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New York University School of Law



**November 5th, 2026, from 4-7 pm
Lester Pollock Room, FH, 9th Floor**

Colloquium in Legal, Political, and Social Philosophy

**Conducted by
Sophia Moreau and Liam Murphy**

**Speaker: Richard R.W. Brooks, NYU
Paper: Powers for Making Agents Act on One's Behalf**



Colloquium Website: <http://www.law.nyu.edu/node/22315>

Powers for Making Agents Act on One's Behalf

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October 22, 2026

1 Introduction

Our point of departure is the principal-agent relationship, a longstanding concern among economists. My more specific aim is the nature and sources of agency and power within such relationships. Agency and power are, of course, subjects of sustained and critical inquiry in law, philosophy, sociology, and allied disciplines. But let's begin with economics.

It is hardly surprising that a discipline founded on observations concerning the division of labor would closely attend to how people enlist and direct the labor of others. While not exactly characterizing a 'state of nature,' Adam Smith invited his readers to picture something akin "[i]n the

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lone houses and very small villages which are scattered about in so desert a country as the Highlands of Scotland, [where] every farmer must be butcher, baker and brewer for his own family.”¹ These farmers, like everyone else in Smith’s view, have a natural “propensity to truck, barter, and exchange,”² giving rise to a division of labor which, “once thoroughly established,” makes exchange a necessity of everyday life. “Every man thus lives by exchanging, or becomes, in some measure, a merchant,” explains Smith, “and the society itself grows to be what is properly a commercial society.”³

Appealing to the self-interest of others then becomes the essential means of maintaining the interwoven exchanges on which such a society depends:

It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love and never talk to them of our own necessities, but of their advantages.⁴

Somewhat concealed in this account are the contributions of agency and power that precede the exchanges of meat, brew and bread. For unless each butcher, brewer and baker carries out all aspects of their specialities, they must secure the labor of others, presumably by delegating tasks and exercising power over their performance. Labor doesn’t divide itself. To speak only in terms of a division of labor leaves unaddressed questions about the *delegation of labor* and the agency and power to secure it.

These questions were already present before the emergence of commercial society and, in fact, they may be more apparent in the picture of scattered farming households in the Scottish Highlands. Farmers providing for their own families rarely supply everything with their own hands. Organizing household labor and exercising authority over it are essential aspects of their own agency. As Hannah Arendt emphasized in her account of the ancient household, freedom from the necessity of laboring oneself rested on the capacity to make others labor.⁵ Household management is after all the principal concern of *oikonomia*, the Greek source of our word “economy.” Commercial society extended the organization of labor beyond households wherein agency, authority and power are already constituted. What, if anything, can labor within (and exchanges between) ancient households tell us about agency and power today?

Searching for an answer to this question, at least with respect to the law of agency, Oliver Wendell Holmes proposed “the starting-point of the modern law is the *patria potestas*”—i.e., “power of the father” exercised by the *paterfamilias* (the male head of a household) over his wife, children, servants and remote male-line descendants, irrespective of age. Then, there were those he enslaved.⁶ His extraordinary *power over* them was essentially connected to their *power to* act on his behalf—a critical aspect of agency in the common law (as I will argue below) although Holmes does not make

much of the connection. Rather, for Holmes, the connection between Roman law and modern agency law is in the identification, or absorption, of the slave into the *persona* of the master.

To demonstrate the point, Holmes begins by noting “a slave has no legal standing, but is absorbed in the family which his master represents before the law.” From there he goes on to “say that a free servant, in his relations as such, is in many respects likened by the law to a slave[.]” and then, taking a “next step,” he extends the argument to free agents who, he says, “may be treated as if servants[.]” With this train of thought Holmes, developing a through line from slaves to servants to agents, concludes:

This is the progress of ideas as shown us by history; and this is what is meant by saying that the characteristic feature which justifies agency as a title of the law is the absorption *pro hac vice* of the agent’s legal individuality in that of his principal.⁷

Scholars of Roman law and early English common law have questioned this “progress of ideas”—from the identification of the *paterfamilias* and those enslaved in his household (under a so-called “unity of person” account) to development of the modern law of agency—proposed by Holmes.⁸ Nonetheless, his reliance on slavery to explain agency is instructive.

Consider, for example, the situation of Simon Gray, an enslaved black man who was owned by the Andrew Brown Lumber Company (Brown Lumber Co.) in Mississippi. Gray was also the company’s legal agent. As Juliet

Walker documents, Gray captained the company's riverboat, supervised enslaved and free white workers, and transacted with third parties on behalf of the company.⁹ A corporate owner of an enslaved agent brings into view several often overlooked or conflated aspects of power in the principal-agent relationship.

First, the company's *power over* Gray was sweeping. Its managers could discipline him corporally, constrain his movements, and direct his most personal decisions. They also appear to have used financial incentives, other rewards, and no doubt persuasion to get him, in Robert Dahl's formulation, to do things he "would not otherwise do."¹⁰ Second, one might expect that Gray himself exercised *power with* the workers he supervised as well as perhaps those who supervised him in their more collaborative endeavors. Hannah Arendt pointed to this as a distinct type of power in 1969, as Abizadeh recounts in his analysis of social power, though Arendt did not use that precise term or reference Mary Parker Follett, who "was perhaps the first to mark the distinction in English, in 1925."¹¹ A pioneering management scholar, Follett sought "to develop the conception of power-with, a jointly developed power, a co-active, not a coercive power," which she illustrated with a comment a workman once made to her: "In this factory they don't just try to persuade us, they try to convince us."¹² Third, and most revealing, Gray's *power to* act on behalf of the company is also starkly shown by

their distinct status and legal capacities.

