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Agent Correction: Chastisement, Wellness, and Personal Ethics

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AGENT CORRECTION: CHASTISEMENT, WELLNESS, AND PERSONAL ETHICS

DAVID YOSIFON*

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“[T]he literature of agency is filled with terms which are used in a variety of senses.”

—Prof. Warren A. Seavey (1955)¹

INTRODUCTION

The law requires agents to diligently and selflessly pursue the interests of their principals.² But agents often shirk or pursue their own interests instead. This “agency problem” diminishes the efficacy of agency relationships and the organizational arrangements that rely on them. Solving, or mitigating, the agency problem has been a core concern of agency theory in general and corporate theory in particular.³ Modern thinking emphasizes two basic approaches to addressing

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1. Warren A. Seavey, Comment, *Subagents and Subservants*, 68 HARV. L. REV. 658, 658 (1955).

2. RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. L. INST. 2006) (“An agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.”).

3. See Michael C. Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308-10 (1976) (explicating the canonical modern assessment of the agency problem).

the agency problem: law and economics. The law looks to deter misconduct by imposing liability if an agent is careless or disloyal, and economics prescribes strategies to better align the interests of an agent with their principal, for example, by giving the agent a financial stake in the principal's enterprise.⁴

Here, I examine a distinct third approach to solving the agency problem that was salient in the past but is obscure today: agent "correction." The early common law regarded an agent's slacking or insubordination as an expression of a dispositional flaw that was subject to remediation.⁵ The common law recognized a principal's prerogative to "correct" an agent through chastisement: physical hitting.⁶ The prohibition of this dehumanizing practice is one of the signature achievements of modernity. But the evil of corporal discipline has perhaps led us to conflate the galling means of chastisement with the provocative idea of correction. Examining the idea of agent correction at a level of abstraction allows us to recover from that idea discourses and insights about the nature of the agency relationship, its promises and threats, that are lost to the contemporary idiom. Informed by these insights, I identify the reemergence of the idea of agent correction in the form of contemporary "wellness" campaigns in corporate and other organizational operations. Attention to the idea of agent "correction" as a distinct approach to solving the agency problem can help us understand and properly modulate the use of "wellness" in corporate contexts today.

While this inquiry makes an important contribution to the study of the agency problem in organizational affairs, its motivating purpose and deeper work is more personal. This Article is part of a broader project aimed at excavating from corporate law ideas about how to live a good life and how to make meaning in our lives. We must find some other resource to draw on if we are to thrive amid the collapse of other, once trusted, now suspect, sources of meaning, and hold off the threats of malaise, nihilism, and madness that otherwise rush into the resulting existential vacuum. Fiduciary scriptures, I submit, can help. Resuscitating and modernizing the idea of "agent correction" demonstrates the workability of this project and adds a crucial component to it.

I. THE CRISIS OF MEANING AND A WAY OUT

We want meaning but the world does not provide it. We make it for ourselves but find it spoils in the heat of our journey. Our religions are no longer believable. Our politics are dispiriting. The culture all around is a mess. We dispose of wisdom we once found nourishing, as it now seems sour and corrupting. The resulting sorrow is founded in

4. *See id.*

5. *See infra* Section II.B.

6. *See infra* Section II.A.

integrity: we rid ourselves of shoddy meaning before we have any ready replacement. But we do not despair. Scarcity has made us frugal and creative. Honesty makes a ruin of the past, but we repurpose that rubble and use it for found shelter, made meaning.⁷ We know from experience that any good sense we manage to put together now will not last very long before it becomes a mind-sore to us and needs to be torn down again. But it is not really the promise of any lasting foundation that moves us. What keeps us pressing on is the exhilaration that comes from the creative reconstruction of meaning. That is the sentiment of being we are after. Ethics is for hedonists.

Everyone—Nietzsche, Oscar Wilde, Simone de Beauvoir, Roberto Unger, Bob Dylan—is always talking about the necessity of we moderns making our own meaning and virtues. But there is far less talk about how to do it, and even less doing of it. Here, I aim to operationalize the injunction to make our own meaning and show how legal theory can help. Some good, ready stuff for meaning-making is available within the legal designs of our prevailing institutions. These institutions do not just reflect and serve who we are, they also show us who and how we might be.⁸ In particular, there is personal existential guidance to be found in the legal designs of our corporate law, and the agency law that our corporate law uses and vitalizes.

A. *The Rule of Law as Institutional and Conceptual Slack*

Among the things the rule of law does is formalize prevailing distributions of power, consolidating and legitimating the prerogatives of elites over those whom they subordinate. It is “the law” that must be obeyed rather than those who establish or enforce it. This transference confounds resistance to capitalist exploitation, patriarchy, racism, and other systems of privilege and oppression, in the fog of ideology. But it comes at some cost to the powerful. Once created, the institution itself, the rule of law, comes to develop, in the space of the lie, its own discourses, its own logic, its own *actors*, who can divorce the ideas, principles, and processes set out in the law from their pretextual function, develop them on their own, and finally use them to alter the relations of power in the society in which they operate.

This is the imagined, imaginative domain of legal thinking. It is a liminal, creative space that is not merely reflective of existing power relations. Legal theory, often pilloried by “realists” for its distance

7. Nietzsche wrote that while philosophers worry most about the completeness of their systems, their readers are concerned only with the usability of any of its parts, since the systems inevitably collapse before most readers even come to them. See FRIEDRICH NIETZSCHE, *A GENEALOGY OF MORALS* 175-76 (William A. Haussmann trans., 1907) (1887). So it is, in my view here, with the common law of agent correction.

8. See PLATO, *THE REPUBLIC* 16 (Allan Bloom ed. & trans., 2d ed. 1991) (375 B.C.) (analyzing kinds of city-states as a means through which to better understand what makes for a good individual human soul).

from what is happening in the trenches,⁹ is valuable precisely because of that distance. Its intellectual, political, moral, and aesthetic content is undetermined because it is essentially made up. The conceit that all people are created equal and endowed by their creator with unalienable rights derives its great power not from its realism but from its artificiality. This slack in the rule of law creates opportunity not only for institutional change but also for personal transformation. The fake-ness of the law is a workshop of masks in which we might better imagine ourselves and imagine our better selves. By establishing the rule of law to serve their purposes, the powerful thus create slack that can lead to both institutionally and personally transformative possibilities.¹⁰ Legal theory can be the place where, as in other art forms, “the lie is sanctified and the will to deception has a good conscience.”¹¹

I want to deploy the will to legal theory here in assessing the common law idea of agent correction. I am not so much looking for parallels or connections between the old law, modern corporate law, and personal ethics as I am trying to make out conceptual rhymes between them. Sometimes false rhymes, or forced rhymes, can speak more fully, and finally more truly, than technically precise kinds.¹²

B. Corporate Existentialism

We know what kind of good lives we want. We want joyfulness, power and legitimacy, fairness and mercy, excellence and tenderness. We want caring and faithfulness, efficacy and propriety, and we want the freedom to live these things in our own way. Care, oomph, judgment, good faith, loyalty: these are the beating heart of agency law. These ethically rich agency concepts have been especially thoughtfully

9. See Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399, 399 & n.1 (2012) (collecting recent statements by Supreme Court justices about the irrelevance of legal scholarship). These complaints are as long-standing as they are weak-kneed. See, e.g., Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936) (“There are two things wrong with almost all legal writing. One is its style. The other is its content.”).

10. My approach here is in some sense the inverse of an important finding from the critical legal studies tradition that identified the “legalization” of organic social movements—the reconceiving of social movements in terms of their legal demands and legal status—as a way of flattening out and co-opting such movements into the narrower, safer, more compliant terms of legal life than they enjoyed in their natural, organic vitality. See, e.g., Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984). There is much insight in that work. But insight is a two-way street, and I explore the other direction here. I am grateful to Gabel for his correspondence with me on these matters and his encouragement of this project.

11. NIETZSCHE, *supra* note 7, at 153 (emphasis omitted). What follows here builds on ideas I began setting out in David Yosifon, *Corporate Law as an Existential Project*, 88 FORDHAM L. REV. 1801 (2020).

12. A true rhyme is a rhyme both in sound and metaphorical association. A false rhyme may cheat a bit on the sound but can pay off double in the evocation. See CHRISTOPHER RICKS, *DYLAN’S VISIONS OF SIN 10-48* (2005) (analyzing true and false rhymes).

cultivated within corporate law's doctrinal landscape, which in our society has been prized and prioritized terrain.¹³ My intention is to harvest—or sack if need be—these ideas from corporate law and carry them off for more personal purposes. The corporate fiduciary framework is promising because it holds so much that is of interest to us and that can be effective for us. More than promising, it is practically necessary to work with this material for this kind of project. If the idea, the *power*, of the corporation is uninvolved, unreferenced, in a contemporary pursuit of ethics, then the result is likely to end in the desert realms of nostalgia, utopia, or irrelevance.

Corporate governance law involves at its core two existentially vital injunctions. First, the law says to the corporate director: go. And then it says: selflessly. The rest is commentary. The business and affairs of a corporation “*shall* be managed”¹⁴ by a board of directors, and the self-interest of those directors, in the course of their service to the firm, must “be renounced, however hard the abnegation.”¹⁵ To make meaning in our lives, to gain that sense of *becoming* ourselves, our better selves, we must *act*. Woe unto the person who, like *Bartleby*, prefers not to.¹⁶ For them there is nothing but “the pain of idleness.”¹⁷ This

13. Corporate law is fundamentally based in agency law. See *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 663 (Del. Ch. 1988) (“The theory of our corporation law confers power upon directors as the agents of the shareholders . . .”). Some commentators insist it is conceptual and doctrinal error to regard directors as agents of shareholders because traditional agency law centers the idea that agents are subject to the control of the principal, while corporate law confers tremendous discretion on corporate directors to manage corporate affairs as they see fit. See, e.g., *Report of the Task Force of the ABA Section of Business Law Corporate Governance Committee on Delineation of Governance Roles and Responsibilities*, 65 BUS. LAW. 107, 115-16 (2009) (“[D]irectors are not ‘agents’ in a principal-agent relationship . . . [T]he basic indicia of the principal-agent relationship are missing in the shareholder-director relationship.”). I take the view championed by Delaware jurists (always a comforting side to be on in descriptive corporate law controversies) as set out in *Blasius* and other cases. The most important rule in corporate law is that directors must pursue the interests of the shareholders, carefully and loyally. These requirements are firmly rooted in agency law. It is common in modern economic arrangements for agents to operate free in practical ways from their principals’ control, and yet shareholders *do* control directors through corporate elections, and perhaps more importantly, by operation of the corporate charter which dictates to directors what exactly they are supposed to do (maximize value) and, in some ways, how they are to do it (e.g., when they can pay dividends or how they can merge). See DEL. CODE ANN. tit. 8, § 170(a) (2022) (specifying conditions under which dividends can be paid); *id.* § 251 (specifying merger rules). Much like in the related corporate purpose controversy, the academic debate over whether corporate directors are agents of shareholders is one in which jurists and laypeople are correct, while too many academics adopt descriptive confusions that confound rather than clarify the more important normative disputes about what corporate law *should* be. See generally David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181 (2013).

14. DEL. CODE ANN. tit. 8, § 141(a) (2022) (emphasis added).

15. *Meinhard v. Salmon*, 164 N.E. 545, 548 (N.Y. 1928); see also *Estate of Eller v. Barton*, 31 A.3d 895, 898 (Del. 2011) (quoting this famous passage from *Meinhard* and using it to describe principals of loyalty in fiduciary relationships of all sorts, including in corporate contexts).

16. HERMAN MELVILLE, *Bartleby*, in *PIAZZA TALES* 16, 24-30 (Egbert S. Oliver ed., Hendricks House, Farrar Straus 1948) (1853).

17. BOB DYLAN, *Every Grain of Sand*, on *SHOT OF LOVE* (Columbia Records 1981).

existentially vital instruction to get after it does not counsel any kind of frantic, overscheduled, so-busy-too-busy way of life. Instead, it prescribes—it insists on—*purposeful undertaking*. It tells us to manage our lives rather than be subsumed by the inertia of instinct, institutional pressures, culture, and politics—which if left unmoderated leads, under current conditions, to depression, nausea, madness, and death. The black letter of corporate law stokes this wisdom in the plain-spoken imperative.¹⁸

These clarifying, energizing fiduciary nutrients are especially well reaped in that fertile crescent of corporate law: the business judgment rule. A core feature of corporate law's version of the duty of care, the business judgment rule specifies that directors enjoy near total discretion to decide for themselves how best to pursue the interests of the operation they serve.¹⁹ There is no requirement that things be done in the usual or ordinarily prudent way. Under the business judgment rule, no liability—no blame—is put on directors if good faith decisions go badly, or even disastrously.²⁰ The business judgment rule frees the board, and can free us, from the deadening, dehumanizing burdens of conformity. It is a kind of font of liberty, an occasion for creativity.

But in order to gain the protections of this nonjudgmental doctrine, corporate decisions must be informed and deliberate.²¹ Directors can handle the firm's business how they want—they *have to* handle it how they want. But they must think it through first. They must talk it through first. And they have to listen to what other informed people have to say about it before they act in their own way. Nonconformity for its own sake is a dull, dullard's existential project. Informed, deliberate nonconformity is the stuff of personal, and finally social, transformation. The existential guidance in corporate law thus both invites us fully to pursue ourselves, in the way that we want to do it, while at the same time shepherding us into serious, communicative relationships with other people. It requires us to listen to and speak with other

18. I ascribe this injunction to corporate law for the reasons described above. *See supra* notes 10-12 and accompanying text. But it emerges into corporate law through the ancient roots of agency law and flowers out today through many of its branches. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2020) ("A lawyer should *pursue* a matter on behalf of a client" (emphasis added)); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. L. INST. 2006) ("An agent has a fiduciary duty to *act* loyally for the principal's benefit in all matters connected with the agency relationship." (emphasis added)).

19. *See, e.g.*, *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 124 (Del. Ch. 2009) ("[T]he business judgment rule prevents a judge or jury from second guessing director decisions if they were the product of a rational process and the directors availed themselves of all material and reasonably available information.").

20. *See, e.g., id.* (dismissing claims against directors who, acting deliberately and in good faith, presided over the loss of billions in shareholder value through bad subprime mortgage investments).

21. *See Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985) (establishing this process component to the business judgment rule).

people, sincerely, even as we do our own thing. Dogmatism is forbidden to the fiduciary. In our time of political and epistemological polarization, this is especially crucial for individual conscience and civic virtue alike.

