

LEGAL DRUGS? NOT WITHOUT LEGAL REFORM: THE IMPACT OF DRUG LEGALIZATION ON EMPLOYERS UNDER CURRENT THEORIES OF ENTERPRISE LIABILITY

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“The good, say the mystics of muscle, is Society—a thing which they define as an organism that possesses no physical form, a superbeing embodied in no one in particular and everyone in general except yourself. . . . Man’s mind, say the mystics of muscle, must be subordinated to the will of Society. . . . Man’s standard of value, say the mystics of muscle, is the pleasure of Society, whose standards are beyond man’s right of judgment and must be obeyed as a primary absolute.”

—*John Galt*

“The law of a business world is not made for amusement.”

—*Harold J. Laski*

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INTRODUCTION

For some time now, arguments have been marshaled to support legalization, or at least decriminalization, of the sale, possession and use of certain drugs.¹ This Article is not so much an argument against drug legalization as it is a wake-up call to American employers about enterprise liability generally.² Its purpose is to discuss the negative economic impact that drug legalization (and concomitant increase in drug use) is likely to have on employers—an enormous population virtually ignored by scholars and commentators involved in the debate—under current American enterprise liability law.³ Private sector employers are already quite concerned about the impact of drug and alcohol abuse on workplace safety and productivity.⁴ Very few, however, seem to have consid-

¹ For the arguments offered in favor of drug legalization, see *infra* Part I.A.

² I must confess that at the outset of the research for this article, I was overwhelmingly opposed to the legalization or decriminalization of any of the currently illegal drugs. However, the arguments and the statistics offered by the pro-legalization writers are compelling, and as a result, I am willing to rethink my position on legalization. For purposes of *this* Article, that only serves to prove that employers in the United States cannot afford to believe that *drugs will never be legalized*. If I can be persuaded, so can like-minded others.

³ In fact, an astonishingly small number of commentators address tort law in the context of drug legalization. One of the few is Thomas Szasz, a professor in the Department of Psychiatry at Syracuse University, who has been a vocal proponent of the libertarian arguments in favor of drug legalization for many years. Dr. Szasz acknowledges that drug legalization without tort reform is a prescription for disaster. See Thomas Szasz, *The War on Drugs is Lost*, NAT'L REV., Feb. 12, 1996, at 34, 46 ("[B]ringing a free market in drugs into being in America would require more than repealing criminal sanctions against selling and buying drugs. Respect for autonomy and responsibility, supported by a rational tort system, would be needed as well.") (emphasis added).

⁴ See, e.g., William C. Collins, *Drug Abuse Testing in the Workplace: Avoiding Pitfalls and Problems*, 19 MED. LABORATORY OBSERVER, Feb. 1987, at 30 (estimating that drug abuse affects 5-13 percent of the American workforce and costs up to \$33 billion annually); Michael A. Verespej, *Emerging Set of Rules: The Courts Are Putting Limits on Employers*, INDUSTRY WK., Feb. 9, 1987, at 20 (reporting Southern Pacific Railroad's drug policy resulted in a 71 percent reduction in accidents and injuries that were caused by human error); Lisa Westbrook, *Why You Need A Crystal-Clear Drug Policy*, 7 BUS. & HEALTH, Jan. 1989, at 16 (National Institute on Drug Abuse estimates that one in seven American workers abuses drugs, at a cost to businesses of at least \$100 billion per year in absenteeism and lost productivity); Kaye-Sung Chon & Lynn F. Jacob, *If Drug Testing is Enacted, It Must Be Done Properly*, 23 NATION'S RESTAURANT NEWS, Oct. 9, 1989, at F8 (noting that productivity studies in 1974 reported that alcoholics and drug abusers take two-and-a-half times more absences of nearly eight days or more, receive three times as much sick leave and accident benefits, and five times as many workers' compensation claims. The studies also reported that alcohol and drug abusers lead the statistics in industrial accidents.); Joseph F. Mangan, *Controlling Substance Abuse in the Workplace*, 91 BEST'S REV.: PROP.-CASUALTY INS. EDITION, Oct. 1990, at 88 (discussing a congressional report disclosing that drug or alcohol abuse was a factor in one of every five train accidents in 1987, and that in 1988, 13 percent of the nation's workforce was estimated to be addicted to alcohol or drugs); James H. Coil, III & Charles M. Rice, *State Limits on Drug-Testing Programs After Accidents*, 20 EMPLOYMENT REL. TODAY, Mar. 22, 1993, at 103 (estimating that illicit drug use by employees may cost businesses as much as \$100 billion per year in "absenteeism, reduced productivity, workplace accidents, increased insurance costs, and other losses"); Paul M. Thompson, *Implementing A Drug-Testing Program*, 56 AM.

ered the potential effects of drug legalization within the context of the current law on enterprise liability. Perhaps, like many others, they are confident that currently illicit drugs like cocaine, marijuana and heroin *will never be legalized*. If that is the basis for their comfort, they can ill afford to be so blithe.

Part II of this Article sets forth a number of the most commonly offered arguments in favor of drug legalization. They are detailed and compelling. Although proponents of drug legalization are not winning the public relations war (Americans are still overwhelmingly opposed to drug legalization), they are in no hurry. Each year they tally the costs and the casualties of the War on Drugs and wait for the American public's patience—or its money—to run out. When either happens, arguments favoring drug legalization will be taken seriously. The danger for employers if drug laws are repealed lies in the change in enterprise liability law over the past thirty years. Recent interpretations of common-law agency theories of respondeat superior,⁵ the creation and expansion of strict liability theories, and newer federal and state employee protection legislation have combined to create a climate in which employers are nearly always held financially liable for the actions of their employees, no matter how deliberate or how out of the control of the employers.⁶ Potential liability for their employees' *negligence* alone ought to be enough to prompt most modern employers to oppose drug legalization.

As Part III of this Article sets forth, the law in this area was not always so unsympathetic to employers. From its uncertain origins in Roman or Germanic law to the early English incarnations, the theory of respondeat superior was typically invoked to impose liability upon the master only for those acts of his servant that were commanded by him, or that were negligently performed by the servant in furtherance of the master's endeavors.⁷ In some exceptional cases the master would also be liable for the servant's intentional torts, but these were typically trespass

PAPERMAKER, Sep. 1993, at 65 (estimating substance abuse costs to American businesses at \$150 billion per year); Deanna Keleman, *How To Recognize Substance Abuse in the Workplace*, 56 SUPERVISION, Sep. 1995, at 3 (citing a study reporting that among 5,000 postal service job applicants, those who tested positive for drug use and were hired anyway missed 50 percent more time from work and had a 47 percent greater chance of being fired; further, quoting from a National Institute on Drug Abuse (NIDA) study that estimated that 10 percent of the workforce "suffers from a chemical dependency"); Paul Farrell, *Pass or Fail: Managing A Drug or Alcohol Testing Program for Commercial Drivers*, 43 RISK MGMT., May 1996, at 34 (citing a NIDA study that found that one or two of every ten Americans use illegal drugs).

⁵ Latin for "let the master answer." BLACK'S LAW DICTIONARY 1312-13 (6th ed. 1990) ("The doctrine or maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent.").

⁶ For a discussion of the development of the modern enterprise liability theories in the United States, see *infra* Part III.

⁷ In both Roman and early English law, there were also instances where the master was held liable by virtue of a nondelegable duty imposed by law. Traditionally, the only masters

or battery cases, and the servant had to be acting within the "scope of his employment;" that is, with the intent to serve the master.⁸

Unfortunately for employers, courts in the latter half of this century have expanded the application of respondeat superior to cover an employee's intentional torts and criminal acts (in addition to their negligent acts). As Part IV of the Article demonstrates, this has been a dramatic departure from the historical understanding of respondeat superior. When the policy arguments that traditionally supported respondeat superior are applied to the area of violent intentional torts or crimes of employees (such as theft, assault, rape or even murder) the justifications for imposing vicarious liability on employers completely break down, especially when applied to cases involving employees under the influence of drugs or alcohol.

This Article takes the position that the modern understanding of the proper scope of enterprise liability is based upon early twentieth century scholarly infatuation with communism and socialism—theories untested at the time, but which were nevertheless the latest rage in political thought, and which have been thoroughly debunked in the decades since. Obvious class envy, a longing for public control over the means of production and a visceral mistrust of the corporate form are all manifest in the writings of the early twentieth century legal scholars, who enthusiastically endorsed strict vicarious liability of the enterprise. As scholars, courts and legislators flocked to socialist legal theory, labor and employment laws saw dramatic changes, such as minimum wage laws and workers' compensation statutes. In the area of tort law, "privity of contract" was replaced by theories like strict liability, while respondeat superior was expanded to impose vicarious liability on the employer for the intentional torts of its employees. Interestingly, however, courts and commentators consistently denied critics' charges that the latest incarnations of respondeat superior were just thinly veiled attempts at pure "deep pocket" rationales.⁹ Since the purely socialist justifications for expanding the bases for enterprise liability were seldom expressly acknowledged as such, they have yet to be explicitly rejected.

It is not just the tort theories that pose a threat to the American enterprise's economic stability. Part V of the Article examines limits on the enterprise's ability to shield itself from liability for an employee's drug- or alcohol-induced negligence, intentional torts or crimes, specifically, legislation regulating drug testing in the workplace and legislation characterizing addiction as a disability legally protected from discrimina-

affected in this way were innkeepers, common carriers and persons handling fire. See *infra* note 69 and accompanying text.

⁸ See *infra* Part II.A and accompanying notes.

⁹ See *infra* notes 96, 119, 154 and accompanying text.

tion. For example, the recently-enacted Americans with Disabilities Act (ADA) contains provisions (and case law has provided interpretations) that characterize addiction to alcohol or drugs as a "disability" that employers must "reasonably accommodate" under the Act.¹⁰ Although employers are still relatively free to discharge an employee who is working under the influence of alcohol or drugs, employees frequently sue, claiming that such disciplinary action is discriminatory under the ADA. The question of whether legalization of currently illicit drugs would undermine an employer's existing right to test for these drugs goes unaddressed in the legalization literature.

Thus, even though most courts currently rule in favor of the employers in employee drug use cases,¹¹ the ADA still creates a counterintuitive incentive for employees to claim that their drug or alcohol problem is *more serious* than it otherwise may be. If an employee is merely a casual user, high on the job, she can be terminated; if she claims to be an addict, however, federal law protects her. Furthermore, legal scholars are beginning to complain that the purpose of the ADA is not fulfilled if employees can be disciplined for conduct that is "related" to their "disability."¹² These commentators have been successful before at persuading the courts to see things their way. If they succeed again, employers will be saddled with addicted employees whom they can neither trust with job duties, nor get rid of. The expenses of protracted lawsuits, unpredictable financial losses and inevitably inflated insurance costs associated with employee torts or crimes will become more costs of doing business to be passed along to the hapless consumer in the form of increased costs of goods and services.

It is the position of this Article that employers should fight vigorously *against* legalization of drugs until such time as agency and tort law have been substantially reformed to once again insulate employers from liability for the violent intentional torts and criminal acts of their employees, especially those committed by persons under the influence of alcohol or drugs.

I. THE ARGUMENTS IN FAVOR OF DRUG LEGALIZATION¹³ AND THE PROSPECTS FOR THE FUTURE

A. THE ARGUMENTS THEMSELVES

If one wants to assess the likelihood of legalization of marijuana, cocaine and/or heroin, one needs to be familiar with the arguments in

¹⁰ See *infra* Part III.B.1.

¹¹ See *infra* Part III.B

¹² See *infra* notes 352-54 and accompanying text.

¹³ The terms "legalization" and "decriminalization" actually have different meanings. "Legalization" usually implies a scheme whereby it is no longer a violation of law to

supporting legalization or decriminalization¹⁴ (The arguments *against* legalizing these drugs should be more obvious because they are embodied in the current drug policy, as fleshed out from time to time during political campaigns.¹⁵).

Familiarizing oneself with the arguments in favor of legalization not only gives one a sense of the persuasiveness (or lack thereof) of the rationales themselves, it also helps to clarify the point that many of the hidden costs of legalization would be disproportionately borne by the private sector. The public seems to be under the impression that those who want drugs to be legalized believe that drug abuse is a benign activity. This is inaccurate, and is a common misconception put forth by the anti-legalization forces. By and large, the writers in favor of legalization of illegal drugs concede that drug use is a social ill that calls for a cure.¹⁶ However, they stress that the proper societal response is to treat drug use and/or abuse as a public health problem, as opposed to a law enforcement

manufacture, sell and/or use drugs, subject to regulation, the content of which could vary widely. "Decriminalization," on the other hand, usually suggests the reduction or elimination of criminal penalties for possession of small amounts of otherwise illicit drugs for personal use. Advocates of legalization and/or decriminalization do not agree on which is preferable, or what scheme of government regulation would best accomplish their objectives. Since either legalization or decriminalization would result in the ability of individuals to possess and use drugs for individual use, there is no meaningful distinction between them for the purposes of this Article. Therefore, I use the terms interchangeably throughout the Article.

¹⁴ See, e.g., Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501 (1990); Mark A. R. Kleiman & Aaron J. Saiger, *Drug Legalization: The Importance of Asking the Right Question*, 18 HOFSTRA L. REV. 527 (1990); Gregory A. Loken & James Kennedy, *Legal Cocaine and Kids: The Very Bitterness of Shame*, 18 HOFSTRA L. REV. 567 (1990); James Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 HOFSTRA L. REV. 607 (1990); Henk Jan van Vliet, *The Uneasy Decriminalization: A Perspective on Dutch Drug Policy*, 18 HOFSTRA L. REV. 717 (1990); Steven Jonas, *Solving the Drug Problem: A Public Health Approach to the Reduction of the Use and Abuse of Both Legal and Illegal Recreational Drugs*, 18 HOFSTRA L. REV. 751 (1990); Michael Z. Letwin, *Report from the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate*, 18 HOFSTRA L. REV. 795 (1990); Mark H. Moore, *Drugs: Getting A Fix on the Problem and the Solution*, 8 YALE L. & POL'Y REV. 8 (1990); Stephen J. Schulhofer, *Solving the Drug Enforcement Dilemma: Lessons From Economics*, 1994 U. CHI. LEGAL F. 207 (1994); Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483 (1997); Symposium, *The War on Drugs is Lost*, NAT'L REV., Feb. 12, 1996, at 34; Symposium, *Save Money, Cut Crime, Get Real*, PLAYBOY, Jan. 1, 1997, at 188.

¹⁵ For those who would like a simple statement of the arguments against legalization, few are as succinct as John Lawn, former Administrator of the United States Drug Enforcement Administration, 1985-1990. "Drugs are not bad because they are illegal; they are illegal because they are bad." John C. Lawn, *The Issue of Legalizing Illicit Drugs*, 18 HOFSTRA L. REV. 703 (1990).

¹⁶ As with many other aspects of this debate, however, libertarian commentator Thomas Szasz runs counter even to unconventional views. See Szasz, *supra* note 3, at 45 ("William Bennett is right: Drug use and drug control are primarily moral issues. But whereas Bennett sees self-medication as wicked and drug criminalization as virtuous, I see self-medication as a basic human right (with unqualified responsibility for its consequences) and drug criminalization as sinful (hypocritical and unenforceable).").

problem.¹⁷ The problem, they would agree, is that our current stated national policy of "zero tolerance," including criminalization of the use and abuse of drugs, is not only unsuccessful in curbing the use of drugs, but it has also created a host of social problems worse than drug use itself.¹⁸

The arguments in favor of drug legalization can be broken down into nine basic points:

- 1) Our current policy regarding illegal drugs is hypocritical;
- 2) Marijuana, cocaine and heroin are neither more addictive nor more lethal than alcohol and tobacco—two legal drugs;
- 3) Because humans have used psychoactive substances for millennia, it is impossible and unrealistic to aspire to a completely "drug-free" society;
- 4) As evidenced by alcohol Prohibition in the 1920s, previous attempts to criminalize drug use have failed;
- 5) The ills caused by drug use and abuse are significantly less serious than those caused by criminalizing drugs, most notably the creation of a "black market" in illegal drugs, with all that entails;
- 6) The War on Drugs has ended or ruined the lives of drug dealers, drug users, law enforcement personnel and thousands of innocent parties;
- 7) Most people who try or use illegal drugs do not become addicts;
- 8) Drug addicts suffer from a disease; and
- 9) Decriminalization would free up literally hundreds of millions of dollars in public funds that could be more effectively used to pay for education and treatment of drug users, as well as negative advertising to discourage future drug use (just as has been done with cigarette smoking and drunk driving).

¹⁷ See, e.g., Schmoke, *supra* note 14, at 501 ("[D]rug addiction is a disease, and addicts need medical care."); Jonas, *supra* note 14, at 787 ("[T]he program promoted by this Article . . . is founded on the concept that the *misuse* of recreational drugs is a *health* problem and that only criminal *behaviors* resulting from the misuse of the recreational drugs should be handled by the criminal justice system."); Luna, *supra* note 14, at 525 ("Drug abuse looks and sounds like a medical, public-health problem.")

¹⁸ See, e.g., Luna, *supra* note 14, at 490-95 (citing, among other authorities, H. WAYNE MORGAN, *DRUGS IN AMERICA: A SOCIAL HISTORY, 1800-1983*, 93-94 (1981):

The Near Easterner had symbolized apprehensions about the adverse personal and social effects of cannabis use. Stereotypes of the Chinese had summarized fears about the social dangers of opium smoking. In decades to come, the Mexican and marijuana, and the African-American or Puerto-Rican and heroin would figure in the debate. This imagery revealed apprehension about these ethnic groups and a desire to control their behavior or isolate them).

DAVID T. COURTWRIGHT, *DARK PARADISE OPIATE ADDICTION IN AMERICA BEFORE 1940*, 64 (1982).

1. *Legalization Rationale Number 1: The Current Policy Vis-à-Vis Illegal Drugs Is Hypocritical.*

Pro-legalization forces point out that alcohol and tobacco, two very powerful and very addictive drugs, are legal and are used as recreational drugs by millions of Americans every day.¹⁹ The hypocritical policy of legalizing some potentially dangerous drugs and not others has resulted in at least two problems with the public perception of drugs. First, the arbitrary policy creates the factually false idea in the public's mind that there are meaningful pharmacological differences between legal drugs and illegal drugs.²⁰ Second, the policy sends the message that certain forms of recreational drug use (smoking and drinking) are fun, glamorous, and sexy, while illegal drug use is per se dangerous, degrading, debilitating and sinful—even evil. For while there are legitimate arguments to be made in favor of criminalizing the use of some drugs as opposed to others, relying merely on the distinction between “legal” and

¹⁹ See, e.g., Schmoke, *supra* note 14, at 520 & n.114 (“[W]ith the exception of taxes and labeling, cigarettes are sold almost without restriction. Cigarettes are cheap, widely available and widely advertised except on television. Despite their highly addictive nature, they are not even classified as a drug.”) (citing 21 U.S.C. § 802(6) (1988)), which exempts tobacco from the definition of “controlled substance” as that term is used in the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended in various sections of U.S.C. Titles 18, 19, 21, 26, 31, 40, 42, 46 and 49)); see also Kleiman & Saiger, *supra* note 14, at 545 & nn.106-08.

Regulations governing alcohol, the nation's premier recreational psychoactive, are fantastically permissive, measured against either the rules for other drugs or benefit-cost criteria. Alcohol is a very dangerous drug. Had Congress failed to specifically exempt it from the provisions of the Controlled Substances Act, it could be placed along with marijuana and heroin in Schedule I, as a psychoactive with no accepted medical use and great potential for harm.

Id. (citing The Controlled Substances Act, 21 U.S.C. § 801-917 et. seq. (1988); 15 U.S.C. § 812(b)(1) (1988); *Secretary of Health and Hum. Services., U.S. Dep't of Health & Hum. Services, Sixth Special Report to the U.S. Congress on Alcohol and Health*, S. REP. NO. 101-43, at 24 (1987) [hereinafter *Sixth Special Report*]).

²⁰ See, e.g., Kleiman & Saiger, *supra* note 14, at 539.

Alcohol and tobacco, like marijuana and heroin, are drugs with significant costs of abuse and costs of control. Tobacco is an important special case: addictive and health damaging. But the rhetoric of the ‘war on drugs’ attempts to obscure this fact, as if there were chemical categories of ‘legal’ and ‘illegal’ drugs.

Id.; Jonas, *supra* note 14, at 753 n.13.

The ‘good,’ or at least the ‘OK,’ drugs are those which are currently legal, while the ‘bad’ drugs, those which are the sole cause of ‘The Drug Problem,’ are those which are currently illegal. However, there are no scientific, epidemiological or medical bases on which the legal distinctions among the various drugs are made.

Id. (citing E. BRECHER & THE EDITORS OF CONSUMER REPORTS, LICIT AND ILLEGAL DRUGS: THE CONSUMERS' UNION REPORT ON NARCOIICS, STIMULANTS, DEPRESSANTS, INHALANTS, HALLUCINOGENS, AND MARIJUANA - INCLUDING CAFFEINE, NICOTINE, AND ALCOHOL, 525-26 (1972), which Jonas characterizes as a “landmark of rationality in the study of the history of American drug policy.”e).

“illegal” drugs significantly undermines the credibility of the current policy because it is factually untenable political propaganda.

2. *Legalization Rationale Number 2: Marijuana, Cocaine and Heroin Are No More Addictive or Lethal than the Two Most Popular Legal Recreational Drugs—Alcohol and Tobacco.*

As a corollary to rationale number one, explained above, pro-legalization advocates also maintain that marijuana, cocaine, and heroin are no more lethal than alcohol or tobacco. In fact, many writers persuasively argue that alcohol and tobacco are *more* dangerous than marijuana, cocaine and heroin.²¹ This second rationale is advanced primarily by comparing the total number of annual deaths attributable to the use of alcohol and/or cigarettes to that attributable to marijuana, cocaine or heroin.²² However, the obvious response to this argument is that a higher death rate is attributable to alcohol and tobacco use because they are legal drugs.

Perhaps anticipating this response, the advocates of legalization also provide evidence that marijuana, cocaine and heroin are not as addictive as alcohol or tobacco, even if one merely looks *proportionately* (as op-

²¹ See, e.g., Schmoke, *supra* note 14, at 520 & n.107 (“In 1985 alone, approximately 390,000 people died from tobacco related diseases.”) (citing Richard Berke, *U.S. Report Raises Estimate of Smoking Toll*, N.Y. TIMES, Jan. 11, 1989, at A20); *Id.* at 521 & n.120 (“Alcohol, like tobacco, is also a drug that kills thousands of people each year. Alcohol plays a part in approximately 25,000 automobile fatalities annually, is frequently involved in suicides, non-automobile accidents, and crimes of violence.”) (citing *Sixth Special Report, supra* note 19, at 12; NATIONAL COUNCIL ON ALCOHOLISM, INC., *FACTS ON ALCOHOLISM AND ALCOHOL RELATED PROBLEMS* (1987) [hereinafter *FACTS ON ALCOHOLISM*]); Kleiman & Saiger, *supra* note 14, at 546.

Heavy chronic alcohol use is associated with a wide variety of diseases, and alcohol has been estimated to cause approximately twenty thousand excess disease deaths per year. More than one-third of all crime leading to state prison sentences is committed under the influence of alcohol, as is an even greater proportion of domestic assault, sexual assault and the physical and sexual abuse of children . . .

Id. (citing 1986 BUREAU OF JUST. STAT., U.S. DEP’T. OF JUST., *CORRECTIONAL POPULATIONS IN THE UNITED STATES* 39; Clare Jo Hamilton & James J. Collins, *The Role of Alcohol in Wife Beating and Child Abuse: A Review of the Literature*, in *DRENKING AND CRIME PERSPECTIVES ON THE RELATIONSHIP BETWEEN ALCOHOL CONSUMPTION AND CRIMINAL BEHAVIOR* 253-67 (James J. Collins ed., 1981)); see also Ostrowski, *supra* note 14, at 658-59 (citing *Sixth Special Report*); Jonas, *supra* note 14, at 765 (“Cigarette smoking causes about 400,000 deaths per year.”) (citing CENTERS FOR DISEASE CONTROL, U.S. DEP’T HEALTH AND HUM. SERVICES, *REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL*, at v (1989)). Note that these writers (and others) also distinguish between drug related deaths attributable solely to the use of the drugs themselves (so-called “pharmacological” deaths) and those attributable to criminalization and prohibition, such as deaths caused by tainted or adulterated drugs, or the spread of HIV/AIDS caused by sharing dirty needles.

²² See *supra* note 21.

posed to sheer numbers) among those who have "ever used" any of the five recreational drugs.²³ Unlike raw numbers, data that compares the *percentage* of those who become addicted to marijuana, cocaine or heroin among those who have ever used the drugs tends to buttress legalization advocates' argument that alcohol and cigarettes are actually more addictive because a much larger proportion of those who have "ever used" alcohol or tobacco become addicted.

3. *Legalization Rationale Number 3: The Use of Intoxicating Substances Is So Deeply Ingrained in Human Culture that Attempts to Completely Rid Society of These Substances Are Destined to Fail.*

The "zero tolerance" approach to recreational use of psychoactive substances, the argument goes, is unrealistic and destined to fail. Some scholars point out that while cultural tolerance for the use of drugs has varied, humans have been using psychoactive substances for thousands of years. Quoting from a text entitled "Heroin and Politicians," Dr. Steven Jonas writes:

Throughout history man has used available psychoactive substances . . . to receive pleasure or to achieve new experiences. [Furthermore,] [t]he use of mind-altering drugs and drug-induced behavior is a common thread in the social fabric of humanity. For thousands of years people have taken drugs to alter mood, relax, feel better,

²³ See, e.g., Jonas, *supra* note 14, at 764-65.

According to the Surgeon General's Report on nicotine addiction, "[t]he pharmacological and behavioral process that determine [sic] tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine." Despite that fact, cigarette tobacco is much more addicting than either alcohol or crack-cocaine. While heroin is ordinarily thought of as a highly addictive drug, some authorities state "that a great many heroin users have developed stable, non-addictive patterns of occasional use . . . over long periods of time. . . . A commonly held view in the media is that crack is a particularly addicting drug. According to the NIDA data, however, crack is not 'highly addictive.'"

Id. (citing, among other authorities, Dr. Jack Henningfield of the Addiction Research Center of Baltimore, whose research showed that nine out of ten people who tried cigarettes became addicted, as compared with one in six persons who tried cocaine or one in ten who tried alcohol); see also *id.* at 792. Jonas breaks down the use of thirteen types of legal, prescription and illegal drugs by number and percentage of persons in three age groups who have "ever used" each drug, versus those in the same age groups who still use the drug. See *id.* at Appendix I. For marijuana, cocaine and heroin, fewer than half of those who "ever used" the drug still described themselves as "current users." For alcohol and cigarettes, however, 85 and 75 percent, respectively, of the entire population reported having "ever used" the drugs, and 53 and 29 percent, respectively, of those who ever used alcohol or cigarettes still described themselves as "current users." *Id.*

feel different, escape and avoid pain. . . . Records show that narcotics have been used for at least 8,000 years.²⁴

Therefore, given the seemingly innate human craving for mind-altering substances and the desperate need at times to relieve physical pain or emotional misery, a more practical goal than eliminating drug use altogether is *reducing* the use of drugs with a dangerous potential for addiction, and *minimizing* the possibility of harm to or by those who use psychoactive substances (including alcohol, tobacco and prescription medications).²⁵

4. *Legalization Rationale Number 4: Previous Attempts to Criminalize Intoxicants in the United States—Most Notably Alcohol Prohibition—Failed.*

Legalization advocates further argue that criminalizing psychoactive substances produces social evils far worse than the intoxication or addiction itself. They point to historical precedent to bolster their argument.²⁶

The first (and best known) true attempt by the federal government to control narcotics was the passage of the Eighteenth Amendment to the United States Constitution, forbidding the manufacture and sale of alcohol, and ushering in what has come to be known as Prohibition.²⁷ Despite broad public support for Prohibition as a policy,²⁸ Americans grew weary of the turmoil and upheaval associated with law enforcement efforts to effectuate Prohibition, and thirteen years after its enactment, the

²⁴ *Id.* at 756 (quoting from D. BELLIS, *HEROIN AND POLITICIANS* 3 (1981)); see also Luna, *supra* note 14, at 486 (“‘For most of human history,’ remarked historian Stanton Peele, ‘even under conditions of ready access to the most potent of drugs, people and societies have regulated their drug use without requiring massive education, legal and interdiction campaigns.’”) (citing Loren Siegel, *Decriminalize Drugs Now: Even Some Conservatives Agree That It’s Not as Dumb an Idea as It Sounds* 57 (Jan. 1989) (unpublished manuscript on file with author)).

²⁵ See, e.g., Jonas, *supra* note 14, at 783.

