Doe 1 v. City of Murrieta: How the California Court of Appeal Missed the Mark on Vicarious Liability for Sexual Torts Committed by On-Duty Police Officers

By TARA L. PENNINGTON*

PICTURE A WOMAN driving alone late at night. She is driving twenty miles per hour over the speed limit when she sees flashing red police lights behind her. She pulls over to the side of the road in the darkness. The officer approaches the car, informs her that she was exceeding the speed limit and that, due to the late time of night and the high speed at which she was traveling, he will have to take her to the station in his patrol car instead of issuing her a ticket immediately. Although puzzled by this solution, the woman complies with the police officer's orders. Instead of driving her to the station, however, he drives her to his apartment, takes her inside, and rapes her.

Now picture a fifteen-year-old girl interested in a career in law enforcement. The local police department offers a program through which high school students can spend time at the police department, take a basic course on law enforcement, and receive career advice from the officers. One of the more exciting parts of the program involves an opportunity for each program participant to go on a one-on-one ride-along with an on-duty police officer. The program participant can observe the officer on patrol, responding to calls, making traffic stops, and otherwise completing officer duties. While on an evening ride-along, a male officer, with whom the fifteen-year-old became acquainted during classes at the police station, makes sexual advances toward the female student. He tells her she is attractive and smart and that he thinks she could be a good police officer in the future. She initially objects, but she finds the officer to be not only handsome but

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very powerful, convincing, and persistent. The encounter ends in sexual intercourse between the parties in the officer's patrol car.

The California Supreme Court held that the first situation involves such a powerful use of authority that the city employing the officer can be held vicariously liable for his sexual torts.[1] However, in *Doe 1 v. City of Murrieta*,[2] the California Court of Appeal decided that the City cannot be held vicariously liable in the second situation.[3]

Part I of this Note provides background on the doctrine of respondeat superior in California with a focus on the state's treatment of vicarious liability for sexual torts committed in the scope of employment. Part II discusses the California Court of Appeal's decision in *Doe 1 v. City of Murrieta*, a vicarious liability case brought by two sixteen-year-old females for sexual torts committed by a Murrieta police officer. Part III argues that the case was decided wrongly and that, in light of established precedent, the court should have found the City of Murrieta vicariously liable. More specifically, this section focuses both on the inherent authority a police officer possesses and the court's mischaracterization of the relationship between the minors and the officer. This section also addresses the court's quickness to assert that the youths consented to the officer's advances. This Note concludes that the California Court of Appeal should have found Murrieta vicariously liable for the sexual torts of the police officer.

I. Background

A. The Doctrine of Respondeat Superior and Its Treatment in California

The doctrine of respondeat superior holds an employer vicariously liable for the torts that an employee commits within the scope of employment.[4] The doctrine originated in the common law, and courts have altered their approach to the doctrine many times since its inception.[5] Although there is some disagreement among legal

1. *See* Mary M. v. City of Los Angeles, 814 P.2d 1341, 1351 (Cal. 1991).

2. 126 Cal. Rptr. 2d 213 (Ct. App. 2002).

3. *See id.* at 222.

4. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69 (5th ed. 1984); Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 564–81 (1988); John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 383, 441 (1894).

5. *See* Wigmore, *supra* note 4, at 316.

scholars as to the origin of the doctrine,[6] originally courts tended to hold an employer strictly liable for most tortious harms committed by an employee.[7] In an early example, courts held a slave owner strictly liable for any harm caused by his or her slaves.[8] However, English common law, traceable to the sixteenth century, rejected the strict liability framework and limited vicarious liability to harm resulting from employee actions specifically authorized by the employer.[9] By the eighteenth century, courts had yet again shifted their approach and developed the theory adhered to today—that an employer is vicariously liable for an employee's tortious acts that occur within the scope of employment.[10]

Determining the definition of "scope of employment" has proved to be a difficult task for courts and has resulted in a variety of formulations depending on the time period, jurisdiction, and the facts of the case at hand.[11] The modern California approach dictates that employee conduct is considered within the scope of employment if it "is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."[12] California courts sharpened this definition by explaining that "the inquiry should be whether the risk was one 'that may fairly be regarded as typical of or broadly incidental' to the enterprise undertaken by the employer."[13]

California courts consider three policy objectives when determining whether the tortious act was a risk that was typical of the enterprise undertaken by the employer: 1) preventing recurrence of the tortious conduct; 2) providing greater assurance of compensation for the victim; and 3) ensuring that the victim's losses will be equitably borne by those who benefit from the enterprise giving rise to the injury.[14] Policy goals have aided courts in deciding whether a strict lia-

6. *See* Rochelle Rubin Weber, Note, *"Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees*, 76 MINN. L. REV. 1513, 1515–16 (1992).

7. *See* Wigmore, *supra* note 4, at 317–18.

8. *See id.*

9. *See id.* at 392.

10. *See id.* at 399–402.

