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VICARIOUS LIABILITY—A LIMITED APPLICATION OF RESPONDEAT SUPERIOR TO POLITICAL CAMPAIGNING

Although respondeat superior, the doctrine under which liability is imposed upon an employer for the acts of his employee committed within the scope of his employment, is firmly entrenched in our legal system, it has had little, if any, impact in the context of a political campaign. In order to determine the extent to which a political candidate may be held vicariously liable for the tortious conduct of a volunteer campaign worker, this Note analyzes the elements of the doctrine at common law in conjunction with the competing policy considerations which could affect extension of vicarious liability to the electoral process. Recognizing potential first amendment restrictions upon such an extension, the author concludes by suggesting several types of tortious conduct to which, within the framework of a political campaign, liability should attach under respondeat superior.

INTRODUCTION

RESPONDEAT SUPERIOR is generally recognized as a basic principle governing liability in enterprise organizations.¹ Over time, the doctrine has been consistently expanded to cover new areas of human interaction which may result in injury to third parties.² Yet there remains one area in which the doctrine has had little or no impact: political campaigning.

Although there are few cases advocating the extension of vicarious liability into the political arena,³ the issue is, nevertheless, ripe. The dimension of modern campaigning invites more wide-

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1. Interpreted literally from Latin, respondeat superior means “let the master answer.” BLACK’S LAW DICTIONARY 1475 (4th ed. 1968). The phrase commonly stands for the proposition that “the master is liable for the torts of his servant, committed in the course of employment.” F. MECHEM, OUTLINES OF THE LAW OF AGENCY § 349 (4th ed. 1952).

2. F. MECHEN, supra note 1.

3. As early as 1913, a Wisconsin court imposed personal liability on the treasurer and other members of a campaign committee for a contract which was made in the name of the campaign chairman. Vader v. Ballou, 151 Wis. 577, 139 N.W. 413 (1913). The court based its holding on evidence which showed that the treasurer was aware of the contract and had made part payment for it out of committee funds. In so doing, reasoned the court, the treasurer, and, implicitly, the entire committee, had ratified the chairman’s conduct. Id.

Similarly, in United States v. Finance Comm. to Re-Elect the President, 507 F.2d 1194 (D.C. Cir. 1974), the court imputed knowledge of a contribution illegally obtained by a committee chairman to the entire committee. The court said that the committee clearly knew that it had a legal duty to report each contribution but had not done so. Id. at 1198.
spread contact with the public with a corresponding increased potential for injury to third parties. For instance, some negligent as well as intentional physical harm may be produced by volunteer workers maneuvering through a crowd at a political rally. Heated political debates and the occasional excess of zeal generated by a political campaign may transform a volunteer campaign worker into an agent of harm. Equally apparent is a campaign worker’s propensity toward violating local trespass laws, either by posting signs and placards or by door-to-door canvassing of voters. Such conduct may encompass newer torts as well, ranging from invasion of privacy arising out of unauthorized wiretapping and electronic eavesdropping to statutorily unethical campaign conduct.4

Despite the tendency of modern political campaigning to result in diverse forms of harm, several arguments against the extension of respondeat superior to the campaign context have been advanced. Foremost among them is the fact that a political campaign is vastly different from the traditional areas to which the doctrine has been applied. For example, a campaign organization is necessarily temporary. It may be composed in large part of untrained, voluntary, grassroots workers. Additionally, the campaign organization functions as a nonprofit political organization which has traditionally exemplified the first amendment freedoms of speech and association.5

Given these structural tensions, this Note analyzes whether political candidates, campaign committees, campaign officers, and political parties should be vicariously liable for the tortious conduct of volunteer campaign workers. This analysis first focuses upon the traditional justifications for application of vicarious liability to determine the relevance of each in the context of political campaigning.6 Second, an attempt is made to identify the legal capacity of campaign committees, campaign workers, and candidates to be sued for the torts of a campaign volunteer.7 Third, using the traditional “scope of employment” analysis, this Note seeks to determine to whom and under what circumstances respondeat superior may apply during the campaign process.8

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4. Unethical campaign conduct includes the use of racially or ethnically derogatory remarks in public criticism of an opponent, false claims about one’s own qualifications, and a wide variety of “dirty tricks.” See text accompanying notes 134–39 infra.

5. See text accompanying notes 125–39 infra.


7. See text accompanying notes 35–62 infra.

8. See text accompanying notes 63–93 infra.
Fourth, attention is addressed to the potential constitutional limitations upon the application of vicarious liability to political campaigns.9

This pattern of analysis concludes by identifying the conduct to which vicarious liability should attach and suggesting a qualified application of respondeat superior to the enterprise of political campaigning. Such an approach should render campaign organizations accountable to the public while preserving them as a valued democratic institution.10

I. TRADITIONAL JUSTIFICATIONS FOR THE APPLICATION OF VICARIOUS LIABILITY

Despite widespread acceptance of vicarious liability over the past 250 years, courts appear to be not wholly comfortable with the notion of charging one person with the responsibility for the wrongful actions of another solely on the basis of their employment relationship.11 Consequently, courts consistently reexamine the traditional policy justifications for vicarious liability before extending the doctrine to new relationships.12

A. Competing Policy Considerations

Six justifications are generally recognized. First, liability should befall the employer13 for negligently selecting or supervising an employee who injured a third party.14 This theory does not, however, justify the imposition of vicarious liability; rather, it imposes liability directly, based on the negligence of the employer himself.15

9. See text accompanying notes 94-122 infra.
10. See text accompanying notes 124-39 infra.
11. Virtually all scope of employment or frolic-and-detour cases stand as support for the proposition that courts do not feel that an employment relationship alone suffices to warrant vicarious liability for all harms precipitated by a servant. See, e.g., Grimes v. B.F. Saul Co., 47 F.2d 409 (D.C. Cir. 1931); Herr v. Simplex Paper Box Co., 330 Pa. 129, 198 A. 309 (1938).
12. See, e.g., Heims v. Hanke, 5 Wis. 2d 465, 93 N.W.2d 455 (1958) (extending vicarious liability to a gratuitous master-servant relationship); Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951) (applying respondeat superior to charitable institutions).
13. The terms "employer" and "employee" have, through usage, developed an imprecise connotation. For the purposes of this Note, however, the terms are used to encompass the tort concept of master and servant and to exclude the notions of principal and agent and contractual liability.
A second theory is that one employs a substitute at his own peril. Any positive action necessarily involves a risk of harm to a third party. One who initiates that action, either on his own or by virtue of the employment of another, must take responsibility for any resultant harm.

The third justification for the application of vicarious liability developed as a response to evidentiary problems faced by the injured party who was generally unable to specify which employee precipitated the injury and at whose direction. The doctrine of vicarious liability removed this onerous burden from the injured party.

The three justifications already discussed are, however, only tangentially relevant to the policy considerations which underlie the application of the doctrine of respondeat superior. The ensuing three theories, based on notions of control, benefit, and financial responsibility, are the more frequent justifications for the imposition of vicarious liability.

The fourth theory emphasizes the employer's right to control the actions of his employee, rather than the employer's actual opportunity to do so. Stated simply, because the employer is in the best position to control the course of an employee's actions, the employer should bear the loss for injury to third parties when he has failed to meet this burden.

Underlying this justification are notions of negligent hiring and supervision. The threat of vicarious liability encourages an employer to supervise his workers more carefully. This reasoning is, of course, compelling only when the employer is in fact in the best position to supervise the actions of his employees.