Even as the fiduciary duty of care gets you moving, corporate law's signature rule of loyalty keeps you moving in the right direction. The duty of loyalty requires that in our vital pursuits—in our pursuit of vitality—we must continually safeguard against the malign influence of self-interest, self-deception, and our own bad faith. For the purposes of this existential project, the selflessness idea in the fiduciary instruction need not necessarily involve a literal command to be other-directed, of service to others, or focused on giving rather than private gain, although those things are said to be good for you.²² My focus here is more primary than that, or anyway is prior to that, and concerns the instruction that the injunction to selflessness provides us to guard against the corrosive effects of self-service in our thinking about how we ought to behave, how we ought to live. Corporate law's loyalty doctrines require searching, continuous self-scrutiny of motivations and reasoning, compelling us to protect our convictions, our highest value, from the desultory effects of self-patronization. The duty of loyalty requires us to renounce ourselves, who we were (that lout), and instead undertake with total commitment the unconflicted pursuit of the self we set out to become. The instruction to abandon self-interest, and to be loyal to the life projects in which we are engaged, is a continual aid to this difficult ethical instruction.

The poetics of fiduciary care and loyalty invite us to a healthy way of being. One cannot act unless they are ready to act. To *pursue*, as a fiduciary must, rather than just waiting around passively for something to happen, we must be fit, sober, rested, and alert. Thus does the responsibility to be competent become an opportunity to be excellent. Life is better with a hop in our step, and fiduciary commandments compel us to put one there. As we act selflessly, we become freed from our anchoring, limiting, parochial self-conceptions and our powers grow, we spill over, transcending ourselves.

This is personal but it is not solipsistic. There can be a dialectical relationship between law and institutional analysis on the one hand, and the work of soul-making and personal ethics on the other. When we involve ourselves in legal designs as a means of exploring our own sentiment of being, we become especially alert to and concerned with the work of those designs. We become sensitive to how they operate, and how they might operate better. Informed and enlivened by the scriptures of fiduciary law, we become more vital and clear-headed.

22. See Oliver Scott Curry et al., *Happy to Help? A Systematic Review and Meta-Analysis of the Effects of Performing Acts of Kindness on the Well-Being of the Actor*, 76 J. EXPERIMENTAL SOC. PSYCH. 320, 320 (2018) (“[M]odeling revealed that the overall effect of kindness on the well-being of the actor is small-to-medium . . .”).

This energy and clarity can then be deployed to press for socially desirable reforms to the legal framework that inspired the transfigurative self-conception.²³

C. *The Existential Agency Problem*

Existential opportunity thus abides in the fiduciary conception. But how do we get ourselves to act on it? The central problematic of agency and corporate law has been trying to figure out how to get agents to behave in the prescribed manner, rather than in some other way. The agent may shirk, or use the opportunities of the agency to pursue their own interests, rather than the purpose of the agency. An agency may also present temptations and opportunities that are destructive to the character and efficacy of the agent, making the agent a danger not only to the interests of the principal, but also to themselves.²⁴ Before we can enjoy the secret ethical profits of agency, and the enthusiastic sentiment of being that it offers, we must solve within ourselves, or at least address to ourselves, “the agency problem.”

We have a sense always that the problem of personal ethics involves a problem of self-control. But a *sense* of a thing is a conceptual dawdle: fine for diversion, but insufficient to guide the undertaking of life purpose. To work with this sense, to make effective use of it, we must cultivate it into a fully florid idea. Agency thinking can help. By bringing agency concepts, in particular now the agency *problem*, to bear on ourselves, we can see that the idea of self-control must involve the idea of self-obedience.

Nietzsche identified this crucial complexity in the idea of the will. Willing is not just an exercise of authority, it is *also* an act of acquiescence to that authority. *Willing* is both command *and* compliance. What we call the will, Nietzsche saw, is really a relationship between saying-so and complying with.²⁵ “A man who *wills* commands something within himself that renders obedience . . .”²⁶ It is this relationship, Nietzsche says, which generates the delightful feeling experienced with the operation of the will, the thrilling “affect of superiority in relation to him who must obey.”²⁷ This all is happening within and

23. In other work, I have been a stern critic of prevailing corporate governance law. See DAVID YOSIFON, *CORPORATE FRICTION: HOW CORPORATE LAW IMPEDES AMERICAN PROGRESS AND WHAT TO DO ABOUT IT* (2018). Here, I aim to excavate the power that corporate law undoubtedly contains and harness it for personally, and ultimately socially, reformative purposes.

24. See David Yosifon, *Moby-Dick as Corporate Catastrophe: Law, Ethics, and Redemption*, 90 U. CIN. L. REV. 372, 385-92 (2021) (developing this idea with reference to Captain Ahab, who destroys himself in the course of his agency with the *Pequod* in ways he could not have done alone).

25. FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE* 25-27 (Walter Kaufmann trans., Vintage Books 1989) (1886).

26. *Id.* at 26.

27. *Id.* at 25.

having to do only with ourselves, with controlling and obeying ourselves. Crucially, this special feeling, this nutritious hedonism of mastery, is only experienced when obedience is *expected*, when the saying-self anticipates it will enjoy the willing participation of the self-obedient. Otherwise, the feeling is something else, not the feeling of will, but rather the ill-sentiment of ambivalence, an anxious retreat against hints of self-mutiny. It is not only that mastery is delight, it is that anything less is at best banal and more likely falls in the range from discomforting to maddening. The master-servant relationship abides, wherever else it might operate, in the individual human soul. The exercise of the will can be developed and experienced in terms of that relationship, internally. We want to ramify the master and the servant, both aspects, within us. We are trying to find a way to develop, as Emerson put it, “a grand will, which, when legitimate and abiding, we call *character*.”²⁸

The phrase “agency problem” is of relatively recent vintage, but the issue has been acknowledged as a problem in agency relationships from time immemorial.²⁹ As noted above, the contemporary conception acknowledges two basic approaches to getting the agent to go, selflessly: legal liability if the agent is careless or disloyal, and compensation schemes meant to better align the interests of principal and agent.³⁰ The past, however, had other ways of dealing with it.

II. CORRECTION OF AGENTS

Reading an early twentieth-century treatise on agency law, searching for old characterizations of the duty of loyalty, I fell instead upon a passage stating that masters are prohibited from chastising their servants.³¹ I did not understand. The stutter-step of my confusion lasted just an instant, but it was real, a real find. Having begun in the darkness of understanding, as scholars must, I had stumbled into the

28. RALPH WALDO EMERSON, *Eloquence*, in *LETTERS AND SOCIAL AIMS* 109, 117 (Houghton Mifflin Co. 1904) (1875).

29. Legal scholars and economists typically cite Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, *supra* note 3, as the cornerstone of modern work on the “agency problem.” But recognition of the issue is much older. See, e.g., 2 ADAM SMITH, *THE WEALTH OF NATIONS* 233 (Edwin Cannan, ed., Methuen & Co. 1904) (1776) (“[B]eing the managers rather of other people’s money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own.”). The Apostle Paul wrote about it in his letters: “Servants, obey in all things your masters according to the flesh; not with eyeservice, as menpleasers; but in singleness of heart . . .” *Colossians* 3:22-23 (King James).

30. Another means of addressing the agency problem is through professional regulation, as is seen in the legal profession. See *infra* notes 153-59 and accompanying text (discussing bar regulation of lawyer well-being).

31. C.M. KNOWLES, *A TREATISE ON THE LAW OF MASTER AND SERVANT* 72-73 (7th ed. 1922). The first edition of this treatise was authored by Charles Manley Smith in 1852. See *infra* note 73 and accompanying text (discussing this text).

light of obscurity. I dwell on that disorienting moment in order to intensify it, lest it slip away in the rough manufacture of coherence. To me, chastisement meant scolding. But by chastisement, this early twentieth-century treatise was referring to a much earlier use of that word that meant physical hitting.³² This old book was repudiating what was from its vantage the old rule that hitting servants was allowed. Twenty-first-century treatises on agency law do not include prohibitions on chastising agents. Not because it is allowed, but because the idea that it would be is not imagined, and so is never dispelled.

There are two ways of condescending to the past. The first is to judge the past by contemporary standards. The second is not to. The only way to avoid condescension then is to address the past in terms of its continuing vitality. To do this, we must take an attitude to the history I will review here that is suggested by the answer that the Ghost of Christmas Past gives to Ebenezer Scrooge when the latter asks, “Long past?” and is answered, “No. Your past.”³³

A. Chastisement of Servants

The first touchstone in pursuit of early-modern legal thinking on agent correction must be Blackstone’s *Commentaries on the Law of England*, since that is where early-modern lawyers would have gone. In a time when books were rare, Blackstone’s was the rare book.³⁴ In the *Commentaries*’ chapter on agency we find this: “A Master may by law correct his . . . servant for negligence or other misbehaviour, so it be done with moderation.”³⁵ In this concise, shocking statement, we see

32. Serendipitously, on September 23, 2021, while I was working on this writing, “chastise” was the online *Merriam-Webster Dictionary*’s “Word of the Day,” and the definition it gave was “to criticize (someone) harshly for doing something wrong.” *Word of the Day: September 23, 2021*, MERRIAM-WEBSTER (Sept. 23, 2021), <https://www.merriam-webster.com/word-of-the-day/arch-2021-09-23> [<https://perma.cc/Z87D-YCYU>]. To qualify as a reputable dictionary’s “Word of the Day” suggests both that the word “chastise” is obscure (since readers will benefit from a definition) and that it is useful (since readers will benefit from a definition). The Word of the Day feature made no mention at all of physical chastisement. The actual definition within the online dictionary (distinct from the Word of the Day feature) does have it in the second definition: “1: to censure severely . . . 2: to inflict punishment on (as by whipping).” See *Chastise*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/chastise> [<https://perma.cc/S7F2-84AT>] (last visited May 14, 2023).

33. CHARLES DICKENS, *A CHRISTMAS CAROL* 45 (Cambridge Univ. Press 2013) (1843).

34. Blackstone’s *Commentaries* was ubiquitous among early-American lawyers and judges. In fact, there were fewer published treatises available in eighteenth and early nineteenth-century America than there were in England in that era, so it appears that American lawyers and jurists often relied on older sources and older legal ideas than their English counterparts did at the same time. See ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1355-1870*, at 120-21 (1991).

35. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *416. Chastisement was authorized in several different kinds of relationships in the early-modern period, including parent-child, husband-wife, teacher-student, master-apprentice, and master-servant. See *id.* at *416, *432; see also 3 *id.* at *115-41. Comprehensive study of the issue is

that the idea of agent *correction* in Blackstone's era was so closely associated with physical chastisement that he uses just the one word in verb form—"correct"—to address what really are two distinct things: correction (a noun, a state of being) and a *means* of correction (chastisement). Lest contemporary conceptions confuse matters, be clear that in the grand introduction to his "Of Master and Servant" chapter, Blackstone had already denounced slavery as wholly incompatible with the Law of England or any genuine rule of law.³⁶ Servant and slave beating would later be treated differently in important ways in the American context,³⁷ but the fundamental statement in Blackstone's *Commentaries* on the permissibility of servant chastisement is not about slavery. It is about agency.³⁸

Blackstone's account was not controversial. A contemporary of Blackstone's, Richard Wooddeson, in his *A Systematical View of the Laws of England*, is in accord that the "legal power of correction . . . is applicable to [the] relation of master and servant."³⁹ Matthew Bacon's *A New Abridgement of the Law* had, in 1736, described it as "clearly agreed" that a master may "correct" and "beat" a servant for "neglect of duty, etc."⁴⁰ Blackstone himself cites to an earlier treatise by another Englishman, William Hawkins, published in 1716, wherein Hawkins examines the idea of "[e]xcusable homicide" and lists among excused killings, "[w]here a Schoolmaster in correcting his Scholar . . . or a

beyond the scope of this inquiry. My purpose here is to explore an antiquated feature of the master-servant relationship in particular, so I limit my treatment of chastisement to that area. For rhetorical force, I have usually eliminated (with ellipses or other proper form) references to chastisement in other kinds of relationships in the quotations that I draw on for this Article.

36. See 1 *id.* at *411 ("[I]t is repugnant to reason, and the principles of natural law, that such a state should subsist any where.").

37. See *infra* note 90 and accompanying text.

38. To cross the historical divide in pursuit of the idea I am after, I use the terms agent and servant interchangeably with license. In the early-modern period, the term "agent" was not as widespread in legal discourse as it is today, and in Blackstone's work, "agents" are actually treated as a subcategory of "servants." See OLIVER WENDELL HOLMES, *THE COMMON LAW* 228 (1881) (noting that Blackstone regarded "stewards, factors, and bailiffs" as "a fourth species of servants"). By the time of the RESTATEMENT (FIRST) OF AGENCY (1933), the situation is reversed and it is said that "[a] master is a species of principal, and a servant is a species of agent." RESTATEMENT (FIRST) OF AGENCY § 2 (AM. L. INST. 1933). Even in the Restatement era, however, the "sub-category" of servant is very broad and captures all agents "whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." *Id.* Importantly, for our purposes, the Restatement emphasizes that "[t]he duties of servants to masters . . . are the same as those of agents who are not servants." *Id.* From a doctrinal standpoint, the categorical distinction between servant and non-servant agents most importantly bears on the liability of the master to third parties for the acts of the agent, an issue that does not concern us here. On the demise of the term "servant" in contemporary agency law discourse, see *infra* text accompanying notes 106-14.

39. RICHARD WOODDESON, *A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND* 465 (1792).

40. 3 MATTHEW BACON, *A NEW ABRIDGMENT OF THE LAW* 566-67 (1736).

Master his Servant . . . happens to occasion his Death.”⁴¹ Earlier than any of these is Michael Dalton, a mid-seventeenth-century legal writer who had it that “the master may chastise his servant for . . . negligence or refusal, so as he doth it not outrageously [sic].”⁴² References to the right and practice of servant chastisement abound in early-modern legal writing. Once alert to it, you see it everywhere.

