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ABSTRACT

Although sexual abuse against children is a problem in the public schools, school officials have generally not acted aggressively to stop it. This paper argues for a strict liability standard--the assessment of liability without fault--against a school district in cases of student sexual abuse by a school employee. Part 1 explores the principle of respondeat superior, whereby employers can be held liable for the tortious conduct of their employees, without regard to whether the employer engaged in any wrongful act. Recently, courts have imposed respondeat liability against law-enforcement agencies and health-care providers, but not school districts. Part 2 reviews the recent federal court cases that have discussed an educational institution's liability under Title IX of the Civil Rights Amendments of 1972 when an employee engages in sexual misconduct against a student. The review concludes that the stage is set for judicial imposition of vicarious liability against school districts whenever their employees sexually assault children. School districts would be wise to prepare for increased exposure to liability, chiefly by increasing their vigilance in protecting children from a school employee's sexual abuse. (Contains 76 endnotes.) (LMI)

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"LET THE MASTER RESPOND":

SHOULD SCHOOLS BE STRICTLY LIABLE WHEN EMPLOYEES SEXUALLY ABUSE CHILDREN?

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"LET THE MASTER RESPOND":

SHOULD SCHOOLS BE STRICTLY LIABLE WHEN EMPLOYEES SEXUALLY ABUSE CHILDREN?

by Richard Fossey and Todd DeMitchell

Sexual abuse against children is a continuing problem in the public schools. Although it is impossible to state the exact extent of the problem, recent studies show that it is not a rare phenomenon. The American Association of University Women published a survey in 1993 which reported that 25 percent of females in grades 8 through 11 and 10 percent of the males in that age group had been sexually molested in some way at school by an adult.[1] An earlier study of North Carolina high school graduates reported that 17.7 percent of males and more than 80% of females had been sexually harassed by a school employee at some time in their school career.[2]

In spite of the seriousness of this problem--the psychological effect of sexual abuse on child victims is catastrophic and can last a life time[3]--there is mounting evidence that schools are not committed to stopping sexual abuse in the schools. Several studies have shown that teachers fail to report all the sexual abuse that they suspect,[4] in spite of laws in all 50 states that require them to do so. And educators seem particularly reluctant to address sexual abuse by school employees.[5]

One reason school officials have not been more aggressive about stopping sexual abuse in the schools may be their perception that the realistic risk of liability for injuries is quite small. In many states, school districts are immune from negligence suits,[6] even when

the negligence leads to a sexual assault by a school employee. Recent federal court decisions have held that school districts can be sued for showing "deliberate indifference" to a child's constitutional right to bodily integrity,[7] but the standard of actionable indifference is quite high. No federal appellate court decision has upheld a money judgment against a school district for a constitutional violation involving sexual abuse of a school child.

It seems likely that school districts would be more vigilant in preventing and detecting sexual abuse by employees if the possibility of civil damages were more certain when a child is assaulted. Thus, a strict liability standard--assessing liability without fault against a school district whenever such a tragedy occurs, may make sense from the standpoint of public policy.

This paper is in two parts. In the first part, we explore the principle of respondeat superior, whereby employers can be held liable for the tortious conduct of their employees, without regard to whether the employer itself engaged in any wrongful act.

Recently, courts have imposed respondeat liability against law enforcement agencies and health care providers, but they have not done so for school districts. Sexual assaults by police officers and health care workers are foreseeable, courts have held, while sexual assaults in the school are not. In addition, courts have recognized that sexual molesters in law enforcement and health care settings were aided by their employment status when commiting their crimes. In contrast, courts have not recognized any link between a school employee's sexual assault of a school child and the fact of the perpetrator's status as a school employee.

In the second part, we briefly sketch the recent federal court cases that have discussed an educational institution's liability under Title IX of the Civil Rights Amendments of 1972[8] when an employee engages in sexual misconduct against a student. In this area, no clear trend has emerged. Nevertheless, there are early indications that a school district may be liable under Title IX for an employee's sexual assault against a student, without regard to whether the school district was itself in any way negligent.

We conclude, based on a review of these cases, that the stage is set for judicial imposition of vicarious liability against school districts whenever their employees sexually assault children. The same factors present when police officers and health care workers commit sexual assaults in the workplace--foreseeability and power derived from employment status--are also present when school employees molest children. School districts would be wise to prepare for increased exposure to liability, chiefly by increasing their vigilance in protecting children from a school employee's sexual abuse.

PART ONE: EMPLOYER'S VICARIOUS LIABILITY UNDER TORT LAW FOR AN EMPLOYEE'S SEXUAL ASSAULT

Agency liability for an employee's criminal acts: an overview

A settled principle of the common law of agency is the proposition that a master is liable for the unauthorized tortious acts of a servant if the servant acts within the scope of the servant's employment.[9] Typically, conduct is considered to be within the scope of employment if the act is one the employee was hired to

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perform, the act occurs substantially within the time of employment, and the act furthers the purposes of the employer.

