

The Fiduciary Character of Agency and the Interpretation of Instructions

By

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Abstract

This chapter in a forthcoming book justifies the conventional characterization of common-law agency as a fiduciary relationship. An agent serves as the principal's representative in dealings with third parties and facts about the world, situating the agent as an extension of the principal for legally-salient purposes. A principal's power to furnish instructions to the agent is the fundamental mechanism through which the principal exercises control over the agent, a requisite for an agency relationship. The agent's fiduciary duty to the principal provides a benchmark for the agent's interpretation of those instructions. The chapter draws on philosophical literature on the identity of the self over time to address related characteristics of agency doctrine, including the agent's duty to interpret instructions and statements of authority in light of the principal's present wishes as the agent reasonably understands them as well as the principal's ongoing power to revoke the agent's authority even when the revocation constitutes a breach of contract.

1. Introduction

Disputes that turn on the application of agency law often involve situations in which, notwithstanding an agent's foibles, the principal is legally responsible for the agent's actions.

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Agency doctrine grounds the principal's responsibility in the principal's right or power to control the agent. The principal's fundamental mechanism of control, which may be supplemented by others, is the provision of instructions to the agent, either initially when stating the actions the agent has authority to take on the principal's behalf or thereafter throughout the duration of their relationship.¹ This chapter focuses on how the agent should interpret those instructions. The agent's fiduciary duty to the principal furnishes a benchmark for interpretation and for assessing actions the agent takes in response. The fiduciary benchmark requires the agent to interpret instructions reasonably in light of the principal's wishes as the agent understands them when the agent must decide what action to take, a temporal focus for interpretation that is distinctive to agency relationships. The fiduciary benchmark does not permit the agent to exploit gaps or arguable ambiguities in the principal's instructions to further the agent's self-interest or that of a third party, without the principal's consent. The foundational importance of control in defining agency,² and the centrality of instructions to control, make agency distinctive as a common-law subject, in particular distinguishing it from other categories (e.g. trusts) conventionally treated as fiduciary. Accounts of agency law that ignore or slight the importance of instructions are incomplete

¹More formally defined, an instruction specifies "how [an] authorized person is to exercise the power conferred." Scott J. Shapiro, *Legality* 228 (Cambridge & London: Harvard University Press 2011). Collapsing instructions and initial statements of authority is consistent with common-law agency doctrine.

²Formally stated, "[a]gency is the fiduciary relationship that arises when one person (the 'principal') manifests consent to another person (the 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Restatement (Third) of Agency* § 1 (St. Paul: American Law Institute Publishers 2007).

because they fail to explain either well-settled doctrine or hard-to-miss facts about how agency relationships function.

Focusing on an agent's interpretation of instructions received from the principal also explains the relative weakness of agency as a mechanism through which a person might bind herself prospectively regardless of future changes in external circumstances or in the principal's own preferences. A principal's power to terminate an agent's authority or countermand prior instructions stems from the representational character of an agency relationship—remaining a separate person, an agent also functions as an extension of the principal as a legally-salient person—as well from the principal's inability to foresee shifts in the agent's motivations and, more generally, how the agent may act in the future. Although agency doctrine does not treat the principal as personally discontinuous over time, it also does not privilege the principal's prior preferences or intentions over those that the agent reasonably understands the principal presently to have at the time the agent determines how to act. How the agent should understand the principal's instructions is contingent on circumstances when the agent must determine the action to take and on an honest assessment of what the principal would then wish the agent to do. This assessment has a subjunctive quality—as the principal's representative, the agent should aim to act “as if” the principal personally had taken action and as the principal “would have” acted—which suffices to fulfill the agent's duty although the principal has not, as a matter of historical fact, specifically “consented” to the agent's action. And, acting as the principal's extension, the agent's duty is one of faithful interpretation,

aimed at accurate replication of how the principal would have acted at the time the agent determines what to do³

To develop these arguments, the chapter proceeds through a series of examples testing an agent's interpretation of instructions against the fiduciary benchmark: categorically-stated instructions that are nonetheless incomplete; instructions that explicitly confer discretion on the agent; instructions conferring authority given after the agent acts; and instructions that countermand prior instructions or withdraw authority altogether. A cumulative discussion of other two other accounts of agency doctrine follows, with an assessment of their implications for how agents should interpret instructions.

2. The Categorical But Incomplete Instruction

Most statements of authority and interim instructions are incomplete in one way or another in specifying what the agent should and should not do, distinct from explicit conferrals of discretion on the agent. Although conduct may express meaning without using words, as when a principal points to a painting that the agent should attempt to buy for the principal at an auction, this chapter focuses on verbal expression, which is typical of accounts of legal interpretation. To be sure, not all instructions require interpretation in the sense of raising real doubts what the principal means; the world of agency relationships requires a more workaday understanding of language than one that treats all expressive conduct as requiring interpretation

³Agency exemplifies a private-law institution that furthers a principal's autonomy. Among its distinguishing characteristics are doctrines enabling a form of self-authorship that is subject to ongoing revision when the principal so wishes. On autonomy-enhancing institutions,

because doubts are always possible.⁴ Nonetheless, although a principal's instruction raises no real doubt as to its meaning as a semantic matter, the agent must always decide what to do in response.⁵ The agent's situation, that is, raises questions even when they would not ordinarily be characterized as ones of interpretation.

a. Categorically-stated instructions

Consider first an instruction that on its face is categorical. P, who owns a commercial menagerie, employs A as its manager.⁶ P says to A, "Buy no more horses." If A thereafter makes a contract in P's name binding P to buy a horse from T, a dealer in horses, has A acted with authority from P?⁷ Most likely the answer is no, but explanations are possible for A's purchase despite P's direction to the contrary. First, P's instruction, as understood by A, may not have been as clear as P believed it to be. Lack of clarity takes different forms. Suppose P said, instead and more colloquially, "I'm not into horses anymore." This does not categorically state an instruction to A, and A may understand P to be referring to preferences and choices unrelated to the menagerie business. Separately, P's instruction does not itself define "horse," which might prompt A to wonder whether P should be understood to forbid the

see H. Dagan & S. Hannes, 'Managing Our Money: The Law of Financial Fiduciaries As a Private Law Institution' [in this volume, draft manuscript at 5].

⁴M. Stone, 'Theory, Practice, and Ubiquitous Interpretation: The Basics,' *Post-Modern Sophistry: Stanley Fish and the Critical Enterprise* 43, 51, 66 (Gary A. Olson & Lynn Worsham eds.)(Albany: State University of New York Press 2004).

