Destroying the Scope of Employment

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I. INTRODUCTION

Consider the following cases:

One machine operator attacks another with a stick in a dispute over whether a door should be left open or closed. The employer is liable because the dispute was employment-rooted.¹

A dental resident attacks an elevator operator because she hit him with the door. The employer is liable because the dispute was employment-rooted.²

An employee at a scrap yard hits a man on the head with a pipe because he was taking sawdust from the yard. The employer is not liable because removing trespassers was not part of the employee’s job.³

The third case obviously applied a different test for liability (based on the employee’s job description) than the first two (based on the cause of the dispute), yet all three cases purport to apply the Louisiana definition of the scope of employment. Something is wrong with this picture. In fact, errors and inconsistencies abound in scope of employment cases. Such distortions in the law do not merely lead to occasional injustices; they undermine the legal system and interfere with the operation of a legal doctrine that is essential to modern life.

This Article examines the case law concerning an employer’s liability for its employee’s torts. That doctrine, commonly known as respondeat superior, is intended to ensure that employers internalize the losses that arise from their businesses. Once a loss is too far removed from the business, then it is no longer appropriate that the employer internalize the loss. The scope of employment doctrine is the legal link between the tort and the employer’s business. If the doctrine is too narrow, employers are able to externalize some of their costs of doing business to innocent third parties. If the doctrine is too broad, a third party’s losses are fortuitously charged to an innocent business. If the doctrine is indeterminate, however, judges are free to decide the

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cases as they please, a situation that violates both the concept of legal precedent and the concept of law itself.

The cases involving an employer's liability for the intentional torts of her employee frequently involve legal errors that reveal a fundamental lack of understanding of agency law, an apparent inability to conduct basic legal research and analysis, or both. Part II of this Article includes some preliminary notes about the methodology employed in this Article. Part III describes common doctrinal errors, and Part IV describes technical errors arising from bad research or legal analysis. Part V reviews the effects such errors have on the law and considers their possible causes. Part VI concludes with suggested measures to reduce the number of errors.

II. METHODOLOGY

My analysis is premised on the idea that a legal argument or conclusion can be erroneous in some objective sense. This may sound like a controversial premise, but one need not believe that law is always determinate to believe that there are right and wrong ways to do legal analysis. There is a recognized and accepted mode of legal reasoning.

A legal argument that is not erroneous takes the following form: (a) prior applicable cases are identified and cited accurately, (b) the rules from the prior cases are stated accurately, and (c) those rules are then applied to the facts of the case at hand. "Errors" are situations in which a court fails to perform one of those steps correctly. Whether a prior case is applicable may be a matter of judgment, but only up to a point. Lawyers know when a prior decision is applicable because they can be sanctioned for failing to cite it. The rule from a prior case might also be a matter of legitimate disagreement, but only up to a point. The "correct" rules I describe here are rules stated in so many words by courts of last resort. They are not "indeterminate" to a practicing lawyer. Sources of law, while they may permit several or many outcomes, interpretations and applications, always also preclude some. If a court decides a question that is a matter of judgment or opinion or "legal discretion," I do not treat it as an error even if I think it is

6. See Barzun, supra note 5, at 1680.
7. See Model Rules of Professional Conduct R. 3.3 (2015) (stating that "A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client . . . ").
8. See Nelson, supra note 4, at 6–8.
misguided.9 I also assume that standard rules of stare decisis are applicable. That is, a court should treat its own prior decisions as at least presumptively applicable, and, if a later court chooses to rule differently, it should say so and explain why.10 A lower court, on the other hand, is bound by the decisions of higher courts.11

In the analysis below I usually use the term “court” or “courts” to refer to the perpetrators of the errors, but I do not mean to suggest that the errors are the judges’ fault. That is almost certainly not the case: the sources of the errors are most likely the lawyers for the parties and, possibly, the research tools those lawyers use. However, the errors wind up in decisions and opinions issued by courts, in which clerks and judges theoretically have the opportunity to correct the errors of counsel. By the time an error appears in a written opinion, it is a collective effort for which the entire legal team must take credit.

In order to enable comprehensive research and comparison, this Article considers only cases concerning the “scope of employment” analysis when an employee commits an intentional tort.12 This Article generally excludes cases in which the employer is a governmental entity—the vast majority of intentional tort cases—because they involve additional issues, such as sovereign immunity and statutory torts. Non-governmental intentional tort cases are both remarkably humdrum and somewhat unusual. They are humdrum in the sense that they involve individual human plaintiffs, usually represented by small-firm, small-town lawyers, suing businesses who are probably represented by small “insurance-defense” law firms. The cases usually arise in state courts and involve state common law that has not been codified. The cases are unusual for all the same reasons in that they differ from the cases usually subject to academic scrutiny: academic lawyers usually deal with cases involving high-profile parties—usually institutions—represented by high-powered lawyers and dealing with Federal law, statutory law, and public law.13

9. See Nelson, supra note 4, at 10 (attributing to John Marshall the idea that “legal discretion” applies to matters of choice within the bounds of legal reasoning).
10. Barzun, supra note 5, at 1663.
11. Id. at 1661; see FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING (2012).
12. The other challenging aspect of respondeat superior liability, as explained below, concerns whether an agent is an employee at all, and unsystematic research suggests that cases addressing that question are just as error-prone as the scope-of-employment cases.
13. I cannot support this assertion with quantitative data. I suggest that the academic reader look at her own colleagues and see if I am correct.
III. CONCEPTUAL ERRORS AND THE FUNDAMENTALS OF VICARIOUS LIABILITY

A principal is liable for torts committed by a servant acting in the scope of employment.\(^4\) Obviously, this rule requires a definition of the scope of employment. But it also contains three other important concepts. First, the rule concerns the principal's vicarious liability for the agent's acts, not direct liability for her own acts. In other words, liability is not based on fault. Second, the rule concerns liability for the acts of servants, not of independent contractors. And third, the rule concerns liability for torts, not contracts. Each of those features creates sufficient complexity to confuse the unwary.

A. Liability without Fault

One of the surprisingly challenging conceptual aspects of respondeat superior liability is that it imposes liability on a person (the employer) in the absence of the person's fault and often in cases where the person could not possibly have prevented the tort. This seems contrary to our sense of justice and our concept of tort law, which views liability without fault (i.e., strict liability) as an exception applicable only in special cases.\(^5\) There have been a number of theories advanced to explain respondeat superior liability, and some commentators have even argued that it should be eliminated.\(^6\) An obvious purpose of the doctrine is that it prevents a person from avoiding liability for injuries caused by her activities simply by hiring someone else to do the work. The Second Restatement justifies the doctrine as follows:

"With the growth of large enterprises, it became increasingly apparent that it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit."

Even if liability without fault is fully justified as a policy matter, however, it may seem counterintuitive or unjust. This is especially true in cases where the servant has committed an intentional tort. To hold a master liable when a servant commits an unauthorized assault just

17. Restatement (Second) of Agency § 219 cmt. a. With respect to the scope of employment, "the ultimate question is whether or not it is just that 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." Id. § 229 cmt. a.
seems wrong. Nevertheless, a master is indisputably liable for at least
some intentional torts—for example, when a bouncer commits a battery
in ejecting an obstreperous patron or a “repo man” commits assault in
the process of reclaiming property. The legal doctrine that identifies
those torts for which a master should be liable is the “scope of
employment” requirement.

B. The Scope of Employment

While the definition of “scope of employment” varies from state to
state, it generally tries to capture one of two ideas: purpose or causation.
The more common test is a three-element test from the Second
Restatement of Agency that includes a requirement that the servant’s
conduct have been “actuated, at least in part, by a purpose to serve the
master.” The premise of this test is, presumably, that if the servant
thought it would benefit the master, then perhaps under other
circumstances it might have benefitted the master, and if the master
might have benefitted then the master should be liable. The master’s
liability for the bouncer and the repo man illustrates this idea.

Many states use some variation of the “purpose to serve”
requirement, sometimes stated as a requirement that the act of the
servant have been “intended to further” the master’s business, or have
been “taken in furtherance of” the master’s business. Sometimes the
“furtherance” language is read, or misread, to require that the tort
actually further the employer’s business. There are undoubtedly cases
that satisfy that requirement: yes, the employee drove so recklessly that
the plaintiff was killed, but the pizza arrived within thirty minutes.
However, the Restatement test, and most of the “furtherance” tests, are
applied to ask whether the servant was trying to advance the master’s
business, not whether she was somehow able to do so even while

18. Of course, if assaults were authorized there would be no need for respondeat superior
liability. As noted below, respondeat superior liability can never depend upon the tort itself having
been authorized.

