THE U.S. SUPREME COURT ILLUMINATES THE BASIS OF VICARIOUS LIABILITY

DANIEL HARRIS*

In February 2023, the U.S. Supreme Court unanimously held that a bankrupt debtor could not discharge a debt she incurred as a result of a fraud perpetrated by her husband and business partner, even though the debtor was personally innocent of the fraud and her liability was purely vicarious. The decision sheds light on why the law imposes vicarious liability; that is, why the law holds one person responsible for the misdeeds of another, just as if the wrongdoer and the defendant were the same person.

The preferred academic justification of vicarious liability, endorsed by Dean William Prosser's treatise on torts, is the justice of shifting losses from hapless tort victims to deep pocket employers with the ability to spread the losses to the community at large by raising their prices. There are many decisions, including the recent ruling of the Supreme Court, that are inconsistent with this theory. This Article argues that a better explanation of the doctrine of vicarious liability lies in the concept of agency: the notion that the employment of agents by an employer or principal involves a voluntary extension of the principal's legal personality, such that it is fair to treat the actions of agents, within the scope of their agency, as the actions of the agents' principal. In other words, vicarious responsibility is the responsibility of a principal for the actions of the principal's voluntarily expanded legal self. The shifting of losses to deep pocket employers is a frequent result of vicarious liability and sometimes a motive to construe vicarious responsibility expansively. It is not the doctrine's true purpose, justification, or rationale.

---

* Adjunct Professor of Agency Law, Chicago-Kent College of Law.

TABLE OF CONTENTS

INTRODUCTION

In February 2023, the U.S. Supreme Court held that Kate Bartenwerfer could not secure a bankruptcy discharge of a debt of more than $200,000 that she incurred because of a fraud by her husband and business partner, even though her liability was purely vicarious; that is, the debt was not based on her own fault but on that of her partner.[1]

The decision illustrates that vicarious liability is not limited to deep pocket employers, is not based on the defendant's ability to pass the cost of compensation on to society at large in the form of higher prices, and does not have the liberal, risk-spreading rationale ascribed to it by leading scholars.[2]

Instead, this Article will argue vicarious liability is a much more formal and much less equitable doctrine. The true rationale of vicarious liability is that the employment of agents or partners involves an expansion of the legal personality of the employer or principal, so that the actions of the agents or partners within the scope of their agency are attributed to the principal.[3]

The practical import of this jurisprudential point is that vicarious liability can happen to anyone who employs an agent or takes on a partner. Therefore, it is prudent for people to do business through corporations or other limited liability entities, so the entity can act as the principal and absorb any vicarious liability arising from the torts of agents. Form matters. The law is not imposing vicarious liability because of the defendant's ability to pay. Rather, vicarious liability is imposed on principals to hold them responsible for the actions of their voluntarily expanded legal selves.[4]

To make these points, this Article will proceed in three parts. Part I will discuss the recent U.S. Supreme Court decision in *Bartenwerfer v. Buckley*. Part II will discuss the deep-pocket, risk-spreading rationale for vicarious liability and how it does not explain the *Bartenwerfer* case. Part III will discuss the agency rationale for vicarious liability and how it makes sense of the *Bartenwerfer* case. The Conclusion will return to the main jurisprudential thesis and its practical lesson.

---

[1] *See* Bartenwerfer v. Buckley, 598 U.S. 69, 83 (2023) (holding Kate Bartenwerfer's debt could not be discharged because the creditor's interest in recovering the full amount of the debt obtained through fraud took precedence over Kate Bartenwerfer's interest in a fresh start, even though she did not personally commit the fraud).

[2] *See, e.g.*, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 459 (Jesse H. Choper et al., 4th ed. 1971).

[3] *See id.* at 460.

[4] *See* Daniel Harris, *The Lost Rationale of Agency Law*, 3 BUS. & FIN. L. REV. 1, 2–3 (2019).

I. *BARTENWERFER V. BUCKLEY*

A. The Ill-Fated House Sale

The case before the Supreme Court arose out of a house sale that went terribly wrong. In 2005, Kate Bartenwerfer and her then-boyfriend, later-husband, David Bartenwerfer, jointly purchased a house in San Francisco.[5] They decided to remodel the house and sell it for a profit.[6]

Although the Bartenwerfers never signed anything formal creating a partnership,[7] their joint action in this enterprise made them business partners under a California law that defines partnership as "an association of two or more persons to carry on as coowners a business for profit."[8] That same statute makes each partner an agent of the partnership for actions taken in apparent furtherance of the partnership business[9] and, in general, makes all partners personally liable for all partnership obligations.[10] David took charge of the project, hiring an architect, structural engineer, designer, and general contractor and then monitored their work, reviewed invoices, and signed checks.[11] "Kate, on the other hand, was largely uninvolved."[12] Eventually, the remodeled house was sold to Kiernan Buckley.[13] In connection "with the sale, the Bartenwerfers attested that they had disclosed all material facts relating to the property."[14] That turned out not to be true.

