

The Lost Rationale of Agency Law

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ABSTRACT

The legal academy has lost sight of the rationale of agency law and tried to recast agency doctrines in the image of other areas of the law, such as contracts or torts. The misunderstanding hampers scholarship and poses a danger to the important values that agency law protects.

The law of agency sets the rules for such basic concepts as representation, authority, vicarious responsibility and the loyalty duties of agents. The field rests on a simple idea: the metaphoric identification of agent with principal: the notion that, within the scope of the agency, the agent acts as the principal so that the actions of the agent are treated as the actions of the principal and the two are as one.

This article reintroduces this metaphor, shows how the idea explains the law of agency and argues that the law needs the concept and the doctrines based on it to create a place for group action and team values in a legal system designed for individuals.

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INTRODUCTION

Following the terrorist attacks on September 11, 2001, the U.S. Department of Justice arrested hundreds of undocumented aliens and held them in detention while it investigated their possible ties to terrorism. After they were released, some detainees sued the officials who formulated the detention policy, charging the officials with conspiracy to violate the detainees' constitutional rights and demanding that the officials be held personally liable for money damages. In 2017, the U.S. Supreme Court rejected the conspiracy claim. The Court reasoned that a conspiracy requires at least two parties and that officers acting for the same employer are acting as a single person, their employer. The Court said that “[w]hen two agents of the same legal entity make an agreement in the course of their official duties . . . as a practical and legal matter their acts are attributed to their principal.”²

The decision illustrates the law of agency, the body of law that sets the rules for representation, authority, and vicarious responsibility. Agency law provides the legal foundation for business organizations, employment, and the practice of law. The Court’s rationale further highlights an idea at the heart of agency law: the identification of the agent with the principal.

This idea takes several forms: the theory that an agent assumes the legal persona of the principal thereby becoming the principal’s alter ego; the notion that an agent acts as the principal so that the actions of the agent are

² Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017).

the actions of the principal; the construct “that, within the scope of the agency, principal and agent are one.”³ For lawyers and judges, this metaphor of identification is an essential idea that provides the conceptual frame for dealing with groups.

However, due to changes in the intellectual understanding of the law more than a century ago,⁴ the construct has largely gone missing in the academy.⁵ As a result, there is no grand theory uniting agency law and the subject now receives little attention in teaching and scholarship.⁶ This article seeks to restore agency law to its proper place in legal thought by showing the conceptual unity of the subject. The article reintroduces the metaphor of identification and explains how that idea makes sense of the area, including doctrines that now puzzle scholars.⁷

There are also policy reasons for a renewed understanding of the lost rationale of agency law. The concept justifies exceptions to the realm of contract, so it could limit the recent tendency of the U.S. Supreme Court to favor market freedom over fiduciary loyalty.⁸

More generally, the metaphor of identification offers a needed supplement to the legal philosophies that prioritize equality,⁹ individual

³ Oliver Wendell Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 345 (1891) [hereinafter Holmes, Jr., *Agency*]; see OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 232 (photo. reprt. 2009) (Boston, Little, Brown, and Co. 1881) [hereinafter HOLMES, JR., *THE COMMON LAW*].

⁴ See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 46 (1913); Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 107–08 (1916) [hereinafter Laski, *Vicarious*].

⁵ See Paula J. Dalley, *All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment*, 104 W. VA. L. REV. 517, 528 (2002) [hereinafter Dalley, *All in a Day's Work*]; Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 499 n.4 (2011) [hereinafter Dalley, *A Theory of Agency Law*].

⁶ See Randy E. Barnett, *Squaring Undisclosed Agency Law and Contract Theory*, 75 CALIF. L. REV. 1969, 1970 (1987) (referring to the “current dearth of American agency law scholarship”); *id.* at 1970 n.4 (noting “the current neglect of agency law in the American law school curriculum”); Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1612 (2005) (“[L]aw schools today appear to devote significantly less time and attention to agency law principles than they did, say, thirty or forty years ago.”).

⁷ See Dalley, *A Theory of Agency Law*, *supra* note 5, at 497 (describing the basis of agency law as a “mystery” for scholars, courts, and lawyers).

⁸ See Daniel Harris, *Loyalty Loses Ground to Market Freedom in the U.S. Supreme Court*, 10 WM. & MARY BUS. L. REV. 615, 618 (2019).

⁹ See, e.g., Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981) (stating that if he were a judge, he would push whatever “result is, in the circumstances now existing, likely to advance the cause of socialism”).

autonomy,¹⁰ or economic efficiency.¹¹ As part one of this article explains, the metaphor sees people as social beings with a sense of self that includes shared identities.¹² Starting from this premise, the metaphor builds a legal foundation for ideals like faithful representation, legitimate authority, and loyalty; notions that the other philosophies ignore, redefine,¹³ or dismiss as outmoded.¹⁴ Therefore, preserving the metaphor matters because it has an impact on the types of morality that will be recognized as law.

Part one of this article discusses the metaphor's purpose, origins, uses, and critics. Part two shows how the metaphor explains vicarious liability rules far better than the explanation now presented by tort scholars. Part three shows how the metaphor explains other doctrines that have troubled scholars, such as the evidence rules for vicarious admissions, the government speech doctrine, and the agency duties of loyalty and confidentiality. Part four argues that the metaphor is an essential idea and the doctrines based on it strike a fair balance between individual rights and social responsibility.

I. THE METAPHOR AND THE CONCEPT OF REPRESENTATION

A. *Conceptualizing Groups*

To conduct business, people often must work in teams. This group action, while essential for society, presents conceptual challenges for a legal system designed for individuals and based on notions of individual rights and responsibilities. What does it mean for a group to acquire property, enter into a contract or commit a tort? Who owns what? Who bears responsibility for which actions? To address these issues, the law needs some way to think about groups and fit them into the system.

The law of agency meets this need. It provides a conceptual framework for understanding groups and assigning rights and responsibilities when

¹⁰ See, e.g., Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 824 (2002) (“[O]ur broader political structure . . . enshrines individual autonomy as its core norm.”).

¹¹ See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 426 (1993).

¹² See E. Merrick Dodd, Jr., *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977, 981, 984 (1929).

¹³ See, e.g., Easterbrook & Fischel, *supra* note 11, at 427 (arguing that the duty of loyalty is just a possible, implied contract term with “no moral footing”).

¹⁴ See, e.g., Gabriel Rautenberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075, 1119 (2017) (disparaging the duty of loyalty as a “long-hallowed ‘sacred cow’ of fiduciary principles”); Steven D. Smith, *Hart’s Onion: The Peeling Away of Legal Authority*, 16 S. CAL. INTERDISC. L.J. 97, 133 (2006) (concluding that under “modern assumptions . . . ‘legitimate’ or normatively attractive authority--seems impossible, almost inconceivable”).

groups are in the picture. The framework is built on a definition of agency now set forth in section 1.01 of the Restatement (Third) of Agency (the “Third Restatement”): “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”¹⁵

One word in this definition deserves special attention because it expresses an idea that is both essential to agency law and very difficult to understand. That word is *behalf*. This word is what distinguishes the common law definition of agency from the definition of agency used in economics and social science. Because of the word *behalf*, an agent is not simply an economic actor, or a fiduciary employed to act in the best interests of the principal. An agent is a special type of fiduciary, one who is empowered to “act on the principal’s behalf.”¹⁶

According to the Restatement commentary, the phrase “act on the principal’s behalf” means that the agent “acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person.”¹⁷ In 2014, the Restatement reporter Deborah DeMott, amplified on this thought, explaining that representation by an agent effectuates a “legally-salient extension of the principal’s personality.”¹⁸

What these abstractions mean is that the agent does not simply act *for* the principal. Within the scope of the agency, the agent acts *as* the principal. In other words, in the contemplation of the law, it is as though principal and agent are the same person.

Of course, this metaphoric unity is not literally true: principal and agent are not really the same person. Two human beings do not suddenly occupy the same physical body. The metaphor of identification is, after all, just a metaphor. However, it is a necessary thought because the metaphor conveys, in understandable human terms, an idea that is hard to comprehend any other way.¹⁹

What is more, the metaphor is not simply the figurative counterpart of an abstract doctrine. As we shall see, the metaphor came first; the

¹⁵ RESTATEMENT (THIRD) OF AGENCY, § 1.01 (AM. LAW. INST. 2006).

¹⁶ *Id.*

¹⁷ *Id.* at cmt. c.

¹⁸ Deborah A. DeMott, *The Contours and Composition of Agency Doctrine: Perspectives from History and Theory of Inherent Agency Power*, 2014 U. ILL. L. REV. 1813, 1833 (2014).

¹⁹ See GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 3 (1980); Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1053 (1989) (“The mystery of metaphor begins with its paradoxical nature.”).

abstractions followed. It was the metaphor of identification, in various forms, that provided the conceptual basis for the law of agency and the vital force for its expansion.

B. *Metaphoric Origins*

A key to this evolution is the concept of representation, which is central both to the metaphor and to the idea of agency. Recall the Third Restatement commentary that the agent acts as a “representative” of the principal. To explore the idea of representation, consider how people use the word “represent.”

We might say that a lawyer represents her client. Employees represent their corporation. Olympic athletes represent their country. This legislator represents her constituents while that other legislator represents the special interests. The prosecutor represents the government. The painting represents the scene. *X* represents the unknown.

In all these contexts, the word “represent” describes the making present of something that is not actually present. As Professor Hanna Fenichel Pitkin explained: “‘representation’ means ‘re-presentation,’ a making present of something absent—but not making it literally present. It must be made present indirectly, through an intermediary; it must be made present in some sense, while nevertheless remaining literally absent.”²⁰ Thus, “in representation something not literally present is considered as present in a nonliteral sense.”²¹

This means that the word “represent” involves a paradox or fiction—the making present of something that is not literally present—that is very similar to the fiction expressed by the metaphor of identification. Moreover, the concept of representation did not just happen. It was a legal construct developed, through a process of metaphoric expansion, by jurists and theologians in the middle ages to explain the nature, justification, limits, and legal effect of delegated power.

In classical Latin, the word *representare* (meaning “to make present or manifest or to present again”) was used to refer to inanimate objects.²² The word was used literally, as we might today talk about re-presenting a previously dishonored check to the bank for payment (meaning physically presenting the check to the bank again). The word could also be figuratively,

²⁰ Hanna Fenichel Pitkin, *Introduction: The Concept of Representation*, in REPRESENTATION 1, 16 (Hanna Fenichel Pitkin ed., 1969).

²¹ HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 9 (1967).

²² *Id.* at 241.

as we might say that a sculpture represents the virtue of courage.²³ Later, the concept expanded to include representation by people and of people. In the thirteenth and fourteenth centuries, the Catholic Church used *representare* to refer to the mystic embodiment by the Pope and the cardinals of Christ and the Apostles.²⁴

At the same time, jurists began to use the word *representare* “for the personification of collectivities: a community was said to be a representative person—not really a person but nevertheless to be considered as one.”²⁵ The word was also used to describe “the way in which a magistrate or attorney [stood and acted] for the community.”²⁶ According to Professor Pitkin, English legal theorists also used the word *representation* to refer to representation by political institutions. For example, because Parliament was the representative of the English people, Parliamentary consent to taxes levied on the people was the legal equivalent of the consent of the people.²⁷

In the fourteenth century, the concept of representation also entered English common law, probably from canon law,²⁸ through the Latin maxim of *Qui facit per alium, facit per se*, meaning, “he who acts through another, acts himself.”²⁹ The *qui facit* maxim is the classic expression of the metaphor of identification. As Deborah DeMott stated: “[o]f venerable lineage, this maxim identifies the agent with the principal.”³⁰

At first, English law used the maxim to justify masters taking title to property acquired through the efforts of their servants.³¹ Over time, through broader and broader metaphoric use, the maxim expanded to permit other forms of attribution, such as holding masters responsible for contracts negotiated for them by their servants and the like.³²

²³ *Id.*

²⁴ *Id.* at 241–42.

²⁵ Pitkin, *supra* note 20, at 2.

²⁶ PITKIN, *supra* note 21, at 242.

²⁷ *Id.* at 246.

²⁸ See R. H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297, 321 (1999) (referring to “the principle of the Roman and canon law of agency: *Qui facit per alium ... facit per se*”); see also Ramon Casadesus-Masanell & Daniel F. Spulber, *Trust and Incentives in Agency*, 15 S. CAL. INTERDISC. L.J. 45, 71 (2005) (“By 1200, Canon law had introduced a form of agency relationship to solve the representation problem in all except legal matters.”).

²⁹ Dalley, *A Theory of Agency Law*, *supra* note 5, at 517 n.84.

³⁰ Deborah A. DeMott, *Our Partners’ Keepers? Agency Dimensions of Partnership Relationships*, 58 LAW & CONTEMP. PROBS. 109, 121 (1995).

³¹ See Dalley, *A Theory of Agency Law*, *supra* note 5, at 518 n.87 (servant allowed to represent master for purposes of claiming ownership according to 1311 case from the fair of St. Ives).

³² See, e.g., *United States v. Gooding*, 25 U.S. 460, 472 (1827).

In a related development, jurists invented the idea of legal personality, as something separate from the personality of a natural person, by using the word *persona* to describe artificial entities such as a corporation.³³ The concept gave the common law a theory for converting groups into something more familiar, legal persons.³⁴ The idea of incorporation creating a new legal person out of previously separate individuals became part of the culture. For instance, in Shakespeare's *Romeo and Juliet*, Friar Laurence told the couple not to be alone until "holy church incorporate two in one."³⁵

In 1651, Thomas Hobbes brought these ideas together to justify a strong central government in a world of atomistic individuals. Using agency ideas, Hobbes argued that the state represents the people and derives its authority from them. A key step in this argument was the notion (a form of the metaphor of identification) that the representative bears the *persona* of the represented.