Being a corporation, the Brown Lumber Company could be a bearer of rights, privileges, powers, immunities and their correlatives.¹³ As a strictly legal person, however, it lacked any natural capacity to act. Gray presented the largely complementary case. As an enslaved person, he was legally disabled from many of the entitlements enjoyed by the company, but his enslavement obviously did not eliminate his natural agentic capacity. The corporation's legal powers and Gray's agentic capacity were necessarily combined in his *power to act* on the company's behalf as a legal agent. Without the contribution of another's agentic capacity, the corporation is unable to act; without the delegated or attributed legal power of another person, Gray's agentic capacity alone cannot supply the legal power to bind anyone, including himself. Gray's legal disabilities and the corporation's agentic incapacity make their dependence on each other's contribution especially apparent.

Other cases involving persons with restricted legal capacities reveal similar dependencies: e.g., monks historically subject to civil disabilities and married women under coverture could act as agents in law, as minors can today, notwithstanding their respective legal disabilities. To be sure, the historic disabilities of monks, married women and minors today differ in their grounds and extent. What matters here is that a disability affecting a

person's own legal capacity need not prevent that person's agentic capacity from giving effect to the legally attributed powers of another. These outlier and, in some instances, outdated cases illustrate a necessary aspect of the *power to* act on behalf of another in the law of agency. When a person acts on their own account, that person's natural agentic capacity enables the exercise of their own legal power. In agency law, one person's agentic capacity enables the exercise of another person's legal power. Agentic capacity and legal power are necessarily separate when an agent acts on behalf of a principal, which can be easy to overlook when principal and agent each possess both legal and agentic capacity.

Nor need the three forms of power distinguished above (i.e., *over*, *with* and *to*) operate separately. Gray could not alone load and transport large cargo of lumber downriver. His capacity to do so depended on the coordinated efforts of the crew, whose work he supervised. In other words, his *power over* them could support their *power with* one another to accomplish the voyage. As Abizadeh puts it, "not only can power-over be an indispensable basis for power-with, power-with can also be an indispensable basis for—indeed, take the form of—power-over."¹⁴ Company managers depended on Gray's *power to* discipline and reward the crew in order to sustain the corporate enterprise which had *power over* all of them. And no doubt Gray's authority over free white workers in antebellum Mississippi, in particular, re-

quired the concerted backing of the company’s managers and owners—their *power with* one another and Gray sustained his *power over* the crew. These connections leave some more basic legal questions to be addressed—such as what does it mean to be an agent in law and what is required of an agent to act on behalf of a principal—to which we now turn.

2 Agents in Law

Given law’s practical demands, terms and concepts contested in other domains are often made tractable to get on with the business of settling disputes. Rarely do legal definitions, however, put an end to controversies over the meaning of those terms and concepts (as illustrated all too well by the legal definition of a “person”). Still, law can be a good place to start. Taking this tack, Gideon Yaffe extracted a “legal definition of the term ‘agent’ ” from the legal doctrine that “[o]nly exercises of agency are appropriate objects of criminal liability.”¹⁵ After reporting subsidiary definitions for “act” (i.e., “a willed bodily motion”) and “omission” (i.e., “the absence of an act that the person could have performed”), Yaffe concludes:

It follows from this explicit legal doctrine that under the law, an agent is simply a creature that is capable of action or omission in these senses. If, and only if, you can will and guide your body in accordance with your will, are you an agent.¹⁶

That's not a bad start, and Yaffe goes further "to uncover a somewhat hidden conception of agency in the law" (i.e., the concept of being the *agent of* a given event) in the doctrine of proximate causation.¹⁷ Looking beyond his own inquiry, he notes that other legal rules may also be usefully enlisted for "the project of mapping the law's conception of agency."¹⁸ No doubt the doctrines related to the principal-agent relationship are prime candidates for conscription in this broader mapping project and, more specifically, for the present effort of charting the nature and sources of agency and power within such relationships.

For this purpose, the *Restatement of Agency* offers a useful starting formulation. While there is no single legal definition of the principal-agent relationship, the most recent *Restatement* provides a broadly accepted characterization of its main elements:

Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.¹⁹

There are three essential elements to this definition: (1) it is a manifestation of assent between two persons, a "principal" and an "agent", that gives rise to the consensual relationship, wherein (2) it is agreed that the agent shall act on the principal's behalf and (3) shall be subject to the principal's control. The first two elements are broadly shared with other fiduciary rela-

tionships and thus do not distinguish the principal-agent relationship. What distinguishes it is power, captured here by the requirement that the agent be subject to “the principal’s control.” Before elaborating on that requirement, however, a brief comment on the first two elements (the relationship’s consensual character and acting on the principal’s behalf) is warranted.

Manifesting assent does not necessarily mean choosing freely among acceptable alternatives. Whether employment relationships are truly consensual remains contested, and the legal recognition of assent does not settle that controversy. As Hale and Commons emphasized, bargaining takes place within an allocation of legally supported powers, including powers to withhold resources or opportunities that others need. Law helps determine which pressures may be brought to bear in securing agreement. Gray’s case makes the distinction stark: his enslavement did not prevent the recognition of his actions as those of an agent, but neither did his undertaking to conduct the company’s business establish that he freely accepted the conditions under which he acted. Acting on the principal’s behalf concerns a different connection. An agent brings a natural capacity for action to the exercise of another person’s legal powers. Gray’s capacity to negotiate and conclude transactions was his own; the legal powers he exercised for the company were attributable to the principal. Assent helps establish the arrangement through which those contributions combine.

