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A Restatement or a Redefinition: Elimination of Inherent Agency in the Tentative Draft of the Restatement (Third) of Agency

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A Restatement or a Redefinition: Elimination of Inherent Agency in the Tentative Draft of the Restatement (Third) of Agency

Matthew P. Ward*

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"[I]t is easier for heaven and earth to pass away, than for one stroke of a letter in the law to be dropped." Luke 16.17 (NRSV)

I. Introduction

The inherent agency doctrine is one means by which a third party may subject principals to liability for their agents' conduct. The American Law Institute is drafting a new Restatement of Agency, and that draft has eliminated inherent agency. Although the draft attempts to expand apparent authority to cover the present scope of inherent agency, this Note argues that the Institute has not accomplished this goal and should reconsider its approach.

The Restatement (Second) of Agency currently provides several doctrines creating a principal's liability for its agent's conduct.¹ Like the Restatement, this Note presents actual authority first.² That doctrine holds a principal liable to third parties transacting with the principal's agent when the principal manifests authority to the agent to transact in the manner in question.³ The discussion of actual authority in this Note serves merely to preface the focus on two other doctrines that the Second Restatement articulates. Apparent authority creates a principal's liability to third parties to whom the principal manifests that an agent has authority, even if the agent really has no such authority.⁴ Inherent agency, on the other hand, requires no manifestation. Instead, that doctrine imposes liability upon a principal when a third party transacting with an agent is reasonable in believing that the agent has authority, even if the agent has no authority and even if the principal makes no manifestations that the agent has authority.⁵

1. This Note focuses on the relationship between apparent authority and inherent agency. Therefore, aside from the background discussion of actual authority, this Note discusses only those two doctrines. The Note omits discussion of estoppel and ratification in Sections 8 B and 82, respectively, of the Second Restatement.

2. *Infra* Part II.A.

3. *See infra* notes 15-17 and accompanying text (listing requisite elements of actual authority).

4. *See infra* notes 28-32 and accompanying text (listing requisite elements of apparent authority).

5. *See infra* notes 56-57 and accompanying text (listing requisite elements of inherent agency).

Several scholars have criticized inherent agency heavily,⁶ especially its ambiguity.⁷ This criticism culminates in the elimination of inherent agency in the current draft of the Restatement (Third) of Agency.⁸ That draft claims to expand the definition of "manifestation," thereby broadening apparent

6. See J. DENNIS HYNES, AGENCY, PARTNERSHIP, AND THE LLC IN A NUTSHELL § 40, at 140 (2d ed. 2001) (noting that cases have expressed doubt about inherent agency, "perhaps because it is unclear what interest of the third person is being protected and perhaps also because it introduces uncertainty into an area of law that already has gone far in protecting the third person's interests"); Steven A. Fishman, *Inherent Agency Power – Should Enterprise Liability Apply to Agents' Unauthorized Contracts?*, 19 RUTGERS L.J. 1, 56 (1987) (noting that benefits of inherent agency do not outweigh confusion that it creates and arguing against broadening doctrine); Grace M. Giesel, *Enforcement of Settlement Contracts: The Problem of the Attorney Agent*, 12 GEO. J. LEGAL ETHICS 543, 563 (1999) (quoting Fishman and arguing against expanding inherent agency to apply in attorney settlement context to bind principal client in deal that agent attorney enters with third party); Kornelia Dormire, Comment, *Inherent Agency Power: A Modest Proposal for the RESTATEMENT (THIRD) OF AGENCY*, 5 J. SMALL & EMERGING BUS. L. 243, 244 (2001) (noting that courts may not feel that inherent agency accurately reflects current state of law).

7. See J. DENNIS HYNES, AGENCY AND PARTNERSHIP 167 (1974) (identifying confusion among actual authority, apparent authority, and inherent agency, in part because of unclear and overlapping definitions, inconsistency by courts and authors, and lack of underlying agency law principles); WILLIAM A. KLEIN ET AL., AGENCY, PARTNERSHIPS, AND LIMITED LIABILITY ENTITIES 33 (2001) (calling inherent agency "a puzzling doctrine"); Deborah A. DeMott, *A Revised Prospectus for a Third Restatement of Agency*, 31 U.C. DAVIS L. REV. 1035, 1046 (1998) (noting that inherent agency generates considerable confusion); Giesel, *supra* note 6, at 563 (noting that courts have not used inherent agency often, and "even when courts mention the doctrine, the discussion reveals courts' lack of understanding on how to use it"); Jeffrey A. Parness & Austin W. Bartlett, *Unsettling Questions Regarding Lawyer Civil Claim Settlement Authority*, 78 OR. L. REV. 1061, 1062 (1999) (identifying ambiguity of attorney's express actual, implied actual, apparent, and inherent authorities in settlement context); Philip T. Colton, Note, *Apparent Authority in Antitrust Law and Ruminations on a New Antitrust Theory: The Implications of American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 68 MINN. L. REV. 439, 442 (1983) ("[C]ourts have often used the term 'apparent authority' to describe any situation in which a principal is bound by the unauthorized conduct of its agent. Consistent with section 8A of the Restatement (Second) of Agency, however, some courts now recognize the 'inherent' [agency] power"); Dormire, *supra* note 6, at 244 (recognizing less certainty about inherent agency than about apparent and actual authority and concluding that courts may not understand inherent agency). Ms. Dormire states, "The section of the Restatement (Second) addressing inherent agency power has generated divergent opinions which may indicate . . . that courts do not understand the section" *Id.* But see MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 11 (8th ed. 2000) (noting that inherent agency is "relatively well established" even though "its exact contours are not always clear"); WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 26, at 77 (3d ed. 2001) ("The limited number of jurisdictions adopting the [inherent agency] doctrine should not be taken as dissatisfaction with it, since there are few decisions, if any, rejecting it.").

8. See *infra* note 80 and accompanying text (citing elimination of inherent agency in draft of Third Restatement).

authority to include everything that inherent agency currently regulates.⁹ This Note rebuts that claim by arguing that apparent authority under the draft of the Third Restatement does not, and cannot, embrace all of the cases in which a principal would be liable based on inherent agency. First, Part II distinguishes inherent agency from actual and apparent authority.¹⁰ Part III then analyzes the treatment of inherent agency in the Third Restatement draft.¹¹ Part IV demonstrates that courts have been receptive to inherent agency.¹² Finally, Part V argues that the elimination of inherent agency conflicts with precedent, policy, and the purpose of Restatements.¹³

II. Overview of Agency Authority

A. Actual Authority

Actual authority is one means by which a third party may hold a principal liable for its agent's conduct. The liability arises out of the principal's manifestations to its agent that the agent has authority to act in a certain manner.¹⁴ Actual authority requires (1) manifestations by the principal to the agent¹⁵ that both (2) make it reasonable for the agent to believe that he had authority¹⁶ and (3) are express (directly stated) or implied (such that the acts are incidental to expressly authorized conduct).¹⁷

9. See *infra* note 85 and accompanying text (analyzing attempt to expand "manifestation" in draft of Third Restatement to allow apparent authority to govern all situations that inherent agency current regulates).

10. See *infra* Parts II.A-C (discussing actual authority, apparent authority, and inherent agency); Part II.D (proving that apparent authority is merely subset of inherent agency).

11. See *infra* Part III (analyzing elimination of inherent agency in draft of Third Restatement).

12. See *infra* Part IV (discussing cases in which courts identified inherent agency as distinct doctrine and, in some instances, used inherent agency as basis for decisions).

13. See *infra* Part V (arguing against elimination of inherent agency based on case law and policy).

14. See RESTATEMENT (SECOND) OF AGENCY § 7 (1957) ("Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him.").

15. See *id.* (requiring "manifestations of consent to [agent]").

16. See *id.* cmt. b (stating that "[m]anifestation . . . means conduct from which, in light of the circumstances, it is *reasonable* for another to infer consent") (emphasis added).

17. See *id.* cmt c (allowing implied as well as express manifestations). The comment describes the distinction between express and implied manifestations as follows:

It is possible for a principal to specify minutely what the agent is to do. To the extent that he does this, the agent may be said to have express authority. But most authority is created by implication These powers are all implied or inferred from the words used, from customs and from the relations of the parties. They are

As for the manifestations by the principal to the agent, what the third party knows or should know of the manifestations is immaterial.¹⁸ The only concern of the manifestation requirement is the existence of such manifestations, not the third party's awareness of them.¹⁹ As for reasonableness, the scope of actual authority is the reasonable belief *by the agent* that the principal confers authority.²⁰ Even when the principal intends otherwise, if the agent reasonably believes that the principal intends to confer authority, then the agent has actual authority, and the principal thereby assumes liability.²¹ That is, actual authority arises from an objective manifestation, not the principal's subjective intent.

The third element allows communications from the principal to the agent to be express or implied.²² Express communications include the actual terms that the principal manifests to the agent, whether spoken or written.²³ In addition to having such express actual authority, the agent also has authority to perform acts incidental to specifically authorized acts.²⁴ This authority is implied, but still part of actual authority.²⁵ For instance, if the principal tells the agent to deliver a package immediately, the agent may have implied actual authority to take a cab to do so.²⁶

described as "implied authority."

Id.

18. See EISENBERG, *supra* note 7, at 9 ("[I]f an agent has actual authority, the principal is bound even if the third person did not know that the agent had actual authority, and indeed even if the third person thought the agent was herself the principal, not merely an agent.").

19. See RESTATEMENT (SECOND) OF AGENCY § 7 cmt. d (1957) ("The fact that the third person with whom the agent deals on account of the principal has no knowledge of the manifestations of the principal . . . does not prevent the agent from having [actual] authority to make the principal a party to the transaction . . .").

20. See *supra* note 16 (noting that Second Restatement defines reasonableness from viewpoint of agent, not principal).

21. See RESTATEMENT (SECOND) OF AGENCY § 7 cmt. b (1957) (noting that "agent's conduct is authorized if he is reasonable in drawing an inference that the principal intended him so to act *although that was not the principal's intent*") (emphasis added).

22. See *Introductory Note* to RESTATEMENT (THIRD) OF AGENCY ch. 2 (Tentative Draft No. 2, 2001) (noting that draft "treats implied authority as an aspect of the scope of the agent's actual authority").

23. See RESTATEMENT (SECOND) OF AGENCY § 7 cmt. c (1957) (labeling as express authority those situations in which principal specifies what agent is to do).

24. See *id.* (noting that implication creates most authority).

25. See *id.* (noting that "[b]oth [express actual authority and implied actual authority] are to be distinguished sharply from 'apparent' [authority] as it is used in Section 8").

26. WARREN A. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* §§ 24-31 (1964) also provides various examples of the implied actual authority that certain agents possess.

B. Apparent Authority

Apparent authority involves a principal's liability for its agent's conduct arising from manifestations that the principal makes to a third party, not to the agent.²⁷ The elements of apparent authority are (1) manifestations by the principal to the third party (whether directly or indirectly)²⁸ that (2) are the source of²⁹ (3) the third party's actual³⁰ and (4) reasonable³¹ belief that the agent has authority to act.³² The definition of "manifestation" with respect to apparent authority is very broad and includes nonverbal communications.³³

27. See RESTATEMENT (SECOND) OF AGENCY § 8 (1957) ("Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.") (emphasis added); HARRY G. HENN, AGENCY, PARTNERSHIP AND OTHER UNINCORPORATED BUSINESS ENTERPRISES 30 (1972) ("Apparent authority differs from actual (express or implied) authority in that apparent authority arises . . . from what the 'principal' manifests to the third person, while actual authority (express or implied) arises from what the principal manifests to the agent.")

28. See *supra* note 27 and accompanying text (identifying requirement of manifestation by principal to third person).

29. See RESTATEMENT (SECOND) OF AGENCY § 8 (1957) (noting that apparent authority is power "arising from" manifestations to third party).

30. See *id.* cmt. a (noting that "apparent authority exists only with regard to those who believe . . . that there is authority"); *id.* cmt. c (stating that third person must actually believe that agent had authority).

31. See *id.* cmt. a (noting that "apparent authority exists only with regard to those who . . . have reason to believe that there is authority"); *id.* cmt. c ("Apparent authority exists only to the extent that it is reasonable for the third person . . . to believe that the agent is authorized.") (emphasis added).

32. See RESTATEMENT (SECOND) OF AGENCY § 27 (1957) (providing four required elements to create apparent authority). Section 27 reads as follows:

[A]pparent authority to do an act is created as to a third person by written or spoken words or any other conduct [that is, manifestations] of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

Id.; see also DeMott, *supra* note 7, at 1047 ("Apparent authority holds the principal to the consequences of the agent's conduct when a third party reasonably believes that the agent has authority to do particular acts and that belief is traceable to conduct of the principal."); Bart McKay, Note, *Inherent Agency Powers: Does Celtic Life Insurance Co. v. Coats Open the Door to a New Theory of Vicarious Liability in Texas?*, 46 BAYLOR L. REV. 449, 450 n.12 (1994) (providing definition of apparent authority using same four elements, stating, "Apparent authority is the authority which the third person dealing with the agent, [1] based upon [2] representations the principal has made to the third party, [3] naturally and [4] reasonably supposes the agent to possess").

33. See JOSEPH L. FRASCONA, AGENCY 31 (1964) (noting that definition of "manifestation" already is very broad in Second Restatement). In the actual authority context, Professor Frascogna recalls that "P's manifestation to A may consist of any conduct that causes A reason-

By manifesting to the third party that an agent has authority, the principal assumes liability for the agent's acts, even if the principal has not given manifestations of authority to the agent himself.³⁴ However, the third element requires that the manifestation, not the agent's conduct, causes the third party's belief that the agent has authority.³⁵ If the agent's conduct alone causes the third party's belief, even if that conduct would make everyone reasonably believe that the agent has authority, then no apparent authority exists.³⁶

Two points on apparent authority require elaboration. First, apparent authority allows someone other than the principal himself to make the manifestations from the principal to the third party.³⁷ Therefore, the principal could authorize the agent whose authority is in question to manifest his authority to the third party.³⁸ For example, the principal could instruct the agent, "Tell the third party that you have authority to negotiate on my behalf, but don't close the deal without my permission, and don't tell the third party

ably to believe that P desires him to be P's agent." *Id.* He then notes under apparent authority that the principal should be liable for whatever "T reasonably can believe from P's manifestation to T that A may do[.] It is unimportant what P's intent is; what is important is T's reasonable belief from P's manifestation to T" *Id.* To underscore the breadth of the apparent authority definition of "manifestation," Professor Frascogna goes on to say, "As in [actual] authority when P's manifestations are made to A, so in apparent authority P's manifestations to T may be made in a variety of ways." *Id.* at 32. He notes that direct, indirect, oral, and written communications, or any other conduct that reasonably conveys authority to the third party, is a manifestation. *Id.*

34. See RESTATEMENT (SECOND) OF AGENCY § 8 cmt. a (1957) ("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 [actual] authority is created, to the agent.").

35. See *supra* note 29 and accompanying text (requiring source of third party's belief to be principal's manifestations).

36. See SEAVEY, *supra* note 26, § 8D (noting that apparent authority results from conduct by principal to third party and stating that unauthorized statements by agent or another deceiver are insufficient to give rise to apparent authority).

37. See RESTATEMENT (SECOND) OF AGENCY § 27 cmt. a (1957) (discussing manifestations that give rise to apparent authority). The comment identifies the different permissible sources of manifestations as follows:

The information received by the third person may come directly from the principal by letter or word of mouth, from authorized statements of the agent, from documents or other indicia of authority given by the principal to the agent, or from third persons who have heard of the agent's authority through authorized or permitted channels of communication.

Id.