⁵One might characterize this as a form of interpretation nonetheless, see Greenawalt, *Legal Interpretation*, 223 and as consistent with Gadamer's claim that applications of legal norms "inevitably involve judgment and create new meaning," *id.* at 161.

⁶"P" and "A" are conventional schematic figures, as is "T" with whom A interacts.

⁷For basic scenario in somewhat different form see *Restatement (Third) of Agency* § 2.02 cmt. g.

purchase of a pony, a zebra, or toy horses for the menagerie's gift shop. Separately, if A has reason to know that P uses the word "horse" idiosyncratically, that understanding of "horse" governs A's authority.⁸

b. Changed circumstances

Second, P's instruction does not state how absolutely or unconditionally A should understand it. It may be necessary for A to decide what to do if circumstances change. Would A contravene P's instruction if A buys another horse when one presently in the menagerie dies? That is, should A should understand P's concern to be the menagerie's array of species, or, more literally and narrowly, a prohibition on purchasing horses? A might also wonder whether P's concern is horses as such, or whether monetary issues of relative value are relevant as well. Suppose A has reason to believe that the horse purchased from T is worth more than T's asking price. If A attempts to justify the purchase to P as a bargain, P might respond "That's not the point. Your authority is to buy animals to exhibit, not for investment or trading—what I own is a menagerie, not a mutual fund of animals." Thus, A's understanding of P's overall objectives is key. P may call to mind the speaker in Wittgenstein's well-known example who has said, "Shew the children a game," to a listener who then teaches the children 'gaming with dice.'⁹ The speaker's rejoinder "I didn't mean that sort of game" may imply that the listener misunderstood either the point of the instruction or the

⁸Id. § 2.02, cmt. e.

⁹Ludwig Wittgenstein, *Philosophical Investigations* 33 n. (2d ed., tr. G.E.M. Anscombe)(New York: Macmillan 1958). Wittgenstein continues, "Must the exclusion of the game have come before his mind when he gave me the order?" Id.

speaker's relationship with the children now educated in how to gamble with dice, or that the listener had motives incompatible with the speaker's known objectives.

Agents often resolve such questions by seeking clarification from the principal. Indeed, a prudent third party would often confirm with the principal the nature and extent of an agent's authority. Many older agency cases involving such problems feature agents and principals separated by physical distance and lacking effective means of rapid communication.¹⁰ However, the theoretical ability to seek and achieve clarification that modern technology provides does not mean that such clarification always occurs. Not all agents go about their work armed with cell phones or otherwise engaged in continual exchanges with their principals, and an agent's quest for clarification may, at some point, impede efficient performance of work. Moreover, whatever the mode of contact, the agent may seek clarification but the principal may not respond because the principal is otherwise too busy or wishes the agent to make the decision.¹¹ A principal may intend to respond but forget to do so; if the principal is an organization, inadvertent slippage from prescribed routines may result in a

¹⁰E.g., *Butler v. Maples*, 76 U.S. 766 (1869). A related consequence of physical distance is the principal's inability promptly to learn that the agent has contravened instructions, as in *Short v. Skipwith*, 22 F. Cas. 9, 10 (C.D. Va. 1806)(Marshall, C.J.). The agent's failure promptly to follow the principal's instructions caused loss to the principal when the market value of the investments specified by the principal rose during the interval of delay. *Short* also articulates the importance of the agent's duty to follow instructions; the agent, a friend of the principal's, was not a professional in investment matters. Observed the court, "[i]t certainly was not to be expected, that a person under the circumstances of the defendant, could execute the order of the plaintiff with the clarity and adroitness of a professional dealer in certificates; but it was to be expected, that the orders of the plaintiff would not be disobeyed, and his remote situation increased the obligation not altogether to neglect any part of his business." *Id.* at 10. Thanks to Peter Fish for this reference.

failure to provide the requested clarification. The principal may attempt to respond but the response goes astray, whether in the mail, amidst or within fax machines, or in cyberspace.

Agency doctrine protects the agent and the third party when the agent's action is reasonable under the circumstances, in light of the principal's present wishes as the agent understands them. This dimension of agency doctrine simplifies matters for the principal by eliminating the need explicitly to update prior instructions in light of changed circumstances.¹² However, circumstances vary, and exigent circumstances may warrant a broader scope for the agent's construction of the principal's instructions. For example, leaving the menagerie for a military illustration, suppose a commanding officer tells his troops to patrol an area but to avoid engagement with enemy troops and to take no prisoners. If the patrol encounters the enemy's general, unguarded, one might initially think that it is reasonable to capture the general, given the overall objectives of armed combat.¹³ In some circumstances, that is, an agent may reasonably believe that the need or opportunity to act to accomplish the principal's overriding objective should be understood to expand the agent's authority. This can be a risky choice for the agent because the principal may disagree after the fact with the agent's assessment of what the principal's overriding objective required, or even what its nature might have been. Moreover, the principal may have information the agent lacks and which the principal has determined to withhold from the agent. In the military illustration, perhaps the

¹¹Or the principal may acknowledge the inquiry but explicitly refuse to respond. See *Garriock v. Walker*, 1 Rattie 100 (Sess. 1873).

¹²For a related argument supporting a current-preferences default rule for statutory interpretation, see Einer Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* 45 (Cambridge & London: Harvard University Press 2008).

commanding officer knew that high-level peace negotiations were underway but did not tell the patrol leader. Capturing the enemy general may destroy the peace negotiations and may also prompt a court-martial, not a medal, for the patrol leader.

c. Departures from instructions

Third, agents at times depart from instructions, well understanding what the principal wished to be done under the immediate circumstances, because the agent believes that the principal's instruction was misguided. Returning to the menagerie example, suppose A contracts to buy the horse from T, fully understanding P's instruction as P meant it, but believing it to be a mistake from the standpoint of the menagerie itself. What appears to be hubris on A's part could have several explanations. A may know from the experience of working for P that P is given to issuing instructions that P later regrets if anyone acts on them. After A ignores P's instructions, P applauds A's good judgment.¹⁴ It may, of course, be difficult and hazardous for A to make an assessment of any particular instruction at the time A acts. A risks ignoring instructions that P intends to be taken seriously, just as the patrol leader in the military illustration risks taking action that is contrary to the organization's objectives as those in control understand them at the time.

