Institutional Liability for Employees’ Intentional Torts:
Vicarious Liability as a Quasi-Substitute for Punitive Damages
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Abstract

Modern day vicarious liability cases often address the liability of enterprises and institutions where agents have committed intentional acts. Increasingly, when corporations or employers are sued, the line is blurred between the principal’s vicarious liability for its agent’s acts and its own direct liability for hiring and/or failing to control its agent.

From an economic deterrence perspective, the imposition of vicarious liability induces employers to adopt cost-justified preventative measures, including selective hiring and more stringent supervision and discipline, and, in some instances, to truncate the scope of their business activities. Negligence-based direct liability likewise induces employers to adopt cost-justified preventative measures (without constraining activity levels to the degree that strict liability does). This raises two questions: why doesn’t direct employer negligence liability suffice, in terms of deterring employees’ intentional torts? And conversely, so long as there is vicarious liability, is there any need for direct negligence liability at all?

I argue that, as a form of strict liability, vicarious liability will have an edge over direct employer negligence liability to the extent that there is a significant risk of under-detection of the failures of an employer’s preventative measures. Traces of this under-detection rationale for vicarious liability can be found in the academic literature and court decisions, but it warrants further elaboration. It has the potential to serve as a coherent framework for some modern doctrinal debates, including whether punitive damages should be imposed either vicariously or directly upon employers when their employees commit intentional torts.

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Introduction

Vicarious liability of employers for employees’ torts can be justified on economic deterrence grounds: namely, identifying the “cheapest cost avoider” to hold liable for the tortious conduct. The economic approach emphasizes both the ability of the employer to induce careful conduct by its employees and the potential that judgment-proof employees might escape direct personal liability. The conventional economic accounts compare vicarious liability of the employer (or principal) with direct liability of the (typically) negligent employee (or agent). But these conventional accounts do not address an emerging paradigm of institutional liability confronting the courts.

Modern day vicarious liability cases often address the liability of enterprises and institutions (such as churches, schools, and residential homes) in a context where their agents have committed intentional acts. Increasingly, when corporations or employers are sued, the line is blurred between the principal’s vicarious liability and its own direct liability. My article thus focuses exclusively on employer liability for employees’ intentional torts and, in that context, compares vicarious liability with direct liability against the employer using an optimal deterrence framework.

The imposition of strict liability vicarious liability induces employers to adopt cost-justified preventative measures, including selective hiring and more stringent supervision and discipline of its employees, and, in some instances, to truncate the scope of their business activities. But there is a serious potential downside: when there is nothing the employer reasonably could have done to prevent the employee’s tort—as may often be the case with intentional torts—then the imposition of strict liability has no benefit from a deterrence perspective, and simply creates expensive lawsuits.

Negligence-based direct liability likewise induces employers to adopt cost-justified preventative measures (without constraining activity levels to the degree that strict liability does). This raises two questions: why doesn’t direct employer negligence liability suffice in terms of deterring the commission of intentional torts by employees? And conversely, so long as there is strict liability vicarious liability is there any need for direct negligence liability at all?

“Scope of employment” stands as a doctrinal dividing line between the two approaches. The requirement that an employee act within the “scope of employment” in order for the employer to be held strictly vicariously liable for his or her torts is well established, and, more than any other factor, determines whether a court applies strict or negligence-based liability against the employer. But does it mark a logical and efficient boundary between the imposition of direct negligence and vicarious strict liability? The conventional economic account has justified the “scope of employment” limitation as a proxy for enterprise causation.

But, apart from causation (which, in some form must be satisfied for both strict liability and negligence-based liability), what justifies the choice between direct negligence and strict vicarious liability against the employer? In this article, I highlight as a significant factor the likelihood of detection of the failures of an employer’s preventative measures. To the extent that there is a significant risk of under-detection of the failures of an employer’s preventative measures, strict liability vicarious liability has an edge over direct employer negligence liability in terms of optimal deterrence. Traces of this
under-detection rationale for vicarious liability can be found in the academic literature as well as court decisions, but it warrants further elaboration.

The under-detection rationale has the potential, moreover, to serve as a coherent framework for the significant modern doctrinal debates regarding whether punitive damages should be imposed either vicariously or directly upon employers for intentional torts committed by their employees. Focusing on under-detection, vicarious liability acts as a quasi-substitute for punitive damages. And seen through this lens, the Restatement (Second) of Torts §909 provision on “Punitive Damages Against a Principal”—typically defended as a “complicity rule” limiting the imposition of vicarious punitive liability on fairness grounds—is justified on economic deterrence grounds by allowing punitive damages coupled with direct negligence liability but limiting its operation in the vicarious liability sphere.

I. Conventional Economic Account of Employer Vicarious Liability

In two seminal articles, Alan Sykes set forth the classic economic argument for employer vicarious liability. In this Part, I summarize the solid underlying theory and more limited doctrinal application of Sykes’ framework. While this will serve as a necessary foundation (and in fact it is hardly possible to explore the topic of vicarious liability without engaging with Sykes’ work), I emphasize at the outset that the issues I explore in this article fall largely outside of Sykes’ (and following him most economists’) core interest in pitting employer vicarious liability against employee personal liability, primarily in the context of negligence actions.

In his 1984 article, “The Economics of Vicarious Liability,” Sykes “inquires whether a rule of vicarious liability, under which the principal and agent are jointly and severally liable for the agent’s wrongs, is economically efficient relative to a rule of personal liability, under which the agent alone is liable for his wrongs.” Sykes explicitly did not consider “rules that impose liability on principals for agent wrongs that are attributable to the principals’ own malfeasance.” Sykes reiterated in his 1988 article, “The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines,” that “[t]he analysis throughout . . . contemplates the choice between a rule of personal liability, under which the employee alone is liable for his wrongs, and a rule of vicarious liability, under which the employer and the employee are jointly and severally liable.”

A. Theory

The classic economic justification for employer vicarious liability rests on three pillars: employee inability to pay; employer control methods; and enterprise causation. Sykes’ framework emphasizes that “the choice between vicarious liability and personal liability is a significant one whenever the

2 Id. at 1231 n.2. Sykes explained: “Rather, the Article deals with situations in which the principal does not contribute to the wrong except, perhaps, by his failure to monitor the agent or to design incentives that deter agent malfeasance.” Id. But this caveat flags what I take up in this article—namely whether actions such as the employer’s failure to monitor or detect employee misconduct warrants the imposition of direct negligence liability and, if so, whether that alters the soundness of the imposition of vicarious liability.
employee is unable to pay judgments in full under a rule of personal liability.”

The efficiency of vicarious liability rests not only on the potentially diminished incentives for judgment proof employees to take adequate care, but also on the potential for employers to be the cheapest cost avoiders in terms of taking cost-effective measures to induce their employees to take adequate care. Sykes’ seminal contribution is his elaboration of the notion of “enterprise causation”—namely an employer “causes” its employees’ torts to the extent that the probability of the employee committing the tort is increased due to the employment relationship.

1. Employee inability to pay

Sykes’ cost internalization framework starts with the Coasean insight that, absent transactions costs, the optimal allocation of risk “does not depend upon where the law initially places liability.” However, if the tortfeasor employee’s assets are less than the potential judgment against him, the choice between employee personal liability and employer vicarious liability becomes significant.

Given that employees and employers internalize future expected costs, where an employee may be (wholly or partially) judgment proof, personal liability creates three inefficiencies: (1) the employee’s incentive to avoid committing torts is sub-optimal, given that he will not pay for the full consequences of his actions; (2) the employer’s profitability is inflated, as it need not expend resources to monitor employees to minimize the risk of their committing torts (and indeed, some of the employees’ torts may in fact serve the employer’s bottom line); and (3) employees may be dissuaded from entering optimal risk-allocation agreements with employers. The imposition of vicarious liability upon the employer is presented as a solution that avoids the “inefficient expansion of the scale of business activity that results when the employee cannot pay judgments,” “improve[s] the efficiency of risk-sharing by eliminating the incentive . . . to take advantage of employees’ inability to pay,” and eliminates transaction costs incurred in negotiating private agreements for the employer to assume liability.