38. Alternatively, another agent, different from the agent whose authority is in question, could give the manifestations. That is, the principal could tell a second agent to tell the third party that the first agent has authority to make a deal.

that you lack closing authority." The agent, as instructed, tells the third party, "I have authority to negotiate," and as instructed, he does not tell the third party that he needs permission to close the deal.³⁹ However, the agent closes the deal without permission. Obviously, the agent has no actual authority to close the deal. Apparent authority, on the other hand, considers communications from the principal to the third party, and it labels the agent's communication in this example as one by the principal because the principal instructed the agent to make it. Because the agent has express actual authority to make that communication to the third party, that communication creates apparent authority.

The second point that requires elaboration is *to whom* the principal must make the manifestations. The principal need not focus its manifestations directly at the third party.⁴⁰ Instead, the principal's public manifestations that reach the third party suffice.⁴¹ The fact that principals need not direct manifestations at a specific third party gives rise to a doctrine known as "power of position."⁴² Pursuant to that doctrine, the principal's appointment of the agent to particular positions is a manifestation that the agent has certain accompanying authority.⁴³ Any third party who learns of that manifestation may hold the principal liable for acts that customarily accompany the duties of that position.⁴⁴ The power of position doctrine applies even if that third party does not know what customarily comes with the position.⁴⁵

39. That is, the agent tells the third party everything that he is supposed to tell and nothing more.

40. See RESTATEMENT (SECOND) OF AGENCY § 8 cmt. b (1957) ("The manifestation of the principal may be made directly to a third person, or may be made to the community . . .").

41. Of course, if the principal makes such public manifestations, the third party still actually must hear and believe them, as the third element requires. RESTATEMENT (SECOND) OF AGENCY § 27 cmt. b (1957) notes, "The principal does not, and cannot, make a manifestation 'to the world.'" However, that comment does not make public manifestations that the third party hears insufficient. It merely prevents a third party from arguing that the principal bound itself by a manifestation to the entire world, even to a third party that did not hear of the manifestation. Although such manifestations to the world are insufficient, the third party could learn of a manifestation directed at another or directed to the community-at-large, and such a manifestation may establish apparent authority.

42. See EISENBERG, *supra* note 7, at 10 (describing "a special type of apparent authority known as *power of position*" and citing RESTATEMENT (SECOND) OF AGENCY § 27 cmt. a, § 49 cmt. c (1957)); HYNES, AGENCY, PARTNERSHIP, AND THE LLC 296-97 (LEXIS 5th ed. 1998) (discussing "power of position argument").

43. See RESTATEMENT (SECOND) OF AGENCY § 27 cmt. a (1957) ("[A]pparent authority can be created by appointing a person to a position, such as that of manager or treasurer . . .").

44. See *id.* ("[T]o those who know of the appointment there is apparent authority to do the things ordinarily entrusted to one occupying such a position . . .").

45. See *id.* cmt. d ("[A] manager has apparent authority to do those things which manag-

When the principal appoints an agent to a position of power but intends to limit the agent's powers to less than the customarily included powers, the agent nonetheless receives apparent authority for those powers.⁴⁶ In fact, the agent receives apparent authority for those customarily included powers even when the principal explicitly tells him otherwise.⁴⁷ For example, if a principal tells its general purchasing agent not to purchase certain items, the agent nonetheless has apparent authority to purchase those items.⁴⁸ If the principal wants to preclude its liability for the forbidden purchases, it must tell all sellers of the products in question that the agent has no authority to make those purchases.⁴⁹

Certain conditions might prevent the creation of apparent authority based on the power of position doctrine. First, when a principal publicly appoints an agent to a position, a particular third party may use apparent authority only if he actually knows of the appointment, just as the third party would have to know of any verbal manifestation.⁵⁰ Second, because apparent authority must

ers . . . customarily do, as to persons who know that he is a manager, although they do not know what powers managers in such a business have."). Note, though, that the third party must still know that the agent holds the position and holds it *for a principal*, even though he does not need to know what that position customarily entails.

46. See *id.* § 49 cmt. c ("If a principal puts an agent into . . . a position in which . . . it is usual for such an agent to have a particular kind of authority, anyone dealing with him is justified in inferring that he has such authority, in the absence of reason to know otherwise."). Thus, the intent of the principal to limit the agent's power to less than what the position usually includes is irrelevant.

47. See *id.* § 27 cmt. a (noting that agent has apparent authority to do things ordinarily entrusted to one with such position, "regardless of unknown limitations which are imposed upon the particular agent"). This result is due to apparent authority arising from the manifestation of the appointment to the *third party*, who here does not know of the limiting instructions. The situation is different when the third party knows of the limiting instructions. See *infra* note 49 and accompanying text (noting that third party learning of limiting instructions that deny certain usually included responsibilities results in lack of apparent authority for those denied responsibilities).

48. See RESTATEMENT (SECOND) OF AGENCY § 27 cmt. a illus. 8-9 (1957) (giving same fact pattern and result).

49. When a principal tells a third party that the agent is not receiving responsibilities that the position usually includes, that limitation is effective because it no longer is reasonable for the third party to believe that the agent has the responsibilities in question. See *id.* § 49 cmt. c (stating that agent receives customarily included responsibilities "in the absence of reason to know otherwise"); *id.* § 49 ("[M]anifestations of the principal to the [third] party . . . are interpreted in light of what the [third] party knows . . .").

50. See *id.* cmt. b ("[A]pparent authority exists only as to those who learn of a manifestation . . . [U]ntil that [third] person learns facts from which he reasonably infers that the agent is authorized, there is no apparent authority . . ."); see also *supra* note 41 (noting insufficiency of manifestations "to the world" of which third party is unaware).

arise from a manifestation by the principal,⁵¹ no apparent authority exists based on the power of position doctrine unless the third party knows that the agent holds his position *for a principal*.⁵² Finally, apparent authority pursuant to the power of position doctrine extends only to the powers customarily included with the position; an agent acting outside of those bounds has no apparent authority.⁵³ For example, when an agent misrepresents to a third party that he has authority exceeding the customary powers of his position, no apparent authority exists, even if the third party's belief is reasonable.⁵⁴

C. Inherent Agency

The inherent agency doctrine is a third means by which a third party may hold a principal liable for its agent's conduct.⁵⁵ Pursuant to the inherent agency doctrine, a principal need not give any manifestations, whether to a third party or to an agent, that the agent has authority.⁵⁶ If the third party actually believes that the agent has such authority from the principal, and if that belief is objectively reasonable, then the principal is liable for the agent's conduct, despite the lack of manifestations of authority.⁵⁷ A determination of

51. See *supra* note 29 and accompanying text (discussing requirement that apparent authority must come from manifestation by principal to third party).

52. See RESTATEMENT (SECOND) OF AGENCY § 8 cmt. a (1957) ("[T]here can be no apparent authority created by an undisclosed principal.").

53. See SEAVEY, *supra* note 26, § 22B ("Persons dealing with an agent . . . cannot hold the principal liable for unauthorized acts of an agent which are not normally permitted to an agent in such a position.").

54. Because the position in this example does not customarily include the authority in question, no apparent authority exists. As noted later, inherent agency covers these situations. See *infra* Part II.C (discussing inherent agency).

55. See RESTATEMENT (SECOND) OF AGENCY § 8 A (1957) ("Inherent agency power is . . . the power of an agent which is derived not from [actual] authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent.").

56. See *id.* cmt. b (noting that inherent agency power in contracts realm "is based neither upon the consent of the principal nor upon his manifestations").

57. See HYNES, *supra* note 7, at 211-12 (citing example of inherent agency that Section 161 of Second Restatement provides and noting that "[t]he only limitation stated in Section 161 is that the third party must 'reasonably believe' that the agent is authorized"); Colton, *supra* note 7, at 443 (stating that inherent agency powers "include all powers that a third party would reasonably suppose the agent to have"); Dormire, *supra* note 6, at 248 (citing case law suggesting that "the third party needed to show only that he acted reasonably" to establish inherent agency). But see EISENBERG, *supra* note 7, at 13 (defining reasonableness from *principal's* viewpoint). Eisenberg argues that the test for inherent authority is whether "a reasonable person in the *principal's* position [would] have foreseen that, despite his instructions, there was a significant likelihood that the agent would act as he did." *Id.* However, Eisenberg cites no

reasonableness requires an examination of whether the acts in question are a continuation of prior authorized acts of the agent, whether a trust relationship already exists between the third party and the agent, and whether the agent has done anything to make the third party's belief unreasonable.⁵⁸

Inherent agency falls within a complex yet organized framework into which the Second Restatement divides the liability of principals. The highest level of division is between contracts and torts,⁵⁹ and this Note discusses only the realm of contracts.⁶⁰ The Second Restatement next divides the contracts cases by whether the principal is disclosed or undisclosed⁶¹ and then, for each category, by whether the agent has authority or has no authority.⁶² Inherent agency involves agents without authority acting on behalf of either disclosed or undisclosed principals. Apparent authority also involves agents without authority, but only those acting on behalf of disclosed principals.⁶³ Finally, regardless of whether the principal is disclosed or undisclosed, the Restatement separates inherent agency cases involving a "general agent" from those involving a "special agent."⁶⁴ The Second Restatement provides a fairly

authority for his definition, and the other authorities in this footnote demonstrate the prevailing view.

58. See *infra* notes 163-66 and accompanying text (discussing use by one court of these three considerations to determine reasonableness, but noting that this list of considerations might not be exhaustive).

59. Chapter 6 of the Second Restatement discusses holding principals liable to third persons in the contracts setting. Chapter 7 discusses the liability in the torts setting. These two chapters discuss actual authority, apparent authority, and inherent agency. However, Chapter 3 discusses creation of actual and apparent authority, and Chapter 5 discusses termination of actual and apparent authority, whereas no other chapter specifically discusses creation or termination of inherent agency.

60. Most inherent agency cases discuss the doctrine in the contracts realm. However, one could gather cases and frame similar arguments in the torts realm. This Note leaves that task for another day.

61. Topic 2 of Chapter 6 discusses liability in contract for disclosed or at least partially disclosed principals. Topic 3 discusses liability in contract for undisclosed principals.

62. Titles A and C of Topic 2 divide liability in contract for disclosed principals based on whether the agent had authority or no authority, respectively. Titles A and B of Topic 3 make the same division for undisclosed principals.

63. When the principal is undisclosed, he cannot manifest authority to the third party to satisfy the requisite manifestation element. Therefore, Title C (unauthorized agent) of Topic 2 (disclosed principals) does discuss apparent authority, whereas Title B (unauthorized agent) of Topic 3 (undisclosed principals) does not.

64. Sections 161 and 161 A consider the inherent agency power of general agents and special agents, respectively, within the unauthorized agent and *disclosed* principal contractual liability arena. Sections 194 and 195 A consider the inherent agency power of general agents and special agents, respectively, within the unauthorized agent and *undisclosed* principal contractual liability arena.

straightforward distinction between general agents and special agents. General agents are those authorized to conduct a series of transactions involving a continuity of service, whereas special agents are those with authority to conduct only a single transaction or series of transactions not involving a continuity of service.⁶⁵

D. Apparent Authority as a Subset of Inherent Agency

A comparison of the elements of inherent agency and apparent authority reveals an interesting corollary that both scholars and courts have overlooked. As noted above,⁶⁶ apparent authority arises only when the facts of the case satisfy four properties: (1) manifestations by the principal to the third party (whether direct or indirect) that (2) are the source of (3) the third party's actual and (4) reasonable belief that the agent has authority to act.⁶⁷ Inherent agency requires satisfaction of only two of these properties: (1) the third party's actual and (2) reasonable belief that the agent has authority to act.⁶⁸ Because apparent authority requires both inherent agency properties, apparent authority is a subset of inherent agency.⁶⁹ That is, if apparent authority applies to a case, the facts must satisfy the four apparent authority properties, which means that the facts satisfy the actual and reasonable belief properties, which means that inherent agency also applies. The converse is not true. An agent who satisfies both inherent agency properties might not satisfy the other two apparent authority properties, so apparent authority might not apply every

65. RESTATEMENT (SECOND) OF AGENCY § 3 (1957).

66. See *supra* notes 28-32 and accompanying text (listing four required elements of apparent authority).

67. That is, let $U_M = \{A \cap B \cap C \cap D\}$, where U_M represents the universe of cases in which apparent authority is applicable, A represents the universe of cases in which the third party has actual belief, B represents the universe of cases in which the third party has reasonable belief, C represents the universe of cases in which the principal makes manifestations, and D represents the universe of cases in which the manifestations cause the third party's belief. $\{A \cap B \cap C \cap D\}$ is the intersection of A , B , C , and D , or the universe of cases in which the facts satisfy all four properties. In other words, the universe of cases in which apparent authority is applicable consists of those cases in which the facts satisfy these four properties.

68. That is, let $U_M = \{A \cap B\}$, where U_M represents the universe of cases in which inherent agency is applicable, A represents the universe of cases in which the third party has actual belief, and B represents the universe of cases in which the third party has reasonable belief. $\{A \cap B\}$ is the intersection of A and B , or the universe of cases in which the facts satisfy both properties. In other words, the universe of cases in which inherent agency is applicable consists of those cases in which the facts satisfy both properties.

69. A fundamental axiom of set theory posits that $\{X \cap Y\} \subseteq \{X\}$. Applying this law to the relationship between apparent authority and inherent agency, $U_M = \{A \cap B \cap C \cap D\} = \{(A \cap B) \cap (C \cap D)\} \subseteq \{(A \cap B)\} = \{A \cap B\} = U_M$. That is, apparent authority is only a subset of inherent agency.

time that inherent agency applies. Because apparent authority is a subset of inherent agency, the draft of the Third Restatement correctly finds that an expansion of apparent authority would be necessary to cover the entire scope of inherent agency.⁷⁰ This Note suggests that the "expansion" of apparent authority in the Third Restatement draft arguably is no expansion at all,⁷¹ and that the elimination of inherent agency in the draft of the Third Restatement inappropriately changes the outcome of many inherent agency cases.⁷²

III. Overview of the Draft of the Third Restatement of Agency

The American Law Institute (ALI) released the draft of the first two chapters of the Restatement (Third) of Agency on March 20, 2000.⁷³ On March 14, 2001, the ALI published changes to these two chapters, as well as the preliminary text for two additional chapters.⁷⁴ The most recent draft, including one additional chapter and revisions to three earlier chapters, became available on March 18, 2002.⁷⁵

This Note presents an exhaustive analysis of the treatment of inherent agency in the draft of the Third Restatement.⁷⁶ Only two articles in the last thirty years have thoroughly analyzed the inherent agency doctrine,⁷⁷ and only a handful of additional articles in that time have discussed it.⁷⁸ The only

70. See *infra* note 85 and accompanying text (identifying "expansion" of apparent authority in draft of Third Restatement).

71. See *infra* notes 87-88, 100 and accompanying text (showing that apparent authority in Second Restatement already encompasses "expansions" in draft of Third Restatement).

72. See *infra* Part V.A (discussing inherent agency cases that would yield different results under draft of Third Restatement).

73. RESTATEMENT (THIRD) OF AGENCY (Tentative Draft No. 1, 2000).

74. RESTATEMENT (THIRD) OF AGENCY (Tentative Draft No. 2, 2001).

75. RESTATEMENT (THIRD) OF AGENCY (Tentative Draft No. 3, 2002).

76. Because the third tentative draft of the Third Restatement does not mention inherent agency, this Note exhaustively reviews the doctrine even without citations to that tentative draft.

77. See Fishman, *supra* note 6, at 1-59 (providing in-depth analysis of inherent agency doctrine and arguing against its further adoption by courts); Dormire, *supra* note 6, at 243-63 (distinguishing inherent agency from actual and apparent authority and arguing that Third Restatement draft should clarify ambiguity surrounding inherent agency doctrine).

