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Accessibility
Sherman v. Department of Public Safety: Institutional Responsibility for Sexual Assault

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1 Introduction

In Sherman v. Department of Public Safety, Chief Justice Leo E. Strine, Jr. of the Delaware Supreme Court, writing for a 3-2 majority, held the Delaware Department of Public Safety liable for the sexual assault of an arrestee by one of its police officers. The Court imposed liability with no finding that the State was negligent in hiring, retaining or supervising the officer, and without second-guessing a jury finding that the officer acted outside the scope of his employment. Instead, it rested its decision on two alternative grounds within tort and agency law: nondelegable duty and “aided-by-agency.”

As authors of a 1L Torts casebook, we might not have been expected to choose as a leading tort-law decision one that is so centrally concerned with agency law. Our choice, in 2023, of a battery case might also raise eyebrows. And why would exponents of a wrongs-based theory of tort law pick a vicarious liability case that imposes strict liability for employee actions?

The most obvious answers to these questions are probably the most important ones. Not only is Sherman about police misconduct, it is a contemporary decision about tort liability for sexual assault – a legal, moral, social, and political issue of enormous ongoing importance. But that is not all. Sherman is about a plaintiff trying to find a way around the shields that often prevent citizens abused by officials from obtaining recourse against the governmental entities that employ them. In this respect, it admirably cuts against the trend, evidenced in the jurisprudence of our Nation’s highest court and many state courts, toward greater governmental immunity. The fact that the Delaware Supreme Court is one of our nation’s most important state courts, with particular expertise in the law of agency, and that Chief Justice Strine is among the country’s most illustrious judges also played a role in our choice. Finally, it perhaps goes without saying that we picked Sherman because we think it settles on the right answer to a hard question and largely gets to it in the right way, and because we hope it will provide guidance for future courts.

This said, we do not think Sherman is easy. Indeed, it raises a host of difficult questions that courts have addressed in different ways. In part, the difficulty stems from the fact that state law in the U.S., when compared to the law of other common-law jurisdictions, has tended to apply

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1 190 A.3d 148 (Del. 2018).

2 See generally Paula Giliker (Ed.), Vicarious Liability in the Common Law World (2022). In particular, in some institutional settings – group homes for vulnerable children, for example, where employees charged with supervising children have sexually abused them – tortious conduct of this sort is regarded as so “closely connected” to the nature of the employment as to be within the scope of the employment. Representative is the Canadian Supreme Court’s landmark decision in Bazley v. Curry, [1999] 2 S.C.R. 534. See Jason W. Neyers & Jared Kiss, Vicarious Liability: The Revolution in Canada, in
– though not invariably, and not without criticism – a relatively narrow test for scope of employment. Indeed, as Martha Chamallas pointed out a decade ago, the preferred test asks whether the employee acted with the intent or motive to serve the employer. For this reason, sexual assault plaintiffs in the U.S. have had to identify alternative bases for employer liability, and have done so with only limited success. Sherman is a case in which, in our view, a state high court rightly identifies important doctrinal grounds that allow for such liability.

Part I provides an account of the facts of Sherman and the complicated litigation that the Court’s 2018 decision brought to an end. It also highlights key elements of the Court’s analysis, particularly its reliance on nondelegable duty and on the lesser-known doctrine of aided-by-agency. Part 2 steps back to look at more basic doctrinal questions. It lays out five routes that a plaintiff might seek to establish employer liability in a case predicated on an employee’s sexual assault: (i) employer negligence; (ii) vicarious liability under a traditional scope-of-employment test; (iii) vicarious liability under the characteristic-risk scope-of-employment test; (iv) vicarious liability via nondelegable duty doctrine; (v) vicarious liability via aided-by-agency doctrine. Part 3 concludes by addressing categories (i)-(iv), leaving an extended discussion of aided-by-agency for Part 4. The Conclusion suggests that a particular version of aided-by-agency theory should be attractive to courts across the country.

2. Facts and Procedural History

The facts of Sherman are as disturbing as its procedural history is tangled. Jane Doe – at the time subject to an outstanding arrest warrant – was detained for shoplifting by a store security guard, who summoned state police. An officer in the Department’s employ placed Doe in his police car, eventually driving her to a remote location. There, the officer threatened her with the prospect of spending the weekend in jail if she did not perform oral sex, to which threat she acceded. He then drove Doe home, instructing her to turn herself in on the warrant the following week. Doe later reported the incident to the Department, which resulted in the officer’s arrest. The officer killed himself soon thereafter. Doe passed away six years later.

In response to the estate’s complaint, the Department moved for summary judgment on the ground that it could not be held liable for the officer’s intentional and criminal sexual assault. In response, the estate invoked two provisions of the American Law Institute’s 1958 Second Restatement of Agency – Sections 228 and 219 – as providing multiple grounds for Departmental liability. These can be summarized as follows:

1. Section 228 (scope-of-employment liability). Under the terms of Section 228, the estate had to demonstrate that the officer’s actions were within the scope of his employment because motivated in part to serve the interests of the Department and foreseeable to it. As to motivation, the estate argued that, while the assault was not motivated in the right way, it took place within an overall course of conduct – namely the arrest and transportation of an arrestee – that was motivated to serve the Department. As to foreseeability, the estate maintained that the attack was foreseeable at a general level: the Department could not

Vicarious Liability in the Common Law World, supra, at 19-46 (analyzing and defending Canadian law’s post-Bazley “closely connected” standard).


