WHAT'S WRONG WITH AGENCY?

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THE EMERGENCE OF AGENCY

"I FIRST shall endeavor to show," Professor Holmes told his class in 1882, "why agency is a proper title in the law."[1] It is not, he contended, merely an application of the general principles of tort, contract, possession, and ratification. Agency brings into operation new and distinct rules of law; the facts which constitute it have legal effects peculiar to agency alone.[2]

In a sense, agency was already a "title in the law." William Paley, an English barrister, had published a book on the subject in 1811, of which an American edition appeared in 1822.[3] In 1839, Justice Story had published his treatise on agency as the first volume of his immortal Commentaries.[4] Both these works had served as compulsory reading for Harvard law students before Holmes's time.[5]

But the conception of agency held by Paley and Story, and developed in the Harvard curriculum, was not Holmes's conception of the subject. Paley's full title was "The Law of Principal and Agent, Chiefly With Reference to Mercantile Transactions." Story's was "Agency as a Branch of Commercial and Maritime Jurisprudence." The course which Holmes was teaching was called, as it had been for some years, "Agency and Carriers."[6]

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1 Oliver Wendell Holmes, Jr., *History of Agency*, in 3 SELECT ESSAYS ON ANGLO-AMERICAN LEGAL HISTORY 368 (1909), reprinted from 4 HARV.L.REV. 345, 5 *id.* 1 (1891). These lectures will be cited hereafter with references to pages in the SELECT ESSAYS.

2 Holmes, *supra* note 1, at 369.

3 WILLIAM PALEY, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT, CHIEFLY WITH REFERENCE TO MERCANTILE TRANSACTIONS (2d Am. ed. 1822). The cover of my copy (apparently the original binding) bears the imprint "Paley on Agency." Paley also uses the term "agency," apparently as synonymous with "principal and agent," in his Preface. *Id.* at vii.

4 JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE (1839). The Preface (p. v.) describes the work as "the commencement of a series of Commentaries, which... it is my design, if my life and health are prolonged, to publish upon the different branches of commercial and maritime jurisprudence." Other early works on agency are cited in 1 FLOYD R. MECHEM, CASES ON AGENCY 10 (2d ed. 1914).

5 1 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 436 (1908); 2 *id.* at 86.

6 2 *id.* at 431. This course name had been introduced in 1876. HARVARD LAW SCHOOL CENTENNIAL HISTORY 76 (1918). Previously Agency had been listed as a subject (*id.* at 75; 2 WARREN, *op. cit. supra* note 5, at 128), but it

"Agency" in these contexts meant largely contract law, concerned as much with the contractual rights between the principal and the agent as between the principal and the public.[7] It definitely excluded the law of "Master and Servant." [8] And it was largely unanalytic, taking the rules and conceptions of the law as it found them without inquiring into their justification and utility.

Holmes's conception of agency was different. He was not interested in the phases which simply applied contract and tort rules to agency situations. He was interested in the phases of agency which made it different from other subjects of law—particularly in those phases which seemed to flow from the peculiar fiction whereby the agent and the principal are "feigned to be one person."

Wherever this fiction led, he wanted to follow it. Hence, agency did not stop with contract law; it embraced also the law known as "Master and Servant," where the fiction played still stranger tricks. Its study should extend to the doctrine of "ratification," by which an act which was not originally the principal's becomes his by later approval, "relating back" to the earlier time. Students were also to probe the procedural and criminal-law distinction between "possession" and "custody," which rested on the identification idea.[9] Wherever the fiction led, Holmes found the law at war with common sense.[10]

The Holmesian view of agency did not sweep rapidly through American law schools. It made no visible impression on the first published casebook on agency, presented in 1893 by Floyd R. Mechem of the University of Michigan.[11] Like Paley in 1811, Professor Mechem

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was probably regarded as a subtitle of "Commercial and Maritime Law." See 1 WARREN, *op. cit. supra* note 5, at 436.

7 See contents and text of PALEY, *op. cit. supra* note 3, and STORY, *op. cit. supra* note 4.

8 PALEY, *op cit. supra* note 3, at viii, expressly disclaimed anything more than incidental references to "Master and Servant."

9 Holmes, *supra* note 1, at 368–371. After referring to doctrines of so-called agency law which are no more than applications of tort and contract law, he concluded:

"If agency is a proper title of our *corpus juris*, its peculiarities must be sought in doctrines that go farther than any yet mentioned. Such doctrines are to be found in each of the great departments of the law. In tort, masters are held answerable for conduct on the part of their servants, which they not only have not authorized, but have forbidden. In contract, an undisclosed principal may bind or be bound to another, who did not know of his very existence at the time he made the contract. By a few words of ratification a man may make a trespass or a contract his own in which he had no part in fact. The possession of a tangible object may be attributed to him although he never saw it, and may be denied to another who has it under his actual custody or control. The existence of these rules is what makes agency a proper title in the law." *Id.* at 371.

10 Holmes, *supra* note 1, at 404–405.

11 FLOYD R. MECHEM, CASES ON AGENCY (1893).

expressly disclaimed any intention to cover Master and Servant.[12] Nor did he show any great interest in exploring the agency fictions. The same may be said of the first edition of agency cases issued by Ernest W. Huffcut of Cornell in 1896.[13] Mechem's successor at Michigan, Edwin C. Goddard, adhered to the mercantile conception of agency in his casebook as late as 1914.[14]

But the Holmes view did have an impact at Harvard. Three years after Holmes's lectures were delivered, "Agency and Carriers" became simply "Agency."[15] At about the same time it was moved from the third year to the second year in the curriculum[16]—possibly indicating a recognition of its place among the "fundamentals." In 1896 Eugene Wambaugh's *Cases on Agency* appeared, embodying many of Holmes's ideas in a standard casebook.[17]

Wambaugh's book began with the fiction which, in Holmes's mind, united the diverse facets of agency law—*qui facit per alium facit per se.* This was the heading of Chapter I, Section I, and the *ratio decidendi* of the first case.[18] Medieval origins were illustrated by cases of 1304 and 1401; Latin texts appeared in the footnotes.[19] The tort liabilities of master and servant received equal emphasis with the contract liabilities of principal and agent.[20] The undisclosed agency cases were chosen to highlight the fallacy of the identification theory; we find a jury refusing three times to follow a judge's charge against a third person who in good faith had paid the agent of an undisclosed principal.[21]

Gradually, the main features of the Holmes-Wambaugh pattern pervaded the law school scene. By 1928–29, there was probably no prom-

12 *Id.* at iii.

13 ERNEST W. HUFFCUT, CASES ON AGENCY (1896).

14 EDWIN C. GODDARD, CASES ON AGENCY (1914).

15 HARV. CENT. HIST., *supra* note 6, at 76. Holmes had, of course, left Harvard to pursue his duties as Associate Justice of the Supreme Judicial Court of Massachusetts after only one year of service at the law school.

16 2 WARREN, *op. cit supra* note 5, at 431, 445.

17 EUGENE WAMBAUGH, CASES ON AGENCY (1896). Wambaugh had been appointed to the Harvard faculty in 1892, but apparently did not take over the Agency course until a little later. See 2 WARREN, *op. cit. supra* note 5, at 448–449.

18 WAMBAUGH, *op. cit. supra* note 17, at 1.

19 *Id.* at 1, 79.

