INSTITUTIONAL LIABILITY FOR SEXUAL VIOLENCE IN PRISONS BASED ON THE AIDED-BY-AGENCY THEORY

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Sexual assault perpetrated by correctional officers in prisons and jails is a pervasive problem in women's correctional facilities. However, victims who choose to pursue a civil action rarely recover damages for their injuries because our legal system fails to provide adequate options for relief. This failure leaves victims uncompensated and disincentivizes correctional institutions from implementing effective preventative measures. Part of the reason for this failure is that most U.S. courts refuse to hold employers liable for sexual violence committed by their employees. They find that employers cannot be held liable for the tortious conduct of their employees unless the conduct falls within the scope of their employment. Courts consider sexual assault to be a criminal act committed out of personal motivation, which is never considered to fall within the traditional scope of employment.

However, some courts—including the U.S. Supreme Court—have adopted an "aided-by-agency" theory of employer liability that holds employers liable when they have delegated immense power to their employees and that power is used to harm others. Aided-by-agency liability is framed as an exception to the scope of employment requirement for vicarious liability and is justified by the same policy goals underlying the doctrine of respondeat superior. This Note considers the aided-by-agency theory and discusses the debate among courts and commentators as to whether it should apply to cases involving sexual assault. It concludes by arguing that courts should adopt a modified aided-by-agency rule in the context of prison sexual assault. The modified rule imposes liability on prisons and jails for sexual assaults committed by their employees when (1) the employer has delegated authority to the employee to control important elements of the victim's life or livelihood and (2) the empowered employee was aided by the employer-conferred authority in committing the sexual assault.

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INTRODUCTION

More than one in four incarcerated women report that they are sexually assaulted while incarcerated.[1] Correctional officers are the perpetrators in over half of all reported incidents of sexual assault in prisons.[2] Sexual abuse by correctional officers in women's prisons is so pervasive and notorious that it has been described as "an institutionalized component of punishment behind prison walls."[3] The state confines incarcerated women to dangerous environments that are statistically proven to significantly increase the risk of sexual assault.[4] Yet, prisons are virtually shielded from any liability for the harm caused by the risk of sexual assault that they create.[5]

A woman who is sexually assaulted by a correctional officer while she is incarcerated will rarely recover damages for her injuries.[6] Even if the officer is prosecuted and convicted for their crimes, our legal system fails to compensate victims who pursue civil action. One key reason for this failure is that courts tend to not find states and municipalities liable for the sexual violence that occurs in their correctional institutions.[7] Even though sexual

1. *See* Hannah Brenner, Kathleen Darcy, Gina Fedock & Sheryl Kubiak, *Bars to Justice: The Impact of Rape Myths on Women in Prison*, 17 GEO. J. GENDER & L. 521, 537 (2016) (noting that the statistic is almost certainly an underestimate due to underreporting).

2. *See* ALLEN J. BECK, RAMONA R. RANTALA & JESSICA REXROAT, BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2009–11, at 1 (2014).

3. Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 45 (2007) (quoting Angela Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 350 (1998)).

4. *See generally id.*

5. *See infra* Part II.B.

6. This Note focuses on women's prisons because women who are incarcerated are far likelier to be sexually assaulted by correctional officers than men who are incarcerated. *See* Teresa A. Miller, *Keeping the Government's Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861, 869 n.29 (2001) ("[W]hereas most sexual assaults on women prisoners are perpetrated by male guards and staff, most sexual assaults on male prisoners are committed by fellow prisoners."). Additionally, women suffer sexual abuse perpetrated by many different members of prison staff, but for the purposes of this Note, "perpetrators" will refer to "correctional officers" because most incidents of sexual assault are perpetrated by prison guards. *See* Brenner et al., *supra* note 1, at 538 n.105.

7. *See infra* Part II.B.

assault is a pervasive element of prisons and jails in the United States, and these institutions are responsible for offloading large sums of custodial power to correctional officers over the human beings in their care, prisons and jails are rarely held accountable for the sexual assaults that occur within their walls.[8]

Part of the reason why it is difficult for victims of prison sexual assault to recover damages is that the defendant, the correctional officer, is almost always insolvent and unable to pay their liabilities.[9] If victims try to sue the prison or jail itself, few courts will find an employer liable for intentional torts committed by their employees, especially sexual assault.[10] Vicarious liability is typically imposed because the employee's tortious conduct fell within the scope of their employment.[11] Courts differ in their analyses of whether certain acts fall within the scope of employment, but typically, "scope of employment" includes conduct that is incidental to the duties the employee was hired to perform.[12]

Recently, however, some state courts have identified this injustice and adopted a theory of tort liability that holds employers liable when they have delegated a dangerous amount of power to their employees and that power is subsequently abused.[13] This theory, called the "aided-by-agency" theory, has been endorsed in some form by the Restatement (Second) of Agency and the U.S. Supreme Court.[14] The aided-by-agency theory imposes liability on employers when an employee was "aided in accomplishing" their tortious conduct by their agency relationship with their employer.[15] The state courts that have adopted aided-by-agency liability have limited its scope to situations in which the employer is responsible for conferring power on their employee and the employee used that power to sexually assault a third party.[16]

Critics argue that the aided-by-agency theory expands liability unfairly for employers by overriding the traditional analysis for vicarious liability, which holds employers liable for employee conduct only when the conduct falls

8. *See* Sasha Volokh, *Prisoner Litigation Against Public Prisons: How Many Ways Can You Lose?*, WASH. POST (Feb. 18, 2014, 11:54 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/18/prisoner-litigation-against-public-prisons-how-many-ways-can-you-lose/ [https://perma.cc/VGP6-36XP].

9. *See infra* note 39 and accompanying text.

10. *See infra* Part I.C (discussing the difficulties of bringing a vicarious liability claim against an employer for a sexual assault committed by an employee).

11. *See id.*

12. *See infra* note 51 and accompanying text.

13. *See generally* P.J. v. City of Jersey City, No. 21-CV-20222, 2022 WL 16949544 (D.N.J. Nov. 15, 2022); K.J. v. J.P.D., No. 20-CV-14177, 2023 WL 4103013 (D.N.J. June 21, 2023); Peña v. Greffet, 110 F. Supp. 3d 1103 (D.N.M. 2015); Ayuluk v. Red Oaks Assisted Living, Inc., 201 P.3d 1183 (Alaska 2009); Sherman v. State Dep't of Pub. Safety, 190 A.3d 148 (Del. 2018); Hardwicke v. Am. Boychoir Sch., 902 A.2d 900 (N.J. 2006); Spurlock v. Townes, 368 P.3d 1213 (N.M. 2016); Doe v. Forrest, 853 A.2d 48 (Vt. 2004).

14. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (Am. L. Inst. 1958).

15. *See id.*

16. *See infra* Part II.B (discussing the aided-by-agency courts' application of the rule).

within the scope of employment.[17] This Note disagrees, and it argues that courts should adopt a modified aided-by-agency rule that holds prisons and jails liable for sexual assaults committed by the correctional officers they employ.

Part I of this Note first provides background on the institutional problem of sexual violence against women in custody and then turns to the inadequate response of our legal system to that problem. It discusses each prevailing legal theory for holding employers liable for sexual assaults committed by their employees and the reasons why each of these theories tends to fail. Part I then introduces the aided-by-agency theory of vicarious liability, which has worked for some plaintiffs in sexual assault cases and discusses the theory's background.

Part II describes different courts' and commentators' views on the aided-by-agency theory as it applies to cases in which employees are aided by their employer-conferred power in committing sexual assault. Part II will outline the various arguments for and against applying the aided-by-agency theory in the context of sexual assault generally.

Part III will conclude that the aided-by-agency exception should be adopted by courts in the context of prison sexual assaults through the following limiting rule: employers are liable for sexual assaults committed by their employees when (1) the employer has delegated the power or authority to the employee to control important elements of the victim's life or livelihood and (2) the empowered employee was aided by the employer-conferred power or authority in committing the sexual assault. This approach is more appropriate for situations involving sexual violence against women who are incarcerated because it focuses on the power imbalance between offender and victim and the institution's role in fostering that relationship.

I. SEXUAL VIOLENCE IN PRISON AND THE BARRIERS TO CIVIL RECOVERY

Part I introduces the institutional problem of sexual assault in prisons and jails and the many barriers to civil recovery faced by victims. Part I.A describes the pervasiveness of sexual assault perpetrated by correctional officers across the country. Parts I.B and I.C discuss the obstacles that victims of sexual assault generally face when trying to bring a lawsuit based on direct or vicarious liability. Part I.D then introduces an alternative theory of vicarious liability that courts have applied to find institutions liable for sexual assaults committed by their employees. Part I.E concludes by explaining the policy rationales behind vicarious liability generally.

17. *See infra* Part II.A (describing the arguments against aided-by-agency liability).

A. Institutionalized Sexual Violence in Women's Prisons

Despite the universal criminalization of sexual contact between correctional officers and inmates,[18] sexual assault of female inmates by guards is rampant. Sexual abuse by correctional officers in women's prisons is so pervasive and notorious that it has been described as "an institutionalized component of punishment behind prison walls."[19] One in four female inmates reported that they were sexually assaulted while incarcerated, and researchers believe that to be an underestimate because so many incidents go unreported.[20] Half of all reported incidents of sexual violence are perpetrated by correctional officers.[21]

The institutionalization of sexual assault in women's prisons is well-documented in scholarship.[22] Correctional officers have complete power and control over inmates in female prisons.[23] Women who are incarcerated depend on guards for all of their basic needs and safety, which makes it difficult for them to resist any form of sexual predation out of fear of being deprived of basic privileges.[24] In prison, "orders are given as to what prisoners wear, what they eat, how much they eat, how they work, where they work, what they read, whom they see, what they write, when they can write, when they can talk, and what they can say."[25] Incarcerated women who resist these orders are often labeled "problem prisoners," leading to retaliation by correctional officers, which could include placement in solitary confinement and parole denial.[26]

Scholars argue that conditions of certain institutions tend to foster or create abusers.[27] Professor Margaret Hall focuses her research on the abuse of

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18. PRISON POL'Y INITIATIVE, CUSTODIAL SEXUAL MISCONDUCT LAWS: A STATE-BY-STATE LEGISLATIVE REVIEW (2012), https://static.prisonpolicy.org/scans/sprcsmstatelaw.pdf [https://perma.cc/48PM-6LFG].

19. Buchanan, *supra* note 3, at 45.

20. *See* Brenner, *supra* note 1, at 537.

21. BECK ET AL., *supra* note 2.

22. *See, e.g.*, Buchanan, *supra* note 3; J.S. Welsh, Note, *Sex Discrimination in Prison: Title VII Protections for America's Incarcerated Workers*, 42 HARV. J.L. & GENDER 477, 484 (2019); Anthea Dinos, *Custodial Sexual Abuse: Enforcing Long-Awaited Policies Designed to Protect Female Prisoners*, 45 N.Y.L. SCH. L. REV. 281 (2001); Melissa Stein, *Rape, Resign, Repeat: How the Deliberate Indifference Standard Denies Redress to Detainees Raped by Corrections Officials*, 34 WIS. J.L. GENDER & SOC'Y 83 (2019).

23. *See* Kristen Seddiqui, Graham v. Sheriff of Logan County*: Coercion in Rape and the Plight of Women Prisoners*, 92 DENV. L. REV. 671, 675 (2015).