The early-modern legal imagination did not regard servant chastisement as contradicting the background common law principle, certainly vital in Blackstone’s day, that *any* nonconsensual touching is unlawful.⁴³ The early-modern practice of agent correction functioned within a system of voluntary, contractual labor.⁴⁴ In that era’s thinking, after a person agreed to enter into a master-servant relationship for a given period, they could be forced to perform. Chastisement was a means of doing so. Indeed, chastisement was not merely considered consistent with the idea of freedom of contract, it was construed as a natural or even necessary element of it. One of the reasons that early-modern agency law developed its idea of agent correction so fully was that, in that period, a master could not simply dismiss a slacking or insubordinate servant. Most labor relationships at that time were for a specific term, laid down in statute or reflected in custom, often for a year, or a quarter, and they were hard to break. Short-term and even

41. 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 73 (1716); *see also* MATTHEW DUTTON, THE LAW OF MASTERS AND SERVANTS IN IRELAND 88 (1723) (noting that the statutory rules that “takes away the benefit of Clergy from him that stabs another, not having a weapon drawn [] don’t extend to any Person which, in chastising or correcting his . . . Servant, shall (besides his intent and purpose) chance to commit Manslaughter”).

42. MICHAEL DALTON, THE COUNTRY JUSTICE 204 (1655).

43. *See* Lea VanderVelde, *The Last Legally Beaten Servant in America: From Compulsion to Coercion in the American Workplace*, 39 SEATTLE U. L. REV. 727, 730 (2016) (noting that after authorizing servant chastisement in his agency chapter, Blackstone specifically exempts masters striking servants from the general rule of battery that he sets out in his chapter on torts). My study of this subject has been aided enormously by Professor VanderVelde’s unaccountably neglected work in this area. More widely celebrated, and also heavily relied on here, is ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR, *supra* note 34. Another excellent, underappreciated resource is C. Ashley Ellefson, *The Private Punishment of Servants and Slaves in Eighteenth-Century Maryland* (2010) (unpublished scholarly study) (on file with the Maryland State Archives). *See also* Evelyn Atkinson, *Out of the Household: Master-Servant Relations and Employer Liability Law*, 25 YALE J.L. & HUMANS. 205 (2013) (providing an outstanding historical analysis).

44. *See* STEINFELD, *supra* note 34, at 32. Steinfeld’s core theme is that the idea of freely contracted labor does not imply only one particular set of legal rules or institutional arrangements. *Id.* at 6 (“[T]he generic sale of labor by one individual to another has no intrinsic legal definition of its own.”). Understanding chastisement as an element of voluntary relationships is difficult even in formal terms when set against the Statute of Labourers in force in this period in England, which *required* people to work if they had no other means of support. *See* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 120 (1976). But the rule of mandatory employment did not prevail in the early-American context during the period in which servant chastisement was lawful. *Id.* at 122-24.

by-the-day labor arrangements were not unknown, but they were not the norm or the prototype conception.⁴⁵ The practice of correction held dominion in the absence of the threat of dismissal.⁴⁶

B. *A Duty to Correct and a Right to Be Corrected*

In the course of the agency relationship, the early-modern master had duties to the agent that could not be dropped at-will. For example, masters had an obligation to “provide convenient food for them, and whatever else is necessary and fitting in their respective stations, especially in sickness.”⁴⁷ The legal imagination of this period also regarded it as not just a right but a duty of the master to keep the servant from suffering the distortions of character—the “pain of idleness”—that can attend the agency problem. Our contemporary thinking considers shirking by agents to be a problem for the principal, and maybe for society, but modern discourses do not typically regard it as a problem for the agent. Our idea is that agents exploit slack in the agency relationship in order to pursue their own interests, rather than the interests of the master. Indeed, in contemporary thinking, the agency “problem” represents a windfall, or secret profits, as far as the agent is concerned.⁴⁸ But the situation was construed differently in early-modern thought. A malingering or disobedient servant was regarded as deviant in a manner that was neither beneficial to the master *nor* to themselves. Insubordination was not an expression of the servant’s authentic private preference, or anyway whatever authenticity it expressed was not worth having. Agent correction was concerned with fixing or instilling something in the agent’s disposition that bore on their willingness to obey as they should obey, to perform as they

45. See Feinman, *supra* note 44, at 122; see also Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 66-67 (2000) (tracing movement of term employment to the at-will default in the United States).

46. Steinfeld argues that the principal was understood to have a property interest in the labor of their agent during the specified employment term. STEINFELD, *supra* note 34, at 77. As with other property interests, the master could use self-help, or seek help from the state, to keep others, including the agent himself, from absconding with that property. *Id.* at 45. Steinfeld also identifies a collateral conceit that, within the master-servant relationship, the master had a *governance* authority over the person of their agent to which the servant had willingly submitted. See *id.* at 90. This brings to mind Ronald Coase’s core insight that the essence of the firm is its *governance* relationship to its employees, which takes the place of sharply negotiated contract terms that prevail in other market relationships. See R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 387 (1937) (“If a workman moves from department Y to department X, he does not go because of a change in relative prices, but because he is ordered to do so.”).

47. DUTTON, *supra* note 41, at 80. The servant, however, had no right of “master correction,” should the master come up short in his duties. Blackstone takes pains to specify that “if any servant, workman, or labourer assaults his master or dame, he shall suffer one year’s imprisonment.” 1 BLACKSTONE, *supra* note 35, at *416.

48. See, e.g., Jensen & Meckling, *supra* note 3, at 309 n.10 (“[T]he existence of positive monitoring and bonding costs will result in the manager of a corporation possessing control over some resources which he can allocate (within certain constraints) to satisfy his own preferences.”).

ought to perform, both in the masters' interests and in their own. Agent "correction" was not just the prerogative of the master, but also a *responsibility* and a duty of the master that ran to the servant.

Matthew Dutton, a prolific eighteenth-century legal writer, made this responsibility explicit in his treatise, *The Law of Masters and Servant in Ireland*: "Masters ought to correct and humble idle, rude, disorderly, insolent, sa[u]cy and unmannerly Servants . . . [a]nd the forbearing to give them correction, may be called a defrauding them of what is their due."⁴⁹ There is no tone of irony or condescension in this. Dutton emphasized, more than most of his contemporaries, the imperative to first try to correct servants by admonition or instruction. Speech was the preferred method, but if it was not enough, the master must do more: "[I]f a Servant will not be corrected by words, that is, if they will not work upon him, then a moderate and discreet correction is become his right, and the Master (as some say) can no more detain it from him, than deny him his daily food."⁵⁰ Reflecting this idea, a nineteenth-century historian of flogging tells a peculiar story of a baker who was committed to the "House of Correction" for deserting his employment after a dispute about wages. The baker "not having during his confinement received any personal correction, conformably to the statute . . . brought an action against the Lord Mayor in the Court of Common Pleas . . . as he had received no whipping during his confinement."⁵¹ Whether this actually happened or not, the story itself only makes sense if correction was understood as something that was due to the servant within the agency relationship.

While early-modern lawyers made steady use of their Blackstone, householders of the era embraced a then-emergent genre of manuals and books about manners. These texts relate ideas from the period about the correction of servants. Such material does not necessarily reflect the way people actually thought or behaved, but it does describe a way of thinking that the emergent middle-class of that period eagerly consumed.⁵² One historian of the era concludes that "[h]ousehold manuals insisted on the *obligation* of a master or mistress to both instruct and discipline her or his servants."⁵³ Religious connotations in these

49. DUTTON, *supra* note 41, at 82 (spelling modernized but no words changed).

50. *Id.* at 82; *cf.* *Proverbs* 29:19 (New International Version) ("Servants cannot be corrected by mere words; though they understand, they will not respond.")

51. See WILLIAM M. COOPER, FLAGELLATION AND THE FLAGELLANTS: A HISTORY OF THE ROD 168 (1869) (citing an article from an 1816 edition of *Gentleman's Magazine*).

52. See generally R.C. Richardson, *Social Engineering in Early Modern England: Masters, Servants, and the Godly Discipline*, 33 *CLIO* 163 (2004) (analyzing household manuals with special attention to religious discourses, especially as it related to servants suffering the sin of sloth); see also JOHN F. KASSON, *RUDENESS AND CIVILITY: MANNERS IN NINETEENTH-CENTURY URBAN AMERICA* (1990) (providing a cultural history of manners relying principally on household manuals).

53. Susan Dwyer Amussen, *Punishment, Discipline, and Power: The Social Meanings of Violence in Early Modern England*, 34 *J. BRIT. STUD.* 1, 14 (1995) (emphasis added).

texts also made clear that servant chastisement was a duty of the master.⁵⁴ “Ultimately, masters are enjoined to ‘correct’ the ‘errors’ of servants, often by means of harsh physical punishment, in order to save their souls.”⁵⁵ What legal and economic theorists today call the “monitoring problem” in agency relationships (the cost that the principal bears to ensure that the agent performs), was in this early-modern literature conceived of as the monitoring *function* of the master. Correcting the agent was understood not just as a prerogative, but also as a responsibility.

C. *The Meaning of Moderation*

Early-modern agency law conceptualized chastisement as “an inherent part of masters’ authority.”⁵⁶ But the legal writing of that period never discussed chastisement without specifying the requirement of *moderation* in its use. The moderation requirement encompassed multiple dimensions, including the reasons for chastisement, the methods used, the severity of it, and who could deliver it.

The purpose of the chastisement could only be “correction” of the agent, and so its use was only authorized in response to misconduct, such as negligence or insubordination.⁵⁷ Prophylactic beating was prohibited. Forbidden also was chastisement for the purpose of punishment, or for giving the master pleasure: “Masters should by no means delight in severity towards their . . . Servants.”⁵⁸ Moderation required the use only of appropriate instruments. Dalton described the means of moderate chastisement in some detail: “[T]he Master may strike his Servant with his Hand, Fist, small Staff or Stick for Correction; and though he do draw Blood thereby, yet it seemeth no Breach of the Peace . . .”⁵⁹ The chastisement had to be moderate in force. Wild, unrestrained beating was forbidden. Hawkins put it parenthetically: “([Y]et if such Persons in their Correction, be so barbarous as to exceed all Bounds of Moderation, and thereby cause the Party’s Death, they are guilty of Manslaughter at the least . . .).”⁶⁰ Dutton wrote, “Nor

54. See PATRICIA AKHIMIE, *SHAKESPEARE AND THE CULTIVATION OF DIFFERENCE: RACE AND CONDUCT IN THE EARLY MODERN WORLD* 88-92 (2018) (analyzing seventeenth-century domestic manuals as they related to chastisement of servants).

55. *Id.* at 92.

56. Ian C. Pilarczyk, “*Too Well Used by His Master*”: *Judicial Enforcement of Servants’ Rights in Montreal, 1830-1845*, 46 MCGILL L.J. 491, 523 (2001).

57. See *supra* notes 34-42 and accompanying text. Among the aims of correction was keeping the agent from incurring liabilities vicariously imposed on the master through the doctrine of respondeat superior. See 3 BACON, *supra* note 40, at 560-62 (setting out “[w]hat [a]cts of the Servant shall be deemed the Master’s, for which the Master shall answer and be bound”).

58. DUTTON, *supra* note 41, at 83.

59. DALTON, *supra* note 42, at 204. Dalton’s words here are often repeated verbatim in subsequent treatises by later writers. See, e.g., DUTTON, *supra* note 41, at 89.

60. 1 HAWKINS, *supra* note 41, at 73-74 ([sic] as to antiquated spelling).

should a Master for cause beat his Servant or Apprentice outrageously [sic].”⁶¹ He went on to give several examples of immoderate chastisement done with the wrong instruments and unrestrained force, and the legal consequence: “A Smith struck his Servant with an iron bar, and kill’d him; ’twas murder. So a Smith run a hot iron into his Servant’s belly, and kill’d him; ’twas murder.”⁶² Another component of moderation in correction was that it could not be delegated by the master to some other agent, or even to the master’s wife.⁶³ Other aspects of the master-servant relationship could be delegated, but not this one. Authorities also sometimes note that chastisement had to be done in private.⁶⁴ Immoderate chastisement could sever the master-servant relationship, freeing the servant from their contracted obligations, and it could also subject the master to criminal prosecution and civil damages.⁶⁵

The requirement of moderation in correction should be understood as an injunction that was meant to serve the interests not just of the servant, but of the master too. There is a cruel propensity in humanity, which if left unleashed, and antagonized by sick ideas, destroys both the one on whom it is deployed *and* the one who deploys it. The master who whips for the wild blood-lusting pleasure of it, or for revenge, or for more and more money, destroys within himself the qualities of self-restraint and intentionality that are characteristic of mastery to begin with. The master who chastises immoderately is a threat not only to the servant, and the master-servant relationship, but also to themselves. The element of moderation in the agent correction doctrine requires the master to maintain mastery over himself, rather than become a servant to wild or perverse impulse.

One early nineteenth-century writer, Richard Henry Dana, recounted his horror at first seeing the crazed flogging of workers. He witnessed a sailor whipped brutally for insubordination, and another whipped mercilessly for protesting it.⁶⁶ Dana’s report shows the diabolical consequence of immoderate chastisement:

“Can’t a man ask a question here without being flogged?”

61. DUTTON, *supra* note 41, at 83.

62. *Id.* at 92.

63. See 3 BACON, *supra* note 40, 567 (“[I]t hath been held, that though a master may beat his servant, yet he cannot delegate that power to another.”); see also 1 BLACKSTONE, *supra* note 35, at *416 (“[I]f the master’s wife beats him, it is good cause of departure.”).

64. See VanderVelde, *supra* note 43, at 742 (noting that public chastisement of a worker was regarded as a common law nuisance).

65. See DUTTON, *supra* note 41, at 92 (“[I]f loss of service . . . happen by such battery, an Action will lie against the Master, wherein the Servant may recover his damages.”); see also Pilarczyk, *supra* note 56, at 523 (“The most obvious vehicle for use by servants was to charge abusive masters with assault and battery, and such prosecutions were recurrent during this period.”).

66. See RICHARD HENRY DANA, TWO YEARS BEFORE THE MAST 125-29 (1840).

“No,” shouted the captain; “nobody shall open his mouth aboard this vessel, but myself,” and began laying the blows upon his back, swinging half round between each blow, to give it full effect. As he went on, his passion increased, and he danced about the deck, calling out as he swung the rope,—“If you want to know what I flog you for, I’ll tell you. It’s because I like to do it! . . . It suits me! That’s what I do it for!”

The man writhed under the pain until he could endure it no longer . . . [exclaiming—] “Oh, Jesus Christ! Oh, Jesus Christ!”

“Don’t call on Jesus Christ,” shouted the captain; “*he can’t help you.*”⁶⁷

We see in Dana’s depiction the monster that is made of the man who whips immoderately. It stokes a depravity that makes everything worse for himself and his victim.⁶⁸ It is through the rule of moderation that agent correction becomes an occasion for the exercise of mastery—not mastery over the servant, but mastery over the self. In moderating chastisement, the master obeys their own will to restraint and in so doing becomes masterful.