20 In Chapter II—The Agent's Power to Subject his Principal to Liabilities—Torts occupies 158 pages (95–253), while Contracts occupies 105 pages (253–358). "Topics Common to Torts and Contracts" occupies another 71 pages (358–429).

21 Scrimshire v. Alderton, 2 Strange 1182, 93 Eng.Rep. 1114 (1742–1743); WAMBAUGH, *op. cit. supra* note 17, at 627. Wambaugh omitted one of Holmes's agency topics—the distinction between "possession" and "custody," as drawn in procedural and criminal law. He also added topics not mentioned by Holmes, dealing with the relations of principals and agents to each other.

inent law school in which Agency was not a separate course,[22] and there were very few in which it did not include the tort liability aspects of "Master and Servant." [23] Mechem's first edition, confined to Principal and Agent, had been re-edited by Professor Seavey to include the liabilities of a "master." [24] Huffcut's first edition of 1896 had been succeeded by a second and third, in both of which Master and Servant assumed a prominent position.[25] In 1924, Edwin R. Keedy of Pennsylvania had brought out his agency cases, having similar scope.[26]

By the time the law of agency came to be graven in the tables of the American Law Institute, there remained no dispute about its existence as a separate topic, or its inclusion of "Master and Servant." Floyd R. Mehem, the first Reporter, told the Institute, "I know that a good many people . . . say there is no law of Agency," but he did not name any of them, and none of the judges or lawyers present gave any in-

22 The course was listed as regularly offered in all of about twenty law school announcements of this period examined by the writer.

23 This conclusion on the content of courses is based partly upon the content of casebooks used. Obviously both may be misleading, since professors fail notoriously to reach the parts of the casebook (or of the course description) which do not interest them. But catalogues and casebooks are good evidence of what professors intend to teach, and some evidence of what they do.

The casebooks examined in the preparation of this article are listed in chronological order below:

1893. FLOYD R. MECHEM (MICHIGAN), CASES ON THE LAW OF AGENCY
1896. EUGENE WAMBAUGH (HARVARD), A SELECTION OF CASES ON AGENCY
1896. ERNEST W. HUFFCUT (CORNELL), CASES ON AGENCY
1907. ERNEST W. HUFFCUT (CORNELL), CASES ON THE LAW OF AGENCY (2d ed.)
1911. GEORGE L. REINHARD (INDIANA), CASES ON THE LAW OF AGENCY
1914. EDWIN C. GODDARD (MICHIGAN), CASES ON PRINCIPAL AND AGENT SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS
1924. WARREN A. SEAVEY (HARVARD) (2d ed. of MECHEM, above)
1924. EDWIN R. KEEDY (PENNSYLVANIA), CASES ON THE LAW OF AGENCY
1926. HORACE E. WHITESIDE (CORNELL) (3d ed. of HUFFCUT, above)
1933. ROSCOE T. STEFFEN (YALE), CASES ON THE LAW OF AGENCY
1933. I ROSWELL MAGILL AND ROBERT P. HAMILTON (COLUMBIA) CASES ON BUSINESS ORGANIZATION
1937. LAYLIN K. JAMES (MICHIGAN), CASES AND MATERIALS ON BUSINESS ASSOCIATIONS
1938. KARL STECHER (LOUISVILLE), CASES ON THE LAW OF AGENCY AND PARTNERSHIP
1938. KARL STECHER (LOUISVILLE), CASES ON AGENCY
1940. ROBERT E. MATHEWS (OHIO), CASES AND MATERIALS ON THE LAW OF AGENCY AND PARTNERSHIP
1942. PHILIP MECHEM (IOWA), SELECTED CASES ON THE LAW OF AGENCY (3d ed. of MECHEM, above)
1945. WARREN A. SEAVEY, (HARVARD), CASES ON AGENCY
1948. EDWIN R. KEEDY AND A. ARTHUR SCHILLER, CASES ON AGENCY

24 MECHEM, CASES ON AGENCY (2d ed. by Warren E. SEAVEY, 1925). Herein cited as SEAVEY'S MECHEM.

25 ERNEST W. HUFFCUT, CASES ON THE LAW OF AGENCY (2d ed. 1907); ERNEST W. HUFFCUT, CASES ON THE LAW OF AGENCY (3d ed. by Whiteside, 1926).

26 EDWIN R. KEEDY, CASES ON THE LAW OF AGENCY (1924).

dication of holding this belief.[27] The sections which disclosed that masters and servants would be included were passed without comment as the conferees leaped to battle over the definition of "independent contractor." [28] True, "principal" and "agent" were defined by the first Reporter as distinct concepts from "master" and "servant." [29] But the final draft reduced masters and servants to the status of mere species in the genera of principals and agents.[30]

The Submergence of Agency

The unanimity about Agency, like many other types of unanimity existing in 1928, was to be short-lived. A new attitude was revealed in 1933 when Magill and Hamilton of Columbia renamed the subject "Business Organizations I" [31]—the first part of a course including agency, partnership, and corporations. In actual content, their casebook was largely traditional.[32] But Steffen's compilation, which appeared the same year,[33] fulfilled the promise of Magill's title. It attempted to cover the basic aspects of every representative relationship. "Corporation law" on the removal of directors and "contract law" on the interpretation of hiring agreements were laid alongside "agency" cases on the termination of authority. "Lack of authority" cases were compared with "ultra vires" cases. "Workmen's compensation," "partnership responsibility," and "parent and subsidiary corporations" were all ranged in ambuscade under a cover marked "Agency." The University of Chicago, which adopted the casebook, appropriately rechristened its course "Risk and the Business Enterprise." [34]

27 4 PROCEEDINGS A.L.I. 134 *ff.* (1926).

28 *Id.* at 144.

29 RESTATEMENT, AGENCY §§ 3–4 (Tent. Draft No. 1, 1926). The draft recognized, however, that a person might be simultaneously both principal and master, or both agent and servant. *Id.* § 5.

30 RESTATEMENT, AGENCY §§ 1–2 and comments (1933).

31 I ROSWELL MAGILL AND ROBERT P. HAMILTON, CASES ON BUSINESS ORGANIZATION (1933). Volume II, which was published in the following year, dealt with partnerships, unincorporated associations, and corporations.

32 The principal novelties consisted of footnote material incorporating paragraphs from books and law review articles. There were a few note paragraphs on employers' liability acts and workmen's compensation.

The arrangement of cases was traditional, commencing with Creation...of the Agency, and passing through Construction of the Grant of Authority, Claims of Third Persons, etc., to a penultimate chapter on Termination.

33 ROSCOE T. STEFFEN, CASES ON THE LAW OF AGENCY (1933). Steffen was then, as now, Professor of Law at Yale.

34 UNIVERSITY OF CHICAGO LAW SCHOOL, ANNOUNCEMENT (1939). The new title remained for several years, but had reverted by 1948 to old-fashioned "Agency." Several other schools which used the book indicated its content in their course descriptions, although not in the course title.

The merger of Agency with allied fields took a further step in 1940, with Mathews' casebook on "Agency and Partnership." [35] As the editor avowed, it proceeded on the hypothesis "not that Agency and Partnership are different fields . . . but that they are essentially the same field. . . ." [36] Cases on agency and on partnership lay side by side without even a section heading to separate them. Employers' Liability and Workmen's Compensation were also included.

