Forthcoming in the Kansas Law Review

From Fidelity to Precarity: The Evolution of Agency in Business from Legal Formalism to the Gig Economy

by
Amy Deen Westbrook*

---

* Professor and Norman R. Pozez Chair in Business and Transactional Law; Director, Business and Transactional Law Center; Washburn University School of Law. I would like to thank David A. Westbrook for his helpful comments, and Nis Wilbur and Isaac Booth for their research assistance. All mistakes are, of course, my own.

I. Introduction

Imagine that you work for Unter Corp. If you make a deal on behalf of Unter Corp., is Unter Corp. bound by it? What if you harm someone while working for Unter Corp.? Can you take a second job with Unter Corp.'s fiercest competitor? Do your answers depend on what you do for Unter Corp.? Would your answers have been different 25 years ago?

The common law of agency articulates the internal and external relationships of business associations, including relationships with employees, customers, and the public. As our society and economy change, shaping and shaped by those business associations, agency law is pressured to change too. This article explores the sources and nature of those changes.

Agency law governs the relationships between a legal entity (the "principal") and a person acting on behalf of and subject to a degree of control by the entity (the "agent"). Agents and principals owe duties to one another, most notably the fiduciary duty of loyalty required of agents. In addition, agency law establishes rights and obligations of principals for the dealings of their agents with third parties. Modern business, in which intangible legal entities act through large numbers of legal and natural persons, would not be possible without agency law or something like it.

Neither business nor law is static. The law governing the internal and external consequences of agency relationships has shifted over time, and may be about to shift again. To what extent is an employee obligated to act in the interest of her employer? What constitutes the "loyalty" owed by a manager of a company to that company and its shareholders? In appropriate circumstances, principals may be bound by their agents in contract. Traditionally, an intangible corporation can only "sign" a contract through the action of a human agent.[1] Principals may also be liable, under some circumstances, for the tortious actions of their agents. But what circumstances?

The common law of agency has been articulated, summarized, and generalized by the American Law Institute's ("ALI") restatements, and agency law developments in the last century have been reflected in its three restatements of agency. The most recent, the 2006 *Restatement*

[1] *See infra* Part VI.B.1

*(Third) of Agency (*the "*Third Restatement*"),[2] is widely followed by courts[3] and thus relied upon by business associations.

Since the *Third Restatement*, there have been substantial shifts in the environment in which businesses operate. To name just a few: the ubiquity of smart phones, the emergence of the "gig economy,"[4] the Global Financial Crisis ("GFC"), the nationwide acceptance of the Limited Liability Company form, the COVID-19 pandemic, blockchain technology, and the proliferation of large language models like Chat-GPT. Such developments create conflicts in both the internal and external relationships of business associations, conflicts the common law of agency is called upon to resolve.

Agency law emerged as a formal, distinct set of doctrines because U.S. business required resolution of questions that were not fully addressed by existing understandings of contract, tort, and the developing law of business associations.[5] Since its inception, agency law has evolved to respond to changes in the business environment. That is, the common law of agency has always both reflected and addressed the contemporary social order.[6]

Today, in part due to developments listed above, business associations and their agents – people – operate in an uncertain, precarious environment. Loyalty, a cornerstone of traditional thinking about agency and key to our understanding of corporate governance, appears to be in decline, and in many circumstances even unreasonable.[7] Conversely, it is not clear how responsible contemporary firms are for their workers, who are often designated subcontractors. More broadly, changes in the business environment come with changes in the relationships governed by agency law, and so the interrelated laws of business associations, contract, tort, employment and so forth. What should be expected in these new circumstances? Courts are

---

[2] RESTATEMENT (THIRD) OF AGENCY (2006).
[3] *See* Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119, 2121 (2022) (noting that courts in all U.S. jurisdictions routinely rely on restatements, citing them nearly 10,000 times).
[4] *See* INTERNAL REVENUE SERVICE, GIG ECONOMY TAX CENTER (2024) (defining a gig economy as "activity where people earn income providing on-demand work, services or goods. Often, it's through a digital platform like an app or website.").
[5] *See infra* Part IV.B.
[6] *See* David A. Westbrook, *A Shallow Harbor and a Cold Horizon, The Deceptive Promise of Modern Agency Law for the Theory of the Firm*, 35 SEATTLE U. L. REV. 1369, 1390 (2012) (explaining that apparent authority "expresses society's insistence on what it believes is right").
[7] *See* WORLD ECONOMIC FORUM, https://www.weforum.org/agenda/2021/11/employee-loyalty-declining-how-to-build-it-back/ (last visited June 21, 2024).

under increasing pressure to adjudicate matters with which agency law, especially as set out in the *Third Restatement's* clear categories and requirements, struggle. The common law of agency will have to adapt to changes in business and social organization. This article explores why and how that might happen.

II. A Brief History of the Common Law of Agency

A. Status, Organizational Hierarchy, and Commercial Relationships

Ideas of status and organizational hierarchy – in which one person acts on behalf of, and subject to the control of, another – are hardly new. Otherwise, social and economic relations would have to be direct, limited to immediate time and space, and complexity would be severely limited. Relationships that today are articulated as "agency" can be found in all commercial societies: in the *paterfamilias*/family structure in Roman law,[8] in canon law,[9] and in medieval law merchant rules allocating responsibility for those acting on behalf of business associations.[10] Early English common law cases employed agency concepts in the contract context.[11] As England became more commercial, the idea expanded to torts and what we now call vicarious liability through a series of decisions by Chief Justice Holt in the 1690s.[12] In 1765, William Blackstone articulated fundamental doctrines of the common law of agency in his *Commentaries*.[13]

[8] *See* Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 519 (2011) [hereinafter Dalley, *Theory*] (examining the family institution in Roman law, under which actions by slaves were binding on the *paterfamilias*).
[9] *See* Daniel Harris, *Corporate Intent and the Concept of Agency*, 27 STAN. J. L. BUS. & FIN. 133, 138 (2022) [hereinafter Harris, *Intent*] (noting that the maxim was used as early as 1311).
[10] *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 333-56 (1983) (tracing the early development and doctrines of mercantile law).
[11] *See* Dalley, *Theory, supra* note 8, at 521-22 (discussing, for example, a bailiff's ability to bind the lord in the medieval estate management context).
[12] *See* Daniel Harris, *The Rival Rationales of Vicarious Liability*, 20 FLA. ST. U. BUS. REV. 49, 53 (2021) [hereinafter Harris, *Rival*] (examining the history of agency law). *See also* Oliver Wendell Holmes, Jr. *Agency*, 4 HARV. L. REV. 345, 361 (1891) (reprinting the first of two lectures delivered at Harvard Law School on Agency). Early common law did not usually hold employers liable for the torts of their employees unless they were specifically authorized, enabling employers to escape liability in many cases. *See* Harris, *Rival, supra* at 53.
[13] 1 William Blackstone, *Commentaries* *417 (1765), *cited in* Daniel Harris, *Rival, supra* note 12, at n.4.

While canon law, feudal law, and early doctrines of contract and tort all indicated the centrality of an idea of agency for commercial relations, at common law there was no cause of action for agency as such. When the common law of England became the common law of the colonies and then the United States, the law had no way to talk about agency *per se*. In practice, resolving cases required particularity – addressing specific problems in consistent ways and providing rules for business on which courts and economic actors could rely. So, the common law developed.

B. 19th and Early 20th Century Formalism and Development

1. The Intertwined Laws of Agency and Business Associations

Today, it is easy enough to say (or teach) that "agency law" enables intangible business associations to act, glibly overlooking the fact that business law existed before agency law was articulated. So, it is said, the agent is the alter ego of the firm when dealing with third parties on matters within the scope of the agency.[14] *Qui facit per alium, facit per se* ("he who acts through another acts through himself").[15] In contract, agency law is used by business associations to negotiate, sign contracts, and sell their goods and services. Firms are bound by such contracts. In tort, agency law is used to assign liability to the firm for certain acts of its agents.[16]

Such matters were not so clear in the early 19th century; what is now taught as the law required generations of work by the legal community. The privilege of doing business as a corporation required an act of the state's legislature, often called a "special bill." Consequently, there were relatively few corporations. The process was unwieldy, favored the wealthy, and tended to be corrupt. Reform of this process was one plank of the "Jacksonian Democracy" of

[14] *See* Harris, *Intent, supra* note 9, at 135.
[15] 1 William Blackstone, *Commentaries* *417 (1765) ("the master is answerable for the act of his servant, if done by his command, either expressly given, or implied: *nam qui facit per alium, facit per se*").
[16] This is also true in some criminal law contexts, but the question of organizational criminal intent is beyond the scope of this article.

the 1830s.[17] As the commercial republic grew, business was increasingly done through firms. States began to pass statutes of general incorporation: corporation status would be freely given upon filing basic information about the business with the state and payment of a modest fee and franchise taxes thereafter. Today, firms are still "incorporated" or "chartered" by the states, and subject to state business association laws.

Through the 19th and 20th centuries, corporations proliferated. As corporations did business in an increasingly national economy, questions arose. Who could make a contract on behalf of the corporation, which was after all distinct from any natural person? Or, suppose an employee of a corporation committed a tort against a third party, and the employee lacked resources to pay the judgment. Must the corporation pay? Under what circumstances? How could the business association control its employees, who might be out there making contracts and committing torts? The new institutional structure of a new economy created new conflicts, new litigations, and new legal questions. Judges across jurisdictions answered, and today's common law of agency gradually emerged.

2. Inward and Outward-Looking Consequences of Business Relationships

a. Internal Relationships: Loyalty

Courts were at times called upon to consider the fiduciary loyalty required of persons acting on behalf of a firm. Late 19th century courts adopted a strongly pro-firm stance. In 1880, the U.S. Supreme Court emphasized: "It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as agent for another, whose interests are conflicting."[18] Director conflict-of-interest transactions were automatically

[17] *See* Paul Kens, *Lochner v. New York: Tradition or Change in Constitutional Law,* 1 NYU J.L. & LIBERTY 404, 417 (2005) (explaining Jacksonian reform and its "fear that accumulation of property could pose a threat to democracy if it resulted in the kind of imbalance of power that existed in past aristocratic or hierarchical political systems").
[18] Wardell v. Union Pacific R.R. Co., 103 U.S. 651, 658 (1880) (condemning a conflict-of-interest transaction by railroad directors).

voidable, regardless of whether the transaction was fair.[19] In some cases, antipathy towards agents with adverse interests was even extended to majority stockholders, who could not form a second entity and conduct transactions between the two that excluded or disadvantaged their fellow stockholders.[20] This era is considered by some to have been a high water mark for a corporate fiduciary's duty of loyalty to the firm.[21]

b. External Relationships: Principal Responsibility and Liability

i. Contracts

By the 1880s, U.S. courts had also come to recognize agents' apparent authority (in addition to actual authority) to act on behalf of principals.[22] A number of courts did not allow principals to disavow the contracts or other legal arrangements made by their agents acting with apparent authority.[23] For example, in 1883 the Arkansas Supreme Court considered theft by a butcher shop manager, and ruled that "where one of two persons must suffer by the acts of a third person, he who has held the person out as worthy of trust and confidence, and having authority in that matter, shall be bound by it."[24] That same year, the Alabama Supreme Court reviewed payments on a life insurance policy and found that the company had held two individuals out to the world as its agents, and would "not be allowed to disown responsibility for their acts."[25]

---

[19] *See* Harold Marsh, Jr., *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35, 36 (1966).
[20] *See* Harold M. Bowman, *The Validity of Contracts Between Corporations Having Common Directors*, 8 MICH. L. REV. 577, 585-86 (1906) (reviewing then-recent caselaw).
[21] *See* Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 ST. MARY'S L.J. 909, 944-45 (2009) (tracing the narrowing rule of the rule between 1880 and 1960); Marsh, *supra* note 19, at 35-39; 43.
[22] *See, e.g.,* S. Life Ins. Co. v. McCain, 96 U.S. 84, 84 (1877) (holding a life insurance company liable for a policy concluded by an agent who continued to collect premiums after he resigned); Haden v. Farmers' & Mechanics' Fire Ass'n, 80 Va. 683, 685 (Va. 1885) (finding that "an insurance company cannot hold out a person as its agent and then disavow responsibility for his acts"); Com. Union Assur. Co. v. State, 15 N.E. 518, 521 (Ind. 1888) (finding that the company's agent had authority to make a contract, because private instructions from the principal limiting his actual authority were unknown to the other party).
[23] *See* Daniel Harris, *Corporate Responsibility for Rogue Agents*, 37 NOTRE DAME J. L. ETHICS & PUB. POL'Y 121, 128-30 (2023) [hereinafter Harris, *Responsibility*].
[24] Jacobson v. Poindexter, 42 Ark. 97, 99 (1883) (holding the shop's owner liable for delivery of hides that the shop's manager, acting without actual authority, had agreed to sell before absconding with the payment).
[25] Mobile Life Ins. Co. v. Pruett, 74 Ala. 487, 495 (1883) (finding nevertheless that the plaintiff made the overdue payments after his wife died, without informing the life insurance company of that fact).

ii. Torts

A number of early U.S. vicarious liability cases arose from the burgeoning railroad system. Between the 1850s and the 1880s, courts held railroad companies responsible for employee torts ranging from driving on the wrong track to securities fraud.[26] Expressing concern for public welfare, courts tried to incentivize companies to be vigilant and their agents to be faithful.

Vicarious liability was not without critics. In 1881 Oliver Wendell Holmes, Jr. called the common law of agency "peculiar" and argued that vicarious liability ran contrary to the "instinct of justice."[27] A few years later, Holmes gave two lectures, later published in the *Harvard Law Review*, in which he called the doctrine of agency an "irrational embarrassment."[28] Holmes was not the only such critic, and the late 19th century witnessed some retrenchment in courts' imposition of vicarious liability. For example, in 1889 the U.S. Supreme Court found a railroad agent's issuance of a fraudulent bill of lading outside the scope of his employment and rejected a claim for vicarious liability that in earlier cases had been granted upon similar facts.[29]

3. Early 20th Century Debate

a. Internal Relationships - Loyalty

By 1910, at least in the corporate context, a fiduciary's duty of loyalty was understood in more nuanced and contextual ways. Where the 19th century had all but banned interested

[26] *See e.g.*, Phila. & R.R. Co. v. Derby, 55 U.S. 468, 487 (1853) (holding a railroad responsible for the negligence of an engineer driving on the wrong track); St. Louis, Alton & Chi. R.R. Co. v. Dalby, 19 Ill. 352, 368-69 (1857) (holding a railroad responsible for the assault by one of its employees on a passenger during an argument over the fare); Tome v. Parkersburg B. R. Co., 39 Md. 36, 36 (1873) (considering a tort claim against a railroad executive who fraudulently issued securities as collateral for a personal loan); Bank of Batavia v. N.Y., L.E. & W. R. Co., 12 N.E. 433, 433 (1887) (holding the company liable for a fraudulent bill of lading issued by one of its agents, and used by a co-conspirator to get a loan).
[27] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 231 (1881).
[28] Oliver Wendell Holmes, Jr., *Agency II.*, 5 HARV. L. REV. 1, 22-3 (1891).
[29] Friedlander v. Tex. & P. R. Co., 130 U.S. 416, 425 (1889).

director transactions, by the early 20th century courts had shifted to a more conditional and procedural understanding of what constituted a valid transaction. For example, director conflict of interest transactions were held valid if approved by a majority of the disinterested directors and, if challenged, to be fair.[30] Professor Harold Marsh examined the changed rule, and noted that "Some courts seem simply to admit that the practice [of ratifying interested transactions] has grown too widespread for them to cope with."[31] As this article argues, articulating social norms to cope with changing circumstances is what the common law does. In the early 20th century, corporations often found it in their interest to do business with directors and other interested parties. If the transactions were indeed fair, the law came to allow the practice.

b. External Relationships - Contracts

In 1917, in *Kidd v Thomas Edison, Inc.,*[32] then-District Judge Learned Hand found Thomas Edison, Inc., responsible for the contract its employee concluded with a popular singer. Although the employee's actual authority to contract was limited to an unusual payment arrangement, Hand held the company to the more generous and more customary contract its employee had in fact concluded with the singer. Hand recognized that businesses need agency: "The very purpose of delegated authority is to avoid constant recourse by third persons to the principal, which would be a corollary of denying the agent any latitude beyond his exact instructions. Once a third person has assured himself widely of the character of the agent's mandate, the very purpose of the relation demands the possibility of the principal's being bound through the agent's minor deviations."[33] Hand found Thomas Edison, Inc., liable for the contract as negotiated, based on apparent authority[34] derived from social practice at the time.[35] He explained that "The scope of any authority must, of course, in the first place, be measured, not

[30] *See* Marsh, *supra* note 19, at 39-40.
[31] *See id.* at 41.
[32] Kidd v. Thomas A. Edison, Inc., 239 F. 405 (S.D.N.Y. 1917), *aff'd,* 242 F. 923 (2d Cir.1917).
[33] *Id.* at 408.
[34] *Id.* at 406 (noting that he is articulating agency law, particularly apparent agency, despite substantial ambiguity in the developing doctrine, and that his interpretation does not fully jibe with that of Floyd R. Mechem, a prominent agency law scholar who later served as the initial reporter for the first restatement of agency).
[35] *See* David A. Westbrook, *supra* note 6, at 1395.

alone by the words in which it is created, but by the whole setting in which those words are used, including the customary powers of such agents."[36] For Hand, "agency" was "a structural account or description of a social practice, in fact, the practice of corporate life."[37]

c. External Harms - Torts

Corporate responsibility also made sense for Progressives in the early 20th century who blamed moneyed interests and excessive individualism for inequality and an array of social ills.[38] An array of prominent intellectuals and academics, and eventually courts, believed vicarious liability furthered public welfare.[39] In 1929, the U.S. Supreme Court seemed to reverse its 1889 rejection of vicarious liability, holding yet another railroad liable for loss from a bill of lading forged by its employee.[40]

d. A New Body of Law?

As the role of business associations in U.S. society and its economy continued to expand, doctrinal debate continued. Both Dean Roscoe Pound and Justice Holmes raised questions about the need for a separate area of law, which Holmes considered the result of mixing the fiction of identity between principals and agents with common sense.[41] Others questioned whether agency law should apply to business associations or be limited to individuals.[42] Agency law had grown out of laws governing the characteristics and ramifications of relationships between "masters"

---

[36] *Kidd* 239 F. at 406.
[37] *See* David A. Westbrook, *supra* note 6, at 1395.
[38] *See* Amy Deen Westbrook & David A. Westbrook, *Unicorns, Guardians, and the Concentration of the U.S. Equity markets*, 96 NEB. L. REV. 688, 700-02 (2018) (discussing the concentration of wealth during that era).
[39] *See* Harris, *Responsibility, supra* note 23, at 136-139. *See also* Harold Laski, *The Basis of Vicarious Liability*, 26 YALE L. J. 105, 111-2 (1916-1917) (rejecting the agency rationale in favor of public policy and social expediency); Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 456 (1923) (emphasizing the social utility of vicarious liability); William O. Douglas, *Vicarious Liability and the Administration of Risk I*, 38 YALE L. J. 584, 588 (1929) (focusing on the fact that employers were in the best position to control risk).
[40] Gleason v. Seaboard Air Line A. L. R. Co., 278 U.S. 349, 357 (1929).
See Deborah A. DeMott, *The First Restatement of Agency: What Was the Agenda?* 32 S. ILL. U. L. J. 17, 29 (2007) [hereinafter DeMott, *First*].
[42] *See* Harris, *Responsibility, supra* note 23, at 124 (noting that the common law tradition is designed for individuals).

and "servants," natural persons, but most business associations are considered entities, legal persons.[43]

In a 1920 article in the *Yale Law Review*, Professor Warren A. Seavey rebutted the criticism of Holmes and others, arguing that the results reached by the courts could be explained by "judicial sense (rather than common sense) and the needs of commerce."[44] Seavey walked through the elements of agency doctrine as articulated by various courts, seeking to show "the rhyme and reason of the law beneath the tangle of words which has grown upon the fertile soil of a three party relationship."[45] He concluded that courts' successful protection of the relevant interests "could not have been achieved unless the judges had decided in harmony with the general principles underlying our jurisprudence and in response to commercial necessity."[46] Agency was evolving to address the increasingly complex relationships of a developing economy.