The fifth justification is premised on the notion that the employer establishes the venture to further his own interests. By so doing he places the employee in a position which may result in

17. See Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167 (2d Cir. 1960) (holding defendant vicariously liable for the actions of its servant, an intoxicated sailor returning from shore leave who tampered with the valves controlling a drydock near his ship, causing substantial damage). It may be that this theory represents a combination of the benefit and control arguments (see notes 19–20 infra and accompanying text) and operates merely as a shorthand notation for these concepts.
harm to a third party. Because the employer is deriving profits and other benefits from the venture, he should absorb the loss if harm results.\textsuperscript{20}

The final justification is widely known as the "deep pocket" theory. The argument is that vicarious liability should be applied because employers, as a class, tend to be financially responsible more often than employees, thus diminishing the chance that an injured party's only recourse will be against a judgment-proof person.\textsuperscript{21} Two theories are usually considered in conjunction with the deep pocket rationale. The first is enterprise liability, which is based upon the notion that the enterprise which occasioned the injury is in a better position to absorb such losses and insure against them.\textsuperscript{22} The second is risk allocation, an economic approach premised upon the theory that the price of a product should truly reflect the costs associated with it. Including the cost of tort injuries in the price of a product will cause consumers to pay in accordance with the product's true economic value.\textsuperscript{23}

Although none of these justifications alone provides an adequate basis for imposing vicarious liability on the employer, each represents an important consideration which merits analysis in the political campaign context. Perhaps a combination of these theories will create a sound foundation for redressing innocent third parties injured in the course of a political campaign.

B. \textit{Relevance of the Justifications in the Context of a Political Campaign}

At first glance, these justifications appear to apply directly to a

\textsuperscript{20} Note, \textit{Respondeat Superior and the Intentional Tort: A Short Discourse On How To Make Assault and Battery a Part of the Job}, 45 U. CIN. L. REV. 235, 252 (1976). See also Dill v. Rader, 533 P.2d 650 (Okla. App. 1975) (applying the principle that the master will be liable for the torts of his servants which occur while the servant is on duty or performing an employment-related task).

In Panama R.R. v. Bosse, 249 U.S. 41 (1919), Justice Holmes supported this justification by stating that "a master must be taken to foresee that sooner or later a servant driving a motor will be likely to have a collision, which a jury may hold to have been due to his negligence, whatever care has been used in the employment of the man." \textit{Id.} at 46.

\textsuperscript{21} Smith, \textit{supra} note 18, at 460.

\textsuperscript{22} F. MECHEN, \textit{supra} note 1, at § 352; Calabresi, \textit{Some Thoughts on Risk Distribution and the Law of Torts}, 70 YALE L.J. 499 (1961).

\textsuperscript{23} Calabresi, \textit{supra} note 22. In a business context, consumers who absorb the cost of these losses or of improvements made to eliminate the losses have a substantial interest in obtaining a safer product or in insuring against possible injury to themselves by absorbing such costs as a group.
campaign for elective office. For example, a candidate\textsuperscript{24} may be
negligent in selecting and supervising his volunteer workers.\textsuperscript{25}
Similarly, he may be in the same position as any other individual
who employs a substitute to accomplish his goals.\textsuperscript{26} It would seem
that applying vicarious liability to the campaign context would re-
move the burden on the injured third party to identify which em-
ployee created the harm.\textsuperscript{27}

Although all three of these justifications are applicable to po-
litical campaigning, they are an inadequate foundation for the ex-
tension of vicarious liability to this area. Negligent selection and
supervision justifies liability but not vicarious liability since the
candidate himself would be negligent. Employing a substitute at
one's peril is conclusory; it fails to provide a justification without
incorporating the control and benefit arguments. Additionally,
concern for easing the injured party's burden of proof may be
laudable, but it is altogether too simplistic a justification because it
fails to take into consideration the employer's burden.

The control, benefit, and deep pocket theories appear to apply
to the campaign context in a superficial way as well. For example,
within the campaign structure the candidate occupies a position of
control similar to that of the employer.\textsuperscript{28} He has the capacity to
control campaign workers in carrying out their duties. The can-
didate also derives a benefit from his venture. Unlike the employer,
however, his immediate benefit is not in the form of monetary
profit but rather in the power of the office he is seeking.\textsuperscript{29} Finally,
the deep pocket or loss-spreading rationale might be advanced to
justify extending vicarious liability to the political candidate. The

\textsuperscript{24} The term "candidate" will be used to include the candidate, his campaign commit-
te, or his staff as potential bearers of the costs of imposing vicarious liability.

\textsuperscript{25} See note 14 supra and accompanying text.

\textsuperscript{26} See text accompanying notes 16-17 supra.

\textsuperscript{27} See note 18 supra and accompanying text. See also note 29 infra.

\textsuperscript{28} See text accompanying notes 67-69 infra. While it is impractical to expect can-
didates to exercise control over the details of each worker's duties, the possibility of vicarious
liability may prove to be an effective incentive for the candidate, his committee, or his
campaign officers to ensure that greater controls are exercised. Due to the extensive travel-
ing a candidate may do and the vast number of locations in which he might have workers
campaigning, it is unlikely that he would be in the best position to control the activities of
these workers. On the other hand, presidents of large businesses are in a similar position.
They exercise control through intermediaries. Cf: MICH. COMP. LAWS ANN. § 169.203(2)
(Supp. 1978) (stating, "A candidate committee shall be presumed to be under the control
and direction of the candidate . . . .").

\textsuperscript{29} It is well established that profit is not essential to the imposition of vicarious liabil-
ity. E.g., Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951); Heims v. Hanke, 5 Wis. 2d
465, 93 N.W.2d 455 (1958).
candidate's campaign fund, if not the candidate himself, is presumptively a more adequate source for satisfying losses of third parties than is a volunteer worker. There is, however, no logical reason to assume that the candidate's pockets are, in fact, sufficiently deep to satisfy third party claims. Additionally, since the candidate is not engaged in a business with a product to sell, he cannot effectively distribute these losses over a class of consumers who buy his product. Even if contributors are equated with consumers, contributions do not flow to the candidate personally but to his campaign treasury, which is controlled by his committee.

Although these theories seem to justify the application of respondeat superior in the campaign context, a mechanical application of the justifications is inadequate. Policy considerations and the uniqueness of the campaign structure make the application less certain. For instance, the candidate's right of control over volunteer workers is questionable when compared to the employer's control over paid employees. The political candidate's campaign organization is not precisely like an entrepreneur's association. The campaign structure is loose and of temporary duration. Campaign workers are chosen for their availability and enthusiasm rather than for their skill. Generally, there is no sophisticated personnel department or screening procedures. Further, the desire for promotion and fear of a cut in salary which operate as strong incentives for a hired worker to meet the demands of his employer may have little, if any, effect upon a volunteer. The "employer" of volunteers simply does not have the same leverage to impose his will on subordinates as does the employer of paid workers. On the other hand, he does have the unconditional right to terminate a volunteer as well as the right to control the details of the volunteer's work, a factor which some courts have considered sufficient to justify applying respondeat superior to the employment relationship.

It might also be argued that the candidate receives the benefit

30. The typical business has a concrete product to sell which consumers need and for which they will spend money. The more abstract "product" a campaign is "selling" is not an immediate need as is a television set or an automobile. Thus, it may not be fair or even possible to pass along the cost of tort losses to the candidate. On the other hand, imposing these costs would foster more realistic expenditures on the part of the campaign organization. The advent of public financing has caused the candidate's class of contributors to expand to include his entire constituency rather than merely his political contributors. Thus, the fact that the candidate has no tangible product to sell is less important.


of the campaign enterprise and thus should not escape the burdens. There is clearly a benefit even though it is not the typical entrepreneurial profit. Benefit alone, however, cannot justify the imposition of vicarious liability. This rationale alone proves too much since liability would be justified for all injuries connected in any way with the enterprise as long as the party being sued has derived a benefit.

