

AN EXTENSION OF THE LAW OF TORTS OR NOT?: A
MULTI-JURISDICTIONAL APPROACH TO THE
ADDITION OF A SPECIAL RULE ON VICARIOUS
LIABILITY FOR SEXUAL ASSAULT

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INTRODUCTION AND THE STORY OF G.H.

In May 2020, New Orleans Police Officer Rodney Vicknair responded to a call concerning a potential rape victim.¹ Vicknair transported the victim, a fourteen-year-old girl, referred to as G.H., to the emergency room to undergo a forensic exam.² From the beginning, Vicknair engaged with G.H. inappropriately.³ Vicknair told G.H. she could confide in him, showed her “photos of his daughter scantily clad,” and gave her his cell phone number.⁴ Following the emergency room visit, Vicknair began to prey on G.H. by communicating with the minor over Snapchat.⁵ He also visited her

1. Upton v. Vicknair, No. 21-407, 2024 WL 688333, at *4 (E.D. La. Feb. 20, 2024).

2. *Id.*

3. *See id.*

4. *Id.* at *2.

5. *Id.*

home, dressed in his police uniform, “at least ten times, while on- and off-duty.”⁶

By September of the same year, G.H.’s mother expressed concern over her minor daughter’s relationship with a fifty-year-old man.⁷ Only a few weeks later, Vicknair committed her worst nightmare.⁸ After arriving at G.H.’s home, Vicknair coerced her to come outside; he then locked G.H. in his car and “confined her against her will” before assaulting her.⁹ During the assault, Vicknair did not present himself as an officer as he did not wear his uniform and arrived in his personal vehicle.¹⁰ However, his vehicle had a “NOPD placard in the front window,”¹¹ possibly causing G.H. to feel she had no choice due to his power as a police officer. According to G.H., this was not the only time Vicknair assaulted her; she claims that on another occasion, he came into her bedroom while in uniform with his police radio in hand.¹² During these instances, G.H. may have felt powerless against Vicknair’s display of police authority, making her a particularly vulnerable victim.¹³

Following an investigation into G.H.’s assault, the New Orleans Police Department suspended Vicknair,¹⁴ which is not frequently the result of cases involving police officer misconduct.¹⁵ Vicknair even faced criminal charges,¹⁶ which could have allowed G.H. to feel like she achieved some semblance of justice for the harm she suffered. However, six months into his fourteen-year prison sentence, Vicknair died of cancer.¹⁷ As a result, G.H.’s mother filed a civil suit, on G.H.’s behalf, against the City of New Orleans for Vicknair’s conduct while on the clock.¹⁸ G.H.’s mother brought state law tort claims (including battery, assault, and false imprisonment).¹⁹ She also brought a vicarious liability claim for Vicknair’s actions, arguing that he “abused his apparent authority” as an officer in order to assault her daughter.²⁰

6. *Id.*

7. *Id.*

8. *See id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at *3.

13. *See* discussion *infra* Sections IV.B–IV.C.

14. *Vicknair*, 2024 WL 688333, at *3.

15. *See* discussion *infra* Part II.

16. Anna Betts, *New Orleans Jury Hears Case Against City over Sexual Assault of Teen by Officer*, GUARDIAN (Aug. 20, 2024), <https://perma.cc/MTU6-MQ9Z>.

17. *Id.*

18. *Id.*; *see also Vicknair*, 2024 WL 688333, at *3.

19. *Vicknair*, 2024 WL 688333, at *4.

20. *Id.* at *3, *5.

Under Louisiana law, an employer is only liable under a theory of vicarious liability if its employee acts within the scope of his or her employment.²¹ However, Louisiana courts often depart from the bright-line “motivated-to-serve” test, a requirement of the scope of employment analysis, and apply the four factor test found in *Lebrane v. Lewis*²² to determine whether an action fell within the employee’s scope of employment.²³ In sum, these factors generally require a finding that the conduct related to the employment and occurred within the time and space of the employment.²⁴ Despite the court’s finding that the fourth factor did not favor finding vicarious liability, it found that the other three factors did.²⁵ As a result, the court found Vicknair’s conduct within the scope of his employment and granted the plaintiff’s motion for summary judgment on her vicarious liability claim against the City.²⁶

Unfortunately, G.H. is not alone in her experience as countless individuals have fallen victim to this type of traumatic event.²⁷ Sexual assaults are incredibly harmful, prevalent, and violent,²⁸ and the law must evolve as times change. Thankfully, in recent years, society has begun to recognize just how devastating and harmful sexual assaults are.²⁹ As a result of increased awareness, collective acknowledgment, and the imposition of new laws,³⁰ sexual assault victims are finally beginning to receive the support and compensation they have long been owed.³¹

The drafters of the Restatement of Torts hope to be a part of this increased show of support for sexual assault victims. In attempting to perform this goal, the drafters of the Restatement have introduced section 5A to the Restatement (Third) of Torts, which will create a new rule encompassing the elements necessary for vicarious liability claims against employers for sexual assaults committed by their employees.³² While at first glance, this rule might seem to be a deviation from the longstanding vicarious liability doctrine, it encompasses this aspect of tort law as it currently exists in

21. *Id.* at *13.

22. 292 So. 2d 216 (La. 1974).

23. *Vicknair*, 2024 WL 688333, at *13.

24. *Id.*

25. *Id.* at *13–14.

26. *Id.* at *14.

27. See Sarah Haque & Meirion Jones, *One Police Officer Accused of Rape Every Week*, BUREAU INVESTIGATIVE JOURNALISM (June 15, 2023), <https://perma.cc/UP4Z-PHLX>.

28. See discussion *infra* Part II.

29. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A cmt. b (AM. L. INST., Preliminary Draft No. 5, 2024).

30. *Id.* § 5A reporters’ note on cmt. a, at 115–18.

31. See, e.g., *id.* at 115–16.

32. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A (AM. L. INST., Preliminary Draft No. 5, 2024).

jurisdictions like Louisiana. Section 5A accomplishes this feat by crafting its elements through a combination of doctrinal hooks, which are presently being implemented in jurisdictions that are willing to extend vicarious liability to claims involving sexual assaults.³³ Hopefully, it will become evident that this new section is not a complete and utter deviation from current law and allows victims, like G.H., to receive compensation directly from the employer of the individual who caused them great harm. In doing so, it is the hope that the rule could also serve as a deterrent and encourage employers to make significant changes in their policies to lessen the number of sexual assault victims.

While some critics might argue that section 5A would extend vicarious liability far beyond current law, this new rule includes four specific elements to ensure that only the employees of certain professions fall under this rule when they commit assaults on particularly vulnerable victims. To emphasize how prevalent sexual assaults are in certain occupations, Part II of this Comment provides sexual assault statistics committed by the employees of the specific occupations that this rule would apply to. Part III lays out a brief overview of the basics and rationale behind the vicarious liability doctrine. It also explains the requirements of this doctrine, including the motivated-to-serve test, that courts must apply to find an employee's conduct within their scope of employment. This Part also explores the ability to hold an employer vicariously liable for an employee's commission of a sexual assault.

Part IV explores the American Law Institute's (ALI) newly proposed rule on vicarious liability for sexual assault, which was first offered in Preliminary Draft No. 5 of the Restatement (Third) of Torts: Miscellaneous Provisions. This Part explains each of the four elements of this new rule and, in doing so, demonstrates how this new rule does indeed fall in line with current law. Part V concludes that, despite many jurisdictions continuously finding sexual assaults to be outside of the scope of employment under the motivated-to-serve test, the Restatement's new rule is not a complete deviation from current law.

I. BRIEF OVERVIEW OF SEXUAL ASSAULT STATISTICS

According to the Center for Disease Control and Prevention, sexual assault is "a serious public health problem in the United States that profoundly impacts lifelong health, opportunity, and well-being."³⁴ Most victims of sexual assault find themselves suffering from lifelong or chronic post-traumatic stress syndrome, suicide ideation, depression, difficulty in personal relationships, sexual health dysfunction, alcohol and drug abuse, and other adverse

33. *Id.* § 5A cmt b.