78. See DeMott, *supra* note 7, at 1046-47 (providing brief discussion of elimination of inherent agency in prospectus for Third Restatement); Giesel, *supra* note 6, at 562-63 (arguing that courts should not apply inherent agency to bind client in settlement context); Parness & Bartlett, *supra* note 7, at 1092-93 (discussing courts' use of inherent agency to bind client in settlement agreement despite ethics rules preventing attorneys from entering such agreements without authority); Paul A. Quiros et al., *Annual Survey of Georgia Law June 1, 1999 - May 31, 2000 Survey Articles: Business Associations*, 52 MERCER L. REV. 95, 132-33 (2000) (discussing application of inherent agency in one Georgia case); Colton, *supra* note 7, at 442-

article published after the issuance of the Third Restatement draft is a note by Kornelia Dormire. However, because she wrote that work prior to the issuance of the Third Restatement draft, she did not have the opportunity to discuss the treatment of inherent agency in that draft.⁷⁹ Hence, no article has discussed the elimination of inherent agency in the draft of the Third Restatement.

The reporter clearly states on several occasions that the draft eliminates the inherent agency doctrine.⁸⁰ In addition to these cursory dismissals of the doctrine, the reporter also provides substantive discussion of changes to the Second Restatement that affect inherent agency.⁸¹ The first substantive treatment of inherent agency is the reporter's discussion of the new definition of "manifestation" in the Restatement. In Section 1.02 of her memorandum to the first draft, the reporter states one reason for the elimination of inherent agency. Because the Second Restatement does not define "manifestation," a required element for apparent authority, she observes that various implicit definitions have arisen.⁸² The reporter asserts that courts, prior to the formation of inherent agency, used these implicit definitions of "manifestation" to apply apparent authority only to cases involving specific

43, 462 (discussing inherent agency and analyzing one case based on apparent authority in which inherent agency was more applicable); McKay, *supra* note 32, at 449-61 (discussing recent adoption of inherent agency in Texas and arguing that breadth of that adoption gives inherent agency too much reign).

79. See Dormire, *supra* note 6, at 252 n.52 (stating that no draft yet existed when Ms. Dormire wrote her note).

80. See RESTATEMENT (THIRD) OF AGENCY § 2.01 cmt. b (Tentative Draft No. 1, 2000) (citing definition of inherent agency in Section 8 A of Second Restatement, acknowledging elimination of doctrine in this draft, and claiming that "[o]ther doctrines stated in this Restatement encompass the justifications underpinning [inherent agency], including the importance of interpretation by the agent in the agent's relationship with the principal, as well as the doctrines of apparent authority, estoppel, and restitution"); RESTATEMENT (THIRD) OF AGENCY § 2.01 cmt. b (Tentative Draft No. 2, 2001) (same); *Reporter's Memorandum* to RESTATEMENT (THIRD) OF AGENCY xiii, xvii (Tentative Draft No. 1, 2000) (noting that draft does not use inherent agency because "[o]ther doctrines, as restated and clarified, cover the situations in which inherent agency power was said to explain the outcome"); *Introductory Note* to RESTATEMENT (THIRD) OF AGENCY ch. 2 (Tentative Draft No. 1, 2000) (justifying elimination of inherent agency because "[s]ituations that inherent agency power is said to govern are covered herein by other doctrines, as explained specifically where relevant"); *Introductory Note* to RESTATEMENT (THIRD) OF AGENCY ch. 2 (Tentative Draft No. 2, 2001) (same).

81. See *infra* notes 82-105 and accompanying text (discussing substantive treatment of inherent agency in Third Restatement draft).

82. See *Reporter's Memorandum* to RESTATEMENT (THIRD) OF AGENCY xiii, xvi (Tentative Draft No. 1, 2000) (noting that Second Restatement left "manifestation" undefined and stating that "implicit definitions became operative").

communications directly to a third party.⁸³ This restriction on apparent authority led to the creation of inherent agency, a doctrine that the courts could apply in the absence of such specific, direct communications.⁸⁴ Rather than retain inherent agency, the reporter instead attempts to expand the definition of "manifestation" for apparent authority purposes to include situations without verbal communications, such as appointments of agents to certain positions.⁸⁵ The reporter believes that the expanded definition of "manifestation" matches the definition that the courts already have applied.⁸⁶

The "expansion" of apparent authority to include inherent agency arguably is no expansion at all. As noted previously, the reporter identifies only two "expansions" – namely, nonverbal communications and appointments by a principal of an agent to a position – as manifestations.⁸⁷ However, under current law the definition of "manifestation" is already very broad and includes both of these "expansions."⁸⁸ Furthermore, this Note

83. *See id.* ("[S]ome courts assumed that to create apparent authority it was essential that the principal make a specific communication directly to the third party.").

84. *See id.* ("This in turn led to the perceived need for the doctrine of inherent agency power, as stated in Restatement Second, Agency § 8 A.").

85. *See id.* ("In contrast, this section [1.02] defines manifestation broadly and explains how the concept [of apparent authority] applies when a person is appointed to a position."). The second draft maintains the same position, arguing as follows:

The definition of manifestation in this section is intended to be broader than that assumed to be operative at points in the Restatement Second of Agency. The principal consequence of this breadth is to eliminate the rationale for a distinct doctrine of inherent-agency power applicable to disclosed principals when the agent disregards instructions or oversteps actual authority In this Restatement, conduct may constitute a manifestation sufficient to create apparent authority even though it does not use the word "authority" and even though it does not consist of words targeted specifically to a third party.

RESTATEMENT (THIRD) OF AGENCY § 1.03 reporter's note a (Tentative Draft No. 2, 2001).

86. RESTATEMENT (THIRD) OF AGENCY § 1.02 reporter's note a (Tentative Draft No. 1, 2000) (citing Second Restatement). The reporter here notes that the main effect of broadening the definition of "manifestation" is to eliminate inherent agency. *Id.* She observes that comment b to Second Restatement Section 8 A states that courts have relied on apparent authority at times when inherent agency is more applicable. *Id.* Whereas the Second Restatement restricted the definition of "manifestation" to make apparent authority in such situations inapplicable, the reporter takes the opposite position in the tentative drafts of the Third Restatement. "In this Restatement, conduct may constitute a manifestation sufficient to create apparent authority even though it does not use the word 'authority' and even though it does not consist of words targeted specifically to a third party." *Id.*

87. *See supra* note 85 and accompanying text (noting that Third Restatement draft only expands definition of "manifestation" to include power of position doctrine and nonverbal manifestations).

88. *See supra* notes 33, 40-45 and accompanying text (discussing apparent authority and

argues that apparent authority, despite its inclusion of the power of position doctrine and allowance of nonverbal manifestations, still does not apply to all situations that inherent agency currently covers.⁸⁹ Inherent agency did not originate from a definition of "manifestation" that was too narrow. Rather, inherent agency holds the principal liable so long as the third party's belief is reasonable, even if the principal has made no manifestations whatsoever (including appointments to positions and nonverbal communications).⁹⁰

The reporter's second substantive treatment of the elimination of inherent agency is a discussion of *Koval v. Simon Telelect, Inc.*⁹¹ and *Croisant v. Watrud*,⁹² both inherent agency cases.⁹³ The discussion suggests some possible confusion in the draft regarding inherent agency. First, when citing *Koval*, the reporter refers to inherent agency as synonymous with implied actual authority,⁹⁴ whereas the two actually are wholly distinct doctrines.⁹⁵ Second, the reporter's analysis of these cases falls under Section 3.03, entitled "Creation of Apparent Authority."⁹⁶ This section requires, among other elements, a manifestation by the principal that the agent has authority.⁹⁷

showing that nonverbal communications, including appointments of agents to certain positions, fall within realm of apparent authority); *see also infra* note 100 and accompanying text (showing that Third Restatement draft and Second Restatement require same four elements to create apparent authority, and therefore draft of Third Restatement arguably does not expand apparent authority at all).

89. *See infra* Part V.A (identifying cases in which courts imposed liability based on inherent agency but which would yield different results under draft of Third Restatement, despite "expansions" of apparent authority).

90. *See supra* notes 56-57 and accompanying text (listing requisite elements of inherent agency and showing that manifestations are unnecessary).

91. 693 N.E.2d 1299 (Ind. 1998).

92. 432 P.2d 799 (Or. 1967).

93. *See infra* notes 147-72, 185-93 and accompanying text (discussing facts and reasoning in *Croisant* and *Koval*, respectively, and demonstrating that court in both cases applied inherent agency rather than apparent authority).

94. *See* RESTATEMENT (THIRD) OF AGENCY § 2.03 reporter's note e, at 182 (Tentative Draft No. 1, 2000) (referring to inherent agency power and implied actual authority synonymously); RESTATEMENT (THIRD) OF AGENCY § 3.03 reporter's note b, at 262 (Tentative Draft No. 2, 2001) (same).

95. Implied actual authority, as part of actual authority, considers manifestations by the principal to the agent. *See supra* notes 15-17, 25 and accompanying text (listing requisite elements of actual authority and noting that implied actual authority falls within that category). Inherent agency does not require any manifestations and looks at the third party, not the principal and not the agent. *See supra* note 57 and accompanying text (listing requisite elements of inherent agency).

96. RESTATEMENT (THIRD) OF AGENCY § 3.03 (Tentative Draft No. 2, 2001).

97. *See id.* (stating that apparent authority requires, among other things, principal's manifestation).

However, the holding of these cases is that inherent agency liability requires no manifestation whatsoever, and therefore an elimination of inherent agency in favor of apparent authority which does require a manifestation would yield different results in both cases.⁹⁸ Both drafts make each of these two errors.⁹⁹

However, the reporter's discussion of these two cases appears to have a larger underlying error. The section that analyzes these cases underscores the fact that the draft of the Third Restatement arguably does not expand the concept of apparent authority at all. The requirements in Section 3.03 of the draft are the exact same four requirements in the Second Restatement – namely, manifestations by the principal that cause the third party's actual and reasonable belief that the agent has authority.¹⁰⁰

The third substantive mention of inherent agency falls under the discussion of estoppel of an undisclosed principal. Apparent authority is inapplicable in situations involving an undisclosed principal because third parties cannot trace any manifestations to a principal.¹⁰¹ As a corollary, the power of position doctrine is inapplicable because the third party does not know that the agent holds his position on behalf of a principal.¹⁰² Inherent agency currently regulates situations involving an undisclosed principal.¹⁰³

98. See *infra* notes 282-85, 291-95 and accompanying text (explaining why *Croisant* and *Koval*, respectively, would have different results under draft of Third Restatement without inherent agency).

99. See RESTATEMENT (THIRD) OF AGENCY § 3.03 reporter's note b, at 262, reporter's note e(2), at 271 (Tentative Draft No. 2, 2001) (discussing *Koval* and *Croisant* cases, respectively); RESTATEMENT (THIRD) OF AGENCY § 2.03 reporter's note c, at 182, reporter's note i(2), at 196 (Tentative Draft No. 1, 2000) (same).

100. Compare RESTATEMENT (THIRD) OF AGENCY § 3.03 (Tentative Draft No. 2, 2001) ("Apparent authority . . . is created by a person's manifestation that another has authority . . . if a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.") with RESTATEMENT (SECOND) OF AGENCY § 27 (1957) ("[A]pparent authority to do an act is created [by] conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the [agent] act for him.").

101. See RESTATEMENT (SECOND) OF AGENCY § 8 cmt. a (1957) ("[T]here can be no apparent authority created by an undisclosed principal."); Dormire, *supra* note 6, at 246 (identifying manifestation by principal as requirement for apparent authority and concluding that "there can be no apparent authority by an undisclosed principal"); *supra* notes 27-28 and accompanying text (listing manifestation by principal to third party as requirement for apparent authority).

102. See *supra* note 52 and accompanying text (explaining inapplicability of power of position doctrine in situations involving undisclosed principals).

103. See DeMott, *supra* note 7, at 1047 (acknowledging placement of undisclosed principals under inherent agency because of lack of manifestation by principal). DeMott states, "Inherent agency power explains why courts might hold an undisclosed principal liable when the agent exceeds the scope of actual authority; in such a relationship, because third parties are unaware that their liaison is anyone's agent, the definition of apparent authority in Restatement

To preserve regulation of undisclosed principals despite the elimination of inherent agency, the reporter places such cases under estoppel.¹⁰⁴ Despite the shift from inherent agency to estoppel, the reporter maintains the position from the Second Restatement that the only requirement to impose liability on an undisclosed principal is the third party's reasonable belief.¹⁰⁵

The reporter of the draft of the Third Restatement also has issued a prospectus for the draft,¹⁰⁶ one section of which deals with inherent agency.¹⁰⁷ She defines inherent agency¹⁰⁸ and then lists some of its contributions to agency law,¹⁰⁹ such as its regulation of undisclosed principals.¹¹⁰ The reporter then cites two potential problems with inherent agency.¹¹¹ First, she notes that some courts incorrectly have applied apparent authority rather than inherent agency.¹¹² The reporter suggests that those incorrect expansions of apparent authority have caused that doctrine to overtake inherent agency.¹¹³ However, this incorrect expansion of apparent authority is not a problem with inherent agency but rather a problem with the courts' interpretation of apparent authority. Furthermore, the reporter's claim that apparent authority has overtaken inherent agency is a *non sequitur*. As noted above, apparent

(Second) is inapplicable." *Id.*

104. See RESTATEMENT (THIRD) OF AGENCY § 2.06 cmt. b (Tentative Draft No. 2, 2001) (noting that situations involving undisclosed principals currently fall under inherent agency, but because of elimination of inherent agency, draft places them under rule of estoppel in that section); *id.* § 2.06 reporter's note a (stating that Sections 194 and 195 of Second Restatement, which deal with undisclosed principals, are examples of inherent agency); *id.* § 2.06 reporter's note c, at 213 (citing *Watteau v. Fenwick*, 1 Q.B. 346 (1893) as one example involving undisclosed principal that RESTATEMENT (SECOND) OF AGENCY § 195 cmt. b (1957) places under inherent agency).

105. See *id.* § 2.06 (placing liability upon principal if third party's belief of agent's authority was reasonable). Section 2.06, entitled "Estoppel of Undisclosed Principal," states, "An undisclosed principal may not rely on instructions given an agent that qualify or reduce the agent's authority to less than the authority a third party would reasonably believe the agent to have under the same circumstances if the principal had been disclosed." *Id.*

106. DeMott, *supra* note 7.

107. See *id.* at 1046-50 (discussing inherent agency).

108. See *id.* at 1046 (citing basis for inherent agency in Second Restatement).

109. See *id.* at 1047 (observing that "contributions [of inherent agency] to agency doctrine are worth noting").

110. See *supra* notes 101-03 and accompanying text (showing why apparent authority does not apply to undisclosed principals and stating that inherent agency regulates such situations).

111. See DeMott, *supra* note 7, at 1047 (noting that treatment of inherent agency in Second Restatement "is problematic in two respects").

112. See *id.* (noting that "contemporary cases broadly define . . . apparent authority").

113. See *id.* (arguing that apparent authority, through developments and expansions, "may have overtaken the doctrine of inherent agency power").

authority is a subset of inherent agency.¹¹⁴ Any case that satisfies the apparent authority requirements also satisfies the inherent agency requirements. Therefore, apparent authority could not have "overtaken" inherent agency, regardless of any expansion of apparent authority.

The second potential problem that the reporter articulates regarding inherent agency arguably is also inaccurate. The reporter notes that inherent agency exists for the protection of the third party dealing with the agent.¹¹⁵ She characterizes this statement as "misleading" because inherent agency might also work for the principal's benefit.¹¹⁶ However, the doctrine may incidentally benefit the principal and still have the primary purpose of assisting the third party. The two ideas are not mutually exclusive.