Restatement (Second) of Agency §§ 219, 228 (Am. L. Inst. 1958).
claim it is unheard of for police officers (whether in the Department or elsewhere) to abuse their power over arrestees to procure sexual favors.

2. **Section 219 (employer negligence, apparent authority, aided-by-agency).** Section 219 identifies three alternative grounds for employer liability apart from vicarious liability: negligent hiring or supervision (§219(2)(b)); non-delegable duty (§219(2)(c)); and apparent authority or commission of a tort aided by the existence of the agency relation with the employer (§219(2)(d)). The estate invoked each of these as grounds for holding the Department liable for the officer’s assault.

Unmoved by the estate’s arguments, the trial judge granted the Department’s motion. On initial appeal, the Supreme Court, in a decision later labeled “Doe I,” reversed, ruling that a jury should determine whether the estate had proven the ‘motivation’ and ‘foreseeability’ prongs of Section 228’s scope-of-employment test. Importantly, *Doe I* said nothing about the estate’s other theories of employer liability.

Although the case was remanded on these terms, the trial judge did not reach the issue of vicarious liability. Instead, it granted summary judgment to the Department on another ground: sovereign immunity. The estate appealed again to the high court. On this appeal, it not only sought reversal of the entry of judgment for the defendant, but also invited the court to rule as a matter of law that the Department was vicariously liable under Section 228’s test for scope-of-employment. According to the estate, such a ruling was warranted because there were no factual disputes as to: (a) whether the officer had intentionally arrested and transported Jane Doe (and in this respect was acting out of a motivation to serve the interest of the department), or (b) the foreseeability, in general, of a police officer abusing his authority to procure sexual favors from an arrestee.

In *Doe II*, the Delaware Supreme Court again reversed, holding that the Department could not benefit from sovereign immunity. However, it declined the estate’s invitation to rule as a matter of law that the Department was vicariously liable. Instead, it held that, under *Doe I*, the law of the case called for that issue to be resolved by a jury.

On second remand, a jury trial was held. On the scope-of-employment issues of motivation and foreseeability, the judge instructed the jury to determine whether the officer’s “conduct” was motivated at least in part to serve his employer and whether the “force” used by the officer was reasonably foreseeable. In addition, the trial judge instructed the jury that it was required to determine whether any tort had been committed in the first place, given the possibility that Doe could be deemed by the jury to have performed oral sex consensually.

After the jury returned a defense verdict, the case reached the Delaware Supreme Court for the third time, with the estate arguing that the instructions on motivation, foreseeability and consent were all erroneous. After oral argument, the high court invited the parties to submit additional briefing on two further issues. The first was whether any problems with the trial judge’s jury instructions were the product of an error in *Doe I* and *Doe II* – namely, those decisions having mistakenly ruled that the motivation and foreseeability issues raised questions of fact for the jury. It might be, the Court now reasoned, that there were no factual questions for the jury to decide on the scope-of-employment issue – that it instead raised purely legal issues concerning the level of generality at which the motivation and foreseeability tests should be framed. Second, the Court invited input on whether the high court’s until-then exclusive focus on Section 228 and its scope-of-employment question had diverted attention from alternative grounds for holding the
Department liable that the plaintiff had properly raised – namely, one or more of the grounds identified in Section 219 of the Second Agency Restatement.

With the benefit of this further briefing, a divided Delaware Supreme Court issued the 2018 opinion that is the focus of our paper, and that we will henceforth refer to as Sherman. In it, the majority ruled as follows. First, it held that a rare departure from the law-of-the-case doctrine was warranted, because revisiting the scope-of-employment rulings of Doe I and II would help clarify and develop Delaware law. Those rulings, the Court now held, were erroneous in their handling of the motivation and foreseeability issues. In particular, the motivation issue should have been decided for the Department as a matter of law because it should have been framed by reference to the assault of Doe (not her arrest), which the estate conceded was not motivated out of a desire to serve the employer.5

Having ruled for the Department on scope-of-employment, Sherman nonetheless identified grounds within Section 219 of the Second Restatement of Agency that not only favored the plaintiff, but required judgment for the estate as a matter of law. Indeed, it concluded that the Department was subject to liability on two grounds identified in Section 219: nondelegable duty and aided-by-agency. Finally, the Court ruled as a matter of law that Doe could not have been found to have effectively consented. Accordingly, with the Department’s liability established as a matter of law, it remanded the case solely on the issue of damages.