Finally, the agent acts subject to the principal's control. Not everyone who consensually acts on behalf of another is an "agent" in the sense described here. Guardians and trustees act on behalf of others to whom they owe fiduciary duties, just as agents owe fiduciary duties to their principals. However, those other fiduciaries lack the third crucial element of agency—*power*. None are subject to the control of their beneficiaries. To be an "agent" by definition, according to doctrine, is to be subject to the power of a "principal." The principal's right to direct action within the relationship is even greater in the special case of master-servant (or employer-employee). "A master is a species of principal, and a servant is a species of agent," characterized as follows by the *Restatement*:

- (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
- (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.²⁰

In the modern doctrine, control in the "physical conduct in the performance of the service" doesn't mean that the master may physically handle the servant's body. Rather, the phrase is about the right to direct the servant's physical conduct in doing the work: what tasks to do, how, when and where. Older common law did go further, though. Masters had a recognized right of

“moderate correction” over some servants, such as apprentices and servants who lived in the household.²¹ Masters then also held something close to a property interest in their servants’ labor. These interests, as applied to white persons, largely disappeared by the early nineteenth century,²² and following the American Civil War, the Thirteenth Amendment of the U.S. Constitution sought, quite imperfectly, to put an end to the notion of property in another person’s labor, irrespective of race.²³

3 Agents in Economics

In his graduate microeconomics textbook, subtitled *The Economic Agent*, Ariel Rubinstein describes an economic agent as the basic behavior unit in conventional economic models.²⁴ “Most often, we do have in mind that the economic agent is an individual, a person with one head, one heart, two eyes, and two ears,” concedes Rubinstein, but such notions of an economic agent as “an individual” are largely superfluous for the task at hand. In “advancing to the stage of economic models,” these agents needn’t be endowed with a “name, age and gender, personal history, brain structure, cognitive abilities, [or] emotional state.” All that is required, “in most of economic theory [is that] we specify an economic agent only by his attitude toward the elements in some relevant set, and usually we assume that his attitude is expressed

in the form of *preferences*.”²⁵ In other words, an economic agent is “a unit that responds to a scenario called a *choice problem*, where the agent must make a choice from a set of available alternatives [according to] a specified deliberation process ... called *rational choice*.”²⁶

Such a restricted view of the economic agent reflects the parsimony of standard microeconomic and game-theoretic models, rather than necessarily any limits to the economic imagination. Still, this stripped-down version of an agent captures the commonsensical appreciation of agency grounded in choice. An economic agent is an active chooser—one capable of making choices (always able to give an answer when asked to choose between or among objects and courses of conduct) and one who does so in a consistent manner. These choices are, to be sure, constrained by the requirements of “rationality,” narrowly defined. Yet even within these confines we have an agent who chooses. It is a separate matter whether such choices reflect the behaviors of actual individuals, or whether anyone should behave as an economic agent would. Nonetheless, the conventional economic agent has its uses, and economists may still adopt, as Amartya Sen has, “the term ‘agent’ ... in its older—and ‘grander’—sense as someone who acts and brings about change, and whose achievements can be judged in terms of her own values and objectives[.]”²⁷

Sen's richer conception invites attention not only to an agent's capacity to choose, but also to the values and understandings through which the agent makes sense of acting with others. The conventional economic agent, when conceived as exclusively self-interested, is in this respect a stunted social actor—capable of choosing among alternatives, but restricted to understanding social relations through their contribution to individual advantage. Charles Taylor clarifies what this restricted conception leaves out by distinguishing the simple weighing of alternatives from what he calls “strong evaluation,” whereby agents assess the worth of their desires, motivations and actions.²⁸ An agent may reject a desirable course of action because it is deemed unworthy of the person they aspire to be, rather than because another course promises greater satisfaction of preferences. Attending to these judgments draws us to the shared understandings through which individuals interpret their relations with others, offering a richer way to situate economic agents within the organization of labor.

Across all societies individuals organize and conceive of “exchanges” through conventional modalities. According to Alan Fiske, there are only four basic modalities, each one offering individuals a distinct mental model “to plan possible actions and anticipate others’ future actions, and above all to coordinate action so that dyads and groups act in concert—undertaking complementary actions that mesh” and “make sense” of their exchanges,

from acceptable means of persuasion and negotiation to permitted critiques, demands, excuses and sanctions when exchanges fail to occur as imagined. Fiske has his own distinct terminology, but I will refer to these modalities as *authority*, *solidarity*, *reciprocity* and *individuality*.²⁹ These four modalities structure how all people relate to each other, including how they conceive of and organize their labor and exchanges.

Consider a trivial case where a parent says to a child “take out the garbage now or no allowance this week” and the child complies. Between the parties, the reasons for the child’s compliance may be grounded in authority (i.e., a parental command with a threat of no allowance among other possible sanctions) or solidarity (they understand themselves as engaged in care-taking acts of family and household) or reciprocity (their ongoing weekly repeated interaction calls for action to preserve expectations of future in-kind reciprocation) or individuality (where the child’s contingent performance turns on the parent’s payment of ‘allowance’ and both performance and payment are based on their individual consent and individual rationality, along with their preferences and desires). Mismatches between parties or a mix of modalities for either party will complicate this simple framework, not to mention the multiplicity of rules, manners and habits, operating at any given time, within and between the basic modalities.³⁰

These modalities, trivially illustrated in the parent-child relationship, apply equally well when we move from the household to commercial society. Take, for instance, exchanges between buyer and seller, creditor and debtor, principal and agent, or within a business partnership or corporate entity. In each of these exchange relations one can find authority, solidarity, reciprocity and individuality (to varying degrees)—although we might expect relatively more authority in principal-agent and master-servant relationships, more solidarity in partnerships, more reciprocity among long-term relational contractors, and more self-interested individuality in arm’s-length sales and credit transactions. Even within a hierarchical firm (today’s version of the ancient household of *oikonomia* in our ever growing commercial society) modes of fiat and authority may give way to team production and solidarity, or special dispensations and anticipation of future reciprocal favors, or well-defined hard-bargained transfer pricing or bonus schemes that harness the self-serving individuality of relevant actors for a given transaction.