19. The Third Restatement’s definition of the scope of employment is “when performing work
assigned by the employer or engaging in a course of conduct subject to the employer’s control.”
RESTATEMENT (THIRD) OF AGENCY § 7.07. That definition is idiosyncratic; the Restatement does
not provide an illustration explaining the “course of conduct subject to control” concept, and it cites
only secondary sources, including sources “in philosophy and economics” as support for the emphasis
on control. See id. Reporter’s Note b.

20. RESTATEMENT (SECOND) OF AGENCY § 228(1)(c). The Second Restatement sets out two
additional elements: that the conduct have “occurred substantially within the authorized time and
space limits” and that it have been “of the kind the servant was employed to perform.” Id. There is a
fourth requirement that, in cases involving the intentional use of force, the use of force must have
been “not unexpectable” by the master. Id. § 228(1)(d). This element is rarely invoked.

harassment did not advance employer’s business). At one time, Connecticut’s definition of the scope
of employment required that the tortious conduct actually further the business of the employer. See
infra note 143. Needless to say, employer liability was quite rare.
committing a tort. In other words, the “purpose to serve” or “furtherance” test asks about the servant’s purpose in engaging in the tortious behavior.\footnote{22}

A second variety of tests asks whether the master’s business caused the tort, or at least substantially increased the risk that the tort would occur. The basis for this test is more obvious: The master should be liable for all the costs foreseeable generated by her business. This is sometimes called “enterprise liability.” The enterprise liability theory posits that respondeat superior liability is based on the “deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.”\footnote{23} The risks that are “characteristic” of an enterprise’s activities are those that are “likely to flow” from the activity, or that are “inherent in the working environment”.\footnote{24} California asks whether the tort is an “outgrowth” of the employment or “engendered by the employment”—in other words, whether there is a “causal nexus” between the employment and the tort.\footnote{25} Other courts use a similar formulation: Did conduct that was within the scope of employment result in the injury?\footnote{26} Did the tort “arise from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master’s business?”\footnote{27} Although the California-style tests are often described as being based on “foreseeability,” they are more fairly described as causation-based.\footnote{28}

Under either test, the important underlying societal policies are satisfied most of the time: the master cannot be permitted to evade liability by employing another, and the master cannot be permitted to shift the costs of her business to relatively innocent bystanders. Unfortunately, however, courts have difficulty defining and applying the scope of employment tests correctly. Those errors often appear to be the result of a failure to understand the relevant agency law concepts, and, in particular, of an unshakeable desire to bring some aspect of the

\footnotetext{22}{In Missouri, the law is that the employee’s “motive” is irrelevant. Nevertheless the courts use a furtherance test for scope of employment. See P.S. v. Psychiatric Coverage Ltd., 887 S.W.2d 622, 624 (Mo. Ct. App. 1994), Noah v. Ziehl, 759 S.W.2d 905, 910–11 (Mo. Ct. App. 1988). How those two propositions coexist is unclear.}

\footnotetext{23}{Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968).}

\footnotetext{24}{Id.}


\footnotetext{26}{See Fearing v. Bucher, 977 P.2d 1163, 1166–67 (Ore. 1999).}


\footnotetext{28}{Although the court in Lisa M. used the term “foreseeable” in its explication of the rule, its application of the rule in that case was based on the fact that nothing in the employment relationship caused the employee to decide to commit the tort. See Lisa M., 907 P.2d at 365; see also Lange v. Nat’l Biscuit Co., 211 N.W.2d 783, 786 (Minn. 1973) (looking for "precipitating cause").}
employer's fault into the respondeat superior analysis.

C. Vicarious and Direct Liability

The scope of employment requirement only applies when a victim attempts to hold an employer vicariously liable.29 When liability is premised on the principal's own act or omission, the usual requirements of negligence law apply. The distinction between direct and vicarious liability is not difficult if one is looking for it. A principal may be liable for negligence in hiring or supervising an agent, for negligence in entrusting dangerous instrumentalities to the wrong person, or for negligently failing to take appropriate steps to prevent foreseeable injuries to third parties.30 In all those cases, the principal's liability is direct. Similarly, a principal who actually authorizes conduct that itself constitutes a tort is directly liable for the tort because of the principal's own act of authorizing the conduct.31 There is no need for respondeat superior liability in any of those cases, because such a principal will be directly liable. In other words, the essence of vicarious liability, as opposed to direct liability, is precisely the employer's lack of fault.

Many conceptual errors arise from a failure (or refusal) to accept the fact that vicarious liability is liability without fault, as discussed above.32 Courts sometimes simply confuse direct claims against employers—in particular, negligent supervision—with vicarious liability under respondeat superior.33 Or courts may focus attention on the acts of the employer by importing extraneous concepts into the law of respondeat superior. An egregious example of the phenomenon occurred in Minnesota: In 1992, the Supreme Court quoted the definition of negligent supervision (a species of direct liability) from the Second Restatement of Torts: "A master is under a duty to exercise

29. In a sense, a principal's liability on a contract is vicarious when the agent, not the principal, enters into the contract. But the term "vicarious liability" is usually used only to refer to the principal's liability for the agent's torts under the doctrine known as respondeat superior.
32. See Grease Monkey Int'l, Inc. v. Montoya, 904 P.2d 468, 476 (Colo. 1995) (en banc) (responding to defendant's complaint that the rule adopted would "amount to strict liability").
reasonable care so to control his servant while acting *outside the scope of his employment* as to prevent him from intentionally harming others" when the employee is on the employer's premises or using the employer's chattels.\textsuperscript{34} The court ruled, however, that the doctrine was not applicable in that case. The following year, a lower appellate court stated in dicta that, unlike negligent hiring and negligent retention, "negligent supervision derives from the respondeat superior doctrine, which relies on connection to the employer's premises or chattels."\textsuperscript{35} The important point in that case was the connection to the employer's property; the supposed connection to respondeat superior was unexplained. Predictably, a federal court the following year ruled that in order to state a claim for negligent supervision, the plaintiff must establish that the employee was acting *within* the scope of employment, thus completely up-ending the Minnesota rule announced only two years earlier.\textsuperscript{36} The "new" rule that negligent supervision claims arise only when the employee was acting in the scope of employment quickly became Minnesota law.\textsuperscript{37} The consequence of this bizarre series of holdings is that the tort of negligent supervision, which is designed to protect the public from *negligent employers* even when their employees are not technically in the scope of employment,\textsuperscript{38} does not exist in Minnesota.

Other courts conflate direct and vicarious liability by requiring that the master have authorized the tortious conduct\textsuperscript{39} or by requiring that the tortious conduct have been foreseeable.\textsuperscript{40} Such a requirement

\textsuperscript{34} Semrad v. Edina Realty Inc., 493 N.W.2d 528, 534 (Minn. 1992) (emphasis added) (quoting \textsc{Restatement (Second) of Torts § 317}).


\textsuperscript{38} \textsc{Restatement (Second) of Torts § 317 cmt. b.}

\textsuperscript{39} See DeStefano v. Grabrian, 763 P.2d 275, 287 (Colo. 1988) (stating that conduct was not in the scope of employment when it was contrary to the employer's instructions); Savage v. Andoh, No. CV075015657, 2008 WL 1914630 at *6 (Conn. Super. Ct. Apr. 11, 2008) (stating that the tort was not in the scope of employment because the act was not authorized); Fontaine v. Roman Catholic Archdiocese of New Orleans, 625 So. 2d 548, 555 (La. Ct. App. 1993) (stating that allegations that defendants knew or should have known about tort might create liability, "either vicariously or independently"); \textit{Byrd}, 565 N.E.2d at 588 (observing that employer did not hire pastor to commit rape and other torts); see \textit{also} Gonzalez v. Harte Subaru, Inc., No. CV10601240S, 2010 WL 4722262 at *4 (Conn. Super. Ct. Nov. 2, 2010) (arguing that it could reasonably be inferred that the employer "acquiesced" in the misconduct because the plaintiff reported it and the employer failed to act and because employer "was in the best position to guard against and correct supervisor misconduct."); \textit{cf} State v. Schallock 941 P.2d 1275, 1281282 (Ariz. 1997) (finding scope of employment test satisfied because employer had committed direct wrongs).

sometimes reflects confusion about the conduct to which a particular test is to be applied. The tort itself need not be in the scope of employment—torts rarely are; rather, the tort must be part of a course of lawful conduct that is within the scope of employment. Some courts struggle with this distinction.