Aside from these two potential problems, the reporter possibly creates further confusion in her prospectus by incorrectly applying inherent agency to a case that apparent authority should control. She discusses those situations in which a third party reasonably believes that the agent has authority although the principal does not intend to grant authority.¹¹⁷ In such situations, she applies inherent agency if the third party's belief arises from the agent's position, whereas she applies apparent authority if the third party's belief arises from the principal's manifestation.¹¹⁸ However, the appointment of the agent to his position is a manifestation by the principal to the third party, so the third party's belief in both examples arises from the principal's manifestation, and therefore apparent authority applies regardless of whether the principal intends otherwise.¹¹⁹ For this reason, apparent authority, not inherent agency, should control the second example as well as the first.

114. See *supra* Part II.D (noting that apparent authority elements include inherent agency elements and therefore apparent authority is subset of inherent agency).

115. See DeMott, *supra* note 7, at 1046-50 (citing observation in Second Restatement that inherent agency "exists for the protection of persons harmed by or dealing with a servant or other agent").

116. See *id.* (characterizing assertion in Second Restatement that inherent agency exists for protection of third party as "misleading" because principal could use doctrine to bind third party).

117. See *id.* at 1050 (discussing situations involving "authority that third parties might mistakenly yet reasonably believe the principal conferred upon the agent").

118. See *id.* (noting that such authority "derives either from the position in which the principal places the agent and the customary powers of that position (inherent agency power) or from the principal's manifestations to third parties . . . (apparent authority)"). The prospectus provides no case law to support this statement.

119. See *supra* note 46 and accompanying text (noting that power of position doctrine, as part of apparent authority, applies when third party's belief comes from agent's position, even if principal did not intend to give agent all authorities of that position).

This misapplication of inherent agency is another reason why the ALI perhaps should reconsider its elimination of inherent agency. Claims that the draft expands apparent authority appear to be inaccurate,¹²⁰ and even with such an expansion, apparent authority would still be a subset of inherent agency that could not encompass the inherent agency doctrine.¹²¹ The draft also refers to inherent agency and implied actual authority synonymously¹²² and justifies its position with cases that would come out differently under the draft.¹²³ The following Part presents cases demonstrating that courts have recognized inherent agency as a distinct doctrine,¹²⁴ after which the Note argues that the elimination of inherent agency contradicts precedent, policy, and the purpose of Restatements.¹²⁵

IV. Inherent Agency as a Distinct Category

A. Case Law Correctly Distinguishing Inherent Agency from Actual and Apparent Authority

In several cases, courts either based their decisions on inherent agency despite the inapplicability of apparent authority or based their decisions on another theory but correctly identified inherent agency and explained its inapplicability. The purpose of analyzing these cases is twofold. First, the analysis shows that inherent agency is a distinct legal doctrine, making any elimination of the doctrine not merely a restatement but rather a substantive change in the law.¹²⁶ Second, it proves that courts recognize the doctrine, making any elimination of the doctrine a departure from precedent.¹²⁷

120. See *supra* notes 87-90 and accompanying text (showing that attempt by draft to expand apparent authority to encompass inherent agency arguably results in no expansion at all).

121. See *supra* Part II.D (proving that apparent authority remains subset of inherent agency as long as apparent authority elements include elements of inherent agency).

122. See *supra* notes 94-95 and accompanying text (identifying reference to inherent agency as synonymous with implied actual authority but demonstrating how these two doctrines are wholly distinct).

123. See *supra* notes 96-99 and accompanying text (noting that draft discusses *Koval* and *Croissant* but showing that both cases would yield different results under draft).

124. *Infra* Parts IV.A, C.

125. See *infra* Part V (supporting retention of inherent agency as distinct doctrine).

126. See *infra* Part V.B (suggesting that elimination of inherent agency is substantive change in law and therefore inappropriate for Restatement).

127. See *infra* Part V.A (suggesting that elimination of inherent agency conflicts with precedent).

1. Three Early Cases

Although the Second Restatement is the first official text to coin the phrase "inherent agency power,"¹²⁸ the logic behind the doctrine preceded that work by three-quarters of a century. *Thurber & Co. v. Anderson*,¹²⁹ a nineteenth century case, applied the concept of inherent agency to hold undisclosed principals liable, and an English court soon thereafter adopted similar reasoning in *Watteau v. Fenwick*.¹³⁰ Although scholars attribute the establishment of inherent agency in the Second Restatement to *Watteau*,¹³¹ numerous cases since that decision have accepted the doctrine,¹³² *Croissant v. Watrud*¹³³ being the first to receive academic recognition. The following analysis examines the reasoning of these three early cases.

*Thurber & Co. v. Anderson*¹³⁴ involved a defendant principal in the grocery business and its agent who ordered cigars and ale by mail.¹³⁵ The principal remained undisclosed because the transaction was by mail, thereby rendering apparent authority, including the power of position doctrine, inapplicable.¹³⁶ Nonetheless, the court held that the principal had to pay for the goods.¹³⁷ The court imposed liability because the principal put the agent into surroundings that allowed him to represent to others that he had authority to make the purchase.¹³⁸

128. See GREGORY, *supra* note 7, § 26, at 77 (citing RESTATEMENT (SECOND) OF AGENCY § 8 A (1957) and stating that "[t]he term 'inherent agency power' was first used in the Restatement"); SEAVEY, *supra* note 26, § 8F (noting that inherent agency power "is a term first used in the Restatement of Agency, 2d, Section 8 A").

129. 88 Ill. 167 (1878).

130. 1 Q.B. 346 (1893).

131. See HYNES, *supra* note 7, at 211 (stating in notes following *Watteau* that "[t]he Restatement sections on inherent agency power adopt the rationale of this case").

132. The quick and widespread acceptance of the doctrine shows that the decision to adopt inherent agency, whether or not correct at the time of the Second Restatement, should receive respect as precedent. See *infra* Part V.A (suggesting that elimination of inherent agency conflicts with precedent).

133. 432 P.2d 799 (Or. 1967).

134. 88 Ill. 167 (1878).

135. *Thurber & Co. v. Anderson*, 88 Ill. 167, 168 (1878).

136. See Fishman, *supra* note 6, at 11 ("Applying apparent authority in this case is difficult, since the third party dealt directly with the agent by mail and never directly observed the agent's relationship to the establishment. Thus, the principal made no manifestation."); *supra* note 101 and accompanying text (showing inapplicability of apparent authority when principal is undisclosed).

137. See *Thurber*, 88 Ill. at 169 (placing liability upon principal defendants).

138. See *id.* ("By permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be held bound to the person who gives credit thereafter to the

An English court subsequently adopted the same reasoning. In *Watteau v. Fenwick*,¹³⁹ the defendant principals had appointed an agent as manager of their pub but subsequently restricted his power to purchase certain beverages.¹⁴⁰ This manager purchased the beverages from the plaintiff third party, but the defendants refused to pay for them.¹⁴¹ Clearly no actual authority existed.¹⁴² Apparent authority also was inapplicable because the third party's belief arose from manifestations by the agent, not the principals.¹⁴³ Indeed, the principals were undisclosed and therefore could have made no manifestations traceable to them,¹⁴⁴ thereby precluding the applicability of apparent authority.¹⁴⁵ Nonetheless, the court found the principals liable based on an inherent agency theory.¹⁴⁶

*Croissant v. Watrud*¹⁴⁷ is one of the first cases in which a court correctly chose to apply the inherent agency section in the Second Restatement.¹⁴⁸ The

other . . .").

139. 1 Q.B. 346 (1893).

140. *Watteau v. Fenwick*, 1 Q.B. 346, 346 (1893).

141. *Id.*

142. *See id.* ("Under the terms of the agreement made between [agent] and [principal] defendants, the former had no [actual] authority to buy any goods for the business except bottled ales and mineral waters . . .").

143. *See id.* at 348 (noting that principals allowed agent to hold himself out as proprietor of business).

144. *See id.* at 347 ("[T]here is no holding out by the principal They are in fact undisclosed principals . . ."); *id.* at 347-48 (comparing this case to prior case in which "there was no holding out of the manager as an agent; it was the simple case of an agent being allowed to act as the ostensible principal [himself] without any disclosure to the world of there being any one behind him").

145. *See supra* notes 101-03, 110 and accompanying text (showing that inherent agency, not apparent authority, applies to undisclosed principals).

146. *See Watteau v. Fenwick*, 1 Q.B. 346, 348 (1893) ("All that the plaintiff has to do . . . in order to charge the principals, is to shew that the goods supplied were . . . within the reasonable scope of the agent's authority.") (emphasis added). The court noted that the principals here "enable[d] their agent to hold himself out to the world as the proprietor," and that the third party in such cases needs only to show that he was reasonable in thinking that the agent had the authority in question. *Id.*

147. 432 P.2d 799 (Or. 1967).

148. Some cases preceding *Croissant* applied inherent agency. *See, e.g.*, *Local Joint Executive Bd., Hotel & Rest. Employees & Bartenders Int'l Union v. Nationwide Downtowner Motor Inns*, 229 F. Supp. 413, 414-15 (W.D. Mo. 1964) (determining that general manager had apparent authority and inherent agency power to bind his principal corporation in contract); *Cote Bros. v. Granite Lake Realty Corp.*, 193 A.2d 884, 886 (N.H. 1963) (determining that financial manager had inherent agency power to purchase ordinary supplies); *Holman-Baker Co. v. Pre-Design, Inc.*, 179 A.2d 454, 456 (N.H. 1962) (using inherent agency power to hold undisclosed principal corporation liable for contract signed by its

plaintiff third party in *Croisant* hired the defendant accounting firm to provide her with tax advice and to complete her tax forms.¹⁴⁹ The plaintiff then hired LaVern Watrud, an accountant with the defendant firm, not only to continue doing her taxes but also to make collections under a sale of one of her properties.¹⁵⁰ When the plaintiff moved to another state, she also gave Watrud responsibility for maintaining her financial records in addition to his previous tax and collection responsibilities.¹⁵¹ The plaintiff, to no avail, reprimanded Watrud for making unauthorized payments on her accounts (including some payments to himself).¹⁵² After Watrud suffered a fatal hunting wound, the plaintiff sought to hold Watrud's accounting firm liable for an accounting.¹⁵³

Clearly the situation involved no express actual authority because the firm never expressly allowed Watrud to assume the added responsibilities.¹⁵⁴ If accountants commonly handled funds, there could have been common knowledge to that effect, in which case the firm's manifestation to Watrud in appointing him as an accountant could have caused Watrud to believe that he had implied actual authority to handle funds.¹⁵⁵ However, the court found "no basis for saying that accountants commonly or frequently perform fund-handling services."¹⁵⁶ Similarly, if it were common knowledge that accountants handled funds, the firm's appointment of Watrud as an accountant could have been a manifestation to the plaintiff third party that created apparent authority pursuant to the power of position doctrine.¹⁵⁷ But again, the

president/treasurer/director/manager). However, *Croisant* was the first case that received substantial recognition. See HYNES, *supra* note 42, at 323-36 (discussing inherent agency and citing *Croisant* as first post-Second Restatement case); *supra* notes 91-94 and accompanying text (noting that draft of Third Restatement cites and discusses *Croisant* as one example of inherent agency).

149. *Croisant v. Watrud*, 432 P.2d 799, 800 (Or. 1967).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 801 ("It is clear that Watrud had no express authority from defendants to perform these services.").

155. See *id.* ("If it were common knowledge that accountants frequently [performed these duties], we would be in a position to take judicial notice of the common practice and thus find an implied authority . . ."). One may have implied actual authority for acts that usually accompany the expressly authorized acts. See RESTATEMENT (SECOND) OF AGENCY § 35 (1957) (interpreting implied actual authority to include "acts which are incidental to [a transaction], usually accompany it, or are reasonably necessary to accomplish it"); *supra* notes 24-26 and accompanying text (discussing and providing example of implied actual authority).

156. *Croisant v. Watrud*, 432 P.2d 799, 801 (Or. 1967).

157. See *id.* ("If it were common knowledge . . . , we would be in a position to . . . find . . . apparent authority."). One may have apparent authority based on the power of position doctrine

court found that accountants customarily did not handle funds, and therefore there could be no common knowledge to that effect.¹⁵⁸ The court identified no other manifestations by the principal that could have given rise to apparent authority.¹⁵⁹

The court instead imposed liability on the defendants under a theory of "inherent agency power."¹⁶⁰ As noted above, the only requirements to establish inherent agency power are the third party's actual and reasonable belief that the agent has the authority in question.¹⁶¹ Courts do not determine reasonableness from accountants' opinions about what their authority usually includes, but rather from the facts in the particular case.¹⁶² The court identified three facts in this case that established the reasonableness of the third party's belief. The acts in question were a continuation of prior accounting services,¹⁶³ the prior accounting services gave rise to a trust relationship,¹⁶⁴ and the agent had done nothing to convey the lack of authority to the third party.¹⁶⁵ Although these factors might not always establish that the third party's belief was reasonable, they did in this case. Again, courts must consider "the facts in the particular case."¹⁶⁶

only for acts commonly performed by people with that position. See RESTATEMENT (SECOND) OF AGENCY § 27 cmt. a (1957) (describing power of position doctrine and stating, "[T]o those who know of the appointment there is apparent authority to do the things ordinarily entrusted to one occupying such a position").

158. See *Croisant*, 432 P.2d at 801 (noting that accountants did not commonly handle funds and therefore concluding "that liability cannot be rested upon a manifestation [whether to the agent or to the third party] by defendants that they assented to be bound for such services").

159. See *id.* (identifying no manifestation other than agent's position).

160. See *id.* (citing definition of inherent agency in Second Restatement and stating that agent may bind principal even without actual or apparent authority because "[a]n agent may have an 'inherent agency power'").

161. See *supra* note 57 and accompanying text (providing requisite elements of inherent agency).

162. See *Croisant v. Watrud*, 432 P.2d 799, 803 (Or. 1967) (noting that courts did not test reasonableness of third party's belief of authority by accountants' description of what their authority included because third party was not accountant).

163. See *id.* (describing past services of which services in question were continuation). The court noted that the agent was taking on additional responsibilities "as a continuation of the original employment of the partnership firm." *Id.*

164. See *id.* at 804 (identifying trust relationship that past transactions developed between third party and agent). The court stated that assumption of reasonableness "is even more likely . . . where there is trust and confidence reposed in the person employed." *Id.*

165. See *id.* (noting that agent had done nothing to inform third party that he was no longer acting on behalf of principal partnership).

166. *Id.* at 803. The three elements that the court identified (the continuity of services, the

The court correctly found inherent agency power based on the third party's reasonable belief. Nonetheless, the court inappropriately cited Section 161 of the Second Restatement as defining the scope of inherent agency.¹⁶⁷ Section 161 does provide one example of inherent agency¹⁶⁸ and shows that inherent agency is distinct from apparent authority.¹⁶⁹ Nonetheless, Section 161 applies inherent agency only when the transactions in question usually accompany the agent's authorized transactions.¹⁷⁰ Because the court applied inherent agency even though the acts in question did not usually accompany Watrud's position, Section 161 must not truly define the full scope of inherent agency.¹⁷¹ Instead of using Section 161 as the full scope of inherent agency,

trust relationship, and a failure to convey lack of authority) probably would not suffice in all cases. If Watrud had claimed to have authority to watch the dogs of the firm's clients, a third party's belief that he had such authority from the firm probably would have been unreasonable, even if such services were a continuation of a trust relationship and Watrud failed to convey lack of authority. Similarly, if the third party discovered a lack of Watrud's authority from another source, any further belief of authority would have been unreasonable, despite a continuation of a trust relationship or the agent's failure to convey lack of authority. *Cf. infra* notes 184, 189 (discussing two cases and quoting courts' reasoning that indicated the inapplicability of inherent agency once third party knows that agent lacks authority because any belief to contrary is then unreasonable).