24. *See id.*; Margaret Penland, *A Constitutional Paradox: Prisoner "Consent" to Sexual Abuse in Prison Under the Eighth Amendment*, 33 LAW & INEQ. 507, 519–20 (2015); DOROTHY Q. THOMAS, DEBORAH BLATT, ROBIN S. LEVI, SARAH LAI, JOANNE MARINER & REGAN E. RALPH, HUM. RTS. WATCH WOMEN'S RTS. PROJECT, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996), https://www.hrw.org/legacy/reports/1996/Us1.htm [https://perma.cc/QZZ9-J7S2] ("We found that . . . male officers . . . used their near total authority to provide or deny goods and privileges to female prisoners to compel them to have sex.").

25. Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751, 778 (2005).

26. *Id.* (quoting KATHERYN WATTERSON BURKHART, WOMEN IN PRISON 132 (1973)).

27. *See generally* Margaret Hall, *After* Waterhouse*: Vicarious Liability and the Tort of Institutional Abuse*, 22 J. SOC. WELFARE & FAM. L. 159 (2000).

children in residential care, and other scholars have applied Professor Hall's theories to widespread abuse in the Catholic Church,[28] the Boy Scouts,[29] Penn State Athletics,[30] USA Gymnastics and other sports organizations,[31] and women's prisons.[32] These institutions each have the common characteristics of secrecy, apartness, vulnerable populations,[33] and hierarchies of power.[34] These characteristics create a culture in which misconduct is shielded from public scrutiny, rarely reported by victims, and so hidden from view that even offenders grow to believe that "so long as the behaviour is not known or spoken about, it did not actually happen."[35] Professor Hall argues that this misconduct becomes entrenched in institutions because the law treats "institutional abuse as a series of disconnected crimes committed by cunning deviants" rather than "generally foreseeable organizational or 'man-made' disasters."[36] But despite the close connection between correctional institutions and the sexual abuse that occurs within them, prisons and jails often escape liability when sought by victims.[37]

B. Insufficient Avenues for Direct Liability

Incarcerated women have limited options to recover for the sexual violence they endure in prison.[38] Assuming the offending correctional officer is reported, prosecuted, and convicted, a woman who has been sexually assaulted in prison will have little trouble bringing a direct claim for battery against the perpetrator under state tort law.[39] However, even if correctional officers are held liable, they are likely to be insolvent and thus unable to bear full liability.[40]

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28. *See* Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 171 (2013).

29. *See id.*

30. *See id.* at 133.

31. *See* Emily C. Hoskins, *Actions Speak Louder than Words: When Should Courts Find That Institutions Have a Duty to Protect Minor Children from Sexual Abuse?*, 24 CHAP. L. REV. 487, 491 (2021).

32. Welsh, *supra* note 22, at 484.

33. Incarcerated women are particularly susceptible to abuse. They are often young, single mothers who have dropped out of high school and have some history of abusive relationships, sexual abuse, or drug and alcohol abuse. *See* Dinos, *supra* note 22 at 283.

34. Hall, *supra* note 27, at 162, 168.

35. *Id.* at 162–63.

36. *Id.* at 161, 163.

37. *See infra* Part II.B.

38. *See infra* notes 40–48 and accompanying text.

39. Victims face obstacles in bringing direct claims as well. For a discussion about the difficulties of reporting sexual abuse in prisons and bringing direct claims against correctional officers, see generally Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 801 (2014). For a discussion of the social barriers to reporting sexual abuse in prison, see generally Brenner, *supra* note 1.

40. The median annual wages for correctional officers and jailers were estimated to be $47,920 as of May 2021. *Occupational Employment and Wages, May 2021: Correctional Officers and Jailers*, U.S. BUREAU LAB. STAT., https://www.bls.gov/oes/2021/may/oes333012.htm [https://perma.cc/DX4W-28JD] (May 31, 2022).

A victim could file a direct state law claim against the perpetrator's supervisors and the prison for negligent hiring, retention, training, or supervision, but this is a challenging case for plaintiffs for two reasons: sovereign immunity and high evidentiary burdens. In many states, sovereign or governmental immunity laws bar most negligence suits against state prisons and local jails.[41] In states without sovereign or governmental immunity, negligence-based actions are difficult to prove because they require a showing that the employer knew or should have known of the employee's dangerous proclivities and that the employer's negligence proximately caused the plaintiff's injuries.[42]

A victim could also bring a federal civil rights claim under 42 U.S.C. § 1983, which permits individuals to bring an action against public officials and municipalities (but not states) for deprivation of a constitutional right.[43] However, like a state law negligence claim, immunities and high evidentiary burdens often preclude § 1983 from providing redress.[44] Prison supervisors are protected by qualified immunity, which is often an insurmountable defense for plaintiffs.[45] In order to hold a municipality liable under § 1983, the plaintiff must show that the prison caused the sexual assault either by its deliberate indifference to a pattern or practice of similar misconduct or through a policy that directly caused the harm.[46] Failing to train or supervise employees is an appropriate basis on which to bring a § 1983 claim, but the failure must be deliberately indifferent, and such indifference must closely cause the plaintiff's injuries.[47] The Supreme Court and many other courts have required a formidable burden of proof for such claims.[48]

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41. *See, e.g.*, OKLA. STAT. tit. 51, §§ 151–258 (2023) (rendering Oklahoma immune from any tort suit arising out of a prison, jail, or correctional facility); W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B., 766 S.E.2d 751, 777 (W. Va. 2014) (holding that the prison was immune from suit for alleged negligent hiring, supervision, and retention that resulted in the sexual assault of an incarcerated woman).

42. *See, e.g.*, Reed v. Kelly, 37 S.W.3d 274, 277 (Mo. Ct. App. 2000) (rejecting a negligent hiring claim alleging that guard committed two prior physical assaults and was previously reprimanded for inappropriate sexual comments); *see also* Perry v. Asphalt & Concrete Servs., Inc., 133 A.3d 1143, 1155 (Md. 2016); Wansey v. Hole, 379 S.W.3d 246, 247 (Tex. 2012).

43. 42 U.S.C. § 1983.

44. *See infra* notes 45–48 and accompanying text.

45. Qualified immunity shields public officials from liability for civil damages insofar as their conduct does not violate a clearly established constitutional or statutory right, so long as a reasonable person would have known that they were violating the law. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). For further discussion and critique of qualified immunity in the context of prison, see generally Stein, *supra* note 22.

46. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978).

47. *See* City of Canton v. Harris, 489 U.S. 378, 391–92 (1989).

48. *See* Connick v. Thompson, 563 U.S. 51, 71 (2011) (holding that a district attorney's office was not liable for its prosecutors' *Brady* violations, even though (1) the office did not train prosecutors on their *Brady* obligations at all; (2) at least five prosecutors had known about the violations over a period of twenty years; and (3) the office's prosecutors were responsible for four court-acknowledged *Brady* violations in the past); *see also* Jennifer A. Brobst, *Vicarious Liability for Systemic Risks of Sexual Violence in the United States: Not a Modest Proposal*, 99 U. DET. MERCY L. REV. 261, 276–77 (2022).

C. Insufficient Avenues for Vicarious Liability: The Failure of Scope of Employment

Instead of seeking direct liability from prisons, victims of sexual assault in prison may also allege that the prison is vicariously liable for the harm caused by a prison employee. A lawsuit can be brought against employers for harm caused by their employees under the common law doctrine of respondeat superior.[49] Respondeat superior imposes no requirement that the employer have any fault or knowledge of the tortious behavior, so long as the employee's wrongful conduct was committed within the scope of their employment.[50]

The test for whether an act falls within the scope of employment varies from state to state. Many states have adopted section 228 of the Restatement (Second) of Agency, which states that an employee's conduct must satisfy three criteria: "(a) [the conduct] is the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the [employer]."[51] Other states consider whether the tortious conduct was foreseeable, meaning that the employee's conduct was "not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."[52] Some states also find that intentional torts can be within the scope of employment when "the act was not unexpectable in view of the duties" of the employee.[53] The scope of employment requirement largely prevents vicarious liability for intentional torts because very few uses of force are expectable by the employer.[54]

The overwhelming majority of courts find that sexual assault never falls within the scope of employment.[55] Most courts that have adopted section 228 have refused to find vicarious liability for sexual assault claims, finding that sexual assault is not "the kind of conduct the employee is employed to perform" and cannot possibly be "actuated . . . by a purpose to serve the

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49. *See* Mark E. Roszkowski & Christine L. Roszkowski, *Making Sense of Respondeat Superior: An Integrated Approach for Both Negligent and Intentional Conduct*, 14 S. CAL. REV. L. & WOMEN'S STUD. 235, 236 (2005).

50. *See* RESTATEMENT (THIRD) OF AGENCY §§ 2.04, 7.07(1) (Am. L. Inst. 2006).

51. RESTATEMENT (SECOND) OF AGENCY § 228(1) (Am. L. Inst. 1958); *see also id.* § 235 (providing that "[a]n act of a servant is not within the scope of employment if it is done with no intention to perform it as part of or incident to a service on account of which he is employed").

52. Rodgers v. Kemper Constr. Co., 124 Cal. Rptr. 143, 148–49 (Ct. App. 1975).

53. RESTATEMENT (SECOND) OF AGENCY § 245 (Am. L. Inst. 1958).

54. *See id.* § 228(1).

55. *See, e.g.*, Martin v. Milwaukee County, 904 F.3d 544 (7th Cir. 2018) (guard-inmate); Doe v. Cramer, No. 17-CV-14382, 2018 WL 8265221 (S.D. Fla. Aug. 9, 2018) (police officer-arrestee); Motelewski v. Maui Police Dep't, No. 11-CV-778, 2012 WL 3780188 (D. Haw. Aug. 30, 2012) (police officer-arrestee); Goss v. Hum. Servs. Assocs., 79 So. 3d 127 (Fla. Ct. App. 2012) (group care facility employee-foster child); Powell v. City of Chicago, 197 N.E.3d 219 (Ill. App. Ct. 2021) (police officer-detainee); N.X. v. Cabrini Med. Ctr., 765 N.E.2d 844 (N.Y. 2002) (surgical resident-patient); Doe v. S.C. State Budget & Control Bd., 523 S.E.2d 457 (S.C. 1999) (police officer-arrestee).

employer."[56] These courts typically adhere to the common law doctrine that the very nature of sexual assault is personal desire and thus could never be within the scope of employment.[57]

A small minority of states have found, in limited circumstances, that sexual assault can fall within the scope of employment and have thus imposed vicarious liability on employers.[58] The justifications for these holdings vary. Oregon courts, for example, look at the acts that led to the injury in intentional torts cases to determine if those acts were within the scope of employment, as opposed to looking at the act that caused the injury.[59] Indiana courts have found that sexual assault is within the scope of employment when the employment context "naturally or predictably gave rise to" the conduct.[60] But scholars have criticized the tests formulated by these courts as unclear and unworkable products of tortured reasoning.[61] Thus, most states never find sexual assault to fall within the scope of employment, and plaintiffs are forced to bring their claims under a different theory.