Chastisement is a humiliating, destructive practice. This is obvious to us, and our clarity about it registers the moral progress of our society. It is the concept of correction standing apart from the means of chastisement that we are looking now to draw out of the early-modern master-servant relationship, to see what improvement we can make with it for ourselves. From our perspective, if we are to find any ethical instruction in the idea of “moderation” in the course of agent correction, then we must conceive of the idea not in its inflection of “non-extreme chastisement” (since any chastisement is extreme to us), but in its sense of “deliberate management” of correction. For us, the continuing vitality of moderation in the law of agent correction can be the requirement it imposes on the master to actively, thoughtfully, and carefully manage their relationship with the agent, especially as it relates to correcting the agent. That is the essence of wisdom in this piece of the old common law, if there is any there at all. To retrieve that wisdom, we must more clearly than those in that period separate the two senses of “correction” that were evident in their literature. The means of correction, the selection of means as well as its use, must be well-managed if we are to ameliorate the agency problem, for principals, for agents, and for ourselves.

67. *Id.* at 127.

68. There seems to be a kind of malign dissonance avoidance in operation here. The master sees himself doing this monstrous thing, the monstrousness cannot be denied, and so he becomes fully a monster to make it make sense. See Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 107-15 (2004) (reviewing social psychological findings on dissonance avoidance in human cognition).

D. *The Decline of Servant Chastisement*

Today principals cannot correct their agents. But they can just throw them out.⁶⁹ The repudiation of Blackstone's rule on chastisement began in the late eighteenth century. In fact, the first posthumous edition of Blackstone's *Commentaries*, published in 1809, nixed Blackstone's earlier permissive statement on chastisement as to servants.⁷⁰ By the early decades of the nineteenth century the process was complete. Thereafter, treatises prohibited the practice as routinely as they had until then allowed it.⁷¹ In a typical 1852 treatment, we find instead the suggestion of a newer remedy:

It is conceived, notwithstanding passages which may be found in the books apparently to the contrary, that no master would be justified . . . even in moderately chastising a hired servant of full age for dereliction of duty . . . and the only civil remedies a master has for idleness, disobedience or other dereliction of duty, or breach of contract on the part of a servant are, to bring an action against him, or . . . "to expel the lazy drone from his family, and leave him to his own beggarly condition."⁷²

Out of the heat of chastisement and into the cold of the market.

The demise of servant chastisement coincided with the rise of the at-will employment rule in the United States. The dismal, sorrowful, "expel the lazy drone" language in the passage above is repeated in treatise after treatise on agency law from the early nineteenth century into the early twentieth century.⁷³ But that quotation—"expel the lazy drone"—actually derives from an early *seventeenth*-century tract, which would have been an anachronistic place to find explication of an

69. See VanderVelde, *supra* note 43, at 738 ("A master's commanding control can now be continually achieved by the coercion of being under the perennial threat of discharge.").

70. While earlier editions allowed that "[a] master may by law correct his apprentice or servant for negligence," see 1 BLACKSTONE, *supra* note 35, at *416, the 1809 edition instead provides only that "[a] master may by law correct his apprentice for negligence or other misbehavior." 1 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 428 (15th ed. 1809).

71. See, e.g., *Matthews v. Terry*, 10 Conn. 455, 455 (Conn. 1835) ("The master of a hired servant, whether a minor or of full age, is not empowered by law to inflict upon him corporal chastisement, though moderate and by way of correction for misconduct."). Steinfeld and VanderVelde seem to disagree on periodization, with VanderVelde putting the end of the practice in the early nineteenth century, see VanderVelde, *supra* note 43, at 755, and Steinfeld putting it at the end of the eighteenth, see STEINFELD, *supra* note 34, at 129-38. Precise periodization is important for some studies, but it is not crucial for my purposes here.

72. See KNOWLES, *supra* note 31 at, 72-73 (footnotes omitted).

73. See, e.g., 1 C.B. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT INCLUDING THE MODERN LAWS ON WORKMEN'S COMPENSATION, ARBITRATION, EMPLOYERS' LIABILITY, ETC., ETC. 742 (1913); JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS: EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT 616-17 (Little, Brown, & Co. 2d ed. 1874); CHARLES MANLEY SMITH, A TREATISE ON THE LAW OF MASTER AND SERVANT 73 (Sweet & Maxwell, Ltd. 7th ed. 1922) (1852); CHARLES E. BAKER, THE LAW OF MASTER AND SERVANT 65 (1881).

at-will idea in master-servant relationships. Follow into that seventeenth-century treatise, however, and see that the full language from the text which provides the “expel the lazy drone” instruction gives that line only *after* stating the seventeenth-century rule allowing a master to physically correct a servant. The passage then describes the option to “expel the lazy drone” as the *worst* thing that can be done to the servant—it is given as a last-ditch option that is *worse* than physical chastisement. The author of this text, Samuel Pufendorf, wrote of the master’s prerogative:

He may enjoin them what Task he pleaseth, in Proportion to their Strength and Skill. He may likewise correct their Sluggishness, by such Methods of Severity as are most likely to prevail on their particular Dispositions; tho’ he cannot, on this score, proceed to capital Punishments: so that the *highest Degree of Penalty* he can inflict on their Idleness is to expel the lazy Drones from his Family, and leave them to their own beggarly Condition.⁷⁴

By the nineteenth century, expelling the lazy drone is seen as the *only* thing that can be done about a discordant agent, and it is considered better or more humane than chastisement. Before this, outright dismissal was regarded as the *most extreme* thing that could be done to the servant, after all moderate efforts at solving the agency problem through correction had failed. While not so immediate or sharp as chastisement, dismissal can, of course, have catastrophic consequences for the servant’s physical health and well-being, as it can deprive the agent of the means of subsistence, including shelter, food, and medical care. Their past, our present.

E. The End of Moderation: American Slave Whipping

American wealth and power were built up through slavery. And it was the whip—it was whipping—that made slavery so profitable.⁷⁵ Before the nineteenth century, the whip was not synonymous with slavery. It was a common feature, at least in principle, in master-servant relationships more generally. One way of understanding this history is that violence in the master-slave relationship was not generated by or dependent on the institution of slavery but was instead founded on more general assumptions about principal-agent relationships, of which the master-slave relationship was a type.

74. 1 SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS 615 (Basil Kennett trans., 4th ed. 1728) (1672) (emphasis added) (footnotes omitted); see also BAKER, *supra* note 73, at 65-66 (“But it must be borne in mind that for some faults of the servant the master has power to punish him more heavily than by chastisement, and that is by discharging him at once without a character . . .”).

75. See generally EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM (2016) (emphasizing the ways in which extreme violence drove productivity and profitability in the American slavery system).

While whipping was not originally exclusive to slavery, the intensification of slave whipping is related to the cessation of the practice in master-servant relations generally. As slavery intensified and spread in the American South in the early nineteenth century, and as the financialization of the internal slave trade intensified the compulsion to expropriation, slave whipping got much worse.⁷⁶ The whip then became the inescapable symbol of slavery. As the whip became more closely identified with slavery, free servants and labor agitators resisted and rejected its use against them, to distinguish themselves from their enslaved counterparts.⁷⁷ In a sense then, it was slavery, and the intensification of violence in the master-slave relationship specifically, that put an end to violence in the master-servant relationship generally. The merciless whipping of enslaved people put an end to the chastisement of servants.

As chastisement disassociated from the master-servant relationship generally and came to be regarded as a signature feature of slavery, the legal regime of whipping lost its focus on moderation.⁷⁸ Whipping killed untold numbers of enslaved people and broke the hearts of many more. This constant, inhuman form of abuse in America is a profoundly disturbing feature of the historical record. Free servant whipping was typically irregular and episodic, but it was a constant part of life for many enslaved people and their enslavers.⁷⁹ In memoirs from the time, whipping is present on page after page. In Frederick Douglass's canonical memoir, it happens again and again: "Mr. Covey gave me a very severe whipping, cutting my back causing the blood to

76. See *id.* at 111-44 (describing innovations and intensification of violence against slaves as competitive markets in cotton production expanded).

77. See Atkinson, *supra* note 43, at 220. ("A significant impetus behind this development was the desire of white workers to distinguish themselves from slaves."); see also VanderVelde, *supra* note 43, at 734 ("[C]laims in some reform movements—that the mobilizing group not be treated like slaves—simply reinforced the diminished status of slaves by tacitly acknowledging that slaves could be subject to such treatment."); *id.* at 747 ("[T]he practice [of physical chastisement] . . . assumed its distinctly race- and status-based connotations in America by the 1830s and 1840s . . .").

78. See Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619-1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93, 132 (1985) ("[S]lave law granted masters the unlimited right to abuse their slaves to any extreme of brutality and wantonness as long as the slave survived."); *id.* at 150 ("[S]laves were excepted from the protections of the common law and were, instead, placed under the 'absolute' control of the white 'despots.'"); see also Seth F. Kreimer, *Rejecting "Uncontrolled Authority over the Body": The Decencies of Civilized Conduct, the Past and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 423, 424 (2007) ("[I]n antebellum American law, one of the defining differences between slavery and other domestic relations was precisely that the body of the slave was subject to the master's 'uncontrolled authority' . . ." (citing *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829))).

79. See VanderVelde, *supra* note 43, at 769 ("While one struggles to find three lawsuits about workplace corporal punishment in northern courts, there are hundreds of common law cases mentioning the beatings of slaves in the southern states.").

run, and raising ridges on my flesh as large as my little finger.”⁸⁰ And again: “[S]carce a week passed without his whipping me. I was seldom free from a sore back. My awkwardness was almost always his excuse for whipping me.”⁸¹

Slave whipping saw the abandonment of moderation in every respect. In his memoir, Douglass gives the sickening report of one master’s ill-habit that showcases the collapse of moderation’s prohibition against prophylactic beating:

His maxim was, Behave well or behave ill, it is the duty of a master occasionally to whip a slave, to remind him of his master’s authority. Such was his theory, and such his practice.

. . . The peculiar feature of his government was that of whipping slaves in advance of deserving it. He always managed to have one or more of his slaves to whip every Monday morning.⁸²

While the old common law had prohibited servant chastisement in public as a nuisance, slave whipping was done in public as a matter of course, a course though which enslaved people were deindividuated and white supremacy was constructed and expressed.

Such total domination does not evoke mastery, it eradicates it. In the immoderate chastisement of enslaved people was seen the destruction of both the enslaved and the enslavers. Indeed, the adverse effect of brutality on the character of the master is a recurring theme in slave narratives and abolitionist writings.⁸³ In his adolescence, Douglas was moved from rural Maryland to serve a relative of his enslaver in Baltimore.⁸⁴ The woman he is made to live with and work for had not previously dealt with enslaved people. She was the first white person Douglas had known who was undistorted by depravity. “I saw what I had never seen before; it was a white face beaming with the most kindly emotions . . .”⁸⁵ He knows this person thrives only because “she had been in a good degree preserved from the blighting and dehumanizing effects of slavery.”⁸⁶ He anticipates its fading as she comes to dominate him: “[T]his kind heart had but a short time to remain such. The fatal poison of irresponsible power was already in her hands, and

80. FREDERICK DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE* 66 (Harvard Univ. Press 2009) (1845).

81. *Id.* at 68.

82. *Id.* at 82.

83. See, e.g., RALPH WALDO EMERSON, *Address Delivered in Concord on the Anniversary of the Emancipation of the Negroes in the British West Indies, August 1, 1844*, in 11 *THE COMPLETE WORKS OF RALPH WALDO EMERSON* 97, 118-19 (Concord ed. 1904) (“The planter is the spoiled child of his unnatural habits, and has contracted in his indolent and luxurious climate the need of excitement by irritating and tormenting his slave.”).

84. DOUGLASS, *supra* note 80, at 39-42.

85. *Id.* at 41.

86. *Id.* at 43.

soon commenced its infernal work.”⁸⁷ Then comes that predicted destruction: “That cheerful eye, under the influence of slavery, soon became red with rage; that voice, made all of sweet accord, changed to one of harsh and horrid discord; and that angelic face gave place to that of a demon.”⁸⁸ This moral fiasco—lust for power, lust for luxury, festering in the diabolical logic of slavery-capitalism—brought about the destructive result of which the old common law of chastisement had given warning.⁸⁹ Slave whipping destroyed the enslaved and the master too, and with it the idea of self-mastery, real mastery.

It bears explicit recognition: one of the most significant consequences of the destruction of American slavery in the Civil War was a sweeping cessation of workplace whipping. Yet, as has been reviewed here, it is not accurate to think that labor whipping ended because slavery ended. Whipping ended because slavery ended *and* because several decades earlier chastisement had been eliminated from contractual master-servant relationships. After the slavery system was crushed, former enslaved people gained the protections of the modern common law’s prohibition against chastisement of servants.⁹⁰

87. *Id.* at 44.

88. *Id.*

89. The law of slavery did formally prohibit the wanton killing of enslaved people. Some scholars cite to such material as evidence of nascent conscience, arguing that slaveholding America did recognize the humanity of the people it held in bondage. *See, e.g.,* MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* 104-07 (1981). Professor VanderVelde offers a less forgiving efficiency analysis: she reads the prohibition on killing slaves as concern for preserving the nation’s capital stock from wasteful destruction. *See e.g.,* VanderVelde, *supra* note 43, at 772 n.202. I read it here as a remnant of the common law wisdom of restraint meant to speak to the master class itself, to protect against the self-destruction consequent to unchecked cruelty or greed. Regardless, the prohibition against killing enslaved people made a mockery of the rule of law as it was openly ignored, making a menace of masters to slaves, themselves, and the human imagination. *See e.g.,* DOUGLASS, *supra* note 80, at 35-37 (recounting episodes of slave-killing that resulted in no prosecution).

90. In fact, however, the end of slavery did not mark the end of agent whipping in the United States. The whipping of sailors—not just naval but private sailors too—continued long after slavery fell. The nineteenth and early twentieth-century treatises that repudiated the right of the master to chastise servants made it a point to explicitly exclude sailors from their account. *See* William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1224 n.525 (1989) (noting that admiralty law allowed the whipping of seamen into the twentieth century). It is ironic that the endpoint of Frederick Douglass’s long flight from slavery to freedom finds him at last in New Bedford, Massachusetts, where he hopes to find work caulking ships, a trade he learned while enslaved in Baltimore. On the ships that sailed from New Bedford, the whipping of free men was widespread and legal, and would remain so long after the Civil War. *See* DOUGLASS, *supra* note 80, at 137-40 (Douglass himself does not describe this). The practice of arresting ship-jumping sailors and physically forcing them back to labor on ships was also upheld in post-bellum federal courts against claims that this violated the Thirteenth Amendment’s prohibition on involuntary servitude. *See* Robertson v. Baldwin, 165 U.S. 275, 281 (1897) (“[I]f one should agree, for a yearly wage, to serve another in a particular capacity during his life, and never to leave his estate without his consent, the contract might . . . be void upon grounds of public policy, but the servitude could not be properly termed ‘involuntary.’”). *But see id.* at 292 (Harlan, J., dissenting) (“A condition of enforced service, even for a limited period, in the private business of another, is a condition of involuntary servitude.”).

