

The Contours and Composition of Agency Doctrine: Perspectives from History and Theory on

Inherent Agency Power

Deborah A. DeMott*

Abstract

This Essay explores the history of formulations of agency doctrine, arguing that agency law can best be rationalized as a distinctive subject by recognizing that an agent acts as an extension of the principal. The Essay relies on historical material related to the drafting of the Restatements of Agency, the disagreements among Reporters and other participants about the contours of agency law, and the intellectual backdrop against which these experts worked. Their disputes, preceded as they were by challenges to the fundamental coherence of agency law, led to successive formulations of agency doctrine; while attempting to provide a comprehensive level of generality, some formulations threatened to distort established limits on the scope of a principal's responsibility for the actions of an agent.

To explain that distortion, this Essay proceeds first by outlining the debates over the status of agency law as an independent branch of law and the ALI's struggles to define agency law. It then delves into the history and development of inherent agency power as a doctrine, through its inclusion in the Restatement (Second) of Agency and culminating in the doctrine's rejection by the Restatement (Third). The doctrine of inherent agency power originated as a sort of catch-all (termed a "third bottle") for cases in which an agent had neither actual nor apparent authority, but nonetheless was able to subject the principal to liability to third parties. Inherent agency power generalized these as situations arising from the agency relationship itself and where the protection of third parties from harm was sought. As a distinct doctrine, inherent agency power risked situations in which a principal would be subject to liability on a transaction entered into by an agent when a third party had notice that the agent lacked authority.

This Essay then explains the impact of inherent agency power doctrine on agency law. The perceived necessity for inherent agency power stemmed in part from definitions of apparent authority that were unduly narrow. Tying the themes of the discussion together, the Essay

returns to the distinctiveness of agency doctrine among common-law subjects, a distinctiveness that does not require the use of generalizations that lack clarity and normative content.

I. Introduction

Agency law is distinctive if not unique among common-law subjects because wide-ranging consequences follow from definitions and doctrinal formulations that, at first glance, look straightforward. Amplifying these consequences, many formally distinct elements of agency doctrine are reticulated or interconnected. Additionally, the role or position ascribed to agency relative to other bodies of law matters. This Essay explores perennial difficulties in formulating agency doctrine within a framework of broader claims about the defining characteristics of agency relationships. I wrote this Essay in the spirit of an homage to Larry Ribstein's scholarship on fiduciary duty, not that I claim Larry would or would not have agreed with me. Indeed reading Larry's scholarship may have been so invigorating for me precisely because I often disagreed with it! But Larry always made me think and reconsider my own assumptions. Larry made bold claims, insisted on the importance of careful theoretical grounding, and anticipated reactions and objections to his arguments. He defended his arguments with vigor but was open-minded and intrigued by others' assessments.

In particular, Larry objected to "the fiduciary confusion," that is, the range of situations in which fiduciary duties might apply to one or more actors, as well as the criteria—which Larry saw as too indefinite—that govern the application of fiduciary duty.¹ Larry argued that "the fiduciary confusion" reached its depth in partnerships and other unincorporated business firms;

1. See Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 211.

to resolve the confusion, he recast the fiduciary duty of loyalty as a consequence of a “contractual delegation of broad power over one’s property.”² Turning to agency law, my concern in this Essay, Larry wrote that the principal’s power of control, essential to a relationship of common-law agency, “may be inconsistent with the kind of open-ended delegation that creates a fiduciary relationship” as he defined it.³ In contrast, my starting point is that an actor who is not subject to fiduciary duties is not an agent. That is, the fiduciary character of agency is (and should be) a constitutive element of an agency relationship, as is the principal’s power of control.⁴ Despite our disagreements, I always found Larry’s scholarship to be exemplary for the clarity and robustness with which he articulated and defended underlying theoretical claims and thought of him with affection when I drafted this Essay.

As this disagreement suggests, the definition of agency that grounds the doctrinal specifics of agency law is neither obvious nor undisputed. Indeed, as the Essay explains more fully,

2. *Id.* at 212.

3. *Id.* at 224.

4. For a recent application of this point, see *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (holding that proponents of ballot initiative to amend California’s constitution were not agents of the people of California for purposes of having standing to defend the amendment’s constitutionality because “the most basic features of an agency relationship are missing” *Id.* at 2666. Proponents lacked both a principal with rights or powers of control and “owe[d] nothing “resembling a fiduciary obligation. *Id.* at 2667). Of course, it is not necessary to prove the existence of a fiduciary relationship to establish that a relationship is one of agency because the agent’s fiduciary duties are a consequence of the agent’s position. See RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. e (2006); *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F. 3d 1229, 1250 (10th Cir. 2013). For fuller discussion of the fiduciary character of agency and its linkage to the principal’s power of control, see Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew S. Gold & Paul B. Miller, eds., forthcoming 2014) available at http://scholarship.law.duke.edu/faculty_scholarship/3129/ [hereinafter DeMott, *Fiduciary Character*].

whether agency law is itself a coherent subject with substance independent of other bodies of law has long been questioned.⁵ This Essay explores the intellectual history of formulations of agency doctrine in the United States, which undertook to respond to fundamental challenges to the subject's coherence. The essay argues that this effort may have prompted formulations of agency doctrine (in particular in the Restatement (Second) of Agency) that were broadly cast in a quest for a consolidating level of generality that threatened to consume long-established doctrine, including limits on the scope of a principal's legal responsibility for conduct by the agent. In the United States, the successive Restatements of Agency have been the focal points for scholarly engagement with the subject since the mid 1920's.⁶

5. As the question was stated relatively recently, is agency “only the sum of a variety of legally regulated relationships . . . [?]”, Lance Liebman, *Foreword to RESTATEMENT (THIRD) OF AGENCY* at xi. *See also* Thomas Krebs, *Agency Law for Muggles: Why There Is No Magic in Agency*, in *CONTRACT FORMATION AND PARTIES* 205, 205 (Andrew Burrows & Edwin Peel eds. 2010) (“there is much to be said for a view . . . which maintains that the rights and liabilities of the parties must generally be derived from and explained by an application of the general rules of contract, tort, and unjust enrichment.”). Other recent scholarly accounts note that agency law contains rules that are not explicable by other bodies of law. *See, e.g.*, LAURA J. MACGREGOR, *THE LAW OF AGENCY IN SCOTLAND* 32 (2013) (arguing that “[a]lthough one could describe agency law as sui generis, it is more accurately described as the application of parts of private law to situations involving principal and agent, coupled with rules specific to agency law (for example, the undisclosed principal).”). *See also infra* text accompanying notes 11–23.

6. My prior scholarship links the Restatements' centrality to the fact that no competing comprehensive account of agency emerged in the United States, in contrast with common-law subjects like Contracts and Torts. *See* Deborah A. DeMott, *The First Restatement of Agency: What Was the Agenda?*, 32 *SO. ILL. U. L.J.* 17, 18 (2007) [hereinafter DeMott, *The First Restatement*]. The last comprehensive account of the subject published in the United States (apart from the Restatements) was FLOYD R. MECHEM, *A TREATISE ON THE LAW OF AGENCY INCLUDING NOT ONLY A DISCUSSION OF THE GENERAL SUBJECT BUT ALSO SPECIAL CHAPTERS ON ATTORNEYS, AUCTIONEERS, BROKERS AND FACTORS* (2d ed. 1914). *See also* Alfred Conard, *What's Wrong with Agency?*, 1 *J. LEGAL EDUC.* 540, 547 (1949) (noting that “there has been no treatise attempted since Mechem's second edition of 1914”). Mechem's treatise consists of two volumes and runs, exclusive of tables and index, for 2191 pages. For further discussion of Mechem's treatise and its influence, see *infra* text accompanying notes 21–23 & 91.