D. The Aided-by-Agency Exception to Scope of Employment

One additional theory of employer liability that has been successful for some victims of sexual assault is the "aided-by-agency" theory. Aided-by-agency is a common law concept that courts have used to impose vicarious liability for tortious conduct committed outside the scope of employment.[62] The theory is that an employer should be liable for tortious conduct that was made possible solely by the existence of the agency relationship. Courts have justified their reliance on the aided-by-agency

56. *See, e.g.*, *Powell*, 197 N.E.3d at 224 ("[T]he alleged sexual assault by [the defendant police officer] is not the kind of conduct he is employed to perform."); *N.X.*, 765 N.E.2d at 847 ("A sexual assault perpetrated by a hospital employee is not in furtherance of hospital business and is a clear departure from the scope of employment, having been committed for wholly personal motives.").

57. *See, e.g.*, Hunter v. United States, 825 F. App'x 699, 702 (11th Cir. 2020) ("Florida courts have generally held sexual torts to be outside the scope of employment . . . . because assault [is] a 'self-serving act that in no way further[s] the business.'") (quoting Hammer v. Lee Mem'l Health Sys., No. 18-CV-347, 2018 WL 3707832, at *4 (M.D. Fla. Aug. 3, 2018)); Stout v. United States, 721 F. App'x 462, 472 (6th Cir. 2018) ("Ohio courts have consistently held that [sexual assaults are] outside the scope of employment."); Doe *ex rel.* Doe v. Lawrence Hall Youth Servs., 966 N.E.2d 52, 61 (Ill. App. Ct. 2012) (collecting cases and holding that "sexual assault by its very nature precludes a conclusion that it occurred within the employee's scope of employment").

58. *See, e.g.*, Mary M. v. City of Los Angeles, 814 P.2d 1341 (Cal. 1991); Red Elk v. United States, 62 F.3d 1102 (8th Cir. 1995); Cox v. Evansville Police Dep't, 107 N.E.3d 453 (Ind. 2018); L.B. v. United States, 515 P.3d 818 (Mont. 2022) (police officer-arrestee); Schmidt v. Archdiocese of Portland, 234 P.3d 993 (Or. 2010) (teacher-student).

59. *See Schmidt*, 234 P.3d at 992.

60. *See Cox*, 107 N.E.3d at 463.

61. *See* Roszkowski & Roszkowski, *supra* note 49, at 263–70; *see also* Christopher E. Krueger, Note, Mary M. v. City of Los Angeles*: Should a City Be Held Liable Under Respondeat Superior for a Rape by a Police Officer?*, 28. U.S.F. L. REV. 419, 449–61 (1994).

62. *See, e.g.*, Doe v. Forrest, 853 A.2d 48, 55–56 (Vt. 2004).

theory by citing two authorities: the Restatement (Second) of Agency and the Supreme Court.

1. Restatement (Second) of Agency Section 219(2)(d)

Section 219 of the Restatement (Second) of Agency provides several exceptions to the requirement that tortious conduct must be within the scope of employment to hold an employer liable for the tortious conduct of their employees.[63] Section 219(2)(d) of the Restatement (Second) of Agency states that an employer may be vicariously liable when the employee acted outside the scope of employment but "purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."[64] Most courts, including the Supreme Court, interpret the "aided in accomplishing the tort" phrase as a separate exception from the "reliance upon apparent authority" exception.[65]

On its face, the "aided-by-agency" exception is broad. For almost every conceivable tort committed in the workplace, one could argue that the existence of the agency relationship will cause a tortfeasor to be in close proximity to, and have regular contact with, their victim.[66] For this reason, courts have rejected section 219(2)(d), and some have adopted limitations on the aided-by-agency exception based on the scenarios presented in the section 219(2)(d) comments.[67]

Comment (e) to section 219 states that subsection (d) involves "primarily" apparent authority situations in which "one purports to speak for his employer in defaming another or interfering with another's business."[68] "In other situations," the comment continues, "the servant may be able to cause harm because of his position as an agent, as where a telegraph operator sends false messages purporting to come from third persons."[69] The second example the comment gives is that "the manager of a store operated by him for an undisclosed principal is enabled to cheat the customers because of his position."[70] Finally, the comment notes that "[t]he enumeration of such situations is not exhaustive."[71]

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63. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (Am. L. Inst. 1958).

64. *Id.*

65. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 801–02 (1998). Additionally, the sentence structure and drafting history of the section indicate that the reporters intended for the "aided-by-agency" exception to stand alone. *See* Alan J. Oxford, II, *When Agents Attack: Judicial Misinterpretation of Vicarious Liability Under "Aided in Accomplishing the Tort by the Existence of the Agency Relation" and Restatement 3rd's Failure to Properly "Restate" the Ill-Fated Section 219(2)(d) Provision*, 37 OKLA. CITY U. L. REV. 157, 171–76 (2012).

66. *See Faragher*, 524 U.S. at 786–87; Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995).

67. *See, e.g.*, Turner v. Wash. Metro. Area Transit Auth., 853 F. Supp. 2d 134, 137 (D.D.C. 2012); Mahar v. StoneWood Transp., 823 A.2d 540, 546 (Me. 2003).

68. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (Am. L. Inst. 1958).

69. *Id.*

70. *Id.*

71. *Id.*

Some courts infer from the two inexhaustive examples presented in comment (e) that the aided-by-agency exception is intended to be limited to situations involving deceit and manipulation.[72] For example, in a case in which a substance abuse program counselor used her authority to provide one of the incarcerated participants with drugs and sexually abuse him while he was confined in the program, the U.S. District Court for the District of Maine, applying Maine law, granted summary judgment for the defendant because the plaintiff failed to present evidence that the counselor "engaged in misrepresentation or deceit."[73]

Other courts use the comment to limit aided-by-agency liability to situations in which the tort "was 'accomplished by an instrumentality, or through conduct associated with the agency status.'"[74] These courts find that in order to hold the employer liable, the employee must commit the tort in the course of a transaction that "seems regular on its face" to the third party, or "the agent [must] appear[] to be acting in the ordinary course of the business confided to him."[75] For example, the U.S. District Court for the District of Columbia, which has adopted the instrumentality limitation, found that a police officer accomplished his sexual assault of an arrestee "by use of instrumentalities associated with [the officer's] official position."[76] The "instrumentalities" referenced by the court were the officer's police uniform, his access to police headquarters, and special police credentials that granted him access to remote and enclosed spaces in the building.[77] Therefore, the court concluded that "from a third-party perspective, [the officer's] conduct would have appeared to be in the ordinary course of his police business—taking a private citizen from his official vehicle, while in his official uniform, to his office in [Metropolitan Police Department] headquarters."[78]

The Supreme Court has also limited its adoption of the aided-by-agency exception but does not use comment (e) to justify its narrower rule. Rather, the Court stated that aided-by-agency is properly applied when "the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed."[79]

Lastly, it is worth noting that the Restatement (Third) of Agency does not include section 219(2)(d) as stated in the Restatement (Second). Although the commentary to the Restatement (Third) states that section 219(2)(d) is incorporated through "a more fully elaborated treatment of apparent

72. *See, e.g.*, *Mahar*, 823 A.2d at 546.

73. Harrison v. Corr. Med. Servs., No. 2-CV-104, 2003 WL 21262100, at *1 (D. Me. May 30, 2003); *see also* Harrison v. Corr. Med. Servs., No. 02-104, 2003 WL 1233049 (D. Me. Mar. 17, 2003), *vacated in part by* No. 2-CV-104, 2003 WL 21262100 (D. Me. May 30, 2003).

74. *See, e.g.*, Turner v. Wash. Metro. Area Transit Auth., 853 F. Supp. 2d 134, 137 (D.D.C. 2012) (quoting Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995)).

75. Buie v. District of Columbia, 273 F. Supp. 3d 65, 68 (D.D.C. 2017) (quoting Gary v. Long, 59 F.3d at 1397).

76. *Id.* at 69.

77. *Id.*

78. *Id.*

79. Faragher v. City of Boca Raton, 524 U.S. 775, 797 (1998); *see also infra* Part I.D.2 (discussing the Court's endorsement of the aided-by-agency exception in more detail).

authority and by the duty of reasonable care that a principal owes to third parties,"[80] the text of the Restatement (Third) does not sufficiently embody the aided-by-agency exception.[81] However, the reporter's notes, which discuss how courts are applying the rules set forth in each section, discuss cases in which courts use section 219(2)(d) to find employers liable for sexual abuse perpetrated by their employees.[82] Given the lack of clarity in the Restatement (Third), the reporters' most current view on section 219(2)(d) is unclear.[83]

2. The Supreme Court's Endorsement of Aided-by-Agency: *Faragher* and *Ellerth*

In addition to the Restatement, the Supreme Court is the main authority cited in support of the aided-by-agency theory through their decisions in *Faragher v. City of Boca Raton*[84] and *Burlington Industries, Inc. v. Ellerth*.[85] Nearly every state court that has discussed aided-by-agency liability has acknowledged the Supreme Court's treatment of section 219(2)(d). In *Faragher* and *Ellerth*, which were decided on the same day, the Court endorsed the aided-by-agency theory as a legitimate tool of agency law in the context of Title VII sexual harassment.[86]

In both *Faragher* and *Ellerth*, plaintiffs alleged that their supervisors sexually harassed them at work and sought recovery under Title VII of the Civil Rights Act of 1964.[87] Both actions sought to hold the employer, not the supervisor, liable.[88] The Court held, in both cases, that an employee who suffers sexual harassment at the hands of a supervisor can recover against the employer without showing that the employer is negligent or otherwise at fault for the supervisor's actions.[89] Their reasoning rested almost entirely on section 219(2)(d)'s aided-by-agency theory of liability.[90]

The issue of whether to impose employer liability for supervisor harassment under Title VII was one of first impression for the Court.[91] The Court had previously held that agency law controls in questions of whether employer liability is imposed for supervisor harassment,[92] and so the Court turned to two theories of agency liability: scope of employment and aided-by-agency. Discussing the scope of employment theory first, the Court concluded that harassing behavior falls outside the scope of a supervisor's

80. RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (Am. L. Inst. 2006).
81. *See* Jennifer K. Weinhold, *Beyond the Traditional Scope-of-Employment Analysis in the Clergy Sexual Abuse Context*, 47 U. LOUISVILLE L. REV. 531, 552–53 (2009).
82. *See* RESTATEMENT (THIRD) OF AGENCY § 7.05 cmt. e (Am. L. Inst. 2006).
83. *See* Weinhold, *supra* note 81, at 553.
84. 524 U.S. 775 (1998).
85. 524 U.S. 742 (1998).
86. *See Faragher*, 524 U.S. at 802; *Ellerth*, 524 U.S. at 760.
87. 42 U.S.C. § 2000e; *see Faragher*, 524 U.S. at 780; Ellerth, 524 U.S. at 747.
88. *See Faragher*, 524 U.S. at 780; *Ellerth*, 524 U.S. at 747.
89. *See Ellerth*, 524 U.S. at 747.
90. *See Faragher*, 524 U.S. at 802–03; *Ellerth*, 524 U.S. at 758.
91. *See Ellerth*, 524 U.S. at 746–47.
92. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

employment.[93] First, the Court reasoned that a supervisor who sexually harasses employees will rarely ever do so with the purpose of serving the interests of the employer.[94] Second, the Court was persuaded by the unanimity of finding supervisor harassment outside the scope of employment among district courts and courts of appeals.[95]

The Court then turned to section 219(2)(d), stating that "[s]cope of employment does not define the only basis for employer liability under agency principles."[96] The Court acknowledged that the aided-by-agency theory, as plainly written in the Restatement, is overly broad.[97] If taken literally, employers would be liable for every conceivable instance of misconduct that occurred in the workplace because "[p]roximity and regular contact may afford a captive pool of potential victims."[98] The Court thus concluded that to avoid strict liability for all tortious conduct committed in the workplace, there must be "something more" to impose liability under an aided-by-agency theory.[99]