Two other casebooks, of lesser influence, had also merged Agency with other topics. Laylin James of Michigan relegated it to a later chapter in a 1400-page book on "Business Associations" (chiefly corporations).[37] Karl Stecher of Louisville published a casebook on "Agency and Partnership" and another on "Agency" alone, both of which incorporated workmen's compensation and employers' liability.[38]

Even Mechem's cases—the oldest name in the field—included a chapter on Workmen's Compensation in its third edition, edited by Philip Mechem of Iowa.[39]

Only two of the books which appeared in this period confined themselves to the subjects which made Agency for Wambaugh. These, edited by Seavey of Harvard and Keedy of Pennsylvania,[40] are the works of men who had published earlier editions in the Twenties.[41]

The roster of extant casebooks under twenty-one years old can be summarized about as follows:

Group 1. Showing no substantial subject expansion since Wambaugh—two (Seavey, Keedy)

Group 2. Showing slight subject expansion since Wambaugh —two (Philip Mechem, Stecher's *Agency.*)

Group 3. Combining agency with partnership, although not mingling materials—two (Magill, Stecher's *Agency and Partnership)*

35 ROBERT E. MATHEWS, CASES AND MATERIALS ON THE LAW OF AGENCY AND PARTNERSHIP (1940). Mr. Mathews is Professor of Law at Ohio State University.

36 *Id.* at iii.

37 LAYLIN K. JAMES, CASES AND MATERIALS ON BUSINESS ASSOCIATIONS (1937).

38 KARL STECHER, CASES ON THE LAW OF AGENCY AND PARTNERSHIP (1938); STECHER, CASES ON AGENCY (1938).

39 FLOYD R. MECHEM, SELECTED CASES ON THE LAW OF AGENCY (3d ed. by Philip Mechem, 1942). Herein cited as PHILIP MECHEM. Philip Mechem, son of Floyd R. Mechem, has since been named Professor of Law at the University of Pennsylvania.

40 WARREN A. SEAVEY, CASES ON AGENCY (1945); EDWIN R. KEEDY AND A. ARTHUR SCHILLER, CASES ON AGENCY (1948).

41 See SEAVEY'S MECHEM, *supra* note 24, and KEEDY, *op. cit. supra* note 26.

Group 4. Mingling agency materials with business associations and industrial accidents—two (Steffen, Mathews)

Group 5. Mingling agency materials with business associations —one (James)

Counting casebooks is not, of course, a reliable index of educational trends. A more important question is, Who uses them? A count based solely on numbers would indicate an overwhelming preference for the more traditional books. Using the above classifications, the best information the publishers could give me suggests the following distribution of adoptions by AALS members:[42]

Group 1: 48 (Seavey 47, Keedy 1)[43]
Group 2: 51 (Philip Mechem 48, Stecher's *Agency* 3)
Group 3: 9 (Magill 3, Stecher's *Agency and Partnership* 6).
Group 4: 31 (Mathews 16, Steffen 15)
Group 5: 1 (James)[44]

Another significant approach would be to count the four schools which, through their graduate study programs, have achieved a pre-eminence in teacher training. It is reasonable to suppose that the choices of these will be highly significant of the trends which may be expected. This yields these results:

Group 1: one (Harvard)
Groups 2 and 3: None
Group 4: two (Yale, Columbia)
Group 5: one (Michigan)

While the facts may be analyzed in various ways, none of them conceals a significant trend away from agency as a separate "title of the law." There is a tendency to make it again, as it was before Holmes, a segment of another field. But the field, this time, is that of business organization. There is very little tendency to revive the separation of Master-Servant from Principal-Agent, or to treat Agency in the Paley-Story manner, as a facet of contract law.

[42] For these estimates, I am indebted to the courtesy of J. T. Faber of Callaghan & Co., Mr. George H. Chapman of Lawyers Co-operative Publishing Co., Mr. William E. Cox of Bobbs-Merrill Co., and Mr. Hobart M. Yates of West Publishing Co. These gentlemen gave me reported adoptions as shown on their records, with the express reserve that their information could not be guaranteed. There were considerable duplications among the lists, but not such as to alter the general magnitude of the numbers reported.

[43] Since Professor Keedy's present edition became available after the opening of the current school year, adoptions elsewhere than at Pennsylvania could not have taken place when the information was collected.

[44] James's *Cases on Business Associations* is used at several schools, but not apparently for its agency materials.

If we turn from casebooks to learned writing, we find further symptoms of a decline in Agency. There has been no treatise attempted since Mechem's second edition of 1914. While hornbooks proliferate for other first-year subjects, there has not been even a short reference book on agency law since Mechem's *Outlines* of 1923 and Powell's revision of Tiffany in 1924.[45] The best available text material on vicarious liability now appears in a torts book.[46] A like scarcity of recent law review writing is detectable, although not readily demonstrable in statistical terms.

The evidence indicates strongly a dissatisfaction with Agency as law schools have presented it in the past, and a marked lack of scholarly interest in topics it covered. In pages to follow, I want to disclose some of the problems which give rise to the dissatisfaction. Some of these problems are evidenced by the departures which later casebook editors have attempted to make from the older patterns. Others must remain my own surmises, based on conversations with teachers and with students, and in part, perhaps, on reactions which are personal to myself.

THE DEPREDATIONS OF THE LAWMAKERS

The Agency of Wambaugh was a beautifully conceived subject. The vagaries of the abridgments, in which the subject must be pieced together from titles like "Attorneys," "Agents," "Apprentices," "Factors," and "Servants" were left behind.[47] For the first time, the law

[45] Mr. Ludwig Teller published a text on agency in 1948 which appears to be in the nature of a course outline, usually citing only one classic case for each point discussed. It is in no sense a general reference book.

[46] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 471–504 (1941).

[47] Comyns' *Digest*, supposed to have originated in 1694, contains agency material under "Attorneys" (divided into "Attorneys in Court" and "Attorneys for Other Purposes"), and under "Servants" as a subtitle of "Justices of the Peace" (justices having jurisdiction of certain actions between masters and servants). Further material appears in the "Appendix to Chancery," apparently added to the *Digest* in the early 1800's, under the title "Principal and Agent." JOHN COMYNS, DIGEST (5th ed. 1822).

Bacon's *Abridgment*, dating from about 1730, contains agency material under the following heads:

Authority
Master and Servant
Merchants and Merchandise
(subtitles) Principals and Agents and Factors
Partners and Joint Traders

MATTHEW BACON, ABRIDGMENT (Am. ed. 1856, from 7th English ed. 1831).

Dane's, the first American abridgment, contains some agency material under procedural headings, as follows:

c. 30 Assumpsit—Factors
c. 47 Assumpsit—Master and Servant
c. 59 Case on Torts Against One for the Acts of his Agents, Apprentices and Servants

NATHAN DANE, GENERAL ABRIDGMENT OF AMERICAN LAW (1823–1829).

presented a title knitting together the whole subject of the employment of one man by another, whether for one job or for life, and whether on commission or on payroll. Wambaugh covered all aspects of this subject—not only the liabilities of principals to the public, but their liabilities to their agents, and their agents' liabilities to them. It was a basic, comprehensive title of the law, like "Contracts," "Torts," or "Crimes."

