Squaring Undisclosed Agency Law with Contract Theory

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The law of undisclosed agency has long been considered an anomaly of contract theory. While few disapprove of its content, this body of law does not appear to square with our theoretical understanding of contractual obligation. In this Article, Professor Barnett applies a "consent theory of contract" to explain and critically evaluate the law of undisclosed agency. After showing why standard contract theories have been unable to explain the established doctrine in this area, he analyzes the nexus of obligations arising from the consensual "triangular flow of rights" among the three parties to the paradigm undisclosed agency relationship. He then extends this analysis to treat several "hard cases." Professor Barnett concludes that the bulk of this spontaneously evolved body of law is theoretically sound; that the source of the long-standing apparent anomaly is the predominance of the promise-based theory underlying the action of assumpsit; and that judges' ability to develop good law in spite of the deficiencies in the prevailing contract theories provides an insight into the appropriate roles of tradition and reason in generating law.

INTRODUCTION

The law of undisclosed agency concerns the following situation: UP's agent A makes an agreement with T, but UP's existence and identity are unknown to T. UP is called the "undisclosed principal."1 What are the legal relations among these three actors? Do A and T have a valid contract? Can T sue UP for breach? Can T refuse to perform when she discovers the identity of UP? Nearly every legal theorist who has considered the law of undisclosed agency from the point of view of contract theory has concluded that the established rules are anomalous.2 This has

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1. H. REUSCHELIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND

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I have cited only the most recent one. In this Article, I explain the apparent anomaly of the present law of undisclosed agency law as an entitle-ment theory and a "consent theory of contract." In Part I, I show why the law of undisclosed agency is considered to be anomalous by sketching four illustrative cases that conventional theories of contractual obligation cannot explain. To help correct the current dearth of American agency law scholarship, I also provide citations to the most recent state cases on the basic principles of undisclosed agency. In Part II, I summarize a consent theory of contract and apply it, first to the paradigm case of undisclosed agency described above, and then to several "hard cases." My conclusion is that current undisclosed agency doctrine is supported by sound modern entitlement theory and a consent theory of contract. Moreover, where doctrinal conflict exists among American courts or between American courts, a consent theory of contract can be used to determine which stance is preferable. In Part III, I identify the doctrine of as-sump-sit—a product of promise-based contract theory—as the source of the seeming anomaly of undisclosed agency law. Having thus squared undisclosed agency law with contract theory, I observe in Part IV that the judicial development of this coherent body of doctrine illustrates the proper role of legal theory in the development of legal doctrine.

I

THE ANOMALY OF UNDISCLOSED AGENCY

A. The Law of Undisclosed Agency

To see why the law of undisclosed agency is thought to be anomalous, consider a series of hypothetical illustrations. First, consider the paradigm case:

Illustration I. A and T manifest to each other assent to a contract for some goods. A bargains for T's rights to the goods, and T bargains for A's payment. Unknown to T, A represents U. If T fails to deliver the goods, can A sue T? Can U sue T? If U fails to pay for the goods, can T sue A? Can T sue U?

Under conventional contract principles, A is contractually liable to T, and T to A. Each has "bargained for" the assent or promise of the other. Therefore, a failure to pay for or deliver the goods constitutes a breach of contract and provides the nonbreaching party with a good cause of action against the party in breach. The law of undisclosed agency is in accord.

7. Although I have refer only to a bargain theory of contract, I below examine these relationships under all five standard theories of contract. See infra text accompanying notes 19-38.

The conceptual problem arises when we consider UP's liability to T and T's liability to UP. According to normal contract theory, UP is not a party to the contract between A and T. UP never manifested his assent to T. T never manifested her assent to A. It was A who promised to pay for the goods and T who promised to buy them. A kept UP's existence a secret from T. Although the law of contract usually does not permit the secret intentions or knowledge of one party to affect the rights of the other, the normal law of undisclosed agency permits UP to sue T for failure to deliver, and permits T to sue UP for failure to pay.10


In Illustration 1, T was permitted to sue for failure to pay. Yet here, most American courts, stressing the fact that T contracted with A and relied solely on A's credit, would deny T a right to sue UP for payment.11

In contrast, English courts would permit T to recover from UP;12 forcing UP to pay twice unless T had done something to induce UP to settle with A.13

Compare these results with how A's insolvency affects UP's rights:

In Illustration 2. Same facts as Illustration 1, except that after T delivers the goods to A, who in turn delivers them to UP, UP pays A the money for the goods. A becomes insolvent before paying for the goods. Can T sue UP for payment?14

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This was precisely the problem addressed in the early case of Scrimshire v. Alderton.14 In Scrimshire, the trial judge directed the jury to find that, where T disregarded UP's instructions and settled with A, UP could recover the purchase price from T, forcing T to pay twice.15

American
courts have accepted this doctrine. 16

The Sclitwich doctrine contrasts with the rule governing Illustration 2, where American courts would not permit T to recover from UP when UP settled with A. Symmetry would seem to require that UP should not be able to recover from T when T has settled with A, given that T cannot recover from UP when UP has settled with A. Any theory justifying current undisclosed agency law should explain this apparent anomaly.

Finally, consider another hard case:

Illustration 4. Same facts as Illustration 1. After entering into the contract with A, T, an archenemy of UP, learns of UP's existence and identity and refuses to deliver the goods. May UP or A sue T for breach?

In Illustration 1, the law of undisclosed agency permits UP to sue and be sued as a party to the contract without regard for the secret nature of the relationship between UP and A. 17 In this case, however, if either A or UP knew of T's attitude, then most courts would permit T to rescind the contract. 18

B. Undisclosed Agency and Contract Theory

How well do the traditional theories or principles of contractual obligation explain these doctrinal results? Elsewhere, I have described the five traditional theories of contract as the will, reliance, efficiency, substantive fairness, and bargain theories. 19 Here, I argue that none of these theories adequately explains the law of undisclosed agency.

The will theory looks to see if both parties subjectively assented to a contract. 20 A will theory can explain why T would be bound to A in Illustration 1, but it cannot explain A's liability to T, since A was secretly representing UP and may not have intended to be bound personally. Because subjective assent by T to contract with UP is lacking in all four Illustrations, a will theory does not explain the instances where UP can sue T. Moreover, in Illustration 4, T may escape liability by objecting to UP as a contracting party, but only if UP or A were aware of T's unwillingness to contract with UP. 21 This result lends no credence to a subjective will theory.

Even if we limit our inquiry, as most modern analysts would, to the presence of objective or manifested assent, 22 we find no manifestation of assent by T to contract with UP. Nor has UP manifested assent directly to T, except vicariously, and in a disguised manner, through A.

The seeming incongruity between the law of undisclosed agency and theories of contract based on either subjective or objective assent is probably the main reason that the doctrine of undisclosed agency historically has been considered anomalous. This comment from the Restatement (Second) of Agency is representative:

The rules with reference to undisclosed principals appear to violate one of the basic theories of contracts. The relation between the principal and a person with whom the agent has made an authorized contract is spoken of as contractual, although by definition there has been no manifestation of consent by the third person to the principal or by the principal to him. In fact, the contract, in the common law sense, is between the agent and the third person. In spite of this, the law of agency finds it expedient to create rights and liabilities between the other party to the transaction and the principal as if the latter were a contracting party. 23

The second traditional contract theory, the reliance theory, which looks to the existence of "reasonable" and detrimental reliance, 24 fares little better. If T does not know of UP's existence, the can never rely on UP's commitment. Therefore, a reliance theory cannot explain why T may hold UP liable as a party to the contract. Frederick Pollock, an early and persistent critic of the doctrine of undisclosed agency, made a similar observation:

A enters into the service of X, he does not know of the existence of Y and Z. X's dormant partners. It therefore follows that he was induced to enter into the contract by his trust in the promise of X to remunerate him; and if he afterwards discovered that X had no partners, A would have no reason to complain. Why then should he gain by the fact, which