What then should the primary goal of our national drug policy be? Very simply, it should be to reduce and control the use of all the recreational mood-altering drugs in order to provide for their safe, pleasurable use, consistent with centuries-old human experience, while minimizing their harmful effects on individuals, the family, and society as a whole.

Id.

²⁶ See, e.g., Luna, *supra* note 14, at 486-512; Schmoke, *supra* note 14, at 507-10; Ostrowski, *supra* note 14, at 641, 645-46; Jonas, *supra* note 14, at 760-61; see also S. WISOTSKY, *BREAKING THE IMPASSE ON THE WAR ON DRUGS* 9-10 (1986).

²⁷ U.S. CONST. amend. XVIII (repealed 1933).

²⁸ See Loken & Kennedy, *supra* note 14, at 569 (“Sixty years ago the adherents of Prohibition swept the 1928 elections, winning some 80 percent of Congressional races . . .”) (citing Aaron & Musto, *Temperance and Prohibition in America: A Historical Overview*, in *ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION* 127, 171 (Mark Moore & Dean R. Gerstein eds., 1981)).

Eighteenth Amendment was repealed by the passage of the Twenty-First Amendment.²⁹ Prohibition was dead.

Not everything about Prohibition was a disaster. Some commentators defend Prohibition by identifying contemporaneous decreases in diseases and deaths associated with alcohol abuse.³⁰ However, drug-related violence increased during Prohibition:

There can be little doubt that most, if not all, "drug-related murders" are the result of drug prohibition. The same type of violence came with the eighteenth amendment's ban of alcohol in 1920. The murder rate rose with the start of Prohibition, remained high during Prohibition, then declined for eleven consecutive years after Prohibition In 1933, the last year of Prohibition, there were 12,124 homicides; 7,863 resulted from assaults with firearms and explosives. By 1941, these figures had declined to 8,048 and 4,525, respectively.³¹

5. *Legalization Rationale Number 5: Criminalization of Marijuana, Cocaine and Heroin Has Created a "Black Market" That Has Devastated Our Inner Cities.*

This is unquestionably the most compelling of all the arguments offered in support of legalization or decriminalization. Indeed, this rationale forms the backbone of the argument for most pro-legalization writers. They maintain that many—if not most—of the ills that we associate with illegal drugs are attributable not to drug *use* (or even abuse) per se, but to the black market created by the War on Drugs.³² Advocates of legalization take the position that a certain amount of demand for

²⁹ U.S. CONST. amend. XXI.

³⁰ See, e.g., Lawn, *supra* note 15, at 703 ("During Prohibition in the 1920's, alcohol-related mental and physical illness declined dramatically.") (citing *Legal or Not, Drugs Kill*, N.Y. TIMES, May 26, 1988, at A34).

³¹ Ostrowski, *supra* note 14, at 641-42 & nn.157-60 (citations omitted); BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, *BICENTENNIAL ED., HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, PART I* 414 (1975). "The murder and assault rates had been rising even before Prohibition. Nevertheless, during Prohibition, [v]iolence was commonplace in establishing exclusive sales territories, in obtaining liquor, or in defending a supply." D.E. KYVIG, *REPEALING NATIONAL PROHIBITION* 27 (1979). While there is no comprehensive study of prohibition-era violence, it is reported that there were more than 1,000 gangland murders in New York City alone during Prohibition. See *id.* Another writer estimates that between two and three thousand people died during law enforcement raids, auto chases, and arrests, casualties which would not show up in murder statistics. See H. LEE, *HOW DR Y WE WERE PROHIBITION REVISITED* 8 (1963).

³² See, e.g., Schmoke, *supra* note 14, at 505-06; Ostrowski, *supra* note 14, at 647; Luna, *supra* note 14, at 517; see also Ethan Nadelmann, *The Case for Legalization*, PUB. INTEREST, Summer 1988, at 6 ("[M]any of the drug-related evils that Americans identify as part and parcel of the 'drug problem' are in fact caused by our drug-prohibition policies.").

intoxicating substances will remain constant, regardless of criminalization.³³ That being the case, as with alcohol Prohibition in the 1920s, the consistent demand and constricted supply create a black market in these drugs, driving the prices so high that it is inevitable people will get into the business of buying and selling illegal drugs, notwithstanding the risks of imprisonment or death attendant with every transaction. Erik Luna has the following to say:

So, how do you create a black market, anyway? It is actually quite simple, as Baltimore mayor Kurt Schmoke asserted before a congressional committee: "The black market is a result of the manufacture and sale of [drugs] being criminalized[;] profits from drug sales are enormous because the substances cannot be obtained legally." In general, a successful underground market requires only a few elements. First, a heavily demanded product must be banned by the government—narcotics and their criminalization certainly suffice. Second, there must be an ample supply of the product to meet the consumer's demand. . . . Third, suppliers must be guaranteed a profit margin commensurate with the "costs" accompanying prohibition. . . . The income from illicit drug trafficking . . . is more than commensurate with these costs [T]he gross profits are simply astonishing—billions of dollars in untaxed proceeds.³⁴

With the black market comes the litany of social crises that we have come to associate with illegal drug use in our inner cities (and, increasingly, in suburban and rural areas as well):

(a) inflated prices caused by the black market that drive drug users to commit crimes to support their habits;³⁵

³³ See *supra* notes 24-25 and accompanying text.

³⁴ Luna, *supra* note 14, at 512-13 (citing SELECT COMM. ON NARCOTICS ABUSE AND CONTROL, 101ST CONGRESS, LEGALIZATION OF ILLICIT DRUGS: IMPACT AND FEASIBILITY (A REVIEW OF RECENT HEARINGS) 11 (Comm. Print 1989) (summary of testimony of Baltimore Mayor Kurt Schmoke)); see also Nadelmann, *supra* note 32, at 13 ("As was the case during Prohibition, the principal beneficiaries of current drug policies are the new and old organized-crime gangs."); Schmoke, *supra* note 14, at 505 ("What prohibition has accomplished has been to ignore the addicts' need for medical treatment while making the illicit drug trade a multi-billion-dollar business.").

³⁵ See, e.g., Schmoke, *supra* note 14, at 512-13 & n.68; Ostrowski, *supra* note 14, at 647 & n.195; Letwin, *supra* note 14, at 812 & n.103.

(b) neighborhoods turned into war zones when armed gangs compete to hold on to their "turf" (lucrative segments of the drug market), and the resulting loss of life in these war-torn neighborhoods;³⁶

(c) youth lured from school and low-paying, entry-level jobs to the high-paying, high-stakes world of drug dealing (Commentators insist that it will be impossible to keep young people from economically-impo- verished backgrounds out of the illegal drug market, in light of the speed with which they can make staggering profits and the status attached to that sort of income.);³⁷

(d) overdoses and deaths from street sales of drugs tainted, "cutl' or "lacedl' with impurities (If drugs were legalized, advocates claim, regula- tion and information would reduce or eliminate the number of drug over- doses and deaths attributable to adulterated drugs, whose content and purity would be assured by governmental standards, much as prescription drugs are regulated today.);³⁸

(e) hundreds of millions of public dollars annually devoted to arrest, prosecution and imprisonment of individuals for possession, use or sale of relatively small amounts of illegal drugs (These are dollars and man- hours and prison cells that could be devoted to serious criminals who commit violent crimes: kidnapping, rape, armed robbery, murder and the like.);³⁹

(f) the spread of AIDS and other diseases from sharing dirty needles;⁴⁰

(g) thousands of addicted individuals who do not seek treatment for fear of legal reprisals, or because of budget cuts affecting treatment facilities;⁴¹

(h) loss of drugs for legitimate medical purposes;⁴²

(i) corruption of law enforcement personnel (The promise of easy profit often seduces police officers, detectives, federal agents and others involved in law enforcement.);⁴³ and

³⁶ See, e.g., Luna, *supra* note 14, at 517; Schmoke, *supra* note 14, at 516 & n.81; Os- trowski, *supra* note 14, at 641, 649-50; Moore, *supra* note 14, at 8.

³⁷ See, e.g., Luna, *supra* note 14, at 517; Schmoke, *supra* note 14, at 516 & n.82; Klei- man & Saiger, *supra* note 14, at 528 & n.6; Ostrowski, *supra* note 14, at 649, 666; Letwin, *supra* note 14, at 813-14.

³⁸ See, e.g., Luna, *supra* note 14, at 539; Ostrowski, *supra* note 14, at 652-54; Letwin, *supra* note 14, at 813 & n.109.

³⁹ See, e.g., Schmoke, *supra* note 14, at 513 n.69, 514; Ostrowski, *supra* note 14, at 656- 57 & n.232, 662-63 & n.258.

⁴⁰ See, e.g., Luna, *supra* note 14, at 523; Schmoke, *supra* note 14, at 516-17; Letwin, *supra* note 14, at 812 & n.105; Moore, *supra* note 14, at 9.

⁴¹ See, e.g., Letwin, *supra* note 14, at 821-27.

⁴² See, e.g., Ostrowski, *supra* note 14, at 652-53.

⁴³ See, e.g., *id.* at 663-64.

(j) the continuing encroachment on our civil liberties.⁴⁴

Proponents of legalization or decriminalization insist that the playing field be level. In order to meaningfully compare "legal" drugs with "illegal" drugs, one must look only to the disease or mortality rate associated with use of the drugs and should not look at the host of other problems caused by criminalization of drugs, such as the creation of the black market. Advocates argue that when the above issues are taken out of the mix, marijuana, cocaine and heroin are neither more addictive nor more deadly than tobacco or alcohol.

6. *Legalization Rationale Number 6: The "War on Drugs" Has Also Taken the Lives of Thousands of Innocent Bystanders.*

Each week, newspapers in most of the major cities in the United States detail the deaths of innocent bystanders who are caught in the cross-fire. They are in the wrong place at the wrong time—a place which often happens to be the neighborhood in which they live.⁴⁵ Our culture is forever deprived of whatever contributions these individuals would have made had they not been drawn into the deadly netherworld of drug dealing.

7. *Legalization Rationale Number 7: Most People Who Use Marijuana, Cocaine or Heroin Do Not Become Addicts.*

Disputing the prospect of increased levels of addiction is essential to refuting the claims of legalization opponents, since many emphasize the public health implications of legalization.⁴⁶ The position taken by advocates of legalization tends to be supported by three statements:

(a) studies in places that have legalized or decriminalized drugs demonstrate that there are no dramatic increases in addiction;

⁴⁴ See, e.g., *id.* at 664-66; Letwin, *supra* note 14, at 817-19.

⁴⁵ See, e.g., Schmoke, *supra* note 14, at 506 n.23.

Due to escalating drug-related crime, more than a dozen major cities in the United States now have so-called 'war-zones,' which are: 'places where drug dealers shoot it out to command street corners, where children grow up under a reign of 'narcoterror' and civil authority has basically broken down . . . where the level of concentrated violence has risen so high that city services barely function, not simply because workers and administrators blatantly redline the areas as in the past or for lack of resources, but also out of well-grounded fear for their lives.'

Id. (citing Moore, *Dead Zones*, U.S. NEWS & WORLD REP., Apr. 10, 1989, at 22); see also *id.* at 515-16; Letwin, *supra* note 14, at 805-06 n.69 (citing numerous newspaper articles detailing deaths attributable to drug-war violence).

⁴⁶ See, e.g., Kleiman & Saiger, *supra* note 14, at 531-32 ("[T]he argument between advocates and opponents of legalization involves different predictions about the results of alternative policies and different value weightings of those results. For example, legalizers are likely to stress crime reduction, whereas prohibitionists would emphasize the protection of users' health.") (citations omitted).

(b) dramatic increases in addiction are a function of social factors other than drug use itself, such as socioeconomic class or the absence of one or both parents in the home; and

(c) repeated attempts to show that "soft" drugs, like marijuana and hashish, are "gateways" to "harder" drugs like cocaine or heroin have failed.

(a) Studies in places that have decriminalized drugs do not show an increase in the amount of addiction.

There are, admittedly, very few places that have tried decriminalization or legalization. Most studies therefore focus on the experiences of the Netherlands which has experimented with limited decriminalization.⁴⁷ The Netherlands has drawn fierce criticism for its decriminalization of so-called "soft" drugs (marijuana and hashish) in the approximately twenty years since the Dutch government implemented the policy.⁴⁸ The country's critics have included the United States, which protests that the Netherlands' decriminalization policy threatens the fulfillment of its international treaty obligations.⁴⁹

In spite of the increasing pressure on the Netherlands to conform their internal law to that of other western countries, statistics from the Dutch experiment with decriminalization of "soft" drugs, coupled with its public health approach to the use of harder drugs, suggest that increased addiction to—indeed, increased use of—drugs is not a necessary result of decriminalization. Author, lawyer and consultant Henk Jan van Vliet explains:

[From about 1980 to 1990] the number of drug addicts has stabilized at an estimated 15,000 to 20,000; the average age of addicts in Amsterdam . . . has increased from twenty-six in 1981 to thirty in 1987, whereas the number of addicts under twenty-two decreased from fourteen

⁴⁷ See van Vliet, *supra* note 14, at 717; Lane Porter, *Comparative Drug Treatment Policies and Legislation*, 29 INT'L LAW. 697 (1995).

⁴⁸ See, e.g., Porter, *supra* note 47, at 709 (discussing the Opium Act, to which the Netherlands became a signatory in 1928); ACR OF 18 MAY 1928 (Bulletin of Acts, Orders and Decrees) No. 167. The Netherlands revised this Act in 1976 to reduce the penalties for possession of cannabis, although trafficking in "soft" drugs still remains an offense punishable by the Dutch government. See ACR OF 1 NOVEMBER 1976, S. 425. The 1976 reform reduced the possession of approximately one ounce of marijuana or hashish from an "offense" to a misdemeanor, with *maximum* penalties of one month in prison and/or a fine of 500 DF. In addition, the "expediency principle" of Dutch criminal law empowers its criminal prosecutors to refrain from prosecuting crimes "on grounds derived from the public interest." As a practical matter, this has meant that possession of small amounts of marijuana or hashish is lowest on the level of criminal prosecution priorities, and almost never prosecuted. See van Vliet, *supra* note 14, at 731.

⁴⁹ See van Vliet, *supra* note 14.

percent to five percent over the same period. The Dutch numbers of drug-related deaths are the lowest of all European countries.⁵⁰

Furthermore, with respect to marijuana use itself, a report from 1988 stated that the number of new users of marijuana had decreased since the 1976 decriminalization, and that only approximately four percent of Dutch youth between ten and eighteen years old had tried marijuana. Of that four percent, over fifty-five percent had ceased to use marijuana by their nineteenth birthdays.⁵¹ Van Vliet also observes that "the total number of soft drug users in the Netherlands [in 1989] is estimated at about 300,000, which is two percent of the total population."⁵²

- (b) Addiction and drug-related violence are more a function of social factors, such as socioeconomic class or the absence of one or both parents, than of drug use itself.

Advocates maintain that legalization or decriminalization will not result in dramatic increases in addiction or addiction-related crime because the available data suggests that social factors, rather than the pharmacological qualities of the drugs themselves, are more accurate predictors of addiction and drug-related crime:

This point can be illustrated by a thought experiment. If a hundred nuns and a hundred congressmen smoked crack, how many would become violent and murder someone? Most reasonable people would answer none. In fact, there is a dearth of evidence that wealthy persons or physicians become violent after using cocaine, although many thousands of them have used the drug As Stanton Peele writes, "it is a mark of naivete—not science—to mistake the behavior of some drug users with the pharmacological effects of the drug, as though the addictive loss of control and crime were somehow chemical properties of the substance."⁵³

⁵⁰ *Id.* at 728 (citations omitted). Van Vliet also writes that some studies indicate that the number of Dutch heroin addicts would actually be decreasing, but for a constant dribble of immigrant addicts, who have fled to the Netherlands to escape harsh drug laws in their home countries, such as Germany and Surinam. *See id.* at 742.

⁵¹ *See id.* at 737 (quoting from Ruter, *The Pragmatic Dutch Approach to Drug Control: Does it Work* (1988), at 521 (transcript of lecture sponsored by The Drug Policy Foundation, May 25, 1998, Washington, D.C.) (citation omitted)).

⁵² *Id.* (citing W. DE ZWART, *ALCOHOL, TABAK EN DRUGS IN CIFERS [ALCOHOL, TOBACCO AND DRUGS IN FIGURES]* 50 (1989)).

⁵³ Ostrowski, *supra* note 14, at 621 (quoting from Stanton Peele, *Does Drug Addiction Excuse Thieves and Killers from Criminal Responsibility?* in *DRUG POLICY 1989-1990: A REFORMER'S CATALOGUE* 204 (A. Trebach & K. Zeese eds., 1989)).

One could argue that even the data presented by opponents of legalization support this conclusion. In their article entitled *Legal Cocaine and Kids: The Very Bitterness of Shame*, legalization opponents Gregory A. Loken and James Kennedy offered the following information, based upon their experience with Covenant House, a nationwide shelter for abused, homeless and runaway youth:

In the seven North American cities where Covenant House currently operates shelter programs, 61% of our clients are male, 54% are aged eighteen to twenty, and 62% are black, [H]ispanic or Native American. Their families are rarely intact and only a small minority can realistically return home. Indeed, many have long histories in foster care. . . . [I]n 1984, a study of runaway and homeless youth in New York City revealed that 82% . . . could be considered to have a "significant psychiatric disability" and that three in ten had previously attempted suicide. . . . The invention of "crack" in 1985 brought the street price of a powerful dose of cocaine to \$10 or less, well within the reach of street kids. As a result, abuse of cocaine has soared among Covenant House clients.⁵⁴

- (c) There is no concrete proof that use of "soft" drugs leads to the use of "harder" drugs.

As a preliminary matter, some legalization advocates resurrect the "hypocrisy" argument, pointing to studies that claim that alcohol and tobacco could be construed as "gateway" drugs as much as marijuana could be.⁵⁵ Secondly, they emphasize that no studies have definitively shown that use of hard drugs is initiated by the use of "softer" ones; instead, they maintain that other factors contribute to a person's desire for mood-altering substances with stronger pleasurable effects.⁵⁶

⁵⁴ Loken & Kennedy, *supra* note 14, at 572-74 (citations omitted).

⁵⁵ See, e.g., Jonas, *supra* note 14, at 771 (citing Casement, *Alcohol and Cocaine*, 11 ALCOHOL HEALTH & RES. WORLD 18 (1987); ARNOLD TREBACII, *THE GREAT DRUG WAR* 82 (1987)).

⁵⁶ See *id.* ("[I]t is only logical to assume that persons who derive one kind of a pleasant mood-alteration from a given drug, may it in the first instance be alcohol or tobacco, will be interested in trying other drugs to experience their different pleasurable effects.") (citations omitted).

8. *Legalization Rationale Number 8: Drug Users Who Do Become Addicted Are Suffering From a Disease.*

Medical and psychological professionals have known for nearly a century that addiction is a physical problem—a *disease*.⁵⁷ Therefore, it seems absurdly cruel, not to mention ineffectual, to treat drug addiction as if it were a law enforcement problem, instead of a public health problem. To treat drug addiction as a law enforcement problem is to assume that refusing to use drugs is a matter of will, and that government-imposed sanctions can strengthen one's will. Reports of the American Medical Association refute the assumption that a fear of punishment can deter drug use.⁵⁸

Advocates of legalization therefore insist that faith in government prohibition is not borne out, either by medical science or practical reality. For drug users who are physically addicted, it is not a simple matter of "will" to discontinue use of drugs. Furthermore, the current high level of experimentation with illegal drugs suggests that imprisonment and the prospect of becoming addicted do not provide a powerful disincentive for those who are trying drugs for the first time.

In light of medical realities, pro-legalization writers protest that the proper societal response is to ignore casual use, to treat addiction as the medical problem that it is and to cease diverting billions of dollars towards ineffective law enforcement.⁵⁹ The funds would be much better spent, they argue, in the prevention and prosecution of crimes that are matters of will—such as murder, rape, robbery, and the like—and that will, presumably, be deterred by threat of government punishment.⁶⁰

⁵⁷ In fact, even the federal government recognizes that addiction is a disease. See The Controlled Substances Act, 21 U.S.C. § 802 (1) (1988), which defines an "addict" as " . . . an individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." (emphasis added).

⁵⁸ See Schmoke, *supra* note 14, at 510-11.

Our current drug policy is self-defeating and destined to fail for precisely the reasons suggested by *American Medicine* in 1915. Addiction is a disease. The American Medical Association ("AMA") stated: "it is clear that addiction is not simply the product of a failure of individual willpower . . . [i]t is properly viewed as a disease, and one that physicians can help many individuals control and overcome."

Id. (citing AMERICAN MEDICAL ASS'N, REPORT NNN OF THE BOARD OF TRUSTEES, DRUG ABUSE IN THE UNITED STATES: A POLICY REPORT 241 (1988)).

⁵⁹ See Schmoke, *supra* note 14; Ostrowski, *supra* note 14; Kleiman & Saiger, *supra* note 14; Jonas, *supra* note 14.

⁶⁰ See *supra* note 59.

9. *Legalization Rationale Number 9: Legalizing Marijuana, Cocaine and/or Heroin Would Free Up Valuable Public Resources.*

It is difficult to calculate the cost of the War on Drugs with any reliability, but all writers place the annual figures in the tens of billions of dollars (including the costs of the Drug Enforcement Agency, the courts, the police and other state and federal law enforcement efforts). Some writers have placed their annual estimates at nearly \$100 billion, taking into account federal and state expenditures, and such intangibles as lost lives and lost profitability.⁶¹

Writers favoring decriminalization or legalization argue that these expenditures have increased every year since the federal government entered the business of criminalizing the use of psychoactive substances shortly after the turn of the century. Therefore, advocates maintain, the federal and state criminal justice systems should abandon their fruitless and exorbitant efforts to solve the problem of drug use and abuse through the mechanism of law enforcement, and should confine themselves to preventing and prosecuting violent crimes. The savings, which some writers estimate, would run into the tens of billions per year, could be funneled into existing and new treatment programs and educational campaigns.⁶²

B. THE PROSPECTS FOR LEGALIZATION OR DECRIMINALIZATION OF CURRENTLY ILLICIT DRUGS

It is impossible to predict with any certainty when, or if, any of the currently illegal drugs will be decriminalized or legalized. As a simple matter, those who favor maintaining the status quo argue that the conclusions offered by the pro-legalization advocates are, at best, speculation. The public recognizes that alcohol and tobacco are legal now, and that they cause a host of problems that we seem powerless to control, so why would we want *more* legal drugs on the street? Those who favor legalization cannot deny that our current policy is hypocritical vis-a-vis alco-

⁶¹ See, e.g., Schmoke, *supra* note 14, at 503-04 (quoting from a 1989 report that estimates the 1989 expenditure on drug enforcement at \$7.9 billion) & 513-14 (citing a national report from 1985, which placed the number of drug arrests nationwide at over 800,000); Kleiman & Saiger, *supra* note 14, at 528 (citing that the federal government spent \$636 million on enforcement against marijuana in 1986 and \$986 million in 1988); Ostrowski, *supra* note 14, at 643 (calculating the government expenditures in the War on Drugs at \$10 billion per year); see *id.* at 611, 655-57 (estimating the *total* economic costs of drug prohibition at more than \$80 billion per year); Schulhofer, *supra* note 14, at 208 (estimating drug prohibition expenditures at the federal level to have been nearly \$13 billion in 1994); Luna, *supra* note 14, at 522 (citing a figure of between \$14 and \$17 billion budgeted by the federal government for drug enforcement efforts in 1996); see *id.* at 523 (estimating that the total costs of the drug war, federal and state, runs closer to \$100 billion annually).

⁶² See Luna, *supra* note 14.

hol and tobacco. And, faced with the statistics on alcohol and cigarette addictiveness and lethality, pro-criminalization advocates argue that, yes, alcohol and tobacco are addictive, but dose for dose, they do not appear to be as dangerous as cocaine or heroin.⁶³ Nor do legalization foes have any real response to claims that the black market causes more problems than it solves.

The arguments in favor of legalizing marijuana, cocaine and even heroin are compelling. Advocates of drug legalization are gathering more data in support of their position every day. The available evidence emanating from countries like the Netherlands, which have experimented with decriminalization, tend to strengthen the legalization advocates' position.⁶⁴ Those in favor of decriminalizing illegal drugs may not yet have public sentiment on their side, but they have past experience, they have logic and, increasingly, they have statistics.

They also have time. Time, while billions of dollars are spent each year in high-tech law enforcement operations that do not appear to put a dent in either drug supply or drug demand. Time, while hundreds and thousands of inner-city youth are lured from schoolwork and diligence and the longer, slower road to success to the get-rich-quick guarantee of drug dealing. Time, until the American public gets tired of the waste of money and human capital, tired of the murders, death and destruction. When that time comes, drugs may very well be decriminalized or legalized.

C. THE LIKELIHOOD OF INCREASED DRUG USE SUBSEQUENT TO LEGALIZATION

From a practical or economic standpoint, the opponents of legalization may not have the data on their side. But what they do have is the most burning question in the debate: Will legalization result in increased drug use? There is really only one answer to this question: Yes.⁶⁵

⁶³ See, e.g., William C. McAuliffe, *Health Care Policy Issues in the Drug Treatment Field*, 15 J. HEALTH POL. POL'Y & LAW 361 (1990).

⁶⁴ See van Vliet, *supra* note 14.

⁶⁵ It is not at all surprising (and thus perhaps not interesting) to see that writers *opposed* to decriminalizing or legalizing drugs believe that decriminalization would increase drug use. See, e.g., Loken & Kennedy, *supra* note 14, at 598 ("Given the powerful addictive and reinforcing qualities of cocaine and crack, and what we know about alcohol and cigarettes abuse by the young, it is impossible not to believe that legalizing cocaine for adults would lead to massive increases in the use of cocaine by kids."); Lawn, *supra* note 15, at 713 ("If the United States decides to establish a system which provides for the universal availability of drugs, the black market of drugs would disappear, but a 'black plague' of drug addiction, overdose deaths and crime would take its place."). What is interesting, however, is the number of *pro-legalization* writers who admit that an increase in drug use would likely take place following legalization. See, e.g., Kleiman & Saiger, *supra* note 14, at 543 ("From a public health standpoint, creating a cocaine problem the size of the current alcohol problem or the current tobacco problem would be a major disaster."); Schulhofer, *supra* note 14, at 209-10.

Even the most strident advocates of legalization reluctantly admit that it would almost certainly result in increased drug use.⁶⁶ However, this is tempered, in their view, by two factors. First, nobody can predict how much of an increase in drug use will result from legalization of marijuana, cocaine, or heroin. Most legalization advocates express hope that education, negative advertising and treatment will produce the same social awareness and reduced or responsible consumption of marijuana, cocaine and heroin as is currently associated with alcohol and tobacco. Thus, the most optimistic projections are for modest increases in drug use for a relatively short period of time, followed by a leveling off and eventual decline in drug use. Second, most legalization advocates maintain that they are not aspiring to solve the problem of drug use; instead, they wish to solve the problems that the War on Drugs has caused.⁶⁷

These caveats are hardly encouraging since none of the advocates of legalization are presenting their arguments along with detailed recommendations for policies that would provide children, inner city youth, the disadvantaged and other susceptible members of society with the protection and the socioeconomic alternatives necessary for such individuals to resist drug abuse and addiction. The fact remains that large portions of the population would remain vulnerable under any system of increased access to drugs. For our purposes, however, the objection is this: any economic model used to justify legalization on the basis of drastic savings from eradicating current expenditures on drug enforcement will be flawed since few if any commentators have considered the economic impact on employers from having more drug users and addicts in the workforce. Given the current scholarly, legislative and judicial predilection for strict enterprise liability, the results for employers would be catastrophic.

Although most users of alcohol . . . and marijuana . . . are able to consume these drugs in moderation without becoming addicted, we cannot be sure that this is true of cocaine or PCP. If assumptions about these matters turned out to be overly optimistic, the public health consequences for an entire generation could turn out to be catastrophic.

Id. (citing John Kaplan, *Taking Drugs Seriously*, PUB. INTEREST, Summer 1988, at 32); Moore, *supra* note 14, at 17.

[O]ne can also envision that under the same legalization regime consumption would increase, perhaps even dramatically: drugs would become cheaper and more widely available across broader elements of the society, thereby making drug use more convenient; the stigma associated with drug use would disappear, thereby encouraging more common use; and legitimate suppliers would have as much reason to encourage wider drug use as the illegal dealers.

Id.

⁶⁶ See Ostrowski, *supra* note 14.