While Wambaugh's new design was becoming the universal fashion in the law schools, something was happening to the threads of which it was made. Legal rule after legal rule was cut down or totally abolished by legislative action. The employer's near immunity to personal injury suits by the employee had disappeared in every important industrial or commercial state.[48] In a few years the right to receive wages by contract would become insignificant in comparison with rights based on minimum wage laws.[49] Employers would be forbidden to discriminate against women[50] or against races and creeds.[51] While casebooks continued to present the "creation of agency" as a matter of contract, the most important prerequisite for a would-be real estate agent became a state-issued license.[52]

Law professors responded in various ways to the intrusion of legislative bacilli into the healthy body of Agency. At some points they

48 In 1928, forty-three states had workmen's compensation laws. The exceptions were Arkansas, Florida, Mississippi, North Carolina, and South Carolina. The history of the evolution from the fellow-servant rule to modern compensation acts is well told by WALTER F. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION (1936).

49 Dating from the federal Fair Labor Standards Act of 1938 (52 STAT. 1060, 29 U.S.C. §§ 201–219 (1946)). A representative sample of 1948 cases on employees' rights to wages and other compensation showed 58 per cent arising under state (2 per cent) or federal (56 per cent) wage and hour laws; 33 per cent arising under state and federal social security laws, and one per cent under other statutes, leaving only 8 per cent to be decided substantially on grounds of contractual rights to compensation. Even among the 8 per cent, statutes were frequently involved in an incidental way.

50 An example is the Illinois statute, ILL.REV.STAT. c. 48, §§ 2a–2b (1947). I have discovered no general compilation or analysis of the various states' provisions on this subject.

51 Good recent notes include: *Legislation Outlawing Discrimination in Employment*, 5 LAW. GUILD REV. 101 (1945); *The Trend in State Fair Employment Practice Legislation*, 23 NOTRE DAME L.REV. 107 (1947).

52 The Illinois act on this subject, passed in 1921, provides fine, imprisonment, and loss of compensation for operating as a real estate broker without a license. ILL.REV.STAT. c. 48, §§ 1–17 (1947). It is probably typical.

That such laws are widespread if not universal in American states is suggested by the dispersion of cases collected in Annotation, *Who Is Real-Estate Agent, Salesman, or Broker Within Meaning of Statute*, 167 A.L.R. 774 (1947), and earlier annotations there cited.

The statute books of some states also include licensing provisions for securities brokers and other types of agents. See, for example, ILL.REV.STAT. c. 121½, §§ 118, 124 (1947). In New York, a prize-fighter's manager must be licensed. Rosenfeld v. Jeffra, 165 Misc. 662, 1 N.Y.S.2d 388 (1937).

applied anesthesia. The ancient common-law cases were reprinted in new editions as though nothing had happened. At other points they used excision, dropping from their books the points on which the common-law decisions had become obsolete. But the subject of employer-employee relations was so full of excisions that one of the leading practitioners resorted to amputation. He wholly eliminated from his course the large fraction which had dealt with reciprocal obligations of worker and proprietor. At the other extreme were those who adopted prosthesis, by adding chapters composed of decisions under workmen's compensation laws.

In point of fact, all of the books used a little of each technique. Philip Mechem, in one of the two leading casebooks, used anesthesia on the problem of an employee's rights to recover wages,[53] and prosthesis on the employer's liability for industrial accidents.[54] Warren A. Seavey used the amputation treatment on employer-employee relations,[55] but made some use of plastic surgery in inserting relevant sections of the Negotiable Instruments Law, the Uniform Fiduciaries Act, and other laws into his materials on a principal's contractual obligations.[56] The most energetic prostheticists were Mathews,[57] Steffen,[58] and Stecher.[59] Relatively minor adaptations to the new legislation were effected by Magill-Hamilton[60] and Keedy-Schiller.[61]

The disadvantages of failing to acquaint a student with the types of law which occasion nine-tenths of modern litigation in a field are too obvious to be labored. Presumably there are few teachers who

53 PHILIP MECHEM, *supra* note 39, at 465–471 (cases dated 1890, 1827, and 1878).

54 *Id.* at 513–581. An excellent collection of materials on workmen's compensation.

55 SEAVEY'S MECHEM, *supra* note 24, contains chapters on Duties of Agent to Principal and Duties of Principal to Agent (at 730–834), which are wholly absent from SEAVEY, *op. cit. supra* note 40. The latter is the only extant agency book which wholly ignores inter-party relations of employer and employee. Seavey does print one case arising under an unemployment tax (p. 16), and one arising under workmen's compensation (p. 104), but neither is accompanied by any explanation of the statutes. To the student, they will be simply additional applications of the "master-servant" and "scope of employment" concepts.

56 SEAVEY, *op. cit. supra* note 40, at 336, 446, 463, 561.

57 See MATHEWS, *op. cit. supra* note 35, at 818–826 (Federal Employers' Liability Act), 827–869 (workmen's compensation).

58 See STEFFEN, *op. cit. supra* note 33, at 29–39 (tenure of corporate officers and directors), 178–208 (workmen's compensation), 435–453 (corporate directors' actions), 454–472 (ultra vires corporate transactions).

59 See STECHER, *op. cit. supra* note 38, at 150–209 (employers' liability laws and workmen's compensation).

60 See MAGILL AND HAMILTON, *op. cit. supra* note 31, at 185 (one-page summary of workmen's compensation law), 228 (one-page annotation on guest statutes), 259 (four-page annotation on permissive-use statutes).

61 See KEEDY AND SCHILLER, *op. cit. supra* note 40, at 171–172 (permissive use statutes). I find no reference to workmen's compensation or employers' liability in this book.

would condone the first three treatments, if teachable materials could be assembled by the fourth. But none of the able and ingenious scholars who have built social legislation into their Agency courses has been able to escape serious difficulties in presentation. The cases make little sense without the statutes, but most editors have felt obliged to omit statutory texts, presumably because they differ from state to state.[62] The cases do not seem to fit "logically" with the tort liability cases;[63] but they fit even less in a chapter on the principal's liability to the agent, where they rub shoulders with suits for brokers' commissioners. If put into a sort of appendix, they lose any cohesion with other parts of the course.[64]

Much smoother is the path of the editor who ignores the intrusion of legislation. He can present cases which lead easily from one to the next, all forming parts of a relatively seamless web.[65] The student who uses them may expect to gain a fine conception of the common-law doctrine; but he will be pathetically unprepared for most of the clients who are likely to visit his office.

RECIPROCAL ATTRACTIONS: AGENCY, BUSINESS ASSOCIATIONS, TORTS

While labor legislation was boring at Agency from within, Partnership was tugging at it (or being tugged by it) from without. The central theme which had drawn together the components of Wambaugh's Agency was "vicarious liability"—the principle that one man may be bound by the acts of another. But no one could follow the

[62] Steffen and Stecher print the Federal Employer's Liability Act, but no compensation acts. Mechem and Mathews print neither.

[63] The chief difficulty is that teachers like to classify the subjects under "Liabilities of Principals to Third Parties" and "Liabilities of Principals to Agents." The tort liability cases fall into the first group, and automatically exclude liability to the employee, who is by definition not a "third party." Further, the ordinary tort cases rely mainly on common-law doctrines, while the compensation cases are statutory.

In this writer's judgment, the obstacle is created by overworking the principal-agent concept. In the digests, accident liabilities, whether to "third parties" or to employees, are both covered under "Master and Servant." It is clear that the same fact situations lead to the questions which are debated both under *respondeat superior* and under workmen's compensation.