Spitsin v. WGM Transportation, Inc., is an example of a case bringing the employer's instructions into the scope of employment. In Spitsin, a passenger sued the taxi driver's employer when the driver beat up the passenger after the passenger attempted to leave without paying his fare. The court stated as a rule that an employer will not be liable for a tort apparently committed to further the employer's business if the tort is so outrageous or bizarre as to indicate that the employee was not really actuated by a purpose to serve the master. In resolving the difficult question of whether the battery was within the scope of employment, the court relied upon a number of irrelevant facts:

Nothing in the facts as pleaded addresses WGM's training or direction with respect to fare collection; there is no allegation that any affirmative act by WGM led Johnson to act so brutally toward Spitsin. The pleading contains no hint as to how WGM contributed to Johnson's apparent belief that his fare-collection responsibilities, however characterized, extended even to the sort of excessive and punitive brutality inflicted by Johnson on Spitsin. Spitsin's complaint does not even aver that any act by WGM arguably justified an inference by Johnson, whether reasonable or unreasonable, that such behavior was viewed as appropriate by WGM.

In Hamed v. Wayne County, on the other hand, the court became hung up on foreseeability. In Hamed, a detainee was sexually assaulted by the sheriff's deputy on duty at the jail. The detainee sued the county under Michigan's civil rights law, which incorporates

malicious acts of employees that were not reasonably foreseeable).

41. See Doe v. Delaware, 76 A.3d 774, 777 (Del. 2013).
43. 97 A.3d 774 (Penn. Super. 2014).
44. Id. at 775–77.
45. Id. at 777 (citing RESTATEMENT (SECOND) OF AGENCY § 235 cmt. c. (1956)).
47. Id. at 781.
49. As noted above, some enterprise liability definitions of the scope of employment include a requirement that the tort be "generally foreseeable," but those rules expressly state that foreseeability in this context does not mean the same thing as foreseeability as an element of negligence. See Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 362 (Cal. 1995) (quoting Hinman v. Westinghouse Elec. Co. 471 P.2d 988, 990 (Calif. 1970) (describing foreseeable means "as a practical matter sure to occur"); Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171–72 (2d Cir. 1968).
common law respondeat superior principles. The court stated,

It cannot be said that any of the institutional defendants benefited in any way from Johnson's criminal assault or his exercise of unlawful authority over plaintiff. In fact, Johnson's behavior was expressly prohibited by defendants' rules regarding treatment of detainees and defendants' antidiscrimination policies, to say nothing of the criminal law. In short, there is no fair basis on which one could conclude that the sheriff or county themselves vicariously took part in the wrongful acts.

The court then noted (citing a negligent retention case, not a vicarious liability case) that "an employer can be held liable for its employee's conduct if the employer 'knew or should have known of [the] employee's propensities and criminal record' before that employee committed an intentional tort," which is a question of foreseeability. The court referred to this as "vicarious" liability. The court then discussed a negligence case and concluded, "[i]n summary, we have consistently held that an employer's liability for the criminal acts of its employees is limited to those acts it can reasonably foresee or reasonably should have foreseen." Thus, the court imported into vicarious liability a foreseeability requirement from the law of negligence.

D. Independent Contractors and Control

The policy against cost-shifting is of less importance when the agent is in business for herself. In those cases, the costs of the business are the agent's. This is reflected in the independent contractor exception, which provides that a principal is vicariously liable for an agent's unauthorized torts only when the agent is a "servant" or "employee," not when the agent is an independent contractor. A

51. Id. at 245. Note the court's use of the contradictory phrase "vicariously took part." Id.
53. Hamed, 803 N.W.2d at 245 (internal quotation marks and italics omitted).
54. Id.
55. Id. (discussing Brown v. Brown, 739 N.W.2d 313 (Mich. 2007)).
56. Id. at 246.
57. See also Nathans v. Offerman, 922 F. Supp. 2d 271, 276 (D. Conn. 2013) (adding a foreseeability requirement to a purpose-to-serve test). The Second Restatement includes references to "expectable" conduct in several places and uses the term "foreseeable" occasionally.
58. See supra Part III.A.
59. The Third Restatement uses the term "employee" rather than "servant". RESTATEMENT (THIRD) OF AGENCY § 7.07(3) (1995). That terminology is somewhat misleading because an
servant is a particular type of agent defined largely by the extent of the principal's power to control the manner and means by which the agent performs her tasks. The terms servant and agent are not interchangeable in this context. However, a servant must be an agent. While the nature of the principal's control over the agent determines whether an agent is a servant, once that question is resolved no further "control" analysis is pertinent. It may be relevant to the scope of employment that an employer retained the right to control the general activity in question—in determining whether an employee was on- or off-duty, for example—but it cannot be necessary to respond to the tortious conduct. Nevertheless, courts seeking to bring the employer's behavior into the scope of employment sometimes import the control aspects of the independent contractor analysis into the scope of employment question.

Two Pennsylvania cases illustrate confusion about the relevance of control. In Iandorio v. Kriss & Senko Enterprises, Inc., the plaintiff worked at a gas station that was undergoing remodeling by the defendant. In the course of his duties, he spilled gasoline on his clothing. He went into the station building, where two of the contractor's men were enjoying a coffee break. Despite knowing that the plaintiff was soaked in gasoline, one of the construction employees lit a cigarette, with predictable results. The court relied on the fact that the defendant's employees were permitted to smoke only in the station building; thus, although the tortfeasor was engaged in a personal activity...
(smoking), he was within the scope of employment because the activity had been brought within the employer's control when the employer dictated where the activity could occur. As two dissenting judges pointed out, the employer's efforts to protect the gas station—by keeping its employees away from the pumps—thus served to ensure that the employer was liable. Ironically, the court used the employer's mandate to distinguish the case from a 1938 case with almost identical facts. In that case, however, the victim and tortfeasor were standing near the gas pumps when the ignition occurred—exactly the risk the employer sought to avoid in *Iandiorio* by mandating that employees smoke in the service building.

In *Valles v. Albert Einstein Medical Center*, the plaintiff's decedent underwent an aortogram to locate a suspected aneurism. After the procedure, the decedent suffered renal failure; following complications from an attempted insertion of a catheter for dialysis, the patient died. The plaintiff claimed that the decedent had not been fully informed about either procedure, and that each procedure had, consequently, constituted a battery. It was disputed whether the doctor was an employee of the hospital, and the court therefore discussed the requirements of the employer/employee relationship. But even assuming that the doctor was an employee, said the court, "a battery which results from a lack of informed consent is not the type of action that occurs within the scope of employment," because, as a matter of law, the hospital lacked control over the manner in which a physician obtains informed consent. Thus, by refusing to adopt mandatory consent forms and therefore ceding control over the manner of getting consent, the hospital escaped liability when disclosure was inadequate. As *Iandiorio* and *Valles* illustrate, a control requirement for respondeat superior liability creates bizarre incentives to relinquish control over employees' risky conduct and is counter to the underlying policies of vicarious liability. *Valles* also raises the question whether the longstanding Pennsylvania definition of the scope of employment, the Restatement three-element test, is still good law.

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67. *Id.* at 1237.
68. *Id.* at 1239.
69. See supra note 20.
As noted above, the law of vicarious liability for a servant's torts is intended to prevent principals from shifting the risks of injury inherent in their businesses to innocent bystanders. That concern does not apply in situations where the agent makes a contract, rather than committing a tort. Thus, the law of vicarious liability is quite different from the law governing a principal's liability for an agent's contracts. Liability based on contract depends upon the agent's having had actual authority, apparent authority, or some other power arising from the agency relationship when the agent entered into the contract. Thus, an agent's "authority" refers to transactional power and determines whether a principal is liable for contracts, conveyances and representations by the agent. "Scope of employment" therefore, means something quite different from "scope of authority" to someone attuned to the Restatement's terminology.