11. *See id.*

12. Doe 1 v. City of Murrieta, 126 Cal. Rptr. 2d 213, 218 (Ct. App. 2002).

13. *Id.*

14. *See* Farmers Ins. Group v. County of Santa Clara, 906 P.2d 440, 454–55 (Cal. 1995); Mary M. v. City of Los Angeles, 814 P.2d 1341, 1347–48 (Cal. 1991); John R. v. Oakland Unified Sch. Dist., 769 P.2d 948, 955–57 (Cal. 1989); *Doe I*, 126 Cal. Rptr. 2d at 220–21.

bility approach is appropriate in the context of a particular case. Additionally, courts often hinge a refusal to impose vicarious liability on the policy justification that absolute liability would detrimentally affect the defendant's business or the community by causing employers to be unwilling, or unable, to offer certain programs or services if they may be held liable for employee torts.[15] Because the "unusual or startling" language of the respondeat superior analysis is somewhat amorphous, in practice, courts often depend on policy to shape their analysis and, ultimately, to support their holdings.[16]

B. California's Modern Approach to Vicarious Liability for Sexual Torts

1. The General Approach

While employee torts appear in a variety of forms, this Note will limit its discussion to torts involving sexual misconduct in the workplace in California. Historically, California courts rejected holding employers vicariously liable for the sexual torts of employees.[17] Many jurisdictions are especially reluctant to impose strict liability on employers for the sexual misconduct of employees due to the perception that "sexual assault is either personally motivated or so unusual that it is outside of the assailant's scope of employment."[18] Of course, legitimate questions surround this unwillingness to view torts of a sexual nature as a risk of the business when so many such cases exist. In fact, the Supreme Court of California has stated, "We are not persuaded that the roots of sexual violence and exploitation are in all cases so fundamentally different from those other abhorrent human traits as to allow a conclusion sexual misconduct is per se unforeseeable in the workplace."[19] Modern decisions from courts in California and around the country reflect an increased willingness to find vicarious liability in sexual tort cases now than they were historically.[20]

15. *See John R.*, 769 P.2d at 956.

16. *See* Weber, *supra* note 6, at 1526.

17. *See John R.*, 769 P.2d at 953–954.

18. *See* Weber, *supra* note 6, at 1514 n.5, 1521–22 nn.33–34 (citing an extensive list of cases in which employers were not held vicariously liable for sexual torts committed by employees).

19. Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 363 (Cal. 1995).

20. *See* Weber, *supra* note 6, at 1514–15.

2. Sexual Torts in Education

In order to follow the court's analysis in *Doe 1*, it is helpful to understand the approach California courts take when addressing sexual misconduct in the education setting.

In *John R. v. Oakland Unified School District*, the California Supreme Court considered a vicarious liability claim involving sexual torts against an educational backdrop.[21] The court held that the defendant school district could not be held vicariously liable for a teacher's sexual assault upon a student.[22] The case involved a ninth-grade male student who was molested by his male mathematics teacher.[23] The molestations occurred at the teacher's apartment while the pair participated in an instructional program in which students received training by assisting teachers as they graded student papers.[24]

Refusing to apply the doctrine of respondeat superior, the court centered its decision on policy.[25] Beginning with the deterrence rationale, the court found that imposing strict liability in an educational context would result in unwillingness among school districts to authorize extracurricular academic activities involving teachers and students.[26] As for victim compensation, the court emphasized the difficulty of obtaining insurance for sexual torts and determined that funds were better allocated to classroom purposes than to covering sexual tort claims.[27] Finally, discussing the propriety of spreading the risk of loss among the beneficiaries of the enterprise, the court reasoned that "the connection between the authority conferred on teachers to carry out their instructional duties and the abuse of that authority to indulge in personal, sexual misconduct is simply too attenuated to deem a sexual assault as falling within the range of risks allocable to a teacher's employer."[28] The court distinguished the level of authority held by a police officer from that held by a teacher and refused to expand the vicarious liability doctrine to the facts in *John R.*[29]

21. *See John R.*, 769 P.2d at 949.
22. *See id.* at 949.
23. *See id.*
24. *See id.*
25. *See id.* at 956–57.
26. *See id.* at 956.
27. *See id.*
28. *Id.*
29. *See id.* at 956–57.

C. Police Officer Sexual Torts: California's Exception to the Traditional Approach to Vicarious Liability

California created a significant exception to the general rule barring vicarious liability for sexual torts by applying the doctrine of respondeat superior in the context of sexual assaults committed by on-duty police officers against civilians.[30] The California Supreme Court commented that "[i]n view of the considerable power and authority that police officers possess, it is neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct."[31] The exception results from the "unique position of both trust and power" that police officers occupy in American society.[32] However, the court has refused to extend this exception to privately-employed security officers, regardless of their display of authority.[33] Additionally, the court has made clear that the mere fact that a perpetrator occupies a position of seniority in the workplace is not enough to merit a finding of vicarious liability.[34] Rather, the court has limited the exception to the narrow circumstances when an on-duty police officer uses his unique position of authority to sexually assault a civilian.[35]

In *White v. County of Orange*,[36] the California Court of Appeal held the county employer vicariously liable for the acts of a police officer who kidnapped a civilian during a traffic stop and threatened to rape and murder her.[37] Citing the extensive authority vested in police officers, the court paved the way for the creation of a vicarious liability exception for on-duty police officers.