4 Islands of Conscious Power

A principal-agent relationship, particularly the master-servant (or employer-employee) variant, is at once a status-based and a contract-based relation-

ship. Classical economists, including Jean-Baptiste Say, David Ricardo and John Stuart Mill among others (writing before Henry Maine issued his famous dictum about progressive societies moving “from Status to Contract”³¹) addressed both status and contract in their analyses of agricultural rents and land-tenancy leases.³² Such leasehold arrangements between wealthy landowners and poor tenant farmers, including sharecropping contracts, would later supply the motivational backdrop for formal economic models of the principal-agent relationship.³³ However, by the time Stephen Ross’s 1973 article, “The Economic Theory of Agency,” launched the modern modeling approach to the principal-agent relationship, the economic analysis was essentially reduced to an arm’s-length contracting problem, without any meaningful attention to status or power.³⁴

Almost a half century earlier, when Ronald Coase was collecting field notes and drafting his truly insightful article “The Nature of the Firm,” his perspective kept in view the classical awareness of both contract and status.³⁵ Coase’s essential insight is that the organization of production (not only involving labor, but also land, capital and other factors, i.e., inputs) follows one logic within markets and another within firms. Markets directed and organized production through the so-called “price mechanism,” where market power (e.g., monopoly power) may determine price, but ultimately it is *price*, not any self conscious power, which is the arbiter that allocates factors.

Firms follow a different logic. Within firms “we find ‘islands of conscious power’,” observes Coase, surfacing in an “ocean of unconscious co-operation [i.e., markets] like lumps of butter coagulating in a pail of buttermilk.”³⁶ Observing these isles led him to an obvious question. “Why are there these ‘islands of conscious power’?” His answer turned on an ‘entrepreneur’ figure, who relied on both contract and status to direct and organize production:

It is true that contracts are not eliminated when there is a firm but they are greatly reduced. A factor of production (or the owner thereof) does not have to make a series of contracts with [others] with whom he is co-operating within the firm, as would be necessary, of course, if this co-operation were as a direct result of the working of the price mechanism.³⁷

Instead of a series of arm’s-length exchanges and contracts pursued in the marketplace, Coase sketches an alternative, the details of which he left for others to later fill in. “At this stage,” he says, it is enough “to note the character of the contract into which a factor enters that is employed within a firm.” As he elaborates:

The contract is one whereby the factor, for a certain remuneration (which may be fixed or fluctuating), agrees to obey the directions of an entrepreneur within certain limits. The essence of the contract is that it should only state the limits to *the powers* of the entrepreneur.³⁸

Obedience, as a servant not a slave,* is the correlative to the master’s authority and the essence of what the contract calls for. Compliance comes not

*As Coase notes, “[i]t would be possible for no limits to the powers of the entrepreneur to be fixed,” but “such a contract would be void and unenforceable.” Ronald H. Coase, (1937) “The Nature of the Firm,” *Economica*, 4(16): 368–405, 39, note 2.

from constant consideration of incentives, but rather because the servant-agent agreed to accept and obey directions of the master-entrepreneur (again, ‘within certain limits’ or within what Herbert Simon calls a zone of acceptance,³⁹ i.e., a “range of decisions within which a subordinate will obey without question.”)

After decades of inattention to Coase’s insights in “The Nature of the Firm,” economists began to take note in the 1970s, perhaps because Coase’s other famous article, “The Problem of Social Cost,” earned him some new celebrity in the profession (in no small part due to advocacy of George Stigler, Aaron Director and other colleagues at the University of Chicago). But not everyone was convinced. His colleague Harold Demsetz was a doubter, and when Demsetz left Chicago for UCLA in 1971, he joined forces with the ever-thoughtful Armen Alchian to publish (in 1972) a broadside against Coase’s assertion of distinct operational logics between markets and firms, calling it “delusional.” It’s only contracts and refusals to contract in both domains, claimed they, a claim that would become a rallying call for later scholars, especially those economic and legal scholars adopting a hard-line contractarian perspective of the principal-agent problem and its solution. A Coasean entrepreneur-employer, Alchian & Demsetz argued,

has no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary market contracting between any two people. I can “punish” you only by withholding

future business or by seeking redress in the courts for any failure to honor our exchange agreement. That is exactly all that any employer can do. He can fire or sue, just as I can *fire my grocer* by stopping purchases from him or sue him for delivering faulty products.⁴⁰

Here, there is no distinction of status or power within the baker's household (to recall Smith) or between the baker and the brewer within the marketplace. "Telling an employee to type this letter rather than to file that document," Alchian & Demsetz propose, "is like my telling a grocer to sell me this brand of tuna rather than that brand of bread."⁴¹

Responding to this critique of Coase, by offering his own "property rights approach" to the analysis, Oliver Hart reaches a "conclusion" that, he says, "is quite Coasian in spirit," but in fact is more in line with Adam Smith's vision of commercial society where appeals must be made to the "self-love" and self regard "of the butcher, the brewer, or the baker." Hart tells us that "a boss can tell a worker what to do [under his] property rights approach [because] it is in a worker's self-interest to behave in this way." We will consider Hart's approach momentarily as we tie together the threads laid out so far.

5 Inarticulacy Hiding Power

As Coase's critics have challenged his account of agent behavior within firms, they have not denied the existence of status and power in their own accounts

so much as left these concepts unstated. Their accounts betray a certain inarticulacy when it comes to talk of status and power, which limits the progress of ideas here. As Charles Taylor suggests, “where there is articulacy there is the possibility of a plurality of visions which there was not before.”⁴² So let’s now recall terminology of power introduced earlier (i.e., *power over*, *power with*, and *power to*) along with Fiske’s modalities of reasons for action (i.e., *authority*, *solidarity*, *reciprocity*, and *individuality*) to see if we may find some grammar to advance the conversation. There’s no need to commit to any underlying claims in these particular terms of power and modalities for action. At this point we are just searching for a shared language, which may be later refined once we can all actually start talking explicitly about status and power.