Matters are more complicated when the principal is not an individual. Suppose that P is not the owner of the menagerie but instead is the chief executive officer of Zoo, Inc., an incorporated firm. P is A's organizational superior but not A's principal; the common law of

¹³I owe this example to Mel Eisenberg.

agency treats both as co-agents of a common incorporated principal.¹⁵ A may contravene P's instruction because A believes it is an element of P's cash-conservation strategy to enable Zoo, Inc. to fund new business ventures believed by A to be unsound. Or P's plan, as understood by A, requires a shift out of horses and into exotic animals to be purchased at inflated prices from P. In either case, by purchasing the horse A has contravened the instruction of A's organizational superior. Does A's duty of loyalty to the interests of Zoo, Inc. justify A's actions? If A disagrees only with P's business strategy, although it may be in A's long-term interest in organizational survival to dissent from P's plan, A is not justified in buying the horse. Zoo, Inc.'s organizational structure allocates authority to make business strategy decisions—some of which likely will turn out to be mistaken—to P, not A. A may resign from Zoo, Inc., or seek reassignment within it, or attempt to persuade P's superiors to override P's prohibition, but if that course fails and A stays in place A should follow the directions of A's immediate superior. Other issues follow when P's instruction is a component of what appears to A to be a plan for self-dealing by P. There may be other avenues within Zoo, Inc. that A should pursue, such as contacting its board of directors, its shareholders, or its general counsel. Additionally, A's justifications for ignoring P's instruction may be more compelling when P has directed A to do something as opposed to prohibiting an action.¹⁶ If A acts affirmatively, as by purchasing exotic animals for Zoo, Inc. from P at prices A knows to be

¹⁴In doctrinal terms, a principal's consistent practice of applauding an agent's departures from instructions may augment the agent's actual authority through implication. *Restatement (Third) of Agency* § 2.02, cmt. e.

¹⁵*Restatement (Third) of Agency* § 1.04(9) & cmt. i.

inflated, A appears to be aiding and abetting P's breach of fiduciary duty.¹⁷ If A obeys P's instruction to refrain from taking an action, such as buying a horse, A is likely to be less closely and necessarily connected to P's breach of duty.

d. Literal compliance

Before leaving this example of a categorical prohibition, consider whether acting on a literal understanding of the prohibition would necessarily discharge A's duty to P. Suppose that A obeys P and buys no more horses for the menagerie. In A's spare time, A develops a specialized menagerie that displays only horses, having recognized that P's menagerie may no longer appeal to horse fans. Or A tips off P's already-established competitor that P may be abandoning horses. A's literal adherence to P's instruction does not privilege A to do other things inconsistent with P's interests that are related to the scope of A's relationship with P.¹⁸

Additionally, A's duty as an agent requires the disclosure to P of relevant information learned while acting for P.¹⁹ If A learns that P's competitor is developing a horse exhibit, A should tell

P. In short, A's literal compliance with P's instruction does not obviate A's fiduciary duties to

P. e. Non-agency relationships

¹⁶For starters, an agent is not obliged to follow an instruction to perform an illegal act. See id § 8.09(2).

¹⁷Knowingly to assist a fiduciary's breach of the duty of loyalty is a tort. *Restatement (Second) of Torts* § 874, cmt. c & § 876 (b)(St. Paul: American Law Institute Publishers 1979).

¹⁸*Restatement (Third) of Agency* § 8.04 (agent who competes with principal or assists principal's competitor breaches duty of loyalty).

¹⁹See, e.g., *Evtex Co. v. Hartley Cooper Assocs., Inc.*, 102 F.3d 1327, 1333 n. 7 (2d Cir. 1996); *Restatement (Third) of Agency* § 8.11.

An agent's duties to the principal contrast sharply with those owed by a person whose relationship with the principal consists only of one or more bargained-for exchanges, whether for goods, services, or other things of value. A is in this respect differently situated from T, the third party dealer in horses encountered earlier. As P's supplier of horses, T's duty to P is to provide the horses P purchases, with qualities as warranted by T. If their supply relationship has had a long history, it may have contributed more to P's success than has A. But T, not having undertaken to act on P's behalf, is free to do what A is not free to do as P's agent. Unless T has explicitly agreed not to do so, T may supply horses to P's competitor and may develop a competing menagerie. T owes no duty to P to reveal relevant information—about P's competitor, for example—unless withholding the information constitutes fraud.²⁰ Likewise, if T is not a dealer in horses but a supplier of a service that P uses in the menagerie, such as veterinarian, T is not P's agent. T's duty is to comply with the relevant standard of care. If P relies on T's advice and trusts T, P may attempt to establish that T should be treated as a fiduciary, for example if P at T's invitation relies on T's professedly expert advice about which animals to buy.²¹ Undisclosed self-dealing by T would then become problematic. In contrast, A's fiduciary duties do not turn on whether P is able to establish that P in fact trusted

²⁰For example, T must reveal nonobvious defects in the horses offered for sale to P that concern facts basic to the transaction and disclosure is reasonably to be expected in the circumstances. *Restatement (Second) of Torts* § 551(e) (St. Paul: American Law Institute Publishers 1977).

²¹On the imposition of duties of loyalty in relationships that are not canonically fiduciary, see D. DeMott, 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences', 48 *Ariz. L. Rev.* 925 (2006).

and relied upon A because agency doctrine operates categorically by treating all agents as fiduciaries as to conduct within the scope of the relationship.

3. Instructions That Explicitly Confer Discretion

a. Discretionary authority

An instruction on its face may give an agent discretion to determine what to do. A principal might so structure an initial grant of authority or an interim instruction for many reasons. The principal may believe that the agent's superior training will better situate the agent to decide what to do at the relevant time.²² Separately, the principal may wish not to hear from the agent again and may wish that the agent not seek clarifications. The principal also may believe that, given the nature of the agent's work, it will be impossible to articulate in advance all contingencies that may occur and how they should be resolved. More concretely, P, the menagerie owner, may tell A, its manager: "We need to enlarge the menagerie. I authorize you to spend up to \$100,000 on additional animals, as you see fit." A then purchases an assortment of elephants, giraffes, and cobras. Upon learning what A has done, P reacts negatively. P first says, "But that assortment won't draw crowds, in my judgment." P, however, has expressly allocated discretion to A to use A's judgment, taking the risk that it may not coincide with what P believes, after the fact, that P would have decided to do instead. Alternatively, P reacts, "Cobras! You know I've always refused to exhibit snakes. Too dangerous." Although P's statement on its face imposed only a monetary limit on A, A is not free to disregard what A knows about P's preferences, even if A believes them to be mistaken.

