CORPORATE RESPONSIBILITY FOR ROGUE AGENTS

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ABSTRACT

When should companies be strictly liable for the torts of their rogue agents? In the twentieth century, the law seemed to be moving in the direction of holding corporations responsible whenever the rogue agent's job facilitated the tort, even if the agent was acting without authority and not trying to serve the interests of the company. By contrast, the direction of the law in the twenty-first century has been toward requiring proof that the rogue agent was acting within the scope of an apparent authority to represent the company, the company itself knowingly fostered that appearance of authority and the tort was caused by an innocent third party's reasonable reliance on the agent's apparent authority. This Article argues that the evolution of the law reflects changing ideas about social equity, individual rights and the proper role of courts. The Article also argues that current doctrine shows how corporate vicarious liability today is not a species of strict enterprise liability but instead follows agency principles to hold corporations responsible for actions taken within the scope of their voluntarily expanded legal personalities.

Vicarious liability means holding one person responsible for the misdeeds of another as when corporations are held strictly liable for the torts of their employees. What is the basis of this form of liability? According to the 1971 edition of Dean William Prosser's treatise on torts, "the modern justification for vicarious liability" is that enterprise related losses "are placed upon that enterprise itself, as a required cost of doing business" because enterprise owners are better able to absorb the losses "and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large."[1]

This justification for vicarious liability is a foundation for the claim that the entire tort system is based on the loss shifting, strict enterprise liability, risk-spreading principle.[2] As a 2020 article expressed the combined idea, "holding corporations strictly liable for employee wrongdoing" is often justified by the

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1. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 459 (4th ed. 1971). Some scholars believe the primary goal of vicarious liability is to force corporations to police those in their orbit. *See, e.g.*, Rory Van Loo, *The Revival of Respondeat Superior and Evolution of Gatekeeper Liability*, 109 GEO L.J. 141, 141 (2020). Others see vicarious liability as a species of agency law; *See, e.g.*, J. Dennis Hynes, *Chaos and the Law of Borrowed Servant: An Argument for Consistency*, 14 J. L. & COM. 1, 17 (1994).

2. *See* Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1315 (2001) (describing the "scholarly march of enterprise liability").

"risk-spreading principles of liability [that] constitute the bedrock of civil tort law . . . ."[3]

While academically popular,[4] Dean Prosser's theory does not fit current law. Under Prosser's approach, employers should be held liable for all enterprise related torts. Yet the law does not go nearly that far. Generally, employers are not liable for wrongs committed by a rogue agent pursuing the agent's own agenda, even if the agent's job with the defendant facilitated the wrongdoing. For example, in March 2022, the U.S. Court of Appeals for the Tenth Circuit held an employer not liable for a truck driver's assault on another driver who allegedly cut ahead in a line to refuel.[5] In December 2021, the Mississippi Supreme Court held a company not liable for its employees stealing valuables from a home the employees were assigned to clean.[6] In January 2021, a federal court in Minnesota rejected a claim that a university was liable for a professor (allegedly) posting a video of a student using the restroom during an online class.[7] In 2019, the New York Court of Appeals held the government not responsible for a prison guard's unprovoked beating of a prisoner.[8]

To reach these results, courts must be following a theory of vicarious liability different from the theory posited by Dean Prosser. This Article will explain that different theory. The Article will argue that vicarious liability (as it is generally followed in the courts today) is not a species of strict enterprise liability but instead is an outgrowth of the concept of agency. In other words, vicarious liability is based on the idea that the employment of agents constitutes an extension of the employer's legal personality so that the actions of an agent, within the scope of an agency, are to be treated as the actions of that agent's employer or principal.[9]

In particular, this Article will break new ground in scholarship through an extensive analysis of a particular species of vicarious liability, the doctrine of apparent authority torts, under which employers are sometimes held responsible for torts committed by rogue agents who were not trying to serve the interests of the employer when the tort was accomplished through the misuse of the employer's apparent authority. This doctrine pushes vicarious liability beyond its normal limits yet stops well short of strict enterprise liability. Because of its exceptional nature, the doctrine tests the competing theories of vicarious liability and illuminates the jurisprudential foundations of the idea. The Article

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3. Robert Luskin, *Caring About Corporate "Due Care": Why Criminal Respondeat Superior Liability Outreaches Its Justification*, 57 AM. CRIM. L. REV. 303, 304 (2020).

4. *See* Daniel Harris, *The Rival Rationales of Vicarious Liability*, 20 FLA. ST. U. BUS. REV. 49, 64–65 (2021).

5. *See* Pauna v. Swift Transp. Co. of Ariz., No. 21-8009, 2022 U.S. App. LEXIS 6381, at *1 (10th Cir. Mar. 11, 2022).

6. *See* RGH Enters v. Ghafarianpoor, 329 So. 3d 447, 447 (Miss. 2021).

7. *See* Miles v. Simmons Univ., 514 F. Supp. 3d 1070, 1070 (D. Minn. 2021).

8. *See* Rivera v. New York, 34 N.Y.3d 383, 385 (N.Y. 2019).

9. An earlier article discussed this agency rationale for respondeat superior. *See* Harris, *supra* note 4. This Article extends the analysis by focusing on cases decided under the doctrine of apparent authority torts. The author thanks Deborah DeMott for suggesting the broadened focus.

will show how the apparent authority tort doctrine developed out of the concept of agency, moved in the direction of Prosser's strict enterprise liability approach for most of the twentieth century, and then moved back to its agency roots.

I. BACKGROUND

A. The General Rule Against Holding the Innocent Responsible for the Misdeeds of Others.

Prosser's theory treats vicarious liability as an application of the general rule of strict enterprise liability; namely, that the risks associated with activities should normally be allocated to the deep pocket enterprises that profit from those activities, regardless of whether the deep pockets did anything wrong to cause the harm.[10] Courts today, on the other hand, are apt to see vicarious liability as a limited exception to a very different general rule: the presumption that, because people have a right to be treated as individuals, defendants can only be blamed for what they themselves did wrong and are not responsible for the misconduct of others.[11]

This general rule of individual responsibility, which can be varied by legislation or private agreement, has the disadvantage of limiting the sources of compensation available to tort victims. The rule also diminishes people's incentive to watch over the behavior of those around them, thereby reducing an important form of regulation. Nevertheless, there are strong arguments in favor of the general rule that justify its existence.

If the law made people responsible for the misdeeds of their associates, people would become reluctant to enter into relationships with others and more apt to isolate themselves. Society would lose many benefits derived from cooperative activities and social contact.[12] Further, the law's moral force would be diminished. The distinction between doing right or doing wrong would matter less if the cost of compensating victims fell on the entire social network and not just on those who acted improperly. As a result, wrongdoers would be less deterred while the law abiding would feel less secure.

Universal vicarious liability would also vastly increase the power of government. If people were responsible for the misdeeds of others, everyone would almost always be guilty of something. People would be subject to the remedial power of government as a matter of course. What are now considered rights would become temporary privileges that the government could revoke. For example, people would lose the right to enjoy the fruits of their own labor because their property would be subject to forfeiture because someone else did something wrong.

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10. *See, e.g.*, Keating, *supra* note 2, at 1286–87.

11. *See, e.g.*, Doe v. Yum! Brands, Inc., 639 S.W.3d 214, 214 (Tex. App. 2021). *See also* Victor E. Schwartz et al., *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 OKLA. L. REV. 359, 359 (2018).

12. *See* Hamed v. Wayne County, 803 N.W.2d 237, 247 (Mich. 2011) (overbroad vicarious liability would discourage the hiring of people with "less than impeccable" backgrounds).

A related point is that the law of torts should be reserved for civil wrongs[13] and not turned into a mechanism for transferring money from the innocent to those who are in need.[14] The needy can be helped much more efficiently through direct government aid or by encouraging them to purchase their own insurance.[15] Using litigation to transfer wealth to the needy from innocent defendants would force those defendants to hire lawyers to defend themselves. The increased costs of doing business would be passed along to consumers, making life much more expensive.

Yet another problem with making people responsible for each other is that it would diminish freedom. Consider that now people enjoy relationships in which the other party has a high degree of autonomy. Parents and adult children may give each other advice, but neither side is required to exercise control. Riders can tell an Uber driver where they wish to go without having to assume responsibility for how the mission is carried out. If the law were changed to make people responsible for the behavior of those associated with them, the options of living one's own life and minding one's own business would be substantially restricted.

The law's strong policy against blaming innocents for the misdeeds of others seems unimpeachable. Yet vicarious liability is deeply rooted in the common law. How does the common law justify vicarious liability? To answer this question, we must turn to the concept of agency.

B. The Concept of Agency

The law of agency defines what it means for one person to represent another and thereby provides the legal foundation for corporations, employment and the practice of law.[16] To understand agency law, it is helpful to begin with the problem it is designed to solve. The Anglo-American common law is designed for individuals. Yet life is often a team sport. For many purposes, people need to work together in groups. How does the law fit these groups into an individualistic legal system?[17]

One way is to expand the definition of *person* by making legal identity or personhood into a construct rather than an immutable natural fact. For example, the law can turn artificial entities (formed by groups) into legal persons through

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13. *See* David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 703 (1992) ("Fault lies at the heart of tort law, the private law of wrongs.").

14. *See* Paula J. Dalley, *All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment*, 104 W. VA. L. REV. 517, 532 (2002) ("a pure compensation rationale" for vicarious liability is, "perhaps, no more justifiable than theft").

15. *See* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1521 (1987).

16. *See* Deborah A. DeMott, *A Revised Prospectus for a Third Restatement of Agency*, 31 U.C. DAVIS L. REV. 1035, 1039 (1998) ("[A]gency doctrine defines the legal consequences of choosing to act through another person in lieu of oneself.").

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

incorporation.[18] A related idea is the agency notion that people (including, most importantly, artificial persons) can expand their legal personalities by employing agents to represent them.[19]

This power to expand one's legal personality through agency, helpful for ordinary humans, is vital for artificial entities such as corporations. Just as human players can only participate in computer fantasy worlds through avatars, corporations as intangible legal fictions can only operate in the real world through representation by human agents.[20]

The next step in the logic of agency law is the key concept of agency. Because agents act as extensions of their principal's legal personality, the agent does not simply act for the principal. Within the scope of the agency, the agent acts as the principal. While acting as agent, the agent becomes the principal's alter ego[21] – the principal's other self – so that the thoughts, words and deeds of the agent are attributed to the principal just as if the two were the same person.[22] In other words, within the scope of the agency (that is, when the agent is playing the role of the principal's alter ego), the agent becomes the principal's substitute.[23]

The classic expression of this idea is a maxim that was imported into England from canon law[24] in the early fourteenth century[25]: *Qui facit per alium, facit per se* (which can be translated as "she who acts through another, acts herself," or as "he who acts through another, acts himself").[26] Originally used

18. For a discussion of how the concept of legal personhood became part of the law, see J.P. Canning, *The Corporation in the Political Thought of the Italian Jurists of the Thirteenth and Fourteenth Centuries*, 1 HIST. POL. THOUGHT 9, 15 (1980).