To start, consider Coase’s account. His theory of obedience inside the firm relies on the employer’s *power over* employees, where employees find their reason for action in the *authority* modality. Coase’s notion of authority, I suspect, is less like a metaphysical demand to comply with a legitimate order or command, than a more passive or permissive submission to authority, as suggested by the organizational psychologist Herbert Simon: ‘authority’ as “not the power to command, but a psychological relationship. A subordinate accepts authority when they permit their behavior to be guided by a superior’s decision without independently examining its merits.”⁴³

Turning to Alchian & Demsetz, note that while rejecting Coase’s theory of behavior within the firm, they offered their own quite interesting theory, based on the limits of the division of labor. That is, transactional or technological challenges (including measurement problems, monitoring and metering difficulties) may recommend that certain activities should be pursued through *teams* rather than the sum of strictly individual efforts. And, in such cases, argue Alchian & Demsetz, “[i]f one could enhance a common interest in nonshirking in the *guise* of a team loyalty or team spirit, the team would be more efficient.”⁴⁴ They would harness *power with* among team members (exploiting some guise in the form of team spirit or the like) to efficiently get things done.⁴⁵ To that end, however, Alchian & Demsetz accord little room for *authority* in the space of reasons for action among team members, which is entirely consistent with their hostility toward Coase’s account.⁴⁶ They proffer a norm of *solidarity*,[†] but *individuality* seeps through in their implicit assumptions of rationality and self-interestedness.⁴⁷

In any case, Alchian & Demsetz’s team theory should be distinguished from Jacob Marschak & Roy Radner’s *Economic Theory of Teams*, which is also based on *power with* among team members, who have different information sets and take distinct actions, but share a common goal that draws them

[†]“Every team member would prefer a team in which no one, *not even himself*, shirked.” Alchian & Demsetz, “Production, Information Costs, and Economic Organization” 62 AMER. ECON. REV. 777 (1972) at 790 (emphasis added).

under the *solidarity* modality.⁴⁸ Oliver Williamson disparages as “utopian” *solidarity* driven modes of organization, which “require deep commitment to collective purposes and commonly involve personal subordination.”⁴⁹ In his own account, Williamson adopts a view of economic agents wielding *power over* each other (typically with high-powered or low-powered incentives) and he assumes an extreme form of *individuality* based not on mere self-interest, but instead “self-interest seeking with guile” or “opportunism,” which “explicitly refers to a distinct lack of candor or honesty in transactions.”⁵⁰

Finally, let’s close with the property rights theory offered by Oliver Hart in response to Coase’s claim of *authority* within the firm and Alchian & Demsetz’s challenge to that claim by asserting there is no greater authority or power in the employer-employee relationship than in the customer-corner grocer relationship. Hart distinguishes the employee from the grocer by pointing to the status of their counterparts. Compared to an ordinary customer, an employer holds a special status. She is an “owner” of property connected to one’s employment.⁵¹ In the old common law an employer’s property interest may have rested in the labor of employees (servants) themselves, but our modern law does not recognize servitudes in the labor of employees. Yet, so long as the employer owns something sufficiently connected to or necessary for the employee’s effective labor, her ownership status will allow her to exercise *power over* the employee. “To put it slightly differently,” says

Hart, “the reason an employee is likely to be more responsive to what his employer wants than a grocer is to what his customer wants is that the employer has much more leverage over his employee than the customer has over his grocer.” In other words:

the employer can deprive the employee of the assets [property] he works with and hire another employee to work with these assets, while the customer can only deprive the grocer of his custom and as long as the customer is small, it is presumably not very difficult for the grocer to find another customer.⁵²

Agents acting under Hart’s property rights theory of the firm find their reasons for action in the *individuality* modality, but the employer’s *power over* employees may be situated in a relational or a repeated interaction structure to allow *solidarity* or *reciprocity* to provide reasons for action.⁵³ Many possibilities may be seen or sought “where there is articulacy” or fluency regarding status and power.

6 Conclusion

My aim here has been to examine the nature and sources of agency and power within the principal agent relationship. I am hardly the first economist to attempt to bring these concepts to the fore. A number of economists have addressed questions of agency and power explicitly and thoughtfully in prior writings. For example, in an entry simply entitled “Power,” Samuel Bowles

and Herbert Gintis develop a definition of power based on sanctions and asymmetry: B has *power over* A when B can, by imposing or threatening sanctions, affect A 's actions in B 's interest while A lacks reciprocal capacity.⁵⁴ Philippe Aghion and Jean Tirole distinguish “formal authority” from “real authority”—a distinction that, in the grammar developed here, separates the formal *power to* decide from the effective *power over* over another derived from an epistemic or informational advantage. An employee may thus exercise real authority through superior information even when her employer retains the formal power to decide.⁵⁵ These contributions among others reveal that power neither is absent from economics nor is beyond its analytical reach. The contribution of this piece may be distinguished along two lines. First, I have sought to develop a grammar of power and reasons for action that may facilitate more explicit discussions of agency, status and power. Second, I have tried to clarify why agentic capacity and legal power are necessarily separated when an agent acts on behalf of a principal.

Notes

¹Adam Smith, *The Wealth Of Nations*, (1776), at I.iii.2. Similarly, says Smith, within “a tribe of hunters or shepherds, a particular person makes bows and arrows, for example, with more readiness and dexterity than any other. He frequently exchanges them for cattle or for venison, with his companions; and he finds at last that he can, in this manner, get more cattle and venison, than if he himself went to the field to catch them. ... In the same manner a third becomes a smith or a brazier; a fourth, a tanner or dresser of hides or skins[.]” *Id.*, at I.ii.3.

²*Id.*, at I.ii.1.

³*Id.*, at I.iv.1.

⁴*Id.*, at I.ii.2

⁵In *The Human Condition*, she describes the ancient household’s mastery of necessity, including through enslaved labor, as a condition of freedom in the polis. See Hannah Arendt, *The Human Condition*, 30–32 (1958).