In chapter 16 of *Leviathan I*, Hobbes noted that one person sometimes represents other people, in which case the actions of the representer are attributed to the represented.³⁶ Hobbes explained that the very word *person* comes from the Latin *persona*, which originally referred to the mask worn by an actor during a performance.³⁷ "So that a *person*, is the same that an actor is . . . and he that acts another, is said to bear his person, or act in his name; . . . and is called . . . a *representer*, or *representative*, . . . an *attorney*, . . . an *actor*, and the like."³⁸ Tellingly, the word *agent* comes from a Latin word meaning *to act*.

Hobbes further explained that when a person is acting as a representative of another, "then the person is the *actor*; and he that owns his words or actions, is the *author*: in which case the actor acts by authority."³⁹ If "the actor makes a covenant by authority, he binds thereby the author, no less

³³ See J.P. Canning, *The Corporation in the Political Thought of the Italian Jurists of the Thirteenth and Fourteenth Centuries*, 1 HIST. POL. THOUGHT 9, 15 (1980) ("[I]t was medieval jurists who invented the concept of 'legal person' by being the first to apply the term, *persona*, to the corporation.").

³⁴ See Dodd, Jr., *supra* note 12, at 981 (1929) ("[The early common law] required a theory by which the group could be regarded as a unit and as the kind of unit to which the formal rules of the medieval common law could readily be applied. Persons the common law knew, and the canonist view of the corporation as a fictitious person seemed to solve that problem."); *id.* at 984 ("[G]radually expanding ideas of agency . . . enabled certain authorized individuals to act for the group.").

³⁵ WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 6 (Cambridge University Press 1969).

³⁶ THOMAS HOBBS, *LEVIATHAN: PART I* 152 (E. H. Plumptre, trans., Henry Regnery Co. 1956) (1651).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

than if he had made it himself; and no less subjects him to all the consequences of the same.”⁴⁰

Hobbes then explained that people could (and in his reconstruction, did) lift themselves out of the atomistic state of nature into collective unity by designating a single person as their collective representative.⁴¹ In other words, through representation, a group of people can become as if they were a single person. “For it is the *unity* of the representer, not the *unity* of the represented, that makes the person *one*.”⁴²

The language in *Leviathan* is old, but it still describes how we think. It is common to treat the represented and the representer (or, as we would say now, principal and agent) as if they were the same person. We say, for example, that a corporation did something when, in fact, the actions were taken by employees of the corporation acting on its behalf. Or a court might say that a plaintiff made a particular argument when, in fact, the argument was made by the plaintiff’s lawyer speaking on behalf of the plaintiff.

In summary, the unity of principal and agent started as a legal fiction but became a social construct that is now part of our culture.⁴³ In the past, judges used this construct, much as Hobbes did, to reconcile the individualistic premises of the common law with group action.⁴⁴ After Hobbes, as before, judges expanded the realm of the idea through reasoning by analogy or metaphoric reasoning.⁴⁵

For example, beginning in the late seventeenth century, English judges used the metaphor of identification and the associated maxim *qui facit per alium facit per se* to justify a holding that employers are vicariously responsible for the torts of their servants acting to serve the master within the scope of their employment.⁴⁶ Under this concept, courts treated the

⁴⁰ *Id.* at 153.

⁴¹ *See id.* at 154–55.

⁴² HOBBS, *supra* note 36, at 155.

⁴³ *See* Eric J. Mitnick, *Law, Cognition and Identity*, 67 LA. L. REV. 823, 839 (2007) (discussing how people understand the world through cognitive schema or categories that lack clear boundaries and often overlap).

⁴⁴ *See* Dalley, *All in a Day’s Work*, *supra* note 5, at 521–22 (“The identification doctrine . . . solved a number of problems in agency law because it allowed the agent’s state of mind, as well as his actions, to be imputed to the principal.”).

⁴⁵ *See* Jeffrey M. Lipshaw, *Metaphor, Models, and Meaning in Contract Law*, 116 PENN ST. L. REV. 987, 1036 (2012) (“Reasoning by analogy . . . is an ordinary mode of category extension.”); *see also* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879 (“[T]he law of fiduciary obligation has developed through analogy . . .”) [hereinafter *Beyond Metaphor*].

⁴⁶ *See* Jones v. Hart, (1698) 90 Eng. Rep. 1255, 1255; 2 Salk 441; 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 429–30 (photo. reprt. 2009) (1765); *see also* Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 693 (1930) (“During the nineteenth century the doctrine of *respondeat superior* emerges in its modern form. The old requirement of express command or procurement

actions of employees within the scope of the employment as the actions of the employer. Therefore, vicarious liability simply meant that the law was holding employers accountable for their own conduct.⁴⁷

The metaphor also provided a frame for thinking about the role of agents. If an agent donned the persona of a principal, it was only natural that the agent should be required to stay in the assumed character and act as the principal would act. The law viewed departures from this norm, stepping out of character while still wearing the principal's *persona*, as breaches of fiduciary duty. In 1880, for example, the Supreme Court condemned a conflict of interest transaction between the Union Pacific Railroad and a company secretly owned by the executive directors of the railroad, explaining that the directors' "character as agents forbade the exercise of their powers for their own personal ends against the interest of the company."⁴⁸

The law used the model in a variety of settings. Lawyers could see themselves as "mouthpieces" for their clients.⁴⁹ Judges could see themselves as

"servants"⁵⁰ or "instruments of the law."⁵¹ Indeed, the metaphor helped legitimize judicial power by identifying judges with the law they articulated.⁵²

One hundred plus years ago, scholars accepted the metaphor of identification as the basis of agency law. As Holmes wrote in 1881 in *The Common Law*: "the characteristic feature which justifies agency as a title of the law is the absorption *pro hac vice* of the agent's legal individuality in that of his principal."⁵³ Floyd Mechem added in 1906: "[b]y the creation of the agency, the principal bestows upon the agent a certain character. For

disappears; and implied command gives place to 'course of business' and 'scope of employment.'").

⁴⁷ See Dalley, *All in a Day's Work*, *supra* note 5, at 528 ("Originally, vicarious liability was thought to be based on the 'identification' theory, the idea that the master and servant are the same person in the eyes of the law, but that formalistic view has been rejected for at least a century."); see also Laski, *Vicarious*, *supra* note 4, at 107.

⁴⁸ *Wardell v. R.R. Co.*, 103 U.S. 651, 657–58 (1880).

⁴⁹ Andrew S. Pollis, *Trying the Trial*, 84 GEO. WASH. L. REV. 55, 76 (2016).

⁵⁰ *Confirmation Hearing on the Confirmation of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

⁵¹ *Osborn v. Bank of the United States*, 22 U.S. 738, 866 (1824).

⁵² See M.H. Hoeflich, *Regulation of Judicial Misconduct from Late Antiquity to the Early Middle Ages*, 2 LAW & HIST. REV. 79, 80 (1984) ("Judges themselves must not be lawless; they must follow the substantive law they are intended to administer.").

⁵³ HOLMES, JR., *THE COMMON LAW*, *supra* note 3, at 232.

some purpose, during some time and to some extent, the agent is to be the *alter ego*,—the other self, of the principal.”⁵⁴

Courts often expressed the concept by citing the *qui facit* maxim. For example, a 1927 U.S. Supreme Court opinion stated: “[t]he general rule of the law is, that what one does through another’s agency is to be regarded as done by himself.”⁵⁵ The legal principle, “‘*Qui facit per alium, facit per se*,’ is of universal application, both in criminal and civil cases.”⁵⁶

In 1920, Warren Seavey, the principal drafter of the Second Restatement of Agency (the “Second Restatement”), tied the various formulations together: “[r]epresentative’ is an expression different only in form from ‘*alter ego*’ and other phrasing connoting the identity of principal and agent. It is the modern ‘*qui facit per alium facit per se*.’”⁵⁷

To be sure, the *qui facit* maxim was not the end of analysis. Courts often gave pragmatic reasons for choosing to apply the identification doctrine, such as the need to protect public safety⁵⁸ or ensure corporate responsibility.⁵⁹ But the identification metaphor provided a frame for thought.⁶⁰ Scholars reinforced that conceptual structure with statements like: “throughout the law of agency we are continually met with the notion that the constituent and the representative are one and the same person”⁶¹ and the origins of agency law doctrines are “to be found in the fiction of the identity of principal and agent.”⁶²

C. *Changed Thinking in the Academy*

The old ideas fell out of favor in the legal academy after the legal intellectual climate changed around the turn of the century. “Nineteenth century conceptualism gave way to twentieth century instrumentalism. Law

⁵⁴ Floyd R. Mechem, *The Nature and Extent of an Agent’s Authority*, 4 MICH. L. REV. 433, 436–37 (1906).

⁵⁵ *Ford v. United States*, 273 U.S. 593, 623 (1927).

⁵⁶ *Id.* at 624.

⁵⁷ Warren A. Seavey, *The Rationale of Agency*, 29 YALE L.J. 859, 860 (1920).

⁵⁸ *See, e.g.*, *Phila. & Reading R.R. Co. v. Derby*, 55 U.S. 468, 487 (1852).

⁵⁹ *See, e.g.*, *St. Louis, Alton & Chi. R.R. Co. v. Dalby*, 19 Ill. 353, 368–69 (1857).

⁶⁰ DeMott, *supra* note 30, at 122 (“The *qui facit* maxim itself does not specify limits to vicarious liability. It suggests, instead, a line of further inquiry, aimed at the question whether by its nature a particular wrongful act makes its unfair or implausible to identify the actor with the partnership and other individual partners.”).

⁶¹ FRANCIS B. TIFFANY, *HANDBOOK OF THE LAW OF PRINCIPAL AND AGENT* 11 (West Publishing Co. 1903).

⁶² Walter Wheeler Cook, *Agency by Estoppel*, 5 COLUM. L. REV. 36, 39 (1905); *see* Everett V. Abbot, *Of the Nature of Agency*, 9 HARV. L. REV. 507, 507 (1896) (“Men may and do act through other men in accomplishing results, which, when accomplished, are their acts, to be attributed to them rather than to their instrumentalities.”).

was viewed as a means to an end, as purposeful human activity aimed at achieving social goals.”⁶³ The new approach rejected the notion of judges finding law using traditional legal reasoning,⁶⁴ believing instead that law should be made to benefit society⁶⁵ using modern social science by “a progressive and enlightened caste whose conceptions are in advance of the public.”⁶⁶ The new philosophy judged legal rules by their results, not by their scholastic justification,⁶⁷ and believed that the underlying postulates of the law should be “brought to light and interrogated as to their usefulness.”⁶⁸

The metaphor of identification was an early target of the new thinking. The opening salvos came from Justice Holmes, who attacked the metaphor and the doctrine of vicarious liability of employers in two separate articles. In the first article, Justice Holmes noted that agency law is based on a fiction: “[t]hat fiction is, of course, that, within the scope of the agency, principal and agent are one.”⁶⁹ That fiction guided thought because according to Justice Holmes, “[i]f ‘the act of the servant is the act of the master,’ or master and servant are ‘considered as one person,’ then the master must pay for the act if it is wrongful, and has the advantage of it if it is right.”⁷⁰ He then argued that this way of thinking led courts to unscientific results:

the mere habit of using these phrases, when the master is bound or benefitted by his servant’s act, makes it likely that other cases will be brought within the penumbra of the same thought on no more substantial ground than the way of thinking which the words have brought about.⁷¹

In the second article, Justice Holmes made his feelings on the subject more explicit, making it plain that he did not like the fiction of agency or the doctrine of vicarious liability. Justice Holmes said: “I assume that common-sense is opposed to making one man pay for another man’s wrong, unless he actually has brought the wrong to pass according to the ordinary canons of

⁶³ T. Alexander Aleinkoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 956 (1987); see generally STEPHEN B. PRESSER, *LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW* (2017).

⁶⁴ See Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 241–42 (2007).

⁶⁵ *Id.* at 242.

⁶⁶ Curtis Nyquist, *Re-Reading Legal Realism and Tracing a Genealogy of Balancing*, 65 BUFF. L. REV. 771, 784 (2017).

⁶⁷ *Id.* at 785.

⁶⁸ Jerome Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORNELL L. REV. 568, 576 (1932).

⁶⁹ Holmes, Jr., *Agency*, *supra* note 3, at 345.

⁷⁰ *Id.* at 351.

⁷¹ *Id.*

legal responsibility”⁷² In other words, the employer should only be held liable if “he has induced the immediate wrong-doer to do acts of which . . . wrong was the natural consequence under the circumstances known to the defendant.”⁷³ Holmes concluded, “I therefore assume that common-sense is opposed to the fundamental theory of agency”⁷⁴

Other legal scholars did not agree with Justice Holmes that vicarious liability was unfair to innocent employers. John Henry Wigmore, for instance, thought the law was fine as it stood and that the fiction of identification merely gave judges “an easy, lazy reason” for a doctrine that could also be justified on policy grounds.⁷⁵

Progressive scholars went further, believing that the shifting of losses from hapless tort victims to enterprise owners was such a good idea that employer liability should be expanded.⁷⁶ They attacked the metaphor of identification because it provided a weak, fictitious, and limiting rationale for employer liability. In a 1916 article in the *Yale Law Journal*, Harold J. Laski argued that employer liability was justified by rational “public policy” in an increasingly complex society as “an attempt to calculate the minimum social loss in a social situation where some loss is inevitable.”⁷⁷ Professor Laski criticized the more limited *qui facit* rationale as an “antique legend” and “a stumbling-block in the pathway of juristic progress.”⁷⁸

Professor Laski posited that law should be made based on scientific calculations of public policy and that judicial unwillingness to do so reflected outmoded distrust of government interference. The fiction identifying principal and agent was not an adequate substitute. Laski said: “[i]f judges continue to apply general principles founded on a dangerous and

⁷² Oliver Wendell Holmes, Jr., *Agency II*, 5 HARV. L. REV. 1, 14 (1891) [hereinafter *Agency II*].