But suppose A had no way of knowing about P's aversion to snake exhibits. How widely the menagerie industry shares P's aversion is relevant to whether A acted reasonably. If P's is a general menagerie and only more specialized ones exhibit snakes (especially large and deadly ones), it is not reasonable for A to believe that, without more, P authorized A so radically to shift the nature of P's business.

As discussed more fully below, a principal's initial statement of authority to an agent is subject to later countermand by the principal, as would occur if P, having earlier delegated discretion to A to choose animals to purchase for the menagerie, issues later instructions that limit A's discretion or otherwise alter the circumstances under which A will perform. Suppose that P initially assures A that A will not be required to travel overseas to make the purchases but then later directs A to fly to Ruritania to purchase a rare specimen for P's menagerie. Unless P can be persuaded to withdraw the instruction, A has a choice: either comply with the instruction, which may give A a claim against P for the increased cost of A's performance; or resign.²³

b. Discretion used to self-deal

The fiduciary benchmark disallows (unless the principal consents) interpretations possibly motivated by the temptations of self-dealing. A may use part of the \$100,000 to pay for a giraffe, a satisfactory giraffe viewed objectively, but sourced from A's personal collection of exotic animals. Even if giraffes of the type have an ascertainable market price, and A pays no more than that price, A's self-dealing breaches the duty of loyalty that A owes to P unless A

²² K. Greenawalt, 'From the Bottom Up', 82 *Cornell L. Rev.* 994, 1020 (1997).

discloses the material facts to P and P consents.²⁴ Free to self-deal without disclosure and the principal's consent, A's judgment as to the assortment of animals to purchase may be biased.²⁵ Giraffes might then loom larger in the menagerie in more than one sense!

A's breach of the duty of loyalty makes remedies available to P that go beyond compensation for demonstrable loss. Suppose, reversing the example, that P directs A to raise \$100,000 by selling animals from the menagerie, and A purchases the giraffe for A's own collection without disclosing this fact to P. Even if A purchases at the then-current market price, P is entitled if P wishes to recover the giraffe itself from A or, if A then resells the giraffe at a higher price to T, to recover A's profit. P may also take the position that A's undisclosed self-dealing forfeits A's right to receive agreed-to compensation for A's services.²⁶

In all of these examples, it is beside the point that P's statement did not specifically prohibit A's act. An agent's fiduciary duty furnishes a benchmark for the agent's interpretation of the principal's instructions and for assessing actions the agent takes in response. This benchmark facilitates and simplifies the principal's exercise of control; it means that, to protect the principal's interests, instructions and statements of authority in agency relationships need not resemble trust indentures and other densely-drafted commercial

²³*Restatement (Third) of Agency* § 1.01, cmt. f(1) & illus. 3-4.

²⁴*Id.* § 8.03.

²⁵Greenawalt, *Legal Interpretation* at 220-221 ("Once an agent is encouraged at all to further his own interests or those of worthwhile causes, so long as he does not harm his principal's interests, his judgment about what exactly what will satisfy his principal's interests may be skewed. He may convince himself, or hope he can convince others, that her interests did not suffer.").

²⁶ *Cameco Inc. v. Gedicke*, 724 A.2d 783 (N.J. 1999). Further on remedies for breach, see D. DeMott, 'Disloyal Agents,' 58 *Ala. L. Rev.* 1047 (2007).

instruments. Absent the fiduciary benchmark, the principal would, like a good corporate lawyer drafting a complex loan agreement on behalf of a lender, need to attempt to anticipate contingencies and routes through which the agent might use discretion to the principal's disadvantage. Alternatively, a principal might reduce its use of agents²⁷ or incur the costs of insuring against agents' decisions skewed by self-interest and other impermissible motivations. Self-protective tactics are not free of transaction and opportunity costs and carry distinct complications and limitations of their own.

Relatedly, some question why agency is a categorical instance of a fiduciary relationship, even in commercial contexts, and whether or not the principal's instructions explicitly confer discretion on the agent. Linking the principal's right and ability to control the agent to the fiduciary benchmark imposed on the agent's interpretation of statements of authority and of interim instructions, answers the question. In our last example, if A is free to self-deal (by purchasing) without disclosing that fact to P, A may select animals to sell on the basis of A's assessment of their potential for resale at prices higher than the then-current market value. This prospect will affect how A interprets P's instructions. If P tells A, "First sell the animals that aren't drawing the crowds," A may well be tempted to press the definition of "crowd" so as to dispose of the giraffe through self-dealing prior to the horse, if the horse's market value over time is more readily predictable than is that of the giraffe.

²⁷The principal's plan may substitute technology for (human) agents or may reorganize its operation to internalize functions performed by external agents on the theory that employees are easier to monitor or less vulnerable to temptation.

To be sure, an agreement between principal and agent may help establish that the parties did not intend a relationship of agency or the scope of any such relationship.²⁸ However, it follows from the argument above that ex ante agreements between principal and agent in which the principal agrees not to hold the agent to any duty of loyalty either are ineffective or create a legal relationship other than agency. An agent's representational capacity, necessarily tied to the principal's power to control the agent, is also necessarily tied to the interpretative framework through which the agent determines actions to take on the principal's behalf.²⁹

c. Well-motivated disregard of principal's preferences

Additionally, an agent's position as the principal's representative calls into question whether the agent may disregard known preferences of the principal when immaterial to the principal's economic interests and when the agent believes that acting on these preferences would be misguided. Returning to the prior example, suppose that A, who cannot immediately consult with P, knows that P has a slight preference that menagerie animals be sold to T, not Z, when both P and Z are willing to pay the same price. P holds this preference for no stated or tangible reason known to A, whether or not economic.³⁰ A, however, prefers Z and sells to Z, not because A will benefit personally, but because Z generously donates a portion of its

²⁸*Restatement (Third) of Agency* § 1.02.

²⁹For recent recognition of the constitutive nature of an agent's fiduciary duty and the significance of the principal's instructions, see *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666-67 (2013).

³⁰K. Greenawalt, *Legal Interpretation*, 228 n.14 ("tangible" interests encompass economic interests as well as preferences known to be based on, for example, sympathy with a particular third party).

profits to the poor.³¹ On the one hand, as Kent Greenawalt notes, A has furthered P's objective—reducing the menagerie's cohort of animals—and at no less economic benefit to P.³² On the other hand, as P's agent, A acted as P's representative, taking action in the world as if P had done so personally, and from all A knows, A has reason to believe that P would have sold to T, not Z. Thus, even well-motivated departures from P's known preferences are inconsistent with A's position as P's representative.