17. See supra notes 9-10 and accompanying text.
18. H. Reuschlein & W. Gregory, supra note 2, § 107, at 173 ("The cases are all but unanimous in allowing recovery when the principal or the agent knows that the other party would not enter into the contract with the principal; but fails to disclose that fact thus perpetrating a fraud."); see, e.g., Daniel Boone Complex, Inc. v. Pursel, 43 N.C. App. 95, 258 S.E.2d 379 (1979); Cummings v. Jorgensen, 25 Utah 2d 274, 480 P.2d 466 (1971).
19. See Barnett, supra note 3, at 271-91 (describing these five theories and their inherent deficiencies). When these concepts are combined within a theory of contractual obligation, they are better characterized as principles or "core concerns" rather than theories.
20. See id. at 272-74 (describing a will theory of contract and its deficiencies).
21. See Restatement (Second) of Agency § 304 & comment a (1957); see, e.g., Almcll C erp. v. Egcr, 141 F. Supp. 10, 22 (S.D. N.Y. 1956) (where no evidence that T previously refused to contract with principal, his later statement that he would not have entered into the contract had he known that UP is no defense); Hunter Tnt Improvement Co. v. Stone, 58 Wash. 661, 109 P. 112 (1910) (where neither UP, who was black, nor his agent knew or had reason to know that T would not have sold property to a black, a subsequent claim of such unwillingness did not support a defense of mistake).
22. See, e.g., Farnsworth, Contracts 113-14 (1982).
23. See id. at 116 & comment a (1957); see also authorities cited supra note 2.
never influenced his conduct, that Y and Z were X's partners when A contracted with X. 25  

Since UP's liability is a central tenet of undisclosed agency law, a reliance theory has serious explanatory shortcomings. Furthermore, a reliance theory may not explain T's liability to A in Illustration 1, since it is not clear how A. acting solely on UP's behalf, would have detrimentally relied on T. The only relations a reliance theory might explain are: (1) T's liability to UP in Illustration 1, if UP knew of and relied on T's commitment, and (2) A's obligation in Illustration 1, if T can be shown to have relied on A's promise. 26

Both the efficiency and substantive fairness theories, the third and fourth traditional contract theories we consider, are standards-based. A standards-based theory evaluates the results of the transactions against a predetermined standard regarded as primary. 27 There are two immediate problems with such theories. First, they require a mechanism for discovering and justifying the standards they apply. Second, they would not enforce any transaction that failed to meet the proper standard, even one in which the parties are in mutual agreement. 28

I discuss elsewhere why an efficiency analysis cannot by itself produce a normative assessment of contractual obligation. 29 Moreover, if a consent theory of contract is consistent with or even necessary to achieving allocational efficiency, 30 then the outcomes it specifies in the area of undisclosed agency are likely to facilitate efficiency without resorting to an explicit efficiency analysis. Still, economic analysis can tell us much about importance of agency relationships. 31 Although to my knowledge economists have yet to discuss specifically the problems unique to undisclosed agency, enforcing contracts made on behalf of undisclosed principals provides important economic benefits. Permitting principals to conceal their existence is one way to overcome strategic behavior—or so-called “hold-out” problems—that can impair the formation of mutually beneficial contracts. Many buyers seek to avoid having to pay more for a particular item solely because the seller knows of the buyer's deep pocket. 32 For example, in Senor v. Bangor Mills, Inc., 33 the defendant, a prodigious user of nylon yarn, had to make frequent and substantial purchases in the “secondary” market in order to maintain its production levels. Because its needs and economic position were well known, it was asked to pay prices that were very high even for that market. Accordingly, it sought to buy yarn more cheaply through an intermediary. 34

In addition to the problems mentioned above, since there is nothing in any of the illustrations to indicate the substantive “unfairness” of the exchange, a substantive fairness theory 35 has nothing whatsoever to say about how these cases should be decided. 36

The final traditional theory, the bargain theory of contract, 37 only explains A and T's liability to each other. Where UP did not himself bargain with T and T certainly did not knowingly bargain with UP, it is unclear under the bargain theory why UP or T would be liable to each other. The inability of the five best known theories of contractual obligation to explain the seemingly anomalous results of the law of undisclosed agency is symptomatic of the general weakness of each of these five approaches standing alone.

Moving beyond the purview of contract theory, a noncontractual, restitution-based “unjust enrichment” analysis is deficient as well. Sometimes UP is enriched at T's expense, and sometimes (as in Illustration 2) he is not. UP's liability does not usually turn on this fact. “Enrichment” normally refers to the receipt by a person of benefits not paid for. Therefore, when UP is enriched, A is surely not. Yet A nonetheless remains subject to liability until T elects to pursue UP. Moreover, T's liability in Illustration 3 cannot be justified in terms of restitution, since T has already paid for the goods once.

Although the law of undisclosed agency has lacked adequate theoretical justification, it makes some sense intuitively. 38 If this body of rules

26. See Barnett, supra note 5, at 277-86.
27. Id. at 255-66.
28. See id. at 277-83.
29. See id.
30. Thus far, however, economic analysis has been applied to “agency cost” questions largely to explain the existence of “the firm.” These analyses ask why and when it is rational or efficient to separate “ownership” (the beneficial residual claim to the firm's cash flow) from “control” (the decisionmaking power to allocate the firm's resources). See generally Fama, Agency Problems and the Theory of the Firm, 84 J. POL. ECON. 288 (1976); Fama & Jensen, Separation of Ownership and Control, 26 J.L. & Econ. 301 (1983); Fama & Jensen, Agency Problems and Residual Claims, 26 J.L. & Econ. 327 (1983); Jensen & Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. FIN. ECON. 305 (1976).
32. 211 F.2d 685 (3d Cir. 1954).
33. Id. at 687. There is an irony here for unconscionability theory in that the perception of the defendant's large requirements and wealth undermined rather than enhanced its bargaining position, if not its “power.”
34. See Barnett, supra note 5, at 283-85 (describing a substantive fairness theory of contract and its deficiencies).
35. Cf. id. at 285 (“The substantive fairness approach fails to address squarely the most central and common problem of contract theory: which conceivable agreements should be enforced and which should not?”) (emphasis in original).
36. See id. at 287-89 (describing and criticizing a bargain theory of contract and its deficiencies).
37. Cf. H. REICHSTEIN & W. GREGORY, supra note 2, § 95, at 159-60 (“It seems significant to note that the commercial fraternity, which has been so active in seeking uniform legislation in other
can be theoretically justified, it will reaffirm an important virtue of a
common law system: that the process of adjudicating countless cases can
lead judges uninformed by the niceties of legal theory (or despite their
familiarity with legal theory) to a more just body of rules. Legal theory,
however, is still necessary to shape the doctrines that result from com-
mon law adjudication and to assist judges in deciding hard cases. Legal
theory is also needed to justify the spontaneously evolved doctrines. For
these reasons, Part II critically applies a consent theory of contract to the
law of undisclosed agency.

II

Undisclosed Agency in a Consent Theory of
Contract

A. A Consent Theory of Contract

Although a consent theory of contract is more fully expounded else­
where, I should give a brief summary of it here before applying it to the
law of undisclosed agency. A consent theory of contract is part of a
more comprehensive, proprietary conception of legal entitlements. This
conception construes legal rights as enforceable claims to acquire, use,
and transfer resources—claims to control one's person and external
resources. Because contracts serve to transfer control of certain
resources, contract law should be grounded in a theory that explains why
people have and can control those resources in the first place. Contract
theory searches for the "other factors" that transform an unenforceable
promise or statement of intention into a legally enforceable contract.
A consent theory of contract requires that an enforceable contract satisfy
at least two conditions. First, the subject of a contract must be a morally
cognizable right possessed by the transferor that is interpersonally trans­
ferable, or "alienable." Second, the possessor of the alienable right must
areas affecting business, has registered no serious complaints. This would seem to indicate that the
rules are at least reasonably satisfactory to the commercial world."