⁶It is important to clarify that slaves in Roman law were subject to a distinct power, the *dominica potestas*, and while Holmes begins his analysis with the supposed unity between the *paterfamilias* and his slaves, he locates the “germ” of the modern law of agency in *patria potestas*, which, he suggests, provides “the substantive ground” that will “cover free agents, who are not even domestic servants[.]” Holmes, “Agency I,” at 352.

Looking at the whole matter analytically it is easy to see that [350] if the law did identify agents with principals, so far as that identification was carried the principal would have the burden and the benefit of his agent’s torts, contracts, or possession. So, framing a historical hypothesis, if the starting-point of the modern law is the *patria potestas*, a little study will show that the fiction of identity is the natural growth from such a germ.

Oliver Wendell Holmes, “Agency I,” 4 HARV. L. REV. 345 (1891) 349-350.

⁷Oliver Wendell Holmes, Jr., *The Common Law*, 232

⁸Agency, as a legal construct, was largely absent in Roman law, particularly with respect to slaves and other members of the household. There was no need for it. As William Alexander Hunter points out, “the rule that everything acquired by a slave or son under *potestas* belonged to the *paterfamilias*, removed to a certain extent any urgent necessity for an elastic law of agency.” W. A. Hunter & J. Ashton Cross, Translators, *Systematic and Historical Exposition of Roman Law in the Order of a Code* (4th ed. 1903) at 609. Hunter further points to Roman law’s formalism as an additional reason for the absence of agency law:

The prohibition of agency is thus directly connected with the important distinction that runs throughout the whole Roman law,—the distinction between formal and non-formal. No agency was ever admitted in the Roman law in respect of any formal transaction; and where agency was introduced, it was by superseding the formal by a non-formal element.

Id. As for the early English statements regarding vicarious liability for torts committed by servants, Wigmore observes that “the indigenous English expressions, scarcely fictions, but merely statements of legal results”—operated in a kind of *as if* mode: “This ‘as if’ (and Littleton says the same) shows that there is here no fiction in a proper sense, merely a concise statement of the legal result. The out-and-out identification expression is [sic] do not come into much vogue until after Blackstone’s time.” John H. Wigmore, “Responsibility for Tortious Acts: Its History.—II” 7 HARV. L. REV. 315, 383 (1894), at

399 (note 1). Taking an “as if”, or “legal result” or “legal operation” view may also be how to best interpret the Roman law treatment “persons,” as Mussawir & Parsley write in cautioning against broad claims that Roman slaves were not “persons.” In Roman law “the ‘person’ is not simply an entity, a norm, a pre-existing individual, a subject that the law simply recognises—if not as a totality ‘in itself’, then at least with this or that condition or attribute which qualifies it or doubles it—but rather a distinct legal operation with a definite juristic function.” Edward Mussawir & Connal Parsley, “The Law of Persons Today: At the Margins of Jurisprudence,” 11 *LAW & HUMANITIES* 44 (2017) [pincite]. “The suggestion, often repeated by modern scholars, that in Roman law the slave was not a ‘person’ or had no personality appears to be an anachronism.” *Id.*, at note 5, citing Buckland’s (*Roman Law of Slavery*, 1908) observation: “This view seems to rest on a misconception, not of the position of the slave, but of the meaning attached by the Roman lawyers to the word *persona*.”)

⁹Juliet E. K. Walker, *The History of Black Business in America: Capitalism, Race, Entrepreneurship* (1998), 55–56; and Juliet E. K. Walker, “Racism, Slavery, and Free Enterprise: Black Entrepreneurship in the United States Before the Civil War,” 60 *BUS. HIST. REV.* 343, 366–67 (1986).

¹⁰Robert A. Dahl, “The Concept of Power,” 2 *BEHAV. SCI.* 201 (1957) at 202–03 (“*A* has power over *B* to the extent that he can get *B* to do something that *B* would not otherwise do.”) On the incentives see Walker, *supra*, at 367; Elizabeth C. Tippet, “Enslaved Agents: Business Transactions Negotiated by Slaves in the Antebellum South,” 63 *ARIZ. L. REV.* 923 (2021)

¹¹Arash Abizadeh, “The Grammar of Social Power: Power-to, Power-with, Power-despite and Power-over,” 71 *POL. STUD.* 3 (2023) at [pincite]. (also noting that “the philosopher Dorothy Emmet in her 1953 presidential address to the Aristotelian Society” had adopted Follett’s *power with* “a decade and a half [before] Hannah Arendt”.)

¹²Metcalf, Henry C., and L. Urwick. *Dynamic Administration : The Collected Papers of Mary Parker Follett*, Taylor & Francis Group, 2003.

¹³Tippet’s description of Gray as “a *corporate slave* owned by the Andrew Brown Lumber Company” suggests this arrangement, although I have not been able to confirm company’s incorporation status. Tippet, at 19 (emphasis added).

¹⁴Arash Abizadeh, “The Grammar of Social Power: Power-to, Power-with, Power-despite and Power-over,” 71 *POL. STUD.* 3 (2023) at [pincite].

¹⁵Gideon Yaffe, “Agency in the law,” in *The Routledge Handbook of Philosophy of Agency* (2022), 448.

¹⁶*Id.*

¹⁷For Yaffe, being the “agent of” an event means that “the event is one’s doing.” In other words, “you are the agent of an event just in case it is caused, in a predictable way, by your action.” Yet, “[a] very large number of events that people are not at all responsible for are things of which they are agents.” So, “[i]f agency-of, then, is to be a useful concept, one that can carry moral or legal weight, it must be because of its comparative aspect.” It is with respect to questions concerning this comparative aspect that, on Yaffe’s account, the legal doctrine of proximate causation supplies a partial answer. *Id.*, at 449–50.

¹⁸*Id.*, at 454.

¹⁹See §1.01, “Agency Defined” of the *Restatement (Third) of Agency* (2006). Earlier Restatement definitions largely track the most recent version, with some subtle distinctions. For instance, §1 of *The Restatement (First) of Agency* (1933) states:

- (1) Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf

and subject to his control, and consent by the other so to act.