Today this agency principle applies to modern corporations, business enterprises, and governmental agencies--all of which may find themselves liable for the tortious acts of their employees. Indeed, the rule is one of strict liability for the employer; that is, liability attaches without regard to the employer's fault. The rule is embodied in the phrase respondeat superior, which means, "Let the master respond."[10]

In general, an employer will be liable for the tortuous conduct of an employee when the employer has actual or constructive knowledge of the acts. Actual knowledge occurs when a supervisory employee has witnessed the tortious act or actually engages in the act. An employer is also deemed to have actual knowledge if a complaint about the employee's conduct is delivered to a supervisor, especially when the employer fails to take action on the complaint. An employer is deemed to have constructive knowledge of an employee's wrongful conduct if the employer could have learned about the conduct through reasonable supervision. The pervasiveness of the act may also provide the basis for an employer's constructive knowledge. For example, in Simms v. Montgomery County Commission, sexual harassment in the workplace was "so open and pervasive that all those in supervisory authority should have known about it."[11]

There are several justifications for imposing strict liability on enterprises for the tortious conduct of their employees. First, it has been argued that an enterprise should pay for the harm caused by

people acting in its behalf in return for the benefits the enterprise receives when its agents act properly. Second, it is said that the rule fosters safety; an employer is more likely to be careful when hiring and supervising employees if it knows that it may be liable in money damages if the employee negligently injures a third party. Finally, the principle of respondeat superior provides the employer with an incentive to obtain insurance, the premiums for which can be paid from its business revenues.[12]

In general, an employer is not liable for the tortious acts of an employee acting outside the scope of employment, but there are exceptions to this rule. An employer can be strictly liable for its worker's misbehavior if the employer itself acted negligently or recklessly, if the employer intended the misconduct, or if the employee was aided in accomplishing the tort by the agency relationship with the employer.[13]

In certain instances, an employer can be liable under agency principles, not only for its employees' negligent acts, but for their criminal acts as well.[14] Moreover, an employer can sometimes be held strictly liable for its employee's misconduct, even if the tortious act was strictly forbidden.[15]

It is not always easy, however, to determine when an employer is legally responsible for an employee's criminal or forbidden behavior. For example, the commentary to the Restatement of Agency states that the fact that a servant intends a crime, especially a crime of some magnitude, can be considered when determining whether the employer should be held liable, since the master is not responsible for acts which are clearly inappropriate to or

unforeseeable in the accomplishment of the servant's assigned task.[16] Likewise, the fact that an employer has explicitly forbidden an employee to engage in a particular act may be relevant in determining whether the employee was acting within the scope of employment. In some cases courts have held that an employee who did something that was expressly forbidden was acting outside the realm of the employment relationship.

Respondeat superior liability for an employee's sexual assaults: the courts are split

Early cases involving respondeat superior liability for employees' criminal acts often dealt with an employer's legal responsibility for an employee's fraud in a financial transaction or a battery. Recently, however, cases have addressed the question of when an employer can be held strictly liable for an employee's sexual assault.

So far, there has been no uniform outcome for these cases. Some courts have taken the view that an employee who commits a serious criminal offense such as rape is not acting within the scope of his employment, and thus an employer bears no responsibility for this kind of misbehavior under agency principles.[17] However, other courts have taken a contrary view and have held employers liable for sexual misconduct by their employees. In general, these decisions have been based on a finding that the employee was aided in his criminal act by the fact of his employment or on the conclusion that the assault, although criminal, was foreseeable in light of the enterprise in which the employer was engaged.[18]

Emerging trend: Respondeat superior liability for sexual assaults committed by law enforcement personnel and health care workers.

Although no clear pattern has emerged with regard to respondeat superior liability for an employee's sexual misconduct., a clear trend seems to be developing in cases involving sexual assaults by health care workers and law enforcement personnel. In these case, courts seem increasingly willing to hold employers strictly liable, without regard to whether the employer itself was in any way at fault.

Mary M. v. City of Los Angeles,[19] a California Supreme Court opinion, is the leading case in this area. In Mary M., a woman was driving home alone late at night when a police officer stopped her for erratic driving. The officer was on duty, in uniform, wore a badge and a gun, and was driving a black-and-white police car.

The woman had been drinking and performed poorly on a field sobriety test that the police officer asked her to perform. She began to cry and pleaded with the officer not to be taken to jail. The officer ordered her to get into the front seat of the police car, and then he drove her home.

After entering her home, the officer told the woman he expected "payment" for taking her home instead of to jail. The woman tried to run away, but the officer grabbed her, threw her on the couch, and raped her. He was subsequently convicted of rape and sentenced to prison.

The woman brought a civil suit against the officer and the City of Los Angeles, which she won at the trial court level. The California Court of Appeals reversed the judgment against the city, holding, as a

matter of law, that the officer was acting outside the scope of his employment when he committed the rape.

On appeal, the California Supreme Court reversed, finding the city could be held strictly liable for the officer's assault. "Respondent superior," the court observed, "is based on a 'deeply rooted sentiment' that it would be unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities." Although the doctrine only applies if the employee is acting within the scope of his duties, the court made clear that an employee can sometimes be acting within the scope of his employment even when his tortious conduct violates his official duties or disregards the employer's express order.

The California court then cited the rule for deciding when an employee's tortious conduct was committed within the scope of employment. A risk arises out of the employment, the court wrote, when the employee's conduct "is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."[20]

To assist it in determining whether the officer was acting within the scope of his employment when he raped the motorist, the court analyzed the three policy objectives underlying respondent superior. The first policy objective, the court said, is to prevent recurrence of the event. By imposing liability on the employer the doctrine "creates a strong incentive for vigilance" among the persons responsible for guarding against the evil that occurred.[21]

On this point, the court decided that policy favored imposing liability on the city. Doing so would encourage the police to take

preventive measures, the court concluded. Moreover, in the court's view, there was little danger that the preventive measures would interfere with the ability of the police to enforce the law.

Next, the court considered the second reason for imposing respondeat superior liability against the city: assuring that the victim receives adequate compensation for her injuries. Citing earlier opinions in which courts had upheld awards against police departments for injuries suffered from beatings, the court concluded vicarious liability against the City of Los Angeles was an appropriate way to make sure that the rape victim received compensation.

Finally, the California Supreme Court considered the appropriateness of spreading the risk of loss among the beneficiaries of the enterprise. And again, the court determined that policy considerations favored liability against the city.