[64] See PHILIP MECHEM, *op. cit. supra* note 39, at 513–582. Professor Mechem has tucked in workmen's compensation as a final chapter, following one which is chiefly concerned with broker's commissions.

[65] Seavey's casebook and Philip Mechem's, up to the last chapter, have a striking continuity from case to case and from chapter to chapter. I have used Mechem repeatedly, and have been greatly impressed with its teachability, owing in large part to the gradual and coherent unfolding of the topic. Seavey's book, which I have not used, appears to me to have a similar or even greater smoothness of flow. As these are by far the most popular casebooks in the field, it seems likely that their success is due in substantial part to their easy classroom use.

principle far without noticing that it was as applicable to Partnership as to Master and Servant. Baty, who denounced vicarious liability in any context, could not exclude Partnership from his analysis.[66] Douglas, who saw in it a device for justly "administering risk," found it operative in Partnership as in Agency.[67]

These discoveries coincided with pressure on the Parnership course, caused by the expansionism of the law of corporations. In some schools, Partnership became a protectorate of Corporations in an alliance called Business Associations. The other possible solution was a course combining it with Agency. Steffen was the first to experiment with the latter alternative,[68] but it remained for Mathews fully to exploit its possibilities.

Mathews' casebook illustrates brilliantly the identity of many issues in the two subjects. For example, he places side by side a case where a general manager signed a check on the principal's account, and one where a partner signed a note on account of the partnership.[69] In either case the question is the same—the scope of the business. The Uniform Partnership Act makes the question identical in name as well as substance when it declares one partner to be the "agent" of the firm within the scope of the firm business.[70]

The forward step that Steffen and Mathews had taken was significant for many reasons. On the side of legal theory, it served to draw together different applications of the idea of one man's "representing" another. As a curricular device, it permitted the consolidation of two courses with a saving of student time. To teachers enthusiastic over law as a study of social institutions, or of social functions, it offered a stimulating opportunity of comparing different ways in which men can associate their efforts in a business enterprise.

Yet the new approach has caught on rather slowly, as my earlier survey of casebooks shows. The reasons are not far to seek. Once the innovators had opened the door on a universe of business organization, freed of the traditional boundaries of legal titles, they did not know where to stop. Steffen plunged on into every problem of corporation law that has any relation to agency law—*de facto* existence, shareholders' liability, parent-subsidiary relations.[71] Mathews was led on into the

66 THOMAS BATY, VICARIOUS LIABILITY 44–49 (1916).

67 Douglas, *Vicarious Liability and the Administration of Risk*, 38 YALE L.J. 720 (1928).

68 STEFFEN, *op. cit. supra* note 33, at 615–670.

69 MATHEWS, *op. cit. supra* note 35, at 175, 179.

70 UNIFORM PARTNERSHIP ACT (1914). Sec. 9: "Every partner is an agent of the partnership for the purpose of its business . . . ."

71 STEFFEN, *op. cit. supra* note 33, at 729–748 (De Facto Corporations), 748–766

study of partnership property, as affected by the rights of creditors and by dissolution.[72] In either case, the excursion led far from the fact situations and the legal doctrines which gave Agency a common core.[73] Many teachers who have felt the attraction of Steffen's and Mathews' enlarged views of Agency have probably shrunk from trying to lead first-year students as far as these books go.

While one side of Agency feels the tug of Partnership, the other senses the encroachment of Torts. At least one torts casebook has attempted a coverage of Workmen's Compensation.[74] Dean Prosser's excellent text on torts covers vicarious liability as well as employers' liability at common law and under statutes.[75] Perhaps the next step will be a torts casebook taking over the whole master-servant side of agency law.

This arrangement would offer some real advantages, in permitting a comprehensive view of methods of redressing personal injuries. Its hazards are equally obvious. Torts already breaks the seams of a full-year course. Furthermore, the comprehensive view of personal injury law would be attained at the expense of a comprehensive view of the employment relationship. Curriculum planners will have to decide which is the unit to be built up. The prolific tribe of Torts, united only by a common ancestry in the action of trespass, has much less contemporary appeal than the field of Agency, seen as a study of the methods by which men associate themselves for business enterprise.

THE BATTLE OF CONCEPTS

A third battle of the Agency world is fought upon the field of concepts. There will be no one to deny that concepts have been peculiarly troublesome in agency law. The very subject of Agency

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(Scope of Corporation Shareholder's Immunity), 766–790 (Parent and Subsidiary Corporations). Other corporation problems covered by Steffen are referred to above. See note 58 *supra*.

72 MATHEWS, *op. cit. supra* note 35, at 930–1026.

73 These problems are treated in most corporations casebooks. See, for example, ADOLF A. BERLE AND WILLIAM C. WARREN, CASES AND MATERIALS ON THE LAW OF BUSINESS ORGANIZATIONS 135–188, 315–331 (1948); ROBERT S. STEVENS AND ARTHUR LARSON, CASES AND MATERIALS ON THE LAW OF CORPORATIONS 111–117, 151–186, 703–771 (1947).

Other editors who have broadened Agency to include Partnership have stopped short of the corporation problems. See MATHEWS, *op. cit. supra* note 35, and STECHER, *op. cit. supra* note 38.

74 L. P. WILSON, CASES AND MATERIALS ON THE LAW OF TORTS 909–938 (2d ed. 1939).

75 WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 471–504 (Vicarious Liability), 505–548 (Employers' Liability) (1941).

as we know it, following the Holmesian outline, is based on the concept of one man's act becoming the act of another.[76]

The role of concepts in most agency casebooks contrasts strikingly with their role in, for example, casebooks in contracts. From Langdell to Fuller, contracts casebooks have plunged immediately into the parties' liabilities. In most of them the initial question is one of liability for a particular type of act—an offer.[77] There is no preliminary skirmishing with the abstract question of "What is a contract?" This may be one of the several reasons why Contracts has always been among the most satisfactory courses in the curriculum.

But agency books from Wambaugh to Seavey have usually begun with the problem of "What is agency?" [78] Steffen and Philip Mechem are the only two, in fifty years' history, to plunge immediately into a liability question—when is a principal liable? [79]

As if it were not enough to lead the student through definitions of agency before he has met the practical applications of the subject, some books begin with cases chosen apparently to show the difference between an "agent" and a "servant." [80] This is a distinction with which the elder Mechem struggled through two editions of his treatise and the tenta-

[76] See text and references in the first five paragraphs of this title.

[77] See C. C. LANGDELL, SUMMARY OF THE LAW OF CONTRACTS (2d ed. 1879), c. I, Mutual Assent; ARTHUR L. CORBIN, CASES ON THE LAW OF CONTRACTS (2d ed. 1933), c. 1, Offer and Acceptance; E. W. PATTERSON AND G. GOBLE, CASES ON THE LAW OF CONTRACTS (2d ed. 1941), c. I, Offer and Acceptance.

Fuller is even more eager to get to essence of the matter, commencing with cases on damages. LON L. FULLER, BASIC CONTRACT LAW (1947), c. 1, The General Scope of the Legal Protection Accorded Contracts.

[78] See WAMBAUGH, *op. cit. supra* note 17, c. I, Introductory Topics, Sec. I, Qui facit per alium . . . ; Sec. II, Who Can Be An Agent; SEAVEY'S MECHEM, *supra* note 24, c. I, Nature of Agency, Sec. 1, Agency Distinguished from Other Relationships; MATHEWS, *op. cit. supra* note 35, Sec. 1, Nature and Indicia of the [Representative] Relation.