Two dissenting Justices wrote opinions offering various grounds for affirmance of the jury’s defense verdict. Justice Valihura argued, among other things, that Section 219’s aided-by-agency theory has relatively little support in case law, subjects entities to the prospect of too much liability, and raises policy questions better addressed by the state legislature.6

3. Employer Liability for Employee Torts: Multiple Pathways

We suspect that most students learn in law school that lawyers representing a person seeking compensation for an injury inflicted by an employee have two routes toward establishing the employer’s liability: they can argue that the employer should be held vicariously liable under the doctrine of respondeat superior, or that the company should be held directly liable because it was negligent in hiring, supervising, or retaining the employee. While this is obviously an oversimplification, the extent of oversimplification is driven home by Sherman and other cases in which victims of sexual assaults by employees seek to hold employers liable. Even if one puts aside negligent hiring, retention, or supervision-based lawsuits, there are – in theory – at least three other liability theories to consider. As noted, there is respondeat superior. There is also the nondelegable duty doctrine. Historically well-entrenched, this doctrine seems to operate as a sort of wildcard that courts invoke when they believe there are distinctive reasons of policy and principle to impose something like strict liability on firms when the plaintiff’s injury arises within a certain space or domain that the firm controls. Finally, at least since a remarkable decision by Third Circuit Judge Herbert F. Goodrich in 1957,7 there has been a variant on the doctrine of apparent authority that can be used in sexual assault cases, namely, “aided-by-agency” theory.

5 By way of dictum, the majority added that the plaintiff’s framing of the foreseeability issue at a general level was proper and that, accordingly, the plaintiff had established foreseeability as a matter of law.

6 In his dissent, Justice Vaughn took issue with the majority’s dictum that the officer’s assault was foreseeable as a matter of law, and with its ruling that there was no basis for a consent defense.

7 Bowman v. Home Life Ins. Co. of America, 243 F.2d 331 (3rd Cir. 1957). Judge Goodrich, a former Dean of the University of Pennsylvania Law School, was the Director of the American Law Institute at the
Things are more complicated still, because different courts have narrower and broader versions of respondeat superior. At a minimum, there is: the traditional “motive-to-serve” test; the “characteristic risk” approach found in California and the Second Circuit (among other jurisdictions); and the “connected with employer” test (which resembles the “characteristic risk” approach), which is prominent in Commonwealth countries. Each of these approaches has been utilized in an array of sexual assault cases in which plaintiffs try to establish employer liability, and, as to each, the results have been mixed. Nonetheless, it is clear that the traditional motive-to-serve approach is considerably less amenable to findings of employer liability than the other two.

A more complete description of the colorable grounds for imposing liability on employers for an assault committed by an employee would thus include at least the following: (i) the employer was negligent in hiring, supervising, or retaining the employee; (ii) the employee committed the assault at least in part out of a motive to serve the purposes of the employer; (iii) the risk of an assault by an employee was characteristic of the employment; (iv) the employee’s duty not to violate the rights of the victim was nondelegable; or (5) the employee’s assault was enabled by the particular type of authority the employee enjoyed by virtue of their employment.

As our Part I summary indicates, the plaintiff in Sherman failed to supply evidence of employer negligence, which left it with options (ii)-(v). Because it was clear under Delaware case law that “scope of employment” was to be evaluated according to Section 228 of the Restatement (Second) of Agency, which rejected the “characteristic risk” approach, option (iii) was also ruled out. And because a jury – and eventually the Delaware Supreme Court – concluded that the plaintiff could not satisfy the motive prong of Section 228, option (ii) was also eliminated, leaving only (iv) and (v). As indicated, Sherman deemed both of these available to the plaintiff estate.

Before focusing on (v) – aided-by-agency doctrine – we should for the sake of completeness briefly explicate Sherman’s application of nondelegable duty doctrine. Relying on

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time he wrote the Bowman decision. The plaintiffs in Bowman were a mother and daughter who were sexually assaulted by an insurance salesman pretending to be an examining physician for the company. Quoting from the Supreme Court of Pennsylvania, Judge Goodrich reasoned “the principal who gives to the agent absolute power to wrong the community in general, must bear the loss if innocent parties are injured by his exercise of that power,” and ruled that the insurance company was vicariously liable notwithstanding its employee’s conduct was outside of the scope of employment, and that nondelegable duty doctrine did not apply. Id. at 333-34 (quoting Keller v. New Jersey Fidelity & Plate Glass Ins. Co., 159 A.40, 44 (Pa. 1932). Because Bowman involved deception, it differs from Sherman, but it nonetheless constitutes an important anchor for the imposition of vicarious liability on a firm for a sexual assault committed by its employee outside of the scope of employment.
an Indiana intermediate appellate court decision, *Cox v. Evansville Police Dep’t*,\(^8\) as well as Delaware common carrier law,\(^9\) Chief Justice Strine reasoned as follows:

When the State authorizes police officers to take away the liberty of arrestees, it cannot delegate away its own responsibility to make sure that an arrestee is not harmed by the tortious conduct of its arresting officers. Even more than common carriers who cannot delegate away the duty of care they owe their passengers and cargo, governmental authorities who give police officers the power to deprive arrestees of their liberty are fairly held to account if their own officers abuse their official authority and commit an intentional tort on an arrestee.\(^{10}\)

Quoting from the *Cox* case, his opinion then added: Because an arrestee is “‘wholly dependent on [her arresting] officer for her safety and survival and ha[s] no ability to control her environment or protect herself from harm,’ we find that the logic behind … § 219(2)(c)’s non-delegable duty exception to *respondeat superior*’s scope of employment requirement is applicable under Delaware law.”\(^{11}\)