Most American lawyers are perfectly capable of deciding whether a cause of action is based on a contract or a tort. Similarly, in most cases it should be obvious to anyone used to the language of agency whether the issue is the scope of employment (because the question involves a servant's tort) or the existence of some form of authority (because the question involves an agent's contract). There are some torts, however, in which the injury depends upon the identity of the speaker. A defamatory statement, for example, is much more likely to be published if it is made by or on behalf of an official speaker. Fraud depends upon the victim's reliance on the perpetrator's false statements, and a potential victim will be more likely to rely on some people's statements than on others. In those cases, the fact that an agent's statement was attributable to the principal (under authority doctrine) is an important factual aspect of the tort. These "speaker torts" or transactional torts therefore may involve an analysis of the agent's authority to utter the tortious speech, or an analysis of the agent's scope of employment, or both. The principal's liability for an agent's tortious misrepresentation

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72. See Restatement (Second) Agency § 140 (1956).
73. See generally id. ch. 6.
74. "Scope of agency" is not a term used by the Restatement.
75. The Second Restatement identifies defamation, interference with business relationships, misrepresentation, and malicious prosecution as torts implicating the agent's authority to speak for the principal. See Restatement (Second) Agency §§ 219(d), 247–249, 253–254 (1956); see also Restatement (Third) Agency § 2.04 cmt. b., § 7.08 cmt. a. (1995).
76. The Second Restatement carefully notes that a principal may be liable for an agent's misrepresentations in an action on the contract or for rescission, see Restatement (Second) of Agency § 162, or for damages arising from the tortious misrepresentation, see id. § 257–264. See generally id. § 162 cmt. a.
depends on the agent's authority, not whether the agent was acting in the scope of employment. Similarly, a principal is liable for an agent's tortious misrepresentation even if the agent is not a servant. The special case of speaker torts can thus cause significant confusion.\textsuperscript{77}

In \textit{Metcoff v. Lebovics},\textsuperscript{78} for example, the plaintiffs became entitled to receive royalties and shares of stock of NCT Midcore following the merger of a predecessor corporation. NCT Midcore failed to deliver the royalties and stock—a breach of contract. The plaintiffs sued the officers and directors of NCT Midcore for tortious interference with contract. The law is clear that a contract party cannot sue an agent for interfering with a contract between the party and the principal if the agent is acting in the "scope of his authority."\textsuperscript{79} This is authority in the contract sense of the word: An agent can cause her principal to be liable for breach of contract if the agent's acts are authorized, but that is simply a breach of the principal's contract because the agent's act is imputed to the principal. However, if the agent is acting outside her authority—in other words, if the acts or omissions of the agent that constitute the breach are not taken on behalf of the principal—then the agent is treated as a third party to the contract, and the agent can be liable for interference with contract. The question is whether the agent is acting as an agent at all when the agent "interferes" with the contract.

In \textit{Metcoff}, the trial court correctly applied the law in holding that the agents in question were acting as agents, not independently, in failing to issue the stock. In affirming the trial court, however, the appellate court looked to the scope of \textit{employment}, quoting the three-part Restatement test.\textsuperscript{80} The concurring judge applied the same test but would have found that the defendants were acting outside the scope of employment because their actions were taken to benefit themselves, not their employer.\textsuperscript{81} While the reasoning of the concurrence might seem logical at first glance, it is a complete misunderstanding of the scope of employment doctrine, which applies to determine whether an employer is liable for the agent's act, not whether an agent can be liable for her own act.\textsuperscript{82}


\textsuperscript{78} 2 A.3d 942 (Conn. App. Ct. 2010).

\textsuperscript{79} \textit{Id.} at 948.

\textsuperscript{80} \textit{Id.} at 949.

\textsuperscript{81} \textit{Id.} at 952-53.

\textsuperscript{82} These errors are occasionally corrected, and the doctrine clarified, by major cases at the
The court in *Bank of Texas v. Glenny*,\(^8\) made a similar error when it applied the scope of employment test to decide whether representations by a paralegal could be attributed to the lawyer (an authority question) and then went on to consider whether the principal made statements "within the scope of employment". In Texas, where the test for scope of employment is whether the act was "within the scope of the employee's general authority in furtherance of the employer's business and for the accomplishment of the object for which the employee was hired,"\(^8\) the role of an agent's transactional authority is particularly challenging.\(^8\)

A troubling example is *Moser v. Davis,*\(^8\) in which a lawyer's secretary completed reciprocal wills—previously drafted by the lawyer—while the lawyer was out of town. When the wife sued the lawyer because her husband's will did not dispose of the estate as he allegedly intended, the court held that the attorney was not liable for the secretary's negligence because she had been hired as a secretary and did not have authority to draft wills. The court was undoubtedly correct that the secretary did not have authority to draft wills. But the question was whether her negligence should be imputed to her employer, which concerns the scope of her employment. It is hard to imagine a definition of scope of employment that would not include an employee who was actually carrying out the employer's business, as the secretary was, albeit negligently and without permission. But the employer avoided liability because of the court's application of the wrong doctrine.

Iowa law provides a nice example of the way repeated conceptual confusion can wreak havoc on the law. In *Sandman v. Hagan*,\(^8\) an early case, a sewer inspector was struck on the head by a shovel during the course of an altercation between the inspector and the crew whose work he was inspecting. The Iowa supreme court noted that the law regarding the master's liability for the servant's intentional torts appeared to be "in hopeless confusion," in part because courts failed to...
distinguish between the "scope of employment" and the "scope of authority." The court stated that conduct within the scope of employment must be "of the same general nature as that authorized or incidental to the conduct authorized." The court also held that, "generally speaking" an employer is liable for torts "if committed while the servant is engaged in furthering the employer's business or interests within the scope of employment." In applying the furtherance analysis, the court noted that "[i]t is difficult to see how his employer's business or interest would ever be furthered by such an employee attack, especially on an inspector." The court thus applied an actual furtherance test, not a purpose-based furtherance test. The court also expressly rejected an enterprise liability test that would place the risk of loss on the enterprise that caused the tort. Thus, the employer (whose crew was installing the sewer) was not liable for the assault on the inspector, despite the fact that the fight was work-related.

In Godar v. Edwards, the leading modern case in Iowa, a school district was sued for sexual abuse committed by an employee both on and off school premises. The court adopted the Sandman rules, added the factors from Section 229(2) of the Second Restatement without explaining how they relate to the Sandman rules, and approvingly quoted language from the comment to Section 229 that describes the enterprise liability concept rejected by Sandman. In finding that the employee was acting outside the scope of employment as a matter of law, the court noted that the conduct was not "expected, foreseeable, or sanctioned" by the employer—facts that relate to direct, not vicarious, liability. Moreover, those facts did not bear on any part of the rules the court had stated. In a Federal clergy abuse case shortly thereafter, the district court, still relying on Sandman, rejected a motion to dismiss because the employer "allegedly knew or should have known of [the employee's] past misconduct and his 'mental disease or defect' making such conduct a realistic threat." Those facts, if true, relate to direct, not vicarious, liability, but that is where Godar's "expected, foreseeable

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88. Id. at 117.
89. Id.
90. Id. at 117–18. The relationship between the same-general-nature and furtherance tests was not made clear.
91. Id. at 118. The court also noted that there was no finding that the attack "was anything which his employment contemplated or was something which, if he would do lawfully, he might do in his employer's name." Id. Thus the court also applied a nonexistent actually-authorized test.
92. Id. at 118. The dissent favored the enterprise liability test. Id. at 122–23 (Becker J., dissenting).
93. 588 N.W.2d 701 (Iowa 1999).
94. Id. at 705–06.
95. Id. at 707.
or sanctioned" language led the court. By 2007, the courts were applying both a "reasonably foreseeable" test for the scope of employment—conflating vicarious liability and negligence—and the previously rejected enterprise liability test.

### III. TECHNICAL ERRORS

In addition to the conceptual errors described above, courts and counsel in respondeat superior cases make surprising technical errors, such as stating one rule and applying another. For example, in *L.L.N. v. Cluder,* a clergy abuse case, the court stated a typical scope of employment test based on local precedent. The court did not apply any of the elements stated in the rule to the facts of the case; rather, it based its ruling on the fact that the conduct in question was forbidden by the employer, an irrelevant fact under the test stated. *Byrd v. Faber,* a leading Ohio clergy abuse case, stated the rule that a tort must be "calculated to facilitate or promote" the employer's business, but relied in its application on cases using a foreseeability test. In *Konkle v. Edwards,* also a clergy abuse case, the court stated that an employer could be liable for unauthorized acts where "there is a sufficient association between authorized and unauthorized acts." The court went on to rule, however, that the employer in that case could not be liable because the tortious conduct was not authorized.