34. *Id.* § 5A reporters' note on cmt. a, at 121.

effects.³⁵ Despite the prevalence of sexual assaults, depending on which jurisdiction a victim is in, they might not receive compensation under the law if they chose to solely sue the employer of the person who hurt them—due to some jurisdictions’ current limitations under the vicarious liability doctrine.³⁶

As mentioned, the Restatement’s new rule attempts to build off society’s increased understanding of the harms associated with sexual assaults.³⁷ In doing so—and while falling in line with current law as evident in jurisdictions such as Louisiana—its elements show how this new rule effectively focuses on sexual assaults committed by employees in certain professions. The employees in these professions include police officers, correction officers, teachers, religious leaders, medical providers, etc.³⁸ This rule is concerned with these professions as they have been the ones in which courts have previously been willing to find a viable vicarious liability claim. Courts often come to this conclusion as these employees frequently hold immense power or authority over the particularly vulnerable individuals they come into contact with—simply due to their employment status.³⁹

A. *Governmental Actors: Police and Correctional Officers Sexual Assaults*

Unfortunately, sexual abuse by police officers is not a rare phenomenon. For instance, “[o]ne study found that, over a 10-year period, a police officer was caught committing sexual abuse or sexualized misconduct at least every five days.”⁴⁰ After excessive force, sexual misconduct is the most reported type of wrongdoing done by police.⁴¹ The victims of this type of abuse are most often community members of minority groups who are underrepresented and most vulnerable.⁴² However, lower ranking police officers are also victims of sexual abuse as officer-on-officer sexual misconduct is an epidemic inside of many police departments.⁴³ Some departments have been accused of promoting officers even though they engaged in this type of officer-on-officer sexual misconduct; others allow them to stay at

35. *Id.*

36. *See id.* § 5A cmt. b.

37. *See id.* § 5A cmts. c, d.

38. *See id.* § 5A reporters’ note on cmt. b.

39. *See* discussion *infra* Sections IV.B–IV.C.

40. Jenn Rolnick Borchetta & Linda Morris, *Taking Action to Stop Police Sexual Violence*, ACLU (Oct. 19, 2023), <https://perma.cc/2SHC-PF8A>.

41. *Id.*

42. *Id.*

43. Emily R. Siegel & Simone Weichselbaum, *Major U.S. Police Departments Plagued by Officer-on-Officer Sexual Abuse and Retaliation*, NBC NEWS (Dec. 9, 2022), <https://perma.cc/4JNC-W92G>.

the same rank instead of incurring punishment through criminal charges, civil damages, or expulsion from the force.⁴⁴

In addition to police misconduct, sexual assaults are also highly prevalent in jails and prisons.⁴⁵ Between 2016 and 2018, correctional officers committed 2,229 incidents of sexual misconduct on inmates.⁴⁶ This type of sexual violence, like that committed by police officers, is problematic because of the control and power correctional officers have over inmates. These assaults are also troubling because some states prefer not to find “municipalities liable for the sexual violence that occurs in their correctional institutions.”⁴⁷ As a result, it can be challenging for an inmate to recover civil damages if the correctional officer cannot pay.⁴⁸

B. *Sexual Assaults in the Workplace as Well as in Schools*

One study reported that nearly 7 million women and 3 million men have reported sexual violence of “some type . . . by a workplace-related perpetrator.”⁴⁹ Workplace sexual assaults, which predominantly target vulnerable victims, pose significant detriments to society, as they can lead to mental health challenges, physical declines, and diminished productivity among the victims.⁵⁰ Regarding sexual violence in educational institutions, it is estimated by the United States Department of Education that “[one] in [ten] students will experience school employee sexual misconduct by the time they graduate from high school.”⁵¹ In 2023, law enforcement apprehended nearly 350 educators for sexual offenses against children.⁵² These perpetrators may include principals, teachers, priests, athletic

44. *Id.*

45. *Substantiated Incidents of Sexual Victimization Reported by Adult Correctional Authorities, 2016–2018*, BUREAU JUST. STAT. (Jan. 31, 2023), <https://perma.cc/9A9D-X5Y3>; see also Tori Klevan, *Institutional Liability for Sexual Violence in Prisons Based on the Aided-By-Agency Theory*, 92 FORDHAM L. REV. 1075, 1077 (2023) (noting that more than one in four women report being sexually assaulted while incarcerated and over half of those incidents are perpetrated by correctional officers).

46. BUREAU JUST. STAT., *supra* note 45.

47. Klevan, *supra* note 45, at 1077.

48. *Id.* at 1077–78.

49. Kathleen C. Basile et al., *National Prevalence of Sexual Violence by a Workplace-Related Perpetrator*, 58 AM. J. PREVENTIVE MED. 216, 218 (2020).

50. Kathryn Kosmides, *Sexual Assault in the Workplace*, HELPING SURVIVORS (2025), <https://perma.cc/6RBB-A9ZM>.

51. BILLIE-JO GRANT ET AL., A CASE STUDY OF K–12 SCHOOL EMPLOYEE SEXUAL MISCONDUCT: LESSONS LEARNED FROM TITLE IX POLICY IMPLEMENTATION 1 (2017), <https://perma.cc/QZ5J-KDGY> (citing CAROL SHAKESHAF, U.S. DEP’T OF EDUC., EDUCATOR SEXUAL MISCONDUCT: A SYNTHESIS OF EXISTING LITERATURE (2004), <https://perma.cc/4KLF-WNV8>).

52. Jessica Chasmar, *Nearly 350 K-12 Educators Arrested on Child Sex Crimes in 2022*, FOX NEWS (Jan. 10, 2023), <https://perma.cc/8F9G-9CWH>.

coaches, school nurses, and music leaders.⁵³ Despite the well-known consequences of sexual abuse on children,⁵⁴ school systems have been known to conceal the dark secrets of their educators and take little action to prevent the abuse from continuing.⁵⁵ Such misconduct hinders victims from receiving justice for the harm inflicted upon them and allows perpetrators to continue abusing additional victims without fear of punishment.

C. *Sexual Abuse by Religious Leaders and Medical Professionals*

Sexual assaults are also commonly committed in churches and doctors' offices. Concerning religious organizations, "more than 5,300 priests and other clergy have been publicly accused of sexually abusing children."⁵⁶ Plus, "[m]ost large religious organizations have faced allegations of covering up incidents of clergy and priest sex abuse, protecting offenders, and minimizing the harm caused to survivors."⁵⁷ Similar to religious organizations, medical institutions have been "found partially at fault for covering up claims" of sexual assault and allowing medical professionals to continue the abuse.⁵⁸ Notably, Larry Nassar was allowed to treat gymnasts through USA Gymnastics and Michigan State University for decades as these organizations ignored numerous complaints made against him.⁵⁹ Jennifer Sey asserts that the US Olympic Committee concealed his abuse because it "didn't want to scare off sponsors."⁶⁰ To make matters even worse, the DOJ is now paying 138.7 million dollars to settle a claim that "the FBI failed to conduct an adequate investigation of Nassar's conduct."⁶¹

In sum, sexual abuse is extraordinarily harmful and common among vulnerable victims. These victims often incur this harm by individuals who have power over them to commit the assault during the course of their employment. This power imbalance makes

53. See, e.g., Emma Colton, *Schools Nationwide Were Rocked by Alleged Sex Crimes Against Minors in 2023*, FOX NEWS (Dec. 30, 2023), <https://perma.cc/9R8X-Q389>.

54. Kathryn Kosmides, *Sexual Abuse in Schools*, HELPING SURVIVORS (Aug. 18, 2025), <https://perma.cc/N8LM-FW7J> (noting that consequences may include, among others, anxiety, depression, and substance abuse).

55. WHAT HAUNTS US (Blue Fox Entertainment 2018).

56. Curtis Weyant, *Priests Accused of Sexual Abuse*, CONSUMERSAFETY (2025), <https://perma.cc/KJ3E-D2ZW>.

57. Kathryn Kosmides, *Clergy Sexual Abuse: Get Help Today*, HELPING SURVIVORS (2025), <https://perma.cc/USF6-AKTZ>.

58. Kathryn Kosmides, *Medical Sexual Assault Lawsuit: How to Get Help*, HELPING SURVIVORS (2025), <https://perma.cc/V3VW-R5ST>.

59. Hadley Freeman, *How Was Larry Nassar Able to Abuse So Many Gymnasts for So Long?*, GUARDIAN (Jan. 26, 2018), <https://perma.cc/5247-LYD2>.

60. *Id.* (quoting Jennifer Sey).

61. *Justice Department Pays \$138 Million over FBI Failures in Larry Nassar Case*, NPR (Apr. 23, 2024), <https://perma.cc/GX27-E2TN>.

assaults committed by certain employees more foreseeable, as shown by the previously discussed statistics. However, some courts would argue that for sexual assaults committed by employees to fall within the scope of employment, it must have been intended to serve the employer.

II. VICARIOUS LIABILITY: A BASIC SUMMARY

Respondeat superior, a Latin phrase meaning “let the superior make answer,” is a basic doctrine that holds “an employer or principal liable for the employee’s or agent’s wrongful acts.”⁶² This doctrine, also known as vicarious liability, originated from English Common Law⁶³ and further developed through the Law of Agency in the United States.⁶⁴ Thus, while Tentative Draft No. 2 of the Restatement (Third) of Torts: Miscellaneous Provisions section 5 is “the first time that The American Law Institute has restated comprehensively the subject of vicarious liability,”⁶⁵ it is not a new concept within the scope of tort law.