4. **Aided-by-Agency and its Variants**

Chief Justice Strine’s *Sherman* opinion concisely states the argument for adoption and application of an aided-by-agency approach to the Department’s liability for its officer’s assault. The opinion’s most compelling passages emphasize the officer’s exploitation of his power over arrestees, and illustrate that power by reference to the facts of *Sherman*. Recounting Doe’s testimony as to the threat issued to her by the officer, it observes that “[f]rom the standpoint of an ordinary person,

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In a decision issued a few months after *Sherman*, the Indiana Supreme Court reversed in part the intermediate appellate court decision that *Sherman* invoked. Specifically, the high court rejected the lower court’s holding that the two city defendants were subject to liability under Indiana’s particular version of nondelegable duty doctrine.

At the same time, the Indiana high court expressly affirmed that juries in *Cox* and *Beyer* could reasonably conclude that the officers had acted within the scope of their employment and thus remanded both suits for trial on that issue. 107 N.E.3d, at 456. In support of this conclusion, it emphasized that the scope-of-employment inquiry must be sensitive to the fact that “investing officers with … considerable and intimidating powers comes with an inherent risk of abuse,” *id.* at 463, adding: “When that abuse is a tortious act arising naturally or predictably from the police officer’s employment activities, it falls within the scope of employment for which the city is liable.” *Id.*

Thus, even though the Indiana Supreme Court’s subsequent *Cox/Beyer* decision undermines *Sherman*’s effort to use Indiana law in support of nondelegable duty theory as such in the police sexual assault context, it nonetheless supports *Sherman*’s invocation of an abuse-of-power rationale to justify the imposition of employer liability when police officers abuse their power to perpetrate sexual assaults (and it does so in a manner that connects with some of the reasons that led the lower court to utilize nondelegable duty theory).


\(^{10}\) *Sherman*, 190 A.3d at 182 (internal footnote omitted).

\(^{11}\) *Id.* at 182-83 (quoting *Cox*, 84 N.E.3d, at 687).
this threat would have real force.”12 The opinion also emphasizes that the force of this threat did not depend on any belief by Doe that the officer was acting within his authority. To the contrary:

… the threat would have real force for a more mundane reason: police officers have considerable discretion in determining how strict to be in seeking high bail or other conditions of release, and in many cases, releasing a defendant on a summons. Someone in Doe’s position would rightly fear that if she refused the Officer, he would seek to put her in jail. And if she attempted to tell the magistrate what he did, she might fear that she would be disbelieved by a magistrate who may have dealt with the Officer in other cases, and perhaps get even worse treatment for appearing to have falsely accused a member of law enforcement of wrongdoing. Fear of that kind would be reasonable, as someone in Doe’s position would assume the Officer would lie to the court. The record here illustrates how rational a fear of that kind would be, because the Officer denied that the oral sex occurred when first confronted with Doe’s complaint, and only admitted it when he was later confronted with physical evidence of the oral sex. Absent the oral sex occurring, that evidence does not exist and is unavailable to an arrestee who refuses.13

One of the many grounds for our selection of Sherman is the realism and candor with which this and other passages set forth the intimidating and coercive aspects of Doe’s situation, given the power over her enjoyed by the officer and by the courts.

Notably, Sherman concludes its invocation of aided-by-agency doctrine by claiming to follow “courts in other jurisdictions [which] have held that Section 219(2)(d) applies when an employee misuses his authority to obtain sex.”14 The footnote that follows this sentence marshals these authorities in a creative but fair manner. It begins as follows: “For cases in which courts have used the principles of authority underlying § 219(2)(d) to hold employing police agencies liable for their officers’ sexual misconduct, see ...”15 Some of the cases following the “see” signal are police-officer sexual assault cases from California and Louisiana in which Departments were held liable on the ground that they provided police officers with great authority, which authority enabled the officers to carry out their wrongful conduct. The footnote goes on to quote the California Supreme Court’s well-known Mary M. decision:

Our society has entrusted police officers with enforcing its laws and ensuring the safety of the lives and property of its members. In carrying out these important responsibilities, the police act with the authority of the state. When police officers on duty misuse that formidable power to commit sexual assaults, the public employer must be held accountable for their actions.16

Mary M., however, was decided on the ground that the officer in that case was acting within the scope of employment, not on §219(2)(d)’s aided-by-agency theory.17 However, the California court

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12 Id. at 179.
13 Id. (internal citation omitted).
14 Id. at 180 (citation omitted).
15 Id. at 180, n. 138.
16 Id. (quoting Mary M. v. City of L.A., 814 P.2d 1341, 1352 (Cal. 1991)).
found this path tenable because it conceives of scope of employment in the broader “characteristic risk” framework outlined above. As noted, this framework was not available to the Delaware court, because Delaware common law has adopted the narrower motive-to-serve-the-employer test for scope of employment.\textsuperscript{18} Nonetheless, \textit{Sherman} reasons that the grounds that justified the \textit{Mary M.} court’s imposition of departmental liability under the characteristic-risk test for scope-of-employment are also supported by the aided-by-agency approach to vicarious liability, and in a way truer to traditional doctrine.\textsuperscript{19}