In his latest edition, Seavey has almost emancipated himself from the definitional approach, since his first chapter is substantially restricted to cases on vicarious liability. But its heading is "Master and Servant," as distinguished from Chapter 2, Respondeat Superior. A teacher would probably need to take affirmative action to make his students notice that the subject of "Master and Servant" is being examined in the context of a claim of vicarious liability, and that the conclusions reached have no necessary bearing in a master's action for enticement, for example. However, Seavey's book certainly does permit the teacher to present the question in its liability context, if he wishes to.

[79] PHILIP MECHEM, *op. cit. supra* note 39, c. I, Vicarious Liability: The Course of Employment; STEFFEN, *op. cit. supra* note 33, Sec. 1, Tenure: The Importance of Contract.

[80] This approach was apparently invented by the elder Mechem. FLOYD R. MECHEM, CASES ON THE LAW OF AGENCY (1893), c. I, Definitions and Divisions. It was carried on by (among others) EDWIN C. GODDARD, CASES ON PRINCIPAL AND AGENT (1914), and persists amazingly in KEEDY AND SCHILLER, *op. cit. supra* note 40.

tive draft of the *Restatement*.[81] The Institute finally laid it to rest, after Professor Seavey became Reporter, by concluding that a servant *is* an agent—of a particular variety.[82]

When a student has surmounted the introductory chapter of the casebook, his struggle with concepts has only begun. Probably the best example of those that await him is the distinction between something which is genuine authority, and those other things which are not genuine authority, but are variously designated as "apparent authority," or "ostensible authority," or the result of an estoppel to deny authority, or something for which no distinctive name exists.[83]

The one thing clear about the bearers of all these different names is that all of them result in the principal's being liable, which is the only question at issue in the cases. According to one analyst, the principal does not in all cases become liable on a "true contract"; but he admittedly becomes liable in an action of assumpsit,[84] so that the distinction is difficult to demonstrate to anyone not already convinced of its existence.

Under these circumstances, a casebook designed to encourage the inductive method might be expected to lump together the cases that are so confusingly similar, and let the student determine for himself whether they are alike or different. This was indeed the procedure chosen by Wambaugh.[85] But the most popular contemporary casebooks segregate their cases sharply into those supposed to illustrate authority that is actual and those in which the authority is only apparent.[86] One of

81 In 1889 Professor Mechem observed that "the line of demarcation between the relation of principal and agent, and that of master and servant, is exceedingly difficult to define," and confessed that his best attempt at definition might be found "not altogether satisfactory in actual application." FLOYD R. MECHEM, CASES ON AGENCY 2–4 (1889). In 1914 he accepted reluctantly the name of "Agency" for the field of law comprising both relations, but still sought to maintain the distinction between "agents" and "servants," although conceding that others might find them indistinguishable. 1 FLOYD R. MECHEM, CASES ON AGENCY 3–4, 19–20 (2d ed. 1914).

The tentative draft of the *Restatement of Agency* included sections distinguishing agents from servants, but institute members had some difficulty in getting at the Reporter's meaning in the "agency" section. RESTATEMENT, AGENCY §§ 3–4 (Tent. Draft No. 1 1926); 4 PROCEEDINGS A.L.I. 141–144 (1926).

82 RESTATEMENT, AGENCY § 2, and comment *a* (1933). "A master is a species of principal, and a servant is a species of agent." The shift, which appeared in Proposed Final Draft (1933) was one of a large number presented to the Institute as dealing with language, not substance, and escaped membership debate. 11 PROCEEDINGS A.L.I. 77–78 (1933).

83 A classic discussion of these conceptions may be found in Seavey, *The Rationale of Agency*, 29 YALE L.J. 859, 872–885 (1920).

84 *Id.* at 877. Professor Seavey declines to call the resulting set of obligations a contract because there is "no mutual assent, even by the use of the most violent of presumptions." He does not, however, offer any other name for the set of reciprocal obligations which result from the agent's dealings with the third person.

85 WAMBAUGH, *op. cit. supra* note 17, at 253–357.

86 See PHILIP MECHEM, *op. cit. supra* note 39, c. IV, The Agent's Authority:

these insures complete isolation by inserting two chapters on other topics between the cases where the principal is bound by true authority and those in which he is bound by something which looks like authority.[87] It would be a comparable practice in a Contracts course to close the chapter on "true" consideration and follow it with two chapters on parties and third parties before returning to the distasteful topic of promissory estoppel.

Many teachers have doubtless experienced the difficulty of illuminating the boundary between authority which is genuine and that which, though spurious, has the same effects. The *Restatement,* which hews to this line, is driven to a number of peculiar devices to maintain consistency. In the chapter on interpretation, it devotes forty-eight sections to interpretation of true authority, and one section to saying that the rules for interpreting apparent authority are just the same.[88] On the subject of termination, it manages to state different rules for the different species of authority,[89] but explains in an aside that after the true authority is ended, the apparent authority lingers on.[90] Hence the agent continues to have power to bind the principal, and the disappearance of true "authority" becomes a matter of purely academic interest. It is no wonder that a very able teacher of Agency recently confided, "Every year it seems to take longer for my students to see the difference between actual and apparent authority."

The struggle against such odds has been abandoned by two of the contemporary casebooks in the field.[91] Again, the abandonment of old lines of demarcation raises new problems which are not easily solved. In one of these books,[92] as in the early work of Wambaugh,[93] the student is thrown upon a large and amorphous mass of cases with no framework of organization to supplant the one that has been re-

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Formalities; c. V, The Agent's Authority; Types of Sources; c. VI, The Agent's Power to Bind the Principal in Excess of his Authority; c. VII, The Principal's Responsibility for the Agent's Misrepresentations. SEAVEY, *op. cit. supra* note 45, c. 4, Authority; c. 7, Unauthorized Transactions. STECHER, *op. cit. supra* note 38, c. IV, Acts of Agent in Field of Contract . . . (1) Scope of Authority in General; (2) Apparent Authority; (3) Special Kinds of Authority.

87 SEAVEY, *op. cit. supra* note 87.

88 RESTATEMENT, AGENCY (1933). Sections 32–48 and 50–81 state the rules for "authority"; sec. 49 assimilates "apparent authority."

89 *Id.* §§ 105–124 (Termination of Authority), §§ 125–133 (Termination of Apparent Authority).

90 *Id.* § 125, comment *a.*

91 STEFFEN, *op. cit. supra* note 33, at 350–400; MATHEWS, *op. cit. supra* note 35, at 150–236. For a comment on the impracticability of maintaining distinctions between "kinds" of authority, see Note, *Analysis of "Apparent Authority" in Principal and Agent,* 1 U. OF CHI.L.REV. 337 (1933).

92 MATHEWS, *op. cit. supra* note 35, at 156–236.

93 WAMBAUGH, *op. cit. supra* note 17, at 253–357.

moved. A better solution seems to be that of Steffen, who breaks up the cases into factual groups, dealing with land transactions, sales cases, possession of goods, and the like.[94] Yet many teachers may feel that Steffen has so submerged the lines of judicial doctrine that students will have trouble in grasping the bases of argument to which judges customarily resort.