30. *See* Thorn v. City of Glendale, 35 Cal. Rptr. 2d 1, 3 (Ct. App. 1994) (discussing the on-duty police officer exception but holding the exception inapplicable to the facts of the case involving a fire marshal who intentionally started a fire that burned down a building).

31. Mary M. v. City of Los Angeles, 814 P.2d 1341, 1350 (Cal. 1991).

32. *Thorn*, 35 Cal. Rptr. 2d at 3.

33. *See* Maria D. v. Westec Residential Sec., Inc., 102 Cal. Rptr. 2d 326, 339–42 (Ct. App. 2000) (noting that the California Supreme Court intended to limit the exception to acts by police officers and that security guards are not authorized to perform many of the acts of authority consistent with police officers' duties, such as making traffic stops, interrogations and identification checks).

34. *See* Farmers Ins. Group v. County of Santa Clara, 906 P.2d 440, 454 (Cal. 1995) (finding that the deputy sheriff was not exercising job-conferred authority over the female deputy sheriffs he sexually harassed because his supervisory authority over the subordinate deputies did not include the power to detain, arrest, or jail any individual).

35. *See Mary M.*, 814 P.2d at 1351.

36. 212 Cal. Rptr. 493 (Ct. App. 1985).

37. *See id.* at 496.

In *Mary M. v. City of Los Angeles*,[38] the leading California case on vicarious liability for the sexual torts of police officers, the California Supreme Court solidified this police officer exception when it held the defendant City vicariously liable for a police officer's rape of a woman during a traffic stop.[39] The court considered the policy objectives of vicarious liability and concluded that all three objectives supported holding the city liable on the facts of the case.[40] Considering the deterrence justification, the court found that imposing liability for sexual torts of police officers would not impair law enforcement abilities because preventive measures would be easily implemented and would not reduce police effectiveness.[41] Second, the court noted that the legislature's enactment of the California Tort Claims Act, under which governmental entities can be held vicariously liable, signifies the appropriateness of implementing respondeat superior to sexual torts of police officers.[42] Finally, the court cited the "extraordinary power and authority" police officers possess and determined that the community should bear the cost of the misuse of power since the community benefits from exercise of the power.[43]

The court justified its departure from the holding in *John R.* by focusing on the drastic difference in authority possessed by teachers and police officers.[44] *Doe 1* arose against this backdrop of a general refusal to find vicarious liability for sexual torts except in the context of sexual misconduct by on-duty police officers.

II. The Case: *Doe 1 v. City of Murrieta*

A. The Parties

In *Doe 1*, plaintiffs Jane Doe 1 and Jane Doe 3 filed a civil suit for damages against defendants Officer Derick Boyd ("Officer Boyd") and his employer, the City of Murrieta ("the City").[45] The plaintiffs were both sixteen years old at the time the incidents occurred.[46] They became acquainted with Officer Boyd while participating in a program

38. 814 P.2d 1341.
39. *See id.* at 1342.
40. *See id.* at 1347–50.
41. *See id.* at 1347–48.
42. *See id.* at 1348.
43. *See id.* at 1349.
44. *See id.* at 1349.
45. *See* Doe 1 v. City of Murrieta, 126 Cal. Rptr. 2d 213, 216–17 (Ct. App. 2002).
46. *See id.* at 216.

offered by the Murrieta Police Department to local students interested in law enforcement as a career.[47]

B. Procedural History

Officer Boyd was criminally charged with committing felony sexual acts with plaintiffs and pled guilty to the charges.[48] Plaintiffs next filed a civil suit against Officer Boyd and the City asserting five causes of action: negligence, battery, sexual battery, intentional infliction of emotional distress, and breach of contract.[49] The trial court sustained defendant City's demurrers without leave to amend for the battery, sexual battery, and intentional infliction of emotional distress causes of action, and granted defendants' summary judgment motions for the negligence and breach of contract causes of action.[50] The plaintiffs appealed the trial court's findings on all five causes of action.[51] After issuance of the appellate court opinion, which is the subject of this Note, the California Supreme Court denied plaintiffs' petition for review.[52]

C. The Parties' Contentions

On appeal, the plaintiffs contended that the trial court erred in refusing to find the City vicariously liable for the sexual misconduct of Officer Boyd.[53] The plaintiffs urged the court to follow *Mary M.* and find the City liable under the doctrine of respondeat superior because Officer Boyd committed the sexual torts while on-duty and in a position of inherent authority.[54] The defendants countered by asserting that the facts of the case were distinguishable from *Mary M.* because the minors each had a personal relationship with Officer Boyd and voluntarily accompanied him on the ride-alongs during which the sexual incidents occurred.[55] The defendants also emphasized that Officer Boyd did not use force or authority during his sexual acts with plaintiffs, characterizing the sexual acts as consensual.[56]