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manifest his intention to be legally bound to transfer the right—that is,
he must consent. In a consent theory, neither consideration nor reli-
ance are essential to contract formation.

In the vast majority of contracts cases, the vexing issue is neither the
alienability of rights nor even whether the parties manifested consent
to transfer rights. Most "real-world" contractual disputes involve deter-
mapping precisely which rights were intended to be transferred by the
parties. But a close examination of either the alienability or the consent
requirement can explain the persistent "hard cases" for traditional con-
tract theories. For example, a close analysis of the consent requirement
can explain both the justification for enforcing formal agreements that
lack bargained-for consideration and the willingness of courts to focus on
objective assent in some cases and subjective assent in others. Similarly,
the requirement of alienability can explain the reluctance of com-
mon law courts to specifically enforce personal service contracts. The
supposed "anomaly" of undisclosed agency is another important exam-
ple of the explanatory value of a consent theory of contract.

B. Explaining the Paradigm Case of Undisclosed Agency

The paradigm case of undisclosed agency is Illustration 1. None of
the prevailing theories of contractual obligation can satisfactorily explain
why UP may either sue or be sued by T. Before we address the "hard
cases" of contractual obligation posed by Illustrations 2, 3, and 4 (and
others as well), we must first consider at length the obligations arising in
the paradigm case. Let us recall Illustration 1:

Illustration 1. A and T manifest to each other assent to a contract for
some goods. A bargains for T's rights to the goods, and T bargains for
A's payment. Unknown to T, A represents UP. If T fails to deliver the
goods, can A sue T? Can UP sue T? If UP fails to pay T for the goods,
can T sue A? Can T sue UP?

Answering these questions will require a multifaceted application of
a consent theory of contract. We must isolate and consider separately all
three legal relationships at issue: (1) the relationship between A and T;

38. See K. Zweigert & H. Kötz, An Introduction to Comparative Law 104 (1977)
(Although eminent English and American jurists have thought of this role as an anomaly of the
Common Law, it is regarded by continental lawyers as a forward-looking doctrine which could serve
as a landmark for legal development.). cf. Müller-Frensels, Comparative Aspects of Undisclosed
Agency, 18 MOLI. L. REV. 33, 41 (1955) ("Both laws admit, starting from opposed principles so
many exceptions that ... both extensively accord in practical results."). See generally J. F. A.
Hayek, Law, Legislation, and Liberty, 1973 (describing the evolutionary process produced
by adjudication). I will return to this theme in text accompanying notes 140-45.
39. The summary of a consent theory of contract presented here is necessarily a truncated one.
The theory is presented in greater length in Barnett, supra note 5, at 291-321, and Barnett, Contract
Remedies and Inalienable Rights, 4 SOC. PHIL., & POL'Y, Autumn 1986, at 179.
40. See Barnett, supra note 5, at 201-300; Barnett, Pursuing Justice in a Free Society: Part
One—Power vs. Liberty, CRIM. J 1STIC ETHICS, Summer/Fall 1985, at 50.
41. I A. CORBIN, CORBIN ON CONTRACTS § 110, at 490-94 (1963); see also Eisenberg, The
42. See Barnett, supra note 5, at 296-300.
43. This aspect of a consent theory also yields a comprehensive explanation of the doctrine of
promissory estoppel. See Barnett & Becker, Beyond Reliance: Promissory Estoppel, Contract
44. For this reason, contract theory does not always directly address important problems of
interest to doctrinal scholars. See, e.g., Farnsworth, 4 Fabi and A Quiz on Contracts, 37 J. LEGAL
EDUC. 206, 209 (1987) (noting that decisions concerning energy disputes "have been largely
concerned with problems that arise during the performance stage of contracts and have had little
classical case of the explanatory value of a consent theory of contract.

the other shall act on his behalf and subject to his control, and consent by the other so to act.\textsuperscript{50}

In its conception of the agency relationship, however, a consent theory differs from conventional agency theory. Conventional agency theory relies on existing contract doctrine that requires "bargained-for" consideration. Consequently, it recognizes a contract between the principal and agent only when, as in most commercial agency arrangements, the principal commits to compensate the agent for his services. When the relationship is gratuitous and revocable by either party, however, standard agency theory must resort to noncontractual "empowering" of agents.\textsuperscript{51}

In contrast, a consent theory contemplates that all agents who are empowered to enter into contracts\textsuperscript{52} with third parties on behalf of their principals also enter into a contract with their principals—a contract in which they explicitly or implicitly commit to transfer to their principals any rights they receive under the contracts they enter into in their own name but on the principal's behalf. A consent theory identifies any consensual transfer of rights as "contractual," and therefore characterizes the agent's rights-transfer commitment to the principal as contractual, regardless of the presence or absence of consideration. When the normal agent-principal relationship is seen as contractual, it provides a vital "missing link" in a proper understanding of the obligations arising in undisclosed agency situations.

In a normal agency arrangement, an agent contracts with a third party to transfer rights to resources that he, the agent, does not own. A principal who authorizes his agent to so act "on his behalf" consensually empowers the agent to exercise certain rights that the principal alone would normally exercise. The right to sell one's goods—for example, one's car—is one aspect of the "bundle of rights" that constitutes "ownership" of goods. It is a right that a lessee of goods, for example, does not enjoy. When a principal-owner consensually authorizes an agent to sell his car, he empowers the agent to exercise this right for the benefit of ("on behalf of"), and subject to the control of, the principal-owner. In turn, the agent consensually commits himself to transfer to the principal the rights to the purchase money he acquires from a third party purchaser.\textsuperscript{53}

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\textsuperscript{50} See \textit{Restatement (Second) of Agency} § 1 (1957).

\textsuperscript{51} See \textit{Restatement (Second) of Agency} § 6 (1957) ("A power is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act.").

\textsuperscript{52} The analysis in the text is not intended, therefore, to apply to situations where agents are empowered to perform other, noncontractual kinds of acts on behalf of principals.

\textsuperscript{53} While each party to this kind of agency relationship necessarily makes a commitment to the other, these "reciprocal" commitments need not constitute traditional "bargained-for" consideration. Though reciprocal, the agent's commitment might be entirely gratuitous. An agent may commit to transfer rights to the purchase money without any intention that this commitment

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\textsuperscript{47} The assumption is in favor of the unequivocal, objective meaning of a term. However, if the proponent can prove that the promisee understood the term in a subjective, extraordinary meaning of a term, a court may enforce that subjective meaning. Furthermore, a special meaning held in common by the parties is also enforceable. See Barnett, supra note 5, at 307-09.

\textsuperscript{48} Cf. \textit{Ade v. Vaughn}, 139 Okla. 32, 33, 14 P.2d 231, 232 (1932) (quoting \textit{Calman v. Kretzke}, 40 Okla. 516, 518, 139 P. 698, 699 (1914)). "Although an agent enters into a contract with the actual intention of binding his principal only, if his wording of the same or the circumstance of the case are such as to bind himself, he will be personally liable therefor." By the same token, in Illustration 4, any mental reservation subjectively held by \textit{T} concerning a legal relationship between \textit{A} and \textit{UP}, unexpressed or unknown to \textit{A} at the time of formation, would not ordinarily affect \textit{A}'s right to enforce the agreement against \textit{T}. See infra text accompanying notes 86-100.

\textsuperscript{49} "Standard doctrine" refers to well-settled contract rules and principles. The diverse contract theories discussed above purport to explain the doctrine. See supra text accompanying notes 19-38.
The normal results of this consensual agreement between agent and principal, then, are: (1) the principal grants to the agent the power to alienate the principal's rights to the car; (2) the agent, by exercising this power, effectuates the transfer of all the principal's rights to the car directly from the principal to the third party purchaser; and (3) the agent is consensually committed (to the principal) to transfer to the principal the rights to the purchase money he receives from a third person. Therefore, these rights pass immediately to the principal without any further assent or act by the agent. Nothing in the normal undisclosed agency situation changes this general agency analysis.