F. *Explaining the End of Agent Chastisement*

There are several reasons the law came to prohibit chastisement of agents—some overlapping, some contradictory. The emergence of the “at-will” rule rendered chastisement obsolete, as the threat of termination more effectively addressed the agency problem than did physical hitting. As industrialization proceeded, so did class consciousness, and with its new intentionality, labor rejected corporal discipline in the workplace. Across classes, an emergent humanitarianism regarded the practice as immoral and helped stamp it out as to free labor. Finally, and crucially, racism developed in such a way as to simultaneously insulate whites from the practice of chastisement while intensifying its use against Black slaves. All of the above are important explanations. A kind of “bootleggers and Baptists” explanation is likely most correct, with the humanitarian inflection coinciding with racism and capital interests. The elimination of chastisement is explained by the unintended combination of these impulses, none of which would have been sufficient alone to account for the change.⁹¹

The prohibition of chastisement extinguished, along with the contemptible practice, active discourse concerning the distinct idea of agent correction, the pursuit of which the practice of chastisement had been aimed. Relatedly, the cessation of agent chastisement eliminated an occasion for a discourse on moderation in the master-servant relationship. These developments presented a new kind of vulnerability in the principal-agent relationship and the imagination of the self which might draw upon it. With correction gone, employers are left with only the promise of incentives and the threat of dismissal in looking to solve the agency problem. These mechanisms are not guided by the common law requirement of moderation that informed the idea of correction, and which served to protect both servant and master from the dangers of their relationship. The elimination of correction and moderation discourse in the principal-agent relationship impoverishes the agency conception as a model for use in cultivating our own self-mastery and self-obedience.

III. ABOUT THE WORDS MASTER AND SERVANT

In an early scene in the 2019 film, *The Rise of Skywalker* (Episode IX of the Star Wars saga), we find Rey, an orphan Force-adept, reporting her failure to complete a Jedi training course to Leia (once known as Princess Leia).⁹² With Yoda dead, and Luke Skywalker dead, Leia

91. See VanderVelde, *supra* note 43, at 749-50 (discussing this kind of interpretation and attributing it in this context to RICHARD B. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 523 (1946)).

92. STAR WARS: EPISODE IX—THE RISE OF SKYWALKER (Walt Disney Studios Motion Pictures 2019).

is the only one who can guide Rey in the ways of the Force. As their colloquy ends, Leia, having given her guidance, turns away to other responsibilities. The camera tightens on Rey as she looks toward the departing Leia and, gently smiling, says: “Yes, Master.”⁹³ It is a crucial moment in the Star Wars galaxy and in ours. Leia’s authority and wisdom is here unreservedly acknowledged. The first female Jedi lead in the film series announces to herself and the audience that she is being trained also by a woman of great stature and skill. The moment and its profound, useful meanings is made in the words, “Yes, Master.” There is no irony or hesitation in it.

In early 2021, the Disney Corporation, which owns the Star Wars franchise, without fanfare (but with fans noticing), changed the name of an important spaceship in the story. The bounty hunter Boba Fett’s legendary ship, *Slave 1*, would henceforth be known as *Firespray*.⁹⁴ Denizens know that this ship was first owned by Jango Fett, who passed it upon his death to his clone-son Boba. The history behind the ship’s original name is obscure, but legend has it that Jango called it *Slave 1* in order to disclaim any sentimental connection to the ship and express that it had only instrumental meaning to him.⁹⁵ The Fetts’ dominion over their ship, which they manifest by calling it *Slave 1*, showcased their mastery not only over their environment, but also over *themselves*. There is poetry in this, some expressive value. But we do without it now. With imperatives of racial justice especially salient in our historical moment, sensitivities around language that deal with the gruesome history of slavery are especially acute. The term slave is too suspect, too sensitive in this moment, for inclusion *in this way* in this kind of tale. Yet, at the same time, in the same story, the term “master” survives to express not malignant domination, but excellence, achievement, and utility through moderate command of subordinates.⁹⁶

93. *Id.*

94. Ryan Parker, *Disney Drops ‘Slave 1’ Name on Lego’s Boba Fett ‘Star Wars’ Ship*, THE HOLLYWOOD REP. (June 29, 2021, 7:47 AM), <https://www.hollywoodreporter.com/tv/tv-news/disney-slave-1-name-boba-fett-star-wars-ship-1234975131/> [<https://perma.cc/P7EJ-NFWQ>].

95. See Message Board Discussion *On Naming the Ship “Slave I,”* BOBA FETT FAN CLUB, <https://www.bobafettfanclub.com/boards/topic/3140/on-naming-the-ship-slave-i> [<https://perma.cc/PZR7-M3CZ>] (last visited May 14, 2023). Compare the abiding affection that another *Star Wars* character, Han Solo, has for his ship, the *Millennium Falcon*. See, e.g., STAR WARS: EPISODE IV—A NEW HOPE (Lucasfilm Ltd. 1977) (“She may not look like much, but she’s got it where it counts, kid.”).

96. Yet it would be hard to imagine a scene in a Star Wars film today in which Fin, a Force-sensitive Rebel played by Black actor John Boyega, were to say to an older, white male Jedi in the course of a failed training exercise, “Yes, Master.” The scene, anyway, would read differently than the one with Leia and Rey, both of whom are played by white women. Boyega has been an outspoken critic of the limitations Disney has placed on the development of the Fin character, which Boyega attributes to racial bias. See Jimi Famurewa, *John Boyega: I’m the Only Cast Member Whose Experience of Star Wars Was Based on Their Race*, BRIT. GQ (Sept. 2., 2020), <https://www.gq-magazine.co.uk/culture/article/john-boyega-interview-2020> [<https://perma.cc/NGS5-J9VD>] (“[D]o not bring out a black character, market them to be

This is not to say that slavery is completely excluded from the Star Wars narrative. A crucial, unalterable element of the story is that Anakin Skywalker, who becomes Darth Vader, was born into slavery. (Among the most memorable lines in the series has a character asking the nine-year-old boy, "You're a slave?" To which he replies, "I'm a person, and my name is Anakin.")⁹⁷ The taboo that is erected in the *Slave I* controversy concerns any affirming literary exploration of the conceit of mastery as it might be showcased in the course of a master-slave relationship, or, not even a master-slave relationship, but master-slave *words* (as what is at issue here is not a slave, but a ship). These ideas do not depend upon literal slave systems. In his famous discussion of master and slave morality, Nietzsche, without irony or acrobatic explanation, specifies that "slave morality" prevails in the free, democratic, industrial societies of modern Europe.⁹⁸ Slave, in his usage, was an expressive signifier, not a technical, social, legal, or political designation.

The terms "slave" and "servant" are distinct, but they are also closely related, and closely enough related to be affected by similar language sensitivities. As noted above,⁹⁹ from a certain point of view, the master-slave relationship can plausibly be understood as a *sub-category* of the master-servant relationship. Slavery was not, as far as agency law was concerned, an entirely distinct legal relationship. Writing in 1690, John Locke described "slaves" as "another sort of servants."¹⁰⁰ In antebellum America, while the term "slave" was never used to denote a free servant, the term "servant" was routinely used to reference a slave. In the course of his escape from slavery, Frederick Douglass forged for himself a "pass" from his master to be shown to anyone suspicious of his traveling alone.¹⁰¹ In it, he described himself not as a slave but as a servant: "[his] is to certify that I, the undersigned, have given the bearer, my servant, full liberty to go to Baltimore, and spend the Easter holidays."¹⁰²

much more important in the franchise than they are and then have them pushed to the side.").

97. STAR WARS: EPISODE I—THE PHANTOM MENACE (Lucasfilm Ltd. 1999).

98. See NIETZSCHE, *supra* note 25, at 115-17, 202-12.

99. See *supra* note 38 and accompanying text.

100. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 42 (J.W. Gough ed., Basil Blackwell 1948) (1689). According to Locke, the master-servant relationship puts the servant "under the ordinary discipline" of the master, "yet it gives the master but a temporary power over him, and no greater than what is contained in the contract between them." *Id.* Yet that other sort of servants "which by a peculiar name we call slaves, who, being captives taken in a just war, are by the right of nature subjected to the absolute dominion and arbitrary power of their masters." *Id.* That last sentence is, of course, idiotic and wicked, and it was so when it was written.

101. DOUGLASS, *supra* note 80, at 88-89.

102. *Id.* at 89. In *The Comedy of Errors* (1594), Shakespeare moves without distinction between the words "slave," "servant," and "bondsman" for the "servant" character, thus attesting to the fluidity of those words and concepts in sixteenth-century England. See Maurice

Because of the proximity of the terms slave and servant and the important distinction between them, free working-class people in nineteenth-century America were keen to cancel use of the term “servant” as applied to them and “master” as applied to their principals.¹⁰³ Even domestic workers rejected the term servant, insisting instead on what was for them the more politically correct term, “help.”¹⁰⁴ This was peculiar to the American context; in England the term “servant” was used for domestic workers well into the twentieth century.¹⁰⁵ America developed such an intense concern with the conceit of freedom, in language and self-conception, not despite but because of the terrifying counterexample of slavery in its midst.

While free laborers and labor activists rejected the term servant, legal discourse in the United States maintained routine use of the “master-servant” formulation right through the twentieth century and into the start of the twenty-first. In part, this probably stemmed from American lawyers’ reliance on Blackstone and other treatises by older English authors.¹⁰⁶ In part, it no doubt also reflected lawyers’ penchant for distinct cant, for old cant, and for cant incanted in the old cases. And, in part, the terms may capture or create something in the legal imagination that is useful but distinct from what emerges in the lived experience of, and popular discourse concerning, principal-agent relationships.

But recently the terms “master” and “servant” have fallen out of usage in legal discourse. More than fallen, they have been *dropped*. The *Restatement (Third) of Agency*, published in 2006, abandoned the centuries-old, core terminology of “master and servant” in agency law, making due instead with the words principal, agent, employer, employee, and independent-contractor. This was a big change. Yet, turning back to the Reporter’s Introduction to the Third Restatement, it is surprising to find no mention at all, in the explanation given for the

Hunt, *Slavery, English Servitude, and The Comedy of Errors*, 27 *ENG. LITERARY RENAISSANCE* 31, 31 (1997); see also Matthew W. Finkin, *Menschenbild: The Conception of the Employee as a Person in Western Law*, 23 *COMPAR. LAB. L. & POL’Y J.* 577, 597 (2002) (noting that in the early-modern “economic, social, and legal structure . . . the very word for one engaged in the service of another [i.e., “servant”] was indistinguishable from that of a slave”); *id.* at 602 (“[I]n the seventeenth century some were masters and others servants (or slaves, Pufendorf using the term *servus* to cover both) . . .” (citing Pufendorf)); see also *supra* text accompanying note 74 (discussing Pufendorf).

103. See, e.g., SCHOULER, *supra* note 73, at 599-600; Lea VanderVelde, *The Anti-Republican Origins of the At-Will Doctrine*, 60 *AM. J. LEGAL HIST.* 397, 430-31 (2020); see also STEINFELD, *supra* note 34, at 125 (discussing this issue).

104. STEINFELD, *supra* note 34, at 126-27.

105. Sally Alexander, *Reviews*, 25 *TWENTIETH CENTURY BRIT. HIST.* 327, 327 (2014) (reviewing LUCY DELAP, *KNOWING THEIR PLACE: DOMESTIC SERVICE IN TWENTIETH-CENTURY BRITAIN* (2011)).

106. See STEINFELD, *supra* note 34, at 125-27 (noting early-American lawyers’ reliance on old English sources).

shift, of the troublesome associations of the terms “master and servant” with slavery or status hierarchy. It is inconceivable that such a linguistic change would be made in 2023 without direct reference to such issues.

The explanation that the 2006 Restatement does give for abandoning the “master-servant” verbiage emphasizes that those older terms no longer evoke or reflect typical principal-agent relationships: “The connotation that household service is the prototype for employment is dated, as is its suggestion that an employer has an all-pervasive right of control over most dimensions of the employee’s life. This Restatement thus does not use the ‘master-servant’ terminology.”¹⁰⁷ Now, household service as the prototype for employment was dated long before 2006. Indeed, it was dated before 1906, and was already unreliable in 1806. There was always some imprecision in the terms “master and servant” in legal writing. In one sense, they referred to a very specific type of agency relationship involving domestic service. But the terms were *never* strictly used to denote only that type of agency. In Blackstone’s day, “master and servant” were used to describe principal-agent relationships in many kinds of business and employment settings. Blackstone himself was explicit that “servant” in his text was meant to capture not just domestics but also apprentices, clerks, and laborers.¹⁰⁸ (Indeed, in the *Commentary’s* dedication, given to “the Queen’s Most Excellent Majesty,” Blackstone signs himself, “her most dutiful and obedient servant.”¹⁰⁹)

The common law used the terms “master and servant” in widespread agency contexts because the core principles that governed master-servant relationships were broadly applicable to them all. Many of those principles, and the practical realities they address, are as relevant today as they ever were. It may be true that the master-servant

107. RESTATEMENT (THIRD) OF AGENCY intro. 10 (AM. L. INST. 2006). In her 1998 prospectus outlining the need for a new Restatement, Professor DeMott signaled she might move past the terms “master and servant” but did not focus on sensitivities about the words, instead emphasizing doctrinal confusions surrounding legal and practical developments since the Second Restatement. “It is telling that *Restatement (Second)* terms the employer the ‘master’ and the employee the ‘servant’; although these words may function as terms of art in this context, they connote a view of the employer’s prerogatives and capacity for pervasive control atypical in the contemporary workplace.” Deborah A. DeMott, *A Revised Prospectus for a Third Restatement of Agency*, 31 U.C. DAVIS L. REV. 1035, 1040-41 (1998) (footnotes omitted).