For as long as respondeat superior has existed, the test to determine an employer’s liability comes from whether the employee committed “wrongful acts” within the scope of their employment.⁶⁶ According to the Restatement’s Tentative Draft, the scope of employment test is as follows:

[A]n employee acts within the scope of employment when both of the following conditions are satisfied: (a) The employee is performing work assigned by the employer or engaging in a course of conduct subject to the employer’s control; and (b) The employee’s conduct is *intended* by the employee in any way to *serve any purpose of the employer*.⁶⁷

62. *Respondeat Superior*, BLACK’S LAW DICTIONARY (12th ed. 2024).

63. *Jones v. Hart* (1698) 91 Eng. Rep. 382 (“[F]or whoever employs another is answerable for him.”).

64. See RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A (AM. L. INST., Preliminary Draft No. 5, 2024); RESTATEMENT OF EMPLOYMENT LAW § 4.03(b) (AM. L. INST. 2015); RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. L. INST. 2006); RESTATEMENT (SECOND) OF AGENCY § 219 (AM. L. INST. 1958); RESTATEMENT (FIRST) OF AGENCY § 219 (AM. L. INST. 1933); see also *M.J. v. Wisan*, 371 P.3d 21, 34 (Utah 2016) (“The doctrine of respondeat superior is rooted in common law principles of agency.”).

65. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS topic 1, intro. note (AM. L. INST., Tentative Draft No. 2, 2023).

66. *Respondeat Superior*, BLACK’S LAW DICTIONARY (12th ed. 2024); RESTATEMENT (THIRD) OF AGENCY § 7.07.

67. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5(a)–(b) (AM. L. INST., Tentative Draft No. 2, 2023) (emphasis added) (subsection (a) of this test is consistent with the Restatement (Third) of Agency § 7.07(2)); “This is true even if the employee violates a statute or disobeys the employer’s express

Section (b) encompasses what is commonly known as the “motivated-to-serve” test.⁶⁸ The drafters of the Restatement of Agency initially incorporated the element of “motivation” into the scope of the employment test to avoid overextending employer liability, which also seems to be the objective of the drafters of the Restatement of Torts.⁶⁹ Beyond limiting employer liability, the underlying rationale for vicarious liability and the motivated-to-serve test stems from three fundamental policy goals: fairness, compensation, and deterrence.⁷⁰

Under fairness, it is believed that if an enterprise benefits from an employee’s conduct, the enterprise, not the victim, should bear the burdens and costs of operation.⁷¹ This aligns with the motivated-to-serve test, ensuring that an enterprise pays for the harm an employee might cause on its behalf but not for damage caused by the employee’s personal motives (as this does not benefit the enterprise and is not considered conduct under the enterprise’s control).⁷² Regarding compensation, it is thought that enterprises should pay victims for the harm done to them, as most enterprises, rather than their employees, carry liability insurance for this purpose.⁷³ Additionally, it can be challenging to hold an enterprise directly liable for its tortious actions because “the plaintiff typically must pinpoint the way in which the [enterprise] was negligent.”⁷⁴ Thus, vicarious liability makes it easier for a plaintiff to bring a successful claim.⁷⁵ Imposing vicarious liability on an enterprise also encourages that entity to “seek out ways to reduce accident costs that a pure negligence scheme may not.”⁷⁶ This is the primary rationale behind the deterrence factor—enterprises benefit from employee conduct, so they should be required to ensure that employees do not cause harm while engaged in conduct that benefits the enterprise.⁷⁷

Thus, due to the motivated-to-serve test and the policy goals behind this doctrine, under many U.S. jurisdictions, vicarious liability is not a viable claim against an employer when sexual assault

directive. . . . [or] even if the employee becomes angry, excited, or loses self-control.” *Id.* § 5 cmt. b, illus. 1.

68. *See id.* § 3 cmt. b (noting that § 5(b) grew out of the justification for invoking respondeat superior that an employee was motivated, at least in part, to serve their employer).

69. *See id.* In falling in line with this goal, some jurisdictions find an employee’s conduct outside the scope of employment if it is committed solely out of the employee’s own desire, lust, or purpose. *Id.* § 5 cmt. g.

70. *Id.* § 3 cmt. b.

71. *Id.*

72. *See id.*

73. *Id.*

74. *Id.* (emphasis omitted).

75. *Id.*

76. *Id.*

77. *Id.*

is the “conduct” committed by its employees.⁷⁸ This is because “[s]exual assaults only rarely serve the employer’s interest,”⁷⁹ failing section (b) of the scope of employment test. Consequently, “many courts have ruled categorically that [sexual assaults are], as a matter of law, outside the scope of employment,”⁸⁰ limiting a victim’s recovery. However, when a vicarious liability claim against the employee’s employer is not applicable, a sexual assault victim can always sue the employee directly.⁸¹ Still, this individual is often either insolvent or unable to pay to the extent that the employer would be able to under its liability insurance policy.⁸² Due to this unfair result, some states have begun to depart from the motivated-to-serve test to hold the employer vicariously liable and, in doing so, achieve fairness, compensation, and deterrence.⁸³

As beautifully described by the Salt Lake Tribune, “[t]he chance to go to civil court for damages is an important option for survivors, experts say. While a criminal conviction can provide a sense of justice, winning a lawsuit can help victims pay for the therapy and additional support they need to heal after trauma.”⁸⁴ This sentiment must have been on the mind of the Louisiana judge presiding over G.H.’s vicarious liability suit against the City of New Orleans. Like the drafters of the Restatement (Third) of Torts, Louisiana courts continue to strive toward achieving the policy goals embedded in the doctrine of vicarious liability. To accomplish this, section 5A provides a means for victims to hold employers accountable for the conduct of their employees, regardless of the employee’s lack of motivation to serve their employer.⁸⁵

IV. SECTION 5A: SPECIAL RULE ON VICARIOUS LIABILITY FOR SEXUAL ASSAULT

In August 2024, the ALI proposed Preliminary Draft No. 5 of the Restatement (Third) of Torts: Miscellaneous Provisions.⁸⁶ This draft includes a critical but possibly controversial addition to the law of Torts, specifically the vicarious liability doctrine. This new rule provides the necessary elements that would allow victims to

78. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A cmt. b (AM. L. INST., Preliminary Draft No. 5, 2024).

79. *Id.*

80. *Id.*

81. *See id.* § 5A cmt. k.

82. *See* Klevan, *supra* note 45, at 1078.

83. *See id.* at 1084, 1091.

84. Jessica Miller, *94 Women Allege a Utah Doctor Sexually Assaulted Them. Here’s Why a Judge Threw Out Their Case*, SALT LAKE TRIB. (Feb. 22, 2023), <https://perma.cc/7AUP-6ZTC>.

85. *See* discussion *infra* Part IV.

86. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A (AM. L. INST., Preliminary Draft No. 5, 2024).

capitalize on a vicarious liability claim against the employer of an employee who sexually assaulted them. The rule is as follows:

Notwithstanding §§ 3 and 5, an employee may be found to have acted within the scope of employment if the employee sexually assaults a victim and:

- (a) the nature of the employee's employment creates a foreseeable risk of sexual assault;
- (b) the employer enables the sexual assault by providing the employee with power, authority, or influence over, or the opportunity to develop a trusting relationship with, the victim;
- (c) the victim is particularly vulnerable, by reason of age, mental capacity, disability, incarceration, detention, hierarchical relationship, confinement, medical need, or other similar circumstance; and
- (d) the sexual assault occurs when the employee is performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.⁸⁷

As the Restatement Draft admits, and as explained in Part III of this Note, this new rule “breaks with traditional tort doctrine” because it allows victims to bring vicarious liability claims even when the motivated-to-serve test is not satisfied.⁸⁸ The drafters also concede that, at this moment, no U.S. jurisdiction has extended liability as far as this section intends to.⁸⁹ This results from the new rule combining a piecemeal of four doctrinal tests used in different jurisdictions into one cohesive rule. These four doctrinal tests serve as “alternatives to the classic motive-to-serve-the-employer test”⁹⁰ and include “(1) the aided by agency test; (2) the characteristic-risk approach; (3) a foreseeability test; and (4) the invocation of a nondelegable duty.”⁹¹

While crafting this new rule, it seems as if drafters of the Restatement leaned on the arguments and reasoning typically explored by courts when applying the four doctrinal hooks mentioned above. The drafters then seem to have incorporated aspects of each test into all four elements required by this new section (foreseeability, assault enabled by power, vulnerable victim, and conduct subject to employers' control). While this rule would be a tremendous win for victims of sexual assault, which is a “pervasive problem that affects

87. *Id.*

88. *Id.* § 5A cmt. b.

89. *Id.* § 5A cmt. d.

90. *Id.* § 5A cmt. b.