A third problem in concepts which plagues the Agency courses concerns dark closets of agency law such as nondisclosure of the principal and ratification. The traditional treatment is to put each in a separate chapter, which begins all over again with an introductory section on the nature of undisclosed principals or the nature of ratification.[95] Students are likely to emerge with little perception of the elements which are common to the law of undisclosed principals and that of other principals, or of the resemblances between the law of agents by authority (true or spurious) and the law of agents by ratification. A satisfactory escape from this maze remains to be discovered.

THE MAJOR POLICY QUESTIONS

The law of agency is rich with major questions of social policy. At the outset, there is the startling announcement by Professor (later Justice) Holmes that the whole theory of vicarious liability is "opposed to common sense" [96]—a charge which was repeated and documented, but not seriously challenged, for nearly thirty-five years.[97] Then there was the spirited reply by Harold J. Laski, seconded by Professor (later Dean) Smith and Professor (later Justice) Douglas.[98]

This conflict, which raged largely in academic circles, is even surpassed in interest by the battle over the fellow-servant rule. There are few

94 STEFFEN, *op. cit. supra* note 33, at 350–400.

95 The best illustration of this "enclave" treatment is in KEEDY AND SCHILLER, *op. cit. supra* note 40, at 341–406 (Ratification), 472–530 (Undisclosed Principal). But something of the same appears in PHILIP MECHEM, *op. cit. supra* note 39, at 280–336, and in SEAVEY, *op. cit. supra* note 45, at 574–666.

The latter two have, however, added a great deal of light to previous treatments. Mechem's great merit is in separating the problem of the principal's *liability* from that of his *rights* against the third party. Seavey offers a superb collection of cases showing the relation of ratification to the third party's right to rescind.

96 Holmes, *supra* note 1, at 404.

97 THOMAS BATY, VICARIOUS LIABILITY (1916). This is a brilliant and thorough polemic, in which Mr. Baty purported to examine and demolish every vestige of support for the rule which judges had then been following for two centuries, and have since followed and expanded.

A rather amusing reiteration of Holmes's criticism, without the master's learning or perspective, is Hackett, *Why is a Master Liable for the Tort of his Servant?* 7 HARV.L.REV. 107 (1893).

98 Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105 (1916); Smith, *Frolic and Detour*, 23 COL.L.REV. 444, 452–463 (1923); Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L.J. 584 (1929).

episodes in legal history where the leading of judicial intuition was to be more roundly denounced or more completely undone by elective assemblies.[99] If law's relation to social evolution is a fit subject for study, there is no better case history than the fellow-servant rule.

On the contract side of agency, the policy conflicts have been less extensively exploited, but they do exist. One of their subjects is the rule that death, though unknown to any of the parties, terminates authority—a rule which was denounced as "barbarous and archaic" on the floor of the American Law Institute. There was no voice to defend the merits of the rule; yet it was voted into blackletter under the sign of stare decisis.[100]

The traditional approach, of course, knows nothing of conflicts of opinion unless they are conflicts in the opinions of judges. The casebook of the man who has most masterfully summarized the arguments for and against vicarious liability,[101] from Holmes to Douglas, gives a bare citation to the original documents, and modestly omits all reference to the summary.[102] When Professor Seavey took to the American Law Institute his draft of a section on termination by death, he said:

Here is one thing you ought to argue about anyway. The bald statement . . . indicates that when a principal dies, the agent's power to bind the estate of the principal thereby terminates. This, it seems to many of us, is a very shocking result. . . .[103]

But the reader of *Seavey on Agency* hears no echo of the storm.

The most persistent attempt to raise the classroom shades and see the fistfights outside was made by Professor Steffen. His casebook is divided into sections, each about right for a day's assignment. Each section is devoted to one subject, often titled in terms of a policy problem, such as "Section 1: Tenure—The Importance of Contract"; "Section 21: Notice—The Organization Problem." For each section, there is an editor's introductory note (in full-sized type) stating the problem and posing provocative questions about its solution. Steffen has, however, respected decorum to the extent of leaving his questions un-

99 This history is told in WALTER F. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 11–16 (1936). For an early polemic against the rule, see T. G. SHEARMAN AND A. A. REDFIELD, TREATISE ON THE LAW OF NEGLIGENCE vi–vii (Introd., by T. G. Shearman) (5th ed. 1898).

For an interesting analysis of the class bias that underlay the origin of the fellow-servant rule, see Evatt, *Judges and Teachers of Public Law*, 53 HARV.L.REV. 1145, 1150 (1940).

100 11 PROCEEDINGS A.L.I. 85–94 (1933).

101 See Professor Seavey's excellent monograph (cited by everyone but himself), *Speculations as to Respondeat Superior*, in HARVARD LEGAL ESSAYS 433 (1934).

102 SEAVEY, *op. cit. supra* note 45, at 1.

103 See note 101 *supra*.

answered, unless one can find the answers in the cases he reprints.[104] One teacher has observed that Steffen's focus on the implications of legal rules has a great utility purely as a mnemonic device, since students more readily remember a rule when sides have been taken for or against it.

Two other editors indicate less optimism about the ability of students to produce meaningful answers to such questions as Steffen poses; they have taken the further step of printing textual material in which solutions are discussed. Philip Mechem's reproduction of excerpts from *The Administration of Workmen's Compensation* has been found useful by many law teachers.[105] Mathews has included substantial excerpts from Harold Laski on the policy questions of vicarious liability and of workmen's compensation.[106] Both these developments seem desirable, but need to be expanded. And when a polemic writer like Laski is quoted, balance would seem to require some statement, on a comparable plane, of the opposing arguments.

Steffen and Mathews have also tried to highlight policy questions by a radically new arrangement of the subject of agency, conforming to lines of economic analysis rather than of judicial doctrine. The student of *Steffen's Agency* confronts chapters with names like Management Responsibility for Losses, The Risk of Business Failure, and The Personal Injury Risks. Mathews' Table of Contents reads like a treatise on insurance, with scope of authority recaptioned Risk of Imposition of Contract Liability, vicarious liability called Risk of Imposition of Tort Liability, the agent's liability disguised as Nature and Extent of the Risk Imposed, and some rather strained headings like Delegation as a Factor in Risk and Ratification as a Risk. The law teacher is likely to feel like Mr. Challis on reading Sanders' *Uses and Trusts*—"like a traveller in a strange land, where everything wears an odd and unexpected appearance." [107] This is probably a desirable experience for law teachers. For a student there is the danger that after he has been brought up in this strange land the home country of judicial reasoning will seem equally strange when he returns to it.

104 ROSCOE T. STEFFEN, CASES ON AGENCY (1933).

105 PHILIP MECHEM, *op. cit. supra* note 39, at 513–524.

106 MATHEWS, *op. cit. supra* note 35, at 1, 815.

107 HENRY W. CHALLIS, LAW OF REAL PROPERTY 437 (3d ed. 1911). This should never be quoted without adding Gray's comment: "This unfamiliar aspect of certain legal writers is a not uncommon experience. But it is largely a subjective matter. Mr. Sanders strikes Mr. Challis as queer. I do not think he ever produced that impression on me." JOHN C. GRAY, RULE AGAINST PERPETUITIES 581 (3d ed. 1915).