19. *See* Deborah A. DeMott, *The Domains of Loyalty: Relationships Between Fiduciary Obligation and Intrinsic Motivation*, 62 WM. & MARY L. REV. 1137, 1159 (2021) ("the point of the relationship is the extension, through the agent, of the principal's 'legal personality'"); Gabriel Rauterberg, *The Essential Roles of Agency Law*, 118 MICH. L. REV. 609, 614 (2020).

20. *See* Great Minds v. FedEx Off. & Print Servs., 886 F.3d 91, 95 (2d Cir. 2018) ("The concept of an agency relationship is a sine qua non in the world of entities like corporations and public school districts, which have no concrete existence" and therefore "'must act solely through the instrumentality of their officers or other duly authorized agents.'").

21. *See* Floyd R. Mechem, *The Nature and Extent of an Agent's Authority*, 4 MICH. L. REV. 433, 436–37 (1905) ("By the creation of the agency, the principal bestows upon the agent a certain character. For some purpose, during some time and to some extent, the agent is to be the *alter ego*,—the other self, of the principal.").

22. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 232 (1881) ("the characteristic feature which justifies agency as a title of the law is the absorption *pro hac vice* of the agent's legal individuality in that of his principal").

23. *See* Everett V. Abbot, *Of the Nature of Agency*, 9 HARV. L. REV. 507 (1896); Oliver Wendell Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 349–50 (1891).

24. *See* R.H. Helmholz, *Magna Charta and the Ius Commune*, 66 U. CHI. L. REV. 297, 321 (1999).

25. *See* Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 518 n.87 (2011).

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

to allow employers to take credit for the accomplishments of their servants,[27] the maxim was given broader scope over the centuries so as to apply to other situations in which the actions of an agent are attributed to the agent's employer.[28]

C. Traditional Respondeat Superior

The doctrine of respondeat superior applies the *qui facit* maxim in the tort context.[29] It holds that employers are not only responsible for torts they authorize. Employers are also vicariously liable for torts their employees commit within the scope of their employment (that is, while the employees were on the job, trying to do the job).[30] The theory is that the employer is not being punished for the misdeeds of others, but for its own misdeeds accomplished through its alter ego employees while those employees are acting as the employer's legal substitute.[31] Indeed, the word *vicarious* comes from a Latin word that means *substitute*.[32]

The sense behind the rule is particularly evident when one considers corporations. These artificial entities can only operate in the real world through agents. If the *qui facit* maxim did not apply to the actions of corporate agents, then corporations could never be held responsible for anything. Society's most powerful economic actors would be beyond the reach of the law. Obviously, the law could not allow such an absurd result.

It also makes sense that respondeat superior does not require proof that the wrongdoer had actual authorization from the employer. Employers in general, and corporations in particular, would almost never (officially) authorize misconduct by their employees. Instead, one would expect, as a matter of course, directives from top management that employees should always be careful and abide by the law. If those directives negated corporate liability, then corporations would be beyond the reach of the law for all practical purposes.[33]

Consider also that human beings have to live with their mistakes. Human defendants cannot avoid tort liability by saying their tortious conduct was out of character and not representative of their true selves. Similarly, corporations should have to take ownership of what their minions do on their behalf, even if

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27. *See* Dalley, *supra* note 25.

28. *See* THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 102 (Oxford Univ. Press 3d ed. 1886).

29. *See* Blake v. Ferris, 5 N.Y. 48, 57 (1851). *See also* Bibb's Adm'r v. Norfolk & W.R. Co., 14 S.E. 163, 167 (Va. 1891) ("'the liability of any one, other than the party actually guilty of any wrongful act proceeds on the maxim *qui facit per alium facit per se*'") (quoting *Hobbit v. Ry. Co.*, 4 Exch., 255) (citing MECHEM, A TREATISE ON THE LAW OF AGENCY § 747).

30. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. L. INST. 2006).

31. *See* Dalley, *supra* note 25, at 517 (explaining that the identification doctrine held "the agent was the principal when the agent was acting on the principal's behalf. As an explanation for the principal's liability, the identification doctrine is perfect ….").

32. *See* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 132 (1967).

33. *See* Phila. & Reading R.R. Co. v. Derby, 55 U.S. 468, 487 (1853).

the errant employees were not acting in accordance with official corporate policy. Like humans, corporations should be responsible for what they do and not just for what they officially meant to do.

While protective of the public, the doctrine of respondeat superior is also fair to employers and consistent with the general rule against blaming innocents for the misdeeds of others. The doctrine is limited by its *qui facit*, agency rationale. It only applies to the actions of employees who were on the job and trying to do their assigned job and, therefore, acting as legal substitutes or alter egos of the employer.

Thus, respondeat superior does not apply to torts of employees who were outside their agency role because they were off the job or not trying to do the job. A good example is a 2018 decision from Kentucky.[34] While driving home from work, a pizza delivery driver hit a pedestrian.[35] The pedestrian's estate sued the driver's employer.[36] The trial court granted summary judgment for the employer and the Appellate Court affirmed.[37] The court explained that the liability of the employer for the negligence of an employee "proceeds from the maxim, 'Qui facit per alium facit per se.'"[38] Under that maxim, the driver's alleged negligence would be attributed to the employer only if the driver was then acting in furtherance of the employer's business.[39] Because the driver was not operating in furtherance of the employer's business at the time of the accident, the employer was not vicariously liable.[40]

The law here is both well settled and widespread. For example, in a 2019 case from Indiana, a hospital employee posted a patient's confidential medical records on Facebook (apparently) pursuant to a personal grudge. The court held the employer was not responsible, even though the employee accessed the records as a result of her employment at the hospital, because the employee was not trying to serve the employer and the misconduct was not incidental to authorized conduct.[41] In 2018, the Washington Supreme Court held a school not responsible for an accident caused by a high school coach serving alcohol to students visiting his home because it was unreasonable to infer the school viewed the conduct as within the coach's scope of employment.[42] In 2019, a federal court in New York held an employer not liable for an alleged sexual assault by a firm manager at a job interview because "'New York courts consistently have held that sexual misconduct and related tortious behavior arise

34. Feltner v. PJ Operations, LLC, 568 S.W.3d 1, 1 (Ky. Ct. App. 2018).
35. *Id.* at 3.
36. *Id.*
37. *Id.* at 3, 7.
38. *Id.* at 5.
39. *Id.*
40. *Id.* at 6.
41. Hayden v. Franciscan All. Inc., 131 N.E.3d 685, 688, 689, 691, 693 (Ind. Ct. App. 2019).
42. Anderson v. Soap Lake Sch. Dist., 423 P.3d 197, 215 (Wash. 2018).

from personal motives and do not further an employer's business, even when committed within the employment context.'"[43]

The upshot is that in cases involving rogue agents, respondeat superior typically does not apply. To reach the employer in these cases, plaintiffs need to invoke some other theory of liability. One of those theories is the focus of this Article, the doctrine of apparent authority torts.

II. THE BEGINNING OF THE APPARENT AUTHORITY TORT DOCTRINE

A.The Concept of Apparent Authority

Apparent authority is another extension of the *qui facit* maxim. The governing notion is that if an employer (also known as a "principal") clothes an actor with the appearance of authority to act as the principal's agent, then innocent third parties should be able to rely on that appearance of authority.[44] Two cases decided by the U.S. Supreme Court in the 1870s illustrate the reasoning and justice behind the doctrine.

1. Bronson's Executor v. Chappell (1870)[45]

William Bostwick of Galena, Illinois, acting as an agent for Fredrick Bronson of New York, sold land in Wisconsin. The contract said the buyers were to make payments in installments with the first payment to be made to Bostwick and the later payments to be made to Bronson in New York. Nonetheless, the buyers continued to pay Bostwick, and Bronson did not object.[46] The last payment on the contract created problems. Bostwick did not pay that money over to Bronson, so Bronson disclaimed Bostwick's authority to receive payments on his behalf and sued to foreclose the mortgage.[47]

The Supreme Court ruled for the buyers on the ground that Bronson had conferred apparent authority on Bostwick by allowing Bostwick to accept payments on Bronson's behalf. The Court held that where a principal (in this case, Bronson), without objection, allows another (in this case, Bostwick) "to do acts which proceed upon the ground of authority from" that principal or the principal by "conduct adopts and sanctions such acts after they are done, [that principal] will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner."[48] In other words, if a principal "has justified the belief of a third party that the person assuming to be" that principal's "agent was authorized to do what was done, it is no answer for [the principal] to say that no authority had been given, or that

43. Chau v. Donovan, 357 F. Supp. 3d 276, 291 (S.D.N.Y. 2019) (quoting Swarna v. Al-Awadi, 622 F.3d 123, 144–45 (2d Cir. 2010)).

44. *See* RESTATEMENT (THIRD) OF AGENCY §§ 2.03, 3.03 (AM. L. INST. 2006).

45. Bronson's Ex'r v. Chappell, 79 U.S. 681, 681 (1870).

46. *Id.* at 682–83.

47. *Id.*

48. *Id.* at 683.

it did not reach so far, and that the third party had acted upon a mistaken conclusion."[49]

The principal is estopped from arguing that the agent lacked authority, the Supreme Court said, when the principal led the third party to believe the agent was authorized. "If a loss is to be borne, the author of the error must bear it."[50] The Court continued: "Under such circumstances the presence or absence of authority in point of fact, is immaterial to the rights of third persons whose interests are involved. The seeming and reality are followed by the same consequences."[51]

The *Bronson* case is a good illustration of how agency law is built on a series of "as if" propositions. If Bronson had in fact authorized Bostwick to receive payments from the buyers, then the law would treat the payments to Bostwick as if the money really was paid to Bronson. Because Bronson had created the impression Bostwick was authorized to receive payments on Bronson's behalf, then the law treated Bostwick as if he really were authorized to receive payments on Bronson's behalf, and, therefore, the buyer's payments to Bostwick were treated as if the money really was paid directly to Bronson.

The *Bronson* case is also a good illustration of the differences between apparent authority and respondeat superior. First, respondeat superior only applies to employees of the defendant—that is agents of the defendant over whom the defendant also has the right to control the physical details of how the job is done.[52] Apparent authority, by contrast, applies to employees and other agents, such as commercial representatives like William Bostwick. Second, as we saw in the case involving the pizza delivery driver, respondeat superior only applies if the wrongdoer was acting in furtherance of the defendant's business. There is no such requirement for apparent authority. William Bostwick had apparent authority to receive payments on behalf of Fredrick Bronson even if Bostwick had been planning to steal Bronson's money before he received the last payment.