167. *See id.* at 801 (citing RESTATEMENT (SECOND) OF AGENCY § 161 (1957)). Section 161 reads as follows:

A general agent for a disclosed . . . principal subjects his principal to liability for acts done . . . which usually accompany or are incidental to transactions which the agent is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and has no notice that he is not so authorized.

RESTATEMENT (SECOND) OF AGENCY § 161 (1957).

168. *See* RESTATEMENT (SECOND) OF AGENCY § 161 cmt. a (1957) (noting that agent in example has neither actual authority nor apparent authority but nonetheless subjects principal to liability based on inherent agency).

169. *See id.* cmt. b (identifying distinction between inherent agency and apparent authority). Like the *Croissant* case and the cases that follow, this comment illustrates a situation in which inherent agency applies despite the lack of apparent authority. Although the example closely resembles the power of position doctrine, this example lacks the manifestation that apparent authority requires – namely, the appointment of the agent to a position. Because the agent is merely a general agent rather than one with a certain position of power, no manifestation to the third party is present, so apparent authority is inapplicable. Again, the cases that follow provide other examples in which inherent agency imposes liability on the principal despite the inapplicability of apparent authority.

170. *See id.* § 161 (providing, "A general agent . . . subjects his principal to liability for acts done on his account *which usually accompany* [authorized] transactions") (emphasis added).

171. *See Croissant v. Watrud*, 432 P.2d 799, 802 (Or. 1967) (noting that authority to handle funds did not "usually accompany" and was not "incidental to" Watrud's authorized responsibil-

the court used a standard of the third party's reasonableness to define the scope of inherent agency.¹⁷²

2. Modern Examples over the Last Decade

Since *Croissant*, an impressive number of courts have accepted inherent agency as a distinct doctrine and have used that doctrine as a basis for their decisions.¹⁷³ The following cases serve as a sample of how courts over the last decade have accepted and applied inherent agency and correctly distinguished inherent agency from apparent authority.¹⁷⁴ Following this sample of correct treatment of inherent agency, the Note will examine two groups of cases in which courts treated inherent agency incorrectly, either by incorrectly failing to apply inherent agency¹⁷⁵ or by applying inherent agency incorrectly.¹⁷⁶

In *Kahn v. Royal Banks of Missouri*,¹⁷⁷ a husband had signed both his and his wife's names to two notes payable to a bank and secured with jointly owned property as collateral.¹⁷⁸ When the bank declared the notes in default and sought to sell the collateral, the wife filed a declaratory judgment action against both the bank and her husband.¹⁷⁹ A central issue in the case was whether the husband's actions bound the wife as a principal.¹⁸⁰

ities, but nonetheless holding principal accounting firm liable because third party was reasonable in thinking that there was such usual accompaniment).

172. See *id.* at 803 (basing liability of partnership on reasonableness of third party). The court made the following important observation:

If a third person reasonably believes that the services he has requested of a member of an accounting partnership is [sic] undertaken as a part of the partnership business, the partnership should be bound for a breach of trust incident to that employment even though those engaged in the practice of accountancy would regard as unusual the performance of such service by an accounting firm.

Id.

173. See *infra* note 269-71 (citing cases in which courts have recognized inherent agency as distinct category).

174. See *infra* Part IV.A.2 (analyzing five recent cases that correctly distinguished inherent agency from other agency principles and showing that court used inherent agency as basis for its decision in four of these cases).

175. See *infra* Part IV.B (discussing one case pending in federal district court that improperly failed to apply inherent agency).

176. See *infra* Part IV.C (analyzing three cases in which court applied inherent agency improperly).

177. 790 S.W.2d 503 (Mo. Ct. App. 1990).

178. *Kahn v. Royal Banks of Mo.*, 790 S.W.2d 503, 506 (Mo. Ct. App. 1990).

179. *Id.*

180. See *id.* at 508-09 (determining whether agent husband, in spite of his breach of fiduciary duty, nonetheless had apparent authority or inherent agency power to bind principal

The court correctly found no actual authority because the husband, as his wife's agent, had breached his fiduciary duty by signing his wife's name for his own benefit.¹⁸¹ The court then based its decision on both apparent authority and inherent agency. If the bank's belief that the husband had authority arose from the power of attorney agreement that the wife had signed, then the husband had apparent authority arising from a manifestation by the wife to the bank.¹⁸² This apparent authority would remain until the wife communicated a lack thereof to the bank.¹⁸³ In the alternative, if the bank's belief that the husband had authority arose not from the principal wife's manifestations but instead from the agent husband's own statements, then the court would still bind the wife based on inherent agency.¹⁸⁴ Hence, the court correctly distinguished inherent agency and used that doctrine as one of two bases for its decision.

*Koval v. Simon Telelect, Inc.*¹⁸⁵ is a challenging case to analyze because it dealt with a special agent rather than a general agent.¹⁸⁶ An attorney, acting without actual authority, entered a settlement agreement on behalf of his two clients.¹⁸⁷ The federal district court certified to the state court the question of whether such a settlement would bind the clients.¹⁸⁸ The state court concluded

wife).

181. *See id.* at 507-08 ("[W]hen an agent is authorized to borrow money on his principal's behalf, it is inferred that the agent is authorized to borrow only for the purposes of the principal Obviously, then, an agent has no actual authority to act in violation of his fiduciary duties.") (quotation and citation omitted).

182. *See id.* at 508 ("As long as the husband had not breached his fiduciary duties *prior* to apprising the Bank of the durable power of attorney, the husband retained apparent authority . . . until [the wife] communicated revocation of the power of attorney to the Bank.") (emphasis added).

183. *See id.* ("[T]he wife concedes that she did not communicate revocation of the durable power of attorney to the Bank until after the 1987 transactions.").

184. *See id.* at 509 (showing that principal wife was liable for agent husband's conduct even if he breached his authority, as long as bank had no knowledge of breach and therefore was in good faith). The court explained the liability as follows:

Since the Bank had no knowledge that the husband may have been acting in violation of his fiduciary duties and therefore beyond his authority, the husband had inherent agency power to deal with the Bank on his wife's behalf. Even if the husband did breach his fiduciary duties as his wife's agent, she, as principal, would still be liable to the Bank, a third party dealing in good faith with her ostensible agent.

Id.

185. 693 N.E.2d 1299 (Ind. 1998).

186. *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1305 (Ind. 1998).

187. *Id.* at 1301.

188. *Id.*

that the district court should bind the clients based on the attorney's inherent agency power,¹⁸⁹ despite his lack of apparent authority.¹⁹⁰ The court correctly chose not to apply apparent authority's power of position doctrine for two reasons. First, that doctrine considers only the agent's position, whereas this court considered factors other than the position in determining the binding effect of the settlement agreement.¹⁹¹ Second, the attorney's position was not of the type to which the power of position doctrine usually applies.¹⁹² The court instead correctly bound the client by the attorney's inherent agency power in order to provide "the protection of third parties who rely on the finality of [the settlement] procedures."¹⁹³

*Menard, Inc. v. Dage-MTI, Inc.*¹⁹⁴ is another case in which the court correctly found inherent agency power rather than actual or apparent authority. Arthur Sterling served as a director and president for defendant Dage-MTI, Inc.¹⁹⁵ Plaintiff Menard, Inc. sought to purchase a tract of land that Dage owned.¹⁹⁶ Dage's directors authorized Sterling to solicit Menard's offers but gave him no authority to accept any offer from Menard on behalf of Dage.¹⁹⁷ Overreaching his authority, Sterling did accept an offer from Menard, and the contract of sale that Sterling signed falsely stated that he had authority to do

189. *See id.* ("[R]etention does equip an attorney with the inherent power to bind a client to the results of a procedure in court Accordingly, in the absence of a communication of lack of authority by the attorney, as a matter of law, an attorney has the inherent power to settle a claim . . .").

190. *See id.* ("[W]e conclude that the sole act of retaining an attorney does not give the attorney the implied or the apparent authority to settle [a claim], nor is it a manifestation by the client to third parties such that the attorney is clothed with the apparent authority to settle.").

191. *See id.* (noting that binding effect of settlement depends not only on attorney's position but also on "the conduct of the client, either with respect to the third parties who deal with the attorney or with respect to the attorney[, as well as on] the nature of the proceedings").

192. *See id.* at 1305 (noting that attorneys are special, not general, agents). The power of position doctrine usually applies to employees who serve as general agents in a position of recognized title. An attorney is not an employee of the client, has no special title, and does not serve over a continued period of time as does a general agent.

193. *Id.*

194. 726 N.E.2d 1206 (Ind. 2000).

195. *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1208 (Ind. 2000).

196. *Id.* at 1209.

197. *See id.* (describing Sterling's authority). Sterling had presented a resolution to Dage's board of directors that would have authorized him to offer and sell the tract in question. *Id.* However, the other directors instructed Sterling to change the resolution to allow him to offer the tract but not to sell it. *Id.* They also told Sterling that he could not negotiate the terms of sale, and two directors on separate occasions specifically reminded him that any offer needed board review and approval. *Id.*

so.¹⁹⁸ No one at Dage told Menard that Dage's board had limited Sterling's authority to the solicitation of offers.¹⁹⁹ When Dage sought to back out of the deal, Menard brought a suit for specific performance.²⁰⁰

Although the court briefly mentioned actual and apparent authority, it failed to state why it found those two doctrines inapplicable.²⁰¹ Instead, it abruptly stated, "We find the concept of inherent authority rather than actual or apparent authority controls our analysis in this case."²⁰² Nonetheless, the court correctly applied inherent agency rather than actual or apparent authority, even if its reasoning was incorrect. No actual authority existed because Dage specifically instructed Sterling not to close the deal on its behalf.²⁰³ Apparent authority was inapplicable because the plaintiff's belief arose not from the principal's manifestation in appointing Sterling as president, but rather from statements that Sterling himself made.²⁰⁴ The court used a three-part analysis to apply inherent agency. First, Sterling's actions in question were ones that "usually accompany or are incidental to transactions which [he was] authorized to conduct."²⁰⁵ Next, Menard's belief that Sterling was authorized to bind Dage in contract was reasonable.²⁰⁶ Finally, Menard's

198. See *id.* at 1210 (noting that Sterling, unbeknownst to Dage's board of directors, both negotiated changes in Menard's offer and signed offer on behalf of Dage). The offer that Sterling signed stated, "The persons signing this Agreement on behalf of the Seller [Dage] are duly authorized to do so and their signatures bind the seller . . ." *Id.*

199. *Id.*

200. See *id.* (observing that Dage's board tried to have Sterling remove Dage from deal, after which time Menard filed specific performance action). The lower courts ruled in favor of Dage, finding that Sterling had neither express actual authority nor apparent authority to bind Dage. See *id.* (citing *Menard, Inc. v. Dage-MTI, Inc.*, 698 N.E.2d 1227 (Ind. Ct. App. 1998)).

201. See *id.* at 1210-11 (providing definitions for actual and apparent authority but never showing how they were inapplicable to this case).

202. *Id.* at 1212.

203. See *supra* note 197 and accompanying text (discussing Sterling's lack of actual authority to close deal).

204. See *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1215 (Ind. 2000) ("We find it reasonable that Menard did not question the corporate president's statement that he had 'authority from his Board of Directors to proceed' with the land transaction."); *infra* note 206 and accompanying text (noting that plaintiff's reasonableness arose from Sterling's own statements, not principal's appointment of him to his position).

205. *Id.* at 1214 (quoting RESTATEMENT (SECOND) OF AGENCY § 161 (1957)). Again, as noted above, Section 161 provides only examples of inherent agency, and therefore a situation need not fall under that section for inherent agency to apply. See *supra* notes 167-72 and accompanying text (discussing *Croissant* and showing that Section 161 is not exhaustive but instead merely provides some examples of inherent agency).

206. See *id.* ("Here, the facts establish that Menard reasonably believed that Sterling was authorized to contract for the sale and purchase of Dage real estate."). Although the court noted Sterling's position as part of what made Menard's belief reasonable, more importantly the court

belief would have been unreasonable if it knew that Sterling lacked authority, but Menard had no such knowledge.²⁰⁷ Because Menard's belief that Sterling had authority to close the deal was reasonable and was not based on his position, the court correctly applied inherent agency rather than apparent authority.

The court used certain language that could cause confusion about apparent authority. Specifically, the court noted that Menard was not dealing with a lower-tiered employee, special agent, or general agent, but instead was dealing with Dage's president, and therefore inherent agency was more appropriate than apparent authority.²⁰⁸ If the court meant to suggest that involvement of a president precludes application of apparent authority, the court was wrong.²⁰⁹ Nonetheless, for the reasons stated above, apparent authority was inapplicable *in this case*, and the court correctly chose inherent agency.²¹⁰

Federal courts also have distinguished correctly between apparent authority and inherent agency power. In *Cange v. Stotler & Co.*,²¹¹ the plaintiff invested money with the defendant futures commission merchant.²¹² The plaintiff argued that the defendant was liable for unauthorized trades made by the defendant's agents.²¹³ The court correctly reversed the lower court's dismissal of the case.²¹⁴ Dismissal was improper because the lower court could have imposed liability on the defendant for using agents but failing to inform

showed that Sterling himself (not the principal) "confirmed that he had the authority from his Board of Directors to proceed." *Id.* at 1214-15.

207. *See id.* at 1216 ("We conclude that Menard had no notice that the Board had limited Sterling's authority with respect to [the] 30-acre parcel.").

208. *See id.* at 1212 (applying inherent agency, not apparent authority, because Sterling was president rather than lower-tiered employee, suggesting that court believed that involvement of president precludes applicability of apparent authority).

209. *See supra* notes 40-45 and accompanying text (discussing power of position doctrine as one type of apparent authority).

210. *See supra* notes 204-07 and accompanying text (showing why apparent authority was inapplicable and that inherent agency was better choice).

211. 826 F.2d 581 (7th Cir. 1987).

212. *Cange v. Stotler & Co.*, 826 F.2d 581, 583 (7th Cir. 1987).

213. *Id.*

214. *See id.* at 595 ("The scope of Wilson's actual and inherent authority are issues of fact and cannot be resolved based on the present limited record. The district court should not have granted defendant's summary judgment motion . . ."). The court remanded this case to the lower court to give it the opportunity to rule in the plaintiff's favor. After the lower court took that opportunity, the appellate court affirmed, entitling the plaintiff to all unrecovered losses, costs, and attorneys' fees. *Cange v. Stotler & Co.*, No. 85 C 7664, 1988 U.S. Dist. LEXIS 13862 (N.D. Ill. June 20, 1988), *aff'd*, 913 F.2d 1204 (7th Cir. 1990).

third parties of the limits on the agents' authority.²¹⁵ Because such agents customarily had the authority in question, the plaintiffs might have been reasonable in assuming that the defendant had given authority to the agents.²¹⁶ The court provided no apparent authority analysis, but it likely would have found no apparent authority because the principal had made no manifestations to the third party, whether expressly or by placing the agents in positions of power.²¹⁷

The majority in *First Fidelity Bank, N.A. v. Government of Antigua & Barbuda – Permanent Mission*²¹⁸ correctly chose not to follow the dissent's argument in favor of applying inherent agency. A plaintiff bank sought to hold Antigua liable for a loan that its agent ambassador to the United States had entered and defaulted.²¹⁹ The court reversed a lower court's grant of default judgment in favor of the plaintiff third party bank.²²⁰ Citing the power of position doctrine, the court noted that an ambassador might have had apparent authority to bind the principal state in contract,²²¹ but here the plaintiff third

215. See *Cange*, 826 F.2d at 590 (showing that principal was liable for acts that third party reasonably believed were within agent's authority, despite principal's limiting instructions to contrary, as long as third party did not know of instructions). The court elaborated on the point as follows:

Stotler and Company allowed Wilson to act as its agent in handling plaintiff's account, and absent proof that Stotler and Company informed plaintiff that Wilson would not have the customary power of a person in a similar agency relationship, the defendant is bound by the acts of its agent no matter its secret limitations to the contrary.