⁶⁷ See *id.*

II. THE THEORIES OF ENTERPRISE LIABILITY: PRIMARY LIABILITY, RESPONDEAT SUPERIOR AND STRICT LIABILITY

As gripping as the debate over drug legalization is, its usefulness for the purpose of this Article is that it demonstrates the precarious position that employers find themselves in today, with or without increased use of psychoactive substances by their employees, as a result of the current state of affairs in enterprise liability,⁶⁸ the body of law that imposes liability upon the enterprise (or employer) for the torts or other actions of its employees. Traditionally, enterprise liability has been divided into approximately three categories: primary liability (which tended to involve negligent hiring, supervision or retention of employees), respondeat superior (non-fault based or vicarious liability) and strict liability (also non-fault based). The early English and American theories in support of enterprise liability indicate why prevailing justifications for imposing strict liability on employers completely break down in the face of drug use by employees, especially the increased drug use that is likely to follow legalization.

A. ENTERPRISE LIABILITY IN EARLY ENGLAND

The notion of an employer's liability for certain acts of its employees dates back in the common law tradition to the early English law of "master and servant" (and, according to some commentators, as far back as the Roman civil code).⁶⁹ In the English legal tradition, this concept originated by holding the master liable only for injury to third parties caused by acts of the servant that were specifically commanded by the master. This was more in the nature of primary liability; that is, the master was liable for the torts or other wrongs that he ordered committed through his servant, just as if he had done them himself.⁷⁰

⁶⁸ I have used the term "enterprise liability" to refer to all current theories that hold the enterprise (or employer) liable for the actions of its agents (or employees), including respondeat superior, the concept of negligent hiring, strict liability and other more recent bases of vicarious liability (such as liability for sexual harassment committed by an employee). I also use the term "enterprise liability" generally, applying to corporations, partnerships and sole proprietorships.

⁶⁹ See, e.g., Oliver Wendell Holmes, Jr., *Agency*, 1, 4 HARV. L. REV. 345, 348-50 (1891) (arguing that the idea of a master's liability for the wrongs of a servant originated in Roman law). However, Holmes acknowledges the notion of respondeat superior in Roman law was more limited than the English concepts. In early English law, only innkeepers and shipowners were answerable for the wrongdoing of their servants. See *id.*

⁷⁰ See *id.* at 355 (finding a basis for the concept of respondeat superior in English law as far back as the Norman Conquest); see also John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 1, 7 HARV. L. REV. 315, 335 (1894) ("[W]e are safe in concluding that by the end of the 1200s . . . the master could pretty generally exonerate himself by pleading that he had not commanded or consented to the act. . . .") (citation omitted).

Eventually, however, the courts expanded enterprise liability to cover the negligent acts of the servant, even if such acts were forbidden, as long as they were incidental to, or foreseeable in light of, the nature of the servant's work.⁷¹ English scholars and jurists struggled with this new sort of vicarious liability since there was little precedent in English, Roman, or even Germanic law for imposing liability on one who had no legal or moral fault in the action. Nevertheless, a number of theoretical bases developed that were offered in support of imposing the evolved form of respondeat superior: that the master and servant were "one person," e.g., the act of the servant was the act of the master;⁷² that policy reasons justified imposition of vicarious liability because of the master's position of special trust within the community;⁷³ that because the master benefits from the servant's acts, he should also suffer the consequences of those acts;⁷⁴ and that "[i]t is more reasonable that he [the master] should suffer for the cheats of his servant than strangers."⁷⁵

Increasing commerce at the beginning of the nineteenth century in England introduced the modern notion of "employment." English cases began to make reference to the master's liability for acts of the servant that were committed in the servant's "scope of employment."⁷⁶ Indeed, the "scope of employment" test was used initially to impose liability

⁷¹ See Holmes, *supra* note 69, at 362 (citing Lord Holt's opinion in *Turberville v. Stamp* (1698)); see also Wigmore, *supra* note 70, at 391-92 (dating the concept of a master's liability for the acts done by the servant within the servant's implied authority from Lord Holt's time (early eighteenth century)).

As for those things which a servant may do on behalf of his master, they all seem to proceed upon this principle, that the master is answerable for the act of the servant, if done by his command, either expressly given or implied: *nam qui facit per alium facit per se*. Therefore, . . . [i]f the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master; for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command.

Id. at 396 (quoting from Blackstone's Commentaries).

⁷² See Holmes, *supra* note 69, at 350 (arguing that this particular justification arose from the imposition of liability on the head of the household for the acts of a slave or wife, both of which were considered possessions, or chattels, of the master, and not free persons); see also Wigmore, *supra* note 70, at 317 ("The doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer . . . the owner of an animal, the master of a slave, was responsible because he was associated with it as owner, as master.").

⁷³ See Holmes, *supra* note 69, at 351 (using the example of innkeepers).

⁷⁴ See *id.*

⁷⁵ Wigmore, *supra* note 70, at 398 (citing Lord Holt in *Sir Robert Wayland's Case*, 91 Eng. Rep. 797 (1701)).

⁷⁶ Wigmore traces the idea of a master being liable for the wrongs of the servant committed within the servant's "scope of employment" to the opinions of Lord Kenyon (late eighteenth century). See *id.* at 400. Thomas Baty, like Holmes, ascribes the use of this phrase to Lord Holt, in the case of *Hernv. Nichols*, 1 Salk. 289 (1709). See THOMAS BATY, VICARIOUS LIABILITY 9 (1916).

even upon one who hired what we now refer to as an "independent contractor."

In 1799, *Bush v. Steinman* enunciated the principle that an entrepreneur was liable for all torts committed in the course of services performed for him even where the actor was what later became known as an independent contractor, and "[n]ot until twenty-seven years later [*Laugher v. Pointer* (1826),] were the judges able to devise the rule of the independent contractor's immunity."⁷⁷

However, early English law stopped short of imposing liability on the master (or employer) for the intentional, willful or malicious actions of those who worked for him.⁷⁸

B. ENTERPRISE LIABILITY IN AMERICA THROUGH 1900

In early American law, jurists and scholars took essentially the same approach toward enterprise liability as their counterparts in England: a master (or employer) would be liable if his fault was primary, i.e., if he was negligent in hiring, retaining or supervising the servant (or employee), or if he specifically commanded the acts in question.⁷⁹ The master would also be liable for the negligent torts committed by the servant in the scope of the servant's employment.⁸⁰ The general principle of the master's liability for the servant's negligence is typified by the

⁷⁷ MARC LINDER, *THE EMPLOYMENT RELATIONSHIP IN ANGLICAN-LAW: A HISTORICAL PERSPECTIVE* 133 (1989) (quoting Fowler Harper, *The Basis of the Immunity of an Employer of an Independent Contractor*, 10 *IND. L.J.* 494, 497 (1935)).

⁷⁸ See, e.g., Holmes, *supra* note 69, at 358-59.

It must be remembered, however, that the cases in which the modern doctrines could have been applied in the time of the Year Books were exceedingly few. The torts dealt with by the early law were almost invariably willful. They were either prompted by actual malevolence, or at least were committed with full foresight of the ensuing damage. And as the judges from an early day were familiar with the distinction between acts done by a man on his own behalf and those done in the capacity of servant, it is obvious that they could not have held masters generally answerable for such torts unless they were prepared to go much beyond the point at which their successors have stopped.

Id. (citations omitted).

⁷⁹ At least one early twentieth century American commentator distinguished between use of the terms "principal" and "agent," which he reserved for contractual matters, and "master" and "servant," which he viewed as the more appropriate terminology if the case sounded in tort. See ERNEST W. HUFFCUT, *THE LAW OF AGENCY* § 148 (2ded. 1901). Presumably, this difference in terminology was intended to reflect the older English tort cases, all of which used the "master" and "servant" terms, reserving "principal" and "agent" for more modern commercial notions of employment, in which an "agent," unlike a mere "servant," had the authority to bind the principal to new contractual obligations. See *id.* § 4-6.

⁸⁰ See, e.g., *id.* § 149; FRANCES WHARTON, *A COMMENTARY ON THE LAW OF AGENCY AND AGENTS* (1876) §§ 474, 475. Nineteenth- and early twentieth-century American scholars had as much difficulty with the notion of one being liable for a tort he did not actually commit as had the eighteenth- and nineteenth-century English jurists. See, e.g., HUFFCUT, *supra* note 79, § 149.

Massachusetts case of *Farwell v. Boston R.R. Co.*: "This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it"⁸¹

Beyond the servant's negligence, the concept of vicarious liability in the United States had begun to change. For the first one hundred years or so of this country's existence, courts had not held the master liable for the servant's willful or intentional torts, including acts of fraud or deceit, unless the master specifically commanded them,⁸² ratified them after the fact⁸³ or profited from them in some way.⁸⁴ By the end of the nineteenth century, however, courts (both in England and the United States) were increasingly receptive to the imposition of liability on the master for the "willful or malicious" torts of the servant, as long as the acts were "committed within the course of the employment and in furtherance of it."⁸⁵ Cases which imposed such vicarious liability on the master included those involving a servant's having committed assault, false imprisonment, libel, malicious prosecution, fraud or deceit and even patent infringement.⁸⁶ Yet even in these cases, imposition of vicarious liability was conditioned on the servant having acted *primarily for the master's benefit* in committing the intentional or willful tort.⁸⁷

But as to why he [the master] is liable for a tort which he neither commanded nor ratified, it is difficult to explain. The whole matter must be referred to grounds of social utility. A master is answerable because the servant is about the master's business, and it is, on the whole, better that the master should suffer for defaults in the conduct of the business, than that innocent third persons should bear the losses that such defaults cast upon them.

Id. (citations omitted).

⁸¹ 49 Mass. (4 Met.); see also HUFFCUT, *supra* note 79, at 148.

⁸² See, e.g., WHARTON, *supra* note 80, § 474; HUFFCUT, *supra* note 79, § 246.

⁸³ See, e.g., WHARTON, *supra* note 80, § 477; HUFFCUT, *supra* note 79, § 247.

⁸⁴ WHARTON, *supra* note 80, § 478. However, as regards actions of deceit, Wharton remarks in 1876 that the Queen's Bench, in England, was inclined to hold the employer liable for its employee's unauthorized fraudulent representations, seemingly on the grounds that "the signature of the [employee] to such representations was the signature of the [employer]." *Id.* (citing *Swift v. Winterbotham*, L.R. 8 Q.B. 244 (1873)). Wharton also cites several American cases (though still a minority of jurisdictions in 1876) which were willing to impose liability on the employer for the fraud or deceit of the employee, even where there was no subsequent ratification by or benefit to the employer. See *id.*

⁸⁵ HUFFCUT, *supra* note 79, § 252 (citations omitted). Professor Huffcut's observations from the cases of his day were that imposition of liability on the master for intentional torts committed by the servant typically involved acts which were authorized by the master, but in furtherance of which the servant used excessive force. See *id.*

⁸⁶ See *id.* (citations omitted).

⁸⁷ See *id.* § 253 ("This doctrine has not met with universal approval, and other . . . cases have been decided upon a strict application of the doctrine that the master is liable for a willful or malicious act only when the servant does the act for the master in the course of employment.") (citations omitted).

Additionally, as in England, the distinction between “servants” and “independent contractors” was well established in the United States at the opening of the twentieth century. Thus, while the master would be liable for the negligent torts of his servants, he would in theory *not* be liable for any torts committed by an independent contractor.⁸⁸ But this rule, too, was peppered with numerous exceptions: where the employer had retained an incompetent contractor or had specifically contracted for an unsafe result;⁸⁹ where the acts contracted for were *per se* nuisance⁹⁰ or ultrahazardous;⁹¹ where there was a non-delegable statutory duty to conduct certain tasks safely;⁹² and where the employer had assumed a non-assignable contractual duty to conduct work safely.⁹³ Furthermore, notwithstanding the “general principle” that an employer was not liable for the torts of an independent contractor, American law still imposed a duty upon the employer to maintain safe premises,⁹⁴ and imposed liability upon the employer if he interfered in (i.e., took control of) the contractor’s work.⁹⁵

It appears, then, that at the commencement of the twentieth century, Anglo-American law had certain rules that were fairly consistently applied with respect to enterprise liability. The master (now also referred to simply as the “principal” or “employer”) would be liable:

(a) for his own negligence and intentional torts, and for those which he commanded his servant (“agent” or “employee”) to do;

(b) for the negligence of his servant, as long as the servant was acting within the scope of his employment; and

(c) for the intentional torts of his servant, if in committing the torts the servant was acting primarily for the master’s benefit.

These myriad forms of enterprise liability were justified by the following rationales:

(a) the master’s *control* over the servant or contractor;

(b) his ability to benefit from the work of others;

(c) his duty to society;

(d) and a pinch of risk-spreading thrown in for good measure.

⁸⁸ See, e.g., *id.* § 218.

⁸⁹ See *id.* §§ 219, 221. It must be noted, however, that these are more in the nature of *primary liability*; that is, the employer himself has been negligent in the selection of an independent contractor who is not competent to do the work requested safely, or has specifically requested “improper materials or an unsafe plan,” and cannot hide behind the contractor. *Id.*

⁹⁰ See *id.* § 220.

⁹¹ See *id.* § 224.

⁹² See *id.* § 222.

⁹³ See *id.* § 223.

⁹⁴ See *id.* § 225.

⁹⁵ See *id.* § 226.

But this predictability would not last long. The twentieth century would usher in new approaches to enterprise liability law that were grounded in political philosophies which had their birth in the nineteenth century: socialism and communism. Many of the ideas contained within these philosophies would transform American law, including tort law in general and respondeat superior in particular.

C. ENTERPRISE LIABILITY IN TWENTIETH CENTURY AMERICAN LAW: THE CORONATION OF "DEEP POCKET" AS THE HEIR TO FAULT

If writers in the eighteenth and nineteenth centuries balked at the philosophical inconsistencies inherent in imposing liability without fault on the enterprise, early twentieth century American legal scholars showed no such equivocation, and the rationales for imposing strict vicarious liability upon the enterprise were becoming fixed in the legal firmament.

In 1916, Professor Harold J. Laski of Harvard University wrote what has come to be regarded as a primary essay in support of the modern notions of respondeat superior. In this essay, entitled "The Basis of Vicarious Liability,"⁹⁶ Laski praised the yeoman efforts of earlier scholars to justify respondeat superior (including Lord Brougham,⁹⁷ Justice Willes,⁹⁸ Pothier,⁹⁹ and particularly Sir Frederick Pollock).¹⁰⁰ Although Laski was willing to accept their proffered rationales, he dismissed the difficulties faced by his predecessors in conforming the idea of vicarious liability to preexisting law as being simply a function of their quaint, outdated view that the law ought to be consistent with precedent.¹⁰¹

With enthusiastic abandon, Laski then praised his contemporaries—early twentieth century scholars and jurists—for their willingness to dis-

⁹⁶ Harold J. Laski, *The Basis of Vicarious Liability*, 26 *YALE L.J.* 105 (1916).

⁹⁷ "[B]y employing him [the servant], I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it." *Id.* at 109 (quoting from Lord Brougham's opinion in *Duncan v. Finlater*, Cl. & F. 894, 910 (1839)).

⁹⁸ "[T]here ought to be a remedy against some person capable of paying damages to those injured." *Id.* (quoting from Justice Willes opinion in *Limpus v. Gen. Omnibus Company*, 1 H. & C. 526 (1867)).

⁹⁹ Laski paraphrases Pothier's idea that respondeat superior is intended to make "men careful in the selection of their servants." *Id.* at 110 (citing an English translation of Pothier's *Obligations*). Yet Laski acknowledges that most cases involving enterprise liability do *not* involve the negligent selection of servants; i.e., they are not cases of primary, or fault-based liability. *See id.*

¹⁰⁰ "Sir Frederick Pollock—with far more reason—urges that as all business is a dangerous enterprise, boldness must pay its price." *Id.* (citing Pollock's paper on Employer's Liability from his book, *Essays on Jurisprudence and Ethics*).

¹⁰¹ *See id.* at 107 ("We shall be less pessimistic. Our skepticism is the consequence of too great reliance upon the historic method. We have laid insistence rather upon the *origins* of law than the *ends* it is to serve.") (paraphrasing Justice Oliver W. Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457 *passim* (1897) (emphasis added)).

pense with precedent and create legal fictions (such as “implied authority”) in order to hold the enterprise liable, and to embrace a more flexible idea of law based upon modern notions of the benevolent state’s control over commerce. Thus, Laski wrote:

[t]he basis of our principles is to be found in the economic conditions of the time. Business has ceased to be mere matter of private concern. A man who embarks upon commercial enterprise is something more—even in the eyes of the law—than a gay adventurer in search of a fortune. The results of his speculation are bound to affect the public; and the state, as the guardian of its interests, is compelled to lay down conditions upon which he may pursue his profession.¹⁰²

Professor Laski grounded his new and improved justifications for respondeat superior in the popular socialist philosophy of his day, proclaiming a “social interpretation of negligence”¹⁰³ and a “frankly communal application of the law,” with the “promotion of social solidarity” as its end.¹⁰⁴

Laski did not contemplate serious problems associated with holding the employer liable for the *crimes* of its employees, an innovation which he also called for.¹⁰⁵ All of this was justified, in his mind, if one simply took the view that:

[T]he state has the right, on grounds of public policy, to condition the industrial process . . . [I]t [thus] becomes

¹⁰² *Id.* at 111.

¹⁰³ *Id.* at 119.

¹⁰⁴ *Id.* at 121.

¹⁰⁵ “There seems no valid *a priori* reason why the operation of our principles should cease at that border where tort becomes crime.” *Id.* at 130. Laski does anticipate some problems with the *mens rea* component of some crimes, but happily suggests that perhaps we could dispense with the *mens rea* requirement altogether, by simply imposing a sort of criminal liability *per se* by statute. “The point at issue in this class of crime is simply and surely the enforcement of the law, and it may generally be suggested that the necessities of the case do not admit of our enquiring too closely into the delicate niceties of the situation.” *Id.* at 131; see also *id.* at 132-33.

Nor ought the corporation to avoid responsibility on the ground that it is mindless. Such a view has long been regarded as untenable. No one would dream of accusing a corporation of adultery, but there are offenses clearly to be attributed to it where the act is directly performed by its servants. ‘We think,’ said a strong court, ‘that a corporation may be criminally liable for certain offenses of which a specific intent may be a necessary element A corporation cannot be arrested and imprisoned . . . but its property may be taken either in compensation for a private wrong, or as punishment for a public wrong.’ Those people would agree that common sense is on the side of such an attitude. It would be intolerable if corporate enterprise did not imply corporate responsibility.

Id. (citing *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294 (1899)).

apparent that the basis of the vicarious liability is not tortious at all; nor, since it is withdrawn from the area of agreement, is it contractual. It is simply a statutory protection the state chooses to offer its workers. Whether, as such, it so discriminates against the employing class, as to come within the scope of measures contemplated by the Fourteenth Amendment, is another and a very different question. If we believe that it is not an infringement of liberty to read its meaning in its social context, we shall perhaps be in no doubt as to the rightness of a negative response.¹⁰⁶

Thus, in Professor Laski's view, having dispensed with the requirement of intent by fiat, employers should be liable not only for the torts, but also for the *crimes* of their employees because the state says so, and it does not matter what common law dictates.

In response to critics who warned of the increasing encroachment upon individual liberties by a government unconstrained by the Rule of Law, or of the dangers of a "law" that is internally inconsistent, that deviates markedly from precedent, or that twists unpredictably in the shifting winds of public policy, Laski made the following admonishment:

[S]uch an attitude [mistrust of so-called 'public policy'] is, in truth, but the prophetic anticipation of the Victorian distrust of governmental interference. It is becoming more and more clear that we may not be content with an individualistic commercial law. Just as that individualism was the natural reaction from the too strict and local paternalism of mediaeval policy—perhaps aided by the inherent self-centeredness of Puritan thought—so we are compelled to turn away from every conception of the business relation which does not see the public as an effective, if silent, partner in every enterprise. . . . That, at which we industrially aim, is the maximum public good as we see it. In that respect, the employer is himself no more than a public servant, to whom, for special purposes, a certain additional freedom of action, and therefore a greater measure of responsibility has been vouchsafed. If that employer is compelled to bear the burden of his servant's torts even when he is himself personally without fault, it is because in a social distribu-

¹⁰⁶ *Id.* at 130.

tion of profit and loss, the balance of least disturbance seems thereby best to be obtained.¹⁰⁷

. . . .

. . . We are beyond that stage of strict law where men are bound by an empty formalism.¹⁰⁸

There would be no room in Comrade Laski's ideal modern governmental system for persons whose definitions of "liberty," "property," or "due process" were not flexible enough to vary, depending upon their "social context." For example, in Laski's system, the role of the judiciary would be to provide case-by-case amorphous jurisprudence that would convert them into quasi-arbitrators and de facto legislators.

Professor Laski was not alone in his advocacy of the newest socialist trends in vicarious liability. Also writing in 1916, Dean Ezra R. Thayer weighed in on the controversy. Dean Thayer foresaw that the United States was entering an era when legislation would become the dominant form of lawmaking, and when the prevailing attitudes, as reflected by the new Workmen's Compensation Acts, would play an important part in imposing liability *per se* on the enterprise.¹⁰⁹

¹⁰⁷ *Id.* at 112.

¹⁰⁸ *Id.* at 118.

¹⁰⁹ "This is a period of legislation, when it is alike inevitable and desirable that industry be subjected to detailed regulations of many kinds. . . . The imposition of liability without fault will be a constant characteristic of such legislation." Ezra R. Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801, 814 (1916). One may rightly question Dean Thayer's evident love of government regulation, but at least his assessment of future trends was more consistent with the traditional American idea of separation of powers—he left the responsibility for codifying public policy with elected officials. It is interesting to note that not all of Laski's contemporaries shared his unbounded enthusiasm for the new justifications of respondeat superior. In his book entitled *Vicarious Liability*, Professor Thomas Baty argues that the two English cases most often cited for the origin of the "modern" notion of respondeat superior—*Turberville v. Stampe*, 91 Eng. Rep. 1072 (1697), and *Hern v. Nichols*, 91 Eng. Rep. 256 (1709)—were misinterpreted. THOMAS BATY, *VICARIOUS LIABILITY* 21-22 (1916). Baty maintains that *Turberville v. Stampe* was not a respondeat superior case at all, but a case of absolute liability—the non-delegable duty to safely maintain the use of fire on one's premises. *See id.* at 19-20. He also points out that *Hern v. Nichols* sounded not in tort, but in contract, and that the buyer of nonconforming goods in that case would have had recourse against the seller in any event. *See id.* at 11-12. Baty insists that later judges relied not upon the actual principles of law in those cases, but upon Lord Holt's dicta: "These two cases of contract and of absolute public duty are irrelevant. . . . What one would like to know is the precise process by which Holt's dicta acquired the force of law between, say, 1698 and 1725." *Id.* at 28. Having established that to his satisfaction, Baty concludes that respondeat superior is "a principle dubious in origin and unjust in operation . . ." and that; "it will, I think, be clear to most students that the doctrine of the employer's responsibility was due to no considered theory of civil liability, and to no survival of early mediaeval notions, but was derived from an inconsiderate use of precedents and a blind reliance on the slightest word of an eminent judge." *Id.* at 29. Evidently it was not as clear to everyone else as it was to Baty, and he ultimately lost the argument—at least for the time being.

Scholars continued to write essays in support of an expanded respondeat superior into the 1920s and 1930s.¹¹⁰ Professor Warren Seavey, writing in 1934, bemoaned that some still considered vicarious liability unfair, and praised Laski's "brilliant" defense some eighteen years earlier.¹¹¹ Professor Seavey, like Dean Thayer, predicted that there would be an increase in legislation, and that courts would "tend more and more to impose liability upon the one who employs others to do work for him."¹¹² Seavey also predicted that there would be a decrease in dependence upon the notions of legal or moral fault. He concluded that "until we have an entirely changed form of political organization, the principles of respondeat superior will not disappear."¹¹³

Seavey continued to toe the party line on respondeat superior, asserting that expansion was defensible because:

(a) principals benefit from agents' wrongful acts, even in cases where neither they nor society know it;¹¹⁴

(b) liability without fault fosters proper supervision of the workplace;

(c) liability without fault encourages the principal to hire responsible agents;¹¹⁶

(d) liability without fault makes it unnecessary to prove negligence, an often difficult task;¹¹⁷ and

(e) the employer has the "long purse" (or "deep pocket").¹¹⁸

The last justification—the notion that because the employer *can* pay, the employer *should* pay—has come to trump all the others according to the socialist theories that underlie the Twentieth Century American law on enterprise liability. Until Seavey's day, even the most avid proponents of respondeat superior tiptoed around this basis for imposition of strict vicarious liability.¹¹⁹ However, Professor Seavey was astonishingly straightforward, stating:

¹¹⁰ See, e.g., WARREN A. SEAVEY, *Speculations as to "Respondeat Superior,"* in *STUDIES IN AGENCY* 129 (1916) (excerpted from *Harvard Legal Essays* at 433 (1934)).

¹¹¹ See *id.*

¹¹² *Id.* at 158.

¹¹³ *Id.* at 159.

¹¹⁴ *Id.* at 147. ("[T]here are doubtless numerous frauds perpetrated by agents to the advantage of their principals for which their principals are not required to respond in damages.")

¹¹⁵ *Id.* ("[O]ne who is responsible for all consequences is more apt to take precautions to prevent injurious consequences from arising.")

¹¹⁶ *Id.* at 148. ("Without further investigation, our self-questioning inevitably leads us to believe that respondeat superior results in greater care in the selection and instruction of servants")

¹¹⁷ See *id.* at 149.

¹¹⁸ *Id.* at 150.

¹¹⁹ See, e.g., Laski, *supra* note 96, at 124 ("The reason is not that companies are well able to pay; for it is not the business of law to see that a debtor is solvent, but to provide a remedy for admitted wrong.")

The bald statement that the master should pay because he can pay may have little more than class appeal, although it is in conformity with the spirit of our times to believe that if one is successful enough either to operate a business or to employ servants, in addition to the income taxes taking off the upper layers of soft living, he should pay for the misfortunes caused others by his business or household. This, of itself, may not be a sufficiently strong reason; . . . To-day, however, we realize that the loss from accident usually falls upon the community as a whole, . . . The business enterprise, *until it becomes insolvent*, can shift losses imposed upon it because of harm to third persons to the consumers who ultimately pay, . . . It is this which is leading to the extension of absolute liability.¹²⁰

D. *A Word About Strict Liability in America*

An in-depth analysis of strict liability is beyond the purview of this Article. Nevertheless, it is worth mentioning that many of the ideas expressed by commentators above underlie the development of strict liability, and arose at the same time. Thus, briefly discussing some of the theoretical underpinnings of strict liability will inform our understanding of the current theories of enterprise liability.

Strict liability is probably best known in its incarnation within products liability, but is also applicable outside of it, inherent in such concepts as liability for abnormally dangerous activities, *res ipsa loquitur* and negligence per se.¹²¹ As regards products liability specifically, the eighteenth century view in England and America required privity of contract in order to recover for injuries associated with a defective or dangerous product.¹²² At the beginning of the twentieth century, however, American courts grew increasingly disenchanted with the ill-fitting, inflexible strictures of commercial law as applied to personal injury cases. Courts utilized the concepts of fraud and express and implied warranties to mitigate the privity of contract requirement, thus allowing consumers to sue and collect from the manufacturer or purveyors of products in commerce.¹²³ In 1913, a Washington court used implied warranty to

¹²⁰ SEAVEY, *supra* note 110, at 150-51 (emphasis added) (citations omitted). Seavey, in this portion of *Speculations*, is also calling for universal insurance against such accidents. *Id.*

¹²¹ See, e.g., FRANK J. VANDALL, *STRICT LIABILITY: LEGAL AND ECONOMIC ANALYSIS* 7 (1989).

¹²² See, e.g., *id.* at 7 (citing *Winterbottom v. Wright*, 10 M. & W. 109, 11 L.J. Ex. 415, 152 Eng. Rep. 402 (Exch. P. 1842)).

¹²³ See, e.g., *id.*

hold the defendant liable in *Mazetti v. Armour & Co.*, a food products case.¹²⁴ Later, in 1916, in *MacPherson v. Buick Motor Co.*, another court held that negligence was a valid legal basis upon which the plaintiff could recover, and no privity was required.¹²⁵ The court observed that the former rule of privity of contract had been so eroded by exceptions that it had been effectively abolished. With the addition of negligence as a basis for recovery, products liability moved out of the commercial law of contracts and into the law of torts.