47. *See id.* at 216–17.
48. *See id.* at 218.
49. *See id.*
50. *See id.*
51. *See id.*
52. *See* 2002 Cal. LEXIS 8620 (Dec. 18, 2002).
53. *See Doe 1*, 126 Cal. Rptr. 2d at 218.
54. *See id.* at 220–21.
55. *See id.*
56. *See id.*

D. The Facts

The Murrieta Police Department collaborated with the Boy Scouts of America and formed a Police Explorer Program ("the program").[57] The purpose of the program was to introduce students between the ages of fourteen and eighteen to law enforcement as a career option.[58] Among other activities, the program allowed participating explorers to go on one-on-one ride-alongs with an on-duty police officer.[59] Program regulations generally permitted one ride-along per month, and a variety of regulations governed the appropriate times and procedures for all officer-explorer interactions.[60] For example, the explorer handbook prohibited dating or other close social relationships between adults and explorers and specified that one-on-one contact between explorers and adults was prohibited except during authorized ride-alongs.[61]

Plaintiffs Jane Doe 1 and Jane Doe 3 enrolled in the explorer program and developed a liking for thirty-two-year-old Officer Boyd.[62] Between September 1997 and December 1997, each minor accompanied Boyd on frequent ride-alongs, the majority of which occurred late at night.[63] Jane Doe 1 went on between thirty and forty ride-alongs while Jane Doe 3 went on fifteen to twenty ride-alongs with Boyd.[64] During many of the one-on-one ride-alongs, Boyd engaged in sexual encounters with the plaintiffs.[65] The plaintiffs later disclosed the sexual encounters, and Boyd was investigated on suspicion of unlawful sexual intercourse with a person under eighteen years of age, oral copulation with a person under eighteen, sodomy with a person under eighteen, and penetration with a foreign object of a person

57. *See id.* at 217.

58. *See id.*

59. *See id.*

60. *See id.*

61. *See* Third Amended Complaint for Damages at A-65, Doe 1 v. City of Murrieta, 126 Cal. Rptr. 2d 213 (Ct. App. 2002) (No. 317616).

62. *See Doe 1,* 126 Cal. Rptr. 2d at 217.

63. *See id.* at 218.

64. *See id.*

65. *See id.*

under eighteen.[66] Officer Boyd entered a guilty plea to criminal charges for the former two felony charges.[67]

E. The Decision

The appellate court began by citing the California vicarious liability statute which states a public employer can be held liable "for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."[68] The court also recited the general vicarious liability principle adhered to in California, that an employer could be held liable for conduct "not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."[69]

In its analysis, the court first distinguished *White* by noting that, instead of being stopped, kidnapped, and threatened, plaintiffs "became infatuated with Boyd, pursued him, and consented to his sexual acts."[70] This characterization of the facts led the court to conclude that "the illicit sexual acts did not arise out of the exercise of Boyd's job-created authority over plaintiffs."[71] The court then moved to a policy discussion, arguing that a strict liability finding was inappropriate on the facts.[72] As for deterrence, the court recommended a negligence approach and expressed concern that "imposing vicarious liability might deter police departments from sponsoring explorer programs."[73] Second, the court found that assuring compensation to plaintiffs through the doctrine of respondeat superior was not crucial because they could receive compensation through a negligence claim.[74] Finally, the court resurrected language from *John R.* and found, as to the policy goal of assuring broad and equitable distribution of the losses, that "[t]he connection [between the authority con-

66. *See* Carl Love, *Murrieta Officer Held on Suspicion of Sex with Cadets; Police Explorer Adviser Resigns After the Allegations Surface*, THE PRESS ENTERPRISE (Riverside, CA), Jan. 7, 1998, at B01.

67. *See* Joe Vargo, *Boyd Pleads Guilty to Sexual Activity with 2 Teen-Agers; The Former Murrieta Police Officer Could Serve a Prison Term for Misconduct with 16-Year-Old Girls*, THE PRESS ENTERPRISE (Riverside, CA), Mar. 11, 1998, at B01.

68. CAL. GOV'T. CODE § 815.2(a) (West 2002).

69. *Doe I*, 126 Cal. Rptr. 2d at 218–19.

70. *Id.* at 219.

71. *Id.* at 220.

72. *See id.* at 220–21.

73. *Id.* at 220.