On the other hand, apparent authority has requirements that respondeat superior lacks. First, apparent authority only applies when the principal did something to create the false impression the actor was authorized to act on the principal's behalf (as Fredrick Bronson did when he failed to object to the buyers making their payments to Bostwick). Second, apparent authority requires that the innocent third party reasonably and detrimentally rely on the false impression of authority created by the principal (as the land buyers did when they continued to make their payments to Bostwick, including the ill-fated last payment).

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49. *Id.*

50. *Id.*

51. *Id.*

52. *See* Singer Mfg. Co. v. Rahn, 132 U.S. 518, 523 (1889).

2. Ins. Co. v. McCain (1877)[53]

B.F. Smith, an agent of the Southern Life Insurance Company, obtained and sent to the company a policy on the life of Adam S. McCain, with the benefit of $5,000 to be paid to McCain's wife and children. The payments on the policy were made to Smith who apparently remitted the money to the company. All seemed fine, but there were two technical problems the McCain family did not know about. First, under the rules of the insurance company, Smith needed special authority to collect premiums, and Smith did not have that authority. Second, during the course of the relationship, Smith accepted employment from another company and later resigned, both of which worked to terminate Smith's status as an agent of the insurance company. The insurance company pointed these problems out for the first time after Adam McCain died as grounds for refusing to pay on the life insurance policy.[54]

The U.S. Supreme Court affirmed a jury verdict against the insurer. Smith's loss of his status as an agent was not a defense, the Supreme Court held, because: "No company can be allowed to hold out another as its agent, and then disavow responsibility for [that person's] acts. After it has appointed an agent in a particular business, parties dealing with [the agent] in that business have a right to rely upon the continuance of [the agent's] authority, until in some way informed of its revocation."[55]

It was also not a defense that Smith lacked the authorization needed under the insurance company's rules to collect premiums. The Supreme Court explained "that special instructions limiting the authority of a general agent, whose powers would otherwise be coextensive with the business intrusted to [the agent], must be communicated to the party with whom [the agent] deals, or the principal will be bound to the same extent as though such special instructions were not given."[56] The Supreme Court went on to explain: "Good faith requires that the principal should be held by the acts of one whom [the principal] has publicly clothed with apparent authority to bind [the principal]."[57]

The *McCain* case is another illustration of the law's use of "as if" propositions to extend the *qui facit* principle. If a company holds out an actor as an authorized agent of the company, then the law will treat that actor as if the actor really were an authorized agent of the company, to the extent needed to protect the reasonable and detrimental reliance of an innocent third party. If the normal authority of a corporate agent is limited by special instructions unknown to a third party, then (to the extent needed to protect the reasonable reliance of that innocent third party) the law will proceed as if those special instructions did not exist. Thus, because the insurance company gave the McCains the

53. S. Life Ins. Co. v. McCain, 96 U.S. 84, 84 (1877).

54. *See id.* at 84–85.

55. *Id.* at 86.

56. *Id.*

57. *Id.*

impression Smith was its agent authorized by the company to receive payments on its behalf, the law treated Smith as if he really were the company's agent authorized to receive payments on the company's behalf. Once again, the seeming and the reality were followed by the same consequences.

B. Apparent Authority Torts in State Courts

The apparent authority doctrine was developed in contract cases. In the nineteenth century, some state courts extended the idea into the tort realm. This subsection will discuss three of those cases, from Maryland, New York and Minnesota.

1. Tome v. Parkersburg Branch R.R. Co. (1873)[58]

On October 2, 1869, Jacob Tome loaned $6,650 to Thomas Rich & Co. and took as collateral what appeared to be 350 shares of the stock of the Parkersburg Branch Railroad Company issued on that day from the railroad's office and signed by John L. Crawford, the treasurer of the railroad.[59] As it turned out, the borrowed money had really gone to Crawford, who had fraudulently issued the securities used as collateral.[60] The loan was not repaid.[61] The railroad company discovered Crawford's fraud, removed him from office and repudiated the securities he had issued as spurious.[62] Tome sued the railroad company in tort for damages.[63]

The Maryland Court of Appeals ruled for Tome and against the railroad. The court began its analysis with basics: "The maxim, '*qui facit per alium facit per se*,' on which it is said the whole law of principal and agent rests, is based on the instinct of natural justice; that in all employments and business . . . , those who create or appoint agents for their own convenience and advantage, should be liable for their acts of omission or commission, in the course of their employment."[64] The court went on to quote a British treatise for the proposition that a principal "'will be bound by contracts made'" by its agent "'with innocent third persons, in the seeming course of employment, . . . whether the employer intended to authorize them or not; since where one of two innocent persons must suffer by the fraud of a third, [the party] who enabled the third person to commit the fraud, should be the sufferer.'"[65]

The Maryland Court of Appeals explained that the "ground of liability is not that the principal has been benefited by the act of the agent, but that an innocent third person has been damaged by confiding in the agent, who was

58. Tome v. Parkersburg Branch R.R. Co., 39 Md. 36, 36 (1873).
59. *See id.* at 38.
60. *See id.* at 39–40.
61. *See id.* at 39.
62. *See id.* at 39–40.
63. *See id.* at 86–87.
64. *Id.* at 65.
65. *Id.* at 70 (quoting SMITH'S MER. LAW 56, 57 (London Ed. 1834)).

accredited by the principal, as worthy of trust, in that particular business."[66] Therefore, it did not matter that Crawford had perpetrated a fraud on the railroad.

> It is essential to public welfare, that where the acts of acknowledged agents are accompanied with all the *indicia* of *genuineness*, and issued for a valuable consideration, the principal should be responsible, whether the *indicia* are true or not. Such liability would conduce to greater vigilance on the part of the principal, greater fidelity in the agent, and greater security to all dealing with them.[67]

The defendant could not be allowed to set up the fraud of its own agent, which the court said was "by construction" its own act, as a bar to the action by the innocent third party, because that would make fraud "invincible and incurable."[68]

Thus, in a tort suit as in a contract suit, the actions of an agent within the seeming course of employment were treated as if the actions were really authorized by the principal, to the extent needed to protect the reasonable reliance of an innocent third party, even though the bad actor was unauthorized and not trying to serve the interests of the principal. Once again, the seeming and the reality had the same legal consequences.

2. Bank of Batavia v. New York, L.E. & W. R. Co. (1887)[69]

The New York Court of Appeals issued a similar decision in 1887. An agent of a railroad company issued a bill of lading that falsely said goods had been received when, in fact, the goods had not been received. A co-conspirator of the railroad agent used the fraudulent bill of lading to obtain money from a bank.[70] The New York Court of Appeals ruled the railroad was liable to the bank. The court explained that where a principal has clothed its agent

> with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation . . . .[71]

Otherwise, the court noted, if the law compelled transferees of apparently genuine bills of lading "to incur the peril of the existence or absence of the essential fact, it would practically end the large volume of business founded

66. *Id.* at 76.

67. *Id.* at 85.

68. *Id.* at 87.

69. Bank of Batavia v. New York, L.E. & W.R. Co., 12 N.E. 433, 433 (1887).

70. *See id.* at 434.

71. *Id.* at 433–434.

upon transfers of bills of lading."[72] Reasoning through the business reality, the court said: "Of whom shall the lender inquire? And how ascertain the fact? Naturally [the lender] would go to the freight agent who had already falsely declared in writing that the property had been received."[73]

Once again, to allow commerce to proceed on the basis of apparently genuine documents and to protect the reasonable reliance of innocent third parties on false appearances of authority created by the employer, the law treated that which was apparently true as if it were actually true.

3. McCord v. W. Union Tel. Co. (1888)[74]

The Minnesota Supreme Court reached a similar conclusion in 1888. An employee of Western Union sent the plaintiff, T.M. McCord, a telegram that purported to come from McCord's purchasing agents and directed McCord to send them $1,500. When McCord did so, the Western Union employee intercepted the payment and stole the money.[75] The Minnesota Supreme Court held the company liable even though its employee had not been acting in furtherance of company business.

The Court said the company had created the agent's appearance of authority by authorizing the agent to send messages over the telegraph company's line. "Persons receiving dispatches in the usual course of business, when there is nothing to excite suspicion, are entitled to rely upon the presumption that the agents intrusted with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons . . . ."[76] The Court went on to explain that it "was the business of the agent to send dispatches of a similar character, and such acts were within the scope of [the agent's] employment, and the plaintiff could not know the circumstances that made the particular act wrongful and unauthorized."[77] Therefore, the Court concluded, as to the plaintiff, the sending of the fraudulent telegraph message "must be deemed the act of the corporation."[78]

The word *deemed* is key to the reasoning. Because the fraudulent agent was acting within the scope of an apparent authority created by the company, then the actions of the agent within the scope of that apparent authority were deemed to be the actions of the company in order to protect the reasonable reliance of an innocent third party. The company's responsibility was constructive. Unauthorized actions were treated as if they were authorized. The seeming became the reality.

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72. *Id.* at 435.
73. *Id.*
74. McCord v. W. Union Tel. Co., 39 N.W. 315, 315 (1888).
75. *See id.* at 315–316.
76. *Id.* at 317.
77. *Id.*
78. *Id.*

III. LATE NINETEENTH CENTURY RETRENCHMENT

A. Friedlander v. Texas & P. Ry. Co. (1889)[79]

In 1889, the U.S. Supreme Court parted company with the state courts and rejected the apparent authority tort doctrine. The case involved a fraudulent bill of lading issued by E.D. Easton, the station agent for the Texas and Pacific Railway Company in Grayson County, Texas. One of Easton's jobs for the company was to receive shipments of cotton and issue bills of lading certifying their receipt. On November 6, 1883, Easton issued a bill of lading representing that two hundred bales of cotton had been received from Joseph Lahnstein. In fact, no such cotton had been received. Lahnstein and Easton were partners in crime. Lahnstein used the bill of lading to sell the cotton represented therein to Friedlander & Co. When the cotton turned out not to exist, Friedlander sued the railroad company.[80]

The Supreme Court ruled for the railroad company on the ground the company did nothing wrong and Easton was acting outside the scope of his agency for the company. The Court noted: "The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents except upon the delivery of the merchandise."[81] Easton's actions should not be attributed to the company, the Court went on, because Easton was not acting as the company's agent in the transaction, but rather as Lahnstein's partner in crime, "and it would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business."[82]

The Court cited British cases for the proposition that respondeat superior was limited to torts committed in the course of service to the employer and actions taken for the employer's benefit, which plainly did not apply to Easton's fraud.[83] Near the conclusion of its opinion, the Court invoked the principle that innocent people should not be blamed for the misdeeds of others, stating, "[t]he law can punish roguery, but cannot always protect a purchaser from loss; and so fraud perpetrated through the device of a false bill of lading may work injury to an innocent party, which cannot be redressed by a change of victim."[84]

The *Friedlander* opinion followed traditional respondeat superior. Easton was acting outside the scope of his employment. He was not trying to do the job assigned to him. Therefore, Easton's were not attributable to the company. The possibility the company could be liable on an apparent authority theory based on appearances to others was dismissed as "going too far" from the reality

79. Friedlander v. Tex. & P. Ry. Co., 130 U.S. 416, 416 (1889).

80. *Id.* at 417–20.