Thus, the Court held that an aided-by-agency theory becomes more applicable when the harassment is conducted by a supervisor.[100] A supervisor, as opposed to a coworker, is necessarily aided by their position of power in every interaction with subordinates.[101] An employee will always find it difficult to call out, report, or walk away from a harassing supervisor who has the power to hire, fire, or promote.[102] A supervisor's "power to supervise—[which may be] to hire and fire, and to set work schedules and pay rates—does not disappear . . . when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion."[103] Therefore, when a supervisor sexually harasses an employee, they are acting with the authority of the employer, even if they are not acting within the appropriate scope of their authority.[104] As such, the Court held that an employer may be subject to vicarious liability for a hostile work environment created by a supervisor.[105]

However, the Court did not sanction automatic vicarious liability for harassment by a supervisor. The Court was compelled by a prior holding in *Meritor Savings Bank, FSB v. Vinson*[106] to reject automatic liability.[107] Rather, the Court reinforced their position in *Meritor*, explaining that

93. *See Faragher*, 524 U.S. at 798–99; *Ellerth*, 524 U.S. at 756–57.
94. *See Ellerth*, 524 U.S. at 756–57.
95. *See id.*; *Faragher*, 524 U.S. at 799.
96. *Ellerth*, 524 U.S. at 758.
97. *See id.* at 760.
98. *Id.*
99. *Id.*
100. *See Faragher*, 524 U.S. at 802.
101. *See id.* at 803.
102. *See id.*
103. *Id.* (quoting Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 854 (1991)).
104. *See Ellerth*, 524 U.S. at 763.
105. *See id.* at 765.
106. 477 U.S. 57 (1986).
107. *See Faragher*, 524 U.S. at 804.

common law agency principles are transferable to Title VII only to the extent they do not frustrate the purpose of the statute.[108] The Court believed that employer liability should partially depend on the employer's effort to create antiharassment policies and effective grievance mechanisms in order to recognize "Congress' intention to promote conciliation rather than litigation."[109] The Equal Employment Opportunity Commission (EEOC) has also followed Title VII's objective of avoiding harm rather than providing redress by promulgating recommendations for employers on sexual harassment policy and training.[110]

In order to balance "the agency principles of vicarious liability . . . as well as Title VII's . . . policies of encouraging forethought by employers and saving action by objecting employees," the Court created an affirmative defense for employers who are faced with Title VII liability for harassment by supervisors.[111] The defense has two elements. First, the employer must show that they took reasonable steps to prevent harassment and to swiftly end it when it occurs.[112] Second, the employer must show that the plaintiff-employee failed to reasonably take advantage of the employer's safeguard system, which was shown in the first element.[113] "An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense."[114]

This two-part affirmative defense kept the Court in accordance with its precedent's denouncement of automatic liability and satisfied Title VII's policy goals.[115] Therefore, the decisions in *Faragher* and *Ellerth* were based on a combination of agency principles (aided-by-agency liability) and Title VII policy interpretation.

E. The Policy Rationales for Vicarious Liability

Before discussing the debate surrounding aided-by-agency liability for sexual assault, it is helpful to briefly understand the policy rationales underlying vicarious liability generally because they are analyzed by most courts that have addressed the aided-by-agency theory. The most common and fundamental rationales for imposing vicarious liability on employers—rather than subjecting them to the standards of negligence—are compensation, deterrence, and fairness.[116]

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108. *See id.* at 804 n.4.
109. *See Ellerth*, 524 U.S. at 764.
110. *See Faragher*, 524 U.S. at 806.
111. *Ellerth*, 524 U.S. at 764.
112. *See Faragher*, 524 U.S. at 805.
113. *See id.*
114. *Id.* at 806.
115. *See id.*
116. *See* Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 329 (2007); Mary M. v. City of Los Angeles, 814 P.2d 1341, 1343 (Cal. 1991) ("[W]e articulated three reasons for applying the doctrine of respondeat superior: (1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation

Compensation and deterrence are the predominant instrumentalist justifications for vicarious liability.[117] Compensation for victims is central to vicarious liability for the simple reason that employers tend to have deeper pockets than employee-tortfeasors.[118] The entire tort law system would be futile if victims could not recover damages for their injuries. Deterrence is also a leading rationale for vicarious liability, elevated to the forefront primarily by law and economics scholars.[119] They believe that vicarious liability should be imposed when it would reduce harm in an economically efficient manner.[120] Holding an employer liable for its employees' wrongdoings is oftentimes more likely to prevent misconduct because it incentivizes employers to implement effective precautions.[121]

Although instrumentalist accounts of vicarious liability are common in torts cases, principles of fairness are equally if not more important to judges.[122] The fairness rationale is that an employer who creates a risk bears some responsibility for managing that risk.[123] Scholars have argued that vicarious liability is imposed properly when the employer posed a "distinctive risk[]" well above the general risk that exists outside of the employment relationship.[124]

These three policy goals—particularly the fairness rationale—are central to the debate over aided-by-agency liability. The next part will discuss different courts' analyses of whether these policy rationales support the aided-by-agency theory.

II. AIDED-BY-AGENCY LIABILITY IN SEXUAL ASSAULT CASES: THE DEBATE

State courts are split in their adoption of the section 219(2)(d) aided-by-agency theory to hold employers vicariously liable for sexual assaults committed by their employees. Most state courts reject employer liability claims because sexual assault does not fall within the scope of employment, and they have not yet considered aided-by-agency liability as a possible alternative.[125] Other courts have analyzed the aided-by-agency

for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury.").

117. *See, e.g.*, Chamallas, *supra* note 28, at 150.

118. *See id.*

119. *See id.* at 151–52.

120. *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, 569 (1988).

121. *See id.* at 569–70.

122. *See, e.g.*, Zsigo v. Hurley Med. Ctr., 716 N.W.2d 220, 228 (Mich. 2006) (finding that the imposition of vicarious liability should flow from "a considered policy judgment that it is fair and reasonable to hold an employer liable for the harmful actions of its employee" (quoting Doe v. Forrest, 853 A.2d 48, 70 (Vt. 2004) (Skoglund, J., dissenting))).

123. *See* Chamallas, *supra* note 28, at 156.

124. Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1292 (1997).

125. *See generally* Martin v. Milwaukee County, 904 F.3d 544 (7th Cir. 2018) (guard-inmate); Doe v. Cramer, No. 17-CV-14382, 2018 WL 8265221 (S.D. Fla. Aug. 9,

theory but reject it as a basis for liability for claims against employers for sexual assaults committed by their employees.[126] These courts see the aided-by-agency rule as overly broad and unfair to employers who cannot reasonably foresee sexual assault as a natural consequence of their business.[127] On the other hand, five states—Alaska, Delaware, New Jersey, New Mexico, and Vermont—have found employers vicariously liable for sexual assaults committed by their employees based on the aided-by-agency theory of liability.[128] These courts follow the reasoning of Justices Kennedy and Souter in *Faragher* and *Ellerth* by focusing on the power imbalance that exists in certain employment-related relationships.

There are some states that either follow a very limited version of the aided-by-agency rule[129] or have rejected aided-by-agency liability in certain circumstances but have not committed to a blanket rejection of the theory.[130] However, this section will focus on the courts that have either expressly adopted or expressly rejected the aided-by-agency theory of liability for sexual assault, as well as the scholars who have advocated for or against it.

A. Arguments Against the Adoption of Employer Liability for Sexual Assault Under an Aided-by-Agency Theory: Scope of Employment Supremacy

As discussed, most courts have not directly addressed the applicability of an aided-by-agency theory on sexual assault cases.[131] However, the courts and critics who have outright rejected the aided-by-agency exception argue

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2018) (police officer-arrestee); Motelewski v. Maui Police Dep't, No. 11-CV-778, 2012 WL 3780188 (D. Haw. Aug. 30, 2012) (police officer-arrestee); Goss v. Hum. Servs. Assocs., 79 So. 3d 127 (Fla. Ct. App. 2012) (group care facility employee-foster child); Powell v. City of Chicago, 197 N.E.3d 219 (Ill. App. Ct. 2021) (police officer-detainee); N.X. v. Cabrini Med. Ctr., 765 N.E.2d 844 (N.Y. 2002) (surgical resident-patient); Doe v. S.C. State Budget & Control Bd., 523 S.E.2d 457 (S.C. 1999) (police officer-arrestee).

126. *See generally* Sparks v. Bellin Health Sys., Inc., No. 09-CV-14, 2010 WL 2349467 (W.D. Mich. June 7, 2010); Doe v. Daniels, No. CV125036226S, 2014 WL 4413217 (Conn. Sup. Ct. July 23, 2014); Martin v. Tovar, 991 N.W.2d 760 (Iowa 2023); *Zsigo*, 716 N.W.2d 220; Doe 1 v. Young, No. 335089, 2018 WL 521832 (Mich. Ct. App. Jan. 23, 2018).

127. *See generally supra* note 126.

128. *See, e.g.*, P.J. v. City of Jersey City, No. 21-CV-20222, 2022 WL 16949544 (D.N.J. Nov. 15, 2022); K.J. v. J.P.D., No. 20-CV-14177, 2023 WL 4103013 (D.N.J. June 21, 2023); Peña v. Greffet, 110 F. Supp. 3d 1103 (D.N.M. 2015); Ayuluk v. Red Oaks Assisted Living, Inc., 201 P.3d 1183 (Alaska 2009); Sherman v. State Dep't of Pub. Safety, 190 A.3d 148 (Del. 2018); Hardwicke v. Am. Boychoir Sch., 902 A.2d 900 (N.J. 2006); Spurlock v. Townes, 368 P.3d 1213 (N.M. 2016); Doe v. Forrest, 853 A.2d 48 (Vt. 2004).

129. *See, e.g.*, Buie v. District of Columbia, 273 F. Supp. 3d 65 (D.D.C. 2017); Schierts v. City of Brookfield, 868 F. Supp. 2d 818 (E.D. Wis. 2012); Applewhite v. City of Baton Rouge, 380 So. 2d 119 (La. Ct. App. 1979). An analysis of these limited interpretations of aided-by-agency liability is beyond the scope of this Note.

130. *See, e.g.*, Pearce v. Werner Enters., 116 F. Supp. 3d 948, 957 (D. Neb. 2015) (finding that the Nebraska Supreme Court would not adopt section 219(2)(d) "*under the circumstances of this case*," in which a truck driving student was sexually assaulted by her truck driving teacher (emphasis added)); Connolly v. Roman Cath. Archbishop of Bos., No. 1782-CV-1126, 2019 WL 2402290 (Mass. Sup. Ct. May 17, 2019) (priest-minor); Kingston Mound Manor I v. Keeton, No. 18-CV-15, 2019 WL 3814952 (Ohio Ct. App. Aug. 7, 2019) (landlord-tenant).

131. *See supra* note 125 and accompanying text.

that vicarious liability flows from a policy judgment that it is fair and reasonable to hold an employer liable for the misconduct of its employee and that holding an employer liable for unforeseeable conduct outside the scope of employment is not fair or reasonable.[132] Furthermore, they argue that (1) holding employers liable under section 219(2)(d) would not deter future misconduct; (2) aided-by-agency liability, as it has been adopted by courts, lacks support in the Restatement (Second) and Restatement (Third); (3) the Supreme Court's decisions in *Faragher* and *Ellerth* do not support state courts' adoption of section 219(2)(d) for sexual assault; and (4) there are practical reasons to reject section 219(2)(d).