> [W]e observed that society has granted police officers extraordinary power and authority over its citizenry. An officer who detains an individual is acting as the official representative of the state, with all of its coercive power. As visible symbols of that power, an officer is given a distinctively marked car, a uniform, a badge, and a gun. . . The cost resulting from misuse of that power should be borne by the community, because of the substantial benefits that the community derives from the lawful exercise of police power.[22]

After deciding that all three policy objectives favored imposition of strict liability against the city for the officer's sexual assault, the court observed that the risk of such an incident was foreseeable.

> In view of the considerable power and authority that police officers possess, it is neither startling nor unexpected than on occasion an officer will misuse that authority by engaging in assaultive conduct. The precise circumstances of the assault need not be anticipated, so long as the risk is one that is reasonably foreseeable. Sexual assaults by police officers are fortunately uncommon, nevertheless, the risk of such tortious conduct is broadly incidental to the enterprise of law enforcement and thus liability for such acts may appropriately be imposed on the employing public entity.[23]

Two years after Mary M., a federal district court in California ruled that a public employer could be held liable for sexual misconduct of an off-duty police officer.[24] In the federal case, the court stated the legal principle for holding public employers liable for sexual assaults committed by police officer:

> Under California law, respondeat superior liability will be found when: (1) the officer is on-duty (or if he is off-duty, he announces his status and intention to arrest pursuant to his authority to arrest when he is on-duty); and (2) the officer misuses his official authority to commit the sexual assault.[25]

According to the facts of this case, the officer had been off-duty when the sex acts occurred. However, the plaintiff, a single parent, testified that on two occasions the officer had announced his presence at her door with the words, "Oakland police, open up" or "Oakland police." The court ruled that the officer had used his police status to gain entrance to the woman's apartment, and that his actions were sufficient to find the police department vicariously liable.

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A Louisiana court also imposed strict liability against a government employer for a sexual assault by a law enforcement officer. In a 1979 decision, the Louisiana Court of Appeals also ruled that it was appropriate to hold the city liable for a police officer's sexual assault.[26] The Louisiana court cited these facts in support of its decision.

> We particularly note that [the officer] was on duty in uniform and armed, and was operating a police unit at the time of this incident. He was able to separate the plaintiff from her companions because of the force and authority of the position which he held. He took her into police custody and then committed the sexual abuses upon her in the vehicle provided for his use by his employer.[27]

In addition to law enforcement agencies, courts have shown themselves increasingly willing to hold health care enterprises strictly liable for sexual misconduct by their employees.[28] For example, in Doe v. Samaritan Counseling Center,[29] the Alaska Supreme Court ruled that a counseling center could be held strictly liable for the averred sexual misconduct of one of its therapists. In that case, Jane Doe accused a counselor of misusing the "transference phenomenon," by bringing about a sexual relationship that began about a month after Doe terminated her therapy. No sexual intercourse occurred during the therapeutic relationship, and all sexual liaisons took place off the premises of the counseling center.

The counseling center moved to dismiss Doe's respondent superior claim as well as Doe's negligence claims. The center argued that it could not be vicariously liable for the counselor's sexual

misconduct, since the counselor was acting purely in furtherance of his own interests.

The Alaska court noted divergent views on this issue. Some courts had held employers could never be held liable for the sexual misconduct of their employees, since their conduct, although motivated by desire, was not motivated by a desire to serve the employer. Other courts had discarded the "motivation to serve" approach in favor of a foreseeability approach. Those courts held that while the sexual acts may be purely self-serving, they were nonetheless precipitated by the employee's performance of assigned duties. The Alaska court cited Simmons v. United States,[30] in which the Ninth Circuit had ruled that an employer could be liable for sexual misconduct of a social worker. The Ninth Circuit had reasoned that although the social worker had not been authorized to become sexually involved with his patients, that contact occurred in conjunction with his legitimate counseling activities.

In Doe, the Alaska Supreme Court was persuaded by the reasoning in Simmons, and it ruled that where tortious conduct arises out of and is reasonably incidental to the employee's legitimate work activities, the "motivation to serve" test will have been satisfied. The court also ruled "that a jury might reasonably find that [the counselor's] tortious conduct arose out of, and was reasonably incidental to counseling activities authorized by and of potential benefit to [the counseling center]."[31]

Likewise, the Indiana Supreme Court ruled that a children's residential center could be held vicariously liable for the sexual

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assault of a mentally retarded child by a nursing aide.[32] Thus, the court reversed a trial court's decision in favor of the center.

In that case, the injured child was a fourteen-year-old victim of cerebral palsy and severe mental retardation. The center had hired a nursing aide, whose duties included feeding and bathing residents, changing their clothes and bedding, and monitoring the residents' comfort and safety. The assault occurred at the end of the day, when the aide came in to change the boy's clothing and bedding. Another employee reported the assault, and the aide eventually plead guilty to felony charges.

The court began its analysis by stating that the fact that the aide's tortious act was a sexual offense did not automatically mean that it occurred outside the scope of employment.

> Rape and sexual abuse constitute arguably the most egregious instances of wrongful acts which an employee could commit on the job and lend themselves to arguably the most instinctive conclusion that such acts could never be within the scope of one's employment, yet other courts have recognized that the resolution of the question does not turn on the type of act committed or on the perpetrator's emotional baggage accompanying the attack. Rather, these courts indicate that the focus must be on how the employment relates to the context in which the commission of the wrongful act arose.[33]

Moreover, the Indiana court continued, the children's center had a duty of care to its residents similar to that owed by common carriers. "The imposition of liability under the common carrier exception is premised on the control and autonomy surrendered by the passenger to the carrier for the period of accommodation," the court said.