81. *Id.* at 425.

82. *Id.*

83. *See id.* at 425–26.

84. *Id.* at 426.

that Easton was acting outside the scope of his agency for the company when he issued the fictitious bill of lading.

B. Holmesian Common Sense

The *Friedlander* decision was in keeping with the elite opinion of its day. Beginning in the 1870s, in response to the corruption of America's Gilded Age, the plunder of public resources by political machines and the demands by plutocrats, farmers and labor for government help, educated classes in this country soured on the idea of redistributive government.[85] Reformers who had exalted the power of activist government during the Civil War and the early years of Reconstruction changed their minds, attacked "'the fallacy of attempts to benefit humanity by legislation'" and came to insist that public authority was "'by nature wasteful, corrupt, and dangerous.'"[86] Their new creed of classical liberalism emphasized instead the importance of liberty of contract, limited government and the protection of property.[87]

The changed attitude led to skepticism about the agency theories used to justify transferring wealth from innocent employers to needy plaintiffs through vicarious liability. In his 1881 classic book *The Common Law*,[88] future U.S. Supreme Court Justice Oliver Wendell Holmes, Jr. condemned "the peculiar doctrines of agency" as "anomalous" and expressed the hope "that common sense will refuse to carry them out to their furthest applications."[89] In particular, Holmes said holding principals vicariously responsible for the frauds of their agents ran contrary to "the instinct of justice" and could only be justified by an illogical fiction.[90]

Holmes built on these ideas in a series of lectures in the 1880s that were later published as articles in the Harvard Law Review in 1891.[91] In the first of these articles, Holmes argued that agency law was based on the "fiction . . . , that, within the scope of the agency, principal and agent are one,"[92] and vicarious liability in turn was based on the fiction of agency rather than on reasoned policy analysis.[93] In the second article, Holmes argued that because it was contrary to common sense to make an innocent person pay for the wrongs of another person, common sense stood "opposed to the fundamental theory of

85. *See* ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 209–11 (1990).

86. *See id.* at 211.

87. *See id.* at 210.

88. HOLMES, JR., *supra* note 22.

89. *Id.* at 231.

90. *Id.*

91. *See* Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV 444, 453 (1923).

92. Holmes, Jr., *supra* note 23, at 345.

93. *See id.* at 351.

agency,"[94] and the whole doctrine of respondeat superior was an irrational embarrassment.[95]

In the course of the second article, Holmes referenced English cases that declined to extend respondeat superior to cases involving employee frauds.[96] Holmes used these cases to argue that holding principals responsible for the frauds of their agents was so absurd as to be "almost inconceivable without the aid of the fiction."[97] Therefore, Holmes continued, because "a fiction is not a satisfactory reason for changing . . . rights or liabilities, . . . common-sense has more or less revolted at this point . . . and has denied the liability."[98]

For a time, the Holmes view enjoyed strong support in the legal academy. An article by Fredric Cunningham published in the Harvard Law Review in 1906, for example, began with this sentence: "That there could hardly be greater injustice than to take A's property and give it to B because C has injured B seems clear, yet that is the result of the maxim *respondeat superior* plainly stated."[99] Cunningham cited Holmes for the proposition that respondeat superior was clearly unjust and "a legal fiction resting on no ground of logic or good sense."[100] With all this as a predicate, Cunningham went on to argue "that there should be no desire on the part of any one to extend a doctrine so unjust, but that the object should be to keep it within its present limits or even to restrict it."[101]

IV. TWENTIETH CENTURY EXPANSION OF LIABILITY

A. The Progressive Response

The intellectual mood of the country changed during America's Progressive Era, in the early years of the twentieth century. "Progressive intellectuals blamed excessive individualism for the destructive inequality and division they saw throughout American society."[102] As a cure, they favored an "active state,"[103] an idea that was also being pushed by popular leaders. For example, Theodore Roosevelt "asserted that the American President was free to

94. Oliver Wendell Holmes, Jr., *Agency. II.*, 5 HARV. L. REV. 1, 14 (1891).

95. *See id.* at 22.

96. *See id.* at 18.

97. *Id.*

98. *Id.*

99. Frederic Cunningham, *Respondeat Superior in Admiralty*, 19 HARV. L. REV. 445, 445 (1905-1906).

100. *Id.*

101. *Id.*

102. David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 954–55 (1996).

103. *Id.* at 958.

do anything on behalf of the nation except what the Constitution and the laws explicitly proscribed."[104]

The political orientation of the legal academy followed the progressive trend.[105] As a later article put it, "[m]arket-individualist models of law and society were attacked" and the "ravages of industrial capitalism were increasingly attributed to the shortcomings of laissez-faire individualism."[106] Scholars said government should play an active role in solving social problems, courts should be enlisted in this enterprise as arms of the modern state. and the law itself should be transformed into a pragmatic tool for achieving progressive social change.[107]

Since courts were to become an instrument of progress, it followed that the remedial power of courts over corporations could not be limited to situations in which the defendant corporation did something wrong. Instead, the common law should be "rededicated to serving the public welfare"[108] by making corporate coffers more generally available to meet social needs. That meant changing tort law from a system "in which fault was an important, if not the all-important, element"[109] to a "modern" theory focused on compensation.[110]

The new thinking prompted a whole new attitude toward vicarious liability. Its practice of transferring money from innocent employers to needy tort victims was no longer seen as unjust or irrational. On the contrary, vicarious liability was treated as a model for the law in general.[111] Moreover, because the Holmes critique had discredited the agency rationale for vicarious liability, it was now time to give the doctrine a new rationale as well as a far more expansive scope.

A key player in this transformation was a young British friend of Justice Holmes named Harold Laski.[112] Laski, who later served as Chair of the British Labour Party,[113] has been described as "'arguably the most famous socialist

104. Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2078 (2009).

105. *See generally* STEPHEN B. PRESSER, LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW (2017).

106. Mark M. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 583 (1989).

107. *See* William J. Novak, *The Progressive Idea of Democratic Administration*, 167 U. PA. L. REV. 1823, 1831 (2019) ("Positive conceptions of statecraft and law yielded a more pragmatic and instrumental vision of government directed toward the resolution of public problems and the satisfaction of social needs.").

108. Alan Calnan, *The Distorted Reality of Civil Recourse Theory*, 60 CLEV. ST. L. REV. 159, 169 (2012).

109. Nathan Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954, 974 (1917-1918).

110. *See* Harvey McGregor, *Compensation Versus Punishment in Damages Awards*, 28 MOD. L. REV. 629, 629 (1965).

111. *See* Keating, *supra* note 2, at 1315.

112. *See* Jeffrey O'Connell and Thomas E. O'Connell, *The Rise and Fall (And Rise Again?) of Harold Laski*, 55 MD. L. REV. 1384, 1385, 1390 (1996).

113. *See id*. at 1391.

intellectual of his era'"[114] and (by another friend, Supreme Court Justice Felix Frankfurter) as "'one of the greatest teachers'" of his time.[115]

In 1917, when he was about twenty-three years old [116] and the same year that he met Holmes,[117] Laski published an article in the Yale Law Journal entitled *The Basis of Vicarious Liability*.[118] In that article, Laski dismissed the *qui facit* maxim as an "antique legend" and a "stumbling-block in the pathway of juristic progress."[119] In place of the agency rationale for vicarious liability, Laski posited that the real reason for holding employers responsible for the torts of their employees was a "public policy"[120] determination of social expediency[121] "very similar" to the basis for workers' compensation statutes: namely, that "the needs of the modern state require that the burden of loss of life, or personal injury in industry, shall be charged to the expenses of production," that is, to the "employer," and then passed on so that "eventually the cost will be paid by the community in the form of increased prices. . . ."[122] To justify his rejection of individualistic approaches to employer responsibility, Laski said, "individualism is in truth the coronation of anarchy; and the time comes when a spirit of community supersedes it."[123]

A 1923 article in the Columbia Law Review by Young B. Smith reached a similar conclusion. Smith posited that the real reason for respondeat superior was the same reason offered to justify workers compensation statutes; that it is "socially more expedient to spread or distribute among a large group of the community the losses which experience has taught are inevitable in the carrying on of industry, than to cast the loss upon a few."[124] Smith suggested respondeat superior might be "the forerunner" of a "more intelligent way of dealing with a social problem."[125]

A 1929 article in the Yale Law Journal by then-Professor (later Supreme Court Justice) William O. Douglas justified vicarious liability on the ground

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114. *Id.* at 1389.

115. *Id.* at 1399.

116. *See id.* at 1390.

117. *See* Charles P. Curtis, 63 YALE L.J. 266, 266 (1953) (reviewing HOLMES-LASKI LETTERS, 1916-1935 (1953)). Even though they were friends, Holmes and Laski retained their political differences. "When Laski sent Holmes his book on Communism, Holmes found it [as Holmes said in a letter to Laski] 'deeply interesting, interesting not only in itself but in suggesting the rationale of the differences between us. . . . I have no respect for the passion for equality, which seems to me merely idealizing envy . . . . Some kind of despotism is at the bottom of the seeking for change. I don't care to boss my neighbors and to require them to want something different from what they do—even when, as frequently, I think their wishes more or less suicidal.'" *Id.* at 275.

118. Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 118 (1916-1917).

119. *Id.* at 107.

120. *Id.* at 111.

121. *See id.* at 112, 116.

122. *Id.* at 126–27.

123. *Id.* at 134.

124. Smith, *supra* note 91, at 456.

125. *Id.* at 454.

that employers were in the best position to manage the risks of their enterprises. Employers could avoid risky activities, take accident-prevention measures, buy insurance or self-insure, and then pay for whatever precautions they chose by raising their prices.[126] Recognizing that this theory did not fit the law as it then stood, Douglas argued that the scope of employment test and the independent contractor doctrine should be rethought in light of the newly crafted social and economic rationale.[127]

B. Gleason v. Seaboard Air Line Railway Co. (1929)[128]

In 1929, the U.S. Supreme Court decided another case involving a fraudulent bill of lading issued by an employee of a railroad company. This time the Court ruled unanimously in favor of the plaintiff and against the company. Justice Harlan Fiske Stone wrote the opinion for the Court. Interestingly, prior to his appointment to the Supreme Court, Justice Stone had served as Dean of Columbia Law School where he was closely associated with Young B. Smith.[129]

Through Justice Stone, the Court noted that the *Friedlander* decision was inconsistent with the rule generally followed (in 1929) by the state courts and by English courts, "that the liability of the principal for the false statement or other misconduct of the agent acting within the scope of [the agent's] authority is unaffected by [the agent's] secret purpose or motives."[130] The opinion went on to say that this general rule was also supported by "reason" because "few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of [its] own."[131] The opinion also observed that the "tendency of modern legislation" such as the workers compensation statutes "has been to enlarge rather than curtail the rule."[132]

The Court said it made no sense to create an exception for cases in which the agent was secretly acting to serve his or her own purposes, noting that the "arguments in favor of creating such an exception are equally objections to the rule itself."[133] The Court then cited the scholarship of Justice Holmes.[134] The opinion continued: "as we accept and apply the rule, despite those objections, we can find no justification for an exception which is inconsistent both with the

126. *See* William O. Douglas, *Vicarious Liability and the Administration of Risk I*, 38 YALE L.J. 584, 588 (1929).