Even these exceptions to privity were met with judicial dissatisfaction. In the California case, *Escola v. Coca-Cola Bottling Co.*, Justice Traynor called for the abolition of the requirement of proving fault or negligence and argued for the imposition of an absolute liability standard.¹²⁶ Although the California Supreme Court declined to adopt Justice Traynor's recommendation in *Escola*, it did so nearly twenty years later in *Greenman v. Yuba Power Products*.¹²⁷ Also, in the case of *Cronin v. J.B.E. Olson Corp.*,¹²⁸ the court explicitly distinguished absolute liability from negligence. The *Cronin* court stated that the plaintiff need only prove that a product had a defect, not that it was "unreasonably dangerous."¹²⁹

The courts continued to advance arguments of "social policy," "social justice," and loss-spreading in support of the growth of strict products liability in the U.S.¹³⁰ Professor Frank A. Vandall of Emory University writes that strict liability developed in America for a number of reasons: dissatisfaction with results under commercial law;¹³¹ difficulties for plaintiffs of proving negligence;¹³² and concern for policies of social justice and loss-spreading.¹³³ Vandall also offers the interesting

¹²⁴ 135 P. 633 (Wash. 1913).

¹²⁵ 111 N.E. 1050 (N.Y. 1916).

¹²⁶ 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

¹²⁷ 377 P.2d 897 (Cal. 1963).

¹²⁸ 501 P.2d 1153 (Cal. 1972).

¹²⁹ See *id.*

¹³⁰ See, e.g., *Mazetti*, 135 P. at 635-36 ("The obligation of the manufacturer should not be based alone on privity of contract. It should rest . . . upon 'the demands of social justice.'"); *Escola*, 150 P.2d at 901 ("[T]he risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public.") (Traynor, J., concurring).

¹³¹ See VANDALL, *supra* note 121, at 17.

Warranty is a case in point. This was fashioned to serve commercial needs in a commercial context, and however well or ill adapted it is to that end today, its technicalities and limitations reflect those needs. If it occasionally happens to fit the needs of accident law, that is pure coincidence.

Id. (quoting Fleming James, Jr., *Products Liability*, 34 TEX. L. REV. 192, 227-28 (1955)).

¹³² See *id.* at 19-20.

¹³³ See *id.* at 20-22.

hypothesis that strict liability was created by the American judiciary as an alternative to socialized medicine.¹³⁴

As with the evolution of respondeat superior, the concept of strict liability arose because of the inability of existing (commercial) law to deal with new situations; here, personal injuries suffered by an increasing number of consumers exposed to an increasing number of products.¹³⁵ Nineteenth century commercial law did not translate well to twentieth century economic realities. Requiring proof of a designer's or manufacturer's negligence seemed unfair, as plaintiffs were often unable to show that another design was "better." Courts and commentators raised the familiar policy arguments: that manufacturers and purveyors were better able to absorb losses associated with injuries and damages and pass them along to their (increasingly larger) consumer base;¹³⁶ that the manufacturers should be strongly encouraged by threat of financial loss to protect the public safety and were in the best position to do so;¹³⁷ that manufacturers and designers, rather than the consuming public, were experts in their fields and thus had superior knowledge about the safety of their products;¹³⁸ and that the availability of insurance tended to protect the manufacturers from catastrophic losses, and thus enabled the manufacturers to protect individuals from the same.¹³⁹

Thus, we see that the enterprise liability theories advanced in the last one hundred years—primary liability (negligent hiring, supervision and retention), respondeat superior and strict liability in all its forms—have marched inexorably toward imposing *more* liability upon the enterprise. Also, regardless of the fact pattern in question—an employee's tort committed against a third party, or a design defect or abnormally dangerous activity causing injury to another—the commentators have consistently offered the same justifications for imposition of liability

¹³⁴ Vandall states:

One of the important conclusions reached from comparing the British and American legal systems is that the American preference for strict liability much earlier grows out of the nature of the American society. Britain provides for injured persons through the National Health Care system. Personal injury litigation constitutes a backup. Despite the Judeo-Christian ethic in America, which supports the notion that injured persons should not be left to bear losses caused by others, there is no American national health care system. . . . These factors have led American courts to endorse an expansion of strict liability because it leads to compensation of injured persons who would otherwise receive 'free' medical treatment under a system comparable to the British system. Strict liability enables injured persons to purchase expensive medical care in the market.

Id. at 38.

¹³⁵ *See id.*

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *See id.*

¹³⁹ *See id.*

upon the enterprise. It is time to ask if the policies underlying enterprise liability are still valid as applied to the current version of enterprise liability. Further, we should consider the possibility that another motive behind enterprise liability has been at work all along.

No one wishes to return to a time where the injured worker or consumer was left on his or her own, without recourse. Nevertheless, even the most sensible and just principle of law eventually reaches a point at which its application, far from promoting justice, begins to work hardship. Early twentieth century writers recognized this when discussing then-current *limits* upon an enterprise's liability.¹⁴⁰ If the expansion of respondeat superior was intended to make the enterprise more responsible, then we have long since reached that goal. What we are now approaching is nearly *limitless* enterprise liability, a policy that eventually discourages the enterprise from acting responsibly because taking precautions would not prevent their being found liable for most of their employees' unfavorable acts. So why do scholars continue to press for more enterprise liability?

Because the foundations for the modern notion of enterprise liability were laid at a different time, and under different economic and social conditions, the views expressed by writers like Laski, Thayer and Seavey are instructive. Both Laski's and Thayer's essays were published in 1916, the year before the communist Russian Revolution of 1917. Professor Seavey's *Speculations* was published in 1934. Professors Laski and Seavey, in particular, represented the views of a significant segment of academia, flushed with excitement about what were then the hottest trends in legal thought: legal realism and socialist/communist economic and political theories.

However, we have since discarded communism and socialism as sound political theories.¹⁴¹ Legal scholars, eighty years later, having witnessed firsthand the devastating political and economic results of these

¹⁴⁰ See *id.*

¹⁴¹ That is, most of us have. There continue to be writers in academia who cleave to socialist political and economic theories. For example, Professor Englard was concerned about scholarly calls in the late 1970s and 1980s for judicial restraint and more emphasis upon economic efficiency in legal theories (which he referred to as "legal formalism"):

Legal formalism bestows upon the rules of law an appearance of being self-contained, apolitical and logical. The conceptual framework with its inherent preestablished value decisions tends to exclude new policy discussions by reducing the judicial process to a mere rule application. Legal formalism thus may become a tool for legal conservatism in preventing *the instrumental use of the law for attaining redistributive goals.*

Izhak Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 31-32 (1980) (emphasis added) (cited in VANDALL, *supra* note 121, at 80). In all fairness to Professor Englard, his article was written several years before the collapse of the Soviet Union. Perhaps it is unfair to expect an American academician to reject socialist redistributionist theories before the Soviets themselves had.

now thoroughly debunked philosophies, ought to be inclined to have less enthusiasm for "social" or "frankly communal" theories of the law.

It is time we also reconsider the outdated vestiges of these discarded theories that remain in the modern legal system, beginning with the imposition of vicarious liability on the enterprise for the intentional torts and crimes of its employees. In addition to a legitimate aversion to abuses by industry in the nineteenth and early twentieth centuries, the original justifications for imposition of vicarious liability also contained well-intentioned but misguided socialist manifestos, founded upon class envy and mistrust of the corporate form. Such views were sympathetic and arguably justified in the class-locked society of Georgian, Edwardian and Victorian England, and in the American industrial environment of the early twentieth century. However, the creation of Workers' Compensation schemes, the advent of products liability, the availability of insurance and the wealth distribution associated with the democratization of incorporation in the latter half of this century suggest that the philosophies of the early twentieth century writers have reached the limits of their effectiveness.

Continued insistence upon placing liability upon the enterprise for any and all acts of its employees will produce absurd, unjust, and economically disastrous results. This is evidenced by the latest incarnations of enterprise liability: liability for employee crimes, liability for certain types of employee sexual harassment and the recent characterization of addiction as a protected disability. Obviously, this attitude has become the prevailing, if unspoken, force driving the development of enterprise liability law in the United States in the latter half of this century.

III. MORE RECENT EXPANSIONS OF ENTERPRISE LIABILITY

A. ENTERPRISE LIABILITY FOR EMPLOYEES' CRIMES

1. *The Majority's "Scope of Employment" Test: Furthering the Employer's Purpose*

Given the modern jurists' and scholars' rationales for imposing vicarious liability for intentional torts, there is no meaningful delimitation between those and employees' crimes. This is proof that the current concept of "enterprise liability" has strayed too far beyond fault, or even economically effective allocation of risks and resources.

Vicarious enterprise liability began with liability for the negligence of employees in performing certain appointed tasks. From there, jurists expanded the theory to include negligent acts that were not commanded, or perhaps were even forbidden, by the employer. The courts reasoned that certain accidents were bound to happen in the ordinary course of the employer's business, and the employer, rather than the "innocent" third

party, was in the best position to control the acts of the employees, to insure against the loss and to absorb the cost of the third party's injury and spread it along to his customers in the form of higher prices for his goods and/or services. This was not, courts kept insisting, a mere "deep pocket" analysis.¹⁴²

The persuasiveness of these assertions weakens when one observes their extension to the area of intentional torts, many of which also constitute crimes. The early cases involving intentional torts (excluding fraud) were often assault and battery cases involving physical violence committed by an employee against a co-employee, a customer, or another third party in the context of performing duties specifically required by the position (such as a bouncer forcibly ejecting a patron from a local pub).¹⁴³

On the other hand, in cases where the employee's intentional acts were particularly brutal, or where the damage suffered was unusual, it was no longer possible for the courts or commentators to rest their rationales for vicarious liability on the notion that "accidents will happen." Rather, the courts began to expand the definition of "scope of employment" by finding that such events were somehow inherent in the nature of the defendant employer's activities. For example, in the California case of *Fields v. Sanders*,¹⁴⁴ the court held an employer liable for the plaintiff's injuries caused when, during a fight following a traffic accident, an employee hit the plaintiff on the head with a metal wrench.¹⁴⁵

Perhaps the most important case in this area is *Ira S. Bushey & Sons, Inc. v. United States*.¹⁴⁶ In the *Bushey* case, the plaintiff, a drydock owner, sued the United States after a seaman from the U.S. Coast Guard vessel *Tamaroa* returned to the ship from shore leave and, in a drunken stupor, turned the valves that controlled the water flow into the drydock where the *Tamaroa* was docked. The resulting flood caused the ship to list, slide off its blocks and fall against the wall, partially sinking both the ship and the drydock.¹⁴⁷ The Government maintained that it should not be liable because the seaman's actions in turning the drydock valves were not within the scope of his employment. In support of its position the Government cited *Restatement (Second) of Agency*, § 228(1), which

¹⁴² See e.g., *Rodgers v. Kemper Constr. Co.*, 124 Cal. Rptr. 143, 148 (1975).

¹⁴³ See 5 FOWLER V. HARPER ET AL., *THE LAW OF TORTS* § 26.7, at 25 (2d ed. 1986) (The master will be liable for an intentional tort committed by the servant if the "act was not unexpected in view of the duties of the servant.") (quoting *RESTATEMENT (SECOND) OF AGENCY* § 245 (1958)); see also *Medina v. Graham's Cowboys, Inc.*, 827 P.2d 859 (1992).

¹⁴⁴ 180 P.2d 684 (Cal. 1947).

¹⁴⁵ See HARPER ET AL., *supra* note 143, § 26.7, at 28 (The court's rationale was that, "association between the driver and other men on the highway and the friction that such associations might in fallible human beings together with the conduct that the friction might lead to were all 'risk[s] of the business.'") (quoting from *Fields v. Sanders*, 29 Cal. 2d at 842).

¹⁴⁶ 398 F.2d 167 (2d Cir. 1968).

¹⁴⁷ See *id.* at 168.

indicates that the appropriate test for “scope of employment” is whether or not the employee is motivated, at least in part, by a desire to further the employer’s purpose.¹⁴⁸

Judge Friendly, writing for the Second Circuit, acknowledged the ubiquitous “motive test,” but concluded that its application in the case at bar would be “highly artificial.”¹⁴⁹ Rather than emphasize the employee’s motive, Friendly wrote, the proper basis for imposing vicarious liability on the employer is the “deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be *characteristic of its activities*.”¹⁵⁰ In order to conclude that the inebriated seaman’s turning the water intake valves was “characteristic” of the U.S. Coast Guard’s business, Judge Friendly redefined “foreseeability” in an infamous passage which has since been quoted in hundreds of cases:

Put another way, Lane’s [the seaman’s] conduct was not so “unforeseeable” as to make it unfair to charge the government with responsibility. We agree with a leading treatise that “what is reasonably foreseeable in this context [of respondeat superior] . . . is quite a different thing from the foreseeably unreasonable risk of harm that spells negligence . . . The proper test here bears far more resemblance to that which limits liability to workmen’s compensation than to the test for negligence. The employer should be held to expect risks, to the public also, which arise ‘out of and in the course of’ his employment of labor.” Here it was foreseeable that crew members crossing the drydock might do damage, negligently or even intentionally, such as pushing a Bushey employee or kicking property into the water. Moreover, the proclivity of seamen to find solace for solitude by copious resort to the bottle while ashore has been noted in opinions too numerous to warrant citation. Once all this is granted, it is immaterial that Lane’s precise action was not to be foreseen.¹⁵¹

Thus, the Second Circuit Court of Appeals found that the United States was vicariously liable for the seaman’s actions. This was the result even though Judge Friendly, in his opinion, also acknowledged that the other common justifications for applying respondeat superior were

¹⁴⁸ See *id.* at 170.

¹⁴⁹ See *id.*

¹⁵⁰ *Id.* at 171 (emphasis added).

¹⁵¹ *Id.* at 171-72 (citations omitted).

not present in the *Bushey* case. Specifically, Friendly found that imposing liability upon the United States would probably not result in efficient allocation of resources since the drydock owners, and not the United States (or other ship owners), were in the best position to avoid such disasters by simply installing locks on drydock valves.¹⁵² Nor was Friendly persuaded that imposing liability on the United States would result in "more intensive screening" of its employees under those circumstances.¹⁵³

Judge Friendly's insistence to the contrary notwithstanding,¹⁵⁴ it is hard to see the *Bushey* case as anything other than a pure "deep pocket" approach to respondeat superior. Friendly's new respondeat superior definition of "foreseeability" made it synonymous with mere possibility, thus making vicarious liability irrefutable for all practical purposes by converting the inquiry into a backward-looking determination, as follows: the fact that an injurious event occurred is de facto proof that it was possible; if it was possible, it was therefore foreseeable; if it was foreseeable, it was therefore "incidental to" or "characteristic of" the employer's business; if it was characteristic of the employer's business, then the employee was acting within the scope of his employment, and *voila!* The employer is liable under the new permutation of vicarious liability. With this end-oriented approach clearly understood, it is not difficult to see how the courts could come, in subsequent years, to impose liability upon the enterprise for violent crimes committed by its employees.

In spite of Judge Friendly's approach in *Bushey*, however, most other jurisdictions have adhered to the traditional "motive" or "primary purpose" test in determining whether an employee is acting within the scope of his or her employment. In other words, most states have required that, in order to hold the employer liable for an employee's violent intentional tort or crime, the employee be acting, at least in part, with the motivation to be about the employer's business.¹⁵⁵ Since vio-

¹⁵² As, apparently, most other drydocks already had.

¹⁵³ *Bushey*, 398 F.2d at 170.

¹⁵⁴ See *id.* at 171 ("But the fact that the defendant is better able to afford damages is not alone sufficient to justify legal responsibility . . .").

¹⁵⁵ See, e.g., *McIntosh v. Becker*, 314 N.W.2d 728 (Mich. 1981) (using the "furthering the master's purpose" test, court found that school district was not vicariously liable for teacher's alleged racial and sexual slurs, but that other verbal abuse and physical assault might be within the "scope of employment"); *State v. Beaudry*, 365 N.W.2d 593 (Wis. 1986) (The court found the defendant employer was vicariously liable for employee's serving alcohol to friends after closing hours. However, this appeal was decided on a "manifest weight of the evidence" standard applied to the jury's finding that the employee, while serving alcohol to his friends in an otherwise locked bar, was acting within the "scope of his employment." There was a strongly worded dissent.); *G.L. v. Kaiser Found. Hosps., Inc.*, 757 P.2d 1347 (Or. 1988) (The court found that the hospital was not liable for employee's sexual assault on plaintiff, an unconscious patient at the time, under theories of negligent hiring, respondeat superior, strict liability and breach of implied contract. Plaintiff's respondeat superior argument was un-

lent intentional torts and crimes are almost never motivated by a desire to serve the employer, it is still difficult, in most jurisdictions, to impose liability on the employer for violent intentional torts or crimes committed by its employees.¹⁵⁶

2. *The California Test: "Foreseeability" and "Job-Related Authority"*

California, however, has followed the *Bushey* rationale. If one wishes to predict the erratic and unfair results that would obtain if this were the majority approach, a review of California jurisprudence is en-

cessful because sexual assault was not committed with the employer's purpose in mind, and thus not within the employee's scope of employment); *Bryant v. Brannen*, 446 N.W.2d 847 (Mich. 1989) (holding that landlord was not vicariously liable for building manager's shooting of tenant, since the employee was not acting to further any purpose of his employer); *McLaren v. Imperial Cas. and Indem. Co.*, 767 F. Supp. 1364 (Tex. 1991) (holding that the "wrongful act" indemnification provisions of a professional liability policy issued to police officers did not extend to liability for claims of sexual assault since it was not within the officer's scope of employment); *Connes v. Molalla Transp. Sys.*, 831 P.2d 1316, 1321 (Colo. 1992) (recognizing the tort of negligent hiring, but declining to hold that an employer is "an insurer for violent acts committed by an employee against a third person."); *C.C. v. Roadrunner Trucking, Inc.*, 823 F. Supp. 913 (Utah 1993) (holding that Interstate Commerce Commission certificate on truck did not signify that federal law imposed strict liability upon carrier for alleged rape committed by its employee. The court, interpreting Utah law, held that no action for respondeat superior would lie because alleged rape was clearly outside of driver's scope of employment); *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993) (using the "furthering the employer's interest" test, held that although grounds for negligent hiring might exist, Episcopal priest's sexual relations with parishioner were not within the scope of his employment, and thus the diocese could not be held liable under a theory of vicarious liability); *Sebastian v. District of Columbia*, 636 A.2d 958 (D.C. 1994) (holding that the District of Columbia was not vicariously liable for sexual assault committed by ambulance attendant as it was outside the scope of his employment); *D.D.Z. v. Molerway Freight Lines, Inc.*, 880 P.2d 1, 5 (Utah 1994) (holding freight company not vicariously liable for sexual assault committed by employee against plaintiff at Christmas party because Utah law requires that the acts be "closely connected to what the servant is employed to do."); *Lourim v. Swensen*, 936 P.2d 1011 (Or. 1997) (holding that, as a matter of law, sexual assault by a Boy Scout troop leader was outside the scope of his employment). *But cf.* *Weinberg v. Johnson*, 518 A.2d 985 (D.C. 1986) (using the "furthering the interest of the employer" test, court found that laundromat employee who shot a patron was acting within the scope of his employment); *Floyd-Mayers v. American Cab Co.*, 732 F. Supp. 243 (D.C. 1990) (using the "furthering the employer's business" test to hold that summary judgment was not appropriate since there was a question of fact as to whether cab drivers were acting within the "scope of their employment" in failing to pick up black passengers, subjecting the cab company to vicarious liability under 42 U.S.C. § 1981); *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344 (Alaska 1990) (holding that summary judgment in favor of defendant employer was not appropriate where finder of fact could reasonably find that psychotherapist's sexual intercourse with patient, off-premises and one month after counseling concluded, was based upon "motivation to serve" the employer and thus within the therapist's "scope of employment." There was a strongly worded dissent in this case.); *Oelschlagel v. Magnuson*, 528 N.W.2d 895 (Minn. 1995) (holding that under Minnesota law church could be vicariously liable for sexual abuse committed by pastor because "scope of employment" is not defined by "furthering the master's business" test, but rather by a foreseeability test (employee's acts are foreseeable in light of his or her duties)).

¹⁵⁶ *See id.*

lightening. The first California case to explicitly adopt the *Bushey* definition of "scope of employment" was *Rodgers v. Kemper Construction Co.*¹⁵⁷ In *Rodgers*, a subcontractor was held vicariously liable for the brutal beating received by two of the general contractor's employees at the hands of two of the subcontractor's employees. The subcontractor/employer tried unsuccessfully to argue that the presence of alcohol and the extraordinarily violent nature of the attack had taken the employees' acts outside of the scope of their employment.¹⁵⁸ The California court disagreed. Citing the *Bushey* case (among others), the court held that the employees' violent behavior was "foreseeable," not as that term is used in negligence, but in the sense that it was "not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of an employer's business."¹⁵⁹ Phrasing the proposition differently, the court stated that vicarious liability would attach for an employee's violent intentional torts where the risk was one "that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer."¹⁶⁰

Using a modified *Bushey* approach, the California courts have developed an alternative test for imposition of vicarious liability for an employee's intentional torts: either the act had to be required or "incidental" to an employee's other duties, or it had to be "foreseeable," as that term was defined by Judge Friendly in the *Bushey* case.¹⁶¹ California's adoption of the *Bushey* definition of "foreseeability" for purposes of determining "scope of employment" has had an unstable record. For example, in *Hinman v. Westinghouse Electric Co.*,¹⁶² the California Supreme Court extended "scope of employment" to include an employee's going to and coming from the workplace "where the trip involves an incidental benefit to the employer, not common to commuting trips by ordinary members of the workforce."¹⁶³ But in *Golden West Broadcasters v. Superior Court of Riverside County*,¹⁶⁴ the California appellate court found that a TV station's employee was *not* acting within the scope of his employment when he got into a brawl in a bar's parking lot, even though he was on location and being paid a *per diem* by his employer.¹⁶⁵

¹⁵⁷ 124 Cal. Rptr. 143 (1975).

¹⁵⁸ See *id.* at 147.

¹⁵⁹ *Id.* at 148-49.

¹⁶⁰ *Id.* at 149 (citations omitted).

¹⁶¹ See *Clark Equip. Co. v. Wheat*, 154 Cal. Rptr. 874, 882 (1979).

¹⁶² 88 Cal. Rptr. 188 (1970).

¹⁶³ *Id.* at 191.

¹⁶⁴ 171 Cal. Rptr. 95 (Ct. App. 1981).

¹⁶⁵ See *id.* at 101.

The most erratic and inconsistent results have occurred in the California cases dealing with an employer's liability for an employee's criminal sexual assault or rape. When confronted with such shocking and deviant behavior, the California courts' initial approach was to conclude that, unlike a workplace scuffle or fistfight, criminal sexual conduct was so unrelated to an employee's position and so "unusual" and "startling" that it could not be the basis for vicarious liability. Thus, in *Alma W. v. Oakland Unified School District*, a California appellate court held that the school district could not be held vicariously liable for a sexual assault committed by a school janitor upon a grade school child.¹⁶⁶ In *Alma*, the appellate court stated strongly that the janitor's act of molesting the plaintiff was in no way "incidental to [his] duties," nor was it foreseeable, even using the "broad foreseeability test articulated in *Rodgers v. Kemper Construction Co.*"¹⁶⁷ Although the plaintiff attempted to argue that the *Bushey* "foreseeability" test adopted by a California court in *Rodgers* required only that the possibility of such an attack was conceivable, the appellate court refused to acknowledge such an interpretation, saying, "[w]e believe that appellant's argument stretches the *Rodgers* foreseeability standard far beyond its logical limits."¹⁶⁸ Nor was the court willing to accept a pure "deep pocket" argument, saying:

Distilled to its essence, appellant's argument is little more than that the risk of loss from an employee's sexual assault should fall on the school district as a means of spreading the risk to the community at large. Appellant is leaning on a slender reed. The "spread the risk" concept underlying the doctrine of respondeat superior does not mean that attribution of liability to an employer is merely a legal artifice invoked to reach a deep pocket or that it is based on an elaborate theory of optimal resource allocation.¹⁶⁹

Contrary to the *Alma* court's insistence, however, the *Bushey/Rodgers* definition of "foreseeability" and "scope of employment" had no inherent limits, and within a few years, the California courts were beginning to split on the issue of whether an employee's criminal sexual conduct could be the basis for imposing vicarious liability upon the employer. By 1988, when the case *Mary M. vs. City of Los Angeles*¹⁷⁰ reached a California appellate court, the inherent limitlessness of the

¹⁶⁶ 176 Cal. Rptr. 287 (Ct. App. 1981).

¹⁶⁷ *Id.* at 291.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 292 (citations omitted).

¹⁷⁰ 246 Cal. Rptr. 487 (Ct. App. 1988).

Bushey/Rodgers rationale manifest itself in the split among the judges of the court.

Mary M. involved an intoxicated motorist who was stopped by a Los Angeles police officer, tested for sobriety, and, upon failing the test, was taken to her home by the officer, where he raped her. The officer was subsequently convicted of rape and sentenced to imprisonment, and the plaintiff, *Mary M.*, sued the Los Angeles Police Department alleging that the department should be vicariously liable under the theory of respondeat superior.¹⁷¹ Using California's two-part alternative test, and resting its opinion on previous cases, including *Alma*,¹⁷² the majority of a California appellate court concluded that the L.A.P.D. was not vicariously liable for the officer's criminal behavior because he had "radically deviated from his duties as a law enforcement officer."¹⁷³ The court, in very strong language, insisted that rape by a policeman was not incidental to the officer's ordinary duties, and was so "startling" and "unusual" that it could not have been foreseen.¹⁷⁴ However, in a long and impassioned dissent, Judge Spencer (the Presiding Justice) argued that a new test had arisen in California for imposing vicarious liability on an employer for an employee's violent or criminal behavior, and that this new test should have been applied in *Mary M.*¹⁷⁵

The test to which Judge Spencer referred had come to be known as the "job-related authority" test, and had been created by a sister court in California in the case of *White v. County of Orange*.¹⁷⁶ The *White* case involved similar facts: an Orange County police officer stopped a female motorist, forced her into his patrol car, drove her around over a period of several hours and threatened to rape and murder her. The plaintiff in *White* sued the police department for false imprisonment and kidnapping under a theory of vicarious liability.¹⁷⁷ Although the trial court entered summary judgment in favor of the defendant police department,¹⁷⁸ a California appellate court reversed, finding that the police officer had been vested, by virtue of his position, with "a great deal of authority," and that

¹⁷¹ See *id.* at 489.

¹⁷² 176 Cal. Rptr. 287 (Ct. App. 1981).

¹⁷³ *Mary M.*, 246 Cal. Rptr. at 495.

¹⁷⁴ *Id.* at 495, n497.

¹⁷⁵ *Id.* at 505. In actuality, the first state court to hold a police department vicariously liable for rape was a Louisiana court in the case of *Applewhite v. City of Baton Rouge*, 380 So.2d 119 (La. Ct. App. 1979). But a novel change in the law often draws more attention in highly populated states like California or New York. Judge Spencer's dissent also devoted a great deal of time to discussing society's changed viewpoint with respect to rape. Citing numerous feminist and sociological studies, Judge Spencer concluded that rape is an act of violence and should be treated (for vicarious liability purposes) as any other intentional tort or crime. See 246 Cal. Rptr. at 503-04.

¹⁷⁶ 212 Cal. Rptr. 493 (Ct. App. 1985).

¹⁷⁷ See *id.* at 494.

¹⁷⁸ See *id.*

the “employer/government must be responsible for acts done during the exercise of this authority.”¹⁷⁹ It was this “job-related authority” test that Judge Spencer argued should have been used to impose vicarious liability on the L.A.P.D. in the *Mary M.* case.¹⁸⁰

Spencer’s colleagues in the appellate majority in *Mary M.* had explicitly declined to follow the “job-related authority” test from *White v. County of Orange*, saying:

First, because it emanates from a court of equal jurisdiction, *White* does not bind this court. Second, *White* fails to follow and apply well-established principles of decisional law. Third, *White* creates by judicial fiat a new theory for vicarious liability (elsewhere referred to as “job-related authority”) under respondeat superior, which is tantamount (under many factual situations) to making governmental entities strictly liable for its employee’s wrongful acts.¹⁸¹

The “job-created authority” test obviously did not carry the day at the intermediate appellate level in 1988, but the *Mary M.* case would eventually get to the California Supreme Court.¹⁸²

In the meantime, *John R. v. Oakland Unified School District*, another sexual assault case, had made its way through the California court system and to the California Supreme Court.¹⁸³ In the *John R.* case, a former student sued the Oakland school district, alleging that it was vicariously liable for a sexual assault (including oral and anal intercourse) committed on him by a male teacher.¹⁸⁴ As with the *Mary M.* case in the intermediate appellate court, the California Supreme Court justices split on the issue of the school district’s vicarious liability for the criminal

¹⁷⁹ *Id.* at 496.