1. Aided-by-Agency Liability Is Not Supported by the Policy Goals of Respondeat Superior

Putting aside the policy goal of compensation,[133] courts argue that the aided-by-agency exception is unsupported by respondeat superior's policy goals of fairness and deterrence.[134] For these reasons, courts believe scope of employment is the proper analysis in all vicarious liability cases involving sexual assault.[135]

The general principle behind the scope of employment rule is that holding employers liable for acts of their employees that occur outside their scope of employment is fundamentally unfair.[136] Employers cannot be expected to bear liability for employee torts that are completely unforeseeable.[137] The most intuitive argument against vicarious liability for intentional torts is that criminal conduct, especially use of force, is nearly always unforeseeable to a reasonable employer, and so imposing vicarious liability in those cases is unfair.[138] Some courts argue that sexual assault is particularly unforeseeable.[139] Former Justice Marilyn Skoglund of the Vermont Supreme Court has stated:

> [I]t is one thing to say that a public entity must expect that some police officers will abuse their authority by, for example, using excessive force in

132. *See* Zsigo v. Hurley Med. Ctr., 716 N.W.2d 220, 230 (Mich. 2006); *Forrest*, 853 A.2d at 70 (Skoglund, J., dissenting).

133. *See generally* Chamallas, *supra* note 28. Opponents concede that aided-by-agency liability furthers the policy goal of compensation because the theory necessarily expands employer liability and thus compensates plaintiffs more frequently.

134. *See infra* notes 136–51.

135. *Id.*

136. *See, e.g.*, Farmers Ins. Grp. v. County of Santa Clara, 906 P.2d 440, 448 (Cal. 1995) (reasoning that the scope of employment test should generally be applied when "an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business").

137. Many courts adopt this approach. *See* Peña v. Greffet, 110 F. Supp. 3d 1103, 1120 (D.N.M. 2015) (listing courts that find sexual assault to be an action outside the scope of employment).

138. *See, e.g.*, Hall v. Fed. Bureau of Prisons, No. 15-CV-12376, 2016 WL 4500881, at *4 (E.D. Mich. Aug. 29, 2016) ("Michigan courts have found that criminal conduct of an employee, when employers do not have past knowledge of acts of impropriety, is unforeseeable in general and outside the scope of employment.").

139. *See, e.g.*, Hamed v. Wayne County, 803 N.W.2d 237, 247 (Mich. 2011).

> effectuating an arrest or detention and quite another to conclude that a public entity must expect that some officers will rape women they have detained.[140]

In *Hamed v. Wayne County*,[141] a case in which an arrestee was sexually assaulted by a deputy sheriff while she was incarcerated in county jail, the Michigan Supreme Court went as far as saying that all "[c]riminal conduct is inherently arbitrary and highly unpredictable."[142]

Courts have questioned whether it is fair to impose the aided-by-agency exception when the opportunity exists to hold employers directly liable for negligent hiring, training, or supervising the tortfeasor.[143] Negligence-based liability, they argue, is the only fair legal theory for employer liability in sexual assault cases because it requires plaintiffs to prove that the sexual assault was somehow foreseeable.[144] This argument stems from the scope of employment theory, which does not require specific negligent acts to be foreseeable, but does require some foreseeability of negligence generally that would make it fair to impose liability on the employer.[145]

Although the opponents of aided-by-agency liability primarily justify their dissent with notions of fairness, courts have also argued that imposing aided-by-agency liability will not deter future conduct and that risk-spreading does not work in this context.[146] Courts argue that employee misconduct will not be deterred by spreading the cost of a rogue employee's conduct to the employer—and in cases of public entity employers, to taxpayers—instead of on the wrongdoer alone.[147] They argue that imposing liability on the employer does not incentivize employers to better train or supervise their employees, as better training will not deter an intentional sexual assault committed solely out of personal motivations.[148] Additionally, some have argued that vicarious liability for public entities does not serve the interest of spreading the "costs of [public employee] misconduct"[149] because public agencies such as police departments or school districts cannot raise their prices, so they will likely have to cut funding elsewhere.[150] "[E]mployers would essentially become insurers responsible for recompensing victims for the criminal acts of their employees."[151]

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140. Doe v. Forrest, 853 A.2d 48, 76 (Vt. 2004) (Skoglund, J., dissenting) (quoting Farmers Ins. Grp. v. County of Santa Clara, 906 P.2d 440, 461 (Cal. 1995) (George, J. concurring)).

141. 803 N.W.2d 237.

142. *Id.* at 246.

143. *Forrest*, 853 A.2d at 75–76 (Skoglund, J., dissenting).

144. *See id.*

145. *See id.*

146. *See, e.g.*, *Sherman*, 190 A.3d at 199 (Valihura, J., dissenting).

147. *See id.*

148. *See Forrest*, 853 A.2d at 75 (Skoglund, J., dissenting); Krueger, *supra* note 61, at 450–53 (noting that employers' practical ability to prevent sexual assaults of this nature is "slight").

149. *Forrest*, 853 A.2d at 75 (Skoglund, J., dissenting).

150. Hamed v. Wayne County, 803 N.W.2d 237, 254–55 (Mich. 2011) ("Because public entities cannot increase prices or otherwise alter business practices to absorb the increased risk of liability, a governmental agency's only option may be to cut funding or curtail beneficial public programs.").

151. *Id.* at 246.

2. Aided-by-Agency Is an Unworkable Rule

In rejecting section 219(2)(d), courts emphasize that it would be unworkable to replace the scope of employment analysis with the aided-by-agency exception.[152] They argue that an employee, by virtue of their employment relationship, will always be aided in accomplishing a tort at work.[153] For example, lawyers come into contact with each other in the office by virtue of their employment at a law firm, sales clerks come into contact with shoppers at stores by virtue of their employment at a retail store, and flight attendants come into contact with passengers on planes by virtue of their employment by an airline.[154] Some courts and commentators reason that if any of those employees—the lawyer, the sales clerk, or the flight attendant—committed any tort against an individual whom they encounter in the regular course of their employment, a plain reading of section 219(2)(d) could find the employer liable without engaging in any scope of employment analysis.[155] Even if there are ways to limit the scope of such a broad rule to make it more fair to employers, the Restatement (Second) of Agency gives no guidance as to how to do so.[156]

Courts have also reasoned that any attempts to limit the scope of section 219(2)(d) are futile.[157] For example, in *Doe v. Forrest*,[158] the Vermont Supreme Court limited employer liability to sexual assaults committed by on-duty law enforcement officers.[159] Even though they attempted to limit the facially broad scope of section 219(2)(d), the court was criticized for implicating "a broad range of employees whose duties grant them unique access to and authority over others, such as teachers, physicians, nurses, therapists, probation officers, and correctional officers, to name but a few."[160]

Furthermore, section 219(2)(d) would not only be impractical in its application, but it would also practically burden employers and courts. Courts worry that employers would be forced to implement burdensome and ineffective regulations to attempt to prevent conduct that cannot be

152. *See, e.g.*, Martin v. Tovar, 991 N.W.2d 760, 767 (Iowa 2023); Zsigo v. Hurley Med. Ctr., 715 N.W.2d 220, 230 (Mich. 2006).

153. *See Zsigo*, 715 N.W.2d at 226; *Hamed*, 803 N.W.2d at 254; Sherman v. State Dep't of Pub. Safety, 190 A.3d 148, 195–96 (Del. 2018) (Valihura, J., dissenting).

154. *See* Peña v. Greffet, 110 F. Supp. 3d 1103, 1118 (D.N.M. 2015) (describing the potential expansiveness of section 219(2)(d) by drawing similar examples such as a barista being able to poison a patron's coffee only because they worked for the coffee shop).

155. *See, e.g.*, *Sherman*, 190 A.3d at 195–96 (Vaughn, J., dissenting); *see also* 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, 1130 (2002) ("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.").

156. *See* Oxford, *supra* note 65, at 167–68.

157. *See infra* notes 158–60.

158. 853 A.2d 48 (Vt. 2004).

159. *See id.* at 49.

160. *Zsigo*, 715 N.W.2d at 228 (quoting *Forrest*, 853 A.2d at 70 (Skoglund, J., dissenting)); *see also Forrest*, 853 A.2d at 74 (Skoglund, J., dissenting); *Sherman*, 190 A.3d at 198 (Valihura, J., dissenting).

prevented.[161] For example, employers would be hesitant to hire applicants with imperfect personal backgrounds out of fear of liability.[162] Judges have also made a floodgates argument, predicting that the adoption of section 219(2)(d) would lead to an "inevitable spate of lawsuits."[163]

3. The Supreme Court's Decisions in *Faragher* and *Ellerth* and the Restatements Do Not Support the Aided-by-Agency Theory

Though not binding law on state courts, the Supreme Court's adoption of the aided-by-agency exception in the context of Title VII federal sexual harassment claims and the Restatement (Second)'s and Restatement (Third)'s commentaries and drafting histories provide persuasive insight into the appropriate scope of section 219(2)(d). Some courts and commentators have argued that these authorities have limited section 219(2)(d)'s applicability significantly.[164]

Some argue that the Supreme Court's interpretation of aided-by-agency liability was not broad enough to include intentional torts such as custodial sexual assault.[165] The Supreme Court in *Faragher* stated that it did not intend to "make a pronouncement of agency law in general," but rather "to adapt agency concepts to the practical objectives of Title VII."[166] The Court in *Faragher* and *Ellerth* did not input their own policy determinations, but rather grounded their decision in the policy goals of the legislation that they were interpreting.[167] As one commentator put it, "courts deciding Title VII cases have used common law tort and agency principles for guidance, but ultimately have based their rulings on the statute itself."[168] The Supreme Court also took care not to impose strict liability for supervisor sexual harassment by creating an affirmative defense for employers to show that they instituted sufficient prevention precautions.[169]

Courts also argue that the commentary to section 219(2)(d) and proceedings of the American Law Institute (ALI) show that the aided-by-agency clause "does not properly apply in intentional physical tort

161. *See* Hamed v. Wayne County, 803 N.W.2d 237, 246 (Mich. 2011).

162. *See id.* at 247; Brown v. Brown, 739 N.W.2d 313, 326 (Mich. 2007) (Markman, J., concurring).

163. *Forrest*, 853 A.2d at 70 (Skoglund, J., dissenting).

164. *See infra* notes 165–84.

165. *See, e.g.*, Combs, *supra* note 155, at 1130; Martin v. Tovar, 991 N.W.2d 760, 766 (Iowa 2023) ("The Supreme Court in *Burlington* and *Faragher* did *not* adopt the Restatement (Second)'s aided-by-agency theory wholesale, but instead limited it to fit within Title VII of the Federal Civil Rights Act.").

166. *Forrest*, 853 A.2d at 70 (Skoglund, J., dissenting) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 802 n.3 (1998)).

167. *See Faragher*, 524 U.S. at 807; Sherman v. State Dep't of Pub. Safety, 190 A.3d 148, 194–96 (Del. 2018) (Valihura, J., dissenting).