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ John H. Wigmore, *Responsibility for Tortious Acts: Its History. II Harm Done by Servants and Other Agents: 1300-1850*, 7 HARV. L. REV. 383, 398–99 (1894) (“But very often the judicial mind gave up the troublesome task of accurately expressing a reason, and, quite content with the policy of the rule, took refuge, when it came to naming a reason, in a fiction or other form of words. . . . The favorite expressions of this sort, however, were ‘the act of the servant is the act of the master,’ when done in the execution of authority”) (citations omitted); *id.* at 399 (“[T]o employ a fiction to sanction a rule which we thoroughly believe in, but lazily prefer to evade accounting for openly and rationally.”); *id.* (“[T]he above fiction of Identification . . . was merely a reason, an easy, lazy reason, which was put forth to sanction and support a rule of whose practical expediency the Courts were perfectly satisfied . . . [and] the rule would have stood substantially as it does now, if all reference to the Identification fiction were wanting.”).

⁷⁶ See, e.g., Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 460 (1923).

⁷⁷ Laski, *Vicarious*, *supra* note 4, at 111, 116.

⁷⁸ *Id.* at 107.

unsatisfactory fiction, only confusion of a lamentable kind can result.”⁷⁹ Laski also called for “a frankly communal application of the law,”⁸⁰ arguing that “[t]he fiction of implied authority is no more than a barbarous relic of individualistic interpretation.”⁸¹ He concluded: “[w]e would base our legal decisions not on the facts of yesterday, but on the possibilities of tomorrow.”⁸²

In summary, the metaphor of identification came under attack from two sides: those who wanted to eliminate vicarious employer liability and those who wanted to expand it. The two sets of critics might not agree on much else, but they did share a dislike for the metaphoric construct at the heart of agency law.

The traditional rationale of agency law also came under attack in the contractual setting. A seminal 1913 article by Wesley Newcomb Hohfeld posited that agency should be understood in terms of the agent’s power to alter the principal’s legal relations and argued that the *qui facit* metaphor of identification obscured the true basis of agency law.⁸³

A 1920 article by Warren Seavey, titled *The Rationale of Agency*, conformed to the new thinking. Professor Seavey, who later became the reporter for the Second Restatement, provided pragmatic rationales for much of agency law. Professor Seavey did not propose any major substantive changes in the law. However, he argued that the effect of fiction in shaping the law had been overestimated, doctrines could be justified without the use of presumptions, and decisions in particular cases could be tested by judicial sense and “the needs of commerce.”⁸⁴

The new rationale quickly became dominant in the academy. Scholars explained agency doctrines as based on the needs of commerce and the judicial sense of what is “socially desirable and expedient.”⁸⁵ The academy dismissed the old rationale as an “irksome fiction”⁸⁶ and then pretty much forgot about it. This oblivion has persisted (within the academy) for nearly a

⁷⁹ *Id.* at 121.

⁸⁰ *Id.* at 121.

⁸¹ *Id.* at 121–22.

⁸² *Id.* at 135; see also Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404, 414 (1916) (criticizing the doctrine of agency “as a means of avoiding the metaphysical problem of what is behind the agent”).

⁸³ See Hohfeld, *supra* note 4, at 46 (“By the use of some *metaphorical* expression such as the Latin, *qui facit per alium, facit per se*, the true nature of agency relations is only too frequently obscured.”).

⁸⁴ Seavey, *supra* note 57, at 859.

⁸⁵ Note, *Vicarious Liability: Statutes as a Guide to Its Basis*, 45 HARV. L. REV. 171, 175 (1931).

⁸⁶ *Id.* at 175.

century. As Paula Dalley said in 2002: “[t]he identification doctrine is now largely ignored, except as an historical artifact.”⁸⁷

Agency did not prosper as a discipline with its new rationale. Perhaps because judicial sense, social expediency and the needs of commerce are such amorphous bases for legal doctrines or perhaps because those considerations do not distinguish agency from other areas of the law, scholarly interest in the field declined. Seventy years ago, most law schools required students to take courses in agency or agency and partnership.⁸⁸ In the past several decades, however, the subject has received little attention in teaching or scholarship.⁸⁹

II. THE METAPHOR AND RESPONDEAT SUPERIOR

A. *The Agency Basis of Vicarious Liability*

Despite the changed intellectual climate, agency has remained an important concept in the courts. After all, the law of agency sets the rules for such pervasive questions as representation, authority, notice, attribution, vicarious responsibility, and the agency duties of loyalty, obedience, and confidentiality. In the administration of justice, agency issues are inescapable.

As theoretical constructs, social expediency and the needs of commerce do not provide much in the way of guidance. Nor do they explain the law. Judges still see the subject through the traditional lens. Courts continue to use the metaphor of identification and doctrines based on it, preferring their formal structure to open-ended, policy-based balancing tests.⁹⁰ Questions of attribution and responsibility still depend on judgments as to the capacity in which a particular player was acting. The mental process of treating the conduct of agents acting within the scope of their agency as the conduct of

⁸⁷ Dalley, *All in a Day's Work*, *supra* note 5, at 522.

⁸⁸ See Paula Dalley, *Destroying the Scope of Employment*, 55 WASHBURN L.J. 637, 660 n.167 (2016) (“In 1949, 62 of 100 law schools included either Agency or Agency and Partnership in their required curricula.”).

⁸⁹ See Barnett, *supra* note 6, at 1970 (referring to the “current dearth of American agency law scholarship”); *id.* at 1970 n.4 (referencing “the current neglect of agency law in the American law school curriculum”).

⁹⁰ See Paul B Miller, *The Fiduciary Relationship*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 63, 63 (Andrew S. Gold & Paul B Miller eds., 2014) (“The conceptual structure of private law is, to a considerable extent, formal in nature. Principles of private liability are mediated by relatively stable forms of action, interaction, and organization.”); see also Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 769 (2000) (“[C]ourts possess a fairly well-developed schema of the fiduciary role.”).

the principal remains the same habit of mind that it was in Holmes' day. For judges, the benefits of using the familiar frame outweigh any possible costs.

The most striking example of the persistence of the metaphor is that courts still follow the traditional, middle ground approach to vicarious liability that Holmes and Laski condemned for being based on the fiction of agency. Innocent employers are held liable for some torts of those they employ, but their vicarious liability is limited by the scope of employment test and the independent contractor doctrine.⁹¹ *Respondeat superior* does not apply to all torts proximately caused by the employment relationship, even though the modern academic rationale for the doctrine says that it should.⁹² This area of law provides a good illustration of how agency law in the courts departs from the current academic understanding.

B. *Traditional Rationale*

By way of background, holding employers responsible for the torts of their (often judgment-proof) employees no doubt advances public policy, at least in certain circumstances. Employer liability gives the victims a source of compensation and employers an added incentive to make sure that accidents do not happen.⁹³ Costs incident to the corporate enterprise are shifted from hapless tort victims to those better able to manage the costs and build them into the price of products. In addition, vicarious liability is often necessary for the regulation of corporations, which can act only through agents.⁹⁴

In the formative years of the employer liability doctrine, from 1698 to 1922, public policy alone was not considered a sufficient justification for vicarious liability. The law, after all, had to respect the rights of the individual. For example, holding *A* responsible for *B*'s misconduct, without *A*'s consent and when *A* had done nothing wrong, clashed with the common law sense of justice. Even if *A* had deeper pockets and even if making *A* pay for something that *B* did wrong might be said to advance the common good,

⁹¹ See, e.g., *Stone v. Pinkerton Farms, Inc.*, 741 F.2d 941, 946 (7th Cir. 1984).

⁹² See, e.g., *Copeland v. County of Macon*, 403 F.3d 929, 932 (7th Cir. 2005).

⁹³ See William O. Douglas, *Vicarious Liability and Administration of Risk I*, 38 *YALE L.J.* 584, 585 (1929).

⁹⁴ See, e.g., *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 495 (1908) (“[S]tatutes against rebates could not be effectively enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions enured to the benefit of the corporations of which the individuals were but the instruments.”); see also *Phila. & Reading R.R. Co. v. Derby*, 55 U.S. 468, 487 (1853) (noting that if the disobedience of the servant were a defense to vicarious liability of railroad companies, “the remedy of the injured party would in most cases be illusive, discipline would be relaxed, and the danger to the life and limb of the traveller greatly enhanced.”).

the practice resembled too much of the guilt by association, collective responsibility, and punishment of innocents associated with tyrannies.

The metaphor of identification, together with the concept of representation that it expressed, solved this problem. If the actions of employees within the scope of their employment were the actions of the employer, then the vicarious liability of employers simply meant that employers were being held accountable for their own conduct, which was how the law is supposed to work.⁹⁵ The maxim *qui facit per alium, facit per se* justified holding corporations accountable for what its employees did on behalf of the company. As the U.S. Supreme Court said in 1908 to explain how a corporation could have the mens rea to commit a crime: “Since a corporation acts by its officers and agents their purposes, motives, and intent are just as much those of the corporation as are the things done.”⁹⁶

Moreover, the fiction did describe a type of reality. As a 1911 article put it: “[a] corporation is as visible a body as an army; for though the commission or authority be not seen by every one, yet the body, united by that authority, is seen by all but the blind.”⁹⁷ Thus, “when a jurist first said, ‘A corporation is a person,’ he was using a metaphor to express the truth that a corporation bears some analogy or resemblance to a person, and is to be treated in law in certain respects as if it were a person, or a rational being capable of feeling and volition.”⁹⁸

However, the fiction had its own logic that had to be honored. It was not enough that the employment relationship was a cause of the tort or that the employer derived some benefit from the actions of the wrongdoer. To justify vicarious liability, there needed to be representation. The wrongdoer must have been acting as the employer.⁹⁹ This generally meant that the errant actor had to have been an employee of the defendant who was on the job and trying to do the job at the time of the tort.¹⁰⁰

A 1902 decision illustrates the old rationale.¹⁰¹ A man named Keenan got into an accident while driving a horse and wagon. Keenan’s immediate employer was in the transportation business, owned the horse and wagon and paid Keenan his wages.¹⁰² At the time of the accident, Keenan was carrying

⁹⁵ See V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1482 (1996) (“In order to hold corporations liable for misfeasance, courts imputed agent conduct to corporations, and such imputation would have been theoretically troublesome without the doctrine of respondeat superior.”).

⁹⁶ *N.Y. Cent. & Hudson River R.R. Co.*, 212 U.S. at 493.

⁹⁷ Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 261 (1911).

⁹⁸ *Id.* at 263.

⁹⁹ See, e.g., *Fioccio v. Carver*, 137 N.E. 309, 311 (N.Y. 1922).

¹⁰⁰ See *id.*

¹⁰¹ See *Driscoll v. Towle*, 181 Mass. 416 (1902).

¹⁰² See *id.* at 417.

property owned by the Boston Electric Light Company (pursuant to an arrangement between his employer and the Boston Electric Light Company) and was following general orders given to him by an employee of the Boston Electric Light Company that day.¹⁰³

In an opinion by Justice Holmes, the Massachusetts Supreme Judicial Court held Keenan's negligence was attributable to his employer and not to the Boston Electric Light Company.¹⁰⁴ The mere fact that Keenan followed orders given to him by the Boston Electric Light Company was not enough "to take him out" of his relationship with his employer and

make him a voluntary subject of a new sovereign.

There is not that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to make the employer liable under the fiction that the act of the employed is his act.¹⁰⁵

The Court went on to explain that even though a driver may be given instructions by those who have made a bargain with his employer, "he remains subject to no orders but those of the man who pays him. Therefore, he can make no one else liable if he negligently runs a person down in the street."¹⁰⁶

A 1922 decision from New York also illustrates the traditional approach.¹⁰⁷ A truck driver was supposed to bring his truck back to a garage at Twenty-Third Street and Eleventh Avenue on the west side of Manhattan. Instead, he drove across town to Hamilton Avenue on the east side of the city to join in a neighborhood carnival where he allowed children to ride on the truck.¹⁰⁸ Just as the driver was leaving the carnival to go back to the garage, a child was injured by the truck's wheel while trying to get down from the truck.¹⁰⁹

The New York Court of Appeals held that the driver's employer was not liable because the driver had left the scope of employment.¹¹⁰ The opinion by Justice Cardozo explained that "[w]e are not dealing with a case where, in the course of a continuing relation, business and private ends have been coincidentally served, [but rather] [w]e are dealing with a departure so manifest as to constitute an abandonment of duty, exempting the master from

¹⁰³ *See id.*

¹⁰⁴ *See id.* at 418–19.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See* *Fioccio v. Carver*, 137 N.E. 309 (N.Y. 1922).

¹⁰⁸ *Id.* at 310.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

liability till duty is resumed.”¹¹¹ The fact that the driver was heading back to the garage at the time of the accident was not enough to bring him back into the scope of employment because “the homeward trip was bound up with the effects of the excursion, the parts interpenetrated and commingled beyond hope of separation. Division more substantial must be shown before a relation, once ignored and abandoned, will be renewed and re-established.”¹¹²

A more recent example of the traditional rationale may be seen in a 1999 case from Virginia.¹¹³ A police officer, working as a guard at an amusement park, arrested a customer for allegedly passing a bad check. The charges were later dropped and the customer sued the park for false arrest.¹¹⁴

The U.S. Court of Appeals for the Fourth Circuit, applying Virginia law, held that the vicarious liability of the park depended on what capacity the officer was acting in when she arrested the plaintiff.¹¹⁵ If the officer was engaged in the performance of her duty as a police officer “such as the enforcement of general laws” then the park would incur no liability, but if the officer was “engaged in the protection of the employer’s property, ejecting trespassers or enforcing rules and regulations promulgated by the employer” then there was a jury question as to whether the park should be held liable.¹¹⁶ The Court went on to hold that because the plaintiff “presented no evidence that [the officer] acted other than in her capacity as a public officer in effecting” the plaintiff’s arrest, the park could not be held liable.¹¹⁷

C. *Scholarly Criticism*

Most of the scholarly literature on agency (referenced earlier) focused on the question of vicarious liability. In the nineteenth century, scholars scorned the vicarious liability rules as inconsistent with the individualist premises of the common law and going much too far in imposing liability on corporate employers.¹¹⁸ The articles by Holmes, discussed above, are illustrative.¹¹⁹ Additionally, one article observed in 1923 that “[n]o legal

¹¹¹ *Id.* at 311.

