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Vicarious Liability and the Private University Student Press

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ARTICLE: VICARIOUS LIABILITY AND THE PRIVATE UNIVERSITY STUDENT PRESS

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TEXT:

[*255] Commentators often lament the fact that the First Amendment's free speech and press protections do not apply to the private university student press.ⁿ¹ Some have argued that First Amendment [*256] protection for the private-university student press should be based on state action doctrine,ⁿ² but these arguments have received little approval in the courts.ⁿ³ The Student Press Law Center, meanwhile, has advised those involved with a private-university student press to convince the university to create such a protection through formal policy statements that grant private university students freedoms similar, if not identical, to those granted to students at public universities.ⁿ⁴ Such a policy should include "a strong and clear statement affirming the rights of student editors to make all content decisions and assume all responsibility for student media."ⁿ⁵ The SPLC contends that the creation of a public university free-press model through such policy statements could insulate the private university from liabilityⁿ⁶ because after adopting such policies, private universities faced with lawsuits could "point to the policy and argue that the student journalists are not like employees in an agency relationship, but more like independent contractors exempt from vicarious liability theory."ⁿ⁷ The question that remains for private university student press advisers and others who are responsible for a private university student press is, will the creation of a free-press model at a private university protect the university in a vicarious liability lawsuit resulting from the publication of content by the private-university [*257] student press?ⁿ⁸ Given the trend in vicarious liability law, this article argues that it is highly unlikely that such policy statements will protect a private university from liability for torts committed by its dependent student press.ⁿ⁹ The adoption of policies and procedures designed to prevent and correct foreseeable misconduct associated with the dissemination of student-produced content, however, will help protect a private university from vicarious liability arising from the operation of its student press.

LEGAL LIABILITY

According to the Student Press Law Center, "The general principle behind legal liability is that any person who could and should have prevented an injury from occurring can be held responsible for it."ⁿ¹⁰ Thus, in the context of a libel claim resulting from the publication of a news story, "Everyone who takes a responsible part in the publication is liable for the defamation."ⁿ¹¹ In the world of the commercial press, responsibility also extends to the publisher and the company that owns the publication in question. The same cannot be [*258] said, however, for a public university in the context of a claim resulting from a news story published by the student press.ⁿ¹² Public universities are generally not held liable because they lack the constitutional authority to review the content of student publications.ⁿ¹³ According to the Student Press Law Center, a public university that complies with the constraints of the First Amendment should be protected from liability, whereas a public university that engages in censorship of its student press would most likely be liable not only for a First Amendment infringement claim by student editors but also for any lawsuits arising from the publication itself through a vicarious liability claim.ⁿ¹⁴ Basing its advice on "a growing body of law," the SPLC counsels public universities to adopt a "hands-off" approach with regard to the student media.ⁿ¹⁵

This same approach has been proposed by the SPLC also in the context of the private-university student press,ⁿ¹⁶ even though no First Amendment bar exists to prevent a private university from exercising content control over student media.ⁿ¹⁷ The lack of a First Amendment prohibition

regarding administrative interference with the student press leaves a private university open to legal liability from the content of student publications.ⁿ¹⁸ The main source of legal liability for a private university operating a student press is vicarious liability.ⁿ¹⁹

[*259] AGENCY RELATIONSHIP

The doctrine of vicarious liability, also referred to as "respondeat superior," defines the situation in which a principal or "master" is liable for the torts of an agent or "servant."ⁿ²⁰ Based on the agency relationship in which the principal "controls or has the right to control the physical conduct of [an agent] in the performance of the service,"ⁿ²¹ vicarious liability is "intended to coordinate the costs, risks, and losses of a business with its benefits, advantages, and profits"ⁿ²² by making a principal vicariously liable for the torts of an agent committed while acting within the "scope of employment."ⁿ²³ Vicarious liability, then, forces the business owner "to pay costs, including tort liabilities, associated with [the] business"ⁿ²⁴ by requiring that there be an agency relationship between the defendant and the tortfeasor.ⁿ²⁵

It is often said an agency relationship consists of three elements: consent by the principal and agent, control by the principal, and action by the agent on the principal's behalf.ⁿ²⁶ An agency relationship is consensual in that both the principal and the agent in some way benefit from the relationship.ⁿ²⁷ While the benefit to the principal is [*260] most often tied to the operation of the business, the agent must also derive some benefit from the relationship or no reason would exist for the agent to be subjected to the fiduciary obligations set forth by the principal.ⁿ²⁸

Because vicarious liability is based on the agency relationship, "The principal will be liable only if the tortfeasor is a[n agent], rather than an independent contractor, and only if the tort was committed within the scope of the [agent's] employment."ⁿ²⁹ The distinction between an agent and an independent contractor "is often said to be based on the degree of control the principal exerts over the agent's performance of his duties."ⁿ³⁰ Actual control as well as the right to control can satisfy the control element.ⁿ³¹ Professor Paula J. Dalley has noted that the control aspect is better understood as an incident of business ownership, where "either the agent is employed in the principal's business, in which case the agent is a servant, or the agent is engaged in a business of his own, in which case he is an independent contractor."ⁿ³² Independent contractors, then, aid in the business enterprise but are not a part of it, whereas an agent is an integral part of the principal's establishment.ⁿ³³ To determine whether an agency relationship exists between the defendant and the tortfeasor, courts widelyⁿ³⁴ examine all of the following factors:ⁿ³⁵

- a. The extent to which the principal may exercise control over the details of the agent's work and has the right to assign other duties;
- b. Whether or not the agent is engaged in a distinct occupation or business;
- [*261] c. Whether the work is usually done under the direction of the principal or by a specialist without supervision;
- d. The amount of skill required to perform the work

- e. Whether the principal or the agent supplies the tools and place of work;
- f. The length of time for which the agent is employed;
- g. The method of payment, whether by the time or by the job; h. Whether or not the work is part of the regular business of the principal;
- i. Whether or not the parties believe they are creating the relationship of principal and agent; and
- j. Whether the principal is or is not in business.ⁿ³⁶

While the Restatement (Second) of Agency lists a number of factors to be considered in determining whether an independent contractor relationship exists, none of the factors listed "is necessarily dispositive."ⁿ³⁷ Commentators have concluded that the distinction between an agent and an independent contractor may turn not only on "whether the [principal] has retained control or the right of control over the details of the work"ⁿ³⁸ but also on whether the principal has the right to direct the agent to employ the skills necessary to accomplish a certain result.ⁿ³⁹ According to Professor Dalley, the list of factors is actually a way of determining "whose business is this" rather than "who's in control here?"ⁿ⁴⁰ The point of the independent contractor exception, she writes, "is to exclude those burdens, or risks, that are not part of the defendant's business (because they are in fact risks of another business -- the independent contractor's)."ⁿ⁴¹ This point also applies when determining whether an agent committed the tort within the "scope of employment."

Under the vicarious liability doctrine, a principal is subjected to liability for torts that an agent committed while acting within the "scope of employment."ⁿ⁴² The Restatement defines "employment" as the "subject matter as to which the master and servant relation exists" [*262] and scope of employment as "the extent of this subject matter."ⁿ⁴³ Scope of employment then "denotes the field of action within which one is a servant."ⁿ⁴⁴

Applying this reasoning to a public university does not work because a public university is constitutionally prohibited from exercising content control over the student press; thus, the "risks" associated with the publication of student press content are not part of the "business" of the public university.ⁿ⁴⁵ However, the vicarious liability theory may be successful in the context of a private university, where the university has the right to regulate content and the actions of student journalists because no First Amendment bar prevents it from exercising prior restraint or other forms of editorial control. Unless the private-university student press is separately incorporated or in some other way restructured as an independent auxiliary enterprise,ⁿ⁴⁶ it is very likely that a court would perceive the "risks" associated with the operation of a student press as legitimate "business" risks of the university. Furthermore because a private university has the right to direct student journalists in the details of their work, the independent contractor exception would not apply.

While no appellate case on point upholding student press rights at private institutions exists,ⁿ⁴⁷ a New York state county court in *Wallace v. Weiss*ⁿ⁴⁸ took up the issue of private university liability in connection with a libel suit against the university for a photograph published by the

school's student press. In its defense, the University of Rochester relied on case law in which the free speech rights of students were upheld against restrictive action by school administrators.