127. *See id.* at 594, 604.

128. Gleason v. Seaboard Air Line Ry. Co., 278 U.S. 349, 349 (1929).

129. *See* Young B. Smith, *Harlan Fiske Stone: Teacher, Scholar and Dean*, 46 COLUM. L. REV. 700, 700 (1946).

130. *Gleason*, *supra* note 128, at 356.

131. *Id.*

132. *Id.* at 357.

133. *Id.*

134. *See id.*

rule itself and the underlying policy which has created and perpetuated it."[135] Therefore, the Court concluded, "the *Friedlander* case should be overruled so far as it supports such an exception . . . ."[136]

C. The Liberal Era

Thus, in *Gleason,* the doctrine of apparent authority torts, which was already generally followed in the state courts, was given the endorsement of the U.S. Supreme Court. The *Gleason* opinion did not define the elements of the doctrine. The American Law Institute filled this gap in the first and second Restatements of Agency, published in 1933 and 1958 respectively. In language that was repeated in the second Restatement, Section 261 of the first Restatement said, "A principal who puts an agent in a position that enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud."[137]

Section 262 of the Restatement added, "A person who otherwise would be liable to another for the misrepresentation of one apparently acting for him, under the rule stated in [section] 261, is not relieved from liability by the fact that the apparent agent acts entirely for his own purposes, unless the other has notice of this."[138]

This expansive definition of vicarious liability was buttressed by Section 219(2)(d) of the Restatement (Second) of Agency, which said that employers were liable for torts committed by employees acting outside the scope of employment if the employee "purported to act or to speak on behalf of the principal and there was reliance on apparent authority" or if the employee "was aided in accomplishing the tort by the existence of the agency relation."[139]

The addition of the phrase "aided in accomplishing the tort by the existence of the agency relation" brought the Restatement very close to the strict enterprise liability theory of vicarious liability favored by Harold Laski, Young B. Smith and William O. Douglas. Interestingly, the author of Section 219(2)(d) was Warren Seavey, an agency scholar who was also a torts professor and believed "that the future development of tort doctrine was toward greater imposition of strict (or 'absolute') liability that was not fault-based."[140]

For decades, the "aided in accomplishing the tort" language of Section 219(2)(d) went largely ignored. Instead, many courts reached a similar result by giving a broad reading to Sections 261 and 262 to hold employers responsible

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135. *Id.*

136. *Id*.

137. RESTATEMENT OF AGENCY § 261 (AM. L. INST. 1933).

138. *Id.* at § 262.

139. RESTATEMENT (SECOND) OF AGENCY § 219(2)(D) (AM. L. INST. 1958).

140. Deborah A. DeMott, *Larry Ribstein Memorial Symposium: The Contours and Composition of Agency Doctrine: Perspectives from History and Theory on Inherent Agency Power*, 2014 U. ILL. L. REV. 1813, 1822 (2014).

for frauds and similar torts of their agents that arose out of the employment relationship and were facilitated by the agent's job with the employer.

One example is a case decided by the U.S. Court of Appeals for the Third Circuit in 1957.[141] A male field underwriter employed by an insurance company posed as a doctor so he could conduct a supposed medical examination of an eighteen year old female applying for insurance.[142] The Court of Appeals followed Section 261 to hold the insurance company potentially liable because the company had put the underwriter in a position to deceive.[143] The court explained: "True the company did not give him the black bag. But it did give him the cards which entitled him to ask a good many questions."[144] Therefore, the court went on, the underwriter's deceit was "well within the insignia of office with which he had been clothed."[145] The court also indicated the case fell within the "rule that 'where one of two innocent persons must suffer loss for the fraud of a third, the loss should fall on the one whose act facilitated it.'"[146] Thus, the rule seemed to be that the employer was liable whenever the rogue agent's job facilitated the commission of the tort.

To similar effect is a decision from Hawaii in 1968.[147] A sales agent employed by a cigarette company took on the responsibility of servicing the cigarette racks at a customer's store and stole cigarettes from those racks.[148] The customer sued the cigarette company. A jury found for the company.[149] The Hawaii Supreme Court reversed, holding that the customer was entitled to a directed verdict.[150] The court quoted section 261 of the Restatement (Second) of Agency, as follows: "A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud."[151] The court went on to quote Comment a. to section 261 of the Restatement (Second) of Agency that the reason for the rule is that "'the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.'"[152] Applying those principles, the court said the cigarette company was liable because if the cigarette company "had not employed" the sales agent "and if it

141. Bowman v. Home Life Ins. Co., 243 F.2d 331 (3d Cir. 1957).
142. *See id.* at 333.
143. *See id.* at 334.
144. *Id.*
145. *Id.*
146. *Id.*
147. Lucas v. Liggett & Myers Tobacco Co., 442 P.2d 460 (Haw. 1968).
148. *See id.* at 461–62.
149. *See id.* at 462.
150. *See id.* at 463.
151. *Id.*
152. *Id.*

had not placed its cigarette rack in" the plaintiff's store, then the sales agent "would not have had the opportunity to commit the thefts."[153]

Along these same lines is a decision of the U.S. Court of Appeals for the Seventh Circuit in 1972.[154] The case involved a fraud perpetrated by Lester Nay, the president of First Securities Company, in which Nay offered customers the special opportunity to invest in so-called high-interest escrow accounts that did not in fact exist.[155] The customers sent the funds in checks "payable to Nay or to a bank for his account."[156] The later transactions "with regard to the escrow were not in the form usual to dealings between customers and First Securities, nor was the escrow reflected in periodic accountings by First Securities to the claimants."[157] Nay had no authority from First Securities to carry out this scheme and kept it secret from other employees of the company.[158]

A special master ruled that the company was not liable for Nay's fraud because he never represented that he was acting for the company.[159] The Court of Appeals for the Seventh Circuit reversed, holding the company was liable under Section 261 of the Restatement (Second) of Agency. The court relied in particular on an illustration to Section 262 which said: "P, whose business is that of advising persons concerning investments, represents to T that A is his manager. At P's office T seeks advice of A concerning investments. A, acting solely to promote an enterprise of which he is the owner, made deceitful statements in regard to it, on the strength of which T invests and loses. P is subject to liability to T."[160]

In 1982, the U.S. Supreme Court followed Section 261 in an antitrust case involving the American Society of Mechanical Engineers, Inc. (ASME), a nonprofit membership organization that promulgated safety standards for areas of engineering and industry.[161] T.R. Hardin was a member of an ASME committee that set safety standards for boilers and also an executive of a company that manufactured devices used on boilers. Hardin helped to cause the ASME committee to send out a letter that cast doubt on the safety of a device manufactured by Hydrolevel Corporation, which competed with the product made by Hardin's company. Hardin's company used the letter to discourage customers from choosing the Hydrolevel device.[162] Hydrolevel sued various

153. *See id.* Not all courts interpreted Section 261 so broadly. *See, e.g.*, Lou-Con Inc. v. Gulf Bldg., 287 So.2d 192, 200 (La. Ct. App. 1973) (giving a janitor the keys to a building was not enough to make the janitor's employer liable for an arson perpetrated by the janitor).

154. SEC v. First Sec. Co., 463 F.2d 981 (7th Cir. 1972).

155. *See id.* at 983.

156. *Id.* at 984.

157. *Id.*

158. *See id.* at 985.

159. *See id.* at 986.

160. *Id.* at 985.

161. *See* Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 558 (1982).

162. *See id.* at 560–62.

parties under the antitrust laws, including ASME.[163] The other defendants settled, ASME went to trial and lost.[164]

The Supreme Court affirmed the ruling against ASME. The Court noted that, "under general rules of agency law, principals are liable when their agents act with apparent authority and commit torts analogous to the antitrust violation presented by this case."[165] The Court then listed examples of cases involving fraud, misrepresentation, defamation and tortious interference with business relations.[166] The Court went on to explain, quoting Comment a. to Section 261 of the Restatement (Second) of Agency, that "[u]nder an apparent authority theory, '[l]iability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.'"[167]

The Court then explained that application of the apparent authority tort doctrine would serve the purposes underlying the doctrine. The Court noted, "ASME's system of codes and interpretative advice would not be effective if the statements of its agents did not carry with them the assurance that persons in the affected industries could reasonably rely upon their apparent trustworthiness."[168] The law protects such reasonable reliance, the Court went on, because: "It is … for the ultimate interest of persons employing agents, as well as for the benefit of the public, that persons dealing with agents should be able to rely upon apparently true statements by agents who are purporting to act and are apparently acting in the interests of the principal."[169]

It is worth noting here that the Supreme Court's *ASME* decision does not go as far as some of the cases cited earlier. Liability was not imposed simply because the rogue agent's position with the defendant facilitated the tort. Rather, liability was justified by proof that the harm was caused because innocent third parties reasonably believed and detrimentally relied on the false impression the rogue agent was speaking as and for the principal. Indeed, the critical statement was purportedly made by ASME itself and, as the Supreme Court observed, was "'effective, in part at least, because of the personality of the one publishing it.'"[170]

Our final example of a liberal application of the apparent authority tort doctrine is a decision of the U.S. Court of Appeals for the Tenth Circuit in 1987, which held that a company could be liable for sexual harassment by a supervisor pursuant to Section 219(2)(d) of the Restatement (Second) of Agency, even if the harassment did not result in tangible job action by the employer and even if

163. *See id*. at 564.

164. *See id*.

165. *Id*. at 565–66.

166. *See id*. at 566.

167. *Id*.

168. *Id*. at 567.

169. *Id*.

170. *Id*. at 566–67.

the employer had received no prior notice of the harassing activity.[171] Since the supervisor obviously did not have apparent authority from the company to engage in harassment, the court must have been relying on the language in Section 219(2)(d) making the employer liable if the employee was aided in accomplishing the tort by the existence of the agency relation.