¹⁸⁰ See 246 Cal. Rptr. at 505. Perhaps even more disturbingly, Judge Spencer argued that the officer’s rape of the plaintiff, *Mary M.*, was “foreseeable” because the Los Angeles County Police Department had drafted very strict internal procedures for situations involving a one-man vehicle transporting a female passenger, including notifying the dispatcher (which the officer did not do), and handcuffing the passenger and placing her in the back seat (the officer in *Mary M.* placed the plaintiff in the front seat). Regulations also required a report to be filed on all motorist stops (which the officer did not prepare) and forbade transporting motorists anywhere other than to the police station. In a classic example of “damned-if-you-do-and-damned-if-you-don’t,” these very procedural protections, all of which were deliberately and flagrantly disregarded by the officer, were proof, in Judge Spencer’s mind, that the Police Department “foresaw” the possibility of rape, thus subjecting themselves to vicarious liability when it occurred. *Id.* at 506.

¹⁸¹ *Id.* at 493.

¹⁸² See *infra* Part III.B.2.

¹⁸³ 256 Cal. Rptr. 766 (1989).

¹⁸⁴ See *id.* at 768.

sexual behavior of the teacher.¹⁸⁵ However, a majority in *John R.* held that the school district could *not* be held vicariously liable for the teacher's sexual molestation of the student. The court declined to apply the "job-related authority" test utilized in *White v. County of Orange*, and distinguished that case, stating that a police officer's authority over the public is dramatically more substantial than that of a teacher over his students.¹⁸⁶ The court concluded that a teacher's act of sodomy on a student is so far removed from the performance of his duties that it could not be held to be "incidental to" those duties or "foreseeable" by the employer/school district.¹⁸⁷ The majority was apparently not content to let its ruling rest only on those grounds. In addition, the court emphasized that none of the other public policy rationales traditionally offered in support of vicarious liability would be met by imposing it on the school district in the *John R.* case. Specifically, the court stated that "the imposition of vicarious liability on school districts for the sexual torts of their employees would tend to make insurance, already a scarce resource, even harder to obtain, and could lead to the diversion of needed funds from the classroom to cover claims."¹⁸⁸ The court also felt that the risk of criminal sexual conduct by teachers was not appropriately spread among the beneficiaries of the school district's services or the community at large.¹⁸⁹

The split among the lower California appellate courts and among the California Supreme Court justices themselves suggested that a change was brewing. The watershed came when the Supreme Court of California agreed to hear the *Mary M. v. City of Los Angeles* appeal in 1991.¹⁹⁰

When *Mary M.* reached the California Supreme Court, the Court reversed the lower court of appeals, and explicitly adopted the "job-re-

¹⁸⁵ Justice Mosk, in his dissent, argued that the "job-related authority" test from the *White* case was just as applicable in the relationship between teacher and student. *See id.* at 776. And Justice Kaufman maintained, in his dissent, that increased public awareness of the frequency of sexual assault meant that it was no longer "unusual" or "startling." *See id.* at 782.

¹⁸⁶ *See id.* at 772.

¹⁸⁷ *See id.* at 773: It is amusing to watch the California judges struggle to find limits to the *Bushey/Rodgers* "foreseeability" test—a test which this Article maintains (and proves, I believe) has no inherent limits. Writing for the majority, Justice Arguelles, in a footnote, addresses the dissent's contention that sexual misconduct is "foreseeable" anytime a teacher and a student are alone in a room together. *See id.* at 955 n.9. In addition to chastising the dissent for its "unduly pessimistic" view of humanity, Justice Arguelles says, "Given the facts of this case and the benefit of hindsight, all would have to agree that the prospect of such misconduct is conceivable, but that is a far cry from foreseeability, even under the meaning that concept is given in the respondeat superior context." *Id.* As the reader of this Article knows by now, the *Bushey/Rodgers* definition of "foreseeable" is *nothing more* than a synonym for "conceivable," easily established with the *benefit* of hindsight.

¹⁸⁸ *Id.* at 774.

¹⁸⁹ *See id.*

¹⁹⁰ 285 Cal. Rptr. 99 (1991).

lated authority' test, imposing vicarious liability on the L.A.P.D. for the rape committed by one of its officers. In an opinion written by Justice Kennard, the court held that, in light of the powerful authority conferred upon a police officer by the state, it was neither "unusual" nor "startling" that an officer might abuse such authority, even to the extent of criminal sexual conduct.¹⁹¹ The majority was confident that imposing vicarious liability in this case would encourage preventive measures without compromising the effectiveness of law enforcement activities.¹⁹² Justice Kennard also expressed the view that the police department was in the best position to insure against such losses and spread the risk of loss among the beneficiaries of its services.¹⁹³ The future import of the California Supreme Court's opinion in *Mary M.* was unclear. Two justices concurred in the judgment, one on entirely different grounds,¹⁹⁴ and Justice Kennard herself seemed to be limiting her opinion to on-duty police officers (although her reasoning did not lend itself to such limitations).¹⁹⁵

The test for the California Supreme Court's commitment to the "job-related authority" test came four years later with the case *Lisa M. v. Henry Mayo Newhall Memorial Hospital*.¹⁹⁶ In *Lisa M.*, the plaintiff sued the hospital, alleging that it was vicariously liable for the sexual assault committed on the plaintiff by one of its ultrasound technicians

¹⁹¹ See *id.* at 105.

¹⁹² Justice Kennard's remarks reflect, at best, a conflicted and internally inconsistent approach to respondeat superior. On the one hand, she justifies the imposition of vicarious liability by asserting that it will promote more caution on the part of police departments. See *id.* at 106. But Justice Baxter had raised the objection in his concurring opinion that the Los Angeles Police Department already had elaborate, detailed proscriptions and procedures, all intended to prevent this sort of conduct. See *id.* at 121. Baxter had written, "no matter what the City does, it may be held liable for a police officer's criminal conduct including offenses such as this rape." *Id.* In spite of her earlier admonition that vicarious liability promotes caution in the employer, Kennard treats this as irrelevant. That Justice Kennard actually views respondeat superior as merely another term for strict liability is evident in her response: "These objections are misplaced, as they are directed at the doctrine of respondeat superior itself, rather than its application to the facts of this case." *Id.* at 106.

¹⁹³ This conclusion has been roundly criticized by commentators who claim that an agency of the government (particularly law enforcement), unlike a private corporation, is not in a position to choose another line of products or services, or simply raise the prices for its goods and/or services. The only alternative is to raise taxes, and this would be particularly burdensome where, as here, the taxes would be imposed only on the local community. See, e.g., Christopher E. Krueger, Note, *Mary M. v. City of Los Angeles: Should a City be Held Liable Under Respondeat Superior for a Rape by a Police Officer?*, 28 U.S.F. L. REV. 419 (1994). One could perhaps argue that passing the increased cost along to the "consumers" in the form of higher taxes (as opposed to prices) is an even better way of testing the public's commitment to the "social view" of the law that scholars and jurists have now been espousing for the better part of this century.

¹⁹⁴ Justice Baxter felt that the rule of invited error should bar the City of Los Angeles' attempt to attack the jury verdict. He disagreed vehemently with Kennard's characterization of respondeat superior. See *Mary M.*, 285 Cal. Rptr. at 112.

¹⁹⁵ 285 Cal. Rptr. at 100.

¹⁹⁶ 48 Cal. Rptr. 2d 510 (1995).

during an examination.¹⁹⁷ The plaintiff, relying upon the *Mary M.* case, argued that the hospital should be liable because the employee's assault had taken place as a result of the authority inherent in his position.¹⁹⁸ The Court backed off from its sweeping language in *Mary M.* and held that while the ultrasound technician may have had a position of *trust*, that was not similar to the authority conferred by the state in a police officer.¹⁹⁹ In an opinion written by Justice Werdegar, the Supreme Court of California held that Henry Mayo Memorial Hospital was not liable for the sexual assault committed by the ultrasound technician. Justice Werdegar cited Justice Kennard's language in *Mary M.*:

We expressly limited our holding: "We stress that our conclusion in this case flows from the unique authority vested in police officers. Employees who do not have this authority and who commit sexual assaults may be acting outside the scope of their employment as a matter of law."²⁰⁰

The *Lisa M.* Court evidently attempted to revert to the pre-*Mary M.* definition of respondeat superior.²⁰¹ Nonetheless, the future of California law in this area seems unclear since both Justices Mosk and Kennard wrote strongly worded dissents.²⁰²

3. *The Future of the "Scope of Employment" Test If Currently Illicit Drugs Become Legal*

It is not a recent development to hold the employer liable for acts committed by an employee under the influence of an intoxicating substance. Casebooks, treatises and reporters are replete with historical instances of companies found liable because their employees were driving vehicles, operating heavy equipment or otherwise performing tasks made more dangerous by their being under the influence of alcohol or drugs. What *is* new is the willingness of the courts to consider bizarre and un-

¹⁹⁷ The technician's sexual assault included improperly inserting the ultrasound wand into the plaintiff's vagina (an ultrasound examination is external), and digitally fondling and caressing her genitals, while telling plaintiff that it was necessary to "excite her to get a good [ultrasound] view of the baby." *Id.* at 512.

¹⁹⁸ *See id.* at 517.

¹⁹⁹ *See id.* at 518.

²⁰⁰ *Id.* at 518 (citing *Mary M.*, 285 Cal. Rptr. at 108).

²⁰¹ In fact, Justice George concurred, saying that he would have gone further and overruled the Court's decision in *Mary M.* *See id.* at 519 (George, J., concurring).

²⁰² *See id.* at 519-24. Both Justices Mosk and Kennard maintained that summary judgment was inappropriate in this case, since the trier of fact could have found that the technician was acting within the scope of his employment when he molested the plaintiff. *See id.* at 523-24. Interestingly, neither Justice Mosk nor Justice Kennard used "job-related authority" *per se*; rather, they both emphasized the intimate nature of an ultrasound examination, and concluded that a sexual assault therein was "foreseeable." *See id.* at 520-21.

foreseeable acts or brutal, violent and sexual crimes as being within the "scope of employment" for respondeat superior purposes. As the last thirty years of cases (since *Ira S. Bushey v. United States* was decided in 1968) have shown, many courts now simply decide *ab initio* that an employer should be liable, and then set about redefining terms like "scope of employment" and "foreseeability"—concepts which traditionally protected the employer from liability for an employee's egregious behavior—such that they now cover *any* act by an employee, no matter how forbidden, how depraved, or how unrelated to the duties of the job.

For all the courts' protests to the contrary, it is clear that the most recent incarnations of respondeat superior in the area of an employee's intentional torts and criminal conduct are nothing more than applications of the principle of strict liability, and they are motivated by no public policy or purpose other than to reach the "deep pocket" (real or perceived) of the employer. If the past is any indication, California may well lead the way for the rest of the state courts in the United States. And as the previous section of this Article demonstrates, the California definition of "foreseeability" is a frightening prospect for the American enterprise.

In fact, although some observers protest the extension of vicarious liability to the area of violent crimes and sexual assaults,²⁰³ others are arguing that the "job-related authority" test should be expanded to include "job-related power" and "job-related access" within the "scope of employment," such that *all* employers (not just police departments) are liable for sexual assaults committed by their employees.²⁰⁴ The exist-

²⁰³ See, e.g., Krueger, *supra* note 193.

²⁰⁴ See Rochelle Rubin Weber, Note, "Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by their Employees, 76 *MINN. L. REV.* 1513 (1992). Weber maintains that "a reasoned approach" to vicarious liability requires that the "job-related authority" standard be expanded to include any situation where the employer "creates the situation where the employee can commit a tort." *Id.* at 1533. Her definition of "creating the situation" is a simple "but for" type of causation—having hired the employee in the first place. Her application of the standard would be universal: "Once a court has decided to use the job-created power standard, the standard should be applied to all situations involving sexual assaults by employees." *Id.* at 1538-39. And it would encompass more than just authority or positions of trust; she would also include situations where, by virtue of the employee's job, he or she has "access" or "power":

If job-created power is defined in this way, the test differs from the approach taken by a number of courts because it is applicable to a broad range of employment situations, not just to police officers or therapists. For example, it would apply to plumbers or electricians who gain access to a person's home through their employment.

Id. at 1540 (emphasis added). Like so many of her counterparts, Ms. Weber conflates strict liability and negligence policies in her justification for expanded applications of respondeat superior. On the one hand, she is not advocating a "negligent hiring and supervision" standard—no amount of preventative action will exonerate the employer if its employee commits sexual assault according to her "job-created power" standard; on the other hand, she recites the

ence and prominence of these arguments should be enough to spur corporate America to action. To make things worse for employers, it is no coincidence that two of the primary opinions in the area of enterprise liability for violent crimes or sexual harassment—*Ira S. Bushey v. United States* and *Rodgers v. Kemper Construction Co.*—both involved employees who committed extraordinarily damaging or violent acts while under the influence of alcohol.²⁰⁵ When one combines the current trends in judicial and scholarly thought with the prospect of legalized drug use by greater numbers of employees, the potential for economic disaster is evident.

B. ENTERPRISE LIABILITY FOR SEXUAL HARASSMENT BY EMPLOYEES

1. *The Evolution of Enterprise Liability for Sexual Harassment*

Many of the cases that arise in a discussion of enterprise liability for employees' intentional and criminal acts involve criminal sexual conduct—conduct which now also forms the basis of many sexual harassment claims. In this case of enterprise liability, like in the area of intentional torts, there are varying definitions of the offensive employee's "scope of employment." Given the judicial confusion over the definition of "scope of employment" in other contexts, it is not surprising that the sexual harassment cases are all over the map as well.

As an initial matter, with regard to sexual harassment, the employer liability issue is slightly different than that which we have examined thus far. Most cases addressing primary liability or respondeat superior deal with a *third party* who has been injured by an employee; with sexual harassment, most of the cases involve wrongful conduct by an employee against *another employee*. Because the employer (master) was typically insulated from such liability under the "fellow-servant" rule at common-law, liability for sexual harassment has its roots in statutes, not case law.²⁰⁶ It is an outgrowth of Title VII of the Civil Rights Act of 1964, which provides that an employer must not "fail or refuse to hire or to discharge any individual or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."²⁰⁷ Early Title VII cases decided by the EEOC were largely racial and ethnic harassment cases in which the EEOC held that employers had an obligation to provide a workplace free of the taint of

correspondingly obsolete (but rote) justification that, "imposing liability upon the employer creates a strong incentive for the employer to exercise care in training and supervising employees." *Id.* at 1533.

²⁰⁵ See *Bushey*, 398 F.2d at 168; *Rodgers*, 124 Cal. Rptr. at 146.

²⁰⁶ See RESTATEMENT (SECOND) OF AGENCY §§ 474-491 (1958).

²⁰⁷ Now codified as 42 U.S.C. § 2000e-2(a)(1) (1972).

racial intimidation. This obligation included a duty to prevent such harassment by creating a culture which discouraged it, as well as taking appropriate action when it did occur.²⁰⁸ The early cases made no references to specific agency principles, such as breach of an employer's duty of care, or vicarious liability for the acts of its employees. Rather, the cases simply insisted that the employer had a statutory duty to its employees to ensure a safe and productive workplace free of discrimination.²⁰⁹

However, it was inevitable that courts would begin to fine-tune their reasoning as more harassment cases found their way into the dockets, and courts struggled with increasingly complicated issues such as the nature of the employer's liability, and the difference between harassment occurring between *co-employees* and that occurring between an employee and a *supervisor*.²¹⁰ The courts found it necessary to import agency principles into Title VII law. The difficulty faced by courts in attempting to apply vicarious liability to sexual harassment cases would not have been hard to predict for anyone familiar with the evolution of respondeat superior in other contexts. For example, if the courts concluded only that an employer has a non-delegable statutory duty to provide a discrimination-free work environment, then in theory it would not

²⁰⁸ See David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by their Supervisors*, 81 CORNELL L. REV. 66, 100 & nn.157-160 (1995) (citing EEOC Dec. No. YSF 9-108, 1 FAIR EMPL. PRAC. CAS. (BNA) 922 (1969); EEOC Dec. No. 71-909, 3 FAIR EMPL. PRAC. CAS. (BNA) 269 (1970); EEOC Dec. No. 72-0779, 4 FAIR EMPL. PRAC. CAS. (BNA) 317 (1971); EEOC Dec. No. 72-1561, 4 FAIR EMPL. PRAC. CAS. (BNA) 852 (1972); EEOC Dec. No. 74-05, 6 FAIR EMPL. PRAC. CAS. (BNA) 834 (1973); EEOC Dec. No. CL 68-12-431EU, 2 FAIR EMPL. PRAC. CAS. (BNA) 295 (1969)).

²⁰⁹ See *id.* at 100-01.

These EEOC decisions make no reference to the theories of vicarious or direct liability, but the reasoning in each case is consistent with both doctrines. For example, the employer's obligation is cast as a special duty, imposed by statute, to protect employees from harassment. . . . Upon breach of this duty, an employer might find itself vicariously liable, based on its responsibility for the acts of its servants or the breach of a non-delegable duty owed to its employees, or directly liable, based on the breach of its own duty of care.

Id.; see also *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971). *Rogers* was the first federal circuit court of appeals decision to address workplace harassment. In *Rogers*, plaintiff had been told by her employer that she was being fired because, being Hispanic, her presence in the workplace had provoked hostile and abusive behavior by the white employees, which had created an unpleasant atmosphere. She sued and lost at the district court level, but the Fifth Circuit reversed, saying:

[Title VII] sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and . . . Title VII was aimed at the eradication of such noxious practices.

Id. at 238.

²¹⁰ See *infra* Part III.B.1-3.

matter whether the offensive sexual behavior was committed by a co-employee or a supervisor: the employer's vicarious liability would be strict in either case. If, however, the court chose to utilize agency principles, then liability could be imposed under at least two different theories: an employer could be negligent in its hiring or supervision of particular personnel, in which case it could be held *primarily* (or directly) liable for the ensuing harassment; or, an employer could be held *vicariously* liable for the harassment of its employees.

While imposition of primary liability could be based on a relatively simple inquiry, vicarious liability under a theory of respondeat superior invoked all of the issues we have previously addressed in this Article, most notably whether the employee doing the harassing was acting in the "scope of his employment" when he committed the wrongful acts or made the offensive statements. Bringing "scope of employment" into the Title VII arena of workplace harassment has created judicial inconsistency. Throughout the 1970s courts "began to distinguish between cases involving harassment by supervisors and those involving harassment by nonsupervisory co-employees."²¹¹ This distinction was vital, in the courts' view, since supervisory employees could be construed as "agents" of the employer, with the employer being held liable for acts which were within the supervisor's "scope of employment," including, as has been seen before, wrongful acts that were not authorized, but were "foreseeable," "broadly incidental" to the supervisor's authority, or that were motivated, at least partially, by a motive to further the employer's business.²¹² As a result of the application of these agency principles to Title VII discrimination cases, courts held employers liable for harassment by supervisors under "authority" and "scope of employment" analyses of respondeat superior, but did not hold employers liable for harassment by non-supervisory employees unless the employer either knew or should have known of the pervasively discriminatory environment and failed to address it. In other words, employers would be liable only if a factual basis could be found for holding the employer *primarily* liable.²¹³

²¹¹ Oppenheimer, *supra* note 208, at 102.

²¹² Oppenheimer provides a concise description of the evolution of the incorporation of agency principles into Title VII harassment cases. *See id.* at 103-08.

²¹³ *See id.* (citing *Fekete v. United States Steel Corp.*, 353 F. Supp. 1177 (W.D. Pa. 1973) (holding that the employer could not be held vicariously liable for harassment by co-employees unless the company had negligently allowed the harassment to occur, or ratified it after the fact); *Howard v. National Cash Register Co.*, 388 F. Supp. 603 (S.D. Ohio 1975) (holding that company was not liable for racial harassment of plaintiff by co-workers where company warned and disciplined co-workers following each event); *Bell v. St. Regis Paper Co.*, 425 F. Supp. 1126 (N.D. Ohio 1976) (holding that employer was not liable for racial intimidation of plaintiff by co-workers where plaintiff complained to supervisors, who properly responded to each complaint and disseminated company policy prohibiting harassment); *Friend v. Leid-*

Cases involving sexual harassment arrived not long after the courts had begun to grapple with the application of agency principles in Title VII racial and ethnic harassment cases. Many of the early decisions concluded that sexual harassment fell entirely outside the purview of Title VII.²¹⁴ The debate heated up when the academic community weighed in on the issue, arguing that sexual harassment should be covered by Title VII.²¹⁵ Not long afterwards, the federal circuit Courts of Appeals began to reverse the district courts on the question of whether sexual harassment by supervisors was discriminatory behavior prohibited by Title VII.²¹⁶ These courts utilized the agency analyses to ascertain if the employers were vicariously liable for the wrongful conduct of their supervisory employees.²¹⁷

inger, 588 F.2d 61 (4th Cir. 1978) (holding employer properly responded after each complaint and was not liable for isolated acts which did not constitute a pattern of discrimination); *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978) (employer not liable for racial harassment where it could not have known about isolated instance of racial epithet, and thus could not have responded). *But cf.* *EEOC v. Murphy Motor Freight Lines*, 488 F. Supp. 381 (D. Minn. 1980) (holding employer was *directly*, not vicariously, liable for failing to take appropriate action after being notified of harassment by co-employees); *DeGrace v. Rumsfeld*, 614 F.2d 796 (1st Cir. 1980) (holding that Navy supervisors had known of racial harassment of plaintiff and had failed to remedy the situation, thus rendering the Navy liable under a theory of primary liability)).

²¹⁴ See *id.* at 109-13 (describing the following cases: *Come v. Bausch and Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977) (holding that a supervisor's sexual advances were due to his "personal proclivity" or "peculiarity," and not to a company policy, and that such behavior was not covered by Title VII); *Barnes v. Train*, 13 FAIR EMPL. PRAC. CAS. (BNA) 123, 124 (D.D.C. 1974), *rev'd sub nom Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (stating, "[r]egardless of how inexcusable the conduct of the plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex"); *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979) (holding that plaintiff was not entitled to recover against employer, notwithstanding her termination for refusing to accede to supervisor's demands for sexual intercourse, since she did not take advantage of intracorporate grievance policy); *Tomlins v. Pub. Serv. Elec. and Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977) (holding employer was not liable for plaintiff's transfer, layoff, threats of demotion, pay cuts and termination at hands of supervisor whose sexual advances she rebuffed)). Having the benefit of twenty years' hindsight, it is amusing to note a comment by one federal judge, who remarked that if a supervisor's sexual invitations were actionable, it would prompt a "potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another." *Come*, 390 F. Supp. at 163.

²¹⁵ See Oppenheimer, *supra* note 208, at 111 & n.237 (citing numerous law review articles written between 1976 and 1981).

²¹⁶ See *id.* at 111-12 (describing the following cases: *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979) (reversing lower court); *Garber v. Saxon Bus. Prods., Inc.*, 552 F.2d 1032 (4th Cir. 1977) (*per curiam*) (holding that "an employer's policy or acquiescence in a practice of compelling female employees to submit to the sexual advances of their male supervisors" was a violation of Title VII); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (reversing lower court, holding that the condition of being subjected to a supervisor's sexual demands was "gender specific" and thus violative of Title VII); *Tomlins v. Public Serv. Elec. and Gas Co.*, 568 F.2d 1044 (3d Cir. 1977) (reversing lower court)).

²¹⁷ See cases cited *supra* note 216.

In November of 1980, the EEOC promulgated new regulations in an attempt to clarify the emerging law of sexual harassment.²¹⁸ The new Guidelines described two types of sexual harassment which were actionable under Title VII: conditioning a tangible benefit of employment or loss thereof (including initial employment, subsequent pay and promotion decisions) upon a supervisor's sexual demands,²¹⁹ and workplace behavior that created an offensive environment.²²⁰ The former became known as "quid pro quo" form of sexual harassment;²²¹ the latter as "hostile environment."²²²

According to the EEOC's Final Guidelines, an employer was liable for sexual harassment by a non-supervisory employee only in situations where it was negligent: "those situations in which the employer, including its agents and supervisory employees, knew or should have known of the harassment, yet failed to take immediate and appropriate corrective action."²²³ However, the EEOC recommended strict vicarious liability in sexual harassment cases involving supervisory employees.²²⁴

²¹⁸ See 29 C.F.R. § 1604.11 (1995).

²¹⁹ See *id.* § 1604.11(a)(1).

²²⁰ See *id.* § 1604.11(a)(2).

²²¹ See, e.g., Oppenheimer, *supra* note 208, at 115. Oppenheimer attributes the first scholarly use of this term to Catharine MacKinnon. See *SEXUAL HARASSMENT OF WORKING WOMEN* 32-40 (1979). He also attributes the first judicial recognition of the term to the cases *Henson v. City of Dundee*, 682 F.2d 897, 908 (11th Cir. 1982), and *Katz v. Dole*, 709 F.2d 251, 254-55 (4th Cir. 1983). The United States Supreme Court explicitly identified the separate forms of sexual harassment in the landmark case *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

²²² See, e.g., Oppenheimer, *supra* note 208, at 115.

[T]o formulate its third form of harassment, the EEOC followed the lead of feminist scholars like Catharine MacKinnon and Nadine Taub and of courts in cases involving racial, religious, and ethnic harassment. The EEOC's third form of harassment encompassed the type of conduct described in this Article's Introduction—unwelcome sexual conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."

Id. (quoting from 29 C.F.R. § 1604.11(a)(3) (1995)) (citations omitted).

²²³ 29 C.F.R. § 1604.11(d) (1995).

²²⁴ 29 C.F.R. § 1604.11(c) (1995) (stating that the employer will be strictly vicariously liable "for its acts and those of its agents and supervisory employees with respect to sexual harassment. . . regardless of whether the employer knew or should have known of their occurrence."). Although the EEOC's Final Guidelines utilized the terms "agent" and "supervisor," they did not define them. Title VII does not even contain the term "supervisor." David Benjamin Oppenheimer suggests reference to the National Labor Relations Act, which defines "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In spite of the EEOC's interpretation of Title VII,²²⁵ courts did not hold employers vicariously liable for all sexually offensive behavior by supervisors. Instead, the courts began to distinguish between "quid pro quo" and "hostile environment" supervisor harassment cases. Even those courts that held employers liable for supervisor harassment did so only under a primary liability standard, not a vicarious liability standard.²²⁶

2. *The United States Supreme Court's standard in Meritor Savings Bank v. Vinson*

In *Meritor Savings Bank v. Vinson*,²²⁷ the U.S. Supreme Court attempted to clarify the law governing sexual harassment cases brought under Title VII.²²⁸ Mechelle Vinson sued her employer, Meritor Savings Bank, alleging that her supervisor coerced her into an involuntary sexual relationship by threatening her position with the bank.²²⁹ The supervisor denied the acts alleged by Vinson, and the bank maintained that it was

Oppenheimer, *supra* note 208, at 118 (citing National Labor Relations Act, 29 U.S.C. §§ 152(11) (1988)).

²²⁵ Oppenheimer suggests that much of the confusion is attributable to the fact that the EEOC's Final Guidelines on sexual harassment were adopted under the direction of Eleanor Holmes Norton on November 3, 1980—"one day before Ronald Reagan's election as President." Oppenheimer, *supra* note 208, at 114. The purpose for Oppenheimer's odd insertion of this seemingly unrelated event becomes more understandable somewhat later in his article, when he explains that Ronald Reagan's new Director of the EEOC, Clarence Thomas, disavowed the Guidelines in the position taken by the EEOC on subsequent cases, including the *Meritor* case in 1986. *See id.* at 126. Oppenheimer obviously believes that Anita Hill's testimony about being subjected to sexual harassment under Clarence Thomas at the EEOC is truthful, and not-so-subtly suggests that Thomas' reasons for opposing the EEOC Guidelines as drafted under Norton were therefore personal. *See id.* at 148-49 & n.435. In fact, Anita Hill's account of Thomas's alleged behavior toward her forms the basis for the "hypothetical" harassment scenarios Oppenheimer offers throughout his article. For one familiar with the gaps in Hill's 1991 testimony and the specifics of her allegations, Oppenheimer's inclusion of this material further undercuts his persuasiveness.

²²⁶ *See, e.g., Bundy v. Jackson*, 641 F.2d 934, 940 (D.C. Cir. 1981) (holding that employer was liable since the manager to whom plaintiff complained of her own supervisor's harassment said, "[A]ny man in his right mind would want to rape you," and then made his own sexual advances. But dicta in this case suggested that an employer might not be liable if it responded properly, after the fact, to a supervisor's harassing behavior.); *Henson v. City of Dundee*, 682 F.2d 897, 905 (14th Cir. 1982) (holding that in order for the plaintiff to hold employer liable for a hostile environment created by supervisor's sexual advances, she must prove that "employer knew or should have known of the harassment in question and failed to take prompt remedial action."); *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983) (holding employer liable for "extremely vulgar and offensive sexually related epithets addressed to and employed about Katz by supervisory personnel" because the harassment was so pervasive that the employer either must have known or should have known about it, and failed to remedy it).

²²⁷ 477 U.S. 57 (1986).