[*263] The university concluded from this case law that it was prohibited from exercising control over its student publications, and argued that because it had no control over the student press, it could not, therefore, be held "liable for the acts of those over whom it has no control."ⁿ⁴⁹

The court was quick to note that all the cases cited by the university involved First Amendment prohibitions on public institutions.ⁿ⁵⁰ These cases, the court said, did not apply to a private university, which is not constitutionally bound by the First Amendment.ⁿ⁵¹ The court said that even though it appeared that the University of Rochester did not exercise control over its student press, a private university has the power to exercise such control, including the issuing of instructions and guidelines to those in charge of student publications and quite possibly even prior restraint.ⁿ⁵² Furthermore, the court explained that the university, by furnishing space, providing financial assistance, and allowing the student newspaper to use its name, "may well be responsible for acts" of the student press.ⁿ⁵³ "By assisting the [student press] in its activities," the court concluded, the university "cannot avoid responsibility by refusing to exercise control or by delegating that control to another student organization."ⁿ⁵⁴

CONTROL, CONSENT AND BENEFIT

Control, which is one of the three elements of an agency relationship, is often defined as the "essence" of the relationship,ⁿ⁵⁵ and has been, perhaps, the most common test of that relationship.ⁿ⁵⁶ Control "is met in the clearest way" when an agent is employed by a principal.ⁿ⁵⁷ Yet, while a private university, through the nominal resources it provides to the student press,ⁿ⁵⁸ may or may not believe it "employs" its student journalists, the question in vicarious liability often comes down to whether the university had the right to control the actions of the students in "respect to the very thing from which the injury [*264] arose."ⁿ⁵⁹ In *Mazart v. State of New York*,ⁿ⁶⁰ a New York state court took up the issue of control in a vicarious liability claim against the State University of New York Binghamton for an allegedly defamatory letter to the editor published in the student newspaper.ⁿ⁶¹ The court held, "Control need not apply to every detail of an agent's conduct and can be found where there is merely a right held by the principal to make management and policy decisions affecting the agent."ⁿ⁶² However, the court held that the relationship between the university and the student newspaper would not "warrant the imposition of vicarious liability on the State for defamatory material" appearing in the student pressⁿ⁶³ given the "severe constitutional limitations on the exercise of any form of control by a State university over a student newspaper."ⁿ⁶⁴

To invalidate a charge of "control," SPLC recommends that the private university "limit its direct interference with content decisions" and draft a strong policy statement "affirming the rights of student editors to make all content decisions and assume all responsibility for the student media."ⁿ⁶⁵ However, even though parties may take great pains to write policies and draw up contracts that "provide an appearance of independence," these efforts will not succeed "if the court sees a pattern of . . . control in the circumstances and conduct of the parties."ⁿ⁶⁶ Moreover, control or the right to control may be established on "very attenuated"ⁿ⁶⁷ grounds. In fact, in some cases, "There may even be an understanding that the employer shall not exercise control" as in the case

of a cook who is regarded in agency [*265] law as a servant even though "it is understood that the employer will exercise no control over the cooking." ⁿ⁶⁸

Control or the right to control may be established in the context of a dependent private-university student press even though the university disclaims any editorial control. In such a context, student media receive financial support from the university in the form of a direct subsidy or from student activity fees. ⁿ⁶⁹ In addition, the university may provide office space, utilities, computers and other assets and supplies, technical assistance and support services, compensation or wages for student journalists, reimbursement for out-of-pocket expenses incurred by the student journalists, and a media adviser whose salary is paid with university funds. ⁿ⁷⁰ Because the university provides the financial support necessary to operate the student press, it also retains the power to approve all such expenditures. Furthermore, the university also retains the power to withdraw its funding as well as its declared intent to provide the students with complete editorial freedom at any time. Thus, the university, through its financial control and its inherent power to operate or regulate the activities associated with it, has established control over or the right to control the student press. ⁿ⁷¹ Because control may be very attenuated, one commentator argues that a situation where the "only significant contact between the [private] university and the student newspaper is the paper's status as an official student organization . . . may be sufficient to establish control." ⁿ⁷²

In addition to control, the agency relationship is based on consent and action by the agent on the principal's behalf. ⁿ⁷³ Consent could be established in various forms in the private-university student press context, such as the recognition of the student publication as a student activity or organization or through financial control, distribution rights or written acknowledgement of its existence on campus. ⁿ⁷⁴ In situations where the private university "exercises some form of control" over the student press, courts will most likely hold that a consensual relationship exists. ⁿ⁷⁵

As for the third prong of the agency relationship standard, several commentators have termed the stipulation that the agent [*266] must act on behalf of the principal as the "benefit" requirement. ⁿ⁷⁶ An agent is said to be acting "on behalf of" a principal if the agent is acting "primarily for the benefit of the [principal] and not himself." ⁿ⁷⁷ The term "benefit" is derived from the idea that the principal "typically expects to benefit financially by entering into [an agency] relationship," ⁿ⁷⁸ even though some agents, such as domestic servants, provide non-financial benefits to the principal. ⁿ⁷⁹ In the context of a public university, courts have found that there is "no doubt" that the university "benefits" from the existence of a student press. ⁿ⁸⁰ While benefit to the university from a student press is unlikely to be financial, it may be argued that a university benefits in other, non-financial ways. ⁿ⁸¹ For example, the operation of a student press may be viewed as central to the mission of the journalism department because it provides an experiential learning opportunity that is rivaled only by work within the professional industry and, therefore, increases the marketability of the university's journalism graduates, given the fact that mass media employers often prefer individuals who, in addition to having earned a bachelor's degree in journalism or mass communication, have experience working on college news platforms. ⁿ⁸² In *Mazart*, the court found that the university derived an "educational benefit" [*267] from its practice of granting college credit for student participation on the newspaper in the form of an independent study. ⁿ⁸³

In addition to the educational benefits, the existence of a student news organization provides the campus with an informational service. Private and public universities whose public relations departments submit news releases to the student press receive a benefit when the release is used and the event or situation is publicized.

SCOPE OF EMPLOYMENT

Given that an agency relationship is found to exist between a private university and its dependent student press, the court would then determine whether the conduct that harmed the plaintiff occurred within the "scope" of the student journalist's "employment." ⁿ⁸⁴ Such conduct would fall within the "scope of employment" if it was "the very thing the [agent] was employed to do," however, principals "seldom employ or direct [agents] to be negligent." ⁿ⁸⁵ According to the Restatement, conduct of a servant is within the scope of employment if, but only if:

- a. It is of the kind he is employed to perform;
- b. It occurs substantially within the authorized time and space limits;
- c. It is actuated, at least in part, by a purpose to serve the master; and
- d. If force is intentionally used by the servant against another, the use of force is not unexpected by the master. ⁿ⁸⁶

Conduct, therefore, "must be of the same general nature as that authorized, or incidental to the conduct authorized" to be within the scope of employment. ⁿ⁸⁷ In determining whether conduct not authorized is so similar to or incidental to the conduct authorized as to be within the scope of employment, factors courts examine include whether the act is commonly performed by the agent or similar to other acts previously authorized by the principal; whether given their past history the principal could reasonably anticipate the [*268] agent's act; whether the same act has been apportioned to other agents; whether the agent was using the tools or materials of the principal; and whether the act is outside the business of the principal. ⁿ⁸⁸ A principal is not only liable for acts performed or achieved by an agent when the agent is operating under the direction of the principal, but the principal is also liable for authorized but unintended conduct of the agent as well as other acts in an agency relationship that the agent "is not privileged to do." ⁿ⁸⁹

While the definition of "scope of employment" is open to interpretation ⁿ⁹⁰ and dependent upon the facts of a particular case, the ultimate question, according to the Restatement, "is whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed." ⁿ⁹¹ Thus, the controlling factor in the application of vicarious tort liability can be said to center on whether the tort in some sense was a part of the principal's business risks. Acts that are purely motivated by personal interests or that are so outrageous in nature as to have no rational business purpose are, therefore, generally held to be outside the scope of the employment. ⁿ⁹²

In the commercial realm, communication torts, such as libel and invasion of privacy, are viewed as normal business risks of a publisher, and, thus, the publishing company is held liable for such

torts [*269] committed by its reporters or editors.ⁿ⁹³ Clearly, in such a situation, a court would find that a reporter or editor was engaged in "authorized conduct."ⁿ⁹⁴ The fact that a journalist is not employed to commit libel or invade privacy "does not at all mean that such tortious acts are outside the scope or course of his employment."ⁿ⁹⁵ To employ someone to commit a tortious act is illegal; therefore, vicarious liability "arises out of tortious conduct committed while the servant is undertaking to fulfill a particular employment."ⁿ⁹⁶ The same logic and understanding of the law would be applied to a private university that operates a dependent student press, and a court would most likely consider a student reporter who published an inaccurate story that libeled a plaintiff to be engaged in conduct within the scope of employment.ⁿ⁹⁷ In terms of defamation, the Restatement notes that a principal is liable for defamatory statements made by the agent within the scope of employment or the "apparent" scope of employment.ⁿ⁹⁸ A private university that adopted a strong policy statement affirming the rights of students to assume all responsibility for the student press could argue that the conduct the student journalist is authorized to perform is not actuated by a purpose to serve the university. But this argument would most likely fail given a trend in vicarious [*270] liability law that has expanded the scope of employment standard beyond its traditional limits.ⁿ⁹⁹