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The court went on to compare the child victim's circumstances to that of a passenger with a common carrier.

> Given the degree of David's lack of autonomy and his dependence on Heritage for care and the degree of Heritage's control over David and the circumstances in which he found himself, we find that Heritage assumed a non-delegable duty to provide protection and care so as to fall within the common carrier exception. The standard of care which Heritage owed to David, therefore, was that actual care be used by Heritage and its employees to provide that protection.[34]

In a 1992 case involving a hospital employee's sexual assault on a 16 year-old psychiatric patient, the Louisiana Court of Appeals ruled that the hospital could be held vicariously liable for its employee's act.[35] According to the court, the incident occurred while the assailant was on duty, taking care of the patient's well-being; and his tortious conduct was reasonably incidental and closely connected to his employment duties.[36]

Similarly, the Minnesota Supreme Court held a psychiatric clinic vicariously liable for sexual improprieties by a doctor who exploited his physical and emotional access to two patients.[37] The court stated, "[I]t is both unrealistic and artificial to determine at which point the [acts] leave the sphere of the employer's business and become motivated by personal animosity--or. . . an improper, personal benefit."[38]

Finally, a California appellate court has ruled that a hospital could be held liable under respondeat superior principles for the sexual misconduct of an ultrasound technician toward a pregnant patient.[39] The court essentially adopted the standard for imposing

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liability that the California Supreme Court had laid out for police misconduct in Mary M. Just as in police matters, the court observed, "[I]nherent in the hospital setting is the potential for the exact type of abuse which occurred."[40]

Not every court has applied respondeat superior principles to sexual misconduct in the health care setting. An Ohio appellate court took the more traditional approach to these cases when it ruled that an orderly was acting outside the scope of his duties when he allegedly assaulted a female patient.[41] If the accusations were true, the court declared, the orderly acted to "gratify his impulses," not to further the business of the hospital.[42]

Nevertheless, a clear trend is emerging to hold health care providers liable for sexual assaults by their employers, regardless of whether the employer was negligent. In many of these cases, courts have stressed the fact that health care employees exercise considerable control over patients. Health care agencies can anticipate sexual misconduct in such settings, courts have reasoned, and respondeat superior liability would encourage them to take effective preventive measures.[43]

Majority view: schools are not strictly liable for an employee's sexual assault.

Remarkably, although courts have begun holding health-care and law-enforcement agencies vicariously liable for their employees' sexual assaults, the reasoning of these decisions has not been extended to school districts. On the contrary, courts are almost unanimous in holding that school districts are not liable under agency principles for sexual assaults by school employees. In

general, the courts have held that these criminal acts are outside the scope of the school employee's work, and thus an agency theory of liability should not apply.

Bozarth v. Harper Creek Board of Education, a 1980 case, is the first decision in this area. The Michigan Court of Appeals ruled that the Harper Creek School Board could not be held liable for alleged homosexual assaults by a school teacher.[44] "A teacher's homosexual assaults on his student constitutes conduct clearly outside the scope of the teacher's employment and outside the teacher's authority," the court declared. "The mere fact than an employee's employment situation may offer an opportunity for tortious activity does not make the employer liable to the victim of that activity."[45]

Until 1989, California courts were split regarding school district liability for an employee's sexual assault. One appellate court had ruled that a district was not liable when a custodian allegedly molested a grade-school student,[46] while another had ruled that a district could be held accountable for a teacher's alleged assault of a child.[47]

In 1989, the California Supreme Court resolved this conflict in John R. v. Oakland Unified School District.[48] John R. involved an accusation that a teacher had sexually molested a junior high student while the student was at the teacher's apartment as part of an officially sanctioned, extracurricular program. The student and his parents sought to hold the school district vicariously liable.

In considering whether vicarious liability should be imposed against the district, the California Supreme Court weighed three policy considerations: to prevent a recurrence of the injury, to give

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greater assurance of compensation for the victim, and to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury. With two dissenters, the court ruled that strict liability could not be imposed.

Other courts have ruled that schools cannot be held strictly liable for sexual assaults by school employees. In a 1984 decision, the District of Columbia Court of Appeals dismissed a complaint against the District of Columbia School District arising from the sexual assault of a blind, deaf, and mute student by the coordinator of the program for deaf and blind students.[49] The court found that the coordinator's conduct was outside the course of his duties for the school district, and thus the school district was not liable.

In 1990, the Massachusetts Supreme Judicial Court followed this line of reasoning in a case involving accusations of child abuse at a private day school.[50] The Massachusetts court ruled the day school could not be held liable for sexual assaults allegedly committed at the school. ""[T]hese acts obviously were not 'of the kind [the employees were] employed to perform,' nor were they 'motivated, at least in part, by a purpose to serve the employer.'" In addition, the court added, "None of the acts of forcible sexual molestation or rape can be interpreted as 'originating in' any legitimate activities 'closely associated with the employment relationship.'"[51]

Two years later, the Ohio Court of Appeals ruled that a school district was immune from liability for a teacher's sexual assaults against several school children. Although the court did not rule on plaintiffs' respondeat superior claims, it noted that such a claim could not be successful because there was no evidence that the school

district promoted or advocated the teacher's behavior or that it could have reasonably foreseen that the teacher would assault school children.[52]

Finally, two 1994 cases have held that schools are not vicariously liable for sexual assaults committed by employees. In Mary KK v. Jack LL,[53] a New York appellate court ruled that a school district was not liable for a teacher's sexual misconduct toward a high school girl. Although the molestation occurred on school property and during school hours, the court concluded that the teacher's conduct was outside the scope of his teaching duties, wholly for a personal purpose, and not in pursuance of the school district's business. Likewise, a panel of the Washington Court of Appeals ruled that a school district could not be held liable on a respondeat superior theory based on an accusation of long-term sexual abuse of a high school student by a teacher and coach.[54]

Why have schools been exempted from vicarious liability for sexual assaults?