V. TURN OF THE MILLENNIUM TURNABOUT

A. Changing Attitudes Toward Government and Tort Suits

In the closing decades of the twentieth century, the progressive philosophy that had driven the expansion of vicarious liability lost ground to a resurgence of individualism.[172] Vietnam, Watergate and the inflation of the 1970s eroded faith in government.[173] Americans became more apt to prize their individual rights,[174] defend their autonomy and value freedom of choice.[175] Private ordering and the free market became more popular.[176] The demise of communism in Eastern Europe and the Soviet Union diminished the appeal of socialism and redistributive government.[177] An ethic of deference to authority was replaced by an ethic of questioning authority.[178] One rough measure of the changing attitude: In 1964, 76 percent of respondents to a poll question said the government in Washington could be trusted to do what is right most of the time. In 1996, the positive response rate to that same question was only 19 percent.[179]

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171. *See* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1418 (10th Cir. 1987).

172. *See* Daniel Harris, *Loyalty Loses Ground to Market Freedom in The U.S. Supreme Court*, 10 WM. & MARY BUS. L. REV. 615, 643–44 (2019).

173. *See* Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 OKLA. CITY U. L. REV. 323, 375 (2012) ("Disillusioned by Vietnam and Watergate, the public was cynical about government …."); L.A. Powe, Jr., *Book Review: The Not-So-Brave New Constitutional Order: The New Constitutional Order by Mark Tushnet*, 117 HARV. L. REV. 647, 662 (2003) ("When the honest Jimmy Carter was elected, the former engineer gave the system a coup de grace – government, even if honest, was no longer competent.").

174. *See* Harris, *supra* note 172, at 643.

175. *See* Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1538 (1992).

176. *See* GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 4 (1993).

177. *See, e.g.*, Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace,* 29 J. MARSHALL L. REV. 75, 122 (1995) ("[T]he seventy-two year experiment of the Soviet Union and Eastern European economies premised on principles of distributional equity generally provides powerful evidence of the long term failure of such a system for allocating resources.").

178. *See* Steven D. Smith, *Hart's Onion: The Peeling Away of Legal Authority*, 16 S. CAL. INTERDISC. L.J. 97, 132–33 (2006).

179. *See* Alan Murray, *Foreword* to LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS, at ix (1996).

In the heart of this era, the 1980s, problems with the tort system became evident. As a 1992 article by Gary T. Schwartz recalled, the judges who "expanded the scope of formal liability during the 1960s and 1970s . . . foresaw very little of the heavy cost burden of modern tort liability."[180] Their assumption, rather, was that expanded liability "would not be especially expensive for individual or institutional defendants."[181] That assumption proved to be overly optimistic. "By the 1980s, . . . it had become clear that at least for certain service providers and product manufacturers, the costs of liability had become quite high. Then, during the tort crisis that began in late 1984, liability costs proceeded to soar."[182]

Business interests used the increased cost and reduced availability of insurance to argue that the expansion of tort liability in American law had gone too far.[183] According to a 2002 article by Michael Rustad and Thomas Koenig, tort reformers invoked "traditional values such as self-reliance, personal responsibility and property rights to castigate the contemporary civil justice system as unfairly redistributive social welfare and destructive of core American values."[184]

In a political climate already primed to see activist government as a problem, the tort reformers were able to convince many people. State legislatures responded. The 2002 article described legislative "tort retrenchment" as "one of the most successful law reform campaigns in Anglo-American legal history."[185] Between 1986 and 2002, "forty-five states and the District of Columbia . . . enacted at least one limitation on plaintiffs' tort rights and remedies."[186]

Meanwhile, academic attitudes were also changing. According to the 1992 article by Gary T. Schwartz: "When modern tort law began in the 1960s, almost all of the intellectual life within the United States—and within American law schools—lay on the liberal left."[187] As a result, if "any scholars in the 1960s had objected that modern tort law unduly disparages contract or is excessively costly, they would have been dismissed as old-fashioned and irrelevant."[188] "By the 1980s, however, much of the intellectual vitality in public-policy analysis

180. Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 690 (1992).

181. *Id.*

182. *Id.* at 691.

183. *See* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 438 (2006).

184. Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 50 (2002).

185. *Id.* at 65.

186. *Id.* at 69.

187. Schwartz, *supra* note 180, at 693.

188. *Id.*

had switched to the neo-conservatives or to rejuvenated traditional conservatives."[189]

Conservatives disputed the strict enterprise liability precept that the goal of tort law was to provide compensation to needy plaintiffs as a matter of social fairness, regardless of the defendant's fault. For example, an article by David Owen argued that the "ideals of freedom and equality require that the interests of actors and other persons be accorded an equal dignity to those of accident victims."[190]

Most notably, a 1987 article in the *Yale Law Journal* by George Priest challenged the loss spreading idea[191] that lay at the heart of Prosser's modern justification and the earlier scholarship of Harold Laski, Young B. Smith and William O. Douglas. In an article entitled *The Current Insurance Crisis and Modern Tort Law*, Priest argued that spreading losses through the tort system, and thereby forcing consumers to buy disability and accident insurance through higher product prices, was inefficient and unfair when compared to the alternatives of helping the needy through direct government help or encouraging people to buy their own insurance.

For one thing, force-placed insurance through the tort system was much more expensive because of the high cost of litigation. According to the Priest article, "tort law administrative costs are estimated to be 53% of net plaintiff benefits."[192] By contrast, the article noted that "Blue Cross-Blue Shield first-party health insurance administrative costs are 10% of benefits" and SSI (Social Security Insurance) "disability insurance administrative costs are 8% of benefits . . . ."[193]

Another problem stemmed from the fact that tort damage awards include non-economic damages and damages that have already been paid for by other insurance policies. Consumers buying accident insurance on their own would not want to pay for higher-priced policies that covered these losses. For example, the article noted: "Losses representing pain and suffering or other emotional effects of an injury . . . are never insured in first-party markets because it is not worthwhile for consumers to pay the premiums necessary to support coverage of them."[194] Businesses facing the prospect of tort damage awards, however, must buy the higher coverage policies and then pass the insurance cost along to consumers in the form of higher prices. As a result, the article said, "[i]n comparison to first-party insurance, third-party tort law insurance provides coverage in excessive amounts,"[195] much like forcing a family to pay for a $600,000 fire insurance policy on a home worth $300,000.

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189. *Id.* at 694.

190. Owen, *supra* note 13, at 723. *See also* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

191. *See generally* Priest, *supra* note 15.

192. *Id.* at 1560.

193. *Id.*

194. *Id.* at 1553.

195. *Id.* at 1552.

The Priest article "[e]stimated conservatively" that "tort law insurance coverage levels are in the range of 64% to 134% greater than first-party coverage levels."[196]

Loss spreading through tort law was also unfair to poor people. Because tort damage awards include a component for lost income, awards to affluent plaintiffs tend to be higher than awards to poorer plaintiffs. Businesses passing along their increased insurance costs through higher prices, however, set the implicit insurance premium included in their prices "with reference to *average* expected loss."[197] Thus, the article continued, "the high correlation of total awards with income means that premiums reflect the average income of the population of consumers."[198] The article went on to explain that the "implication of charging each consumer a premium related to average income is that consumers with high incomes are charged a premium lower than their expected loss, and consumers with low incomes are charged a premium higher than their expected loss."[199] As a consequence, the article concluded, force-placed third-party insurance through the tort system "requires low-income consumers to subsidize high-income consumers."[200]

The article went on to point out another unfair effect of the loss-spreading model. "The relatively greater administrative costs of the tort system must be averaged over the sale of all products and services. As a consequence, they operate in the manner of a sales tax on product and service delivery."[201] Sales taxes, unlike income taxes, have "a regressive redistributional effect: They represent a greater proportion of the resources of the poor than of the moderate- or high-income population."[202] As a result, the Priest article continued, "low-income persons are harmed doubly by the delivery of compensation insurance through tort law: They pay premiums greater than their expected return, and they pay a fixed-rate levy that affects them more severely than those consumers possessing greater resources."[203]

The *Yale Law Journal* article by George Priest had a major impact on judicial thinking about tort law. For example, the Supreme Court cited the article in a unanimous 1997 U.S. Supreme Court opinion by Justice Stephen Breyer,[204] which limited liability under a federal statute and said that courts could properly reject a liability rule that, "despite benefits in *some* individual cases, would on balance cause more harm than good . . . ."[205]

196. *Id.* at 1556.
197. *Id.* at 1559.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at 1560.
202. *Id.*
203. *Id.*
204. *See* Metro-North Commuter R.R. v. Buckley, 521 U.S. 424, 435 (1997).
205. *Id.* at 438.

B. Walk Back

In this new environment, courts became more sympathetic to employers of rogue agents and less automatic in imposing liability. An early example came in 1986 when the U.S. Supreme Court held that employers were sometimes but not always automatically liable for sexual harassment by supervisors in violation of Title VII of the Civil Rights Act of 1964.[206] The Court indicated that, in deciding the question of employer liability, "Congress wanted courts to look to agency principles for guidance in this area" and cited generally to sections 219 through 237 of the Restatement (Second) of Agency.[207] The Court, however, did not specify precisely what agency principles were applicable or what they meant.

In another 1986 case that stopped short of automatic liability, the South Dakota Supreme Court held an insurance company was not responsible for an agent who (allegedly) went to the plaintiffs' home for the ostensible purpose of writing an insurance policy, used the visit to discover the location of the plaintiffs' secret lockbox and then relayed that information to professional burglars who later burglarized the plaintiffs' home.[208] The court said the alleged harm was not a foreseeable result of the agent's employment, so that holding the company liable would be "unfair."[209]

A 1992 case from Tennessee provides another example of a court declining to impose vicarious liability even though the rogue agent's job gave the agent the opportunity to commit the tort. A divorcing couple sold their marital home and deposited the proceeds with the husband's lawyer while their dispute over how to divide the money was being worked out. "When the lawyer absconded without accounting for the funds, the trial judge held the husband responsible."[210] The appellate court reversed on the ground that the agency relationship between the husband and the lawyer was not the proximate cause of the fraud. Rather, "[t]he joint act of the parties transferring the funds to" the lawyer as trustee for both parties was "the act that enabled [the lawyer] to embezzle the funds."[211]

In 1998, the U.S. Supreme Court revisited the question of when employers should be held vicariously liable for sexual harassment by their supervisors. The Court said an employer would be liable if the harassment culminated in tangible employment action (such as termination, demotion or denial of

206. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

207. *Id.*

208. Leafgreen v. Am. Fam. Mut. Ins. Co., 393 N.W.2d 275, 276 (S.D. 1986).

209. *Id.* at 280–81.

210. McReynolds v. McReynolds, Appeal No. 01-A-01-9109-CV-00315, 1992 Tenn. App. LEXIS 99, at *1 (Ct. App. Jan 31, 1992).