DEVIATING FROM SCOPE OF EMPLOYMENT

While "all authorities agree that there must be some connection with the principal's business"ⁿ¹⁰⁰ before the principal will be held vicariously liable for the acts of an agent, courts have been willing to expand the number of situations considered within the realm of scope of employment by relaxing the requirement that the tortious act be actuated by an intent to serve or benefit the principal.ⁿ¹⁰¹ In these cases, courts have applied a variety of tests and rationalesⁿ¹⁰² that "substitute broad questions about loss spreading and enterprise liability" for the Restatement's purpose-to-serve prong.ⁿ¹⁰³ One such test, the foreseeability or characteristic risk test, asks whether the general class of injury at issue in a case constitutes a risk characteristic of the principal's enterprise.ⁿ¹⁰⁴ The test holds that the doctrine of vicarious liability is based on a "deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of [the principal's] activities."ⁿ¹⁰⁵ Under the test, the principal is held liable for "foreseeable" risks. "Foreseeable" or "characteristic" risks are those which are expected to "arise out of and in the course of" the operation of the enterpriseⁿ¹⁰⁶ in the sense that the "ordinary operation of the business enterprise increases the risk in question."ⁿ¹⁰⁷

[*271] This line of reasoning, one commentator contends, is based on a sense of fairness.ⁿ¹⁰⁸ This "sense of fairness" dictates that enterprisereLATED costs should be "borne by those who profit from" the enterprise.ⁿ¹⁰⁹ Under this line of reasoning, it is unlikely that a private university could escape liability for communication torts which arise from the operation of a dependent student press given the fact that such risks "may fairly be said to be characteristic of [privateuniversity student press] activities," and "flow from [the private university's] long-run activity in spite of all reasonable precautions on [its] part."ⁿ¹¹⁰ It is quite foreseeable that a student journalist in the course of producing a news product might commit a communication tort, whether intentionally, negligently or in good faith. The fact that a private university has adopted a policy placing all responsibility for the production of that news product in the hands of the students does not alter the fact that the potential harm is foreseeable and characteristic of the operation of a private

university's student-operated news enterprise and that the costs associated with such a student-operated enterprise are ultimately the costs of doing business as a private educational enterprise.

Additional tests which have similarly deviated from the purpose-to-serve prong include the "three policy objectives" test, which holds a principal liable if such liability would "(1) . . . prevent recurrence of the tortious conduct; (2) . . . give greater assurance of compensation to the victim; and (3) . . . ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gives rise to the injury;" ⁿ¹¹¹ and the enterprise liability rationale, which would find a principal vicariously liable for the agent's act if the act was "incident to carrying on an enterprise." ⁿ¹¹² While the "great majority of courts today continue to apply" all four prongs of the scope of employment test, including the purpose to serve prong, these openended substitute standards have expanded vicarious liability far beyond the traditional agency relationship elements of consent, control and conduct on the principal's behalf. ⁿ¹¹³ Given this trend, one commentator concluded that, in addition to acts committed within the [*272] agent's scope of employment, a principal may now be held vicariously liable if "the wrongful act was known or should have been known" by the principal. ⁿ¹¹⁴

PERSONALLY MOTIVATED TORTS

Regardless of the standard applied, courts generally have no difficulty determining that an employee was acting within the scope of employment in cases where "an employee commits a tort during the ordinary course of duties." ⁿ¹¹⁵ However, in cases where the employee was personally motivated to commit the tort, questions arise as to whether the principal should be held vicariously liable for an act that was clearly not actuated by an intent to serve or benefit the principal. Such cases commonly include questions of vicarious liability for sexual harassment by supervisory employees under Title VII of the Civil Rights Act of 1964, ⁿ¹¹⁶ but could well include defamation provoked by malice toward a plaintiff. In the realm of the former, however, the Supreme Court of the United States has applied a section of the Restatement that provides the basis for vicarious liability where the conduct giving rise to the tort occurred outside the scope of employment. ⁿ¹¹⁷ According to Section 219(2) of the Restatement, a principal is subject to liability for an agent's torts committed outside the scope of employment when:

- (a) the [principal] intended the conduct or the consequences, or
- (b) the [principal] was negligent or reckless, or
- (c) the conduct violated a non-delegable duty of the employer, or
- (d) the [agent] purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation. ⁿ¹¹⁸

[*273] In factual situations involving sexual harassment by a supervisor, the Court has applied subsections (b) and (d). ⁿ¹¹⁹ The Court explained in *Burlington Industries v. Ellerth* ⁿ¹²⁰ that under subsection (b), a principal is liable for a tort committed outside the scope of employment in situations where the principal's "own negligence is a cause" of the tort. ⁿ¹²¹ Agency law

provides for liability for harm resulting from a principal's failure to give directions or to provide adequate regulations.ⁿ¹²² In both incidences, the principal is required to use due care to prevent undue risk of harm to third parties resulting from improper or ambiguous orders or failing to make proper regulations.ⁿ¹²³ In cases of sexual harassment, the Court said negligence also includes situations where the principal "knew or should have known about the conduct and failed to stop it."ⁿ¹²⁴ Under this line of reasoning, a private university would not be able to escape vicarious liability by willfully turning a blind eye to tortious acts or disavowing any responsibility for such an activity in order to avoid legal liability for the risks associated with that activity.

APPARENT AUTHORITY

Moreover, under subsection (d), a principal is also liable for personally motivated tortious conduct if the agent "purported to act or to speak on behalf of the principal and there was reliance upon apparent authority" or if the conduct was "made possible or facilitated by the existence of the actual agency relationship."ⁿ¹²⁵ Apparent authority, according to the Restatement, exists when a third party dealing with the agent believes the agent is authorized by the principal and reliance on that belief by the third party enables the agent to commit the tort.ⁿ¹²⁶ Illustrations of the application of apparent authority include "a newspaper's liability for a libelous editorial published by an editor acting for his own purposes."ⁿ¹²⁷ In such a case, [*274] the credibility of the editorial is based on the principal's supposed knowledge of the editorial.ⁿ¹²⁸ The Restatement notes that defamation is effective because of the reputation of the publisher.ⁿ¹²⁹ Thus, a principal would most likely be liable for a defamatory statement under the apparent-authority standard if it appears to readers that the agent was authorized by the principal to make such statements.ⁿ¹³⁰ According to the Restatement, "The motive of the spokesman and the position he holds are . . . immaterial if the [principal] has apparently designated him to speak."ⁿ¹³¹

The Supreme Court dismissed the apparent authority standard as irrelevant in the context of sexual harassment. "As a general rule," the Court said, "apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as distinct from where the agent threatens to misuse actual power."ⁿ¹³² Apparent authority, then, involves the "false impression" of the existence of actual power, not the misuse of that power.ⁿ¹³³ A private university may be liable for a defamatory statement published by the student press under this standard if a false impression exists as to the apparent authority of the student journalist to speak for the university or with authority granted to the student by the university. Either way, the defamatory statement gains added credibility (and the plaintiff's reputation suffers additional harm) because of the statement's apparent connection to the status of the university.

AIDED IN THE AGENCY RELATION STANDARD

While the Supreme Court dismissed the apparent authority standard in the sexual harassment context, it focused its discussion on the "agent's misuse of delegated authority" and concluded that the "aided-in-the-agency-relation" standard was the "appropriate form of analysis."ⁿ¹³⁴ Under the aided-in-the-agency-relation standard, the Court explained that a clear line of cases has held an employer liable for intentional discriminatory conduct of a supervisor when the

misconduct "results in a tangible employment action," ⁿ¹³⁵ such as "hiring, [*275] firing, failing to promote, reassignment [of] responsibilities or significant change in benefits." ⁿ¹³⁶ The Court, however, noted that this "standard is made difficult by its malleable terminology, which can be read to either expand or limit liability." ⁿ¹³⁷ The aided-in-the-agency-relation standard, the Court added, "is a developing feature of agency law." ⁿ¹³⁸