Assuming the justifications underlying respondeat superior are applicable to the campaign context, the benefits obtained by the injured third party must be weighed against the burdens imposed upon both the freedoms of speech and association and the general desirability of maintaining the campaign as the foundation of our democratic government.

It is evident that the applicability of vicarious liability to political candidates is not easily resolved. Consequently, it is necessary to analyze the sufficiency of the justifications underlying the doctrine in light of concepts such as the nature and scope of employment, the special nature of campaigning as an enterprise, and the free exercise of the constitutionally protected rights of speech and association.

II. Capacity to be Sued

Preceding any inquiry into whether respondeat superior should be extended to politicians and their campaign workers, however, a preliminary question arises: is there a party with the capacity to be sued?

A. The Campaign Committee

Campaign committees are usually neither partnerships nor corporate entities, but in United States v. Finance Committee to


34. Smith, supra note 18. Dean Smith notes:

But one may derive profits from an undertaking and still not be responsible for injuries to others resulting from the operations. This is best illustrated by the cases holding that participation in the profits of a business does not necessarily render one responsible as a partner. True it is that frequently the master does receive part or all of the profits, but his liability for his servants' torts rests upon something other than the mere fact that he receives the profits from the undertaking.

Id. at 456.

35. Although not recognized as legal entities, campaign organizations may still be criminally accountable to the Federal Election Commission.
Re-Elect the President, the Court of Appeals for the District of Columbia held the committee liable for campaign violations pursuant to statutory authorization to do so. Other courts have avoided the capacity to be sued problem by viewing campaign organizations as voluntary unincorporated associations.

In general, unincorporated associations do not have the legal capacity to sue or be sued absent a statute expressly establishing their legal obligations and defining their rights and obligations. There are, however, certain exceptions to this general rule. Unincorporated associations have been sued, even in the absence of such a statute, if the action is brought to enforce a right existing under the Constitution or laws of the United States. Thus, for example, a campaign committee might be amenable to suit, without the aid of a state statute, if it were accused by an individual of violating his right to privacy due to an illegal wiretap.

Second, an unincorporated association may be sued as part of a class action. A class of Republican voters might, for instance, sue a Democratic opponent who had fraudulently induced the Republican candidate to travel to the wrong location causing him to miss an important speaking engagement.

Third, unincorporated associations may be sued in actions brought in equity. Thus, a suit for specific performance on a contract would stand. Further, a campaign committee might be amenable to suit in tort if a candidate were invoking the court's equity jurisdiction to enjoin his opponent's campaign activities

36. 507 F.2d 1194 (D.C. Cir. 1974).
38. E.g., Vader v. Ballou, 151 Wis. 2d 577, 139 N.W. 413 (1913).
39. Labor unions, for example, have no legal capacity to sue or be sued in absence of express statutory language. See, e.g., Zane v. International Hod Carriers Bldg. and Common Laborers' Union, 155 Kan. 87, 122 P.2d 715 (1942); Cousin v. Taylor, 115 Or. 472, 239 P. 96 (1925); Wortex Mills, Inc. v. Textile Workers Union, 380 Pa. 3, 109 A.2d 815 (1954).
40. E.g., Montgomery Ward & Co. v. Langer, 168 F.2d 182, 186-87 (8th Cir. 1948), interpreting Fed. R. Civ. P. 17(b)(1) as permitting an unincorporated association to be sued even in the absence of a state statute defining its legal status.
42. Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 148 F.2d 403 (4th Cir. 1945), holding that an unincorporated association may be sued pursuant to Fed. R. Civ. P. 23, even in the absence of state statutory provision establishing the capacity of unincorporated associations to sue or be sued. In this case, the defendant unincorporated labor union was sued as a representative of the defendant class in a labor discrimination action.
43. E.g., Zane v. International Hod Carriers Bldg. & Common Laborers' Union, 155 Kan. 87, 122 P.2d 715 (1942), indicating that unincorporated associations might be sued on equitable claims.
under a cause of action similar to an unfair competition theory.\footnote{44}

A fourth exception allows unincorporated associations to be sued if policy reasons so dictate. Thus, in considering the capacity of a large unincorporated labor union to be sued, the Supreme Court stated:

It would be unfortunate if an organization with as great power as this International Union has in the raising of large funds and in directing the conduct of four hundred thousand members in carrying on, in a wide territory, industrial controversies and strikes, out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in the course of such strikes.\footnote{45}

Clearly, the analogy between large labor unions and campaign committees is imperfect. Campaign committees are not as large, as permanent, or probably as powerful as giant labor unions. On the other hand, campaign committees are capable of organizing hundreds or even thousands of workers and of utilizing potentially huge campaign funds to attain its goals. Inevitably, in the course of pursuing these goals, unlawful injury may result, and the campaign should not be insulated from liability.

Finally, an unincorporated association may be sued, absent a statute, in certain instances of misrepresentation. It has been held that an unincorporated association is estopped to deny its existence as a legal entity.\footnote{46} When the plaintiff has relied upon the association’s misrepresentations to his detriment, it is evident in light of these precedents that a campaign committee could be sued on a theory of respondeat superior, either under statutory grant or under one of the exceptions to the general rule governing voluntary unincorporated associations.

B. Campaign Workers: “Members” of an Association?

Many jurisdictions have enacted statutes which prohibit judgments against unincorporated associations from being executed

\footnote{44}{Examples include an opponent’s campaign publications which falsely claim that he is an incumbent and an opponent who legally changes his name to resemble that of the candidate.}

\footnote{45}{United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 388–89 (1920). See also, Survey of Recent Developments in Indiana Law, 12 Ind. L. Rev. 1, 110–11 (1979).}

\footnote{46}{Baird v. National Health Foundation, 235 Mo. App. 594, 144 S.W.2d 850 (1940).}
individually against the association's members.\textsuperscript{47} In these jurisdictions, any judgment based upon vicarious liability against a campaign committee could be enforced only against the campaign fund and not the volunteer workers or staff. In cases in which members of unincorporated associations are sued in their individual capacities, they generally can be held liable only to the extent that they ratified, authorized, or participated in the alleged misconduct.\textsuperscript{48} Thus, when the alleged tort is that of a member not acting as an agent or servant of the association, other members cannot be held accountable because they had no power to select, control, or discharge the wrongdoer.\textsuperscript{49}

On the other hand, if the member is acting as an agent or servant of the association, the general rule requiring liability when there is ratification, participation, or authorization by the member would apply with one possible addition: "Liability of a member may exist without personal participation in the unlawful act of a voluntary association if the member sets the proceedings in motion or agrees to a course of action which culminates in wrongful conduct."\textsuperscript{50}

Thus, in order to set this issue properly within the perspective of the campaign structure, it is necessary to determine who the members of the campaign organization are. In the typical voluntary unincorporated association, the question is easily answered; however, in a campaign organization, it seems that many of those connected with the campaign are more like employees than members. For instance, the average grass roots campaign worker, unlike the member of an association, has no voice in campaign strategy and is not directly benefited by the campaign's objectives. The extent of his ties to the campaign is minimal. He is given a specific, often ministerial, task to perform. Those workers who

\textsuperscript{47} E.g., \textit{Ohio Rev. Code Ann.} § 1745.02 (Page 1978).

\textsuperscript{48} E.g., Cousin v. Taylor, 115 Or. 472, 239 P. 96 (1925), where plaintiff sued officers and members of a nonprofit unincorporated association on an employment contract. The court held that although an unincorporated association may not be sued in the absence of a statute granting such capacity, its members and officers may nevertheless be sued individually where they assumed to act for a principal which had no legal existence.