Why have courts refused to hold school districts vicariously liable for their employees' sexual assaults against school children, when they are increasingly willing to apply the doctrine of respondeat superior to other enterprises--particularly law enforcement agencies and health care providers? A review of the cases in all three areas--health care, law enforcement, and education--suggests this explanation.

Although the courts give no uniform explanation for imposing vicarious liability on law enforcement agencies and health care providers, two themes are woven through this line of cases. First,

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the courts have concluded that sexual assaults in the law enforcement and health care setting are foreseeable, given the nature the employer's mission. Second, the courts view the victims of these assaults as being particularly vulnerable, due to perpetrators' authority over the victims--authority they obtained from their employment status.

In contrast, courts have not held schools vicariously liable for their employees' sexual assaults, because the courts consider such assaults to be unforeseeable aberations that schools can not anticipate or guard against. Likewise, courts do not appreciate that school employees are aided in their misconduct by the power and authority they have over children, power and authority given to them by virtue of their school employment.

As we will see, the courts' refusal to hold schools strictly liable for their employees' sexual assaults is based on inaccurate impressions about the teacher-student relationship and the foreseeability of molestation in the school environment. When these inaccuracies are identified and examined, it becomes clear that the same considerations that have lead courts to hold police departments and health care providers vicariously liable for employees' sexual assaults can also apply to schools.

Foreseeability of sexual assault. First, although courts understand that sexual misconduct by law enforcement officers and health care workers is foreseeable, they refuse to recognize that the sexual assault of school children by school employees is also foreseeable. For example, in Mary M., the California Supreme Court wrote: "In view of the considerable power and authority that police

officers possess, it is neither startling nor unexpected than on occasion an officer will misuse that authority by engaging in assaultive conduct."[55] However, in John R., involving the sexual assault of a school child, the same court reasoned that the teacher's act was "so unusual or startling" that it could not be said to have been foreseeable for purposes of imposing respondeat superior liability.[56] And a California lower court described a school custodian's sexual assault as being "highly unusual and very startling."[57]

Recent research findings confirm, however, that sexual assaults by school employees are quite foreseeable. As previously stated, a study sponsored by the American Association of University Women found a high percentage of students in grades 8 through 11 had been sexually harassed by an adult at school.[58] And an earlier study found that a majority of children were sexually harassed at one time or another by an adult at school during some point in their elementary or secondary education.[59]

Of course, sexual harassement does not inevitably lead to sexual assault; and findings on the frequency of school-related sexual harassment is not direct evidence that sexual assaults are frequent as well. Nevertheless, sexual harassment often precedes assault, so the prevalence of sexual harassment in schools indicates that school leaders can anticipate a certain amount of sexual assaults as well.

Moreover, judged by the number of reported cases involving sexual assaults by school employees, sexual molestation in the schools may be increasing. Gail Sorenson surveyed the reported court decisions in this area during the period from 1987 through

1990, and she found that the number of cases increased each year.[60] A later survey of sexual abuse cases during 1993 found that the number of cases had increased still further.

In short, it seems clear that school leaders can reasonably expect that a school child might be sexually abused by a school employee. Indeed, the likelihood of such a tragedy is probably greater in the nation's schools than in the nation's hospitals and police cruisers. Therefore, courts are wrong to relieve school districts from liability for sexual assaults by school employees based on a finding that these assaults are not foreseeable.

Perpetrator's authority over sexual assault victim. Second, courts recognize that police officers and health care workers have considerable power over the persons who are in their care or custody, power which can aid them in commiting a sexual assault. Police officers have the power to arrest or detain lawbreakers. As visible symbols of that power, they are given distinctively marked cars, uniforms, badges, and weapons.[61] Likewise, hospital personnel sometimes exercise almost complete control over their patients' bodies; and they too have distinctive symbols of power--hospital uniforms, medical instruments, and identity cards.[62]

In contrast, the courts have generally not considered a school employee's authority over children to play any part in the employee's assault. In fact, in several cases involving sexual abuse, courts explicitly distinguished the circumstances of school children from those of prisoners and patients. The California Supreme Court has stated that a police officer's authority over a motorist, bolstered by officer's firearm, badge, and uniform, is substantially greater tha

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a teacher's authority over a child.[63] And a California appellate court stated that a hospital technician had more authority over a pregnant outpatient than a teacher had over a student.

> We believe there is a difference in authority, "in both degree and kind," between a hospital technician and a teacher. The authority of a hospital technician over a patient--bolstered immediately by his uniform, identification card, medical instruments, and expectation of submission to invasive procedures--plainly surpasses that of a teacher over a student.[64]

Likewise, in a 1990 case involving accusations of sexual abuse against a teacher, the Seventh Circuit expressly rejected the analogy between school children and prisoners or mental patients.[65] Prisoners and mental patients, the court wrote "are unable to provide for basic human needs like food, clothing, shelter, medical care, and reasonable safety."[66] In contrast, the state merely requires a child to attend school, which does not prevent the child from meeting her basic human needs. By mandating school attendance, the court said, "the state . . . has not assumed responsibility for [children's] entire personal lives; these children and their parents retain substantial freedom to act."[67]