Although the Court was reluctant to render a "definitive explanation" of the standard, it relied upon the aided-in-the-agency-relation standard to hold a principal vicariously liable for personally motivated misconduct not involving a tangible employment action. ⁿ¹³⁹ The Court's holding provides that the liability be subjected to an affirmative defense in which the principal is required to prove that: (a) "reasonable care" was exercised "to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the [principal] or to avoid harm otherwise." ⁿ¹⁴⁰ In litigating the first element of the defense, the Court said that it is "appropriate" to address "the need for a stated policy suitable to the employment circumstances" which prompted the tortious conduct. ⁿ¹⁴¹ The second element may be demonstrated, according to the Court, upon showing a failure on the plaintiff's part to use any complaint procedure provided by the principal. ⁿ¹⁴² An examination of some 200 federal court cases that addressed the affirmative defense in relation to sexual harassment claims advanced in Ellerth and the later case of Faragher v. Boca Raton ⁿ¹⁴³ found that "the lower federal courts have consistently held that an employer satisfies its obligation to prevent harassment by doing little more than creating and [*276] disseminating (or posting) an anti-harassment policy with a grievance procedure." ⁿ¹⁴⁴ In addition to the plaintiff's failure to report the harassment, federal courts have also concluded that an employer may prevail on prong two of "the affirmative defense by demonstrating nothing more than a prompt and appropriate response to a complaint of harassment." ⁿ¹⁴⁵

Because the Court read subsection (d) as consisting of two completely independent clauses and relied upon the second clause to hold the principal subject to vicarious liability for a supervisor's actionable sexual harassment, one commentator concluded that the Court's rulings in Ellerth and Faragher "would vastly expand vicarious tort liability, and would make the scope of employment requirement largely superfluous." ⁿ¹⁴⁶ The Court's rulings, which allow vicarious liability on the fact that the agent is aided in the commission of the tort by the agency relationship, are "much too broad" since most workplace torts, in some sense, are "aided by the agency relation." ⁿ¹⁴⁷ Furthermore, the affirmative defense rule, the commentator argues, which excuses principals who take reasonable steps to prevent misconduct from liability, "is completely contrary to agency law's insistence that employers pay the costs of their employees' torts whether preventable or not." ⁿ¹⁴⁸ According to an economic explanation of vicarious liability, the cost burden is placed on a principal for the tortious conduct of the agent as an incentive to induce the principal to exert control over the agent's actions. ⁿ¹⁴⁹ The cost burden incentive is placed on the principal because agents, given their inability to pay a tort judgment, lack the impetus to take due care. ⁿ¹⁵⁰ Because vicarious liability acts as an inducement for principals to exert control over their agents, it is not inconsistent with the principles of agency law to conclude that the cost burden on employers who follow through on this inducement should be lessened.

[*277] PUBLIC FORUM ANALYSIS

In 1988, the Supreme Court handed down *Hazelwood School District v. Kuhlmeier*ⁿ¹⁵¹ and established the standard that censorship of the high school student press is permissible if the publication in question is school-sponsored, is developed within an adopted curriculum, is described as part of that curriculum, operates as part of a regular classroom activity, and functions in practice as a closed forum.ⁿ¹⁵² In such cases, "Educators are entitled to exercise greater control over . . . student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."ⁿ¹⁵³ As long as school-imposed censorship is "reasonably related to legitimate pedagogical concerns," censorship of high school publications is permitted.ⁿ¹⁵⁴

The issue of whether "the principles of *Hazelwood* apply to public college and university students" was recently addressed by the United States Court of Appeals for the Seventh Circuit in *Hosty v. Carter*.ⁿ¹⁵⁵ While a three judge panel held that "*Hazelwood*'s rationale for limiting the First Amendment rights of high school journalism students is not a good fit for students at colleges or universities,"ⁿ¹⁵⁶ the panel decision was reversed upon appeal by the full panel of appellate court judges.ⁿ¹⁵⁷ In its en banc decision, the Seventh Circuit held "that *Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools."ⁿ¹⁵⁸ But even under *Hazelwood*, the court noted that censorship by an administrator is not allowed if the underwritten student publication at the university was established as a public forum.ⁿ¹⁵⁹

[*278] The issue of whether a school-sponsored college newspaper should be considered a public forum for student expression was "intently raised"ⁿ¹⁶⁰ in *Lueth v. St Clair County Community College*.ⁿ¹⁶¹ At issue in the case was whether a college administrator could prohibit the editor of the college newspaper from accepting and publishing a specific advertisement.ⁿ¹⁶² The court noted that the decision would turn on "the nature of the regulated forum."ⁿ¹⁶³ Government, the court said, "face[s] a lessened burden in justifying [its] restrictions" when the publication at issue is "deemed to be something other than [a] true public forum[]." ⁿ¹⁶⁴ To assess the "public character" of the "state-controlled" college newspaper, the court turned to the *Hazelwood* standard of evaluating whether authorities "have by policy or by practice' opened those facilities for discriminate use by the general public,' . . . or by some segment of the public, such as student organizations."ⁿ¹⁶⁵ The court relied on six criteria it said the Supreme Court emphasized in concluding that the newspaper at issue in *Hazelwood* was not a public forum.ⁿ¹⁶⁶ The criteria were whether the publication was developed within an adopted curriculum, a journalism course was associated with the publication, students received graded credits for working on the publication, the journalism instructor selected the editorial staff, the school principal conducted final review of each issue, and school officials did not deviate in practice from the policies surrounding the publication.ⁿ¹⁶⁷

The court determined that the college newspaper was a public forum, given the fact that the publication did not "operate in a laboratory situation" or "under the guise of a specific academic course," adopted curriculum or faculty member.ⁿ¹⁶⁸ Furthermore, the newspaper was operated entirely by students, freely distributed through the local community, and relied on outside advertisers to aid in the funding [*279] of the publication.ⁿ¹⁶⁹ And, finally, the court noted that

it could not ignore the "unequivocal language" contained in the newspaper's rules and regulations that placed "all policy decisions regarding what is printed in the paper, staff appointments and dismissals, and publication dates" under the control of the editor-in-chief.ⁿ¹⁷⁰ The public forum analysis was dispositive in the court's decision which held that state-funded school officials violated the First Amendment rights of the newspaper's editor-in-chief by prohibiting her from running a specific advertisement.ⁿ¹⁷¹

The Supreme Court has often applied a public forum analysis to issues regarding government-imposed restrictions on a speaker's access to public property as well as on expressive activity within educational settings.ⁿ¹⁷² Most recently, the Sixth Circuit relied on the public forum theoryⁿ¹⁷³ in a case involving actions taken by school officials to withhold the distribution of yearbooks from the university community.ⁿ¹⁷⁴ To determine whether the government intended to create a limited public forum, the court examined the university's policy and practice with respect to the yearbook as well as the nature of the yearbook and its "compatibility with expressive activity."ⁿ¹⁷⁵ The court found that university policy and practice placed editorial control of the yearbook in the hands of student editors,ⁿ¹⁷⁶ and the student handbook "described the yearbook as a "student publication." "ⁿ¹⁷⁷ Moreover, the court noted that the fact that the issue arises [*280] within the context of a public university "mitigates in favor of finding that the yearbook is a limited public forum." "ⁿ¹⁷⁸ The Sixth Circuit concluded that the yearbook was a "journal of expression and communication in the public forum sense," and as such the university's confiscation of the publication violated the First Amendment rights of its students.ⁿ¹⁷⁹

Given courts' reliance on the public forum analysis to uphold the First Amendment rights of students at public institutions, it is logical that the SPLC would conclude that "the best way for a private university to protect itself is to limit its direct interference with content and production decisions" and adopt a written policy that "affirm[s] the rights of student editors to make all content decisions and assume all responsibility for student media" and "prevents [university] officials from exercising content control over student publications."ⁿ¹⁸⁰ But the fact that private-university student publications function as a public forum will not protect the university from vicarious liability. Vicarious liability, which operates from the central question of "whether a risk is inherent in the business,"ⁿ¹⁸¹ basically rests on the risks-and-benefits-of-the-business theory.ⁿ¹⁸² This theory asserts that:

The principal retains all the incidents of ownership of the enterprise: ultimate (although perhaps not day-to-day) control; the benefit of profits, revenues, and opportunities arising from the business; ownership of (and exclusive right to use) business property; responsibility for financial losses; and liability for tort and contractual obligations of the business.ⁿ¹⁸³

Under this theory, a student press operated by a private university would most likely be conceived as a part of the "ownership" of the university's "business," and, therefore, the university would retain all the incidents of that ownership, including vicarious liability for tort and contractual obligations of the student press. A private university, [*281] then, could neither retain the benefits of advertising revenue from a student-produced publication while disclaiming the authority of the student who initiated the advertising contract nor avail itself of the news

services provided by student journalists then escape the obligations entered into by these same students in accordance with that service.ⁿ¹⁸⁴ As a result, the risks involved with operating a student press at a private university should be viewed as a cost of doing business, regardless of whether the primary role of that "cost" is to provide an experiential learning experience to journalism students or a public forum for the campus community.