More broadly, the Essay argues that agency relationships, as the law uses these terms, are best understood to enable one person (a “principal”) through an independent actor (the “agent”) to take legally-salient actions in relationship to third persons and facts about the world.⁷ An agent, that is, functions as the principal’s representative, as an extension of the principal, while retaining the agent’s own separate legal personality. Unlike some fiduciaries, an agent as such does not function as the principal’s substitute; as a consequence, the principal’s continued existence is requisite to any ongoing agency relationship.⁸ Viewing agency through the metaphor of extension helps to rationalize well-settled doctrine; it also furnishes an analytic criterion against which to evaluate doctrinal formulations that delimit the extent of a principal’s liability to third parties. In agency law, these limits become especially salient when an agent has

7. Formally defined, “[a]gency 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.” RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). To the same substantive effect is the counterpart definition in RESTATEMENT (SECOND) OF AGENCY § 1 (1958). In contrast, in the first Restatement, “fiduciary” is not present in the definition, see RESTATEMENT OF AGENCY § 1 (1933). A subsequent provision, contained within a topic delineating “Essential Characteristics of Relationship,” characterizes an agent’s relationship to the principal as fiduciary. *Id.* § 13 (stating that “[a]n agent is a fiduciary with respect to matters within the scope of his agency.”). Comment b observes that “the understanding that one is to act primarily for the benefit of another is often the determinative feature in distinguishing the agency relationship from others.” *Id.* at cmt. b.

8. See DeMott, *Fiduciary Character*, *supra* note 4, at 3. Thus, a typology of fiduciary relationships should distinguish ones of extension from ones of substitution. Relationships in which an actor renders advice to another are do not necessarily fall into either category but may be characterized as fiduciary, especially when the adviser obtains confidential information from the advisee, holds itself out as a disinterested source of investment or financial advice, or seeks separate remuneration for furnishing advice. See D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1461-63 (2002).

acted contrary to the principal's instructions or beyond the bounds of authorized action as prescribed by the principal, or the principal so claims after the fact of the agent's action.

To test the metaphor of extension, the Essay focuses a well-known formulation present in Restatement (Second) but jettisoned by Restatement (Third): inherent agency power (or powers).⁹ The Essay argues that inherent agency power misconceived the point of Agency as a distinct subject through an understandable but ill-fated attempt to frame doctrine in broad and generalized terms.¹⁰ The history explored in the Essay illustrates the origins and arguable motivations underlying inherent agency power. Section II begins with an introduction to

9. RESTATEMENT (SECOND) OF AGENCY §8A (1958).

10. The other leading example of such a misconception is the prospect—created by RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958)—of a principal's vicarious liability for an agent's torts on the sole basis that the agency relationship aided in the commission of the tort. Restatement (Third) rejects this theory. *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441 n.2 (2013) (noting Restatement Third's rejection of "aided-in-accomplishing" theory for vicarious liability). Vicarious liability as stated by Restatement (Third) requires either that the agent, if an employee, have acted within the scope of employment; or that the agent have acted with apparent authority in dealing or communicating with a third party on or purportedly on the principal's behalf, or that the agent's apparent authority have enabled concealment of the tort. *See RESTATEMENT (THIRD) OF AGENCY § 7.02* (2006) (stating circumstances under which principal is subject to vicarious liability); *id.* § 7.07 (stating principal's vicarious liability for torts committed by employees within the scope of employment); *id.* § 7.08 (stating principal's vicarious liability when agent acted with apparent authority in committing tort or concealing it). Venturing beyond the scope of this Essay, it may be justifiable for a court to impose vicarious liability when an agency relationship enables the commission of a tort against a victim who could not have reasonably believed that the agent acted with authority, as when the principal confers power on the agent over important elements of the life of a vulnerable victim. *See Ayuluk v. Red Oaks Assisted Living, Inc.*, 201 P.3d 1183, 1199–1200 (2009) (recognizing theory of vicarious liability against employers when employee "has by reason of his employment substantial power or authority to control important elements" of the livelihood or life of a vulnerable person). "Aided-in-the-accomplishment," when coupled with a mitigating structure, also has an established presence in employment-discrimination litigation. *Vance*, 133 S.Ct. at 2441–43 (discussing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 755 (1998)).

agency's controverted status and uncertain contours when the American Law Institute undertook to restate the common law. The account draws on unpublished archival material associated with this early history to illustrate the intellectual and practical stakes as the participants then understood them. Section III explores the history—a complex one—of the doctrine of inherent agency power, a category articulated in Restatement (Second) that provided for the principal's liability when the agent acted with neither actual nor apparent authority and that furnished a rationale for liability operative across a broad swath of disparate cases. This history illustrates, among other things, the lingering consequences that stemmed from an early and narrow definition of apparent authority. Section IV examines the practical and theoretical implications of inherent agency power. A concluding section ties the history and its consequences back to the fundamental challenges to Agency as a distinct subject and back to the importance of clarity in how one defines an agency relationship and the point of agency law.

II. Agency's Controverted Status and Contours

Whether the common law of agency should be characterized as a distinct or independent subject, and, if so, whether it has sufficient internal coherence to be a "proper title in the law,"¹¹ have been prominent questions for over a century. To be sure, beginning early in the nineteenth century, scholars published lengthy descriptive books compiling and organizing precedents that primarily focused on contractual disputes between agents and their principals, and principals and the third parties with whom their agents dealt.¹² However, to answer a question Oliver Wendell

11. Oliver Wendell Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 345 (1891).

12. The first book-length treatment of agency was published by an English barrister in 1811, followed by an American edition in 1822. See WILLIAM PALEY, *A TREATISE ON THE LAW OF*

Holmes raised with his students at Harvard Law School in 1882,¹³ agency's status as a "proper title in the law" required that it be distinct from other bodies of law already recognized as "proper titles." Floyd Mechem, who wrote the last comprehensive American treatise on agency, acknowledged "[t]hat there are some unique cases—like the rules respecting the undisclosed principal, for example—cannot be denied; though some have preferred to treat these merely as anomalies rather than as the subject of a distinct system of rules."¹⁴

Against this backdrop, work on the first Restatement of Agency began with a question mark. Commissioned by the Council of the American Law Institute to prepare a report on "Classification of the Law," Roscoe Pound came to Agency at the end of his report, situating it

PRINCIPAL AND AGENT, CHIEFLY WITH REFERENCE TO MERCANTILE TRANSACTIONS (2d Am. ed. 1822). The first indigenous American work was JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE (1839). For discussion of other early works, see I MECHEM, *supra* note 6, at 10–11.

13. His brief tenure on the Harvard Law faculty began in February 1882; when the 1881-1882 academic year opened, the school had 139 students and four full-time professors. Appointing Holmes to a fifth professorship required raising an endowment, which was funded by William F. Weld, Jr. at the urging of Louis Brandeis. G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 198–201 (1993). Upon his appointment, Holmes began preparing for the courses he was to teach in fall 1882: Torts, Agency and Carriers, Suretyship and Mortgages (full-year courses, each one hour per week with the exception of two hours for Torts); and Jurisprudence and Admiralty (one-semester, one-hour courses). *Id.* at 201–02. Holmes resigned in December 1882 to accept appointment to the Supreme Judicial Court of Massachusetts. *Id.* at 202. He accepted the judgeship without consulting either his colleagues on the law faculty or Charles W. Eliot, the President of Harvard University. *Id.* at 202–03. The suddenness of his departure startled his faculty colleagues, but perhaps not President Eliot, who had earlier written to Holmes that he "remain[ed] free to accept a better position or more congenial environment elsewhere," unless Holmes returned to law practice within five years, which would be acceptable "only in the improbable case that you had not succeeded as a teacher of law." *Id.* at 199. President Eliot was aware that Holmes had been seeking a judgeship. *Id.* at 198.

