and related ones involving the type of work and so on—hereinafter collectively called the "motive test"—are based on agency law.[6] This doctrinal foundation for vicarious liability has been criticized for over a century now on the ground that it unduly narrows the scope of an employer's tort liability.[7] The problem is particularly pronounced when employees commit intentional torts such as sexual assault that seem to be tied to the workplace in a manner the motive test misses, as the Utah case illustrates.[8]

An alternative approach rejects the motive test in favor of a general foreseeability tort standard, with courts in California first adopting this rule.[9] The approach was subsequently reformulated and adopted by the U.S. Court of Appeals for the Second Circuit in a much-discussed

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2 *Id.* at 1009.

3 Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 757 (1998).

4 *See*, *e.g.*, *Burton*, 532 P.3d at 1009 (inquiring, in the *respondeat superior* analysis, as to whether the tortfeasor employee was "motivated, at least in part" to serve his employer's interest).

5 *See id*. at n.4 (stating that the district court relied on the employee's motive to dismiss the plaintiff's claim of vicarious liability but deciding that it did not need to address that finding in light of its holding about the general nature of the conduct in question).

6 *See* Restatement (Third) of Agency § 7.07(2), at 198 (Am. L. Inst. 2006) ("An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment. . . . An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.").

7 *See, e.g.*, Harold J. Laski, *The Basis of Vicarious Liability*, 26 Yale L.J. 105, 128–31 (1916).

8 *See generally* Martha Chamallas, Lecture, *Vicarious Liability in Torts: The Sex Exception*, 48 Val. U. L. Rev. 133, 193 (2013) (relying on cases of sexual assault as a reason to reject the motive test in part "[b]ecause sexual abuse committed by employees is all too common," and so the "law should not treat it as exceptional").

9 For discussion of these cases, see *Farmers Ins. Grp. v. County of Santa Clara*, 906 P.2d 440, 447–50 (Cal. 1995). Because federal courts rely on California law to determine the law of

admiralty case,[10] "one of the most cited respondeat superior cases involving an intentional tort."[11] The Canadian Supreme Court adopted this test in a landmark case,[12] which the House of Lords subsequently relied on to adopt this same basic approach to vicarious liability.[13]

Courts and commentators uniformly describe this foreseeability standard as being more general than the case-specific "foreseeably unreasonable risk of harm that spells negligence"; it "bears far more resemblance to that which limits liability for workmen's compensation. . . . The employer should be held to expect risks . . . which arise 'out of and in the course of' his employment of labor."[14] This generalized foreseeability standard, defined in terms of the "harm likely to flow" from the enterprise's "long-run activity," imputes more risk to the business than does the motive test.[15] According to its proponents, this generalized foreseeability standard "reflects the central justification for respondeat superior: that losses fairly attributable to an enterprise—those which foreseeably result from the conduct of the enterprise—should be allocated to the enterprise as a cost of doing business."[16]

By analogizing respondeat superior to workers' compensation law, advocates of the general foreseeability approach are invoking the theory of enterprise liability.[17] On this view, for the same reasons that workers' compensation subjects employers to strict liability for

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Guam, the Second Circuit adopted this test in a case governed by that body of law. *See* Taber v. Maine, 67 F.3d 1029, 1033–38 (2d Cir. 1995) (Calabresi, J.).

10 Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171–72 (2d Cir. 1968) (Friendly, J.).

11 Patterson v. Blair, 172 S.W.3d 361, 365 (Ky. 2005).

12 Bazley v. Curry, [1999] 2 S.C.R. 534, paras. 39–41 (Can.); Jacobi v. Griffiths, [1999] 2 S.C.R. 570, 571–73 (Can.).

13 Lister v. Hesley Hall Ltd. [2001] UKHL 22, [2002] 1 AC 215 (HL) [2, 28–29] (appeal taken from Eng.).

14 *Ira S. Bushey & Sons, Inc.*, 398 F.2d at 171–72 (quoting 2 Fowler V. Harper & Fleming James, Jr., The Law of Torts 1377–78 (1956)); *see also* Kirlin v. Halverson, 758 N.W.2d 436, 444 (S.D. 2008) ("'Foreseeability' as used in the *respondeat superior* context is different from 'foreseeability' as used for proximate causation analysis in tort law."); Bazley v. Curry, [1999] 2 S.C.R. 534, paras. 39–40 (Can.) (describing the inquiry as focusing on "general cause" defined in terms of the "foreseeability of the broad risks incident to a whole enterprise" as contrasted to the foreseeability of specific risks required by ordinary negligence liability); *Farmers Ins. Grp.*, 906 P.2d at 448 (same); *Taber*, 67 F.3d at 1034 (applying California law, which "equat[es] the scope of respondeat superior liability to the traditionally broader coverage mandated by workers' compensation statutes").

15 *Ira S. Bushey & Sons, Inc.*, 398 F.2d at 171 (quoting Harper & James, *supra* note 14, at 1377–78).

16 *Farmers Ins. Grp.*, 906 P.2d at 448.

17 *See, e.g.*, Huntsinger v. Fell, 99 Cal. Rptr. 666, 668 (Ct. App. 1972) (observing that "the social philosophy underlying the rule and its exceptions in the tort field is now substantially similar to that underlying workmen's compensation"); William O. Douglas, *Vicarious Liability and the Administration of Risk I*, 38 Yale L.J. 584, 588 (1929).

work-related injuries as a "cost of doing business," vicarious liability should also make employers strictly liable for the tortious harms their employees foreseeably inflict on others. In the mid-1980s, a leading torts treatise described enterprise liability as "the modern justification for vicarious liability" that involves "a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon the enterprise itself, as a required cost of doing business."[18]

The general foreseeability standard can subject an employer to vicarious liability for the sexual misconduct of an employee in the workplace. One court, for example, found that "as a general matter, [it is] foreseeable that police officers will misuse their authority to extract sexual favors from arrestees."[19]

The general foreseeability test has been persuasively justified as a matter of efficient deterrence[20] and basic fairness.[21] In a leading article calling for courts to apply this formulation of vicarious liability in cases of sexual assault, Martha Chamallas invokes the overlapping consensus about these "first principles" of tort law while observing that the motive test "finds little support in the academic literature."[22]

Most courts, however, have rejected the general foreseeability approach.[23] As conventionally formulated, it rests upon a highly contestable rationale for tort liability—that enterprises should be subject to liability without fault because enterprise-caused injuries

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18 W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser and Keeton on the Law of Torts § 69, at 500 (5th ed. 1984).

19 Sherman v. State Dep't of Pub. Safety, 190 A.3d 148, 175 (Del. 2018); *see also* Mary M. v. City of Los Angeles, 814 P.2d 1341, 1350 (Cal. 1991) ("Sexual assaults by police officers are fortunately uncommon; nevertheless, the risk of such tortious conduct is broadly incidental to the enterprise of law enforcement, and thus liability for such acts may appropriately be imposed on the employing public entity."). For application of the test subjecting an employer to vicarious liability for an employee's sexual assault of emotionally disturbed children in a treatment facility, see Bazley v. Curry, [1999] 2 S.C.R. 534, paras. 2, 58 (Can.).

20 For the leading account, see Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv. L. Rev. 563 (1988). For elaboration of the underlying deterrence rationale, see Catherine M. Sharkey, *Institutional Liability for Employees' Intentional Torts: Vicarious Liability as a Quasi-Substitute for Punitive Damages*, 53 Val. U. L. Rev. 1 (2018); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231 (1984).

21 For the leading account, see Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 Mich. L. Rev. 1266, 1270 (1997).

22 Chamallas, *supra* note 8, at 139, 150–59 (describing the general foreseeability standard in terms of "enterprise causation" that "is central to both arguments" of efficient deterrence and fairness).

23 *See* Daniel Harris, *The Rival Rationales for Vicarious Liability*, 20 Fla. State U. Bus. Rev. 49, 65 (2021) ("This theory is the law in California, but it is not always followed. Elsewhere, the agency approach [or the motive test] is the general rule, subject to occasional exceptions.").

should be treated as a "cost of doing business." If this were a sufficient rationale for tort liability, then enterprises should be strictly liable for *all* injuries they cause, regardless of any negligence by an employee or the enterprise itself. In part because enterprise liability has no principle for limiting the scope of strict liability, it "has never been accepted by the tort system as a whole."[24]

A related alternative to the motive test subjects an employer to vicarious liability if the employee "was aided in accomplishing the tort by the existence of the agency relationship."[25] Some courts have applied this "aided-by-agency" theory to impose vicarious liability on employers for the sexual misconduct of their employees while engaged in work-related activities.[26]

Like the enterprise liability rationale, most courts have rejected the aided-by-agency theory, worried about "the danger of adopting an exception that essentially has no parameters and can be applied too broadly."[27] Indeed, this theory is spelled out in a section of the *Restatement (Second) of Agency* that the American Law Institute never formally adopted and which does not reappear in the *Restatement (Third) of Agency*.[28] "Shunned even by the organization that originated the theory, the aided-by-agency theory does not appear ripe for any expansion."[29]

As this brief survey of vicarious liability demonstrates, the various attempts to reformulate vicarious liability have largely foundered. The motive test rules the land. But these efforts to displace the motive test are based on an important insight: The motive test misses something basic about vicarious liability, as intentional torts such as sexual assault make painfully clear. In the Utah case described earlier, the workplace put the employee in a position of power over a vulnerable victim that he would not otherwise have had—the ability to withhold prescriptions for pain medication from a chronic-pain patient.[30] This fact ought to be relevant for evaluating whether the employee's sexual assault was properly attributable to the employment relationship, and yet the motive test ignores that fact entirely.

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24 Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. Cal. L. Rev. 1739, 1750 (1996).

25 Restatement (Second) of Agency § 219, at 481 (Am. L. Inst. 1958).

26 *E.g.*, Sherman v. State Dep't of Pub. Safety, 190 A.3d 148, 179 (Del. 2018).

27 Zsigo v. Hurley Med. Ctr., 716 N.W.2d 220, 229 (Mich. 2006). For further discussion, see *infra* notes 86–90 and accompanying text.

28 Restatement (Second) of Agency § 219, at 174 (Am. L. Inst. Supp. 2023).

29 Martin v. Tovar, 991 N.W.2d 760, 768 (Iowa 2023).

30 Burton v. Chen, 532 P.3d 1005, 1008 (Utah 2023).

Any attempt to overcome the limitations of the motive test by reformulating vicarious liability faces an evident methodological problem. Tort scholars have invoked the concerns of both efficiency and fairness to endorse the enterprise liability rationale for vicarious liability, whereas the motive test finds little or no support from this type of legal analysis. Nevertheless, the vast majority of courts have rejected the enterprise liability rationale and retained the motive test, fully illustrating the difficulty of reforming vicarious liability via primary reliance on abstract normative principles such as efficient deterrence or the fairness of the liability rule.

An alternative path is worth exploring. As I will try to establish, vicarious liability has a doctrinal rationale that is immanent in the case law but not yet clearly identified. The animating idea finds expression in various doctrines that subject employers to vicarious liability even when employees act outside the formal scope of the agency relationship, such as when an employee engages in unauthorized tortious misconduct while motivated to serve the employer's interest. Basic tort doctrine persuasively justifies these forms of vicarious liability, unlike agency law, which simply does not have the resources for justifying an employer's liability anytime the employee steps outside the formal confines of the agency relationship.

When formulated as a rule of tort law rather than as agency law, the scope of vicarious liability is limited to the injuries caused by a tortious risk for which the employer is responsible—one which the employment relationship foreseeably created. This inquiry is no different from the one courts use to determine the scope of liability in ordinary tort cases, whether based on negligence or strict liability, distinguishing it from the workers' compensation-esque general foreseeability standard for vicarious liability that has not fared well in the courts.

Whereas agency law cannot persuasively explain why vicarious liability applies to an employee's unauthorized tortious misconduct, the tort rationale recognizes that the employment relationship creates a foreseeable risk that employees will be careless or overzealous and can commit torts while serving the employer. The risks stemming from the motive to serve are a foreseeable consequence of the employment relationship, but employees are autonomous actors who can predictably misbehave in other ways as well. Motive, while clearly relevant, does not limit the tortious scope of vicarious liability which can extend to reach other risks the employment relationship foreseeably creates, such as certain forms of employee sexual misconduct in the workplace.

The argument proceeds in three parts. Part I more fully describes how courts have derived respondeat superior from agency law, which inherently limits an employer's vicarious liability to cases in which the

employee had some purpose of serving the employer's interests. Part I then explains why so many courts adhere to the motive test despite concerted efforts to displace it. Part II reconceptualizes vicarious liability as a tort doctrine that defines the conditions under which an employer should be legally responsible for the conduct of an employee. The basic tort requirements for establishing such responsibility are embodied in the tortious risk standard courts use to determine the scope of liability for rules of both negligence and strict liability. By applying this same risk standard, courts can account for the different ways in which an employee's motivations affect the scope of vicarious liability. Part III then uses the problem of sexual assault to show why tort law provides the most defensible method for determining the scope of vicarious liability. Vicarious liability should not be tied to agency law and the motive test; it is properly grounded in tort law.

I
The Current State of Vicarious Liability

The dominant approach to respondeat superior is based on agency law and its reliance on the motive test for determining the scope of vicarious liability. Alternative approaches reject the motive test but are not formulated in terms of basic tort doctrine.

A. Agency Relationships and the Motive Test for Vicarious Liability

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and [be] subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[31] The consensual agency relationship can also be contractual, but not necessarily so.[32]

The "person" who, as principal, creates an agency relationship is often a corporation, a legal personality who can act in the real world only through the conduct of its agents. The agency relationship "endow[s]" the agent "with the capacity to alter the principal's legal rights and duties as to third parties."[33] Hence, "the characteristic feature

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[31] Restatement (Third) of Agency § 1.01, at 17 (Am. L. Inst. 2006).

[32] *Id.* § 1.01 cmt. d, at 21 ("Many agents act or promise to act gratuitously. While either acting as an agent or promising to do so creates an agency relation, neither the promise to act gratuitously nor an act in response to the principal's request for gratuitous service creates an enforceable contract.").

[33] Gabriel Rauterberg, *The Essential Roles of Agency Law*, 118 Mich. L. Rev. 609, 616 (2020).

which justifies agency as a title of the law," as Oliver Wendell Holmes, Jr. explained long ago, "is the absorption *pro hac vice* of the agent's individuality in that of his principal."[34] The identity of a corporation is nothing other than the absorption of its employees' individualities via the agency relationship.

Holmes famously criticized the dogmatic legal fiction that merges the principal and agent into a legal unity based on archaic notions of status, paradigmatically embodied in the master-servant relationship.[35] Like other legal fictions, the identification doctrine has now fallen "out of favor," in large part because status relationships do not "provide guidance in a world where social interactions are organized very differently."[36]

But even though the identification doctrine no longer holds sway, it is still highly relevant for our purposes: "As an explanation for the principal's liability, the identification doctrine is perfect . . . ."[37] The doctrine has this explanatory power because it is a "simple rendering" of the modern characterization of agency law as a set of rules that treat "acts accomplished through the use of the agent as if they were accomplished by the principal's faculties alone."[38] The identification doctrine is also "closely connected with another [fiction] on which a great deal of law currently rests—namely the fiction of corporate personality" embodied in the personalities of its employees.[39] For these reasons, we will analyze the agency rationale for vicarious liability in terms of the identification doctrine, even though, as a formal matter, modern agency law rejects this fiction.[40]

Respondeat superior is a species of vicarious liability limited to the employment relationship which was called the master-servant rule under the early common law.[41] Though deservedly obsolescent, the label of a master-servant relationship conveys an essential aspect of the agency relationship—the ability of the principal (or master) to control the conduct of the agent (or servant).[42] When a principal's liability is

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34 Oliver Wendell Holmes, Jr., The Common Law 232 (1881).