74. *See id.*

ferred and abuse of that authority] is 'not great enough to persuade us that vicarious liability should attach here' for Boyd's personal tort since he exercised no job-conferred authority over plaintiffs when he engaged in sexual acts with them."[75]

The court justified its conclusion on the third policy factor by asserting that factually the case more closely resembled *John R.* rather than *Mary M.*[76] Framing the relationship between Boyd and plaintiffs as that of teacher-student, the court stated that "Boyd was plaintiffs' explorer adviser and trainer when the sexual misconduct occurred."[77] The court reasoned that Boyd's relationship with plaintiffs was that of a "coworker rather than that of a police officer exercising law enforcement over a member of the general public."[78] Thus, on the basis of plaintiffs' "infatuation" with Boyd,[79] policy objectives,[80] and the coworker relationship between thirty-two-year-old Boyd and the sixteen-year-old plaintiffs,[81] the *Doe 1* court held that the City could not be held vicariously liable for the sexual misconduct of Officer Boyd.[82]

III. Analysis

In refusing to hold the City vicariously liable for the sexual torts of Officer Boyd, the court incorrectly evaluated the policy objectives and underestimated the inherent authority a police officer asserts over any member of society, particularly over minors. The court also overestimated the ability of a sixteen-year-old girl to consent to the sexual advances of a thirty-two-year-old police officer. Ultimately, the court endangered an important exception to the general respondeat superior doctrine the California Supreme Court carved out in *Mary M.*

A. The Court Incorrectly Evaluated the Policy Objectives

The court departed from its pattern of analysis in previous cases when discussing the policy objectives in *Doe 1.* The court, possibly uncomfortable with the prospect of holding the City vicariously liable for the sexual torts of Officer Boyd, shaped its policy analysis to conform

75. *Id.*
76. *See id.* at 221.
77. *Id.*
78. *Id.* at 222.
79. *See id.* at 219.
80. *See id.* at 220–221.
81. *See id.* at 222.
82. *See id.*

to its desired outcome. Instead, the court should have followed the established precedent of *Mary M.* or distinguished that holding and its on-duty police officer exception.

1. The Relative Importance of Safeguarding Academic Tutoring Programs as Compared to Police Explorer Programs

Devoting only one sentence to the deterrence policy justification, the *Doe 1* court mimicked its reasoning in *John R.* and expressed concern that holding the City vicariously liable for Officer Boyd's acts could deter police departments from offering explorer programs.[83] While many police departments across California offer police explorer programs with the goal of sparking student interest in law enforcement,[84] the range of students who benefit from access to the tutoring at issue in *John R.* likely exceeds the number of students who take advantage of police explorer programs. Protecting academic tutorial programs is of greater importance based on students' need to understand basic academic subjects in order to be successful at any career, including law enforcement. Consequently, the court's rationale based on protecting access to teachers who can provide additional instruction is more persuasive. At a minimum, the *Doe 1* court should have acknowledged the difference in the value of a police explorer program and the value of teacher availability for tutoring students when assessing the deterrence rationale.

2. The Court's Improper Reliance on Plaintiffs' Potential Success on a Negligence Claim

The court relied on the potential success of a negligence claim in an effort to strengthen its position,[85] thus deviating from its usual method of framing arguments either in favor of or against the use of strict liability as a method of assuring victims compensation.[86] Numer-

83. *See id.* at 220.

84. *See* News Release, Fraternal Order of Police, California State Lodge (Oct. 26, 2000) (announcing grants to 211 different police explorer programs in California), *available at* www.cafop.org/pressrel02.html (last visited Aug. 20, 2003).

85. *See Doe 1*, 126 Cal. Rptr. 2d at 220 ("[T]he objective of assuring plaintiffs' compensation is not a weighty factor since compensation may be achieved through proving direct negligence . . . .").

86. *See, e.g.*, Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 366–67 (Cal. 1995) (pointing out that the lack of discussion in the parties' briefs as to the availability of insurance to medical providers for coverage of sexual torts of employees resulted in the court's inability to make a policy finding on the assurance of victim compensation rationale); Mary M. v. City of Los Angeles, 814 P.2d 1341, 1348 (Cal. 1991) (noting that vicarious liability is an appropriate method of assuring victim compensation because statutory

ous California cases addressing the second policy justification of assuring compensation narrowed the issue to a discussion of availability of insurance to compensate the victim, not the victim's ability to succeed on other causes of action.[87] As long as the court has interpreted statutory tort laws to permit the government to be held vicariously liable for the torts of its employees, the court should not base its refusal to find vicarious liability on the availability of other causes of action for the plaintiff to pursue.

3. The Court Underestimated Officer Boyd's Position of Authority

a. *Mary M. v. City of Los Angeles* and *White v. County of Orange*

Authority was the most important factor prompting the California Supreme Court to carve out a respondeat superior exception for tortious acts committed by police officers.[88] In *White v. County of Orange*, Officer Loudermilk stopped a female motorist, put her in his patrol car, and drove her around for several hours while threatening to rape and murder her.[89] The court articulated its support for a finding of vicarious liability:

> [T]he police officer carries the authority of the law with him into the community. The officer is supplied with a conspicuous automobile, a badge and a gun to ensure immediate compliance with his directions. The officer's method of dealing with this authority is certainly incidental to his duties; indeed, it is an integral part of them.[90]