108. See 1 BLACKSTONE, *supra* note 35, at *413-15. The term “menial” labor, which has come to describe a wide range of physical or low-skilled work, derives from the early-modern use of the term “menial” to specifically describe household servants (because “menial” derives from the Latin *intra moenia*, which means “within the house”). Feinman, *supra* note 44, at 123.

109. 1 BLACKSTONE, *supra* note 35, at dedication page; see also *supra* note 38 and accompanying text (noting that in Blackstone’s day the term “agent” was considered a subcategory of “servant,” rather than the other way around, as we have it today).

terminology suggests an “all-pervasive”¹¹⁰ control, but this may be precisely the type of control experienced by the average Amazon warehouse worker, McDonald’s line cook, or junior attorney whose every working moment is logged and assessed by surveillance technology.¹¹¹ The Third Restatement’s explanation for the linguistic change obscures the scope of control contemporary employers exercise over their agents, relative even to the past. The terms master-servant might actually cast better light on those conditions than do the antiseptic terms employer and employee.¹¹²

The *Second Restatement of Agency* (1958) had stared down the problem of the “master-servant” language and then doubled-down on using

110. RESTATEMENT (THIRD) OF AGENCY intro. 10 (AM. L. INST. 2006).

111. See, e.g., Drew Harwell, *Contract Lawyers Face a Growing Invasion of Surveillance Programs that Monitor Their Work*, WASH. POST (Nov. 11, 2021, 8:00 AM), <https://www.washingtonpost.com/technology/2021/11/11/lawyer-facial-recognition-monitoring/> [<https://perma.cc/RH6V-ZCKS>] (“[T]he software judges their level of attention or distraction and kicks them out of their work networks if the system thinks they’re not focused enough.”).

112. More recent reflections on the issue have *assumed*, somewhat mistakenly, that the change had to do with the dubious cultural associations of the words rather than with doctrinal or practical confusions, as the Restatement itself asserts. In 2018, for example, when noting (and ruing) the change, Professor Bainbridge makes reference to sensitivities around the terms as a matter of course: “Admittedly, the terms master and servant are archaic and politically incorrect. The implication of menial service, moreover, is usually erroneous. Yet, it is not clear that employer and employee are an improvement.” See STEPHEN M. BAINBRIDGE, *AGENCY, PARTNERSHIPS, & LLCs* 83 (3d ed. 2019). David Westbrook, in 2012, made a similar remark: “The redolent ‘master and servant’ of earlier restatements has been replaced by the anodyne ‘employer and employee’; the language of dominion has been replaced by the language of the employment contract. Whether this is bureaucratic avoidance, good manners, or mere squeamishness, the question . . . is, ‘Can it work?’ ” David A. Westbrook, *A Shallow Harbor and a Cold Horizon: The Deceptive Promise of Modern Agency Law for the Theory of the Firm*, 35 SEATTLE U. L. REV. 1369, 1389 (2012). Both Bainbridge and Westbrook doubt the efficacy of “employer-employee” as replacement language for “master-servant” because, while “master-servant” clearly connotes agency, contemporary parlance uses “employer-employee” both for relationships that the law calls principal-agent *and* for relationships that the law calls “principal-independent contractor.” Thus, reliance on the term employer-employee introduces more doctrinal, practical, and political confusion than it solves.

The Third Restatement does, in fact, include numerous references to “masters” and “servants” in the older cases that it cites. See, e.g., RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. L. INST. 2006) (“Other recent cases involving other contexts characterize all employees as agents. See, e.g., . . . *Green v. H & R Block, Inc.*, 735 A.2d 1039, 1051 (Md. 1999) (dictum that ‘all masters are principals and all servants are agents’ ”)). It remains to be seen whether future scholars and lawyers will, when referencing earlier cases, alter the word master to “[principal/employer]” and servant to “[agent/employee],” or whether they will be chastised for failing to do so. Cf. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N. 2020) (“It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race . . . or socioeconomic status in conduct related to the practice of law.”); see also *id.* r. 8.4 cmt. 3 (“Harassment includes . . . derogatory or demeaning verbal . . . conduct.”); *id.* r. 8.4 cmt 4 (“Conduct related to the practice of law includes representing clients . . . and . . . social activities in connection with the practice of law.”). Language sensitivities may seem especially salient in our moment, but they are not new and are always changing. Reading Booker T. Washington’s memoir, I was amused to see him writing “d—d” because he would not dare write “damned,” even as I was scandalized to read in his book words in full that I would not signify even by letter-and-dash today. See DOUGLASS, *supra* note 80, at 36.

it: “[T]he term servant does not denote menial or manual service. Many servants perform exacting work requiring intelligence rather than muscle. Thus the officers of a corporation . . . are servants equally with the janitor and others performing manual labor.”¹¹³ Obviously, corporate officers in the mid-twentieth century did not typically call themselves “servants,” nor answer to the term, not any more than did corporate janitors. But the law’s distinct parlance, using those terms, may have fertilized legal thinking about how to understand fiduciary obligations in the emerging corporate designs of modern capitalism. For example, when Chancellor Allan was called upon to work out just what is meant by the crucial but under-theorized obligation of “good faith” that corporate directors owe to a firm’s shareholders, he found conceptual footing in the phrase “faithful servants.”¹¹⁴ That conception grows out of the legacy of common law discourses on master-servant relationships. It does not flower in the muddy idiom of employer-employee obligations.

To use the terms master and servant *now* might properly humble our corporate directors and officers and make more salient to them the nature of their roles, the reality of their statuses, and the depths of their obligations to corporate stakeholders.¹¹⁵ We are not going to do that and we should not. We cannot return to or countenance routine

113. RESTATEMENT (SECOND) OF AGENCY § 2 (AM. L. INST. 1958). Elsewhere, the Second Restatement even experiments with the term “industrial servant,” never widely adopted, to distinguish the modern situation from the older sense of the “servant in the early centuries of the English common law.” *Id.* § 316 Reporter’s Notes (1958).

114. See e.g., *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 698 (Del. Ch. 2005) (“The decision-makers entrusted by shareholders must act out of loyalty to those shareholders. They must in good faith act to make informed decisions . . . untainted by self-interest. . . . Even where decision-makers act as faithful servants, however, their ability and the wisdom of their judgments will vary.”), *aff’d*, 906 A.2d 27 (Del. 2006); see also *Enstar Grp., Inc. v. Grassgreen*, 812 F. Supp. 1562, 1574 (M.D. Ala. 1993) (“Enstar did not attempt to prove at trial that its bankruptcy was caused by these wrongful acts of Grassgreen. This would certainly require speculation. If Grassgreen had been a faithful servant to his corporation, however, such speculation would not even arise.”); *In re E.C. Warner Co.*, 45 N.W.2d 388, 391 (Minn. 1950) (“There is a vast difference between letting a director fight the battle at his own expense—with reimbursement if he is vindicated—and using the power of the corporation to aid in the fight before it is shown whether or not he is a faithful servant who deserves indemnity.”).

The Third Restatement purports to exclude altogether from the idea of “true agency” the “relationship between a corporation’s shareholders and its directors” and asserts that “the law applicable to those relationships is not covered by this Restatement.” RESTATEMENT (THIRD) OF AGENCY intro. 5 (AM. L. INST. 2006). This declaration is honored in the breach, as agency law’s care and loyalty doctrines are continually drawn on in corporate law to flesh out what duties directors owe to shareholders, and Delaware jurisprudence makes routine use of agency concepts and doctrine in giving its commanding shape to corporate governance law.

115. I note, but do not pursue here, that the term “stakeholder” has also in some quarters recently been brought in for cancellation in connection with its own etymological problems. See Joshua M. Sharfstein, *Banishing “Stakeholders,”* 94 MILBANK Q. 476 (2016) (providing a thoughtful summary of the controversy).

use of the phrase “master and servant” in common parlance or in formal legal usage. But we should keep an awareness and understanding of those terms and their legacy alive in our conception of agency relationships. They contain information and ideas that are worth having. The idea of agent correction that I am trying to capture here and repurpose for an idea of personal growth and transformation finds spark in the smoldering embers of features of that legacy that have rightly been snuffed out.

While the Third Restatement works to bury the terms master and servant, the unsettled ghosts of that legal relationship find other ways to haunt modern language. Near the same moment that the legal profession was abandoning the terms master and servant, lawyers and academics without embarrassment, indeed, with enthusiasm, began to speak and write about the importance of fiduciaries having “skin in the game.” Only when agents have “skin in the game,” we are told, will their behavior be oriented towards properly serving the master—I mean the principal. An agent with “skin in the game,” in contemporary parlance, has some *financial* stake tied up with the interests of the principal they serve. This phrase did not exist, and would not have existed, when human flesh was literally subject to physical chastisement to solve the agency problem. Where the skin at risk was real, nobody would have described the undertaking as a game. In a sense, the cavalier use of “skin in the game” could be more offensive than reference to the terms “master and servant,” which could refer to that agency relationship as it existed long after chastisement was banned.

The etymology of “skin in the game” is obscure. William Safire tried to track it down in an “On Language” column for the *New York Times*, but the source evaded him.¹¹⁶ In his bestselling 2018 book, *Skin in the Game*, the flaneur Nassim Taleb gives no origin for the phrase.¹¹⁷ The *Oxford English Dictionary* (OED) finds a first usage in a computer trade periodical in 1976, backing its definition of the phrase as “*colloquial*” for “to have a stake in the success of something, *esp.* to have a financial or personal investment in a business.”¹¹⁸ The OED admits to confusion: “It is not clear whether the metaphor underlying this phrase is to do with putting oneself at risk . . . or with risking one’s money”¹¹⁹ The writing I have found on the origins of “skin the

116. See William Safire, *Skin in the Game*, N.Y. TIMES MAG. (Sept. 17, 2006), https://www.nytimes.com/2006/09/17/magazine/17wwln_safire.html [<https://perma.cc/PKN9-3MA9>].

117. See NASSIM NICHOLAS TALEB, *SKIN IN THE GAME* (2018).

118. *To Have (One’s) Skin in the Game*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/180922?redirectedFrom=skin+in+the+game#eid177418446> [<https://perma.cc/F7MU-SW3N>] (last visited May 14, 2023).

119. *Id.* Safire opined that “skin in this case is a synecdoche for the self, much as ‘head’ stands for cattle and ‘sail’ for ships.” See Safire, *supra* note 116. But I think that is wrong.

game” does not mention servant chastisement. However, given the etymologists’ admissions as to continuing uncertainty about the source, I think the context given by the present study can lend plausible conjecture as to some connection, if not directly, then at least indirectly, to servant chastisement. “Skin in the game” as a fix to the agency problem resonates so strongly in our imagination, and fits so easily into our expression, because of the evocative, terrifying idea of skin being ripped in the course of a principal-agent relationship. That terror, salience, and intrigue must draw on, or must be stoked in some way by, the lingering memory of servant chastisement.

And yet “skin in the game” is freely used, even as the words master and servant are dropped. The first use of “skin in the game” in Westlaw’s legal databases is in a law review article in 1998.¹²⁰ By 2008, Delaware’s Court of Chancery began using those words to explain fundamental corporate law concepts, e.g.: “[M]ost shareholders are rationally apathetic Individual investors have too little ‘skin in the game’ to rationally devote the time and energy necessary to keep themselves aware of the details of the corporation’s performance or to campaign for corporate change.”¹²¹ The phrase is even now being *retroactively* applied to characterize or explain the holdings of older cases that do not themselves use the formulation.¹²² Under the modern “skin in the game” conceit, the agent does not subject themselves to discipline by the principal, for now the principal is no longer close and powerful but rather is distant and weak (because diversified and therefore disinterested). To say today that an agent has “skin in the game” is to say that they are subject to discipline by the *market*, which will punish the agent for shirking or negligence.¹²³ The phrase signifies the commodification of flesh, the fetishization of money, and the elevation of the market itself as master.

The skin of the servant is *not* their whole self; it is singled out because of its particular vulnerability and because of its connection specifically to the servant’s labor. Skin as a financial vulnerability in an economic arrangement or “game” is even less a synecdoche for the whole person, unless the fiduciary is so consumed with money as to identify with it as closely as does a cow with its head. Skin in the game is a workable solution to the agency problem because it involves *less* than the whole self, even if its exposure can bring pain.

120. See Charles H. Steen & Michael B. Hopkins, *Corporate Governance Meets the Constitution: A Case Study of Nonprofit Membership Corporations and Their Associational Standing Under Article III*, 17 REV. LITIG. 209, 242 (1998).

121. *Jana Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 340 (Del. Ch. 2008).

122. See *In re Carvana Co. S’holders Litig.*, No. 2020-0415-KSJM, 2022 WL 2352457, at *15 (Del. Ch. June 30, 2022) (“Defendants rely on numerous decisions of this court establishing that directors owning stock in the companies they serve have ‘skin in the game,’ beneficially aligning their interests with other company stockholders to maximize corporate value and incentivizing compliance with fiduciary duty over loyalty to a third party.”).

123. See Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112-13 (1965) (explaining the discipline that the market for control has over corporate directors and officers).

Whatever becomes of the “skin in the game” locution,¹²⁴ we cannot use the terms master and servant any longer today, not routinely. The terms are anachronistic, awkward, and loaded. But we can make use of a concept founded in those terms without routine use of that verbiage in our parlance. We should not forbid reference to the master-servant relationship, and by so doing risk either losing altogether what lessons it contains, or worse, creating by its sublimation some neurotic conceptual consequence. Occasional poetic, philosophical, conceptual reference to the terms master and servant will keep us rooted in that history, while sustained use of principal-agent will allow our thinking to flower into modern conceptions as we abandon older indignities.¹²⁵ The vocabulary of freedom, of flourishing, must have access to deep conceits of mastery, of self-mastery, and the self-obedience it involves.

IV. WELLNESS AS AGENT CORRECTION

The legacy of chastisement is one of the main reasons that we want to be rid of the terms master and servant. But the valuable idea of correction is one of the reasons we should look to sustain some historical understanding of the legal imagination of that relationship. Chastisement is a morally and practically corrupting means of correction. It is a hard, stupid, and stupefying technology. But the idea of agent correction is not, or need not be, in its essential aspect, a hard idea. It can be constructed in terms of a caring sensibility, an idea of cultivation. The means of chastisement corrupted this idea, or potential idea, of agent correction, but we can resuscitate it. If we are to have the agency relationship as a fulcrum of personal ethics, we ought to. We are attempting a kind of semantic transfusion, moving the precious remains of vitality from diseased and discredited formulations to healthier, still promising conceptions.