211. *Id.* at *6.

promotion) against the plaintiff by the employer itself[212] or if the company "knew or should have known about the conduct and failed to stop it."[213]

In cases when the company was not negligent and did not take any tangible employment action against the plaintiff, the Supreme Court said the supervisor's misconduct could not be attributed to the employer under the general rule of employer liability (which we have called respondeat superior) because harassing supervisors are not trying to serve the interests of the employer and therefore sexual harassment by a supervisor falls outside the scope of employment.[214] The Court also said the employer could not be held liable under an apparent authority theory, noting: "As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as distinct from where the agent threatens to misuse actual power."[215] The Court went on to explain that, "[i]n the usual case, a supervisor's harassment involves misuse of actual power, not the false impression of its existence. Apparent authority analysis therefore is inappropriate in this context."[216]

The Court was not willing to give full effect to the "aided in accomplishing the tort by the agency relation" language of Section 219(2)(d) of the Restatement (Second) of Agency, noting the standard could make employers liable "not only for all supervisor harassment, but also for all co-worker harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue."[217] Such a result, the Court said, would be inconsistent with its 1986 decision that harassment by supervisors does not always result in employer liability.[218] Since the Supreme Court was not bound by Section 219(2)(d), and just looking to agency principles for guidance, the Court adopted the rule that employers would be only be presumptively liable in cases of harassment by supervisors that did not involve a tangible employment action. The Court said employers could overcome the presumptive liability through proof: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[219]

Other courts went even further in limiting or rejecting Section 219(2)(d). For example, in 2003, the Maine Supreme Judicial Court said that even if Maine were to adopt Section 219(2)(d), the standard would be limited to cases involving "apparent authority, reliance, or deceit" and would not create

212. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760–61 (1998).

213. *Id.* at 759.

214. *See id.* at 757.

215. *Id.* at 759.

216. *Id.*

217. *Id.* at 760.

218. *See id.* at 763–64.

219. *Id.* at 765.

vicarious employer liability for the assaultive behavior of a truck driver.[220] In 2005, a Michigan appellate court held a store was not vicariously liable for its clerk (allegedly) copying and sharing nude photographs of a customer taken from a roll of film left at the store to be developed. The court rejected liability under the aided by agency standard of Section 219(2)(d), explaining that even if Michigan were to recognize that standard, "the mere fact that an employee's employment situation may offer an opportunity for tortious activity" would not be enough to justify vicarious liability.[221]

In 2006, the Ohio Supreme Court held that a bank was not vicariously liable for its employee's using information in a loan application to set up a separate competing business and expressly refused to adopt Section 219(2)(d).[222] Also in 2006, the Michigan Supreme Court refused to adopt Section 219(2)(d) in the course of holding that a hospital was not vicariously liable for a sexual assault on a patient. The court justified its rejection of Section 219(2)(d) by saying that Section 219(2)(d) imposed "strict liability" upon employers, strayed too far from the limits of respondeat superior and would expose "employers to the 'threat of vicarious liability that knows no borders' for acts committed by employees that are clearly outside the scope of employment."[223]

In 2007, the U.S. Court of Appeals for the Third Circuit held that a bank was not liable under New Jersey law for its teller's alleged knowing participation in a fraudulent check-cashing scheme, noting that the plaintiff "neither articulates clearly how it was 'misled' nor identifies the particular act it believed [the teller] was authorized to take."[224] The court refused to find liability under the aided by agency language of Section 219(2)(d), explaining that such an application of the provision "would, in effect, strip certain prongs from the 'scope of employment' aspect of the *respondeat superior* test."[225]

Thus, between 1986 and 2007, the direction of the law changed. Courts rejected automatic employer liability for all enterprise related torts. The mere fact the rogue agent's job facilitated the tort stopped being enough to justify liability.

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220. Mahar v. StoneWood Transp., 2003 ME 63, ¶ 21, 823 A.2d 540, 546.

221. Caron v. Walmart Stores, No. 254915, 2005 Mich. App. LEXIS 1366, at *8 (Mich. Ct. App. May 31, 2005) (internal quotation marks omitted) (quoting Salinas v. Genesys Health Sys., 688 N.W.2d 112, 115 (Mich. Ct. App. 2004)).

222. *See* Groob v. KeyBank, 108 Ohio St. 3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, at ¶ 1–7, ¶ 56–57.

223. Zsigo v. Hurley Med. Ctr., 716 N.W.2d 220, 227, 229 (Mich. 2006) (quoting Doe v. Forrest, 2004 VT 37, ¶ 59, 176 Vt. 476, 853 A.2d 48 (Skoglund, J., dissenting)).

224. Siemens Bldg. Techs., Inc. v. PNC Fin. Servs. Grp. Inc., 226 F. App'x 192, 197 (3d Cir. 2007).

225. *Id.* at 198.

VI. THE ERA OF THE THIRD RESTATEMENT

A. The Third Restatement of Agency

In 2006, the American Law Institute published the Restatement (Third) of Agency, which updated the Restatement (Second) of Agency that had been published in 1958. In an important change, the Third Restatement dropped Section 219(2)(d) of the Second Restatement and its language about employer liability when the tortfeasor was aided in accomplishing the tort by the existence of the agency relation. The commentary to the Third Restatement explained the language was being omitted because: "Interpreting 'aided in accomplishing the tort by the existence of the agency relation' beyond situations in which an employee purports to speak or transact on behalf of the employer has the potential to expand an employer's vicarious liability well beyond the established boundaries of the scope-of-employment test."[226]

In another important change, the Third Restatement tightened the definition of an apparent authority tort. Section 7.08 of the Third Restatement provided: "A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission."[227]

Recall that under the commentary to Section 261 of the Second Restatement of Agency, liability seemed to be justified if actions taken with apparent authority facilitated a fraud.[228] The commentary to Section 7.08 of the Third Restatement made it clear the new standard was narrower. Comment b to Section 7.08 said: "A principal is not subject to liability under the rule stated in this section unless there is a close link between an agent's tortious conduct and the agent's apparent authority."[229] Thus, the general presumption against vicarious liability for employee actions outside the scope of employment would apply "when actions that an agent takes with apparent authority, although connected in some way to the agent's tortious conduct, do not themselves constitute the tort or enable the agent to mask its commission."[230]

B. Non-Fraud Torts

Consistent with the tightened standard, courts exonerated employers in many cases in which the wrongdoer's job with the defendant was a cause of the tort. For example, in 2011, the Maine Supreme Judicial Court held a summer camp was not responsible for the alleged sexual assault of a counselor on a

226. RESTATEMENT (THIRD) OF AGENCY § 7.08 reporter's notes b, LEXIS (AM. L. INST. 2006).

227. *Id.* § 7.08.

228. RESTATEMENT (SECOND) OF AGENCY § 261 cmt. a (AM. L. INST. 1958).

229. RESTATEMENT (THIRD) OF AGENCY § 7.08, cmt. b (AM. L. INST. 2006).

230. *Id.*

camper when the two were travelling together two months after the end of camp because it was not reasonable for the camper to believe the counselor was acting with actual authority from the camp when they embarked on their trip or, even less, when the counselor engaged in the alleged sexual assault.[231]

Likewise, in 2021, the Virginia Supreme Court held a church was not vicariously liable under an apparent authority theory for an alleged sexual assault by the retired, but still active, pastor of the church because "[n]o reasonable person would believe that the church vested" the pastor with the authority to engage in sexual battery.[232] Similarly, in December 2021, the Mississippi Supreme Court held a company was not liable for its employees stealing valuables from a home the employees were assigned to clean, noting that the plaintiffs did not claim reliance on the company's representations.[233]

Also in 2021, a New Jersey appellate court held the owner of an apartment building was not vicariously liable for alleged sexual assaults on two girls who lived in the building by a person named Fred employed by the owner to make repairs in the building because the alleged assaults were not only outside the scope of Fred's employment but also outside the scope of Fred's apparent authority.[234] The court quoted comment c. to Section 2.03 of the Restatement (Third) Agency: "Apparent authority holds a principal accountable *for the results of third-party beliefs about an actor's authority to act as an agent when the belief is reasonable and is traceable to a manifestation of the principal."*[235] The court also quoted Section 7.08 of the Third Restatement for the point that a principal is liable for an apparent authority tort only "*when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission.*"[236] Applying these principles, the court said the only authority the plaintiff and her family could have reasonably believed Fred to possess, based on manifestations of the defendant, was the authority "to make repairs and otherwise maintain the Commercial Avenue property."[237] The alleged sexual assaults were not within the scope of Fred's apparent authority and the mere fact Fred's job gave him the opportunity to commit the alleged crimes was not enough to make the employer vicariously liable.[238]

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231. Gniadek v. Camp Sunshine at Sebago Lake, Inc., 2011 ME 11, ¶ 36, 11 A.3d 308, 317.

232. Doe v. Baker, 857 S.E.2d 573, 587 (Va. 2021).

233. *See* RGH Enters. v. Ghafarianpoor, 2021-IA-00013-SCT (¶ 450) (Miss. 2021).

234. E.S. *ex rel*. G.S. v. Brunswick Inv. Ltd. P'ship, 263 A.3d 527, 541 (N.J. Super. Ct. App. Div. 2021).

235. *Id.* at 542 (citing RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. 2.03 (emphasis added)).

236. *Id* (citing RESTATEMENT (THIRD) OF AGENCY § 7.08 (emphasis added)).

237. *Id.* at 543.

238. *See id*. Some jurisdictions follow the Second Restatement's aided by agency standard, or its equivalent, in limited circumstances. *See, e.g.*, J.C. *ex rel.* N.C. v. St. Bernard Par. Sch. Bd., 2021-0111 (La. App. 4th Cir. 2/4/22), 336 So. 3d 92 (abuse of student); Sherman v. State Dep't of Pub. Safety, 190 A.3d 148 (Del. 2018) (sexual tort by arresting police officer).

C. Tighter Rules on Business Frauds

The new regime also meant less liability for employers in cases of business frauds by rogue agents. It was no longer enough that the wrongdoer's job had facilitated the fraud. Courts insisted on proof the defendant did something to create a false appearance of authority. For example, in a March 2022 case from New Jersey, fraudfeasors tricked plaintiffs into investing in a sham company that supposedly provided home delivery and installation services for Best Buy. The plaintiffs sued Best Buy because its employees allegedly participated in the fraud by corroborating the fraudfeasors' representations.[239] A federal court ruled for Best Buy because the plaintiffs failed to allege how the company "created an appearance" that it "authorized the alleged actions of the employees."[240]

In 2019, the U.S. Court of Appeals for the Eleventh Circuit held an employer, Fancy Farms, not vicariously responsible under the Fair Labor Standards Act for a labor recruiter wrongfully demanding and collecting recruitment fees from workers.[241] The court noted that apparent authority must be traceable to actions of the defendant[242] and that the plaintiffs failed "to identify any acts by Fancy Farms, the principal, that would have caused them to believe that Fancy Farms consented to [the labor recruiter] charging and collecting recruitment fees."[243] The court concluded that "[w]ithout a manifestation by Fancy Farms to this effect, the plaintiffs cannot demonstrate the creation of apparent authority."[244]

Another example is a 2020 case from Nevada.[245] The plaintiff was tricked into sending money to a thief by an email that purportedly came from the defendant but in fact had been sent by someone who had hacked into the defendant's computer system.[246] The court said the defendant was not liable under an apparent authority theory because the "theory is limited to situations where the principal 'intentionally or carelessly caused' the injured party to believe the fraudulent actor was acting on behalf of the principal"[247] and the court did not believe the defendant had been careless.[248]

In a 2021 case, the U.S. Court of Appeals for the Fifth Circuit affirmed summary judgment for the defense in a case in which a lawyer at the firm, while working in his office at the firm purportedly on behalf of the firm, had

239. *See* Gibly v. Best Buy Co., No. 21-cv-14531, 2022 U.S. Dist. LEXIS 48393, at *1 (D.N.J. Mar. 18, 2022).