91. *Id.*

millions of Americans” with a sexual assault occurring nearly every minute,⁹² it could struggle to transform from a Tentative Draft to part of the official text of the Restatement.

For this new rule to leave the pages of the draft and transform into official Restatement text, it must be voted on by both the Members and Council of the ALI.⁹³ As mentioned, this new rule was first proposed in Preliminary Draft No. 5 of the Restatement (Third) of Torts in August 2024.⁹⁴ Thus, as a preliminary draft, this new rule is in the very beginning stages of the process of becoming part of official Restatement text.⁹⁵ To initiate this process, Members of the ALI must come together to discuss all newly proposed sections to the Restatement, which they did in September of 2024.⁹⁶ After this discussion, the draft must be submitted to the Council as a Council Draft.⁹⁷ Then, it becomes a Discussion Draft.⁹⁸ After approval, it reaches its final form as a Tentative Draft before its adoption into official text.⁹⁹ According to a library guide published by Harvard Law School, the drafting process can take anywhere from nine to twenty-one years.¹⁰⁰ Thus, this new rule is not close to becoming official text since it is only in the preliminary draft stages. However, this does not mean that it should not or will not become official text in the future. Hopefully, the arguments made throughout this Note, and the Restatement’s comments attached to this new rule will help speed up the drafting and voting of section 5a into official text.

92. *Id.* § 5A reporters’ note on cmt a. (citing *Statistics: Victims of Sexual Violence*, RAINN (2025), <https://rainn.org/facts-statistics-the-scope-of-the-problem/statistics-victims-of-sexual-violence/>).

93. *Id.* at x; see also *Secondary Sources: Restatements*, OKLA. CITY UNIV. SCH. L. (Sept. 16, 2025), <https://perma.cc/43XX-586Q>.

94. See discussion *supra* Part IV.

95. *Project Life Cycle*, AM. L. INST. (2025), <https://perma.cc/UJ9W-QYDX>; see also *Restatements: Drafting Process*, GONZ. UNIV. SCH. L. (June 22, 2022), <https://perma.cc/LBG9-6XXH>.

96. *Project Life Cycle*, *supra* note 95; *Meetings and Events Calendar at-a-Glance*, ALI REP., Summer 2024, at 2, 2.

97. *Project Life Cycle*, *supra* note 95.

98. *Id.*

99. *Id.*

100. Catherine Biondo, *Secondary Sources: ALRs, Encyclopedias, Law Reviews, Restatements, & Treatises*, HARV. L. SCH. LIBR. (Aug. 15, 2025), <https://perma.cc/3NFR-KFNH> (9 to 21 years). See also *Frequently Asked Questions*, AM. L. INST. (2025), <https://perma.cc/6N9V-RHQQ> (“[I]t takes years to complete a project.”); Lorelie S. Masters & Geoffrey B. Fehling, *The American Law Institute’s Restatement of the Law, Liability Insurance: Scholarship and Controversy*, 27 CONN. INS. L. J. 116, 118 (2020) (stating that the restatement takes eight years and numerous drafts before reaching official text).

A. *Foreseeable Risk*

The first element under section 5A requires a foreseeability component to hold an employer liable for a sexual assault committed by their employee. The Restatement drafters specify that this foreseeability component is broader than what is required for a negligence claim, as it simply asks for “a showing that the employer’s business or activity creates an environment in which an employee’s sexual assault is a *reasonable possibility*.”¹⁰¹ The drafters indicated two doctrinal hooks that support this element: the foreseeability test and the characteristic test.¹⁰²

The foreseeability test simply investigates “whether the *employee’s* sexual assault was foreseeable.”¹⁰³ For instance, in *Anderson v. Mandalay Corp.*,¹⁰⁴ the Supreme Court of Nevada determined that a “reasonable jury could conclude it was foreseeable that [a hotel employee] would abuse his keycard access to sexually assault a [hotel] guest.”¹⁰⁵ The Court’s determination depended on the following facts: (1) the employee received a suspension in “response to allegations that he harassed and threatened a female supervisor,” before this assault, and (2) after his suspension, his employer “restored his keycard access to occupied rooms and assigned him to a shift with minimal supervision.”¹⁰⁶ Under the Restatement’s new rule, this Court would likely reach the same conclusion. Applying these facts under the new rule, a sexual assault committed by this employee appears to be a reasonable possibility given the environment created by the employer. Therefore, a reasonable jury would likely find this assault foreseeable, as the hotel provided this employee with keycard access to all of its hotel rooms without supervision, despite previous complaints against him. This is just one

101. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A cmt. g (AM. L. INST., Preliminary Draft No. 5, 2024) (emphasis added).

102. *Id.* § 5A cmt. b.

103. *Id.* (emphasis added); *see also* Rendon v. Circle K Stores Inc., No. CV-19-05875, 2020 WL 6562345, at *4 (D. Ariz. Nov. 9, 2020) (after discussing the motivated-to-serve test, some aspects of aided-by-agency, and what seems like the foreseeability approach, finding that the “Complaint sufficiently pleads vicarious liability to hold Circle K liable for Mr. Larson-Jarvis’ alleged conduct” because “Circle K had received complaints in the past about [Mr. Larson-Jarvis] sexually harassing the women he worked with” (alteration in original) (quoting the complaint)).

104. 358 P.3d 242 (Nev. 2015).

105. *Id.* at 247. *Cf.* Hamed v. Wayne County, 803 N.W.2d 237, 247 (Mich. 2011) (Police department not liable for a police officer’s sexual assault because it was not foreseeable; “[t]he majority of complaints against Johnson during his employment with defendants involved his failure to obey work-related policies . . . or unsatisfactory work performance.” This misconduct provided defendants with notice of his irresponsible tendencies, not notice of any “prior similar criminal sexual misconduct.”).

106. *Anderson*, 358 P.3d at 246.

example of how the Restatement's new rule mirrors current case law and avoids extending liability to situations that would be unfathomable to current courts refusing to rule sexual assaults outside the scope of employment as a matter of law.

The second doctrinal hook, the characteristic-risk approach, is a little less specific than the foreseeability test as it simply inquires into "whether the employee's tort constituted a distinctive or foreseeable risk of the employer's enterprise."¹⁰⁷ *Mary M. v. City of Los Angeles*¹⁰⁸ is a famous example of this approach. In this case, the Supreme Court of California, without applying the motivated-to-serve test, was tasked with determining whether the risk "may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer."¹⁰⁹ The Court determined that the risk of a police officer raping a woman whom he detained was foreseeable, so this misconduct did fall within the officer's scope of employment.¹¹⁰ Interestingly, when this case was decided thirty-three years ago, the Court reached its conclusion despite believing that sexual assaults by the police were "uncommon."¹¹¹ Now, statistical evidence illustrates just how prevalent sexual assaults perpetrated by police officers are.¹¹² This further demonstrates that the issue of sexual assaults perpetrated by employees in certain professions is not a new phenomenon, as the notion of finding such conduct within the scope of employment was not absurd in 1991.

After *Mary M.*, countless cases from other jurisdictions have also found police departments liable for sexual assaults committed by

107. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A cmt. b (AM. L. INST., Preliminary Draft No. 5, 2024).

108. 814 P.2d 1341 (Cal. 1991).

109. *Id.* at 1344 (quoting *Perez v. Van Groningen & Sons, Inc.*, 719 P.2d 676, 678 (Cal. 1986)).

110. *Id.* at 1350 ("In view of the considerable power and authority that police officers possess, it is neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct. . . . Sexual assaults by police officers are fortunately uncommon; nevertheless, the risk of such tortious conduct is broadly incidental to the enterprise of law enforcement, and thus liability for such acts may appropriately be imposed on the employing public entity.")

111. *Id.*

112. See discussion *supra* Part II.

their officers.¹¹³ For example, in *Doe v. State*,¹¹⁴ the Supreme Court of Delaware applied the characteristic risk approach, as well as the motivated-to-serve test, and reversed the Superior Court's decision to grant the employer's motion for summary judgment.¹¹⁵ This court found a police officer's sexual assault on a shoplifting suspect a foreseeable risk of his employment because the assault occurred in the officer's cruiser while he was on duty and transporting the victim to court.¹¹⁶ Plus, this conduct satisfied the kind of work he was employed to perform and was within the authorized time and space limits of his work,¹¹⁷ which are requirements for vicarious liability as listed in the Restatement of Agency.¹¹⁸ The Court also found that since the language, "[acted] in part to serve his employer—has been construed broadly," the officer's conduct satisfied the motivated-to-serve test.¹¹⁹

In addition to police departments, employers of a nursing assistant,¹²⁰ a counselor of a group home,¹²¹ and a schoolteacher¹²²

113. See, e.g., *Cox v. Evansville Police Dep't*, 107 N.E.3d 453, 464, 467 (Ind. 2018) ("Because cities vest this immense power in their officers, the doctrine of *respondeat superior* holds cities legally responsible for officers' tortious abuse of their employer-conferred power when the abuse arises naturally or predictably from an officer's employment activities," regardless of whether the conduct was intended to serve the employer or not.); see also *Red Elk v. United States*, 62 F.3d 1102, 1107 (8th Cir. 1995) (applying South Dakota law under the FTCA; holding it was "foreseeable that a male officer with authority to pick up a teenage girl out alone at night in violation of the curfew might be tempted to violate [her] trust.").