C. Taming the Common Law

1. Sprawl

Business law is primarily state law. As the nation grew, so did the number of state courts, which served as venues for the resolution of business disputes and the creation of business law. At the same time, the number of business disputes also multiplied. As a myriad of courts decided a legion of cases about the relationships between business associations, their agents, and third parties, dissatisfaction with the multiplicity of the common law increased. Unsurprisingly, the "common law has always struck some as unruly, sprawling, and mysterious," leading to calls for harmonization and rationalization, that is, for the codification of the law.[47] This was not

[43] In 1929, Merrick Dodd argued for the legal personality of business associations. E. Merrick Dodd, Jr., *Dogma and Practice in Law of Associations*, 42 HARV. L. REV. 977, 981 (1929) (examining a fellow scholar's treatise on unincorporated entities and the assertion that they did not constitute separate legal entities).
[44] Warren A. Seavey, *The Rationale of Agency*, 29 YALE L. J. 859, 859 (1920).
[45] *Id.*
[46] *Id.*
[47] Andrew S. Gold & Henry E. Smith, *Restatements and the Common Law, in* THE AMERICAN LAW INSTITUTE, A CENTENNIAL HISTORY 441 (Andrew S. Gold & Robert W. Gordon, eds., 2023) [hereinafter, THE ALI].

entirely new. A century earlier, in 1821, Justice Joseph Story gave a speech to lawyers in Boston in which he warned about divergence among state laws.[48] In response to the confusion, numerous "reporters" of judicial decisions were published, but this tended to create even more confusion. In 1837, Story updated his argument to suggest that the common law could be written down in influential but non-statutory form.[49] Towards the end of the 19th century, support grew for some harmonization or articulation of various areas of the law.[50] Although there were some arguments for a code of common law,[51] state judiciaries were and are independent of one another. Which state law would govern? By the early 20th century, the legal community sought some kind of substantive consensus that spanned jurisdictions.

2. The American Law Institute and the Restatements

The American Law Institute ("ALI") was founded in 1923, following a report from the American Association of Law Schools ("AALS") that called for a Permanent Organization for Improvement of Law.[52] The ALI was established as a "private-sector institution dedicated to producing authoritative legal texts."[53] Its mission was "To promote the clarification and

---

[48] JOSEPH STORY, THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 213 (1852) (ed. William W. Story ("There are now twenty-four states in the Union, in all of which, except Louisiana, the common law is the acknowledged basis of their jurisprudence. Yet this jurisprudence, partly by a statute, partly by judicial interpretations, and partly by local usages and peculiarities, is perpetually receding farther and farther from the common standard.").
[49] *See* David J. Seipp, *The Need for Restatement of the Common Law, in* THE ALI, *supra* note 47, at 49.
[50] During this same era there was a growing appreciation in the bar and bench for the need for some consistency in the statutes governing business associations and other areas. *See* Lawrence J. Bugge, *Commercial Law, Federalism, and the Future*, 17 DEL. J. CORP. L. 11, 11 (1992). In 1878, the America Bar Association included in its founding constitution the goal of uniform legislation throughout the country. ABA CONST. Sec. 1.2 (1971) (adopted Aug. 24, 1936; substantially revised July 21, 1971). *Id.* This effort gained steam in 1892, when the Uniform Law Commission was established. *See* Lawrence J. Bugge, *Commercial Law, Federalism, and the Future*, 17 DEL. J. CORP. L. 11, 14 (1992) (noting that the commission was known by other names in its early years). The Commission focused on commercial law and commerce among the states, producing a widely adopted negotiable Instruments Law in 1896, and, most famously, the Uniform Commercial Code in 1952. *See* Lawrence J. Bugge, *Commercial Law, Federalism, and the Future*, 17 DEL. J. CORP. L. 11, 13 (1992).
[51] *See* Seipp, *supra* note 49, at 27-29. Logically, codifying the common law (made up of judicial decisions on particular facts) is self-contradictory.
[52] *See* Kenneth S. Abraham & G. Edward White, *The Work of the American Law Institute in Historical Context*, *in* THE ALI, at 51.
[53] Deborah A. DeMott, *Restating the Law in the Shadow of Codes, in* THE ALI, at 78 [hereinafter, DeMott, *Restating*].

simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."[54]

The ALI sought to ameliorate two problems endemic to the structure of the common law: uncertainty and complexity.[55] Different judges, in different jurisdictions, inevitably have differing opinions. Even when written with the same intentions, different decisions are often read differently. In response, the AALS committee contemplated restatements "'not only to … help make certain much of which is now uncertain and to simplify unnecessary complexities' but also 'to promote those changes which will tend better to adapt the laws to the needs of life.'"[56]

Restatements thus emerged as a kind of compromise between the Charybdis of unruly decisions and the Scylla of a single code, a central ruler.[57] The goal was to promote uniformity among jurisdictions by reaching intellectual agreement that judges would freely adopt.[58] "Next to codification, restating the law is a less radical way to tame the common law."[59] To do so, restatements were to be "drafted collaboratively by practitioners, judges, and academics."[60] At one level, this was a deeply conservative enterprise. In reconciling multiple jurisdictions, and expressing such reconciliation in blackletter rules, the restatements articulated the existing legal, and thus social, landscape.[61] At the same time, "reconciliation" was an invitation to make the best statement of the law, to see the law in its best light. Restatements could also be an instrument of legal reform, thought then-Judge Benjamin Cardozo, a Progressive effort to correct legal uncertainties and deformities (by Progressive lights) within the law.[62] In practice, the ALI "fell somewhere into the middle of this spectrum of formalism and contextualism, or orientation

---

[54] Andrew S. Gold & Robert W. Gordon, *Introduction, in* THE ALI, at 2; Roberta Cooper Ramo, *The American Law Institute at 100, in* THE ALI, at 11 (quoting from the 1923 Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute).
[55] *See* THE AMERICAN LAW INSTITUTE, *The Story of ALI,* https://www.ali.org/about-ali/story-line/ (last visited Jul. 2, 2024) (noting the perception that the law was "unnecessarily uncertain and complex").
[56] Abraham & White, *supra* note 52, at 52.
[57] *See* THE AMERICAN LAW INSTITUTE, *The Story of ALI,* https://www.ali.org/about-ali/story-line/ (discussing its founding and earliest conceptions of offering standardized or restated legal summaries).
[58] *See* Gold & Gordon, *supra* note 54, at 2.
[59] Gold & Smith, *supra* note 47, at 441.
[60] Gold & Smith, *supra* note 47, at 456.
[61] *See* Abraham & White, *supra* note 52, at 55.
[62] *See id.,* at 56.

to certainty versus flexibility."[63] In doing so, the ALI balanced desires for stability and for reform.

D. The First Restatement of Agency (1933)

1. Mechem and Seavey

Agency was one area of law included in the first round of ALI restatements published during the 1930s. The initial Reporter was Professor Floyd R. Mechem, who had just published the second edition of his authoritative agency law treatise.[64] Despite being the nation's preeminent agency law scholar, Mechem introduced his first draft to the 1926 ALI Annual Meeting as "*Tentative* Draft No. 1." Unsurprisingly, the *Restatement (First) of Agency Law* (the "*First Restatement*")[65] strongly resembled Mechem's treatise, in some ways simply 'codifying' his explanation of legal doctrine in restatement form.[66] Mechem described agency law modestly, as filling gaps to decide cases that could not be decided using contracts or torts.[67] The *First Restatement* presented agency as a law of natural persons, not entities, and did not address corporate officers or most implications of an agent's representation of a principal that was not an individual.[68]

Mechem died in 1928, before the *First Restatement* was complete. Warren A. Seavey succeeded Mechem as Reporter.[69] Although Seavey's approach was similar (he had served on the ALI committee advising Mechem), Seavey made some changes. Notably, Seavey updated apparent authority to enable actual and apparent authority to operate concurrently, thereby allowing apparent authority to persist after actual authority ended.[70]

---

[63] Gold & Smith, *supra* note 47, at 444.
[64] FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY: INCLUDING NOT ONLY A DISCUSSION OF THE GENERAL SUBJECT BUT ALSO SEPARATE CHAPTERS ON ATTORNEYS AUCTIONEERS BROKERS AND Factors (2d ed. 1914). The second edition, published in 1914, was said to be the "last treatise on agency law in the United States of comparable depth and scope. DeMott, *Restating, supra* note 53, at 86.
[65] RESTATEMENT OF AGENCY (1933).
[66] *See* DeMott, *Restating, supra* note 53, at 87.
[67] *See* DeMott, *First, supra* note 41, at 28-29 (explaining that Mechem characterized agency law as a "residuum").
[68] *See* DeMott, *Restating, supra* note 53, at 87.
[69] *See id.* at 90.
[70] *See id*. at 89-90.

2. Business Associations: Too Massive and Too Fluid

Seavey's revised draft of the *First Restatement* continued to approach principals and agents as individuals.[71] This was to some extent explained by Mechem's influence, but also by the fact that the ALI originally planned for a restatement of the law of business associations. "In response to an ALI member [at the 1926 Annual Meeting] who questioned why the draft did not cover the appointment of an agent for a corporation, Mechem replied, 'that was thought to belong in Mr. Lewis' Business Associations …'"[72] The law of business associations was ultimately left out of the first round of restatements, however, "because the changing content of the field and the emergence of governmental regulation made the content of any established principles in the area uncertain."[73] During this era there were more, and more powerful, corporations in every state. Antitrust law was being deployed at the federal level, and the New Deal was just over the horizon. The ALI eventually concluded that a restatement of a common law struggling to adapt to the profusion of business association issues was not possible, and abandoned the effort in 1933.

In sum, during the 1930s, the related laws of business association and agency were developing to cope with a changing social and economic environment. Courts were scrambling to decide conflicts resulting from the transformation of the U.S. economy.

3. The Finished Product and Its Reception

In 1933, after a decade of collective drafting and discussion, the ALI published the *First Restatement*.[74] The text was relatively conservative: "the accomplishment represented by the

[71] *See* RESTATEMENT OF AGENCY (1933). *See also* DeMott, *Restating, supra* note 53, at 89 (noting that it omitted explicit discussion of situations in which agents represented entities).
[72] DeMott, *Restating, supra* note 53, at 89.
[73] Abraham & White, *supra* note 52, at 55. The ALI is currently developing the first Restatement of the Law, Corporate Governance. *See* THE AMERICAN LAW INSTITUTE, *Restatement of the Law, Corporate Governance*, https://www.ali.org/publications/show/corporate-governance-rs/ (outlining the materials in Tentative Draft No. 2 that were approved in May 2024).
[74] RESTATEMENT OF AGENCY (1933).

first Restatement of Agency is the rationalization and clarification of legal doctrine in a systematic fashion, not the fulfillment of a reformist agenda in a more conventional sense."[75] The *First Restatement* appeared as formal statements of "the law," without citation to other authority. Legal principles were presented as fundamental and independent of the particular judicial decisions embodying them.[76] Other restatements took a similarly spare approach. "Early Restatements were unadorned statements of black-letter rules, each followed by brief 'Comments' and a few 'Illustrations,' examples of concrete applications. No cases were cited."[77] In the first restatements, the "form was chosen to mimic that of code, while avoiding state legislatures and the supposed inflexibility of codes; it was hoped that the product of leading scholars, reviewed and approved by the cream of the bench, bar, and academy, would furnish its own sufficient authority."[78] Scholarly treatises were expected to follow, perhaps providing things like context, history, justification, and authority that the restatements did not.[79]

Responses to the first restatements were not all positive. In particular, the emerging school of American Legal Realists argued that legal doctrines could not be understood in the abstract. Context mattered.[80] "[L]egal doctrines were invariably products of their social context, and that context constantly changed"[81] "Therefore, 'the law' at any one time was the sum of decisions and policies responding to on-the-ground developments in society at large."[82]

Practicing lawyers were less critical of the first generation of restatements, and cited them in briefs and arguments. Courts, too, were receptive, so the restatements made their way back

[75] DeMott, *First, supra* note 41, at 31 (describing the first restatement as restating the law as they found it not as it should be). DeMott argued that this approach made sense for the ALI which, as a new institution, sought to ensure legitimacy and thus impact for its project. *Id. See also* N.E.H Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55, 86 (1990) (arguing that driving force behind the ALI restatements was a group of "progressive-pragmatist" academics who struggled to maintain their reformist objectives in the face of compromises with the conservative elements of the practicing bar and their own academic ranks).
[76] *See* Abraham & White*, supra* note 52, at 57-58.
[77] Robert W. Gordon, *Restatements and Realists, in* THE ALI, at 406.
[78] Gordon, *supra* note 77, at 406.
[79] *See Id.*
[80] *See generally* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995) (analyzing early realist efforts to employ empirical research methods).
[81] Abraham & White, *supra* note 52, at 58.
[82] *Id.*

into caselaw.[83] In sum, the ALI's restatement enterprise was deemed a "success in the world of law in practice," if not in academe.[84]

E. The Second Restatement (1958)

1. Changes in the Economy, Society, and the Role of Law

Between the 1920s, when the *First Restatement* was begun, and 1958, when the *Restatement (Second) of Agency* (the "*Second Restatement"*)[85] was published, the U.S. economy transformed. A relatively decentralized, *laissez-faire* economy was replaced by a more centralized and regulated economy. Legislation and regulation surged at the state and federal levels. The issues coming before courts shifted accordingly. More subtly, the emergence of the regulatory state changed the way law was understood. What had been "Progressive" and critical concerns, articulated by the likes of Cardozo,[86] Hand,[87] and Professor Merrick Dodd,[88] had become mainstream, indeed government policy, under the pressure of the Great Depression and World War Two. In addition, a number of prominent Legal Realists went to Washington to serve in the Roosevelt administration.[89] Realist concern for social context and skepticism of the formalism of the first generation of restatements increasingly dominated legislatures, administrative agencies, the bench, and the legal academy.

2. The Second Restatement and Its Reception

---

[83] *See* Balganesh, *supra* note 3, at 2129-30 (noting that restatements are valuable sources of law relied on by lawyers and courts).
[84] Abraham & White, *supra* note 52, at 60.
[85] RESTATEMENT (SECOND) OF AGENCY (1958).
[86] *See* Robert J. Pushaw Jr., *Analyzing Justice Cardozo's Opinions on the Constitutionality of the New Deal*, 34 TOURO L.R. 20, 336 (2018) (exploring Cardozo's New Deal era opinions).
[87] *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 190 (1994) (discussing Hand's early Progressivism and describing him as a "true believer").
[88] *See* Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1894-95 (2003) (illustrating that Dodd believed business practices would support social goals).
[89] *See* Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code,* 59 ALB. L. REV. 325, 327 (1995) (listing various legal realists and the governmental positions in which they served).

In the early 1950s, Hand chaired an ALI committee that recommended a second set of restatements.[90] The bar increasingly believed lawyers and judges would be better served by restatements that were not limited to rules and examples, but also provided commentary, including caveats recognizing areas of disagreement.[91] Therefore, the second round of restatements would be different from the first: "more open about the policy dimensions of common law rules and more aspirational in their reform thrust," involving an "evaluation of their current social utility and desirability."[92] The new restatements would "shift away from rules and towards standards."[93] Generally, the second set of restatements reflected a social and jurisprudential shift that might be characterized as movement from *laissez- faire* formalism towards social realism.

Of course, the *Second Restatement* also bore many similarities to the first. Seavey again served as the Reporter, and Mechem's son, Professor Philip Mechem, also an agency law scholar, served on the ALI Committee of Advisors. But the attitude was different, reflecting both the traditionalism and the confidence in regulated markets that characterized the post-war consensus.[94]

Published in 1958, the *Second Restatement* was well received, and in time, used by courts in all 50 states and the District of Columbia.[95] Some states still decline to adopt some of the provisions of the *Third Restatement*. Notably, several states continue to prefer the *Second Restatement* test for the scope of employment, which assesses, among other things, whether an agent's work occurred "substantially within the authorized time and space limits."[96] As

---

[90] *See* HERBERT F. GOODRICH & PAUL A. WOLKIN, THE STORY OF THE AMERICAN LAW INSTITUTE, 1923-1961 at 11-12 (1961) (explaining the need for revision and the ALI decision to revise).
[91] *See* Abraham & White, *supra* note 52, at 60-61.
[92] *Id.* at 61.
[93] Gold & Smith, *supra* note 47, at 450.
[94] *See* Abraham & White, *supra* note 52, at 61 (noting they were more open about the policy dimensions of common law rules).
[95] A Westlaw search for "Restatement (Second) of Agency" yielded multiple results in all states and the District of Columbia.
[96] The *Third Restatement* broadened "scope of employment," arguing that §228(1)(b) of the *Second Restatement* failed to "encompass the working circumstances of many managerial and professional employees and others whose work is not so readily cabined by temporal or special limitation." RESTATEMENT (THIRD) OF AGENCY §7.7 cmt b. *See also* Diana J. Simon, *The Scope of Employment Test Under the Work-Made-For-Hire Doctrine Revisited: How COVID-19, Remote Working, and the Restatement (Third) of Agency Could Change It,* 20 UIC REV. INTELL. PROP.

discussed below in Part V.C, the question of when an agent is an employee operating within that employee's scope of employment has only gotten more vexed with the advent of the gig economy.