35 Oliver Wendell Holmes, Jr., *Agency II*, 5 Harv. L. Rev. 1, 14–22 (1891).

36 Paula J. Dalley, *A Theory of Agency Law*, 72 U. Pitt. L. Rev. 495, 517–18 (2011).

37 *Id.* at 517.

38 *Id.* at 499 & n.4.

39 P.S. Atiyah, Vicarious Liability in the Law of Torts 19 (1967).

40 Restatement (Third) of Agency § 1.01 cmt. c, at 20 (Am. L. Inst. 2006) ("Despite their agency relationship, a principal and an agent retain separate legal personalities. Agency does not merge a principal's personality into that of the agent, nor is an agent, as an autonomous person or organization with distinct legal personality, merged into the principal.").

41 *Id.* § 2.04 & cmt. a, at 139–40.

42 The "traditional definition of a servant is that he is a person employed to perform services in the affairs of [the master or principal], whose physical conduct in the performance

based on an agent's conduct that the principal had authorized and therefore controlled, the reason for holding the principal liable for the agent's conduct is obvious: "[H]e who does a thing through another does it himself."[43]

By effectively making the agent the "*alter ego*" or "the other self" of the principal, the agency relationship has further implications for the ability of an agent to bind the principal.[44] Under the doctrine of apparent authority, even if an agent did not have the authority to do so, she can still bind the principal with obligations owed to a third party who "reasonably believe[d] the actor ha[d] authority to act on behalf of the principal" if "that belief is traceable to the principal's manifestations."[45] After all, ordinary individuals can be equitably estopped from denying a false or misleading impression that others had reasonably relied on to their detriment.[46] So, too, the doctrine of apparent authority equitably estops a principal from denying that its agent as alter ego had the requisite authority to engage in conduct when others reasonably believed the agent had such authority.[47]

The unity of principal and agent also enables the agent to engage in other forms of unauthorized behavior that have legal consequences for the principal, including tortious misconduct that was motivated in part by a desire to serve the principal. This form of vicarious liability ensures that for liability purposes, the principal-agent relationship is treated as a monolith no different from an ordinary individual:

> Imagine if . . . employers were only liable for authorized torts. Corporations could effectively insulate themselves from liability by ordering all their agents to behave in a careful, lawful manner and then claiming that any departures from that prescription were unauthorized. The result would be a two-tiered system of justice. Ordinary human beings would be held responsible for what they actually did (no matter how upright their New Year's resolutions might have been). Corporations, by contrast, would only be accountable for what they officially meant to do. The largest and most dangerous legal persons would be effectively above the law.[48]

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of the services is controlled, or is subject to a right of control," by the master or principal. KEETON ET AL., *supra* note 18, § 70, at 501.

43 *Id.* § 69, at 500.

44 Floyd R. Mechem, *The Nature and Extent of an Agent's Authority*, 4 MICH. L. REV. 433, 437 (1906).

45 RESTATEMENT (THIRD) OF AGENCY § 2.03 (AM. L. INST. 2006).

46 *See* RESTATEMENT (SECOND) OF TORTS §§ 872, 894 (AM. L. INST. 1979).

47 *See* 12 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 35:13, at 327 (4th ed. 2012) (stating that "in most cases involving apparent authority, the doctrine of apparent agency is essentially integral with that of estoppel").

48 Harris, *supra* note 23, at 55.

The identification doctrine effectively turns the principal and agent into a single legal actor, explaining why that monolith is subject to the same liability rules governing the conduct of ordinary human beings. Having tortiously injured someone, the monolith—both the principal and the agent—are subject to liability.

Control unifies the principal and agent into a single legal personality for liability purposes. However, "although an employer's ability to exercise control is an important element in justifying respondeat superior, the range of an employer's effective control is not the limit that respondeat superior imposes on the circumstances under which an employer is subject to liability."[49] The employer's exercise of effective control through the actual grant of authority, therefore, does not limit respondeat superior. When an employee engages in unauthorized conduct motivated to serve the employer, the requisite control instead is aspirational in the sense that "[a]n employer's ability to exercise control over its employees' work-related conduct enables the employer to take measures to reduce the incidence of tortious conduct."[50] The employer's opportunity to control the employee is sufficient for liability purposes; actual control at the time of the employee's misconduct is not required.

In the absence of any such control, what would otherwise be an agency relationship is transformed into an independent-contractor relationship that does not ordinarily subject the employer or any other hiring party to vicarious liability.[51] In these cases, the employer could exercise control by terminating its relationship with the independent contractor, but that is not enough to establish vicarious liability.

By implication, an employer's ability to control an employee's unauthorized conduct by firing the rogue employee does not persuasively explain why the employer is vicariously liable for that behavior. The requisite control must instead involve the employer's ability to manage how the employee carries out the authorized activities. But the employer's control over authorized activities begs the question of why it can be unified with the employee into a single legal entity for purposes of vicarious liability when the employee acts in an unauthorized manner.

The requisite unity is attained by the motive test for determining whether an employer is subject to liability for an employee's tortious

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49 RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. b, at 199 (AM. L. INST. 2006).

50 *Id.* at 200.

51 *See, e.g.*, Hill v. City of Horn Lake, 160 So. 3d 671, 676 (Miss. 2015) (relying on control to distinguish the master-servant relationships from independent-contractor relationships); Anderson v. PPCT Mgmt. Sys., Inc., 145 P.3d 503, 507–08 (Alaska 2006) (observing that "the most important factor is whether the alleged master had the right to control the manner of performance of the work").

conduct. "An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer."[52] By definition, an employee who does not further any purpose of the employer cannot be identified as the employer's alter ego, exempting the employer from liability based solely upon the unified legal personality of the two parties as embodied in the agency relationship. "When an employee commits a tort with the sole intention of furthering the employee's own purposes, and not any purpose of the employer, it is neither fair nor true-to-life to characterize the employee's action as that of a representative of the employer."[53]

The motive test suffers from the obvious challenge of identifying the type of motivation sufficient to serve any interest of the employer. For example, empirical study "suggests that happier workers are more productive."[54] If so, why doesn't *any* act that improves the employee's well-being improve productivity and thereby serve a purpose of the employer?

Because of this problem, courts sometimes undertake a supplemental analysis that helps avert the difficulty of confronting the purpose question head-on; they ask instead "whether the agent's conduct is of the general kind the agent is employed to perform."[55] However, tying the conduct to the workplace in a spatial or temporal manner is no longer realistic in a world where work is increasingly conducted at home throughout the day. Consequently, the scope of vicarious liability largely reduces to the question of whether the employee was motivated at least in part to serve an interest of the employer, despite the inherent ambiguities of identifying the type of motive that is relevant for this purpose.[56]

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[52] Restatement (Third) of Agency § 7.07(2), at 198 (Am. L. Inst. 2006).

[53] *Id.* § 7.07 cmt. b, at 201.

[54] Andrew J. Oswald, Eugenio Proto & Daniel Sgroi, *Happiness and Productivity*, 33 J. Lab. Econ. 789, 790, 791 (2015) (reporting results of laboratory trial finding that "happiness treatments" improve productivity by "approximately 10-12%," and that individuals who suffered recent tragedies in their families "are disproportionately ones who had significantly lower productivity" at the start of the experiment); *see also* George Ward, Jan-Emmanuel De Neve & Christian Krekel, *It's Official: Happy Employees Mean Healthy Firms*, London Sch. Econ. Bus. Rev. (July 18, 2019), https://www.weforum.org/agenda/2019/07/happy-employees-and-their-impact-on-firm-performance [https://perma.cc/YJ4H-GK8N].

[55] Burton v. Chen, 532 P.3d 1005, 1009 (Utah 2023); *see also, e.g.*, Marez v. Lyft, Inc., 261 Cal. Rptr. 3d 805, 814 (Ct. App. 2020) (applying the motive test, but adding that "there must be a nexus between the employee's tort and the employment to ensure that liability is properly placed upon the employer" (citation and quotation omitted)).

[56] *See* Restatement (Third) of Agency § 7.07 cmt. b (Am. L. Inst. 2006) (relying exclusively on the motive test in part for this reason).

When wholly derived from agency law, vicarious liability is "based on the idea that agents act as extensions of their principals' legal personality,"[57] explaining why the scope of vicarious liability is inherently limited by the motive test, coupled with the prospect of control (which, again, differentiates between employees and independent contractors). All of this explains why the legal fiction of merging the identity of the agent into the principal is a "perfect" explanation "for the principal's liability."[58]

In his critique of this legal fiction, Holmes argued that it does not adequately justify treating a faultless principal as a tortfeasor simply because the agent committed an unauthorized tort while serving some purpose of the principal:

> I assume that common-sense is opposed to making one man pay for another man's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility,—unless, that is to say, he has induced the immediate wrong-doer to do acts of which the wrong, or, at least, wrong, was the natural consequence under the circumstances known to the defendant.[59]

Regardless of his other arguments about vicarious liability, Holmes is surely correct that it must satisfy the "ordinary canons of legal responsibility." Unlike agency law, tort law defines an actor's responsibility in relation to the foreseeable risks of harm threatened by the risky conduct in question—its "natural consequences," as courts of his era framed the inquiry.[60] Characterizing vicarious liability as a question of tort law unmasks a fundamental problem for any limitation of vicarious liability based on agency law alone, such as the motive test. To serve as a tort doctrine, vicarious liability must satisfy the "ordinary canons of legal responsibility" within tort law.

B. The General Foreseeability Formulation of Vicarious Liability

In conceptualizing vicarious liability as a rule of tort law rather than agency law, courts and scholars deem it to be a species of strict

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57 Harris, *supra* note 23, at 49.

58 Dalley, *supra* note 36, at 517.

59 Holmes, *supra* note 35, at 14.

60 *See* Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 74 (1991) ("Almost all the courts announced a general test of proximate cause that embodied the notions of natural, ordinary consequences of defendant's wrongful conduct."). For discussion of why this test for proximate or legal cause now centers on a foreseeability inquiry, see *infra* Section II.B.

liability—the vicariously liable employer is strictly liable for an employee's work-related torts. Vicarious liability does not require proof of fault on the employer's part, nor does it displace the default rule of negligence liability.[61] Rather than rely on vicarious liability, a tort plaintiff can recover by proving that the employer was negligent in hiring or supervising the employee—a form of liability that can justifiably result in a punitive damages award when the employer engaged in flagrant misconduct, unlike forms of vicarious liability that involve no culpable misconduct on the employer's part.[62] In the absence of the employer's fault, vicarious liability functions as a rule of strict liability and is conventionally understood in that manner.[63]

Once framed as a tort rule of strict liability, vicarious liability requires some rationale for departing from the default rule of negligence liability. "There may be reasons for making innocent *A* pay for *B*'s defaults, but they are no part of a philosophy that rests liability on personal moral shortcoming."[64]

When considering rules of strict liability, courts and scholars throughout most of the twentieth century were deeply influenced by the widespread adoption of workers' compensation statutes in the early part of the century.[65] In the ensuing decades, tort scholars sought to identify the justifications for workers' compensation in an effort to determine whether other areas of tort law required similar reforms:

> It was widely accepted that losses from injuries to workers represented a "cost" of enterprise and that the compensation statutes served to internalize these costs to the responsible corporate decision makers. It was also accepted that businesses could bear these costs more adequately than injured workers could because businesses could pass them along to consumers in the price of their products.[66]

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61 Restatement (Second) of Agency § 219(2)(b) (Am. L. Inst. 1958).

62 *See generally* Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. Cal. L. Rev. 263 (2008) (describing how and why punitive damages are formulated to punish the defendant for having egregiously violated the duty to exercise reasonable care towards the plaintiff).

63 *See, e.g.*, Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts ch. 37 (2d ed. & 2023 update) (locating vicarious liability within the more general category, "Innocent Interference with Person or Property: Strict Liability and Its Modifications"); Schwartz, *supra* note 24, at 1740–41 ("[W]hen the employer ends up bearing liability, it is only because of the strict liability doctrine of vicarious liability . . . .").

64 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, Harper, James and Gray on Torts § 26.1 (3d ed. 2006 & Supp. 2023–24).

65 *See* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461, 466 (1985) (highlighting the efforts of tort scholars to reconcile the common law and theories of justification for workers' compensation).

66 *Id.* at 466 (citations omitted).

These two concepts of cost internalization and risk spreading are integral to the theory of enterprise liability that Legal Realist scholars developed.[67] According to this theory, strict liability should apply to business-caused injuries for two basic reasons: It internalizes the cost of injury to the enterprise, and it optimally spreads risk.[68] The concept of cost internalization is related to deterrence or risk reduction. The financial incentive that businesses have to reduce costs would lead them to reduce their liability costs by adopting safety measures and reducing injuries (and liability payments). The concept of risk distribution is based on the premise that as compared to the potentially ruinous costs faced by an individual whom the enterprise has injured, the enterprise is in a better position to bear those injury costs by spreading them across all customers of the business via small price increases.

The theory of enterprise liability strongly influenced the development of strict products liability in the mid-twentieth century.[69] The concepts of cost internalization and risk spreading were among the list of rationales providing "a considerable impetus" for this emergent form of strict liability according to William Prosser in his 1941 treatise.[70] In 1944, Justice Roger Traynor's influential concurrence in *Escola v. Coca-Cola Bottling Company* heavily relied on Prosser's work.[71] "Traynor's *Escola* opinion came at a time when strict liability theory was in an embryonic state; he gave it a model for practical application."[72] Traynor did not develop the theory of enterprise liability, but he was the first to see clearly how it would apply to the problem of product-caused injuries. Consequently, Traynor has been called the "judicial architect" of enterprise liability.[73]

"It is not surprising that, with the principle of loss-distribution so well recognised" in these areas, "it was soon appreciated that precisely the same considerations applied to cases of vicarious liability."[74] Hence Traynor's embrace of enterprise liability was not limited to product cases; he applied that same logic to justify expanding vicarious liability

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67 For extensive discussions of the development of enterprise liability, see Virginia E. Nolan & Edmund Ursin, Understanding Enterprise Liability: Rethinking Tort Reform for the Twenty-First Century (1995); Priest, *supra* note 65, at 465–519.

68 *See* Priest, *supra* note 65, at 463.

69 *See generally id.* (developing this thesis).

70 William L. Prosser, Handbook of the Law of Torts 688–93 (1941).

71 For a detailed comparison, see G. Edward White, Tort Law in America: An Intellectual History 198–201 (1980). "Prosser and Roger Traynor were friends and often intellectual allies: their partnership was a significant event in the intellectual history of torts in America." *Id.* at 179.

72 *Id.* at 200.

73 Nolan & Ursin, *supra* note 67, at 114.

74 Atiyah, *supra* note 39, at 24.

beyond its agency limits to encompass the torts that employees commit at the workplace, even if done intentionally and with malice.