4. The Tardy Instruction

a. *Delayed conferrals of authority*

Should it matter what the agent believes the extent of authority to be at the time the agent acts? Suppose P, who owns the copyright interests in books written by her late father, has authorized A, a literary agent, to enter into contracts with publishers for her father's nonfiction works. Later on, P, pleased with the quality of A's work, drafts a letter increasing A's authority to include contracts for her father's novels. P mails the letter to A, but it does not arrive before A executes a contract with T for publication of one of the novels.³³ Is P bound to T? Or is P free to contract with Z, a rival publisher, who offers better terms than T? There are many possible explanations for A's action. A may have failed to focus on or understand the scope of authority granted by P, or A may have known that authority was lacking but

³¹Or perhaps A knows that Z minimizes the taxes it pays less aggressively than T.

³²K. Greenawalt, *Legal Interpretation*, 221 (approving of agent's choice "so long as the peripheral interest is a general good and not the agent's own welfare or particular interests").

³³For an illustration in a reported case, see *Ruggles v. American Cent. Ins. Co.*, 114 N.Y. 415 (1889).

hoped that P wouldn't care if A got a good deal with T. Or A may not have wanted to reveal to T that P granted only limited authority to A.

This example illustrates the importance of the prototype or theoretical construct used to define and analyze authority. If authority is defined as a function of the ongoing relationship between an agent and a principal that must reflect the agent's reasonable understanding of the principal's present wishes, an agent may not contravene or exceed instructions even when the agent's action happens to coincide with further instructions that, unbeknownst to the agent, conform the agent's authority to the agent's acts. It is irrelevant to the extent of A's actual authority that P would act grudgingly in objecting to A's action; the letter when it arrived establishes P's willingness to be bound by just such an act by A. In contrast, if conferring authority is like making a gift, it should not matter whether the conferee knows of the conferral. The conferral, if provable, would be analogous to delivery in making a gift, so long as the donor intended to make the gift.³⁴ Authority would have an autonomous and continuing existence of its own, separate or detached from the relationship between principal and agent. Like a testamentary will, authority would be effective until the principal revoked it but its existence would be detached from the ongoing relationship and communications between the principal and the agent, and perhaps also from the state of facts known to the agent at the time the agent acts.

³⁴ E. Allan Farnsworth, *Changing Your Mind: The Law of Regretted Decisions* 136 (New Haven & London: Yale University Press 1998) (emphasizing importance of donor's intention). To complete the gift, the donee must accept it. *Restatement (Third) of Property: Wills and Other Donative Transfers* § 6.1(b).

Although other doctrines—soon to be explored—may bind P (the copyright holder), A lacked actual authority to do so because the basis for actual authority is the agent's reasonable understanding of what the principal wishes the agent to do.³⁵ The common law does not define authority as a thing that has existence separate from the principal's manifestations to the agent and the agent's reasonable understanding of them. In the example, this understanding is lacking because although P acted to enlarge A's authority, P did so unbeknownst to A.³⁶ The common law diverges in this respect from civil-law systems, which separate questions going to the agent-principal relationship from those concerning the agent's authority to bind the principal in transactions with third parties. For example, under the Louisiana civil code, a principal may confer authority through a unilateral juridical act, addressed to either the agent or the third party.³⁷ An agent may thus have authority to act without consenting to the conferral itself, which implies that the existence of authority is not dependent on the agent's knowledge of the principal's conferral.

b. Apparent authority

T might nonetheless be able to hold P on the basis that A acted with apparent authority by showing that T reasonably believed A to be authorized, a belief traceable to a manifestation made by P. If T succeeds on this ground, P has a claim against A to recover her loss of the better terms offered by Z because an agent is liable to the principal for losses caused by the

³⁵*Restatement (Third) of Agency* § 2.01.

³⁶*Id.* § 3.01, cmt. b, illus. 1. The same point underlies *Restatement (Second) of Agency* § 26, Illus. 1 (St. Paul: American Law Institute Publishers 1958).

³⁷La. Civ. Code art. 2987 (defining procuration).

agent's failure to act only as directed.³⁸ Apparent authority is crucial to explaining how the world works, or, more precisely, how agency doctrine accommodates the need for stability in transactions and third-party expectations. As the presence of actual authority depends on events that are often observable only by the agent and the principal, it may be tempting to the principal to deny the existence of actual authority when the principal regrets what the agent has done.³⁹ Additionally, the principal's explicit imposition of limits on the agent's authority may be accompanied with a nudge and a wink, encouraging the agent to ignore a limit when the agent can conclude a deal that seems advantageous, knowing that the principal has a defense if the deal subsequently proves disadvantageous. That principals only infrequently sue agents—especially employee agents—for overstepping their authority, may suggest that the presence of actual authority often coincides with apparent authority.⁴⁰ Apparent authority thus backstops actual authority in circumstances when proving actual authority would likely elude a third party.

Apparent authority resembles shadow boxing because its presence turns on what P has caused T to believe about P's relationship with A. Suppose T first approaches P about her father's novels and P responds, "Talk to A about any of my father's books. I'm too busy to deal with publishers." By deflecting T's inquiry and redirecting T to A, P may lead T reasonably to believe that A's authority encompasses, as P says, "any" of her father's books. Indeed, perhaps, at the time A executes the contract, T knows, but A does not, that P has

³⁸*Restatement (Third) of Agency* § 8.09, cmt. b.

³⁹For further elaboration, see *id.* § 2.03, cmt. c.

written and mailed a letter expanding A's authority to encompass what A is about to do.

Unless T knows that A executed the contract unaware of the letter, it is reasonable for T to believe that P has authorized A to make the contract for the novel. In contrast, if T knows that A does not know the content of the letter, T has at least reason to suspect that A lacks actual authority. But T may nonetheless reasonably believe that P has also communicated less formally with A. Otherwise, T would not reasonably believe that A has actual authority. Nor would T be reasonable in believing that A acts with actual authority when T has reason to know that A's conduct breaches a fiduciary duty to P, as when T bribes A to induce A to deal with T.⁴¹

c. Ratification

In contrast, ratification is a consequence of a principal's decision to affirm what the agent has done, after the principal learns the facts.⁴² Although ratification has the effect of creating actual authority after the fact,⁴³ it does not require an instruction from the principal that precedes the agent's action. Accordingly ratification operates differently from actual authority. Suppose P first learns about the contract from T and responds to T, "That's what I've always liked about A —the ability to take initiative to make a good deal." P is bound because P has affirmed or accepted A's action. That P communicates with T, not A, does not matter because

⁴⁰For other possible explanations, see G. Schwartz, 'The Hidden and Fundamental Issue of Employer Vicarious Liability,' 69 *S. Cal. L. Rev.* 1739, 1764-1767 (1996).