After buying the house, Buckley discovered defects that the Bartenwerfers had not disclosed: a leaky roof, defective windows, a missing fire escape, and permit problems.[15] Buckley sued the Bartenwerfers in California state court and prevailed in a jury trial, leaving the Bartenwerfers jointly and severally liable for more than $200,000 in damages.[16]

B. Bankruptcy Litigation in the Lower Courts

Unable to pay this and other debts, the Bartenwerfers filed for bankruptcy under chapter 7 of the Bankruptcy Code, which generally allows debtors to get a "fresh start" by discharging their debts.[17] Unfortunately for the Bartenwerfers, there are

---

[5] *See Bartenwerfer*, 598 U.S. at 72.
[6] *See id.*
[7] *See In re* Bartenwerfer, No. AP 13-03185, 2017 WL 6553392, at *10 (B.A.P. 9th Cir. Dec. 22, 2017).
[8] *See id.* at *9 (quoting CAL. CORP. CODE § 16101(9) (2013)).
[9] *See* CAL. CORP. CODE § 16301(1) (West 2013).
[10] *See id.* § 16306.
[11] *See Bartenwerfer*, 598 U.S. at 72.
[12] *Id.*
[13] *See id.*
[14] *Id.*
[15] *Id.*
[16] *See id.* at 73–74.
[17] *See id.* at 73.

exceptions to the discharge of debts under chapter 7. Buckley invoked one of them, section 523(a)(2)(A), which bars the discharge of "any debt . . . for money . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud . . . ."[18]

After a bench trial, the Bankruptcy Court ruled in favor of Buckley, finding that David Bartenwerfer had knowingly concealed the house's defects from Buckley, and that David's fraudulent intent was imputable to Kate because the two had formed a partnership to execute the renovation and resale project.[19] On appeal, the Ninth Circuit's Bankruptcy Appellate Panel agreed as to David, but reversed as to Kate, holding that her discharge was barred by section 523(a)(2)(A) only if she knew or had reason to know of David's fraud.[20]

Following a second bench trial, the Bankruptcy Court found that Kate lacked the requisite knowledge of David's fraud and so granted her a discharge.[21] This ruling was affirmed on appeal by the Bankruptcy Appellate Panel,[22] but then reversed by the U.S. Court of Appeals for the Ninth Circuit.[23] In reversing, the Court of Appeals relied on an 1885 decision of the U.S. Supreme Court[24] that held that a debtor who is liable for a partner's fraud cannot discharge that debt in bankruptcy, regardless of the debtor's own culpability.[25] As a result of this decision, Kate Bartenwerfer remained personally liable to Buckley. That liability was not just for half the debt, but for the entire debt resulting from David's fraud.

C. The Supreme Court's Decision

The U.S. Supreme Court granted review of the case and unanimously affirmed in an opinion by Justice Amy Coney Barrett.[26] The primary reason was the language of the law. Speaking in the passive voice, section 523(a)(2)(A) bars the discharge of debts "for money . . . obtained by . . . false pretenses, a false representation, or actual fraud . . . ."[27] There is no requirement that the debtor be personally responsible for the fraud, and the Supreme Court declined to read such a requirement into the statute.[28]

---

[18] 11 U.S.C. § 523(a)(2)(A) (2018).

[19] *See In re* Bartenwerfer, 549 B.R. 222, 225 n.3, 232 (N.D. Cal. 2016) ("The Court denied the motion for a directed verdict, finding that an agency relationship existed between Mr. and Mrs. Bartenwerfer based on their partnership with respect to the remodel project . . . .").

[20] *See In re* Bartenwerfer, No. AP 13-03185, 2017 WL 6553392, at *10 (B.A.P. 9th Cir. Dec. 22, 2017).

[21] *See In re* Bartenwerfer, 596 B.R. 675, 686 (Bankr. N.D. Cal. 2019).

[22] *See In re* Bartenwerfer, No. 3:13-AP-03185, 2020 WL 1970506 (B.A.P. 9th Cir. Apr. 23, 2020).

[23] *See* Bartenwerfer v. Bartenwerfer (*In re* Bartenwerfer), 860 Fed. App'x 544 (9th Cir 2021).

[24] *See* Strang v. Bradner, 114 U.S. 555, 561 (1885).

[25] *See In re* Bartenwerfer, 860 Fed. App'x. at 546–47.

[26] *See* Bartenwerfer v. Buckley, 598 U.S. 69, 71 (2023).

[27] 11 U.S.C. § 523(a)(2)(A) (2018).