The aided-by-agency discussion in \textit{Sherman} is sufficiently concise that it would not be right to accuse Chief Justice Strine of “padding” his decision. However it is striking that it takes the time to mention an opinion authored by Judge Richard Posner that, like \textit{Mary M.}, adopted a broad approach to scope-of-employment analysis.\textsuperscript{20}

The policy basis for [imposing liability notwithstanding the conduct’s being outside of the scope of employment as traditionally conceived] was well stated by … \textit{Norris v. Waymire}, a case decided under 42 U.S.C. § 1983: When an officer takes “advantage of the opportunity that [his] authority and proximity and privacy give him to extract sexual favors,” that behavior “should be sufficiently within the orbit of his employer-conferring powers to bring the doctrine of \textit{respondeat superior} into play, even though he is not acting to further the employer’s goals but instead is on a frolic of his own.”\textsuperscript{21}

Along with references to the foregoing precedents, which do not themselves invoke Section 219(2)(d), \textit{Sherman} also cites several cases that do. Among these, is Judge Sandra Lynch’s influential opinion in \textit{Costos v. Coconut Island Corp.}\textsuperscript{22} Writing for the First Circuit and applying Maine Law, Judge Lynch reasoned that an inn was responsible for the sexual assault its employee committed by using the inn’s key to enter the plaintiff’s locked room while she was sleeping. A subsequent and arguably more directly analogous case was the Vermont Supreme Court’s decision in \textit{Doe v. Forrest}.\textsuperscript{23} Like the plaintiff in \textit{Sherman}, the plaintiff in \textit{Doe} was a young woman sexually assaulted by a police officer. In a footnote, the Delaware Court also makes reference to two decisions of the New Mexico Supreme Court endorsing the aided-by-agency theory.\textsuperscript{24}

Lastly, \textit{Sherman} invokes – although less centrally – two elephants in the room in any discussion of aided-by-agency doctrine: \textit{Faragher v. City of Boca Raton}\textsuperscript{25} and \textit{Burlington Indus., Inc. v. Ellerth}.\textsuperscript{26} Each of these is a United States Supreme Court decision interpreting Title VII, the federal statute that renders civilly actionable employment discrimination on the basis of protected characteristics such as race and sex. Justice Souter in the former and Justice Kennedy in

\begin{itemize}
\item \textsuperscript{18} \textit{Sherman}, 190 A.3d at 178, n. 130.
\item \textsuperscript{19} \textit{Id.} at 184, n.159.
\item \textsuperscript{20} 114 F.3d 646, 649, 652 (7th Cir. 1997).
\item \textsuperscript{21} \textit{Sherman}, 190 A.3d at 180 (quoting \textit{W. By & Through Norris v. Waymire}, 114 F.3d 646, 649, 652 (7th Cir. 1997)).
\item \textsuperscript{22} 137 F.3d 46, 50 (1st Cir. 1998)
\item \textsuperscript{23} 853 A.2d 48, 67 (Vt. 2004).
\item \textsuperscript{24} Ocana v. Am. Furniture Co., 191 P.3d 58, 71 (N.M. 2004); Spurlock v. Townes, 368 P.3d 1213, 1217 (N.M. 2016).
\item \textsuperscript{25} 524 U.S. 775 (1998).
\item \textsuperscript{26} 524 U.S. 742 (1998).
\end{itemize}
the latter wrote decisions embracing the logic underlying Section 219(2)(d) and applying it to Title VII. While these are statutory interpretation cases, not common-law decisions, and while both supply employers with a background affirmative defense not adopted in Sherman, it is significant that two moderate Justices wrote majority opinions for the nation’s high court that embrace the legal reasoning behind Section 219(2)(d), quite apart from its alleged common law pedigree.

At the conclusion of its analysis, Sherman considers two arguments against the applicability of §219(2)(d) to the case. One of these was central to the Michigan Supreme Court’s decision to reject that doctrine. Specifically, in Zsigo v. Hurley Med. Ctr., 27 it declined to impose employer liability on a hospital for a sexual assault by a nurse on an emergency room patient. In alluding to a concern about exceptions swallowing rules, it reasoned: “…it is difficult to conceive of an instance when the [aided-by-agency] exception [imposing vicarious liability for acts outside the scope of employment] would not apply because an employee, by virtue of his or her employment relationship with the employer is always ‘aided in accomplishing’ the tort.” 28 In response, Sherman identifies grounds for distinguishing the particular type of power that police officers derive from their positions from the powers of other kinds of employees:

In finding that § 219(2)(d) applies to this case, we take into account the critical difference between police officers who act to arrest people and employees of most businesses. However important plumbers, electricians, accountants, and myriad other providers of services are to their customers, none of them wield the potent coercive power entrusted to our police under our laws. None of these employees have the presumptive legal authority to deprive a person of her liberty and subject her to a period of incarceration. By contrast, that is the authority our police officers possess, which is enforced by criminal laws punishing arrestees for resisting any exercise of their authority. 29

In this respect, Sherman anticipated Delaware and Vermont decisions declining to apply the theory to employees holding far less power over those they injured than the officer held over Doe. 30