114. 76 A.3d 774 (Del. 2013).

115. *Id.* at 776–77.

116. *Id.* at 777.

117. *Id.*

118. RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. L. INST. 2006).

119. *Doe*, 76 A.3d at 777.

120. *Samuels v. S. Baptist Hosp.*, 594 So. 2d 571, 573–74 (La. Ct. App. 1992) (applying the motivated-to-serve and characteristic risk approach, the Court of Appeals ruled that "[t]he tortious conduct committed by Stewart was reasonably incidental to the performance of his duties as a nurse's assistant although totally unauthorized by the employer and motivated by the employee's personal interest. Further, Stewart's actions were closely connected to his employment duties so that the risk of harm faced by the young female victim was fairly attributable to his employer, who placed the employee in his capacity as a nurse's assistant and in a position of authority and contact with the victim.").

121. *Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 910–11 (Minn. 1999) (deviating from the motivated-to-serve test, holding instead that the factual inquiry is whether the "[e]mployee's acts were foreseeable, related to, and connected with acts otherwise within the scope of his employment.").

122. *Doe v. Special Sch. Dist. No. 6, S. St. Paul Pub. Schs.*, No. A22-1736, 2023 WL 4695939, at *3, *5–6 (Minn. Ct. App. July 24, 2023) (nonprecedential) (recognizing expert and record evidence that "the risk of adult sexual abuse of children is well-known in the field of youth education" and "that Babbitt initiated his advances towards Doe using activity that directly related to his legitimate duties as her teacher"); cf. *Godar v. Edwards*, 588 N.W.2d 701, 707 (Iowa 1999)

have also been held liable for sexual assault under the characteristic risk approach. This shows that the new rule is not overly expansive. Instead, it encompasses the certain categories of employment in which sexual assaults are more foreseeable than other types of employment. This falls in line with current statistics surrounding the prevalence of sexual assaults committed by these kinds of employees on victims who are especially vulnerable.¹²³ Thus, this seems to further suggest how this foreseeability element coincides with current legal opinions. Additionally, it shows how now more than ever, sexual assault victims need this kind of support because of how harmful and prevalent sexual assaults are.

To further the push for the adoption of this special rule, other scholars and commentators in the field can assist, but only as a policy rationale.¹²⁴ For instance, in his piece, *Reformulating Vicarious Liability in Terms of Basic Tort Doctrine: The Example of Employer Liability for Sexual Assaults in the Workplace*, Mark Geistfeld argues that vicarious liability is better suited as a tort doctrine than as one rooted in agency law.¹²⁵ Throughout his article, he discusses how foreseeability can and should play a role in a vicarious liability claim as the “ordinary tort conception of foreseeability governing cases of both negligence and strict liability can help justify vicarious liability as a tort rule that makes employers and other principals responsible for the foreseeable misconduct of their employees and other agents.”¹²⁶ To build off of this argument, *Mary M.* did not apply the motivated-to-serve test, just elements of foreseeability, and still found the vicarious liability claim for sexual assault viable.¹²⁷ Conversely, *Doe v. State* did consider the motivated-to-serve test and still declared that foreseeable sexual assaults can fall within the scope of employment.¹²⁸ Thus, despite the prevalence of the motivated-to-serve test throughout the history of vicarious liability, it could be argued that more and more courts and scholars desire to move away from this strict requirement and adopt a regime like the one outlined in the Restatement’s new rule.

(concluding that sexual abuse by a teacher is not “a ‘normal’ risk associated with the objectives of educating students such that it should be a risk that should be borne by the school district”).

123. See discussion *supra* Part II; see also discussion *infra* Section IV.C.

124. See Klevan, *supra* note 45, at 1084.

125. Mark A. Geistfeld, *Reformulating Vicarious Liability in Terms of Basic Tort Doctrine: The Example of Employer Liability for Sexual Assaults in the Workplace*, 99 N.Y.U. L. REV. 578, 614 (2024).

126. *Id.* at 633–34.

127. *Mary M. v. City of Los Angeles*, P.2d 1341, 1350, 1352 (Cal. 1991).

128. *Doe v. State*, 76 A.3d 774, 776–777 (Del. 2013).

B. *Assault Enabled by Power, Authority, or Influence*

The second element under section 5A notes that to have a valid vicarious liability claim against an employer, the sexual assault must be “enabled or facilitated by the employee’s power, authority, influence over, or trusting relationship with, the victim” and the employer must “provide[] the power, authority, influence, or trusting relationship by virtue of the employment relationship.”¹²⁹ In sum, the “plaintiff must show that the employee’s status or relationship vis-à-vis the employer facilitated—i.e., increased the risk of—the sexual assault.”¹³⁰ It seems the drafters wrote this element with the “aided-by-agency” approach in mind.

Over time, courts have defined aided-by-agency as an exception to the general scope of the employment test that requires the “motivated by” element.¹³¹ Thus, under this exception, employers can still be held vicariously liable for a sexual assault as long as the employment aided the employee during the commission of the misconduct.¹³² Courts seem more willing to veer away from the motivated-to-serve test when the victim is especially vulnerable¹³³ and when the employer vests the employee with great power over their victim.¹³⁴ For example, in *Spurlock v. Townes*,¹³⁵ the Supreme Court of New Mexico, while limiting its adoption of aided-by-agency,¹³⁶ still found the Camino Nuevo Correctional Center vicariously liable for the sexual assaults its employee, a corrections

129. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A cmt. i (AM. L. INST., Preliminary Draft No. 5, 2024) (emphasis omitted).

130. *Id.*

131. *See* Geistfeld, *supra* note 125, at 583, 624–25.

132. *See, e.g.,* Veco, Inc. v. Rosebrock, 970 P.2d 906, 911 (Alaska 1999) (sexual harassment case); *see also* P.K. v. Hartford Roman Cath. Diocese Corp., No. 13-cv-00211, 2014 WL 4536626, at *2 (D. Conn. Sept. 11, 2014) (discussing how a priest who sexually molested a minor “operated within and was aided by his agency relationship with [employer],” while also acknowledging foreseeability (or characteristic risk) as a factor); *Costos v. Coconut Island Corp.*, 137 F.3d 46, 50 (1st Cir. 1998) (applying Maine law; explaining that, as the hotel’s manager, the perpetrator was able to find the victim’s room and access the key which he used “to unlock the door, slip into bed beside her as she slept, and rape her”).

133. *See* discussion *infra* Section IV.C.

134. However, some jurisdictions refuse to apply this approach as it “would expose employers to the ‘threat of vicarious liability that knows no borders’” and “can be applied too broadly.” *Zsigo v. Hurley Med. Ctr.*, 716 N.W.2d 220, 229 (Mich. 2006).

135. 368 P.3d 1213 (N.M. 2016).

136. *Id.* at 1217 (acknowledging concerns that “aided-in-agency as a theory independent of apparent authority risks an unjustified expansion of employer tort liability for acts of employees” (quoting *Ayuluk v. Red Oaks Assisted Living, Inc.*, 201 P.3d 1183, 1199 (Alaska 2009))).

guard, committed against the prison's inmates.¹³⁷ The Court's decision boiled down to the fact that correctional officers are vested with "extraordinary authority" over inmates, and this power is provided to them by their employer.¹³⁸ In addition to prisons, police departments, like the one in Louisiana that employed Officer Vicknair, are also commonly found vicariously liable for the conduct of police officers under this approach.¹³⁹

In 2013, Martha Chamallas,¹⁴⁰ drawing on the dichotomy of current tort law in the U.S., proposed the following rule: "[v]icarious liability shall be imposed if an employer materially increases the risk of tortious action either by conferring power or authority on its employees over vulnerable persons, or by regularly placing its employees in situations of intimate or personal contact with clients, customers, or other potential victims."¹⁴¹ This aligns directly with the language and reasoning of the new Restatement rule, indicating that scholars have previously advocated for change outside the courts. Additionally, in her Note, Tori Klevan argues that respondeat superior should apply to employers when sexual assaults by their employees stem from the exercise of authority, power, or access created by the job.¹⁴² This reasoning is grounded in aided-by-agency, as this approach serves the three policy objectives—fairness,

137. *Id.* at 1218–19; *see also* Peña v. Greffet, 110 F. Supp. 3d 1103, 1105, 1124 (D.N.M. 2015) (“[T]he tort cannot be of a nature that a mere coworker could have just as easily committed; rather, a specifically supervisory relationship must have aided the tort’s commission.”).