2. Employer control

The economic efficiency view of vicarious liability depends upon “its effect upon employees’ incentives to avoid wrongful conduct,” where “[t]he effect of vicarious liability on such incentives [in turn] depends upon the devices available to the employer to induce careful behavior and the costs of these devices.”

Sykes set forth the various ways in which employers can exercise such control. First, employers can directly observe their employees’ activities and announce a desired standard of conduct. Second, employers can structure compensation and promotion decisions to incentivize employees over the course of a long-term relationship. Finally, in situations where an employee, whose conduct is

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4 Id. at 566.
5 Id. at 566.
6 Id.
7 Id. at 567-68.
8 Id. at 568.
9 Id. at 569.
10 Id.
11 Id. at 570.
unobservable, is engaged only in a short-term relationship, an employer’s “threat of an indemnity action against the employee” may be the only device available to dissuade misconduct.\textsuperscript{12}

3. Enterprise causation

The most innovative feature of Sykes’ framework is his elaboration of the notion of enterprise causation to forge the link between an employer’s business activity and its employees’ torts: “An enterprise ‘fully causes’ the wrong of an employee if the dissolution of the enterprise and subsequent unemployment of the employee would reduce the probability of the wrong to zero.”\textsuperscript{13} And vicarious liability “will [thus] force the enterprise to bear a greater proportion of the cost of the accidents that it ‘causes.’”\textsuperscript{14}

Applying Sykes’ notion of enterprise causation ensures that each business is bearing the incremental social costs associated with its operation.\textsuperscript{15} Furthermore, it demonstrates the inefficiency of holding an employer vicariously liable for all employee torts even when the employer cannot affect either the likelihood that the employee commits a tort or the likely amount of damages.\textsuperscript{16} Thus, where the enterprise is fully responsible for the harm, it “will operate at an efficient level of output only if it bears, directly or indirectly, all liability for the employee’s [tort].”\textsuperscript{17} Whereas, where “the probability of a [tort] depends upon whether the employee is employed or not, but (by hypothesis) cannot be affected by the employer once the employee has been hired,” it is inefficient to impose either the full value of the tort or no liability on the enterprise.\textsuperscript{18}

B. Doctrine

To what extent does the doctrine of vicarious liability, with its insistence upon an employee acting within the “scope of employment” as a prerequisite for employer vicarious liability, comport with the economic efficiency justification?

Sykes examined (to a limited extent) the scope of employment rule in the context of the “frolic and detour” motor vehicle tort cases at the rule’s boundary. Sykes concluded that vicarious liability should be imposed on an employer whose employee commits a motor vehicle tort if the tort arose during an errand that would not have occurred absent the employment relationship, or the probability of the tort was substantially increased by the employment relationship.\textsuperscript{19} When the tort is not so “caused” by business activities, vicarious liability should not be imposed upon the employer unless one of two conditions hold: the employer could adopt incentive devices that reduce motor vehicle torts that more than offset the additional costs to the enterprise, or if it resulted in increased efficiency of risk-

\textsuperscript{12} Id.
\textsuperscript{13} Id. at 572.
\textsuperscript{14} Id. at 584.
\textsuperscript{15} Id. at 573.
\textsuperscript{16} Id. at 573-75.
\textsuperscript{17} Id. at 576.
\textsuperscript{18} Id. at 575.
\textsuperscript{19} Id. at 587.
sharing. According to Sykes, neither of these conditions seemed likely to hold true; moreover, this likewise seemed to be reflected in the case law he examined.

1. Employer control

The Restatement of Agency provides a “control test” to determine the scope of vicarious liability. Overall, the criteria are in line with the factors that determine the efficiency of vicarious liability: observability and the costs to the principal of monitoring loss-avoidance efforts.

Sykes, however, did not find such a close appreciation of the efficiency factors reflected in his examination of the case law. Judges resolved vicarious liability in the context of service station torts, for example, using “indicia of control . . . that appear[ed] to have little or no economic significance.” More specifically, judges defined the requisite control without referring either to the employer’s ability to observe the employee’s loss avoidance conduct or to the duration of the employer-employee relationship.

2. Scope of employment

Sykes uncovered an even greater divergence between doctrine and theory when he examined the extent to which the “scope of employment” limitation mapped onto the notion of enterprise causation. Here, Sykes concluded that courts took a very different tack. In the motor vehicle torts context that he examined, courts tended to decide whether the employee acted outside the scope of employment in a “frolic or detour” by examining either the length of the detour or else the foreseeability of the detour. Such considerations are economically unsound, at least when considered against Sykes’ notion of enterprise causation.

II. Employer Liability for Employee Intentional Torts: “Scope of Employment” as Dividing Line

We turn now from the conventional economic account—with employer vicarious liability pitted against employee personal liability, primarily in the context of employee negligence torts—to my main focus, namely comparing and contrasting different forms of employer liability (vicarious liability and direct negligence) in the context of employee intentional torts. Moreover, I begin with an exposition of the doctrine of “scope of employment” as it has emerged as a dividing line between employer vicarious

20 Id. at 585. Imposing vicarious liability on the employer shifts the risk from driver and victim—neither of whom may have adequate insurance—to employer and its insurer.
21 Id. at 586.
22 Sykes, supra note 1, at 1261.
23 Id. at 1262.
24 Id. at 1265.
25 Id.
26 Id.
27 Id. Sykes briefly extended his analysis to intentional torts, noting in that context too, that courts that have extended vicarious liability have not typically addressed the issue of whether the enterprise’s existence actually causes the tort.
liability and direct negligence liability in the context of employee intentional torts before proceeding to offer a theoretical criticism and posit an alternative approach.

The “scope of employment” doctrine has emerged as a sharp dividing line separating vicarious employer liability from direct negligence liability for employee intentional torts in at least a significant number of jurisdictions. Employers can be held vicariously liable for employees who commit intentional torts while acting within the scope of employment; whereas employers can be held directly liable for their own negligence in situations where employees commit intentional tort outside the scope of employment. For example, “New Jersey would not permit Plaintiff to proceed on her claim of negligent hiring, training, supervision, and retention in light of Defendants’ admission that [their employee] was acting within the course and scope of his employment.” And in Florida, courts have likewise restricted employer direct liability claims to realms in which the employee commits an intentional tort while acting outside the scope of employment. Thus, “Florida law requires that a claim for negligent retention allege acts committed outside the course and scope of employment.”

Moreover, the Restatement (Second) of Torts seems to embrace this approach as well. Section 317, entitled “Duty of Master to Control Conduct of Servant,” provides that “[a] master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others . . . .” Indeed, the commentary clarifies that “[t]he rule stated in this Section is applicable only when the servant is acting outside the scope of his employment. If the servant is acting within the scope of his employment, the master may be vicariously liable under the principles of the law of Agency.”

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28 Indeed, the doctrinal confusion goes even deeper. There are myriad examples of courts that have altogether confused the requirements and purposes for vicarious liability with direct liability. See, e.g., Bishop v. Miller, Nos. 4-97-30, 4-97-31, 1998 WL 135802 at *3 (Ohio Ct. App. March 26, 1998) (dismissing a claim of negligent supervision on the ground that the alleged sexual battery was “not within the scope of [Defendant’s] employment” as is required for respondeat superior); Cook v. Greyhound Lines, Inc., 847 F. Supp. 725, 732 (D. Minn. 1994) (“[U]nder the rubric of negligent supervision, in order to successfully state a claim against an employer, the claimant must establish that the employee who caused an injury did so within the scope of his or her employment.”). See generally Paula Dalley, Destroying the Scope of Employment, 55 WASHBURN L.J. 637 (2016).