14. I MECHEM, *supra* note 6, at 4.

within a series of “Specific Questions of Classification.”¹⁵ To Pound’s question, “The place of Agency?,” his report gave no answer.¹⁶ Another sort of question mark lingered as well. Holmes had established agency’s substantive distinctiveness but had also challenged the subject’s intellectual cogency and merit. Perhaps because his teaching duties included agency law, Holmes identified many instances in which the presence of an agency relationship led to distinctive results.¹⁷ But distinctiveness and intellectual strength are not identical; a catalog of anomalous results would be a collection of miscellany, not an intellectually systematized “proper title.” Holmes claimed that agency-law doctrine rested on no more than an identification between principal and agent traceable to the Roman law applicable to slaves, plus common sense.¹⁸ The fact that the fictitious identification of agent and principal led to distinctive results could be explained by “the survival in practice of rules which lost their true meaning when the objects of them ceased to be slaves.”¹⁹

A separate but related question for Agency, if designated a “proper title,” was its content and, in particular, whether the Restatement, like the agency treatises, should mostly focus on

15. See Roscoe Pound, *Preliminary Report to the Council on the Classification of the Law*, 2 A.L.I. PROC. 379-425, at 423 (1924).

16. Portions of Pound’s system of classification—but excluding his question about Agency—were published as Roscoe Pound, *A Classification of Law*, 37 HARV. L. REV. 933 (1924).

17. See Holmes, *supra* note 11, at 368–71.

18. OLIVER WENDELL HOLMES, *THE COMMON LAW* 16, 228–32 (1963).

19. *Id.* at 232.

contractual questions or should additionally fully address the legal consequences—for all three parties—of an agent’s tortious conduct that injures a third party. And were employees (“servants” in the older nomenclature)²⁰ relevant actors for an Agency Restatement? In the preface to the second edition of his treatise, Floyd Mechem wrote in 1914 that

[i]t seems desirable to point out,—what perhaps sufficiently appears from the text itself,—that although the title Agency in modern times is quite frequently made to include the relation of Master and Servant as well as that of Principal and Agent, this book is primarily designed to deal with the latter subject, and the former subject is dealt with only incidentally and for the purpose of rounding out the discussion of the latter.²¹

Indeed, the treatise continues, “[t]he proper discussion of the law of Master and Servant, in all of its bearings, would require volumes.”²² Consistent with this view, of the 2191 pages in the substantive body of Mechem’s treatise, only 127 focus on the principal’s liability when an agent engages in tortious conduct.²³

When work began in 1923 on the first Restatement of Agency, Professor Mechem served as the Reporter. He was acknowledged by the ALI’s governing body, its Council, as the “one

20. Restatement (Third) of Agency jettisons the master-servant terminology. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. a (2006).

21. I MECHEM, *supra* note 6, at iii–iv.

22. *Id.* at iv. That such length would be requisite might have been due to Mechem’s writing style, which was not concise, plus his preference for a highly articulated scheme of organization.

23. II MECHEM, *supra* note 6, at 1436–1563. Mechem’s treatise demonstrates a sustained commitment to an “exhaustive” “enumeration of possibilities,” which he acknowledged the torts-related material did not achieve. *Id.* at 1436.

person preeminently fitted”²⁴ for that role, charged with research and drafting, and assisted by a group of expert advisers. It appears that Mechem and his advisers addressed provisions dealing with the implications of employees’ torts in 1928. At a meeting among Mechem and his advisers, plus Francis Bohlen (the reporter for contemporaneous work on the Restatement of Torts), all agreed to “treat[ment] in extenso in this re-statement as a particular application of principles which would be more generally stated in the re-statement on Torts.”²⁵ Discussion at the meeting appears to have focused, not on a draft written by Mechem—perhaps unsurprising given his treatise’s relative reticence about “the relation of Master and Servant”²⁶—but on a text prepared by Warren A. Seavey, one of Mechem’s advisers: “[t]he group for the purpose of discussing the question went hastily over Mr. Seavey’s typewritten suggestions, section by section, to see whether or not it would be advisable to expand the Topic²⁷ for Agency purposes.”²⁸

24. American Law Institute, *Report of the Executive Committee of the Council on Organization, Work and Budget Adopted May 5, Considered by the Council May 19*, 1 A.L.I. PROC., Part III app. 2 at 97–98 (1923).

25. American Law Institute, *Minutes of Meetings of Conferences of Reporters and Advisers*, Apr. 28, 1928, at 1 (hereinafter *Advisers’ Minutes*). In its early days, the ALI took minutes of advisers’ meetings, which were transcribed via carbon paper onto onion-skin paper and distributed to individual participants. Although these minutes were not published, I reviewed a set from the agency meetings that belonged to Judge John Kimberly Beach, who became an Adviser to the project in 1927. Thus the record available to me did not include minutes of meetings held prior to May 1927. In 1940, Judge Beach’s estate presented his set of minutes to the Yale Law Library. I am grateful for the Yale Law Library’s loan of this material.

26. *See supra* text accompanying notes 21–23.

27. *Advisers’ Minutes*, Apr. 28, 1928, at 1. It is not entirely clear what “the Topic” was at this point. At the next meeting “Topic VI” covered “Defaults of Principal or Master in Connection

How best to draft the Restatement's text to accommodate doctrine related to torts was also on the agenda. Professor Mechem stated that he agreed it was desirable "to try to include . . . an idea that has been suggested here which I did not include, that is to say, a more general statement of the ground of liability of the principal or master for the act of his agent or servant, quite regardless of the question whether it is within the ordinary rules of respondeat superior."²⁹ Seavey—but Mechem was reluctant—proposed a division along the lines of "[l]iability of a master for the Torts of his servant; then the liability of a master for Torts of agents who are not servants,"³⁰ which corresponds to the structure in the published version of the first Restatement of Agency.³¹ But the underlying question of whether to attempt a broader formulation to rationalize or amalgamate the torts-related doctrines with doctrine stemming from mercantile disputes remained.

Seven months later, on December 11, 1928, Floyd Mechem died.³² Warren Seavey succeeded him as Reporter,³³ taking on, as he characterized it, "an almost impossible situation,

with the Agency." "Topic VII" was headed "Liability for Torts." *Advisers' Minutes*, Aug. 1, 1928, at 2.

28. *Advisers' Minutes*, Apr. 28, 1928 at 1.

29. *Id.* at 1–2.

30. *Id.* at 2–3.

31. See RESTATEMENT (FIRST) OF AGENCY, ch. 7, topic 2, title B ("Torts of Servants") & title C ("Torts of Agents Who Are Not Servants") (1933).

32. Mechem was sixty-five years old when he began as Reporter and intermittently suffered from health problems. See DeMott, *The First Restatement*, *supra* note 6, at 20.

and all that we can say about it is that we are doing the best we can.”³⁴ Referring to the draft presented to the ALI’s members at the ALI’s 1929 Annual Meeting, Professor Seavey continued: “[y]ou will find possibly some inconsistencies due to the fact that the method of approach is mine, but based on what Mr. Mechem had done before.”³⁵ Seavey carried the project through to its final publication in 1933. By the time he succeeded Mechem as Reporter, Seavey had been designated Mechem’s special adviser.³⁶

Although Professor Seavey did not follow Mechem in the treatise-writing tradition, he attained visibility as a scholar of agency law with a law review article published in 1920.³⁷ In that article, Seavey took aim at Holmes, arguing in effect that Holmes had drifted into intellectual nihilism: were Holmes correct, “we are . . . denied by our belief the ability to

33. Seavey, born in 1880, lived a long and robust life. For illustrative details, see WARREN A. SEAVEY & DONALD B. KING, *A HARVARD LAW SCHOOL PROFESSOR: WARREN A. SEAVEY’S LIFE AND THE WORLD OF LEGAL EDUCATION* (2005). Seavey’s posthumously-published memoir expresses his gratitude to Mechem for asking him to prepare a second (1925) edition of Mechem’s casebook on agency and, “[m]ore importantly, he asked me to be one of his advisors” for the Restatement. *Id.* at 54. At that time a professor at the University of Nebraska’s law school, Seavey also served as the dean and de facto as university counsel. *Id.* at 53–54. He left Lincoln for the University of Pennsylvania, joining the Harvard Law faculty one year later. *Id.* at 58–59; 65.

34. Warren A. Seavey, *Discussion of Agency Tentative Draft No. 4*, 7 A.L.I. PROC. 233 (1928–1929).

35. *Id.* at 234.