[28] *See Bartenwerfer*, 598 U.S. at 74–76 ("Congress framed [section 523(a)(2)(A)] to 'focu[s] on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability.'").

The Court explained that while sometimes words are read into statutes to make them compatible with background legal rules, there was no reason to do so in this case.[29] On the contrary, the Court noted, the common law of fraud "has long maintained that fraud liability is *not* limited to the wrongdoer."[30] For instance, "courts have traditionally held principals liable for the frauds of their agents."[31] In addition, courts "have also held individuals liable for the frauds committed by their partners within the scope of their partnership."[32]

A second reason for the Supreme Court's decision was that the language that Kate Bartenwerfer wished to read into the statute—requiring personal culpability on the part of the debtor—was missing for a reason.[33] A late nineteenth century version of the law had barred the discharge of any debt "created by the fraud or embezzlement *of the bankrupt* . . . ."[34] In 1885, the U.S. Supreme Court essentially read the words "*of the bankrupt*" out of law by holding that bankrupts could not discharge debts incurred as a result of the fraud of one of their partners, on the theory that the fraud of one partner in service of the partnership business was the fraud of all.[35] Congress responded to the 1885 Supreme Court decision by dropping the words "*of the bankrupt*" from the statute, thus effectively endorsing the Supreme Court's ruling, and conforming the text of the statute thereto.[36]

Finally, the U.S. Supreme Court rejected Kate Bartenwerfer's argument that it was fundamentally unfair to hold her responsible for David Bartenwerfer's misconduct.[37] The Court noted that the federal statute did not create her debt; the underlying liability was the result of California state law, so her "fairness-based critiques seem[ed] better directed toward the state law that imposed the obligation on her in the first place."[38]

Moreover, the Court noted, the applicable state law principles were not all that unreasonable.[39] While Kate Bartenwerfer "paints a picture of liability imposed on hapless bystanders," the Supreme Court noted, "the law of fraud does not work that way."[40] The Court explained: "Ordinarily, a faultless individual is responsible for another's debt only when the two have a special relationship, and even then, defenses to liability are available."[41] For instance, "though an employer is generally accountable for the wrongdoing of an employee, [the employer] usually can escape

---

[29] *See id.* at 77.
[30] *Id.* at 76.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 79, 81.
[34] *Id.* at 79.
[35] *Id.*
[36] *See id.* at 80–81. The 1885 U.S. Supreme Court decision was *Strang v. Bradner*, 114 U.S. 555 (1885).
[37] *See id.* at 81.
[38] *Id.* at 82.
[39] *See id.* (countering petitioner's unfairness argument by highlighting the "variety of antecedent defenses" against liability provided to innocent debtors under California law).
[40] *Id.*
[41] *Id.*

liability if [the employer] proves that the employee's action was committed outside the scope of employment."[42] Similarly, "if one partner takes a wrongful act without authority or outside the ordinary course of business, then the partnership—and by extension, the innocent partners—are generally not on the hook."[43] In addition, the Court noted, "Partnerships and other businesses can also organize as limited-liability entities, which insulate individuals from personal exposure to the business's debts."[44]

The Supreme Court concluded that "innocent people are sometimes held liable for fraud they did not personally commit, and, if they declare bankruptcy, section 523(a)(2)(A) bars discharge of that debt."[45] The opinion went on to say that, although the Court was "sensitive to the hardship" that Kate Bartenwerfer was facing, it was not the Court's role to "second-guess" the judgment of Congress to limit bankruptcy discharge in this way.[46]

Justice Sotomayor wrote a concurring opinion, joined by Justice Jackson, which emphasized that the decision was based on principles of agency and partnership law and should not be read to bar discharge for innocent debtors outside that context.[47] Agreeing that the Court's decision was correct because Kate Bartenwerfer "and her husband acted as partners," the opinion by Justice Sotomayor went on to note: "The Court here does not confront a situation involving fraud by a person bearing no agency or partnership relationship to the debtor."[48] Justice Sotomayor then quoted language from the Court's opinion indicating that "'[t]he relevant legal context' concerns fraud only by 'agents' and 'partners within the scope of that partnership.'"[49] Justice Sotomayor said she joined the Court's opinion based on her understanding that the Court's opinion did not go beyond this agency or partnership context.[50]

D. Philosophical Questions

Whatever its correctness as a matter of law, the harsh result of the Supreme Court's opinion in *Bartenwerfer v. Buckley* leaves the reader with questions about the moral basis of the underlying legal rules. Why should Kate Bartenwerfer be jointly responsible for the entire fraud liability? Why isn't her liability limited to disgorgement of the monies she personally received? As a matter of common sense, that seems to be as far as her liability should go. Under what theory of justice is it legitimate to hold Kate Bartenwerfer vicariously responsible for the misdeeds of David Bartenwerfer? How can the law possibly deem it fair to blame an innocent

---

[42] *Id.* (citations omitted).
[43] *Id.* (citation omitted).
[44] *Id.* (citations omitted).
[45] *Id.* at 83.
[46] *Id.*
[47] *See id.* (Sotomayor, J. concurring).
[48] *Id.* at 84 (Sotomayor, J. concurring).
[49] *Id.* (Sotomayor, J. concurring) (quoting *Bartenwerfer*, 598 U.S. at 76).
[50] *See id.* (Sotomayor, J. concurring).

person for the actions of someone else? What is the basis of the doctrine of vicarious liability followed by the courts?