The result of this arrangement can be represented as a triangular flow of rights, as illustrated in Figure 1. The undisclosed principal grants the agent the power to sell the car, and then, upon the exercise of this power by the agent, transfers all his rights to the car directly to the third party. The third party transfers the rights to the purchase money to the agent who, by prior contractual agreement, has consented to these rights moving immediately and automatically to the principal. To put it more simply, rights flow directly from UP to T and indirectly from T to UP through A.

Figure 1

![Diagram of rights flow](image)

The flow of rights between UP and A is normally the same when, as in Illustration 1, UP is buying goods from T. In this case, UP grants to A the power to sell the goods. On the other hand, an agent may make this commitment, and others as well, with the intention that it induce the principal to compensate the agent, in which case the agency would not be gratuitous. Traditional agency theory based on traditional contract doctrine recognizes only the latter situation to be "contractual."

54. For other constructions of this arrangement, see text note 81 and accompanying text.

3. The Relationship Between the Undisclosed Principal and the Third Party

We are now in a position to assess the relationship between undisclosed principals and third parties. The simultaneous operation of the two distinct contracts between UP and A and between A and T creates a triangular flow of rights. Rights flow from UP directly to T, and rights flow indirectly from T to UP through A. Whether or not a third contract is said to exist between UP and T is academic. The rights that each has against the other are "contractual" in nature insofar as their distribution resulted from the consensual alienation of proprietary entitlements. This consensual flow of rights redistributes the resource or property rights of the parties, thereby resulting in a cause of action when actual resource holdings fail to correspond to the new set of entitlements.

In Figure 1, where UP has transferred to T all rights to the car, UP's failure to deliver the car to T would result in an unjust distribution of holdings that ought to be corrected. Because holdings must match entitlements, a consent theory of contract makes sense of this situation. While the flow of rights to T was initiated by UP's agency relationship with A, the effect of A's exercise of his power to alienate UP's rights is that T now has the right to the car. Thus, UP is wrongfully in possession. Moreover, A is also consensually liable for UP's failure to perform. A manifested his intention to perform or pay damages, and is therefore a party to a valid sales contract with T. T is then entitled to pursue both A and UP until she receives either performance or damages.

Now suppose instead that T refuses to pay for the car. Since the sales contract between T and A transfers the right to the money from T to A, and the agency contract between A and UP automatically and immediately transfers this right from A to UP, UP may either sue T directly or authorize A to sue T for payment on his behalf. Nothing in

55. Cases where A has committed to personal performance of the obligation are discussed below as among the "hard cases" of undisclosed agency. See infra text accompanying notes 101-106.

56. The subject of election is beyond the scope of this Article. See Restatement (Second) of Agency § 209-211 (1957); Richmond, Stripping Some Moss From the Old Oaken Doctrine: Election Between Undisclosed Principals and Agents and Discovery of Their Net Worth, 66 Marq. L. Rev. 745 (1983). One recent decision may indicate the future direction of the doctrine of election. See Grinder v. Bryans Rd. Bldg. & Supply Co., 290 Md. 687, 707-08, 432 A.2d 453, 464 (1981) ("We hold that a creditor who contracts with the agent for an undisclosed principal does not obtain alternative liability, that he may proceed to judgment against both, but that he is limited to one satisfaction.").
this triangular flow is necessarily affected by T's ignorance of UP's existence.57 The same result would obtain in Illustration 1 if T refused to convey the promised goods.

C. Explaining the "Hard Cases" of Undisclosed Agency

A consent theory's account of the paradigm case of undisclosed agency provides a better understanding of the hard cases described in Illustrations 2, 3, and 4, and others as well.

1. The Effects of Default by the Agent

a. Effect of Settlement With Agent by Principal

Illustration 2. T delivers the goods to A, who in turn delivers them to UP. UP pays A the money for the goods, but A becomes insolvent before paying T for the goods. Can T sue UP for payment?

When UP pays the purchase price to A, and A becomes insolvent and does not transmit the money to T, both UP and T are innocent parties. (This is also true when T pays A for goods purchased from UP, but A becomes insolvent before paying UP.) This is a "hard case" for the law of undisclosed agency because one of two innocent parties must bear the loss caused by A's insolvency.58 Because there is no obvious way that the burden of such a loss should be allocated, it is not surprising that American and English courts differ in their treatment of such cases.59 What treatment does a consent theory suggest?

In section B, I traced the triangular consensual flow of rights normally created by the two contracts that comprise an undisclosed agency situation. In Figure 1, UP acquires T's rights to the car through A. T acquires rights to the purchase money directly from UP as a result of A's exercise of the power granted to him by UP. T's ignorance of UP's existence is normally60 immaterial to this flow of rights, and is therefore immaterial both to T's rights against UP and to UP's rights against T.

The flow of rights that explains the paradigm case suggests that in this case UP cannot avoid liability to T simply by giving the purchase money to A. UP is the real debtor here and he owes the purchase money

57. See Restatement (Second) of Agency § 155A (1957). Therefore, while T's ignorance of UP's existence can affect the flow of rights in special circumstances, see infra text accompanying notes 86-100, I argue that it need not do so.


Under these conditions, when the rule imposing liability is applied without reservation, it results in the principal paying twice on the contract. On the other hand, if the rule is not applied, and the third party cannot enforce his claim against the agent for some reason, such as the agent's insolvency, the third party is left without a remedy.

59. See supra notes 11-13 and accompanying text.

60. But see infra text accompanying notes 86-100.

59. See supra note II, at 920-22 (collecting cases following minority rule that payment to a third party without the creditor's consent). In this situation, T's ignorance of UP's existence is relevant. T certainly did not expressly consent to UP's satisfying his debt by paying A, and because T was completely ignorant of UP's existence, her consent cannot be implied. Without the express or implied consent of T, the rights to the purchase money that T acquires from UP entitle T to payment from UP. UP may attempt to satisfy this debt by transmitting the money to T through A (or, for that matter, through the Post Office), but UP properly bears the risk of loss created by this choice. UP bears the loss not merely because he chose A, but because the flow of rights transferred the right to the money from UP directly to T. A consent theory would therefore support the English rule that protects third parties—the rule also favored by the authors of the Restatement (Second) of Agency.62 A consent theory would reject the American rule, which holds that third parties bear the risk of A's default.63

b. Effect of Settlement with Agent by Third Party

Illustration 3. Now T is buying goods from A. UP becomes concerned about A's financial condition and informs T that he is A's principal and therefore the "true" seller, and that T should pay him directly for the goods. T pays A anyway. A becomes insolvent. Can UP sue T for payment?

The flow of rights that has occurred here is essentially the same as that in Illustration 2. While UP acquires the rights to the purchase money indirectly through A, those rights entitle him to payment from T. When T pays A and A becomes insolvent, we again must allocate the risk of loss between two innocent parties. Despite the similarity in the flow of rights, however, the situation in Illustration 3 is quite different from that in Illustration 2.

61. See 60 Am. Jur. 2d Payment § 72 (1972). Notice that the language of debt (and debtors) is more apt here than the language of assumpsit. See infra text accompanying notes 131-39.

62. See Restatement (Second) of Agency § 208 (1957).

An undisclosed principal is not discharged from liability to the other party to a transaction conducted by an agent by payment to, or settlement of accounts with, the agent, unless he does so in reasonable reliance upon conduct of the other party which is not induced by the agent's misrepresentations and which indicates that the agent has settled the account. See also Poretta v. Superior Dowel Co., 153 Me. 308, 137 A.2d 361 (1957) (adopting § 208 of first Restatement); A. Gay Jenson Farms Co. v. Cargill, Inc., 309 N.W.2d 285 (Minn. 1981) (adopting § 208); Annot., supra note 11, at 920-22 (collecting cases following majority rule that payment alone does not discharge principle); cf. Shasta Livestock Auction Yard, Inc. v. Bill Evans Cattle Management Corp., 375 F. Supp. 1027, 1032 (D. Idaho 1974) (implying that an Idaho court would follow the "more modern view" expressed in § 208).