CONCLUSION AND RECOMMENDATION

Given the examination of vicarious liability law, it is most likely that an agency relationship between a private university and student journalists working on a dependent student press could be established easily and clearly. By its very nature, a dependent student press operates with the consent of the private university, and, at the very least, provides an informational benefit to the university. Private universities, while they may have a hands-off policy regarding editorial decisions, nonetheless have the right to control the actions of student journalists who work on dependent student-operated publications. Furthermore, any loss resulting from the actions of student journalists working on a dependent student press would most likely be considered by a court as a normal and foreseeable business risk that should be borne by the university regardless of whether the university adopted a policy negating their responsibility for editorial decisions.

Even in situations where the student journalist was personally motivated to commit a tort, a private university could still be vicariously liable for the tortious actions of the student. Liability in this instance could arise if the harm resulted from a failure on the part of the university to give clear directions or provide adequate regulations or if a false impression exists as to the authority of the student to speak for the university or with authority granted by the university. Moreover, a private university may be vicariously liable for a tortious act if the student was aided in the commission of the tort by the agency relationship. While the aided in relationship standard is a "developing [*282] feature" of vicarious liability law,ⁿ¹⁸⁵ the standard, as the Supreme Court noted, "can be read to either expand or limit liability."ⁿ¹⁸⁶

Such statements regarding the malleable nature of vicarious liability are likely to give private universities that operate dependent student publications pause. Furthermore, it is clear from the trend in vicarious liability law that statements and policies written to counteract the legitimate cost burdens of an enterprise will not protect that enterprise from legal liability. However, fully recognizing the risks inherent in operating a student press might negate or at least mitigate legal liability given the Court's holding that vicarious liability for personally motivated misconduct be subjected to an affirmative defense. This defense requires proof that reasonable care was exercised to prevent and correct promptly any misconduct and that preventive or corrective opportunities of which the plaintiff failed to take advantage were provided.ⁿ¹⁸⁷ In relation to sexual harassment claims, for example, some 200 federal courts have concluded that an employer satisfies prong one of the Ellerth/Faragher affirmative defense by "creating and disseminating (or posting) an antiharassment policy with a grievance procedure."ⁿ¹⁸⁸ Prong two is satisfied when the plaintiff fails to report the tortious conduct or the employer can demonstrate a "prompt and appropriate response" to the plaintiff's complaint.ⁿ¹⁸⁹ Thus, instead of creating policy that renounces the university's responsibility for the actions and activities of student journalists, the Court's holding in Ellerth and Faragher instructs enterprises to enact policies and

procedures designed to prevent and correct foreseeable misconduct that is characteristic of their business enterprise.

Private universities as well as journalism educators who work for such institutions are fully aware of the risks associated with the dissemination of student-produced content. A communication torts policy should define these risks and the conduct prohibited. It should also provide a clear and consistent procedure for the reporting and investigation of complaints and grievances concerning published content as well as delineate the scope of corrective action that may result from a successful complaint. In addition the university may also wish to define the scope of the policy in terms of its purpose, the parties to whom it applies, and the department and/or offices responsible [*283] for administering the policy. When defining the purpose of the policy, the university may include a statement confirming its commitment to editorial freedom for student journalists. Such a statement may be qualified in terms of the expected pedagogical outcomes derived from editorial independence.

Because publications are complex enterprises that require expertise from multiple areas -- news editorial, advertising, visual communication, print production and Web technology, for example -- the responsibility of administering a communication torts policy should not fall to a dean of student services, director of student activities, provost, university president or college dean. These individuals cannot effectively manage such a policy in addition to performing their customary duties. Journalism educators should take the lead, therefore, in crafting and administering such a policy as well as providing opportunities for additional training for student editors regarding tort liability and the private university press. Private university educators who, for whatever reason, do not wish to create an auxiliary or independent student press and, thus, maintain "control" of student-run media ⁿ¹⁹⁰ must accept their responsibility as publishers of student-produced content, and work to implement a policy that not only mitigates the university's liability risks but also provides a richer, more exhaustive experiential learning environment for the students.

In a recently published book on the American press, journalism educator Theodore L. Glasser and Fortune magazine senior writer Marc Gunther contend that "journalism organizations marginalize themselves" when "they ignore the larger and arguably more important issues in journalism" such as a division of labor which exists in news organizations that "fails to place journalists in control of journalism." ⁿ¹⁹¹ Needless to say, the same might be said of journalism educators in regard to the operation of a dependent student press. By focusing on a hands-off public university model, journalism educators at private universities neither reap the legal protections of such a structure nor offer students a distinctive experiential learning environment. By creating a private university student press model that is anchored around a basic communication torts policy, journalism [*284] educators at private institutions could improve the standards of quality, accountability, and professionalism required from their student journalists while mitigating the university's liability from the operation of a student press.

This model should spell out the ethical and legal standards to which all student journalists must adhere. These standards should foster sound, independent news judgment and encourage the type of watchdog journalism that challenges university administrators as well as provide specific policy guidelines on the conduct and practices often associated with communication torts.

Journalistic conduct and practices covered by the policy would likely include the use of unnamed sources and promises of anonymity, use of quotations and reporting from other news sources, rebuttals and corrections, fact checking and the red flagging of accusatory language, impartial and dispassionate handling of controversial issues and subjects, accuracy, relationship with news sources and advertisers, misrepresentation of identity or intent, use of photography and graphics, fabrication and plagiarism, conflicts of interest, standards of decency, accountability, legitimate and ethical newsgathering practices, and the use of intellectual property.ⁿ¹⁹² In addition to providing guidelines on acceptable and unacceptable conduct, a communication tort policy must also include procedural guidelines for the reporting and investigation of complaints and grievances concerning published content and the delineation of corrective action that may result from a successful complaint. Such guidelines might encourage potential plaintiffs to first address their concerns with the editor-in-chief of the student publication before filing a formal complaint with a publications board, student press ombudsman, or some other designated oversight body. The scope of corrective action may include the running of retractions or corrections to the record to the dismissal of student journalists.

Without question, the effective operation of a student-operated press is central to the educational objectives of university journalism programs.ⁿ¹⁹³ Such an operation provides students with an experiential [*285] learning opportunity that is rivaled only by work within the professional industry itself. Students involved in the publishing process in relation to these operations should have the same degree of freedom and responsibility as their professional counterparts. This includes the freedom-responsibility of determining what is and is not "news" and of actively investigating and reporting on that news. It also includes the observance and application of traditional journalistic values, such as accuracy, balance, fairness, objectivity, and social responsibility, and the adherence to basic policies that set the standards of quality and professional accountability for working journalists.

Accountability, journalism educators Carolyn Marvin and Philip Meyer argue, "is an emergent aspect of professionalism" that takes courage and honesty.ⁿ¹⁹⁴ It is a concept that calls on journalists to not only publicly acknowledge mistakes but to also create a "culture of safeguards against error and distortion"ⁿ¹⁹⁵ by instituting "visible steps to minimize their reoccurrence."ⁿ¹⁹⁶ A communications torts policy intended to prevent the occurrence of communication torts by student journalists and provide a reporting procedure whereby the university will respond to a report of a violation of the policy is a step toward creating a professional culture of journalistic accountability that may well enhance the experiential learning experience students receive at a private university as it works to produce responsible and credible journalists.

FOOTNOTES:

n1 See Erwin Chemerinsky, *The Constitution and Private Schools*, in *PUBLIC VALUES, PRIVATE SCHOOLS* 274 (Neal E. Devins ed., 1989) [hereinafter Chemerinsky, *Private Schools*]; ROBERT TRAGER & DONNA L. DICKERSON, *COLLEGE STUDENT PRESS LAW* 11 (1976); Erwin Chemerinsky, *More Speech Is Better*, 45 *UCLA L. REV.* 1635, 1635 (1998) [hereinafter Chemerinsky, *More Speech*]; Robert C. Schubert, *State Action and the Private University*, *RUTGERS L. REV.* 323, 323 (1970); Brian J. Steffen, *A First Amendment Focus: Freedom of the Private-University Student Press: A Constitutional Proposal*, 36 *J.*

MARSHALL L. REV. 139, 139-40 (2002). This problem also impacts the general free speech rights of students on private university campuses. See Evan G. S. Siegel, Comment: Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities, 39 EMORY L.J. 1351, 1381 (1990).

n2 See Chemerinsky, Private Schools, *supra* note 1, at 286-87; Schubert, *supra* note 1, at 323; Steffen, *supra* note 1, at 160, 178.

n3 See, e.g., *Powe v. Miles*, 407 F.2d 73, 79-82 (2d Cir. 1968). In *Powe*, the court wrote that for state action to apply to the actions of a private institution, the state must be involved with the private action that caused the injury to the plaintiff. *Id.* at 81. Thus, state regulation of education standards at private universities as well as state aid to private universities would not constitute a finding of state action in lawsuits involving the alleged abridgement of free speech rights by students. See *id.* at 79-82. See also *Blackburn v. Fisk University*, 443 F.2d 121, 123 (6th Cir. 1971) (holding that "State involvement sufficient to transform a private university into a State university requires more than merely chartering the university"); *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535, 547-48 (S.D.N.Y. 1968) (noting that the "receipt of money from the State is not, without a good deal more, enough to make [a private institution] an agency or instrumentality of the Government").