The court pointed out that "[h]ad Loudermilk not been a deputy sheriff, in uniform, in a marked patrol vehicle using flashing red lights, White would not have stopped at his direction and the events that followed would not have occurred."[91]

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law in California allows government entities to be held liable for employee torts within the scope of employment); John R. v. Oakland Unified School Dist., 769 P.2d 948, 956 (Cal. 1989) (focusing on the inability of school districts to obtain insurance to cover strict liability claims and the resulting diversion of funds, otherwise dedicated to classroom purposes, to compensating tort claim victims); Maria D. v. Westec Residential Sec., Inc., 102 Cal. Rptr. 2d 326, 331 (Ct. App. 2000) (agreeing with the finding in *Mary M.* that the legislature's willingness to hold government employers vicariously liable for torts of government employees indicates that vicarious liability is an appropriate method of assuring victim compensation).

87. *See* cases cited *supra* note 86.

88. *See* Michelle Neumann-Ribner, *When Good Cops Go Bad: Can a City Be Held Liable for a Rape or Murder Committed by an On-Duty Police Officer?*, 1 SAN DIEGO JUSTICE J., 457, 465 (1993).

89. *See* 212 Cal. Rptr. 493, 494 (Ct. App. 1985).

90. *Id.* at 496.

91. *Id.*

Similarly, the officer in *Mary M.* took advantage of his job-conferred authority to accomplish sexual misconduct.[92] The court explained that the officer first misused his authority as a law enforcement officer to lure the plaintiff into his car, drive her to her home, and rape her.[93] He further misused his authority by threatening to take the plaintiff to jail when she attempted to resist his advances.[94] The court also noted "it is necessary to examine the employees' conduct as a whole, not simply the tortious act itself" when deciding whether vicarious liability is appropriate.[95] The court found that the officer's conduct as a whole indicated a misuse of authority that culminated in the rape of the plaintiff.[96] Both *White* and *Mary M.* involve an officer who took advantage of his unique position of job-conferred authority to gain access to the victims and to engage in tortious activity.

While the facts of *Doe 1* are distinguishable from those of *White* and *Mary M.* in a variety of ways, the inherent authority Officer Boyd possessed as a result of his position as a police officer is the same authority that is at play in the other cases. One way in which *Doe 1* differs is that the plaintiffs in that case chose to be in the company of Officer Boyd,[97] whereas the *Mary M.* and *White* plaintiffs were not acquainted with the offending officers prior to the incidents.[98] Despite the fact that the *Doe 1* plaintiffs knew Officer Boyd, it is unlikely that the apparent or actual authority of Officer Boyd was diminished or that they felt less obligated to follow his orders simply because they were under his tutelage through the explorer program.

Before Officer Boyd agreed to take the plaintiffs on ride-alongs, it is likely that he or other officers educated the explorers about the potential dangers associated with ride-alongs and instructed them, for their safety, to follow the accompanying police officer's orders at all times. Since plaintiffs were minors, they may have been less aware of a policeman's ability to abuse his authority than an adult might be, making an objective assessment of Officer Boyd's conduct more difficult

92. *See* Mary M. v. City of Los Angeles, 814 P.2d 1341, 1351 (Cal. 1991).

93. *See id.*

94. *See id.*

95. *Id.* at 1350.

96. *See id.* at 1351.

97. *See* Doe 1 v. City of Murrieta, 126 Cal. Rptr. 2d 213, 221 (Ct. App. 2002).

98. *See Mary M.*, 814 P.2d at 1342–43; White v. County of Orange, 212 Cal. Rptr. 493, 494 (Ct. App. 1985).

for them. Viewing Officer Boyd's conduct as a whole,[99] he was in a position of authority at all times because he was on-duty during the sexual encounters.[100] Officer Boyd's authority likely influenced plaintiffs' responses to his sexual advances and contributed significantly to the illicit acts that transpired between Boyd and the plaintiffs. Based on the focus on authority in the *Mary M.* and *White* cases,[101] the court should have accorded more weight to the level of authority Boyd possessed during the sexual encounters.

b. The Court's Mischaracterization of Officer Boyd's Relationship with the Plaintiffs

The court did not grant sufficient attention to Officer Boyd's position of authority when it found the *Doe 1* facts akin to a teacher-student or supervisor-trainee situation instead of an officer-civilian case. First, the court stated "[t]he instant case is more akin to the *John R.* case involving a teacher-student relationship since Boyd was plaintiffs' explorer adviser and trainer when the sexual misconduct occurred."[102] While it is true that plaintiffs were under the supervision of Officer Boyd as part of the police explorer program, the sexual incidents occurred while Boyd was on duty,[103] in uniform, wearing a gun, and exercising his authority over members of the public.[104] Teachers are accorded a significant level of authority in the classroom, but it is always clear to students that the authority a teacher has over them in that context does not extend to others outside of the classroom. Older students, such as those of plaintiffs' age, would also realize that drastically different repercussions may result from refusing to follow the instructions of a teacher as compared to those of a police officer. Students who ignore a teacher's instructions risk being sent to the principal's office, serving detention, or having their parents called by the school. Conversely, the risk of criminal repercussions, such as being handcuffed, arrested, or going to jail, are certainly far more serious and would compel many more individuals to obey police orders. In light of the difference in the level of actual and perceived authority,

99. *See Mary M.*, 814 P.2d at 1350 (stating that vicarious liability determinations should be made by looking at the employee's conduct as a whole instead of solely examining the tortious act).