III. The Common Law of Agency Today

A. The Third Restatement (2006)

1. More Changes in the Economy, Society, and Law

Between the 1958 publication of the *Second Restatement* and the 1995 commencement of work on a third restatement of agency law, it had become obvious that the U.S. economy and social structure were best understood in terms of large entities[97] and regulation. Franchising had become common, replacing many mom-and-pop small businesses.[98] Industries had consolidated. Federal legislation and regulation dominated areas previously governed by state common law, notably securities and employment.[99]

Professor Deborah DeMott served as Reporter for the *Third Restatement*.[100] DeMott identified problems with the *Second Restatement's* treatment of bases for agency relationships, the scope of agent authority, agency and nonagency fiduciary relationships, selective agency relationships, rationales for vicarious liability, the consequences of actions of conflicted agents, and contractual variations of the agency relationship, all of which had been overtaken by caselaw.[101] In addition, she pointed out issues insufficiently addressed by the *Second Restatement*, including preparations to compete after the relationship, termination of at-will employees, certain agency norms in specific settings, corporate alter egos (piercing the corporate

L., 232, 232. 246-7 (2021) (pointing out that, in the other contexts, some U.S. Supreme Court justices have preferred more status quo-focused second round of restatements over those produced during the third round).
[97] *See* Deborah A. DeMott, *A Revised Prospectus for a Third Restatement of Agency*, 31 U.C. DAVIS L. REV. 1035, 1040 (1998) [hereinafter DeMott, *Prospectus*].
[98] *See id*.
[99] *See id.*
[100] RESTATEMENT (THIRD) OF AGENCY (2006).
[101] *See* DeMott, *Prospectus, supra* note 97, at 1044-59.

veil), and special trust and confidence relationships.[102] In short, by the 1990's, the *Second Restatement* was "showing its age."[103]

Prominently, the connection between a business association and its workers, or between individual principals and agents, had shifted from one of full control to one of mutual assent to commonplace and generally understood working conditions. This shift rendered the "master and servant" nomenclature of the *First* and *Second Restatements* inappropriate. When it was published, the *Third Restatement* explained that "[t]he connotation that household service is the prototype for employment is dated, as is its suggestions that an employer has an all-pervasive right of control over most dimensions of the employee's life."[104]

The term "independent contractor" was also eliminated in the *Third Restatement* as "equivocal in meaning and confusing in usage" because some independent contractors are agents and some are non-agent service providers.[105] Instead, the *Third Restatement* adopts the somewhat confusing "employer," "employee agent", and "non-employee agent" nomenclature. Some of the terms in the *Third Restatement* are used differently from their use in other legal contexts, most notably employment law, which was articulated in the 2015 *Restatement of Employment Law* (the "*Employment Restatement*"). [106] In some cases, the *Third Restatement's* language did not catch on; independent contractor remains widely used.

Articulating changes is challenging. During the decade when the *Third Restatement* was being drafted, the United States saw the bursting of the dot.com bubble, the implosion of Enron and a wave of accounting scandals, and the passage of the Sarbanes-Oxley Act. The *Third Restatement* had to restate the law while corporate drama and major statutes focused public attention on the relationships among principals, agents, and affected third parties. In his foreword to the *Third Restatement*, Lance Liebman, then-Director of the ALI, concluded that a simple summation of existing agency law would have been an accomplishment, but the revised

[102] *See id.* at 1059-62.
[103] *Id.* at 1040.
[104] RESTATEMENT (THIRD) OF AGENCY, Introduction (2006).
[105] RESTATEMENT (THIRD) OF AGENCY §1.01 cmt c (2006).
[106] RESTATEMENT OF EMPLOYMENT LAW (2015). The *Employment Restatement* also highlighted several areas of divergence among courts and, as discussed below in Part VI.A.2, the *Third Restatement* and the *Employment Restatement* differ in some sections.

version went beyond that to "interpret[ ] the relevant history and point[ ] to future development".[107]

2. A Broader Approach

As the Introduction to the *Third Restatement* makes clear, the common law of agency is broad.[108] "Agency" intersects with other doctrinal fields including contracts, torts, and employment law.[109] In response to the breadth of agency, DeMott adopted a more general approach to the law than her predecessors had taken. Where the *Second Restatement* has 528 sections, the *Third Restatement* has 73. While the *Second Restatement* devotes 97 sections to the common law duties owed by principals to their agents, the *Third Restatement* recognizes that many were included in tort law or were overtaken by workplace regulations and summarizes those duties in just three sections.[110] In addition, the *Third Restatement* employs only 11 sections to enumerate the duties owed by agents to their principals, including the general, overarching fiduciary principle. In this more intellectual style,[111] broadly applicable statements are followed by substantial commentary that recognizes controversies and provides informative interpretations.

Importantly, the *Third Restatement* explicitly includes entities, both as principals and agents. DeMott explained that including entities facilitated the generalization of agency law.[112] By considering roles played by business associations in commercial life, the drafters of the *Third Restatement* were able to discern links between agency law's inward-looking concern with the principal-agent relationship and its outward-looking concern for the consequences of an agent's interaction with a third party.[113]

B. Agency as Articulated by the Third Restatement

[107] RESTATEMENT (THIRD) OF AGENCY, Foreword (2006).
[108] RESTATEMENT (THIRD) OF AGENCY, Introduction (2006).
[109] RESTATEMENT (THIRD) OF AGENCY, Foreword (2006).
[110] *See* DeMott, *Prospectus, supra* note 97, at 1062-63.
[111] *See id.* at 1041.
[112] *See id.* at 1043.
[113] *See id.*

1. The Basic Relationship

A full summary of agency law as articulated in the *Third Restatement* is beyond the scope of this article. This section focuses on aspects of the *Third Restatement* in tension with the emerging gig economy, that is, places where existing law struggles to account for contemporary social and economic realities.

According to the *Third Restatement,* an agency relationship is established when a principal manifests assent that an agent shall act on its behalf and subject to its control, and that agent manifests assent or otherwise consents so to act.[114] In the business associations context, the entity often functions as the principal, and establishes a relationship with other entities or individuals as agents. Using the *Third Restatement* nomenclature, agency includes "employment" relationships, as well as "nonemployment relationships in which one person has the right to direct the physical actions of another who has consented to act on the person's behalf."[115]

Under the *Third Restatement*, actors may have multiple legal relationships with one another. One can be an employee and an agent, who owes fiduciary duties to the principal/employer and is able to subject the principal/employer to vicarious liability, but lacks capacity to contract on behalf of the principal/employer.[116] More technically phrased, the doctrine of scope of employment, determining when an agent/employee's liability-creating behavior should be charged to the principal/employer, is separate from the transactionally oriented doctrines of actual and apparent authority.[117] As discussed below, what this means for gig workers – who is responsible when things go wrong – is often unclear.

2. Internal Consequences of Agency Relationships: Duties Between the Principal and the Agent

[114] RESTATEMENT (THIRD) OF AGENCY §1.01 (2006).
[115] RESTATEMENT (THIRD) OF AGENCY, Introduction (2006).
[116] *See* RESTATEMENT (THIRD) OF AGENCY, Introduction (2006).
[117] *See* RESTATEMENT (THIRD) OF AGENCY, Introduction (2006).

Both employee agents and non-employee agents/independent contractors owe fiduciary duties to their principals.[118] The *Third Restatement* articulates an agent's basic duty to the principal as: "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."[119] That simple, sweeping statement replaced 10 sections of the *Second Restatement.*[120]

In general, agents owe their principals substantial duties of both loyalty and performance. Marsh argued that the duty of loyalty, in particular, was substantially narrowed between 1880 and 1960, turning from a prophylactic rule to a weak ad hoc analysis. By the 1960s, Marsh claimed, fiduciary duty in director conflict-of-interest transactions did "little or nothing to inhibit conflicts" and worked "only in a haphazard fashion in a small minority of cases."[121] Such transactions were no longer automatically voidable, regardless of disinterested director approval, though they were subject to judicial review for fairness.[122] At the time of the release of the *Third Restatement* in 2006, however, several aspects of agency law (the common law duty of loyalty in particular) seemed to swing back toward the more stringent requirements of the 1880s.[123]

The *Third Restatement* reorganized agents' duties of loyalty as: the duty not to acquire a material benefit from a third party through the use of the agent's position;[124] the duty not to act as or on behalf of an adverse party;[125] the duty not to compete with the principal during the

---

[118] RESTATEMENT (THIRD) OF AGENCY §8.01 cmt. c (2006); *See e.g.* Protected Goals, LLC v. Terrero, No. A-0257-19, 2022 WL 2340970 (N.J. Super. Ct. App. Div. Jun. 29, 2022) (holding a consultant to a financial advisory business liable for a duty of loyalty breach for siphoning clients and client information to his own, new company). The court was clear: "Any insinuation that the duty of loyalty is wholly inapplicable to independent contractors is belied by our Supreme Court's persistent reference to "agents" in the context of the duty and citations to the Restatements of Agency." *Id.* at *10. As noted below in Part VI.A.2, the subsequent *Employment Restatement* took a narrower approach to fiduciary duty.

[119] RESTATEMENT (THIRD) OF AGENCY §8.01 cmt. b (2006). (describing fiduciary duty as an "overarching standard that unifies the mores specific rules of loyalty and complements and facilitates an agent's compliance with duties of performance that the agent owes to the principal.").

[120] RESTATEMENT (THIRD) OF AGENCY, Parallel Tables Showing Corresponding Restatement Third and Restatement Second Section Numbers (2006).

[121] Marsh, *supra* note 19, at 73.

[122] *See id.* at 43.

[123] *See, e.g.,* Lyman Johnson*, After Enron: Remembering Loyalty Discourse in Corporate Law,* 28 DEL. J. CORP. L. 27, 40 (2003) (finding that a directors were being held to a maximal duty of loyalty requiring affirmative furtherance of the corporation's interest) *But see* Reza Dibadj, *The Misguided Transformation of Loyalty into Contract*, 41 TULSA L. REV. 451, 451-52 (2006) (worrying that, with the rise of unincorporated entities, the "law of unincorporated associations … is transforming the duty of loyalty into to a contractarian construct").

[124] RESTATEMENT (THIRD) OF AGENCY §8.02 (2006).

[125] RESTATEMENT (THIRD) OF AGENCY §8.03 (2006).

agency relationship;[126] and the combined duty not to use the principal's property or the principal's confidential information for the agent's own purposes or those of a third party.[127] Agents also owe an array of duties of performance to their principals.[128] Principals, however, owe minimal fiduciary duties to their agents: they must simply act in accordance with any contract, indemnify the agent if costs are incurred, and deal fairly and in good faith.[129] As we shall see below, these aspects of the duty of loyalty are called into question by the gig economy. In some contexts, now the *Third Restatement* is showing its age.

3. External Consequences of Agency Relationships: Principal Responsibility and Liability

a. Contracts

Business associations' relationships with third parties – buying or selling goods, purchasing property, making contracts, and generally acting in the world – are accomplished through agents. All parties rely on the assurance that firms will be bound by the action of their agents. Like its predecessors, the *Third Restatement* recognizes an agent's "actual" and "apparent" authority to bind the principal. Actual authority is established when the agent takes an action reasonably believing, based on the principal's manifestation to the agent, that the principal wishes the agent to take that action.[130] Apparent authority, on the other hand, rests on a third party's reasonable belief, traceable to some manifestation by the principal, that the actor has authority to act on the principal's behalf.[131]

As part of the ALI's effort to rationalize the law under liberal notions of consent and reasonable reliance, the *Third Restatement* omitted a third category, inherent agency power, that had been in the earlier restatements.[132] Inherent agency power had grown out of a 19th century

[126] RESTATEMENT (THIRD) OF AGENCY §8.04 (2006).
[127] RESTATEMENT (THIRD) OF AGENCY §8.05 (2006).
[128] RESTATEMENT (THIRD) OF AGENCY §§8.07-12 (2006).
[129] RESTATEMENT (THIRD) OF AGENCY §§8.13-15 (2006).
[130] RESTATEMENT (THIRD) OF AGENCY §2.01(2006).
[131] RESTATEMENT (THIRD) OF AGENCY §2.03 (2006).
[132] RESTATEMENT (SECOND) OF AGENCY §8A (1958).

Queen's Bench decision, *Watteau v. Fenwick*, in which a supplier sought payment for goods ordered by a beerhouse manager.[133] Because the beerhouse owners had instructed the manager not to make such purchases, the manager lacked actual authority. Because the supplier did not know about the existence of the owners (the manager appeared to be the owner), the manager lacked apparent authority. Despite the agent's lack of authority, the court found the owners liable; the supplier was reasonably entitled to rely on the conventional role of beerhouse managers – they buy supplies for the establishment – and finding otherwise would cause "very mischievous consequences."[134] *Watteau* was thus decided on the basis of social role, rather than an attenuated notion of consent in a reciprocal relationship. U.S. courts employed inherent agency over the years, with mixed outcomes. Recognizing that the concept generated confusion, the *Third Restatement* instead describes the narrower "liability of the undisclosed principal" to address cases in which an unknowing third party suffers harm at the hands of an unauthorized agent of a principal whose existence is concealed.[135]

b. Torts

The *Third Restatement* explains that an employer principal is vicariously liable for the torts of its "employee" (which includes certain but not all, of its agents) acting within that employee's scope of employment.[136] For an agent to be considered an employee, the employer must have the right to control the manner and means of how the employee agent carries out its work.[137] As noted, the terminology can be confusing because employment law defines "employee" somewhat differently.[138] An employee agent is operating within the scope of

[133] Watteau v. Fenwick, 1 Q.B. 97 (1893).
[134] Watteau v. Fenwick, 1 Q.B. 97 (1893).
[135] *See* DeMott, *Prospectus, supra* note 97, at 1046-7.
[136] RESTATEMENT (THIRD) OF AGENCY §7.03(2)(a) (2006). The principal may also be vicariously liable if the agent commits a tort while acting with apparent authority or even directly liable, but such situations are less common. *See* RESTATEMENT (THIRD) OF AGENCY §§7.03(2)(b); 7.03(1) (2006).
[137] RESTATEMENT (THIRD) OF AGENCY §7.07(3)(a) (2006). This terse rule differs from the *Second Restatement,* which defined servant and provided a detailed list of 10 factors to distinguish servants and independent contractors. RESTATEMENT (SECOND) OF AGENCY §220 (2006).
[138] As set out in the *Employment Restatement*, an individual (*i.e.,* a natural person) is an employee if the individual acts at least in part to serve the employer's interests, and if the employer consents to receive the services and controls the manner and means in which they are rendered. This is contrasted with an "independent businessperson"

employment when the employee is performing work assigned by the employer or engaged in conduct subject to the employer's control.[139] The *Third Restatement* implicitly presumes that the "employment" relationship is relatively unproblematic. We know what "the job" is, and the question for vicarious liability is whether the tortious act is part of, or in furtherance of, "the job." As discussed below, however, whether or not a working relationship is a "job" and what that requires are unclear in the gig economy.

The *Third Restatement* also addresses situations in which an agent acts for a principal, but the relationship is not that of employer principal – employee agent. In those cases, the agent is termed a "non-employee agent." In this respect, the terminology of earlier restatements, which labeled such persons "independent contractors," has stuck. Independent contractors may or may not be agents. Examples of independent contractor agents include brokers, factors, and attorneys.[140] When an independent contractor is acting as an agent, the independent contractor may be distinguished from employee agents because the principal controls only the results, not the manner and means by which the work is accomplished.[141] The difference between an employee agent and a non-employee agent (independent contractor) is the subject of frequent litigation and is at the core of many disputes in the gig economy. Here again, the *Third Restatement* may not reflect the ethos of the contemporary economy.

IV. Business Life and Agency Law

A. Agency as the Social Fabric of Commerce

which controls important business decisions, and it specifically excludes volunteers and controlling owners. RESTATEMENT OF EMPLOYMENT LAW §§1.01-03 (2015).

[139] RESTATEMENT (THIRD) OF AGENCY §7.07(2) (2006). *See also* Paula J. Dalley, *Destroying the Scope of Employment*, 55 WASHBURN L. J. 637, 641-653 (2016) [hereinafter Dalley, *Scope*] (explaining the concept and providing numerous caselaw examples).

[140] *See* Harry P. Trueheart, III & Richard M. McGuirk, *Creating an Agency: Elements of an Agency Relationship: Control*, 12 BUS. & COM. LITIG. FED. CTS, §132:15 (5th ed., Robert L. Haig, ed.).

[141] *See* Paul M. Coltoff *et al*., *Independent contractor relationship distinguished from agency*, 2A C.J.S. AGENCY §18 (2023). Direct liability may be invoked in cases involving independent contractors.

Intangible legal persons like corporations require natural persons to function in the material world.[142] Agency, whether or not articulated as "agency law," is thus entailed in the idea of an intangible legal person.[143] Unsurprisingly, perhaps, agency law has become the accepted articulation of not only the basic structure of the business association[144] but also much of the social fabric of commerce, including the complexity of relationships between an entity, those who operate on its behalf, and those with which or whom it interacts. Any of these actors may be natural or legal persons. The common law of agency is an imagination of a social order, how we describe the underlying structure of obligations and expectations among social actors.

Of course, the body of common law agency doctrines, derived from caselaw and assembled in restatements written during the last century, does not somehow *cause* a business association, any more than any other "theory of the firm" causes a business association. The corporation is an older legal institution than the restatements. Like theories of the firm, however, the common law of agency provides ways to think about and articulate key aspects of social organization. Some aspects of society, like business associations and the law itself, only work if they are items of collective belief. For example, a transaction between corporations requires people to believe that corporations are much like natural persons, capable of speaking, even binding themselves, and liable for their activities, even when the natural persons actually conducting those activities have no liability.

Agency law is central to contemporary theories of the firm.[145] For a prominent example, in the 1930s, Professors Adoph A. Berle, Jr., and Gardiner C. Means defined the corporation in terms of the separation of ownership from control.[146] As they explained it, shareholders own the corporation, but professional managers run it. If we have organizations that take people's assets and place them under the control of others, it seems natural to expect the persons holding and

---

[142] *See* Harris, *Rival, supra* note 12, at 52. This article postpones until Part VI.B.1 questions of whether digital agents should be governed under agency law or whether agency relations can arise from interactions between digital end users and programs representing business interests. Regardless of the extent to which it makes sense to speak of digital agents, a corporate charter cannot act.
[143] *See* E. Merrick Dodd, Jr., *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977, 999 (1929) (explaining the need for a human being as a representative of an entity).
[144] Many business associations textbooks begin with agency law. *See e.g.* STEPHEN M. BAINBRIDGE, BUSINESS ASSOCIATIONS, CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, LLCS AND CORPORATIONS (11th ed., 2021).
[145] *See* Westbrook & Westbrook, *supra* note 38, at 692-4, 739 (discussing early concerns about concentrated management of firms).
[146] ADOPH A. BERLE, JR., & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 89 (1933).

managing the assets to take care of them on behalf of their owners. Berle and Means used the language of the trust – the trustee must manage the corpus of the trust in the interests of the beneficiary.[147] Today, however, we describe their insight in terms of agency: the managers of the corporation are the agents of the corporation and its shareholders, and, as agents, owe fiduciary duties to their principals. Fiduciary duty enables owners of a corporation or other business association to delegate business strategy and operations to managers.[148] Without agency and fiduciary duty, business associations of any scale would be impossible.

Berle and Means focused on the large operating corporation, the sort of company that was and is traded on the New York Stock Exchange. In such companies, managers have both power and opportunity to do what they wish with the company, that is, with the property of the shareholders. Shareholders in such companies are numerous and often geographically dispersed. Practically speaking, they have little way to know what the managers, their agents, are doing. Losses due to such mismanagement are sometimes called "agency costs."[149]

In other arrangements such as some partnerships, LLCs, and closely held corporations, agency is essential for clarity regarding the consequences of the internal and external relationships that are created.[150] In all of these institutions, as in in trusts, beneficial owners relinquish legal control over assets to the entity for management by agents. Asset partitioning, and thus financing ventures, is impossible without agency.[151]

Agency is similarly important to operations. The fiduciary duty of loyalty is "prophylactic," *i.e.,* it discourages breach by the agent across the range of circumstances that arise in business. The duty's "stringency reflects pragmatic concerns" such as the difficulty of judicial second-guessing discretionary decisions, the ease with which an agent can hide her misconduct, and the temptation that may be posed by an agency relationship.[152] In this way, agency law is intrinsic to the operation of business associations. In a capitalist economy, where

---

[147] *Id.* at 336.
[148] Note that directors of a corporation, although they owe a fiduciary duty to the corporation and its shareholders under business associations law, are not legally agents. RESTATEMENT (THIRD) OF AGENCY §1.01 cmt. f(2) (2006). In most discourse, however, directors are routinely described as agents.
[149] *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308-10 (1976).
[150] *See* Gabriel Rauterberg, *The Essential Roles of Agency Law*, 118 MICH. L. REV. 609, 644 (2020).
[151] *See id.* at 621 (discussing how partitioning is efficient for both debtors and creditors).
[152] Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1057 (2007) [hereinafter DeMott, *Disloyal*].

many, perhaps most, assets are managed by people other than their owners, agency concepts are ubiquitous. In this economy, agency law, as set forth in *Third Restatement*, has served to articulate relationships among the players in business associations at the beginning of the 21st century.