²²⁸ *See Vinson v. Taylor*, 1980 WL 100 (D.D.C.), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *reh. denied*, 760 F.2d 1330 (D.C. Cir. 1985) (*per curiam*), *aff'd in part, rev'd in part sub nom.*

²²⁹ Some of Ms. Vinson's complaints included that Mr. Taylor had "assaulted and raped her on numerous occasions, that he frequently fondled her breasts and buttocks in public, and

not liable since Ms. Vinson had not taken advantage of internal grievance procedures. The district court held that the conduct alleged by Vinson may constitute sexual harassment under Title VII, but that Vinson's participation was either voluntary or, in any case, that the events did not affect the continuation of her employment at the bank.²³⁰ The court, holding the bank to a negligence standard of liability, concluded that the bank was not liable since it did not have reason to know of the alleged acts.²³¹ The Court of Appeals for the District of Columbia Circuit reversed, holding that the district court misapplied the test for sexual harassment and failed to consider both *quid pro quo* and hostile environment forms of sexual harassment.²³² In its opinion, the D.C. Circuit expressly adopted the standards set forth in the EEOC's 1980 Final Guidelines.²³³ The court held that an employer would be liable for a non-supervisory employee's harassing behavior only if it either knew or should have known (the primary liability standard) about the pervasively discriminatory environment and neglected to remedy it; however, an employer would be vicariously liable for a *supervisory* employee's harassment of a subordinate, regardless of the employer's fault (the strict liability standard).²³⁴

The United States Supreme Court's decision in *Meritor* definitively established sexual harassment as prohibited behavior within the ambit of Title VII. It also identified "*quid pro quo*" and "hostile environment" as

that he would enter the ladies' restroom of the bank to expose himself to her." See *Vinson*, 1980 WL 100 at *6.

²³⁰ See *id.* at *7.

²³¹ See *id.* at *6.

²³² See *Vinson*, 753 F.2d at 145.

²³³ See *id.* at 150.

²³⁴ See *id.* However, David Oppenheimer opines that the D.C. Circuit misinterpreted the EEOC Guidelines as being a higher standard of responsibility than that imposed by the common law definition of "scope of employment." Oppenheimer characterized the court's opinion, that "scope of employment" in common law tort cases was limited to only those acts which were authorized, as mistaken. See Oppenheimer, *supra* note 208, at 124. With all due respect to Professor Oppenheimer's prodigious research, "scope of employment" was not a strict liability inquiry, even in 1985. As we have seen, the "scope of employment" inquiry was originally intended to insulate the employer from the outrageous or unforeseen acts of the employee. Nevertheless, from a very early day, an employee's intentional tort would be considered within the scope of his or her employment if it was done, at least in part, with the intent to serve the employer. Since extraordinary and utterly unrelated acts such as violent assaults or criminal sexual conduct were never done with the intent to "be about the employer's business," the traditional rule was that these acts were *not* within the scope of an employee's employment. Indeed, even at present, a majority of courts use the "motive to serve the master" test to assess "scope of employment" inquiries, and few (California, Louisiana, Minnesota) find criminal sexual conduct a basis for imposition of vicarious liability upon the employer. Thus, it is perfectly logical that in 1985 the D.C. Circuit could have concluded that Sidney Taylor's rape of Mechelle Vinson, if it did occur, would not have been within the "scope of his employment" at common law, and that Title VII's extension of vicarious liability in this circumstance was a dramatic departure from the traditional rule. See *infra* Parts II and III.

separately actionable forms of harassment. But the Court did not resolve the dilemma over the proper standard to be applied in supervisory versus non-supervisory harassment cases, saying:

[W]e do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. *See generally* Restatement (Second) of Agency §§ 219-237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. . . . As to employer liability, we conclude that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.²³⁵

3. *Enterprise Liability for Sexual Harassment Since Meritor Savings Bank v. Vinson: Federal and State Decisions*

a. Federal Decisions

Alas, the U.S. Supreme Court's decision in the *Meritor* case did not clarify the law. The Supreme Court's convenient reliance on other courts' interpretations of agency principles has now placed sexual harassment on the same footing as outrageous acts of employees—like violent intentional torts and criminal sexual conduct. In other words, the employer *may* be vicariously liable for sexual harassment, depending upon the jurisdiction, its definition of concepts like "scope of employment" and "foreseeability," its prevailing judicial and scholarly philosophies about "cost-shifting" and "loss-spreading" and its willingness (implicitly or explicitly) to adopt "deep pocket" rationales.

Sexual harassment cases decided since 1986 bear this out. In the eleven years since *Meritor* was decided, the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuit Courts of Appeals have struggled with the proper application of agency principles to

²³⁵ *Meritor Savings Bank*, 471 U.S. at 72-73.

sexual harassment cases.²³⁶ Two very recent 1997 cases, *Faragher v. City of Boca Raton*²³⁷ and the consolidated appeals of *Jansen v. Packaging Corporation of America* and *Ellerth v. Burlington Industries, Inc.*,²³⁸ indicate that the difficulty is nowhere near resolution.

In *Faragher*, two lifeguards sued the City of Boca Raton and their supervisors for sexual harassment, battery and negligent hiring and supervision.²³⁹ The women claimed that their male supervisors engaged them in offensive touching and vulgar language. The district court en-

²³⁶ See, e.g., *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559 (11th Cir. 1987) (holding that employer was not strictly vicariously liable; rather, liability was imposed on the theory that employee was "aided in accomplishing the tort by existence of the agency relationship."); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987) (holding that supervisor's grabbing of plaintiff's breasts and buttocks was "boorish" behavior, but not sexual harassment within the meaning of Title VII); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989) (holding that corporate officer's sexual advances were not within the scope of his authority, thus exonerating the employer from liability); *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *vacated in part*, 900 F.2d 27 (4th Cir. 1990) (holding that harassing supervisor was an "agent" and thus an "employer" in his own right under Title VII; but further holding that Unisys could escape liability by taking prompt and appropriate action upon finding out about the harassment); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (holding that in a "hostile environment" case involving both supervisory and non-supervisory co-employee harassment, the plaintiff was required to show that management had actual or constructive knowledge of sexually hostile environment and failed to take prompt and adequate remedial action); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178 (6th Cir. 1992) (distinguishing between "quid pro quo" and "hostile environment" cases and holding that in order for plaintiff to obtain judgment against employer in "hostile environment" case, she must show not only that supervisor's sexually harassing behavior was within the scope of his employment, but also that employer knew (or should have known) of the harassment and failed to properly address the situation); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994) (holding that district court's summary judgment in favor of defendant of company was error, since plaintiff could prevail if she could show that employer knew of harassment and failed to address it); *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994) (affirming district court's imposition of vicarious liability, but on grounds that supervisor's constant demands for oral sex from plaintiff constituted "quid pro quo" and not "hostile environment" sexual harassment. The court also stated that a "management-level employee" must be aware of the environment in order to hold employer liable for "hostile environment," and plaintiff's supervisor was not "management-level"); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 110 (3d Cir. 1994) (holding "that an effective grievance procedure—one that is known to the victim and that timely stops the harassment—shields the employer from Title VII liability for a hostile environment"). It must be noted that there is no such dilemma with "quid pro quo" cases. Co-employees do not have the ability to demand sexual favors in exchange for promotion, job benefits or pay increases, or to threaten their denial for refusal. By contrast, a supervisor, who can condition a subordinate's pay raise, promotion or other benefit upon submitting to his sexual advances, or who threatens to withhold same if the subordinate refuses is clearly utilizing his conferred authority and position to harass the subordinate employee. See *supra* note 255; see generally *Oppenheimer*, *supra* note 208.

²³⁷ 111 F.3d 1530 (11th Cir. 1997).

²³⁸ 123 F.3d 490 (7th Cir. 1997) (addressing for the first time the appropriate use of agency principles in Title VII sexual harassment cases).

²³⁹ *Faragher*, 111 F.3d at 1534 n.2. Plaintiff *Faragher* sued under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., and under 42 U.S.C. § 1983, as well as asserting pendant state law claims for battery and negligent retention and supervision. See *id.*

tered judgment for plaintiff Faragher on her Title VII claim against the City, and awarded her \$1 in nominal damages.²⁴⁰ Citing *Meritor Savings Bank v. Vinson*, and acknowledging differences between the circuits, a divided Eleventh Circuit reversed (in part), holding that the City of Boca Raton was neither primarily nor vicariously liable for the offensive conduct engaged in by plaintiffs' supervisors.²⁴¹ As to the City's vicarious liability, the court said:

This Circuit has concluded that in a pure hostile environment case, a supervisor's harassing conduct is typically outside the scope of his employment. [In *Steele v. Offshore Building, Inc.*], [w]e noted that, "Strict liability is illogical in a pure hostile environment setting. In a hostile environment case, no quid pro quo exists. The supervisor does not act as the company; the supervisor acts outside 'the scope of actual or apparent authority to hire, fire, discipline or promote.'"²⁴²

The court concluded that the lifeguards were acting to promote their own personal ends and not in furtherance of the city's business.²⁴³ The court did not find any evidence that the city had been negligent in its hiring, retention or supervision of the lifeguard supervisors since there was no proof that the city had been notified, either explicitly or constructively, or given an opportunity to rectify the situation.²⁴⁴ In short, although the supervisors themselves were liable for their offensive conduct, the City of Boca Raton was not.

As divided as it was, the Eleventh Circuit was at least able to assemble a majority in the *Faragher* case. There was no such agreement in the Seventh Circuit when it heard the consolidated appeals of *Jansen v. Packaging Corporation of America* and *Ellerth v. Burlington Industries*,

²⁴⁰ The district court also awarded Faragher \$10,000 in compensatory damages on her § 1983 claim against her supervisors and \$500 in punitive damages for her battery claims against one of her supervisors. The court awarded plaintiff Ewanchew \$35,000 in compensatory damages and \$2000 punitive damages for her battery claim. *See id.*

²⁴¹ Judges Hatchett, Kravitch, and Barkett dissented in part, as did Judges Tjoflat and Anderson. All four judges disagreed with the majority's interpretation of vicarious liability principles applied in supervisor "hostile environment" cases. *See id.* at 1539-48.

²⁴² *Faragher*, 111 F.3d at 1535 (quoting from *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982))).

²⁴³ *See id.* at 1536.

²⁴⁴ *See id.* at 1538-39. In fact, the court pointed out that the City of Boca Raton had not been informed of the supervisors' offensive behavior until after both plaintiffs left the city's employ—one to take a better job elsewhere and the other to attend law school—and plaintiff Ewanchew sent the city a letter complaining of their treatment at the hands of their supervisors. At that point, the city investigated plaintiffs' complaints and reprimanded and disciplined both supervisors. *See id.* at 1533.

*Inc.*²⁴⁵ Rather than producing a majority opinion, the Seventh Circuit was forced to write a brief *per curiam* opinion, setting forth the facts and announcing the holding, while virtually every judge wrote a separate opinion expressing his or her interpretation of how agency principles should and should not be applied in Title VII sexual harassment cases.

In the *Jansen* and *Ellerth* cases, both plaintiffs asserted “quid pro quo” and “hostile environment” claims in their complaints.²⁴⁶ A majority of the judges were able to agree that the standard for imposing vicarious liability for “hostile environment” sexual harassment committed by a supervisor was *negligence*, but that an employer would be *strictly* liable for “quid pro quo” sexual harassment by any supervisor, whether or not the employer knew of the supervisor’s acts or had the opportunity to remedy the situation.²⁴⁷ Beyond these three cases, the federal courts’ opinions constitute a morass of competing approaches, too long and too detailed to set forth concisely here.²⁴⁸

²⁴⁵ 123 F.3d 490 (7th Cir. 1997).

²⁴⁶ *See id.* at 492.

²⁴⁷ *See id.* at 493.

²⁴⁸ *Jansen*, 123 F.3d 490 (7th Cir. 1997). The entire opinion is nearly one hundred pages long, not including the judge’s footnotes. To give the reader a taste of the conflict among the judges in this circuit, an excerpt from the three page *per curiam* opinion follows.

All the judges with the exception of Judges Easterbrook, Rovner and Wood believe that negligence is the only proper standard of employer liability in cases of hostile-environment sexual harassment even if as here the harasser was a supervisor rather than a co-worker of the plaintiff. The view of these judges is set forth in Judge Flaum’s opinion, which is joined by Judges Cummings, Bauer (as to [plaintiff Ellerth]), Cudahy (as to [plaintiff Jansen]) (with the reservations indicated in Judge Cudahy’s separate opinion), Kanne (with the reservations indicated in Judge Kanne’s separate opinion), and Evans; in Chief Judge Posner’s opinion, which is joined by Judge Manion; in Judge Manion’s opinion, which is joined by Chief Judge Posner; and in Judge Coffey’s opinion. Judges Easterbrook, Rovner and Wood, as explained in Judge Easterbrook’s and Judge Wood’s opinions, believe that the proper standard of employer liability in all cases of sexual harassment by a supervisor is respondeat superior, provided, however, that the harassment was committed by the supervisor in the course of exercising his actual or apparent supervisory responsibilities, was foreseeable, and subjects the employer to liability under the principles of the applicable state law. . . . Judge Flaum’s opinion concludes that Jansen has a viable quid pro quo claim, as do Judges Easterbrook, Rovner and Wood, though their route to this conclusion is different, as they do not believe that there should be any different standard for an employer’s liability for supervisors’ harassment depending on whether it is hostile-environment harassment or quid pro quo harassment. Chief Judge Posner and Judges Coffey and Manion disagree that Jansen has a viable quid pro quo claim, Chief Judge Posner and Judge Manion because they believe that strict liability for quid pro quo harassment should be limited to ‘company acts’ (such as firing or demoting), as distinct from mere threats, and Judge Coffey because he rejects strict liability in quid pro quo cases and also because he deems Jansen to have waived her quid pro quo claims. In Ellerth’s case . . . [a]ll the judges except Judges Easterbrook, Rovner and Wood believe that the hostile-environment claim was expressly waived by Ellerth in her briefs to the panel. . . . All the judges except Chief Judge Posner and Judges Coffey and Manion believe that Ellerth’s evidence of quid

b. State Decisions

The opinions of the state courts are no easier to reconcile. In New York, for example, the courts have interpreted their state's law on sexual harassment and have held employers to a negligence standard. For a plaintiff to ensure that her employer is held liable, she must demonstrate that her employer "had knowledge of and acquiesced in the discriminatory conduct of its employee."²⁴⁹

Arizona has taken an even more limited view, one which incorporates the traditional basis for vicarious liability. In *Smith v. American Express Travel Related Services, Inc.*, the plaintiff sued her employer for sexual harassment on the basis of common law tort and contract principles, alleging assault and battery, intentional infliction of emotional distress, breach of contract and breach of a covenant of fair dealing.²⁵⁰ In *Smith*, the plaintiff was subjected to gross and offensive behavior by Edwin Nally, a manager at American Express who was not Smith's direct supervisor.²⁵¹ The trial court granted American Express's motion for summary judgment and plaintiff appealed. On appeal, the Court of Appeals of Arizona affirmed. The appellate court utilized the "in furtherance of the employer's business" test, and concluded that "under common law principles, an employee's sexual harassment of another employee is not within the scope of employment," and thus American Express was not vicariously liable under respondeat superior.²⁵²

There were a number of notable points in the court's opinion. First, the court stated in its holding that it was following the majority view.²⁵³

pro quo harassment was sufficient to create a genuine issue of material fact, thus precluding summary judgment, although the routes to this conclusion are different. As noted earlier, Chief Judge Posner and Judge Manion believe that an employer's liability for quid pro quo harassment should be limited to company acts, as explained in their opinions, as opposed to mere threats by the supervisor, and there were no company acts here. Judge Coffey believes, as also noted earlier, that there is no strict liability in a quid pro quo case and that there is no proof of negligence on the part of Burlington Industries with respect to [the supervisor's] harassment of Ellerth.

Id. at 2-3.

²⁴⁹ *Spoon v. American Agriculturalist, Inc.*, 502 N.Y.S.2d 296 (1986) (citing *Matter of Totem Taxi v. New York State Human Rights Appeal Bd.*, 480 N.E.2d 1075 (1985); *Hart v. Sullivan*, 444 N.Y.S.2d 40 (1981), *aff'd* 434 N.E.2d 717; *In re SUNY Albany v. State Human Rights Appeal Bd.*, 438 N.Y.S.2d 643 (1981), *aff'd* 433 N.E.2d 1277 (1982)).

²⁵⁰ 876 P.2d 1166 (Ariz. 1994).

²⁵¹ According to the court's opinion, Nally's behavior began innocuously, and became progressively more offensive and intimidating, including grabbing and touching Smith's breasts, throwing a condom on her desk, tossing candy down her shirt and forcibly carrying her out of the building, all in front of her co-workers. Eventually he forced her to have sex with him several times at the office, which Smith said she did because she was afraid of Nally. *See id.* at 1169.

²⁵² *Id.* at 1170.

²⁵³ *See id.*; *see also id.* at 1171 ("Our conclusion is supported by reported cases in other jurisdictions. Most courts that have considered the question have held that, as a matter of law,

Although the plaintiff had not brought her claim under Title VII, the court further noted that an employer's Title VII liability for sexual harassment is broader than its liability under the common law.²⁵⁴ An Arizona appellate court declined to follow cases like *Johnson v. Weinberg*,²⁵⁵ in which the court held the employer liable for the criminal act of one of its employees. In rejecting the *Bushey* "foreseeability" test for "scope of employment," the court stated: "because we are not convinced that *Johnson* was properly decided, we decline to follow it."²⁵⁶

Like California, Minnesota's standard for imposing of vicarious liability is notoriously more generous to plaintiffs than that of other states. Yet some Minnesota opinions reflect a confusing amalgam of traditional principles of respondeat superior and more current "strict liability" interpretations. For example, in the case of *Oslin v. State of Minnesota*,²⁵⁷ the plaintiff sued the state (her employer) for the offensive sexual conduct of her supervisor, Gary Grimm. The plaintiff's theories of recovery included battery, defamation and negligent supervision and retention.²⁵⁸ The trial court granted defendant's motion for summary judgment, and plaintiff appealed. In its opinion, the Court of Appeals of Minnesota stated that sexual harassment of employees was "foreseeable" (using the *Bushey* rationale).²⁵⁹ This would suggest that Grimm's acts would be deemed to be within the scope of his employment, but the court went on to state that while negligent supervision was a basis for vicarious liability

an employee's sexual harassment of another employee is not within the scope of employment.") (citing numerous cases from other jurisdictions).

²⁵⁴ We first observe that this appeal involves common law tort and contract claims rather than sexual harassment claims brought under either Title VII of the Civil Rights Act of 1964, . . . or Arizona's Civil Rights Act, . . . Title VII liability is much broader than common law tort liability. . . . One reason is that in Title VII actions, employer liability is based on a statutory scheme that broadly defines "employer," to include "agents" of the employer.

Id. at 1170 (citations omitted).

²⁵⁵ 434 A.2d 404 (D.C. App. 1981). For more about *Johnson v. Weinberg*, see *supra* note 159.

²⁵⁶ *Smith*, 876 P.2d at 1171-72. Finally, the court also held that American Express had not ratified Nally's tortious conduct after the fact, nor was an occasional supervisor's knowledge of Nally's behavior imputed to American Express, since the supervisor did not "acquire" the knowledge of Nally's harassing conduct while acting within the scope of his authority as supervisor. See *id.* at 1172-73.

²⁵⁷ 543 N.W.2d 408 (1996).

²⁵⁸ At a Christmas party off-premises, plaintiff's supervisor had grabbed plaintiff, stroked her breasts, said, "You are one hell of a woman," and kissed her. She pushed him away. Some time later, he again approached her, grabbed her leg, slid his hand up and clutched at her crotch. Plaintiff prosecuted him for criminal assault, and he pleaded guilty to two lesser counts of disorderly conduct. See *id.* at 411.

²⁵⁹ The court said, "[s]exual harassment of an employee can be, to a degree, foreseeable." *Id.* at 413; *P.L. v. Aubert*, 527 N.W.2d 142, 147 (Minn. App. 1995) (noting that sexual abuse of students by teachers has become a well-known hazard; thus holding that whether a teacher's sexual abuse was "foreseeable, related to and connected with acts otherwise within the scope of employment" was a factual question.).

in the employer, negligent retention was a basis for direct, or primary liability. Thus, it would be difficult for the plaintiff to prevail on the theory of negligent retention since the supervisor's behavior was intentionally tortious and the theory of negligent retention requires proof that the employer either knew or should have known of the supervisor's behavior.²⁶⁰

Perhaps most interestingly, two recent cases from California suggest that that state may be backing away from the strict vicarious liability approach it heralded in *Mary M. v. City of Los Angeles*.²⁶¹ *Farmers Insurance Group v. County of Santa Clara*²⁶² and *Doe v. Capital Cities*²⁶³ were decided in 1995 and 1996, respectively. *Farmers Insurance* was a California Supreme Court case in which the plaintiff insurance carrier sued the County of Santa Clara for indemnity, requesting that the county repay sums that the insurance company spent in defense of their insured, Craig Nelson, a Santa Clara deputy sheriff who was sued (successfully) for sexual harassment by two female deputies.²⁶⁴ The plaintiffs sued under both Title VII of the Civil Rights Act of 1964²⁶⁵ and California's Fair Employment and Housing Act.²⁶⁶ Farmers Insurance maintained that it should be indemnified because deputy Nelson was entitled to have his defense paid by the County, not by the insurance company, if the acts or omissions for which he was sued were within the scope of his employment.²⁶⁷ The trial court found for the County of Santa Clara. The Court of Appeals reversed, holding that the *Mary M.* case required a finding that "Nelson's conduct was not so unusual or startling that it would be unfair to include the loss as a cost of the employer's doing business."²⁶⁸ The California Supreme Court subsequently reversed the Court of Appeals, concluding that Farmers Insurance was not entitled to reimbursement from the County of Santa Clara. The Court stated that the burden was on the public employee to show that the actions for

²⁶⁰ See *Oslin*, 543 N.W.2d at 414-15. There had been previous complaints by several female employees against Gary Grimm. Additionally, it is of particular note that Grimm evidently had a drinking problem, and a number of his co-workers had reported him smelling of alcohol during work hours. Indeed, he was drinking when he harassed the plaintiff Smith at the Christmas party. Nevertheless, the court was compelled to hold that the employer was immune from liability under Minnesota's Tort Claims Act. See *id.* at 416.

²⁶¹ 285 Cal. Rptr. 99 (1991); see *infra* note 173 and accompanying text.

²⁶² 47 Cal. Rptr. 2d. 478 (1995).

²⁶³ 58 Cal. Rptr. 2d. 122 (1996).

²⁶⁴ See 47 Cal. Rptr. 2d. at 484.

²⁶⁵ 42 U.S.C. § 2000(e) (1991).

²⁶⁶ CAL. GOV'T CODE, § 12940(h) (West 1991).

²⁶⁷ See *Farmers Insurance*, 47 Cal. Rptr. 2d. at 483 (citing applicable provisions of the California Government Code).

²⁶⁸ *Id.* at 484. The California Court of Appeals must have an incredibly high threshold for "startling" behavior. For those interested in reading some of the gorier details of deputy Nelson's disgusting invitations to his female co-workers, see *id.* at 482-83.

which he was sued were within the scope of his employment.²⁶⁹ Although it was forced by its own precedent to acknowledge that "scope of employment" is a loose standard in California, the Court resurrected language from some of its earlier (pre-*Mary M.*) cases, insisting that the employer is "strictly liable for all actions of its employees during working hours."²⁷⁰ Nor was the Court comfortable with the *Bushey* "foreseeability" test as a framework for determining whether the deputy's acts were within the scope of his employment.²⁷¹

The majority's argument to the contrary notwithstanding, there is simply no way to reconcile the *Farmers Insurance* holding with the standards the Court set forth in *Mary M. v. City of Los Angeles*, just four years earlier. Justice Baxter, who wrote the majority opinion in *Farmers Insurance*, even went so far as to cite courts from other states that have held that sexual harassment is outside the scope of employment.²⁷² Thus, *Farmers Insurance* seems to take a step back from the strict vicarious liability standard that the California Supreme Court had previously adopted.²⁷³

The case of *Doe v. Capital Cities*, decided one year after *Farmers Insurance*, indicates that the lower California courts have interpreted *Farmers Insurance* the same way. *Capital Cities* involved an aspiring actor who sued ABC (and its parent company, Capital Cities) under statutory and common law tort theories of sexual harassment and negligent hiring. The plaintiff was working with one of ABC's casting directors and, at the director's invitation, arrived at the director's home early one Sunday morning, where he was told he would meet various ABC executives over brunch. After arriving at the casting director's home, he was drugged and gang-raped by the director and four other men, and taken to a remote location, where he was abandoned until the police found him.²⁷⁴

²⁶⁹ See *id.* at 485.

²⁷⁰ *Id.* at 487.

²⁷¹ "While it is no doubt true that sexual harassment is a pervasive problem and that many workers in many different fields of employment have experienced some form of uninvited and unwanted sexual attention, this argument stretches the respondeat superior foreseeability concept beyond its logical limits." *Id.* at 489-90.

²⁷² *Id.* at 495-96 (citing cases from New York, Ohio, Arizona, North Carolina, Oregon, Illinois, Texas, Georgia, Louisiana and South Carolina, acknowledging that they are not controlling, but saying that "they nonetheless demonstrate that Justice Mosk's contrary conclusion is not in sync with the national trend."). Recall that Justice Baxter had objected strongly to Justice Kennard's views on respondeat superior in the *Mary M.* case. See *supra* note 192 and accompanying text.

²⁷³ Justices Mosk and Kennard obviously would agree, as their vehement dissents indicate. See *Farmers Insurance*, 47 Cal. Rptr. 2d. at 501-08, 509-16. That *Farmers Insurance* stops just short of overruling *Mary M.* is indicated by the concurring opinion of Justice George, who writes, "I write separately because, in addition to distinguishing the decision in *Mary M. v. City of Los Angeles*, I would go further and overrule *Mary M.* because I believe that case was wrongly decided." *Id.* at 497.

²⁷⁴ See *Doe*, 58 Cal. Rptr. 2d. at 125.

Some time later the plaintiff was assaulted outside his home and stabbed by the same casting director and his accomplices.²⁷⁵ A California appellate court ultimately held that ABC could feasibly be held liable for the director's wrongful conduct, and reversed the trial court's earlier decision on that issue.²⁷⁶

Because of the intervening decision by the California Supreme Court in *Farmers Insurance, Capital Cities* involved only theories of *primary liability*. At the outset of its opinion, the Court of Appeals of California stated:

We begin our discussion by noting the theory of liability this case does not expressly involve—vicarious liability or respondeat superior. Plaintiff's second amended complaint had alleged that ABC was vicariously liable for the common-law intentional torts (assault, battery, false imprisonment, and intentional infliction of emotional distress) committed by [the director]. . . . During the pendency of this case, our Supreme Court clarified the law governing an employer's vicarious liability for sexual assaults. As a result of those holdings, . . . plaintiff has abandoned his claims based upon vicarious liability.²⁷⁷

4. *The Future of Enterprise Liability for Sexual Harassment if Currently Illicit Drugs Become Legal*

It seems clear that scholarly proponents of strict enterprise liability hoped that sexual harassment litigation under Title VII would strengthen many courts' recent predisposition to extend the concept of respondeat superior to the egregiously wrongful acts of their employees. Much to the scholars' chagrin, most of the federal and state courts have applied a negligence (i.e., fault-based) standard—at least in "hostile environment" cases. In other words, the courts have given employers an opportunity to respond to an employee's complaints of a sexually offensive work atmosphere and to discipline the wrongdoer(s) before imposing liability on the enterprise.

Consistent with their positions over the past century, however, scholars in this area are not satisfied, and they find what they view as

²⁷⁵ See *id.*

²⁷⁶ See *id.* at 124.

²⁷⁷ *Id.* at 126 (citations omitted). Note that in addition to the *Farmers Insurance* case, the California Supreme Court had also recently decided *Lisa M. v. Henry Mayo Newhall Hospital*, another post-*Mary M.* case, in which the court retreated from the earlier *Mary M.* approach. See *supra* note 190 and accompanying text. The Court of Appeals cited the *Lisa M.* case as well as *Farmers Insurance*.

judicial intransigence baffling, or worse.²⁷⁸ Some conclude that none of the federal courts understand the law of agency.²⁷⁹ As this Article has demonstrated, the most recent versions of that inquiry are little more than stabs at “but for” causation; specifically, considering the current “mere possibility” version of “foreseeability” and the latest “job-related authority” interpretation of “scope of employment,” the plaintiff will, if the commentators have their way, only need prove that her supervisor was in fact employed by her employer. This would then trigger strict vicarious liability in the employer for all “hostile environment” harassment committed by the supervisor.