100. *See Doe 1*, 126 Cal. Rptr. 2d at 218.

101. *See Mary M.*, 814 P.2d at 1349–51; *White*, 212 Cal. Rptr. at 496.

102. *Doe 1*, 126 Cal. Rptr. 2d at 221.

103. *See id.* at 218.

104. See Third Amended Complaint for Damages at 6, Doe 1 v. City of Murrieta, 126 Cal. Rptr. 2d 213 (Ct. App. 2002) (No. 317616).

the court should reconsider its inaccurate characterization of the officer-explorer relationship as similar to that of teacher and student.

The court in *Doe 1* also compared the relationship between Boyd and plaintiffs to the supervisor-trainee relationship explored in *Farmers Insurance Group v. County of Santa Clara.*[105] In that case, three female deputy sheriffs sued Santa Clara County for sexual harassment by a male deputy sheriff.[106] The California Supreme Court refused to apply respondeat superior, in part because "the work-related authority of a supervisor over a trainee employee in a county sheriff's department is in no way comparable to the extraordinary power and authority that police officers exercise over members of the public."[107] Interestingly, the *Doe 1* court opined that Officer Boyd did not exercise his authority over a member of the general public, but rather against "individuals who worked with Boyd and were trained and supervised by him."[108] It seems unlikely that either the members of the explorer program or the officers of the Murrieta Police Department thought of the program as one in which the officers were "working" alongside children between the ages of fourteen and eighteen. Rather, the purpose of the program was to expose students to opportunities associated with a career in law enforcement.[109] Since the program guidelines only permitted one ride-along per month, the creators of the explorer program likely did not envision officers and high school students collaborating to fight crime. Instead, the creators probably envisioned it as an occasional observational opportunity for the students.

c. Other Cases Demonstrating the Court's Misapplication of Authority in *Doe 1*

Two other cases provide guidance on the court's misplaced analysis of the authority issue in *Doe 1.*[110] *Maria D. v. Westec Residential Security, Inc.*[111] involved a private security guard who posed as a police officer and stopped and raped a motorist.[112] Differentiating between

105. *See* Farmers Ins. Group v. County of Santa Clara, 906 P.2d 440, 444–46 (Cal. 1995).

106. *See id.*

107. *Id.* at 454.

108. *Doe 1*, 126 Cal. Rptr. 2d at 221.

109. *See id.* at 217.

110. *See* Maria D. v. Westec Residential Sec., Inc., 102 Cal. Rptr. 2d 326 (Ct. App. 2000); Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358 (Cal. 1995).

111. 102 Cal. Rptr. 2d 326.

112. *See id.* at 327–28.

the level of authority and control of a police officer and that of a private security guard, the court focused on actual authority and stated "[t]he security guard's actual authority is not comparable to that of a police officer."[113] There, the court refused to focus on apparent authority and the level of fear plaintiff felt when confronted with an individual she thought to be a police officer.[114] Applying this distinction to *Doe 1*, the court should have focused on the actual authority of the police officer instead of characterizing the personal relationship between the plaintiffs and Officer Boyd as one that minimized the officer's apparent authority.

In *Lisa M. v. Henry Mayo Newhall Memorial Hospital*,[115] the plaintiff sued defendants hospital and employee lab technician Tripoli after the technician sexually molested the plaintiff during an obstetrical ultrasound exam.[116] The court refused to find vicarious liability on those facts and rejected plaintiff's argument that the authority of a technician during an exam was similar to that of a police officer during a traffic stop.[117] Distinguishing between job-conferred authority and a position of trust, the court stated, "Tripoli abused his position of *trust*, since he had no legal or coercive authority over plaintiff."[118] The court pointed out that the "[h]ospital did not give Tripoli any power to exercise general control over plaintiff's liberty."[119] In contrast, at all times during the interactions between the *Doe 1* plaintiffs and Officer Boyd, Boyd retained the ability to exercise legal control over them through the use of job-conferred authority, not trust. The court should have placed a higher value on this legal control element when deciding whether or not to impose liability on the City.