168. Combs, *supra* note 155, at 1130.

169. *See Faragher*, 524 U.S. at 804; *Sherman*, 190 A.3d at 197 (Valihura, J., dissenting); Combs, *supra* note 155, at 1129.

cases that lack elements of reliance or deceit."[170] Many courts reject the entire second clause of section 219(2)(d), claiming that the Restatement (Second)'s commentary makes clear that the liability for an employee's torts committed outside the scope of employment is limited to torts committed within the apparent authority of the employee.[171] For example, a Connecticut court found that a school could not be held liable for the sexual abuse of school children by a teacher when there was no plausible inference that the school "held out [the teacher] as authorized to engage in sexual exploitation of the plaintiffs."[172] Others argue that the commentary's hypothetical examples involving "instrumentalities"[173] narrow liability to instances in which the tortious act itself appeared to be within the ordinary course of business.[174] For example, in *Smith v. Metropolitan School District*,[175] the U.S. Court of Appeals for the Seventh Circuit held that section 219(2)(d) did not apply to the facts of the case because the defendant could not "appear to be acting in the ordinary course of the business confided to him in having sexual intercourse with [the plaintiff]."[176]

Additionally, courts and commentators have engaged in a thorough analysis of the ALI's drafting proceedings for section 219(2)(d) and concluded that the drafters were clear about some limitations.[177] One commentator believes that the ALI "showed great hesitancy" in extending vicarious liability to a hypothetical example in which a utility worker sexually assaults a homeowner whose home they entered by showing their employer-issued badge.[178] Debate over the drafting history of section 219(2)(d) resulted in legal research databases Westlaw and Lexis+ publishing a disclaimer on their section 219 pages, noting that the "aided-by-agency" theory was not approved by the ALI membership.[179]

Lastly, the Restatement (Third) of Agency abandons the aided-by-agency exception and strengthens the apparent authority exception.[180] Many courts are hesitant to adopt the aided-by-agency exception because it is a stale

170. *Forrest*, 853 A.2d at 72–73 (Skoglund, J., dissenting) (quoting Combs, *supra* note 155, at 1130); *see also* Harrison v. Corr. Med. Servs., No. 2-CV-104, 2003 WL 21262100, at *1 (D. Me. May 30, 2003).

171. *See, e.g.*, E.S. *ex rel.* G.S. v. Brunswick Inv. Ltd., 263 A.3d 527, 541 (N.J. Super. Ct. App. Div. 2021).

172. Jean-Charles v. Perlitz, 937 F. Supp. 2d 276, 287 (D. Conn. 2013).

173. *See supra* notes 76–77 and accompanying text.

174. *See* Smith v. Metro. Sch. Dist., 128 F.3d 1014 (7th Cir. 1997).

175. 128 F.3d 1014 (7th Cir. 1997).

176. *Id.* at 1029.

177. *See, e.g.*, Oxford, *supra* note 65, at 180–81.

178. *See id.*

179. *See § 219 When Master Is Liable for Torts of His Servants*, THOMSON REUTERS WESTLAW PRECISION, https://perma.cc/7PP7-ULM2 (last visited Nov. 3, 2023) ("Note: The second part of § 219(2)(d), regarding the 'aided-by-agency' theory of vicarious liability, was not approved by the ALI membership and thus did not represent the position of the ALI. It has since been superseded by the Restatement of the Law Third, Agency; *see* Restatement of the Law Third, Agency § 7.08, Comment b; *see also* Restatement of the Law, Employment Law § 4.03, Reporters' Note to Comment f."); *Restat 2d of Agency, § 219*, LEXIS+, https://perma.cc/8VJ9-AAQP (last visited Nov. 3, 2023) (same).

180. *See* RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (Am. L. Inst. 2006).

provision.[181] Courts have read the Restatement (Third)'s commentary as requiring some nexus between the employer's manifestation of authority and the employee's tortious conduct.[182] Courts have stated that the Restatement (Third)'s dismissive treatment of the aided-by-agency exception "raises questions as to whether courts were ever correct to apply it."[183] Opponents of the aided-by-agency theory believe that a rule that has been disavowed by its creators should not be adopted by state courts.[184]

B. Arguments for the Adoption of Employer Liability for Sexual Assault Under an Aided-by-Agency Theory

Proponents of section 219(2)(d) believe that an employer who delegates an extraordinary amount of power to its employees should not escape liability when that power is used to harm others.[185] Therefore, courts have framed section 219(2)(d) to impose employer liability when the employee was aided by their employer-conferred power, rejecting the criticism that section 219(2)(d) is overly broad.[186] Courts point specifically to an employee's power to make or substantially influence decisions that can materially alter an individual's basic well-being or livelihood.[187] Proponents address the arguments of section 219(2)(d)'s critics, arguing that (1) adopting section 219(2)(d) will promote fairness and deter future misconduct; (2) the commentary and amendments to the Restatement are not dispositive; and (3) the Supreme Court's adoption of a qualified section 219(2)(d) supports, not undermines, state courts' adoption of the provision.

1. A Gap in Employer Liability: Aided-by-Agency Supports the Policy Goals of Respondeat Superior

Courts and commentators that have espoused the aided-by-agency theory justify their support through the policy goals of vicarious liability: fairness, deterrence, and compensation.[188] On the fairness front, proponents of

181. *See, e.g.*, Martin v. Tovar, 991 N.W.2d 760, 768 (Iowa 2023); Connolly v. Roman Cath. Archbishop of Bos., No. 1782-CV-1126, 2019 WL 2402290, at *5 (Mass. Super. Ct. May 17, 2019); Ayuluk v. Red Oaks Assisted Living, Inc., 201 P.3d 1183, 1199 n.40 (Alaska 2009).

182. *See, e.g.*, E.S. *ex rel.* G.S. v. Brunswick Inv. Ltd., 263 A.3d 527, 541 (N.J. Super. Ct. App. Div. 2021) (stating that there is no employer liability under the apparent agency rule "unless there is a close link between an agent's tortious conduct and the agent's apparent authority" (quoting RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (Am. L. Inst. 2006))).

183. Peña v. Greffet, 110 F. Supp. 3d 1103, 1131 (D.N.M. 2015).

184. *See* Pearce v. Werner Enters., Inc., 116 F. Supp. 3d 948, 954–57 (D. Neb. 2015).

185. *See infra* note 191 and accompanying text.

186. *See infra* note 201 and accompanying text.

187. *See infra* note 201 and accompanying text.

188. *See* P.J. v. City of Jersey City, No. 21-CV-20222, 2022 WL 16949544 (D.N.J. Nov. 15, 2022); K.J. v. J.P.D., No. 20-CV-14177, 2023 WL 4103013 (D.N.J. June 21, 2023); *Peña*, 110 F. Supp. 3d 1103; Ayuluk v. Red Oaks Assisted Living, Inc., 201 P.3d 1183 (Alaska 2009); Sherman v. State Dep't of Pub. Safety, 190 A.3d 148 (Del. 2018); Hardwicke v. Am. Boychoir Sch., 902 A.2d 900 (N.J. 2006); Spurlock v. Townes, 368 P.3d 1213 (N.M. 2016); Doe v. Forrest, 853 A.2d 48 (Vt. 2004); *see also* John C.P. Goldberg & Benjamin C. Zipursky,

aided-by-agency liability argue that there is a gap in employer liability between negligence-based liability and scope-of-employment vicarious liability in which employers are unfairly escaping responsibility.[189] In that gap are cases in which the employer delegates a large degree of power to employees and that power is subsequently—and arguably, predictably—abused.[190] These proponents argue that it frustrates vicarious liability's goal of fairness to shield employers from liability when they created the enormous power imbalance between their employee and a third party that "aided in accomplishing" a sexual assault.[191] An employee with authority over others has been empowered by their employer as "a distinct class of agent to make . . . decisions affecting other [people] under his or her control."[192] Accordingly, the state courts that have adopted aided-by-agency liability have done so only in cases in which the offending employee held a unique degree of power over the victim by virtue of their employment.[193] These courts reason that the risk of sexual assault should not be placed on plaintiffs who have little power to prevent the misconduct.[194] In *Sherman v. State Department of Public Safety*,[195] the court warned that without the potential for vicarious liability in sexual assault cases, "the risk of misconduct [will be] placed on a class of victims poorly positioned to protect themselves."[196]

In addition to the fairness rationale, courts have also defended aided-by-agency liability by discussing how it furthers the vicarious liability policy goal of deterrence. In *Faragher* and *Ellerth*, the Supreme Court

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Sherman v. Department of Public Safety*: Institutional Responsibility for Sexual Assault*, 16 J. TORT L. (forthcoming December 2023).

189. *See supra* note 188.

190. *See infra* note 193.

191. *Peña*, 110 F. Supp. 3d at 1135 ("There is danger inherent in granting one person extraordinary power over another, and the granting of that power should, thus, carry with it some accountability.").

192. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998); *see also* Ocana v. Am. Furniture Co., 91 P.3d 58, 71 (N.M. 2004) ("It is this authority, bestowed by the employer, that gives the . . . employee the ability to injure . . . . In this sense, the supervising employee is 'aided-in-agency.'").

193. *See P.J.*, 2022 WL 16949544, at *1 (holding employer liable when a police officer sexually assaulted an eight-year-old boy after threatening him with arrest for littering); *K.J.*, 2023 WL 4103013, at *1 (holding employer liable when police officer sexually abused vulnerable child in his care); *Peña*, 110 F. Supp. 3d at 1106–07 (holding employer liable when a correctional officer targeted, manipulated, and sexually assaulted a woman who was incarcerated at the prison at which he was employed); *Forrest*, 853 A.2d at 51–52 (holding employer liable when an on-duty police officer harassed a female cashier at a convenience store and "maneuver[ed]" her into a secluded area of the store, where he coerced her to perform oral sex); *Ayuluk*, 201 P.3d at 1188–89 (holding employer liable when a caregiver at an assisted living home sexually assaulted a mentally disabled resident on multiple occasions); *Sherman*, 190 A.3d at 189 (holding employer liable when a police officer threatened to make an arrestee spend the weekend in jail if she refused to perform oral sex on him); *Hardwicke*, 902 A.2d at 903 (holding employer liable when a school music director living in the same building as students sexually assaulted a boarding student); *Spurlock*, 368 P.3d at 1214 (holding employer liable when a correctional officer sexually assaulted three incarcerated women by ordering them to secluded "blind spots" beyond the range of surveillance cameras).

194. *See, e.g.*, *Sherman*, 190 A.3d at 189.

195. 190 A.3d 148 (Del. 2018).

196. *Id.* at 189.

confirmed that placing the liability on the employer for a supervisor's actions "places the burden on the party that can guard against misconduct through screening, training, and monitoring."[197] Other courts have explained that imposing liability on the employer would create an incentive for individuals in power to be more vigilant.[198] Furthermore, preventative measures would not significantly interfere with the ability of certain authoritative employees to do their jobs.[199] Leaving the victim uncompensated or requiring the plaintiff to prove negligent supervision or hiring does not create the same incentive that imposing liability on the public entity would.[200]

2. An Aided-by-Agency Rule Is Workable

Proponents argue that a vicarious liability rule based on the aided-by-agency theory is workable without being overly broad.[201] This workability argument is rooted in the distinction that courts have drawn between job-created opportunity—which critics argue is too broad—and job-created power.[202] For example, a job-created opportunity may be the opportunity that a factory worker has to sexually assault the coworker next to him by virtue of their placement next to each other on the assembly line.[203] By placing the coworkers next to each other, the factory did not increase the chances of sexual assault occurring in the workplace.[204] On the other hand, a job-created power may be the power granted to a correctional officer to order women who are incarcerated into secluded, unmonitored areas and threaten them with solitary confinement, rescission of yard time, or deprivation of a number of other privileges unless they acquiesce to sexual assault.[205] The prison, as opposed to the factory, enables torts that might not otherwise happen.[206]

One factor that courts say helps them draw a line between job-created opportunity and job-created power is the power that the tortfeasor has to retaliate.[207] In *Faragher* and *Ellerth*, the Court noted that the power delegated to the supervisor is more likely to prevent employees from

197. *Forrest*, 853 A.2d at 59 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998)).