In *Carr v. William C. Crowell Company*, the plaintiff was hit by a hammer that the defendant's employee threw at him following an argument at a construction site.[75] The defendant employer argued that the motive test barred the claim of vicarious liability for two obvious reasons: "the throwing of the hammer did not further defendant's interests as an employer," nor could the employee "have intended by his conduct to further such interests."[76] Relying on the principle of enterprise liability that businesses should internalize the costs of doing business, Traynor concluded that the employer should be vicariously liable regardless of the motive test: "It is sufficient . . . if the injury resulted from a dispute arising out of the employment."[77]

Rather than depending on the employee's motive, this inquiry asks whether the workplace foreseeably created the risk in question. As Traynor explained, "Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional makeup."[78] Because "[t]hese expressions of human nature are incidents inseparable from working together," they predictably create "risks of injury" that "are inherent in the working environment."[79] California courts subsequently developed this foreseeability-based conception of vicarious liability, expressly justifying it as a form of enterprise liability.[80]

Outside of California, the motive test for vicarious liability was most famously rejected in a federal admiralty case governed by the common law of torts. In *Ira S. Bushey & Sons, Inc. v. United States*, Judge Henry Friendly concluded that vicarious liability is based "in 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."[81]

For Judge Friendly, the proper formulation of vicarious liability is also based on a general foreseeability standard. "[C]haracteristic" accidents are those that are "likely to flow from [an enterprise's]

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75 171 P.2d 5, 6 (Cal. 1946).
76 *Id.* at 6–7.
77 *Id.* at 7.
78 *Id.* at 7–8 (internal quotations and citations omitted).
79 *Id.* at 8.
80 *See supra* notes 6–16 and accompanying text.
81 398 F.2d 167, 171 (2d Cir. 1968).

long-run activity in spite of all reasonable precautions on [its] own part."[82] The inquiry in this regard "bears far more resemblance to that which limits liability for workmen's compensation than to the test for negligence. The employer should be held to expect risks . . . which arise 'out of and in the course of' his employment of labor."[83]

Like its California counterpart, this version of vicarious liability relies on an analogy to workers' compensation laws. Its attendant rationale for strict liability, though, is framed in terms of fairness—the "deeply rooted sentiment that a business enterprise" should incur liability for the accidents that are "characteristic" of its business—rather than the instrumental concerns of cost internalization and risk spreading.

And like the enterprise liability rationale for vicarious liability, *Bushey* frames the liability inquiry in a manner that would seem to justify too much liability. As Gary Schwartz points out in a cogent critique of any rule that bases liability solely on the "characteristic" accidents of the enterprise:

> The harms of knife cuts are in some sense "characteristic" of the distribution of knives; adverse side effects are "characteristic" of the manufacture of prescription drugs; and injuries to passengers are evidently "characteristic" of the operation of a bus system. Yet our tort system shows no interest in imposing automatic liability on the companies that produce knives and drugs and that operate buses. Whatever our system's rules of strict liability, they exclude such results.[84]

The same problem inheres within the enterprise liability rationale for vicarious liability. Whether justified for instrumental reasons (as in California) or as a matter of fairness (*Bushey*), enterprise liability furthers the goals of cost internalization and risk spreading. Both goals would be better served by holding knife distributors, drug manufacturers, and bus operators strictly liable for *all* harms they foreseeably cause, rather than only those caused by tortious employee behavior or the enterprise's negligence. The rationale for enterprise liability accordingly entails "abandoning the whole concept of vicarious liability as it is known today" in order to replace it with a system of strict liability for all business-caused harms.[85]

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[82] *Id.*

[83] *Id.* at 171–72 (quoting Harper & James, *supra* note 14, at 1377–78).

[84] Schwartz, *supra* note 24, at 1750.

[85] Atiyah, *supra* note 39, at 28; *see* Priest, *supra* note 65, at 505 (explaining why the logic of enterprise liability would justify making product manufacturers strictly liable for all product-related injuries and not merely those attributable to defects).

The absence of an identifiable limiting principle also plagues the aided-by-agency rationale for vicarious liability in the *Restatement (Second) of Agency*, which can subject an employer to vicarious liability for an employee's tort when the employee "was aided in accomplishing the tort by the existence of the agency relation."[86] As the U.S. Supreme Court observed, "[i]n a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims."[87] Hence in rejecting this theory of liability, "courts . . . typically explain" that the "agency relation by itself could expose the employer to nearly limitless liability, involving situations that fall well beyond a fair assessment of the employer's responsibility."[88] The American Law Institute has since expressly disavowed the aided-by-agency theory,[89] which, in any event, was arguably intended to apply only to cases of apparent authority rather than to foreseeable harms in general.[90]

In their efforts to reformulate vicarious liability as a matter of tort law based on foreseeability or related conceptions of causal responsibility, courts and scholars have used multiple justifications that all suffer from the same flaw: Each one lacks a limiting principle that squares with the rest of tort law. Consequently, most court across the country have rejected these alternative formulations of vicarious liability. The motive test is still the majority rule by a wide margin across the country.[91]

II
Reformulating Vicarious Liability as a Tort Doctrine

Vicarious liability based on agency law is limited by the motive test.[92] But as a tort doctrine, vicarious liability does not have to be limited by agency law for the same reason that tort rules governing

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86 Restatement (Second) of Agency § 219(2)(d) (Am. L. Inst. 1958).

87 Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760 (1998).

88 E.S. *ex rel.* G.S. v. Brunswick Inv. Ltd., 263 A.3d 527, 540 (N.J. Super. Ct. App. Div. 2021) (quoting Daniel M. Combs, Note, Costos v. Coconut Island Corp.*: Creating a Vicarious Liability Catchall Under the Aided-by-Agency-Relation Theory*, 73 U. Colo. L. Rev. 1099, 1105 (2002)).

89 Restatement (Second) of Agency § 219, at 174 (Am. L. Inst. Supp. 2023).

90 *Id.* cmt. e; *see also* Combs, *supra* note 88, at 1103–06 (locating these limitations within the text and related commentary of the *Restatement (Second) of Agency*).

91 *See* Restatement (Third) of Torts: Miscellaneous Provisions § 5 cmt. k (Am. L. Inst., Tentative Draft No. 2, 2023) (noting that "[t]he great majority of American courts have not followed the 'characteristic risk' approach to respondeat superior and, instead, have applied the scope-of-employment test" formulated in terms of the employee's motive to serve, at least in part, the employer's interest.).

92 *See supra* Section I.A.

contractual relationships are not inherently circumscribed by contract law. "It is a settled and 'familiar proposition that not every duty assumed by contract will sustain an action sounding in tort.' There are situations, however, when responsibilities imposed by a contractual relationship are supplemented with tort duties."[93] So, too, the tort duty can supplement the obligations that agency law otherwise imposes on employers for the conduct of their employees. Vicarious liability formulated in terms of an independent tort duty is not necessarily tethered to agency law and its limitation of liability based on the motive test.

Any attempt to reformulate vicarious liability in terms of foundational principles for justifying tort law, whether based on efficiency or fairness, is unlikely to be widely persuasive.[94] As a practical matter, judges do not wholly defend their rulings with a particular rationale for tort liability. They instead apply "settled rules" to the case at hand or otherwise "develop new rules by extending established rules," neither of which typically involves or requires "a justification for the rules that these practices apply or develop."[95] The most promising way to reformulate vicarious liability is to rely on established tort doctrine.[96]

Moreover, numerous rationales for strict vicarious liability have been offered over the years. After surveying the case law in England and Scotland, one treatise writer in the early twentieth century identified nine different justifications for vicarious liability: Control, Profit, Revenge, Carefulness and Choice, Identification, Evidence,

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93 E. Shore Title Co. v. Ochse, 160 A.3d 1238, 1259 (Md. 2017) (citations omitted).

94 For leading accounts of the efficiency rationale for tort liability, see Guido Calabresi, The Cost of Accidents: A Legal and Economic Analysis (1970); Richard A. Posner, The Economics of Justice 192–202 (1981). This scholarship produced a backlash, prompting other scholars to develop alternative fairness or justice rationales for tort law. *See, e.g.*, Ernest J. Weinrib, The Idea of Private Law 132 (1995) (justifying tort liability as a matter of corrective justice based on "Kantian right" that "rules out the economic analysis of private law").

95 Stephen A. Smith, *Intermediate and Comprehensive Justifications for Legal Rules*, *in* Justifying Private Rights 63, 66 (Simone Diegling, Michael Crawford & Nicholas Tiverios eds., 2021).

96 *Cf.* McCarthy v. Olin Corp., 119 F.3d 148, 161 (2d Cir. 1997) (Calabresi, J., dissenting) ("Courts must see how these cases [raising new issues] fit into old categories before considering whether it is either necessary or proper to expand those old categories or to create new ones."). To be clear, this approach does not devalue the importance of interpreting tort law in terms of a single integrated justification based on first principles such as efficiency or an alternative rights-based conception of fairness or justice. These rationales are necessary for identifying an overlapping consensus of the pluralist values judges rely on to decide cases and can sharpen legal analysis within that domain. For a more rigorous defense of this jurisprudential approach, see Mark A. Geistfeld, *Unifying Principles Within Pluralist Tort Adjudication*, *in* Torts on Three Continents: Honouring Jane Stapleton (Kylie Burns et al. eds., forthcoming 2024) [hereinafter Geistfeld, *Pluralist Tort Adjudication*].

Indulgence, Danger, and Satisfaction.[97] According to this critic of the doctrine, virtually none of these rationales withstand scrutiny, and so "[i]n hard fact, the real reason for the employers' liability is the ninth: the damages are taken from a deep pocket."[98]

Vicarious liability undoubtedly gives the tort plaintiff access to a deep pocket—the employer ordinarily will have more assets than the employee who committed the tort and is personally liable for having done so. But this is an untenable rationale for vicarious liability. As Judge Friendly recognized in the *Bushey* case, "the fact that the defendant is better able to afford damages is not alone sufficient to justify legal responsibility, and this overarching principle must be taken into account in deciding whether to expand the reach of *respondeat superior*."[99]

This observation suggests an alternative way to reconceptualize vicarious liability. Friendly describes the need to "justify legal *responsibility*" for the vicariously liable employer, which is not the same as justifying a rule of strict liability—the conventional method of analyzing vicarious liability.[100] Similarly, in criticizing the application of vicarious liability to a faultless employer for the unauthorized tortious misconduct of an employee, Holmes argued that the doctrine violates "ordinary canons of legal responsibility."[101] Once one looks, it is not hard to find other instances in which vicarious liability is described in terms of legal responsibility. After all, "vicarious liability lies at the heart of all common law systems of tort law. It represents not a tort, but a rule of responsibility which renders the defendant liable for the torts committed by another."[102]

Conceptualizing vicarious liability as a form of legal responsibility is not controversial, although it would seem to lead straightforwardly back to the conventional tort formulation of vicarious liability as a rule of employer strict liability. An employer who is responsible for the torts employees commit within the scope of employment incurs liability regardless of any fault on its part; that is, the employer is strictly liable for the torts its employees commit. This formulation is correct as far as it goes. However, it elides a foundational question: Is the legal

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97 T. Baty, Vicarious Liability 148 (1916).

98 *Id.* at 154; *see also* Schwartz, *supra* note 24, at 1740 (concluding that the contemporary justifications for vicarious liability, "while interesting, tend to be incomplete, or persuasive only in part").

99 Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968) (citation omitted); *see also* Patterson v. Blair, 172 S.W.3d 361, 364 (Ky. 2005) ("Various judges and commentators have recognized this inadequacy [of the deep-pockets rationale] and have offered myriad alternate, or at least supplemental, and more robust rationales for the rule.").

100 *See supra* notes 61–64 and accompanying text.

101 Holmes, *supra* note 35, at 14.

102 Paula Giliker, Vicarious Liability in Tort: A Comparative Perspective 1 (2010).

responsibility entirely a matter of agency law, or does tort law instead provide the grounds for making the employer strictly liable for an employee's torts? Once the basis of responsibility has been established, the resultant rule of vicarious liability does make the employer strictly liable for an employee's torts, but the basis of responsibility determines whether vicarious liability applies in any given case.

A. Responsibility and the Scope of Tort Liability

Legal responsibility for tort purposes is embodied in the element of duty. "It is fundamental that the existence of a legally cognizable duty is a prerequisite to all tort liability."[103] Unless they are subject to an antecedent duty or legal obligation, individuals are not legally responsible and cannot be subject to tort liability for the injuries of another.

Although legal responsibility must underlie all forms of tort liability, most torts do not contain duty as a separate element of the prima facie case. For example, one commits a battery by intentionally causing another to suffer a harmful or offensive bodily contact.[104] The entire tort of battery essentially states the correlative legal obligation: One has a duty not to intentionally cause another to suffer a harmful or offensive bodily contact, and the breach of this duty obligates the defendant to pay compensatory damages for the plaintiff's injury. The tort of battery does not have a separate element of duty, yet the entire tort can be restated to show why liability ultimately depends on the defendant's breach of a duty owed to the plaintiff.

By contrast, duty is a separate element of negligence liability for an illuminating reason. Courts must first specify the element of duty in order to define the risks encompassed within the defendant's legal obligation to exercise reasonable care towards the plaintiff.[105] In specifying the standard of reasonable care, the second element of the negligence claim necessarily depends on how the prior element of duty defines the risks for which the defendant as duty-bearer was legally obligated to exercise reasonable care.[106] The remaining elements of the

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[103] Graff v. Beard, 858 S.W.2d 918, 919 (Tex. 1993) (citations omitted); *see also, e.g.*, Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 522 (1992) (holding that "common-law damages actions of the sort raised by petitioner [involving strict products liability, negligence, express warranty, and intentional tort claims] are premised on the existence of a legal duty").

[104] *See* RESTATEMENT (SECOND) OF TORTS § 13 (AM. L. INST. 1965) (harmful contact); *id.* § 18 (offensive contact).

[105] *See* Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 148–50 (2011).

[106] For example, if the duty excludes certain types of harms such as pure economic losses or stand-alone emotional harms that do not stem from a predicate physical harm, then those

negligence claim require findings that the defendant's failure to exercise reasonable care created an unreasonable risk that caused the plaintiff to suffer a compensable harm, thereby ensuring that the plaintiff's injury was encompassed within the duty the defendant owed to the plaintiff.[107] For reasons the negligence rule makes clear, the fundamental principle that a defendant must be legally responsible in order to be liable for the plaintiff's injuries obscures an important point—the specification of the predicate duty ultimately determines the scope of liability, as with the type of risks that must materialize into a compensable harm in order to establish the prima facie case of negligence liability.

To ensure that defendants incur negligence liability only for injuries they were legally obligated to prevent, the *Restatement (Third) of Torts* adopts the following rule: "An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."[108] In negligence cases, the defendant acts tortiously by not exercising reasonable care, thereby creating unreasonable or tortious risks with respect to those harms the duty encompasses. Unless one of these unreasonable or tortious risks materializes and causes compensable harm, the defendant is not subject to negligence liability.

This tortious risk standard also limits rules of strict liability. In these cases, the actor's conduct is not tortious because it involves the failure to exercise reasonable care. Instead, the conduct is tortious for having created a risk subject to strict liability in the event that it materializes and causes compensable harm.