In his influential 1991 book, *Postmodernism*, Frederic Jameson wrote that while there was no good definition for that word—postmodernism—it came into widespread use anyway because some word was needed to denote the arrival of an intellectual, aesthetic, and moral sensibility that was importantly different from what had come before.¹²⁶ Something of the same can be said for the word “wellness.” In

124. I always wince at the locution, more for its reduction of our social lives, our business lives, and our inner lives, to a “game,” which it is not, then for the reference to vulnerability of our skin to market forces, which it is.

125. I find too that students become more deeply, critically engaged in the study of agency law when the full historical context of the subject is kept salient by occasional, critical, contextualized reference to the defunct “master-servant” formulation. Sometimes the phrase will come out as a student struggles to apply old principles to new problems. Once the problem is solved, the terms are battened again as the fresh understanding is clothed in proper modern attire.

126. See FREDERIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC LATE CAPITALISM* 1-6 (1990).

its contemporary usage, "wellness," despite its ambiguity and intractability, signals an approach to a sentiment of being that is distinct from earlier, related ways. Wellness has neither the precise moral inflection of goodness, nor the narrow biologic association of health, nor the philosophical particularity of virtue, nor the common sense of happiness. "Wellness" is a word we have now to describe an ambition of experience, and an experience of ambition, that partakes of elements of each of these, and yet is distinct and more than any of them.

Wellness discourse is ubiquitous today, but its modern usage is of relatively recent vintage. The word does not appear in legal publications before the 1980s. While the *Oxford English Dictionary* finds scattered appearances of the word as early as the sixteenth century, its modern formulation can be traced to Harlan L. Dunn, an American medical doctor and writer who promoted the idea of "High-Level Wellness" in a series of lectures in the late 1950s, which were then collected in a book by that name in 1961.¹²⁷ Dunn insisted that his idea of "wellness" was meant to signify "something quite different from good health."¹²⁸ The notion of good health, to Dunn, was a passive idea reflecting merely an absence of illness and a state of ease relative to one's environment.¹²⁹ Wellness, in contrast, is dynamic and advancing: "wellness is a *direction* in progress toward an ever-higher potential of functioning."¹³⁰ Dunn indulged an idiom of excellence that unreservedly embraced "the whole being of the total individual," including the "body, mind, and, spirit."¹³¹ He asserted that his concept of "wellness" could be applied not just to individuals but to "all types of social organizations," including the family, business, the nation, and "mankind as a whole."¹³² Writing at a height of intellectual liberality between the beatnik advance into respectable society and the hippy emergence in popular culture, Dunn without embarrassment proposed that such a way of thinking would lead to "the emergence of a world culture."¹³³ In accord with the attitude taken in what you are reading now, Dunn insisted that every academic and professional discipline should have the right and responsibility to advance wellness, with no area of expertise "maintain[ing] a monopoly over a particular facet of man's nature."¹³⁴

127. See generally HALBERT L. DUNN, *HIGH-LEVEL WELLNESS* (1961).

128. Halbert L. Dunn, *What High-Level Wellness Means*, 50 *CANADIAN J. PUB. HEALTH* 447, 447 (1959); see also Halbert L. Dunn, *High-Level Wellness for Man and Society*, 49 *AM. J. PUB. HEALTH & NATION'S HEALTH* 786, 788 (1959) ("[T]he essence of the task ahead might well be to fashion a rational bridge between the biological nature of man and the spirit of man—the spirit being that intangible something that transcends physiology and psychology.").

129. See Dunn, *What High-Level Wellness Means*, *supra* note 128, at 447.

130. *Id.*

131. *Id.* (emphasis omitted).

132. *Id.* at 448.

133. *Id.*

134. *Id.*

Dunn's work did not describe a program so much as it did an intention. But his vision was championed by counterculture antagonists and entrepreneurs in the 1960s. Books were published and periodicals started.¹³⁵ The National Wellness Institute was launched in 1971, and through it conferences and certification programs were undertaken, forging a cadre of like-minded professionals who would bring the wellness movement into the mainstream of American life.¹³⁶ Then came the consultants. And then came the integration of "wellness" campaigns into business and organizational strategies.¹³⁷ Wellness was identified by corporate capitalism as an effective correction approach to the agency problem, simultaneously making workers more productive and satisfied, while also reducing corporate health care expenditures.¹³⁸

A kind of pre-history of corporate efforts at "wellness" correction of agents can be identified before the emergence of that term or its modern methods. A canonical example is the Ford Motor Company's Sociological Department initiative. With the long history of servant chastisement fading from active memory, Ford sought out new ways to diminish agent absenteeism and presenteeism (showing up to work sick or hungover, and disengaged).¹³⁹ In 1914, the company established a Sociological Department, staffed by scores of operatives and informants, to try to curb unwell activity by the company's workforce, such as gambling, drinking, and patronizing sex workers.¹⁴⁰ Workers who complied with the program were given higher wages, and it is said that ninety percent compliance was achieved within two years of its implementation. Nevertheless, labor resisted the program's invasion of privacy, and Ford himself came to rue its paternalistic attributes.¹⁴¹ The Ford Sociological Department was ultimately abandoned, but the ambitions of agent correction through corporate wellness programs was just beginning.

In the 1970s, many firms began to fund and promote voluntary wellness programs aimed at smoking cessation, weight loss, and stress reduction. Later variants of such wellness initiatives included making exercise, yoga, and meditation sessions available in the workplace.

135. See Meg Jordan, *Wellness: From Movement to Profession*, 34 AM. FITNESS 58, 59 (2016) (providing a history and analysis of the wellness industry).

136. See *id.*

137. See *id.* at 60.

138. See generally Daniela Blei, *The False Promises of Wellness Culture*, JSTOR DAILY (Jan. 4, 2017), <https://daily.jstor.org/the-false-promises-of-wellness-culture/> [<https://perma.cc/H4JB-VSTS>]. Within an at-will regime, agent correction may be an attractive solution to the agency problem where competitive labor markets or robust social welfare programs render the threat of dismissal insufficient to take up the slack. See *supra* text accompanying notes 44-46 (discussing correction as an alternative to dismissal).

139. See generally Paul Hemp, *Presenteeism: At Work—But Out of It*, HARV. BUS. REV., Oct. 2004, at 49.

140. See M. Todd Henderson, *The Nanny Corporation*, 76 U. CHI. L. REV. 1517, 1540-42 (2009) (discussing Ford's project).

141. See *id.* at 1541-42.

Voluntary wellness programs, however, have never enjoyed high participation rates,¹⁴² suggesting either that workers do not think such programs serve their interests, or that they cannot “get themselves” to pursue what they do think is important. Firms began experimenting with mandatory wellness programs¹⁴³: smoking was forbidden in the workplace, junk food was limited in the cafeteria, and ergonomically correct furniture and computer interfaces were provisioned to workers. Mandatory wellness correction methods are becoming more pervasive and running deeper. Some firms rigorously screen and monitor important health factors of their servants, including weight and blood pressure, and also cognitive and emotional function.¹⁴⁴ Some firms impose mandatory workplace exercise.¹⁴⁵ Further to a new cutting-edge corporate wellness program, Amazon warehouse workers are prompted once every hour to stop what they are doing and practice mindfulness for thirty seconds, in the course of which they are instructed to repeat these phrases: “I notice the good” and “Even in chaos, I can feel peaceful.”¹⁴⁶

Agent correction in the early-modern period was circumscribed by discourses of moderation. But that common law vocabulary of restraint

142. See, e.g., Jennifer Dianne Thomas, *Mandatory Wellness Programs: A Plan to Reduce Health Care Costs or a Subterfuge to Discriminate Against Overweight Employees?*, 53 HOW. L.J. 513, 516-21 (2010).

143. Of course, in an “at-will” situation, and where workers cannot be physically compelled to execute a labor contract, all terms of employment are in some sense at every moment “voluntary.” All that can be meant by “mandatory” here is that you cannot have the job unless you participate in the wellness program.

144. See Indy Wijngaards et al., *Worker Well-Being: What It Is, and How It Should Be Measured*, 17 APPLIED RSCH. QUALITY LIFE 795 (2022) (providing comprehensive survey of innovative methods and best practices used to evaluate physical, emotional, and psychological wellness in the workplace).

145. See Thomas, *supra* note 142, at 516-21; Céline Brassart Olsen, *When Mandatory Exercise at Work Meets Employees’ Rights to Privacy and Non-Discrimination: A Comparative and European Perspective*, 12 EUR. LAB. L.J. 338, 339 (2021). It is worthwhile to distinguish mandatory exercise programs for jobs that require special levels of physical fitness from those which involve more ordinary, or even sedentary, physicality. See, e.g., *Ortiz v. City of San Antonio Fire Dep’t*, 806 F.3d 822, 823-24 (5th Cir. 2015) (assessing legality of “mandatory wellness program” for firefighters).

146. See Edward Ongweso Jr., *Amazon’s New ‘AmazEn’ Program Will Show Warehouse Workers Meditation Videos*, VICE (May 17, 2021), <https://www.vice.com/en/article/3aqb43/amazons-new-amazen-program-will-show-warehouse-workers-meditation-videos> [<https://perma.cc/H45U-CVCU>] (describing Amazon’s rollout of the new wellness program); Catherine Ferris, *Amazon Slammed for Alleged Photo of ‘Dystopian’ Motivation Messages* (July 6, 2022, 4:58 PM), <https://www.newsweek.com/amazon-slammed-alleged-photo-dystopian-motivation-messages-1722371> [<https://perma.cc/74MA-26JB>] (describing Internet outrage in connection with Amazon mindfulness program); see also Lydia Kostopoulos, *The Emerging Artificial Intelligence Wellness Landscape: Benefits and Potential Areas of Ethical Concern*, 55 CAL. W. L. REV. 235 (2018) (discussing a fascinating, terrifying compendium of technological innovations in the wellness area, and emphasizing the urgency of having ideas and intentionality around wellness).

is mostly absent from the idiom of corporate wellness.¹⁴⁷ Wellness is taken to the hilt. There was no prophylactic chastisement in Blackstone's day: agent correction could only follow misconduct. But prophylactic correction is *implicit* in corporate wellness campaigns. Wellness is a process that requires constant attention and continuous intervention. Corporate wellness is not even limited to workplace behavior—it is capacious in its concern with “encouraging employees to adopt a healthy lifestyle.”¹⁴⁸ The common law evolved to forbid servant chastisement, in part because of a “growing discomfort contemporaries had begun to feel over one unrelated adult governing another in their ‘private’ lives.”¹⁴⁹ This kind of discomfort is not felt, or if it is felt it is not countenanced, in the wellness correction movement. Far from discomfort, there is witnessed in many workplaces an enthusiasm for the principal concerning itself with the agent's “whole person.” Of course, this deepening involvement in the agent's life is typically not exercised by “one unrelated adult.”¹⁵⁰ Rather, in the modern context, it is undertaken institutionally, by many subagents of the corporation, on behalf of many distant masters (shareholders).

Because corporate wellness programs are aimed both at improving worker productivity and controlling healthcare costs, many firms now aim to improve the wellness not just of their agents, but of their agents'

147. Workplace wellness programs are largely unconstrained by legal regulation where they operate independently of employer-sponsored healthcare plans. Wellness initiatives that function in conjunction with employer-provided health care programs—for example, programs that make premiums dependent on participation—are subject to federal regulation under HIPAA (Health Insurance Portability and Accountability Act), GINA (Genetic Information Nondiscrimination Act), and the ADA (Americans with Disabilities Act). See Samuel R. Bagenstos, *The EEOC, the ADA, and Workplace Wellness Programs*, 27 HEALTH MATRIX 81 (2017) (summarizing and critiquing current legal standards). Some firms establish very high deductibles as a default and then offer substantial reductions if workers opt in for participation in wellness programs. At Scotts Miracle Gro, “[t]hose who do not participate [in the wellness program] paid an additional \$67 per month above the standard \$40 monthly health insurance premium paid by participating employees.” Thomas, *supra* note 142, at 519; see also *id.* (“Using an outside management company, Scott's analysts scour the physical, mental, and family health histories of nearly every employee and cross-reference that information with insurance claims data.” (quoting GARRY G. MATHIASON ET AL., EMPLOYER MANDATED WELLNESS INITIATIVES: RESPECTING WORKPLACE RIGHTS WHILE CONTROLLING HEALTH CARE COSTS 6 (2008), <https://www.litler.com/files/press/pdf/18868.pdf> [<https://perma.cc/ES3G-EFV3>])). Elective wellness programs related to health insurance are allowed, so long as compensation for participation is not contingent on any specific outcome or the achievement of any health-related target. Mandatory programs related to healthcare plans are subject to more scrutiny and require opt-outs and accommodations for people with particular health issues that make participation especially burdensome or impossible. Despite the regulatory complexity, commentators conclude that with the proper form, firms can and do in substance undertake a broad range of wellness programs.

148. Olsen, *supra* note 145, at 342.

149. STEINFELD, *supra* note 34, at 118.

150. See *supra* text accompanying notes 63-64 (noting the old common law's prohibition on the delegation of servant chastisement from the master to another servant or even to his wife).

dependents too. Some programs, for example, regulate smoking not just by employees, but also by employees' family members.¹⁵¹ This is a reach of servant correction that was not grasped in the early-modern legal imagination.¹⁵²

Compulsory wellness correction of agents is not limited to menial corporate labor. It is now conceived of as a solution to the agency problem in myriad domains, including professional ones. In 2017, the American Bar Association's Task Force on Lawyer Well-Being published a comprehensive, troubling report on the state of wellness in the legal profession.¹⁵³ The report asserts that lawyers, servants not only to their clients but also to the rule of law itself, "are languishing."¹⁵⁴ This conclusion is backed by harrowing statistics on lawyer depression, mental illness, substance abuse, and suicide.¹⁵⁵ Among the suggestions in the report is to amend the Model Rules of Professional Conduct to explicitly require wellness as a component of professional responsibility.¹⁵⁶ Following the report's publication, several states implemented mandatory wellness correction as a part of professional licensing requirements.¹⁵⁷ So far, this is just a thin formal requirement.

151. Daniel Charles Rubenstein, *The Emergence of Mandatory Wellness Programs in the United States: Welcoming, or Worrisome?*, 12 J. HEALTH CARE L. & POL'Y 99, 100-01 (2009).