In addition to offering a rebuttal to Michigan’s Zsigo decision, Sherman also responds to a combined doctrinal and institutional objection that has been leveled against aided-by-agency theory. The doctrinal objection, emphasized by the State of Delaware in its briefing to the Sherman court, is “that § 219(2)(d) only applies to situations in which the tortfeasor exercises apparent authority and tricks the victim into believing he has been authorized by his employer to commit

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27 716 N.W.2d 220 (Mich. 2006).
28 Id. at 226. Relying on a similar rationale, the Iowa Supreme Court recently declined to recognize aided-by-agency doctrine in a suit brought against a city by a victim of a police officer’s sexual assault. Martin v. Tovar, 991 N.W.2d 760, 767-68 (Iowa 2023). On Martin’s horrific facts – after a traffic stop of a car driven by a friend of the heavily intoxicated victim, the officer drove the victim to her hotel room and raped her while she was unconscious – the court did not need to reject the version of aided-by-agency doctrine articulated in Sherman to reach the result it did: given the victim’s severe intoxication, the officer had no occasion to wield his official authority coercively in order to carry out the attack. In short, there was no ‘official’ aspect to the officer’s assault: it could have been perpetrated on the same terms by a ride-share driver who had been tasked by police with transporting the victim to her hotel.
29 Sherman. 190 A.3d at 181 (internal citations omitted).
the tort itself.”31 To this attempt to collapse the aiding-by-agency idea into the idea of apparent authority, Sherman responds by quoting Justice Souter’s Faragher opinion, which pointed out that this interpretation fails to account for both the second conjunct of § 219(2)(d) (which treats aiding-by-agency as distinct from apparent authority) and the illustrations offered to explicate it.

The State, however, anticipated and sought to defeat this counterargument by pointing out that the American Law Institute’s subsequently adopted Third Restatement of Agency – approved in 2006 – contains no counterpart to Section 219(2)(d), which suggests that the Institute is now of the view that the aided-by-agency doctrine is not a sufficiently well-established common law rule.32 Unmoved, Sherman notes that Delaware courts had accepted the rules of vicarious liability provided in the Second Restatement, noting also that

the Restatement (Third)’s Reporter’s Notes indicate that jurisdictions “are not in accord on the appropriate standard for vicarious liability when an employee commits an intentional tort involving sexual misconduct in connection with the employee’s work,” and that some “cases [continue to] analyze employee sexual misconduct using a standard based on [the Restatement (Second) of Agency § 219(2)(d) ].”33

In addition, it maintains that the Third Restatement “appears to otherwise recognize the continuing vitality of § 219(2)(c) and (d) and that the theories underlying them are embedded in the broader treatment of apparent authority under the Restatement (Third).”34

Chief Justice Strine’s reply to the State’s challenge strikes us as only partially successful. It is true, of course, that the Delaware courts are at liberty to adhere to the Second Restatement of Agency and to embrace the logic of Section 219(2)(d). Moreover, we think he was on solid ground in invoking Justice Souter’s Faragher opinion as itself endorsing the soundness of aided-by-agency theory. Less convincing is his claim that the Restatement Third of Agency can be read as embracing the more expansive conception of employer liability that goes along with the aided-by-agency provision of Section 219(2)(d). This is an overly conciliatory reading of the Restatement Third taken on its own, and the parallel treatment of the 2015 Restatement of Employment Law makes it even more evident that a less conciliatory reading is more plausible. This does not mean that Chief Justice Strine was legally mistaken. Rather, it indicates that the Delaware court (and the other courts embracing aided-by-agency) are staking out a different position than the one adopted in the current Restatements of Agency and Employment Law.

In our view, Sherman is right to do so, and is supported in doing so by persuasive authority from other jurisdictions. Moreover, by acknowledging and responding to the troubling overbreadth of certain versions of aided-by-agency, Sherman points the way forward to a more precise and satisfactory description of the aided-by-agency doctrine.

In terms of authority, as we have noted, the United States Supreme Court endorsed a version of aided-by-agency theory twenty-five years ago in the Title VII context. Since then, eight state high courts have addressed it directly: Alaska,35 Delaware, Iowa, Maine,36 Michigan, New

31 Sherman, 190 A.3d at 181 (citing the State’s supplemental brief).
32 Id. at 178 n. 30.
33 Id. (quoting RESTATEMENT (THIRD) OF AGENCY § 7.05, Reporter’s Note (AM. L. INST. 2006)).
34 Id. (citing RESTATEMENT (THIRD) OF AGENCY § 7.08).
New Mexico, and Vermont. Of these, only two – Iowa and Michigan – have expressly rejected it. Maine’s high court has been equivocal, expressing skepticism about the First Circuit’s early decision in *Costos* and rejecting a plainly very weak case, but nonetheless seeming to leave the door open. The high courts of five other states have all endorsed the theory. Unsurprisingly, there is a range of decisions in lower state and federal courts and circuit courts in jurisdictions whose high courts have not addressed the theory. Many predict that the relevant state high court would reject the theory, while others predict acceptance.