36. Seavey was formally designated Mechem’s Assistant in 1927. DeMott, *The First Restatement*, *supra* note 6, at 23.

37. SEAVEY & KING, *supra* note 33, at 51. While teaching summer school in Bloomington, Indiana, Seavey later wrote that he “had a little cubbyhole over the kitchen in which I spent the evenings thinking and writing about Agency.” *Id.* at 51. The resulting article, although rejected by the Harvard Law Review, “was the basis of my invitation to work for the American Law Institute” after it was published by the Yale Law Journal. *Id.*

rationalize the subject and relying only upon intuition to determine when and to what extent common sense is to be applied.”³⁸ Instead, wrote Professor Seavey, “Justice Holmes overestimates the effect of the fictions. . . . the results reached by the courts can be explained without using legal presumptions as axioms and . . . individual cases may be tested by the use of judicial sense (rather than common sense) and the needs of commerce.”³⁹ Professor Seavey’s bold optimism in 1920 about Agency as a subject for rationalized treatment—as fully a “proper title in the law”—no doubt shaped his approach as Professor Mechem’s successor and then as the sole Reporter for the Restatement (Second) of Agency.

Additionally, and unlike Mechem, Seavey was not reticent about the place of torts within Agency doctrine. After all, he was celebrated as a torts professor⁴⁰ and as “one of a dynasty of torts men,” in William Prosser’s assessment.⁴¹ Some of Professor Seavey’s own scholarship on

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

39. *Id.*

40. This is probably an understatement; Seavey taught not just Torts but Agency (then a required first-year course at Harvard Law School). Many of Seavey’s students assessed him as “the best of their teachers, bar none.” John M. Maguire, *Warren Abner Seavey, Bussey Professor of Law*, 5 HARV. L. SCH. BULL. No. 6, at 3 (Dec. 1954). Professor Maguire credited Seavey with “giv[ing] first-year classes their proper obstacle race, forcing them to learn the difference between rabbit chasing and the real fox hunt.” *Id.*

41. William A. Prosser, *Warren Seavey*, 79 HARV. L. REV. 1338, 1338 (1966). Referring to a law professor as “a [Subject Matter] man” may have been conventional usage in that era. Seavey himself characterized Arthur L. Corbin as “a Contracts man” in discussions at an ALI annual meeting. See Warren A. Seavey, *Discussion of Agency Draft*, 31 A.L.I Proc. 202 (1954). Referring to a letter received from Professor Corbin (who was not present), Seavey said, “[h]e is a very nice fellow but he is a Contracts man, and you know how stubborn Contracts men are.” *Id.* Corbin wrote to express disagreement with the treatment of general agents in Restatement (Second) § 161, discussed *infra* in text accompanying notes 48–49.

tort law—distinct from his work on the first Restatement of Torts—may reflect the depth of his engagement with the absolute character of a principal’s liability associated with agency law. That is, if a principal is subject to vicarious liability for torts committed by an agent, it is irrelevant whether the principal might be said to be at fault, as (for example) negligence-based tort liability requires. And, of course, whether a principal becomes a party to a contract made by an agent is likewise not a fault-driven inquiry. Writing in 1934, Professor Seavey predicted that the future development of tort doctrine was toward greater imposition of strict (or “absolute”) liability that was not fault-based: “while . . . conduct which is morally bad will become increasingly penalized, the absence of negligence or fault in other cases will play a continually smaller part”⁴² Although developments in tort law as of 2013 have not borne out this prediction,⁴³ Seavey’s embrace of automatic liability helps explain subsequent developments in the narrative.

III. From the “Third Bottle” to Inherent Agency Power

A. The “third bottle” and its contents

Even prior to Floyd Mechem’s death, participants in the Restatement project identified instances in which a court had held a principal liable for an agent’s conduct albeit in the absence of any of the bases for liability identified by Professor Mechem’s typology, when an agent acted

42. Warren A. Seavey, *Speculations as to “Respondeat Superior”*, HARV. L. ESSAYS 433 (1934), *reprinted in* WARREN A. SEAVEY, *STUDIES IN AGENCY* 129, 159 (1949) (hereinafter Seavey, *Respondeat Superior*).

43. *See, e.g.*, James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 U.C.L.A. L. REV. 377 (2002) (arguing that negligence has and will continue to dominate tort law instead of strict liability).

in disregard of the principal's instructions or limits imposed by the principal on actions for which the agent had authority. They used a catch-phrase, "the third bottle," which contained examples of liability not captured by Mechem's definitions of actual or apparent authority and in which conventional principles of estoppel also seemed inapplicable.⁴⁴ Seavey pressed Mechem to acknowledge that "the third bottle" with its contents warranted formal recognition as a distinct basis for liability.⁴⁵ Mechem resisted, and the disagreement remained unresolved when he died.

Reflecting years later in his memoir, Professor Seavey wrote that

Mr. Mechem, who knew all the cases as no one else did, could not accept my interpretation of a group of cases which I had thought of as adding a distinctive agency liability to the principal, all cases in which an agent has disobeyed orders. In the fall of 1928, I stubbornly refused to agree with Mr. Mechem, who believed that my views interfered with the principal's rights. When he left [the advisers' meeting] for Chicago he was worried, since before that, while we had disagreed at times on phraseology, we had not disagreed on substance. The dispute was of course ended by Mr. Mechem's unfortunate death.⁴⁶

But Mechem's death did not, in fact, resolve the substance of their disagreement, as later events reveal.

44. The "third bottle" appears to have been settled usage within the group by 1927. One might imagine that the metaphorical first and second bottles contained instances of liability based on actual and apparent authority. Why bottles as the chosen containers I leave to the reader's imagination.

45. Consider an exchange between Professors Mechem and Seavey involving cases that, applying New York law, find the principal liable when an agent authorized to issue a bill of lading did so contrary to the principal's instructions. Mechem asked Seavey: "If we adopt the New York view do you regard that liability as a third bottle liability or do you think it can be worked out as a matter of apparent authority[?]" *Advisers' Minutes*, Oct. 19, 1928, at 32. Seavey replied: "I do not think that in many of the cases dealing with bills of lading there is any apparent authority, among other reasons being these, that the subsequent bona fide taker knows nothing of the personality or even the particular agent who in fact misused his authority in signing the bill of lading." *Id.* at 32–33.

46. SEAVEY & KING, *supra* note 33, at 65–66. The last advisers' meeting preceding Mechem's death was held in New Haven on Oct. 19–21, 1928.

What specific instances of liability did “the third bottle” contain, apart from the common feature that the agent disobeyed orders? One candidate, on which Professors Mechem and Seavey disagreed, was a so-called general agent who disregarded an instruction narrowing the scope of actual authority.⁴⁷ Often Professor Mechem and his advisers discussed hypotheticals based on reported cases and reacted seriatim, as in a meeting in August 1928:

A is a general agent for the management of P’s grocery business, except in the one particular. His principal has told him: ‘You must not buy any sugar.’ A goes to T who does not know previously of the business and represents that he is authorized to buy sugar for P. Question: Is P liable to T?⁴⁸

Mechem answered “No,” and Seavey “Yes;” two advisers agreed with Seavey, while the ALI’s Director (William Draper Lewis) was “not prepared to make any answer.”⁴⁹

47. The first Restatement, like Restatement (Second), differentiated between general and special agents. A general agent “is an agent authorized to conduct a series of transactions involving a continuity of service.” RESTATEMENT OF AGENCY § 3(1) (1933); RESTATEMENT (SECOND) OF AGENCY § 3(1) (1958). In contrast, a special agent “is an agent authorized to conduct a single transactions or a series of transactions not involving continuity of service.” RESTATEMENT OF AGENCY § 3(2); RESTATEMENT (SECOND) OF AGENCY § 3(2). This formal distinction is not repeated in Restatement (Third), which acknowledges that many cases use this terminology but also states that “[t]he labels matter less than the underlying circumstances that warrant their application.” RESTATEMENT (THIRD) OF AGENCY § 2.01, cmt. d (2006). Restatement (Third)’s resolution is consistent with the reactions of some of the advisers to the first Restatement, one of whom observed that “it seems to me that the difference between a special and a general agent is important only in an evidential way, that is, evidential of the position which the agent holds.” *Advisers’ Minutes*, Oct. 21, 1928, at 39 (statement of Frederick Green). Another commented that “I also have some doubt as to whether the distinction between the general and special agent furnishes any real line of cleavage.” *Id.* at 40 (statement of Judge John K. Beach).