198. *See* Mary M. v. City of Los Angeles, 814 P.2d 1341, 1348 (Cal. 1991); *see also id.* at 1348 n.7 (pointing to a San Francisco Police Department internal rule that requires a male officer who transports a female to notify dispatch of his mileage, location, destination, arrival time, and ending mileage).

199. *See id.*

200. *Forrest*, 853 A.2d at 62–63; West v. Waymire, 114 F.3d 646, 649 (7th Cir. 1997).

201. *See, e.g.*, Peña v. Greffet, 110 F. Supp. 3d 1103, 1134–35 (D.N.M. 2015).

202. *See id.*

203. *See id.* at 1135.

204. *See id.*

205. *See id.*; *see also Waymire*, 114 F.3d at 649 ("[A] male police officer whose employer has invested him with intimidating authority to deal in private with troubled teenaged girls, his taking advantage of the opportunity that authority . . . give[s] him to extract sexual favors . . . should be sufficiently within the orbit of his employer-conferred powers to bring the doctrine of respondeat superior into play.").

206. *See Peña*, 110 F. Supp. at 1135.

207. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998).

defending themselves, as is normally true with a coworker.[208] The main reason for this is because the supervisor has the authority to take adverse employment actions against an employee, which discourages the employee from resisting or complaining.[209] Courts have noted that in the context of police officers, correctional officers, and other positions that have the power to deprive individuals of their freedom or basic needs, the power imbalance is even more intense.[210] For example, in *Sherman*, the Delaware court pointed to a police officer's "considerable discretion in determining how strict to be in seeking high bail or other conditions of release."[211] Proponents of aided-by-agency liability point to these indicators to show that courts are capable of limiting the aided-by-agency rule.[212]

3. Response to Critics: The Restatement and the Supreme Court

Proponents of aided-by-agency liability believe that the Supreme Court's treatment of section 291(2)(d) in the Title VII context and the Restatement (Second)'s language, commentary, and drafting history support—rather than undermine—the application of the aided-by-agency theory in the sexual assault context.

Nearly every court that has adopted a version of aided-by-agency liability has referenced the Supreme Court's endorsement of section 219(2)(d) as a legitimate vicarious liability tool in the context of a delegation of power.[213] Some courts have rejected the claim that the Supreme Court did not have any intention of influencing agency common law.[214] They argue that every appellate decision represents the development of the common law, and the Supreme Court is an integral part of that process.[215] In fact, courts have argued that by resolving the dispute over the meaning of section 219(2)(d), the Supreme Court helped all courts by engaging in discussion about the provision.[216] Furthermore, courts have noted that they, as common law state courts, have the authority to use any persuasive source in reaching their tort law decisions.[217]

Proponents of aided-by-agency liability also generally believe that the Restatement (Second) of Agency and its language, commentary, and drafting history support the adoption of the aided-by-agency theory as it has been applied in Alaska, Delaware, New Jersey, New Mexico, and Vermont. Some courts have responded to critics' contention that the comments to section 219(2)(d) limit the aided-by-agency provision to instances of

208. *See id.*
209. *Id.*
210. *See, e.g.*, Sherman v. State Dep't of Pub. Safety, 190 A.3d 148, 179 (Del. 2018).
211. *Id.*
212. *See, e.g.*, Peña v. Greffet, 110 F. Supp. 3d 1103, 1134–35 (D.N.M. 2015).
213. *See supra* note 193.
214. Doe v. Forrest, 853 A.2d 48, 60 n.3 (Vt. 2004).
215. *See id.*
216. *Id.*
217. *See id.* at 67.

misrepresentation and deceit.[218] They argue that reading section 219(2)(d) to require misrepresentation or deceit strays too far from the plain language of the section and the commentary.[219] Courts also point to the end of comment (e), which states that the "enumeration of such situations is not exhaustive," implying that the provision is broad and open to courts' interpretations.[220]

In response to critics who have argued that the ALI debates reject aided-by-agency liability as it has been applied by states,[221] some commentators have argued that the ALI is consistently inconsistent, and courts have no obligation to follow their advice.[222] Similarly, the ALI does not have any power to undo the extensive aided-by-agency case law, including Supreme Court cases, that developed between the Restatement (Second) and Restatement (Third).[223] Furthermore, scholars have concluded that the ALI debates over the aided-by-agency provision were inconclusive, writing that the reporters "found it difficult to even define the Aided in Accomplishing language."[224] One researcher argues that the disclaimer posted on Westlaw and Lexis+—that section 219(2)(d) was never truly passed by the ALI[225]—is wholly inaccurate, citing to evidence from the ALI annual meeting proceedings from 1956 and 1957.[226] Furthermore, the ALI has not formally voted to approve the disclaimer that appears on Westlaw and Lexis+.

III. AIDED-BY-AGENCY INSTITUTIONAL LIABILITY FOR PRISON SEXUAL ASSAULT

The aided-by-agency rule that Alaska, Delaware, New Jersey, New Mexico, and Vermont (the "aided-by-agency courts") have adopted is a step in the right direction for victims of sexual assault in prison. The aided-by-agency rule can be described as follows: employers are liable for

218. *See, e.g.*, *id.* at 64–65.

219. *See id.* (noting that only one of the hypotheticals in the comment involves misrepresentation or deceit; the other does not).

220. *See, e.g.*, *id.* at 65.

221. *See supra* Part II.A.3.

222. *See, e.g.*, Peña v. Greffet, 110 F. Supp. 3d 1103, 1138 (D.N.M. 2015).

223. *Id.*

224. *See* Oxford, *supra* note 65.

225. *See supra* note 179 and accompanying text.

226. *See generally* Discussion of the Restatement of the Law, Second, Agency (Tentative Draft No. 4), *in* 22 A.L.I. PROC. 314 (1956); Remarks at the Thursday Afternoon Session (May 23, 1957), *in* 34 A.L.I. PROC. 224 (1957). Danielle Dascher, Adjunct Professor and Head of Instructional Services at the Fordham University School of Law Library, is currently writing a research paper based on the ALI's discussions of section 219(2)(d) that argues that the ALI did, in fact, pass the version of section 219(2)(d) that appears in the Restatement (Second) of Agency. She argues, among other things, that (1) the vote on a motion to strike the wording of section 219(2)(d) during the 1956 meeting was not binding on the reporter, per the session transcript and the ALI's bylaws; and (2) after that vote, the reporter made changes to the wording of section 219(2)(d) based on the recommendations of the membership, and the entire Restatement, including section 219(2)(d), was then adopted by the membership at the annual meeting in 1957. *See* E-mail from Danielle Dascher, Head of Instructional Servs. Fordham L. Lib., to author (Aug. 28, 2023, 4:47 PM) (on file with author).

sexual assaults committed by their employees when (1) the employer has delegated authority to the employee to control important elements of the victim's life or livelihood and (2) the empowered employee was aided by the employer-conferred authority in committing the sexual assault. In the context of sexual assault committed by correctional officers in prisons and jails, the application of this rule is sensible and straightforward. Correctional institutions delegate significant power to correctional officers to control nearly every element of inmates' lives and livelihoods.[227] When correctional officers sexually assault inmates in the confines of the facility, they necessarily use their employer-conferred power to sexually assault the victim.

This Note argues that the aided-by-agency rule described above fills an unjust gap in institutional liability in which prisons and jails delegate large amounts of power to their employees but do not bear any responsibility for abuses of that power. This part argues that courts are justified in adopting this version of aided-by-agency liability in the context of prison sexual assault and concludes that the adoption of aided-by-agency liability will allow victims to recover from a legal system that is otherwise likely to fail them. Part III.A argues that the aided-by-agency rule reflects the policy considerations of the doctrine of respondeat superior better than the scope of employment analysis in the context of prison sexual assault. This section focuses primarily on the fairness rationale for vicarious liability. Part III.B addresses and disagrees with the argument that the aided-by-agency rule is unworkable. It also describes why aided-by-agency liability is more practical for courts to adopt than expanding the scope of employment analysis to include sexual assault.

A. Aided-by-Agency Liability in Sexual Assault Cases Serves Respondeat Superior's Policy Goals

Aided-by-agency liability serves the three policy objectives underlying the doctrine of respondeat superior: compensation, deterrence, and fairness.[228] Although courts have discussed all three rationales in their analyses of aided-by-agency liability, courts that reject the aided-by-agency theory do so primarily because they believe it is unfair.[229] Therefore, this section only briefly addresses compensation and deterrence and focuses mainly on the fairness rationale, concluding that aided-by-agency liability promotes the policy goal of fairness more than the scope of employment analysis.

1. The Instrumentalist Rationales: Compensation and Deterrence

Aided-by-agency liability furthers the respondeat superior policy goals of compensation and deterrence. First, imposing liability on an employer for

227. *See supra* Part I.A.

228. *See supra* Part I.D (describing the policy goals of vicarious liability).

229. *See supra* Part II.A.1 (describing arguments against aided-by-agency liability based on policy rationales).

the harms caused by its employee almost always serves the interest of compensating the injured victim, because the employee is often insolvent—especially if the employee is a correctional officer.[230] As scholars have discussed, even the staunchest critics of vicarious liability agree that holding the employer liable serves the goal of compensating plaintiffs for their injuries caused by others.[231]

Second, imposing aided-by-agency liability deters future employee misconduct. Employers have had little legal incentive to go beyond the minimum standards required by negligence law to prevent sexual assault in the workplace.[232] Imposing liability on prisons and jails for sexual assaults committed by their employees will incentivize administrators to seek out creative and effective solutions to minimize their financial burden. Critics who argue that employers have limited ability to prevent sexual assault by their employees because sexual assault is a crime motivated by personal desire are incorrect.[233] Sexual assaults in prisons are not sporadic crimes of personal passion; they are an institutional problem that requires an institutional solution.[234] The threat of expensive legal action is likely to incentivize prisons to generate institutional solutions.