240. *Id.* at *9.

241. Ulloa v. Fancy Farms, Inc., 762 F. App'x 859 (11th Cir. 2019).

242. *See id.* at 865.

243. *Id.* at 866.

244. *Id.*

245. Jetcrete N. Am. LP v. Austin Truck & Equip., Ltd., 484 F. Supp. 3d 915 (D. Nev. 2020).

246. *See id.* at 916–18.

247. *Id.* at 920

248. *See id.* at 920–21.

committed a fraud while acting as an escrow agent.[249] The court explained that for there to be apparent authority, the "principal must have affirmatively held out the agent as possessing the authority or must have knowingly and voluntarily permitted the agent to act in an unauthorized manner."[250] While the plaintiff claimed the law firm had complete knowledge of the lawyer's escrow practice, the court said the evidence only established the firm knew the lawyer was engaged in some outside work from the firm's office, which was not sufficient to support a claim that the defendant knowingly permitted the lawyer to represent himself as an agent of the firm while engaged in his escrow practice.[251]

Courts also restricted the apparent authority tort doctrine by requiring proof the plaintiff's justifiable reliance on the appearance of authority was a direct cause of alleged harm. A good example is a 2013 case from Wisconsin.[252] The Manson Insurance Agency, which represented Travelers Indemnity Company, allegedly overbilled customers and embezzled rebate checks from Travelers that the agency was supposed to send to customers.[253] A federal court held the apparent authority tort doctrine could be used to hold Travelers vicariously responsible for the overbilling, but not for the embezzlements.[254] The court explained that there must be a causal nexus between a plaintiff's reliance on apparent agency and the harm caused.[255] That causal nexus was not present with respect to the embezzlements because "plaintiffs' reliance was not what enabled Manson to steal their mail—if anything, it was *Travelers'* reliance on Manson to forward the mail rather than sending it directly that put Manson in a position to steal."[256]

D. Remaining Bedrock

Plaintiffs can still win tort cases brought under an apparent authority theory. Here are two recent examples.

1. Shurwest v. Howard[257]

In 2017, Carolyn Howard, a Kentucky financial planner, visited the headquarters of Shurwest, LLC, a company that marketed financial products to

249. *In re* 3 Star Props., L.L.C., 6 F.4th 595 (5th Cir. 2021).

250. *Id.* at 615 (quoting NationsBank, N.A. v. Dilling, 922 S.W.2d 950, 953 (Tex. 1996)).

251. *See id.*

252. Kolbe & Kolbe Millwork, Co. v. Manson Ins. Agency, Inc., 983 F. Supp. 2d 1035 (W.D. Wis. 2013).

253. *See id.* at 1039–40.

254. *See id.* at 1044.

255. *See id.* at 1047.

256. *Id.* at 1048.

257. Shurwest, LLC v. Howard, No. 5:19-CV-180-REW, 2021 U.S. Dist. LEXIS 52144, at *1 (E.D. Ky. Mar. 19, 2021).

retirement planners, on a business-recruiting trip paid for by Shurwest.[258] While there, Howard met with Melanie Schultze-Miller, Shurwest's National Sales Director of Life Insurance, who persuaded Howard to invest (for herself and one of her clients) in certain structured notes.[259] "Disaster (and loss) ensued when the structured notes seller imploded in a series of criminal and regulatory enforcement actions, actions that swept up Shurwest's National Sales Director as well."[260]

Howard sued Shurwest in federal court in Kentucky. Shurwest moved for summary judgment on the ground the National Sales Director had gone "'rogue' in marketing the structured notes at Shurwest. The company had rejected her proposal to market the structured notes in 2016. She made an end-run by creating a secret, side company, furtively enlisting some Shurwest employees, and forging on in the shadows."[261] The district court denied the motion for summary judgment by invoking the apparent authority tort doctrine.

Setting the standard, the court noted that "[a]pparent authority is created when the principal holds out to others that the agent possesses certain authority that may or may not have been actually granted to the agent."[262] "It is a matter of appearances on which third parties come to rely."[263] Howard argued Shurwest had clothed its National Sales Director with apparent authority by allowing her to market the structured notes from the Shurwest headquarters on a business trip paid for by Shurwest. The company responded that Howard should have realized the National Sales Director was acting on her own because of certain disclaimers in communications with Howard.

Analyzing the dispute, the court said: "Apparent authority, its existence or not, is a linchpin in this case. A jury must decide the issue."[264] On the one hand, "Shurwest undoubtedly made certain manifestations to Howard when it flew her across the country for a day at Shurwest's headquarters" that included a sales pitch by Schulze-Miller, Shurwest's National Sales Director of Life Insurance, for the structured notes.[265] On the other hand, the "disclaimer—fairly far down the email history and, of debatable prominence, and perhaps ambiguous . . . —may register with the jury."[266] The district court concluded that "on assessment of the full record, a reasonable jury could decide the

258. *See id.* at *1.

259. *See id.* at *1–2.

260. *Id.* at *2.

261. *Id.*

262. *Id.* at *29–30 (quoting Kindred Nursing Ctrs. Ltd. P'ship v. Brown, 411 S.W.3d 242, 249 (Ky. Ct. App. 2011)).

263. *Id.* at *30 (quoting Mill St. Church of Christ v. Hogan, 785 S.W.2d 263, 267 (Ky. Ct. App. 1990)).

264. *Id.* at *31.

265. *Id.*

266. *Id.* at *32.

apparent authority question either way, foreclosing a dispositive pre-trial ruling."[267]

2. Drew v Pac. Life Ins. Co. (2021)[268]

Lamar and LaRene Drew claimed they "lost a significant portion of their life savings after they followed bad financial advice peddled by employees of R. Scott National, Inc. (RSN)."[269] According to the Drews, RSN persuaded them to buy life insurance policies by Pacific Life Insurance Company that the Drews did not need and could not afford by representing "that, after two years of paying the policies' annual premiums, they could resell the policies on the secondary market for a large profit."[270] In fact, after two years passed, RSN was unable to resell the policies, the Drews stopped paying the premiums, the policies lapsed and the Drews lost the considerable sums they had paid for the policies (including borrowed money that had consumed the equity in their home).[271]

The Drews sued Pacific Life for RSN's alleged misconduct. The Utah Supreme Court said the insurance company was not liable under a theory of actual authority because its contract with RSN prohibited RSN from marketing insurance products that did not meet the customer's insurance needs and making promises about insurance products (such as promising that the policy could be resold for a profit in the secondary market).[272] On the other hand, the Drews were entitled to partial summary judgment on the issue of apparent authority. The court said that "[a]pparent authority exists 'when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.'"[273] The court went on to list the three elements of apparent authority recognized in Utah:

> (1) that the principal has manifested his [or her] consent to the exercise of such authority or has knowing permitted the agent to assume the exercise of such authority; (2) that the third person knew of the facts and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and (3) that the third person, relying on such appearance of authority has changed his [or her] position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal.[274]

The court said that the Drews satisfied all of these elements. First, at least for purposes of the Utah statute under which Drews had filed suit, "Pacific's act

267. *Id.*

268. Drew v. Pac. Life Ins. Co., 496 P.3d 201 (Utah 2021).

269. *Id.* at 206.

270. *Id.* at 207.

271. *See id.* at 208.

272. *See id.* at 218–19.

273. *Id.* at 214 (quoting RESTATEMENT (THIRD) OF AGENCY § 2.03 (AM. L. INST. 2006)).

274. *Id.* at 220.

of giving its policy application forms to RSN" manifested "consent to RSN's authority to solicit applications for Pacific's policies and provide information about them."[275] Second, the court noted that the evidence "establishes that the Drews knew that they were signing Pacific Life forms and, based on that, they actually believed RSN had authority from Pacific to make representations about Pacific's products."[276] That belief was objectively reasonable, the court went on, because

> [a] reasonable person of ordinary prudence could assume that if a salesperson has authority to solicit and submit application forms for a company's products, then the salesperson also has authority to describe the features, uses, and advantages and disadvantages of the product. Otherwise, the salesperson would be nothing more than a vessel for carrying forms.[277]

Finally, the court said, the evidence showed that the Drews "relied on RSN's appearance of authority and its representations about Pacific Life's products when they decided to purchase a policy with sizable premiums."[278]

E. Summary

Thus, the doctrine of apparent authority torts has largely returned to the standards that state courts followed in 1888. The doctrine does not institute a regime of strict enterprise liability, but can be used to hold companies responsible for the misdeeds of unauthorized rogue agents if the plaintiff can satisfy three elements. To prevail, plaintiffs must prove that the defendant company did something to clothe the rogue agent with a false appearance of authority, that an innocent third party (normally, the plaintiff) reasonably believed based on the manifestations of the company that the agent was in fact authorized and that the tortious harm was directly caused by the innocent third party's justifiable reliance on the false appearance of authority.

VII. CONCLUSION

A key lesson from this history is that the direction of the law can change. Sometimes ideas about social fairness set the course and sometimes the law moves toward enhanced individual rights.

Dean Prosser's modern justification of vicarious liability, articulated back in 1971, was the product of an era that emphasized social fairness. From the perspective of a philosophy of individual rights, the best justification for vicarious liability is that it is essential to ensure that corporations are held accountable for their actions. Since corporations are legal constructs that can

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275. *Id.* at 223.

276. *Id.* at 225.

277. *Id.*

278. *Id.* at 227.

operate in the real world only through the agency of human actors, the law must define what it means for a corporation to do something. Corporate fault must be constructive. Corporate liability must be vicarious.

The doctrine of apparent authority torts is one of the ways the law defines corporate action. The doctrine is not a form of strict enterprise liability. The key question is not the social fairness of providing compensation to needy plaintiffs. Rather, the inquiry is into the individual fairness of making the defendant pay for the misdeeds of someone else. To prevail, therefore, plaintiffs have to show the defendant did something to enlarge its legal personality, actual or apparent, so that the relevant misconduct of the bad actor is fairly attributable to the defendant.