In fact, a school child is probably just as vulnerable to sexual assault by a teacher as an adult would be while in custody of a police officer or under the care of a physician or hospital worker. Court cases reveal that school children often suffer from sexual abuse in the school setting for months or years before their abusers are detected and stopped. This indicates that abused school children have a diminished capacity to seek and obtain assistance, perhaps

due to their isolation or their abuser's psychological dominance over them.[68]

In a recent civil rights case, a federal district court more accurately explained the link between a school employee's sexual assaults and the authority which he derived from his employment status. "The allegations here," the court observed, "are not merely unadorned private acts; rather they are acts clothed in public authority and stature. They are acts that took place on school grounds, during school hours, and within the context of the unique teacher-student relationship."[69]

PART TWO: AN EDUCATIONAL INSTITUTION'S VICARIOUS LIABILITY UNDER TITLE IX FOR AN EMPLOYEE'S SEXUAL ASSAULTS

The first part of this paper examined the way courts have applied respondeat superior principles in tort suits brought by sexual assault victims against their assailants' employers. In these cases, two trends emerged; most courts refuse to apply respondeat superior against schools, but they are increasingly willing to adopt the principle in suits against law enforcement agencies and health care providers.

In the last few years, another line of cases has developed in which plaintiffs have sued educational institutions for sexual harassment under Title IX of the Education Amendments of 1972. Although no clear trend is evident, some decisions suggest that educational institutions can be held liable without fault under Title IX when their employees commit a sexual assault.

The seminal case is Franklin v. Gwinnett County Public Schools,[70] in which a female student sued a Georgia school district under Title IX based on her accusation that she had been sexually harassed by a teacher. According to the student, the teacher had:

> engaged her in sexually-oriented conversations. . . forcibly kissed her on the mouth in the school parking lot. . . telephoned her at home and asked if she would meet him socially . . . and . . . on three occasions . . interrupted a class, requested that the teacher excuse [her] and took her to a private office where he subjected her to coercive intercourse.

The Supreme Court ruled that a Georgia school district could be sued under Title IX for damages arising from the teacher's behavior.

Unfortunately, the standard the Court used to determine whether the school district might be held liable was not clear. There are at least two possibilities. First, the school district could be held liable for a teacher's sexual misconduct under respondeat superior principles, whether or not it knew about the misconduct or was itself negligent. Alternatively, liability could be assessed only if school officials knew or should have known about the teacher's harassment and took no action to stop it. In other words, the district would only be liable for a teacher's sexual misbehavior if it were found negligent.

One commentator has argued that Franklin held the school district liable for the teacher's sexual misconduct without regard to fault.

> In the portion of Franklin . . . which deals with district liability, the Court makes no reference whatever to

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> anything school administrators or board members did or did not do. It is apparent that the Court simply imputed to the school district the teacher's acts of intentional discrimination.[71]

A recent federal district court decision takes the same view. In Doe v. Petaluma City School District, the court interpreted Franklin as follows:

> [I]t appears that the Supreme Court would impose liability on the school district under agency principles for the intentional discrimination by its agent, a school teacher, not for the school district's failure to stop the harassment despite its knowledge of it. . . .Although not expressly stated in the opinion, the rule laid down by Franklin appears to be that, under Title IX, . . . an institution is deemed to have intentionally discriminated when one of its agents has done so.[72]

Petaluma's pronouncement was contained in dicta; the suit did not involve accusations about a school employee's sexual misconduct. However, in another recent Title IX case, Hastings v. Hancock,[73] a federal court ruled that an educational institution (a hairstyling school) and its owners could be vicariously liable for a school supervisor's sexual harassment of students, even though the harassment occurred without the owner's knowledge.

The Hastings court adopted an agency principle as the standard for imposing Title IX liability against the educational institution. Specifically, the court cited Restatement (Second) of Agency § 219(2)(d), providing that a master may be liable for the acts of a servant acting outside the scope of delegated authority if the servant was aided in the commission of the tort by the agency relationship.

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Even more importantly, the court ruled that sexual harassment of a student could be the basis for vicarious liability, without regard to whether the institution and its owners knew about the misconduct.

> Moreover, the court notes that in many cases decided under Title VII, courts have held that an act of a supervisor with direct authority over the harassee makes an employer directly liable for any violations of Title VII.
>
> . . . . .
>
> In the present case, Hancock had complete authority over the school and its students, presumably including authority over graduation, student financial aid, and grades. Therefore, this alternative "delegation of authority" interpretation of section 219(d)(2) could also provide a basis for liability on the part of the school, and the Morrisons as its owners.[74]

The court concluded that a question of fact existed with regard to whether the harasser was aided in his harassing behavior by his relationship with the educational institution.[75]

Of course, Petaluma and Hastings are not the last words on an employer's Title IX liability for an employee's sexual misbehavior. At least one federal court adopted a different view from Petaluma and Hastings. In Floyd v. Waters, a federal district court in Georgia ruled that a school board was not liable under Title IX for a security guard's assault on a fourteen-year-old student, because "the Board played no part in the discrimination."[76]

CONCLUSION

Under agency principles, employers can sometimes be held vicariously liable for sexual assaults committed by their employees. In several cases involving law enforcement agencies and health care

providers, employers have been held liable for an employee's sexual assault without a showing of negligence on the part of the employer. Although the courts have articulated no uniform rationale for their rulings, two themes emerge. First, sexual assaults by health care and law enforcement employees are foreseeable. Second, the victims of these assaults are particularly vulnerable due to the power and authority the perpetrators have by virtue of their employment.

School children are also vulnerable to sexual assaults by people in authority over them, and the possibility of such assaults is just as foreseeable as assaults by police officers or health care employees. If the courts come to understand the dynamics of sexual abuse in schools, they may well hold schools vicariously liable for their employees' sexual assaults, just as they have done for police departments and hospitals. Title IX may well be the vehicle the courts will use to make such a change in the law.