29 I am not taking on this even “lower hanging fruit” doctrinal confusion for two reasons. First, it is not theoretically very interesting (although may nonetheless be important to correct given the stakes of these cases). Second, it does not appear to be as widespread an issue, in part given ample evidence that appellate courts often correct trial courts that make this mistake. See, e.g., Doe v. Borromeo, No. 305162, 2012 WL 4215032 at *4-5 (Mich. Ct. App. Sept. 20, 2012) (remanding a case to a trial court that failed to address plaintiff’s negligent supervision claim and only addressed vicarious liability); Minnis v. Oregon Mut. Ins. Co., 48 P.3d 137, 144 (Or. 2002) (noting danger of confusion); Byrd v. Faber, 565 N.E.2d 584, 588-89 (Ohio 1991) (noting that appellate court had conflated negligent hiring and respondeat superior).

30 Belizaire v. City of Miami, 944 F. Supp. 2d 1204, 1215 (S.D. Fla. 2013) (granting the defendant’s motion to dismiss negligent retention claim on the grounds that “the officers here were acting within the scope of their employment”).

31 Note, however, that Restatement (Second) of Torts §317 is in tension (if not outright contradiction) with Restatement (Second) of Agency § 213: “In a given case the employer may be liable both on the ground that he was personally negligent and on the ground that the conduct was within the scope of employment.”

32 RESTATEMENT (SECOND) TORTS §317 cmt. a.
Significant practical implications flow from scope of employment forging a doctrinal dividing line between vicarious and direct employer liability. An employer might have strategic advantage to concede that an employee’s intentional tort falls within the “scope of employment” so as to foreclose a direct liability claim, especially if the latter is either the sole, or more likely, route to recovery of punitive damages. On the flip side, perhaps the division makes sense in light of evidentiary concerns. The South Carolina Supreme Court, for example, acknowledged that “the admission of evidence which must be offered to prove a negligent hiring, training, supervision, or entrustment claim—evidence such as a prior driving record, an arrest record, or others records of past mishaps or misbehavior by the employee—will be highly prejudicial if combined with a stipulation by the employer that it will ultimately be vicariously liable for the employee’s . . . acts.”

But the court nonetheless concluded that “the argument that the court must entirely preclude a cause of action to protect the jury from considering prejudicial evidence gives impermissibly short-shrift to the trial court’s ability to judge the admission of evidence and to protect the integrity of trial, and to the jury’s ability to follow the trial court’s instructions.”

Should an employer’s direct negligence liability thus be reserved only for situations where an employee’s intentional torts fall outside the scope of employment? To the extent courts expand the realm of “scope of employment” for employee intentional torts, should they concomitantly limit the range for direct negligence based liability?

A. Vicarious Liability for Intentional Torts “Within Scope of Employment”

Courts are, by and large, willing to consider imposing vicarious liability on employers for employees’ intentional torts so long as they are acting “within the scope of employment.” But, to date, courts have typically construed “within the scope of employment” extremely narrowly in the context of employee intentional torts—primarily only those actions employees take in the service of their employer’s purposes, typically where they have acted with apparent or actual authorization by their employer.

The classic Ira S. Bushey & Sons case and one of its progeny, Taber v. Maine, are the exceptions that prove the rule. Two visionary Second Circuit judges (applying the law of admiralty and Guam/California, respectively), Henry Friendly and Guido Calabresi, articulated a much broader rationale for (in each case, a military) employer’s vicarious liability for its employee (serviceman’s) intentional tort, based on economic theories of enterprise causation and employer control.

1. Narrow Recognition by Courts

Most jurisdictions hold that employee intentional torts can only be considered within the scope of employment under extremely limited circumstances. As one court aptly summed up: “As a general rule, it is not within the scope of an employee’s employment to commit an assault upon a third person.”

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34 Id. Nor was the court satisfied with the rule coupled with a “punitive damages exception”—as this would lead to a rule of “little utility” or else force a judgment regarding the employer’s conduct by the court based only on the pleadings. Id. at 332.
35 Rodebush By & Through Rodebush v. Oklahoma Nursing Homes, Ltd., 867 P.2d 1241, 1245 (Okla. 1993).
The majority position is that intentional torts are only within the scope of employment when done to serve the employer’s interest, namely “the act is one which is fairly and naturally incident to the business, and is done while the servant was engaged upon the master’s business and is done, although mistakenly or ill advisedly, with a view to further the master’s interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master’s business.”\textsuperscript{36} By contrast, courts have held that “[w]hen ‘an assault is purely personal to the servant, having no real connection with the master’s business, the doctrine of respondeat superior is inapplicable to fasten liability upon the master.’”\textsuperscript{37} And some have held in the hybrid situation in which “an employee commits an intentional tort with the dual purpose of furthering the employer’s interest and venting personal anger, respondeat superior may lie.”\textsuperscript{38}

Jurisdictions often cabin vicarious liability in this manner by deploying the actual or apparent agency doctrine: “To recover under a theory of vicarious liability such as actual or apparent agency, it must be shown that the agent or apparent agent’s conduct was motivated, at least in part, by the purpose of serving the employer. It is entirely clear that responsibility for the intentional wrongful acts of a servant-employee may be visited upon his master-employer under the doctrine of respondeat superior only when that conduct in some way furthers the interests of the master or is at least motivated by a purpose to serve those interests, rather than the employee’s own.”\textsuperscript{39}

2. Whither Enterprise Causation Rationale?

In the context of employee intentional torts, courts seem especially wary of the imposition of vicarious employer liability. As noted above, court typically recognize vicarious liability only in the more limited situations where the employee acts to serve the employer’s purposes under some variant of actual or apparent authority. But this all but transforms vicarious liability into a form of direct liability (which would apply in situations where the employer authorized the employee’s act). In any event, it is a far cry from Sykes’ notion of enterprise causation.

Against this backdrop, two cases stand out in terms of their endorsement (implicit and explicit, respectively) of the enterprise causation rationale.\textsuperscript{40} The first is the class case, \textit{Ira S. Bushey & Sons}, in which the Second Circuit (applying admiralty law) affirmed the imposition of vicarious liability on the Coast Guard for vandalism by a drunken soldier. In this famous decision, Judge Henry Friendly rehearsed various justifications for vicarious liability, including the narrowest “serves the master’s purpose,” and cheapest cost avoider/ deterrence rationales (which he disparaged, though not on the basis of any kind of empirical evidence), before landing (implicitly) on an enterprise causation rationale: “the activities of the ‘enterprise’ do not reach into areas where the servant does not create risks different from those attendant on the activities of the community in general.”\textsuperscript{41}

\textsuperscript{36} Id. (internal quotation marks omitted).
\textsuperscript{39} Ayers, 941 F. Supp. at 1169.
\textsuperscript{40} Moreover, the Second Circuit appears to be the (unique?) hotbed for the enterprise causation rationale for vicarious liability.
\textsuperscript{41} 398 F.2d 167, 172 (2d Cir. 1968).
A quarter century later, drawing upon Ira Bushey, Judge Guido Calabresi (applying the law of Guam, which looks to California law for guidance) explicitly endorsed the enterprise causation rationale in *Taber v. Maine.* According to Judge Calabresi, the vicarious liability doctrine is “concerned with the allocation of the cost of industrial injury” and thus its applicability should turn on the “relationship between the servicemember’s behavior and the costs of the military enterprise.” Moreover, Judge Calabresi reasoned, “given the pervasive control that the military exercises over its personnel while they are on a base, it is totally in keeping with the doctrine of respondeat superior to allocate the costs of base operations to the government.”

B. Direct Negligence Liability for Intentional Torts “Outside Scope of Employment”

We move now from employer liability for employees’ commission of intentional torts “within the scope of employment” to those committed “outside the scope of employment.” Restatement (Second) of Torts § 317, entitled “Duty of Master to Control Conduct of Servant,” provides the contours under which “[a] master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them.” Section 317 liability attaches when the servant “(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master.” Not all jurisdictions have expressly adopted Restatement (Second) of Torts §317, but all jurisdictions seem to allow direct liability claims against the employer for negligent hiring, supervision, or retention.