\textsuperscript{49} Thus, in Guy v. Donald, 203 U.S. 399 (1906), in discussing the liability of members of a voluntary river-pilot association for the torts of another member, the Court said: If we imagine such a pilot performing his duties within sight of the assembled association, he still would be sole master of his course. If all his fellows passed a vote on the spot that he should change and shouted it through a speaking trumpet, he would owe no duty to obey, but would be as free as before to do what he thought best.

\textit{Id.} at 407.

\textsuperscript{50} Feldman v. North British & Mercantile Ins. Co., 137 F.2d 266, 268 (4th Cir. 1943).
have a greater voice in the policymaking and practical operations of the campaign may, by contrast, more closely approximate the role of a typical association member.

Thus, the voluntary worker is set apart from the member by virtue of the member's interest in the goals and activities of the association in addition to the power to effect changes in campaign organization and strategy. This distinction is supported by cases which discuss member liability. They indicate that a member will be held vicariously liable for the acts of another member or employee of the association when the member acts in an "employer-like manner." Authorization, ratification, and initiation of enterprise activities constitute attributes of employers.\(^5\) Thus, the voluntary campaign worker's lack of employer-like qualities, especially when considered in light of the traditional justifications for vicarious liability, leads one to conclude that it would be inappropriate to hold the vast majority of campaign workers liable for the tortious acts of their coworkers.\(^5\)

The campaign structure, however, includes different levels of workers. At some point along this continuum, a campaign worker may cross the line between employee and member. Consequently, it may be fair to hold some campaign workers liable under the doctrine of vicarious liability when they have sufficiently participated in, ratified, authorized, or set in motion the wrongful act.\(^5\)

C. Personal Liability of the Candidate

It would be difficult to justify the membership theory of vicarious liability if it were possible for the candidate himself to be more insulated from liability for personally authorized staff activities than the protection afforded members of the staff who actually

\(^5\) Eg., Guy v. Donald, 203 U.S. 399 (1906), in which Justice Holmes held that a member of an unincorporated association cannot be held liable for the actions of another member or servant of the association if he did not have the right or opportunity to select, control, or discharge the tortfeasor; Wortex Mills v. Textile Workers of America, 380 Pa. 3, 109 A.2d 815 (1954), where the court held for the defendant labor union officers on the grounds that direct participation in, or express authorization or planning of, the wrongful acts must be alleged in order to establish liability on such a membership theory.

\(^5\) Smith, supra note 18. The grassroots campaign worker has no control over the employment or supervision of the volunteers. Such a worker receives no benefit from the operation of the campaign organization, except a psychological one which is probably not sufficiently strong to justify imposing vicarious liability. Further, these workers are not in the best position to avoid losses, nor are their pockets sufficiently deep to satisfy damage judgments.

performed the activities. The candidate is, in reality, a "super-member" of the association because he possesses all of the employer-like attributes required for the imposition of vicarious liability. The candidate also derives the ultimate benefit of a successful campaign and should be, at least in theory, the one best suited to bear responsibility for the tortious activities of his workers. Thus, blanket immunity from legal action should not be afforded the candidate—particularly not where the wrongful conduct at issue was ratified, authorized, or set in motion by the candidate, or where the candidate participated in the conduct.

This conclusion does not, however, lead to the conclusion that the candidate should be personally subject to the liability flowing from respondeat superior in all instances in which a third party is harmed. Imposition of vicarious liability requires a closer examination of the traditional justifications for respondeat superior based on an enterprise or entrepreneurial theory. These justifications fall short of providing a sound basis for applying respondeat superior to the political candidate.

First, support of such an extension of vicarious liability may be found in the principle that one employs a substitute at one's own peril. Although this justification carries some emotional appeal, it is clear that merely placing an employee in a position in which he may cause injury has not received widespread support as a basis for imposing liability on respondeat superior principles.

Second, it might be argued that the candidate, as leader of the campaign organization, is in the best position to control the acts of the volunteer and, thus, to prevent the injury. But, a political candidate is not precisely a typical entrepreneur; his organization is a loose one of temporary duration and his campaign workers are chosen more for their availability and enthusiasm than for any special skills. Of necessity, no sophisticated personnel departments or screening procedures exist. Further, campaign expenditure statutes may limit the amounts that such candidates may

54. In certain circumstances, the candidate may, as a practical matter, fall under the ultimate control of his political party. In these cases, a reexamination of the candidate's employer-like qualities is required to determine whether he is a member of the organization and accordingly liable.

55. This theory focuses on who runs the enterprise rather than on acts of participation, ratification, and authorization. See text accompanying notes 11–23 supra.

56. See text accompanying notes 24–34 supra.

57. See text accompanying notes 16–17 supra.


59. See note 19 supra and accompanying text.
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contribute to their own causes, thus limiting the candidate's ability to control his workers directly. If a candidate cannot add personal funds to his campaign fund, then one of the justifications for vicarious liability has been partially defeated. Vicarious liability should act to encourage an employer to improve his training and supervision procedures in order to operate a safer venture. Statutes which limit the funds available for these purposes make it less likely that such care will be taken.

Third, it might be argued that the candidate receives the benefit of this enterprise and thus should not escape its burdens. Clearly, a benefit is derived, although not in the usual form of profit. However, this justification proves too much—including a range of actions too wide to be logically justified. If benefit were to be the sole test, liability would be imposed for all injuries connected in any way with the enterprise, as long as the party being sued has received a benefit.

Finally, the deep pocket or loss spreading rationale might be advanced as a justification for extending vicarious liability to the political candidate. There is, however, no reason to expect that a candidate's pockets are deep. Additionally, since he is not engaged in a business with a product to sell, he cannot distribute the losses over a class of consumers who might buy his product. Even if contributors are analogous to consumers, these contributions go not to the candidate personally, but to his campaign treasury, which is in the control of his committee.

Thus, the reasons for vicarious imposition of personal liability upon a political candidate are not compelling. Indeed, imposing personal vicarious liability on candidates may drive poorer candidates from the political arena and even inhibit some campaigners from exercising the full breadth of their legitimate speech and associational rights.

Therefore, a closer analysis of the structural elements of a political campaign is necessary. To this end, the following section examines the traditional elements of respondeat superior in the context of relationships between a volunteer worker and campaign committees, their members, and political candidates in an attempt

60. See note 20 supra and accompanying text.
61. E.g., Malloy v. Fong, 37 Cal.2d 356, 232 P.2d 241 (1951); Heims v. Hanke, 5 Wis.2d 465, 93 N.W.2d 455 (1958). Both cases apply respondeat superior although the benefits received by the employer were services gratuitously performed instead of profit as such.
to determine the extent to which vicarious liability is applicable to this facet of the electoral process.

III. THE EMPLOYMENT RELATIONSHIP

The minimal requirement for any application of respondeat superior is the existence of a master-servant relationship. There are three requisite elements underlying this relationship:

1. the master must assent to the relationship;
2. the master must expect to derive some benefit from the relationship; and
3. the master must have the right to control the actions of the servant.

Only in rare instances will a political candidate expressly assent to the employment of each individual worker. He does, however, implicitly assent to his campaign committee, the campaign itself, the random method of recruiting, and, perhaps, even inadequate supervision of campaign workers. The candidate should also know that untrained or poorly trained volunteer workers will be assigned to perform various ministerial tasks. Yet it is arguable that the candidate is so far removed from the daily operations of the campaign that any such constructive assent amounts to an unrealistic fiction which is wholly inappropriate in the context of a modern, large-scale political campaign. On the other hand, the candidate is in the same position as the president of a large corporation who is held to have assented to the acts of his employees.