II. The Deep Pocket Rationale for Vicarious Liability

The standard academic account of vicarious liability is not much help in answering these questions. The rationale favored by scholars is best understood as a vision of what academics believe the law should be. The theory is inconsistent with much of the case law and does not explain why the law is the way it is.

Scholars start from the premise that law is a pragmatic tool for improving society,[51] so legal rules should be evaluated and reshaped based on whether they produce socially beneficial results.[52] Applying this theoretical framework to vicarious liability, scholars focus on cases in which the doctrine is used to shift losses from hapless tort victims to deep pocket corporations.[53] Seeing this equitable redistribution of losses as socially beneficial—indeed, as an exemplary example of the law forcing those with the ability to pay to help those who are in need—scholars rationalize vicarious liability as designed to achieve this consequence.[54]

For example, the 1971 edition of Dean William Prosser's treatise on torts said: "[T]he modern justification for vicarious liability" is the policy decision that "it is just" that enterprise related losses "are placed upon that enterprise itself, as a required cost of doing business," rather than on the "innocent injured plaintiff."[55] This is because the enterprise owner profits from the underlying activity and is better able to absorb the losses "and to distribute them, through prices, rates or liability insurance . . . and so to shift them to society, to the community at large."[56] The 1984 edition of the treatise made the point more bluntly, stating: "In hard fact, the reason for the employers' liability is the damages are taken from a deep pocket."[57]

Other scholars have endorsed the notion that vicarious liability is justified because enterprise owners can pass the cost of compensating tort victims to their customers, and thereby spread the risk of harm to society at large. As a 2019 article put it: "Tort theorists have advanced risk spreading as a primary justification for

---

[51] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 956 (1987); *see generally* STEPHEN B. PRESSER, LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW 14, 317 (1st ed. 2017).

[52] *See* William J. Novak, *The Progressive Idea of Democratic Administration*, 167 U. PA. L. REV. 1823, 1831 (2019).

[53] *See generally* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (finding oil tycoon Exxon Shipping liable for over $500 million in punitive damages resulting from an oil spill caused by the reckless actions of one of its ship captains).

[54] *See, e.g.*, Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 126–27 (1916).

[55] PROSSER, *supra* note 2, at 459.

[56] *Id.*

[57] *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 500 (5th ed. 1984) (quoting T. BATY, VICARIOUS LIABILITY: A SHORT HISTORY OF THE LIABILITY OF EMPLOYERS, PRINCIPALS, PARTNERS, ASSOCIATIONS AND TRADE-UNION MEMBERS WITH A CHAPTER ON THE LAWS OF SCOTLAND AND FOREIGN STATES 154 (Oxford Univ. Press 1916)).

holding an employer liable without fault for the torts of its employees."[58] Indeed, the academic justification of vicarious liability has become the foundation for the claim that the entire tort system is based on the strict enterprise liability, risk-spreading principle.[59] As a 2020 article expressed the combined idea: "[H]olding corporations strictly liable for employee wrongdoing" is often justified by the "risk-spreading principles of liability [that] constitute the bedrock of civil tort law . . . ."[60]

While favored by tort theorists, the deep pocket, risk-spreading rationale for vicarious liability is more prescriptive than descriptive.[61] The theory articulates a vision of what the law should be; it is not designed to explain how the law works in practice. Anyone seeking to use the rationale for that purpose will be disappointed.

For example, the deep pocket rationale does not explain why someone like Kate Bartenwerfer should be saddled with personal liability for David Bartenwerfer's wrongdoing. If the justification of vicarious liability is that it shifts losses to those with the ability to pay in the first instance and then pass the cost along to the community at large, then it makes no sense to impose vicarious liability on people like Kate Bartenwerfer. Nor does it make any sense under the risk-spreading rationale that Kate Bartenwerfer should be personally liable for the entire debt (not just half, but all of it) resulting from David Bartenwerfer's fraud.