1. Narrow Recognition by Courts

Courts have recognized direct employer liability for employees’ intentional torts committed outside the scope of employment in very limited situations. As succinctly summarized by one court, “cases that rely on section 317 generally involve rather obvious acts of negligence on the part of the employer—for example, the knowing retention of an incompetent employee or the knowing allowance of dangerous practices by an employee even though relatively inexpensive measures could have stopped the practices.” The two prongs of direct employer liability—whether pursuant to causes of action based on §317 or negligent hiring, supervision or retention—knowledge and identification of preventative measures—are demanding threshold requirements and thus constitute formidable barriers to employer direct liability.

a. Knowledge Requirement

The knowledge requirement, as construed by the courts, presents a seemingly insuperable barrier to employer direct liability in the context of employee intentional torts. In case after case, courts have dismissed such direct liability claims against employers in a variety of settings, including ones in which employers provide services to vulnerable populations (and thus might be thought to have

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42 67 F.3d 1029 (2d Cir. 1995).
43 Id. at 1036.
44 Id. at 1037.
46 *Restatement (Second) Torts* § 317.
fiduciary duties)—such as rehabilitation centers, schools, and churches—on the ground that the employer lacked knowledge of the risk posed by the employee. Moreover, courts have insisted upon an exacting type of particular knowledge of the specific risks involved. Even where the employer was on notice regarding an employee’s prior acts of misconduct, courts have rejected negligent hiring, supervision and retention claims where such prior bad acts were different in kind from the type of intentional tort committed in the case at hand.

b. Specification of Preventative Measures

Moreover, even if the knowledge barrier is overcome, negligence-based employer direct liability forces the plaintiff to specify the preventative measures that should have been taken. Placing this burden on the plaintiff serves in practice to restrict the domain of measures considered by the court. Consider, for example, Roman Catholic Bishop v. Superior Court, a California case in which a fourteen-year-old girl and her family sued a church because of a priest’s alleged molestation of the girl. In this case, given that the priest had no criminal history of child molestation, a background check alone would not have uncovered his propensity to commit such an act. The plaintiffs identified specific preventative measures that the church nonetheless failed to take: (a) an investigation of the priest's background, including whether the priest had had sexual relationships with adults, or (b) requiring the priest “to undergo a psychological evaluation before hiring him.” The court refused to impose a duty upon the church either to undertake such an investigation or to require a psychological evaluation on the ground that either of these investigations would have unacceptably interfered with the priest’s

\[47\] See, e.g., Total Rehabilitation & Medical Centers, Inc. v. E.B.O., 915 So. 2d 694, 695, 696-97 (Fla. Dist. Ct. App. 2005) (a patient in a rehabilitation center who was allegedly raped in a company-owned van during the course of an employee’s assigned responsibility to transport the patient between facilities did not establish a negligent supervision claim against the center because the employer was not on notice that the employee was prone to commit the tortious or criminal act); Stephenson v. School Bd. of Polk County, 467 So.2d 1112 (Fla. Dist Ct. App. 1985) (a school board was held not liable for negligent supervision because there was “no indication from the record that [it] was put on notice of the harmful propensities of [its] employees”); Willis v. Dade County Sch. Bd., 411 So.2d 245, 246 n. 1 (Fla. Dist Ct. App. 1982) ("[T]o state a cause of action for the tort of negligent hiring or retention recognized in Florida, a plaintiff must allege facts showing that the employer was put on notice of the harmful propensities of the employee.") (internal citations omitted); Iglesia Cristiano La Casa Del Senor, Inc. v. L.M., 783 So.2d 353, 358 (Fla. Dist. Ct. App. 2001) (a church was not liable for sexual assault of a minor by pastor because “it [did not have] constructive or actual notice that [he] was unfit to work as a pastor at the [c]hurch”).

\[48\] Dibrill v. Normandy Assocs., Inc., 383 S.W.3d 77, 88 (Mo. Ct. App. 2012), is illustrative. In that case, an employer defendant was granted summary judgment in a negligent hiring claim "because employee's prior acts of misconduct"—which involved slapping his wife and a physical altercation with a co-worker—did not "put him at risk to commit the sexual offense on plaintiff" such that the employer could be liable for negligent hiring. The court also affirmed summary judgment for the employer on the plaintiff’s negligent retention and negligent supervision claims because “the combination of the employee's pre-employment assaults and a sexually harassing comment he made during his employment did not put employer on notice that [the employee] had dangerous sexual propensities that it would be foreseeable that [the employee] would sexually assault a building visitor.” (internal citations omitted).

\[49\] 50 Cal. Rptr. 2d 399, 400-01 (Cal. Ct. App. 1996).

\[50\] Id. at 404.

\[51\] Id. at 405-06.
privacy. And, having considered the specific untaken precautions alleged by the plaintiffs, the court ended its analysis there.

Many jurisdictions combine stringency on the knowledge requirement with exacting specification of preventative measures. For example, to make out a prima facie case for negligent hiring in Florida, a plaintiff must demonstrate: “(1) the employer was required to make an appropriate investigation of the employee and failed to do so; (2) an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and (3) it was unreasonable for the employer to hire the employee in light of the information he knew or should have known.” In Malicki v. Doe, another church abuse case, the Florida Supreme Court evaluated whether the defendants could be held liable for negligent hiring in light of their failure “to make inquiries into Malicki’s background, qualifications, reputation, work history and/or criminal history prior to employing him in the capacity of Associate Pastor.” The upshot is that only in the most blatantly obvious cases of an untaken precaution—for example, where employers completely fail to inquire into the employee’s background—do courts recognize employer negligence in the context of employee intentional torts.

2. Rationale for Limitations on Direct Employer Liability

Courts have reasoned that Restatement (Second) of Torts § 317 must impose a narrow duty on employers, or else a tight causal link between the employer’s acts or omissions and the employee’s tort or crime, in order to prevent employers from becoming guarantors of their employees. As one court elaborated: “The limitations expressed in § 317(a)(i) are intended to restrict the master’s liability for a servant’s intentional acts outside the course and scope of employment to situations where either the master has some degree of control of the premises where the act occurred or where the master, because of the employment relationship, has placed the servant in a position to obtain access to some premises that are not controlled by the master.” Similar to the enterprise causation rationale, “[s]uch limitations serve to restrict the master’s liability for a servant’s purely personal conduct which has no relationship to the servant’s employment and the master’s ability to control the servant’s conduct or prevent harm.”

In this way, direct liability claims often intersect with acts considered within the scope of employment due to the requirement that liability attaches to acts occurring at the employer’s business location or committed during the conduct of the employer’s business. As the Tenth Circuit noted, in cases of employer direct liability, “the existence of a duty to the injured party was based on actions against a customer or co-worker which took place on the working premises during the time employment

52 Id.
53 Malicki v. Doe, 814 So. 2d 347, 362 (Fla. 2002).
54 Id. The court also examined whether “the Church Defendants negligently placed [Plaintiffs] under the supervision of Malicki, when the Church Defendants either knew or should have known that Malicki had the propensity to commit sexual assaults and molestations.” Id.
57 Id.
services were normally rendered. In none of such cases was the employee not acting in the course of employment, nor was the injurious action removed from the employer’s premises or without any nexus to the employer’s operations.\textsuperscript{58}

But once again, courts have read these limitations very broadly. For example, in Napieralski v. Unity Church of Greater Portland, Napieralski was allegedly sexually assaulted by a minister while meeting with him at the minister’s church-provided home.\textsuperscript{59} The meeting was not for church business or spiritual counseling.\textsuperscript{60} Napieralski argued that the church was negligent in supervising its employee, but the Maine Supreme Judicial Court rejected this argument, partly because “[w]here an employer does provide a residence for employees, it is very different from the employer’s premises as addressed in the Restatement. The employee retains rights of privacy and quiet enjoyment in the residence that are not subject to close supervision or domination by the employer.”\textsuperscript{61}

C. Revisiting “Scope of Employment” as Proxy for Causal Link

The doctrinal concept of “scope of employment” acts as a proxy for enterprise causation or employer control—some notion of which must exist across both employer vicarious liability and direct negligence liability realms. Courts’ use of “scope of employment” as a dividing line between the availability of vicarious liability and direct negligence claims thus does not make sense.