63. This result occurs because most American courts emphasize that T relied on A's credit alone, not UP's. The American rule, therefore, reflects a reliance theory. See supra text accompanying notes 24-25.
A creditor may always consent to receive payment through an agent and can consent to assume the risk of loss during transmission. In Illustration 3, Up has chosen to deal with T through A. If Up does not disclose his existence, UP must bear the loss caused by A's insolvency. By Up's choice, the contract with T was entered into on his behalf by A. Any such contract would have stipulated that A was to receive payment, and any other term presumably would disclose the existence of Up.64 Because Up expressly consented to receiving payment through A, a consent theory provides that T is within her contractual rights to pay A.65 In contrast, in illustration 2, T manifested no consent to receive payment through an agent, and in light of Up's secret existence, her consent could not be implied.66 This result is harmonious with standard agency law. Analogously, it is standard contract doctrine that when one party uses a particular mode of communication to tender an offer, it is reasonable for the other party to utilize the same mode to tender acceptance.67 In addition, the "mailbox rule" specifies that acceptance is effective upon dispatch—that is, "as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror."68 The mailbox rule ensures that the offeree can judge when a contract has been formed, thereby protecting him if the offeror later changed his mind, even though the offeree had already sent acceptance.69 The mailbox rule is consistent with the law governing the assignment of contract rights.70 Normal contract law creates a presumption that, in the absence of an express term to the contrary,71 any contractual right may be assigned to another, provided that this assignment does not materially affect the rights of the obligor.72 Normal contract doctrine further states that a change in the identity of the person who will receive a money payment will not ordinarily be considered material.73

Agency law applies this rule to the contract between T and A by interpreting the rights received by Up from T via A as though they were rights assigned by A to Up.74 Similarly, the "flow of rights" analysis silent on an issue would require a lengthy and separate treatment. Such an effort would involve, among other topics: (1) a discussion of tacit versus expressed knowledge; (2) the presumption that the parties intended what most similarly situated parties would have intended ex ante, thus putting the onus on a minority of parties to express their dissent from the majority by an express term; and (3) the likely incentive effects of the principles of construction on the bargaining behavior of other parties. For an analysis that uses the last of these factors, see Barnett, supra note 39, at 198-201 (discussing the incentive effects of the presumption that limits the remedy for breach of contract to monetary damages).

70. Cf. U.C.C. § 9-318(4) ("A term in any contract between an account debtor and an assignee is ineffective if it prohibits assignment of an account . . ."). The official comment to this section cites "economic need" to justify this rule which "breaks sharply with the older contract doctrines." U.C.C. § 9-318(4) comment 4 (1977). The comment somewhat sarcastically concludes that this change can be regarded as a radical departure only by those who "still cherish the hope that we may yet return to the views entertained some two hundred years ago by the Court of King's Bench." Id.

72. Nonetheless, in an entitlement theory of justice, the consent of a rights-holder is required if a right may be alienated (although, as in normal contract law, consent to free assignability is presumed absent an express statement to the contrary); wrongdoing of a rights-holder is required before a right may be forfeited. Standing alone, "economic need" does not override these imperatives of justice.

73. See Restatement (Second) of Contracts § 317 (1979): (1) An assignment of a right is a manifestation of the assignor's intention to transfer it to the assignee; (2) the assignee acquires a right to such performance; (3) the assignee may change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or (c) assignment is voidly precluded by contract.

74. See Restatement (Second) of Contracts, § 317 comment d (1979) ("When the obligor's duty is to pay money, a change in the person to whom the payment is made is not ordinarily material.")

75. See Restatement (Second) of Agency, § 310 comment a (1957) ("The right of the principal to demand performance is subject to substantially the same limitations as the right of an assignee"). As noted above, the assignment of an undisclosed agency as closely related to the law of contract assignments and based the rights of the third party against the principal on an implied assignment to the third party of the agent's right of indemnification. See Ams., supra note 3, at 459-51. Müller-Freienfels, supra note 2, at 352. (The doctrine of the undisclosed principal is perhaps best considered as a primitive and highly restricted form of assignment . . .").

76. Developing a consent theory's approach to construing contractual intent when parties are
sis of a consent theory of contract can be conceived as an assignment of rights from A to B. As with the law of assignments, unless the undisclosed principal "assignee" notifies the third party "obligor" of the assignment, the third party's performance tendered to the agent satisfies the obligation to the undisclosed principal.

Goodhart and Hamson note that this rule is likely to create hardship and uncertainty for the third party who "may be put into a difficulty by being in doubt whom he ought to pay." The Restatement (Second) of Agency suggests that the third party cannot refuse to pay the principal "[i]f the agency is admitted by the agent, and the agent sets up no personal claim in the transaction." The same problem of uncertainty also exists in the law of assignments. Professor Farnsworth has noted that "In applying the notification requirement, courts have sometimes seemed insufficiently sympathetic to the position of the obligor." Thus, he recommends the adoption of the notification rules specified in section 9-318 of the U.C.C.

Finally, Professor Geva describes another possible construction of the transaction in Illustration 3 that is both consistent with the entitlement approach presented here and yet explains the adamant refusal of both juries in Scrimshire v. Alderton to follow the judge's repeated direction for the defendant. In Scrimshire, the agent, or "factor," received a higher commission from the principal by taking "the risk of the debts" arising from his credit sales. Geva suggests that the sale can be viewed as a sale of the principal's property, thereby creating a debt of the buyer to the principal. This sale is conceptually fol-

76. See RESTATEMENT (SECOND) OF AGENCY §§ 310 comment c (1957).
77. Goodhart & Hamson, supra note 2, at 322.
78. RESTATEMENT (SECOND) OF AGENCY § 310 comment a (1957). The comment also states that if "there is doubt as to the existence of the agency or the respective rights to performance, the other party can interplead the principal and agent." Id.
79. E. FARNSWORTH, supra note 22, at 777.
81. The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.
82. Geva, supra note 14, at 58. In his excellent article, Professor Geva suggests that an undisclosed owner's ability to recover the price from the buyer is explained by his "property in the goods" rather than by a contractual relationship. Id. at 32. His analysis is most harmonious with the entitlement theory that underlies a consent theory of contract. He uses this proprietary framework to explain an important issue that is beyond the scope of this article: when does a disclosed or undisclosed principal retain his right to the buyer's payment for goods upon the ineffectiveness of the agent, and when does he lose this right to the creditors of the agent? See id. at 49-60.
83. 2 Str. 1182, 93 Eng. Rep. at 1114 (1743).
84. 2 Str. 1182, 93 Eng. Rep. at 1114.
86. This restriction of free assignability is discussed infra text accompanying notes 101-06.
87. See 6 AM. JUR. 2D Assignments § 9 (1963).
88. Goodhart & Hamson, supra note 2, at 344 ("normally a person contracting in his own name does not, by that mere fact, make any representation that he is not contracting as trustee for, or for the benefit of, another.").
nity.\footnote{90} Normally it is presumed that any right is freely alienable. So, unless there is an expressed reservation to the contrary, when one buys a car or some land, she obtains the right to resell it—that is, to alienate her rights to it—and to sell it to whomever she chooses.

Finally, a consent theory defines an agency relationship as a commitment by an agent to transfer, to the principal any rights obtained on the principal’s behalf. The fact that A made the transfer commitment to UP before A obtained the rights from T in no way undermines the normal presumption that the rights acquired from T are fully transferable.

The argument that third parties should not be liable to an objectionable undisclosed principal gains its plausibility from the normal background assumption that a person with whom one deals is not the agent of another. Yet this assumption is not determinative here. Most contracting parties are indifferent to whether they are dealing with an agent or a principal, and so there is no reason to assume in Illustration 4 that T objected to dealing with an agent qua agent rather than with a principal. In fact, what she really objected to was dealing with UP. Unless UP had reason to know of this objection,\footnote{90} the determinative issue concerns whether the rights traded by T are subject to any restrictions on their future alienability. Therefore, when T is silent on this question and UP is unaware of T’s particular objection to him, the background assumption favoring free alienability should govern.