- (2) The one for whom action is to be taken is the principal.
- (3) The one who is to act is the agent.

And §1 Restatement (Second) of Agency (1958) states:

- (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
- (2) The one for whom action is to be taken is the principal.
- (3) The one who is to act is the agent.

²⁰Restatement (Second) of Agency §2 (1958).

²¹See, Blackstone, *Commentaries*, Book 1, chapter 14.

²²Robert Steinfeld, *The Invention of Free Labor* (1991); and especially, Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (1993).

²³The Amendment itself preserved status-based servitude by excepting compulsory labor imposed “as a punishment for crime whereof the party shall have been duly convicted.” Nor did its prohibition immediately eliminate efforts to secure labor through criminal sanctions attached to ostensibly contractual obligations. Decades later, the Supreme Court was still confronting such evasions: in *Bailey v. Alabama* (1911), it invalidated a statutory presumption that turned failure to perform a labor contract or repay an advance into evidence of criminal fraud; in *United States v. Reynolds* (1914), it rejected a system compelling convicted persons to work for private sureties who paid their fines. As late as 1944, in *Pollock v. Williams*, the Court invalidated another criminal-fraud statute used to compel performance of labor contracts.” 322 U.S. 4, 17–18, 25 (1944). Status and contract both continue to direct the organization of labor, even as courts have sought to distinguish permissible punishment from prohibited servitude.

²⁴Ariel Rubinstein, *Lecture Notes in Microeconomic Theory: the Economic Agent* (2nd ed., 2012), at xi.

²⁵*Id.*, at 1 (emphasis in original).

²⁶*Id.*, at xi (emphasis in original).

²⁷Amartya Sen, *Development as Freedom*, 18–19 (1999).

²⁸Charles Taylor, “What Is Human Agency?,” in *Human Agency and Language: Philosophical Papers* 1 15, 26 (1985).

²⁹Fiske labels these four fundamental modalities Communal Sharing, Authority Ranking, Equality Matching, and Market Pricing. “Communal Sharing is a relationship in which people treat some dyad or group as equivalent and undifferentiated with respect to the social domain in question. Examples are people using a commons, (Communal Sharing with respect to utilization of the particular resource) people intensely in love (Communal Sharing with respect to their social selves) people who ‘ask not for whom the bell tolls, for it tolls for thee,’ (Communal Sharing with respect to shared suffering and common well-being) or people who kill any member of an enemy group indiscriminately in retaliation for an attack (Communal Sharing with respect to collective responsibility). In Authority Ranking people have asymmetric positions in a linear hierarchy in which subordinates defer, respect, and (perhaps) obey, while superiors take precedence and take pastoral responsibility for subordinates. Examples are military hierarchies (AR in decisions, control, and many other matters), ancestor worship (AR in offerings of filial piety and expectations of protection and enforcement of norms), monotheistic religious moralities (AR for the definition of right and wrong by commandments or will of God), social

status systems such as class or ethnic rankings (AR with respect to social value of identities), and rankings such as sports team standings (AR with respect to prestige). AR relationships are based on perceptions of legitimate asymmetries, not coercive power; they are not inherently exploitative (although they may involve power or cause harm). In Equality Matching relationships people keep track of the balance or difference among participants and know what would be required to restore balance. Common manifestations are turn-taking, one-person one-vote elections, equal share distributions, and vengeance based on an-eye-for-an-eye, a-tooth-for-a-tooth. Examples include sports and games (EM with respect to the rules, procedures, equipment and terrain), baby-sitting coops (EM with respect to the exchange of child care), and restitution in-kind (EM with respect to righting a wrong). Market Pricing relationships are oriented to socially meaningful ratios or rates such as prices, wages, interest, rents, tithes, or cost-benefit analyses. Money need not be the medium, and MP relationships need not be selfish, competitive, maximizing, or materialistic—any of the four models may exhibit any of these features.” MP relationships are not necessarily individualistic; a family may be the CS or AR unit running a business that operates in an MP mode with respect to other enterprises. Examples are property that can be bought, sold, or treated as investment capital (land or objects as MP), marriages organized contractually or implicitly in terms of costs and benefits to the partners, prostitution (sex as MP), bureaucratic cost-effectiveness standards (resource allocation as MP), utilitarian judgments about the greatest good for the greatest number, or standards of equity in judging entitlements in proportion to contributions (two forms of morality as MP), considerations of “spending time” efficiently, and estimates of expected kill ratios (aggression as MP). Alan Fiske (1991, 1992).

³⁰Oliver ? offers a useful schema for organizing these behavioral conventions within what he calls “four levels of social analysis.” (1) First, at the highest level, are slow-changing informal institutions, like taboos, religion, custom and social norms. These institutions are stable over centuries or even millennia. (2) At the next level down are formal rules, including those found in constitutions and other legal sources. I suspect that Williamson has in mind, what might be called “high-order legal norms”, like basic constitutional principles, property rights, consent and notice, as opposed to more lower-order technical rules, regulations, ordinances and the like. Institutions at the second level are stable over decades or longer. (3) Institutions at the third level down are those involving “the choice of appropriate modes of governance for each type of transaction,” such as the make-or-buy decision, which Williamson elaborates by drawing the following interesting, but doubtful, distinction between property and contracts: “Going beyond the rules of the game (property) to include the play of the game (contract). . . .” By “contract” I think he means actual agreements among parties as opposed to contract law principles and rules. These agreements, he observes, tend to be stable on the order of years. (4) Finally, at the lowest level are “routine economic activities such as production, employment, market equilibration,” which are constantly being adjusted. (?, 599)

³¹Sir Henry Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas*, (1861) Chapter V (“Primitive Society and Ancient Law”):

If then we employ *Status*, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from *Status* to *Contract*.