Indeed, Professor David Oppenheimer suggests this very result. Citing *Bushey v. United States*, Oppenheimer argues that employers should be strictly liable for sexual harassment because it is “foreseeable.”²⁸⁰ He further insists that, “[u]nder the doctrine of respondeat superior, employers are vicariously liable for the wrongs of their employees, if committed while in the scope of their employment.”²⁸¹ As with many modern scholars, his definition of “scope of employment” is

²⁷⁸ See, e.g., Oppenheimer, *supra* note 208, at 131 (citing a myriad of scholarly articles critical of the result in *Meritor Savings Bank v. Vinson* and subsequent cases). Oppenheimer does approve of California’s approach. California has enacted a statute, the Fair Employment and Housing Act (FEHA), which follows the EEOC’s 1980 Final Guidelines, thus holding California employers strictly liable for all harassment—quid pro quo and hostile environment—committed by supervisory employees. CAL. LAB. CODE §§ 1410-1433 (West 1989), repealed by 1980 CAL. STAT. 992 § 11, reenacted CAL. GOV’T. CODE §§ 12900-12996 (West 1992 & Supp. 1995).

²⁷⁹ For example, Professor Oppenheimer, a proponent of strict vicarious liability for all supervisory harassment, said, “Unfortunately, Justice Rehnquist’s opinion in *Vinson* erroneously distinguished between agency liability and vicarious liability for harassment committed by supervisors. The circuit courts compounded this error as they attempted to apply *Vinson*, leaving the area in chaos, especially in light of the contrary dictates of the 1980 EEOC Guidelines.” Oppenheimer, *supra* note 208, at 142. “The array of federal court decisions addressing the problem between agency law and sexual harassment by supervisors reveals an exasperating problem. Federal Courts routinely misapply the law of agency.” *Id.* at 73. The court went on to find that:

The preceding discussion established that the federal courts have misapplied the law of agency in Title VII sexual harassment cases. Why did such fundamental errors occur? . . . One possibility is that counsel have failed to correctly and convincingly explain the operation of respondeat superior. *Without proper guidance from the parties, courts may easily substitute an incorrect, albeit common-sense, understanding of an agent’s authority, for the more exacting requirements imposed by the law of agency.*

Id. at 145 (emphasis added).

²⁸⁰ See *id.* at 91 (“With respect to vicarious liability for sexual harassment, it cannot seriously be argued that sexual harassment in employment is unforeseeable conduct.”). However, it would seem to me that, using the *Bushey* “foreseeability” test as a rationale, strict vicarious liability could be imposed on the employer for a hostile environment created by non-supervisory employees as well; after all, in *Bushey*, seaman Lane, the wrongdoer, was a lowly sailor, not an officer or higher-ranking serviceman. Ergo my prediction. See *infra* note 285.

²⁸¹ Oppenheimer, *supra* note 208, at 142.

such that no act of a supervisor would ever be outside of the scope of his employment, no matter how heinous, offensive or proscribed:

Should we ever conclude that a harasser-supervisor is acting so far outside his role as a supervisory employee that his on-the-job harassment is not the responsibility of his employer? . . . I conclude that the answer to this question must be "no." . . . The application of respondeat superior recognizes the supervisor's effect on the work environment, which is so closely connected with the authority he exercises as a supervisor that his acts of harassment within the workplace can almost never be independent of his authority as an agent of the employer.²⁸²

It is a mark of how far we have departed from traditional respondeat superior that Professor Oppenheimer can also say that his proffered interpretation would "result in the proper application of common-law respondeat superior."²⁸³

Nothing could be further from the truth. And this, not the courts' seeming ignorance of agency law, is the source of the current dilemma in applying agency principles to Title VII sexual harassment cases. According to traditional principles of respondeat superior, an employer would be liable for acts which it authorized, or for an employee's negligent acts which were reasonably foreseeable given the nature of the enterprise. In *exceptional cases*, the employer would also be liable for an employee's intentional or willful misconduct, but only if the employer was negligent in hiring or supervising the employee, or if the intentional act was committed at least partially in furtherance of the employer's purpose.²⁸⁴ Traditionally, crimes, violent assaults, and disgusting or vulgar sexual behavior would *never* have been construed as "in furtherance of the employer's purpose," and thus would *not* have been deemed to be within a supervisor's "scope of employment."

It is only within the past thirty years that scholars and some courts have overextended and confused traditional agency principles to accomplish their actual goal of imposing strict liability upon an employer for *every act* of its employees. It is Professor Oppenheimer and his ilk, both in academia and the judiciary, that have found it difficult to accept traditional notions of common-law respondeat superior. On the other hand, judges and a handful of other scholars are legitimately opposed to fitting

²⁸² *Id.* at 76.

²⁸³ *Id.* at 142 (emphasis added).

²⁸⁴ See *supra* Part II.A. & B.

a strict liability square peg into a respondeat superior round hole.²⁸⁵ For this, the American enterprise can be grateful. Yet they cannot rest easy. In the area of sexual harassment, as with tort law in general, the prospect of a strict liability approach taken by the judiciary, coupled with increased drug use after legalization, poses an incalculable economic threat.

IV. LIMITS ON THE ENTERPRISE'S ABILITY TO SHIELD ITSELF FROM LIABILITY FOR EMPLOYEES' DRUG-RELATED, INTENTIONAL TORTS OR CRIMES

A. RESTRICTIONS ON DRUG TESTING OF EMPLOYEES UNDER STATE LAW

The previous two sections of this Article have identified trends in enterprise liability over the past 100 years, and focused in particular upon recent incarnations of enterprise liability that seek to hold the employer liable for intentional torts, crimes, sexual harassment and sexual assault by employees. Although not a factor in every case, it is ominous and instructive that in some of the most prominent cases, such as *Ira S. Bushey & Sons v. United States*²⁸⁶ and *Rodgers v. Kemper Construction Co.*,²⁸⁷ the bizarre, violent or grotesquely offensive acts for which the employers were held liable were committed by employees while they were *intoxicated*.²⁸⁸

If, as this Article posits (and the experts seem to admit), legalization of currently illicit drugs would result in a significant increase in their use, it stands to reason that more negligent torts will certainly be committed by employees. But even more disturbing is the fact that more *intentional* torts—violent assaults, battery, offensive sexual conduct and even criminal sexual conduct—will also be committed by employees under the influence of psychoactive substances. The logical response for any self-protective enterprise is to institute and implement policies that screen and weed out applicants and employees who abuse alcohol or drugs. In fact,

²⁸⁵ It is encouraging to see that so many federal judges insist upon giving the employer the opportunity to address a sexually offensive workplace, and to discipline the offenders, prior to imposing liability upon the enterprise. And perhaps one could take heart that at least two scholarly commentators oppose uniform application of strict liability principles. See, e.g., Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387 (1994); J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273 (1995). Despite Professor Oppenheimer's expressed fear that we might be returning to a time of more limited, fault-based enterprise liability, my prediction is that the next call will be for an *extension* of strict vicarious liability in sexual harassment cases to the acts of *non-supervisory* employees as well.

²⁸⁶ See *Bushey*, 398 F.2d 167 (2d Cir. 1968).

²⁸⁷ *Rodgers*, 124 Cal. Rptr. at 143 (1975).

²⁸⁸ See *Bushey*, 398 F.2d at 168; *Rodgers*, 124 Cal. Rptr. at 146.

the number of employers who utilize drug testing has risen dramatically within the last fifteen years or so.²⁸⁹ However, there are limits, both legal and practical, on an employer's ability to test for employee drug use, and on the effectiveness of such programs.

The process of testing for the presence of illegal drugs is a highly invasive procedure, usually involving employee urine samples taken under supervised and controlled conditions, which are then subjected to urinalysis in a laboratory environment.²⁹⁰ Because of the embarrassing nature of a urine test and the highly personal information it reveals, there are employee privacy concerns associated with drug testing. As regards government employees, it has been held that urine tests are Fourth Amendment searches and seizures that are subject to scrutiny by the courts for their reasonableness.²⁹¹ Private employers are also con-

²⁸⁹ See, e.g., William Andrew Hamilton, Note, *Drug Testing of Florida's Public Employees: When May a Public Employer Require Urinalysis?*, 15 FLA. ST. U. L. REV. 101, 102 (1987) ("One-fourth of the Fortune 500 companies now screen employees for drugs."); Michelle Lynn O'Brien, Comment, *Webster v. Motorola: Employees Reclaiming the Right to Privacy; Random Drug Testing for Safety Sensitive Employees Only*, 30 NEW ENG. L. REV. 547 n.2 (1996) ("While fewer than 5 percent of Fortune 500 companies participated in drug testing programs in 1982, by 1988, more than 50 percent of them did."); Chon & Jacob, *supra* note 4, at F8.

Employee drug and alcohol testing in many groups is expanding at a rapid pace, not only in the athletic area but also in public and private employment settings, particularly because of recent attention to the issue. More and more employers are looking at substance abuse screening programs as an effective risk management tool. According to survey results published in national newspapers, 90 percent of the Fortune 500 companies were considering substance abuse screening programs, with half of the firms planning to implement the program before the end of the year.

Id. Richard Alaniz, *Drug Testing Programs: Tough Test for Employers*, ELECTRIC LIGHT AND POWER, Sep. 1990, at 24 ("[I]n 1982, less than 3 percent of the nation's largest firms used any form of drug testing. Today, according to a recent survey, 50 percent do.").

²⁹⁰ Urinalysis is used to detect the presence of cocaine, marijuana, opiates, PCP, amphetamines and barbiturates. For testing the presence of alcohol, the preferred method is blood and serum testing, rather than urine. See, e.g., Collins, *supra* note 4, at 31 ("Common drug assay methods currently include thin-layer chromatography, immunoassay, and gas chromatography/mass spectrometry."); Chon & Jacob, *supra* note 4, at F8 ("A number of different techniques are available for determining the presence of drugs in urine, the most widely used being the testing technique called immunoassay testing. It can detect the use of most illicit drugs, including cocaine, amphetamines, barbiturates, heroin, methaqualone, and PCP.").

²⁹¹ The courts which have considered this issue have likened urine tests to blood tests and analogized to the United States Supreme Court's reasoning in *Schmerber v. California*, 384 U.S. 757 (1966), which held that a blood sample taken from a motorist suspected of driving under the influence of alcohol was a "search and seizure" within the meaning of the Fourth Amendment. See, e.g., McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), *modified*, 809 F.2d 1302 (8th Cir. 1987); Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985); Railway Labor Executives Assn. v. Long Island R.R. Co., 651 F. Supp. 1284 (E.D.N.Y. 1987); American Fed'n Gov't Employees v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986). This is not to say that drug testing will be thrown out, just that the employer must be reasonable in the justification and implementation of the drug testing program. See, e.g., Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986); Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986); National Treasury Em-

strained by law even though they are not acting on behalf of the state when they subject their employees to drug tests.²⁹² Nearly every state has enacted statutes that either designate specific industries for mandated drug testing, provide limits to permissible grounds for drug testing, or regulate its methods and procedures.²⁹³ Additionally, state unemployment compensation statutes (and cases interpreting them) often address the issue of drug testing or illegal drug use in conjunction with dismissal

employees Union v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986); City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla. 5th D.C.A. 1985). "Reasonableness" has tended to be a function of the nature of the employees' jobs (for example, being in so-called "safety-sensitive positions"), after an accident or where other external indicia suggest the possibility of substance abuse. This standard is referred to in the cases as the "reasonable suspicion" standard, somewhat less strict than the "probable cause" standard. "Reasonable suspicion" is generally considered to be less comprehensive, less arbitrary and thus less potentially violative than random testing.

²⁹² *But see, e.g.,* Kelley v. Schlumberger Tech. Corp., 849 F.2d 41 (1st Cir. 1988) (interpreting Article I, section 5 of the Louisiana Constitution, holding that it protects persons from invasions of privacy that "negligently" inflict foreseeable "emotional injuries"); MASS. GEN. LAWS ANN., ch. 214, § 1B (West 1989) (creating a statutory prohibition of unreasonable, substantial or serious interference with the privacy of Massachusetts citizens).

²⁹³ For an excellent breakdown of the (primarily) statutory law governing drug testing, state by state, see Morgan, Lewis & Bockius, P.C., *Drug Testing in the Workplace: State-by-State Drug and Alcohol Testing Survey*, 33 WM. & MARY L. REV. 189 (1991). *See, e.g.,* CONN. GEN. STAT. §§ 31-12 through 31-57 (b) (1987 & Supp. 1991) (requiring "reasonable suspicion" before implementing drug test; requiring written consent to drug test by prospective employee; limiting employer's ability to condition job benefits (promotion, pay raise, etc.) on basis of drug test results; requiring employer to submit employee to at least two drug tests by urinalysis, and results of second urinalysis to be confirmed by a third test, utilizing gas chromatography or mass spectrometry methods); HAW. REV. STAT. § 378-26.5(5) (Supp. 1990) (outlawing the use of any bodily intrusive device for purposes of truth verification; arguably applies to use of drug or alcohol tests for verification after asking employee about substance use). *See* Morgan, Lewis & Bockius, *supra*, at 202; ILL. REV. STAT. ch. 111-112, ¶ 6356-3 (1990) (authorizing the Department of Public Health to issue guidelines for private employers instituting drug testing programs); IOWA CODE § 730.5 (Supp. 1989) (prohibiting drug tests except in case of probable cause to suspect drug use by an employee in a safety-sensitive position); 26 ME. REV. STAT. ANN. §§ 681-690 (West Supp. 1990) (comprehensively regulating all matters relating to drug and alcohol testing procedures in the workplace; also requiring an employee assistance program prior to instituting substance testing, in all companies with more than twenty employees). *Id.* at § 683; MD. CODE ANN., [HEALTH-GEN] § 17-214.1 (1990) (generally permitting drug testing in private employment and setting forth procedures); MINN. STAT. ANN. §§ 181.950-181.957 (comprehensively regulating drug and alcohol testing in the workplace); MONT. CODE ANN. § 39-2-304 (1989) (comprehensively regulating drug testing of prospective and current employees); NEB. REV. STAT. §§ 48-1901 through 48-1910 (1988) (comprehensively regulating the collection and utilization procedures in drug testing); New York State Division of Human Rights, Rulings on Inquiries § 11(B) (1988) (limiting drug and alcohol testing for prospective employees); OR. REV. STAT. § 438.435 (providing comprehensive regulation for drug testing procedures); R.I. GEN. LAWS § 28-6.5-1 (Supp. 1990) (requiring "reasonable suspicion before drug test"); UTAH CODE ANN. §§ 34-38-1 through 34-38-15 (1988) (comprehensively regulating drug testing procedures for private employers); 21 VT. STAT. ANN. §§ 511-520 (1987) (strictly regulating all drug testing procedures by private employers; requiring the higher "probable cause" standard to justify testing, rather than the lesser "reasonable cause" test); WASH. REV. CODE § 49.44.120 (Supp. 1990) (prohibiting drug test as a condition of employment, but certain professions are excepted).

or denial of unemployment benefits.²⁹⁴ Finally, employees of private companies may have recourse to common law tort remedies for invasion of privacy,²⁹⁵ intentional infliction of emotional distress,²⁹⁶ or defamation,²⁹⁷ in an appropriate case.²⁹⁸ In enterprises with unionized employees, existence of drug testing programs can present conflicts with the unions, including disputes over claims of unfair trade practices or violation of the collective bargaining agreement.²⁹⁹

There are four types of typical drug testing schemes: pre-employment, post-accident, "reasonable suspicion," and random drug testing. Courts generally uphold pre-employment drug screening since prospective employees are deemed to have less of an interest in obtaining a job than current employees have in keeping one.³⁰⁰ Post-accident testing is almost never successfully challenged because it is prompted by safety concerns evidenced by the accident itself.³⁰¹ The test enjoying the most support under state law is the "reasonable suspicion," standard, which permits an employer to test certain individual employees for drugs if external behaviors indicate that an employee is impaired, under the influ-

²⁹⁴ See, e.g., ARK. STAT. ANN. § 11-10-514(b) (Supp. 1990) (stating that an employee discharged from work for being under the influence of alcohol or a controlled substance is disqualified from receiving benefits); *Dock v. M & G Convoy*, No. 88A-FE-5, 1988 Del. Super. LEXIS 453 (Dec. 27, 1988) (holding that employee who refused to submit to alcohol test could be denied unemployment benefits under certain conditions); FLA. STAT. ANN. §§ 440.01 et. seq. (outlining procedures and limits on employee drug testing); *Fowler v. Unemployment Appeals Comm'n*, 537 So.2d 162 (Fla. Ct. App. 1989) (holding that refusal to submit to drug test is misconduct justifying denial of unemployment benefits); LA. REV. STAT. ANN. § 23:1601 (10)(a) (West. Supp. 1991) (permitting denial of unemployment benefits for discharge on grounds of using illegal drugs on or off the job, subject to certain conditions); *Fremont Hotel and Casino v. Esposito*, 760 P.2d 122 (Nev. 1988) (holding that refusal to submit to drug test violated collective bargaining agreement and justified denial of benefits); *Barkley v. Peninsula Transp. Dist. Comm'n*, 398 S.E.2d 94 (Va. Ct. App. 1990) (holding that employee misconduct justifying denial of benefits must be based upon clear violation of employer policy).

²⁹⁵ See, e.g., *Hill v. N.C.A.A.*, 273 Cal. Rptr. 402 (Ct. App. 1990) (involving drug tests for student athletes); *O'Brien v. Papa Gino's*, 780 F.2d 1067 (1st Cir. 1986) (holding that coercive techniques used by employer supported award for invasion of privacy).

²⁹⁶ See, e.g., 1987 Op. of Ariz. Att'y. Gen. 251 (1987) (advising that "medical testing by private employers will be allowed unless there is intentional infliction of emotional distress by means of extreme and outrageous conduct").

²⁹⁷ See, e.g., *Bratt v. IBM, Corp.*, 467 N.E.2d 126 (Mass. 1984) (stating employer's disclosure of employee's personal medical facts may provide grounds for defamation, subject to conditional privilege).

²⁹⁸ See, e.g., Edward M. Chen et al., *Common Law Privacy: A Limit on an Employer's Power to Test for Drugs*, 12 GEO. MASON L. REV. 651 (1990).

²⁹⁹ See, e.g., *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111 (1st Cir. 1988) (holding that analysis of plaintiff employee's privacy claim required interpretation of company's collective bargaining agreement); MINN. STAT. ANN. § 181.954(5) (providing that parties' collective bargaining agreement may meet or exceed minimum protections provided by statute).

³⁰⁰ See, e.g., Gillian Flynn, *Will Drug Testing Pass or Fail in Court?*, 75 PERSONNEL, Apr. 1996, at 141 (interview with attorney Larry Michaels).

³⁰¹ See, e.g., *Coil & Rice*, *supra* note 4, at 103.

ence at work or has a substance abuse problem.³⁰² Many employers would prefer random drug testing to testing upon "reasonable suspicion" because of the surprise factor and the increased likelihood of catching employees impaired by drug use on or off the job. However, random drug testing is consistently subjected to the toughest judicial scrutiny, and in some states is even prohibited by statute.³⁰³

Notwithstanding the increasing frequency of their use, drug tests have practical problems as well. There are some serious questions as to their reliability.³⁰⁴ Positive results do not necessarily indicate impairment, or even drug use, because other extraneous factors may produce a positive test result.³⁰⁵ Some commentators also complain that while urinalysis reveals traces of illegal drugs, it cannot determine if an employee is specifically impaired while working because in some cases (e.g., cases of marijuana use) the test can identify drug use which pre-dates the test by two weeks or more.³⁰⁶ Additionally, urinalysis reveals much more about an employee than is necessary to ascertain if he or she is using illegal drugs. This highly confidential information must remain private, at the employer's peril.³⁰⁷ Furthermore, drug testing is expensive, often prohibitively so.³⁰⁸ In other words, screening employees for drug use is a fairly complicated endeavor.³⁰⁹

³⁰² See *supra* note 293 for a list of state statutes; see also O'Brien, *supra* note 289, at 554, 566. O'Brien notes, however, that "reasonable suspicion" is fraught with peril as well, since there are other factors, such as fatigue, stress, or depression which can cause an employee to exhibit symptoms easily mistaken for substance abuse. See *id.* at 566.

³⁰³ See O'Brien, *supra* note 289, at 554-55 (citing law from Alaska, California, Massachusetts, and West Virginia, which prohibits random drug testing for all but employees in safety sensitive positions).

³⁰⁴ One of the most frequent challenges is to collection procedures, "chain of custody" and the procedures of the lab selected to perform the test. See Collins, *supra* note 4, at 31; Verespej, *supra* note 4, at 20; see also Chon & Jacob, *supra* note 4, at F10 ("Experts in the area say that the problem [of false positive results in drug tests] is due to unskilled laboratories entering the business as drug testing is booming. At present, no certification program is available for substance-screening laboratories, and that fact deteriorates the quality of drug-testing laboratories.").

³⁰⁵ See Collins, *supra* note 4, at 33-34. Some of the typical factors which can result in a false positive are consumption of certain foods, such as poppy seeds, or passive ingestion of marijuana smoke at a social event, both of which can produce a false positive for marijuana. See Westbrook, *supra* note 4, at 20.

³⁰⁶ See, e.g., Westbrook, *supra* note 4, at 20 (reporting that the urine tests for marijuana can detect marijuana ingestion as far back as a few weeks).

³⁰⁷ See, e.g., CAL. CIV. CODE § 56.20(a) (West 1989) (imposing upon employers who receive medical information about their employees a duty to establish procedures to keep that information absolutely confidential); LA. REV. STAT. ANN. § 23:1601(10)(e), (f) (strictly limiting use of confidential information obtained through drug test).

³⁰⁸ See, e.g., O'Brien, *supra* note 289, at 551 (quoting Rep. Patricia Schroeder (D-Colo.), who estimated that drug tests could run as high as \$100 per employee).

³⁰⁹ "A drug test does not a policy make. A lot of people don't understand what a test will tell them and what it won't." Westbrook, *supra* note 4, at 18 (quoting Lee Dogoloff, Executive Director of the American Council for Drug Education in Rockville, Maryland).

Finally, the prospect of testing employees to identify drug use can trigger yet another impediment to disciplining or terminating employees with substance abuse problems. Employees who assert that their drug (or alcohol) use is a result of an *addiction* can claim that they are disabled within the meaning of recent laws that characterize addiction as a disability protected against discrimination. The Americans with Disabilities Act of 1990 is an example of such a law, and most states have similar laws.³¹⁰

B. ADDICTION AS A PROTECTED DISABILITY UNDER ANTIDISCRIMINATION STATUTES

1. *The Americans with Disabilities Act of 1990*

The Americans with Disabilities Act of 1990 ("ADA") prohibits employers³¹¹ from discriminating against a "qualified individual with a disability."³¹² The statute sets forth a long list of employer actions that can be construed as discrimination, including decisions regarding hiring, promotion, compensation, job training and other conditions of employment.³¹³ The ADA, like its predecessor, the Rehabilitation Act of 1973, seeks to "level the playing field" in employment opportunities for disabled persons by dispelling unfounded stereotypes of persons with handicaps.³¹⁴ The ADA extends the Rehabilitation Act's protection by applying the prohibition against discrimination by private employers.³¹⁵

In order to have the benefit of ADA protection, the employee must show that he or she is a qualified individual with a disability, who, with or without reasonable accommodation, could perform the tasks associated with the job. Once a current or prospective employee demonstrates that he or she is a qualified individual with a disability, the ADA requires the employer to provide "reasonable accommodation" to the em-

³¹⁰ See *infra* Part IV.B.

³¹¹ The term "covered entity" is actually used in the statute, meaning, "employer, employment agency, labor organization or joint labor-management committee." 42 U.S.C. § 12111(2) (1990).

³¹² 42 U.S.C. § 12112(a) (1994). "Qualified individual with a disability" is defined as an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (1990). "Disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2)(a),(b) & (c) (1990).

³¹³ See 42 U.S.C. § 12112(b) (1990).

³¹⁴ See 42 U.S.C. § 12101(a) (1990); see also *Siefken v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995).

³¹⁵ Subchapter I of the ADA applies to private entities; Subchapter III applies to public entities. Compare with Rehabilitation Act of 1973, codified as 29 U.S.C. § 701-797 et seq. (1994); see also *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993).

ployee.³¹⁶ Although there are already hundreds of cases interpreting the ADA, what is significant for this Article's purposes is that addiction is considered to be a "disability" which must be "accommodated" under the ADA.³¹⁷ As ominous as this might initially sound, language in Section 12114 of the ADA explicitly exempts from the definition of "qualified individual with a disability" anyone who is "currently engaging in the illegal use of drugs."³¹⁸ This section authorizes an employer to insist upon and to take steps to ensure an alcohol- and drug-free workplace (including use of drug testing), and to hold even persons addicted to drugs or alcohol to the same standard of work conduct as non-addicted employees.³¹⁹ Thus, in *Flynn v. Raytheon*,³²⁰ the District Court of Massachusetts held that an employee could be terminated for showing up to work intoxicated, in violation of the company's policy, without violating the ADA. The court explained that "[r]easonable accommodation does not extend to accommodating an alcoholic employee's showing up for work under the influence of alcohol or drinking alcohol on the job."³²¹

The ADA also permits the employer to defend an allegation of disability discrimination by showing that the employment decision or action taken was "job-related" and "consistent with business necessity."³²² For example, in the case of *Thomas v. Mississippi State Department of Health*,³²³ the court rejected the plaintiff's contention that his status as a drug addict prohibited his employer from asking legitimate questions

³¹⁶ See 42 U.S.C. § 12111(9) (1990). But the employer may show that accommodating the disabled employee is an "undue hardship" under the circumstances, taking into account the nature and cost of the accommodation requested, the financial resources of the employer, the size of the enterprise and the type of business conducted by the enterprise. See 42 U.S.C. § 12111(10) (1990). This is very much a case-by-case determination.

³¹⁷ Addiction is also considered to be a disability under the Rehabilitation Act of 1973. Courts interpreting the statute have held that alcoholism was protected within the Act. See, e.g., *Little v. F.B.I.*, 1 F.3d 255 (4th Cir. 1993) (holding that alcoholism is protected disability under the Rehabilitation Act, but nonetheless justifying employee's termination for intoxication on duty). More recent cases interpreting the ADA have followed their lead in finding that alcoholism and drug addiction are protected disabilities. See, e.g., *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991 (D. Or. 1994). But cf. *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316 (5th Cir. 1997) (holding that alcoholism is not a "per se" disability under the ADA: "Unlike HIV infection, the EEOC has not attempted to classify alcoholism as a per se disability, and we decline to adopt such a questionable position.").

³¹⁸ See 42 U.S.C. § 12114(a) (1990); see also *Scott v. Beverly Enters.-Kan., Inc.*, 968 F. Supp. 1430 (D. Kan. 1997). In *Scott*, the court found that plaintiff was not entitled to ADA protection, since he was "currently engaging in the illegal use of drugs," and thus not a "qualified individual with a disability" within the meaning of the statute. *Id.* at 1441; see also *Lewis v. Sheraton Soc'y Hill*, 1997 WL 397490, at* 4 (E.D. Pa. 1997) (holding that plaintiff is "still a drug user," and thus "not an individual with a disability as contemplated under the ADA.").

³¹⁹ See 42 U.S.C. § 12114 (c), (d) & (e) (1990).

³²⁰ 868 F. Supp. 383 (D. Mass. 1994).

³²¹ *Id.* at 387.

³²² See 42 U.S.C. § 12113(a) (1990).

³²³ 934 F. Supp. 768 (S.D. Miss. 1996).

about his previous termination for absenteeism, a problem caused by his addiction to crack cocaine.³²⁴ The court held that the employer was not prohibited by the ADA from asking legitimate questions that were "shown to be job-related and consistent with business necessity."³²⁵

In cases involving disciplinary action against or termination of addicted employees, courts have interpreted sections of the ADA as protecting employers whose decisions were made on the basis of the addicted employee's potential threat to the health or safety of others. Two recent cases involving doctors amply demonstrate this point. In *Altman v. New York City Health and Hospitals Corp.*,³²⁶ the plaintiff, a recovering alcoholic, sued his employer to demand reinstatement as Chief of Internal Medicine, a position which he held until he was discovered treating a patient while drunk.³²⁷ Three months after his removal from that position, the plaintiff completed a one-month alcohol rehabilitation program and insisted that he be reinstated to his prior position. When the hospital refused to reinstate him, he sued, claiming that he was being discriminated against because of his disability, in violation of the ADA.³²⁸ Quoting from § 12111(3) of the ADA and the related regulations, the court held that reinstatement of the plaintiff as Chief of Internal Medicine would have posed a "direct threat to the health or safety" of the hospital's patients, a "significant risk of substantial harm" that could not be monitored by any reasonable means.³²⁹

Similarly, in *Judice v. Hospital Serv. Dist. No. 1*,³³⁰ the plaintiff sued seeking reinstatement to his position as a surgeon, from which he had been removed after it was discovered that he was preparing for surgery under the influence of alcohol. Although Dr. Judice successfully completed a rehabilitation program, his employment history contained previous bouts with alcohol abuse, rehabilitation and relapse, and the hospital sought at least two professional opinions prior to reinstating the

³²⁴ See *id.* at 773. Plaintiff had previously worked for the Department of Health as a Disease Intervention Specialist, and had developed an addiction to crack cocaine, which prompted two administrative leaves, one for involuntary commitment in a rehabilitation facility and one for voluntary commitment to another program. He was eventually fired. Two years later, plaintiff applied for another DIS position. During his interview, he was asked questions about his addiction problems. The court characterized plaintiff's contention as follows: "According to plaintiff, since his drug addiction caused these circumstances, defendants were prohibited from considering them." *Id.* at 771.