In the meantime, school leaders must recognize that a small percentage of school employees are prone to use their power over children to engage in sexual molestation. These tragic incidents are foreseeable and can be guarded against through proper hiring practices and better supervision. School districts have a moral obligation to protect their charges from abusive school employees, regardless of whether the courts recognize respondeat superior liability for sexual assaults in schools.

[1]AMERICAN ASSOC. OF UNIVERSITY WOMEN, HOSTILE HALLWAYS 10-11(1993).
[2]Dan H. Wishnietsky, Reported and Unreported Teacher-Student Sexual Harassment, 3 J. EDUCATIONAL RESEARCH 164-169 (1991).
[3]See, e.g. JUDITH HERMAN, TRAUMA & RECOVERY (1992); Richard Fossey, The Physically or Sexually Abused Child: What Teachers Need to Know, 11 HARV. EDUC. LETTER 4-7 (March/April 1995).
[4]Robert J. Shoop & Lynn M. Firestone, Mandatory Reporting of Suspected Child Abuse: Do Teachers Obey the Law? 46 Ed. L. Rep. 1115-1122 (1988); F. K. Lombard, M. J. Michalka & T. A. Pearlman, Identifying the abused child: a study of reporting practices of teachers. 63 U. DET. L. REV. 657-676 (1986).
[5]See Richard Fossey, Confidential Settlement Agreements Between School Districts and Teachers Accused of Child Abuse: Issues of Law and Ethics, 63 Ed Law Rep. 1(1990) and Nan Stein, Sexual harassment in Schools, Administrators Must Break the Casual Approach to Objectionable Behavior, ADMINISTRATOR 14-19 (January 1993).
[6]See, e.g., McIntosh v. Becker, 314 N.W.2d 728 (Mich. Ct.App. 1981) (school district immune from negligence claim based on accusation of teacher's sexual misconduct, but question of fact existed regarding respondeat superior liability).
[7]See, e.g., Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir. 1989), cert. denied, 493 U.S. 1044, 110 S.Ct. 840, 107 L.Ed.2d 835 (1990); Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir. 1994).
[8]20 U.S.C.A. §§ 1681-1687 (West 1990).
[9]RESTATEMENT (SECOND) OF AGENCY §219(1) (1958); WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY §83 (1964); O. W. Holmes, The History of Agency, 4 HARV. L. REV 345 (1890) and 5 HARV. L. REV. 1 (1891).
[10]BLACK'S LAW DICTIONARY 1311-12 (6th Edition, 1990).
[11]766 F.Supp. 1052, 1075 (M.D. Ala. 1990).
[12]SEAVY, supra at §63.
[13]RESTATEMENT (SECOND) OF AGENCY §219 (1958).
[14]Ibid, §231.
[15]Ibid, § 230. See, e.g. Perez v. Van Groningen & Sons, Inc , 719 P.2d 676, 678 (Cal. 1986) (employer may be held liable even if conduct is forbidden by employer, is intentional and malicious, and does not benefit the employer).
[16]Ibid, §231, Comment a.

[17]*See, e.g.*, Docktor v. Rudolf Wolff Futures, 684 F. Supp. 532, 536 (N.D. Ill. 1988), aff'd, 913 F.2d 456 (7th Cir.) (employer could not be liable for employee's sexual assault on another employee under respondeat superior theory); see also, generally, Smith v. American Express Travel Related Services Company, 876 P.2d 1166 (Ariz. Ct.App. 1994) (employer not liable for alleged sexual harassment); RESTATEMENT (SECOND) OF AGENCY §231(1958), Comment a (fact that servant intends crime, especially one of some magnitude, is considered when determining whether servant acted within scope of employment).
[18]See, e.g., Dismuke v. Quaynor, 637 So.2d 555 (La. Ct. App. 1994) (university liable for alleged sexual misconduct of summer employee involving fifteen

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year old girl; they type of misconduct was foreseeable and closely related to employee's duties working with children).

[19]814 P.2d 1341 (Calif. 1991). For an extensive and thoughtful discussion of this case, see Note: Respondeat Superior--Vicarious Liability--California Supreme Court Holds Police Department Vicariously Liable For Rape Committed by On-Duty Policy Officer, 105 HARV. L. REV. 947 (1992).

[20]Id. at 1344. [Citation omitted.]

[21]Id. at 1347.

[22]Id. at 1349.

[23]Id. at 1350. Even before Mary M., The California Court of Appeal had ruled that Orange County could be held liable for rape threats which a county deputy sheriff allegedly made against a woman motorist who the officer had taken into custody. White v. County of Orange, 212 Cal.Rptr. 493 (Cal.Ct.App. 1993).

[24]Gelfant v. Riley, Case No. C 91-1384 BAC, N.D.Calif. 1993 LEXIS 7325, May 18, 1993.

[25]Id. at p. 22.

[26] Applewhite v. City of Baton Rouge, 380 So.2d 119 (La. Ct. App. 1979).

[27]Id. at 121.

[28]But see Maguire v. State, 254 Mont. 178, 835 P.2d (1992) (state residential care center not liable for alleged sexual assault of mentally retarded patient by staff member).

[29]791 P.2d 344 (Alaska 1990).

[30]805 F.2d 1363 (9th Cir. 1986).

[31]791 P.2d. at 349, fn 7.

[32]Stropes v. Heritage House Children's Center, 547 N.E.2d 244 (Ind. 1990),

[33]Id. at 249.

[34]Id.

[35] Samuels v. Southern Baptist Hospital, 594 So.2d 571 (La. App. 1992).

[36]Id. at 574.