First, Sykes argued that the “scope of employment” limitation on employer vicarious liability was efficient so long as it aligned with his notion of “enterprise causation.” As we have seen above, however, Sykes’ conception of “enterprise causation” is very broad as compared with the courts’ (Friendly, J. and Calabresi, J., notwithstanding) extremely narrow recognition of what falls within the “scope of employment,” particularly with respect to employee intentional torts.

Second, with respect to the choice between employer vicarious liability and employer direct negligence, Sykes claimed that “[w]hen the ‘causal’ relationship between the activities of the entity subject to vicarious liability and the prospective wrong is weak . . . vicarious liability based on negligence [i.e., direct negligence liability] is superior to strict liability.”\textsuperscript{62} Thus, considering §317 direct liability, Sykes concluded that “if the scope of employment is circumscribed to encompass only those torts substantially ‘caused’ by the business enterprise, section 317’s approach to torts committed outside the scope of employment is clearly efficient.”\textsuperscript{63} In other words, if scope of employment served as a proxy for enterprise causation, where this causal link is weak, it makes sense to impose the heightened requirements of negligence-based liability (namely knowledge and identification of preventative measures). In this way, the heightened duty requirements in some sense compensate for the weaker causal link.

But, apart from the strength of causal link, are there additional factors that might be relevant in the choice between vicarious liability and direct negligence approaches? Here, we return to the basic

\textsuperscript{58} Girard v. Trade Professionals, Inc., 13 F. App’x 865, 869-70 (10th Cir. 2001).
\textsuperscript{59} 802 A.2d 391, 392 (Me. 2002).
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 393.
\textsuperscript{62} Id. at 579.
\textsuperscript{63} Id. at 590-91.
(though sometimes overlooked) point that vicarious liability is a form of strict liability and thus the foundations differences between strict liability and negligence pertain. Sykes alluded to one of these—namely administrative costs: “One must always be alert to the possibility that one liability rule may be cheaper to administer than another or may tend to produce fewer meritless suits. With respect to the choice between strict vicarious liability and vicarious liability based on negligence, the negligence approach probably leads to incrementally higher administrative costs associated with the need to litigate the employer’s negligence, whereas the strict liability approach probably leads to incrementally higher administrative costs associated with a higher number of lawsuits.”

Curiously missing, however, is any consideration of another potentially significant factor: risk of under-detection of employer preventative devices. We thus turn to consider the theoretical and practical relevance of this fundamental factor.

III. Under-detection of Employer Preventative Measures

Under-detection of employer’s failure to take measures to prevent their employees’ intentional torts may be prevalent, especially within large employers and institutions with a complex internal organization.

As a theoretical matter, where such under-detection is a concern, strict liability will have an edge over negligence liability in terms of inducing the employer to more carefully screen, monitor, and train its employees. An alternative to expanding the scope for strict liability vicarious liability, direct negligence liability could be tweaked specifically to allow for a more flexibility in terms of widening the range (and imagination) of preventative measures considered by the courts.

A. Expanding Vicarious Liability

1. Theoretical Rationale

Gary Schwartz (in an under-appreciated article) was perhaps the first to highlight the practical and theoretical argument for strict liability vicarious liability. Schwartz concluded that “[t]he intriguing benefit of strict liability, therefore, is that it can do a better job than a negligence regime in achieving that regime’s own goal of encouraging the employer’s cost-justified risk-reducing measures.” Schwartz made two primary claims.

First, Schwartz picked up on the administrative costs issue, noting that strict liability spares the legal system the costs of investigating and then litigating the negligence issue. As Martha Chamallas has further elaborated, “some victims will be able to establish that employers were independently negligent for failing to screen, train, or monitor the offending employee. Such a direct negligence claim, however,

64 Id. at 579.
66 Id. at 1760.
is far more difficult and costly to prove.”

In sum, direct negligence liability is more uncertain and difficult to prove than strict liability.

Second, Schwartz highlighted that an employer’s failure to adopt cost-justified precautions might not be detected. If employers anticipate this, they will lack adequate incentives to take care. Moreover, it seems likely that when the defendant is a large institution such failures will be especially difficult for the court to identify. Jennifer Arlen and Reinier Kraakman have elaborated on this under-detection rationale in the context of the choice between negligence and strict liability regimes in controlling corporate misconduct.

At the same time, there are public policy concerns about strict liability going too far. Indeed, the threshold knowledge requirement of §317—especially if it deployed in situations of weak causal link—promotes efficiency to the extent that it avoids inducing employers to take excess precautionary measures to prevent hypothetical wrongs.

Thus, strict liability vicarious liability would seem warranted where there is a significant risk of under-detection.

2. Practical Relevance

It is difficult to evaluate the prevalence of the under-detection rationale in light of the lack of empirical data—or really prospects for measuring—the relevant fraction of cases (or incidents) where the concern is rife.

That said, as discussed above, in employer direct liability cases, the threshold knowledge and specification of preventative measures requirements train the court’s focus on the prospect of cost-justified precautions that the employer failed to take. And, in the words of the Canadian Supreme Court: “Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the

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67 Martha Chamallas, Vicarious Liability in Torts: The Sex Exception, 48 VALPARAISO U. L. REV. 133, 136 (2013); id. at 153 (“Vicarious liability under this account saves the cost of investigating the existence of the untaken precaution and then litigating the negligence issue.”).
68 Schwartz, supra note 65, at 1764.
70 Thus in Kirlin v. Halverson, 758 N.W.2d 436 (S.D. 2008), the court did not hold an employer liable for failing to fire an employee with a criminal record because “such a risk of liability might make employers hesitant to hire those people, severely limiting employment opportunities. Halverson’s history of violence only includes a single conviction which resulted from a domestic, not workplace, confrontation and an assault charge that was dismissed. Requiring employers to hire employees or face liability under these circumstances is untenable, especially considering Halverson’s minimal contact with others. Such a rule would deter employers from hiring workers with a criminal record and offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community.” Id. at 453–54.
employer has introduced into the community. Holding the employer vicariously liable for the wrongs of its employee may encourage the employer to take such steps . . . .”

To illustrate, recall the Malicki v. Doe church abuse case discussed above. It seems fair to say that the court considered only a “narrow bank of employer conduct” when it decided to impose only a limited duty upon the church. In so doing, it failed to consider myriad other “imaginative” precautions that might have been taken, or potential methods of controlling employee behavior. For example, assuming there is a long-term relationship between the church and its pastor, the church could structure its bonus, promotion and termination schemes to focus on abuse as an institutional matter. Or consider another case, Total Rehabilitation & Medical Centers, Inc. v. E.B.O., in which the court rejected a negligent supervision claim brought by a patient in a rehabilitation center was allegedly raped in a company-owned van during the course of an employee’s assigned responsibility to transport the patient between facilities. There are myriad methods of supervision or punishment an employer could adopt to discourage even a tort or crime like this. Perhaps the van could have been rigged with cameras, or employees not allowed to ever be alone with a patient.

In sum, strict liability could thus promote hitherto unimagined and currently untaken preventative measures. In each of these cases, a motivated and innovative employer could find ways to investigate the employees’ past conduct more deeply and supervise their present conduct more completely.

B. Expanding Direct Negligence Liability

An alternative response—addressing directly the courts’ extremely narrow interpretation of direct negligence liability and indirectly the under-detection issue—is to lower the burden on plaintiffs to establish direct negligence liability to include a more flexible notion of preventative measures.