Id. Of course, if the defendant had told the plaintiff that it excluded the acts in question from the agent's authority, then it no longer would have been reasonable for the plaintiff to assume that the agent had authority, in which case no liability based on inherent agency would have existed.

216. See *id.* at 591 (stating that trier of fact could have found that such agents customarily had type of authority in question and therefore that "the plaintiff's reliance on those statements and promises . . . could be found to be reasonable").

217. The court determined that the plaintiff was reasonable because agents under these circumstances usually had such authority. However, the mere fact that an agent under similar circumstances would usually have the authority in question does not mean that the agent holds a position of power, such as the position of CEO or general manager. Because the agent in this case held no position with a title of power, the power of position doctrine was inapplicable, even if agents in similar circumstances usually had the authority in question.

218. 877 F.2d 189 (2d Cir. 1989).

219. *First Fid. Bank, N.A. v. Gov't of Ant. & Barb. – Permanent Mission*, 877 F.2d 189, 191 (2d Cir. 1989).

220. *Id.* at 196.

221. See *id.* at 193-94 (citing power of position doctrine and noting that agency principles considered agent's position as ambassador in determining extent of apparent authority).

party's belief in the agent's authority might have been unreasonable.²²² In such a case, default judgment in the third party's favor was improper.

The dissent argued that the majority's refusal to use inherent agency to bind the principal state would make third parties hesitant to lend money to agent ambassadors.²²³ Because such hesitancy would hurt foreign relations, the dissent would have applied inherent agency.²²⁴ However, the dissent's legal analysis focused on the power of position doctrine. That is, the dissent noted that the agent's position as ambassador was what manifested to the third party that the principal state guaranteed the loan.²²⁵ Because the dissent based its reasoning on the agent's position as ambassador rather than the third party's reasonableness, the majority correctly rejected the argument and instead analyzed the case under apparent authority.

B. Case Law Incorrectly Failing to Use Inherent Agency

"Courts rarely use the term inherent agency power. Rather, they improperly use apparent authority theory to analyze fact situations that should have been considered under an inherent agency power theory."²²⁶ The following case currently pending in a federal district court in Pennsylvania serves as a good example of courts incorrectly choosing apparent authority over inherent agency.

In *Farris v. J.C. Penney Co.*,²²⁷ plaintiffs husband and wife brought a personal injury action against a defendant retail store for injuries that the wife sustained when she fell on the defendant's premises.²²⁸ After one day at trial, the attorneys for both sides informed the judge that the parties had settled the matter.²²⁹ Shortly thereafter, the plaintiffs would not comply with their attorney's enforcement of the settlement agreement.²³⁰ The plaintiffs argued

222. *See id.* at 195 (providing evidence "which raises questions about the reasonableness of First Fidelity's reliance upon their apparent authority").

223. *Id.* at 199 (Newman, J., dissenting).

224. *See id.* at 198 (Newman, J., dissenting) (arguing that government-ambassador relationship was "especially suitable" for application of inherent agency doctrine).

225. *See id.* at 199 (Newman, J., dissenting) (arguing that ambassador's position was basis that court should have used to impose liability upon principal state). "An ambassador may not be 'l'etat' [the state] for all purposes, but in the context of purporting to obtain goods and services for his country's diplomatic mission, I believe 'c'est lui' [it is him] indeed." *Id.* (Newman, J., dissenting).

226. Colton, *supra* note 7, at 443.

227. 2 F. Supp. 2d 695 (E.D. Pa. 1998), *rev'd*, 176 F.3d 706 (3d Cir. 1999).

228. *Farris v. J.C. Penney Co.*, 2 F. Supp. 2d 695, 696 (E.D. Pa. 1998), *rev'd*, 176 F.3d 706 (3d Cir. 1999).

229. *Id.*

230. *Id.* at 696-97.

that their attorney had no authority to enter a settlement agreement with the defendant.²³¹ The court correctly agreed with the plaintiffs that the attorney had no actual authority.²³² The plaintiffs argued that precedent required an attorney to have express actual authority before she could settle a case.²³³ The court disagreed with that argument and stated that implied actual authority or apparent authority would also suffice to enforce settlement agreements in some circumstances.²³⁴ Although the court correctly found no implied actual authority,²³⁵ it did find apparent authority.²³⁶ The court tried to base its finding of apparent authority on manifestations by the plaintiff principals to the defendant third party, but in actuality no such manifestations occurred; all the manifestations that the court cited were from the plaintiff principals to their own agent attorney.²³⁷ The plaintiffs' only manifestation to the third party was the appointment of the attorney to his position. Because the court did not even discuss that manifestation, the court's justification for finding apparent authority was insufficient.

Therefore, the appellate court should have reversed the decision or affirmed it on different grounds (such as inherent agency). The appellate court spent several pages discussing how Pennsylvania law treated an attorney's apparent authority to settle a case.²³⁸ Within this analysis, the court did agree with the trial court that apparent authority alone sometimes may be sufficient to settle cases.²³⁹ However, the court concluded its analysis by stating that

231. *Id.* at 699.

232. *Id.*

233. *See id.* ("Plaintiffs argue [citing precedent] that express authority is the only basis upon which to uphold a settlement under Pennsylvania law . . .") (citation omitted).

234. *See id.* ("[One precedent] stated that 'the law in [Pennsylvania] is quite clear that an attorney must have express authority to settle a cause of action for the client', but then went on to conclude that 'the Pennsylvania Supreme Court might allow implied actual authority or apparent authority to suffice' under the appropriate set of facts.") (citations omitted).

235. *See id.* at 699 n.7 (noting that implied actual authority, as part of actual authority, required manifestations by principal to agent and observing that no such manifestations occurred here in regard to settlement).

236. *See id.* at 699 (noting that this case "presents the appropriate set of facts for a finding of apparent authority").

237. *See id.* at 700 (citing certain manifestations that court mistakenly believed gave rise to apparent authority, such as plaintiffs and agent attorney entering chambers, agent attorney entering witness room, and plaintiffs sitting with agent attorney). These were not manifestations by the principals to the third party. Indeed, the second manifestation (the attorney entering the witness room) was not a manifestation by the principals at all.

238. *See Farris v. JC Penney Co.*, 176 F.3d 706, 709-13 (3d Cir. 1999) (analyzing prior Pennsylvania cases that discussed sufficiency of attorney's apparent authority to settle cases). Of course, this case did not conclude the state issue because it came from a federal court.

239. *See id.* at 711 ("While we reiterate . . . that the Supreme Court of Pennsylvania may

those circumstances existed only when the manifestations giving rise to the apparent authority were statements directly from the principal to the third party that the attorney had such authority.²⁴⁰ Because such manifestations were not present here, the trial court should not have concluded that the attorney had apparent authority to settle the case.²⁴¹

The appellate court remanded the case to the trial court, thereby giving the trial court the opportunity to enforce the settlement on different grounds.²⁴² The trial court might use the attorney-client interaction upon which it originally based apparent authority to find that the third parties acted reasonably for inherent agency purposes. The trial court likely will take that opportunity because it hinted during the original trial that inherent agency, rather than the apparent authority that it found, might have been a better choice.²⁴³ Thus, another case probably soon will correctly distinguish inherent agency from apparent authority. Again, many cases incorrectly have failed to apply inherent agency,²⁴⁴ but this one is of particular importance because it currently is pending before the federal district court. Elimination of inherent agency from the Restatement could harm these plaintiffs irreparably.

recognize apparent authority in some case, it has yet to do so and we are not convinced that the Supreme Court would invoke the doctrine on the facts of this case.").

240. *See id.* at 712 ("[I]n order for the doctrine of apparent authority to apply, the facts must show that the plaintiffs (principals) communicated directly with defense counsel [third party], making representations that would lead defense counsel to believe that the plaintiffs' attorney had authority to settle the case.").

241. *See id.* (identifying manifestations that trial court cited, explaining their insufficiency to give rise to apparent authority as this court interpreted it, and concluding that "[w]e are convinced that . . . the Supreme Court of Pennsylvania would not rely on the doctrine of apparent authority to enforce the settlement").

242. *See id.* at 713 (remanding case to district court for further proceedings).

243. *See Farris v. J.C. Penney Co.*, 2 F. Supp. 2d 695, 700 n.9 (E.D. Pa. 1998) (noting that apparent authority was basis for decision to impose liability, but stating that inherent agency could have been alternative, perhaps better reasoning for same decision), *rev'd*, 176 F.3d 706 (3d Cir. 1999). The court stated:

A more rational approach might be to adopt "inherent agency doctrine" as an alternate basis to uphold a settlement in cases where express authority is lacking, and the principal has made no manifestations of authorization to the third party, but the attorney has taken various steps indicating that he has authority to settle Such a doctrine . . . removes the burden from the third party to produce affirmative evidence of actual or apparent authority, and places the dispute where it should be, between the principal and his or her agent.

Id.

244. *See Colton, supra* note 7, at 461-62 (citing *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) as one example in which Court improperly based its decision on apparent authority rather than inherent agency).

C. Case Law Incorrectly Applying Inherent Agency

This section does not deal with a correct distinction between actual or apparent authority and inherent agency but rather with the incorrect application of inherent agency by some courts. In *Trust Co. of Georgia v. Nationwide Moving & Storage Co.*,²⁴⁵ the court incorrectly applied inherent agency. A general manager of the plaintiff corporation opened an account at the defendant bank, upon which he was the only individual authorized to make transactions.²⁴⁶ When the corporation discovered the account, it sued the defendant bank for the monies that the bank held to which the corporation had entitlement.²⁴⁷ Clearly no actual authority existed because the corporation had not manifested to the agent his authority to open that account.²⁴⁸ However, the court cursorily – and erroneously – dismissed the apparent authority doctrine by stating that the corporation had made no manifestations to the third party bank.²⁴⁹ Although manifestations between the principal and the third party *are* the focus of apparent authority, in this case the court failed to identify one such manifestation. Rather, the court dealt with the manifestation of appointing the agent as general manager under inherent agency.²⁵⁰ Although the court found that an agent's appointment as general manager alone is insufficient to make the third party's belief of authority reasonable,²⁵¹ that appointment was a public manifestation that the court should have analyzed under apparent authority, not inherent agency.²⁵² By failing to consider the appointment as a manifestation by the principal, and instead analyzing the appointment under inherent agency, the court entirely misapplied inherent agency.

Another incorrect application of inherent agency comes from an intermediate appellate court in Georgia. In *Family Partners Worldwide, Inc.*

245. 219 S.E.2d 162 (Ga. 1975).

246. *Trust Co. of Ga. v. Nationwide Moving & Storage Co.*, 219 S.E.2d 162, 163-64 (Ga. 1975).

247. *Id.* at 164.

248. *See id.* at 165 (noting that plaintiff did not even allege that actual authority existed).

249. *See id.* (claiming that "[t]here were no manifestations of authority to this bank by the principal, so apparent authority is not in issue").

250. *See id.* (discussing agent's position under inherent agency power).

251. *See id.* (stating that bank had no right to rely "solely on the general manager's position as general manager for the power to set up a corporate bank account").

252. *See* RESTATEMENT (SECOND) OF AGENCY § 27 cmt. a (1957) ("[A]pparent authority can be created by appointing a person to a position, such as that of manager . . . , which carries with it generally recognized duties"); *supra* notes 40-45 and accompanying text (discussing power of position doctrine as being within apparent authority).

v. *SunTrust Bank*,²⁵³ the plaintiff corporation appealed a grant of summary judgment in favor of the defendant bank.²⁵⁴ The corporation sued the bank to recover monies that the corporation's agent CEO extorted.²⁵⁵ In this case, the court affirmed the summary judgment because the CEO, according to the court, had inherent agency power to bind the corporation.²⁵⁶ However, the court's reasoning perfectly mirrored what should have been an apparent authority analysis. Specifically, the court stated that the bank was reasonable in assuming that the CEO had authority merely because of his position.²⁵⁷ Although the result based on apparent authority would have been the same as based on inherent agency, analysis based on apparent authority would have been more appropriate.

In both *Family Partners* and *Trust Co.*, the court should have based its decision on apparent authority's power of position doctrine, whereas the *Menard* court correctly based its decision on inherent agency. The difference is subtle yet determinative. In *Family Partners* and *Trust Co.*, the third party's actual belief arose from the appointment of the agent to his position.²⁵⁸ That appointment was a manifestation by the principal to the third party.²⁵⁹ In the *Menard* case, on the other hand, the actual belief arose from the agent's own communications to the third party,²⁶⁰ not from any manifestation by the principal (whether in word or in appointment of the agent to his position).²⁶¹

253. 530 S.E.2d 742 (Ga. Ct. App. 2000).

254. *Family Partners Worldwide, Inc. v. SunTrust Bank*, 530 S.E.2d 742, 743 (Ga. Ct. App. 2000).

255. *Id.*

256. *See id.* at 744 ("The undisputed evidence showed that McGrew had the inherent agency power to open the accounts and withdraw deposited funds In this evidentiary posture, the trial court correctly granted SunTrust's motion for summary judgment.").

257. *See id.* at 743 (finding reasonableness of third party's belief for inherent agency purposes based on appointment of agent to his position). The misuse of inherent agency power in this case was even more blatant than the misuse in *Trust Co.* This court's reasoning proceeded as follows: "The question [is] whether McGrew had inherent agency power Did SunTrust have the right to rely solely on McGrew's position as CEO for the power to set up a corporate bank account . . . ? We hold it did." *Id.* The court clearly stated that the third party based its belief on the agent's position, so the court should have applied the power of position doctrine, a type of apparent authority.

258. *See supra* notes 249-52 and accompanying text (explaining why court in *Trust Co.* should have based its decision on power of position doctrine); *supra* note 257 and accompanying text (showing that belief of third party in *Family Partners* arose from appointment of agent to his position).

259. *See supra* notes 40-45 and accompanying text (discussing power of position doctrine as one application of apparent authority).

260. *See supra* note 206 (showing that belief of third party in *Menard* arose from agent's communications, not agent's position).

261. *See SEAVEY, supra* note 26, at 17 (describing Judge Hand's distinction between

Another incorrect application of the inherent agency doctrine appears in *Sheriff Electric Service v. Greater Allen AME Church*.²⁶² The plaintiff subcontractor performed work outside of the scope of a contract in order to satisfy the request of the agent pastor of the defendant church.²⁶³ After the principal church did not pay the subcontractor for his services, the subcontractor brought an action seeking to hold the church liable for the pastor's request.²⁶⁴ The appellate court reversed the trial court's finding of inherent agency power.²⁶⁵ The appellate court's inherent agency analysis was brief and wholly incorrect.²⁶⁶ The court merely concluded that the pastor did not follow the proper procedures to request additional services from a subcontractor, and therefore he had no inherent agency power.²⁶⁷ However, the focus of inherent agency is upon the third party and its belief, not upon the agent's actions.²⁶⁸ The court should have found that the third party acted reasonably in actually believing that the pastor had authority to request additional services.