⁴¹*Restatement (Third) of Agency* § 2.03, cmt. d. & § 8.02 (agent has duty not to acquire material benefit from a third party through the agent's use of position).

⁴²*Id.* § 4.01.

⁴³*Id.* § 4.02.

events have moved beyond P's statement of instructions to A.⁴⁴ But may P both affirm the contract with T and treat A's unauthorized action as a breach of duty by A? P may wish to affirm the contract to stay on good terms with T,⁴⁵ but P may also wish to sue A to recover for her loss of a better deal or to treat A's conduct as a breach that should reduce A's compensation. As to A, P has given no assurances or representations that would estop P from asserting such claims against A. P did nothing to induce A to execute the unauthorized contract binding P to T, nor did their relationship place A in a situation in which executing the contract appeared reasonably necessary to protecting P's interests. Nonetheless, P seems to be behaving badly. Given P's manifest willingness to confer fuller authority on A, it is opportunistic for P to assert A's lack of actual authority because P could have gotten a better deal from Z, the rival publisher. Generally, agency doctrine protects an agent against the prospect that a principal may use its unilateral power to ratify as a way of shifting risk on to the agent. Otherwise, a principal might be tempted to ratify an unauthorized transaction, thereby binding the third party, while determining later whether to hold the agent accountable if the transaction with the third party turns out to be one that the principal then regrets.⁴⁶ If, however, the agent's unauthorized action places the principal in a predicament requiring that

⁴⁴P's attempt to ratify will be ineffective if it is preceded by any manifestation by T of withdrawal, that is, of intention not to be bound by the transaction. *Id.* § 4.05 (1). Once P repudiates A's action, T should not be subject to the risk of P's subsequent ratification. Farnsworth, *Changing Your Mind*, 177.

⁴⁵See *Goldstick v. ICM Realty*, 788 F.2d 456, 460 (7th Cir. 1986).

⁴⁶*Restatement (Third) of Agency* § 4.01, cmt. b.

the principal take affirmative steps to avoid loss, those steps do not manifest consent by the principal effective to exonerate the agent.⁴⁷

5. The Countermanding or Final Instruction

Agency is a fragile legal institution because actual authority terminates whenever the principal or the agent manifests to the other the wish to discontinue.⁴⁸ Even when principal and the agent have agreed that the agent's authority is irrevocable, it is not,⁴⁹ subject to two general exceptions. The first reflects a lessening of the theoretical rigors of historical formulations of agency doctrine to further widely-acknowledged social needs. Contemporary agency doctrine permits a principal to grant authority irrevocably through a durable power of attorney that becomes irrevocable when the principal loses legal capacity and regardless of that loss.⁵⁰ Although a principal who lacks legal capacity may well be unable to provide instructions to the agent that would reflect the principal's wishes, were the principal still legally competent, contemporary agency doctrine respects the principal's designation of a representative made while still competent. The second exception recognizes that the power to affect a person's legal relationships may be granted irrevocably when the grant supports an interest of the agent's that is separate from, or independent of, the agency relationship itself, as illustrated below.

a. Countermanding instructions

⁴⁷Id. § 4.02(2)(b) & cmt. d.

⁴⁸Id. § 3.10.

⁴⁹See F. Reynolds, 'When Is an Agent's Authority Irrevocable,' in *Making Commercial Law 259* (Oxford: Clarendon Press 1997)(Ross Cranston ed.)

⁵⁰*Restatement (Third) of Agency* § 3.08(2).

These exceptions aside, the relative fragility of authority can seem puzzling because it limits a principal's ability to self-bind against the risk of future changes in the principal's own preferences. Derek Parfit's example, "The Nineteenth Century Russian," is instructive on instructions that countermand prior instructions: a Russian nobleman, knowing he will inherit large estates in the future, is prompted by his socialist ideals to form the intention "now, to give the land to the peasants."⁵¹ Knowing also

that in time his ideals may fade, ... he signs a legal document, which will automatically give away the land, and which can be revoked only with his wife's consent. He then says to his wife, 'Promise me that, if I ever change my mind, and ask you to revoke this document, you will not consent.'⁵²

In the future, Parfit comments, the nobleman's wife "might plausibly regard herself as not released from her commitment," viewing herself as having "obligations to two different people;"⁵³ she would betray the young man to whom she made the promise to obey the man to whom she was (now) married, the later self of the young man. But, Parfit continues, if in sound mind, "the person to whom we are committed can always release us."⁵⁴ Treating the Russian Nobleman's wife as his agent, the fiduciary benchmark requires action consistent with her understanding of her principal's present statement of intentions. Although his preferences have changed, the principal's identity and his wife is the Russian Nobleman's representative. The Russian Nobleman's situation strikes some commentators as paradoxically self-

⁵¹Derek Parfit, *Reasons and Persons* 327 (Oxford: Clarendon Press 1984).

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.* at 328. Parfit continues, "This is like a similar fact about authority. Suppose that a general tells his troops, 'I order you to attack at dawn, and to disregard any later contrary

frustrating.⁵⁵ But his situation is troubling only if there's good reason always to prefer one's present projects and wishes over those one may have in the future.⁵⁶ Moreover, once he has aged, the Russian Nobleman may understand his youthful fear of middle-aged degeneration to have been only a jejune expression of naiveté.⁵⁷ To be sure, his present (middle-aged) perspective may diverge from that of his wife; and the power to revoke that vindicates his autonomy may also be the instrument of her disillusionment with the man to whom she is (now) married.⁵⁸

A principal's power to countermand a prior instruction is not the sole consequence of agency's foregrounding of the principal's present preferences and assessments. Recall that ex ante agreements that relieve an agent of fiduciary duties are, in the context of agency relationships, ineffective. However, conduct by an agent that would breach the agent's duty of loyalty does not constitute a breach if the principal consents to it, effective consent requiring a present decision by the principal preceded by disclosure by the agent of material facts relevant

order.' He later says, "Disregard my last order and retreat.' Despite the content of the first order, it would be this second order that his troops should obey." Id.