For example, someone who owns an animal known to be "abnormally dangerous" is "subject to strict liability for physical harm caused by the animal if the harm ensues from that dangerous tendency."[109] Consequently, "the fact that the defendant knows that its dog chases bicycles in a dangerous way does not justify strict liability should the dog uncharacteristically bite someone standing on a front lawn."[110] The duty is predicated on the owner's knowledge of the animal's abnormally dangerous tendencies, thereby limiting the scope of strict liability "to harms that arise from risks that result from the [known] dangerous tendency."[111] As is true for negligence liability, the

harms are excluded from the standard of reasonable care. *See, e.g.*, MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS 160–72 (2008).

107 For extended discussion of the associated rules, see Mark A. Geistfeld, *Proximate Cause Untangled*, 80 MD. L. REV. 420 (2021) [hereinafter Geistfeld, *Proximate Cause*].

108 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 (AM. L. INST. 2010).

109 *Id.* § 23.

110 *Id.* cmt. g.

111 *Id.*

scope of strict liability "is limited to those harms that result from the risks that made the actor's conduct tortious."[112]

B. Basing Vicarious Liability on Established Tort Doctrines

Formulated as a rule of strict tort liability, vicarious liability is also limited by the same tortious risk standard that limits ordinary rules of both negligence and strict liability. The scope of an employer's strict vicarious liability accordingly depends on the "fundamental question . . . whether the risks that led courts to impose strict liability" on the employer caused the plaintiff's injury.[113] What, then, are the tortious risks encompassed within an employer's tort obligation that can result in vicarious liability?

Because the agency relationship gives rise to the employer's or any other principal's vicarious liability, it would seem to follow that agency law—the legal source of the agency relationship—also determines the scope of vicarious liability. This seemingly inexorable logic explains why most courts have relied on agency law and the motive test to determine the limits of vicarious liability.

Despite the apparent soundness of the agency rationale for vicarious liability, it rests on a faulty premise. Recall that for purposes of explaining the scope of an employer's vicarious liability, the rules of agency law "perfectly" conform to the legal fiction known as the identification doctrine,[114] which involves the "absorption *pro hac vice* of the agent's individuality in that of his principal."[115] This agency rationale inherently limits vicarious liability to cases in which the employee was at least partially motivated to serve the employer's interest, for in the absence of such motivation, there is no unity of the employee and employer.[116] By contrast, the identification doctrine is untenable as a matter of basic tort law—the employer and employee are each autonomous actors for purposes of tort liability, giving their relationship a normative property that has implications for determining the scope of vicarious liability.

The most obvious case for vicarious liability occurs when the employer authorizes the employee to commit the tort in question. The employer's vicarious liability straightforwardly follows from the identification doctrine, based on the maxim "*qui facit per alium, facit per*

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112 *Id.* § 29.

113 Dobbs, Hayden & Bublick, *supra* note 63, § 445 (discussing the scope of strict liability for intervening forces in general).

114 Dalley, *supra* note 36, at 499 n.4.

115 Holmes, *supra* note 34, at 232.

116 *See supra* Section I.A.

se (one who acts through another acts through himself)."[117] This focus on the employer's vicarious liability ignores the associated tort rule that subjects the employee to personal liability for having committed the tort. In applying this rule, courts regularly invoke an "expression of common law principles" to justify the personal liability of an employee for having committed a tort at the command of the employer: "*No man increases or diminishes his obligations to strangers by becoming an agent*."[118] For purposes of tort liability, employees are autonomous actors who remain responsible for the tortious consequences of their voluntary actions, regardless of whether their employers authorized or even commanded the conduct in question.

By implication, one who has control over an autonomous employee or agent—the employer or principal—must also be an autonomous actor for tort purposes. As a matter of tort law, employment or any other agency relationship involves an autonomous principal interacting with an autonomous agent by virtue of the agency relationship.

Once the agency relationship is reframed in tort terms, the logic of vicarious liability is fundamentally altered as compared to its agency counterpart. In contrast to other forms of strict tort liability, vicarious liability depends on the combined conduct of two autonomous actors (the employer and employee) that subjects one of them (the employer) to strict liability for the torts the other one commits. One of these autonomous actors cannot be wholly subsumed into the autonomous other's legal identity, thereby negating the identification doctrine with its associated limitations of vicarious liability based on agency law and the motive test.

The tort version of vicarious liability does not change the analysis for cases in which the employer commands or otherwise authorizes the employee to commit a tort. The employer's instructions are a form of unreasonable behavior properly subject to negligence liability or perhaps even intentional tort liability in some cases. The employee is also an autonomous actor subject to liability for choosing to engage in the tortious behavior, fully explaining why both parties are properly subject to tort liability in these cases.

Our present concern centers on cases in which the employee tortiously acts in an unauthorized manner and in that respect is acting independently from the formal confines of the agency relationship. In these cases, the employer did not act negligently, turning vicarious liability into a form of strict liability.

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[117] Deborah A. DeMott, *Our Partners' Keepers? Agency Dimensions of Partnership Relationships*, 58 Law & Contemp. Probs., no. 2, 1995, at 109, 121.

[118] Warren A. Seavey, *Liability of an Agent in Tort*, 1 S.L.Q. 16, 16 (1916).

In this type of case, the tort inquiry for determining the scope of strict liability for the employer's conduct in creating and controlling the employment relationship is largely the same as the inquiry described earlier: "When a force of nature or an independent act [of a rogue employee] is also a factual cause of harm, an actor's [vicarious] liability is limited to those harms that result from the risks that made the actor's conduct tortious."[119]

According to the *Restatement (Third)*, this tortious risk standard for determining the scope of liability, "[w]hen properly understood and framed," is "congruent with" the foreseeability standard courts commonly employ for resolving this question.[120] As a rule of tort law, the scope of the employer's strict vicarious liability can accordingly be determined by an inquiry asking whether the employer's conduct in establishing and controlling the employment relationship created foreseeable risks of employee misconduct. These tortious risks determine the scope of an employer's vicarious liability as a matter of tort law, not agency law.

This formulation of vicarious liability is wholly derived from basic tort doctrines that determine the scope of tort liability for rules of both negligence and strict liability. The justification for formulating vicarious liability in this manner, therefore, is based on the same rationales that justify the underlying tort doctrines, the gist of which Holmes has famously described:

> The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen.[121]

Established common-law principles base tort duties at least in part on the requirement of action (or feasance) creating foreseeable risks of compensable harm. For reasons Holmes surfaces in this passage, the requirements of feasance and foreseeability are readily justifiable by the manner in which they limit one's tort obligations to meaningful choices or the "power" to avoid the injurious outcome in question.

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[119] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 34 (AM. L. INST. 2010). "The rule provided in this Section . . . is applicable as well to strict liability." *Id.* reps. note cmt. d.

[120] *Id.* § 26 cmt. e. This comment discusses the risk standard as it relates to negligence liability, but the Reporters elsewhere explain that it extends to rules of strict liability. *Id.* § 34 reps. note cmt. d.

[121] HOLMES, *supra* note 34, at 95.

To connect these requirements more fully to vicarious liability, consider them in relation to the following commentary in the *Restatement (Third) of Torts* addressing the tort duty in negligence cases:

> [A]n actor's conduct may increase the natural or third-party risk—such as by inciting a swimmer to swim despite a dangerous riptide or by providing a weapon or alcohol to an assaulter. Similarly, an actor's business operations might provide a fertile location for natural risks or third-party misconduct that creates risks that would not have occurred in the absence of the business. In these cases, the actor's conduct creates risks of its own and, therefore, is governed by the ordinary duty of reasonable care.[122]

These same factors determine the actor's scope of vicarious liability for establishing a business enterprise. The agency relationship gives the employer or principal the power to control the conduct of the employee or agent.[123] Having engaged in the affirmative conduct of setting up a business, establishing the associated relationships with employees, and then managing or controlling the employment relationship, the enterprise is an actor who "creates risks that would not have occurred in the absence of the business." Among the risks a business operation can create is employee "misconduct." If any of these risks are foreseeable, they are encompassed within the enterprise's tort duty, including employee misconduct that is "negligent, reckless, or intentional in its harm-causing quality."[124] The employer, therefore, incurs vicarious liability for having engaged in affirmative conduct that created a tortious risk—the same structure of responsibility embedded in rules of both negligence liability and strict liability.

To be sure, the *Restatement (Third)* in this passage discusses an employer's negligence duty, whereas the employer in cases of unauthorized employee misconduct did not act unreasonably. In these cases, what determines whether such employee misconduct is a tortious risk within the scope of the employer's strict vicarious liability? Is it merely the twin requirements of feasance and foreseeability, or does the employee's motive somehow factor into the tort analysis in a manner that limits the tortious risk for which the employer is vicariously (and strictly) liable?

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122 Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 37 cmt. d (Am. L. Inst. 2012).

123 *See supra* notes 41–52 and accompanying text.

124 Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 19 cmt. a (Am. L. Inst. 2010).

C. *Foreseeability and Motive*

An employer who has authorized conduct causes employees to act in that way anytime their behavior is motivated or actuated by a desire to further the employer's interests.[125] By authorizing the conduct, the employer can also foresee that employees will act in this manner. Foreseeability and motive are obviously tied together in these cases.

But even if the employer did not authorize the tortious conduct, as long as the employee is motivated to serve the employer's interests, the conduct is a foreseeable consequence of the employment relationship. The lack of authority does not negate the fact that, when employees are motivated to serve the employer, their behavior has been at least partially actuated or caused by the employment relationship. An employer can also foresee that employees will act in such an unauthorized manner for reasons numerous courts have recognized in the following, oft-quoted passage:

> Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional make-up. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up. . . . These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.[126]

An employer can foresee that employees will bring their "tendencies to carelessness" into the workplace and can accordingly commit negligence while attempting to further its interests. The employer can also foresee that employees will often be overzealous in performing their assigned tasks, another "expression of human nature" that can result in negligent or even intentional harm-causing behavior. When such a foreseeable or tortious risk materializes and causes a

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125 *See* RESTATEMENT (THIRD) OF AGENCY § 2.01 (AM. L. INST. 2006) ("An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.").

126 Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968) (quoting Hartford Accident & Indem. Co. v. Cardillo, 112 F.2d 11, 15 (D.C. Cir. 1940) (other citations omitted)); *see also* Carr v. William C. Crowell Co., 171 P.2d 5, 6 (Cal. 1946) (same).

compensable third-party harm, the employer is vicariously liable—the same result attained by the motive test.[127]

An inquiry into the employee's motive accordingly provides one method for determining whether an employee's tortious misconduct was foreseeable and within the scope of employment for tort purposes. Like vicarious liability more generally, the relevance of motive is not inherently tied to agency law.

Indeed, the relevance of motive is *easier* to justify with tort law than with agency law for reasons the cases involving unauthorized misconduct make clear. When employees act in unauthorized manners, in what respect is their tortious behavior based on agency law? The answer agency law provides is ultimately question-begging, unlike its tort counterpart.

According to the *Restatement (Second) of Agency*, the agency rationale for vicarious liability in cases of unauthorized employee misconduct is based on the agent's "inherent power" that derives "solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent."[128] Because this inherent power derives solely from the agency relation, it only exists when the employee is motivated to serve the employer's interests. But motive only links the employee's unauthorized behavior to the employer; it does not otherwise authorize that behavior. The authorization instead flows from the employee's "inherent power" for acting in this manner, thereby transforming this otherwise unauthorized behavior into conduct the agency relation authorizes independently of the employer's commands. Once the employee's conduct finds authorization in such an "inherent power," the employer becomes vicariously liable as a matter of agency law, thereby protecting "persons harmed by or dealing with a servant or agent."

This agency rationale is unpersuasive. Suppose the employer commands: DO NOT COMMIT ANY TORTS WHILE WORKING!!! An employee who disobeys this command purportedly gains an "inherent power" within the agency relationship to do so. But if that power is for the *protection* of third parties, why does it authorize employees to disobey the command of the employer, enabling them to act in a tortious manner that *harms* third parties? After all, the

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127 *Cf.* Ga. Messenger Serv., Inc. v. Bradley, 715 S.E.2d 699, 703 (Ga. Ct. App. 2011) (holding that there was a jury question whether a messenger who kicked a security guard in the head while she was placing a "boot" on a wheel of his illegally parked truck was acting within the scope of employment because the messenger testified that the employer had put him under "enormous time pressure" and so he wanted to "get out of there" and "finish [his] deliveries").

128 Restatement (Second) of Agency § 8A (Am. L. Inst. 1958).

employer's command not to act tortiously—if faithfully followed—protects third parties from injuries. What is the public policy that would plausibly override an employer's express command to protect third parties from injury with an "inherent power" that authorizes employees to tortiously injure third parties?

The only possible way for this "inherent power" to protect third parties is by giving them a right to recover for their injuries from the vicariously liable employer. Such a deep-pockets rationale for vicarious liability is untenable.[129] The "inherent power" agency rationale for vicarious liability raises more questions than it answers, explaining why the *Restatement (Third) of Agency* provides no such rationale (or any other one) for vicarious liability when employees who are motivated to serve their employer nevertheless act in an unauthorized tortious manner.[130]

In sharp contrast to the agency rationale for this form of vicarious liability, tort law persuasively explains why motive is sufficient to establish vicarious liability in cases of unauthorized tortious misconduct. The agency relationship provides reasons for employees to act in certain ways. When employees are motivated by these reasons, the agency relationship affirmatively causes their behavior and creates the associated risks. Motivated employee behavior coupled with the foreseeable expressions of human nature such as carelessness or overzealousness satisfy the basic tort requirements for making an employer legally responsible for an employee's tortious conduct, whether authorized or not. If such a tortious risk causes a third-party to suffer compensable harm, the employer is vicariously liable. Tort law provides the most plausible basis for vicarious liability for all cases in which the employee was motivated to serve the employer's interests.

D. Combining the Foreseeability and Motive Inquiries

In defending the motive test as the exclusive limitation for vicarious liability, the *Restatement (Third) of Agency* asserts that "[a]lthough formulations that focus on an employee's intention may be difficult to apply in some cases, formulations based on assessments of 'foreseeability' are potentially confusing and may generate outcomes that are less predictable than intent-based formulations."[131] The scare quotes surrounding foreseeability are telling. The rhetorical move casts foreseeability as an overly mushy concept incapable of adequately

129 *See supra* note 99 and accompanying text.

130 *See* Dalley, *supra* note 36, at 506 (showing that the *Restatement (Third) of Agency* does not even attempt to justify a principal's vicarious liability for an agent's torts).

131 RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. b (AM. L. INST. 2006).

structuring the legal inquiry, unlike the "motive" test which also merits scare quotes on some accounts.[132]

Once again, the observations of Judge Friendly in the *Bushey* case are illuminating:

> Courts have gone to considerable lengths to find such a purpose, as witness a well-known opinion in which Judge Learned Hand concluded that a drunken boatswain who routed the plaintiff out of his bunk with a blow, saying "Get up, you big son of a bitch, and turn to," and then continued to fight, might have thought he was acting in the interest of the ship.[133]

Because the motive test "would create such drastically different consequences for the actions of the drunken boatswain" in that case "and those of the drunken seaman" in *Bushey*, Friendly concluded that the "inadequacy of the motive test becomes apparent": it "reflects a wholly unrealistic attitude toward the risks characteristically attendant upon the operation of a ship."[134]

The employee's motive, however, is not irrelevant for reasons tort law establishes. The employment relationship foreseeably causes employees to serve the employer, making the employer responsible for the foreseeable harms stemming from this type of motivated employee conduct.[135] This foreseeability test or tortious risk standard for determining the scope of tort liability can supplement the inquiry into motive by sharpening the analysis when motive is unclear.