It should be entirely possible to present the policy issues where they arise, even under a conventional organization of the subject. In a modest way, Philip Mechem has tried the latter approach.[108]

There are other policy questions lying close to the heart of agency law which the Agency courses miss, even though they are currently the subject of vigorous debate in the Supreme Court of the United States and in the halls of Congress. The outstanding one is that over the "economic reality" test of the independent contractor, as it has arisen in the law of labor relations, of minimum wages, and of unemployment insurance.[109] The cases are too recent for inclusion in most of the casebooks, but seem likely to be excluded anyway by those which confine agency to the study of common-law doctrines.[110] An issue of similar import is the problem of the employee's time when coming to work and leaving it. This question disclosed its potential repercussions in the fight over portal-to-portal pay.[111] But it is doomed to exclusion from Agency courses for the same reason that dooms the recent debates on the independent contractor.

WHAT SHOULD BE DONE ABOUT IT?

This survey of Agency and of agency casebooks will probably lead some readers to some conclusions, some to other conclusions, and some to no conclusions. It has led me to some conclusions, which are set out below.

Should Agency be partitioned? One solution of the Agency problem is to split its time between Contracts and Torts. Let the Contracts teacher take over the contractual liabilities of principals and their representatives, while the Torts man takes on vicarious liability. If Agency is to be confined to those remnants still dominated by judge-made law, this is probably the best solution. For Agency without its statutory side lacks currency, either in terms of basic issues or of cases. The problems

[108] In addition to his quotations from Dodd, *supra* note 105, Philip Mechem quotes Holmes and Baty against vicarious liability, and Morris for it (at 1–2), but in very condensed form, and in small-type footnotes.

[109] See National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 64 Sup.Ct. 851, 88 L.Ed. 1170 (1944); Hargis v. Wabash R. R., 163 F.2d 608 (C.C.A. 7th 1947); United States v. Silk, 331 U.S. 704, 67 Sup.Ct. 1463, 91 L.Ed. 1757 (1947); Amendment to Federal Unemployment Insurance Tax Act, Pub. L. No. 642, 80th Cong., 2d Sess. (June 14, 1948).

[110] See discussion above under the heading, "The Depredations of the Lawmakers."

[111] *See* Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers, 325 U.S. 161, 65 Sup.Ct. 1063, 89 L.Ed. 1534 (1945); Portal-to-Portal Pay Act, 61 STAT. 84, 29 U.S.C. §§ 251–262 (Supp.1948).

For evidence that the Portal-to-Portal Pay Act has not laid the question wholly to rest, *see* Central Mo. Tel. Co. v. Conwell, 170 F.2d 641 (C.C.A.8th, 1948), dealing with compensation for "sleeping time" put in by night telephone operators.

of a principal's liability on common-law obligations can gain perspective when seen in Contracts and Torts courses. The practical obstacle to this solution is that Contracts and Torts are already exceeding the capacities of men and of casebooks.

If Agency is not partitioned, it should not stop where the common law stops. It should attempt to expose for study all the basic obligations of men who act through employees. It should include an introduction to those problems which result from laws on workmen's compensation, minimum wages, social security, fair employment practices, and broker licensing.

How can legislation be handled? Expansion in the statutory fields has probably been inhibited by the thought that any one of these fields is a world in itself, involving constitutional law, administrative law, damages, taxation, and conflict of laws. But this objection applies to unemployment insurance statutes no more than it does to case law on the negligence of chauffeurs. In each field, Agency can pick out that part of the subject which deals with variations in the employment relation. In both fields, it can leave matters of procedure, due process, and jurisdiction to courses which can better deal with those topics. A number of successful casebooks demonstrate the feasibility of incorporating workmen's compensation with agency; something similar can be done with the other significant statutory topics.

The intelligent teaching of statutory law naturally requires supplying the student with statutes. This is a corollary of the principles which justify the case system. For the same reasons, the statutes must be edited by stripping them down to the sections a student is expected to read. Although statutes differ from state to state, so do judge-made rules. There is probably no more variation in the workmen's compensation laws of the forty-eight states than in judicial holdings on vicarious liability. If this expanded area for the course seems inconsistent with the name "Agency," the remedy is to change the name. There is merit in Magill and Hamilton's title, "Business Organization I." [112] At Illinois, where an expanded course is being used, the course is called "Agency and Employment." [113]

Jurisdictional disputes: Agency and related courses. There is no need for Agency to encroach on other courses. It should not be allowed to swallow Partnership in a school where most of the students are studying that subject in a separate course. But in many schools, Partnership

[112] I ROSWELL MAGILL AND ROBERT P. HAMILTON, CASES ON BUSINESS ORGANIZATION (1933).

[113] Mimeographed materials are being used.

has fallen into the group of courses which are perpetually "Not offered, 19XX–19XY." In others, it is taken by a handful of students who need a two-hour course to fill out a senior program. But the elements of partnership are part of the daily ration of practicing lawyers. Some introduction to them belongs to all students, and Agency is an economical container for these elements.

The same arguments do not apply to those problems on the periphery of corporation law involving *de facto* corporations and *ultra vires* acts. For these there is an adequate separate course, and one which contains a large part of the matrix to which *de facto* and *ultra vires* belong. There is no apparent justification for inflating the agency course with these subjects.

On its other flank, Agency should not be permitted to encroach on a job which is being done by courses in Labor Law or (where it is offered) Workmen's Compensation. But both of these courses are usually advanced electives, chosen by a minority of the student body; they aim to explore the frontiers of their topics. All Agency can aim to do is suggest in a general way the duties imposed by these kinds of laws, and to outline their coverage so far as it is affected by conceptions of who are "employers," and how broad is the "course of employment." These courses would probably gain by having their students already introduced to the existence of labor legislation and its purposes.

Will it be a hodge-podge? Few teachers are likely to challenge the value of injecting students with the complex of information outlined in these paragraphs. Their question will be whether these diverse strains of virus are compatible, or whether their interactions will produce convulsions. It would be futile to deny that Seavey's strain of common-law principles is a more harmonious dose then Steffen's confection of cases, statutes, policy questions, and observations on business practice.

To this writer it appears that the indigestibility of some of the more experimental courses is largely remediable, if one wants to remedy it. If workmen's compensation is introduced by cases on jurisdiction in interstate employment cases, it will mix poorly with the other materials of the course. If the same subject is presented by cases of employees injured while driving on an unauthorized route, or at horseplay in the shop, it will merge insensibly with the most traditional master-servant cases. The professor will be at pains to distinguish the issues involved, rather than to tie them together.

Similarly, broker license laws will seem irrelevant to other principal-agent cases if presented by cases on judicial review of the refusal of a

license. But cases on the unlicensed broker's right to his commission will harmoniously fill out the picture of an agent's right to compensation.

Legal essays can help the job of integration, not only for new materials but for the old as well. Old English cases like *Jones v. Hart* [114] and *Michael v. Alestree* [115] only begin to take on meaning for most students when compared with the conflicting views of Holmes and Baty about their origins.[116] Laski's retort to Holmes and Baty ties common-law vicarious liability to workmen's compensation, and suggests the flow of ideas toward unemployment insurance and minimum wages.[117] Corbin's classic on the "authority" of an agent offers a vastly more meaningful way of thinking about the actual and apparent authority cases.[118]

Agency *can* be modern, and still be teachable.

114 PHILIP MECHEM, *op. cit. supra* note 39, at 1.
115 SEAVEY, *op. cit. supra* note 45, at 1.
116 See notes 1 and 97 *supra.*
117 See note 98 *supra.*
118 Comment, 34 YALE L.J. 788 (1925).