The benefit element of the master-servant relationship is satisfied in the campaign context. The primary purpose for hiring campaign workers is to secure the candidate's election. Although these workers may also have personal motivations, the ultimate

64. Eg., Galvan v. Peters, 22 Wis.2d 598, 126 N.W.2d 590 (1964) (no employment relationship found when a volunteer performed a task without the church's knowledge or assent and without fulfilling any legal obligation of the church).
65. Eg., Dill v. Rader, 533 P.2d 650 (Okla. 1975). Contra, Van Drake v. Thomas, 110 Ind. App. 586, 38 N.E.2d 878 (1942) (suggesting that the test for the existence of an employment relationship is not benefit but "power of control." Id. at 882). Accord, Hall v. Smith, 2 Bing. 156 (1824) (holding that he who derives an advantage from an act which is done by another must answer for any injury which a third person may sustain from that act. Id. at 160).
67. Neither the president of the large corporation nor the candidate assents to the hiring of lower level workers. Both, however, have ultimate control over the mechanism that makes such decisions.
benefit accrues to the candidate.\textsuperscript{68}

The most difficult element of the master-servant relationship to establish in a campaign context is the master's right to control the activities of the servant. Generally, the unconditional right to unilaterally terminate the relationship by firing the worker is sufficient to establish the right to control.\textsuperscript{69} There is also support for the view that this right must include the power to direct authoritatively the activities of the worker rather than to make mere suggestions.\textsuperscript{70} While the right to discharge a worker may represent the right to control a worker, there are generally no employment contracts between a candidate and his campaign personnel. Thus, it may not be technically possible to fire such workers. There is, however, support for the view that a right to sever even gratuitous or nonbinding relationships constitutes control.\textsuperscript{71}

The foregoing analysis demonstrates that the candidate-worker relationship arguably satisfies the minimum requirements of assent, benefit, and control which underlie the master-servant relationship and thereby justifies the application of the doctrine of respondeat superior. Political campaigns, however, are generally staffed by a greater number of volunteer workers than paid workers. In assessing the possible imposition of vicarious liability for the wrongs of volunteers, it is necessary to determine whether a volunteer may be classified as a servant, and, if so, to establish the bounds of a volunteer's scope of employment.

Case law provides few rules for determining the extent to

\textsuperscript{68} For a discussion of the campaign worker's personal motivations for joining the campaign, see text accompanying notes 75–93 infra.


\textsuperscript{70} \textit{E.g.}, Standard Oil Co. v. Anderson, 212 U.S. 215 (1909). The court in Singer Mfg. Co. v. Rahn, 132 U.S. 518 (1899) held that the right to control is "the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.'" \textit{Id.} at 523 (quoting Railroad Co. v. Hanning, 82 U.S. (15 Wall.) 649, 656 (1886)).

\textsuperscript{71} \textit{E.g.}, Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951); Moore v. El Paso Chamber of Commerce, 220 S.W.2d 327 (Tex. 1949), in which the court said:

The relation . . . does not depend upon an express appointment and acceptance thereof, but may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case. It may be implied from a single transaction . . . that [if] there was at least an implied intention to create the obligation, it will by implication be held to exist.

\textit{Id.} at 331.
which voluntary workers may be considered employees for purposes of respondeat superior. Most cases hold that compensation is not fundamental to the creation of an employment relationship.\(^2\) Other cases suggest that the employer's right to control the activities of workers is a sufficient ground to include volunteers as employees for the purpose of imposing vicarious liability.\(^3\) Another group of cases maintains that the assent of and benefit to the employer are the only necessary factors.\(^4\) Thus, by and large, volunteers are not wholly excluded from the employment relationship, provided that some combination of the three prerequisites of assent, benefit, and control are present.

IV. Scope of Employment

If an employment relationship can exist between a candidate and his volunteer workers, and if no substantial constitutional or policy considerations militate against the extension of vicarious liability to a campaign context,\(^5\) then it is essential that the concept of scope of employment be defined with regard to volunteers. The courts will apply respondeat superior only if the tort was

\(^2\) E.g., Lowry v. Kneeland, 263 Minn. 537, 117 N.W.2d 207 (1962). While there are some cases which indicate that compensation might be essential to an employment relationship, these cases generally present the issue in a different context. For instance, one line of cases concerns volunteers who were injured by other volunteers while performing gratuitous services. E.g., Haugen v. Central Lutheran Church, 58 Wash. 2d 166, 361 P.2d 637 (1961) (holding that the plaintiff-volunteer was not an employee but a business invitee because there was no express or implied contract of employment. Interestingly enough, this theory was used to establish the church's liability for the torts of its servants. The court seems to have raised the distinction between employees and business invitees in order to avoid application of the master-servant rule.

Another line of cases involves workers who were not under contract and who received no pay, but who were suing their "employers" under various workmen's compensation statutes. The courts held that for the purposes of such statutes these plaintiffs were not employees. E.g., Reeder v. Pincolini, 59 Nev. 396, 94 P.2d 1097 (1939); Jylha v. Chamberslin, 168 Or. 171, 121 P.2d 928 (1942).

\(^3\) E.g., Fernquist v. San Francisco Presbytery, 152 Cal. App. 2d 405, 313 P.2d 192 (1957). In Flores v. Brown, 39 Cal. 2d 622, 248 P.2d 922 (1952), the court, speaking through Justice Traynor, held that the primary test for determining whether a person performing gratuitous services for another does so as the latter's agent is the same as that applied to determine whether one performing services for compensation does so as an employee or as an independent contractor, and in both situations the determinative issue is whether or not the alleged principal controlled or had the legal right to control the activities of the alleged agent.

\(^4\) Id. at 628, 248 P.2d at 925.

\(^5\) E.g., Scott v. Min-Aqua Bats Water Ski Club, Inc., 79 Wis. 2d 316, 255 N.W.2d 536 (1977); Galvan v. Peters, 22 Wis. 2d 598, 126 N.W.2d 590 (1964).

For a discussion of the impact of vicarious liability on the campaign context on freedom of speech and association, see notes 94-122 infra and accompanying text.
committed within the scope of the servants' employment. Scope of employment is, in turn, defined by case law, various statutes within any given jurisdiction and by policy considerations.

In determining the proper scope of employment, a court will consider the justifications for vicarious liability. For instance, a court which believes that the justification for vicarious liability is that one employs a substitute at one's own peril may be more likely to establish a narrower scope of employment test than a court which accepts the deep pocket theory. The same court would be likely to establish a much broader scope than a court which requires both benefit and right to control.76

The servant's scope of employment is limited by other policy considerations. For example, the courts in some jurisdictions have indicated that different standards of vicarious liability should apply to nonprofit social or political organizations than those which apply to businesses organized for profit.77 Similarly, most states have, in the past, held that charitable institutions were immune from liability for the torts of their servants.78 Thus, the doctrine of respondeat superior will operate differently in every jurisdiction, depending on the court's concept of the limiting principle of scope of employment.