[37]Marston v. Minneapolis clinic of Psychiatry, 329 N.W.2d 206 (Minn. 1982).

[38]Id.

[39]Morin v. Henry Mayo Newhall Mem. Hosp., 34 Cal.Rptr.2d 535 (Cal.Ct.App. 1994).

[40]Id. at 539. See also, Wells v. Bowie, 622 N.E.2d 1170 (Ohio App. 1993) (involving alleged sexual assault of a spychiatric in-patient by nurse).

[41]Taylor v. Doctors Hosp., 486 N.E.2d 1249 (Ohio Ct.App. 1985).

[42]Id., at 1251. See also, Hoover v. University of Chicago Hospitals, 366 N.E.2d 925, 929 (Ill. App. 1977) (hospital not liable under theory of respondeat superior for doctor's act of raping patient);

[43]See, e.g., Morin v. Henry Mayo Newhall Mem. Hosp., 34 Cal.Rptr.2d at 538-39 (imposition of liability on hospitals for sexual assaults would encourage preventive measures without interfering with ability of employees to fulfill their duties).

[44]Bozarth v. Harper Creek Bd. of Educ., 288 N.W.2d 424 (Mich. Ct.App. 1980).

[45]Id at 426.

[46]Alma W. v. Oakland Unified Sch. Dist., 176 Cal.Rptr. 287 (Cal. Ct.App. 1981).

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[47]Kimberly M. v. Los Angeles Unified Sch. Dist., 242 Cal.Rptr. 612 (Cal. Ct.App. 1988).

[48]448 Cal.3d, 438, 256 Cal.Rptr. 766, 769 P.2d 948 (1989).

[49]Boykin v. District of Columbia, 484 A.2d 560 (D.C. App. 1984).

[50]Worcester Insurance v. Fells Acres Day School, 558 N.E.2d 958 (Mass. 1990).

[51]See also, generally, Joshua S. v. Casey, 615 N.Y.S.2d 200 (1994) (parochial school, church, and diocese not liable for alleged sexual misconduct by priest; alleged sexual assault not within scope of employment and not in furtherance of employer's business).

[52]McCullom v. Clow, 1992 Ohio App. LEXIS 4981, September 30, 1992.

[53]611 N.Y.S.2d 347 (A.D. 3 Dept. 1994).

[54]Bratton v. Calkins, 870 P.2d 981 (Wash. App. 1994).

[55]814 P.2d 1341, 1350 (Calif. 1991).

[56]256 Cal.Rptr. 766, 733, fn. 9 (Cal. 1989) (citation omitted).

[57]Alma W. v. Oakland Unified Sch. Dist., 176 Cal.Rptr 287, 292 (Cal. Ct.App. 1981).

[58]AMERICAN ASSOC. OF UNIVERSITY WOMEN, HOSTILE HALLWAYS 10-11(1993)

[59]Dan H. Wishnietsky, Reported and Unreported Teacher-Student Sexual Harassment, 3 J. EDUCATIONAL RESEARCH 164-169 (1991).

[60]Gail Sorenson, Sexual Abuse in Schools: Reported Cases From 1987-1990, EDUC. ADMIN.Q 460 (1991).

[61]Mary M. v. City of Los Angeles, 814 P.2d 1341 (Calif. 1991).

[62]Morin v. Henry Mayo Newhall Mem. Hosp., 34 Cal.Rptr.2d 535, 539 (Cal.Ct.App. 1994).

[63]John R. v. Oakland Unified Sch. Dist. 769 P.2d 948, 956 (Cal. 1989).

[64]Morin, 34 Cal.Rptr. at 539.

[65]J. O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267 (7th Cir. 1990).

[66]Id. at 272-73.

[67]Id. See also, D. R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3rd Cir. 1992) (en banc), cert. denied 113 S. Ct. 1045 (1993) (school girls, allegedly molested at school by other students, were not prevented from acting on their own behalves or from seeking outside help).

[68]Richard Fossey, Law, Trauma, and Sexual Abuse in the Schools: Why Can't Children Protect Themselves? 91 Ed. Law Rep. 443, 448-450 (Aug. 11, 1994). See generally, J. R. Schafer & B. D. McIlwaine, 16 AMER. INDIAN Q. 157 (1992) (describing investigation of alleged sexual abuse by teachers in Indian reservation schools and noting that one alleged perpetrator avoided detection for 18 years).

[69]Wilson v. Webb, 869 F.Supp. 496, 497 (W.D.Ky. 1994). See also, Horosko v. Sch. Dist. of Mount Pleasant Tounship, 6 A.2d 866, 868 (1939), "It has alsways been the recognized duty of the teacher to conduct himself in such a way as t command the respect and good will of the community, though one result of the choice of a teacher's vocation may be to deprive him of the same freedom of action enjoyed by persons in other vocations."

[70]112 S. Ct. 1028 (1992).

[71]Jay Heubert, Sexual Harassment and Racial Harassment of Public School Students: Federal Protections and What State Law May Add to Them. Paper

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delivered at the American Educational Research Association's annual meeting, New Orleans, May 7, 1994.

[72]830 F. Supp. 1560, 1575 (N.D. Cal. 1993).

[73]842 F. Supp. 1315 (D. Kansas 1993).

[74]Id. at 1320.

[75]See also, generally, McCalla v. Ellis, 446 N.W.2d 904 (Mich. App. 1989), in which a Michigan appellate court, interpreting Michigan civil rights law, ruled that an employer could be held vicariously liable for a supervising employee's rape of another employee. The court ruled that it was not necessary for the employer to have notice of the supervisor's conduct for vicarious liability to attach.

[76]831 F. Supp. 867, 876 (M.D. Ga. 1993).

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