The deep pocket theory also does not explain why, as the Supreme Court noted in the *Buckley v. Bartenwerfer* decision, vicarious liability is generally limited to torts committed by agents or partners within the scope of the agency or partnership relationship (that is, while the agent is on the job and trying to do the assigned job)—a limitation on vicarious liability that the Supreme Court has itself repeatedly insisted on in other cases.[62]

If the doctrine was designed to shift losses to enterprises that created the danger, profited from the underlying activity, and spread the cost to the community at large in the form of higher prices, then limiting vicarious liability to torts of agents committed within the scope of their agency does not make sense. Rather, vicarious liability for deep pocket defendants should be much broader, encompassing all foreseeable or characteristic harms associated with the defendant's enterprise.

---

[58] Erin L. Sheley, *Tort Answers to the Problem of Corporate Criminal Mens Rea*, 97 N.C. L. REV. 773, 816 (2019).

[59] *See* Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1315 (2001) (describing "[t]he scholarly march of enterprise liability"). In an excellent 2017 article, Professor Keating makes the moral argument in favor of requiring enterprises to pay for the harms caused by their characteristic activities. *See* Gregory C. Keating, *Products Liability As Enterprise Liability*, J. TORT L. 41, 41–97 (2017). The author thanks Professor Keating for his comments on an earlier draft of this Article.

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

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

[62] *See, e.g.*, Vance v. Ball State Univ., 570 U.S. 421, 430–31 (2013) (holding that employers are not vicariously liable under Title VII of the Civil Rights Act of 1964 for hostile environment sexual harassment by non-supervisors); United States v. BestFoods, 524 U.S. 51, 61 (1998) (holding that a parent corporation is generally not vicariously responsible for the actions of its subsidiary).

Indeed, many years ago, major academic proponents of the deep pocket, risk-spreading theory proposed just such an expansion of liability to bring the law in line with their theory.[63]

The discrepancies between the actual law and the deep pocket rationale for vicarious liability indicate that courts are not following the deep pocket rationale but instead are basing their decisions on some other theory of justice. What is that theory of justice?

III. THE AGENCY BASIS OF VICARIOUS LIABILITY

A. The Basics of Agency and Partnership

Vicarious liability has its origins and justification in the law of agency,[64] the body of precedent used in cases of alleged representation to determine whether one person's actions should be attributed to another.[65] Agency law is not part of tort law. Instead, it belongs to the law of persons.[66] Its role is to determine what it means for one person (an agent) to represent another (a principal)[67] and when the thoughts, words, or deeds of an alleged agent should be attributed to a possible principal.[68] By performing this function, agency law gives the individualistic Anglo-American common law a way of dealing with people operating in teams or through others, and thereby provides the conceptual foundation for corporations, partnerships, employment, vicarious liability, and the practice of law.[69]

---

[63] *See* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 544–47 (1961) ("The similarities between workmen's compensation and respondeat superior have led some writers to urge that the 'scope of employment' rule of respondeat superior be read as broadly as the 'arising out of and in the course of employment' test of workmen's compensation."); *see also* William O. Douglas, *Vicarious Liability and the Administration of Risk I*, 38 YALE L.J. 584, 593–94, 604 (1929) (stipulating that "[o]nly when some such attempt is made can the study of these rules of law in their social and economic background be effected").

[64] *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 185–87 (1995) (arguing that vicarious liability is really agency law).

[65] *See* Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1188 (2003).

[66] *See* Gerard McMeel QC, *Agency Theory Revisited and Practical Implications*, *in* INTERMEDIARIES IN COMMERCIAL LAW 89, 105 (Paul S. Davies and Tan Cheng-Han eds., Hart Publishing 2022); *see also id.* at 107 ("Without agency there can be no artificial legal persons, such as companies. Agency is a central component of the law of persons, and is not subservient to contract, tort or unjust enrichment reasoning.").

[67] *See id.* at 103.

[68] *See* Deborah A. DeMott, *A Revised Prospectus for a Third Restatement of Agency*, 31 U.C. DAVIS L. REV. 1035, 1039 (1998) ("[A]gency doctrine defines the legal consequences of choosing to act through another person in lieu of oneself."). The author thanks Professor DeMott for her comments on an earlier draft of this Article.

[69] *See* Daniel Harris, *Corporate Responsibility for* Rogue Agents, 37 NOTRE DAME J.L., ETHICS & PUB. POL'Y, 121, 124 (2023).