⁵⁵Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* 152 (Cambridge & New York: Cambridge University Press, rev. ed. 1984). As Elster defines paradox, "status X gives you the right to status Z, on the condition that you perform action Y, which automatically disqualifies you from being X." Id. The Russian Nobleman is "setting himself up for a situation in which he cannot make a certain request without ceasing to be himself and thus losing all grounds for being obeyed." Id.

⁵⁶B. Williams, 'Persons, Character and Morality,' *The Identities of Persons* 197, 206 (A. Rorty ed. 1976)(Berkeley & Los Angeles: University of California Press).

⁵⁷Williams, 'Persons, Character and Morality,' 206.

⁵⁸Parfit, *Reasons and Persons*, 328-29 ("That the young man whom she loved and married has, in a sense, ceased to exist—that her middle-aged and cynical husband is at most the later self of this young man—these claims seem to her to express more of the truth than the simple claim, 'they are the same person'.").

to the principal's judgment.⁵⁹ That is, whether "consent" is effective turns on the principal's present decision, informed by presently-disclosed information, and not the principal's prior assessments.

b. Final instructions

A principal's termination of authority is the principal's final instruction to the agent because it directs that agent cease acting on the principal's behalf. If the agent continues service thereafter, the agent is not entitled to compensation for the post-termination service in most instances. Persisting after the final instruction is not, however, treated as a breach of the agent's duty of loyalty that could forfeit the agent's right to compensation for prior service because the agent has been disobedient, not disloyal.⁶⁰ Agency doctrine gives effect to the principal's instruction even when it contravenes an agreement stating that the authority shall be irrevocable, an objective the (young) Russian Nobleman attempted but failed to achieve.

Moreover, a principal has the power to revoke even when exercising the power constitutes a breach of contract. Consider first the distinctive significance of the principal's power to revoke authority, returning to the hypothetical menagerie owner, P. Suppose P retains A Corp. to manage P's menagerie business. A Corp. specializes in managing zoos and amusement parks more generally; properties it manages usually make prominent mention of A Corp.'s involvement. The management agreement between P and A Corp. provides that, in exchange for licensing the use of its name by P's menagerie (which becomes "P's Menagerie.

⁵⁹*Restatement (Third) of Agency* § 8.06 (1).

⁶⁰See *Strategis Asset Valuation & Mgmt, Inc. v. Pacific Mut. Life Ins. Co.*, 805 F. Supp. 1544 (D. Colo. 1992).

An A Corp. Park”) and using its specialized management expertise, A Corp. will receive a royalty of 3% of the menagerie’s gross revenues for the first 5 years, followed by a 5% royalty over the next 5 years. The agreement explicitly provides that P agrees not to terminate prior to the conclusion of 10 years, in exchange for A Corp.’s agreement to accept a lower royalty rate over the first 5 years.⁶¹ Notwithstanding these terms, if P revokes A Corp.’s authority at the five-year point, or indeed at any time, A Corp. may not remain in control of P’s menagerie. If it does not depart voluntarily, A Corp. may be judicially ejected. Although A Corp. may sue P to recover damages for breach of contract, A Corp. will need to prove and quantify its losses.⁶² P’s power to revoke A Corp.’s authority is not ousted by A’s prior agreement with A Corp., just as the Russian Nobleman’s prior instruction to his wife did not cancel his ongoing ability to reconsider in light of his (later) preferences.

In contrast, irrevocability is achievable when authority supports an interest of the agent that is distinct from the agency relationship, which A Corp.’s interest in recovering the higher royalty rate over the final five years of its management agreement with P would not be. But suppose that P and A Corp. agree that A Corp. will make substantial physical improvements to the menagerie and will in exchange become a half-owner of the property. A Corp. now has an interest separate from its interest in continuing to manage the menagerie, as A Corp. would also have if it lends P P the money necessary to improve the menagerie, or if it leases the

⁶¹For the specifics, see *Government Guaranty Fund v. Hyatt Corp.*, 95 F.3d 291 (3d Cir. 1996). Accord, *Restatement (Third) of Agency* § 3.12, illus. 3.

⁶²In Maryland, industry-specific exceptions (hotels and retirement communities) oust the application of common-law doctrine when an operating agreement does not permit early

menagerie from P. A Corp.'s interest as a half-owner, a creditor, or a lessee is distinguishable from its role as an agent.⁶³ A Corp.'s distinct interest is enforceable; it also creates a non-agency basis on which to make irrevocable (if the parties' agreement so provides) A Corp.'s management authority, trumping P's terminal instruction by situating a portion of A Corp.'s relationship with P beyond the scope of its representation of P.

The principal's ongoing power to give the final instruction to an actor who is simply an agent is an aspect of agency doctrine with wide-reaching consequences. For example, a principal's power to revoke authority helps explain why it is important that a corporation be a legal person distinct from its organizers and its stockholders, although some contemporary theorizing about corporate law appears to assume otherwise.⁶⁴ To characterize a corporation as simply a contractually-constituted association, in which directors and officers are the shareholders' agents, overlooks the fact that it is often to the advantage of shareholders that directors and officers be able to create contractual commitments with third parties that bind both the corporation and the third party. But if the shareholders are, individually, the principals, each may revoke authority and do so at any time.⁶⁵ This contingency renders unstable the contracting capacity of directors and officers such that, at a minimum, a third party would always want to know, immediately prior to executing a contract, whether all

termination. See Md. Com. Law Code § 23-104 (2004) & 23-102 (b)(specific performance available as remedy) (2004).

⁶³See *Lane Mtge. Co. v. Crenshaw*, 93 Cal. App. 411, 269 P. 672 (1928).

⁶⁴See Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* 41 (Cambridge: Harvard University Press 1991).

⁶⁵Each shareholder would be characterized as a co-principal. *Restatement (Third) of Agency* § 3.16, cmt. c.

shareholders still assent to their purported representative's authority. The corporate structure overcomes this problem by situating authority between the corporation itself and those who act on its behalf, and not between those agents and the shareholders.⁶⁶

More generally, as a principal's ongoing power to revoke an agent's authority illustrates, agency doctrine consistently privileges the principal's present preferences, which may be expressly stated (as when the principal revokes the agent's authority) or bind the agent when the agent interprets the principal's instructions in light of the principal's present wishes as the agent then reasonably understands them. Viewed instrumentally, this underlying characteristic of agency doctrine reduces the risks inherent in extending one's legal personality by consenting to representation by an agent. Viewed as a consequence of the constitutive elements of an agency relationship, it is consistent with the relational nature of agency itself that agency doctrine mandates loyalty to the principal's present preferences (or persona). A principal's conferral of authority on an agent is unlike making a gift, executing a will, forming a corporation, or authoring a work of literary or artistic art. All of these create a legally-salient something that is external to or detached from their creator, whereas an agency relationship remains an extension of the principal throughout its duration.