Negligence-based direct liability might give enough flexibility to courts. Some courts do acknowledge need for some flexibility inherent in the negligence standard. Thus, courts have adjusted the degree and even necessity for background checks based on the likely contact the employee will have with the public.

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71 Chamallas, supra note 67, at 153 (quoting Bazley v. Curry, [1999] 2 S.C.R. 534, para. 33 (Can. B.C.) (emphasis added)). According to Chamallas, the innovative aspect of Bazley is its application of “enterprise risk” to the realm of intentional torts and sexual abuse in particular. See id. at 181. The Bazley court also noted: “In many cases evidence will be lacking or have long since disappeared. The proof of appropriate standards is a difficult and uneven matter.” Here, I highlight instead the under-detection rationale.

72 It might also make sense to consider burden-shifting as well.

73 See Kirlin v. Halverson, 758 N.W.2d 436, 447-53 (S.D. 2008) (“[W]here job requirements bring an employee into frequent contact with the public, or individuals who have special relationships with the employer, the inquiry required expands beyond the job application and personal interview to an investigation of the applicant/employee’s background.”); Connes v. Molalla Trans. Sys., 831 P.2d 1316, 1321–22 (Colo. 1992) (concluding that the scope of an employer’s duty in exercising reasonable care in hiring depends largely on the anticipated degree of contact the employee will have with others in the normal course of employment); Sandage v. Board of Commissioners of Vanderburgh Cty., 897 N.E.2d 507 (Ind. Ct. App. 2008) (same).
Consider, for example, *Hicks ex rel. Nolette*, a New York case in which a 14-year-old adolescent was sexually assaulted while residing at a youth detention facility. The court dismissed the vicarious liability and negligent hiring causes of action against the facility, but allowed the claims of negligent training and supervision to proceed. Even though the plaintiff had to identify the untaken precautions, the court applied a far-reaching inquiry into the reasonableness of the facilities’ actions. To begin, the court credited the “record testimony [that] indicate[d] that defendant provided staff members, including Williams [the alleged assaulter], with written training manuals regarding proper interaction with troubled youth, including instructions on maintaining adequate interpersonal boundaries. The facility director stated that she attempted to hold staff meetings ‘on a regular basis’ to review the facility's programmatic goals, and Williams similarly testified that he was subject to regular assessments by supervisory staff.” But the court then probed the extent of these measures, finding that “there was a general reluctance on the part of several staff members to report policy violations to supervisors or register complaints regarding staff conduct. . . . [and] complaints to supervisors regarding Williams' improper conduct appear to have gone unaddressed . . . [and] defendant did not test or otherwise ensure that its staff members were knowledgeable and compliant with its written policies and instructional materials.”

In a similar vein, courts have considered potential preventative measures that go beyond background checks and screening employees based on past actions. For example, in *Foradori v. Harris*, the Fifth Circuit noted that an employer could be liable for negligent supervision when it took “a rather passive managerial approach” which avoided directly asking employees about an assault that occurred during business hours, and failed to “adequately inform[] [the employee] of the adverse consequences which would result if he behaved in a violent manner towards a customer.” Among the actions the employer could have taken to avoid liability for the employees’ intentional tort were: “steps to train and discipline its employees to take reasonable precautions to control and defuse customer-related altercations on its premises,” and adequate training of managers to comply with work rules and manuals that gave instructions for how to deal with employee misconduct.

A New Jersey court likewise took an expansive view of employer direct negligence liability by recognizing a corporation’s duty to monitor employee usage of office computers in order to prevent the uploading of child pornography. Relying on Restatement (Second) of Torts § 317, the court found that the employer was under a duty to exercise reasonable care to stop its employee’s activities, which federal lawmakers determined constituted a threat to children forced to engage in such activities. Specifically, the court held that “defendant had a duty to report Employee's activities to the proper

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75 Id.
76 Id. at 882.
77 523 F.3d 477, 493 (5th Cir. 2008).
78 Id.
authorities and to take effective internal action to stop those activities, whether by termination or some less drastic remedy.”

Thus, while there are manifold cases where the employer’s lack of knowledge of the precise risk of the employee’s intentional tort is an insuperable barrier to recovery, in others, courts have exercised discretion and considered fairly wide-ranging potential precautions the employer could take to reduce the likelihood of harm.

IV. Punitive Damages

Punitive damages can be imposed for punishment or deterrence. Punitive damages under Restatement (Second) of Torts § 908 (“Punitive Damages”) can serve a deterrent function that is often justified based on under-detection.

The same holds true in the context of employer liability for punitive damages based on employee intentional torts. Indeed, “[w]hile the policy most often mentioned for requiring ratification or authorization is punishment of the wrongdoer, the supposed deterrent effect of punitive damages is frequently cited by courts not requiring intentional acts.”

Restatement (Second) of Torts § 909 (“Punitive Damages Against A Principle”) marked a departure from strict vicarious liability for punitive damages incurred as a result of an employee tort committed within the scope of employment, to a fault-based rule requiring some complicity in the wrongful act by the employer. States are evenly divided on whether to allow for “pure” vicarious liability for punitive damages as opposed to a more restrictive “complicity” rule, requiring some element of fault on the part of the employer.

80 The court’s recognition of a fairly expansive set of preventative measures that should have been taken was, nonetheless, in a case in which the court had no difficulty finding that the employer was sufficiently on notice of its employee’s specific risk: “[D]efendant was on notice of Employee’s pornographic related computer activity by early 2000. By late March 2001, defendant had knowledge, through its supervisory personnel, that Employee had visited a variety of ‘porn sites’ including one that suggested child pornography. Yet, despite being reported to high level management, no action was taken. A reasonable fact-finder could conclude that an appropriate investigation at that time would have revealed the extent of Employee’s activities and, presumably, would have led to action to shut down those activities.” Id. at 1169.

81 Restatement (Second) Torts § 908 provides:

(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.

(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others. . . .


83 While the employer is not required to have acted with willful or wantonness to be liable for punitive damages, § 909 arose from fairness concerns “which make it improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously.” RESTATEMENT (SECOND) TORTS § 909 cmt. b (1965).

84 See Briner v. Hyslop, 337 N.W.2d 858, 863 (Iowa 1983) (“Of the fifty states and the District of Columbia, twenty-two states follow either the Restatement or a more restrictive rule; twenty states follow the course of
Here, I make a first attempt to link deterrence theory and the under-detection rationale to the doctrines governing employer liability (vicarious and direct, including punitive damages) for employee intentional torts.

A. Economic Deterrence Rationale

Law and economics theories of punitive damages have focused primarily on the influence of the probability of detection of the wrongful conduct. While critics reject the viability of the non-retributive rationale for punitive damages, it has emerged unscathed from the U.S. Supreme Court’s attack on punitive damages and holds considerable sway with some number of courts (and litigants).