A good example of this complementary relation is provided by a Utah case in which the court had to determine whether the defendant Burns International Security Company, the employer of security guards at a steel plant, was vicariously liable to the victim of a traffic accident caused by an employee named Swenson while on an unscheduled run to grab some lunch at the nearby Frontier Café.[136] Although the court's analysis was framed in terms of the motive test, it more plausibly applied the tortious risk standard to determine whether a reasonable juror could find that the crash occurred within the scope of employment.

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132 *See* Warren A. Seavey, Studies in Agency 155 (1949) ("The liability of a master to a third person for the torts of a servant has been widely extended by aid of the elastic phrase 'scope of employment' which may be used to include all which the court wishes to put into it." (footnote omitted)).

133 Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 170 (2d Cir. 1968) (quoting Nelson v. Am.-W. Afr. Line, 86 F.2d 730 (2d Cir. 1936) (Hand, J.)).

134 *Id.*

135 *See supra* Section II.C.

136 Christensen v. Swenson, 874 P.2d 125 (Utah 1994).

Consider the reasons the court provided as to why the employee Swenson's conduct might have satisfied the motive test:

> Reasonable minds might . . . differ on this question.
>
> First, two Burns managers admitted in their depositions that employee breaks benefit both the employee and the employer. Employees must occasionally eat meals and use the restroom, and employers receive the corresponding benefit of productive, satisfied employees. Reasonable minds could differ as to whether Swenson's particular break fell into this mutual-benefit category.
>
> Second, given the continuous-shift nature of the job and the comparatively brief breaks permitted, Burns' break policy obviously placed a premium on speed and efficiency. Swenson claimed that traveling to the Frontier Café enabled her to obtain lunch within the allotted period and thus maximize the time spent at her post. In this respect, reasonable minds might conclude that Swenson's conduct was motivated, at least in part, by the purpose of serving Burns' interest.[137]

This formulation of the employee's motive is puzzling. Based on the court's reasoning, *any* tortious act that makes the employee happier arguably increases the employee's productivity; after all, a happier employee tends to be a more productive employee.[138] If any such act suffices to serve the employer's interest, the relevance of motive runs out of persuasive force.

As the Texas Supreme Court explained in a similar case involving the crash of an employee outside the workplace while in pursuit of food and water, "under the 'coming-and-going rule,' an employee does not act within the course and scope of his employment when traveling to and from work. The rationale that informs the rule is that travelers on public roads are equally susceptible to the hazards of doing so, whether employed or not."[139] What, then, explains why the Utah Supreme Court did not apply this rule to the employee's lunch trip to the Frontier Café?

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137 *Id.* at 129.

138 *See supra* note 54 and accompanying text.

139 Cameron Int'l Corp. v. Martinez, 662 S.W.3d 373, 376 (Tex. 2022) (holding that an oilfield worker was not acting within the scope of employment when he drove to a remote worksite after picking up food and water, which employees were expected to provide for themselves during 12-hour shifts in the hot sun). The intermediate appellate court had found that a reasonable juror could decide otherwise because the employee having access to water and food "was necessary and benefited" the employer by "ensuring workers were physically able to perform." *Id.* at 377. Reversing, the Texas Supreme Court observed that "[n]early every task that supports a worker's personal needs . . . indirectly benefits the employer," and

The tortious risk standard answers this question. In the Utah case, the employment relationship elevated the risk of crash above the background level: "given the continuous-shift nature of the job and the comparatively brief breaks permitted, Burns' break policy obviously placed a premium on speed and efficiency."[140] The employee's sense of urgency was further heightened by her arguably unauthorized exit from the workplace, resulting in a set of conditions that could foreseeably cause the employee to drive more dangerously than she would otherwise do under ordinary circumstances outside of the workplace. The employment conditions accordingly created a tortious risk that time-pressed employees would be overly rushed in their comings and goings from the workplace to get food. For the same reasons the Utah Supreme Court supplied, a reasonable juror could conclude that this tortious risk caused the plaintiff's injuries, subjecting the employer to vicarious liability.

Because there are so many ways in which an employee's conduct might somehow serve the employer's interest, an employee's motive must be tied to the employment relationship. Formal criteria such as time, place, and how the tortious conduct relates to the kind of work performed are all indicia of foreseeability or the likelihood that the conduct plausibly stemmed from the employment relationship rather than from the employee's personal life. Motivated employee behavior is a foreseeable consequence of the employment relationship, a property that enables courts to rely on foreseeability for connecting motive to the workplace.

Ascertaining the relevance of motive in borderline cases requires resort to the reason why motive matters for purposes of vicarious liability. Agency law is of no help in this regard because it cannot persuasively explain why motive is sufficient to establish vicarious liability for cases in which motivated employees engage in unauthorized tortious misconduct.[141] By instead relying on foreseeability to justify vicarious liability, the tort formulation clarifies the relevance of motive in hard cases as compared to its agency counterpart.

E. Foreseeability in the Absence of an Employee's Motive to Serve the Employer

The analysis so far has shown that the employment relationship creates a foreseeable risk that careless or overzealous employees will commit torts while attempting to further the interests of their employers.

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so the lower court's approach would have improperly turned "nearly any personal grocery errand into a special mission on an employer's behalf." *Id.*

[140] *Christensen*, 874 P.2d at 129.

[141] *See supra* notes 127–30.

This foreseeable or tortious risk is within the scope of the employer's vicarious liability for tort purposes. Having found that the employee's motive is relevant to the scope of vicarious liability for tort reasons that are independent of agency law, we can now ask whether motive has any further significance for tort law.

An employee who has no motive to serve the employer's interests presumably acts in a manner that does not benefit the employer. Motive, therefore, could be relevant insofar as the employer must derive some benefit from the employee's tortious misconduct in order to incur strict (vicarious) liability for such unauthorized behavior.

Even if the justification for strict tort liability depends on the duty-bearer deriving some benefit from the risky activity in question—a debatable proposition—that requirement is satisfied in the cases under consideration. By affirmatively creating and controlling a relationship with employees, the employer presumably benefits from the activity. Why else would the employer voluntarily create and maintain it? Inherent within this activity is the risk that employees will misbehave. Whether such a risk is tortious is a matter of foreseeability, not motive. A benefit-based rationale for subjecting employers to strict tort liability does not turn on the reasons why the employee engaged in the tortious wrongdoing.

Employee conduct motivated to serve the employer is a foreseeable consequence of the employment relationship, but aside from this property, the employee's motive for acting in any given case adds little or nothing to the tort analysis and does not justifiably limit vicarious liability. Courts have arguably recognized as much in rejecting the motive test in favor of alternative approaches to vicarious liability, but they have not invoked the relevant conception of tort foreseeability.

These courts have instead framed the inquiry as a general foreseeability test that "bears far more resemblance to that which limits liability for workmen's compensation than to the test for negligence."[142] The responsibility an employer faces under workers' compensation, however, is not necessarily the same as the responsibility that tort law imposes on vicariously liable employers.[143]

To persuasively justify vicarious liability as a tort doctrine, one must employ the tort conception of foreseeability, which is embodied in the

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142 Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171–72 (2d Cir. 1968) (quoting HARPER & JAMES, *supra* note 14, at 1377–78); *see also supra* note 14 (providing more extensive citation to cases and commentary taking this approach).

143 *See* RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5 cmt. m (AM. L. INST., Tentative Draft No. 2, 2023) ("[D]ecisions under workers' compensation laws are not controlling with respect to the scope of employment under the doctrine of respondeat superior.").

tortious risk standard the *Restatement (Third)* employs to determine the scope of liability for rules of both negligence and strict liability.[144] Because courts have most extensively developed the tortious risk standard in negligence cases, we will rely on those cases to determine how the standard applies for determining the scope of an employer's strict vicarious liability when employees commit torts solely for their own personal reasons.

Foreseeability within a negligence claim operates at different levels of generality. The tort duty is defined in categorical terms, obligating one to exercise reasonable care while engaged in affirmative conduct creating risks of physical harm.[145] Requiring that those risks also be reasonably foreseeable is a limitation of the duty that is completely general in the sense that it is an abstract legal requirement applicable to *all* cases which the duty governs, thereby transcending the facts of any individual case. The remaining elements of the negligence claim transform this abstract general requirement of foreseeability into less general requirements that ultimately translate into the specific facts of the case at hand.[146]

Based on the general class of physical harms the duty governs, the issue of breach in any given negligence case—whether the defendant complied with the abstract or general duty to exercise reasonable care—focuses on a more narrowly defined category: the class of foreseeable physical harms that the safety precaution in question would have prevented. The foreseeability inquiry at this stage is still framed in general terms. As one court explained, the inquiry at this point "focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others."[147]

For example, reasonably safe driving behavior reduces the foreseeable risk of a crash for nearby drivers, pedestrians, and so on. A defendant driving in an unreasonably unsafe manner accordingly creates a general field of danger, comprised of myriad individuated risks foreseeably threatening numerous individuals, each of whom can be differently situated. "Thus the duty to exercise reasonable care in driving an automobile down the highway is established for the protection of the persons or property of others against all of the unreasonable possibilities

144 *See supra* Section II.A.

145 *See* Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 7(a) (Am. L. Inst. 2010).

146 *See generally* Geistfeld, *Proximate Cause*, *supra* note 107 (explaining why the foreseeability inquiry throughout the negligence claim proceeds from the general to the specific).

147 McCain v. Florida Power Corp., 593 So.2d 500, 502 (Fla. 1992).

of harm which may be expected to result from collisions."[148] These possibilities include those resulting from crashes "with other vehicles, or with pedestrians, or from the driver's own automobile leaving the highway, or from narrowly averted collisions or other accidents."[149]

The next element of proximate cause filters these more generally defined facets of the tort claim to focus on the issue of how they specifically apply to the plaintiff's injuries in the case at hand. As formulated by the *Restatement (Third)*, this inquiry limits the scope of liability with the tortious risk standard: "An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."[150] This element of the tort claim requires a finding of specific foreseeability in the sense that the plaintiff's particular injury must be of the general type that the defendant's negligent conduct foreseeably threatened, thereby ensuring that the plaintiff's harm is within the more general category of foreseeable harms the duty encompassed.[151] "Central to the limitation of liability . . . is the idea that an actor should be held liable only for harm that was among the potential harms—the risks—that made the actor's conduct tortious."[152]

These basic principles for determining the scope of negligence liability also apply to rules of strict liability and can guide the analysis for identifying the tortious risk of relevance for determining the scope of vicarious liability.[153] General foreseeability is relevant for identifying the general types of risks the employment relationship foreseeably creates—the tortious risks that can give rise to vicarious liability. General foreseeability is not enough, however, to establish vicarious liability. One of these tortious risks must also materialize in the case at hand and proximately cause the plaintiff's injury—an inquiry asking whether the plaintiff's injury was specifically foreseeable or "result[ed] from the risks that made the actor's conduct tortious."[154] When these conditions are met, the employer incurs vicarious liability regardless of the employee's motive.

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148 RESTATEMENT (SECOND) OF TORTS § 281 cmt. e (AM. L. INST. 1965).

149 *Id.*

150 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 (AM. L. INST. 2010).

151 *See, e.g.*, Scott v. Kesselring, 513 P.3d 581, 586 (Or. 2022) ("[The] plaintiff must be within the general class of persons that one reasonably would anticipate might be threatened by the defendant's conduct," and "the harm suffered must be within the general class of harms that one reasonably would anticipate might result from the defendant's conduct.").

152 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. d (AM. L. INST. 2010).

153 *See supra* Section II.A.

154 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 (AM. L. INST. 2010).

This attribute of vicarious liability directly follows from tort law's recognition that employees are autonomous actors whose legal personalities are not absorbed into the employer's legal personality. Motive is necessary within agency law for identifying the employee with the employer, whereas tort law obligates the employer to account for the foreseeable likelihood that autonomous employees will act independently and disobey its commands and perhaps even wholly disregard its interests. Unlike its agency counterpart, the tort version of vicarious liability is not limited by the motive test.

F. The Equity of Vicarious Liability in the Absence of the Employee's Motive to Serve the Employer

By recognizing that both the employer and the employee are autonomous actors, tort law subjects each one to liability for the torts the employee commits within the scope of employment. The plaintiff, of course, cannot sue both of these tortfeasors and receive two awards of compensatory damages for the same injuries. This limitation on the plaintiff's compensatory damages leads to the question of how the liability should be apportioned between the faultless employer and the employee who directly committed the tort. The question can arise as a matter of comparative responsibility in the underlying tort case, or as an independently pursued claim for which one tortfeasor seeks indemnity or partial indemnity (contribution) from the other with respect to the amount owed to the plaintiff by virtue of the tort judgment.

In these cases, the employee or any other agent has a right to indemnification from the employer or principal if the amount the agent would have to expend to satisfy the plaintiff's tort judgment is "a loss that fairly should be borne by the principal in light of their relationship."[155] As a matter of equality or reciprocity running between these two autonomous actors, the employer as principal has an associated right to indemnification from the employee as agent.[156] However, employers rarely exercise their right to indemnity or contribution from employees and instead typically pay for the entirety of the underlying tort judgments.[157]

To the extent that it is unfair for an employer to incur vicarious liability for cases in which the employee was not motivated to serve any interest of the employer, the solution resides in the tort rules that entitle the employer to shift liability onto the employee. The

155 Restatement (Third) of Agency § 8.14(2)(b) & cmt. b (Am. L. Inst. 2006).

156 *See* Restatement (Third) of Torts: Apportionment of Liab. § 22 illus. 2 (Am. L. Inst. 2000).

157 *See* Chamallas, *supra* note 8, at 153–54.

equitable allocation of liability between the employer and employee, though important, is irrelevant for determining the scope of vicarious liability.

III
The Problem of Sexual Assaults in the Workplace and Its Implications for Vicarious Liability

Cases involving employees who sexually assault someone in the workplace pose a contemporary challenge for vicarious liability. "The story of widespread abuse and institutional failure" by organizations such as the Boy Scouts of America and the Catholic Church "is now so familiar it is hard to keep track of even the high-profile cases."[158] Lay individuals, who often personify an organization in terms of its employees, "assume that these institutions are legally responsible for the damage caused by such abuse."[159] But that is not the case. The vast majority of courts deny that the employer is vicariously liable, reasoning that the employee who committed the sexual assault was motivated to pursue purely personal ends and accordingly acted outside the scope of employment.[160]

In rejecting the motive test for its unduly narrow focus in these kinds of cases, a few courts and most commentators endorse alternative formulations of vicarious liability.[161] However, these versions do not have a widely accepted principle for limiting the scope of vicarious liability and accordingly have not gained widespread judicial acceptance.[162]

Building on these alternatives and the concern that motivates them, the analysis so far has reformulated vicarious liability in terms of basic tort doctrine. Applying this tort version to cases involving sexual assaults in the workplace fully illustrates why the scope of vicarious liability depends on an inquiry no different from the one already embodied in ordinary tort cases. This application also underscores the inherent limitations of the agency rationale for vicarious liability and its question-begging treatment of the employee's motive. The problem of sexual assaults in the workplace shows why vicarious liability is best formulated as a doctrine of tort law, not agency law.

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158 *Id*. at 133.
159 *Id.* at 134.
160 *See supra* notes 1–5 and accompanying text.
161 *See supra* notes 9–26 and accompanying text.
162 *See supra* Section I.B.