152. See Thomas, *supra* note 142, at 520 ("Clarion [began] charging workers up to \$30 every two weeks for insurance if they let health risks such as smoking or high cholesterol go unchecked.' The Clarion program extends beyond the actions of the employees and requires any covered spouses to also participate in health screenings." (alteration in original) (quoting Sandy Szwarc, *Pay Cuts for Those Who Are Aging, Fat or Have Bad Habits*, JUNKFOOD SCI. (July 2, 2007), <http://junkfoodscience.blogspot.com/2007/07/pay-cuts-for-those-who-are-aging-fat-or.html> [<https://perma.cc/658S-L2GK>])).

153. See NAT'L TASK FORCE OF LAW. WELL-BEING, AM. BAR ASS'N, *THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE* (2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lawyer_well_being_report_final.pdf [<https://perma.cc/RDW9-6XYT>].

154. See *id.* at 7.

155. See *id.*

156. See *id.* at 26. The report points to language already used in California's lawyer competence rule, now CAL. R. OF PRO. CONDUCT 1.1(b), which requires lawyers to apply the "mental, emotional, and physical ability reasonably necessary" for the representation of given legal work. See *id.* Ought implies can, and so really what the rule means to say is that lawyers must cultivate, so as to be able to deploy, the wellness reasonably necessary to accomplish the tasks of their agency. The Task Force Report also emphasizes the importance of involving law schools in the cultivation of a culture of wellness within the profession. See generally Katelyn Albrecht et al., *Wellness as Practice, Not Product: A Collaborative Approach to Fostering a Healthier, Happier Law School Community*, 59 SANTA CLARA L. REV. 369 (2019) (surveying and critiquing existing programs and urging a community-wide, collaborative approach to wellness in legal education).

157. In Vermont, for example, lawyers must earn twenty-four hours of continuing legal education credits every two years, including "at least 2 hours in Ethics Programming, 1 hour in Attorney Wellness Programming, and 1 hour in Diversity and Inclusion Programming." *Mandatory Continuing Legal Education*, VT. JUDICIARY [hereinafter *Mandatory Continuing Legal Education*], <https://www.vermontjudiciary.org/attorneys/mandatory-continuing-legal-education> [<https://perma.cc/P5FQ-FSF7>] (last visited May 14, 2023). The Vermont standard requires "programming designed to help lawyers detect, prevent, or respond to substance

In Vermont, for example, lawyers must train in wellness for one hour in the course of two years.¹⁵⁸ But wellness is now a duty that the lawyer owes to their principal, the client.¹⁵⁹

Corporate wellness programs inspire a critical jeremiad that is no less compelling for its predictability. Such programs are the latest demonstration of the ways in which systems of power and privilege—corporate capitalism in particular—co-opt into their own operations emergent social and cultural innovations that might otherwise fundamentally challenge their basic assumptions and interests. We see in corporate wellness programs the too familiar pattern through which vital, organic social movements are denuded of their complex meanings and radical potential as they are integrated into hegemonic legal and organizational designs.¹⁶⁰ Wellness is put to work as servant to existing institutional and political power, in particular by focusing discourses of well-being on the behaviors of workers themselves, rather than on social reform.¹⁶¹ Exploitative conditions of production make workers sick in body, mind, and spirit, and then the worker is charged with correcting herself from these distortions through methods of wellness that the corporation generously makes available to her. The hydraulic imperative of corporate profit-maximization flattens out Dunn's broad-minded ideas. Cast into the profit-maximizing bedlam of corporate operations, the soul of wellness is converted to the brute orthodoxy of efficiency.

These critiques of corporate wellness are both valid and morally urgent. But they do not exhaust what can usefully be thought about wellness correction in agency relationships. The idea that corporate wellness unduly emphasizes “personal responsibility” as that path to human flourishing, instead of focusing on situational and institutional

use, mental health, and/or stress-related issues that can affect professional competence and the ability to fulfill a lawyer's ethical and professional duties.” VT. MAND. CLE R. 1(A). Illinois has adopted a similar program. See ILL. SUP. CT. R. 794(d) (requiring one hour of mental health training for every two-year reporting period).

158. See *Mandatory Continuing Legal Education*, *supra* note 157.

159. The Vermont Rule specifies that the wellness programs must concern *lawyering*: “Such programming must focus on these issues in the context of the practice of law and the impact these issues can have on the quality of legal services provided to the public.” VT. MAND. CLE R. 1(A).

160. See, e.g., Gabel, *supra* note 10, at 1563, 1573-74.

161. See, e.g., Gordon Hull & Frank Pasquale, *Toward a Critical Theory of Corporate Wellness*, 13 *BIOsocieties* 190 (2018) (arguing that employee wellness programs provide an opportunity for employers to exercise increasing control over employees); Cristopher Till, *Creating ‘Automatic Subjects’: Corporate Wellness and Self-Tracking*, 23 *HEALTH* 418, 429 (2019) (“[I]n an economy increasingly oriented towards ‘immaterial’ values and driven by cognitive, symbolic and emotional labour, it is consciousnesses which must be accumulated. This new logic of accumulation informs. . . CWST [corporate wellness and self-tracking] initiatives . . .” (citations omitted)); RONALD E. PURSER, *McMINDFULNESS: HOW MINDFULNESS BECAME THE NEW CAPITALIST SPIRITUALITY* (2019) (providing a scathing critique of corporate mindfulness from a management professor who is personally steeped in Buddhist meditative practice).

dynamics, is of course compelling.¹⁶² Yet it is also possible to understand corporate wellness programs as vindicating and operationalizing the truth that individual flourishing happens *not* by singular willfulness, but in relation to institutional contexts, and structured habits and patterns. While corporate wellness undoubtedly reaps exploitation, it also sows language and sponsors imaginative occasions for the cultivation of ideas about correction that may serve counter-hegemonic functions.

The “legalization” of the wellness movement in this way functions as a kind of preservative, and even an incubator, of the wellness movement’s deeper promise. The new world of wellness demands “something . . . transformative,” one prominent consultant recently wrote, using language in which Dunn’s vision yet abides.¹⁶³ Yes, in the wellness movement, we see capital discovering that it is more efficient to externalize the cost of agent correction to the agent herself, getting the agent to “whip herself into shape,” rather than the master bearing the practical and psychic costs of doing it. But there is *slack* in that use of agency, as there always is in agency relationships, and in that slack we may find secret profits in wellness correction, and may make real liberation with the tools set out as a solution to the agency problem. Yes, the conditions of production are what make the servant unwell to begin with. But humanity never needed capitalism to supply its habit of coming up short on its promises to itself. We can rescue the conceit of wellness from its corporate preserve and take transformative advantage of the learning that has been developed in connection with its expropriative use.

Corporate wellness discourse may serve to resuscitate the old agent correction notion that the agent is in some sense entitled to correction, and that the master—now the firm—has a duty to provide it. Reflecting widespread verbiage, a recent book by Scott Behson, *The Whole-Person Workplace*, emphasizes that “[e]mployers owe it to the whole people who work for them to provide an environment where they can thrive, both at work and in the rest of their lives.”¹⁶⁴ Predictably, Behson asserts that this makes everyone better off: “It is both the right thing to do and smart business to respect employees as whole people.”¹⁶⁵ Now, this is fake in important ways. In truth, it is *sometimes*

162. See Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 131-37 (2003) (condemning “dispositionism” in law and legal theory and urging adoption of a “situational character” model that could replace the “rational actor” conception in legal thought).

163. SCOTT BEHSON, *THE WHOLE-PERSON WORKPLACE: BUILDING BETTER WORKPLACES THROUGH WORK-LIFE, WELLNESS, AND EMPLOYEE SUPPORT* 19 (2021).

164. *Id.* at 24.

165. *Id.*; see also *id.* at 22 (reviewing a wellness program at a characteristic firm and insisting “this improvement never represented a financial trade-off”); *id.* at 23 (asserting,

the case that the most profit (“smart business”) involves treating workers well, but sometimes, and in some industries, it is more profitable to treat workers rapaciously. Directors must take whichever path is most profitable: under prevailing corporate governance law, directors cannot sacrifice corporate profits for the purpose of serving some interest unrelated to shareholder value.¹⁶⁶ But fake discourses can be useful grounds for the exploration of creative new possible realities.

Wellness is a wiser, more tender method of agent correction that emerges after the idiot cruelty of agent chastisement has been put down. We can mitigate the agency problem that inhibits the full operation of our own self-mastery by deploying this new means of correction, the modern, humane, progressive means of wellness. Such an approach is more efficient and transformative than is either self-flagellation or self-abandonment, in the ways that kindness and gentleness are always in the end more powerful than brutality. We *can* do this as an expression of self-mastery. And we *ought* to do it too for our servant selves, to give ourselves the verve of action, the upright posture of loyalty, the aroused sentiment of being, that is the promise of the fiduciary-self. If we can hear an echo of the old common law idea that the principal is responsible for the correction of the agent in contemporary corporate wellness discourse, then we can amplify it as we apply such frameworks to ourselves.

CONCLUSION

The legal relationship of principal and agent, of master and servant, rhymes with a deeper, more personal relationship that we have with ourselves. By studying the legal imagination, doctrinal formulations, and practices that have shaped that legal relationship, we might gain insight that is useful to the development of our self-conception and efficacy. In the contemporary corporate context, wherein we find a quintessential contemporary expression of fiduciary duties, the law sets out diligence, judgment, and loyalty as core responsibilities of the agent. We can identify these injunctions not only as burdens but as opportunities for personal growth, excellence, and transcendence. However, agency theory is also highly attuned to the problem of getting an agent to actually behave as the law prescribes. We can witness this agency problem within ourselves too. As we think about making

without reference, the following: “There may be short-term benefits to long, unrelenting hours and high-pressure environments. However, over time, these short-term gains bring with them even larger losses, for both employers and employees.”).

166. See YOSIFON, *supra* note 23, at 18. I have elsewhere described the phony view that profit-maximization always aligns with treating workers well as the “Pareto fallacy of corporate profitability.” *Id.* While I am an unrepentant critic of shareholder primacy in corporate governance, I want to be skeptical but not cynical to the workplace wellness movement. Read gently, BEHSON, *supra* note 163, is an encouraging compendium of the efforts and real accomplishments of scores of smart, caring, hardworking people to improve working conditions in American business.

ourselves more effective, and better aligning our behaviors with our purpose and plans, we must figure out what kind of attitude to cultivate in the relationship between our self-mastery and our self-obedience.

We find in older common law treatments of the agency problem the idea that the master had the right, and even the responsibility, to respond to a slacking or insubordinate agent by “correcting” them. The methods of early-modern agent correction were ignominious: they involved physical chastisement through cuffing, slapping, hitting, and whipping. This reflected a stern, aggressive attitude towards the agent, a mean, hard approach to straightening the agent out. The people of the past were stupid and corrupt, just like us. If we are to learn from them, it must be through a course in their brokenness, or else not at all. The old common law was alert to the need for agent correction, and it was alert to the danger, to the servant, to the master, and to the relationship between them, of using the chastisement mechanism to accomplish it. The use of chastisement was therefore circumscribed by a requirement of moderation, which we can understand as a requirement of intentionality. We can draw from this legacy some understanding about cultivating an attitude of proper self-obedience in our personal existential framework. We cannot assume that we will obey ourselves, indeed we should anticipate that we will not. We are lazy, clumsy, negligent, even corrupt. We might have in mind, or put into our mind through a study of the agency ideas of the past, an idea of a right and responsibility to correct ourselves. This must be done moderately, otherwise it will be self-destructive, undermining both our self-command and our self-obedience. But how do we do it?

The common law woke up from the depravity of servant chastisement into subtler nightmares of labor discipline. “At will” relationships, the coercive, *constant* threat of termination, the fear of being cancelled altogether, replaced the occasional use of the lash. While less acutely terrifying, dismissal can also be physically and psychologically destructive to the agent, since it can lead to deprivation of food, shelter, healthcare—the very means of subsistence. This modern “expel the lazy drone”¹⁶⁷ approach to the agency problem is devoid of attention to moderation, or attention to what consequence immoderation has on the character of the master and the servant. The eclipse of moderate agent-correction discourse thus threatens to impoverish the utility of the agency framework as a model of willful self-command. There is no way to threaten our slacking agent-selves with dismissal, or if there is, then that threat is truly catastrophic, truly existential, even actually suicidal.

Now there emerges, especially in corporate contexts, a new idea and practice in agency relationships: wellness. We see principals concerning themselves with cultivating the wellness of their agents. This wellness

167. See *supra* notes 72-74 and accompanying text.

is conceived as physical, psychological, emotional, and even financial and spiritual thriving. The discourse of wellness concerns not so much satisfying the “preferences” of the agent as the agent self-conceives them, nor of aligning those preexisting preferences with those of the principal, but rather the wellness movement is concerned with “correcting” the physical, emotional, and spiritual systems of the agent, in order to get them to operate more properly, more efficaciously. It is conceived that a well servant will function better and more happily within the agency relationship, and that this will benefit the master, the agent, the relationship between them, and the society of which they are a part.

The wellness conception provides a way to think about agency-cost reduction in our personal ethics in a way that is healthy and vitalizing. We might require of ourselves involvement in a system of wellness designed to improve the efficacy of our self-obedience, in a manner that is unconcerned with patronizing our existing preferences, and more concerned with cultivating a healthy, potent sentiment of being. It is a way of recognizing that we are messed up, not just improperly incentivized, and that we can be better. It is a way to awaken ourselves to a sensitivity and awareness about how we function, fail, and strive for improvement. This ethics is formed in the relationship between our self-mastery and self-obedience. The agent is entitled to wellness, and the master has the responsibility to provide it. We can and we must do this to ourselves, for ourselves. Wellness is a revolutionary improvement over chastisement, so well-improving that with it we can rescue the idea of agent correction from its sordid association with the brutal, corrupting practices of the past.

There is a relationship between individual excellence and institutional alteration. The extractive motivation of corporate wellness programs can lead instead to the de-commodification of labor by well-people, at least in our minds, which is, anyway, a place to start. Made healthier and more capable by this framework, that is, corrected with a gentle self-mastery into a careful, loyal self-obedience, we are aroused to action, ready to go. This enriching personal ethics stokes energy, clarity, and integrity, which can power social engagement and a commitment to reform the very institutional arrangements that inspired the transformative self-conception. We may take, for example, the old idea that the master has a duty to correct the agent, now rescued and ramified in our personal ethics through the idiom of wellness, and deploy that old principle to give some disruptive new grammar to theories of corporate governance that presently speak only derivatively in the language of economics. This is not to say that the ethical power of the fiduciary-self necessarily prescribes any particular set of institutional reforms, or even any particular reformative orientation. It is to say that exploiting the existential vitality available in the fiduciary imagination can lead to meaningful change in the real world.