B. The Ethos of Agency

As discussed above, agency is no longer explicitly understood in terms of personal status, *e.g.,* "master" and "servant," or even "beerhouse manager." Instead, the *Third Restatement* defines agency relationships in vaguely contractual terms of assent.[153] While agency, especially in the context of business associations, may be a consensual relationship, it is not in any legal (as opposed to philosophical) sense contractual. Agency cannot be contractual because "the relation may be established without the knowledge, or even contrary to the intention, of the parties."[154] Agency law thus reflects more than simple bilateral contracts between atomized individuals, the rational wealth-maximizing individuals familiar from liberal economics.

Instead, agency reflects the social organization around it, somewhat uncomfortably still including status and hierarchy.[155] Especially in the context of business associations, agency law describes a broad set of unspecified relationships that may nonetheless impose legal obligations. Thomas Edison, Inc., was liable for the contract with the singer, but not in contract. Corporate managers may be liable for failures of oversight that bear no causal relationship to harms done.

Moreover, breach of an agent's fiduciary duty of loyalty may carry consequences beyond those provided by contract or tort. These enhanced remedies have been described as "ferocious," providing the principal/victim of the breach with opportunities for damages derived from contract, tort, and restitution and unjust enrichment, often with lower causation requirements and

[153] *See* David A. Westbrook, *supra* note 6, at 1377 ("[T]he modern agency relation is understood to be essentially contractual, based on autonomous notions of choice if not always enforceable by a legal document.")
[154] *Id.* at 1379 (2012). *See* RESTATEMENT (THIRD) OF AGENCY §1.02 (2006).
[155] *See* Dalley, *Theory, supra* note 8, at 517 (explaining that agency law originated in status relationships embedded in specific social arrangements); Deborah A. DeMott, *Relationships of Trust and Confidence in the Workplace*, 100 CORNELL L. REV. 1255, 1261 (2015) [hereinafter DeMott, *Relationships*] (noting that most fiduciary relationships are based on status or convention).

more generous remedies.[156] In short, no combination of individualist contract and tort law fully articulates the institutional landscape in which businesses operate, or the enforceable obligations entailed by participation in such businesses.[157] The *Third Restatement's* use of consent as the basis of agency is necessarily incomplete.

Workplace relationships may, indeed must, be understood in many different ways: economically, of course, but also legally, socially, and even morally. Since the 19th century, the common law of agency has reflected the social fabric of business, including the complexity of relationships between an entity, those who operate on its behalf, and those with which or with whom it interacts. One way to read the *Third Restatement,* then, is as an expression of the ethos of late 20th century social and commercial relationships: the elimination of "master-servant," the rearticulation of inherent liability as liability of the undisclosed principal (traditional custom replaced by more modern-seeming notions of transparency), and the careful articulation of an agent's duty of loyalty to a principal, tacitly imagined to be an employer in consensual terms. We expect employees to support the business interests of their employers. We expect employers to be responsible for the consequences of their employees' actions. All of this is familiar to any inhabitant of our commercial society who deals with the agents of business associations for the necessities of life.

C. Loyalty

What do such abstract injunctions mean in practice? How might judges and others think about applying these general principles to specific cases? Agents' duties of loyalty to principals

[156] DeMott, *Disloyal, supra* note 152, at 1056-9.
[157] A survey of different theories of the firm is beyond the scope of this article, but it bears mention that for a while during the 20th century, the corporation was often explained as a "nexus of contracts" among relatively independent, rational, actors. *See* Melvin A. Eisenberg, *The Conception That the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm,* 24 J. CORP. L. 819, 819-20 (1999) (exploring the growth of the theory and rejecting it as unsatisfactory). Agency draws on both contract and tort theories but is more than just their sum. *See* Dalley, *Theory, supra* note 8, at 506-14 (discussing the limits of both doctrines).

might be arranged along a spectrum from minimal proscriptions ("you may not _____"), to more expansive prescriptions ("you must _____").[158]

Under a proscriptive approach, an agent is loyal as long as it does not betray the principal: agents must eschew conflict-of-interest transactions; do no harm to the business; refrain from acquiring a material benefit through their position; and that is about it.[159] This minimalist approach had great appeal for law and economics scholars of the late 20th century and since, who tend to presume that efficient outcomes are more likely to be reached by self-interested, rational, and freely contracting parties.[160] Conversely, such scholars think, the imposition of rules tends to be inefficient, and therefore bad. Whatever the merits of this as judicial philosophy in the wake of the GFC, the findings of behavioral economics, and other developments, it is fair to say that the U.S. workforce has become more contractual over the last decades.

If fiduciary loyalty is understood to be prescriptive, however, agents should act in the best interests of the entity, displaying a kind of affirmative devotion to the principal. The agent should advance the interests of the firm, not just refrain from harming it.[161] Prescriptive loyalty is a social and ultimately moral attachment; it reflects affirmation of commitment to a community.[162] The agent works to advance that community[163] as a team player. [164] But, as already suggested, the understanding of business as a "team" is what is increasingly in question.

---

[158] There are, of course, other ways to think about this. *See, e.g.,* Stephen R. Galoob & Ethan J. Leib, *Fiduciary Loyalty, Inside and Out*, 92 S. CAL. L. REV. 69, 86-117 (2018) (making the case for a third understanding of fiduciary loyalty: cognitivism).
[159] *See* Johnson, *supra* note 123, at 37-40 (discussing the minimal condition for loyalty); Andrew S. Gold, *Purposive Loyalty*, 74 WASH. & LEE L. REV. 881, 884-87 (2017) (describing proscriptive loyalty).
[160] *See e.g.* Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1271 (1999) (describing a limited view of the duty of loyalty); Frank A. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STANFORD L. REV. 271, 274 (1986) (discussing efficient risk bearing in conflict of interest transactions)
[161] *See* Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries,* 46 WM. & MARY L. REV. 1597, 1629 (2005) (discussing the fiduciary duties of corporate officers).
[162] *See* Johnson, *supra* note 123, at 41 (discussing the approach taken in the ALI's Principles of Corporate Governance).
[163] *See id.,* at 48-49 (tracing the idea back to Cincinnatus and the Biblical account of Joseph).
[164] *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250 (suggesting that team production theory is an appropriate basis for understanding the unique economic and legal functions performed by corporations).

The most famous articulation of prescriptive loyalty in the context of business associations remains Cardozo's 1928 decision in *Meinhard v. Salmon,* found in almost every business associations law textbook.[165] Cardozo held one of two co-adventurers (roughly speaking, partners) to "the duty of the finest loyalty": "[n]ot honesty alone, but the punctilio of an honor the most sensitive."[166] Judge Cardozo required partners to renounce "thought of self," in favor of the interests of their venture and their co-adventurers -- to forgo personal profit that came to them by virtue of their agency.[167]

While courts have wrestled over the concept,[168] some sense of loyalty and connection appears to be psychologically important to most people. In many accounts of moral agency, loyalty is seen as a central human need, often essential to a person's identity.[169]

D. Responsibility

A compendium of common law is strikingly representative of the social order in which it arises. Recall that a restatement frames the reasoning of courts across many jurisdictions. In deciding a case, a court says that *this* is how we resolve this kind of dispute – this is what we in this legal community think the right answer, the law, is. A collection of such statements, in pointillist fashion, paints a society's vision of how legal and natural persons should act *vis-à-vis* one another. But things change.

In the *Third Restatement*, broad understandings of agency authority, and therefore expanded principal liability for agent's acts,[170] reflect the influence of the political and legal

[165] Meinhard v. Salmon*,* 249 N.Y. 458, 164 N.E. 545 (1928). Thanks in part to its striking rhetoric, the case is one of the most quoted cases in business associations law. *See* Stephen M. Bainbridge, *Must Salmon Love Meinhard? Agape and Partnership Fiduciary Duties*,17 GREEN BAG 257, 258-9 (2014) (noting its famous "rhetorical finery").
[166] *Meinhard,* 249 N.Y. at 464.
[167] *Meinhard,* 249 N.Y. at 468.
[168] This has been especially true in the context of fiduciary duties of directors. Although they are not agents of the corporation, their fiduciary duties are interpreted by courts in terms of agency law. *See* Galoob & Leib, *supra* note 158, at 107-115 (carefully analyzing director duties).
[169] *See* Eli Wald, *supra* note 21, at 948.
[170] *See* RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006) (stating the rule for an employer's vicarious tort liability for torts of an employee acting within the scope of employment); RESTATEMENT (THIRD) OF AGENCY §§7.04–7.06, §7.07 cmt. e (2006) (describing situations in which a principal may be directly liable for an agent's torts).

liberalism of the 1960s and 1970s.[171] Administrative agencies and their enforcement power and appetite bloomed.[172] Vicarious liability for activities done on a firm's behalf expanded.[173] Professor William L. Prosser's *Handbook of the Law of Torts*, in its fourth edition by 1971,[174] was perhaps the most influential expression of the social policy benefits of allocating risks to firms.[175] With public interests in mind, courts held business associations responsible in a wide variety of situations.

The 1980s and 1990s, however, saw a swing of the pendulum. The business world was reimagined as a negotiation between independent rational economic actors. This was the world envisioned by law and economics.[176] With regard to employment, the late 20th century turn to "market-based" solutions meant turning from a concern with institutions to focusing on contracts among market actors, individual employers and their agents.[177] The late 20th century also saw a concerted effort to address insurance costs with tort reform, which included caps on damages and limits on joint and several liability.[178] In short, it was widely held, business associations should be held somewhat less responsible.

As noted above, between 1995-2006, when the *Third Restatement* was being drafted, the dot.com bubble burst and there were major accounting scandals, including the Enron and WorldCom collapses. In response, Congress passed the Sarbanes-Oxley Act, which sought to impose a sense of responsibility on actors in our largest business associations.[179] The law focused on enforcing sound relationships within business associations, and between business

---

[171] *See* H.W. BRANDS, THE STRANGE DEATH OF AMERICAN LIBERALISM 68-125 (2001) (describing the strength of liberalism in the 1960s and early 1970s).
[172] *See* Peter Strauss, *How the Administrative State Got to This Challenging Place*, 150 DAEDALUS 17, 21–28 (2021).
[173] *See* J.A.C. Hetherington, *Trends in Enterprise Liability: Law and the Unauthorized Agent*, 19 STAN. L. REV. 76, 76 (1966) (examining the rules relating to the power of unauthorized agents to subject their principals to liability).
[174] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed., 1971).
[175] *See* Craig Joyce, *Keepers of the Flame: Prosser and Keeton on the Law of Torts*, 39 VANDERBILT L. REV. 851, 859 (1986) (describing Prosser's influence).
[176] *See. e.g.,* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986).
[177] *See* Jeffrey Frankel & Peter R. Orszag, *Retrospective on American Economic Policy in the 1990's,* BROOKINGS (Nov. 2, 2001) https://www.brookings.edu/articles/retrospective-on-american-economic-policy-in-the-1990s/ (discussing the pro-market orientation of the 1980s and its evolution in the 1990s).
[178] *See* CONG. BUDGET OFF., THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES, A CBO PAPER (June 2004).
[179] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.)

associations and those outside of them.[180] Transparency and responsibility would be key. Agents, especially those of large institution responsible for the fortunes of thousands of stakeholders, were to be held to account. Fiduciary duty, especially the duty of loyalty, mattered.[181]

The *Third Restatement* reflects all three movements in U.S. political economy: the insistence on employer liability; a loosely contractual understanding of social organization; and a faith in transparency and fair dealing. In setting down rules, the *Third Restatement* implicitly assumes that those connections and relationships are important, and that violations of these norms are justiciable. That is, courts are in a position to defend and reinforce a certain ethos of commercial life, not least through tort litigation.

But with developments in the economy, many of which have accelerated since publication of the *Third Restatement*, those assumptions are being challenged. Many business functions that were once done within corporations have been "outsourced," as businesses focus on their "core competencies." Many employees with full-time and relatively permanent jobs have become some sort of contractors. Many employment relationships have become *ad hoc,* delineated by contract, and generally shorter term. "Jobs" have become "gigs."

The *Third Restatement's* understanding of workplace relationships may not be so serviceable for this new economy. In many contemporary situations, "principals" don't care about "agents," and "agents" don't care about "principals." The ethos of the *Third Restatement* may have broken down, at least in some important quarters, and it is not clear what the ethos of this new economy is or what constitutes a justiciable harm. These new business arrangements are generating new relationships, raising new disputes, and perhaps require new understandings of the law.

V. The Gig Economy

[180] *See id.* tit. III (Corporate Responsibility), tit. IV (Enhanced Financial Disclosures), tit. VIII (Corporate and Criminal Fraud Accountability), and tit. IX (White-Collar Crime Penalty Enhancements).
[181] *See e.g.*, In re the Walt Disney Company Derivative Litigation, 906 A. 2d 27, 62-8 (Del. 2006) (exploring good faith determinations in the context of allegations of corporate fiduciaries' duty of loyalty violations); Stone v. Ritter, 911 A.2d 362 (Del. 2006) (clarifying the relationship between obligation of good faith and the duty of loyalty of corporate fiduciaries).

A. Precarity

In 2011, British labor economist Guy Standing identified an emerging class of workers he called the "precariat."[182] The word is a portmanteau, a combination of "precarity" with "proletariat."[183] At a minimum, the precariat includes people like rideshare drivers, home healthcare aides, and temporary workers of all sorts. Members of the precariat (attempt to) bounce from job to job, or do multiple jobs at once, with little meaning and little or no security.[184]

Standing argues that the situation of the precariat is historically specific. The situation of rideshare drivers is not the same as that of the small independent enterprises in traditional economies, including the United States until after the Civil War. Such businesses are precarious in the sense that their fortunes rise or fall with circumstances, but they are also independent. In contrast, members of the precariat work in complex modern societies, dominated by large, globalized enterprises.[185] These enterprises are not like Ford Motor Company in the heyday of industrial capitalism, with factories and iron mines and rubber plantations, an empire of things with a vast workforce of full-time employees.[186] Uber is essentially a software application, with 7.1 million part-time drivers who may or may not be employees.[187] And just as Uber is not Ford, the precariat differs from the proletariat. The proletariat provided labor for big industrial enterprises; capital owned the means of production. The precariat also provides labor, but within coordinated networks of services: ride sharing, delivery, health care, etc. As nodal points within a network, members of the precariat are relatively isolated. They do not participate in a large collective enterprise, paradigmatically a union, firmly embedded in an even larger collectivity, such as the auto industry. Their work-related relationships are few and indirect.

---

[182] GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS (2011). In 2021, Standing published a second edition of the book in light of the COVID-19 pandemic with an additional preface. GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS, COVID-19 EDITION (2d ed., 2021) [hereinafter, STANDING].
[183] STANDING at 8.
[184] *Id.* at 11.
[185] *Id.* at 31-7.
[186] Henry Ford's Rouge, The Henry Ford https://www.thehenryford.org/visit/ford-rouge-factory-tour/history-and-timeline/fords-rouge/ (discussing the company's extensive holdings over time).
[187] Brian Dean, *Uber statistics 2024: How many people ride with uber?*, BACKLINKO (May 29, 2024), https://backlinko.com/uber-users.

Like "proletariat" and even "class," "precariat" is a rather loose concept with which to begin thinking, but something has happened to relationships in and with business associations in the United States. Long-standing work arrangements are now widely perceived as being "under attack."[188] There has been a decline long-term employment and reduction in job security, [189] the rise of service jobs,[190] and an increase in contingent work,[191] often enabled by new technologies. "Precariat" captures salient consequences of that change, even if the contours of the change remain hazy.

Two points seem important for present purposes. First, "precariat" represents a large number of people. How large depends on how the term is defined.[192] Second, the COVID-19 pandemic showed the precariat to be indispensable to the functioning of a society. For example, somebody has to cook, clean, care for the sick, and deliver food. And the law, particularly the law governing business associations and their agents, is struggling with both of these developments.[193]

B. Shifts and Sources

Understanding the shifting nature of work-related relationships in the U.S. economy is an extensive field of interdisciplinary inquiry, but a few things can be said here about the forces that are driving such developments and how agency law might evolve in response. Those forces have included, for example, macroeconomic events (the GFC and the COVID-19 pandemic); technology (robotics, smart phones, video conferencing, and artificial intelligence ("AI")) and

---

[188] Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante*, 11 WM. & MARY BUS. L. REV. 733, 736 (2020) [hereinafter Sprague, *ABC Test*] (analyzing California's test to classify gig workers).
[189] *See* Robert Sprague, *Updating Legal Norms for a Precarious Workplace*, 35 A.B.A. J. LAB. & EMP. L. 85, 87 (2020) [hereinafter Sprague, *Updating*].
[190] *See* Mitchell Barnes *et al., Nine facts about the service sector in the United States, The Hamilton Project and Economic Studies*, BROOKINGS, 2 (Sept. 28, 2022), https://www.brookings.edu/articles/nine-facts-about-the-service-sector-in-the-united-states/ (charting the increase in service sector employment 1959 - 2022).
[191] *See* Alex Kirven, *Whose Gig Is It Anyway? Change, Workplace Control and Supervision, and Workers' Rights in the Gig Economy*, 89 U. COLO. L. REV. 249, 257-8 (2018) (citing a 2015 study finding 40% of jobs contingent in 2015).
[192] Of course, many people live precarious lives, without stable social or economic relationships. This article focuses on workers, but precarity is a society-wide problem.
[193] *See* Sprague, *Updating, supra* note 189, at 85 (discussing the fact that "work, for many, has become contingent and precarious").

secular changes in the economy (the shift from goods to services, and the replacement of labor). All of these developments have contributed to insecurity.