¹¹² *Id.*

¹¹³ *Austin v. Paramount Parks, Inc.*, 195 F.3d 715 (4th Cir. 1999).

¹¹⁴ *Id.* at 718.

¹¹⁵ *Id.* at 731.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *See* Smith, *supra* note 76, at 452-53.

¹¹⁹ *See* Holmes, Jr., *Agency*, *supra* note 3, at 345; *Agency II*, *supra* note 72, at 1.

doctrine has been so generally criticized and yet so generally adhered to by courts as the doctrine of *respondeat superior*.¹²⁰

Some scholars still believe that courts imposing vicarious responsibility “rely on simplistic notions of agency”¹²¹ and “legal fictions”¹²² and go too far in imposing liability on corporations.¹²³ However, since the early twentieth century, most scholars have taken the opposite tack, arguing that the vicarious liability rules adhere too closely to the laissez faire attitude of the common law and do not go far enough in imposing liability on corporations.

Harold Laski’s 1916 article, discussed above, led the way, with its thesis that public policy alone was a sufficient justification for vicarious employer liability, so the limiting “fiction of implied authority” should be discarded as “a barbarous relic of individualistic interpretation.”¹²⁴ Young B. Smith made a similar point in his 1923 article, arguing that the same public policy that supported the workers’ compensation laws also justified vicarious liability of employers. The article reasoned that “[i]f it is socially expedient to spread and distribute throughout the community the inevitable losses occasioned by injuries to employees engaged in industry, is it not also socially expedient to spread and distribute the losses due to injuries to third persons which are equally inevitable?”¹²⁵ The article then went on to argue that judges applying the doctrine should keep this justification in mind “and seek to reach conclusions which will further the policy upon which the justification rests.”¹²⁶

In 1929, then-Professor William O. Douglas took a similar position, arguing that the employer is in the best position to administer the risks of the enterprise.¹²⁷ The employer can decide whether it is most efficient to avoid the costs by not engaging in the activity likely to create the risks, prevent the costs by taking added safety measures, shift the risks to an insurer (and then build the cost of insurance into the price of the products) or assume the risk (and build self-insurance into the price of the products). Douglas urged that vicarious liability be expanded to fit this new rationale.¹²⁸

¹²⁰ Smith, *supra* note 76, at 452.

¹²¹ William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 648, 649 (1994).

¹²² Daniel R. Fischel and Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL. STUD. 319, 320 (1996).

¹²³ See, e.g., Jennifer H. Arlen and William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 694 (“enterprise liability results in large wealth transfers from one group of innocent investors to another”).

¹²⁴ Laski, *Vicarious*, *supra* note 4, at 121-22.

¹²⁵ Smith, *supra* note 76, at 457.

¹²⁶ *Id.* at 460.

¹²⁷ Douglas, *supra* note 93, at 585, 588.

¹²⁸ *Id.* at 587-88.

In 1961, Guido Calabresi argued that vicarious employer liability promoted the efficient allocation of resources in society by forcing enterprises to internalize their costs and reflect those costs in the prices that they charged. The theory was that if prices did not reflect true costs there would be overuse and overinvestment in products with large negative externalities.¹²⁹ Alan O. Sykes made a similar economic argument in favor of vicarious liability in 1984, but with qualifiers about the need to take into account the positive externalities of employment.¹³⁰ In 2011, Paula Dalley argued that the whole point of agency law was to allow enterprises to internalize their benefits and force them to internalize their costs.¹³¹

In his treatise on the law of torts, William Prosser summarized the scholarship:

[T]he modern justification for vicarious liability is a rule of policy, a deliberate allocation of risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon the enterprise itself, as a required cost of doing business.¹³²

Prosser went on to express the hope that, in accordance with this rationale, the exemption of independent contractors from vicarious liability rules would be substantially reduced, so that it only applied to "a limited group of cases" in which the employer "is not in a position to select a responsible contractor, or the risk of any harm to others from the enterprise is slight."¹³³

For scholars, the identification basis for vicarious liability was ancient history. In the words of a 2011 article, "[o]nce legal fictions became suspect, the identification doctrine fell out of favor and it is not a useful doctrine today."¹³⁴

¹²⁹ See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500 (1961).

¹³⁰ Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1244 (1984); see also Jennifer Arlen & Reiner Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 698 (1997) ("Forcing firms to pay for all components of product cost (including expected misconduct) helps ensure that product prices reflect the full social cost of the product. Production is socially optimal because customers will purchase the product only if its value to them equals or exceeds its full cost of production, as reflected in the product price.").

¹³¹ See Dalley, *A Theory of Agency Law*, *supra* note 5, at 499-500.

¹³² WILLIAM PROSSER, *HANDBOOK OF THE LAW OF TORTS* 500 (5th ed. 1984).

¹³³ *Id.* at 509.

¹³⁴ Dalley, *A Theory of Agency Law*, *supra* note 5, at 518.

D. *Persistence of Tradition in the Courts*

The “modern justification” for vicarious employer liability taught by scholars would hold employers accountable for the torts of those employed by the enterprise whenever the tort was a proximate result of the enterprise, regardless of whether the wrongdoer was an employee on the job, trying to do the job or otherwise acting within the scope of his or her employment at the time of the tort. As the Prosser treatise indicates, this would require a modification of existing law.¹³⁵ Indeed, in his 1929 article, then-Professor William Douglas explained how the scope of employment test and the independent contractor doctrine should be changed to expand employer liability in order to fit the modern rationale.¹³⁶

This broader approach to liability is sometimes followed in a few jurisdictions¹³⁷ and by occasional judges.¹³⁸ For the most part, however, courts still go by the traditional standard for vicarious employer liability, a discrepancy from theory that has drawn scholarly comment¹³⁹ and criticism.¹⁴⁰

Thus, for example, vicarious liability under respondeat superior is limited to employees and does not extend to independent contractors even if the enterprise had a regular relationship with the errant worker and could have established a right of control if it wished to do so.¹⁴¹ This doctrine does not appear to be going away. On the contrary, the California Supreme Court, one of the most liberal in the country, held in 2014 that Domino’s Pizza was not vicariously responsible for the misconduct of an employee of one of its franchisees.¹⁴² Domino’s was shielded from liability, the Court ruled, because the worker and the franchisee were independent contractors of Domino’s, and not the company’s employees.¹⁴³

¹³⁵ See PROSSER, *supra* note 132, at 509-10.

¹³⁶ See Douglas, *supra* note 93, at 593.

¹³⁷ See, e.g., Sugimoto v. Exportadora De Sal, S.A., 19 F.3d 1309, 1311-12 (9th Cir. 1994).

¹³⁸ See, e.g., Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171-72 (2d Cir. 1968).

¹³⁹ See, e.g., 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, 609 (1988) (“[S]ome of the rules that have developed to define the scope of employment ... are difficult to reconcile with a view of the tort law as promoting efficiency”); Alan O. Sykes, Note, *An Efficiency Analysis of Vicarious Liability Under the Law of Agency*, 91 YALE L.J. 168, 169 (1981) (“The existing law of agency differs significantly from the normative implications of the proposed economic model.”).

¹⁴⁰ See, e.g., Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 137 (2013); Dalley, *All in a Day’s Work*, *supra* note 5, at 568 (“A rote application of an overly-simplified purpose-to-serve test to determine that harassment is necessarily outside the scope of employment applies the wrong law to the wrong facts.”).

¹⁴¹ See, e.g., Stone v. Pinkerton Farms, Inc., 741 F.2d 941, 944-45 (7th Cir. 1984).

¹⁴² See Patterson v. Domino’s Pizza, LLC, 177 Cal. 4th 474, 503 (Cal. 2014).

¹⁴³ See *id.* at 499-501.

And it is not enough that the tortfeasor is an employee of the defendant corporation. For respondeat superior liability to attach, the wrongdoer must also have been acting in his or her capacity as an employee of the defendant at the time of the wrongdoing. A 1998 U.S. Supreme Court decision provides a good illustration.¹⁴⁴ The government sued a parent company to recover the cost of cleaning up hazardous waste generated by a subsidiary corporation. Among other things, the government argued that the parent should be considered an operator of the facility (enough to trigger liability under the statute) because officers and directors of the parent also served as officers and directors of the operating subsidiary.¹⁴⁵ The Supreme Court rejected this argument, explaining that the parent and subsidiary have distinct legal personalities, so that “directors and officers holding positions with a parent and its subsidiary can and do ‘change hats’ to represent the two corporations separately, despite their common ownership.”¹⁴⁶ The Court went on to say “[s]ince courts generally presume ‘that the directors are wearing their ‘subsidiary hats’ and not their ‘parent hats’ when acting for the subsidiary,’ . . . it cannot be enough to establish liability here that dual officers and directors made policy decisions and supervised activities at the facility.”¹⁴⁷

In determining whether an employee is wearing the employer’s “hat” at the time of a tort (and thus bears the employer’s persona for purposes of respondeat superior), courts continue to use the traditional scope of employment doctrine. Under that doctrine, (to quote a 1998 U.S. Supreme Court decision quoting Section 228(1) of the Restatement (Second) of Agency), conduct is within the scope of employment if it is “‘of the kind [a servant] is employed to perform,’ occurring ‘substantially within the authorized time and space limits,’ and ‘actuated, at least in part, by a purpose to serve the master,’ [except when the conduct involves] an intentional use of force ‘unexpected by the master.’”¹⁴⁸

It is worth noting that this doctrine is inconsistent with what Prosser described as the modern justification for vicarious liability and allows employers to avoid liability for employee torts that were proximately caused by the employment relationship. For example, under this test, employers are normally not liable for road rage attacks by their employees even if the tort was provoked by the employee’s service.¹⁴⁹

¹⁴⁴ See *United States v. BestFoods*, 524 U.S. 51 (1998).

¹⁴⁵ *Id.* at 57.

¹⁴⁶ *Id.* at 69 (quoting *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 779 (5th Cir. 1997)).

¹⁴⁷ *Id.* at 69-70.

¹⁴⁸ *Faragher v. City of Boca Raton*, 524 U.S. 775, 793 (1998).

¹⁴⁹ See, e.g., *Williams v. Hall*, 288 Ill. App. 3d 917, 920-21 (Ill. App. Ct. 1997).

The test also allows employers to escape liability for vigilante action by their employees, even when the employment enabled the tort. Consider a 2005 decision from Illinois, in which a jail guard deliberately opened the cell door of an accused child molester and invited other prisoners to attack him.¹⁵⁰ The U.S. Court of Appeals for the Seventh Circuit held that the guard's employer was not liable because the guard's role "in arranging the beating of a pre-trial detainee was not the type of conduct that he was authorized to perform nor was his conduct actuated by a purpose to serve his master, the County of Macon."¹⁵¹

The scope of employment test also allows employers to avoid liability for employee torts that occur while they are commuting¹⁵² or engaged in personal activities at the office,¹⁵³ even if the job was a proximate cause of the tort.

Another important implication of the traditional standard is that employers are generally not vicariously responsible for work-related sexual torts by their employees.¹⁵⁴ As the U.S. Court of Appeals for the Seventh Circuit explained in 2017, in accordance with Section 228 of the Restatement (Second) of Agency, the employer is not liable "for the acts of an employee where the acts complained of were committed solely for the benefit of the employee . . . [I]n the specific context of sexual assault, the sexual nature of the misconduct generally disqualifies the employee's act as being taken in furtherance of the employer's interest."¹⁵⁵ The Court went on to note that this rule of non-liability applies "even where the employment provided the opportunity for the employee to engage in the misconduct."¹⁵⁶

To be sure, respondeat superior is not the only basis for employer vicarious liability. Employers may also be liable if the wrongdoer was acting with the apparent authority of the employer and the victim relied on that apparent authority.¹⁵⁷ In limited circumstances, the employer may also be liable if it had a non-delegable duty to protect the victim.¹⁵⁸ However, these long-standing exceptions to the general rule do not change the fact that, normally, vicarious liability is limited to misconduct by employees acting within the scope of employment.

¹⁵⁰ See *Copeland v. County of Macon*, 403 F.3d 929, 931 (7th Cir. 2005).

¹⁵¹ *Id.* at 932.

¹⁵² See, e.g., *Hamm v. United States*, 483 F.3d 135, 136 (2d Cir. 2007).

¹⁵³ See, e.g., *Delfino v. Agilent Techs., Inc.*, 145 Cal. App. 4th 790, 813-14 (6th Dist. 2006).

¹⁵⁴ See, e.g., *Poe v. Domino's Pizza, Inc.*, 139 F.3d 617, 619 (8th Cir. 1998).

¹⁵⁵ *Richards v. U.S. Steel*, 869 F.3d 557, 565 (7th Cir. 2017).

¹⁵⁶ *Id.* at 566.

¹⁵⁷ See, e.g., *Gleason v. Seaboard Air Line Ry.*, 278 U.S. 349, 355 (1929).

¹⁵⁸ See, e.g., *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 913 (11th Cir. 2004).