48. *Advisers’ Minutes*, Aug. 5, 1928, at 32.

49. *Id.*

Another candidate for the third bottle was an agent for an undisclosed principal, situated to manage the principal's business in the agent's name, who contravened a narrowing instruction.

The specific focus for analysis was:

P directs A to carry on business for him, P, under A's own name. The business thus managed for P by A is the retail grocery business. P directs A under no condition to purchase sugar for P's business, the direction amounting to a limitation of authority. A carries on the business in his own name as directed and purchases from T, on credit in the name of A, sugar for the business. A does not pay [T]. Is P liable to T for the purchase price?⁵⁰

Professor Mechem did not venture a reply. All the advisers (and Director Lewis) agreed that P should be liable to T. However, their reasoning differed: two advisers emphasized that, by so situating A, P represented to third parties who might deal with him that A owned the business⁵¹ or that P "manifested to the world" that A had the powers of an owner, including the power to do all things necessary and usual in managing the business.⁵² Professor Seavey, with whom two other advisers agreed, emphasized settled authority supporting liability,⁵³ but also claimed that this instance of an undisclosed principal's liability lent support for a larger "underlying theory that the one who controls, as well as benefits by the business, should pay for the to be expected consequences of his engaging in the business."⁵⁴ Other examples of the "underlying theory" at

50. *Id.* at 37.

51. *Id.* (statement of Judge Beach) at 37.

52. *Id.* (statement of Judge Marvin B. Rosenberry) at 38–39.

53. The best-known of a small number of cases is *Watteau v. Fenwick*, [1893] EWHC (QB), 1 Q.B. 346 (Eng.).

54. *Advisers' Minutes*, Aug. 5, 1928, at 40–41.

work were “[t]he cases of master and servant” as well as “those in which a principal has entrusted an agent with goods limiting the disposition of the goods.”⁵⁵ What’s intriguing from the vantage point of 2014 is not so much that the first Restatement (consistently with most cases) resolved these two hypotheticals in favor of imposing liability on the principal⁵⁶ but the breadth and generality of the rationale that, in Professor Seavey’s view (in 1928), justified the imposition of liability. The rationale’s formal appearance awaited the Restatement (Second) project.⁵⁷

B. Enter Inherent Agency Power and “The Son of the Great Mechem”

The contents of “the third bottle” found a name at the ALI’s 1956 Annual Meeting in the course of Professor Seavey’s presentation of a draft portion of Restatement (Second). He stated that what the draft termed “Derivative⁵⁸ Agency Power” had been discovered and formalized “about in 1930 . . . that there were situations in which a principal would be liable to a third person, although the agent who acted for him had no apparent authority and there was no

55. *Id.* at 40.

56. *See* RESTATEMENT OF AGENCY § 161 (1933) (unauthorized acts of general agent when third party “reasonably believes that the agent is authorized to do them and has no notice that the agent is not so authorized”); *id.* § 195 (acts of manager appearing to be owner; principal subject to liability to third persons with whom agent “enters into transactions usual in such businesses and on the principal’s account”). To the same effect are the black-letter counterparts in Restatement (Second) but, as discussed *infra* in text accompanying note 68, the comments claim both for the turf of inherent agency power. RESTATEMENT (SECOND) OF AGENCY § 161 & § 195 (1958).

57. Reflecting later on his success, Professor Seavey wrote that “although I had difficulty in getting the council and the membership of the Institute to agree with me, they finally acquiesced” SEAVEY & KING, *supra* note 33, at 66.

58. The text of the tentative draft under discussion spells the word “Derivative, but the table of contents and cover page spell the word conventionally, as “derivative.” *See* Restatement (Second) of Agency, Tentative Draft No. 4 ix, 13 (1956).

estoppel.”⁵⁹ “But, astonished by our discovery, we never thought of giving this power a name until recently” when another [unnamed] member of the Agency group proposed assigning a name to “this strange thing”⁶⁰ Searching for a better name, participants at the Annual Meeting proposed alternatives, including “relational power,”⁶¹ “relationship power,”⁶² “agency power,”⁶³ and “anomalous agency power,”⁶⁴ until finally an ALI member proposed “inherent agency power.”⁶⁵ Professor Seavey agreed, and no one voted in opposition to the term.⁶⁶ As published in 1958, the Restatement (Second) included a formal black-letter definition of inherent agency power, as “a term used in the restatement of this subject to indicate the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other

59. Warren A. Seavey, Discussion of Tentative Draft No. 4, Restatement (Second) of Agency, 33 A.L.I. PROC. 314-15 (1956). As discussed above, the case for a “third bottle” with disparate contents appears to have been made as early as 1928, at least by Seavey. *See supra* text accompanying notes 44–45.

60. Seavey, *supra* note 59, at 315.

61. *Id.* at 316.

62. *Id.* at 317.

63. *Id.* at 318.

64. *Id.*

65. *Id.* at 322.

66. *Id.* at 322–23. At the 1955 Annual Meeting, Seavey referred to “a special agency power . . . a power which exists when there is no authority and no apparent authority.” Warren A. Seavey, 32 A.L.I. PROC. 179 (1955).

agent.”⁶⁷ Comments to other sections stated the applicability of inherent agency power to (unsurprisingly) a principal’s liability when a general manager oversteps a privately-imposed limit on the authority typical of such a manager,⁶⁸ an undisclosed principal’s liability when its agent appears to own the principal’s business, and a master’s liability for torts committed by servants.⁶⁹

This turn in doctrinal statement encountered a notable critic at the 1956 Annual Meeting: the author of the suggested term “anomalous agency power,” Professor Philip Mechem.⁷⁰ To Philip Mechem’s suggestion of “anomalous agency power,” Seavey responded, “I know, because you do not like it.”⁷¹ Professor Seavey introduced Philip Mechem to the 1954 Annual Meeting as “the son of, shall we say, the Great Meacham [*sic*].”⁷² Philip Mechem, then a law professor at the University of Pennsylvania, was a scholar of the law of property and decedents’ estates who

67. RESTATEMENT (SECOND) OF AGENCY § 8A (1958).

68. *Id.* § 161, cmts. a, b. Comment a characterizes the principal’s liability as “comparable to the liability of a master for the torts of his servant.” *Id.* cmt. a.

69. *Id.* § 195 cmt. b. Comment a characterizes section 195 as a special instance of section 194, which imposes liability on an undisclosed principal for usual or necessary acts done by an agent authorized to conduct transactions for the undisclosed principal. *Id.* § 194. Comment a situates this liability within the ambit of inherent agency power. *Id.* §194 cmt. a.

70. 33 A.L.I. PROC. 318. The meeting transcript misstates Professor Mechem’s first name and middle initial and misspells his last name. *See id.* at 8.

71. *Id.* at 318.

72. Warren A. Seavey, *Tentative Draft No. 2 of Restatement (Second) of Agency*, 31 A.L.I. PROC. 201 (1954).

taught several private-law subjects at Penn and other law schools.⁷³ His scholarship on agency law included the third edition of his father's casebook,⁷⁴ as well as law review articles;⁷⁵ he also served as an adviser to the Restatement (Second) project.⁷⁶ When he retired from teaching, a colleague characterized Philip Mechem as a man with an "ingrained and wholesome distrust of generalities, of the major premise that seldom provides a solution for the concrete case."⁷⁷ Philip Mechem's skepticism encompassed legal realism,⁷⁸ and, based on his comments at ALI annual

73. George L. Haskins, *Philip Mechem*, 111 U. PA. L. REV. 1036, 1036 (1963).

74. FLOYD R. MECHEM, *SELECTED CASES ON THE LAW OF AGENCY* (Floyd R. Mechem, ed., 3d ed. 1942). Seavey was responsible for the second edition. *See supra* note 33.