Agency law stems from two legal inventions that were introduced into English law in or about the fourteenth century.[70] The first invention was to make personhood or legal personality into a legal construct, rather than an immutable natural fact.[71] The second innovation was to empower both natural people and artificial persons (such as corporations) to act as principals and expand their legal personalities[72] by employing agents to act on their behalf.[73] In this way, corporations could operate in the real world through representation by human agents,[74] individuals could become larger legal persons by including in themselves the agency of others, and a group of people could attain the legal unity of a single person.[75]

The triggering event for the expansion of the principal's legal personality is the creation of an actual or apparent agency relationship.[76] One way this can occur is if both principal and agent manifest assent that the agent will act on the principal's behalf, for the principal's benefit, and subject to the principal's control.[77] No formalities are required and the parties' characterization of their relationship does not control.[78] Moreover, a "principal's manifestation of assent to an agency relationship may be informal, implicit, and nonspecific."[79]

Parties may also slip into an agency relationship through forming a partnership.[80] The Revised Uniform Partnership Act, in what is essentially a continuation of the

---

[70] *See* Harris, *supra* note 4, at 7–8; Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 518 n.87 (2011).

[71] *See* J.P. Canning, *The Corporation in the Political Thought of the Italian Jurists of the thirteenth and fourteenth Centuries*, 1 HIST. POL. THOUGHT 9, 15 (1980) (discussing how the concept of legal personhood became part of the law).

[72] *See* Deborah A. DeMott, *The Domains of Loyalty: Relationships Between Fiduciary Obligation and Intrinsic Motivation*, 62 WM. & MARY L. REV. 1137, 1159 (2021) ("[T]he point of the relationship is the extension, through the agent, of the principal's 'legal personality.'").

[73] *See* Gabriel Rauterberg, *The Essential Roles of Agency Law*, 118 MICH. L. REV. 609, 612, 653 (2020); *see generally* Rachel Leow, *Understanding Agency: A Proxy Power Definition*, 78 CAMBRIDGE L.J. 99 (2019).

[74] *See* Daniel Harris, *Corporate Intent and the Concept of Agency*, 27 STAN. J.L., BUS. & FIN. 133, 138 (2022); Great Minds v. FedEx Off. & Print Servs., 886 F.3d 91, 95 (2d Cir. 2018) ("The concept of an agency relationship is a sine qua non in the world of entities like corporations and public school districts, which have no concrete existence . . . [and therefore] must act solely through the instrumentality of their officers or other duly authorized agents.") (citation omitted).

[75] *See* E. Merrick Dodd, Jr., *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977, 981 (1929) ("[The early common law] required a theory by which the group could be regarded as a unit and as the kind of unit to which the formal rules of the medieval common law could readily by applied. Persons the common law knew, and the canonist view of the corporation as a fictitious person seemed to solve the problem."); *id.* at 984 ("[G]radually expanding ideas of agency . . . enabled certain authorized individuals to act for the group . . . .").

[76] *See* F.E. Dowrick, *The Relationship of Principal and Agent*, 17 MOD. L. REV. 24, 35 (1954).

[77] *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) ("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.").

[78] *See id.* § 1.02.

[79] *See id.* § 1.01 cmt. d.

[80] *See id.* at cmt. c.

common law,[81] provides that, in general, "the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership."[82] Unless the parties go through the formalities of creating a limited partnership, each partner is an agent of the partnership and personally liable for the obligations of the partnership, so effectively the partners are principals and agents of each other.[83] The common law came to this result more directly by making all partners agents of each other for actions taken in the course of the partnership business.[84]

B. The Concept of Agency

By employing agents, principals gain power but lose autonomy. Because agents act as extensions of their principal's legal personality, the agent does not simply act for the principal. Within the scope of the agency, the agent acts as the principal.[85] While acting as agent, the agent becomes the principal's alter ego[86]—the principal's other self—so that the thoughts, words, and deeds of the agent are attributed to the principal just as if the two were the same person.[87] In other words, within the scope of the agency (that is, when the agent is playing the role of the principal's alter ego) the agent becomes the principal's substitute.[88]

The power of agents to act as the principal's substitute is the key to understanding the basis of vicarious responsibility. The word *vicarious* comes from a Latin word that means *substitute*.[89] Thus, vicarious responsibility is responsibility for one's legal substitute. The theory is that, because principals have chosen to expand their legal personalities by employing agents to act as their substitutes, and because the law deems the actions of agents while performing this substitutive role (that is, while the agents are trying to do their assigned jobs) to be the actions of their principals, it is

---

[81] *See, e.g.*, Ward v. Thompson, 63 U.S. 330, 333 (1859) ("A contract of partnership is where parties join together their money, goods, labor, or skill, for the purposes of trade or gain, and where there is a community of profits.").

[82] UNIF. P'SHIP ACT § 202(a) (UNIF. L. COMM'N amended 2013).

[83] *See id.* §§ 305–06; *see also* Lawrence Ponoroff, *Vicarious Thrills: The Case for Application of Agency Rules in Bankruptcy Dischargeability Litigation*, 70 TUL. L. REV. 2515, 2526 (1996) ("A partnership is a mutual general agency, and both the original and the recently approved Revised Uniform Partnership Acts make each general partner liable for the wrongful acts and omissions of other partners acting in the ordinary course of the business . . . .").