1. Macroeconomic Events

a. Global Financial Crisis

The 2007-2009 GFC hit the labor market hard.[194] Unemployment reached 10%,[195] venerable companies went bankrupt,[196] and the government intervened to keep other huge companies alive but on life support.[197] Between October 2008 and April 2009, an average of 700,000 U.S. workers lost their jobs each month.[198] Lawyers, salespersons, managers, accountants, everyone lost jobs. Work was outsourced, firms downsized, and unemployment hit near-record levels.[199] Loyalty that supposedly existed between firms and their employees was not at issue as millions were let go.[200] In the Great Recession that followed, although officially over by June 2009, the U.S. "unemployment rate did not return to pre-recession levels until

[194] *See* Arne L Kalleberg & Till M von Wachter, *The U.S. Labor Market During and After the Great Recession: Continuities and Transformations*, 3 RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCI. 1, 1 (2017) (noting estimates that 30 million individuals lost their jobs and the long-term unemployment rate doubled).
[195] Evan Cunningham, *Great recession, great recovery? Trends from the Current Population Survey*, U.S. BUREAU OF LABOR STAT. MONTHLY LAB. REV. (2018) (see Figure 1).
[196] *See* Michael J. de la Merced, *Eastman Kodak Files for Bankruptcy*, N.Y. TIMES DEALBOOK (Jan. 19, 2012), https://archive.nytimes.com/dealbook.nytimes.com/2012/01/19/eastman-kodak-files-for-bankruptcy/.
[197] *See* CONGRESSIONAL RESEARCH SERVICE, COSTS OF GOVERNMENT INTERVENTIONS IN RESPONSE TO THE FINANCIAL CRISIS: A RETROSPECTIVE, (Sept. 12, 2018); *see also* PROPUBLICA, https://projects.propublica.org/bailout/list (last visited May 29, 2024) (listing 991 "bailout" recipients including General Motors, Chrysler, AIG, Fannie Mae, Freddie Mac, Citigroup, and Bank of America).
[198] Michael Greenstone et al., *Unemployment and Earnings Losses: A Look at Long-Term Impacts of the Great Recession on American Workers*, BROOKINGS (Nov. 4, 2011), https://www.brookings.edu/articles/unemployment-and-earnings-losses-a-look-at-long-term-impacts-of-the-great-recession-on-american-workers/. According to the Financial Crisis Inquiry Commission, the U.S. economy shed 3.6 million jobs in 2008 and 4.7 million by December 2009. NAT'L COMM'N ON THE CAUSES OF THE FINANCIAL AND ECON. CRISIS IN THE U.S., FINANCIAL CRISIS INQUIRY REPORT, 390 (2011).
[199] *See* Kimberly Amadeo, *Historical US Unemployment Rate by Year*, THE BALANCE (Dec. 6, 2022), https://www.thebalancemoney.com/unemployment-rate-by-year-3305506 (providing statistics for unemployment, annual GDP, inflation, and notable events that correlate for all years since 1929).
[200] U.S. DEP'T OF LAB. & U.S BUREAU OF LAB. STAT., EXTENDED MASS LAYOFFS IN 2008, REPORT 1024, 1 (June 2010) https://www.bls.gov/opub/reports/mass-layoffs/archive/extended_mass_layoffs2008.pdf (showing that in 2008 employers laid off about 1.5 million workers).

2014, and it took until 2016 for median household incomes to recover."[201] Unsurprisingly, the GFC created a lasting feeling of insecurity in U.S. workers,[202] including the GenZ'ers who were children when it happened.

b. COVID-19

A decade later, the COVID-19 pandemic again brought the U.S. economy to a near-halt.[203] Offices, schools, factories, and public venues shut down, millions of jobs were lost, and the United States grappled with fear and uncertainty. Some workers, like health care providers, delivery persons, and first responders, kept working on the front lines.[204] Some (usually white-collar) workers were sent home to work remotely.[205] And many workers were laid off as entire industries like restaurants and retail shops shut down indefinitely.[206] Anxiety and other mental health disorders, substance abuse, and health challenges skyrocketed.[207] In many respects, the United States still has not returned to its pre-pandemic self, and it may not.[208] In particular, relationships within business associations have been transformed as remote work remains attractive for many professions, delivery of everything from fast food to new cars to mental health medication is expected, and many workers have developed a "take it or leave it" attitude towards employers.[209]

---

[201] *How Long Did The Great Recession Last in 2008*, FORBES (Oct. 19, 2022), https://www.forbes.com/sites/qai/2022/10/19/how-long-did-the-great-recession-last-in-2008/?sh=598ef8d456b0.
[202] *See* Lydia Saad, *U.S. workers still haven't shaken the job worries of 2009* GALLUP.COM (last visited May 2024), https://news.gallup.com/poll/164222/workers-haven-shaken-job-worries-2009.aspx.
[203] *See* Lida S. Weinstock, *COVID-19 and the U.S. Economy, Congressional Research Service (R46606)*, CONGRESSIONAL RESEARCH SERVICE, 1 (May 11, 2021).
[204] *See* Ashley Elizabeth Muller *et al., The mental health impact of the COVID-19 pandemic on healthcare workers, and interventions to help them: A rapid systematic review*, 293 PSYCHIATRY RESEARCH 113441, 1-2 (2020) (discussing the substantial strain placed on first responders and other healthcare workers).
[205] *See* Lydia Saad & Jeffrey M Jones, *Seven in 10 U.S. white-collar workers still working remotely*, GALLUP.COM (May 17, 2021), https://news.gallup.com/poll/348743/seven-u.s.-white-collar-workers-still-working-remotely.aspx.
[206] *See* Tim Smart, *COVID-19 Did a Number on the Workforce – and the Workplace*, U.S. NEWS (Mar. 17, 2022) (discussing the "severe disruption" caused by the pandemic).
[207] *See* Sophie Bethune, *Stress in America 2023: A nation recovering from collective trauma*, AM. PSYCH. ASS'N (Nov. 2023), https://www.apa.org/news/press/releases/stress/2023/collective-trauma-recovery (discussing the mental and other health challenges that increased during the pandemic).
[208] *See id.*
[209] *See* Douglas J. Guth, *Short-staffed: Employers must adapt to worker sentiment post-COVID-19*, THE LAND (Dec. 1, 2022), https://thelandcle.org/stories/short-staffed-employers-must-adapt-to-worker-sentiment-post-covid-19/; Jennifer Liu, *How people have changed the way they think about work, according to their therapists*, CNBC (Mar.

c. Progressive Fragmentation in the Economy

Precarity in U.S. labor may also be understood to be the result of long-term trends in the U.S. economy. John Henry Schlegel has traced how the "associationalist" economy of the mid-20th century has given way to something far more fragmented, which he calls the "impatient" economy of today.[210] The shift has important consequences for the working class. A manufacturing economy gave way to a services economy. In general, service jobs (excluding professions) were less stable and less rewarding than the manufacturing jobs they replaced. Automation, international trade, and outsourcing[211] played roles, as unions declined[212] and companies fragmented.

Boeing does not install the door panels on its 737 Max 9 aircraft; Spirit does. And, until recently, Spirit was a separate entity.[213] Who is liable for those mistakes? To whom do they owe fiduciary duties?[214] What does that mean for their relationships with the world with which they interact? In the early 20th century, courts worried about vertical integration of companies like Ford Motor Company.[215] Many of today's biggest companies, however, are fragmented legal clusters, and the common law of agency struggles to determine liability within and among them. Our laws of business association enabled, even incentivized, the creation of these structures, but the law of agency struggles to untangle the resulting webs.

17, 2022), https://www.cnbc.com/2022/03/16/how-people-have-changed-the-way-they-think-about-work-according-to-their-therapists.html.

[210] JOHN HENRY SCHLEGEL, WHILE WAITING FOR RAIN: COMMUNITY, ECONOMY, AND LAW IN A TIME OF CHANGE 86 (2022)

[211] *See* Michael L. Nadler, *Independent Employees: A New Category of Workers for the Gig Economy*, 19 N.C. J. L. & TECH. 443, 448-458 (2018); RICK WARTZMAN, THE END OF LOYALTY 309 (2017).

[212] Unionized labor has been struggling for decades. *See* WARTZMAN, *supra* note 211, at 336-7.

[213] *See* Jon Sindreu, *Boeing Calls Time on the Great American Outsourcing*, WALL ST. J. (July 2, 2024) (announcing that Boeing Co. would purchase Spirit Aerosystems, which it spun off in 2005).

[214] *See* Carl Stine, *Senior Management and its Board of Directors Are Being Investigated by Wolf Popper LLP, a Leading Law Firm, for Potential Breaches of Fiduciary Duty*, MARKET NEWS PUBLISHING (Apr. 2, 2024), https://plus.lexis.com/api/permalink/b28e45cf-734e-47f9-82c4-ccf14cc5c1a2/?context=1530671 (alleging breach of fiduciary duties by Boeing management); Kahn Swick & Foti, LLC, *Spirit Aerosystems Investigation Initiated by Former Louisiana Attorney General*, BUSINESS WIRE (Jan. 12, 2024) https://plus.lexis.com/api/permalink/c9816813-2d0d-4893-9baa-e8f6823e72f7/?context=1530671 (alleging breach of fiduciary duties by Spirit management).

[215] *See* Dodge v. Ford Motor Co., 204 Mich. 459, 170 NW 668 (1919) (most famously articulating the shareholder primacy doctrine, but also evaluating Ford's ability to engage in vertical integration of the company with some of its suppliers).

2. Technology

a. Automation and Artificial Intelligence

Technology has also impacted relationships within business associations and between business associations and third parties like customers and community members. Automation of assembly line processes has eliminated many manufacturing jobs,[216] but automation's destruction of jobs is not limited to manufacturing. Voice recognition customer service "agents" and chatbots have reduced the demand for many traditional customer service positions. Similarly, more and more travelers make reservations through websites, instead of travel agents.[217] In addition, the rise of generative AI may automate broader classes of work, [218] including law,[219] computer programming,[220] music,[221] and journalism.[222] As machine learning

[216] *See* David Autor, *et al., New Frontiers: The Origins and Content of New Work, 1940 -2018,* 48 QTRLY J. OF ECON. (2024) (finding that, since 1980, automation has replaced more jobs than it has created in the United States).
[217] U.S. BUREAU OF LAB. STAT., GROWTH TRENDS FOR SELECTED OCCUPATIONS CONSIDERED AT RISK FROM AUTOMATION, (July 2022) (providing a job trend chart for 27 occupations considered at risk due to automation and projecting 59,000 (2%) customer service jobs to be lost between 2019 and 2029). The results are more pronounced for telemarketers (reporting a 51% loss between 2008 and 2018, with another 14% loss projected by 2029) and reservation/transportation ticket agents (reporting a 20% loss between 2008 and 2018, with another 3% loss projected by 2029). *Id*.
[218] *See* Rakesh Kochhar, *Which U.S. Workers Are More Exposed to AI on Their Jobs?*, PEW RSCH. CTR. (July 26, 2023) https://www.pewresearch.org/social-trends/2023/07/26/which-u-s-workers-are-more-exposed-to-ai-on-their-jobs/ (finding 19% of all U.S. workers were exposed to AI in their jobs during 2022); *AI May start to boost US GDP in 2027*, GOLDMAN SACHS (Nov. 7, 2023), https://www.goldmansachs.com/intelligence/pages/ai-may-start-to-boost-us-gdp-in-2027.html (finding 25% of full-time work is exposed to automation); COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 271 (March 2024) (finding a mixture of complementarity and substitution from AI).
[219] *See* Clio, *Legal Innovation and AI: Risks and Opportunities,* AMERICAN BAR ASSOCIATION (June 4, 2024) (describing how automation streamlines various aspects of the legal profession, including "contract review, due diligence, legal analytics, e-discovery, and predictive analytics.").
[220] *See* Jeimy Ruiz, *How AI code generation works*, GITHUB BLOG (Feb. 22, 2024), https://github.blog/2024-02-22-how-ai-code-generation-works/ (explaining how to use generative AI to write code and why doing so is beneficial for the industry); Alessio Bucaioni *et al*., *Machine Learning with Applications*, 15 MACH. LEARNING WITH APPLICATIONS 100526 (Mar. 2024) https://doi.org/10.1016/j.mlwa.2024.100526 (stating ChatGPT can solve moderately difficult programming problems but struggles with complex tasks, and cannot outperform human programmers in certain specific program languages).
[221] *See* Andrew R. Chow, *AI's Influence on Music Is Raising Some Difficult Questions*, TIME (Dec. 4, 2023), https://time.com/6340294/ai-transform-music-2023/ (stating AI technology can recreate artist voices).
[222] *See* David Caswell, *AI and journalism: What's Next*, REUTERS INST. AT UNIV. OF OXFORD (Sept. 19, 2023) (presenting ideas on how generative AI can streamline multiple areas of journalism in addition to writing text).

enables employer/principals to replace human agents with web interfaces, more jobs are likely to be lost and relationships are likely to be degraded.[223]

b. Smart Phones

Near-universal adoption of smart phones and their accompanying apps has impacted almost all social interaction,[224] and in the process enabled the gig work explosion. Many jobs are now mediated by apps, e.g., ride share, restaurant delivery, grocery shopping, and retail of all sorts (Amazon.com and Walmart.com).[225] Work that used to require employee attention can now be done without live human contact, including banking, car shopping, insurance claims, prescription renewals, and all sorts of travel assistance.[226] The adoption of smart phones contributes to the ubiquity of precarity in other ways. A substantial literature links social media, generally consumed via smart phone, to increased levels of anxiety, feelings of inadequacy, and general unhappiness.[227]

c. Remote Work and Zoom

[223] *See* Cynthia Estlund, *Losing Leverage: Employee Replaceability and Labor Market Power,* 90 UNIV. OF CHICAGO L. R. 2, 446-49 (Mar. 2023) (arguing automation reduces employee power in the labor market, pressures wages downward, and contributes to inequality); Eva Selenko *et al., Artificial Intelligence and the Future of Work: A Functional-Identity Perspective*, 31 ASS'N FOR PSYCH. SCI. 3 (June 10, 2022) (proposing policy changes to mitigate the effects of AI on worker identities); Lee Rainie et al., *Americans' views on use of AI to monitor and evaluate workers*, PEW RSCH. CTR. (Apr. 20, 2023) (reporting that employers are using AI to monitor and evaluate employees, leading to negative feelings); Wendi S. Lazar and Cody Yorke, *Watched while working: Use of monitoring and AI in the workplace increases*, REUTERS (Apr. 25, 2023) (questioning whether AI monitoring software is discriminatory, invades privacy, and actually increases productivity).

[224] *See* Elyssa M Barrick *et al, The unexpected social consequences of diverting attention to our phones*, J. OF EXPERIMENTAL SOC. PSYCH., 1 (2020), https://psnlab.princeton.edu/sites/g/files/toruqf641/files/documents/Barrick_Barasch_Tamir_2022.pdf ("The cultural shift toward intense, near-constant phone use is among the most significant changes to people's daily lives over the last 20 years.")

[225] *See* Michael Mandel & Jordan Shapiro, *U.S. App Economy Update, 2022*, PROGRESSIVE POL'Y INST. (2022), https://www.progressivepolicy.org/wp-content/uploads/2022/05/PPI_US-App-Economy-Update-2022_V4.pdf (analyzing the increase in the number of jobs involving mobile device applications); Indeed Editorial Team, *10 App-Based Jobs,* INDEED (Feb. 16, 2023), https://www.indeed.com/career-advice/finding-a-job/app-based-jobs (listing 10 popular app-based jobs).

[226] *See* Eric Keating, *5 industries that have been completely transformed by mobile apps,* APPCUES BLOG (last visited June 24, 2024), https://www.appcues.com/blog/mobile-app-industry-transformation (highlighting mobile app transformations in healthcare, real estate, finance and mobile banking, software as a service, and ecommerce).

[227] *See*, *e.g.,* Barrick, *supra* note 224, at 2; JONATHAN HAIDT, THE ANXIOUS GENERATION (2024) (linking smart phones to an epidemic of mental illness in GenZ'ers).

Remote work, also known as Work from Home ("WFH"), was not invented in 2020, but it significantly increased during the COVID-19 pandemic. By April of 2020, near the initial peak of the pandemic, some estimated that 62% of the U.S. workforce was working from home.[228] Although the pandemic has receded, WFH is here to stay for many U.S. workers.[229] In 2023, 12.7% U.S. workers worked from home full time, and 28.2% worked on a hybrid model.[230] The prevalence of remote work is spread unevenly in the economy. The jobs most suitable for remote performance tend to be white-collar jobs that require a college degree.[231] An accountant can work from home. A janitor cannot.

The human impact of remote work appears to be mixed. Some workers appreciate the arrangement, perhaps saving time and money on a commute and gaining flexibility for family and other commitments. Reportedly, 71% of those who work from home most or some of the time say doing so helps them balance their work and personal lives. [232] Given real estate prices and economic uncertainty, some employers have downsized or eliminated their brick-and-mortar

---

[228] Brodie Boland *et al., Reimagining the office and work life after Covid-19*, McKinsey & Co. (Jun. 8, 2020), https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/reimagining-the-office-and-work-life-after-covid-19. This is contrasted with an estimate that only 25% of the workforce worked from home in 2018, prior to the pandemic. *Id.*

[229] *See* Mehdi Punjwani & Sierra Campbell, *Remote work statistics and trends in 2024*, USA Today (2024), https://www.usatoday.com/money/blueprint/business/hr-payroll/remote-work-statistics/ (estimating that more than 1 in 5 Americans will work remotely by 2025); Kim Parker, *About a third of U.S. workers who can work from home now do so all the time*, Pew Rsch. Ctr. (2023), https://www.pewresearch.org/short-reads/2023/03/30/about-a-third-of-us-workers-who-can-work-from-home-do-so-all-the-time/ (reporting that about a third (35%) of workers with jobs that can be done remotely are working from home all of the time, up from only 7% before the pandemic); Tim Smart, *Remote Work Has Radically Changed the Economy – and it's Here to Stay,* U.S. News & World Report (Jan. 25, 2024), https://www.usnews.com/news/economy/articles/2024-01-25/remote-work-has-radically-changed-the-economy-and-its-here-to-stay (discussing a January 2024 LinkedIn study showing that 10% of jobs are fully remote but applications for remote positions accounted for 45% of those received in December 2023, and hybrid positions accounted for about 13% of postings).

[230] Katherine Haan, *Remote work statistics and trends in 2024*, Forbes (2024), https://www.forbes.com/advisor/business/remote-work-statistics/.

[231] *See* Kim Parker, *About a third of U.S. workers who can work from home now do so all the time*, Pew Rsch. Ctr. (Mar. 30, 2023), https://www.pewresearch.org/short-reads/2023/03/30/about-a-third-of-us-workers-who-can-work-from-home-do-so-all-the-time/; Mehdi Punjwani & Sierra Campbell, *Remote work statistics and trends in 2024,* USA Today (Apr. 3, 2024), https://www.usatoday.com/money/blueprint/business/hr-payroll/remote-work-statistics/ (quantifying work location by education levels); Andre Dua *et al., Americans are embracing flexible work-and they want more of it,* McKinsey & Company (June 23, 2022), https://www.mckinsey.com/industries/real-estate/our-insights/americans-are-embracing-flexible-work-and-they-want-more-of-it.