n4 See LAW OF THE STUDENT PRESS 161 (2d ed. 1994); Student Press Law Center, Liability for Student Media: Who's Responsible in the Event of a Lawsuit (1997), available at <http://www.splc.org/legalresearch.asp?id=30> (last visited Oct. 29, 2005) [hereinafter Liability for Student Media].

n5 Liability for Student Media, *supra* note 4

n6 LAW OF THE STUDENT PRESS, *supra* note 4, at 161; Liability for Student Media, *supra* note 4.

n7 Liability for Student Media, *supra* note 4.

n8 This article grew out of a situation that developed during the summer of 2004 at Butler University, where the president of the university became concerned over the degree of the university's "vulnerability to vicarious liability" from publications produced by its student press. See Memorandum from Bobby Fong, President, to Kwadwo Anokwa, Professor and Director of the Eugene S. Pulliam School of Journalism, & Greg Sharer, Dean of Student Services (Aug. 22, 2004) (on file with author). At the core of the president's concerns was the question: What is the likelihood that a private university would be held vicariously liable for communication torts committed by its student press? See *id.* As this article notes, little research exists on this topic. The research that does exist falls into two categories. First, a private university student press should receive the same degree or close to the same degree of First Amendment protection as a public university. See *supra* text accompanying notes 1-3. Second, the enactment of a university policy, which gives student journalists the right to make all content decisions, could insulate the private university from liability. See *supra* text accompanying notes 4-7. Neither category of research is effective or very useful at answering administration concerns directed to college

media advisers and others regarding a private university's "vulnerability to vicarious liability" from publications produced by its student press. This article seeks to address that gap in the research.

n9 For the purposes of this article the use of the term "student press" applies to university-operated student publications and media. Such publications and media are student run but are dependent in that they could not operate without the support they receive from the university. Such operations differ from auxiliary enterprises or independently operated student publications and media. See J. WILLIAM CLICK, GOVERNING COLLEGE STUDENT PUBLICATIONS 2-4 (1993) for an explanation of various approaches to organizing a student press.

n10 LAW OF THE STUDENT PRESS, *supra* note 4, at 159.

n11 *Id.* (quoting *Lewis v. Time Inc.*, 83 F.R.D. 455 (E.D. Cal. 1979)).

n12 *Id.* at 160.

n13 *Id.*

n14 Liability for Student Media, *supra* note 4.

n15 *Id.* The SPLC argues that "if school officials do ignore the First Amendment and engage in censorship or require prior review of content by an adviser or administrator, protection from liability would be lost. A public university that wants protection [from vicarious liability] must allow editorial independence for student media." *Id.* See also Note, Tort Liability of a University for Libelous Material in Student Publications, 71 Mich. L. Rev. 1061, 1083 (1973) ("Vicarious liability should . . . be imposed generally upon . . . the public universities that in fact exercise editorial control" of student publications.).

n16 See Liability for Student Media, *supra* note 4.

n17 See *Wallace v. Weiss*, 372 N.Y.S.2d 416, 422 (N.Y. Sup. Ct. 1975); LAW OF THE STUDENT PRESS, *supra* note 4, at 161; Note, *supra* note 15, at 1083.

n18 See Note, *supra* note 15, at 1082-83.

n19 See *id.* See also Liability for Student Media, *supra* note 4. According to Black's Law Dictionary, vicarious liability is "liability that a supervisory party . . . bears for the actionable conduct of a subordinate or associate . . . based on the relationship between the two parties." BLACK'S LAW DICTIONARY 934 (8th ed. 1999). The doctrine of vicarious liability is also referred to as *respondeat superior*, a Latin term meaning "let the master answer." The doctrine of *respondeat superior* is widely used to describe the vicarious liability of a principal (master) for the torts of an agent (servant). In the law of agency, when a principal/agent relationship exists, "The principal (master) is vicariously liable for the physical torts of the agent (servant)." J. DENNIS HYNES, AGENCY, PARTNERSHIP AND THE LLC IN A NUT SHELL 71-72 (2001).

n20 HYNES, *supra* note 19, at 71. Hynes notes that the words "master" and "servant" are anachronisms today, but "They are often used as terms of art in the law of agency." *Id.* The Restatement (Second) of Agency notes that in "statutes dealing with various aspects of the relation between the two parties, the word employee' has largely displaced servant.' In general [the word employee] is synonymous with servant." RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. g (1958). However, the Restatement also notes that "the relation of master and servant is one not capable of exact definition" and "cannot . . . be defined in general terms with substantial accuracy" even though liability depends upon the existence of such a relationship. *Id.* at § 220(1) cmt. c. In this article, the term "principal/agent" is used to denote the master/servant relationship in agency law. The term "independent contractor" is used to denote non-agents or agents who are not servants. No agency relationship exists between an independent contractor and a principal and, thus, the doctrine of vicarious liability does not apply to a principal for the actions of the independent contractor. See *Id.* at § 220(1) cmt. c.

n21 RESTATEMENT, *supra* note 20, at § 2(1).

n22 Paula J. Dalley, *All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment*, 104 W. VA. L. REV. 517, 520 (2002).

n23 RESTATEMENT, *supra* note 20, at § 219(1).

n24 Dalley, *supra* note 22, at 540.

n25 See *id.*; HYNES, *supra* note 19, at 72.

n26 See RESTATEMENT, *supra* note 20, at § 1(1); Dalley, *supra* note 22, at 536. Professor Dalley argues that the latter two definitional elements actually function as one because control arises from and is dependent upon the fact that the business is operated on the principal's behalf. Dalley, *supra* note 22, at 536-37.

n27 See Dalley, *supra* note 22, at 537. The Restatement notes that consent to serve "can be created although there is no mutual agreement to give and to receive assistance. It is only necessary that there be submission by the one giving service to the directions and control of the one receiving it as to the manner of performance." RESTATEMENT, *supra* note 20, at § 221 cmt c.

n28 See Dalley, *supra* note 22, at 537.

n29 *Id.* at 540.

n30 *Id.* at 540-41. The Restatement notes that relation of principal and agent is "one not capable of exact definition" and "cannot . . . be defined in general terms with substantial accuracy." RESTATEMENT, *supra* note 20, at § 220(1) cmt c.

n31 See HYNES, *supra* note 19, at 83. An independent contractor is described as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." RESTATEMENT, *supra* note 20, at § 2(3). A servant, on the other hand, is someone "whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." *Id.* at § 2(2).

n32 Dalley, *supra* note 22, at 541.

n33 *Id.*

n34 HYNES, *supra* note 19, at 82.

n35 RESTATEMENT, *supra* note 20, at § 220(1) cmt. c.

n36 *Id.* at § 220(2). The court will determine the relationship if it is clear that a sufficient group of favorable factors either clearly establishes a principal/agent relationship or not; otherwise a jury determines the question after instruction by the court. *Id.* at § 220(1) cmt. c.

n37 Fleming James Jr., Vicarious Liability, 28 TUL. L. REV. 161, 194 (1954).

n38 *Id.* at 193.

n39 See Note, *supra* note 15, at 1070-71.

n40 Dalley, *supra* note 22, 542.

n41 *Id.*

n42 RESTATEMENT, *supra* note 20, at § 219(1).

n43 *Id.* at § 228 cmt. a.

n44 *Id.*

n45 While a public university may be vicariously liable for other incidents involving student journalists, this article deals with liability for torts arising from the publishing of content.

n46 Restructuring a student press as an auxiliary enterprise would disassociate the university from the funding of the student-operated press. "An auxiliary enterprise is an agency of a college or university that receives income in return for services it provides and pays its full expenses from that income. . . . Student publications can be established as auxiliary enterprises, collecting their own income for advertising, subscriptions and any other services they offer, and paying for services they obtain, such as office space, electricity and other utilities, personal services, supplies, printing and postage." CLICK, *supra* note 9, at 4. See also *Gallo v. Princeton University*, 656 A.2d 1267, 1275 (N.J. Super. Ct. App. Div. 1995) (holding that "alleged

defamatory statements that appeared in the independent University publications are not attributable to Princeton and its administrators").

n47 See LILLIAN LODGE KOPENHAVER & J. WILLIAM CLICK, COLLEGE MEDIA ADVISING: ETHICS AND RESPONSIBILITIES 4 (4th ed. 2003).

n48 372 N.Y.S.2d 416 (N.Y. Sup. Ct. 1975).

n49 Id. at 421.

n50 Id. at 422.

n51 Id.

n52 Id.

n53 Id.

n54 Id.

n55 See Dalley, *supra* note 22, at 535.