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98. *See Riggan v. Glass,* No. 06-0396, 2007 WL 911888 at *4 (Iowa App. March 28, 2007) (noting that a jury might find the conduct reasonably foreseeable in light of the employer's failure to set appropriate oversight measures, and quoting a rule about "far from unusual and startling" from *Olsen v. Tri-County State Bank,* 456 N.W.2d 132, 135 (S.D. 1990)). The case involved a bank employee who embezzled from a customer and used the proceeds, in part, to conceal bad loans and make the bank look good. The court allowed the case to go to the jury, noting that the employee's purpose was to serve the employer, which is also not part of the Iowa test.


101. *Id.* at 888. The test mirrored Section 229 of the Second Restatement.


104. *Id.* at 587. *See also* *Mirick v. McEleney,* No. C-93009, 1994 WL 156303 (Ohio Ct. App. Apr. 27, 1994) (following *Byrd* in stating one test and applying another); *Gibson v. Brewer,* 952 S.W.2d 239, 245–46 (Mo. 1997) (stating Missouri test requiring that an act be "done as a means or for the purpose of doing the work assigned" but concluding that the tort was outside the scope of employment because it was "forbidden" (citing *Byrd v. Faber,* 565 N.E.2d 584, 588 (Ohio 1991)).


106. *Id.* at 457.

107. *Id.* The court may have been led astray by the egregiousness of the tortious conduct in the
Courts and counsel also ignore, misapply, and misuse governing precedent with surprising frequency. For example, in Louisiana, a leading supreme court case in 1974 adopted a risk-based test for the scope of employment that was followed in later supreme court cases. In 1982, however, a lower appellate court ignored that line of doctrine and adopted a furtherance test based on a 1964 appellate case. The two lines of cases eventually converged when a court combined the rules. In Michigan, at least one court has adopted a blanket “no vicarious liability for intentional torts” rule by misquoting cases stating that vicarious liability did not exist for intentional torts that are not in the scope of employment, while ignoring a line of cases applying typical vicarious liability analysis to intentional torts.

In New York, the leading case at one time was *Riviello v. Waldron*, which stated a “general foreseeability” rule typical of enterprise liability, with factors from the Second Restatement. Lower courts failed to apply that rule, however, arguing that *Riviello* had actually intended to adopt a furtherance test. In 1999, the New York Court of Appeals capitulated, adopting a purpose-to-serve and furtherance test. A few years later, in an “even more compelling” case, the court relied solely on the furtherance test, dumping any hints of enterprise liability but continuing to cite the now-superseded *Riviello* case: sexual molestation. However, the correct application of the law would have led to the same result.

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108. See Spitsin v. WGM Transportation, Inc., 97 A.3d 774 (Pa. Super. Ct. 2014) (ignoring leading case *Iandorio* and citing no relevant cases); Coney v. Fagan, 97 P.3d 1252, 1254 (Or. Ct. App. 2004) (ignoring leading case *Fearing v. Bucher*, 977 P.2d 1163 (Or. 1999)). In *Nutt v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66, 70 (D. Conn. 1995), the court misquoted the Second Restatement. The court quoted Section 1, which defines an agent as a person who consents to act on behalf of another “and subject to his control,” for the proposition that an employer is only liable for the act of an employee when the employer can control the act. *Id.* at 70.

109. *LaBrane v. Lewis*, 292 So. 2d 216, 218 (La. 1974) (“the tortious conduct... was so closely connected... to his employment-duties as to be regarded a risk of harm fairly attributable to the employer’s business.”).


115. *391 N.E.2d 1278, 1281 (N.Y. 1979).*

116. *Id.* at 1282. The tortious conduct must be a “natural incident” of the employment. *Id.*


119. *See N.X. v. Cabrini Med. Ctr.*, 765 N.E.2d 844, 847 (N.Y. 2002). In a recent case the court reaffirmed the furtherance test, ruling that a hospital could be liable for an employee’s breach of a patient’s privacy only if the employee was acting in the scope of employment or if the hospital was itself negligent in failing to protect against reasonably foreseeable risks of disclosure. *See Doe v. Guthrie Clinic, Ltd.*, 5 N.E.3d 578, 580 (N.Y. 2014).
In California, the definition of the scope of employment has been clear for many years: the tortious conduct, or at least the risk of the tort, must arise or result from, be created or engendered by, or grow out of the employment. The Restatement elements about the “kind” of conduct and the “purpose to serve” are notably absent from the California analysis, and “foreseeability” is clearly not typical tort foreseeability.\(^{120}\) In *Benham v. S&G Security and Investigation, Inc.*,\(^{121}\) however, the trial court instructed the jury that conduct is outside the scope of employment if the employee was “not performing work for his or her employer... but was acting only for his or her own personal reasons”\(^{122}\) — a purpose-to-serve test. The California Court of Appeals upheld the verdict because the trial court “instructed the jury in appropriately general terms;” the focus on the employee’s reasons—an out-of-state Restatement analysis—was “substantially equivalent to stating that conduct motivated by emotions that are not attributable to work-related events or conditions is not within the scope of employment.”\(^{123}\) The appellate court relied on the inapplicable Restatement elements in its own analysis as well, ruling that the jury could reasonably infer that the guard “was performing his duties” at the time of the assault and that he was motivated to protect the store’s property.\(^{124}\)

In Florida, the seminal 1965 *City of Miami v. Simpson*\(^{125}\) case included language about the “real or apparent scope of the master’s business,” which appeared in many early cases.\(^{126}\) The idea that there is an “apparent” scope of employment was not discussed in the appellate courts\(^{127}\) for forty-nine years, until *Trabulsy v. Publix Super Market, Inc.*\(^{128}\) dug it up in 2014. The defendant argued that it could not be

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\(^{120}\) As the court explained in *Lisa M. v. Henry Mayo Newhall Mem’t. Hosp.*, 907 P.2d 358, 362 (Cal. 1995), “[r]espondeat superior liability should apply only to the types of injuries that... as a practical matter are sure to occur in the conduct of the employer’s enterprise.” Thus, foreseeable conduct is conduct that “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.” *Id.* at 364 (internal quotations omitted).


\(^{122}\) *Id.* at *8.

\(^{123}\) *Id.* at *9.

\(^{124}\) *Id.* The court also applied the correct creation-of-the-risk analysis.

\(^{125}\) 172 So. 2d 435 (Fla. 1965).

\(^{126}\) *City of Miami*, 172 So. 2d at 435. *City of Miami* itself rested on false precedent. After stating a made-up rule, it cited generally to *Collazo v. John Campbell Farms*, 213 F.2d 255 (5th Cir. 1954), which stated no clear rule, and to *Jacobi v. Claude Nolan, Inc.*, 122 So. 2d 783 (Fla. Dist. Ct. App. 1960), which in turn cited an older case applying an authority rule. *City of Miami*, 172 So. 2d at 435.

\(^{127}\) Cf. *Kirschenbaum v. Rehfield*, 539 So. 2d 12, 13 (Fla. Dist. Ct. App. 1989), in which it stated: “the criminal attack sued upon was entirely outside the scope of any apparent agency relationship... This is so because (a) the attack in no way furthered the interests of the [employer], and (b) the attack was motivated entirely by a malicious criminal purpose of the [employee].”

liable for its employee’s conduct because the conduct was expressly forbidden. The court replied that “[t]his question only focuses on whether [the employee] was actually acting within the scope of employment, not whether he apparently was acting within the scope. Under the latter theory, whether the employer authorized the act, or even forbade it, is immaterial.” The court cited a 1922 case for its analysis.129

In another Florida case, the trial court ruled that the alleged employee’s conduct “in no way was directed, authorized, nor could be considered incidental to or in furtherance of, or supposed from, the nature of his duty.”130 That rule appears to be a combination of the usual Florida furtherance test with a 1953 statement of the law that focused instead on the employer’s behavior, removing from the scope of employment torts “which the master neither directed in fact, nor could be supposed, from the nature of the employment, to have authorized or expected the servant to do.”131 The appellate court affirmed without opinion.132

Other courts are led astray by out-of-state precedents applying law that differs from local law.133 In Iglesia Cristiana Del Senor Inc., v. L.M.,134 a clergy sexual assault case in Florida, the court generally applied the standard furtherance test used in Florida, but relied on several out of state cases: N.H. v. Presbyterian Church (U.S.A.),135 an Oklahoma case, led the court to discuss the first two Restatement elements—conduct must be of the kind the servant was employed to perform and must occur substantially within authorized time and space limits—which had not otherwise been applied in Florida,136 and Konkle v. Henson,137 an Indiana case, led the court into a discussion of the principal’s instructions138—a fact utterly irrelevant to the Florida test.