[232] *See* Katherine Haan, *Remote work statistics and trends in 2024,* Forbes (June 12, 2023), https://www.forbes.com/advisor/business/remote-work-statistics/.

footprint and left employees at home.[233] Similarly, videoconferencing technology may save employers the cost of their workers' travel to meetings or conferences.[234]

Remote work, however, often contributes to the isolation of workers.[235] Sometimes remote workers are perceived as less diligent, and their professional advancement suffers.[236] It may be that they are the first to be let go when the need arises.[237] From the employer's side, some firms bemoan the lack of *espirit de corps* and accountability of a remote workforce.[238]

C. Quantifying and Governing the Gig Economy

1. Temps, Freelancers, and Gig Workers

Contingent and part-time work is hardly a 21st century invention. The temporary worker agency Manpower, Inc., was by some metrics the largest employer in the United States in 1993.[239] Annual temporary and contract staffing employment work steadily increased between

---

[233] *See* Stijn Van Nieuwerburgh, *The Remote Work Revolution: Impact on Real Estate Values and the Urban Environment*, REAL ESTATE ECON. 1-2, 8 (2023) (stating that "various indicators of office demand appear to have stabilized at levels far below their pre-pandemic high-water marks").
[234] *See* Lauren Leffer, *It's Not All in Your Head—You Do Focus Differently on Zoom*, SCI.AMERICAN (Nov. 13, 2023), https://www.scientificamerican.com/article/its-not-all-in-your-head-you-do-focus-differently-on-zoom/ (noting that screens often supplant real life sit-downs and the social consequences).
[235] *See* Te-Ping Chen, *The Loneliness of the American Worker*, WALL ST. J. (May 27, 2024) https://www.wsj.com/lifestyle/workplace/american-workers-loneliness-research-35793dc4 (noting that in 2023 the U.S. Surgeon General declared a loneliness health epidemic).
[236] *See* Society for Human Resources Management, *SHRM Research Reveals Negative Perceptions of Remote Work*, SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT (July 26, 2021), https://www.shrm.org/about-shrm/press-room/press-releases/pages/-shrm-research-reveals-negative-perceptions-of-remote-work.aspx; hireneXus, *How remote work can inhibit career advancement*, LINKEDIN (Sept. 21, 2023), https://www.linkedin.com/pulse/how-remote-work-can-inhibit-career-advancement-hirenexus .
[237] *See* Society for Human Resources Management, *SHRM Research Reveals Negative Perceptions of Remote Work,* SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT (July 26, 2021), https://www.shrm.org/about-shrm/press-room/press-releases/pages/-shrm-research-reveals-negative-perceptions-of-remote-work.aspx (claiming that 67% of supervisors of remote workers surveyed by SHRM consider remote workers more easily replaceable than onsite workers at their organization); Katherine Tangalakis-Lippert, *Remote employees are more likely to be laid off than in-office peers - but they quit more, too*, BUSINESS INSIDER (2024), https://www.businessinsider.com/remote-workers-quit-and-fired-more-often-work-from-home-2024-1 (finding that fully remote employees are laid off 35% more often than their peers who work in-office or hybrid roles).
[238] *See* Jack Kelly, *CEOS Will Be Clamping Down On Employees,* FORBES (Jan. 30, 2023), https://www.forbes.com/sites/jackkelly/2023/01/30/ceos-will-be-clamping-down-on-employees/?sh=38e06ed510db (discussing the negative perceptions of remote work by CEOs of several large companies).
[239] *See* WARTZMAN, *supra* note 211, at 306-8.

2000 and 2022, though the 2022 level (14.6 million workers) mirrored 2006.[240] That said, for reasons suggested above, alternate work – or lack of work – has permeated the economy in significantly new ways. Precarity comes in degrees, from the completely unemployed and insecure, to those with gigs that may be more or less steady, to those with jobs but perhaps little security, and so forth. Circumstances vary, but some version of Standing's precariat, rather than the stable wage earner, has become the new normal for a significant portion of the U.S. workforce.

The terminology for these workers is overlapping and inconsistent.[241] Independent workers may include contract, freelance, and temporary workers, as well as gig workers.[242] Some sources point out that workers who identify as "freelancers" may differ from "gig workers" because they often have substantial independence regarding their schedules, rates, and business development.[243] However, other sources consider gig economy workers to include "independent contractors and freelancers who perform temporary, flexible jobs," including people who work gig jobs in addition to another, full-time position.[244]

---

[240] Statista Research Department, *Annual temporary and contract staffing employment in the United States from 2000 to 2022*, STATISTA (Nov. 6, 2023) https://www.statista.com/statistics/220682/us-total-annual-temporary-employment/.

[241] *See* Anasua Bhattacharya and Tapas Ray, *Precarious Work, Job Stress, and Health-related Quality of Life*, CTRS. FOR DISEASE CONTROL AND PREVENTION: NIOSH SCI. BLOG (Aug. 9, 2022), https://blogs.cdc.gov/niosh-science-blog/2022/08/09/precarious-work/ (detailing the nomenclature problems). The Bureau of Labor Statistics has tried to assess the number of workers in "electronically-mediated" jobs, but differences in terminology and data collected across multiple agencies create problems. *See* Rebecca Rainey & Bruce Rolfson, *Punching In: Labor Agency Leading Effort to measure Gig Economy*, BLOOMBERGLAW (Dec. 18, 2023) https://news.bloomberglaw.com/daily-labor-report/punching-in-labor-agency-leading-effort-to-measure-gig-economy-28.

[242] *See* Andre Dua *et al., Freelance, side hustles, and gigs: Many more Americans have become independent workers,* MCKINSEY & CO. (Aug. 23, 2022) https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/future-of-america/freelance-side-hustles-and-gigs-many-more-americans-have-become-independent-workers (reporting that independent work is booming). According to Statista, 45% of freelancers are millennials, while 15% of freelancers are Gen-Zers. *See Freelance participation in the United States as of 2023, by generation,* STATISTA (Dec. 2023) https://www.statista.com/statistics/531012/freelancers-by-age-us/ (charting freelance participation by generation).

[243] *See* Picxele, *Freelance vs Gig: Decoding the Modern Workforce*, LINKEDIN.COM (Apr. 29, 2024), https://www.linkedin.com/pulse/freelance-vs-gig-decoding-modern-workforce-picxele-5cnmc (discussing differences between freelancers and gig workers).

[244] Statista Research Department, *Gig economy in the U.S. – statistics and facts*, STATISTA: ECONOMY (Feb. 22, 2024) https://www.statista.com/topics/4891/gig-economy-in-the-us/#topicOverview.

"Gig workers" most commonly indicates workers in electronically-mediated (app-based) positions[245] who offer their services through platforms like Uber, Lyft, DoorDash,[246] Grubhub, Angi, Taskrabbit, Thumbtack, Upwork, and Instacart. Participants include interactive computer service providers, information content providers, transportation network companies, carriers, participating drivers and rideshare drivers, innkeepers, short term residential rental providers or shared housing hosts, entrepreneurs, and consumers.[247] Gig workers often provide services on demand through smart phone apps.

Quantifying the number of U.S. workers involved is difficult. Estimates for the total number of freelance and gig workers range from 64 -76 million U.S. workers in 2023 and 2024.[248] Estimates of the number of gig workers alone range from 41 to 57 million U.S. workers in 2024.[249] Some 40% of Gen Z'ers are estimated to have a gig work job.[250]

2. Confusion and Worker Classification

The business model of many companies relying on gig workers depends on their legal classification: such companies are only profitable if drivers and other individual agents are deemed "independent contractors" (in the language of the *Third Restatement*, "non-employee

---

[245] *See* Dan DeFrancesco, *Side hustles are becoming young people's safety net amid so much economic uncertainty*, BUSINESS INSIDER NEDERLAND: ARCHIEF (Feb. 16, 2024), https://www.businessinsider.nl/side-hustles-are-becoming-young-peoples-safety-net-amid-so-much-economic-uncertainty/.
[246] *See* Samantha Delouya, *The rise of gig workers is changing the face of the US economy*, CNN BUSINESS (July 25, 2023) https://www.cnn.com/2023/07/24/economy/gig-workers-economy-impact-explained/index.html.
[247] *See* Juan Diaz-Granados, *Potential Legal Categories in the Sharing Economy's Platform Operator-User-Provider Model: A Taxonomic and Positive Approach – Part 2*, 62 JURIMETRICS J. 241, 242 (2022) (analyzing participants in the sharing economy in terms of a variety of different legal relationships, including agency); Kirven, *supra* note 191, at 258 (suggesting examples like driving, delivery, cleaning, and home repair).
[248] *See Freelance Forward 2023,* UPWORK (Dec. 12, 2023) https://www.upwork.com/research/freelance-forward-2023-research-report (finding that 38% of the U.S. workforce, or 64 million persons, performed had performed freelance work in the preceding 12 months); *Number of freelancers in the United States from 2017-2028,* STATISTA, https://www.statista.com/statistics/921593/gig-economy-number-of-freelancers-us/ (predicting 76.4 million freelance workers in 2024, up from 57.3 million in 2017 and expected to rise to 90.1 million by 2028).
[249] *How many gig workers are there?*, GIG ECONOMY DATA HUB, https://www.gigeconomydata.org/basics/how-many-gig-workers-are-there (last visited Jul. 2, 2024) (noting that the number of gig workers has increased dramatically since the GFC, and estimating it at 41 million persons, or 25-35% of the U.S. workforce); *Gig Economy Statistics: Demographics and Trends in 2024*, TEAMSTAGE, https://teamstage.io/gig-economy-statistics/ (last visited Jul. 2, 2024) (finding that more than 36% of U.S. workers (57 million persons) have a gig work arrangement as either their primary or secondary job, amounting to ¼ of full-time and ½ of part-time workers).
[250] DeFrancesco, *supra* note 245.

agents"), and not "employees."[251] Although minimum wages vary by state, an employee usually costs an employer more than an independent contractor doing the same work, because the employer is responsible for other benefits,[252] federal protections like anti-discrimination statutes,[253] and things like employee payroll taxes.[254] In addition, an employer is subject to vicarious liability for torts committed by its employee acting in the scope of employment. Uber's bottom line changes if it (or its insurance) has to pay when its drivers injure people in traffic accidents.[255] A number of cases have sought to hold Uber liable for other tortious conduct by its drivers, with mixed success.[256]

Classification also varies by and even within states, [257] most notably California. California Assembly Bill 5 (known as AB5) extended "employee" classification status to gig

---

[251] The "employer-employee" terminology of the *Third Restatement* creates some confusion: being an "employee agent" under the common law of agency may not correspond exactly with one's "employee" status for purpose of legislatively or administratively prescribed worker benefits or protections. *See* Dalley, *Scope, supra* note 139, at 643-659 (explaining conceptual and technical errors being made by a variety of courts classifying workers).

[252] The U.S. Department of Labor found that the total company cost for an employee in December 2023 averaged $43.11, 30% of which was benefit costs such as paid leave, legally required benefits, insurance, supplemental pay, and retirement and savings. *See* U.S. BUREAU OF LAB. STAT., PRIVATE INDUSTRY COMPENSATION COSTS AVERAGED $43.11 PER HOUR WORKED IN DECEMBER 2023, TED: THE ECONOMICS DAILY (Mar. 27, 2024) https://www.bls.gov/opub/ted/2024/private-industry-compensation-costs-averaged-43-11-per-hour-worked-in-december-2023.htm.

[253] *See* Susan E. Provenzano, *Worker Classification Conundrums in the Gig Economy*, 54 U. PAC. L. REV. 67,72 (2023)

[254] If a person is classified as an "employee" for purposes of many federal laws, there is a substantial increase in the workplace protections, benefits, and compensation that person receives. *See e.g.*, Alison Griswold, *Uber Saved $730 Million by Hiring Drivers in Two States as Contractors Instead of Employees*, QUARTZ (May 10, 2016), https://qz.com/680503/uber-saved-730-million-by-hiring-drivers-in-two-states-as-contractors-instead-of-employees.

[255] Note that many states require ride share companies to carry auto insurance for their drivers. *See e.g.,* MICH. COMP. LAWS §257.2123(2)(b) (2017).

[256] Courts in several jurisdictions have determined that Uber is not vicariously liable for its drivers' tortious alleged physical assaults or threatening behavior towards customers. *See, e.g.* Hoffman v. Silverio-Delrosar, 2021 WL 2434064 at *3 (D. N.J. Jun. 15, 2021) (finding that a driver's punching a customer was not a foreseeable act and did not further the driver's role as an employee); Karlen v. Uber Technologies, Inc., 2022 WL 3704195 at *4 (U.S.D.C., D. Conn. Aug. 27, 2022)(finding that the driver's alleged tortious conduct toward the passenger ran counter to Uber's business purpose of providing customers with safe, secure, and non-threatening rides). *But see* Fuentes v. Uber Techs., Inc., Civil Action No. 1:23-cv-458 (RDA/LRV), 2024 U.S. Dist. LEXIS 36496 (E.D. Va., 2024) (finding an Uber driver was an Uber employee during an altercation over payment for a ride because a reasonable jury could determine that the driver's actions were in furtherance of Uber's business).

[257] Federal regulation is also in flux. As of March 11, 2024, the Department of Labor began employing a more nuanced six-factor "economic realities" test for determining employee status under the Fair Labor Standards Act. *See US Department of Labor Issues Final Rule on Independent Contractor Status,* COOLEY (Jan. 31, 2024) https://www.cooley.com/news/insight/2024/2024-01-31-us-department-of-labor-issues-final-rule-on-independent-contractor-status#:~:text=On%20January%2010%2C%202024%2C%20the,effect%20on%20March%2011%2C%202024 .

workers like rideshare drivers and delivery persons in 2020,[258] guaranteeing them benefits and minimum wages. Such a change not only would have raised costs for companies like Uber and Grub Hub,[259] but also would have reclassified some freelance operators like journalists,[260] who objected. Eight months later, after the most expensive ballot initiative campaign in U.S. history,[261] California voters approved Proposition 22[262] which implemented substantial exceptions to AB5's classification test andallowed companies to continue classifying their drivers as independent contractors. Rideshare drivers and unions challenged Proposition 22, but the California Supreme Court upheld the measure in July 2024..[263]

Litigation in other states has sought to classify gig workers under the common law. Courts consider this determination to be a mixed question of fact and law that depends upon the facts of the case taken as a whole, usually decided by a jury.[264] For example, in *Matter of Vega,* the New York Court of Appeals wrestled with the classification of persons working for Postmates, Inc., an app-based food delivery service that enables persons approved as couriers to log in and accept posted delivery jobs in order to earn a percentage of the delivery fee.[265] The court wrestled with the distinction between employees and independent contractors, ultimately

---

[258] Assemb. B. No. 5 (Cal. 2020) (adding Labor Code Sec. 2750.3, effective Jan. 1, 2020). AB5 uses the so-called "ABC Test" to classify workers. *See* Sprague, *ABC Test, supra* note 188, at 733 (explaining the application of the test and contemporary work arrangements). AB5 was amended later that year to address problems articulated by, for example, music performers and freelance journalists. Assemb. Bill No. 2257 (Cal. 2020). Uber challenged AB5, but the law was upheld in June 2024. Olson v. California, 2024 WL 2887392 (9th Cir., *en banc*, 2024). Whether it is applied depends on the ongoing legal challenges to Proposition 22.

[259] For an interesting discussion of classification cases relating to Uber and Grubhub that, using a similar test, classified their workers differently, see Juan Diaz-Granados, *Potential Legal Categories in the Sharing Economy's Platform Operator-User-Provider Model: A Taxonomic and Positive Approach – Part 2*, 62 JURIMETRICS J. 241, 246-9 (2022).

[260] *See* Daniel Wiessner, *U.S. Supreme Court won't hear freelancers' challenge to California employment law,* REUTERS (Jun. 27, 2022), https://www.reuters.com/legal/government/us-supreme-court-wont-hear-freelancers-challenge-california-employment-law-2022-06-27/ (explaining a freelancers' free speech-based challenge).

[261] *See* Isaiah Poritz & Maia Spoto, *Uber, Lyft-Backed California Labor Law Faces Final Court Test*, BLOOMBERGLAW, (May 20, 2024).

[262] Cal. Proposition 22 (2020).

[263] Castellanos v. State of Cal., S279622 (July 25, 2024) (confirming the constitutionality of the ballot measure, which exempted certain app-based drivers from the state's independent contractor classification test).

[264] *See, e.g.,* Narayanasamy v. Issa, 435 F.Supp.3d 388, 390-1 (U.S.D.C., RI) (asserting that there is no fixed rule for the employee-independent contractor distinction). This is despite the fact that the Rhode Island General Assembly has determined that Uber drivers are independent contractors. R.I. GEN. LAWS § 39-14.2-16 (2016). For more discussions of courts struggling with classification, see, *e.g.,* Juan Diaz-Granados, *Potential Legal Categories in the Sharing Economy's Platform Operator-User-Provider Model: A Taxonomic and Positive Approach – Part 2*, 62 JURIMETRICS J. 241, 246-9 (2022); Nadler, *supra* note 211, at 464-74.

[265] Matter of Vega, 2020 NY Slip Op 02094, 35 N.Y.3d 131, 134. (Ct. App. N.Y., 2020).

ruling that the couriers are employees.[266] In her concurrence, one judge reviewed the restatements of agency and pointed out that while the traditional "multi-factor test for determining whether a worker is an employee … is well-suited to most cases, it has its limits and may prove difficult to apply in electronically mediated work arrangements."[267] A second judge dissented, in part over the majority's "failure to recognize that the realities of the contemporary working world have outpaced our jurisprudence," which he describes as "reflective of a time when employees received a gold watch upon retiring from the sole company at which they spend their entire careers."[268] The dissent emphasized the difficulty of applying the common law test to a world that has changed since the test was developed, and noted that the rise of technology and the sharing economy have resulted in the crowdsourcing of flexible, low-barrier-to-entry jobs on which workers may be less reliant.[269]

D. Fraying Relationships: Isolation and Insecurity in the Gig Economy

Gig workers often lack income and health security.[270] In a 2022 report (based on a 2020 survey) the Economic Policy Institute found that 14% of gig workers earn less than the minimum wage, 62% had lost money because of problems with the platforms/apps on which they depend, 19% had gone hungry because they could not afford to eat, and 31% could not pay the full amount of their utility bills in the month prior to the survey.[271]

---

[266] *Id.* at 140.
[267] *Id.* at 140-41 (Rivera, J., concurring).
[268] *Id.* at 155 (Wilson, J., dissenting).
[269] *Id.* at 169 (Wilson, J., dissenting). Judge Wilson explained:

> The common-law test for status as an employee developed in a vastly different time, when employment was monotonic. Now it is cacophonic. The number of workers performing multiple of alternative jobs has grown dramatically. New technology and the rise of the sharing economy have driven further changes, including the crowdsourcing of flexible and low-barrier-to-entry jobs upon which many workers are less reliant than our traditional notion of career employees. The challenge is how to apply our inconsistent common-law test in a world where work looks much different than it did when that test was developed. *Id.*

[270] *See* Jonathan Gruber, *How should we provide benefits to gig workers?,* BROOKINGS, (Jun. 13, 2024) https://www.brookings.edu/articles/how-should-we-provide-benefits-to-gig-workers/ (discussing problems gig workers face providing for their income and health security).
[271] BEN ZIPPERER ET AL., ECON. POL'Y INST., NATIONAL SURVEY OF GIG WORKERS PAINTS A PICTURE OF POOR WORKING CONDITIONS, LOW PAY 2 (2022).