6. Other Accounts of Agency Doctrine

The central importance of stating and acting upon instructions explains and links elements of common-law agency doctrine that otherwise lack a single coherent rationale, in particular

⁶⁶The corporate structure also enables an agent to have an interest in something, the corporation, other than the agency relationship itself. See *Restatement (Third) of Agency* § 3.12(2)(irrevocable proxies granting authority to vote stock).

the agent's fiduciary duties to the principal and the principal's power to control the agent.⁶⁷

Some commentators, most prominently Oliver Wendell Holmes, have doubted whether the common law of agency has any ascertainable intellectual coherence. Justice Holmes asserted that "there is no adequate and complete explanation of the modern law, except by the survival in practice of rules which lost their true meaning," which left, as an unsatisfying residue, only a fictional identification of the agent and the principal, plus common sense.⁶⁸ Holmes's pervasive pessimism aside, accounts of agency that slight or ignore the importance of instructions are incomplete. For example, Wesley Hohfeld emphasized an agent's power to create legal liabilities in the principal that are correlatives of the legal power the principal has granted to the agent. The agent's powers, he concluded, are "[e]ssentially similar to...powers of appointment in relation to property interests," as are a sheriff's power to sell property under a writ of execution and a donor's power to revoke a gift that has been promised but not delivered.⁶⁹ Focusing exclusively on an agent's ability to affect the principal's legal interests, Hohfeld's account omits the agent's duties to act loyally on behalf of the principal and as the principal directs and, like civilian treatments of authority, decouples the presence of authority from the agent's duties to the principal. Hohfeld's account also has implications for how an

⁶⁷For a broader theoretical account of fiduciary obligation consistent with this point, see A. Laby, 'The Fiduciary Obligation as the Adoption of Ends', 56 *Buffalo L. Rev.* 99, 135 (2008).

⁶⁸O.W. Holmes, *The Common Law* 232 (Boston: Little, Brown & Co. 1881). For greater optimism about rational or cogent explication, see W. Seavey, 'The Rationale of Agency', 29 *Yale L. J.* 859, 859 (1920)(results reached by courts may be tested, not axiomatically, but "by the use of judicial sense (not common sense) and the needs of commerce.").

⁶⁹W. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 23 *Yale L.J.* 16, 46-47 (1913).

agent should interpret instructions received from the principal. If an agent's authority is comparable to a power of appointment in relation to a property interest, the text in or through which authority is expressed would govern, not the agent's understanding of the principal's wishes at the time the agent takes action. The absence of comparable formal requisites⁷⁰ for the creation of agency relationships would be a source of frustration, as would be the absence in many agency relationships of anything comparable to a written power.

Other accounts attempt to capture agency relationships for the turf of bargained-for exchange (in which many agency relationships unquestionably originate) and for the legal domain of contract. James Coleman analyzed agency relationships as the consequence of transactions involving an agent's surrender of the right to control her own actions in exchange for remuneration from a principal who needs the actions of one with the agent's skills or capacities.⁷¹ The principal's dilemma is that "even a directly supervised agent may devote more or less effort toward the outcome desired by the principal."⁷² An agent's interests are always disjoint from the principal's, not unified, and an agent always by definition acts differently than would the principal in the agent's place and with the agent's resources. Although Coleman's account explores structures through which an agent may be led to identify with the principal's interests, it does not delve into the nature of direction, supervision, or authority, all highly significant to the functioning of agency relationships. Authority to direct

⁷⁰See *Restatement (Third) of Property: Wills and Other Donative Transfers* § 18.1 (compliance with formalities requisite to creation of effective power of appointment).

⁷¹James S. Coleman, *Foundations of Social Theory* 146 (Cambridge & London: Belknap Press 1994).

⁷²Coleman, *Foundations*, 151.

the actions of others is essential to explaining how organized activity occurs because such authority supersedes moment-by-moment negotiation over the terms on which work will be done and by whom.⁷³ Direction or supervision requires instruction, and by consenting to an agency relationship with a principal, the agent becomes subject to a duty to follow instructions furnished by the principal that are within the broad outer limits imposed by the law. Acting on the basis of those instructions requires interpretation by the agent, a process anchored by the agent's fiduciary duty to the principal, which bridges the agent's interests with those of the principal. But this is not the realm of contractual interpretation, necessarily focused as it is on mutually-understood intentions at the time the contract was made and permitting otherwise-legal actions in disregard of the counterparty's interests.⁷⁴ Contractual interpretation, as Daniel Markovits notes, which "takes the terms of the contract as its lodestar," requires that a promisor look not to the promisee's changing interests but to the contract.⁷⁵ Agency doctrine, in contrast, focuses an agent's interpretation on the principal's expressed or cognizable wishes at the time the agent determines how to act.

7. Conclusion

The fiduciary character of an agent's position explains a principal's exercise of control over the agent through instructions given to the agent, as well as the adaptability of agency

⁷³See R. Flannigan, 'The Economic Structure of the Firm', 33 *Osgoode Hall L. J.* 105, 119 (1995)(observing that employees "do not refuse to take direction. They do what is asked of them, and they do so for very good reasons.").

⁷⁴On contractual interpretation, see, e.g., Greenawalt, *Legal Interpretation*, 255-300; Aharon Barak, *Purposive Interpretation in Law* 318-38 (Princeton & Oxford: Princeton University Press 2005)(Sari Bashri tr.).

relationships across changing circumstances. The fiduciary character of the agent's position stems from an agent's position as a legally-salient extension or representative of the principal, as does agency's consistent requirement of loyalty to a principal's present preferences and persona. In striking contrast to other bodies of legal doctrine, agency law is not a basis on which to ground a solution to one's distrust of one's future self, focused as agency necessarily is on assuring a principal's autonomy through time and thus on the principal's present self and preferences.

⁷⁵Daniel Markovits, 'Sharing *Ex Ante* and Sharing *Ex Post*: The Non-Contractual Basis of