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129. Id. (citing Stinson v. Prevatt, 94 So. 656, 657 (Fla. 1922)).
131. Weiss v. Jacobson, 62 So. 2d 904, 906 (Fla. 1953) (en banc).
132. Garcy, 583 So. 2d at 714.
133. See Gibson v. Brewer, 952 S.W.2d 239, 245–46 (Mo. 1997) (applying out of state precedent in clergy abuse case while ignoring Wellman v. Pacer Oil Co., 504 S.W.2d 55 (Mo. 1973), which held that “outrageous and criminal” acts could not be within the scope of employment).
135. 998 P.2d 592 (Okla. 1999).
138. Indiana’s scope of employment test, according to Konkle, is “whether the employee’s actions were at least for a time authorized” and whether “there is a sufficient association between the authorized and unauthorized acts”. Konkle, 672 N.E.2d at 457.
Thus the court noted that the employee knew that his behavior was wrong and that the employer would have tried to prevent it, facts that do not necessarily bear on whether the employee was acting in furtherance of the employer's business.\textsuperscript{139} Similarly, in \textit{NH. v. Presbyterian Church}, the Oklahoma Supreme Court applied the three Restatement elements, citing a "survey of national jurisprudence," despite the fact that the test in Oklahoma is quite different and does not include the three elements.\textsuperscript{140}

In another form of misusing precedent, lower courts sometimes fail to adjust to changing law, as cases in Connecticut illustrate. The leading Connecticut case on scope of employment for many years was \textit{A-G Foods, Inc. v. Pepperidge Farms, Inc.},\textsuperscript{141} which articulated a "furtherance of the business" test. According to the court, "it must be the affairs of the principal, and not solely the affairs of the agent, which are being furthered in order for the doctrine to apply."\textsuperscript{142} The court in \textit{A-G Foods}, and courts in later cases, applied the rule to require that the conduct actually further the interests of the employer; the test did not rely on the motivations of the employee.\textsuperscript{143}

In 2003, however, the Connecticut Supreme Court referred to the three-part Restatement test for scope of employment, citing only the Restatement.\textsuperscript{144} The court did not apply the test, because the conduct in question (discrimination) occurred in the discharge of the employee's duties. It did note that the conduct was "in the furtherance of [the employer's] business."\textsuperscript{145} The following year the court described a novel (to Connecticut)\textsuperscript{146} theory of respondeat superior in dicta in a footnote.\textsuperscript{147} The court referred to the three Restatement elements

\begin{itemize}
\item 140. 998 P.2d 592, 599-600 (Okla. 1999). The rule in Oklahoma is that an intentional tort is within the scope of employment if it is "fairly and naturally incident" to the business, if it "occurs while the employee is engaged in an act for the employer," or when it "arises from a natural impulse growing out of or incident to the attempt to complete the master's business." \textit{Id.} at 598-99.
\item 141. 579 A.2d 69 (Conn. 1990).
\item 142. \textit{Id.} at 73 (quoting \textit{Cardona v. Valentin}, 273 A.2d 697 (Conn. 1970)).
\item 143. \textit{See id.} at 73-74 (noting that the agent's fraud had not increased the principal's sales); \textit{see also} \textit{See v. Bridgeport Roman Catholic Diocese Corp.}, No. CV 930300948S, 1997 WL 466498 at *3 (Conn. Super. Ct. July 31, 1997) (distinguishing cases in which the employee's conduct benefits the employer).
\item 144. \textit{Harp v. King}, 835 A.2d 953, 974 (Conn. 2003).
\item 146. \textit{Mitchell v. Ersto}, 253 A.2d 25 (Conn. 1968), had stated the "underlying rationale" of respondeat superior to be that "every man who prefers to manage his affairs through others, remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others, while they are engaged upon his business and within the scope of their authority." \textit{Id.} at 27 (quoting \textit{Wolf v. Sulik}, 106 A. 443, 444 (Conn. 1919)).
\item 147. \textit{Jagger v. Mohawk Mountain Ski Area, Inc.}, 849 A.2d 813, 826 n.16 (Conn. 2004).
\end{itemize}
(which had been added to Connecticut law the prior year), but added that "a fundamental premise underlying the theory of vicarious liability is that an employer exerts control, fictional or not, over an employee acting within the scope of employment, and therefore may be held responsible for the wrongs of that employee."\(^{148}\)

The lower Connecticut courts, however, have continued to apply the furtherance-of-the-business test,\(^{149}\) despite both the 2003 change in the law and the Connecticut Supreme Court's invitation to base scope of employment analysis on the employer's right to control the activity.\(^{150}\) As a result of the importation of the three elements from the Restatement, the cases include language suggesting the motive of the employee might be important, but the analysis continues to focus on actual furtherance.\(^{151}\) The Federal District Court for the District of Connecticut, however, has followed the state supreme court's lead in abandoning prior state law and adopting new modes of analysis. In *Nathans v. Offerman*,\(^{152}\) the court, relying on Section 245 of the Second Restatement, concluded that the state court precedents had articulated a foreseeability test (although the word had never appeared in a Connecticut case).\(^{153}\) Recently, trial courts have stated the rule in the conjunctive: an employer is not liable unless the employee was *both* acting in the scope of employment and *acting in furtherance of the employer's business*.\(^{154}\) Perhaps the three-part Restatement test would

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148. *Id.* The court cited solely secondary sources, including the First Restatement. The hanging of vicarious liability on the employer's right of control was then used to bolster the court's interpretation of the statute at issue in *Jagger*. There was a vigorous dissent on the "control" analysis. See *id.* at 836 n.3, 837 n.5 (Borden, J., dissenting in part and concurring in part).


151. See *supra* note 150.


153. *Id.* at 276.

come into play as the first piece of the analysis if a court ever attempted to apply a two-part rule. ¹⁵⁵

IV. EFFECTS AND CAUSES

One of the biggest risks of any business is the risk that one of its employees will commit a tort for which it will be liable. Similarly, most of us are imperiled hourly by corporate employees in positions to do serious harm to our physical and financial well-being. Respondeat superior is one of the oldest bulkheads between business ventures and the public. Isolated legal errors affect only the parties to the case, and, however devastating personally, are not a societal concern. But pervasive errors in such an important body of law can have serious systemic consequences.

For one thing, a legal system in which courts regularly ignore binding precedent is arguably not a legal system at all. ¹⁵⁶ Even if precedent is not directly binding, the principle of stare decisis demands that it at least be given some recognition and deference. ¹⁵⁷ Adherence to precedent, including accepted standards of legal research and reasoning, serves pragmatic values by creating certainty, or at least predictability, in the law. ¹⁵⁸ While tort victims presumably do not rely on any particular legal regime in becoming victims, employers cannot insure against risks—and thereby provide funds to compensate victims—without knowing what types of risks they face. Nor will employers seek to minimize those risks that are genuinely attributable to their businesses. ¹⁵⁹

Even if no one actually relied on the predictable application of the scope of employment doctrine, its consistency has value. The rule of law itself demands that decisions be made for legitimate reasons: like cases should usually be treated alike, and, if they are not, a reason should be given explaining why not. ¹⁶⁰ A system of binding, or at least presumptively binding, precedent helps ensure that decisions are made on the basis of relevant, or at least not inappropriate, criteria. In other

¹⁵⁵. See Gonzalez v. Harte Subaru, Inc., No. CV106011240S, 2010 WL 4722262 at *4 (Conn. Super. Ct. Nov. 2, 2010) (noting that the conduct occurred during business hours and at the place of business and that the conduct concerned plaintiff's work, as well as that employee may have been acting to protect the employer).

¹⁵⁶. See LON L. FULLER, THE MORALITY OF LAW 34 (rev. ed. 1969) (describing the "imaginary" failed experiment of a system in which hundreds of cases were decided with no pattern whatsoever).

¹⁵⁷. See generally Barzun, supra note 5, at 1646 n.90 (explaining the general precedent of the current legal system).