Economic ups and downs may intensify these problems. The social contract between the employer and its employee may break down when a firm struggles and an unprofitable business is not a stable place to work; the first thing a troubled company does is cut payroll.[272] These changes come with economic, emotional, and social challenges. 44% of Gen Z'ers reported feeling financially insecure in 2023.[273]

Like remote work (and there is some overlap), the gig economy has some appeal. Work on demand satisfies yearnings for autonomy, freedom, and "being one's one boss" that are often important to Americans' views of themselves.[274] Individual accountability and responsibility resonate in U.S. culture, and remind some of the height of the Reagan presidency.[275] The gig economy may be a "new wave of entrepreneurship and innovation.[276] Some surveys find that independent workers have higher rates of optimism about the future than their counterparts in typical/traditional work arrangements.[277]

Still, the gig economy is a lonely economy.[278] Rather than a Horatio Alger story of individual effort leading to prosperity and happiness, many participants in the current economy report substantial adverse impacts on health and well-being.[279] In 2023, the U.S. Surgeon General declared a loneliness health epidemic,[280] and people who report often feeling lonely or

---

[272] *See* WARTZMAN, *supra* note 211, at 351.
[273] *See Vibe Check,* BUS. INSIDER, slide 10 (2024) https://www.businessinsider.com/vibe-check-gen-z-survey-data-2023-12?utm_source=Iterable&utm_medium=email&utm_campaign=campaign_Insider%20Today%20Fri,%20Feb%2016,%202024%20; Dan DeFrancesco, *Side hustles are becoming young people's safety net amid so much economic uncertainty*, BUS INSIDER NEDERLAND (Feb. 16, 2024), https://www.businessinsider.nl/side-hustles-are-becoming-young-peoples-safety-net-amid-so-much-economic-uncertainty/ .
[274] *See* Kirven, *supra* note 191, at 253.
[275] *See* Nadler, *supra* note 211, at 451-2.
[276] Sprague, *Updating, supra* note 189, at 92 (going on to point out that it may instead be a "race to the bottom for exploited workers").
[277] *See* Andre Dua *et al., Freelance, side hustles, and gigs: Many more Americans have become independent workers,* MCKINSEY & CO. (Aug. 23, 2022) https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/future-of-america/freelance-side-hustles-and-gigs-many-more-americans-have-become-independent-workers.
[278] *See* Te-Ping Chen, *The Loneliness of the American Worker*, WALL ST. J. (May 27, 2024) https://www.wsj.com/lifestyle/workplace/american-workers-loneliness-research-35793dc4; Kirven, *supra* note 191, at 264-5.
[279] *See* Anasua Bhattacharya and Tapas Ray, *Precarious Work, Job Stress, and Health-related Quality of Life*, CTRS. FOR DISEASE CONTROL AND PREVENTION: NIOSH SCI. BLOG (Aug. 9, 2022), https://blogs.cdc.gov/niosh-science-blog/2022/08/09/precarious-work/ (detailing substantial negative impacts demonstrated by a NIOSH study).
[280] VIVEK H. MURTHY, DEP'T OF HEALTH AND HUM. SERV., OUR EPIDEMIC OF LONELINESS AND ISOLATION 2023 (2023) https://www.hhs.gov/sites/default/files/surgeon-general-social-connection-advisory.pdf.

isolated have an increased risk of death.[281] Many people feel a lack of connection with their co-workers, and less and less (if any) connection with their employers.[282] Most gig workers have more than one gig, often for competing companies.[283] Over 75% of Uber drivers also drive for Lyft. [284] Belonging nowhere in particular, gig workers often feel little loyalty to their "employers"/platforms, and *vice versa.*

VI. The Gig Economy Challenges the Common Law of Agency

A. Relationships and Consequences Within Business Associations: Loyalty

1. Is Loyalty Over?

The contemporary law of agency, with its clear expectations of loyalty and responsibility, has difficulty with the new relationships (or lack of relationships) in the gig economy. As workplace bonds have fractured, some scholars have declared the "end of loyalty".[285] The era in which individual employees identified with their employers and demonstrated loyalty as a result of that connection may be over.[286]

When many workers are understood to be fungible commodities with little security in their agency (employment) positions,[287] lack of loyalty may be rational. Most U.S. employment

[281] *See* Brianna Abbott, *Loneliness Isn't Just Bad for Your Health – It's Deadly*, WALL ST. J. (Nov. 9, 2023) https://www.wsj.com/health/wellness/loneliness-social-isolation-death-577009bb?mod=article_inline.
[282] *See* Tracy Brower, *The Connection Crisis: Craving Friends At Work And How To Bring Back Belonging*, FORBES: CAREERS (June 14, 2022), https://www.forbes.com/sites/tracybrower/2022/06/14/the-connection-crisis-craving-friends-at-work-and-how-to-bring-back-belonging/ (discussing the "crisis of connection" in the workplace); Sarah Mulcahy, *Why is human connection important? A report for the Workplace*, ENBOARDER: ORGANIZATIONAL DEVELOPMENT (last accessed June 25, 2024), https://enboarder.com/blog/how-much-is-human-connection-really-worth/ (discussing the challenge to workplace relationships created by remote work and flexible schedules).
[283] *See* PUBLIC FIRST, U.S. APP-BASED RIDESHARE AND DELIVERY: ECONOMIC IMPACT REPORT, FLEX ASSOCIATION, 13 (2024) https://www.flexassociation.org/wp-content/uploads/2024/03/Flex-Economic-Impact-Report-2024.pdf (finding "multi-apping" to be the norm, with the 7.3 million active drivers and delivery persons operating for an average of 1.9 platforms each).
[284] Harry Campbell, *Can You Drive for Uber and Lyft at the Same Time?*, RIDESHARE GUY (July 24, 2023) https://therideshareguy.com/how-to-drive-for-uber-and-lyft-at-the-same-time/.
[285] *See, e.g.*, WARTZMAN, *supra* note 211.
[286] *See* Nadler, *supra* note 211, at 449-458.
[287] *See id.* at 453.

is at will; employee agents may be terminated at any time[288] and often are. Whether or not rational, reports of "disloyal" agents are easy to find. Agents may be disloyal to their principals, either directly, *i.e.,* agents steal from their principals, or indirectly, *i.e.,* agents have multiple principals whose interests are antithetical to one another.[289] Many cases relate to trade secrets and non-competition obligations; issues often arise when an employee agent leaves an employer and moves to another one. The volume of conflicts in this context is striking. Courts are struggling to adapt the common law to these cases, even as states and the Federal Trade Commission attempt to enact additional regulations and bans on the use of post-employment non-compete agreements.[290]

Conversely, many principals (employers) demonstrate little or no commitment to their agents. Even as articulated in the *Third Restatement,* the common law prescribes minimal duties for principals.[291] If one understands loyalty as a reciprocal relationship*,* then it seems like many firms have abandoned that approach.[292] Worker disloyalty may be in the news, but "principal opportunism" is also on the rise.[293]

2. Which Employees Owe What Fiduciary Duties?

Unsurprisingly, state courts differ in their approaches to who owes what duties of loyalty. According to the *Third Restatement*, as agents, all employees owe duties of loyalty to their employer. The comments clarify that the specific implications may vary with the employee's position, but are unequivocal: "However ministerial or routinized a work assignment may be, no agent, whether or not an employee, is simply a pair of hands, legs, or eyes. All are sentient and,

---

[288] *See* Marian K. Riedy & Kim Sperduto, *At-Will Fiduciaries? The Anomalies of a "Duty of Loyalty" in the Twenty-first Century*, 93 NEB. L. REV. 267, 268 (2014) (excepting Montana).
[289] *See* Leslie Larkin Cooney, *Employee Fiduciary Duties: One Size Does Not Fit All*, 79 MISS. L. J. 853, 858 (2010); Harris, *Intent, supra* note 9, at 143-52 (2022) (identifying disobedient, disloyal, incomplete knowledge and behind the scenes bad actor agents); *see also* RESTATEMENT (THIRD) OF AGENCY § 3.14 cmt. b (2006) (noting that when an agent represents more than one principal, principal interests may conflict and the agent may violate fiduciary duties).
[290] *See* Non-Compete Clause Rule, 16 CFR §910 (2024) (promulgating the final rule); Ryan LLC v. FTC, 3:24-cv-00986 (N.D. Tex., Apr. 23, 2024) (challenging the rule, and currently enjoining its planned implementation on September 4, 2024)
[291] *See supra* Part III.B.2.
[292] *See Nadler, supra* note 211, at 452-3.
[293] *See* Rauterberg, *supra* note 150, at 626.

capable of disloyal action, all have the duty to act loyally."[294] Agreeing with that articulation, courts in many states have found that all employees owe a duty of loyalty to their employer.

For example, in *OPS International, Inc. v. Ekeanyanwu* (2023), a U.S. District Court was clear that "Under Florida law, an employee owes a fiduciary duty of loyalty to his or her employer not to engage in disloyal acts in anticipation of his future competition, such as using confidential information acquired during the course of his employment or soliciting customers and other employees prior to his end.[295] In *Aitkin v. USI Insurance Services, LLC* (2023), a U.S. District Court, while ruling that no violation of fiduciary duty had occurred because the employee resigned before joining a new company, nevertheless noted that under Oregon law, employees are agents with a common law fiduciary duty of loyalty not to compete actively with their employers during the period of employment.[296] In *Advanced Fluid Systems, Inc. v. Huber et al.* (2020), the Third Circuit Court of Appeals clarified that "Under Pennsylvania law, employees, in addition to officers or directors, may owe their employers fiduciary duties," and went on to cite a half dozen cases in support of the position.[297] In *United Physician Group LLC v. Leche* (2023), the U.S. District Court for the Northern District of Georgia applying South Carolina law observed that "[a]n employee owes a duty of loyalty to his employer to remain faithful to the employer's interests throughout the term of employment[,]" and that this duty is "implicit in any contract for employment."[298] Similar holdings can be found in recent decisions in, for example, Arizona,[299] New Jersey,[300] Ohio,[301] and Virginia.[302]

---

[294] RESTATEMENT (THIRD) OF AGENCY §1.01 cmt. g (2006) (stating clearly that, as agents, all employees owe duties of loyalty to their employer).
[295] OPS Int'l, Inc. v. Ekeanyanwu, 672 F. Supp. 3d 1228 (M.D. Fla. 2023).
[296] Aitkin v. USI Ins. Servs., LLC, 607 F. Supp. 3d 1126, 1150 (D. Or. 2022).
[297] Advanced Fluid Sys. v. Huber, 958 F.3d 168, 183-4 n.19 (3d Cir. 2020).
[298] United Physician Grp., LLC v. Leche, No. 1:20-CV-01586-SEG, 2023 WL 4843345 *21 (N.D. Ga. Mar. 21, 023).
[299] *See* Powers Steel & Wire Prods. v. Vinton Steel, LLC, No. 1 CA-CV 20-0652, 2021 WL 5495289, *5 (Ariz. Ct. App. Nov. 23, 2021) (holding that employees owe fiduciary duties to their employers during their employment).
[300] *See* Goydos v. Rutgers, No. 19-08966 (GC) (DEA), 2024 WL 1329253, *2 (D. N.J. Mar. 28, 2024) (holding that to state a duty of loyalty breach claim, a plaintiff has to allege the existence of an employer-employee relationship, breach of the duty of loyalty, and resulting harm to the plaintiff).
[301] *See* Mollett v. Lawrence Cty. Bd. of Developmental Disabilities, 2024-Ohio-1434, 12 (Ct. App. Ohio 2024) (finding that employees owe duties of good faith and loyalty to their employers and therefore may not acquire interests adverse to those of their principals and thereby reap secret profits at their principals' expense).
[302] *See* USI Ins. Servs., LLC v. Ellis, No. 3:21cv797, 2023 WL 2244677, *3 (E.D. Va. Feb. 27, 2023) (noting that Virginia courts have long recognized the fiduciary duty of loyalty of employees, including employees-at-will, to their employers during their employment).

Courts in other states impose a duty of loyalty on only some (usually upper-level) employees. This narrower approach is taken by the *Employment Restatement*, which states that employees "in a position of trust and confidence with their employer owe a fiduciary duty of loyalty to the employer in matters related to their employment," and lists instances of potential breach.[303] Many cases are consistent with the *Employment Restatement*. For example, in *Koski Professional Group, P.C. v. Bland & Associates, P.C.* (2020), the Supreme Court of Nebraska observed that "[t]he existence of a fiduciary duty of an officer in a closely-held corporation depends on the ability to exercise the status that creates it, and nominal corporate officers with no management authority generally do not owe fiduciary duties to the corporation."[304] As a policy matter, the Nebraska court explained, an employer's right to demand and receive loyalty must be tempered by society's legitimate interest in encouraging competition.[305]

In *N. Harris Computer Corporation v. DSI Investments, LLC* (2022), a U.S. District Court found that, under Kentucky law, mere status as an employee is not enough to establish fiduciary duties: "courts are willing to find a fiduciary relationship between an employer and an employee when the employee has a position of trust, the freedom of decision, and access to confidential corporate information."[306] In Connecticut, according to the court in *ATI Engineering Services, LLC v. Millard* (2022), corporate employees owe a duty of loyalty to the corporation, but the scope of that duty may vary: employees occupying a position of trust and confidence may owe a higher duty than lower-level employees.[307] In *Broad-Ocean Technologies, LLC., v Lei* (2023), a U.S. District Court in Michigan found that "unless circumstances indicate otherwise, the employer-employee relationship alone generally does not give rise to fiduciary duties;"[308] "mid-level employees generally do not owe fiduciary duties to

[303] THE RESTATEMENT OF EMPLOYMENT LAW §8.01 (Am. L. Inst. 2015). *See also* DeMott, *Relationships, supra* note 155 (analyzing the differences between the two restatements and discussing some of the doctrinal challenges in the *Employment Restatement*).
[304] Dick v. Koski Prof'l Group, P.C., 950 N.W.2d 321, 364 (Neb. 2020). Despite being more than a nominal corporate officer, the employee was found not to have violated his fiduciary duties. *Id.*
[305] *Id.* at 366.
[306] N. Harris Comput. Corp. v. DSI Invs., LLC, 608 F. Supp. 3d 511, 528-29 (W.D. Ky. 2022).
[307] ATI Eng'g Servs., LLC v. Millard, No. X03-CV-18-6118978-S, 2022 WL 1553389 at *13 (Conn. Super. Ct. May 16, 2022) (holding the employee liable for breach of fiduciary duty based on his side work while employed by the plaintiff).
[308] Broad-Ocean Techs., LLC v Lei, 649 F. Supp. 3d 584, 596-98 (E.D. Mich. 2023).

their employers unless their employer places them in a position where they are responsible for strategic plans or operations, or where they are serving as their employer's agent."

Adding to the variety of approaches, in *Hora v. Hora* (2024), the Iowa Supreme Court has declined to impose fiduciary duties on employee managers, and distinguished between an "agent" and an "employee" based on the degree and nature of the person's service and control.[309] The court ruled that: "an agent usually has greater authority to act for the principal, such as negotiating contracts, while an employee typically renders services at the direction of the employer."[310] Texas courts also make a distinction: In *Stress Engineering Services, Inc., v. Olson* (2022), a U.S. District Court found that "Texas law recognizes two types of fiduciary relationships: formal and informal."[311] Formal relationships arise under legal concepts of agency, partnership, and joint ventures, while informal fiduciary relationships are found when one person trusts or relies on another based on a "special confidence," which may occur in the context of employee-employer relationships.[312]

In some states, courts are split amongst themselves. In *Movement Mortgage LLC v. Intercontinental Capital Group, Inc*. (2022), a U.S. District Court in North Carolina applying New York law noted that New York courts differ in their determination of whether an employee owes its employer a fiduciary duty.[313] Both parties devoted considerable time in their briefs to the question of whether all employees, or only some subset of higher-level employees, owe fiduciary duties to their employers in New York. Each side cited numerous cases supporting its approach, but the court determined that resolution of the question was unnecessary because the employees in the case at hand were management-level and therefore owed fiduciary duties to the firm.[314]

3. New Contexts for Old Questions

[309] Hora v. Hora, 5 N.W.3d 635, (Iowa 2024) (vacating a breach of duty claim against a company's operations manager).
[310] *Id.* at 645 (vacating a breach of duty claim against a company's operations manager).
[311] Stress Eng'g Servs. v. Olson, No. H-21-3210, 2022 WL 4086574, at *5-6 (S.D. Tex. Aug. 4, 2022).
[312] *Id.* at *5.
[313] Movement Mortg., LLC v. Intercontinental Capital Grp., Inc., No. 3:22-CV-147-RJC-DCK, 22 WL 19407537, at *4 (W.D.N.C. Dec. 28, 2022).
[314] *Id.*

Allegations of employee/agent disloyalty are hardly new, but the contexts of the issues seem to be changing. Social media, for example, presents new problems. Employees trash talk their employer online.[315] Remote work creates new challenges. In an era of software innovation and startups, principals and agents, and courts, struggle with who works for whom, and when. A full-time technology sector employee secretly takes a second full-time job and does both simultaneously.[316] Many gig workers operate on more than one platform, sometimes simultaneously working for competitors.

In addition, there are increasingly complex issues relating to agents operating in the grey area between between preparing to compete and competing with their principals. In *Yammine v. Toolbox for HR Spolka z Ograniczona Odpowiedzialnoscia Spolka Komandytowa* (2023), a human resources software and services company accused a former employee of breach of his fiduciary duty of loyalty relating to alleged double dealing during his employment.[317] The court denied the company's motion for summary judgment on the issue, based on questions about the impact of "demonstrations" of the software.[318] In *Byton North America Co., v. Breitfeld* (2020), a U.S. District Court in California confronted the duty of loyalty in the context of allegations that a co-founder, director, and executive officer of one electric vehicle startup solicited its employees to work with him at another electric vehicle startup, which then enjoyed allegedly suspicious product development progress.[319]

Technology is even changing the means of (alleged) duty of loyalty breaches. In *Ecosave Automation, Inc., v. Delaware Valley Automation, LLC* (2021), an AI startup (Ecosave) sued a number of former employees alleging breach of fiduciary duties relating to their move from

[315] *See* Jerry Morales, *Protected Activity or Disloyalty*, SNELL & WILMER: LABOR AND EMPLOYMENT (Mary 19, 2021), https://blog.swlaw.com/labor-and-employment/2021/05/19/protected-activity-or-disloyalty/ (discussing a 2021 NLRB Decision of Advice finding an employee's critical social media post disparaged the employer and insulted the employer's customers).
[316] *See* Rachel Feintzeig, *These People Who Work From Home Have a Secret: They Have Two Jobs*, WALL ST. J. (Aug. 13, 2021) (describing a "small, dedicated group of white-collar workers" with two full-time jobs).
[317] Yammine v. Toolbox for HR Spolka z Ograniczona Odpowiedzialnoscia Spolka Komandytowa, No. CV-21-00093-PHX-MTL, 2023 WL 6259412 at *8 (D. Ariz. Aug. 8, 2023).
[318] *Id.* at *8.
[319] Byton N. Am. Co. v. Breitfeld, No. CV 19-10563-DMG (JEMx), 2020 WL 3802700 at *1, *5 (C.D. Cal. Apr. 28, 2020).

Ecosave to a different AI startup.[320] The court considered their actions, which included, before their departures, backing up their work files to their iCloud storage accounts and, at their departures, returning their company phones either locked or with the data wiped.[321]

It is tough to argue that most agents in the gig economy should be prosecuted for disloyalty. While loyalty is constitutive of collectivities such as businesses,[322] and common law fiduciary duties of loyalty control "agency costs," loyalty arises within relationships. As such relationships have frayed, pressure has mounted to narrow the scope of agency law duties that require agents, especially independent contractors, to be loyal to principals with which they have little connection.