There are economic arguments why the traditional test may be sound. Employment has positive as well as negative externalities. For example, people with legitimate jobs are less likely to commit crimes. Employers cannot capture these positive externalities. They cannot charge fees to the people whom their employees would have victimized in another life. Therefore, expanding vicarious liability to make sure that the employers pay for all the negatives caused by the employment relationship when the employers are not compensated for all the positives may deter socially beneficial employment.¹⁵⁹

However, judges do not usually give an economic rationale for following tradition, nor do they try to shape the doctrines to fit an economic justification. Rather, the traditional scope of employment and independent contractor rules developed more than a century ago, back when the metaphor of identification was the acknowledged basis of doctrine, are simply stated and followed. Additionally, when explanations are offered, they tend to be jurisprudential. They reveal that judges, for the most part, do not accept Laski's thesis that courts should be updating the law to reflect proper public policy.¹⁶⁰ Instead, judges seem to think that courts should follow traditional agency law unless the legislature clearly commands otherwise.

In 1998, for example, the U.S. Supreme Court held that the traditional rules for imputing the liability of a subsidiary to a parent corporation were incorporated into a federal environmental statute that said nothing on the subject.¹⁶¹ The Court explained that in order to “abrogate a common-law principle, the statute must speak directly to the question addressed by the common law,”¹⁶² so that against the “venerable common-law backdrop, the congressional silence is audible.”¹⁶³

In another 1998 decision, the U.S. Supreme Court held that the traditional scope of employment test was incorporated into Title VII of the Civil Rights Act of 1964.¹⁶⁴ The Court reasoned that the statute's use of the word “agent” in the statute “expressed Congress's intent that courts look to traditional principles of agency law in devising standards of employer liability”¹⁶⁵ and “there is no reason to suppose that Congress wished courts to ignore the traditional distinction [between acts falling within and outside

¹⁵⁹ Employers should only be forced to internalize the net externalities. *See* Sykes, *supra* note 130, at 1244.

¹⁶⁰ *See, e.g.,* Faragher, 524 U.S. at 798.

¹⁶¹ *BestFoods*, 524 U.S. at 70.

¹⁶² *Id.* at 63.

¹⁶³ *Id.* at 62.

¹⁶⁴ *Faragher*, 524 U.S. at 798.

¹⁶⁵ *Id.* at 791.

of the scope of employment].”¹⁶⁶ The Supreme Court reached a similar conclusion in 2003, holding that traditional vicarious liability rules were incorporated into the Fair Housing Act because Congress had not specified otherwise.¹⁶⁷

The general judicial preference for leaving policymaking to the legislature may also be seen in the dissenting opinions in the (relatively unusual) cases in which State Supreme Courts decide to expand vicarious liability. In a 2018 Delaware case, for example, the dissenters argued that the court’s decision to hold the government vicariously liable for a police officer’s sexual tort usurped the function of the legislature because it was based on the “court’s own policy determinations.”¹⁶⁸ The dissenters said that the issue before the court was “laden with policy questions” so the court should have respected “the General Assembly’s policy-making function” and not changed the law based on its own policy view, particularly when the court did so “without any evidentiary showing that the public will benefit by spreading the cost of a rogue employee’s conduct,” rather than letting it remain “on the wrongdoer alone.”¹⁶⁹

The dissenters in a 2016 Connecticut case made a similar point when the State Supreme Court expanded the vicarious liability of hospitals for malpractice. The dissenters argued that it was the function of the legislature, and not the court, to set the policy for the State.¹⁷⁰ The dissenters noted that the legislature was set up to make policy decisions because it could consult outside experts, elicit input from regulators and “enact comprehensive reform, establishing boundaries of liability and providing predictability to health-care institutions and their insurer[s].”¹⁷¹ Moreover, the dissenters observed, since the allocation of the cost of medical malpractice involves a value judgment, “the legislature, as an elected body, may be held accountable if the allocation is not in line with societal values.”¹⁷² By contrast, the dissenters went on, judges are only able to decide the case before them based on the evidence presented by the parties. Therefore, “they develop policy in an ad hoc basis and on the basis of the facts presented in each case, which creates uncertainty.”¹⁷³ Furthermore, the dissenters noted, “members of this

¹⁶⁶ *Id.* at 798.

¹⁶⁷ *See Meyer v. Holley*, 537 U.S. 280, 286-87 (2003).

¹⁶⁸ *Sherman v. State of Delaware*, 190 A.3d 148, 194 (Del. 2018) (Valihura, J., dissenting).

¹⁶⁹ *Id.* at 198-99.

¹⁷⁰ *Cefratti v. Aranow*, 141 A.3d 752, 776 (Conn. 2016) (Zarella, J., dissenting).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 777.

court, unlike the elected bodies of government, cannot be held accountable for the value judgments they reach.”¹⁷⁴

In a sense, the metaphor of identification is also judge-made law and expands liability. Yet the metaphor has been around for so long, and the doctrines developed pursuant to it are so well established, that judges regard the metaphor as law and not as policymaking. Therefore, the metaphor can be used to hold corporations accountable for (at least some) of the misconduct of those they employ.

III. OTHER AGENCY DOCTRINES BASED ON THE METAPHOR

There are many other examples of agency law doctrines that puzzle scholars but can be explained and justified by the metaphor of identification.

A. *The IntraCorporate Conspiracy Doctrine*

The intracorporate conspiracy doctrine provides that agreements between agents of the same corporation, acting within the scope of their agency, do not constitute a conspiracy.¹⁷⁵ The theory underlying the doctrine is that a conspiracy requires multiple parties and the agents are acting as a single person, their employer. As the Eleventh Circuit explained in 2000, the doctrine is based on agency principles that, “[w]hen two agents of the same legal entity make an agreement in the course of their official duties . . . as a practical and legal matter their acts are attributed to their principal.”¹⁷⁶

The doctrine has significant costs because it impedes the effective prosecution of claims against individual wrongdoers operating within a corporation for the benefit of that corporation.¹⁷⁷ The persistence of the doctrine shows much value the law places on using the metaphor of identification as an anchor for its conceptual framework for dealing with groups.

¹⁷⁴ *Id.*

¹⁷⁵ See *Dickerson v. Alachua Cty. Comm’n*, 200 F.3d 761, 767 (11th Cir. 2000).

¹⁷⁶ *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017).

¹⁷⁷ For policy arguments against the doctrine, see J.S. Nelson, *Paper Dragon Thieves*, 105 GEO. L.J. 871, 910 (2017); J.S. Nelson, *The Corporate Conspiracy Vacuum*, 37 CARDOZO L. REV. 249, 250 (2015).

B. *The Rights and Liabilities of Undisclosed Principals*

Another illustration of the continuing vitality of the metaphor of identification is the doctrine that generally treats undisclosed principals as parties to contracts entered into by their authorized agents. As a Kansas federal court stated in 2017, “[a] contract executed by an authorized agent in his own name, but in fact in behalf of his principal, is the contract of the principal and suit may be brought against him to enforce its provisions.”¹⁷⁸

Before Randy Barnett reconciled the doctrine with contract theory in 1987,¹⁷⁹ scholars criticized the doctrine, saying it ignored fundamental legal principles¹⁸⁰ and describing it as clearly anomalous.¹⁸¹ According to one article, “[n]o . . . textbook omits to call [the doctrine] . . . ‘an anomaly in the law of contracts.’”¹⁸² A treatise said that the “rules governing the undisclosed principal have often been described as anomalous.”¹⁸³

Through the lens of the metaphor of identification, the doctrine makes perfect sense. In 1858, the U.S. Supreme Court explained why an undisclosed principal could sue to enforce a contract made by his authorized agent. The Court noted that, “[t]he contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein . . . by reason that the act of the agent is the act of the principal.”¹⁸⁴ In 1883, Justice Holmes, speaking for the Massachusetts Supreme Judicial Court, explained that an undisclosed principal is liable on a contract for the same reason “which is usually given for the liability of a master for his servant’s torts, that the act of the agent is the act of the principal; . . . the meaning of which . . . is . . . that master and servant are ‘fained to be all one person.’”¹⁸⁵

The application of the same rule in positive law is illustrated by the prosecution of John Gooding in 1827 for violation of a federal statute that

¹⁷⁸ *Rezac Livestock Comm’n Co., Inc. v. Pinnacle Bank*, 255 F. Supp. 3d 1150, 1158 (D. Kan. 2017) (quoting *C.A. Karlan Furniture Co. v. Richardson*, 324 P.2d 180, 183 (Kan. 1958)).

¹⁷⁹ See Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CALIF. L. REV. 1969 (1987).

¹⁸⁰ See James Barr Ames, *Undisclosed Principal -- His Rights and Liabilities*, 18 YALE L.J. 443, 443 (1909).

¹⁸¹ See P.F.P. Higgins, *The Equity of the Undisclosed Principal*, 28 MOD. L. REV. 167, 167 (1965).

¹⁸² See W. Muller-Freienfels, *The Undisclosed Principal*, 16 MOD. L. REV. 299, 299 (1953).

¹⁸³ See HAROLD REUSCHLEIN & WILLIAM GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 95 (1979).

¹⁸⁴ See *Ford v. Williams*, 62 U.S. 287, 289 (1858). See also *Agency II*, *supra* note 72, at 2 (the rules imposing liability on undisclosed principals follows “from the identification of agent and principal”).

¹⁸⁵ *Byington v. Simpson*, 134 Mass. 169, 170 (Mass. 1883).

made it a crime to outfit a ship for the international slave trade.¹⁸⁶ Since Gooding was the ship's owner, and not one of the workers, he argued he was entitled to a jury instruction that he could be convicted only if he personally did the work and not if he merely caused the work to be done by others in his employ.¹⁸⁷ The Supreme Court, in a rare procedure of addressing pre-trial issues, rejected this argument, holding that the statute did not require Gooding to have done the work personally.¹⁸⁸ In an opinion by Justice Joseph Story, the Court explained that “[i]f done by others under the command and direction of the owner, with his approbation and for his benefit, it is just as much in contemplation of law his own act, as if done by himself . . . *qui facit per alium, facit per se*.”¹⁸⁹

In 2016, the U.S. Court of Appeals for the Tenth Circuit held that a search of email attachments for child pornography by a corporation acting as a government agent should be treated as a search by the government for purposes of the Fourth Amendment.¹⁹⁰ The Court of Appeals reasoned that “for what would have been the point of the Amendment if the government could have instantly rendered it a dead letter by the simple expedient of delegating to agents investigative work it was forbidden from undertaking itself?”¹⁹¹

Thus, the rules governing rights and liabilities of undisclosed principals, based on the *qui facit* metaphor of identification, have persisted in the courts from the nineteenth century to the twenty first century despite criticism by twentieth century scholars that the doctrines were anomalies in the law.

C. *Defining Agency*

Courts also used the metaphor of identification in determining whether a particular person is an agent. Consider, for example, the 2003 Delaware Chancery Court decision in *Fasciana v. Electronic Data Systems Corporation*.¹⁹² John Fasciana worked as an outside attorney for Electronic Data Systems Corporation (“EDS”) and was later indicted for alleged misconduct in that role.¹⁹³ Some of the actions involved advice he provided to EDS that allegedly defrauded the company. Other actions involved

¹⁸⁶ *Gooding*, 25 U.S. at 467.

¹⁸⁷ *Id.* at 472.

¹⁸⁸ *Id.* at 469-70.

¹⁸⁹ *Id.* at 472.

¹⁹⁰ *United States v. Ackerman*, 831 F.3d 1292, 1308 (10th Cir. 2016).

¹⁹¹ *Id.* at 1300.

¹⁹² 829 A.2d 160 (Del. Ch. 2003).

¹⁹³ *Id.* at 164-65.

representations that he made on behalf of EDS.¹⁹⁴ The company had a corporate bylaw that promised to advance the litigation expenses of corporate agents to the fullest extent permitted by Section 145 of the Delaware Corporation Law.¹⁹⁵ Fasciana asked for advances pursuant to the bylaw, but EDS refused to pay and Fasciana sued.¹⁹⁶ The Delaware Chancery Court held that Fasciana was only entitled to indemnification for the expenses connected to the representations that he made on behalf of the company.¹⁹⁷ The work that he did advising the company, the court held, was not done in the capacity of agent.

The Chancellor explained that “[t]he term agent is thrown around in many legal contexts and often without great precision.”¹⁹⁸ Yet in the context of Section 145 of the Delaware Corporation Code, it is reasonable to interpret the term “in the more precise sense characteristic of its primary common law definition, which embraces the ‘essential’ requirement that an agent has the power to act on behalf of the principal with third persons.”¹⁹⁹ The Chancellor noted that “[t]he heart of agency is expressed in the ancient maxim: *Qui facit per alium, facit per se* [one acting by another is acting for himself].”²⁰⁰ Reiterating that same point, the opinion noted that “[t]he essence of an agency relationship is the delegation of authority from the principal to the agent which permits the agent to act not only *for*, but *in place of*, his principal in dealings with third parties.”²⁰¹

The Chancellor went on to say that “[i]n this traditional context, the acts of the agent within the scope of the agency are fairly said to be the actions of the principal,”²⁰² so that the agent might fairly expect indemnity under Section 145 of the Corporation Code. By contrast, when a lawyer is providing advice to a client, the lawyer might well owe fiduciary obligations to the client, but the provision of advice “does not ... make the lawyer the agent of the corporation in the sense that [Section] 145 intends.”²⁰³

The *Fasciana* decision illustrates the definition of agency in Section 1.01 of the Restatement (Third) of Agency, which lists as one of the requirements of agency that “the agent shall act on the principal’s behalf.”²⁰⁴ Comment g. to Section 1.01 explains that “[t]he common-law definition of

¹⁹⁴ *See id.*

¹⁹⁵ *See id.* at 167.

¹⁹⁶ *See id.* at 168.