75. *See* Philip Mechem, *The Rationale of Ratification*, 100 U. PA. L. REV. 649 (1952); Philip Mechem, *What's Wrong with Agency?—A Comment*, 2 J. LEGAL EDUC. 203 (1949).

76. By this time, it appears that the ALI no longer prepared and distributed minutes taken at advisers' meetings, as it did for the first Restatement. *See supra* note 25. Thus no written resource enables me further to plumb the dynamics of the relationship between Warren Seavey and Philip Mechem. Still, one might wonder whether Seavey thought listeners at the 1954 Annual Meeting might infer that Philip was "the lesser" to "the Great" Mechem. *See supra* text accompanying note 72. Philip Mechem, born in 1892, was twelve years younger than Seavey; his teaching career began in 1922. Haskins, *supra* note 73, at 1036. Prior to joining Penn's faculty in 1948, Philip Mechem was a professor at the University of Iowa College of law for 18 years, interrupted by two years in Washington with the Department of Justice. Mason Ladd, *Philip Mechem*, 111 U. PA. L. REV. 1038 (1963).

77. Haskins, *supra* note 73, at 1036.

78. Philip Mechem, *The Jurisprudence of Despair*, 21 IOWA L. REV. 669, 669 (1936). His methodology as a scholar could include functional analysis but, in a well-received article on gifts, the functional analysis was accompanied by "nearly one hundred pages of analysis to specific types of gift transfers, and to the operation of the rules of delivery regarding each one." Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876, 1935 (2001), commenting on Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments* (pts. 1-3), 21 ILL. L. REV. 341, 457, 568 (1926).

meetings, several doctrinal turns in Restatement (Second) that departed from the first Restatement.⁷⁹ And, at the 1956 Annual Meeting Philip Mechem forecast that the term “inherent agency power” would confuse law students.⁸⁰

IV. Implications

Inherent agency power thus emerged as a broadly-cast rationale for a disparate set of cases, in which, for the most part, courts had reached predictable and justifiable results. As a doctrinal statement, however, the now-formalized and generalized essence of “the third bottle”

In contrast, Warren Seavey, to be sure never associated with the legal realists, may have been somewhat bemused by the movement. In an essay published in 1934, Seavey wrote that

"[s]everal years ago the class in Torts at [Harvard Law School] was studying . . . [a case in which] the railroad company was held responsible because one of its servants assisted an inebriate passenger from the train and left him half way up a flight of steps down which, according to the jury, the servant should have anticipated that his charge would fall. One of the realists in the class, endeavoring to ascertain whether the decision had affected the conduct of the railway, entered a train of the same company and purported to be drunk. He was carefully ejected, led to the station, and there held in safety until placed in the custody of a policeman."

Seavey, *Respondeat Superior*, *supra* note 42, at 148 n. 36 (citation omitted).

79. At the 1954 Annual Meeting, Philip Mechem spoke at length, questioning the introduction of “subservants” as a distinct category of subagency. 31 A.L.I. PROC. 215-218. At the 1956 Annual Meeting, discussing section 219, *see supra* note 10, Philip Mechem said, “[t]here has been some exaggeration here on the part of the learned Reporter.” 33 A.L.I. PROC. 373. He argued that the basis for the principal’s liability in section 219(2)(d) should explicitly be limited to instances in which an agent acts with apparent authority in committing a tort. *Id.* at 374–75.

80. “I have been teaching that for fifteen years now, and just calling it agency power. My students all understand perfectly. Why confuse them by adding these erroneous adjectives?” *Id.* at 318 (statement of Philip Mechem).

potentially had broad implications, especially in transactional settings. Leave aside for a moment agents who represent undisclosed principals, that is agents who deal with third parties who lack notice they deal with anyone's agent.⁸¹ As expressed in general doctrinal form, inherent agency power implied that a disclosed principal might be subject to liability when the agent acted without actual authority and the third party with whom the agent dealt had notice of the agent's lack of authority. If so, in what sense could the agent be characterized as the principal's representative or extension in the transaction? The agent acted without actual authority, that is, without a reasonable belief that the principal so wished the agent to act.⁸² And, if the third party had notice that the agent acted without authority, the third party could not reasonably believe that the agent acted with authority, and no manifestation made by the principal, whether specifically to that third party or more generally, could underlie a reasonable belief that the principal had authorized the agent so to act.⁸³ Exceptionally, one court in 2000 found a principal liable on a contract on the basis of inherent agency power on facts in which it was acknowledged that the third party was aware that the agent—the president of a corporation—lacked authority because in prior dealings with the same third party, specific authorization from the corporation's board of directors had been required for comparable

81. *See* RESTATEMENT (THIRD) OF AGENCY § 1.04(2)(b) (2006) (defining "undisclosed principal").

82. *Id.* § 2.01 (defining "actual authority").

83. *See id.* § 2.03 (defining "apparent authority").

transactions.⁸⁴ Additionally, the principal had taken no steps to augment the president's authority, and the third party lacked notice of any.⁸⁵ The application of inherent agency power on such facts meant that the principal bore ongoing responsibility to remind the parties with whom its president might deal that prior restrictions on his authority remained in effect.

It may come as no surprise that the Restatement (Third) of Agency (2006) jettisoned inherent agency power, both as a doctrine and as an overarching rationale.⁸⁶ As a doctrine, inherent agency power always risked an outcome like that just described, in which a third party succeeded in holding a principal to a transaction despite demonstrable notice that the agent lacked authority so to commit the principal. Doctrinally, Restatement (Third) deals more narrowly with well-established instances of liability when an agent disregards or disobeys instructions from the principal. For example, an undisclosed principal may not rely on

84. *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1208 (Ind. 2000). For a pointed critique of *Menard*, see John Dwight Ingram, *Inherent Agency Powers: A Mistaken Concept Which Should Be Discarded*, 29 OKLA. CITY U. L. REV. 583, 591–93 (2004).

85. See RESTATEMENT (THIRD) OF AGENCY § 2.03, reporter's note (arguing that outcome reached in *Menard* “appears to outrun” Restatement (Second)’s formulations of inherent agency power).

86. For scholarly treatments of inherent agency power, see Gregory Scott Crespi, *The Proposed Abolition of Inherent Agency Power by the Restatement (Third) of Agency: An Incomplete Solution*, 45 SANTA CLARA L. REV. 337 (2005); Ingram, *supra* note 84; Steven A. Fishman, *Inherent Agency Power-Should Enterprise Liability Apply to Agents' Unauthorized Contracts?*, 19 RUTGERS L.J. 1 (1987); Roger J. Goebel, *The Authority of the President Over Corporate Litigation: A Study in Inherent Agency*, 37 ST. JOHN'S L. REV. 29 (1962); J. A.C. Hetherington, *Trends in Enterprise Liability: Law and the Unauthorized Agent*, 19 STAN. L. REV. 76 (1966); Edward A. Mearns, Jr., *Vicarious Liability for Agency Contracts*, 48 VA. L. REV. 50 (1962); Warren A. Seavey, *Agency Powers*, 1 OKLA. L. REV. 3 (1948); Kornelia Dormire, Comment, *Inherent Agency Power: A Modest Proposal for the Restatement (Third) of Agency*, 5 J. SMALL & EMERGING BUS. L. 243 (2001); Matthew P. Ward, Note, *A Restatement or a Redefinition: Elimination of Inherent Agency in the Tentative Draft of the Restatement (Third) of Agency*, 59 WASH. & LEE L. REV. 1585 (2002).

instructions to its agent that reduce the agent's authority to less than that a third party would reasonably expect the agent to have in the same circumstances had the principal been disclosed.⁸⁷ This formulation would result in liability for the hypothetical undisclosed principal discussed by the advisers to the first Restatement in 1928 who had prohibited the purchase of sugar by the manager of a retail grocery store;⁸⁸ the rationale stresses protecting the reasonable expectations of third parties who deal with an agent in the belief the agent owns the business or otherwise acts on the agent's own behalf, a belief stemming from the set-up created by the undisclosed principal.⁸⁹ On a more theoretical level, as a rationale that linked a number of distinctive instances of liability, inherent agency power had the major drawback that it did not state a normative principle. As Gerard McMeel explained, inherent agency power is a component of an "ontological" account of agency law, not a normative account.⁹⁰ That is, inherent agency power itself did not furnish reasons that justified the imposition of liability, and its very generality placed it at too great a remove from the normative principles operative in the diverse cases linked by inherent agency power.