¹⁵⁸. See id. at 1646-47.


words, treating “like cases alike” prevents biased decisionmaking. A court that ignores or misuses precedent, even if it does so unintentionally, opens the door to illegitimate decisions. Such concerns have a particular force in the case of common law rules, such as the rules of respondeat superior, which exist only if courts and counsel continue to recognize them. These concerns are also likely to be particularly salient in cases involving badly injured parties and violent torts.

Judicial legitimacy is based on the notion that judges are applying law according to some binding system of precedent and legal reasoning. In some states, the “law” of vicarious liability is practically non-existent. Moreover, common law rules are evaluated based on the outcomes they produce. If rules consistently produce undesirable outcomes, they can be changed. In fact, one justification for treating like cases alike is that it creates visibility and accountability. To paraphrase Professor Strauss, if there is going to be respondeat superior, “then there should be a uniform regime, and we will see whether people really want that regime or not.” Jurists and commentators can examine a doctrine and suggest improvements only if the doctrine is stable and identifiable.

What can account for such a collapse in the law? Perhaps the fact that few law schools teach agency law as a separate subject has created a generation of lawyers who have not had the opportunity to learn the subtle (and not-so-subtle) aspects of the concepts involved. Perhaps “bad facts make bad law,” and the compelling facts of employer liability cases are blinding lawyers and judges to formal legal rules. Perhaps lawyers are failing to notice state idiosyncrasies, either because they are from outside the state or because they are relying on secondary sources that fail to take account of state variations.

163. See supra notes 87–99 and accompanying text (describing Iowa law); infra note 185 (describing Louisiana law).
164. See Nelson, supra note 4, at 53.
166. It is possible that there are no more errors in respondeat superior cases than in other types of cases, and that a close examination of state appellate cases in many areas of law would reveal similar problems. Most of the explanations I consider below would apply equally well to other areas of the law.
168. For a particularly egregious ignorance of local law, see Zaveri v. Condor Petroleum Corp., 27 F. Supp. 3d 695 (W.D. La. 2014), a case involving New York parties and New York lawyers but Louisiana law. The parties sought a constructive trust and punitive damages, both of which are unavailable in Louisiana. The influence of out-of-state or “national” sources would also explain the
The cases and available briefs suggest that the two most likely explanations are: first, that courts and lawyers are distorting or misreading the law because of a discomfort with liability without fault arising from a failure to understand the purpose of vicarious liability, and, second, that institutional and pragmatic pressures on lawyers in tort cases, combined with a general unfamiliarity with the doctrine, simply cause those lawyers, and the courts who rely on them, to make more errors.

A. Result Driven Reasoning

Cases involving intentional torts committed by employees tend to involve compelling fact scenarios, often sexual assaults. Courts may stretch the law to enable the victim of an outrageous tort to reach a deep pocket, or they may try to keep such victims away from juries who might be inclined to find for the plaintiff regardless of the law. In some cases, the court obviously seems to have a particular result in mind. For example, in Wood v. Safeway, for example, a janitor sexually assaulted an employee. The court ruled that the assault could be within the scope of employment under the worker’s compensation statute, so that the victim could not sue her employer. However, the court ruled that the assault could not be within the scope of employment for respondeat superior purposes, and therefore the victim could not sue the service that employed the janitor. In Lange v. National Biscuit frequency with which the Second Restatement’s three-part test pops up in states where it has not previously been the law. Cf. Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, 2010 WL 2032478 (U.S.) at *13 n.7, Holy See v. Doe, 130 S.Ct. 3497 (2010) (No. 09-1), 2010 WL 2032478 (observing that a rule that included in the scope of employment intentional torts that were not intended to serve the employer’s purposes would be a “departure from the traditional understanding” of the scope of employment, despite the fact that enterprise liability tests, which do not include a furtherance requirement, are the law in several states, including California).

169. A number of courts have stated that respondeat superior liability is intended to provide compensation for tort victims. See, e.g., Crowell v. City of Philadelphia, 613 A.2d 1178, 1182 (Pa. 1992); Quebedeaux v. Dow Chemical Co., 820 So. 2d 542, 546 (La. 2002); Doe v. Forrest, 853 A.2d 48, 62-63 (Vt. 2004); Mary M. v. City of Los Angeles, 814 P.2d 1341, 1343 (Cal. 1991); but see Rogers v. J.B. Hunt Transport Inc., 649 N.W.2d 23, 26 (Mich. 2002) (noting that the employer’s greater ability to pay is not the basis for respondeat superior liability). It would, however, be gross injustice to force an unrelated party to pay for another’s loss simply because she could afford it.

170. See Dennis v. Pace Suburban Bus Serv., 19 N.E.3d 85 (Ill. App. Ct. 2014) (holding that employer could be liable for driver’s sexual assault, which was clearly outside the scope of employment, because the employer was a common carrier).

171. 121 P.3d 1026 (Nev. 2005).

172. Id. at 1032. The court adopted the rule that sexual assault was covered by the workers compensation statute when the nature of the employment increased the risk of assault. It then concluded that the test was satisfied because the victim in the case was required to go into non-public areas of the store, which is where the assaults occurred. Id.

173. Id. at 1032. The court applied Nevada’s statutory vicarious liability rule, which eliminates vicarious liability for an intentional tort if the tort was “a truly independent venture,” was not committed “in the course of the very task assigned” and was not foreseeable. Id. at 1035 (citing NEV. REV. STAT. ANN.§ 41.745 (West 2005)).
a cookie salesman "viciously" attacked a grocery store manager following a dispute about the salesman's work in the store. The Minnesota Supreme Court held that the employee was within the scope of employment as a matter of law by abandoning the purpose-to-serve test. It stated that "the focus should be on the basis of the assault rather than the motivation of the employee." The court adopted instead the rule that an employer would be liable for assault by an employee "when the source of the attack is related to the duties of the employee and the assault occurs within work-related limits of time and place." Six years later, in Edgewater Motels v. Gatzke, the court applied the purpose-to-serve test (which Lange described as based on a "fallacy") without explanation, and reinstated a jury verdict for the plaintiff. The case involved the negligence of a drunk, exhausted Walgreen's district manager who set fire to the motel in which he was staying on company business. Four years after that, in a case involving a sexual assault by a psychotherapist, the court reconciled Lange and Edgewater Motels by explaining that the causation test of Lange applied only to intentional torts, while the motive to serve test remained the standard in cases of negligence. The judgment for the employer was reversed and the case was remanded for a new trial because sexual assault was a "well-known hazard" of psychotherapy. In each case, a trial judgment for the employer was overturned.

The Louisiana cases seem particularly outcome-driven. In LaBrane v. Lewis, the court found that a stabbing was within the scope of employment because (1) the dispute was "primarily employment-rooted," (2) the fight was "reasonably incidental to the performance" of the employee's duties, and it occurred (3) on the employer's premises and (4) during working hours. The court described conduct within the scope of employment as "so closely connected in time, place, and causation to his employment duties as to be regarded a risk of harm fairly attributable to the employer's business,

174. 211 N.W.2d 783 (Minn. 1973).
175. Id. at 784.
176. Id. at 786.
177. Id. at 785.
178. Id. at 786.
179. 277 N.W.2d 11 (Minn. 1979).
180. Id. at 15.
181. Id. at 17. The trial court had granted judgment notwithstanding the verdict on the scope of employment question.
183. Id. at 312.
184. Id. at 311.
185. 292 So. 2d 216 (La. 1974).
186. Id. at 218.
as compared with conduct motivated by purely personal considerations entirely extraneous to the employer's interests." In *Miller v. Keating*, the appellate court treated *LaBrane* as having announced four factors, although the *LaBrane* court had not enunciated its test that way. The Louisiana Supreme Court, in reversing the appellate court, pointed out that *LaBrane's* holding had been more nuanced, but noted that, in any event, all four "factors" need not be satisfied for an act to be within the scope of employment. The holding was essential to find the employer liable in that case, where the battery (and attempted murder) occurred nowhere near the time and place of employment, but was intended to generate insurance proceeds for the employer.

In *Baumeister v. Plunkett*, the court clarified that, while all four *LaBrane* factors were not required, factors (3) and (4) alone were not enough. Otherwise, the employer in *Baumeister* would have been liable for a sexual assault that happened to occur at the workplace. Meanwhile, in a negligence case, the court added a purpose-to-serve factor, and, in another case, the complete three-part Restatement test. The definition of scope of employment in Louisiana now includes, apparently as "factors," every test in use anywhere. Appellate courts will have no difficulty finding the law they need to reach favored results.