The nature of the employee's tort also bears on the proper scope of employment. Courts have traditionally been reluctant to attribute the intentional torts of employees to employers.79 One widely recognized test for imposing liability is to determine the motive behind the employee's action—more specifically, to determine whose purposes were intended to be furthered by the action. If the employee, intending to serve his master, entered into a tortious course of conduct, it is likely that his master would be re-

76. See notes 11–62 supra and accompanying text.

The prevailing opinion not many years ago narrowly restricted the scope of a man's employment to include those things which his employer directed him to do, and no others. Since it was presumed that an employer would never direct the doing of an intentional tort, either expressly or impliedly, then such acts were not considered a part of the employment. While it is true that the term "scope of employment" is interpreted more liberally today to include a number of intentional torts, the fact remains that historically employer liability in this area is uncertain, if not absent altogether. Id. at 322–23 (footnotes omitted).
sponsible for the resulting injury to a third party.\textsuperscript{80} Courts have applied this test to deny recovery based on vicarious liability when a servant negligently started a fire while smoking on the job,\textsuperscript{81} an employee of an apartment house owner gained access to a woman's apartment on the pretense of inspecting the premises and subsequently raped her,\textsuperscript{82} and a delivery man assaulted a woman customer after making his delivery.\textsuperscript{83}

Under a strict, motive-oriented theory of scope of employment, vicarious liability is unlikely to attach to a candidate or campaign committee in a situation in which, for example, the volunteer worker becomes embroiled in a heated argument resulting in harm to a member of the public. Implying a motive to further the interests of the candidate would be inapt in this situation. However, liability could be imposed on the employer if the worker did not become personally angered in the discussion, but rather became so animated and demonstrative in making his point that he accidentally struck the individual with whom he was speaking. It is also unlikely that this theory would be applicable to a situation in which the worker, after completing his task of soliciting door-to-door contributions, assaulted a donor. Similarly, vicarious liability would not apply in an action for trespass if a worker became tired and lay down in a third party's car.

A different line of cases imposes liability on the employer by incorporating the scope of employment test into the motive-limitation theory.\textsuperscript{84} This modification results in liability if the employee

\textsuperscript{80} "The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it." Standard Oil Co. v. Anderson, 212 U.S. 215, 221 (1909).

\textsuperscript{81} Herr v. Simplex Paper Box Corp., 330 Pa. 129, 130, 198 A. 309, 310 (1938).

\textsuperscript{82} Grimes v. B.F. Saul Co., 47 F.2d 409, 410 (D.C. Cir. 1931).

\textsuperscript{83} Fleming v. Bronfin, 80 A.2d 915, 917 (D.C. 1951) (holding that since the assault took place after the delivery and payment were both completed, it had no connection with any motive to further the employer's business). Similar reasoning was used in Western Union Tel. Co. v. Hill, 67 F.2d 487, 488 (5th Cir. 1933), a case in which an assault took place on business premises but had no motivational connection with the employee's duties. Both cases indicate that had there been some connection with the employer's business, liability would have attached.

\textsuperscript{84} In Maple v. Tennessee Gas Transmission Co., 30 Ohio Op.2d 471, 201 N.E.2d 299 (1963), the court held that the defendant's employee was acting within his scope of employment when he injured the plaintiff by helping the latter move his stalled car which was blocking the defendant company's driveway. In Nelson v. American West African Line, 86 F.2d 730 (2d Cir. 1936), an intoxicated boatswain ordered the plaintiff seaman to "get up, you big son of a bitch, and turn to," just before severely beating the plaintiff. The court held that the boatswain was acting within the scope of his employment because his order to "turn to" indicated a partial intent to further his employer's business. \textit{Id.} at 732.
exceeds his authority or commits an intentional tort when the act is incidental to and in furtherance of the employer's business. Thus, if a door-to-door canvasser refused to vacate a resident's premises upon request and blocked the door with his foot in order to complete his memorized campaign harangue, vicarious liability would attach to the employer. The worker's actions were prompted—at least partially—by a motive to effectuate the candidate's or campaign committee's business, and therefore, the volunteer was acting within the scope of his employment. Similarly, a campaign worker who had both personal and campaign-based motives for engaging in speech which results in an action for defamation would be acting within the scope of his employment if his campaign-related motive were sufficiently apparent.

According to another formulation of the scope of employment limitation:

A master is subject to liability for the intended tortious harm by a servant to the person or things of another by an act done in conjunction with the servant's employment, although the act was unauthorized, if the act was not unexpectable in view of the duties of the servant.

Thus, if a volunteer is responsible for spreading derogatory comments about the opposing candidate without violating the libel and slander provisions, it is arguably "not unexpectable in view of the duties" that he might engage in statutorily prohibited, unethical campaign speech, such as racial or ethnic slurs.

In contrast to this "foreseeability" standard, certain cases demand a closer connection between the employee's tortious conduct and his employment duties. These cases turn on the
argument that if the employee is required, as part of his job, to use force against third parties, excessive force should reasonably be expected. These cases would cover "bouncers" in bars and private bodyguards. Conversely, when force is not an element of the employee's task, it falls outside the scope of employment because its use is not reasonably expected. Applying this standard to the campaign context, a bodyguard charged with the responsibility of protecting a candidate at political rallies would be justified in using excessive force in order to clear a path for the candidate to walk through the crowd.

The most radical standard for determining scope of employment was established in *Ira S. Bushey & Sons, Inc. v. United States.* The rule in that case is that liability will be imposed if the act was not unexpectable, *irrespective of the duties of the servant*, as long as the employment has a special connection with the act done. This test virtually eliminates foreseeability as a criterion for imposing liability. Instead, liability is premised on the fact that the enterprise is responsible for putting the employee in a situation in which he may cause some damage. This theory would impose liability on the candidate in the political context if, for example, a volunteer committed a tort while on his way to or from campaign headquarters.

These theories indicate the inherent difficulty in defining and applying the doctrine of respondeat superior to both the typical business enterprise and the political campaign organization. Even if the principle of respondeat superior is extended to the area of political campaigning, application of the doctrine will depend upon each jurisdiction's attitude toward such issues as the employment relationship, the status of volunteers, and the scope of employment.

90. 398 F.2d 167 (2d Cir. 1968). A drunken sailor returning from shore leave turned the control valves of a Brooklyn drydock causing both the drydock and a Coast Guard vessel to partially sink. The United States government was held liable as the sailor's employer even though he was on short leave and his duties did not include the operation of a dry dock.

91. *Id.* at 171-72.

92. Note, supra note 20, at 246-47.

93. This theory has not enjoyed widespread application. Therefore, it is difficult to predict its application to new situations. Indeed, *Bushey* may be partially explained by the fact that the tortfeasor was in the navy and thus theoretically on duty at all times. It is also relevant that the tortfeasor was in the general vicinity of his place of employment when he committed the tort.
V. **ADDITIONAL LIMITATIONS UPON THE APPLICATION OF RESPONDEAT SUPERIOR IN THE POLITICAL CAMPAIGN CONTEXT**

Even if there are adequate legal and policy justifications for extending respondeat superior to political campaigning there are constitutional arguments against such an extension.

A. **First Amendment Restraints**

Extending vicarious liability to hold a candidate or his committee liable for the torts of his volunteer workers may operate as an unreasonable restraint on the first amendment's guarantees of freedom of speech and association. Prior restraints on first amendment rights are traditionally difficult to justify. Any restriction on these freedoms bears a heavy presumption against its validity. Although all prior restraints are not unconstitutional, it is clear that they cannot act as unconditional limitations upon guaranteed freedoms.

At first glance, vicarious liability does not appear to be a prior restraint, at least not in the traditional sense of the term, because it does not operate as a condition precedent to the exercise of these rights. Vicarious liability might, however, become a prior restraint if there was a concomitant requirement of mandatory campaign insurance or placing funds in escrow to cover damages in vicarious liability suits.

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96. See, *e.g.*, Murdock v. Pennsylvania, 319 U.S. 105 (1943), in which the Court stated that "A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. . . . The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down." *Id.* at 113.