[84] *See* Stockwell v. United States, 80 U.S. 531, 547–48 (1871).

[85] *See* Floyd R. Mechem, *The Nature and Extent of an Agent's Authority*, 4 MICH. L. REV. 433, 437 (1906).

[86] *See id.* at 436–37 (1906) ("By the creation of the agency, the principal bestows upon the agent a certain character. For some purpose, during some time and to some extent, the agent is to be the *alter ego*,—the other self, of the principal.").

[87] *See* O. W. HOLMES, JR., THE COMMON LAW 232 (Univ. Press: John Wilson and Son, Cambridge 1881) ("[T]he 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.").

[88] *See* Everett V. Abbot, *Of the Nature of Agency*, 9 HARV. L. REV. 507, 507 (1896); O. W. Holmes, Jr., *Agency, I*, 4 HARV. L. REV. 345, 349–50 (1891).

[89] *See* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 132 (Univ. of Cal. Press 1967).

fair to hold principals responsible for the conduct of their voluntarily expanded legal selves in the same way that natural persons have to bear responsibility for their actions.[90]

This formal theory is reinforced by other considerations. The public interest in effective regulation requires that society's most powerful actors—entities operating through agents—be held accountable for what they do.[91] Legal accountability gives these entities an incentive to take precautions against inflicting harm on others. Without accountability, the entities would likely engage in unduly risky activities, to the overall detriment of society.[92] Consequently, the powers of these entities should be accompanied by legal responsibility.[93] Moreover, since individual humans are held responsible for their actions, fundamental fairness demands that artificially enlarged legal persons should bear comparable responsibility.[94]

The classic expression of the idea behind vicarious liability—namely, that the actions of agents within the scope of their agency are to be equated with actions of their principal—is the Latin maxim upon which agency law was founded: *Qui facit per alium, facit per se* (which can be translated as "he who acts through another, acts himself").[95] An import from canon law,[96] the maxim was given wider and wider scope over the centuries.[97] By 1927, the U.S. Supreme Court could say: "'*Qui facit per alium, facit per se,*' is of universal application, both in criminal and civil cases."[98] The maxim was recognized by American courts as the basis of vicarious liability.[99]

In accordance with the *qui facit* concept of agency, the actions of agents within the scope of their agency are imputed to their principals.[100] A good example is the U.S. Supreme Court's 1885 decision in *Strang v. Bradner*,[101] the decision the U.S. Supreme Court essentially reaffirmed in *Buckley v. Bartenwerfer*.

---

[90] *See* Harris, *supra* note 4, at 5; *see also* J. Dennis Hynes, *Chaos and the Law of Borrowed Servant: An Argument for Consistency*, 14 J.L. & COMM. 1, 17 (1995).

[91] *See* St. Louis, Alton & Chicago R.R. Co. v. Dalby, 19 Ill. 353, 368–69 (1857).

[92] *See* Philadelphia and Reading Railroad Co. v. Derby, 55 U.S. 468, 487 (1852).

[93] *Cf.* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 465 (2015) ("[I]n this world, with great power there must also come – great responsibility[.]") (citation omitted).

[94] *See* W. Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, 45 FLA. ST. U. L. REV. 477, 484 (2018) ("[C]ourts endeavored to treat all persons equally, but at a minimum sought not to discriminate against individual persons in favor of corporate persons.").

[95] *See* Harris, *supra* note 4, at 7.

[96] *See* R.H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297, 321 (1999) (acknowledging that canon law "provided that a legal duty could not be evaded by putting property into the hands of a nominee.").

[97] See THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 102 (Oxford 3d ed. 1886).

[98] Ford v. United States, 273 U.S. 593, 624 (1927) (quoting Town of Barkhamsted v. Parsons, 3 Conn. 1, 8 (Conn. 1819)).

[99] *See* Blake v. Ferris, 5 N.Y. 48, 57 (1851); *see also* Bibb's Adm'r v. Norfolk & W.R. Co., 14 S.E. 163, 167 (Va. 1891) ("[T]he author quotes with approbation the remark of Baron Rolfe in Hobbit v. Railway Co., 4 Exch., 255, that 'the liability of any one other than the party actually guilty of any wrongful act proceeds on the maxim *qui facit per alium facit per se*.'") (quoting MECHEM ON AGENCY § 747).

[100] *See* Harris, *supra* note 4, at 4 (discussing that the metaphor of agency "builds a legal foundation for ideals like faithful representation, legitimate authority, and loyalty").

[101] *See* Strang v. Bradner, 114 U.S. 555, 561 (1885).