n56 See James, *supra* note 37, at 165.

n57 Id.

n58 See *infra* text accompanying notes 69-70 for the type of resources commonly provided to a student press by a private university. University expenses may also be offset with advertising revenue.

n59 Schramm v. Foster, 341 F. Supp. 2d 536, 546 (D. Md. 2004).

n60 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981).

n61 Id. at 601-02.

n62 Id. at 605.

n63 Id. at 606. The court noted that even though a public university is involved in funding a student newspaper, this fact could not constitute "control" for vicarious liability purposes because the First Amendment prohibits the public university from exercising any form of editorial control. Id. See also Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973); Antonelli v. Hammond, 308 F. Supp. 1329, 1337 (D. Mass. 1970); Korn v. Elkins, 317 F. Supp. 138, 143 (D. Md. 1970); Milliner v. Turner, 436 So. 2d 1300, 1303 (La. App. 1983); Doe v. New York University, 786 N.Y.S.2d 892, 899 (N.Y. Sup. Ct. 2004)

n64 *Id.* at 605.

n65 Liability for Student Media, *supra* note 4.

n66 James, *supra* note 37, at 194. For example, if "M hires S in what is clearly an employment relationship, but has S agree in writing that he is serving as an independent contractor,' and that in no event shall M be liable for S's tortious acts.' The contract between M and S will not affect M's liability to third person injured by S's wrongful acts." RICHARD J. CONVISER, AGENCY, PARTNERSHIP & LIMITED LIABILITY COMPANIES 94 (5th ed. 2003).

n67 RESTATEMENT, *supra* note 20, at § 220(1) cmt. d.

n68 *Id.*

n69 See KOPENHAVER & CLICK, *supra* note 47, at 63-64.

n70 See *id.*

n71 See Note, *supra* note 15, at 1071-73.

n72 *Id.* at 1073.

n73 See RESTATEMENT, *supra* note 20, at § 1(1).

n74 See TRAGER & DICKERSON, *supra* note 1, at 54.

n75 Note, *supra* note 15, at 1069.

n76 See *id.*; TRAGER & DICKERSON, *supra* note 1, at 54; Dalley, *supra* note 22, at 536-37; Liability for Student Media, *supra* note 4.

n77 RESTATEMENT, *supra* note 20, at § 14k. While "it is true that a paid agent is motivated by the prospect of receiving compensation and thus has a personal stake in the situation[,] . . . compensation is earned by acting in a manner that advances the interests of the principal and thus the paid agent is considered to be primarily acting for the benefit of another." HYNES, *supra* note 19, at 16.

n78 Note, *supra* note 15, at 1069.

n79 *Id.*

n80 Doe v. New York University, 786 N.Y.S.2d 892, 899 (N.Y. Sup. Ct. 2004); Mazart v. State of New York, 441 N.Y.S.2d 600, 606 (N.Y. Ct. Cl. 1981).

n81 See TRAGER & DICKERSON, *supra* note 1, at 54.

n82 The Bureau of Labor Statistics reports that most mass media employers prefer individuals who have earned a bachelor's degree in journalism or mass communication and have experience working on college news platforms and, as interns, with news organizations. News Analysts, Reporters, and Commentators, available at <http://www.bls.gov/oco/ocos088.htm#empty> (last visited Nov. 12, 2005). In its career guide, The Journalist's Road to Success, the Dow Jones Newspaper Fund encourages prospective and current journalism students to work on their college newspaper, explaining that most newspaper editors who hire beginning reporters and copy editors immediately after college look for two things in their prospective employees: (1) The ability to write and edit; and (2) A sincere interest in a news career. An Overview of News Careers, in THE JOURNALIST'S ROAD TO SUCCESS: A CAREER GUIDE, available at <http://djnewspaperfund.dowjones.com/fund/pubcareerguide.asp?page=pubcareerguide.aspCareerOverview> (last visited Nov. 12, 2005).

n83 Mazart, 441 N.Y.S.2d at 606.

n84 See RESTATEMENT, *supra* note 20, at § 219(1). The Restatement notes that an agency relationship may be found even though an agent serves voluntarily and is not paid for services provided. *Id.* at § 225.

n85 James, *supra* note 37, at 174.

n86 RESTATEMENT, *supra* note 20, at § 228(1).

n87 *Id.* at § 229(1).

n88 *Id.* at § 229 (2).

n89 *Id.* at § 229 cmt. a. An agent "is authorized to do anything which is reasonably regarded as incidental to the work specifically directed or which is usually done in connection with such work." *Id.*

n90 See Faragher v. City of Boca Raton, 524 U.S. 775, 796-97 (1998) (citing W. KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS 502 (5th ed. 1984)) ("As one eminent authority has observed," the Court wrote of the phrase "scope of employment," the "highly indefinite phrase" is devoid of meaning in itself and is obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not.").

n91 RESTATEMENT, *supra* note 20, at § 229 cmt. a. See also Faragher, 524 U.S. at 797 (explaining that "the proper analysis" is not "a mechanical application of indefinite and malleable factors set forth in the Restatement" defining scope of employment, but "an enquiry into the reasons that would support a conclusion that [the misconduct] ought to be held within the scope of employment and the reasons for the opposite view"); Taber v. Maine, 67 F.3d 1029, 1037 (2d

Cir. 1995) (explaining that " the integrating principle' of respondeat superior is that the employer should be liable for those faults that may be fairly regarded as risks of his business, whether they are committed in furthering it or not" (quoting FOWLER V. HARPER ET AL., LAW OF TORTS § 26.8 (2d ed. 1986))).

n92 See Erin M. Davis, Comment: The Doctrine of Respondeat Superior: An Application to Employers' Liability for the Computer or Internet Crimes Committed by Their Employees, 12 ALB. L.J. SCI. & TECH. 683, 690-91 (2002).

n93 See Ruth Walden, The University's Liability for Libel and Privacy Invasion by Student Press, 65 JOURNALISM Q. 702, 705 (1988).

n94 In this case, the conduct was clearly within the scope of employment, that is the journalist was hired to perform this kind of work, the work occurred within the space and time limitations of employment, and the reporter/editor was serving the publisher's purpose. See RESTATEMENT, supra note 20, at § 228(1).

n95 Sears, Roebuck & Co. v. Creekmore, 23 So.2d 250, 251 (Miss. 1945). See also Burlington Industries v. Ellerth, 524 U.S. 742, 756 (1998) (explaining that the Restatement "defines conduct, including an intentional tort, to be within the scope of employment when actuated, at least in part, by a purpose to serve the [employer], even if it is forbidden by the employer" (quoting RESTATEMENT, supra note 20, at §§ 228(1)(c), 230.)).

n96 Creekmore, 23 So.2d at 251.

n97 See Note, supra note 15, at 1068-69. The author analyzes such conduct in terms of the principles of actual and apparent authority. These principles underlie the principal's liability for an agent's contracts. See RESTATEMENT, supra note 20, at §§ 7-8. According to the Restatement, "Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him." Id. at § 7. The Restatement notes that "the term authority' has been used by the courts in a variety of ways. Sometimes it has been used to denote the factual giving of consent by the principal, without reference to the creation of a legal power." Id. at § 7 cmt. a. See also Dalley, supra note 22, at 522-23.

n98 RESTATEMENT, supra note 20, at § 247 cmt a. Apparent scope of employment refers to the belief by those reading the statement that the agent is acting "within his apparent authority." Id. See infra text accompanying notes 125-33 for a discussion on apparent authority.

n99 See infra text accompanying notes 100-114.

n100 HYNES, supra note 19, at 92.

n101 See Davis, *supra* note 92, at 691-92. See also *Burlington Industries v. Ellerth*, 524 U.S. 742, 757 (1998) (explaining that "the concept of scope of employment has not always been construed to require a motive to serve the employer").

n102 See *Faragher v. City of Boca Raton*, 524 U.S. 775, 796 (1998) (explaining that some courts apply a rationale of foreseeability and hold an employer liable for "the employees's acts [that] were foreseeable and that the employer should in fairness bear the resulting costs of doing business," while other courts hold an employer liable for misconduct which "arose from or was in some way related to the employee's essential duties"). The Court noted that these disparate rationales "represent differing judgments about the desirability of holding an employer liable for his subordinates' wayward behavior." *Id.*

n103 See HYNES, *supra* note 19, at 98.

n104 *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968).

n105 *Id.*

n106 *Id.* at 171-72.

n107 *Dalley*, *supra* note 22, at 549. See also *Taber v. Maine*, 67 F.3d 1029, 1037 (2d Cir. 1995) (explaining that a foreseeable and thus obvious risk to government is the "occasional drunken service member who leaves government premises and causes damage").

n108 See Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1269, 1279 (1997). Keating writes that in *Bushey v. United States*, the judge staked the opinion on the "claim that the deepest ground of vicarious liability was fairness, not [economic] efficiency." *Id.* at 1279.

n109 *Beshada v. Johns-Manville Prod. Corp.*, 447 A.2d 539, 547 (N.J. 1982).

n110 *Bushey*, 398 F.2d 167, 171 (2d Cir. 1968).

n111 *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1343 (Cal. 1991).

n112 *Doe v. Samaritan Counseling Center*, 791 P.2d 344, 349 (Alaska 1990).

n113 See HYNES, *supra* note 19, at 98; Davis, *supra* note 92, at 690-91.

n114 Davis, *supra* note 92, at 694. In *Faragher v. City of Boca Raton*, for example, the city was held to be vicariously liable for a supervisor's actionable sexual harassment even though the city had no knowledge of the behavior. 524 U.S. 775, 810 (1998).