97. Buckley v. Valeo, 424 U.S. 1 (1976), is somewhat relevant in this context. The Supreme Court in *Buckley* was presented with constitutional challenges to the Federal Election Campaign Act of 1971, as it was amended in 1974. The challenged provisions stated that:

(a) individual political contributions are limited to $1,000 to any single candidate per election, with an overall annual limitation of $25,000 by any contributor; independent expenditures by individuals and groups, relative to a clearly identified candidate, are limited to $1,000 a year; campaign spending by candidates for various federal offices and spending for national conventions by political parties are subject to prescribed limits; (b) contributions and expenditures above certain threshold levels must be reported and publicly disclosed; (c) a system for public funding of presidential campaign activities is established by subtitle H of the In-
Perhaps more important than the validity or invalidity of prior restraints is the concept that only restrictions on constitutionally protected rights are invalid. Thus, prior restrictions or subsequent punishments for the use of "fighting words" or the use of the mails in an attempt to defraud the public are valid because no constitutionally protected right is infringed. Therefore, if damages were awarded for injuries stemming from speech-related incidents in political campaigning such as defamation or the use of the mails for disseminating fraudulent campaign literature, the imposition of vicarious liability would not be limited by constitutional restraints.

Another theory which might prevent the imposition of vicarious liability in the campaign context is derived from the fear of a constitutional Revenue Code; and (d) a federal Election Commission is established to administer and enforce the Act.

The net result of *Buckley* is that in the area of political campaigning, money has a direct and substantial impact on speech. Restraints on the expenditure of campaign funds are, in effect, restraints on the exercise of free speech. *Wright, Politics and the Constitution: Is Money Speech?, 85 YALE L.J. 1001* (1976). Discussing the Court's holding in *Buckley*, Judge Wright stated:

I am deeply concerned with the lesson the Court taught in the course of reaching its result. Throughout its discussion of contributions and expenditures, the Court persisted in treating the regulation of campaign monies as tantamount to the regulation of political expression. The Court told us, in effect, that money is speech.

The impact of *Buckley* on the imposition of vicarious liability upon a political candidate is minimal. In *Buckley*, one of the express legislative purposes behind the invalidated campaign expenditure provisions was the limitation of the scope of political campaigning. The Court viewed it as a direct limitation upon the candidate's right to speak freely. 424 U.S. at 17, 39-59. Conversely, the purpose for extending vicarious liability to a campaign organization and its members is not to restrain speech. Vicarious liability would be imposed only to redress the harm caused to an innocent third party. Any effect the application would have on free speech would be tangential to the primary purpose.

98. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (holding that the use of the terms "damned Fascist" and "god-damned racketeer" was not constitutionally protected speech).

99. *See* Donaldson v. Read Magazine, 333 U.S. 178 (1948) (holding that freedom of the press does not include the right to use the mails to conduct a deceptive advertising campaign).

100. *See* text accompanying notes 134-39 *infra*.


Assuming, however, that a constitutionally protected right is being violated, the restraint may be held invalid even though not formally enforceable and though its adverse effect upon the exercise of the right is not great. *E.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 53, 66-67 (1963); Thomas v. Collins, 323 U.S. 516 (1945).

If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty.

*Id.* at 543.
severe "chilling effect" on the first amendment rights of those involved in the campaign.\textsuperscript{102} For example, the court in \textit{Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers}\textsuperscript{103} carved out a limited immunity from liability for the alleged abuse of the lobbying process. In considering the sufficiency of the plaintiff's complaint, the court noted that

\begin{quote}
[i]n any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.\textsuperscript{104}
\end{quote}

This would not, however, be the case, indicated the court, if the defendant's actions were not an exercise of first amendment rights\textsuperscript{105} or if the actions infringed upon the plaintiff's first amendment rights.\textsuperscript{106} Thus, it may be that the chilling effect theory would not prohibit imposition of vicarious liability for torts such as falsely attributed campaign literature, libel, or slander. Similarly, actions based upon invasion of privacy would be sustained on the theory that the plaintiff's constitutionally protected rights were violated by the defendant's actions, thus offsetting the concern for the chilling effect that vicarious liability would have on the defendant's exercise of his constitutional rights.

The extent of the court's holding in \textit{Franchise Realty} is unclear. The court held only that the defendant's lobbying activities, as alleged in the complaint, did not demonstrate sufficient grounds for a cause of action for unfair competition.\textsuperscript{107} The court did not, however, conclude that lobbying with a wrongful purpose is, without more, an actionable offense.

\textsuperscript{102.} See text accompanying notes 134–39 infra.
\textsuperscript{103.} 542 F.2d 1076 (9th Cir. 1976). In \textit{Franchise Realty} the plaintiff sought treble damages under the Sherman Act alleging unfair competitive practices of the defendant's lobbying efforts against the issuance of restaurant construction permits by the city of San Francisco. In dismissing the complaint, the court indicated that such complaints must allege specific violations when the effect of litigation would be to chill the defendant's first amendment rights. \textit{Id.} at 1082.
\textsuperscript{104.} \textit{Id.} at 1082–83.
\textsuperscript{105.} The court indicated that had the defendant's actions been designed solely to harm the plaintiff and not to secure a given course of conduct from the government, then such "lobbying" would not enjoy immunity. \textit{Id.} at 1081.
\textsuperscript{106.} For example, the court said that the defendant's actions could have prevented the plaintiff from gaining access to the construction permits board to present its side of the issue. \textit{Id.}
\textsuperscript{107.} \textit{Id.} at 1083.
The court did note that a mere claim that lobbying had been used to gain a business advantage would not be an adequate allegation. Indeed, such a purpose—to influence legislation—is legitimate.

It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

Finally, the court emphasized that its decision was influenced by the plaintiff’s prayer for damages of $11,100,000. The court pointedly noted that notice-pleading and liberal federal discovery rules, coupled with potentially huge damage awards, would provide “a most potent weapon to deter the exercise of First Amendment rights.”

The chilling effect rationale will probably not serve to block third party tort actions in the political campaign context. Extending vicarious liability to political campaigning would not be “tantamount to outlawing all such campaigns.” As long as the apparent purpose of a vicarious liability action is not vexatiously to chill the defendant’s exercise of his constitutional rights, the application of the chilling effect rational is inapposite.

In order to determine the validity of a restriction on first amendment rights, courts will balance the public interest in having the restriction, the value of the unrestricted right, and the reasonableness of the restraint. First, the restriction must be based on a legitimate public interest. Legitimate interests include protecting the public from undue noise caused by the use of loudspeakers on trucks, determining the community’s zoning

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108. Id. at 1080.
110. 542 F.2d at 1082.
111. Id.
112. However, it is not difficult to envision circumstances in which the chilling effect rationale might have some cogency within the political arena. For instance, if a candidate were to sue his political opponent on questionable grounds, demanding huge damages and seeking broad discovery concerning his opponent’s campaign organization and practices, a court might invoke a chilling-effect theory to deny recovery.
113. See text accompanying note 109 supra.
requirements for commercial property, protecting the privacy of individuals in their homes from door-to-door canvassers, and maintaining order on state fairgrounds. The public interest behind imposition of vicarious liability on the political candidate or committee for the torts of campaign workers is to redress recognizable wrongs and to deter similar conduct in the future. These twin aims have long been considered substantial public interests.

Second, the restriction in question must be both narrow and unburdensome. For instance, statutes which prohibit all door-to-door canvassing are invalid because their scope is broader than that which, given the public interest sought to be protected, is necessary. Courts will, for example, differentiate between statutes which regulate commercial canvassing and those which regulate political, social, or religious canvassing because commercial speech traditionally has not received the same degree of protection as political expression. If there is a less burdensome means of protecting the same interest, that means must be utilized.