³²⁵ *Id.* at 773.

³²⁶ 903 F. Supp. 503 (S.D.N.Y. 1995).

³²⁷ See *id.* at 504.

³²⁸ See *id.* at 507-08. Dr. Altman also sued under N.Y. EXEC. LAW, § 296. *Id.*

³²⁹ *Id.* at 508, 513. The court found it significant that plaintiff had had problems with alcohol abuse before, had successfully completed rehabilitation programs and had relapsed. See *id.* at 509.

³³⁰ 919 F. Supp. 978 (E.D. La. 1996).

plaintiff.³³¹ The plaintiff objected to the necessity of a second opinion about his fitness for reinstatement, and he sued under the ADA.³³² The district court in *Judice*, like the court in *Altman*, pointed to the “direct threat” language in the ADA, concluding that the possibility of plaintiff’s relapse was sufficiently high to warrant the hospital’s prudence, and its procedural safeguards were not disability discrimination in violation of the ADA.³³³

Reassuringly, many courts have developed a common-sense approach to the characterization of “addiction” as a protected “disability,” and have shielded employers from ADA liability by distinguishing between an employee’s “status” as an addict, and his or her “conduct.” According to this distinction, while an employee’s mere *status* as an alcoholic or drug addict cannot be the basis of denial of a job or job benefits, or of disciplinary action or termination, an employee’s *conduct*—even that which is related to current abuse of alcohol or illicit drugs—is considered by many courts as *not* protected by the ADA.

Thus, in *Davis v. Safeway, Inc.*,³³⁴ the court granted summary judgment in favor of the defendant where the plaintiff was terminated because of his physically and verbally abusive behavior (including sexually offensive behavior) toward Safeway employees and guests at a company-sponsored fundraising event, even though the plaintiff claimed that his behavior was caused by alcoholism.³³⁵

Also, in *Adamczyk v. Baltimore County Police Department*,³³⁶ the court refused to hold an employer liable for violation of the ADA where it had demoted a police officer from lieutenant to corporal following a series of explicit and obscene comments which he made to and about lower-ranking female officers over a period of time.³³⁷ Plaintiff Adamczyk argued that his status as an alcoholic was the basis of his demotion, but the court disagreed, distinguishing his addiction from his misconduct, which violated the police department’s internal standards of

³³¹ See *id.* at 980.

³³² See *id.*

³³³ See *id.* at 982-83.

³³⁴ 1996 WL 266128 (N.D. Cal.).

³³⁵ See *id.* at *2 (plaintiff’s behavior is set forth on this page of this unreported opinion). The court ultimately said, “Consistent with [42 U.S.C. § 12114(c)(4)], courts have consistently failed to find ADA violations where the reason for an employee’s termination is the employee’s misconduct, not alcoholism, even where the misconduct is tied to the alcoholism.” *Id.* at *7.

³³⁶ 952 F. Supp. 259 (D. Md. 1997).

³³⁷ Often in sexual harassment cases, the courts discreetly edit the offensive comments with “expletive deleted” and typographical symbols used in place of letters to avoid spelling out some particularly offensive words. The Court in *Adamczyk*, however, perhaps to drive home the correctness of its result, described Adamczyk’s conduct and quoted his comments in all their disgusting detail. See *id.* at 260-62.

conduct.³³⁸ Indeed, the court concluded that Adamczyk's proffered interpretation of the ADA's protection of his conduct was absurd in light of the police department's potential vicarious liability for his behavior, saying:

The BCPD [Baltimore County Police Department] was entirely justified in treating plaintiff's offensive behavior as evidence of sexual harassment by a supervisory employee. Had defendants not taken prompt remedial action by disciplining plaintiff, the BCPD itself might well have faced female officers' claims that the department condoned a hostile or abusive work environment. A police department like the BCPD must be allowed to legally demote even police officers suffering from alcoholism who egregiously offend female officers and disregard rules and standards which Baltimore County has established to regulate the conduct of its police force.³³⁹

Some courts have even extended this protection to employers in cases where employees were disciplined or terminated for improper or illegal conduct (involving alcohol and drug use) during off-hours. For example, in *Maddox v. University of Tennessee*,³⁴⁰ the district court for the Eastern District of Tennessee held that the University of Tennessee's decision to fire the plaintiff, an assistant football coach, after his very public arrest for driving while intoxicated, was not violative of the ADA even though the plaintiff employee was not on duty at the time of his arrest. The *Maddox* court relied upon *Taub v. Frank*,³⁴¹ a First Circuit case, and also distinguished between the disability of addiction itself, which is protected, and misconduct related to it, which the court held is not protected.³⁴²

Fortunately, the ADA contains language which explicitly excludes current illegal drug use from the definition of a "qualified person with a disability." Nevertheless, the ADA still creates the perverse incentive for an employee to claim that his or her problem is worse than it really is;

³³⁸ See *id.* at 264.

³³⁹ *Id.* at 266.

³⁴⁰ 907 F. Supp. 1144 (E.D. Tenn. 1994).

³⁴¹ 957 F.2d 8, 11 (1st Cir. 1992).

³⁴² See *Maddox*, 907 F. Supp. at 1150. In *Taub*, plaintiff employee had been caught in possession of heroin which he intended to sell to his fellow employees. See *Taub*, 957 F.2d at 9. After being advised of his impending termination for that conduct, plaintiff sued, claiming to be addicted to heroin and thus protected from disciplinary action by the ADA. See *id.* The district court granted defendant employer's motion for summary judgment, and the First Circuit affirmed, holding that the employer had discharged the employee for criminal conduct, not solely because of any addiction which he might have had. See *id.* at 9-10.

that is, if employee X is just stoned at work one day, she can be fired; but if she claims to be stoned *every day*, federal law protects her. Indeed, in reading the cases, it becomes clear that many employees, disgruntled after being disciplined or terminated for on-the-job alcohol or drug use, file frivolous ADA actions.³⁴³ These actions have to be defended, at no small cost to the employer, even if the employer ultimately prevails.³⁴⁴

2. State Law

State disability or handicap protection laws follow the same basic structure of the ADA. The states which have enacted handicap protection statutes tend to fall into one of three groups:

(1) states whose statutes explicitly exclude current alcohol or drug use from disability protection;³⁴⁵

³⁴³ See, e.g., *Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995). In the *Collings* case, the employer, Longview Fibre Company, terminated eight former employees who had been caught buying, selling and using marijuana at work in an investigation which took several months. Several of the plaintiff employees were proven to have lied during the investigation, and some were arrested for possession thereafter in unrelated events. The court's view of the dubious nature of the employees' claims of being protected by the ADA is clear from the opinion: "Even assuming, without deciding, that the plaintiffs had such a disability . . ." and "[e]ven assuming that the plaintiffs had a drug addiction problem . . ." *Id.* at 832, 835. The District Court properly saw through the terminated employees' scam. But the inevitable fact is that these cases are litigated by the hundreds each year.

³⁴⁴ In fact, a surprising number of ADA addiction cases are successful summary judgment cases for the defendant employers. See, e.g., *Maddox v. University of Tennessee*, 907 F. Supp. 1144 (1994); *Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995); *Altman v. N.Y. City Health and Hosps. Corp.*, 903 F. Supp. 503 (S.D.N.Y. 1995); *Judice v. Hosp. Serv. Dist. No. 1*, 919 F. Supp. 978 (E.D. La. 1996); *Davis v. Safeway, Inc.*, 1996 WL 266128 (N.D. Cal.); *Adamczyk v. Baltimore County Police Dep't*, 952 F. Supp. 259 (D. Md. 1997); *Williams v. Anheuser-Busch, Inc.*, 957 F. Supp. 1246 (M.D. Fla. 1997); *Scott v. Beverly Enters.-Kan., Inc.*, 968 F. Supp. 1430 (D. Kan. 1997); *Lewis v. Sheraton Society Hill*, 1997 WL 397490 (E.D. Pa. 1997).

³⁴⁵ See, e.g., ARIZ. REV. STAT. ANN. §§ 41-1461 (explicitly excluding impairment caused by "current or recent use of alcohol or drugs") and 41-1463 (prohibiting handicap discrimination in employment) (West 1997); CAL. GOV'T. CODE § 12940 (West 1991) (broadly prohibiting discrimination against the handicapped) and 2 CAL. CODE REGS. TIT. § 7293.6(a)(4) (1991) (explicitly providing that drug or alcohol addiction is not a handicap). 19 DEL. CODE ANN. §§ 720-728 (Supp. 1990) (protecting handicapped persons from discrimination in employment, and specifically excluding persons whose "current use of alcohol or drugs" impedes their ability to perform the job or poses a direct threat to the safety of others. *Id.* at § 722(4)(c)(5)); GA. CODE ANN. §§ 34-6A-1 through 43-6A-6 (1995) (prohibiting discrimination against handicapped individuals in public and private employment; specifically excludes from definition of "handicapped individual" any person addicted to federally-controlled drugs or alcohol); KY. REV. STAT. ANN. §§ 207.130-260 (Michie/Bobbs-Merrill 1991) (prohibits discrimination against disabled individuals in employment; specifically permits employer to reject *prospective* applicant with drug or alcohol addiction); LA. REV. STAT. ANN. §§ 46:2253-2254 (West 1982) (prohibiting discrimination in employment against qualified handicapped person; gives employers discretion *not* to include alcoholism or drug addiction within meaning of "handicapped"); NEB. REV. STAT. §§ 48-1101-1126 (1988) (prohibiting discrimination on the basis of disability, but specifically excusing current use of drugs or alcohol); N.C. GEN. STAT. §§ 143-422.1 to -422.3 (1990), and §§ 168A-1 to A-12 (1987) (prohibiting discrimina-

(2) states whose statutes are silent on the matter³⁴⁶ (in some of these states, the courts have interpreted the handicap protection statutes as in-

tion against handicapped persons or those with "handicapping condition," current use of alcohol specifically excluded. *Id.* at § 168A-3(4)(a)(iii)(B)); OKLA. STAT. tit. 25, §§ 1101-1901 (Supp. 1991) (prohibiting discrimination against disabled individuals; explicitly excludes drug and alcohol use which threatens safety of other employees); TEX. HUM. RES. CODE ANN. § 121.003 (West 1990) and TEX. REV. CIV. STAT. ANN., art. 5221k, § 2.01 (West Supp. 1991) (prohibiting employment discrimination against persons with disabilities, broadly defined; explicitly excluding addiction to alcohol or drugs); VA. CODE ANN. §§ 2.1-714 to -725 (Michie 1987) (prohibiting discrimination against disabled individuals; current alcohol use and drug addiction specifically excluded); W. VA. CODE §§ 5-11-1 to -19 (1990) (forbidding discrimination against "able and competent" disabled individuals; current use of or addiction to alcohol or drugs explicitly excluded).

³⁴⁶ See, e.g., ALA. CODE § 21-7-8 (1990) (prohibiting handicap discrimination in public employment; no mention of addiction or alcoholism); ALASKA STAT. § 18.80.210 (1990) (prohibiting disability discrimination by private employers; no mention of drug or alcohol addiction); ARK. STAT. ANN. § 20-14-301(a) (1990) (prohibiting handicap discrimination in employment; applies only to state or state-funded entities); COLO. REV. STAT. § 24-34-402(a) (1989) (prohibiting handicap discrimination unless employer cannot "reasonably accommodate" handicap") and COLO. CODE REGS. § 60.1 (1980) (defining "handicap" without reference to drug or alcohol abuse or addiction); CONN. GEN. STAT. § 46(a) (1986) (prohibiting discrimination against the physically or mentally disabled by private employers of more than three employees; no reference to addiction as a physical disorder); D.C. CODE ANN. §§ 1-2501, 1-2502 (1990) (prohibiting discrimination on the basis of "physical handicap"; no mention of drug or alcohol addiction); FLA. STAT. ANN. §§ 760.01-.10 (West Supp. 1991) (prohibiting handicap discrimination by private employers; no mention of drug or alcohol addiction); IDAHO CODE § 67-5909 (1990) (prohibiting handicap discrimination; no mention of drug or alcohol addiction); ILL. CONST., art. I, § 19 (prohibiting discrimination against physically or mentally handicapped persons who can perform the tasks required for the position; applies to public employers only); IND. CODE ANN. §§ 22-9-1-1 through 22-9-1-13 (Burns 1986) (prohibiting handicap discrimination; no mention of drug or alcohol addiction); IOWA CODE §§ 601A.1-.19 (Supp. 1989) (prohibiting discrimination against disabled individuals; no mention of drug or alcohol addiction); KAN. STAT. ANN. §§ 44-1001 to 44-1004 (1986) (prohibiting discrimination against the physically handicapped; no mention of drug or alcohol addiction); ME. REV. STAT. ANN. tit. 5, §§ 4551-4665 (West 1989 & Supp. 1990) (prohibiting discrimination against physically or mentally handicapped except for bona fide occupational qualification; no mention of drug or alcohol addiction); MD. ANN. CODE art. 49B, §§ 1-28 (1991) (prohibiting private discrimination against physically or mentally handicapped; no mention of drug or alcohol addiction); MICH. COMP. LAWS §§ 37.1101-.1606 (1991) (prohibiting discrimination against qualified disabled persons in all employment matters; no mention of drug or alcohol addiction); MINN. STAT. ANN. §§ 363.01-.15 (West 1991) (prohibiting discrimination against disabled individuals; no mention of alcoholism or drug addiction); MISS. CODE ANN. §§ 25-9-103, 25-9-149 (Supp. 1990) and § 43-6-15 (1981) (handicap discrimination statute applies only to public entities); MO. ANN. STAT. §§ 213.010-.126 (Vernon Supp. 1991) (prohibiting discrimination on the basis of handicap, explaining that current use of alcohol or drugs is not a "handicap," but persons currently undergoing rehabilitation without use and persons who have completed rehabilitation are considered "handicapped"); MONT. CODE ANN. §§ 49-2-303, 49-2-308 (1989) (prohibiting discrimination on the basis of physical handicap; no mention of drug or alcohol addiction although Montana Commission on Human Rights has concluded that alcoholism is a protected disability). See *In re Am. Indian Action Council*, Case No. 288, Findings, Conclusion and Order (Montana Commission of Human Rights (Oct. 1976)); NEV. REV. STAT. ANN. § 613.630 (Michie Supp. 1989) (prohibiting discrimination based upon "physical, aural or visual" disabilities; no mention of drug or alcohol addiction); N.H. REV. STAT. ANN. §§ 354-A:1 to 354-A:14 (1984 & Supp. 1990) (prohibiting employers of six or more employees from discriminating against the physically or mentally handicapped;

cluding alcohol and drug addiction);³⁴⁷ and

(3) states whose statutes explicitly include alcohol and drug use within their protection.³⁴⁸ (These are overwhelmingly in the minority.)

bona fide occupational qualification is a defense; no mention of drug or alcohol addiction); N.J. REV. STAT. § 10:5-4.1 (Supp. 1990) (prohibiting discrimination against handicapped unless disability precludes performance of job duties); N.M. STAT. ANN. §§ 28-1-1 to 28-1-15 (1987) (prohibiting discrimination against physically or mentally handicapped persons; no mention of drug abuse or alcoholism); N.Y. EXEC. LAWS §§ 290-301 (Consol. 1983 & Supp. 1990) (prohibiting discrimination against handicapped individuals; alcohol and drug addiction not mentioned); N.D. CENT. CODE §§ 14-02.4-01 to -21 (1989) (requiring "reasonable accommodation" for persons with physical or mental handicap; drug and alcohol addiction not mentioned); OHIO REV. CODE ANN. §§ 4112.01-.99 (Anderson 1991) (prohibiting discrimination against persons with disability; drug and alcohol addiction not included); OR. REV. STAT. § 659.425(1)(a)-(c) (1989) (requiring "reasonable accommodation" of disabled individuals; no mention of drug or alcohol addiction); 43 PA. CONS. STAT. ANN. § 955 (1964 & Supp. 1990) (prohibiting discrimination against persons with "non-job related handicap"; drug and alcohol addiction not expressly addressed); R.I. GEN. LAWS §§ 28-5-1 to 28-5-40 (1986 & Supp. 1990) (requiring employers of four or more employees to "reasonably accommodate" disabled individuals' drug and alcohol addiction not mentioned); S.D. CODIFIED LAWS ANN. § 20-13-10 (1987) (requiring "good faith efforts" to accommodate disabled employees; drug and alcohol addiction not mentioned); TENN. CODE ANN. § 8-50-103(a) (1988) (prohibiting discrimination against persons with "physical, mental or visual" handicaps; drug and alcohol addiction not mentioned); UTAH CODE ANN. §§ 34A-5-106 (1989 & Supp. 1990) (prohibiting discrimination against handicapped persons; drug and alcohol addiction not mentioned); VT. STAT. ANN. tit. 21, § 495 (1987) (prohibiting discrimination against "qualified handicapped individual"; drug and alcohol addiction not mentioned); WASH. REV. CODE § 49.60.180 (Supp. 1980) (prohibiting discrimination against persons with "sensory, mental or physical handicap;" drug and alcohol addiction not mentioned); WIS. STAT. §§ 111.31-395 (Supp. 1990) (prohibiting discrimination against handicapped persons; drug and alcohol addiction not mentioned); WYO. STAT. §§ 27-9-101 to 27-9-108 (Supp. 1991) (prohibiting discrimination against "qualified handicapped persons;" no reference to drug or alcohol addiction).

³⁴⁷ See, e.g., *Athanas v. Board of Educ.*, 28 FAIR EMPL. PRAC. CAS. (BNA) 569 (N.D. Ill. 1980) (holding that employer harassed employee and wrongly discharged him based on employee's alcoholism alone); *Consol. Freightways v. Cedar Rapids Civil Rights Comm'n*, 366 N.W.2d 522 (Iowa 1985) (holding alcoholism a "handicap" within meaning of Cedar Rapids anti-discrimination ordinance); *Gruening v. Pinotti*, 392 N.W.2d 670 (Minn. Ct. App. 1986) (holding that alcoholism can meet statutory definition of "disability"); *Clowes v. Terminix Int'l, Inc.*, 538 A.2d 794 (N.J. 1988) (holding that alcoholism is protected disability); *In re Cahill*, 585 A.2d 977 (N.J. 1991) (extending *Clowes* rationale to drug addiction); *Hazlett v. Martin Chevrolet, Inc.*, 496 N.E.2d 478 (Ohio 1986) (holding that drug addiction and alcoholism are "handicaps" within meaning of relevant statute); *Squires v. Labor & Indus. Review Comm'n*, 294 N.W.2d 48 (Wis. Ct. App. 1980) (recognizing alcoholism as a protected handicap).

³⁴⁸ See, e.g., CAL. LAB. CODE §§ 1025-1027 (requiring every private employer with more than 25 employees to "reasonably accommodate" any employee seeking alcohol or drug rehabilitation, to maintain the employee's privacy and to allow the employee to take sick leave); HAW. REV. STAT. § 378-2 (Supp. 1990) (prohibiting discrimination by private employers against persons with a "disability") and § 431M-2 (Supp. 1990) (requiring all insurers and health plan providers to cover alcohol and drug treatment); 56 ILL. ADMIN. CODE, § 2500 (1990) (prohibiting discrimination in employment against handicapped persons; explicitly includes drug and alcohol addiction unless the addiction prevents the employee from performing the job duties); MASS. GEN. LAWS ANN. Ch. 151(b), § 1 (West 1982 Supp. 1990) (prohibiting discrimination against qualified handicapped persons) and 8 MASS. DISCRIMINATION L. REP.

3. *The Future of Handicap or Disability Protection for Addiction if Currently Illicit Drugs Become Legal*

Happily, both federal and state courts, for the most part, have struck a sensible balance between protecting legitimately disabled individuals from stereotyping and discrimination, and appreciating employers' needs to have safe, drug-free workplaces—particularly in light of recent tendencies to hold employers strictly vicariously liable for intentional torts and crimes committed by their employees. But there are a few courts which approach the issue differently. In spite of the clear language of the ADA and the common sense approach taken currently by most courts, some have chosen to disregard the “status” versus “conduct” distinction. In *Ham v. State of Nevada*,³⁴⁹ for example, the district court refused to apply the “status” versus “conduct” distinction, saying, “if defendant acts on the basis of conduct caused by the handicap, it is the same as if that defendant acts on the basis of the handicap itself.”³⁵⁰ The court found that the plaintiff employee’s conduct was inextricably intertwined with his status as an addict, and that therefore the distinction between status and conduct gutted the very purpose of the ADA.³⁵¹ This is a minority view. Nevertheless, employers should not breathe easily, comforted by the knowledge that the courts are using common sense in this area. Legal scholars are beginning to grumble about the “status” versus “conduct” distinction, and at least one now argues that this distinction should be abandoned, and that courts should compel employers under the ADA to accommodate even current users of alcohol or illicit drugs.³⁵²

One author writes that courts should be more “compassionate” in their treatment of addicts on the job, saying, “[a] frigid, intolerant and discriminatory legislative and judicial system offers little security and encouragement to the diseased and disabled addicts whom we are legally and morally bound to protect from discrimination.”³⁵³ Maintaining that the current trend to distinguish the “status” of being addicted from “conduct” related to it defeats the clear intent of the ADA, she argues:

The “conduct-covered” [approach] discussed above demonstrates a federal judicial trend toward intolerance of drug and alcohol addiction, making protection for those suffering from the disability of addiction more dif-

2003 (Sept. 30, 1986) (commission guidelines stating that substance abusers qualify as “handicapped,” while recreational users of alcohol or drugs do not).

³⁴⁹ 788 F. Supp. 455 (D. Nev. 1992).

³⁵⁰ *Id.* at 460.

³⁵¹ *See id.*

³⁵² *See* Amy L. Hennen, *Protecting Addicts in the Workplace: Charting a Course Toward Tolerance*, 15 LAW & INEQUITY J. 157, 189 (1997).

³⁵³ *Id.*

difficult to receive under the ADA and the Rehabilitation Act. . . . As a first step toward reversing the intolerance trend, federal courts should . . . a [reject] the distinction between addiction and conduct caused by the addiction. . . . [T]his rejection of the conduct/disability distinction makes it easier for employees to establish a prima facie case of discrimination under the ADA and the Rehabilitation Act . . . i . [For] courts rejecting the disability/conduct distinction . . . the relevant question is what caused the conduct the employer points to in terminating the employee. If the conduct is caused solely by the disability, . . . the employer has indeed improperly relied on the disability in violation of the Rehabilitation Act.³⁵⁴

This recommendation is disturbing, but it should not be surprising. Nor should it be dismissed. As has been shown amply in the past, where legal commentators point, courts often follow. Such an interpretation of "protected disability" would certainly be consistent with the tendencies of legal scholars over the past century to expand enterprise liability, but it would be disastrous for employers, and ultimately for the American economy in general.

Employers already contend with substantial expense in the form of vicarious liability for negligent torts committed by their employees. Within the last thirty years, we have seen those same respondeat superior concepts distorted in order to justify holding the enterprise vicariously liable, as well, for the intentional torts (trespass, false imprisonment, assault, battery), crimes (assault with a deadly weapon, or with intent to do grievous bodily harm, sexual molestation and rape) and sexually offensive behavior of the most egregious sort. Employees under the influence of alcohol or drugs are much more prone to negligent accidents, and, as recent ADA cases show, to offensive, abusive and violent behavior. The only logical alternative for an employer is to be able to discipline and terminate such an employee immediately, before their alcohol or drug use threatens the safety of the workplace, other employees or third parties, exposing the employer to even greater liability. In fact, much of the language in the respondeat superior cases justifies imposing vicarious liability on the enterprise explicitly on the grounds that the employer is in the best position to observe, monitor and control its employees, and thus the threat of liability serves to encourage the employers to provide a safe and non-hostile working environment.

³⁵⁴ *Id.* at 184.

Forcing the employers to retain current drug users would close off one of the few methods that modern employers have left to insulate themselves from unlimited liability.³⁵⁵ A work force peppered with alcohol and drug abusers who are protected by federal law from discipline or termination is an economic nightmare waiting to happen. The employer, prevented by federal law from terminating drug users, would then become strictly vicariously liable for every wrongful act committed by these individuals. These are not costs that properly belong to the enterprise.

V. CONCLUSION

Arguments in favor of drug legalization have substantial merit. It is clear that gargantuan expenditures by the federal and state governments have done little to stem either the supply or (more to the point) the demand for psychoactive substances. Continued expenditures of this magnitude cannot continue indefinitely because the country does not have infinite dollars to spend on interdiction. Our courts and prisons would be put to better use by dealing with violent predatory criminals, rather than the odd marijuana smoker or the nonthreatening heroin addict. And the havoc wrought in our cities by the black market created by illegal drugs is impossible to ignore.

As a people, we have an obligation to consider all possible resolutions to the problem of drug abuse—including schemes which explicitly tolerate some drug use, such as decriminalization or legalization. Perhaps we *would* be better served by a system that treats addiction as a health problem rather than a law enforcement problem, that eliminates the deadly chaos of the black market and that devotes its resources to education, treatment and rehabilitation. But who will foot the bill for all of these societal improvements? Legalization advocates maintain that all of this will be paid for with cost savings from reduced interdiction and misuse of judicial resources. Perhaps, but legalization of drugs would not occur in a vacuum. In fact, any economic rationale for legalizing drugs is inaccurate without considering the financial impact to the private sector.

An unspoken (and perhaps unidentified) effect of any drug legalization system is to transfer a significant portion of these social costs to the private sector employers in the form of larger and more frequent judg-

³⁵⁵ Some say this policy would also insulate the substance abuser from the consequences of his or her actions. For those truly concerned about addicts' welfare, this is no small point, since many experts in addiction studies suggest that the most intransigent abusers must "hit bottom" before they are willing to acknowledge their addiction and seek help. Perhaps one could argue that sheltering drug-using employees from termination is "enabling" them. But that is a topic for another paper.

ments rendered and fines imposed for the torts and crimes committed by employees under the influence of drugs, and of productivity costs of treatment and rehabilitation efforts required under the Americans with Disabilities Act. The unquantifiable costs associated with retraining new workers to replace those addicted to drugs, along with lost profitability associated with the possible inability to fire addicted and unproductive employees, should also be considered.

Our approach to the problem of drug abuse must be carefully thought out. It must be consistent with the political philosophy and principles upon which this country was founded—liberty, democracy, private ownership of property and a free market. Legalization of drugs is a libertarian position, but the current structure of our enterprise liability law has a distinctly socialist tone. We cannot use libertarian philosophy to justify gratifying our basest urges and socialist philosophy to justify asking others to pay for it. It is just this sort of philosophical schizophrenia that produces the inconsistent and utterly irreconcilable jurisprudence that we have seen recently in the area of respondeat superior.

There may be no imminent risk of drugs being legalized. But the mere prospect should bring into sharp focus the fact that our enterprise liability law has *already* strayed too far from its origins. The current legal climate seeks to make private employers *insurers against any and all bad things that happen to people*. This is contrary to the basic social and political philosophies of the United States. The problem needs to be redressed, even in the absence of legalized drugs.

Employers should not be the only ones concerned about drug legalization without tort reform. As has been shown in the past, corporations will not just blithely absorb these increased costs; they will be passed on to the American consumer. Before we decide to accept such costs, we must know what they are: personally invasive employment policies, dramatically reduced employment opportunities for those with a past criminal record or history of substance use or abuse, reduced productivity, expenses of defending protracted lawsuits, skyrocketing and unpredictable financial losses and inevitably inflated insurance costs, a greater number of goods and services whose costs will be beyond the means of an even greater segment of the population, bankruptcy of enterprises that will no longer be able to afford the losses and/or insurance associated with employee torts or crimes, and lost opportunities of innumerable ventures that will never come into existence for fear of overwhelming financial liability for unpredictable, uninsurable and uncontrollable employee behavior.

It is difficult to agree to pay a price when one does not know what it is. And these costs are incalculable.