For these reasons, undisclosed agency law should permit A secretly to represent anyone when contracting with T, provided that the obligations of T are not adversely affected by the agency relationship, and are subject to any valid contract defense that T might assert. The actual law of undisclosed agency is in accord.\footnote{91}

In Illustration 4, T does business with A, who, unbeknownst to T, represents T’s archcompetitor UP. Upon discovering UP’s existence, T might accurately assert that when she entered the contract, she did so under the mistaken (factual) assumption that A did not represent UP. Under normal contract doctrine, however, T’s mistaken assumption becomes a valid defense only if it was known to A or UP.\footnote{92} Thus, this defense would succeed if either A or UP knew or had reason to know that T would not deal with UP—perhaps because T had refused to deal with UP in the past. Only then would T have a prima facie defense of mistake under normal contract principles. A consent theory of contract supports this position,\footnote{93} as does normal agency law.\footnote{94}

Assuming that T can show that UP or A was or should have been aware of her reservation, UP does have two potential responses to counter T’s assertion of this defense. First, UP might assert that T was “consciously ignorant” of whether A was an agent representing UP, and a party “bears the risk of mistake when . . . he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient.”\footnote{95} If this can be shown, normal contract doctrine would yield the conclusion that T assumed the risk of doing business with UP. This determination would depend on the facts of a particular case and requires that T be conscious or aware of her limited knowledge. Since there is no reason to suspect that T had given any thought to the possibility that A was UP’s agent, UP might not be able to establish this response to the defense of mistake. However, a conspicuous clause in the contract that permitted free assignability “to any party whatsoever” probably raises an inference of conscious ignorance.\footnote{96}

Second, where T does not object to contracting with UP, but would have asked a higher price had she known of UP’s existence, the defense of mistake should be unavailable even where UP is aware of T’s attitude. There is no practical difference between this situation and one where a buyer has exclusive knowledge of the potential resale value of an item. The third-party seller’s ignorance of UP’s existence and identity simply deprives her of knowledge of the potential resale value of the items. In reality, every seller who agrees to a price necessarily assumes the risk that the buyer might have been willing and able to pay more, just as every buyer assumes the risk that a seller would have been willing and able to accept less. Because such ignorance, whether conscious or not, is pervasive, it cannot undermine the normal moral significance of.

\footnote{92. \textit{Restatement (Second) of Contracts} § 153(b) (1979).}
\footnote{93. See Barnett, supra note 5, at 308, 318.}
\footnote{94. See \textit{Restatement (Second) of Agency} § 303 comment a (1957).}
\footnote{95. \textit{Restatement (Second) of Contracts} § 154(b) (1979).}
\footnote{96. \textit{Restatement (Second) of Agency} § 303 comment c (1957).}
After initial reluctance, courts have come to accommodate this pervasive fact of commercial practice. So too, in the undisclosed agency situation, absent an affirmative misrepresentation, ignorance of the potential market value of the item sold does not by itself support the defense of mistake. On the other hand, absent conscious ignorance (or other evidence of an assumption of risk), courts should allow a defense of mistake in extraordinary situations in which one party deals with a second party who secretly represents a third party with whom the first party has previously refused to deal. In such extraordinary situations, the normal significance of manifested assent is undermined by A or UP's knowledge that T would not do business with UP.

3. Undisclosed Agency and Inalienable Rights

Even if the normal triangular flow of rights would transfer rights against T to UP and rights against UP to T, there is one factor that may prevent this flow from occurring. In a consent theory of contract, if the rights involved are inalienable, then they cannot flow from one person to another even with the consent of the rights-holder. The only legal obligation that may properly arise from a commitment to exercise an inalienable right is the duty to pay money damages. In a consent theory, the right to use one's own body is inalienable and cannot under any circumstances be consensually transferred. Labeling such a right an "personal" one, the law of undisclosed agency and the law of assignments are in accord.

In a consent theory, the only legal obligation that can arise from such a "personal" commitment is the commitment to pay damages upon nonperformance. Therefore, given UP's obligation to pay damages conditioned on nonperformance, the inalienable right to money damages could not be transferred from T to A and then to UP.

4. Liability of Undisclosed Principals for Unauthorized Acts

A consent theory of contract contemplates a system of staggered presumptions based on a series of legally sufficient presumptions. Thus far, we have seen that in a consent theory T is prima facie liable to UP if UP can show that: (1) A was UP's agent; (2) T consented to a rights transfer to A; and (3) the subject of the agreement involved an alienable right. T may successfully assert defenses to her prima facie liability to UP, such as a defense of "satisfaction" (that she paid A) or a defense of mistake. UP may, however, be able to rebut a defense by an appropriate response. For example, UP might respond to T's claim of mistake by pleading that T was consciously ignorant and therefore assumed the risk of the mistake.

Conversely, in a consent theory UP is prima facie liable to T if T can show that: (1) A was UP's agent; (2) A consented to a rights transfer to
T: and (3) the subject of the agreement was an alienable right. UP can
defend that T induced him to pay A, who then became insolvent. In a
consent theory UP has another defense that we have yet to consider; that
A’s consent was unauthorized. Notice that in asserting this defense,
UP does not deny that A was his agent. Rather he is asserting an addi-
tional fact that undermines the normal significance of A’s consent.
What responses to this defense are available to T? The next two sections
treat this issue.

a. Apparent Ownership

Under normal agency law, a principal is liable to third parties for
contracts made by his agent where the agent either had actual authority
(expressed or implied) or has “apparent” authority. Apparent author-
ity is “the power to affect the legal relations of another person by trans-
actions with third persons, professedly as agent for the other, arising from
and in accordance with the other’s manifestations to such third
persons.”

In a system of staged pleadings, apparent authority would be viewed
as a response to a defense by a principal that his agent’s acts were una-
uthorized. In other words, agents are presumed to be acting in an author-
ized manner; principals must plead and prove that this was not the case.
Even if the principal proves the agent had no actual authority, however,
third parties may still recover if apparent authority can be shown.

Now consider the following situation:
Illustration 6. UP installs A as the manager of his retail store. A’s name
appears above the door. Unbeknownst to T, UP instructs A that he may
not sell goods to T. Contrary to instructions, A agrees to sell certain
goods to T. UP refuses to honor the sales agreement. Can T sue UP for
breach of contract?

In Illustration 6, actual authority is clearly lacking, since A was expressly
forbidden from selling anything to T, and was therefore acting outside
his authority in doing so. May T respond that A had apparent authority?
The doctrine of apparent authority is unavailable to T in the undis-
closed agency context, and so cannot be applied to Illustration 6. As
traditionally understood, apparent authority exists only when T believes
that A is an agent, and the principal has “cloaked” A with more author-
ity than A was actually given. According to the Restatement (Second) of
Agency: “Apparent authority results from a manifestation by a person
that another is his agent, the manifestation being made to a third person
and not, as when authority is created, to the agent. It is entirely distinct
from authority, either expressed or implied.” The doctrine of apparent
authority requires the principal to create a belief in the third party
that another is his agent. In the realm of undisclosed agency, however,
UP cannot create the appearance that A is his agent, precisely because his
identity and existence are unknown to T. Quite the contrary, UP creates
the appearance that A, who really is his agent, is not an agent at all, but is
the principal.

Although the doctrines of actual or apparent authority are unavailable
to her, the law of undisclosed agency sometimes allows T to recover
from UP in this situation. The rationale offered by the Restatement in
support of this position is revealing. After reaffirming the absence of
actual and apparent authority, the authors then suggest: “There may be,
however, an apparent ownership, and from this there may be a power to
affect the interests of the principal aside from any rule of agency.”