It is arguable that the least burdensome method of protecting the public from tortious harm done by campaign workers is to impose liability only on the workers themselves. However, both the candidate and his committee may be in a better position to oversee the campaign structure and develop new procedural safeguards against harm to third parties. Thus, imposing vicarious liability on either of these parties would more effectively pro-

119. E.g., Citizens for a Better Environment v. City of Park Ridge, 567 F.2d 689, 692 (7th Cir. 1975). Political or religious canvassing is not, of course, immune from all regulation but only from blanket prohibitions or other unreasonable restrictions.
121. Martin v. City of Struthers, 319 U.S. 141 (1943). In invalidating an ordinance which imposed a blanket prohibition on door-to-door canvassing, the Court noted that freedom of speech involves not only the right to speak but the right to hear and to receive information. The court held that a less burdensome restriction, which would prohibit such canvassing only if the property owner had posted notice that he does not want such intrusions, could afford the necessary protection. Id. at 147-48.
122. This argument has not appeared in cases which impose vicarious liability upon charitable institutions such as churches which could be challenged as an undue restriction upon the freedom of religion protected by the first amendment. E.g., Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951); Haugen v. Central Lutheran Church, 58 Wash. 2d 166, 361 P.2d 637 (1961).
tect the public by providing a financially responsible source of redress for past wrongs, by deterring future tortious conduct, and by providing incentive to the campaign to institute safety procedures.

B. Practical Restraints

The imposition of vicarious liability may have other undesirable effects on political campaigning. For instance, it is arguable that the mere filing of large personal injury claims coupled with claims for punitive damages prior to an election could seriously damage or even terminate a candidate’s campaign. Although most claims would probably be trespass or minor personal injury actions, the possibility of large damage claims is equally possible. This problem might be alleviated in part by requiring the plaintiff to post a bond or pay the costs of the litigation if he fails to establish his claim—particularly if he is the candidate’s opponent. Further, damages, attorney’s fees, and court costs would ultimately have to be paid by the candidate or his campaign organization. In light of the inability to pass these costs along to consumers, as business organizations do, the ultimate desirability of extending vicarious liability to the political campaign may depend on the availability of insurance, its costs, and the candidate’s or committee’s ability to bear this burden.

VI. Conclusion: Conduct to Which Vicarious Liability Should Attach

Assuming that vicarious liability may attach to the campaign organization, this final analysis must define that type of conduct which will trigger the imposition of liability.

Perhaps the most frequent causes of action which occur whenever any group has widespread contact with the public are negligence, assault and battery, and trespass. Door-to-door canvassing and crowded political rallies are two common functions of the political campaign which readily lend themselves to both negligent and intentional infliction of harm by campaign workers. The one restriction on the imposition of vicarious liability in this context is, as earlier discussed, that the servant must be acting

123. See text accompanying notes 30–62 supra.
124. See text accompanying note 4 supra.
125. See text accompanying notes 75–93 supra.
within the scope of employment when the harm is inflicted. 126

A second type of harm to which vicarious liability should be extended is inflicted on public figures. Public figures have a right of privacy which is more circumscribed than that of the average person. 127 The public figure’s right to privacy is, for example, not violated by publication of news or material which is informative or educational. 128 However, the public figure is not absolutely barred from bringing suit when he is the subject of publicity. Although a “factually accurate public disclosure is not tortious when connected with a newsworthy event even though offensive to ordinary sensibilities,” 129 a nondefamatory statement putting the public figure in a false light is actionable. 130 Thus, a candidate could subject himself to vicarious liability by allowing his campaign workers to distribute completely unnewsworthy personal information about his opponent which is not informational or educational material or which places his opponent in a false light.

Wiretapping and electronic eavesdropping pose special privacy problems for which there is a common law remedy. 131 This is one area of privacy law in which the scope of allowable intrusion is not dependent upon the public nature of its victim. 132 Thus, although a public figure waives a certain degree of privacy because his activities are of public interest, his home and office remain protected against wiretapping and eavesdropping. The political candidate may reasonably expect to retain his privacy in each of these places. Consequently, a candidate who authorizes

126. Political discussion is typically heated. It can lead to arguments and perhaps violence. One significant question is whether a volunteer is acting within the scope of his employment when he strikes a member of the public during the course of a political debate. On one hand, a strong personal motive is obvious. On the other hand, the nature of the duties assigned to such a worker might foreseeably result in violence.

127. Public figures consist of those individuals who “achieve such pervasive fame or notoriety that [they become] . . . public figure[s] for all purposes and in all contexts” and individuals who “voluntarily [inject themselves] or [are] drawn into a particular controversy and thereby [become] . . . public figure[s] for a limited range of issues.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 328 (1974).

128. Garner v. Triangle Publications, Inc., 97 F. Supp. 546, 549 (S.D.N.Y. 1951). However, the initial questions are: who is a public figure and what constitutes a public event. Further, voluntary and involuntary public figures are treated differently; the latter receive more protection. Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976).


131. E.g., Fowler v. Southern Bell Tel. & Tel. Co., 343 F.2d 150 (5th Cir. 1965).

132. See also Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (uninvited intrusion does not have to be followed by publication in order to be actionable; the harm lies in the intrusion itself).
electronic surveillance of his opponent's home, office, or campaign headquarters, is probably crossing the line between allowable surveillance and invasion of privacy.\textsuperscript{133}

Campaigns, indeed, engender a variety of wrongful acts for which a candidate may be held vicariously liable. These activities reflect unethical campaign conduct which is statutorily proscribed and characterized by its ability to taint the political process. Many states, for instance, have statutes prohibiting the publication of anonymous campaign literature.\textsuperscript{134} Hawaii imposes sanctions for falsely attributed candidate withdrawal statements.\textsuperscript{135} Other state statutes make it unlawful for candidates to falsify their own qualifications.\textsuperscript{136} New York bans certain types of derogatory statements made about one's opponent.\textsuperscript{137} Finally, certain provisions impose sanctions when "dirty tricks" are committed.\textsuperscript{138} These statutes are designed to protect the integrity of political elections and to perpetuate a more reasonable utilization of the right to vote.

These provisions are all statutorily defined prohibitions which have no common law counterparts. Each imposes criminal sanctions as well as fines. They do not, however, specifically provide for private civil actions. If a private cause of action could be inferred from the statutes, then vicarious liability could be extended to cover both the criminal causes of action and the civil claims. It is arguable that the impact of civil liability would be so great that it would require legislative formulation. Yet, implied private causes of action have been found in other areas of the law in the absence of specific statutory provisions.\textsuperscript{139} Regardless of whether

\textsuperscript{133} This issue poses an interesting problem. Suppose that a campaign committee hires a private detective with general instructions to uncover some "dirt" on a political opponent. To do so, the investigator wiretaps the latter's office. Is the detective an employee or an independent contractor? Has the committee—or the candidate himself—set the tort in motion? Similar questions could arise if an advertising agency hired by the candidate or committee commits a tort.


\textsuperscript{137} E.g., N.Y. Elec. Law App. § 5201.1 (McKinney 1978).

\textsuperscript{138} Id.

\textsuperscript{139} In securities law, for instance, private causes of action have been allowed by courts. This arises when the plaintiff is within the zone of interests sought to be protected by the statute and when Congress has failed to make adequate provision for the statute's enforcement. Recently, however, courts have displayed a general reluctance to imply private causes of action. See generally, Note, Towards the Development of an Implied Right of
a civil cause of action would stand, vicarious liability should be available for the express criminal sanctions.

In conclusion, it may be that the application of respondeat superior to the enterprise of political campaigning is an idea whose time has not yet come. There are, at the very least, first amendment restrictions upon the use of vicarious liability in this context. Yet the policy justifications for imposition of the doctrine—in particular, the need to protect the public against tortious politicking—require limited application of respondeat superior to the political campaign hierarchy. It is hoped that application of the limited personal liability set forth in this Note coupled with the requirement that a campaign worker has acted within the scope of his employment when the tort was committed can make campaign organizations more accountable for their tortious behavior, while concurrently avoiding overly severe effects on political campaigning as a valued democratic institution.

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