138. *Townes*, 368 P.3d at 1214, 1217–18.

139. *See* *Sherman v. State Dep’t of Pub. Safety*, 190 A.3d 148, 153–55 (Del. 2018) (Plaintiff does not have to satisfy motivated-to-serve test in order for the employer “to be liable for the Officer’s sexual misconduct” because his “position aided him in obtaining sexual favors”); *see also* *Buie v. District of Columbia*, 273 F. Supp. 3d 65, 69 (D.D.C. 2017) (discussing how “various instrumentalities” of the officer’s position allowed him to commit the sexual assault); *Applewhite v. City of Baton Rouge*, 380 So. 2d 119, 121–22 (La. Ct. App. 1979) (officer abused his position to sexually assault a victim in his police car, which was provided to him by his employer); *Doe v. Morris*, No. 11–1532, 2013 WL 3933928, at *5 (E.D. La. July 30, 2013) (“[W]hen an officer’s position of authority creates a relationship between the officer and a member of the public within the context of the officer’s official duties, and that relationship gives rise to the opportunity and commission of a rape or sexual assault, that harm is attributable to the employer.”); *Doe v. Forrest*, 853 A.2d 48, 57, 68–69 (Vt. 2004) (“A jury could find based on this evidence that despite the fact that [the officer] never used or threatened to use his gun on plaintiff, his position and implements sufficiently intimidated and scared plaintiff to enable him to commit the tort.”).

140. Martha Chamallas is part of the Members Consultative Group for the Restatement implementing section 5A. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS, at viii (AM. L. INST., Preliminary Draft No. 5, 2024).

141. Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 187 (2013).

142. Klevan, *supra* note 45, at 1079.

deterrence, and compensation—under the doctrine of respondeat superior.¹⁴³ Klevan also addresses how the narrow application of aided-by-agency, specifically to prisons and jails, will appease critics who believe the aided-by-agency doctrine is overly broad.¹⁴⁴

As currently drafted, section 5A will encompass more than just prisons and jails. However, this rule intends to extend liability only to employers who provide their employees with significant power over vulnerable victims—not to every employer in any field solely because their employee committed a sexual assault during the course of their employment. This should alleviate critics’ concerns regarding this rule by clarifying that section 5A does not aim to extend liability to circumstances where no court has ever found a viable vicarious liability claim based on an employee committing sexual assault. The drafters of this rule have already emphasized that it only applies to sexual assault and not even to cases of sexual harassment.¹⁴⁵ Furthermore, this element builds upon element one (foreseeability) and element three (vulnerable victim) of section 5A, bolstering the support for this rule overall.

For example, by building upon the foreseeability element required by section 5A, granting an employee significant power over a vulnerable individual increases the likelihood that the employer’s business will foster an environment where sexual assaults are foreseeable. Although the Louisiana court did not directly address foreseeability, it found that Vicknair exerted power over G.H. by appearing at her home in uniform and by the assault occurring in his vehicle with his police placard visible.¹⁴⁶ Furthermore, their relationship began while Vicknair was acting within the scope of his employment, responding to a police department call regarding her suspected assault and transporting her to the hospital.¹⁴⁷ Therefore, under the Restatement’s new rule, requiring this element of power aligns with existing law under the aided-by-agency approach as it only applies to specific employers who give their employees power over particularly vulnerable individuals they interact with—making assaults by these particular employees increasingly foreseeable.

Additionally, it will not extend liability to all employers, which is a concern expressed by courts hesitant to apply the aided-by-agency approach. Instead, the drafter’s new rule applies only to specific employers who give their employees power over particularly vulnerable individuals they interact with—since this increases the

143. *Id.* at 1102.

144. *Id.* at 1099.

145. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A cmt. e (AM. L. INST., Preliminary Draft No. 5, 2024).

146. *Upton v. Vicknair*, No. 21-407, 2024 WL 688333, at *2 (E.D. La. Feb. 20, 2024).

147. *Id.* at *4.

foreseeability of assaults, as evidenced by the prevalence of sexual assaults committed by employees in these specific professions.

C. *Vulnerable Victim*

The third element under section 5A notes that the victim must be vulnerable for this new rule to apply.¹⁴⁸ This element is somewhat trickier to apply as few cases specifically address the court's increased willingness to find an employer vicariously liable simply because the victim is deemed "vulnerable." However, the drafters were certainly not misguided in their decision to include this as a required element under section 5A. For example, the Supreme Court of Alaska, after applying the aided-by-agency approach,¹⁴⁹ ruled that a plaintiff provided sufficient evidence for the issue of vicarious liability to go to a jury because a "caregiver in an assisted living home . . . has supervisory power or authority over [a] *vulnerable* resident[]." ¹⁵⁰ Section 5A's element of vulnerability is also supported by a line of cases refusing to extend vicarious liability to certain employers due to the victim's lack of vulnerability.¹⁵¹ For example, while many courts have found sexual abuse by priests as a possible route for holding a church vicariously liable,¹⁵² other courts have refused to find churches vicariously liable due to the victim's lack of vulnerability—despite the plaintiff's status as a minor.

For example, in *Herrera v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*,¹⁵³ even though the plaintiff was a minor, the court ruled that she "fail[ed] to demonstrate that [the priest's] power and authority over her religious life constituted substantial power that 'aided' the commission of his sexual abuse, as opposed to providing a mere opportunity for it."¹⁵⁴ The Court seemingly reached this conclusion because the plaintiff did not achieve a certain level of vulnerability; here, the priest "did not

148. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A(c) (AM. L. INST., Preliminary Draft No. 5, 2024).

149. *Ayuluk v. Red Oaks Assisted Living, Inc.*, 201 P.3d 1183, 1200 (Alaska 2009) ("[T]he caregiver's power that enables him to further his improper conduct is an inherent part of the employment relationship.").

150. *Id.* at 1199, 1200 (emphasis added).

151. *See* *Fresquez v. White*, No. 21-cv-00043, 2022 WL 1664372, at *9 (D.N.M. May 25, 2022) (dismissing the vicarious liability case against United Airlines because its employee did not seem to have "'substantial power and control' over Plaintiff, the general manager of the Sheraton Albuquerque Airport hotel."); *see also* *Covarrubias v. Wendy's Properties, LLC*, No. 19-cv-4866, 2022 WL 1238666, at *10 (N.D. Ill. Apr. 27, 2022) (Wendy's employees engaged in an instance of sexual misconduct with a customer).

152. *See* Danielle Bolong, *Whether Sexual Misconduct Falls Within Scope of Clergy Member's Employment to Support Theory of Vicarious Liability or Respondeat Superior Under State Law*, 68 A.L.R. 7th Art. 2 § 2 (2021).

153. No. 20-318, 2023 WL 2743534 (D.N.M. Mar. 31, 2023).

154. *Id.* at *16.

control Plaintiff's day-to-day life like a prison guard or boarding school teacher, or even have the power to order her to carry out his instructions at church like a priest has over an altar boy."¹⁵⁵ In this case, the plaintiff's father forced her to attend and perform basic chores for the church; the Priest did not force her to be there, but instead, he took advantage of her father's power over her, not his power as a Priest, and used it as his opportunity to commit the assault.¹⁵⁶ Therefore, while she could be considered vulnerable because of her father's authority over her, her vulnerability was not established through her relationship with the priest who committed the assault. Under the Restatement's new rule, this case would yield the same outcome and not extend the law beyond its current boundaries. Although this case involves elements of power and control over a minor, who is always deemed more vulnerable, the priest's employment did not grant him this power. Instead, the assault merely took place at the priest's workplace and, therefore, would not meet the necessary criteria under section 5A to establish a viable vicarious liability claim against the Church.

Furthermore, like the other two elements of section 5A, the Restatement drafters specified the exact requirements for establishing vulnerability. To satisfy the vulnerability criterion, the victim must be "particularly vulnerable, by reason of age, mental capacity, disability, incarceration, detention, hierarchical relationship, confinement, medical need, or *other similar* circumstance."¹⁵⁷ As should be evident by now, case law supports that victims of police officers, priests,¹⁵⁸ teachers,¹⁵⁹ child protection specialists,¹⁶⁰ medical providers, and correctional officers are regarded as "particularly vulnerable" because their abusers hold significant power over them.¹⁶¹ A review of common case facts and

155. *Id.* at *26.

156. *Id.* at *25.

157. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A(c) (AM. L. INST., Preliminary Draft No. 5, 2024) (emphasis added).