This theory of recovery from UP is not, then, strictly speaking, a
pure agency theory at all, since neither actual nor apparent authority
exists. Nor is it a pure contract theory, since UP has neither actually nor
apparently consented to be bound. UP has not empowered A to alien-

110. See id. § 8 comment a (“Apparent authority exists only with regard to those who believe
and have reason to believe that there is authority; there can be no apparent authority created
by an undisclosed principal.”).
111. Id.
112. See supra note 115.
113. See supra note 115.
114. See Restatement (Second) of Agency § 194 comment a (1957) (“A general agent for an
undisclosed principal authorized to conduct transactions subjects his principal to liability for acts
done on his account, if usual or necessary in such transactions, although forbidden by the principal
to do them.”); see also Ferson, Undisclosed Principals, 22 U. CIN. L. REV. 131, 158 (1953) (“The agent of an undisclosed principal
has apparent ownership of property he holds for his principal.”) (emphasis in original). Not
coincidentally, I think, Ferson also adopts a view akin to a consent theory of contract, albeit without
explicitly acknowledging the crucial entitlements underpinning. See M. Ferson, The Rational
Basis of Contracts and Related Problems in Legal Analysis (1949); Ferson, Fiction
115. Of course, in a consent theory, UP’s liability does depend upon A having manifested assent
to be bound. This element of the prima facie case is contractual. In a system of staged pleadings,
the prima facie case of obligation here would be a mix of both contract and agency theories: (1) A’s
manifested consent to transfer rights to T; (2) the subject of the agreement was an alienable right; and
(3) A is the agent of UP. T’s response to UP’s defense that A’s consent was unauthorized, however,
ate his rights to the goods. Moreover, a tort theory of fraud might be difficult to establish. As UP may have had no intent to misrepresent the extent of A's authority to T, the requisite scienter may be lacking.

This situation is strikingly similar to the problem of explaining the objective interpretation of contracts. The objective approach holds a promisor liable for the appearance of assent, even though he may neither have intended to assent, nor intended to deceive the promissee. A consent theory utilizes its entitlements underpinnings to explain an objective approach. Entitlements exist to establish safe and discernable boundaries within which individuals may exercise personal discretion in pursuit of happiness. In establishing these boundaries, both property and contract law must utilize outwardly manifested behavior.121

Therefore, the Restatement authors' suggested rationale that what has been created is "apparent ownership" is theoretically insightful. For what UP has done is to create the appearance of an entitlement- or ownership-transfer, and outsiders are entitled to rely on this appearance. Conversely, where UP has created no such appearance, the unauthorized acts of an agent will not bind an undisclosed principal.122

In an entitlements theory, just as "apparent assent" can be binding in contract law and "apparent authority" can be binding in agency law, "apparent ownership" can be binding in property law—and for the same reason. As with apparent assent and apparent authority, a person's conduct has created the appearance of a distribution of rights or a "boundary" upon which third parties are entitled to rely. Thus, apparent

need not be contractual in nature. Richard Epstein makes the same point in his discussion of the plaintiff-seller's response to the contract defense of infancy, viz. that the minor was provided with necessaries:

It cannot be said simply that the defendant "is bound, not because he has agreed, but because he has been supplied." The case has two "becauses," the first of which is the agreement to purchase. Had there been no agreement between the parties, the plaintiff might still be able to recover, but not on the same allegation that he provided the defendant with necessaries. The allegation presupposes the two prior stages of the argument, the first of which alleged the agreement. By itself, it does not state a cause of action. The formal rules of pleading do not provide the basis of a "pure" theory of quasi-contract, apart from agreement, but they do help identify those situations in which one is necessary for the plaintiff to recover.

Epstein, supra note 107, at 571 (footnote omitted). 121. Barnett, supra note 5, at 303 ("Only a general reliance on objectively reasonable assertive conduct will enable a system of entitlements to perform its allotted boundary-defining function.").

122. See, e.g., Berman v. Berger Mills, 211 F. 2d 681, 688 (3d Cir. 1954). The typical application of this rule is to a going concern with an established place of business and obvious assets operated by one who ostensibly is the proprietor but secretly is an agent for an undisclosed principal. In such cases liability is imposed upon the undisclosed principal because he has placed the agent in such apparent relationship to an observable enterprise as is likely to induce reliance upon him as a responsible proprietor. But there is no rational or equitable basis for such a doctrine unless the person dealing with the agent finds in his name of a "business" in this sense of a functioning enterprise with observable assets. (citations omitted).

ownership can be created in a manager of a business,123 in a person entrusted with possession of goods who normally has the right to sell goods in his possession,124 or in a person entrusted with title125 or other commercial documents.126

b. Restitution

We now address one last "hard case" of undisclosed agency: Illustration 7. UP installs A as the manager of his hotel and tavern. A's name appears above the door. UP instructs A that he may purchase only beer and ale for the tavern and that all other supplies will be purchased by UP. Contrary to instructions, A purchases cigars, bovril, and other items from T. Is UP liable to T for A's unauthorized purchases?

Here, just as in Illustration 6, actual authority is clearly lacking, since A was expressly forbidden from buying anything other than beer and ale, and was therefore acting outside his authority in doing so. Illustration 7 is based on the famous case of Watteau v. Fenwick.127 In the actual case, the defendant argued that both actual and apparent authority were absent, yet the court held that the UP was liable, stating:

Otherwise, in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal.128

Could an apparent ownership theory again be used to explain the result in Watteau v. Fenwick and Illustration 7? Perhaps not. After endorsing an apparent ownership approach to explain a situation like Illustration 6, Professor Person disputed whether such a theory explained the liability of UP in Illustration 7.

What does Humble's name over the door proclaim? Freely translated, it says "Humble owns this stock of goods." Fenwick [the true owner] is responsible for that statement. And so, if Humble sells goods from the store—even though he has been prohibited from doing so—the buyer will be protected. . . . But Humble's name over the door does not say, or even

121. Barnett, supra note 5, at 303 ("Only a general reliance on objectively reasonable assertive conduct will enable a system of entitlements to perform its allotted boundary-defining function.").

122. See, e.g., Berman v. Berger Mills, 211 F. 2d 681, 688 (3d Cir. 1954). The typical application of this rule is to a going concern with an established place of business and obvious assets operated by one who ostensibly is the proprietor but secretly is an agent for an undisclosed principal. In such cases liability is imposed upon the undisclosed principal because he has placed the agent in such apparent relationship to an observable enterprise as is likely to induce reliance upon him as a responsible proprietor. But there is no rational or equitable basis for such a doctrine unless the person dealing with the agent finds in his name of a "business" in this sense of a functioning enterprise with observable assets. (citations omitted).

123. RESTATEMENT (SECOND) OF AGENCY § 195 (1957) ("An undisclosed principal who entrusts an agent with the management of his business is subject to liability to third persons with whom the agent enters into transactions usual in such businesses and on the principal's account, although contrary to the directions of the principal.").

124. See, e.g., Johnson v. Fischer, 108 Ill. App. 2d 433, 247 N.E.2d 805 (1969) (absentee owner of farm is liable for repairs made by contractor where repairs were ordered by tenant who appeared to own, or have authority to order repairs on, the property).

125. RESTATEMENT (SECOND) OF AGENCY § 201 (1957).

126. See, e.g., Berman v. Berger Mills, 211 F. 2d 681, 688 (3d Cir. 1954). The typical application of this rule is to a going concern with an established place of business and obvious assets operated by one who ostensibly is the proprietor but secretly is an agent for an undisclosed principal. In such cases liability is imposed upon the undisclosed principal because he has placed the agent in such apparent relationship to an observable enterprise as is likely to induce reliance upon him as a responsible proprietor. But there is no rational or equitable basis for such a doctrine unless the person dealing with the agent finds in his name of a "business" in this sense of a functioning enterprise with observable assets. (citations omitted).