¹⁹⁷ *Id.* at 167.

¹⁹⁸ *Fasciana*, 829 A.2d at 168.

¹⁹⁹ *Id.* at 169.

²⁰⁰ *Id.* at 169 n.30 (internal quotation marks omitted).

²⁰¹ *Id.*

²⁰² *Id.* at 171.

²⁰³ *Id.*

²⁰⁴ RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW. INST. 2007).

agency requires as an essential element that the agent consent to act on the principal's behalf . . . [f]rom the standpoint of the principal, this is the purpose of creating the relationship."²⁰⁵

The metaphor of identification simply translates into understandable human terms what it means for one person to act on behalf of another. Namely, that the agent is not simply acting for the principal's benefit, subject to the principal's control, but also is acting as the principal, so that the actions of the agent, within the scope of the agency, are the actions of the principal.

D. *Vicarious Admissions*

The continuing vitality of the metaphor of identification may also be seen in the vicarious admission doctrine, whereby certain statements by agents or co-conspirators of parties are treated as party admissions and are therefore, not subject to the hearsay rule. The following cases²⁰⁶ show the conceptual basis of the doctrine.

In the 1827 slave trade prosecution of John Gooding, discussed above, the government wanted to put on a witness who would testify about a conversation that he had with the ship's captain in which the witness asked who would pay the crew if things went wrong and the captain replied, "Uncle John," referring to the defendant John Gooding.²⁰⁷ The defendant objected to the proposed testimony, but the Supreme Court held that the statement was admissible against Gooding in just the same way that Gooding's own statements would be admissible against him (in modern parlance, the statement was not hearsay because it was a party admission). The Court noted that there was independent evidence that the captain was Gooding's agent and the statement he made was within the scope of his agency.²⁰⁸

The Court then explained that where "the fact of agency" has been proven "the act of the agent, co-extensive with his authority, is the act of the principal, whose mere instrument he is" so that "whatever the agent says within the scope of his authority, the principal says, and evidence may be given of such acts and declarations as if they had been actually done and made by the principal himself."²⁰⁹

A similar rule applies to statements by co-conspirators made within the scope of the conspiracy. The statements are admissible against members of the conspiracy, notwithstanding the hearsay rule, as vicarious party

²⁰⁵ *Id.* § 1.01 cmt. g.

²⁰⁶ *Gooding*, 25 U.S. at 460; *Van Riper v. United States*, 13 F.2d 961 (2d Cir. 1926).

²⁰⁷ *Gooding*, 25 U.S. at 468.

²⁰⁸ *Id.* at 469-70.

²⁰⁹ *Id.* at 470.

admissions. The rationale, as Judge Learned Hand explained in 1926, is that under the substantive law of conspiracy when people “enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a ‘partnership in crime.’”²¹⁰ As a result, “[w]hat one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all.”²¹¹ Or as the U.S. Supreme Court explained in 1974, “[t]he rationale for both the hearsay-conspiracy exception and its limitations is the notion that conspirators are partners in crime . . . [a]s such, the law deems them agents of one another.”²¹²

The vicarious admission doctrine is taught in law schools as part of the law of evidence. Perhaps as a result, modern scholars have been critical of the co-conspirator vicarious admission rule since the doctrine is based on agency ideas and not on the principles underlying the law of evidence in general. One note, for example, asserted that the “criminal agency rationale is not conceptually persuasive . . . [i]t is a fiction.”²¹³ Another note argued that the agency rationale was not an adequate justification because “[a]lthough coconspirators are treated as agents for each other, this is little more than a legal fiction”²¹⁴ Or as Paul Marcus put it in 2015, “the entire grounding of the exception is a legal fiction”²¹⁵ so that the determination to admit the statement of a coconspirator will not be based on a belief that the statement is “reliable, but rather on the agency fiction. Resolving such an important matter on a legal fiction seems dubious at best.”²¹⁶

However, the courts are fine with following a rule of evidence based on the fiction of agency. The vicarious admission rule for agents is codified in Rule 801(d)(2)(D) of the Federal Rules of Evidence, which treats “a statement by a party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship” as a party admission exempt from the hearsay rule.²¹⁷ Rule 801(d)(2)(E) codifies the exemption for statements by co-conspirators, defining as a party

²¹⁰ *Van Riper*, 13 F.2d at 967.

²¹¹ *Id.*

²¹² *Anderson v. United States*, 417 U.S. 211, 218 n.6 (1974).

²¹³ David Calabrese, Note, *Federal Rule of Evidence 801(d)(2)(E): Admissibility of Statements from An Uncharged Conspiracy That Does Not Underlie the Substantive Charge*, 52 *FORDHAM L. REV.* 933, 943 (1984).

²¹⁴ S. Douglas Borisky, Note, *Reconciling the Conflict Between the Coconspirator Exemption from The Hearsay Rule And the Confrontation Clause of The Sixth Amendment*, 85 *COLUM. L. REV.* 1294, 1308 (1985).

²¹⁵ Paul Marcus, *The Crime of Conspiracy Thrives in Decisions of the United States Supreme Court*, 64 *KAN. L. REV.* 373, 397 (2015).

²¹⁶ *Id.* at 398.

²¹⁷ *FED. R. EVID.* 801(d)(2)(D). As the Advisory Committee Notes explain, the rule for agents represent an expansion of the older rule by permitting the admission of unauthorized statements that relate to the subject matter of the agency.

admission “a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy.”²¹⁸

Courts recognize that the vicarious admission rules, particularly for co-conspirators, are based on a fiction. As one decision put it, “Rule 801(d)(2) treats coconspirator statements as a category of party admissions. It does so because of the legal fiction that each conspirator is an agent of the other and that the statements of one can therefore be attributable to all.”²¹⁹ Courts accept the rule as law, despite its tension with the scholarly rejection of legal fictions.²²⁰

E. Government Speech

The cornerstone of the vicarious admission rule is the notion that the words of the agent, within the scope of the agency, are the words of the principal. This same idea illuminates the First Amendment government speech doctrine, which treats speech by government agents within the scope of their agency as government speech that the government naturally has a right to control.²²¹

Scholars looking at this doctrine from the perspective of First Amendment policy have been critical, calling the doctrine “dangerous,”²²² “muddled,”²²³ “confused,”²²⁴ “not only unnecessary but actually harmful,”²²⁵ “troubled,”²²⁶ and “a disaster.”²²⁷ But at least some of the government speech decisions make sense when seen as applications of the metaphor of identification.

Consider *Garcetti v. Ceballos*.²²⁸ Richard Ceballos, a deputy district attorney for the Los Angeles County District Attorney’s Office, was working

²¹⁸ FED. R. EVID. 801(d)(2)(E).

²¹⁹ *United States v. Ammar*, 714 F.2d 238, 255-56 (3d Cir. 1983).

²²⁰ *See United States v. Didomenico*, 78 F.3d 294, 303 (7th Cir. 1996).

²²¹ *See Robert C. Post, Subsidized Speech*, 106 YALE L.J. 151, 151-52 (1996).

²²² Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 698 (2011).

²²³ Jessica Pagano, *The Elusive Meaning of Government Speech*, 69 ALA. L. REV. 997, 1000 (2018).

²²⁴ Mark Strasser, *Government Speech and Circumvention of the First Amendment*, 44 HAST. CONST. L. Q. 37, 37 (2016).

²²⁵ Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government has Nothing to Say*, 95 IOWA L. REV. 1259, 1313-14 (2010).

²²⁶ Mary-Rose Papandrea, *Free Speech Foundations Symposium: The Government Brand*, 110 NW. U. L. REV. 1195, 1197-98 (2016).

²²⁷ Mark Strasser, *Ignore the Man Behind the Curtain: On Government Speech*, 21 B.U. PUB. INT. L.J. 85, 126 (2011).

²²⁸ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

as a calendar deputy (a semi-managerial role) for the Pomona branch.²²⁹ While he was on the job, Ceballos wrote a memorandum recommending that a case in the Pomona branch be dropped because of inaccuracies in an affidavit used to obtain a search warrant.²³⁰ The recommendation was rejected and the memorandum was later used against the government.²³¹ Afterwards, Ceballos claimed he was subject to adverse employment actions, including reassignment, transfer and denial of promotion, in retaliation for what he said in his memorandum.²³²

Ceballos sued for violation of this First Amendment rights.²³³ The U.S. Supreme Court held that the case involved speech that the government had the right to control, not speech by a private citizen that was protected from government regulation by the First Amendment. The Court explained that “[t]he controlling factor in Ceballos’ case is that his expressions were made pursuant to his duties as a calendar deputy.”²³⁴ The Court went on to hold “that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”²³⁵

In *Legal Services Corp. v. Velazquez*,²³⁶ the Supreme Court reviewed a statute prohibiting federally funded Legal Services Corporation lawyers from filing suits challenging the constitutionality of welfare laws.²³⁷ The Supreme Court held that the statute violated the First Amendment.²³⁸ The government was not regulating its own speech because the federally funded LSC “attorney speaks on behalf of the client in a claim against the government for welfare benefits. The lawyer is not the government’s speaker.”²³⁹

Another government speech case²⁴⁰ involved a student religious organization applying for monies from the University of Virginia’s student activity fund.²⁴¹ The U.S. Supreme Court held that the University could not discriminate against the group based on the group’s religious mission and

²²⁹ *Id.* at 413.

²³⁰ *Id.* at 413-14.

²³¹ *Id.* at 414.

²³² *See id.* at 415.

²³³ *Id.*

²³⁴ *Id.* at 421.

²³⁵ *Id.*

²³⁶ 531 U.S. 533 (2001).

²³⁷ *See id.* at 536-37.

²³⁸ *See id.* at 537.

²³⁹ *Id.* at 542.

²⁴⁰ *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

²⁴¹ *See id.* at 825-27.

theory that the University itself considered the student group's speech to be government speech.²⁴² The Court noted that student organizations applying for funds were required to sign an agreement with the University that declared that student groups receiving monies from the student activity fund "are not the University's agents, are not subject to its control, and are not its responsibility."²⁴³

In each of these cases, the Supreme Court used the metaphor of identification and principles of agency to determine whether the true speaker was the government or a private person.²⁴⁴ A 2007 article by Luke Meier made a similar point in an analysis of whether religious speech by students in a school setting should be classified as government speech prohibited by the Establishment Clause or private citizen speech protected by the Free Exercise Clause.²⁴⁵ Professor Meier argued that the true "identity of the speaker is really a question of agency law,"²⁴⁶ so "agency law seems to provide a useful conceptual approach to addressing these issues."²⁴⁷

It is noteworthy here that the very term *government speech* is metaphoric. Governments do not have actual voices. Further, the Supreme Court's analysis in these cases followed the categorization and logic characteristic of metaphor of identification case law rather than the balancing of competing interests more commonly associated with the First Amendment.

Nevertheless, the Supreme Court's use of agency principles can be reconciled with First Amendment doctrine. In his 1996 article on government speech, Robert Post said state regulation of speech is normally subject to strict requirements of neutrality "because we wish to use the First Amendment to establish a realm of public discourse in which people are regarded as autonomous and self-determining."²⁴⁸ The government speech doctrine falls within an exception to this general purpose. Government agents speaking within the scope of their agency are not autonomous and self-determining individuals.²⁴⁹ They are acting as the government.

²⁴² See *id.* at 834-35.

²⁴³ *Id.* at 835.

²⁴⁴ *Velazquez*, 531 U.S. at 533-34; see also *Rosenberger*, 515 U.S. at 838-39.

²⁴⁵ Luke Meier, *Using Agency Law to Determine the Boundaries of the Free Speech and Establishment Clauses*, 40 IND. L. REV. 519, 519 (2007).

²⁴⁶ *Id.* at 522.

²⁴⁷ *Id.* at 528.

²⁴⁸ Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 193 (1996).

²⁴⁹ See generally *Garcetti*, 547 U.S. at 418-19.

F. Duties of Agents to Principals

The metaphor of identification also shapes the fiduciary duties of agents. Here, however, it is harder to draw a sharp contrast with dominant academic theories. That is because there are so many academic approaches in this area; the metaphor is consistent with some and at odds with others.²⁵⁰

By way of background, in recent years, there has been a surge of scholarly interest in fiduciary theory²⁵¹ with a spate of articles seeking to define,²⁵² expand,²⁵³ rationalize,²⁵⁴ justify,²⁵⁵ or find the bases for²⁵⁶ the fiduciary principle. Many scholars have tried to come up with a unified theory applicable to all fiduciaries. For example, some have argued that the duties of fiduciaries are merely contractual and can be understood through contract norms.²⁵⁷ Others, by contrast, argue that fiduciary duty is imposed as a matter of public policy to protect the weak and vulnerable from the strong and opportunistic.²⁵⁸

One problem with these two general theories is that fiduciary duties vary depending on the type of fiduciary.²⁵⁹ A related problem with the two theories is that they do not do a good job of explaining the fiduciary duties of agents. For example, the idea that fiduciary duties are merely contractual does not fit with cases in which intentional breach of fiduciary loyalty or

²⁵⁰ For an example of modern scholarship that does apply agency theory, see Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL'Y REV. 265, 299 (1998) ("Firms of more than one person are better described not as a nexus of contracts, but as a nexus of agency relationships.").

²⁵¹ See Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 516 (2015) ("Fiduciary theory is undergoing a renaissance"); Lionel D. Smith, *Contract, Consent and Fiduciary Relationships*, in CONTRACT, STATUS AND FIDUCIARY LAW, 517, 517 (Paul B. Miller & Andrew S. Gold eds., 2016).

²⁵² See, e.g., D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1400 (2002).

²⁵³ See, e.g., Issac D. Buck, *Furthering the Fiduciary Metaphor*, 104 CALIF. L. REV. 1043, 1093-94 (2016); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 677 (2016).