**B. Research Issues**

Many of the errors described above could have been caused by poor legal research by the lawyers. Almost all the cases involving vicarious liability for intentional torts involve apparently small-firm lawyers, usually on both sides. Lawyers for tort plaintiffs may not
have, or be willing to use, expensive database services like Lexis and Westlaw, and may rely on traditional print sources for their research.197 Those sources are likely to be local case digests, legal encyclopedias, and common treatises such as *Prosser and Keeton on Torts*. In fact, *American Jurisprudence* and *Prosser and Keeton* are frequently cited in these cases.198 Those sources are likely to rely primarily on older cases and to include cases from other jurisdictions. Thus, lawyers may miss important new cases and may rely on cases that sound similar but in fact involve different rules from other states.199

It is also possible that materials specifically dealing with agency law are less common in small law offices. It is striking how rarely the Restatement of Agency is cited, which may reflect the fact that the average small law office does not have a copy.200 Courts rely on *Prosser and Keeton* more often than on an agency law treatise, and a text on torts would not explain the relationship between authority concepts and the scope of employment and would not explain the need for a different mode of analysis in cases involving fraud. A popular source of law for trial lawyers may also be “uniform” jury instructions. Unfortunately, jury instructions themselves often contain errors and fail to cite recent governing cases.201

The Third Restatement of Agency is not likely to enhance clarity of thought about respondeat superior, especially among those without the

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198. *Cf* 1998 SMALL LAW FIRM SURVEY, supra note 197, at 64.


200. See Lawson, supra note 197, at 390 (noting that inexperienced lawyers are more likely to use secondary sources in research); id. at 390–91 (noting that small firm lawyers are more likely to be generalists). Certain Sections of the Second Restatement, such as 219 and 222, are cited with some frequency, but usually those citations travel down through a line of cases, rather than being an original part of a court’s reasoning.

201. For jury instructions containing errors, see IOWA CIVIL JURY INSTRUCTIONS 30.2 (2004) (citing a Federal case and the now-modified *Sandman v. Hagan*, 154 N.W.2d 113 (Iowa 1968)); OHIO JURY INSTRUCTIONS CV 537.07, §§ 8 and 9 (providing two completely different “alternatives” for the scope of employment and citing cases from the 1970s); TEXAS PATTERN JURY INSTRUCTION 10.6 (providing only the “furtherance” definition); OKLAHOMA UNIFORM JURY INSTRUCTION 6.12 (citing obsolete rule from cases from 1933 and earlier); FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES § 404.14(b)(2) (including “apparent agency” instruction about authority in section on vicarious liability for torts, but not including a general scope of authority instruction).
time or inclination to think carefully about the subject. The Third Restatement gratuitously adds a reference to “a course of conduct subject to the employer's control” to the definition of the scope of employment, but does not provide either an illustration or case citations to explain how that part of the rule should be applied or where the requirement came from.\textsuperscript{202} In the commentary, the Third Restatement notes that “[i]n many cases in which an employee's tortious conduct is outside the scope of employment . . ., the employee's action lies beyond the employer's effective control,” which is a quite different thing from stating that tortious conduct is outside the scope of employment because the action is outside the employer's control.\textsuperscript{203} It then goes on to state that “the range of an employer's effective control is not the limit that respondeat superior imposes on the circumstances under which an employer is subject to liability,” which can only mean that respondeat superior liability may exist for acts outside the range of the employer's effective control, an apparent contradiction of the black-letter “law” stated in the text.\textsuperscript{204}

Also in the comment on the scope of employment, the Third Restatement includes a brief, unenlightening reference to the principal's liability for an agent acting with authority in transactional contexts, which does not implicate the scope of employment.\textsuperscript{205} Even more confusing, the Third Restatement includes its definition of an “employee”—formerly known as a “servant”—in the same section as the definition of the scope of employment.\textsuperscript{206} A control requirement thus appears in Section 7.02(2), referring to the scope of employment, and in Section 7.02(3), referring to the definition of an employee. One might assume, incorrectly, that the two concepts are the same.\textsuperscript{207}

C. Sloppy Lawyering

Even lawyers with adequate research resources will find and apply appropriate law only if they are diligent and competent. Lawyers in small firms, especially those who are representing tort plaintiffs on a contingency fee basis, may have heavy caseloads and erratic schedules.

\textsuperscript{202} \textit{Restatement (Third) of Agency} § 7.07(2) (2006).

\textsuperscript{203} \textit{Id.} § 7.07 cmt. b.

\textsuperscript{204} \textit{Id.} An employee driving on an employer's business is clearly both within the scope of employment and beyond the range of the employer's effective control, for example.

\textsuperscript{205} \textit{Id.} The Third Restatement notes that such liability is an alternative to respondeat superior liability, but the discussion might confuse a careless reader.

\textsuperscript{206} \textit{Id.} § 7.02(3). Section 7.02(3) refers to control over "the manner and means of the agent's performance of work," which is the traditional definition of a servant. See supra note 59 and accompanying text. The meaning of "control" in Section 7.07(2) is obscure, as it is not explained or illustrated and the commentary states that it is not actually necessary for an act to be in the scope of employment anyway.

\textsuperscript{207} \textit{Id.}
The economics of such law practice may not encourage counsel to take the time to engage in careful analysis of the intricacies of the law. In the absence of a concise source explaining those intricacies (such as a hornbook on agency law), lawyers may believe they understand the doctrine better than they actually do. Clerks at state courts, particularly intermediate appellate courts which have heavy caseloads themselves, are unlikely to have the time to double-check counsel’s research or analysis.

**D. Unfamiliarity with Agency Law**

Adequate research and analysis should enable a lawyer to state and apply the law whether she is an expert in the field or not. If she fails to do so, however, a reader who is familiar with the general principles of a body of law would recognize errors and demand that they be corrected. Moreover, readers familiar with agency law would be alert to the erroneous use of fault-based arguments, given that lack of fault is a fundamental characteristic of respondeat superior liability. On the other hand, if lawyers, clerks, and judges do not have much prior familiarity with agency law, errors are more likely to go undetected. Thus, while the caseload in federal courts is lighter than the caseload in state courts, and federal clerks presumably have more time and better resources to spend finding and figuring out the law, those advantages may be offset by the fact that personnel in federal courts are likely to be less familiar with state-law agency law.

**V. CONCLUSION: A MODEST PROPOSAL**

The conceptual errors described above would not occur if at least some of the lawyers involved in a case understood agency law, and the solution for that problem is education. Most law students are exposed to agency law in the business associations survey course, and those courses tend to focus on authority issues as the most relevant to business transactions. Instead, business associations texts and teachers should...
focus on underlying principles that are more difficult to pick up in practice. In addition to the basic principles of an agent's authority, students should learn that: (1) vicarious liability is by definition liability without fault, (2) agency law treats liability based on contract differently from liability based on torts, (3) the independent contractor/employee question is separate from and has a different purpose than the scope of employment question, and (4) the scope of employment inquiry is about the relationship between the employment and the tort, and not about anything the principal did.

The effects of practical pressures on lawyers can also be alleviated by education. As other commentators have noted, legal research and writing courses should include training in the use of low-cost research materials likely to be of real use in practice. Law school libraries should provide training for local lawyers in the use of new technologies, including “smart” research tools such as WestlawNext, which can present research challenges. Uniform jury instructions must be brought into line with the decisional law in each state, and the citations supporting the instructions should provide a starting point for online research, which otherwise can lead lawyers to cases providing “hits” for idiosyncratic search terms rather than to the major cases in the state.

Lon Fuller posited that there are at least eight ways in which “the attempt to create and maintain a system of legal rules may miscarry.” Of the eight he mentions, courts in our story have been guilty of four: “failure to achieve rules at all,” failure to enable subjects to know what the law is, “enactment of contradictory rules”, and “a failure of congruence between the rules as announced and their actual administration.” In Fuller's allegory, the bungling monarch intentionally inflicts failed law on his kingdom, albeit with good intentions. In the case of respondeat superior, the law is being destroyed by bungling lawyers acting unintentionally. Both the predictability of the law and the rule of law itself rest on the efforts and
understanding of careful, competent counsel and clerks.