A. Distinguishing Employment-Related Risks from Background or Personal Risks

The scope-of-liability question in any tort case asks whether a risk for which the defendant is responsible—the tortious risk—caused the plaintiff's injury. For purposes of vicarious liability, this inquiry initially requires courts to distinguish employment-related risks from the background risks that exist outside of the workplace, including what we will call "personal risks" that employees wholly create in their personal lives independently of the employment relationship. The employer is not vicariously liable for these background or personal risks because they are not tortious risks that the employement relationship foreseeably created.

To engage in this inquiry, courts in the first instance can still look to the employee's motive. The employment relationship creates the foreseeable risk that employees who are motivated to serve the employer's interests will be careless or overzealous at times, resulting in tortious misconduct. If such a tortious risk materializes and causes third-party harm, the employer is vicariously liable for the injury, regardless of whether the employee's misconduct was authorized.[163]

Unlike agency law, tort law does not make motive a necessary condition for vicarious liability.[164] Tort law can accordingly impose vicarious liability on employers for sexual assaults in the workplace if the employment relationship elevated that foreseeable risk of employee misconduct over the level of background or personal risk that the employee in question would otherwise perpetrate such an attack.

Courts engage in this same type of inquiry when applying the negligence rule. "[T]here is no duty of care when another is at risk for reasons other than the conduct of the actor, even though the actor may be in a position to help. . . . In the absence of a duty, the actor cannot be held liable."[165] So, too, if the affirmative conduct of the employer—the creation and control of the employment relationship—does not increase risk, and the third-party victim was instead injured by an unrelated risk, there is no duty and no basis for holding the employer vicariously liable for that harm.

The nature of this inquiry is illustrated by the well-known case *Berry v. Sugar Notch Borough*, in which the plaintiff's railcar was negligently speeding when struck by a falling tree located in the defendant town,

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163 *See supra* Section II.B.

164 *See supra* Section II.E.

165 Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 37 cmt. b (Am. L. Inst. 2012).

injuring the plaintiff.[166] If the train had instead been operating at the reduced reasonable speed, it would not have been located on the track at the point where the tree fell. The *Berry* court nevertheless concluded that the plaintiff was not contributorily negligent: "The same thing might as readily have happened to a car running slowly, or it might have been that a high speed alone would have carried him beyond the tree to a place of safety."[167] It was merely a coincidence that the tree fell on the speeding train, severing the necessary causal link between the plaintiff's negligence and the plaintiff's injury.

Cases like this explain why courts determine the scope of liability with the risk standard, which limits liability "to those harms that result from the risks that made the actor's conduct tortious."[168] The injury in *Berry* was caused by a falling tree, a hazard different from the injuries the railroad had improperly risked by speeding. The risk standard limits liability to injuries caused by a tortious hazard or risk (the dangerously high speed of a train), absolving the risky actor of responsibility for injuries coincidentally connected to the tortious behavior (a falling tree).

For largely the same reasons, the risk standard prevents a defendant from incurring liability for only causing harms that were entirely unforeseeable. A coincidence is a random outcome lacking a causal connection to any safety decision(s) of a party to a tort suit, thus making it unforeseeable for tort purposes. For example, the plaintiff's safety decision concerning the speed of the train in *Berry* did not affect the risk of a tree falling on the train. The safety decision could not reasonably account for that coincidence and the countless others that might also occur. Consequently, the falling tree caused a coincidental harm that was unforeseeable and outside the scope of the duty to exercise reasonable care in selecting the speed of the train.[169] Rather than relying on the unforeseeable nature of the harm, the risk standard instead forecloses liability on the equivalent ground that the risk of a tree falling was different from the tortious risk of the speeding train, placing it outside of the duty.

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166 43 A. 240 (Pa. 1899).

167 *Id.* at 240.

168 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 (AM. L. INST. 2010).

169 *Cf.* Simler v. Dubuque Paint Equip. Servs., 942 F.3d 448, 451 (8th Cir. 2019) (concluding that negligent speeding by another driver was not foreseeable and recognizing that "[t]he analysis is different, however, if the initial act increases the likelihood that others will act negligently"); DOBBS, HAYDEN & BUBLICK, *supra* note 63, § 205 ("When courts say that such a risk is unforeseeable what they mean is that it is not a risk enhanced or created by the defendant's conduct.").

Thus, for cases in which an employee commits a sexual assault in the workplace, courts must first determine whether the attack was coincidentally connected to the employment relationship. The attack could be entirely a consequence of the background or personal risk that the individual employee would behave in this manner. These coincidental, unforeseeable risks are outside the scope of the employer's responsibility, which instead is limited to risks the employment relationship foreseeably creates.

Because sexual assaults and other forms of criminal misconduct occur throughout society, the inquiry can be hard in some cases. For example, "a retail store that operates in a dangerous and isolated neighborhood might be characterized as creating a risk of criminal activity to patrons. If that characterization were accepted, [the store would incur] a duty of reasonable care to provide security for patrons and employees on the site."[170] To determine whether the retail store elevated the risk of criminal activity, the court needs to consider "what would have happened if the store had not been in operation. Would the patron have been subject to an equivalent risk of attack elsewhere?"[171] These questions are not easily answered when the criminal misconduct often occurs in a wide variety of other social settings.

The nature of this inquiry is well illustrated by *Waters v. New York City Housing Authority*, in which the plaintiff was dragged from a public street into a public-housing project that could be easily entered because the defendant negligently failed to keep the security system in good working order.[172] The plaintiff was forced to go up to the roof, where she was robbed and sexually attacked.[173] Reasoning that "[t]he risk to be reasonably apprehended in this instance is that of intrusion by outsiders with criminal motive who might do harm to those who have a right to feel at least minimally secure inside a dwelling place," the court affirmed dismissal of the plaintiff's claim because the risk of sexual assault was outside the "orbit" of the defendant's duty.[174] "Moreover, it is unlikely that the incidence of street crime would be meaningfully affected, since the urban environment includes many nooks and crannies, other than unsecured dwellings, which afford malefactors the privacy they need to commit their misdeeds."[175]

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170 Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 37 cmt. c (Am. L. Inst. 2012).

171 *Id.*

172 505 N.E.2d 922 (N.Y. 1987).

173 *Id.* at 922.

174 *Id.* at 924–25.

175 *Id.* at 924.

The plaintiff's claim failed as a matter of both general foreseeability[176] and what we have been calling the test of specific foreseeability.[177] As the court reasoned, the general risk landowners are obliged to control is to secure their premises in order to protect those who are inside the building from sexual assaults and the like, not to protect outsiders on the public street. The plaintiff, therefore, was injured by a general type of risk (outsiders being attacked) different from the tortious risk for which the defendant was responsible (insiders being attacked), thereby negating liability. And insofar as this type of criminal misconduct could otherwise have taken place in the "many nooks and crannies" throughout the city, the occurrence of such an attack in the building was a coincidence and outside the scope of the defendant's duty. The attack was neither generally nor specifically foreseeable, absolving the defendant from liability.

Courts would have to engage in the same type of inquiry to determine whether the employment relationship enhanced the risk that an employee would sexually assault someone in the workplace. Sexual assaults are not uncommon both within and outside of the workplace.[178] Consequently, the workplace does not necessarily elevate that risk as compared to the outside world—the same problem the court confronted in the *Waters* case.

"In a typical week in the United States, the average worker spends approximately 55 hours, or about 33% of their time participating in work-related activities."[179] The extended amount of time that individuals spend in the workplace undoubtedly provides more "nooks and crannies" for malefactors to engage in sexual misconduct, but that same kind of activity could also occur outside of the workplace in the same way that the sexual predator in *Waters* could just as easily have operated outside of the defendant's building in one of the many "nooks and crannies" of New York City. The hard question in these cases is

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176 *See supra* notes 144–49 and accompanying text (discussing the role of general foreseeability within the scope-of-liability inquiry).

177 *See supra* notes 150–52 and accompanying text (discussing the role of specific foreseeability within the scope-of-liability inquiry).

178 Nat'l Sexual Violence Resource Center, Sexual Violence & the Workplace: Overview 2 (2013), https://www.nsvrc.org/sites/default/files/2013-04/publications_nsvrc_overview_sexual-violence-workplace.pdf [https://perma.cc/38UB-PE4B] ("While working or on duty, American employees experienced 36,500 rapes and sexual assaults from 1993 to 1999. Women are the victims in 80% of [such] rapes and sexual assaults . . . . Between 2005 and 2009, rape/sexual assault accounted for 2.3% of all nonfatal violence in the workplace." (citations omitted)).

179 *Id.* at 1. The quoted statistic comes from the 2010 time-use study conducted by the Bureau of Labor Statistics. The 2023 study found that the average amount of work-related time had increased to about fifty-six hours per week. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, American Time Use Survey—2022 Results, tbl. 1 (June 22, 2023), https://www.bls.gov/news.release/pdf/atus.pdf [https://perma.cc/Z95V-VDQK].

whether any given sexual attack at the workplace is a mere coincidence or is instead the consequence of an elevated risk the workplace created.

The difficulty of drawing the line in some cases does not imply that the inquiry is so vexing that courts cannot fairly administer the rule. To make the scope-of-liability determination in cases of sexual assault, courts would not have to engage in any kind of inquiry different from those already required in ordinary cases, whether based on negligence or strict liability. The inquiry can be hard in some cases—lines will have to be drawn—but the tort formulation of vicarious liability does not raise any new issues in cases of sexual assault.

B. The Foreseeability of Criminal Misconduct

Individual actors are not subject to tort liability merely because they created risks; those risks must also be foreseeable in the sense that the actor either knew or should have known that they could cause another to suffer compensable harm.[180] Consequently, even if the workplace elevates the risk of sexual assault, it is a separate question whether the employer either knew or should have known that employees might act in that way.

Recall that the foreseeability of motivated but unauthorized employee misconduct stems from the predictable human tendencies to be careless or overzealous.[181] Unfortunately, under certain conditions, individuals also predictably engage in criminal misconduct, explaining why tort law across a wide range of cases recognizes that such a risk is foreseeable and encompassed within a tort duty.[182]

As the *Restatement (Second) of Torts* explains:

> There are certain situations which are commonly recognized as affording temptations to which a recognizable percentage of humanity is likely to yield. So too, there are situations which create temptations to which no considerable percentage of ordinary mankind is likely to yield but which, if they are created at a place where persons of peculiarly vicious type are likely to be, should be recognized as likely to lead to the commission of fairly definite types of crime.[183]

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[180] *See* Dobbs, Hayden & Bublick, *supra* note 63, ch. 14, § 159 ("No actor can be counted as negligent unless he either actually foresaw, or a reasonable person in a similar position would have foreseen that harm to someone's [legally protected] interests was an unreasonably likely outcome of his conduct.").

[181] *See supra* notes 125–27 and accompanying text.

[182] *See generally* Robert L. Rabin, *Enabling Torts*, 49 DePaul L. Rev. 435 (1999) (discussing the set of tort rules subjecting a defendant to tort liability for having enabled the criminal misconduct of a third party). For discussion of why these forms of criminal misconduct are foreseeable, see Mark Geistfeld, *Tort Law and Criminal Behavior (Guns)*, 43 Ariz. L. Rev. 311, 311–16 (2001).

[183] Restatement (Second) of Torts § 448 cmt. b (Am. L. Inst. 1965).

For these same reasons, if an employer knows or should know that the employment relationship creates conditions that can tempt employees to commit sexual assaults, then that form of employee misconduct is a risk the employment relationship foreseeably created.[184] In addition to obligating the employer to exercise reasonable care to prevent such attacks, this same conception of foreseeability determines the scope of vicarious liability.

Synthesizing the case law in this area and largely guided by the influential formulation of the Canadian Supreme Court, Martha Chamallas distills the factors relevant for determining whether the nature of the employment relationship created a foreseeable risk that employees would commit sexual assaults in the workplace: "Vicarious liability shall be imposed if an employer materially increases the risk of tortious action either by conferring power or authority on its employees over vulnerable persons or by regularly placing its employees in situations of intimate or personal contact with clients, customers, or other potential victims."[185] This type of inquiry identifies the conditions that can predictably tempt employees to commit sexual assaults, and so it relies on the same conception of foreseeability that the *Restatement (Second) of Torts* uses to explain why one party can be legally responsible for the criminal misconduct of another.[186]

Consider in this regard the Utah case discussed at the outset of this Article. In *Burton v. Chen*, the Supreme Court of Utah affirmed the district court's decision, which relied on the motive test to dismiss a chronic-pain patient's claim of vicarious liability against the employer of a physician's assistant who allegedly "touched her sexually without permission and threatened to withhold medication if she did not perform sexual acts with him."[187] The risk of this sexual assault was not merely a consequence of the employee taking advantage of some "nook and cranny" in the workplace; it presumably stemmed from the patient's need for, and perhaps dependence on, pain medications—a

184 *See id.* (stating that under these conditions, "an intentionally criminal or tortious act of the third person is not a superseding [i.e., unforeseeable] cause which relieves the actor from liability"); *see also* Niece v. Elmview Grp. Home, 929 P.2d 420, 427 (Wash. 1997) (holding that an employee's sexual assault of a developmentally disabled patient in a private group home was not a legally unforeseeable harm that necessarily relieved the employer from negligence liability); Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 363 (Cal. 1995) ("We are not persuaded that the roots of sexual violence and exploitation are in all cases so fundamentally different from those other abhorrent human traits as to allow a conclusion sexual misconduct is per se unforeseeable in the workplace.").

185 Chamallas, *supra* note 8, at 187 (emphasis omitted).

186 *See* Restatement (Second) of Torts § 448 cmt. b (Am. L. Inst. 1965).

187 532 P.3d 1005, 1008–09 (Utah 2023).

likelihood made all too clear by the ongoing opioid epidemic.[188] The work itself—the provision of prescribed pain medication in secluded circumstances—arguably elevated the foreseeable risk of the sexual attack. In that event, vicarious liability can be justified as a matter of tort responsibility independent of the employee's motive.

C. Reformulating the General Foreseeability Test for Vicarious Liability in Terms of Basic Tort Doctrine

As one might expect, plaintiffs in cases of sexual assault often ask courts to reject the agency-law formulation of vicarious liability based on the motive test in order to adopt the general foreseeability test. "Decisions in the Second Circuit, California, and a few other jurisdictions have applied an approach under which an employer may be held vicariously liable for an employee's tortious conduct . . . if the tortious conduct was generally foreseeable."[189] Invoking these cases, the plaintiff in the previously discussed Utah case *Burton v. Chen* argued that the employer should be vicariously liable because "under this formulation, sexual impropriety would be a foreseeable consequence of interactions between healthcare providers and patients in pain clinics."[190]

The court in *Burton* described the plaintiff's burden of overturning precedent as a "'heavy' one" that must address both "the persuasiveness of the authority and reasoning on which the precedent was originally based," and "how firmly the precedent has become established in the law since it was handed down."[191] Because the plaintiff "[did] not meaningfully engage in these factors" and only made the "bare assertion" that the motive test unfairly limits vicarious liability in cases of sexual assault, the court could not "conclude that the reasoning underlying our precedent is no longer persuasive."[192]

Efforts to transform the law of vicarious liability in cases of sexual assault are unlikely to succeed if plaintiffs can rely on only a few out-of-state cases that formulate vicarious liability in terms of the general

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[188] *See, e.g.*, City of Huntington v. AmerisourceBergen Drug Corp., 609 F. Supp. 3d 408, 419, 450 (S.D.W. Va. 2022) (discussing the addictive properties of opioids available for prescription, including "for chronic pain in appropriate circumstances," and finding "that there is and has been an opioid epidemic in the City of Huntington and Cabell County, West Virginia").