V. Retaining Inherent Agency as a Distinct Category

A. Elimination of Inherent Agency Contradicts Precedent

The previous Part of this Note analyzes cases in which the courts distinguished apparent authority from inherent agency. Professor Steven Fishman has identified over two dozen cases in which courts at least

apparent authority and inherent agency and noting that he "carefully explained that apparent authority . . . was at least somewhat misleading in cases in which the party dealing with the agent did not rely upon more than the agent's statement"). So, Professor Seavey demonstrates that no apparent authority exists when the third party relies only on the agent's statements; only inherent agency applies. On the other hand, if the third party relies on something in addition to or other than such statements (such as reliance upon the agent's position), then apparent authority might apply.

262. No. 7628, 1982 Ohio App. LEXIS 13685 (Ohio Ct. App. Aug. 25, 1982).

263. *Sheriff Elec. Serv. v. Greater Allen AME Church*, No. 7628, 1982 Ohio App. LEXIS 13685, at *2 (Ohio Ct. App. Aug. 25, 1982).

264. *Id.*

265. *See id.* at *5 ("[T]he Court [here] rejects the trial court's holding that appellant is liable under inherent agency power.").

266. *See id.* at *4-5 (providing court's application of inherent agency).

267. *See id.* at *4 (noting that pastor did not seek approval from four groups prior to ordering additional services).

268. *See supra* note 57 and accompanying text (noting that inherent agency looks at third party's belief). Although the court perhaps was correct that the pastor inappropriately failed to receive approval from the four groups, the third party might not have known of the requirement to seek approval, and therefore its belief may have been reasonable despite the pastor's failure.

recognized inherent agency as a distinct doctrine,²⁶⁹ and courts in several more cases have done so since publication of his article.²⁷⁰ In over a dozen cases, courts not only have identified inherent agency as a distinct doctrine, but also have used that doctrine correctly as the basis for their decisions.²⁷¹ Because

269. See Fishman, *supra* note 6, at 25-26, nn.121-22 (providing extensive list of federal and state cases in which courts recognized inherent agency and distinguished it from apparent authority).

270. See Pohl v. United Airlines, Inc., 213 F.3d 336, 338 (7th Cir. 2000) (identifying inherent agency as one means by which attorney could bind client to settlement); Staten v. Neal, 880 F.2d 962, 965-66 (7th Cir. 1989) (incorrectly using Section 161 as scope of inherent agency and therefore concluding that attorney had no inherent authority to enter plea agreement because position of attorney usually did not include such authority); First Fid. Bank, N.A. v. Gov't of Ant. & Barb. – Permanent Mission, 877 F.2d 189, 198-99 (2d Cir. 1989) (Newman, J., dissenting) (arguing incorrectly that inherent agency should hold government liable for agent ambassador's default on loan); United States v. Chevron, U.S.A., Inc., 757 F. Supp. 512, 514-15 (E.D. Pa. 1990) (concluding that inherent agency was inapplicable because third party's belief was unreasonable); Fields v. Horizon House, Inc., Civil Action No. 86-4343, 1987 U.S. Dist. LEXIS 11315, at *16 (E.D. Pa. Dec. 8, 1987) (same); Browne v. Maxfield, 663 F. Supp. 1193, 1200 n.6 (E.D. Pa. 1987) (identifying inherent agency doctrine but concluding that general respondeat superior principles were more applicable); Rouse Woodstock, Inc. v. Sur. Fed. Sav. & Loan Assoc., 630 F. Supp. 1004, 1010 (N.D. Ill. 1986) (citing Sections 165 and 166 of Second Restatement and concluding that president had inherent authority to bind corporation whereas vice-president did not); Evanston Bank v. ContiCommodity Servs., Inc., 623 F. Supp. 1014, 1031 (N.D. Ill. 1985) (citing Section 8 A of Second Restatement and applying Illinois law to conclude that inherent authority of corporate president fell under "the umbrella label of apparent authority"); Cmty. Collaborative v. Ganim, 698 A.2d 245, 252 (Conn. 1997) (stating that presidents did not have inherent authority to bind corporation per se pursuant to Connecticut law); Family Partners Worldwide, Inc. v. SunTrust Bank, 530 S.E.2d 742, 744 (Ga. Ct. App. 2000) (holding incorrectly that CEO had inherent agency power to bind corporation); Gallant Ins. Co. v. Davis, 751 N.E.2d 672, 675-76 (Ind. 2001) (holding that lower court improperly based decision on inherent agency rather than apparent authority because agent was not president and therefore had no inherent authority); Grosberg v. Mich. Nat'l Bank-Oakland, 362 N.W.2d 715, 720 (Mich. 1985) (incorporating inherent agency into implied authority).

271. See Cange v. Stotler & Co., 826 F.2d 581, 590-91 (7th Cir. 1987) (concluding that lower court could have used inherent agency to hold commodity futures merchant liable for agents' unauthorized transactions and that dismissal was therefore improper); Ortiz v. Duff-Norton Co., 975 F. Supp. 713, 719 (E.D. Pa. 1997) (concluding that insurance company for employer had inherent agency power to bind company in settlement of products liability suit); Dupuis v. Fed. Home Loan Mortgage Corp., 879 F. Supp. 139, 144 (D. Me. 1995) (holding undisclosed defendant corporation liable on inherent agency grounds); Xylas v. Tollway Arlington Nat'l Bank, No. 84 C 6149, 1987 U.S. Dist. LEXIS 5623, at *9-10 (N.D. Ill. June 17, 1987) (concluding that summary judgment in principal's favor was improper because inherent agency might have applied to hold principal bank liable, even if apparent authority was inapplicable, as long as third party's belief was reasonable); Bigane Vessel Fueling Co. v. Bolton Steam Shipping Co., No. 79 C 2041, 1981 U.S. Dist. LEXIS 9949, at *5-6 (N.D. Ill. Oct. 15, 1981) (applying inherent agency to bind principal because of statements that its agent

so many courts have used inherent agency as the correct basis for their decisions, any elimination of inherent agency that changes the results of these cases is inconsistent with the respect for precedent in our legal system.²⁷²

Any claim that the draft of the Third Restatement respects precedent because it would not change the results in these cases arguably has serious flaws.²⁷³ The only two expansions of the definition of "manifestation" that the draft alleges are the incorporation of the power of position doctrine and the allowance of nonverbal manifestations.²⁷⁴ The analysis of the above cases already assumes both of these "expansions" yet still demonstrates opposite results under inherent agency and apparent authority.²⁷⁵ Only in *Thurber & Co. v. Anderson*²⁷⁶ and *Watteau v. Fenwick*,²⁷⁷ both involving undisclosed principals, would analysis under the draft of the Third Restatement yield the

made); *Lincoln Bank v. Nat'l Life Ins. Co.*, 476 F. Supp. 1118, 1122-23 (E.D. Pa. 1979) (basing decision to bind principal bank with contract signed by its agent in part on inherent agency); *United States v. Lieber*, 473 F. Supp. 884, 892 (E.D.N.Y. 1979) (basing liability of United States in contract on United States Attorney's promise because third party was reasonable, even though authority of such attorneys was of "limited extent" and usually did not include authority to bind country); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1212 (Ind. 2000) (holding that president/director had inherent agency power to bind corporation in sale contract); *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1301 (Ind. 1998) (holding that attorney, despite lack of apparent authority, had inherent agency power to bind client in settlement agreement); *Jackson v. Goodman*, 244 N.W.2d 423, 424-25 (Mich. Ct. App. 1976) (reversing lower court's judgment notwithstanding verdict in order to reinstate jury's decision that based principal's liability on inherent agency and ratification); *Kahn v. Royal Banks of Mo.*, 790 S.W.2d 503, 508-09 (Mo. Ct. App. 1990) (binding wife by transactions of her husband based on apparent authority or, as alternative, based on inherent agency from power of attorney contract); *Cote Bros. v. Granite Lake Realty Corp.*, 193 A.2d 884, 886 (N.H. 1963) (binding corporation because financial managers had inherent agency power to purchase ordinary supplies, in part from their position but also because of their statements to third party); *Croissant v. Watrud*, 431 P.2d 799, 801 (Or. 1967) (holding accounting firm liable for conduct of accountant that improperly handled third party's funds).

272. See *supra* Part V.A (discussing cases based on inherent agency that would have resulted differently based on apparent authority).

273. See *supra* note 80 (quoting claim in draft of Third Restatement that other doctrines in draft provide alternative bases for inherent agency cases).

274. See *supra* notes 85, 87 and accompanying text (noting that only "expansions" of definition of "manifestation" in draft of Third Restatement are power of position doctrine and allowance of nonverbal communications).

275. See *supra* notes 33, 40-45 and accompanying text (noting that apparent authority already includes both nonverbal communications and power of position doctrine); *supra* Part IV.A (analyzing cases based on inherent agency and finding apparent authority inapplicable despite these expansions).

276. 88 Ill. 167 (1878).

277. 1 Q.B. 346 (1893).

same result under estoppel.²⁷⁸ In the remainder of the cases decided under inherent agency, the courts either identified no manifestations (even with the alleged "expansions") or found that something other than manifestations caused the third party's belief, and therefore correctly concluded that apparent authority was inapplicable.²⁷⁹ Like the Second Restatement, the draft requires both of these elements, so apparent authority would remain inapplicable under its provisions.²⁸⁰ Furthermore, under the draft of the Third Restatement, courts no longer could use inherent agency as the basis for their decisions because the draft eliminates inherent agency.²⁸¹

For example, *Croisant v. Watrud*²⁸² would have a different outcome under the draft of the Third Restatement. The court decided that the principal accounting firm was not liable for the accountant's conduct based on apparent authority because the principal firm had made no manifestations to the third party that it had granted him the authority in question.²⁸³ Even under apparent authority's power of position doctrine, the accountant's position did not usually include such authority. Thus, appointing Watrud to that position was not a manifestation sufficient to create apparent authority.²⁸⁴ Because the draft of the Third Restatement arguably does not broaden the manifestations that create apparent authority, no apparent authority would exist under the Third Restatement draft, and the court would have ruled differently without inherent agency as a basis for liability.²⁸⁵

Also, in *Kahn v. Royal Banks of Missouri*,²⁸⁶ the court concluded that the agent husband's own statements, rather than any manifestation by the principal wife, caused the third party's reasonable belief, and therefore the agent had no

278. See *supra* notes 136, 144 and accompanying text (discussing presence of undisclosed principals in *Thurber* and *Watteau*, respectively).

279. See *infra* notes 282-98 and accompanying text (showing specifically that Third Restatement draft would yield different results in inherent agency cases that did not involve undisclosed principals).

280. See RESTATEMENT (THIRD) OF AGENCY § 3.03 (Tentative Draft No. 2, 2001) (requiring "a [principal]'s manifestation" and that "the [third party's] belief is traceable to the manifestation" for creation of apparent authority).

281. See *supra* note 80 and accompanying text (identifying elimination of inherent agency in Third Restatement draft).

282. 432 P.2d 799 (Or. 1967).

283. See *supra* notes 157-59 and accompanying text (showing that apparent authority, other than possibly power of position doctrine, was inapplicable).

284. See *supra* notes 157-58 and accompanying text (showing that power of position doctrine was inapplicable).

285. See *supra* notes 87-90 and accompanying text (suggesting that draft of Third Restatement does not expand definition of "manifestation").

286. 790 S.W.2d 503 (Mo. Ct. App. 1990).

apparent authority.²⁸⁷ Likewise, the court in *Menard, Inc. v. Dage-MTI, Inc.*²⁸⁸ found apparent authority inapplicable because the agent's statements, rather than his position, were what gave rise to the third party's belief, even though the agent in *Menard* did hold a position of power to which apparent authority could have applied.²⁸⁹ Because the draft of the Third Restatement, like the Second Restatement, requires the principal's manifestations rather than the agent's statements to give rise to the third party's belief, apparent authority would remain inapplicable under the draft.²⁹⁰ In *Koval v. Simon Telelect, Inc.*,²⁹¹ the court applied inherent agency rather than apparent authority in order to protect the third party and because the third party's belief arose from the conduct of the agent attorney, not his position.²⁹² As with *Kahn* and *Menard*, *Koval* involved facts to which the Third Restatement draft would not apply apparent authority because the principal's manifestations were not the cause of the third party's belief.²⁹³ Furthermore, the *Koval* court correctly recognized that one purpose of inherent agency was the protection of third parties,²⁹⁴ whereas the elimination of inherent agency in the draft of the Third Restatement necessarily eliminates that purpose.²⁹⁵ In *Cange v. Stotler & Co.*,²⁹⁶ the agent did hold a position that gave rise to the third party's reasonable belief, but that position was not the type to which the power of

287. See *supra* note 184 and accompanying text (concluding that third party's reasonable belief may have come from agent husband's statements rather than some manifestation by principal wife, in which case court based its decision on inherent agency).

288. 726 N.E.2d 1206 (Ind. 2000).

289. See *supra* note 204 and accompanying text (showing that third party based its belief on agent's statements, not principal's manifestation in appointing agent as president and director).

290. See *supra* note 100 and accompanying text (noting that draft of Third Restatement requires same four elements for apparent authority as Second Restatement, including requirement that third party's belief comes from principal's manifestations).

291. 693 N.E.2d 1299 (Ind. 1998).

292. See *supra* notes 191-93 and accompanying text (explaining inapplicability of apparent authority because power of position doctrine did not apply to attorneys and because third party's belief arose from nature of proceedings and showing that court therefore applied inherent agency to protect third parties).

293. See *supra* notes 286-90 and accompanying text (noting that apparent authority, under Third Restatement draft, remains inapplicable to cases in which third party's belief comes from agent's conduct rather than principal's manifestations).

294. See RESTATEMENT (SECOND) OF AGENCY § 8 A (1957) ("Inherent agency power . . . exists for the protection of persons harmed by or dealing with a servant or other agent.").

295. Cf. *supra* note 116 (characterizing purpose of inherent agency to protect third parties as "misleading").

296. 826 F.2d 581 (7th Cir. 1987).

position doctrine was applicable.²⁹⁷ Again echoing the Second Restatement, the draft of the Third Restatement does not apply the power of position doctrine to all positions, and the agent's position in *Cange* was one to which the draft would not apply the doctrine.²⁹⁸

B. Elimination of Inherent Agency Is Improper for a Restatement

Because the proposed elimination of inherent agency in the draft of the Third Restatement rejects established precedent, that elimination amounts to a substantive change in the law rather than merely a restatement. Restatements by their very nature are not supposed to change the law substantively.²⁹⁹ "[T]he first undertaking of [the ALI] should be to produce a restatement . . . of the law that would tell judges and lawyers *what the law was*."³⁰⁰ Although the ALI has become more open to some changes in Restatements, those permissible changes are still few and far between.³⁰¹ This Note already has shown that apparent authority is only one subset of inherent agency.³⁰² Elimination of inherent agency strikes from the set of inherent agency cases anything that falls outside of the apparent authority subset. Thus, the elimination of inherent agency is not a mere restatement but rather a substantive change of the law.³⁰³

297. See *supra* note 217 and accompanying text (finding that apparent authority was inapplicable because agent's position was not of type to which power of position doctrine applied).

298. See RESTATEMENT (THIRD) OF AGENCY § 3.03 illus. 1, 4-7 (Tentative Draft No. 2, 2001) (applying power of position doctrine when agent holds such positions as CEO, university president, dean, or branch manager). Because the agent in *Cange* was only a commodities broker, the power of position doctrine under the draft of the Third Restatement would not impose liability on the principal commodities firm.

299. See *Dormire*, *supra* note 6, at 247 ("The title 'Restatement' suggests that its role is to reflect the law as it is, possibly with a recasting of the rationale from the opinions reviewed, *but not with a change in result.*") (emphasis added).

300. HERBERT F. GOODRICH & PAUL A. WOLKIN, THE STORY OF THE AMERICAN LAW INSTITUTE 1923-1961, at 8 (1961) (emphasis added).