158. *See Doe v. St. John's Episcopal Par. Day Sch., Inc.*, 997 F. Supp. 2d 1279, 1289 (M.D. Fla. 2014) (ruling that the defendant's motion to dismiss failed because a priest and teacher "abused Plaintiff on Church and School property, utilized their positions of authority to manipulate and intimidate Plaintiff, a *minor* at the time, had access to and the opportunity to abuse Plaintiff because of their official positions and duties" (emphasis added)).

159. *See Hardwicke v. Am. Boychoir Sch.*, 902 A.2d 900, 903, 919–20 (N.J. 2006) (after applying aided-by-agency and the reasoning behind the foreseeability approach, the Court found that a boarding school could be liable for the sexual assault of its students (*minors*) by a music teacher).

160. *See Smith v. Ripley*, 446 F. Supp. 3d 683, 687–88, 691–692 (D. Mont. 2020) (finding the State liable under a non-delegable duty for the rape of a mother by a child protection specialist handling her case).

161. *See State, Dep't of Admin. v. Schallock*, 941 P.2d 1275, 1283–84 (Ariz. 1997) (reasoning that an executive director's "fondling [of] the file clerks . . . both

statistics on sexual assaults reveals that police officers often abuse individuals who are minors, like G.H., or those under their control through detention or confinement, such as the shoplifting suspect.¹⁶² Priests and teachers frequently abuse victims who are minors or individuals who view them as authority figures due to their hierarchical relationship.¹⁶³ Victims of medical providers often experience vulnerability stemming from medical needs, mental capacity, or disabilities.¹⁶⁴ Finally, victims of correctional officers are vulnerable due to incarceration, confinement, and mental capacity, among other factors.¹⁶⁵ Thus, given the vulnerable nature of these victims and the foreseeability of certain types of employees abusing their power to harm individuals in these contexts, it is logical that section 5A incorporates the requirement of vulnerability as a key element. Therefore, this element should not be met with much criticism.

However, adding the language “other similar circumstance”¹⁶⁶ under this element could cause pushback from the ALI Council and Members. While the drafters likely added this language to ensure this rule would not be too narrow for future victims, critics might argue that this broad language travels way beyond current law. To ease the hesitation by critics, it would be helpful for the drafters to include a possible description of circumstances in which this element would not apply. For example, the drafters specify that this element only applies under a factual scenario where the employee’s conduct also falls under element (d) of this new rule. While this helps eliminate circumstances in which an employee commits the assault after significantly deviating from their assigned work or conduct not subject to the employer’s control, it could be more specific.

serv[ed] the master by running the office . . . and serv[ed] his personal desires,” so as a matter of law, his actions could not be ruled outside the scope of his employment); *see also* Dennis v. Pace Suburban Bus Serv., 19 N.E.3d 85, 91–92 (Ill. Ct. App. 2015) (finding that, in a case involving a bus driver who sexually assaulted a passenger, “a common carrier could be liable for the sexual assault of one of its passengers by one of its employees” because “the common carrier is liable for the passenger’s injuries, even if the employee’s actions were not in his actual or apparent scope of authority” (quoting Green v. Carlinville Cmty. Unit Sch. Dist. No. 1, 887 N.E.2d 451 (Ill. App. Ct. 2008))).

162. *See* Upton v. Vicknair, No. 21-407, 2024 WL 688333, at *13 (E.D. La. Feb. 20, 2024); Doe v. State, 76 A.3d 774, 775 (Del. 2013).

163. *See* Chasmar, *supra* note 52; Kosmides, *supra* note 54.

164. *See* RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A reporters’ note on cmt. b (AM. L. INST., Preliminary Draft No. 5, 2024) (providing a chart entitled “Cases Expanding Vicarious Liability for Sexual Assault” which includes numerous cases involving nurses and doctors that abused patients under their care illustrating the unique vulnerabilities of this group).

165. *See* discussion *supra* Section II.A.

166. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A(c) (AM. L. INST., Preliminary Draft No. 5, 2024).

One possible remedy could include describing specific instances when the victim's vulnerability does not cross the threshold of being "particularly vulnerable" enough to hold an employer vicariously liable for the misconduct of its employee. There are two vicarious liability cases, one concerning a sexual assault on a patron of a Wendy's and the second concerning assault on a hotel guest, that could provide a great example and demonstrate the limits of the vulnerability element, if included in the Restatement Draft. In the Wendy's case, *Covarrubias v. Wendy's Properties, LLC*,¹⁶⁷ a Wendy's employee "grabbed [the plaintiff] in his private area" while attempting to escort him out of the bathroom after previously informing him the restaurant was closing.¹⁶⁸ Here, one could argue that an adult man loitering in the bathroom of a fast-food chain is not a particularly vulnerable individual. He was not being detained by a police officer or someone with much power over him. He is not a minor. There is no mention of this individual possessing a mental or physical disability, and he was not in any medical need; thus, the vulnerability element would not be satisfied.

Furthermore, this assault is not foreseeable, as a fast-food restaurant is not a common place where sexual assaults occur. Additionally, Wendy's employees do not possess the authority over the individual involved that a police officer does when apprehending a suspect in transit to the police station. When considering the elements of section 5A in this factual scenario, only one element (conduct within space and time) would be satisfied, as the assault occurred in a Wendy's bathroom while the employees were carrying out their closing duties. Therefore, this example could illustrate to critics how the outcome of this case would stay the same even if the court applied the Restatement's new rule over current law.

To the same effect, the hotel guest case, *Anderson v. Mandalay Corp.*, as already discussed under the foreseeability element of section 5A,¹⁶⁹ would lead to the same result under the Restatement's new rule as under Nevada's current vicarious liability scheme. This case involved the rape of an adult woman by a hotel employee, Gonzalez.¹⁷⁰ After witnessing the woman, who was heavily intoxicated, exit the elevator on her floor, Gonzalez snuck into her room using a keycard, which granted him access to all rooms in the hotel.¹⁷¹ In applying section 5A to these facts, the defendant would likely argue that as an adult woman, the plaintiff is not vulnerable due to her age. Nor is she incarcerated in the hotel room. Nor does she need medical help. However, the plaintiff could argue that she is vulnerable due to

167. No. 19-cv-4866, 2022 WL 1238666 (N.D. Ill. Apr. 27, 2022).

168. *Id.* at *1.

169. See discussion *supra* Section IV.A.

170. 358 P.3d 242, 244 (Nev. 2015).

171. *Id.*

mental incapacity as a result of her intoxication,¹⁷² vulnerable due to confinement in the hotel room if she felt like Gonzalez restricted her ability to leave the situation, or vulnerable due to *another similar circumstance*. She could argue that “another similar circumstance” could arise from the fact that she was asleep in the hotel room where she should have been safe. She paid for the room, not expecting that an employee would use the power bestowed upon him by his employment to break in and harm her. Moreover, many individuals often feel unsafe in hotel rooms, which could also lead to this conduct being foreseeable.

So, based on the foreseeability of a hotel employee abusing his power to assault a guest, it is likely that the court would come to the same result. The court would likely also have no issue finding the element of vulnerability to bolster its decision not to grant summary judgment for the defendant, the hotel. Thus, while a hotel employee might not be the most common perpetrator of sexual assaults,¹⁷³ this case could help demonstrate how the Restatement’s new rule is not overly expansive. Everything about the Restatement’s new rule focuses on situations in which no one could be overly surprised by the sexual assault, which is due to the elements mirroring current case law and sexual assault statistics.

D. *Conduct Occurred within Time and Space of Employment*

The fourth and final element under section 5A notes that the sexual assault in question needs to “occur when the employee is performing work assigned by the employer or engaging in a course of conduct subject to the employer’s control.”¹⁷⁴ In essence, this element removes the requirement of the motivated-to-serve test.¹⁷⁵ As mentioned, the drafters admitted that removing the motivated-to-serve test is “contrary to hornbook law on vicarious liability.”¹⁷⁶ However, a few jurisdictions have already removed this test from their analysis of a vicarious liability claim for a sexual assault,

172. *FAQs on Incapacitation and Consent*, PURDUE UNIV. (2025), <https://perma.cc/SX9J-KYVQ>; see also NEV. REV. STAT. § 200.366(1)(a) (2025) (prohibiting sexual penetration when the perpetrator “knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of the perpetrator’s conduct”).

173. See discussion *supra* Part II.

174. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A (AM. L. INST., Preliminary Draft No. 5, 2024). This element can essentially be summarized as determining whether the conduct occurred within the time and space limits of an employee’s employment. See *id.* § 5A cmt. k.

175. *Id.* § 5A cmt. l (“Even when an employee acts purely for the employee’s own personal gratification fully cognizant that the sexual assault serves no interest of the employer’s—indeed, is detrimental to the employer’s interest—the employer is subject to vicarious liability under this Section.”).

176. *Id.* § 5A cmt. a.

arguably supporting the Restatement's removal of the motivated-to-serve test from section 5A.