[189] Restatement (Third) of Torts: Miscellaneous Provisions § 5 cmt. l (Am. L. Inst., Tentative Draft No. 2, 2023).

[190] Burton v. Chen, 532 P.3d 1005, 1013 (Utah 2023).

[191] *Id.* at 1014 (quoting Rutherford v. Talisker Canyons Fin., Co., 445 P.3d 474, 484 (Utah 2019)) (citing Eldridge v. Johndrow, 345 P.3d 553, 557 (Utah 2015)).

[192] *Id.*

foreseeability test, which is also called a rule for "applying vicarious liability to risks that are 'characteristic' or 'typical' of the business."[193] As Judge Friendly famously explained in the *Bushey* case, the "characteristic accidents" test "is not the same measure" as "the test for negligence" and "bears far more resemblance to that which limits liability for workmen's compensation."[194] A workers' compensation-esque general foreseeability standard does not provide the kind of foundation that persuasively shows why courts should overturn established precedent that determines the scope of vicarious liabillity under the motive test as a matter of agency law.

Upon closer examination, however, Friendly developed the idea of "characteristic accidents" in a manner that can be reformulated in terms of the tortious risk standard applicable to ordinary cases of both negligence and strict liability. So interpreted, these cases provide further support for reformulating vicarious liability in terms of basic tort doctrine.

In *Bushey*, the employee was a seaman who was "returning from shore leave late at night" to a U.S. Coast Guard vessel where he was stationed. The vessel was "being overhauled in a floating drydock" in Brooklyn, and the employee, "in the [inebriated] condition for which seamen are famed, turned some wheels on the drydock wall," causing the plaintiff's drydock (and the employer's ship) to partially sink.[195] The employee's conduct furthered no business purpose of his employer. The court nevertheless concluded that the intentional misconduct was still a risk "characteristic" of the business, because it had been foreseeably created by the employment relationship.[196]

The court developed the concept of a "characteristic accident" with a hypothetical in which a drunken seaman "had set fire to the bar where he had been imbibing or had caused an accident on the street while returning to the drydock," concluding that the "Government would not be liable."[197] The reason is that "the activities of the 'enterprise' do not reach into areas where the servant does not create risks different from those attendant on the activities of the community in general."[198] As applied to employee behavior that is not motivated to serve any purpose of the employer, a "characteristic" risk of the business enterprise is

193 Restatement (Third) of Torts: Miscellaneous Provisions § 5 cmt. l (Am. L. Inst., Tentative Draft No. 2, 2023).

194 Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968).

195 *Id.* at 168.

196 *Id.* at 171.

197 *Id.* at 172.

198 *Id.*

limited to those risks that the employment relationship creates *above* the ordinary level of risk in the community for the activity in question.

Consequently, if the drunken seaman while returning to the drydock had encountered his "wife's lover and shot him," then "vicarious liability would not follow" for the same basic reason: "[T]he incident would have related to the seaman's domestic life, not to his seafaring activity, and it would have been the most unlikely happenstance that the confrontation with the paramour occurred on a drydock rather than at the traditional spot."[199] A business is not responsible for coincidental risks individuals could otherwise equally create or face in their personal lives. These risks are, instead, "characteristic" of the world outside of the employment setting and not of the business enterprise.

Conceptualized in this manner, the "characteristic" risk that guides the *Bushey* analysis of vicarious liability can be reformulated as an ordinary tort inquiry for determining the scope of liability. Indeed, the tort conception of foreseeability as embodied in the tortious risk standard is satisfied on the established facts in *Bushey*.

The risks of drunken misconduct, which in many if not most contexts are imputable solely to the employee's personal life, are foreseeably increased by an employment relationship that places employees on ships at sea for extended periods of time. As the *Bushey* court emphasized, "the proclivity of seamen to find solace for solitude by copious resort to the bottle while ashore has been noted in opinions too numerous to warrant citation."[200] The employer (the U.S. Government) could also foresee the more general risk "that crew members crossing the drydock might do damage, negligently or even intentionally."[201] The generally foreseeable risk of a drunken seaman damaging the drydock while returning to the ship is the same type of risk that caused the plaintiff's injury, thereby satisfying the tortious risk standard for determining the scope of tort liability. "Put another way, [the employee's] conduct was not so 'unforeseeable' as to make it unfair to charge the Government with responsibility."[202]

Bushey shows why courts can defensibly apply the tort version of vicarious liability in cases of sexual assault. Although the problem of alcohol-fueled behavior commonly involves personal risks attributable to an employee's personal life outside of the workplace, the facts of

199 *Bushey*, 398 F.2d at 171.

200 *Id.*

201 *Id.*

202 *Id.* at 171; *see also* Cox v. Evansville Police Dep't, 107 N.E.3d 453, 462 (Ind. 2018) (stating the rule that vicarious liability applies when the "tortious acts are so closely associated with the employment that they arise naturally or predictably from the activities an employee was hired or authorized to do").

Bushey were sufficient to show why the drunken behavior was a foreseeable consequence of the work environment. The same can be true in cases of sexual assault in the workplace.[203]

Though expressly justified in terms of a general foreseeability standard different from the more specific inquiry involved in negligence cases,[204] both the reasoning and the outcome in *Bushey* fully conform to the foreseeability or tortious risk standard courts use to limit the scope of liability for rules of both negligence and strict liability. The tort version of vicarious liability accordingly justifies this formulation of general foreseeability standard, enabling plaintiffs in sexual assault cases to rely on cases like *Bushey* to persuade courts that the motive test improperly limits vicarious liability on the basis of agency law in contravention of established tort principles.

D. Reformulating the Aided-by-Agency Test for Vicarious Liability in Terms of Basic Tort Doctrine

The problem of sexual assault has prompted some courts to adopt the aided-by-agency theory of vicarious liability that applies when the employee "was aided in accomplishing the tort by the existence of the agency relation."[205] Courts have formulated the doctrine in different ways. The most defensible formulation is restricted to circumstances involving an employee with substantial authority and control over a vulnerable victim.[206] As one court put it, "the key determinations for the jury to make are" if the employee "by reason of his employment" relationship "had substantial power or authority over [the victim's]

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203 *See supra* Sections III.A–B.

204 *Ira S. Bushey & Sons, Inc.*, 398 F.2d at 171.

205 RESTATEMENT (SECOND) OF AGENCY § 219 (AM. L. INST. 1958).

206 *See generally* John C.P. Goldberg & Benjamin C. Zipursky, Sherman v. Department of Public Safety*: Institutional Responsibility for Sexual Assault*, 16 J. TORT L. (forthcoming 2024) (discussing five different approaches within the case law that might subject an employer to vicarious liability for sexual assaults in the workplace and defending this type of restricted version of the aided-by-agency theory as the most defensible approach). For example, in *Sherman v. State Department of Public Safety*, the court imposed vicarious liability on the state under the aided-by-agency theory for a police officer's sexual assault upon an arrestee. 190 A.3d 148, 177–82 (Del. 2018). In a subsequent case, the court distinguished the events in *Sherman* from a teacher's sexual assault of a student and did not even consider whether the aided-by-agency theory could apply, reasoning "that there is a significant difference between the coercion a police officer can bring to bear on a detainee . . . and the influence a teacher can exert upon a student. And in the space created by that difference, we draw a line." Bates v. Caesar Rodney Sch. Dist., 263 A.3d 127 (Del. 2021) (unpublished table decision) (footnote omitted). Vermont courts have taken this same type of approach. *Compare* Doe v. Forrest, 853 A.2d 48, 55–69 (Vt. 2004) (applying the aided-by-agency theory to a police officer's sexual misconduct), *with* Doe v. Newbury Bible Church, 933 A.2d 196, 198–200 (Vt. 2007) (emphasizing the unique coercive powers of police officers as a reason not to extend the aided-by-agency theory to a church pastor's sexual misconduct).

important needs and, if so, . . . whether that power and authority played a substantial role in bringing about the sexual contact."[207]

In these circumstances, the employment relationship can facilitate the sexual attack for purposes of vicarious liability in the sense that the nature of the working conditions foreseeably elevated the risk of sexual attack over the background level otherwise present in the community.[208] In that event, the tortious risk standard for limiting the scope of vicarious liability would be satisfied as long as the attack was also specifically foreseeable in the sense that the employment relationship created coercive power that "played a substantial role in bringing about the sexual contact" at issue in the case at hand.[209] Hence the tortious risk standard can achieve the same results as the aided-by-agency theory restricted in the manner described above.

For these reasons, it does not substantively matter whether the aided-by-agency theory is "ripe for any expansion" under agency law.[210] As a matter of tort law, this theory can be formulated in terms of the tortious risk standard to determine the scope of vicarious liability for sexual assaults in the workplace.

E. The Nondelegable Duty Doctrine

Another approach relies on the nondelegable duty doctrine to impose vicarious liability on an employer for the sexual misconduct of an employee who had no purpose of furthering the employer's interests.[211] The underlying rationale for the nondelegable doctrine is unclear. "Historically well-entrenched, this doctrine seems to operate

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[207] Ayuluk v. Red Oaks Assisted Living, Inc., 201 P.3d 1183, 1198–1201 (Alaska 2009) (finding that the aided-by-agency theory could be applied to hold the employer vicariously liable for a caregiver's sexual assaults upon a mentally impaired resident of an assisted living facility); *accord* Spurlock v. Townes, 368 P.3d 1213, 1217 (N.M. 2016) ("We thus follow *Ayuluk* in limiting our adoption of aided-in-agency principles extending vicarious liability to 'cases where an employee has by reason of his employment substantial power or authority to control important elements of a vulnerable tort victim's life or livelihood.'" (quoting *Ayuluk*, 201 P.3d at 1199)).

[208] *See supra* Sections III.A–B.

[209] *Cf.* Restatement (Third) of Agency § 7.07 cmt. b, at 202 (Am. L. Inst. 2006) (criticizing a foreseeability test of vicarious liability insofar as it promotes the mistaken tendency "to conflate the foreseeable likelihood, from an employer's standpoint, that mishaps and slippage will occur . . . with the possibility that the work may lead to or somehow provide the occasion for intentional misconduct that is distinct from an employee's actions in performing assigned work").

[210] *Compare* Martin v. Tovar, 991 N.W.2d 760, 768 (Iowa 2023) (relying in part on this reason to reject the theory), *with* Goldberg & Zipursky, *supra* note 206 (manuscript at 10–11) (arguing that the aided-by-agency theory be more widely adopted in part because it is "supported . . . by persuasive authority").

[211] *See Sherman*, 190 A.3d 148, 157, 182 (Del. 2018); Taylor *ex rel.* Stropes v. Heritage House Childrens Ctr. of Shelbyville, Inc., 547 N.E.2d 244, 250–54 (Ind. 1989).

as a sort of wildcard that courts invoke when they believe there are distinctive reasons of policy and principle to impose something like strict liability on firms when the plaintiff's injury arises within a certain space or domain that the firm controls."[212] Regardless of its particular rationale, the nondelegable duty doctrine ultimately rests on a tort version of vicarious liability that permits recovery in certain cases of sexual assault for reasons already discussed.

An employer or any other principal can avoid vicarious liability by delegating a duty and ceding control over the conduct of the actor in question, often called an independent contractor, subject to limited exceptions.[213] For example, when you hire a taxi, the driver is typically an independent contractor and not your employee. You are not vicariously liable for any traffic accidents the driver negligently causes. You only tell the cab driver about the objective in question (your destination) but otherwise exercise no control over the driving itself—the source of liability in the event of a crash. Although the risk of crash is foreseeable, the absence of control over how safely the vehicle is driven eliminates the normative purchase of foreseeability and absolves you of vicarious tort responsibility.[214]

Some risks cannot be delegated in this manner. An employer or any other principal subject to a nondelegable duty is vicariously liable for the torts that an independent contractor commits within the scope of employment.[215] In deciding that a duty is nondelegable, courts conclude "that the responsibility is so important to the community that the employer should not be permitted to transfer it to another."[216]

These nondelegable duties are based on tort law, not agency law. By definition, a principal does not have the control over an independent contractor that agency law requires.[217] Imposing vicarious liability on the principal for the torts that an independent contractor commits is instead based on the principal's tort responsibility for the contractor's conduct. The principal affirmatively created a foreseeable risk that it could have adequately controlled had the task not been delegated. The principal accordingly incurs a duty to exercise reasonable care in the first

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212 Goldberg & Zipursky, *supra* note 206 (manuscript at 5).

213 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 57 (AM. L. INST. 2012).

214 *See supra* notes 123–24 and accompanying text.

215 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 57 cmt. b (AM. L. INST. 2012).

216 KEETON ET AL., *supra* note 18, § 71, at 512.

217 "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and [be] subject to the principal's control, and the agent manifests assent or otherwise consents so to act." RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

instance, and the nature of the undertaking prevents the principal from delegating that responsibility to the independent contractor. Perhaps more than any other doctrine, nondelegable duties transparently show why employers, or principals more generally, are subject to a tort duty that is independent of agency law.

Even though an employee is an agent of the employer and not an independent contractor, the nondelegable duty doctrine can also apply to employees and other agents.[218] Hence the doctrine could prevent employers from delegating to employees the obligation to exercise reasonable care in order to prevent sexual assaults in the workplace.

Such a nondelegable duty would be based on the following rule:

> One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.[219]

The "special danger" under this rule includes "a risk, recognizable in advance, of physical harm to others which is inherent in the work itself."[220] For example, "the use of a scaffold in painting the wall of a building above the sidewalk involves a recognizable risk that the scaffold, paint brush or bucket, or the painter himself, may fall and injure someone passing below," subjecting the owner of the building to vicarious liability for the negligent behavior of the painter under the nondelegable duty doctrine.[221]

As previously discussed, one of the foreseeable risks the workplace inherently creates is that employees are autonomous actors who can engage in tortious misconduct in disregard of the employer's express commands and even in disregard of the employer's interests altogether.[222] Like ordinary negligence, sexual assaults can also be

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218 The nondelegable duty doctrine applies to "independent contractors," a term that "is equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are nonagent service providers." *Id.* cmt. c. For example, a "railroad has the nondelegable duty to provide an employee with a safe place to work." Payne v. Balt. & Ohio R.R. Co., 309 F.2d 546, 549 (6th Cir. 1962) (discussing liability under the Federal Employer's Liability Act to which the common law of torts applies). Consequently, if a railroad "does delegate and relies upon the services of its agent to carry out its own duty, it may not shift its liability from itself to said agent when an employee seeks to hold it directly liable." *Id.*

219 Restatement (Second) of Torts § 427 (Am. L. Inst. 1965).

220 *Id.* cmt. b.

221 *Id.* cmt. c & illus. 1.

222 *See supra* Sections II.C, II.E.

such a foreseeable risk inherent in the workplace.[223] In principle, the "inherent" or "special" danger required for a nondelegable duty can range from ordinary negligent misconduct to intentional wrongdoing such as sexual assault, depending on the nature of the employment relationship and the risks it foreseeably creates.