²⁵⁴ See, e.g., *Beyond Metaphor*, *supra* note 45, at 908-15; Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 810 (1983) (justifying fiduciary duties based on the entrustor's vulnerability to opportunistic behavior by the fiduciary).

²⁵⁵ See, e.g., Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 35 TEX. L. REV. 993, 995 (2017).

²⁵⁶ See, e.g., Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 678 (2004).

²⁵⁷ See, e.g., Easterbrook & Fischel, *supra* note 11, at 425-26.

²⁵⁸ See, e.g., Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 922 (1993).

²⁵⁹ See, e.g., *Beyond Metaphor*, *supra* note 45, at 879 ("Recognition that the law of fiduciary obligation is situation-specific should be the starting point for any further analysis"); Johnson & Millon, *supra* note 6, at 1597, 1601-02.

confidentiality has been treated as a crime.²⁶⁰ The notion that fiduciary duty is designed to protect the weak does not fit with the rule that at-will employees are, though relatively weak, nevertheless fiduciaries.²⁶¹

The fiduciary duties of agents are better explained as arising out of their status as agents²⁶² and more particularly, their alter ego relationship with the principal.²⁶³ Donning the principal's persona requires the agent to abnegate the agent's personal self and assume what has been described by Margaret Blair and Lynn Stout as a "second self" including "a 'cooperative' or 'other-regarding' personality."²⁶⁴ As a result, agents have special obligations consistent with some general fiduciary theories but not readily explained either by the law of contracts or the public policy in favor of protecting the weak.

1. Duty of Loyalty

Consider, for example, the duty of loyalty which was defined in Section 387 of the Restatement (Second) of Agency as: "[u]nless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency."²⁶⁵ As the commentary to Section 8.01 of the Restatement (Third) of Agency explains, this duty "requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship."²⁶⁶ The idea lies at the heart of agency law. Indeed, the word "principal" comes from a Latin word meaning "first."

Fiduciary relationships are often created by contracts. But it is the relationship, rather than the contract, that creates the duty of loyalty.²⁶⁷ The

²⁶⁰ See, e.g., *Carpenter v. United States*, 484 U.S. 19, 23-24 (1987).

²⁶¹ See RESTATEMENT (THIRD) AGENCY §1.01 cmt. c, illus. 17, 18-9, 33 (AM. LAW. INST. 2006); Marian K. Riedy & Kim Spurduto, *At-Will Fiduciaries: The Anomalies of a "Duty of Loyalty" in the Twenty-First Century*, 93 NEB. L. REV. 267, 283-88 (2014).

²⁶² See Johnson & Millon, *supra* note 6, at 1652 ("Agency law reminds us that officers are agents of the corporate principal and, as such, are subject to a well-developed set of fiduciary obligations that are inherent in the agency relationship").

²⁶³ See Arthur B. Laby, *Current Issues in Fiduciary Law: S.E.C. v. Capital Gains Research Bureau and Investment Advisers Act of 1940*, 91 B.U. L. REV. 1051, 1055 (2011) (discussing that a fiduciary has a duty "when acting on the principal's behalf, to adopt the objectives or ends of the principal as the fiduciary's own"); Ramon Casadeus-Masanell & Daniel F. Spulber, *Trusts and Incentives in Agency*, 15 S. CAL. INTERDISC. L.J. 45, 48 (2005) ("the fundamental nature of the agent as an intermediary between the principal and third parties creates the need for trust").

²⁶⁴ See Margaret M. Blair & Lynn A. Stout, *Symposium Norms & Corporate Law: Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1762 (2001).

²⁶⁵ RESTATEMENT (SECOND) OF AGENCY § 387, 200, 201 (AM. LAW INST. 1958).

²⁶⁶ RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b, 249, 250 (AM. LAW. INST. 2006).

²⁶⁷ See, e.g., *Huong Que, Inc. v. Luu*, 58 Cal. App. 4th 400, 412 (Cal. Ct. App. 2007).

duty flows from the metaphor of identification. Under the metaphor, agents acting within the scope of their agency become their principal and act as that principal. To borrow from Hobbes, the agents are actors wearing the mask of the principal whom they are representing on stage.²⁶⁸ Like actors, agents have a duty to stay in character and in role.²⁶⁹

Staying true to their role of alter ego requires agents to subordinate their personal interests and selves,²⁷⁰ as well as adopt the interests and ends of the principal as their own.²⁷¹ This is the same idea of loyalty that coaches try to instill through the adage: “There is no *I* in team.”²⁷²

This concept of selfless loyalty may be seen in Justice Cardozo’s canonic opinion in *Meinhard v. Salmon*.²⁷³ To explain why the defendant Walter Salmon had a duty to inform his joint venture partner of a business opportunity, Justice Cardozo said “Salmon had put himself in a position in which thought of self was to be renounced, however, hard the abnegation For him and for those like him the rule of undivided loyalty is relentless and supreme.”²⁷⁴

As a recent article by Matthew Bodie observed that “[t]his self-abnegation is a critical aspect of the agency relationship, because it balances out the agent’s power to step into the shoes of the principal and act on the principal’s behalf.”²⁷⁵ Or as Victor Brudney explained in 1997: “[t]he notion is that the fiduciary’s duty of loyalty requires the trustee or agent to act as

²⁶⁸ See HOBBS, *supra* note 36, at 152. See also June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963, 976 (2017).

²⁶⁹ See James D. Nelson, *The Freedom of Business Associations*, 115 COLUM. L. REV. 461, 494 (2015) (“Individual identification with an association involves psychological attachment to group goals and adoption of group perspectives.”); Blair & Stout, *supra* note 264, at 1770-71 (“[G]roup identity is an important component of most individuals’ psychological makeup” and “in situations in which group identity is brought into play, individuals appear to adopt preference functions that consider the group’s welfare...”).

²⁷⁰ See Amy J. Sepinwall, *Guilt by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HAST L.J. 411, 442 (2012) (“[T]eam membership demands deindividuation: the team member must act so as to underscore the softening of boundaries between the self and others.”); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1312 (2003) (psychologists have found that “groups cultivate a special social identity.”).

²⁷¹ See Arthur Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFF L. REV. 99, 103 (2008).

²⁷² See Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 52-53 (2003) (noting inconsistency between loyalty and a world view based on the primacy of the autonomous self); Blair & Stout, *supra* note 264, at 1770 (“group identity” fosters intra-group trust).

²⁷³ 164 N.E. 545, 546 (N.Y. 1928).

²⁷⁴ *Id.* at 548.

²⁷⁵ Matthew T. Bodie, *Employment as Fiduciary Relationship*, 105 GEO. L.J. 819, 826 (2017). See also Paul B. Miller, *Justifying Fiduciary Remedies*, 63 U. TORONTO L.J. 570, 615 (2013) (“The duty of loyalty reflects the substitutive character of fiduciary power.”).

the beneficiary's (or principal's) alter ego and act only as the latter would act for himself."²⁷⁶

The duty to stay in character, playing the assigned role of alter ego rather than remaining a separate person, also accounts for rules against conflicts of interest. As the Supreme Court explained in 1914, "[t]he intention is to provide against any possible selfish interest . . . which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity."²⁷⁷

2. Duty to Act Only as Authorized

The metaphor of identification also explains other agency law doctrines that may seem anomalous when viewed from the perspective of contract or tort law. Consider, for example, a 1999 North Dakota Supreme Court case.²⁷⁸ Burlington Northern, a railroad company, had an agency agreement, terminable on a ninety-day notice, with a company called Meridian.²⁷⁹ The agreement gave Meridian the authority to manage Burlington's oil and gas rights.²⁸⁰ The contract also gave Meridian the right to deal with Burlington on its own account and to acquire Burlington's oil and gas rights on terms consistent with ordinary business judgment and usage.²⁸¹ The relationship between the companies soured. Burlington gave Meridian a notice of termination. Approximately two months after receiving the notice, (that is, before the termination became effective) Meridian, while acting as Burlington's agent, negotiated a deal with itself whereby Meridian purchased oil and gas rights from Burlington on terms that were consistent with the prevailing prices in the area.²⁸²

Burlington sued to undo the transaction. The trial court ruled for Meridian, on the grounds that there was no proof that the deal terms were unfair.²⁸³ The North Dakota Supreme Court, however, reversed.²⁸⁴ Among other things, the Court said that Meridian, as agent, had a duty to act in

²⁷⁶ Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 601 (1997). See also Criddle, *supra* note 255, at 1000 ("A fiduciary's power to exercise entrusted power for and on behalf of her principal . . . would engender domination but for the fact that fiduciary law compels a fiduciary to honor her principal's instructions and her beneficiaries' interests.").

²⁷⁷ *Magruder v. Drury*, 235 U.S. 106, 119 (1914).

²⁷⁸ *Burlington N. & Santa Fe Ry. Co. v. Res. Oil & Gas Co.*, 590 N.W.2d 433 (N.D. 1999).

²⁷⁹ *Id.* at 435

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 436.

²⁸³ *Id.*

²⁸⁴ *Burlington*, 590 N.W.2d at 440.

accordance with its best understanding of the current wishes of its principal even if the contract gave Meridian greater rights.

The Court noted that agency “involves both a contractual and a fiduciary relationship.”²⁸⁵ The fiduciary aspects of the relationship limit what an agent can do while acting as agent. Citing Section 33 of the Restatement (Second) of Agency and its commentary, the Court explained that an agent is only authorized to do “what the agent reasonably infers the principal desires the agent to do in light of the principal’s manifestations and the agent’s knowledge when the agent acts.”²⁸⁶ Thus, the agent’s authority is limited by the principal’s current will because

[w]hatever the original agreement or authority may have been, [an agent] is authorized at any given moment to do, and to do only, what he reasonably believes the principal desires him to do, in light of what he knows or should know of the principal’s purpose and the existing circumstances.²⁸⁷

As a result, the Court explained, if the agent “knows facts which should lead him to believe that his authority is restricted or terminated, he has a duty to act only within the limits of the situation as it is currently known to him.”²⁸⁸ The Court further noted that “[t]he fact that in changing his mind the principal is violating his contract with the agent does not diminish the agent’s duty of obedience to it.”²⁸⁹

The decision of the North Dakota Supreme Court is inconsistent with the notion that fiduciary duty is simply a matter of contract. Nor does the decision in favor of Burlington Northern match up well with the idea that fiduciary duties are designed to protect the weak from the strong. However, the opinion does fit well with the metaphor of identification. For if the agent is playing the role of principal, then it makes sense that the principal’s current will should be the guide to what the agent can do as principal.

²⁸⁵ *Id.* at 437.

²⁸⁶ *Id.* at 439 (quoting RESTATEMENT (SECOND) OF AGENCY § 33 (AM. LAW INST. 1958)).

²⁸⁷ *Id.* at 439-40 (quoting RESTATEMENT (SECOND) OF AGENCY § 33 cmt. a (AM. LAW INST. 1958)).

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 440.

3. Duty of Confidentiality

The U.S. Supreme Court's decision in *Carpenter v. United States*²⁹⁰ is another example of a decision (and doctrine) best understood through the lens of the metaphor of identification. Foster Winans, a reporter for the Wall Street Journal, was one of the writers of the *Heard on the Street* column, which expressed insights and opinions about various stocks. According to company policy, the content of the column prior to publication was confidential information of the Journal.²⁹¹ Yet, Winans revealed to a couple of confederates what he was planning to say in the column in exchange for a share of the profits they made in stock market trades using the information.²⁹² The scheme was uncovered and Winans was convicted of mail fraud and wire fraud.²⁹³

Winans argued before the U.S. Supreme Court that what he had done was simply a violation of workplace rules and should be treated like a breach of contract, not criminal fraud. The U.S. Supreme Court unanimously rejected this argument, holding that the information about the forthcoming columns was the property of the Wall Street Journal and Winans' misappropriation of that information was criminal fraud. The Court explained: "[t]he concept of fraud includes the act of embezzlement, which is the fraudulent appropriation to one's own use of money or goods entrusted to one's care by another."²⁹⁴

The decision does not sit well with the theory that fiduciary duties are merely contractual or that they are designed to protect the weak.²⁹⁵ Nor, for that matter, does the decision make much sense when viewed from the goal of ensuring that all investors operate with equal information.²⁹⁶ As one article noted, "[f]rom the standpoint of investors, the role of fiduciary breach in information acquisition is meaningless."²⁹⁷

Nevertheless, the opinion is readily understood as an application of the metaphor of identification. If the agent becomes the principal, then the

²⁹⁰ 484 U.S. 19 (1987).

²⁹¹ *Id.* at 23.

²⁹² *Id.*

²⁹³ *Id.* at 23-24.

²⁹⁴ *Id.* at 27 (internal quotation marks omitted) (citing *Grin v. Shine*, 187 U.S. 181, 189 (1902)).

²⁹⁵ See John P. Anderson, *The Final Step to Insider Trading Reform: Answering the "It's Just Not Right" Objection*, 12 J.L. ECON. & POL'Y 279, 285 (2016).

²⁹⁶ See Stephen M. Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud*, 52 S.M.U. L. REV. 1589, 1589 (1999) (arguing that the Supreme Court "took an area in which the law made a certain amount of policy sense ... and made hash of it").

²⁹⁷ Kimberly D. Krawiec, *Fairness, Efficiency, and Insider Trading: Deconstructing the Coin of the Realm in the Information Age*, 95 NW. U. L. REV. 443, 475 (2001).

information that the agent acquires in that role is the property of the principal. The knowledge may be inside the agent's head. But it does not belong to the agent personally. The information belongs to the agent's other self, the principal, just as other property that the principal entrusts to the agent is the property of the principal even when it is the agent's possession. That is why Winans' personal use of information about what he was planning to write for the Journal, contrary to the policy of Journal, was considered a form of embezzlement.