127. Id. at § 201A.

128. Id. at § 202.

129. Id. at § 346.
pay for them. Modern theorists and judges would classify this situation in terms of restitution, benefits retained, or unjust enrichment. Yet it is not enough that UP was enriched at T's expense. Only an entitlement theory is able to explain the injustice of the principal's enrichment. In Illustration 7, (1) UP consented to an agency relationship with A; (2) A consented to buy T's goods; (3) T delivered her goods to A; and (4) UP received the benefit of T's goods. In short, a property rights-based entitlement theory puts the res back in restitution. Thus, whether best explained by the "apparent ownership" of the agent-buyer or the property rights of the third party-seller in her goods giving rise to a restitution-based claim, UP's liability for A's unauthorized purchase in Illustration 7 is explained by the entitlement theory that underlies a consent theory of contract.

III

ASSUMPTIS AS THE SOURCE OF THE ANOMALY

If the paradigm case and the hard cases of undisclosed agency can all be explained by a consent theory of contract, why has this area of law seemed to be anomalous to so many for so long? The foregoing analysis of Illustration 7 points to the answer: the use of assumpsit, a promise-based theory of contract, as a means to escape the inflexibility of the previously available writs, and the subsequent abandonment of the action of debt. Assumpsit bases contractual liability on the voluntary assumption of a duty to act or refrain from acting. In other words, liability is based on a willingness to act or refrain from acting in the manner prescribed.

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on injury caused by the failure to perform a promise. While the doctrine of consideration and the Statute of Frauds were devised to restrict assumpsit's potentially limitless scope, actions in contract were nonetheless severed from the property rights that had provided the basis for actions in debt, detinue, and those covenants secured by a penal bond. 138

As long as contract law was conceived of as merely "promissory," anomalies like the law of undisclosed agency will persist. If contractual obligation is viewed as promise-based—that is, derived from the (binding) promise A made to T and the reciprocal promise T made to A—it remains a mystery why UP, to whom T made no promise whatsoever, has any contractual rights against T. Likewise, UP made no promise whatsoever to T; enforceable or otherwise. In the absence of a direct promise, theorists must then search for estoppel or enrichment theories to explain liability, sometimes to no avail.

A consent theory of contract is entitlements-based, not promise-based. Promises may or may not cause the transfer of entitlements. And entitlements may be consensually transferred without a promise—that is, without a "manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." 139 When entitlements to resources have been consensually transferred by promise or otherwise, the actual distribution or "holdings" of resources must be brought into accord with entitlements. It does not ordinarily matter that rights were transferred from UP to T as a result of two distinct rights-transfer agreements such that UP and T were not parties to the same contract. If T is now entitled to something that UP possesses, then a redistribution is warranted. And since A was a party to a contract with T, T may seek money damages from A as well. Nor does it ordinarily matter that UP acquired his right to T's money indirectly through A. If T does not pay, then UP may enforce his entitlement by suing T directly.

IV TRADITION, REASON, AND THE EVOLUTION OF COMMON LAW DOCTRINE

The doctrine of undisclosed agency developed during a period dominated first by will or assent theories and then by reliance and benefit theories. During this time, it was widely known that none of these theories satisfactorily accounted for this body of law. 140 Yet the doctrine developed despite this, and in a remarkably coherent manner. There is a lesson in this for legal theorists.

It is true that we need legal theory to help shape and rationalize the decisions of courts, and it is true that individual judges are often ill-equipped to engage in much rigorous theory. But judicial decisions can be the source of important information for legal theorists. The countless judges who developed the law of undisclosed agency never heard of a consent theory of contract. And they might very well have accepted other doctrines that a consent theory would reject. Yet, in spite of their own theoretical knowledge and by the force of their experience and sheer intuition, they produced a body of doctrine that only a consent theory can adequately explain.

Elsewhere, I have argued that judges seek a form of moral knowledge when devising rules that will both resolve present disputes and avoid future ones. 141 That is, they seek to determine how a dispute ought to be resolved. Judges have acquired this knowledge in two ways: by tradition and by reason. Two important sources of tradition are precedent and commercial custom. Precedent is derived from the decisions of countless other judges. These decisions consist both of adjudicated outcomes and the judges' explanations of those outcomes. Commercial custom is derived from the "situation sense" or practical wisdom of countless traders in a particular commercial community coupled with their experience with the strategic behavior of others.

There is a critical evolutionary process at work here, one that is capable of producing what has been called a "spontaneous order." 142 Countless persons must concur before any decision becomes a "majority rule" or a "custom." The resulting consensus is not right solely because it is a consensus; rather, by capturing the "local" wisdom of innumerable persons, it is provides important insights or knowledge about what is right in particular situations.

Pure tradition alone, however, is not enough. Although the insight provided by these processes is the product of the experience and rational faculties of its participants, and as such deserves great respect, even the multitude can be wrong. Instead of rejecting erroneous decisions, traditional processes can sometimes reinforce them. The task of judges and

138. See authorities cited supra note 137.
139. RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1979). For example, an "as-is" cash sale of goods transfers entitlements, but involves no promises of any kind. For this reason, E. Allais Farnsworth concludes that this transaction is not contractual. See E. FARNSWORTH, supra note 22, at 4.
140. See authorities cited supra note 2.
142. While spontaneous order theory has been an essential component of liberal social thought for centuries, its most prominent contemporary exponent is F.A. Hayek. See generally F.A. HAYEK, supra note 34. For a recent and provocative analysis of spontaneous order processes, see R. SUGDEN, THE ECONOMICS OF RIGHTS, COOPERATION AND WELFARE (1986).
Fuller, "The Forms and Limits of Adjudication," 92 Harv. L. Rev. 353, 356 (1978). As Fuller explained:

The ideals that keep a social institution alive and functioning are never perceived with complete clarity, so that even if there is no failure of good intentions, the existent institution will never be quite what it might have been had it been supported by a clearer insight into its guiding principles. . . . Surely there is a great deal of tosh—that is, superfluous rituals, rules of procedure without clear purpose, needless precautions preserved through habit—in the adjudicative process as we observe it in this country.

Barnett, supra note 141, at 286.

See R. Dworkin, Law's Empire 110 (1986):

Legal theory applies reason to systematize and reform the rules and practices produced by evolutionary processes. Most legal theorists do not presume that they are capable of creating an entire body of law from whole cloth. Rather, they take the time that most judges cannot afford, often using special techniques to evaluate critically the answers to legal problems that tradition has graciously provided. Sometimes the traditional answers are shown to be either wrong or at least inconsistent with traditional answers to other problems. Theorists then strive to correct perceived error and reconcile perceived inconsistencies. I have called the persons who drive this process of legal evolution "the electorate of law." 144

If the "anomaly" of undisclosed agency law arises from the conflict between two spontaneously developed doctrines—undisclosed agency law and the modern doctrine of assumpsit—it has persisted because modern contract theories have taken assumpsit as given. Such theories, therefore, uneasily conclude that the doctrines developed to resolve undisclosed agency problems are "anomalous." It is a sign of the vitality of the "electorate of law" that it has not sacrificed the practical wisdom of this body of rules on the altar of contract theories devised to rationalize a conceptual mistake.

A legal theory needs much more than a correspondence with legal practice to be proved right. The function of legal theory is not simply to predict or explain outcomes of lawsuits, but to justify them. Nonetheless, the fact that a consent theory of contract succeeds in explaining the law of undisclosed agency where other theories of contractual obligation have failed is surely a mark in its favor. Moreover, if a consent theory

143. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 356 (1978). As Fuller explained:

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144. Barnett, supra note 141, at 286.

145. See R. Dworkin, Law's Empire 110 (1986):

A full political theory of law, then, includes at least two main parts: it speaks both to the grounds of law—circumstances in which particular propositions of law should be taken to be sound or true—and to the force of law—the relative power of any true proposition of law to justify coercion in different sorts of exceptional circumstances.

(Emphasis in original); see also Nance, Legal Theory and the Pivotal Role of the Concept of Coercion, 57 U. Colo. L. Rev. 1 (1985) (discussing the centrality of coercion in legal analysis and the requirement of justification).