In *Strang,* the Court held that two people filing for bankruptcy—John and Joseph Holland—could not discharge a debt they incurred as a result of a fraud perpetrated during and in furtherance of a partnership business by Strang, one of their partners, because the law barred the discharge of debts incurred as a result of a fraud by the bankrupt.[102] Even though the Hollands had no personal involvement in the Strang's fraud, the Court reasoned that "[e]ach partner was the agent and representative of the firm with reference to all business within the scope of the partnership," so Strang's "fraud is to be imputed, for purposes of the action, to all members of his firm."[103] The Court went on: "This is especially so when, as in the case before us, the partners, who were not themselves guilty of wrong, received and appropriated the fruits of the fraudulent conduct of their associate in business."[104] Thus, the Hollands remained personally liable for a fraud perpetrated by a partner because their partner had been acting as an extension of their legal personalities, as their legal substitute, when engaged in the wrongdoing, so his fraud became their fraud.[105]

It is worth noting that judicial reliance on this agency construct—that is, the notion that the actions of agents within the scope of their agency are the actions of the principal—has drawn sharp academic criticism.[106] Nevertheless, as the *Bartenwerfer* decision illustrates, the agency construct remains the basis of vicarious liability law.

C. Making Sense of the Bartenwerfer *Decision*

Once the agency basis for vicarious liability is understood, the application of vicarious liability to Kate Bartenwerfer makes a great deal more sense. Vicarious liability applies to poor defendants such as Kate Bartenwerfer as well as to deep pocket corporations because the doctrine is not designed to shift losses from those in need to those with the ability to pay. It is not about the equitable redistribution or spreading of risks. It is not even about forcing disgorgement of ill-gotten gains. Rather, vicarious liability simply holds people responsible for the actions of their voluntarily expanded legal selves.

The agency basis for vicarious liability also makes the limitations on vicarious liability referenced by the Supreme Court in *Bartenwerfer v. Buckley* more understandable. The key question is not whether the plaintiff needs compensation that

---

[102] *See id.* at 560–61 ("[T]he statute expressly declares that a discharge is subject . . . to the limitation that no debt *created by the fraud* of the bankrupt shall be discharged by the proceedings in bankruptcy . . . .") (emphasis added).

[103] *Id.* at 561.

[104] *Id.*

[105] *See id.*

[106] *See, e.g.*, David R. Kuney, *Supreme Court's Vicarious Liability Approach to Discharge Needs Congressional Reform*, 42 AM. BANKR. INST. J., Apr. 2023 at 22, 74 (criticizing vicarious liability for its potential implications on marital relationships*); see also* Laski, *supra* note 54, at 107 (1917) (questioning why a master can be held liable when "no authorization can be shown, or where express prohibition of an act exists").

the defendant can afford to pay, but whether the actions of the wrongdoer are attributable to the defendant. Consequently, vicarious liability generally[107] requires an agency or partnership relationship between the defendant and the wrongdoer and the commission of a wrong within the scope of that relation because otherwise it would not be fair to attribute the actions of the wrongdoer to the defendant's voluntarily expanded legal personality.

The agency rationale for vicarious liability also explains why the Supreme Court said that parties can protect themselves by doing business through "limited-liability entities, which insulate individuals from personal exposure to the business's debts."[108] Under the agency rationale, vicarious liability depends on the defendant's legal relationship with the wrongdoer, and not (as it would under the deep pocket rationale) on the defendant's ability to pay and pass the costs along.

Thus, for example, if the Bartenwerfers had transferred their house to a limited liability entity and then had that entity sell the property, then that entity would have been David Bartenwerfer's principal and the vicarious liability for his misconduct would have flowed to the entity and stopped there. Kate Bartenwerfer would not have been personally liable for David's misconduct or for the partnership obligation resulting from David's misconduct because she would not have been David's partner or principal. This all may seem formalistic, but that is true of a great deal of business law.[109]

CONCLUSION

Vicarious liability is not reserved to deep pocket corporations. It can happen to anyone who acts as a principal. The results can be surprisingly harsh. A practical lesson is that doing business as a sole proprietor or through general partnership can be dangerous. It is much safer to set up a corporation or other limited liability entity to act as principal.

This practical lesson leads to a jurisprudential insight. Vicarious liability was not created in order to impose liability on big corporations. Rather, those corporations were created in order to absorb the vicarious liability that would otherwise flow through to enterprise owners.

---

[107] Liability may also be imposed on a theory of apparent authority. *See* Harris, *supra* note 68, at 154–57 (2023).

[108] *See* Bartenwerfer v. Buckley, 598 U.S. 69, 82 (2023).

[109] *See* Rauterberg, *supra* note 72, at 613 (2020) (discussing asset partitioning rules); *see also* Alan Schwartz and Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 618 (2003) (arguing in favor of literal interpretation of business contracts).