- n115 Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 565 (1988).
- n116 See *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
- n117 *Ellerth*, 524 U.S. at 758; *Faragher*, 524 U.S. at 802.
- n118 RESTATEMENT, *supra* note 20, at § 219 (2).
- n119 See *Ellerth*, 524 U.S. at 758; *Faragher*, 524 U.S. at 802. Subsections a and c are omitted from this discussion because these categories focus on situations where the principal is directly liable, acts with tortious intent, or violates a nondelegable duty, and is, thus, beyond the scope of this article.
- n120 524 U.S. 742 (1998).
- n121 *Id.* at 759.
- n122 RESTATEMENT, *supra* note 20, at § 213 cmt. c, g.
- n123 *Id.* at § 213 (a).
- n124 *Ellerth*, 524 U.S. at 759.
- n125 RESTATEMENT, *supra* note 20, at § 219 (2)(d).
- n126 *Id.* at § 8 cmt. c.
- n127 *Faragher*, 524 U.S. at 802 (relying on RESTATEMENT § 247 illus. 1-3).
- n128 See *Dalley*, *supra* note 22, at 526.
- n129 RESTATEMENT, *supra* note 20, at § 247 cmt c.
- n130 See *id.* at § 247 cmt c.
- n131 *Id.*
- n132 *Ellerth*, 524 U.S. at 759.
- n133 *Id.*

n134 Id.

n135 Id. at 760.

n136 Id. at 761.

n137 Id. at 763.

n138 Id.

n139 Id. at 765. See also *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998).

n140 Id. In *Pennsylvania State Police v. Suders*, the Supreme Court clarified the reasoning behind the affirmative defense. An affirmative defense is not justified in cases where an "official act reflected in the company records -- a demotion or a reduction in compensation, for example - - shows beyond question" that the supervisor has used his managerial or controlling position to the employee's disadvantage. 524 U.S. 129, 124 S.Ct. 2342, 2355 (2004). However, in cases where an official act is absent, "The extent to which the supervisor's misconduct has been aided by the agency relation . . . is less certain," and thus the affirmative defense is justified. 124 S.Ct. at 2355.

n141 *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

n142 *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

n143 524 U.S. 775 (1998).

n144 Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 216 (2004). Professor Lawton found that most federal courts "combine into one discussion the employer's prevention and correction efforts, concluding that the employer satisfies prong one of the affirmative defense by distributing an anti-harassment policy and responding promptly once a complaint is filed." Id. at 218.

n145 Id. at 243.

n146 Dalley, *supra* note 22, at 550.

n147 Id. at 553.

n148 Id. at 555

n149 See William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 914-15 (1981)

n150 See id.

n151 484 U.S. 260 (1988).

n152 Id. at 268-70.

n153 Id. at 271.

n154 Id. at 273.

n155 325 F.3d 945, 946 (7th Cir. 2003), vacated by 2003 U.S. App. LEXIS 13195 (7th Cir., June 25, 2003).

n156 Id. at 948.

n157 Hosty v. Carter, No. 01-4155, 2005 U.S. App. LEXIS 11761, at *22 (7th Cir. 2005).

n158 Id. at *11.

n159 Id. at *11-18. The court did not definitively answer the question of whether the publication at issue in Hosty was a public forum. Instead, the court assumed the publication was a public forum, and thus proceeded to answer the question of whether qualified immunity protected the university administrator from the lawsuit. See id at *18.

n160 LAW OF THE STUDENT PRESS, supra note 4, at 55.

n161 732 F. Supp. 1410 (E.D. Mich. 1990). In the case, the publication in question, the Erie Square Gazette, received the "majority of its funding from a one dollar registration fee charged to students, with additional revenue generated through advertising." Id. at 1412. In addition, "Students working for the Gazette may receive academic credit and full or partial scholarships." Id. The editor-in-chief of the Gazette received a full academic scholarship. Id.

n162 Id. at 1412.

n163 Id. at 1414.

n164 Id.

n165 Id. (citing Hazelwood, 484 U.S. 260, 267 (1988) (quoting Perry Education Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 46 n.7, 47 (1983)).

n166 Id.

n167 Id.

n168 Id

n169 *Id.* at 1414-15

n170 *Id.* at 1415

n171 *Id.* at 1416.

n172 See *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (applying forum analysis to university student activities fund); *Hazelwood*, 484 U.S. 260 (1988) (applying forum analysis to high school newspaper); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 801(1985); *Perry*, 460 U.S. 37 (1983) (applying forum analysis to school district's internal mail system); *Widmar v. Vincent*, 454 U.S. 263 (1981) (applying forum analysis to university meeting fora).

n173 Under the public forum theory, the right of the state to limit expressive activity conducted on public property depends on the character of the property at issue. *Perry*, 460 U.S. at 44. In places traditionally devoted to or explicitly designated for public assembly and debate, "the rights of the State to limit expressive activity are sharply circumscribed" and government regulations that inhibit the free flow of ideas in these forums must meet the strictest of standards. *Id.* at 45. A state may also create a limited public forum if it opens up a piece of government property to the public at large for assembly and speech. While a "State is not required to indefinitely retain the open character" of this limited public forum, as long as it does so it is bound by the strict scrutiny standard. *Id.*

n174 *Kincaid v. Gibson*, 236 F.3d 342, 345 (6th Cir. 2001).

n175 *Id.* at 349 (quoting *Cornelius*, 473 U.S. at 802).

n176 *Id.* at 349, 351.

n177 *Id.* at 352.

n178 *Id.*

n179 *Id.* at 357.

n180 *Liability for Student Media*, *supra* note 4.

n181 *Dalley*, *supra* note 22, at 520.

n182 The Second Circuit noted that "the integrating principle," of respondeat superior is that the employer should be liable for those faults that may be fairly regarded as risks of his business, whether they are committed in furthering it or not." *Taber v. Maine*, 67 F.3d 1029, 1037 (2d Cir. 1995) (quoting *FOWLER V. HARPER ET AL., THE LAW OF TORTS* § 26.8 (2d ed. 1986)).

n183 Dalley, *supra* note 22, at 536.

n184 See *id.* To avoid this entanglement, a student press could be organized as an auxiliary enterprise. Auxiliary enterprises receive income from the university in exchange for services, but they also pay for services they obtain from the university. See *CLICK*, *supra* note 9, at 4.

n185 *Burlington Industries v. Ellerth*, 524 U.S. 742, 763 (1998).

n186 *Id.*

n187 See *supra* text accompanying notes 140-42.

n188 Lawton, *supra* note 144, at 216.

n189 *Id.* at 242-43.

n190 As explained in this article, the doctrine of vicarious liability would conclude that a private university which operates a dependent student press retains the right to control those students who work on such a publication. The scope of actual control a journalism department or private university exerts over the daily operations of such a press is not a focus of the article.

n191 Theodore L. Glasser & Marc Gunther, *The Legacy of Autonomy in American Journalism*, in *INSTITUTIONS OF AMERICAN DEMOCRACY: THE PRESS* 384, 392 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005).

n192 Journalism educators may find professional guidelines on conduct and ethical newsgathering practices useful as a starting point in identifying potentially problematic conduct that should be addressed in the development of a communication tort policy. See American Society of Newspaper Editors, *Codes of Ethics* (2004), available at www.asne.org/index.cfm?id=387 (last visited Nov. 12, 2005).

n193 The issue of editorial independence in an experiential learning environment sets student press organizations apart from other student organizations that may disseminate content. Students who are prepared upon graduation to become professional journalists are expected to have published work independently of administration oversight. A structure which allows administrators to have real power over the dissemination of student press content would inhibit the prospects of graduating journalism students who worked under such a system.

n194 Carolyn Marvin & Philip Meyer, *What Kind of Journalism Does the Public Need*, in *INSTITUTIONS OF AMERICAN DEMOCRACY: THE PRESS* 400, 403 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005).

n195 *Id.* at 408.

n196 *Id.* at 403.