1. Theory

The economic rationale for punitive damages is a cost-internalization theory focusing on the likelihood of under-detection. Mitch Polinsky and Steve Shavell pioneered this theory in a seminal article, “Punitive Damages: An Economic Analysis,” in which they argued that “the proper magnitude of damages is the harm the defendant has caused, multiplied by a factor reflecting the probability of his escaping liability.”85 As they further explained, the use of a multiplier and excess damages over compensatory damages “will make defendants pay on average for harm actually done and thus will lead to socially desirable behavior in terms of precautions and participation in risky activities.”86

2. Doctrine

There is a continuing debate regarding whether the economic rationale for punitive damages has any durable influence on the courts. Judges Richard Posner and Guido Calabresi have led the way towards recognition of the economic deterrence rationale, by emphasizing the significance of defendant’s chance of escaping liability. Thus in Kemezy v. Peters, Judge Posner reasoned (almost straight out of the law and economics theorist’s playbook):

When a tortious act is concealable, a judgment equal to the harm done by the act will underdeter. Suppose a person who goes around assaulting other people is caught only half the time. Then in comparing the costs, in the form of anticipated damages, of the assaults with the benefits to him, he will discount the costs (but not the benefits, because they are realized in

86 Id. at 887-88. Others have elaborated on the role of punitive damages to respond to under-detection. In prior work, I extended the rationale beyond under-detection to include a broader array of factors that might lead compensatory damages to underestimate the total social harms of the defendant’s actions. Catherine M. Sharkey, Punitive Damages as Societal Damages, 113 YALE L.J. 347, 369 (“[T]he punitive multiplier, which focuses on underenforcement error due to nondetection of harms, is in some sense a subset of the broader economic deterrence goal of internalization of total costs.”). See also Joni Hersch & W. Kip Viscusi, Saving Lives Through Punitive Damages, 83 S. CAL. L. REV. 229, 242 (2010) (arguing that probability of detection should be combined with value of statistical life to determine the appropriate level of punitive damages to optimally deter harmful behavior).
every assault) by 50 percent, and so in deciding whether to commit the next assault he will not be confronted by the full social cost of his activity.87

And in Ciraolo v. City of New York, a case involving city-wide illegal strip searching policies, Judge Calabresi proclaimed that “[s]uch a [multiplier] conception of punitive damages, again, is not new, and it has been recognized by courts as well as scholars.”88

Critics have nonetheless argued that the U.S. Supreme Court has flat-out rejected the under-deterrence rationale for punitive damages. In State Farm v. Campbell, the Court maintained that “the argument that State Farm will be punished in only the rare case . . . had little to do with the actual harm sustained by the Campbells.” Indeed, according to the Court, such an argument would only support “a departure from well-established constraints on punitive damages.”89 The Court, however, provided scant reasoning here. Indeed, in almost the same breath in which it criticized the punitive multiplier approach, the Court echoed approvingly its statement from BMW v. Gore that a higher ratio of punitive to compensatory damages might be necessary where “the injury is hard to detect.”90

Moreover, in prior work, I have argued:

By reconceptualizing these underdeterrence damages as societal compensation, as opposed to quasi-fines or penalties, the societal damages approach would seem to survive the retributive-punishment-focused due process constraints of State Farm—more so, if such remedial damages were limited within statewide boundaries. Moreover, the approach would favor a new kind of distributive scheme that would attempt either to compensate society directly for the imposition of those harms or else to direct compensation to some proxy that would attempt to compensate categories of individuals likely harmed by a defendant’s similar wrongdoing.91

Thus, to my mind the economic deterrence rationale for punitive damages persists—not only as a theoretical matter but also practical reality in the courts.

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87 Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996). The economic rationale for punitive damages seems especially live and well in the Seventh Circuit. See Zazu Designs v. L’Oréal, S.A., 979 F.2d 499, 508 (7th Cir. 1992) (Easterbrook, J.) (“Punitive damages are appropriate when some wrongful conduct evades detection; a multiplier then both compensates and deters.”); FDIC v. W.R. Grace & Co, 877 F.2d 614, 623 (7th Cir. 1989) (“The most straightforward rationale for punitive damages . . . is that they are necessary to deter torts or crimes that are concealable. Suppose the average defrauder is brought to book only half the time. To confront him with a sanction that will make fraud worthless to him and thus deter him, it is necessary that when he is caught he be made to pay twice as much as his profits.”). 88 216 F.3d 236, 245 (2d Cir. 2000). 89 State Farm, 123 S. Ct. at 1525. 90 Id. at 1524 (internal quotation marks omitted). In BMW of N. Am., Inc. v. Gore, Justice Stevens (for the majority) and Justice Breyer (in concurrence) embraced under-detection as a rationale for punitive damages. 517 U.S. 559, 582 (1996) (Stevens, J.) (“A higher ratio [of punitive damages to compensatory damages] may also be justified in cases in which the injury is hard to detect . . . .”). Justice Breyer’s concurrence in Gore mentions economic theories of punitive damages that focus on ensuring that a wrongdoer pays for the total cost of the harm caused. See id. at 593 (Breyer, J., concurring). He interprets these theories as permitting juries “to calculate punitive damages by making a rough estimate of global harm [and] dividing that estimate by a similarly rough estimate of the number of successful lawsuits that would likely be brought.” Id. 91 Sharkey, supra note 85, at 401-02.
B. Employer Liability for Punitive Damages

The stakes of a case increase dramatically to the extent that employers can be held liable for punitive damages in situations where they are held liable for employee intentional torts. In this section, I explore the various rules governing the viability of punitive damages in the vicarious liability setting as well as the with respect to direct negligence claims. Each of these variants has been defended on deterrence grounds. To date, little work has been done on assessing the salient differences between the different approaches.

1. Pure Vicarious Liability

Vicarious liability for punitive damages is limited by the scope of employment rule.

The pure vicarious liability rule—namely extending strict vicarious liability to punitive damages without ratification by the employer—has been defended on deterrence grounds “especially in the case of corporations, who can only act through their agents.” As one court reasoned, “if such damages will encourage employers to exercise closer control over their servants for the prevention of outrageous torts, that is sufficient ground for awarding them.”

But critics, most notably William Curtis, have resisted the theory: “[E]ven if it is assumed that an employer should be liable for all the acts of his employees in the scope of their duties, there is nothing to indicate that employers are generally aware of such liability, or that considerations of liability have any more effect upon hiring practices than do ordinary business considerations. This broad rule of liability could, however, significantly increase a plaintiff’s chances of a larger recovery, since it is generally easier to establish liability when no voluntary act is required other than the initial hiring of the employee. A sizeable judgment for punitive damages, however, does not necessarily mean that the policy of holding employers responsible for their employees’ conduct has had the intended effect. The prudent employer will insure against such losses, add the cost of the premiums to his cost of doing business, and thereby transfer the risk to the ultimate consumer of his product.”

According to Curtis: “The theory holding the employer liable even without intent merely infers authorization from the fact that an employer hires a person and gives him authority to carry out certain tasks.” Since “an employer may be assessed punitive damages for no other reason than that he hired the wrongdoer in the first place [and c]are in hiring does not necessarily obviate this liability” the imposition of punitive damages becomes more likely and deterrence may be enhanced.

Requiring a plaintiff to prove an affirmative act of employer participation (as required by the Restatement, considered next) may be a heavy burden. Moreover, since evidence “is likely to be within the exclusive control of the employer, [so] proof may consist of a series of reasonable inferences, with recovery dependent upon the effectiveness of discovery and a sympathetic jury.”

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92 Stroud v. Denny’s Rest., Inc., 532 P.2d 790, 793 n.2 (Or. 1975) (quoting Prosser on Torts 12, § 2 (4th ed. 1971)).
91 Id.
94 Id. at 847.
95 Curtis, supra note 82, at 842.
96 Id. at 843.
97 Id. at 844.
2. Complicity Rule

Restatement (Second) Torts § 909 ("Punitive Damages Against a Principal") provides:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

(a) the principal or a managerial agent authorized the doing and the manner of the act, or
(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
(d) the principal or a managerial agent of the principal ratified or approved the act.\textsuperscript{98}

Known as the "complicity rule," section 909 is a kind of hybrid falling between the poles of the pure vicarious liability rule and no vicarious liability rule. As Clarence Morris wrote in 1960, the complicity rule "wisely protects corporations from vicarious liability for punitive damages when a properly supervised and disciplined employee acts outrageously; and it wisely allows for punitive damages awards against some corporations whose institutional conscience should be aroused."\textsuperscript{99}

The Supreme Court of Iowa has embraced the Restatement rule as "more consistent with the purpose of punitive damages than is the course of employment rule. Although there are arguments in favor of the course of employment rule, the weakening of the deterrence effect, the increase in the cost of legitimate activities, and the injustice of punishing the innocent, all outweigh whatever benefits the course of employment rule might present."