As for the contours of the aided-by-agency doctrine, one of the reasons we have identified *Sherman* as a modern classic is because it adopts a particularly defensible version of it. In fact, one can identify in modern case law at least three iterations of the doctrine, and it is to the credit of the Delaware court that it opted for the third.

The first and broadest version was adopted by the First Circuit in *Costos v. Coconut Island Corp.* In affirming the imposition of liability on the owner of an inn for an assault on a guest perpetrated by the inn’s manager, it emphasized that the assailant’s position as manager conferred on him the knowledge that the victim was alone in her room, and gave him access a room key. One might call this “the Restatement (Second) of Agency version” of aided-by-agency doctrine. As other courts have noted, and as prominent ALI members commented in 1956, there is a legitimate concern that a conception of aided-by-agency requiring only that the employee’s position provide the employee with the opportunity and instrumentality necessary to commit the tort will allow for an end run around limits imposed on vicarious liability under the doctrine of *respondeat superior*.

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38 Spurlock v. Townes, 368 P.3d 1213, 1217 (N.M. 2016).
40 137 F.3d 46, 50 (1st Cir. 1998).
41 The draft “miscellaneous provisions” portion of the Third Torts Restatement has taken the position that the aided-by-agency doctrine stated in §219(2)(d) was never approved by the membership of The American Law Institute and that, therefore, “the inclusion of the aided-by-agency theory in the published Restatement of the Law Second, Agency, was improper and did not represent the position of The American Law Institute.” RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5, Comment k (AM. L. INST. T.D. No. 4, Mar. 2023). For this reason, it cautions that the second Agency Restatement provides “no support” for this rule of employer liability. Id. We take no position on whether this description of Institute procedural history, or the implications drawn from it, are warranted. We acknowledge, however, the overbreadth of the text of § 219(2)(d) as it appeared in what was putatively the official version of the Restatement (Second) of Agency; that many ALI members were troubled by the overbreadth of the aided-by-agency language as originally presented; and that the perceived overbreadth of the original language precipitated a negative majority vote at an ALI meeting in 1956. 33 A.L.I. PROC. 376, 379-380, 381-382, 383 (1956). As we discuss below, *Sherman*’s rendering of aided-by-agency theory is circumscribed in ways that make it less vulnerable to such criticisms.
42 See supra note 42.
43 Under the literal terms of *Costos*’s ‘opportunity and instrumentality’ test, an employer who assigns its employee the job of driving a truck full of fertilizer to a government warehouse would seem to face tort
A different version of aided-by-agency, as noted above, has been developed by the U.S. Supreme Court specifically for application to employers being sued by victims of workplace sexual harassment in violation of Title VII. Crucially, this version comes as an affirmative defense, which, while itself quite demanding of defendants, arguably mitigates the potential strictness of the Restatement (Second) version. In particular, an employer can avoid being held liable under this rendition of aided-by-agency theory if it can establish: “(a) that the employer exercised reasonable care 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 employer or to avoid harm otherwise.” This variant can be dubbed “the Title VII version.” It plainly is inapplicable to cases like Sherman.

A third approach, adopted by Sherman and some other courts, allows for the application of aided-by-agency theory outside of the context of workplace sexual harassment but requires for liability a more stringent set of conditions than those specified in Costos. According to these courts, employer liability is permitted in a narrow class of cases involving: (a) sexual assault; (b) of a person in an especially vulnerable position; (c) by an employee with extensive power over the victim and persons similarly situated to the victim; (d) where the employee’s domain of power over the victim arose from distinctive features of the employer and the employer’s power over the victim (such as the authority physically to detain the victim), and (e) where the exploitation of that power was necessary for the assault to be perpetrated. Assaults perpetrated by police officers, corrections officers, prison guards, and those caring for vulnerable persons in assisted-living facilities all potentially fit within this category. We call this the “abuse-of-authority” version of aided-agency. In including the word “authority” in the label for this view, we acknowledge both the constraint and the reasoning of the courts that have adopted it; we also flag the “conferred-authority” analysis provided by Christine Beuermann, the scholar who has produced the most careful and compelling account of the basis of such liability.

In Spurlock v. Townes, the New Mexico Supreme Court, drawing upon language from a federal District Court Judge, nicely summarizes this version of the doctrine:

Requiring a relationship of job-created control between a tortfeasor, and his or her victim, holds the employer liable only when the tortfeasor has capitalized on the power that the employer gave the tortfeasor, and not merely the opportunity. Opportunity is generic: a factory worker who sexually assaults the coworker next to him on the assembly line might only have been able to do so because the factory stationed him next to his victim, but the factory did not increase the odds—at least as they were knowable to the employer at the time—of either that specific worker committing sexual assault or of that specific coworker being sexually assaulted. On the other hand, when an employer vests an employee with power over another person—whether the other person is a subordinate employee or a non-employee third party, like an inmate—the employer enables torts that might not otherwise

liability if the driver secretly converted the fertilizer into a powerful explosive and then took advantage of his access as delivery-driver to bring the bomb-laden truck into the warehouse and detonate it.