For example, in *Plummer v. Center Psychiatrists, Ltd.*,¹⁷⁷ the Supreme Court of Virginia ruled that a plaintiff alleged enough facts to allow her vicarious liability claim to reach the jury.¹⁷⁸ In reaching this conclusion, the Court did not apply the motivated-to-serve test.¹⁷⁹ Instead, the court determined that the “[employee’s] act was committed while he was performing his duties as a psychologist in the execution of the services for which he was employed.”¹⁸⁰ In another psychologist abuse case, the Supreme Court of Minnesota ruled that “[i]t is irrelevant whether the actual assault involves a motivation to serve the master.”¹⁸¹ Instead, it examined whether the doctor’s conduct was “related to and connected with” his employment.¹⁸²

Despite many jurisdictions removing the requirement of the motivated-to-serve test for a vicarious liability claim,¹⁸³ many jurisdictions continue to apply this test. However, courts in these jurisdictions still refuse to find sexual assaults to be outside the scope of employment, as a matter of law, by reasoning that the employee’s misconduct occurred during work assigned by the employer or under the employer’s control. For example, in *Fearing v. Bucher*,¹⁸⁴ the court, even after applying some semblance of the motivated-to-serve test, found the plaintiff’s complaint stating that a priest’s sexual assault could be sufficiently within his scope of employment to support vicarious liability.¹⁸⁵ The Court came to this conclusion after

177. 476 S.E.2d 172 (Va. 1996).

178. *Id.* at 175. The jury is then tasked with determining whether the clinical psychologist acted within the scope of his employment. *Id.*

179. *Id.* at 174 (“The test of liability is not the motive of the employee in committing the act complained of, but whether that act was within the scope of the duties of employment and in the execution of the service for which he was engaged.” (quoting *Com. Bus. Sys., Inc. v. Bellsouth Servs., Inc.*, 453 S.E.2d 261, 266 (Va. 1995))).

180. *Id.*

181. *Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.*, 329 N.W. 2d 306, 310 (Minn. 1983).

182. *Id.* at 311. This court also looked to the characteristic risk approach to determine what conduct falls in scope of employment. *Id.*

183. *See Mullen v. Horten*, 700 A.2d 1377, 1380–81 (Conn. App. Ct. 1997) (“[Priest’s] alleged sexual exploitation of the plaintiff occurred during his church sanctioned pastoral-psychological counseling sessions and while he staffed church retreats . . . [so it is] not an abandonment of church business.”), *overruled on other grounds by*, *Cefaratti v. Aranow*, 141 A.3d 752 (Conn. 2016); *see also Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344, 348 (Alaska 1990) (“[W]here tortious conduct arises out of and is reasonably incidental to the employee’s legitimate work activities, the ‘motivation to serve’ test will have been satisfied . . . [so] we hold that it could reasonably be concluded that the resulting sexual conduct was ‘incidental’ to the therapy.”).

184. 977 P.2d 1163 (Or. 1999).

185. *Id.* at 1167–68.

determining that a jury could determine that the assault occurred in conjunction with performing his assigned work, which is “of a kind and nature” that youth pastors or priests typically perform.¹⁸⁶

Additionally, in *Stropes v. Heritage House Childrens Center of Shelbyville, Inc.*,¹⁸⁷ the Indiana Supreme Court reversed the trial court’s grant of summary judgment to the hospital employer because the nurse’s conduct was “sufficiently associated with [the nurse’s] authorized duties,” despite the court applying the motivated-to-serve test.¹⁸⁸ Finally, in *Masucci v. United States*,¹⁸⁹ the U.S. District Court for the District of Connecticut denied the Government’s motion to dismiss because it did not want to imply that Governments will never be vicariously liable for sexual assaults.¹⁹⁰ Consequently, the court found that the OB/GYN’s sexual assault of the plaintiff could be classified as conduct performed to serve the Government because the assault occurred alongside a mandatory exam that was required to enter the detention center.¹⁹¹

While the plaintiffs described above received some justice in not having their cases outright dismissed, not all plaintiffs attempting to bring a vicarious liability claim for sexual assault can achieve this result. As explained by Mark Geistfeld, the motivated test “almost invariably prevents the victims of sexual assaults from recovering against the employer, regardless of whether the employment relationship created the conditions that enabled the employee’s wrongdoing.”¹⁹² However, while it has always been thought that the motivated-to-serve test was the general rule, under the line of cases just discussed, it seems that some courts are bending traditional rules to avoid dismissing a plaintiff’s vicarious liability claim simply because sexual assault is the conduct at issue.¹⁹³ Even beyond the

186. *Id.* at 1166–67; *see also* *Lourim v. Swensen*, 977 P.2d 1157, 1159 (Or. 1999) (applying *Fearing* and holding that the complaint sufficiently stated a claim for vicarious liability based on allegations that the troop leader’s sexual abuse was the culmination of acts related to his assigned duties).

187. 547 N.E.2d 244 (Ind. 1989).

188. *Id.* at 249–50 (“[The nurse] began the episode by performing a fully authorized act, stripping the sheets from [plaintiff’s] bed prior to changing the bedding. He was also authorized to undress [the plaintiff] and to touch his genitals and other parts of his body when bathing him and changing his clothes.”).

189. 23-cv-00623, 2024 WL 3493214 (D. Conn. July 22, 2024).

190. *Id.* at *5.

191. *Id.*

192. Geistfeld, *supra* note 125, at 578.

193. *See* *Patel v. Himalayan Int’l Inst. of Yoga Sci. & Phil. of the USA*, No. CV-94-1118, 1999 WL 33747891, at *10 (M.D. Pa. Dec. 9, 1999) (recognizing “that ‘where tortious conduct [of a sexual nature] arises out of and is reasonably incidental to the employees’ legitimate work activities, the ‘motivation to serve’ test [of vicarious liability] will have been satisfied.” (alterations in original) (quoting *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344, 348 (Alaska 1990))).

cases just discussed, it should be evident from the discussion of section 5A's other three elements that the motivated-to-serve test is no longer the definitive response to sexual assault cases.

For example, courts are more willing to reason that sexual assaults are foreseeable in certain professions or occur simply because certain employees are provided with immense power through their employment.¹⁹⁴ Finally, it all comes down to how these elements tie together and affect a particular class of particularly vulnerable individuals. This rule is not so broad that it will allow *all* sexual assaults committed by employees to be the responsibility of the employer. Instead, it encapsulates a piecemeal approach to the certain facts, professions, and victims in which courts are already finding vicarious liability claims viable enough to reach the jury. So, why deny plaintiffs the opportunity to receive some compensation based solely on the argument that sexual assaults can never be committed by an employee to serve their employer? A single cohesive approach to the motivated-to-serve test no longer exists, nor are courts applying one single approach when looking past the motivated-to-serve test (aided-by-agency, foreseeability, characteristic risk, etc.), so plaintiffs should no longer be denied the ability to bring a successful vicarious liability claim simply because of the reasoning behind the motivated-to-serve test.

CONCLUSION

Due to various doctrinal hooks, diverse case law, and the reasoning of multiple scholars, it is clear that the law surrounding vicarious liability is not as concise as previously thought. Ultimately, this new rule is not a significant deviation from current law. It only stands to expand the vicarious liability doctrine to the extent that other courts have already done. Despite the fear that this rule would subject employers to massive amounts of vicarious liability, this rule only covers sexual assaults under particular circumstances. It does not intend to cover other conduct, such as harassment.¹⁹⁵ As this rule cannot automatically be applied in any U.S. jurisdiction at this very moment—because it is an accumulation of the various ways in which different courts are applying the underlying elements of this rule—it is not perfect. However, that does not mean that the elements of this rule are unsupported or an overextension of the vicarious liability doctrine.

194. See RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A cmt. b (AM. L. INST., Preliminary Draft No. 5, 2024).

195. *Id.* § 5A cmts. b, e (“As the black letter makes plain, this Section is limited to sexual assaults. It applies only when there is a battery or other unconsented-to physical contact performed by the employee for the employee’s sexual gratification. It does not extend to pure sexual harassment . . .” (emphasis omitted)).

The Restatement drafter's intention behind suggesting this new rule is to help victims of sexual assault finally receive compensation for the immense harm inflicted upon them. It's time to implement this suggestion and transform the vicarious liability doctrine into one cohesive rule instead of its current piecemeal approach. This rule will assist victims in better understanding what is required to establish a viable claim. It will also raise awareness for victims and encourage employers to do better by implementing policies and practices to mitigate this type of misconduct. While extending unlimited liability to employers is not the solution, acknowledging that for certain professions, allowing a vicarious liability claim for sexual assault is entirely reasonable. Thus, as long as certain employers provide their employees with authority over particularly vulnerable individuals, and the foreseeable misconduct occurs during the time and space of their employment, those employers should be held liable.

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