³²See Adam Smith, *The Wealth of Nations* (1776) Book I, Chapter XI (“Of the Rent of Land”); Jean-Baptiste Say, *A Treatise on Political Economy; or the Production, Distribution, and Consumption of Wealth*, Book II, Chapter IX (“Of the Revenue of Land”);

Thomas Malthus, *An Inquiry into the Nature and Progress of Rent, and the Principles by which it is Regulated* (1815); David Ricardo, *Principles of Political Economy and Taxation* (1817) Chapter II (“On Rent”) and Chapter VI (“On the Effects of Accumulation on Profits and Interest”); Nassau William Senior, *An Outline of the Science of Political Economy* (1836) Distribution, Section 4 (“On Rent”) and John Stuart Mill, *Principles* (1848) Book II, Chapter IV (“Of Competition and Custom”), Sections 1 and 2.

³³See Ramon Casadesus-Masanell and Daniel F. Spulber, “Agency Revisited,” Harvard Business School, Working Paper 10-082 (2010), at 29–35; and Keijiro Otsuka, Hiroyuki Chuma, and Yujiro Hayami, “Land and Labor Contracts in Agrarian Economies: Theories and Facts,” 30 J. ECON. LIT. 1965, (1992).

³⁴“Drawing on analyses of sharecropping and labor contracts in agrarian economies, Ross established the foundations of the general economic model of agency under moral hazard.” Ramon Casadesus-Masanell and Daniel F. Spulber, “Agency Revisited,” *em supra*, at 33. As Casadesus-Masanell and Spulber note Ross was preceded by Marvin Berhold. Marvin Berhold, “A Theory of Linear Profit-Sharing Incentives,” 85 Quarterly Journal of Economics 460, 1971. See also Marvin A. Berhold, *An Analysis of Contractual Incentives*, Ph.D. Thesis, UCLA, 1967.

³⁵Ronald H. Coase, (1937) “The Nature of the Firm,” *Economica*, 4(16): 368–405.

³⁶*Id.*, at 388. Here Coase is quoting D.H. Robertson (“As D. H. Robertson points out, we find “islands of conscious power in this ocean of unconscious co-operation like lumps of butter coagulating in a pail of buttermilk.”)

³⁷*Id.*, at 391

³⁸*Id.* (emphasis added).

³⁹See Herbert A. Simon, *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organizations* (1947) [pincite]. See also, Oliver E. Williamson, (1964) *The Economics of Discretionary Behavior: Managerial Objectives in a Theory of the Firm*.

⁴⁰Armen A. Alchian and Harold Demsetz, “Production, Innovation Costs, and Economic Organization,” *American Economics Review* 62: 777–, (1972) at 777-8 (emphasis added).

⁴¹*Id.*: “To speak of managing, directing, or assigning workers to various tasks is a deceptive way of noting that the employer continually is involved in renegotiation of contracts on terms that must be acceptable to both parties.”

⁴²Taylor, *Agency and the Self*, at 26.

⁴³Simon, *Administrative Behavior*, *supra*, at [pincite].

⁴⁴Alchian & Demsetz [790, emphasis added].

⁴⁵“Obviously the team is better, with team spirit and loyalty, because of the reduced shirking—not because of some other feature inherent in loyalty or spirit as such.” *Id.* (emphasis added). Theirs is a wholly instrumental account. “Corporations and business firms try to instill a spirit of loyalty.” This spirit of loyalty “can be preached with an aura of moral code of conduct a morality with literally the same basis as the ten commandments,” yet “[t]he difficulty, of course, is to create economically that team spirit and loyalty.” *Id.*, at [791].

⁴⁶In their approach there may be some role for a leader or other authority to keep team members in check, but the checking function appears to be motivated less by the leader’s authority than their capacity to monitor team members: “athletic teams clearly exemplify the specialization of monitoring with captains and coaches; a captain detects shirkers while the coach trains and selects strategies and tactics. Both functions may be centralized in one person.” *Id.*, at 791.

⁴⁷[Pincite locations of seepage!]. Why wouldn’t some rational team member prefer to

shirk when it's in her individual self-interest? Perhaps Alchian & Demsetz imagine that the entire team is or could be made to be non-rationally loyal through some "loyalty filter" as Akerlof posits. Or perhaps team members *all* have a preference to want to act loyally, i.e., a meta-preference, as suggested by Sen. See George A. Akerlof, "Loyalty Filters," 73 AMER. ECON. REV. 54 (1983); Amartya Sen, *Rationality and Freedom*, Cambridge, MA: Harvard University Press (2002).

⁴⁸J. Marschak and Roy Radner, *Economic Theory of Teams*, (Cowles Foundation for Research in Economics at Yale University, Monograph 22), Yale University Press, New Haven and London, 1972; J. Marschak, "Elements for a Theory of Teams," 1 *Management Science* 127-137 (1955).

⁴⁹Oliver E. Williamson, *The Economic Institutions of Capitalism*, Free Press (1985) at p. 51-52.

⁵⁰Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* Free Press (1975) at p. 26.

⁵¹The most recent property Restatement (§4) defines: "The word 'owner,' as used in this Restatement, means a person who has ownership of a thing."

⁵²Hart, Colum. L. Rev. at 1771

⁵³See, e.g., George Baker, Robert Gibbons, & Kevin J. Murphy, "Informal Authority in Organizations," 15 J. L. ECON. & ORG. 56 (1999); Gibbons, R. (2001). "Trust in Social Structures: Hobbes and Coase Meet Repeated Games," in K. S. Cook (Ed.), *Trust in society* (pp. 332-353). Russell Sage Foundation.

⁵⁴S. Bowles & H. Gintis, "Power," in *The New Palgrave Dictionary of Economics* S. N. Durlauf & L. E. Blume (Eds.), (2nd ed.) Palgrave Macmillan, London.

⁵⁵Philippe Aghion and Jean Tirole, "Formal and Real Authority in Organizations," 105 J. POL. ECON'Y 129 (1997)