2. The Fairness Rationale

More importantly than serving the instrumentalist goals of compensation and deterrence,[235] aided-by-agency liability serves the policy goal of fairness because it fills a gap in liability in which an employer escapes responsibility for an abuse of a power that they created and delegated.[236] The aided-by-agency courts aptly note that courts that reject employer liability for all sexual assault cases fail to capture the risk of sexual assault created by institutions like prisons.[237] In his piece on fairness in vicarious liability, Professor Gregory Keating writes that "the characteristic risks of the modern world are the inevitable by-products of planned activities—not the random consequences of discrete acts—and seeks to make activities—not actors—bear the costs" of the injuries that they generate.[238] Aided-by-agency courts

230. *See supra* note 40 and accompanying text.
231. *See* Chamallas, *supra* note 28, at 150 n.109.
232. *See supra* Part I.B–C.
233. For a discussion of the critics' argument, *see supra* Part II.A.1.
234. *See supra* Part I.A.
235. The policy goal of fairness is more important than compensation and deterrence because most courts have rejected vicarious liability for sexual assault based solely on fairness.
236. *See, e.g.*, Martin v. Milwaukee County, 904 F.3d 544 (7th Cir. 2018) (guard-inmate); Doe v. Cramer, No. 17-CV-14382, 2018 WL 8265221 (S.D. Fla. Aug. 9, 2018) (police officer-arrestee); Motelewski v. Maui Police Dep't, No. 11-CV-778, 2012 WL 3780188 (D. Haw. Aug. 30, 2012) (police officer-arrestee); Goss v. Hum. Servs. Assocs., 79 So. 3d 127 (Fla. Ct. App. 2012) (group care facility employee-foster child); Powell v. City of Chicago, 197 N.E.3d 219 (Ill. App. Ct. 2021) (police officer-detainee); N.X. v. Cabrini Med. Ctr., 765 N.E.2d 844 (N.Y. 2002) (surgical resident-patient); Doe v. S.C. State Budget & Control Bd., 523 S.E.2d 457 (S.C. 1999) (police officer-arrestee).
237. *See supra* Part II.B.1.
238. Keating, *supra* note 124, at 1267.

view abuses of power as risks that are "the inevitable by-products" of prisons and policing, "not the random consequences of discrete acts."[239]

There are several aspects of the delegation of power to correctional officers that make sexual assault an "inevitable by-product" of the U.S. corrections system, including (1) the immense scope of power delegated to correctional officers,[240] (2) the fact that correctional officers wield the power of the state itself,[241] and (3) the reality that sexual assault is an unfortunately common byproduct of the corrections system.[242]

First, prisons and jails delegate vast power to correctional officers over those in their care.[243] The power wielded by officers is unique. They are granted the authority to make decisions of the highest consequence to individuals in their custody—decisions that deeply affect the individuals' finances, relationships, health, and physical freedom.[244] In *Faragher* and *Ellerth*, the Supreme Court found that a supervising employee wields significant power over subordinate employees such that employers should be held vicariously liable for supervisor sexual harassment.[245] The power of correctional officers far exceeds that of a supervising employee. As the court in *Peña v. Greffet*[246] explained:

> A prison guard has even more employer-vested power over an inmate than a private-sector supervisor has over a subordinate: the control that a prison guard exerts over an inmate extends into virtually every facet of the inmate's life; the relationship, unlike a private-sector supervisor-subordinate relationship, often involves the use of legitimate bodily force and physical violence; and, unlike a private-sector employee, an inmate cannot simply quit the job of being a prisoner.[247]

The immense power over inmates that prisons and jails offload to correctional officers warrants a higher degree of responsibility for the institution than a scope of employment analysis would provide.

Second, correctional officers do not just have a lot of power, they have the power of the state itself. The close connection between the powers identified as exclusive to the state and those exercised by correctional officers strengthens the case for aided-by-agency liability because, in some respects, correctional officers are acting as an alter ego of the state. In *Faragher* and *Ellerth*, the Supreme Court emphasized that when a supervisor has final decision-making authority to hire, fire, promote, and demote, they effectively have the power of the employer itself.[248] So too do officers who wield the power of the state. For example, the ability to decide whether to move a

239. *See id*; *see also supra* Part II.B.1.
240. *See supra* Part I.A.
241. *See supra* Part I.A.
242. *See supra* notes 20–21.
243. *See supra* Part I.A.
244. *See supra* Part I.A.
245. *See supra* Part I.D.2.
246. 110 F. Supp. 3d 1103 (D.N.M. 2015).
247. *Id.* at 1134.
248. *See supra* note 104 and accompanying text.

human being from the general population of a prison into a solitary cell for a period of time is a power exclusively held by the state. Outside the unique context of prison, any civilian who attempts to restrict another's freedom in that way is committing a crime. An employer should not be absolved of liability for abuses of its own state power when they have chosen to delegate it to correctional officers.

Third, as courts have noted, delegating immense power to these employees in a custodial setting significantly increases the risk of abuses of that power, which increases the odds of sexual assault occurring.[249] This point is further strengthened by disturbing empirical evidence: sexual assault in prison and in other forms of custody is unfortunately common.[250] As discussed, sexual assault in prison is rampant, and more than half of all sexual assaults are perpetrated by correctional officers.[251] The correlation between delegation of custodial power and the likelihood of sexual assault is not a hypothesis; it is the reality.[252] For these three reasons, the context of sexual assault in prison involves a unique delegation of power that warrants a fairer vicarious liability analysis than scope of employment.

B. Aided-by-Agency Liability Is a Workable Rule

This Note advocates for the aided-by-agency theory not only because it promotes vicarious liability's policy goals, but also because it is a workable rule for courts to apply. This section describes (1) why the concerns expressed by courts and commentators are unfounded and (2) why an aided-by-agency rule is more workable than an expanded interpretation of scope of employment, which includes sexual assault for certain professions.

1. Critics' Concerns About Workability Are Unfounded

The task of limiting the aided-by-agency rule to certain instances of employer-delegated custodial power is not as difficult as critics suggest.[253] Critics of aided-by-agency liability are incorrect to assert that the aided-by-agency theory swallows the scope of employment rule.[254] It is misleading for courts to assert that the aided-by-agency rule is so broad that it would, for example, confer liability on an employer whose factory employee sexually assaults their coworker who, by virtue of their employment, they sit next to on the assembly line.[255] This assertion assumes that in order to adopt an aided-by-agency rule, courts must adopt section 219(2)(d) verbatim. But critics of the aided-by-agency theory themselves have stated that "the imposition of vicarious liability under agency principles

249. *See supra* Part II.B.1 (discussing the authority delegated to correctional officers).
250. *See supra* notes 19–36 and accompanying text.
251. *See supra* note 2 and accompanying text.
252. *See supra* notes 19–36 and accompanying text.
253. *See supra* Part I.B (describing the workable limitations that courts have applied to their aided-by-agency rules).
254. *See supra* Part II.B.2.
255. *See supra* Part II.B.2.

flows not from the rote application of rules, but from a considered policy judgment that it is fair and reasonable to hold an employer liable for the harmful actions of its employee."[256]

Rather than mechanically applying rules as they are written in the Restatement, courts are capable of—and have—limited the aided-by-agency principle to certain situations based on policy considerations.[257] Not only is this permissible as a matter of state common law, but it is also frequent practice. In tort law, courts often make measured judgments as to whether certain rules apply based on the facts of the case, common law guidance, and policy considerations.[258] Here, it is reasonable to expect courts to determine (1) whether the prison or jail has delegated authority to the correctional officer to control important elements of the inmate-victim's life at the time of the sexual assault and (2) whether the correctional officer was sufficiently aided by that authority in committing the sexual assault. This structured two-part analysis prevents courts from venturing into strict employer liability for all sexual assaults committed by employees.

If vicarious liability should be imposed "not from the rote application of rules, but from a considered policy judgment," then any discourse related to the Restatement's uncertain treatment of aided-by-agency[259] and the Supreme Court's qualifications of employer liability in *Faragher* and *Ellerth*[260] should not be given much weight. First, the Restatement is not binding on any court and is, in fact, meant to "restate" the law of agency as it has been applied by states.[261] However, as a catalog of "restatements" of the states' common law, the Restatement (Third) falls short because it did not include aided-by-agency liability as an exception to the scope of employment requirement even though it had been adopted by numerous courts.[262] Therefore, the Restatement (Third)'s exclusion of an explicit aided-by-agency liability provision does not preclude courts from adopting the aided-by-agency rule.

Second, the Supreme Court's utilization of the aided-by-agency exception to interpret a federal statute is likewise not binding on state courts, but it can be used as a persuasive endorsement of an employer-conferred power-based reading of aided-by-agency liability. Furthermore, courts who choose to look to Supreme Court precedent in this context should apply only the Supreme

256. Doe v. Forrest, 853 A.2d 48, 70 (Vt. 2004) (Skoglund, J., dissenting); *see also* Zsigo v. Hurley Med. Ctr., 715 N.W.2d 220, 228 (Mich. 2006) (quoting *Forrest*, 853 A.2d at 70 (Skoglund, J., dissenting)).

257. *See supra* note 193 and accompanying text.

258. For example, common law courts consider numerous factors when determining whether a worker is an employee for purposes of employment law. *See, e.g.*, Compassionate Care, Inc. v. Travelers Indem. Co., 83 A.3d 647, 655–66 (Conn. App. Ct. 2013) (describing and applying the common law employment test).

259. *See supra* notes 170–84 and accompanying text.

260. *See supra* notes 165–69 and accompanying text.

261. *See supra* Part I.D.1.

262. *See supra* note 180 and accompanying text.

Court's analysis of agency law and not their analysis of Title VII's policy goals.[263]

2. Aided-by-Agency Liability Is More Workable than an Expanded Scope of Employment Rule

A rule based on the aided-by-agency theory is more workable than an expanded interpretation of the scope of employment requirement that some courts have used to find employers liable for sexual assaults committed by their employees.[264] This Note does not advocate for an expansion of the scope of employment requirement for the practical reason that sexual assault does not fit within most state courts' established definition of the scope of employment.

Most courts have already determined that sexual assault falls outside the scope of employment because their definition of scope of employment bars any conduct that is a sufficient "frolic" or departure from the duties the employee was hired to perform.[265] For courts that have adopted the Restatement (Second) of Agency's scope of employment test, sexual assault will not fall within the scope of employment because it is not conduct of the kind a correctional officer is employed to perform and involves no purpose to serve the prison or jail.[266] Even in states with less exacting scope of employment tests, courts are unlikely to accept sexual assault as an act that is "not unexpectable" in view of the correctional officer's duties.[267]

Aided-by-agency liability, however, is an exception to the scope of employment requirement. Adopting the aided-by-agency rule would not require courts to change their scope of employment analysis. As discussed, the discourse supporting the aided-by-agency theory suggests that it furthers the policy goals behind vicarious liability to hold employers liable for certain acts of their employees that fall outside the scope of their employment.[268] Courts are more likely to recognize a new rule rather than to distort a longstanding common law rule in their states.

CONCLUSION

It is long overdue for courts to recognize the instrumental role that correctional institutions play in perpetuating the culture of sexual abuse in prisons and jails. An institution that delegates a dangerous amount of power to its employees should bear responsibility for abuses of it, especially when

263. Some critics of the aided-by-agency exception argue that the Supreme Court's adoption of an affirmative defense for employers to escape liability is evidence that aided-by-agency is not a viable theory without a defense in a state law context. *See, e.g.*, Sherman v. State Dep't of Pub. Safety, 190 A.3d 148, 197 (Del. 2018) (Valihura, J., dissenting); Combs, *supra* note 155, at 1129.

264. *See supra* Part II.B.2.

265. *See supra* Part I.C.

266. *See supra* note 51 and accompanying text.

267. *See supra* notes 52–53 and accompanying text.

268. *See supra* Part II.B.1.

the power is over vulnerable populations like incarcerated women. The highest courts in Alaska, Delaware, New Jersey, New Mexico, and Vermont have acknowledged that these vulnerable populations are not being served by current conceptions of common law vicarious liability. These courts succeeded in crafting a rule that provides victims with relief while adhering to widely accepted policy foundations. Until all state courts adopt aided-by-agency employer liability for prison sexual assault, our country's most vulnerable will continue to be disserved by our legal system.