If a court were to decide that sexual assault involves a nondelegable duty, the liability inquiry is straightforward. An employee who commits an assault at the workplace acts unreasonably, and that tortious behavior is imputed to the employer who could not delegate this responsibility for reasonably maintaining a safe workplace. The employee's sexual assault accordingly breaches the employer's nondelegable duty to exercise reasonable care, potentially subjecting it to vicarious liability. Whether the employer ultimately incurs liability, however, still depends on the same scope-of-liability limitation applicable to any tort claim: The plaintiff's injury must have been caused by a tortious risk for which the employer is responsible.

To identify such a tortious risk, courts must engage in the same inquiry as the one embodied in the tort formulation of vicarious liability—both employ the risk standard to determine the scope of liability. The same basic tort doctrines for applying the nondelegable duty doctrine also structure the tort version of vicarious liability.

Due to this overlap, the incremental step of subjecting employers to a nondelegable duty of exercising reasonable care to prevent sexual assaults in the workplace ultimately rests on tort doctrines of sufficient generality to displace the agency-based formulation of vicarious liability in all cases, not merely those involving sexual assaults. Under either approach, the motive test would no longer limit an employer's vicarious liability for sexual assaults in the workplace.

F. Principled Limitations of Vicarious Liability

If an employer's vicarious liability for sexual assaults would produce an excessive amount of liability that is socially problematic, courts can forthrightly limit liability on the basis of a "no-duty ruling":

> A no-duty ruling represents a determination, a purely legal question, that no liability should be imposed on actors in a category of cases. Such a ruling should be explained and justified based on articulated policies or principles that justify exempting these actors from liability . . . . These reasons of policy and principle do not depend on the foreseeability of

223 *See supra* Section III.B.

> harm based on the specific facts of a case. They should be articulated directly without obscuring references to foreseeability.[224]

To illustrate the importance of expressly relying on such no-duty rulings as the basis for limiting vicarious liability in cases of sexual assault, consider how the California Supreme Court applied the general foreseeability test to absolve a hospital from vicarious liability for the sexual assault one of its technicians committed after completing an ultrasound examination of the plaintiff patient.[225] The court acknowledged that the technician "took advantage of plaintiff's trust and his own superior knowledge to commit on her a deliberate sexual battery."[226] Nevertheless, the conduct was held to be outside the scope of employment because the "[h]ospital, by employing the technician and providing the ultrasound room, may have set the stage for his misconduct, but the script was entirely of his own, independent invention."[227]

One can easily question how the court could plausibly conclude that, from the hospital's perspective, it was not foreseeable that a technician conducting an ultrasound test in a private room could easily dupe a patient who trusted him into believing that the pelvic procedure required him to fondle her repeatedly in that area of her body.[228] Instead of basing its decision on an untenable finding about the lack of foreseeability, the court would have been on firmer ground by acknowledging that the conditions for establishing vicarious liability were potentially established on these facts, but for policy reasons the hospital is immune from being held strictly liable for such malfeasance in the absence of the employee's motive to serve the employer.

California case law provides ample support for relying on this public policy to limit a rule of strict liability. Recognizing that the tort of conversion can function as a form of strict liability, the California Supreme Court limited liability to the negligence doctrine of informed consent for cases in which medical researchers use someone's biological materials: "[T]he theory of [conversion] liability . . . threatens to destroy the economic incentive to conduct important medical research."[229] Similarly, when confronted with the question whether drug manufacturers are subject to strict liability for having sold defective

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224 Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 7 cmt. j (Am. L. Inst. 2010).

225 Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 367 (Cal. 1995).

226 *Id.*

227 *Id.*

228 *Id.* at 359–60.

229 Moore v. Regents of Univ. of Cal., 793 P.2d 479, 495 (Cal. 1990).

products, the court immunized them from strict liability for policy reasons involving the increased cost and reduced availability of medical products.[230] And when faced with the related question whether a pharmacy is subject to strict liability for having sold a defective medical product, the court again declined to apply the rule of strict liability, again expressing concern about the impact of strict liability on the cost and availability of prescription drugs.[231] Other jurisdictions immunize the providers of medical products and healthcare services from strict liability for these same policy reasons, limiting their liability to cases of negligence.[232]

Vicarious liability is a form of strict liability. As applied to the vicarious liability of hospitals and other providers of healthcare, these same policy reasons could justify limiting this rule of strict liability to cases in which the employee was motivated to serve the employer's interests.

A court taking this approach would properly invoke the motive test to limit the scope of vicarious liability within the medical context for reasons of tort law, not agency law. The tort rationale for applying the motive test in this restrictive manner would expressly depend on the underlying policy reasons involving the provision of healthcare, in sharp contrast to agency law, which cannot persuasively explain why motive has any relevance in cases of unauthorized employee misconduct.[233]

Lacking any principled reasons for limiting vicarious liability in these cases, the common law is vulnerable to the critique of Martha Chamallas that it "treat[s] sexual abuse cases as exceptional, echoing the sentiments of old (pre-1970s) criminal law that once approached rape and sexual assault as qualitatively different from other forms of violence and erected special legal barriers to prosecution."[234] The motive test bars liability by ignoring the behavioral reality of the

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230 *See* Brown v. Superior Court, 751 P.2d 470, 473, 477–79, 482–83 (Cal. 1988).

231 *Compare* Murphy v. E.R. Squibb & Sons, Inc., 710 P.2d 247, 249–50, 253 (Cal. 1985) (justifying its holding that pharmacists primarily provide a service not subject to strict products liability in part on the ground that "[i]f pharmacies were held strictly liable for the drugs they dispense, some of them, to avoid liability, might restrict availability by refusing to dispense drugs which pose even a potentially remote risk of harm, although such medications may be essential to the health or even the survival of patients"), *with id.* at 258 (Bird, C.J., dissenting) (arguing that "the issue is whether retail druggists and pharmacies" in the course of selling prescription drugs "are engaged primarily in selling a product or in performing a service. The simple answer is that in the marketing of prescription drugs by retail druggists, as in the marketing of automobiles and other consumer products, the sale aspect predominates over any incidental service provided to the consumer").

232 *See* Mark A. Geistfeld, Principles of Products Liability 181–98, 338–44 (3d ed. 2020).

233 *See supra* notes 128–30 and accompanying text.

234 Chamallas, *supra* note 8, at 137.

workplace, and jurisdictions like California that reject the motive test "do not consistently rule for sexual abuse plaintiffs, even when the risk of sexual abuse is common and predictable."[235] The puzzling treatment of sexual assaults in the workplace lends itself to critiques of the type Chamallas has persuasively developed.

Unlike current formulations of vicarious liability, the tort version permits courts to limit the employer's tort duty for the same reasons of policy or principle courts invoke to limit duties in other contexts, eliminating the appearance that tort law embodies a "sex exception." These principled limitations of the employer's duty should be exceptional, just like they are with respect to other types of tort duties.[236] But exceptional rulings based on the established policies or principles of tort law cannot be fairly criticized on the ground that they treat sexual misconduct as an exceptional form of employee misconduct which merits its own distinctive rules for limiting vicarious liability.

G. The Tort Foundation of Vicarious Liability

Vicarious liability implicates tort questions that agency law can only awkwardly address. Perhaps most importantly, tort law provides the true grounds for vicarious liability when an employee who is motivated to serve the employer's interest engages in unauthorized tortious misconduct. The unauthorized nature of the conduct takes it outside the scope of the agency relationship. Agency law attempts to rectify this problem by adopting a fictitious "inherent power" within the agency relationship that authorizes employees to tortiously injure third parties.[237] Rather than relying on this question-begging agency rationale for vicarious liability, courts would be on firmer ground by recognizing that the motivation makes the unauthorized behavior foreseeable and within the scope of vicarious liability as a matter of tort law.[238]

A different solution to this problem is to reformulate the entirety of agency law with a principle that attempts to capture the relevant normative concerns of contract law, tort law, and remaining issues

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235 *Id.* at 138.

236 *See* Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 7 (Am. L. Inst. 2010) ("In exceptional cases, . . . a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification."); *see generally* Mark A. Geistfeld, *Social Value as a Policy-Based Limitation of the Ordinary Duty to Exercise Reasonable Care*, 44 Wake Forest L. Rev. 899, 901–02, 905–16 (2009) (identifying the types of policy concerns that courts use to justify exceptional limitations of the ordinary duty to exercise reasonable care).

237 *See supra* notes 128–30 and accompanying text.

238 *See supra* Section II.C.

distinctive to agency law.[239] The inherent difficulty with this approach is that it necessarily depends on a unifying principle for these rules of the common law, a highly contestable proposition in light of the ongoing disagreement about whether there is any unifying principle for either contract law or tort law, much less some combination of the two.[240]

Rather than trying to shoehorn the relevant rules into a single body of agency law reformulated to address *all* legal problems stemming from agency relationships, the approach developed in this Article recognizes that vicarious liability is fundamentally a tort doctrine and not merely a component of a different body of agency law. The remaining corpus of agency law still comprises a substantively distinct category of the common law pertaining to the formation of agency relationships, the correlative rights and obligations running between principals and agents, and the ability of agents to contractually bind the principal with third parties.[241] Agency law would continue to be the source of the agency relationship at the heart of vicarious liability, but the scope of vicarious tort liability and the varied rules surrounding this doctrine would be solely a matter of tort law.

For reasons the problem of sexual assault makes clear, restrictive rules of agency law, such as the one that limits the scope of vicarious liability with the motive test, should not constrain vicarious liability as a tort doctrine. Agency law initially determines whether the relationship is one of agency and not something else, with the associated implications for the kinds of employee conduct that the agency relationship actually authorizes. Unauthorized conduct is beyond the scope of agency law. The proper scope of vicarious liability in all cases of unauthorized

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239 *See generally* Dalley, *supra* note 36 (defending a reformulation of agency law in terms of a "cost-benefit internalization theory" that requires principals to bear the foreseeable costs of the agency relationship while retaining the benefits of that relationship). For an alternative way to reformulate vicarious liability in terms more congenial to agency law, see Christine Beuermann, Reconceptualising Strict Liability for the Tort of Another 1 (2019) (arguing that the unifying rationale for vicarious liability is that "the defendant is either vested with authority over the person who committed the tort or has conferred a form of authority upon that person in respect of the claimant." (footnotes omitted)).

240 *See generally* Geistfeld, *Pluralist Tort Adjudication*, *supra* note 96 (describing how the common law has always been justified by a plurality of potentially conflicting moral values that the process of adjudication renders normatively coherent through the requirement that judges treat "like cases alike"); *see also* Weinrib, *supra* note 94, at ix-xi, 123–33 (discussing the conflicting interpretations of private law based on either economic efficiency or Kantian right).

241 For insightful discussion of agency law's importance and value, see generally Rauterberg, *supra* note 33 (arguing, for example, that agency law "serve[s] an essential role" in "business enterprise" through "attribution rules and asset partitioning," a function "that parties could not replicate . . . through contracting").

employee behavior instead is best defined by the associated tortious or foreseeable risks for which the employer is responsible, a form of vicarious liability that can apply to cases of sexual assault regardless of the employee's motive. The problem of sexual assaults in the workplace fully exposes the shaky foundations of the agency rationale for vicarious liability.[242]

Conclusion

In the leading judicial formulation of the foreseeability approach for determining the scope of vicarious liability, Judge Friendly described the inquiry in terms of a workers' compensation-esque foreseeability standard that is more general than the case-specific "foreseeably unreasonable risk of harm that spells negligence."[243] Friendly apparently did not feel obligated to adhere to ordinary tort principles because "*respondeat superior*, even within its traditional limits, rests not so much on policy grounds consistent with the governing principles of tort law as in 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."[244]

The assumption that the role of foreseeability within vicarious liability differs from its tort counterpart is widely held.[245] According to the *Restatement (Third) of Agency*, "'[f]oreseeability' has a well-developed meaning in connection with negligence and to use it, additionally, to define a different boundary for respondeat superior risks confusion."[246]

As I have argued in this Article, the role of foreseeability within the scope-of-employment analysis of vicarious liability has been badly misunderstood by courts and commentators. The ordinary tort conception of foreseeability governing cases of both negligence and strict liability can help justify vicarious liability as a tort rule that

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[242] *Cf.* Harris, *supra* note 23, at 74 (recognizing "that the traditional common law supplements *agency-based* respondeat superior with *non-agency* theories of vicarious liability rooted in tradition, public policy, statute, or implied contract" (both emphases added)).

[243] Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968) (citing 2 Harper & James, The Law of Torts 1377–78 (1956)).

[244] *Id.*

[245] *See, e.g.*, Harper, et al., *supra* note 64, § 26.7 (recognizing that whether a risk is within the scope of employment "may be justified on a notion that the employer will be held for unauthorized acts only if they are reasonably foreseeable," but then rejecting this interpretation because "[w]e are not here looking for the employer's fault but rather for risks that may fairly be regarded as typical of or broadly incidental to the enterprise he has undertaken"). For citation to numerous other courts and commentators taking this position, see *supra* note 14.

[246] Restatement (Third) of Agency § 7.07 cmt. b (Am. L. Inst. 2006).

makes employers and other principals responsible for the foreseeable misconduct of their employees and other agents.

Employees are not merely extensions of the employer; they are autonomous actors who predictably respond to certain work conditions by disobeying the commands and disregarding the interests of the employer. An employee's motivation for engaging in the tortious behavior continues to be relevant but does not fully capture the manner in which the employment relationship can cause employees to engage in foreseeable forms of tortious misconduct while pursuing their own ends. By reformulating vicarious liability as a rule of tort law, courts can jettison the motive test for circumscribing vicarious liability.

Relying on the widespread judicial endorsement of the motive test, the most recent Tentative Draft of the *Restatement (Third) of Torts* also adopts the motive test.[247] Because employees who commit sexual and other physical assaults rarely do so in furtherance of their employers' interests, this rule will ordinarily shield employers from vicarious liability even when the attacks are a foreseeable consequence of the employment relationship. The tentative adoption of this rule should be reversed. The motive test is based on agency law and properly belongs in the *Restatement (Third) of Agency*, not in its tort counterpart.

The following principle is supposed to guide how the Reporters for a Restatement project should formulate their proposed liability rules (which are then subject to revision and final approval by the American Law Institute):

> A Restatement . . . assumes the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole. Faced with such precedent, an Institute Reporter is not compelled to adhere to . . . "a preponderating balance of authority" but is instead expected to propose the better rule and provide the rationale for choosing it.[248]

The better *tort* rule of vicarious liability is not limited by the motive test. When an employee is not acting in furtherance of the employer's interests, basic tort doctrines fully justify making the employer responsible for the extent to which the agency relationship elevated

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247 Restatement (Third) of Torts: Miscellaneous Provisions § 5 & cmts. f, g (Am. L. Inst., Tentative Draft No. 2, 2023).

248 Am. L. Inst., *Restatements*, *in* Capturing the Voice of The American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work 5 (1st ed. 2005, rev. 2015), *reprinted in* Restatement (Third) of Torts: Miscellaneous Provisions ix (Am. L. Inst., Tentative Draft No. 2, 2023).

the foreseeable risk of the employee's tortious misconduct above the background level of such a risk in the community. The resultant form of vicarious liability, when reframed in the powerful prose of Judge Friendly, is both fully "consistent with the governing principles of tort law" and the "deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities."[249]

[249] Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968).