45 See CHRISTINE BEUERMANN, RECONCEPTUALISING STRICT LIABILITY FOR THE TORT OF ANOTHER 76-104 (2019) (utilizing the concept of “conferred authority” to analyze and justify decisions that permit the imposition of liability on certain entities whose employees commit sexual assault on vulnerable persons under their control).
happen—torts that are, essentially, an abuse of that power. There is danger inherent in granting one person extraordinary power over another, and the granting of that power should, thus, carry with it some accountability.\(^{46}\)

The *Spurlock* court easily concluded that the prison guard-inmate relationship satisfied the conditions above, and imposed liability on the prison for a prison guard’s assault.\(^ {47}\)

5. Conclusion

*Sherman* is a complicated case, but we are inclined to think its defense and application of the abuse-of-authority version of aided-by-agency doctrine should be attractive to courts across the country. For better or worse, American jurisdictions today have largely eschewed “characteristic risk” analysis in favor of the traditional motive-to-serve test. While some instances of employee sexual assault might lend themselves to a finding of vicarious liability under this test, its tendency is, on the whole, strongly pro-defendant. To the extent courts maintain this approach to *respondeat superior*, they will do well to apply judiciously auxiliary doctrines, including nondelegable duty and aided-by-agency. As we have explained, *Sherman* invoked both of these doctrines. We have focused particularly on its application of aided-by-agency, setting forth as clearly as we can the reasons to think that the particular version it provides is well-suited to handle cases in which employees invested with certain supervisory or quasi-custodial powers over third parties exploit those powers to commit sexual assaults. This said, we do not mean to deny the possibility that there are versions of nondelegable duty doctrine that can cover some of the same ground in ways some courts might find equally or more intuitive.

Of course, we might be accused of begging the question here: of assuming without argument that a fair-minded and justifiable approach would include employer liability in cases like *Sherman*. This might seem especially surprising from scholars who have staked out a “Torts as Wrongs” position in tort law generally, eschewing deep-pockets-based arguments for liability, and depicting tort law as a regime of responsibility, not risk allocation.

Our response is that aided-by-agency liability is principally about responsibility, not risk allocation or deep pockets. Employers who confer on their employees certain extraordinary powers over third parties that can be exercised so as to place those third parties in highly vulnerable positions incur responsibility for those vulnerable individuals’ safety. They especially take on responsibility for the security of these vulnerable persons as against the powerful actors that have been sent out into the world to exercise such power. As we have noted repeatedly in other works, the duties of tort law are often very demanding – indeed, sometimes so demanding that good faith efforts to comply will not guarantee conformity with one’s legal duties. In these cases, liability will appear – and in some respects will be – strict, but that does not mean the defendant is acting as an insurer. The defendant is the one where the buck stops; the one to whom responsibility belongs.

There is a perhaps more down-to-earth way to explain why aided-by-agency doctrine, employed as it was in *Sherman*, is rightly described as moderate. First and foremost, it is narrow:

\(^{46}\) 368 P.3d 1213, 1217 (N.M. 2016) (quoting Peña v. Greffet, 110 F. Supp.3d 1103, 1135 (D.N.M. 2015)).

recall the court’s statement that “However important plumbers, electricians, accountants, and myriad other providers of services are to their customers, none of them wield the potent coercive power entrusted to our police under our laws,” and recall that the Delaware Supreme Court declined to apply the doctrine in a subsequent case involving a teacher. Second, it is a common-law doctrine that is subject to legislative revision, and will typically pertain to cases of egregious physical assault. Third, the seeming intractability of sexual assault and police violence would seem to warrant at least this much of a response on the part of the law, if not something more far-reaching.

Finally, it is worth mentioning the breadth and eminence of the range of American jurists who have found aided-by-agency logic compelling, even apart from the eminent Torts and Agency scholar, Warren Seavey, who served as the Reporter for the Restatement (Second) of Agency and placed aided-by-agency in that Restatement. Justice Souter was joined in Faragher by Justices Rehnquist, Stevens, O’Connor, Kennedy, Ginsburg, Breyer. Chief Justice Strine – a leading figure in agency and corporate law – drew upon opinions from Judges Lynch and Posner. None of this proves that Sherman is correctly decided, but it does tend to establish that the logic behind aided-by-agency theory as a basis for employer liability in certain sexual assault cases has resonated with many prominent jurists, none of whom can be characterized as pro-liability radicals.

American courts will, unfortunately, continue to see cases of sexual assault in institutional settings and continue to face demands for institutional liability. In common law jurisdictions around the world, legal doctrine has evolved to accommodate some such liability in a nuanced manner. The Delaware Supreme Court’s 2018 decision in Sherman v. Department of Public Safety displays a distinguished state court struggling to do so within the distinctive terms of American law. Although we believe that Sherman’s abuse-of-authority version of aided-by-agency doctrine is a sound basis for liability in a range of settings, the court’s analysis points more broadly to a range of polices, principles, and doctrinal tools that courts might apply in this context, and that perhaps do not fit neatly in any one doctrinal box. In writing about Sherman and designating it part of a new canon of tort cases, our aim has been to invite scholars, students, lawyers, and judges to engage with these issues in order to craft the law in a manner that is realistic, stable, and just.

48 Sherman, 190 A.3d at 181 (internal citations omitted).