A pragmatic (and historical) explanation for the appeal of inherent agency power is the narrow definition of apparent authority operative throughout work on the first and second Restatements. This narrowness had multiple dimensions. Floyd Mechem's treatise did not

87. RESTATEMENT (THIRD) OF AGENCY § 2.06(2).

88. *See supra* text accompanying note 48.

89. RESTATEMENT (THIRD) OF AGENCY § 2.06 cmt. c.

90. Gerard McMeel, *Philosophical Foundations of the Law of Agency*, 116 L.Q. REV. 387, 396–99 (2000).

acknowledge the possibility that apparent authority and actual authority may coincide; unless a principal's creation of the appearance of authority supported an inference of "real" authority in Professor Mechem's terminology, the third party's sole resort was to the principle of estoppel, which would require the third party to show reliance.⁹¹ But as work proceeded following Professor Mechem's death, Seavey and his team realized that Mechem's approach required that the principal have made divergent manifestations: to the agent (creating actual authority) and to the third party (creating apparent authority). This formulation did not work when, as often happens, an agent continued to appear to act with authority after the principal revoked it or reduced its scope, all unbeknownst to the third party with whom the agent then dealt.⁹² To accommodate the well-known phenomenon of post-revocation "lingering authority," the final draft recognized that actual and apparent authority may co-exist.⁹³

More generally, given the opacity of actual authority to a third party—based as it is on manifestations and understandings as between principal and agent—apparent authority viewed more functionally often reinforces actual authority when the means of proving actual authority are inaccessible to a third party.⁹⁴ Even when a principal furnishes an agent with a written statement of the extent of the agent's authority that the agent may display to third parties, the

91. I MECHEM, *supra* note 6, at 509–12.

92. *See* DeMott, *The First Restatement*, *supra* note 6, at 27–28.

93. *Id.* at 28.

94. RESTATEMENT (THIRD) OF AGENCY § 2.03, cmt. c. Across legal systems, apparent authority, broadly defined, is a significant basis for liability in contemporary agency law. *See* Danny Busch & Laura J. Macgregor, *Comparative Conclusions*, in *THE UNAUTHORISED AGENT* 439, 440 (Danny Busch & Laura J. Macgregor eds. 2009).

document itself is not (in Mechem's terminology) "real" authority but, instead, salient to showing its existence and to establishing the agent's apparent authority.⁹⁵ Although the written statement would not necessarily coincide with other directives from principal to agent that expand or narrow the agent's actual authority, it may be reasonable for a third party to proceed on the basis of the written statement when nothing calls the existence or extent of the agent's authority into question.⁹⁶

Additionally, neither the first nor the second Restatement contained a formal definition of "manifestation," whoever its maker or audience might be. At the ALI's 1956 Annual Meeting, Professor Seavey resisted recasting apparent authority so that its creation would follow from placing an agent in a position in which the agent might reasonably appear to have authority.⁹⁷ As a consequence, a principal's "manifestation" to third parties would not encompass the act of placing an agent in a position with which authority of a particular scope is conventionally associated.⁹⁸ In contrast, Restatement (Third) contains a formal (and broad) definition of

95. See RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. d (2006).

96. *Id.*

97. 33 A.L.I. PROC. 381 (1956).

98. Additionally, Professor Seavey over-estimated the explanatory power of contract law, in particular in connection with apparent authority. He stated at the 1955 Annual Meeting that "[a]pparent authority . . . is based upon the contract theory that wherever P has manifested to T that A is the agent, he is making an offer to T in accordance with his manifestation. And when the agent acts, the agent makes a valid contract with T . . ." *Friday Afternoon Session-May 20, 1955* 32 A.L.I. PROC. 174, 179 (1955). This account does not capture a well-known set of cases in which an agent's appearance of authority enables the agent to defraud a third party, thereby subjecting the principal to, among other possibilities, tort liability, even though the principal did not authorize the commission of fraud. See RESTATEMENT (SECOND) OF AGENCY §§ 261–62 (1958); RESTATEMENT (THIRD) OF AGENCY § 7.08.

“manifestation”⁹⁹ that encompasses placing an agent in a position that is customarily associated with authority of a particular scope.¹⁰⁰ Thus, on the facts of the first hypothetical discussed by the advisers in 1928—a disclosed principal imposes an undisclosed restriction (“buy no sugar”) on the general manager of a grocery—¹⁰¹ Restatement (Third) need not resort to inherent agency power to specify the circumstances under which the principal would be liable for the agent’s purchase of sugar contrary to a limiting instruction received from the principal, unbeknownst to all other than principal and agent.¹⁰²

A scholar in the future might view Restatement (Third) as a reflection of its times, in which the parties to many agency relationships are organizations with agents whose actual and apparent authority is wrought into and expressed by the positions they occupy, and many disputes governed by agency doctrine involve business entities, themselves constituted through internal chains of agency relationships. In contrast, the earlier Restatements appear implicitly to assume that most agents, principals, and third parties are individuals and thus to ground doctrine in an assumed prototype that does not realistically correspond to the complex world in which many people live and work. Moreover, even assuming an individual person to be the paradigmatic legal subject for purposes of common law agency, the earlier Restatements made authorial choices that evoke an earlier era, one with a pre-industrial flavor and in which all actors

99. RESTATEMENT (THIRD) OF AGENCY § 1.03.

100. *Id.* cmt. b.

101. *See supra* text accompanying note 43.

102. *See also* Chi. Title Ins. Co. v. State Office of Ins., 309 P.3d 372, 380–81 (Wash. 2013) (reaching same outcome under second and third Restatements when general agent does unlawful act that was then customary in industry).

identified by gender are men.¹⁰³ Throughout, transactions involving horses form the bases for many Illustrations.¹⁰⁴ Moreover, and likely more jarring to a contemporary reader, many Illustrations in the Torts material feature chauffeurs as agents.¹⁰⁵ The assumed social world in

103. In contrast, in its 2005 official style handbook, the ALI articulated its expectation that Reporters would “strive to eliminate all traces of sexism from the language they draft on its behalf.” *See* AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 29 (2005). “Sexism” is reflected in “language that, often unconsciously, betrays stereotypical assumptions about the gender of those occupying particular social roles.” *Id.* By 2005, “what has been referred to as ‘generic man and its compounds’... is no longer acceptable in ALI drafting.” *Id.* at 30 (*quoting* MARILYN SCHWARTZ ET AL., GUIDELINES FOR BIAS-FREE WRITING (1995)). Thus, ALI Reporters “must aim for gender-neutrality in their writing.” AM. L. INST., *supra*, at 30.

104. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 4 cmt. f, illus. 6 (1958) (“A offers to sell a horse to T, and in reply to T’s question concerning the identity of the owner for whom he is acting, A states that he is unable to give his name. The principal is partially disclosed.”); *id.* illus. 7 (“In contracting for the purchase of a horse, A tells T that he is acting for John Smith, a horse dealer in a neighboring city. There are two John Smiths who are horse dealers in that city. Of these, T knows only one, and erroneously, but reasonably, he believes that A is referring to the dealer who is not A’s principal. There is no contract between T and A’s principal.”); *id.* § 106 cmt. c, illus. 9 (“P authorizes A to buy a horse. A knows that P desires to buy only one horse and he also knows that P has not authorized any other agent to buy one. Before A has bought a horse, P buys one. A has no notice of this. A’s authority does not terminate.”); *id.* § 194 cmt. b (“[I]f a general buying agent for a menagerie, directed to buy no more horses, were to buy one for himself, and by a separate contract, one for his employer, the principal would not be liable for the former. He would, however, be liable for the one purchased for the menagerie.”).