The decision shows that there is more to agency relationships than can be calculated using contract norms. The metaphoric identification of agent with principal imposes moral obligations on the agent to be true to the assumed persona and faithful to the group embraced by that persona.

4. Limited Scope

An important qualification is in order. The metaphor of identification is the dominant mode for understanding the fiduciary duties of common law agents. Outside that realm, its impact on fiduciary law is occasional.

There is a prominent line of authority in which courts have used the metaphor's frame to understand the duties of non-agent fiduciaries. Justice Cardozo's canonic opinion in *Meinhard v. Salmon*²⁹⁸ referenced earlier falls into this category. Other examples include the U.S. Supreme Court's opinions in *Pepper v. Litton*²⁹⁹ and *S.E.C. v. Capital Gains Research Bureau*,³⁰⁰ both of which require of non-agent fiduciaries the type of selfless loyalty associated with the metaphor and with the loyalty duties of servants.

But that is not the only approach courts follow in cases involving non-agent fiduciary. Often, in these cases, courts follow the equity approach championed by scholars such as Tamar Frankel³⁰¹ and impose fiduciary duties on dominant parties to protect weaker, vulnerable parties who have reposed trust in them. The metaphor of identification does not play a role in these cases. Often, in non-agency cases, courts follow the alternative approach championed by Judge Frank Easterbrook, Daniel Fischel,³⁰² and John Langbein³⁰³ and treat fiduciary relationships as essentially contractual and with no moral dimension.

²⁹⁸ *Meinhard*, 164 N.E. at 545.

²⁹⁹ 308 U.S. 295, 306-07 (1939).

³⁰⁰ 375 U.S. 180, 201 (1963).

³⁰¹ See Frankel, *supra* note 254, at 810.

³⁰² See Frank H. Easterbrook and Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993).

³⁰³ See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 658 (1995).

The latter, contract-oriented approach is gaining strength. For example, in the last twenty years in non-agency cases governed by federal law, the U.S. Supreme Court has repeatedly loosened the restrictions on fiduciaries with conflicts of interest by narrowing the scope of their fiduciary duty³⁰⁴ or by putting the burden of proving substantive unfairness on the complaining party,³⁰⁵ rather than following the traditional approach of requiring the conflicted fiduciary to demonstrate complete fairness. These recent decisions do not follow the metaphor of identification. They are also inconsistent with the Supreme Court's twentieth century precedents³⁰⁶ and with the approach to fiduciary conflicts still followed by the State courts.³⁰⁷

Therefore, the metaphor of identification is not the only way that courts see economic relationships, but it is the leading frame for seeing agency relationships. And it is often used for other types of fiduciary relationships as well, although the law for such cases is in flux.

IV. IN DEFENSE OF THE METAPHOR

The current controversy over fiduciary loyalty serves as preface to a larger question. Is the metaphor of identification a good idea? The answer is yes. At least in cases involving agency relationships, courts should follow the metaphor and doctrines based on it in the absence of specific legislative direction to the contrary.

A. *Virtues of the Metaphor*

The metaphor performs an essential function in our legal system. A virtue of the common law is its focus on individuals and general aversion to punishing one person for the wrongdoing of others or treating people as if they were part of a collective. Yet, even virtues need exceptions. The practical fact of life is that people often choose to work in teams. These groups want the benefits that come from operating under a single legal persona. The needs of commerce require that they be given this privilege, particularly now that these collective persons have become the most important players in the economy.

So how can a legal system designed for individuals be applied to teams? The metaphor of identification allows the law to make this conceptual leap

³⁰⁴ See generally *Pegram v. Herdrich*, 530 U.S. 211, 214 (2000).

³⁰⁵ See generally *Jones v. Harris Assocs., L.P.*, 559 U.S. 335, 347 (2010); see also *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008).

³⁰⁶ See, e.g., *Pepper*, 308 U.S. at 306.

³⁰⁷ See, e.g., *Hein v. Zoss*, 887 N.W.2d 62, 66 (S.D. 2016); see also *Brooks v. Horner*, 344 P.3d 294, 301 (Alaska 2015).

and does so in a way that recognizes groups and yet preserves the common law's tilt in favor of the individual.

The metaphor and the doctrines based on it have been doing this balancing act so well that courts and legislatures have been using the ideas for centuries. There is no good reason to stop (except when legislatures clearly mandate different rules). A primary function of the common law is the protection of liberty, property and the social order through the preservation of the shared norms, traditions, expectations and legal concepts that hold society together.³⁰⁸ The metaphor of identification qualifies for preservation on all these counts.

The metaphor also resonates with common intuitions. The habit of mind that Holmes criticized³⁰⁹ is not limited to judges. People in general equate the conduct of a corporation with the behavior of its employees acting within the scope of their employment. Indeed, it is hard to think of corporate conduct any other way. Similarly, the metaphor's approach to loyalty is consistent with popular understanding. Psychologists have found that the basis for loyalty is identification. People tend to be loyal to the groups with which they identify.³¹⁰ Our loyalties are a form of self-love to expanded versions of ourselves.

Moreover, the metaphoric construct has generated workable doctrines that lead to middle ground results that both liberals and conservatives can accept as fair, if not ideal. The construct provides a mode of thought considered legitimate on both sides of the political divide. In an increasingly polarized country, ideas that Americans can share should be cherished, not pushed aside in favor of something with more of an ideological edge.

Another advantage of the metaphor is that it justifies treating loyalty (at least for agents) as a legal and moral duty, and not simply an option or possible contract term. This notion could be used to counter, or at least limit, the growing tendency of the U.S. Supreme Court and financial elites to see economic relationships solely as a matter of contract and to back away from ideas of fiduciary loyalty.³¹¹ Given current trends, the idea of loyalty could use some legal reinforcement.³¹²

³⁰⁸ See W.T. Murphy, *The Oldest Social Science? The Epistemic Properties of the Common Law Tradition*, 54 MOD. L. REV. 182, 200 (1991).

³⁰⁹ See Holmes, Jr., *Agency*, *supra* note 3, at 351.

³¹⁰ See Carbone & Levit, *supra* note 270, at 976 ("Modern media theory, when applied to organizational behavior, describes institutions as supplying an identity associated with a firm that in turn commands loyalty from those who embrace the identity.").

³¹¹ See Harris, *supra* note 8, at 618.

³¹² See Adam S. Hofri-Winogradow, *Contract, Trust and Cooperation: From Contrast to Convergence*, 102 IOWA L. REV. 1691, 1716 (referencing "the social alienation and relationship commodification of current society").

Teaching the metaphor is particularly appropriate in law schools, and not just because the metaphor is an essential part of the law. Lawyers often act as agents for their clients. Students should be taught what it means to be an agent.

B. Responding to the Critics

Yet another reason for returning to the metaphor is that its critics were and are wrong. Justice Holmes attacked the metaphor because its flexibility allowed common law judges to develop doctrines imposing vicarious liability on innocent employers and holding corporations accountable for the misdeeds of employees acting within the scope of employment.³¹³ The now widespread acceptance of these doctrines shows that the metaphor's flexibility is a plus, not a minus. The common law needed a theory to allow for exceptions to individualism when dealing with groups. The *qui facit* maxim and the metaphor of identification provided that theory, creating room for a more communitarian approach. Justice Holmes' attack on the metaphor should be rejected just as his effort to abolish respondeat superior was rejected.

Harold Laski condemned the metaphor because the concept constrained judges and kept them from turning progressive, frankly communal public policies into law.³¹⁴ Yet, Laski confused the role of courts and legislatures. Judges do not have the data, time, expertise or political accountability to engage in freewheeling social engineering.³¹⁵ Generally speaking, they also lack the inclination and ideological certainty needed to sweep away individual rights and engage in the wholesale lawmaking that Laski urged upon them. Further, an approach that required judges to base rulings on public policy or notions of fairness or the anticipated consequences of their decisions would make the law less predictable, reduce agreement among judges and lead to more politically disparate results. Judges are much better at maintaining consensus and consistency when they work with the existing system.³¹⁶

It is also worth noting that legislatures generally accept the doctrines generated by the metaphor. Agency ideas are often codified and rarely

³¹³ See generally Holmes, Jr., *Agency*, *supra* note 3, at 351; see also *Agency II*, *supra* note 72, at 20, 22.

³¹⁴ See Laski, *Vicarious*, *supra* note 4, at 121.

³¹⁵ See Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 *YALE L.J.* 27, 32, 59-63 (2003).

³¹⁶ See *id.* at 32.

modified.³¹⁷ So even though the metaphor has not led to the progressive policies Laski advocated, it has come close enough to satisfy the people's chosen representatives.

Holmes, Laski and others criticized the metaphor because it is based on a legal fiction, the unity of principal and agent. But a legal fiction is just a type of useful social construct. Corporations are legal fictions, so are law schools, and so is the United States of America. Courts use the fictions all the time. In 2018, for example, the Third Circuit used what it described as a "legal fiction" to justify tenancy by the entirety³¹⁸ and the Sixth Circuit defended the use of a "legal fiction" established by regulation that fifteen years of exposure to coal dust caused black lung disease.³¹⁹

There is nothing wrong with legal fictions so long as they are useful. As Justice Holmes said on behalf of the U.S. Supreme Court in 1930, in the course of rejecting an argument that the corporate fiction should be ignored: "it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true."³²⁰

The metaphor of identification is a useful construct because it gives lawyers and judges an intuitive handle on the concepts underlying agency law and leads them through questions they can answer (such as, in what capacity was a particular player acting?) to sensible, centrist results.

Deborah DeMott (the nation's leading agency scholar) criticized the metaphor of identification in the commentary to the Third Restatement, calling the metaphor "potentially misleading and not helpful as a starting point for analysis."³²¹ However, Professor DeMott's preferred approach of relying exclusively on abstractions, such as the agent acts "on behalf" of the principal³²² or the agent is a "representative" of the principal "with power to affect the legal rights and duties of the" principal³²³ or "agency relationships enable the legally-salient extension of a principal's personality through an agent's representation"³²⁴ simply rephrases the same idea in less understandable language.

And how is the metaphor of identification potentially misleading? Back in the heyday of the metaphor, no one imagined that agents ceased to exist

³¹⁷ See RESTATEMENT (THIRD) AGENCY, *supra* note 261, at INTRO. 3, 6; *see also* Seavey, *supra* note 57, at 859.

³¹⁸ See *Clientron Corp. v. Devon IT, Inc.*, 894 F.3d 568, 579 (3d Cir. 2018).

³¹⁹ See *Zurich Am. Ins. Grp v. Duncan*, 889 F.3d 293, 305 (6th Cir. 2018).

³²⁰ See *Klein v. Board of Tax Sup'rs of Jefferson County, Ky.*, 282 U.S. 19, 24 (1930).

³²¹ See RESTATEMENT (THIRD) AGENCY, *supra* note 261, at § 1.01, cmt. c, 17, 20.

³²² *Id.* at § 1.01.

³²³ *Id.* at § 1.01, cmt. c.

³²⁴ Deborah A. DeMott, *Larry Ribstein Memorial Symposium: The Contours and Composition of Agency Doctrine: Perspectives from History and Theory of Inherent Agency Power*, 2014 U. ILL. L. REV. 1813, 1833 (2014).

as separate human beings or thought that people became civilly dead when they entered an agency relationship. Identification was understood as metaphoric.³²⁵ To avoid confusion, it is enough to call the metaphor of identification a metaphor.

Professor DeMott had it right a decade before the Third Restatement of Agency when she described the *qui facit* maxim as an “analytically more elegant” justification of vicarious liability, noted that the “maxim identifies the agent with the principal” and said that the maxim’s “power is its usefulness as a figurative or heuristic device to help understand an agency relationship.”³²⁶

However, the power of the metaphor goes beyond its heuristic value. The *qui facit* metaphor of identification gives the law of agency the clear and distinctive organizing theme that the subject needs in order to survive in the academy as a separate title of the law. When it is taken away, and the metaphor is rejected even as a starting point for analysis, scholars have no grand theory to explain the law.

Amorphous considerations of social expediency and the needs of commerce cannot replace the metaphor. It would be like trying to understand a version of the First Amendment that replaced the word *freedom* with the phrase *public policy*. The general subject matter might still be discernible but the guiding idea would be lost. Just as the idea of freedom is an essential part of the First Amendment, the metaphor of identification is needed to make sense of the law of agency.

Consider where agency law came from. Agency principles are not derived from a statute that was originally written in abstractions. As we have seen, the law of agency began in metaphor and figurative use of language. The *qui facit* maxim was a metaphor.³²⁷ The concept of representation (to make present something that is not literally present) began in metaphor.³²⁸ The concept of legal personality (with *persona* being the mask worn by actors on stage) began as metaphor.³²⁹ Therefore, referring to the founding metaphors is like analyzing a literary text by reading the text, not just the commentaries, or like supplementing a review of glosses on a statute with a reading of the statute itself.

To be sure, the application of the metaphor requires the exercise of judgment on such matters as the existence and scope of an agency

³²⁵ See, e.g., Mechem, *supra* note 54, at 436-37.

³²⁶ See DeMott, *supra* note 30, at 121.

³²⁷ See *id.*

³²⁸ See Pitkin, *supra* note 20, at 20; see also PITKIN, *supra* note 21, at 9.

³²⁹ HOBBS, *supra* note 36, at 123.

relationship. But judges and juries can answer these questions fairly, particularly because the doctrines have been developed to guide in their determination. There is no reason to replace this structure with vague considerations of social expediency.

CONCLUSION

The law of agency provides courts with a conceptual framework for dealing with groups. The metaphor of identification is central to this frame. For legal scholars who want to understand how courts deal with issues of representation and responsibility, the concept is essential. Moreover, the construct's justification of social virtues makes it an important idea for today and one that deserves support. It is time for the legal academy to end the exile and welcome back the metaphor of identification.