B. Business Associations and the World Around Them

1. Contractual Responsibility for Digital (Agents?) to Third Parties

As noted, agents traditionally have been assumed to be natural persons.[323] Only with the *Third Restatement* does "agent" explicitly include entities. Suppose, however, that a representation of a company is made digitally, not by a natural person or a legal entity. If a chatbot on a company webpage gives a customer bad information, was the company the maker of the promise?[324] What about situations in which an entity takes action through a smart

[320] Ecosave Automation, Inc., v. Del. Valley Automation, LLC, 540 F. Sup. 3d 491 (E.D. Penn. 2021).
[321] *Id.* at 498.
[322] Malcolm Rogge, *Humanity Constrains Loyalty: Fiduciary Duty, Human Rights, and the Corporate Decision Maker*, 26 FORDHAM J. CORP. & FIN. L. 147, 152 (2021) (explaining that loyalty is essential to corporate law).
[323] The *Third Restatement* does allow for situations in which a specific natural person is not identifiable. See RESTATEMENT (THIRD) OF AGENCY §7.03 cmt. c (2006).
[324] *See* Ashley Belanger, *Air Canada must honor refund policy invented by airline's chatbot,* ARS TECHNICA (Feb. 16, 2024) (concluding that the chatbot was not separate legal entity).

contract?[325] What about decentralized autonomous organizations (DAOs)?[326] Even bottom-up structures, designed to function without reliance on third-party agents or managers, may be vulnerable to *de facto* control groups and so-called "governance attacks" which divert the entity from its stated mission.[327] More generally, programs have origins and usually serve interests. Who should be responsible for the obligations or failings of a DAO?[328] The designer? The participants? The owner of the server? The affected parties?

2. Algorithms and Tort Liability

At least at present, new technology is liable to complicate firm responsibility for harms to third parties. Professor Mihailis Diamantis, discussing the impact of AI on corporate accountability, points out the increasing digitization of the workplace and maintains that "[a]s the human element plays a shrinking role in corporate activity, corporations will become increasingly immune from liability for the harms they cause" because the law is ill-equipped to handle situations involving corporate algorithms, as opposed to humans.[329] An employer might be liable for harm inflicted by an employee operating within the scope of employment, but failure by a "mere machine" under its control may not suffice[330] without a showing of fault by a human acting on its behalf[331] or a showing that the machine was flawed. In practice, especially

[325] Litigation relating to smart contracts is, so far, infrequent. In *Yuga v Hickman*, for example, the corporation responsible for developing a smart contract that sold non-fungible tokens enforced its trademarks and domain name against an individual who marketed competing, counterfeit NFTs using two confusingly similar domain names. Although both parties employed smart contracts to execute their intentions, the identity of the relevant actors did not seem to raise any questions. Yuga Labs, Inc. v. Ryan Hickman, No. 2:23-CV-111 JCM (NJK), 2023 WL 5275186 at *1-2 (D. Nev. Aug. 15, 2023).
[326] Governed by smart contracts programmed with its rules and logic, a DAO operates on a blockchain. *See* Gail Weinstein et al., *A Primer on DAOs*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Sept. 17, 2022), https://corpgov.law.harvard.edu/2022/09/17/a-primer-on-daos/ (explaining DAO basics).
[327] *Id.*
[328] Yu v Rari Capital Infrastructure, 2022 Cal. Super. LEXIS 65881 (Oct. 27, 2022) (considering motions in a suit by an individual against several defendants, including an LLC and a corporation who created DAOs, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and conversion in connection with execution of the DAOs' obligations to the plaintiff).
[329] Mihailis Diamantis, *Employed Algorithms: A Labor Model of Corporate Liability for AI*, 72 DUKE L.J. 797, 800-01 (2023).
[330] Baris Boyer & Andrew Tettenborn, *Artificial intelligence and civil liability – do we need a new regime?*, INTL J. L. & INFO. TECH. 385, 399 (2022).
[331] *See* Diamantis, *supra* note 329, at 801.

given the cost of litigation borne *ex ante* by plaintiffs, one might imagine distinctions between equally deserving claimants (or equally responsible defendants) based on the fact that in one case the harm is an employee's fault, and in the other the harm is inflicted by an algorithm.[332] As AI algorithms discriminate against applicants,[333] manipulate stock prices, and cause car crashes, courts will need to shift their current interpretations of "benefit" and "control" when defining an employee operating within the scope of employment in order to enable attribution of algorithmic harms to the business associations using them.[334] Diamantis discusses cases – an auto factory worker killed by a robot, a pedestrian killed by a self-driving car – in which it was difficult or impossible to attribute the fatal algorithmic problem to an entity, thus jeopardizing recovery to the families of the victims and even potentially incentivizing corporations to use AI to escape liability.[335]

3. Vicarious Liability for Gig Workers

Classification and multiple employer issues make vicarious liability cases involving gig workers more difficult. Is the worker an employee, making the employer vicariously liable for the tort, or not an employee, relieving the employer of liability, so that the losses fall elsewhere? In *Brown v Yazam, Inc.* (2024), a person injured in a traffic accident while a passenger in a vehicle booked through a rideshare company (Empower) sought to hold both the company and the driver liable.[336] Empower argued they were merely a software service provider, but the court, distinguishing their business model from that of Uber or Lyft, found that the injured passenger had alleged facts sufficient to support a plausible claim of an employment relationship, and rejected the company's motion to dismiss.[337] In *Pfadt v. Wheels Assured Delivery Systems,*

---

[332] *See* Baris Boyer & Andrew Tettenborn, *Artificial intelligence and civil liability – do we need a new regime?*, INTL J. L. & INFO. TECH. 385, 399 (2022).
[333] *See* Clara Hudson & Kaustuv Basu, *House Dems Eye How AI Bias in Housing, Banking Hurts Consumers,* Bloomberg Law (Jul. 23, 2024) https://www.bloomberglaw.com/product/blaw/bloomberglawnews/esg/BNA%2000000190-dbcf-d0ea-a5d6-dbcfb2a40000 (describing concerns about algorithmic redlining discussed during a House Financial Services Hearing on July 23, 2024).
[334] *See* Diamantis, *supra* note 329, at 801-4.
[335] *Id.* at 809-812; 825.
[336] Brown v. Yazam, Inc., No. 2023-CAB-6742, 2024 WL1801769 (D.C. Super. Ct. 2024).
[337] *Id*. at *3.

Inc. (2022), the Indiana Court of Appeals, applying the employee/independent contractor distinction factors from the *Second Restatement*[338] considered not just a truck driver's relationship with the company, but also the fact that he allegedly had driven for Uber as well.[339]

Social media may further complicate business association liability for harms inflicted by their workers on third parties. In *Doe v. YUM! Brands* (2021), a Texas court considered whether a local Pizza Hut franchisee had been negligent in hiring a delivery driver who sexually assaulted a customer.[340] The plaintiff argued that the company was liable for the assault because it neglected to search the driver's social media accounts when it conducted its background checks.[341] The court noted that it could find no authority for an employer's "duty to go beyond performing a background check to examine a prospective employee's social media accounts to determine whether hiring the individual would create an unreasonable risk of harm to others," and rejected the plaintiff's arguments based on a foreseeability analysis.[342]

Fragmentation and disaggregation also create problems. In *Webster v. CDI Ind., LLC* (2019), the Seventh Circuit Court of Appeals found a medical center vicariously liable for the negligence of a physician despite the lack of a direct contract, asserting that the medical center could not hold itself out as offering health care services and then escape liability using a "complex corporate arrangement of interrelated companies."[343] In *U.S. v. Dish Network L.L.C.* (2020), the Seventh Circuit found an agency relationship between a satellite television company and the retail telemarketers to whom the company had outsourced its sales efforts, which made the company liable for the telemarketers' violations of "do-not-call list" laws.[344] In *Spann v. Empire Fire & Marine Insurance Company* (2024), the Sixth Circuit, in order to apply a state no-fault insurance act, had to a untangle a situation in which a person rented a car from an agency

[338] Pfadt v. Wheels Assured Delivery Sys., 200 N.E. 3d 961, 972 (Ind. Ct. App. 2022) (citing and quoting the Second Restatement).
[339] *Id*. at 974 (pointing out that the rideshare work was different from the truck-driving work).
[340] Doe v. YUM! Brands, Inc., 639 S.W. 3d 214 (Tex. App. 2021). Note that the court also rejected an argument that YUM! Brands, Inc and Pizza Hut. were responsible for the failures of their franchisee. Id
[341] *Id.* at 228.
[342] *Id.*
[343] Webster v. CDI Ind., LLC, 917 F.3d 574, 575, 577 (7th Cir. 2019), *cited in* Harris, *Rival, supra* note 12, at 56.
[344] United States. v. Dish Network L.L.C., 954 F.3d 970, 976 (7th Cir. 2020) (Judge Easterbrook finding that "the norm of agency is that a principal is liable for the wrongful acts of the agent taken within the scope of the agency").

specializing in renting to rideshare drivers, drove for Uber, and injured another person in a traffic accident.[345]

Finally, precarity itself can make it difficult to allocate responsibility for torts. Widespread mental health struggles and several years of tight labor markets have placed many employees in positions with inadequate training or screening, sometimes leading to conflict and harm. Temporary workers are common in almost every sector. Courts have been variously sympathetic.

For example, in *Pauna v. Swift Transportation Company of Arizona* (2022), the Tenth Circuit Court of Appeals, applying Wyoming tort law, held that "The conduct of an employee is within the scope of his employment only if it is of the kind he is employed to perform; it occurs substantially within the authorized time and space limits; and it is actuated, at least in part, by a purpose to serve the master." Accordingly, Swift Transportation was not vicariously liable when a commercial truck driver, hired despite the driver's criminal history, severely beat another driver who cut in front of him at a gas station. The Swift employee was not acting within the scope of his employment at the time of the attack.[346] In *Advanced Disposal Services Atlanta, LLC v. Marczak* (2021), the Georgia Court of Appeals considered *respondeat superior,* negligent training, and negligent retention claims against a waste pickup company whose driver assaulted a customer. The court denied the company's summary judgment motion because of open questions regarding the employee's purpose and the foreseeability of the employee's violent reaction.[347]

In *Mitchell v. Rite Aid of Maryland, Inc.* (2023), the Maryland Appellate Court struggled with responsibility for a mass shooting carried by a temporary worker at a distribution center.[348] The shooter and the plaintiff victims were employed by two different staffing agencies, both of

[345] For an example of the legal complexity in the gig economy, *see Spann v. Empire Fire & Marine Ins. Co.*, No. 23-1798, 2024 WL1134687 (6th Cir. Mar. 15, 2024) (applying the Michigan No-Fault Auto Insurance Act's limitations period in a situation in which a person rented a car from an agency that rents to rideshare drivers, drove for Uber, and injured another person in a traffic accident).
[346] Pauna v. Swift Transportation Co. of Arizona LLC, No. 21-8009, 2022 WL 729005, at *1 (10th Cir. Mar. 11, 2022).
[347] Advanced Disposal Servs. Atlanta, LLC v. Marczak, 359 Ga. App. 316, 318, 320, 321 (2021) (leaving the question of scope of employment for a jury).
[348] Mitchell v. Rite Aid of Md., Inc., 257 Md. App. 273, 290 A.3d 1125, 1131-33 (2023) (considering liability for a mass shooting at a warehouse facility staffed by multiple temporary workers).

which provided workers to Rite Aid for the facility. The question of Rite Aid's tort liability for harm inflicted by the shooter in part turned on whether the victims were simultaneously employees of their staffing agency and Rite Aid (which would limit them to their workers' compensation remedy) or solely employees of the staffing agency, which was itself an independent contractor of Rite Aid.[349]

C. Law and Reliability

Business life requires a degree of reliability. A business association is based on internal relationships and duties that cannot be completely specified in advance, by contract.[350] Contractual arrangements are insufficient to enable third parties to govern their relationships with firms and, of course, torts often happen in situations where there is no *ex ante* agreement. In conjunction with other laws, common law agency has long articulated such relationships and so provided the necessary predictable consequences. Agency establishes a system for delegation of authority and attribution of firm actors, enables asset partitioning and the determination of creditors' rights, and sets out the liability of the entity for the torts of its employees.[351] In short, agency law was and is fundamental to commerce.[352]

As suggested in this Part VI, however, recent social and economic developments pose questions that the common law of agency currently has difficulty addressing**.** In order to govern themselves responsibly, individuals and firms need to be able to define the four corners of the "boxes" which they operate. Can ChatGPT commit libel? What happens if a FedEx delivery person hits someone's parked car? Is the result different if it is the Uber Eats delivery person?

VII. Conclusion: How Might Agency Law Evolve?

[349] *Id.* at 1147-48 (denying summary judgment on the issue).
[350] *See* Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).
[351] *See* Rauterberg, *supra* note 150, at 612-13.
[352] *See* WILLIAM BLACKSTONE, 1 COMMENTARIES 418 (1765) ("if I pay money to a banker's servant, the banker is answerable for it"); Rauterberg, *supra* note 150, at 636-43.

The common law responds to shifting economic and social forces and thereby evolves. The social contracts between business associations and the persons who work for them that came to seem normal, in the sense of model, in the post-World War Two economy[353] are gone from many industries. Perhaps ironically, business associations drove many of the changes, from insistence on contractual limitations on workers to the promulgation of new technologies, that now seem to imperil their own understandings of business life. The common law of agency will adapt to those changes in some way. People who are paid will have some relationship to those who pay them; somebody will make contracts; somebody will be responsible for harms. But there are many ways such questions can be answered.

A. Stay with "Current" Agency Law

One possibility would be to continue with the common law of agency as articulated in the *Third Restatement*, which would yield constructive outcomes in many if not all situations.[354] Many gig workers could be simply classified as employees, which is the thrust of the legislative and regulatory initiatives discussed above in Part V.C.2. Some ventures would adjust their business models to operate profitably. Others would fail.

Judges could focus on the value of loyalty and fairness in principal-agent relationships. Courts could enforce agents' fiduciary duties, *all* of agents' fiduciary duties, for both employee agents and independent contractors (non-employee agents). Third parties would be more able to rely on the liability of principals and would trade accordingly. Employer/principals, knowing they were responsible, would take more care in hiring, and employment would likely become longer-term. This would be expensive, not only for employers but for consumers and some employees, who presumably would not get hired. Is gig work better than no work? And shouldn't the common law develop?

B. Adapt Agency Law to an Agent's Business Role

[353] *See* WARTZMAN, *supra* note 211, at 361-2.
[354] In a gig economy dominated by technology companies, a fetish for change may seem like an obligation but basic legal principles often address new circumstances quite well.

Do or should an agent's fiduciary duties, and a company's responsibility for that agent, depend on that agent's role? For the purposes of corporate liability for employees' actions, there is a significant difference between, for example, corporate officers and the rank and file. Perhaps executives and officers should observe the duty of loyalty, and they should be able to impact the firm's relationships with third parties? For the predominantly at-will U.S. workforce, a requirement that employees be loyal to their employers or their power to impose liability on the employer for their actions may have "no legitimate role in today's business environment."[355] Should we return, in some deep jurisprudential sense, to the kind of thinking that animated *Watteau v. Fenwick,* and think about legal obligations in terms of social function?

Perhaps a shift is underway. As discussed above in Part VI.A.2, the *Employment Restatement* distinguishes between employees with more or less responsibility, and understands duties accordingly. This approach is attractive but also comes at a cost. Even a lower-level agent can do significant damage both to the entity and to third parties. Agents without an obligation to be loyal would threaten the firm's interest; mistakes presumably would made more often. In response, employer/principals would be likely to resort to contractualization,[356] or to increase surveillance of their workers. Moreover, such differentiation between management and "the rest" might increase income inequality even further.[357] Firms might be forced to compensate management-level employees for their "extra" duties and risks, and those costs may well be taken from rank-and-file wages.

C. Look Beyond Agency

[355] Marian K. Riedy & Kim Sperduto, *At-Will Fiduciaries? The Anomalies of a "Duty of Loyalty" in the Twenty-first Century*, 93 NEB. L. REV. 267, 268 (2014) (numbering the at-will workforce at 140 million in 2014). *See also* Kate Andrias and Alexander Hertel-Fernandez, *Ending At-Will Employment: A Guide For Just Cause Reform*, ROOSEVELT INSTITUTE (Jan. 2021), https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI_AtWill_Report_202101.pdf (stating the "vast majority" of employers operate at-will employment, which is allowed "in every state except Montana").

[356] *See* DeMott, *Relationships, supra* note 155, at 1275 (discussing employers' use of individual employment agreements or unilateral declarations to form relationships of trust and confidence).

[357] *See* Amy Deen Westbrook & David A. Westbrook, *Progressive Corporate Governance Under Social Capitalism: Do the Right Thing or Share the Wealth?,* 17 VA. L. & BUS. REV. 145, 155, 160-1 (2023) (discussing the great and increasing inequality in the United States). This is also connected to the fall of unionized labor and the rise of employers such as Walmart. *See* WARTZMAN, *supra* note 211, at 337.

Perhaps precarity and workplace isolation are the new normal. Absent substantial political will, gig work is likely to develop into whatever benefits employers. The political ethos of the *Third Restatement* is hardly necessary in principle, and we might organize business otherwise. In fact, as a society, we seem to be undertaking just such a reorganization. Under these circumstances, do we need or want loyalty within the firm? Loyalty may be essential to creating community, and enabling firms large and small to operate, and moral language has traditionally belonged in the firm context.[358] But, the idea that "business is business" is also very old, and perhaps becoming more true, as it becomes ever easier to replace people. Maybe the idea of loyalty is ill-matched with the job of the economic functionaries carrying out the business of firms in a highly digitized society.[359] Loyalty by agents of business associations may be a virtue we should no longer try to sustain.

Maybe the law should focus on individual accountability and consequences? Instead of focusing on agency, the law could emphasize that persons are always responsible for the deals they make, regardless of whether they make them on someone else's behalf. No additional relationships would be presumed, and remedies would be limited. Currently, agents are parties to contracts made on behalf of unidentified and undisclosed principals.[360] Perhaps that should be expanded to include the agent in the case of disclosed principals as well? The *Third Restatement* articulates an agent's liability for the agent's own torts, emphasizing that "It is consistent with encouraging responsible conduct by individuals to impose individual liability on an agent for the agent's torts, although the conduct may also subject the principal to liability."[361]

This might be simpler, but it might also enable business associations to impose significant externalities on others. No employee could cover the costs of a plane crash. Such a regime would also chill persons' willingness to serve as agents. Given that the principal controls the relationships, many if not most agents would presumably be uninclined to bear the

[358] *See* Johnson, *supra* note 123, at 47-55 (examining the perils and value of moral language in the corporate context).
[359] *See id.* at 49 (exploring the idea that corporate actors may merely be economic functionaries).
[360] RESTATEMENT (THIRD) OF AGENCY §§6.02, 6.03 (2006) (both explaining that an agent is party to a contract made on a principal's behalf unless the agent and the third party agree otherwise).
[361] RESTATEMENT (THIRD) OF AGENCY §7.01 cmt. b (2006).

consequences of the principal's decisions unless insurance could be believed. By the same token, third party unwillingness to do business could be expected.

Or, maybe the pressures confronting the common law of agency do not portend changes to the law of agency so much as signal need for societal action. Some have suggested that the human issues experienced by the precariat would be better addressed by portable benefits,[362] a universal basic income, or various other improvements to the social safety net. The political will to take such action, however, has not so far been evident, and in the meantime business associations continue to operate.

D. The Variability and Inescapability of Resolution

These are possibilities, and no doubt there are others. What we do know is that doing business (like other areas of human life) involves conflicts. It falls to the courts to resolve such conflicts as best they can. Over time, we may expect patterns to emerge, and it may soon be time for a fourth restatement of agency. In practice, the issue is not so much the policy question beloved of professors, "what should be done?" as the imperative to resolve particular problems, when "we cannot help but do this." So, in the meantime, judges, practitioners, business associations, and workers will continue as best they can in their uncertain and often precarious worlds.

END

[362] *See, e.g.,* Kirven, *supra* note 191, at 273-5.