B. The Court Did Not Properly Consider Plaintiffs' Age When Determining the Issue of Consent to Officer Boyd's Sexual Advances

In its statement of the facts, the *Doe 1* court summarily described the ride-alongs resulting in the tortious acts as "consensual sexual encounters."[120] The court paid almost no attention to the fact that plaintiffs were merely sixteen years old when the sexual encounters

113. *See id.* at 341.
114. *See id.*
115. 907 P.2d 358 (Cal. 1995).
116. *See id.* at 359–60.
117. *See id.* at 365–66.
118. *Id.* at 365.
119. *Id.* at 366.
120. Doe 1 v. City of Murrieta, 126 Cal. Rptr. 2d 213, 218 (Ct. App. 2002).

occurred. Examination of the statutory rape laws and the policy behind those enactments sheds light on legislative concerns about sexual encounters involving minors.[121] The concern about consent, had it been acknowledged by the *Doe 1* court, may have impacted the policy analysis and led the court to a different conclusion regarding vicarious liability.

California Penal Code section 261.5, the statutory rape provision, sets the age of consent for sexual intercourse at eighteen years.[122] Section 261.5 also creates tiers of penalty levels based on the age difference between the minor and the offending adult, escalating the severity of punishment as the age difference between a victim and a perpetrator increases.[123] While there are several justifications supporting statutory rape laws, one of the driving forces behind the legislation is the inability of minors to consent to sexual intercourse with the same capacity as adults.[124]

The law of statutory rape reflects an attempt to protect teenagers from themselves, as well as from those who would prey upon their vulnerability. It also represents a necessary complement to conventional rape law, which offers little protection to the teenager who, due to fear, confusion, coercion, or inexperience, has "consented" to unwanted sex.[125]

Concerns of legislators and academics about the potential coercion of women under age eighteen stem from the notion that a minor is incapable of giving the same knowing, objective consent that an adult can give and therefore needs additional protection.[126] Applying this principle to the *Doe 1* case, the court overestimated the plaintiffs' ability to consent to Officer Boyd's initiation of sexual conduct.

The court stated that plaintiffs "became infatuated with Boyd, pursued him, and consented to his sexual acts."[127] The emphasis the court placed on plaintiffs' alleged pursuit of Boyd suggests that plaintiffs' infatuation with Boyd served as a proxy for consent to sexual acts. The reason the legislature created special laws for statutory rape is not solely because some adults prey on unsuspecting youths.[128] Rather,

121. *See* Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 710 (2000).

122. *See* CAL. PENAL CODE § 261.5(a) (West 2003).

123. *See id.* § 261.5(b)–(d).

124. *See* Oberman, *supra* note 121, at 710.

125. *See id.*

126. *See id.* at 709–10.

127. Doe 1 v. City of Murrieta, 126 Cal. Rptr. 2d 213, 219 (Ct. App. 2002).

128. *See* Oberman, *supra* note 121, at 710.

statutory rape laws reflect a minor's inability to give the same consent that an adult can give, even if they may feel attracted to or romantically interested in the adult.[129] The plaintiffs in *Doe 1* may well have been attracted to Officer Boyd. However, evidence of this attraction alone does not justify the court's quick conclusion that Boyd obtained the consent of plaintiffs prior to the sexual acts.

It is difficult to understand how a court, which must apply legislative determinations regarding the age of consent for sexual intercourse in a criminal context, could declare in a civil suit that sixteen-year-old girls granted full consent to the acts of a thirty-two-year-old on-duty police officer. If the court had taken the position that Officer Boyd did use authority over plaintiffs in obtaining their "consent" for his sexual advances, the third policy objective of ensuring that the victim's losses will be equitably borne by those benefiting from the enterprise giving rise to the injury might have been decided differently. The court analyzed the authority conferred by the job and the abuse of that authority in order to procure consent for sexual conduct and stated, "The connection is 'not great enough to persuade us that vicarious liability should attach here' for Boyd's personal tort since he exercised no job-conferred authority over plaintiffs when he engaged in sexual acts with them."[130] A finding that Officer Boyd did take advantage of his job-conferred authority may have swayed the court to find that policy dictated a finding of vicarious liability.

Conclusion

The California Court of Appeal erred in refusing to hold the City vicariously liable for the sexual torts of Officer Boyd. The court mistakenly found that the police explorer program created a relationship between Officer Boyd and plaintiff participants that was akin to a supervisor-trainee relationship. Instead, it should have acknowledged that plaintiffs likely saw Officer Boyd, as did most members of the public, as a uniformed police officer vested with the full authority of enforcing the law. In addition to refusing to acknowledge Officer Boyd's inherent authority, the court, if anything, characterized the plaintiffs as sexual aggressors who actively pursued Officer Boyd. This characterization did not take into account the young age of plaintiffs or the fact that the law did not view them as capable of giving consent to sexual intercourse.

129. *See id.*
130. *Doe 1*, 126 Cal. Rptr. 2d at 220.

With this holding, the California Court of Appeal endangered the key exception to vicarious liability analysis that the California Supreme Court carved out in *Mary M.* Instead of analogizing to *John R.* and embarking on a policy analysis at odds with precedent, the court should have either followed the Supreme Court's ruling in *Mary M.* or distinguished that ruling, if the court is no longer willing to provide an on-duty policy officer exception. The result of the *Doe 1* decision is to create uncertainty among police departments and victims as to the California courts' stance on this important issue.