Courts have justified the Restatement § 909 complicity rule on deterrence grounds: "To the extent that it appears that a corporation might have been able to prevent wrongful conduct by an employee, the corporation should be liability for punitive damages. Indeed, the threat of punitive damages should be an incentive to the corporation to take precautions with its employees. If, on the other hand, the corporation could have done nothing to prevent the employee’s wrongful conduct, punitive damages can have little deterrent effect, either to that corporation or as an example to other employers. This distinction is recognized by the complicity rule which in assessing punitive damages for reckless hiring or retaining of an unfit employee provides an incentive for taking care in selecting and training personnel."\textsuperscript{100}

Less well recognized is the fact that § 909 provides a very broad definition of complicity, "extend[ing] employer liability to employee conduct which it would be difficult to show was authorized, but for which the employer is at least partially blameworthy because he employed an unfit person."\textsuperscript{101}

Section 909(b) requires employers to have been reckless in hiring an unfit individual. There is no

\textsuperscript{98} Section 909 also requires that the underlying act of the employee “must be of a character subj ecting the agent to liability for exemplary damages before the master can be held vicariously liable for such damages.” Montgomery Ward & Co. v. Marvin Rigs Co., 584 S.W.2d 863, 867 (Tex. Civ. App. 1979).
\textsuperscript{100} Briner v. Hyslop, 337 N.W.2d 858, 865-66 (Iowa 1983).
\textsuperscript{101} Id. at 866.
requirement that the employer’s act be sufficiently reprehensible to meet the given state’s punitive damages standard.\textsuperscript{102}

3. Direct Negligence Liability as Predicate

Punitive damages can also be awarded in cases of direct employer negligence liability. Since Restatement (Second) § 317 imposes direct liability on an employer for its own negligence, punitive damages are justified under Restatement (Second) of Torts §908.

In \textit{Hutchison ex rel. Hutchison v. Luddy}, the Supreme Court of Pennsylvania held that punitive damages could be awarded against employers found liable in § 317 direct negligence claims.\textsuperscript{103} The court applied its traditional direct punitive damages analysis, motivated by the primary concern of deterring future outrageous conduct.\textsuperscript{104} Moreover, the court made clear that “\textit{p}unitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.”\textsuperscript{105}

The court noted that “\textit{I}t may be that, as a practical matter, it proves more difficult to sustain a claim for punitive damages against the ‘master’ in the negligent supervision context than it might be with other negligence-based torts, given that the more direct harm (which, as here, may well involve an intentional tort) will usually have been inflicted directly by the ‘servant.’ ‘But, that is a matter for proof that attends the particular case; there is no general proscription in law against pursuing punitive damages in the Section 317 context, where the facts so warrant.”\textsuperscript{106}

Several courts applying Pennsylvania law and section 908, have held that punitive damages may be awarded in §317 negligent supervision cases. In \textit{Reichert v. Pathway School}, John Doe was repeatedly sexually abused by an older student, T.Y., on the premises of Pathway School.\textsuperscript{107} The plaintiff sued the school for negligent supervision of the abusive student. The court allowed punitive damages to proceed in the case, given that the plaintiff put forth sufficient facts to support a finding of the school’s reckless indifference to John Doe’s safety.\textsuperscript{108} And likewise in \textit{White v. Punita Grp., Inc.}, punitive damages

\textsuperscript{102} See, e.g., \textit{Mercury Motors Exp., Inc. v. Smith}, 393 So. 2d 545, 549 (Fla. 1981) (“Although the misconduct of the employee, upon which the vicarious liability of the employer for punitive damages is based, must be willful and wanton, it is not necessary that the fault of the employer, independent of his employee’s conduct, also be willful and wanton. It is sufficient that the plaintiff allege and prove some fault on the part of the employer which foreseeably contributed to the plaintiff’s injury to make him vicariously liable for punitive damages.”).

\textsuperscript{103} \textit{Hutchison ex rel. Hutchison v. Luddy}, 870 A.2d 766, 773 (Pa. 2005) (“We see no reason . . . to distinguish between claims sounding under Section 317 and other actions sounding in negligence for purposes of punitive damages.”).

\textsuperscript{104} \textit{id.} at 771 (“The only purpose of punitive damages is to deter outrageous conduct.”).

\textsuperscript{105} \textit{id.} at 770 (quoting \textit{Feld v. Merriam}, 485 A.2d 742, 747 (Pa. 1984) (quoting Restatement (Second) of Torts § 908(2) (1979)). The court noted that because punitive damages are intended to punish the tortfeasor for outrageous conduct and to deter him and others like him from similar conduct in the future, “[t]he state of mind of the actor is vital. The act, or the failure to act, must be intentional, reckless or malicious.” \textit{id.}; see also \textit{id.} (“Punitive damages are penal in nature and are proper only in cases where the defendant’s actions are so outrageous as to demonstrate willful, wanton or reckless conduct.”).

\textsuperscript{106} \textit{id.} at 773.


\textsuperscript{108} \textit{id.} The court elaborated:

These facts relate to violations of school policies, the physical circumstances surrounding the sexual acts, and [the school’s] understanding of the behaviors of John Doe and T.Y. Of particular note is the
were allowed to go forward in a case where plaintiff alleged the employer was reckless or grossly negligent for its failure to exercise reasonable care in hiring, training, and supervising.\textsuperscript{109} In that case, defendant Punita Group sent its employee to a gun show without supervision or training as to how to handle firearms and ammunition despite the fact that his job required handling both items.\textsuperscript{110}

C. Vicarious Liability as Quasi-Substitute for Punitive Damages

We are now ready to draw several implications for linking deterrence theory and the under-detection rationale to the doctrines governing employer liability (vicarious and direct) for employee intentional torts.

First, courts should recognize calls for punitive damages predicated on claims for negligent hiring, supervision, or training (e.g. §317 direct negligence claims). Such punitive damages should be awarded where compensatory damages will under-deter, including where the employer’s failures to exercise reasonable care are likely be under-detected.

Second, strict liability vicarious liability may be more efficient than direct negligence liability where there is a significant risk of under-detection of potential employer preventative measures. Thus, where such significant risk of under-detection exists, the scope for strict liability vicarious liability (regardless of “scope of employment”) should be expanded in the context of negligent hiring/supervising/retention scenarios.

Third, where strict vicarious liability is justified on this basis, then vicarious liability for punitive damages may over-deter. Punitive damages—at least imposed to force internalization of the total costs of harms due to under-detection—would not seem warranted.

With these three propositions in mind, we can re-examine the complicity rule for employer liability for punitive damages (Restatement (Second) Torts §909). It appears to mitigate the risk of over-deterrence by requiring some degree of employer fault—namely employee actions are “authorized” per § 909(a) or “ratified or approved” per § 909(d)). It limits “scope of employment” liability to agents acting in a “managerial capacity” per § 909(c). Finally, punitive damages per § 909(b) (“reckless[ly]” employ “unfit” agent) is akin to punitive damages under § 908 with direct negligence liability as predicate. Seen in this light, this Restatement (Second) Torts §909 can be defended on efficiency grounds.

Finally, and more provocatively, if vicarious liability is imposed at least in part for under-detection of preventative measures, then perhaps vicarious liability should be considered a quasi-substitute for punitive damages in direct liability situations, likewise imposed for under-detection purposes.

\footnote{fact that T.Y.’s disciplinary record reflected over one hundred discipline citations, including incidents of a sexual nature and numerous elopements. In addition, many of the sexual encounters occurred over a period of up to thirty minutes and took place in a bathroom located a few feet away from John Doe’s classroom.}

\textit{Id.}


\textsuperscript{110} \textit{Id.} The court concluded: “It is too early to determine where Punita Group’s alleged conduct falls on the spectrum between negligence and reckless indifference. At this stage, Plaintiffs have sufficiently pled a claim for punitive damages. Whether it remains viable will depend on discovery.” \textit{Id.} at *6.