105. *See id.* § 213 cmt. h, illus. 10 (“P employs A as his chauffeur. Thereafter, A periodically gets drunk, as P, in the exercise of reasonable care, should know. While using P’s car on P’s business, A gets drunk and runs into T with the car. P may be liable to T, aside from his liability as master.”); *id.* § 220 cmt. k, illus. 5 (“P employs A to drive him around town in A’s automobile at \$4.00 per hour. The inference is that A is not P’s servant. If P supplies the automobile, the inference is that A is P’s servant for whose conduct within the scope of employment P is responsible.”); *id.* § 226 cmt. b, illus. 4 (“P and B set up a bachelor apartment and employ a chauffeur, A, it being understood that A is to receive half his wages from each of them, and is at all times to obey the orders of either of them. A, while driving negligently in a borrowed automobile to deliver P’s suit to the tailor, injures T. A is the servant of P and of B at the time.”); *id.* § 229 cmt. d, illus. 11 (“P employs A as a chauffeur, requesting him to drive the car to A’s own garage for the night at the termination of the day’s work, in order that A can arrive early in the morning. In driving to and from the garage to P’s place of business, A is within the

some Illustrations is reminiscent of the world depicted in the literary works of P.G. Woodehouse and occasionally Agatha Christie.¹⁰⁶ As a consequence, although the earlier Restatements articulated the doctrine of a “proper title in the law,” they did so in a manner that may have enabled agency law to be overshadowed in accounts of the essential underpinnings of business enterprises.¹⁰⁷

V. Conclusion

At the ALI’s 1956 annual meeting, a member of the ALI’s council (Charles H. Willard) commented that perhaps the draft’s discussion of inherent agency power, by emphasizing the

scope of employment.”); *id.* § 231 cmt. a, illus. 1 (“A, P’s chauffeur, to avoid a rough spot in the road while upon an errand for P, unlawfully drives upon the sidewalk. This conduct is within the scope of employment.”); *id.* § 235 cmt. a, illus. 1 (“T proves that P directed his chauffeur, A, to drive to the station to get a package for P, that A immediately drove in the direction of the station by the customary route and that, while so driving, he negligently ran into T. There is now an inference that A was driving in the scope of employment. P can rebut the inference by proving that A was driving solely for a purpose of his own and not to get the packages.”); *id.* cmt. d, illus. 6 (“A, while driving as chauffeur for P, negligently throws his lighted cigarette from the window of the car into a passing load of hay, not intending to ignite it but careless as to where the cigarette falls. P is not liable for this act.”).

106. *See, e.g., id.* § 221 cmt. b, illus. 3 (“A, a thief, falsely purporting to have been employed for P by B, an agent of P, serves P as a butler, intending to use the employment only as an opportunity for theft. So far as he renders the ordinary services of a butler, A is P’s servant. In the act of serving poison in the coffee to occupants of the house in order that he can subsequently rob them, he is not acting as a servant.”).

107. For a theoretical account of the nature of business firms that is explicitly centered on the law, including agency law, see ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* (2013). Professor Orts argues that “[f]irms of any complexity beyond a single individual cannot exist without the law of agency.” *Id.* at 54. Early in the book, he notes that his project “is radical, though not in the sense of ‘new.’ It is radical in the etymological sense of returning to conceptual roots that have been overlooked and often forgotten.” *Id.* at xviii. Professor Orts argues that “an overgrowth of economic theory has hidden some of these legal roots,” including agency law. *Id.* But the texts that established agency’s status as a “proper title” may have facilitated its later obscurity.

“true” agency power that inherent agency power represented, necessarily implied that a great deal of the remainder of the subject was not agency law at all, but “really branches of the law of contracts, of the law of torts, and other fields of the law.”¹⁰⁸ Professor Seavey responded that he did not intend such a reading, but Mr. Willard rejoined, “I submit that ‘agency’ stands more on its own feet, which I am sure you believe in.”¹⁰⁹ By referring to any power associated with “agency,” Mr. Willard continued, “one think[s] of the entire range of power, apparent authority as well as this anomalous kind of power.”¹¹⁰ Thus, the terminology of inherent or “anomalous”¹¹¹ agency power was unnecessary.¹¹²

Standing “on its own feet,” in Mr. Willard’s terms, agency counted as a “proper title in the law.” Implicitly, Mr. Willard replied to the challenge to the intellectual merit of Agency articulated by Oliver Wendell Holmes and others.¹¹³ He also implicitly made the point that a “proper title in

108. 33 A.L.I PROC. 319.

109. *Id.* at 320.

110. *Id.*

111. To Philip Mechem, the author of this term, *see supra* text accompanying notes 64 & 70–71, the draft’s treatment of inherent agency power was “a novelty, an unnecessary novelty.” 33 A.L.I. PROC. 320. He reported that he was “dumbfounded, to find . . . that apparently the whole law of master’s liability is now treated as an agency power.” *Id.*

112. *Id.* at 321.

113. Mr. Willard, who served on the ALI’s Council for 38 years, was acknowledged as “a walking compendium of banking law”; he served as a partner of Davis, Polk and Wardwell from 1950 to 1973. *See* Joseph F. Johnston, *Charles Hastings Willard*, in ALI MINUTES IN REMEMBRANCE 1976–1997 81, 82 (1998). Although Mr. Willard’s comments at the ALI’s 1956 annual meeting refer to teaching, *see* 33 A.L.I. PROC. 321, and he taught as a visiting lecturer at Yale Law School following his retirement from Davis Polk, a colleague on the A.L.I.’s Council notes that his contributions as an adviser to Restatement projects were especially valued by

the law” might rely on more than one normative principle to justify liability but nonetheless possess overall coherence and intellectual strength. Inherent agency power represented an attempt to elide the differences between, on the one hand, the justifications for an employer’s liability for torts committed by employees acting within the scope of employment,¹¹⁴ and, on the other hand, the justifications for holding a principal to a contract to which an agent committed the principal. Inherent agency power also patched over the far-reaching consequences of an unduly crabbed treatment of apparent authority. But agency’s stature as a subject is not undermined by acknowledging its multiply-footed nature.¹¹⁵ From the perspective of 2014, perhaps inherent agency power represented an interim response, shaped by many constraints, to Justice Holmes’s challenge. Recognizing more generally that agency relationships enable the legally-salient extension of a principal’s personality through an agent’s representation underlies and enables a more robust response.

Reporters because Willard “provided a valuable practicing lawyer’s perspective in groups heavily weighted in favor of judges and academics.” Johnston, *supra*, at 81.

114. Restatement (Third) acknowledges the respondeat superior principle—an employer’s liability for torts committed by employees within the scope of their employment—as a distinct principle of attribution within agency law, along with actual and apparent authority. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006).

115. To be sure, agency law is not the sole “proper title in the law” that serves multiple objectives and has attracted more than one account of its underlying purposes or rationale. *See, e.g.,* L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L. J. 52, 53–54 (1936) (identifying three distinctive purposes that the award of damages for breach of contract may pursue and arguing that the law of contract damages is not separable “from the larger body of motives and policies which constitutes the general law of contracts.”); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1824 (1997) (arguing that deterrence and corrective justice are “equal or concurrent rationales” for basic doctrines of tort liability, including negligence and strict liability).

* David F. Cavers Professor of Law, Duke University School of Law. I served as the Reporter for the RESTATEMENT (THIRD) OF AGENCY (2006), but this Essay, unlike the Restatement, is not a publication of the American Law Institute. For comments on an earlier draft, I thank Hanoch Dagan and participants at the Larry Ribstein Memorial Conference, University of Illinois College of Law. I am grateful to the Yale Law Library for its generous loan of archival material held in its collection, and to Leslie O'Neill for assistance with archives of the American Law Institute, held by the Biddle Law Library, University of Pennsylvania School of Law.