301. See AM. LAW INST., THE AMERICAN LAW INSTITUTE 50TH ANNIVERSARY 21 (1973) (saying of Restatements that their "object should not only be to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes *which will tend better to adapt the laws to the needs of life*") (emphasis added).

302. See *supra* Part II.D (proving that apparent authority is merely subset of inherent agency).

303. See *Fishman*, *supra* note 6, at 17 ("[T]he primary reason for adding [inherent agency] was to make the courts recognize that inherent agency power is a separate doctrinal ground for deciding cases involving unauthorized acts of agents and increase the likelihood that the courts would utilize the doctrine.").

Those few changes that the ALI does find appropriate for Restatements are changes that simplify the law.³⁰⁴ Therefore, even if the reporter of the Third Restatement draft proves that the change that she proposes is appropriate for a Restatement, she still must demonstrate that the change simplifies the law. This Note argues that the reporter's attempted expansion of apparent authority to include inherent agency does not promote the ALI's goal of simplicity for two reasons. First, the reporter uses two steps – elimination of inherent agency, and expansion of apparent authority – to effectuate her change.³⁰⁵ If she truly expands apparent authority to cover the full scope of inherent agency, then she could accomplish the same result with one step: eliminate apparent authority.³⁰⁶ The use of one step rather than two would follow the ALI's goal of promoting simplicity.

Second, the attempt to expand apparent authority to include inherent agency, rather than simplify the law, creates confusion over apparent authority.³⁰⁷ The Second Restatement neatly divides actual and apparent authority on the one hand (which consider manifestations by the principal) from inherent agency power on the other (which considers the third party's belief).³⁰⁸ Any attempt to mix the two categories arguably will fail because "[t]he very nature of the third category of inherent agency power is that it is different not in degree but in kind."³⁰⁹ Indeed, the ALI adopted inherent agency

304. See AM. LAW INST., *supra* note 301, at 21 (noting that one of "its object[s] should [be] to simplify unnecessary complexities"); *id.* at 24 (permitting Restatements to include changes "in the direction of simplifying the law where it is unnecessarily complex").

305. See *supra* note 85 and accompanying text (identifying reporter's attempt to expand apparent authority to include all that inherent agency currently regulates). Again with set theory, under the Second Restatement, $U_A = \{A \cap B \cap C \cap D\}$ and $U_I = \{A \cap B\}$, where U_A and U_I represent the universes of cases in which apparent authority and inherent agency, respectively, apply, and where *supra* note 67 defines A , B , C , and D . The draft eliminates inherent agency, or U_I , leaving only apparent authority, or $U_A = \{A \cap B \cap C \cap D\}$. The draft then attempts to expand apparent authority to the full scope of inherent agency, leaving $U_A = \{A \cap B\}$.

306. That is, after the reporter's elimination of inherent agency and expansion of apparent authority, all that remains is $\{A \cap B\}$, the same result as if the reporter merely eliminated apparent authority.

307. See Dormire, *supra* note 6, at 255-56 (citing possibility of expanding apparent authority to include inherent agency but concluding that this approach would only worsen situation). Ms. Dormire observes that "[t]he way to fit the inherent agency power concept into that of apparent authority would be to stretch the word 'manifest.'" *Id.* at 256. However, she argues that this approach "will only serve to muddy the now clear concept" of apparent authority. *Id.* Furthermore, "[a] stretching of the word 'manifest' will not serve to clarify or simplify the concept[s]." *Id.*

308. See *id.* at 256 (identifying line between inherent agency and actual and apparent authority).

309. *Id.* Ms. Dormire later reemphasizes her point as follows:

in the first place to clarify the law.³¹⁰ A mixture of the inherent agency and apparent authority categories would prevent courts from considering the purpose of the new combined category in a difficult case because the two mixed categories have completely different purposes.³¹¹

C. Policy Arguments Against the Elimination of Inherent Agency

Several policy arguments also support the retention of inherent agency. First, the purpose of the agency relationship is to allow principals to accomplish more than would be possible without such relationships,³¹² in part because agents and third parties can transact without continuously having to receive the principal's approval.³¹³ Because principals benefit from these relationships, the law should require them to take the bitter with the sweet.³¹⁴ Applying that logic, the Second Restatement imposes liability on the principal when the third party is reasonable, despite the agent's lack of actual or apparent

Wherever the lines are drawn, inherent agency power still seems distinct from the other two concepts [of actual and apparent authority,] which are grounded on . . . communications by the principal. Thus, it seems analytical clarity would favor treating inherent agency power separately rather than expanding . . . or redefining apparent authority beyond those bounds.

Id. at 259.

310. See Fishman, *supra* note 6, at 2 (describing cases that fell outside of more traditional principles but in which court nonetheless held principal liable and noting that "[t]he doctrine of inherent agency power was adopted, in part, to serve as an explanation for these cases, and to provide a doctrinal basis to explain the practice of the courts").

311. Compare HENN, *supra* note 27, at 30 (noting that purpose of apparent authority is to place liability on principal because of its conduct or consent) with *id.* at 36 (noting that purpose of inherent agency is to protect third parties).

312. See RESTATEMENT (SECOND) OF AGENCY § 8 A cmt. a (1957) ("The principles of agency have made it possible for persons to utilize the services of others in accomplishing far more than could be done by their unaided efforts. [T]he agency relation[']s primary function in modern life is to make possible the commercial enterprises which could not exist otherwise.").

313. See EISENBERG, *supra* note 7, at 12-13 (noting that inherent agency allows agent to use his best judgment to bind principal rather than having to check back with principal continuously); McKay, *supra* note 32, at 451 (noting that commercial world must be able to rely on agents rather than continuously having to confirm their authority).

314. See W. EDWARD SELL, AGENCY § 6 (1975) (noting that "the principal reaps the benefits of his agent's actions; therefore, it is not unreasonable to hold him liable for his agent's harmful activities" because that is risk that principal takes when using agents); Fishman, *supra* note 6, at 21 ("Both the commentators and the Second Restatement have emphasized the . . . unfairness of permitting businesses to obtain benefits from the use of agents without also bearing the risks when the agents exceed their authority."); McKay, *supra* note 32, at 451 ("[T]he employer who creates, controls, and benefits from the agency relationship should stand to lose, rather than someone who deals in good faith with his agent.").

authority.³¹⁵ *Kidd v. Edison*³¹⁶ illustrated the idea.³¹⁷ Because the case predated the Second Restatement, it did not use the phrase "inherent agency," but the underlying theory was the same.³¹⁸ Judge Learned Hand recognized that the principal benefitted from appointing agents because approval of transactions would no longer occupy all of its time.³¹⁹ To allow the principal to receive that benefit, courts must effectuate its wishes in making the agents' transactions binding, which courts can do only by imposing liability upon the principal, even if the principal intended otherwise.³²⁰ In other words, the court held that

315. See RESTATEMENT (SECOND) OF AGENCY § 8 A cmt. a (1957) (stating that business entities benefitting from agency relationships should take responsibility for harm by agents to third parties). That comment reads as follows:

Partnerships and corporations . . . depend for their existence upon agency principles. The rules designed to promote the interests of these enterprises are necessarily accompanied by rules to police them. It is inevitable that in doing their work, either through negligence or excess of zeal, agents will harm third persons or will deal with them in unauthorized ways. *It would be unfair for an enterprise to have the benefit of the work of its agents without making it responsible to some extent for their excesses and failures to act carefully.*

Id. (emphasis added).

316. 239 F. 405 (S.D.N.Y. 1917).

317. *Kidd v. Edison*, 239 F. 405, 406-08 (S.D.N.Y. 1917). In *Kidd*, the district court considered the binding power of an agreement between the plaintiff third party and an agent of the defendant. The agent had recruited singers for the defendant in the past for musical recitals, and in this case he recruited a singer for an advertising recital. *Id.* at 406. The court said that determining the binding power of the agreement required the court to consider not just the words from the principal to the agent but rather the "whole setting in which those words are used." *Id.* Here, the third parties were reasonable in assuming that the agent's authority extended to include this type of contract (even though in actuality it did not), and therefore the court held the defendant liable. *Id.* at 406, 408. Because the court considered facts other than the principal's manifestations, the reasoning reflected principles of inherent agency more than those of apparent authority.

318. See *Cange v. Stotler & Co.*, 826 F.2d 581, 590-91 (7th Cir. 1987) (stating that Judge Hand's holding in *Kidd* articulated concept of inherent agency).

319. See *Kidd*, 239 F. at 408 (recognizing how principal benefits from appointing agents). Judge Hand thoroughly outlined how principals free their time by appointing agents:

The very purpose of delegated authority is to avoid constant recourse by third persons to the principal It would certainly have been quite contrary to the expectations of the [principal], if any of the [third parties] had insisted upon verifying directly with [the principal] the terms of her contract. It was precisely to delegate such negotiations to a competent substitute that they chose [the agent] at all.

Id.

320. See *id.* (noting that courts must impose liability upon principal if it is to benefit from using agents). The court stated the argument more clearly as follows:

[C]onstant recourse by third persons to the principal . . . would be a corollary of denying the agent any latitude beyond his exact instructions. Once a third person

the principal could receive the intended benefit only if it sustained liability that arose from that benefit.

The second policy argument to retain inherent agency relates to the first. Because inherent agency might impose liability on the principal even when the agent has neither actual nor apparent authority, the doctrine encourages principals to hire responsible agents.³²¹ Dean Sell notes the relationship between these two policy arguments. Because a principal uses the agency relationship to benefit itself, naturally it exercises more caution in selecting agents less likely to overstep their authority, thereby minimizing its liability and, ultimately, increasing its benefit from the relationship.³²²

Finally, because third parties have no control over agents, the principal occupies a better position than third parties to prevent harm from agents' unauthorized acts.³²³ When the principal places agents into positions in which they can misrepresent their authority, the principal retains a degree of control over the agents, whereas third parties have no such control.³²⁴ Recognizing

has assured himself . . . of the agent's mandate, the very purpose of the relation demands the possibility of the principal's being bound through the agent's minor deviations.

Id.

321. See GREGORY, *supra* note 7, § 26, at 78 ("If the employer is held to liability it is quite likely that he will exercise care to select good agents and that he will more closely supervise their conduct."); SEAVEY, *supra* note 26, § 58 (noting that inherent agency "stimulates the watchfulness of the employer in selecting and supervising the agents"); McKay, *supra* note 32, at 449 (applying argument that inherent agency makes principals select more careful agents in tort realm as well).

322. See SELL, *supra* note 314, § 6 (citing policy argument that inherent agency forces principals to take bitter with sweet and then noting, "Overall, the imposition of liability . . . may actually work to the benefit of the whole class of principals, since, as a result, they inevitably will be more careful in selecting their agents").

323. See EISENBERG, *supra* note 7, at 13 (comparing principal who appointed agent and could foresee deviations from instructions with third party who contracted with agent and concluding that "a loss that results from [such] a foreseeable deviation is better placed on the principal").

324. See SELL, *supra* note 314, § 6 (finding it fair to impose liability on principals because they were ones who placed agents in positions in which they could breach their authority); Note, *Inherent Power as a Basis of a Corporate Officer's Authority to Contract*, 57 COLUM. L. REV. 868, 886 (1957) (concluding that equity favors third party and that principal is in better position to prevent harm). The concluding remarks of that note state the following:

Although the basic elements of apparent authority may be absent, the corporation should nonetheless bear the responsibility for placing the particular officer in a position where he could purport to represent the corporation. Even assuming that the corporation be completely faultless . . . , the loss should be borne by the party who allowed the "agent" to assume any authority in the first place, even if that authority is flagrantly abused.

Id.

that a principal is therefore in a better position to prevent unauthorized conduct by agents, inherent agency holds the principal liable as long as the third party was reasonable. For these three reasons, inherent agency prefers to place liability upon the principal rather than upon the third party.³²⁵

Despite these arguments based on policy, precedent, and the purpose of Restatements, the draft of the Third Restatement attempts to replace inherent agency with an expanded apparent authority.³²⁶ However, the expansion falls short of the current coverage of inherent agency.³²⁷ Furthermore, regardless of the latitude in the definition of "manifestation," apparent authority focuses on the *manifestation by the principal*. Such a doctrine cannot replace inherent agency, which focuses not on such manifestations but rather on the *interpretation of authority by the third party*.

VI. Conclusion

The Restatement (Second) of Agency holds forth apparent authority and inherent agency as distinct doctrines, each of which may result in the principal's liability for an agent's conduct.³²⁸ Whereas apparent authority only applies if the principal makes manifestations to the third party that cause the third party actually and reasonably to believe that the agent has authority,³²⁹ inherent agency does not require such manifestations. Instead, it considers only the reasonableness of the third party's belief that the agent possesses authority.³³⁰ The draft of the Restatement (Third) of Agency eliminates inherent agency and claims to expand the definition of "manifestation" to substitute apparent authority in all situations that inherent agency currently regulates.³³¹

This Note identifies several cases that focused on the distinction between apparent authority and inherent agency prior to the draft of the Third Restatement.³³² Although the draft purports to expand the definition of

325. See Colton, *supra* note 7, at 443 ("[A]s between an innocent principal and an innocent third party, inherent agency power theory requires that the loss be borne by the principal . . .").

326. See *supra* note 85 and accompanying text (discussing reporter's attempt to expand definition of "manifestation" such that apparent authority includes inherent agency).

327. See *supra* Part V.A (demonstrating inapplicability of apparent authority under draft in cases based on inherent agency, despite expansion of "manifestation").

328. See *supra* Parts II.B-C (discussing apparent authority and inherent agency).

329. See *supra* notes 28-32 and accompanying text (outlining requisite elements of apparent authority).

330. See *supra* note 57 and accompanying text (outlining requisite elements of inherent agency).

331. See *supra* Part III (analyzing elimination of inherent agency in draft of Third Restatement and justifications therefor).

332. See *supra* Part IV.A (discussing cases in which court correctly distinguished inherent

"manifestation" and places the liability of undisclosed principals under the rubric of estoppel, most of those cases would yield substantively different results under the draft.³³³ Additionally, the mere fact that apparent authority is a subset of inherent agency proves that the doctrines are distinct.³³⁴ For these reasons, elimination of inherent agency in the new Restatement conflicts with precedent.³³⁵ Furthermore, several policy arguments refute the justifications that the draft of the Third Restatement provides for the change. Inherent agency requires the principal to take the bitter with the sweet, encourages principals to hire more responsible agents, and places liability upon the principal that controls the agent rather than upon the third party who has no such control.³³⁶

Even if the draft justifies such a radical departure from precedent and persuasively rebuts these policy arguments, the elimination of inherent agency still is an inappropriate change for a Restatement.³³⁷ The American Law Institute generally discourages substantive changes in Restatements and allows only those changes that simplify the law.³³⁸ Rather than simplify the law, the approach that the draft takes instead creates more confusion than already exists.³³⁹ Whereas inherent agency focuses on the third parties' reasonable beliefs and exists to protect third parties, apparent authority considers manifestations by principals and seeks to promote efficiency. By substituting one doctrine for another, the draft does not simplify the law but rather leaves courts in a state of utter disorientation. Furthermore, even if the draft truly expands apparent authority to the full scope of inherent agency, it could reach the same result merely by eliminating apparent authority, a much less

agency from other agency doctrines); *supra* notes 269-70 (same); *see also supra* note 271 (identifying cases in which courts not only distinguished inherent agency from other agency doctrines but also based their decisions on inherent agency).

333. *See supra* Part V.A (proving that several inherent agency cases would come out differently under draft of Third Restatement).

334. *See supra* Part II.D (proving that apparent authority is subset of inherent agency and therefore necessarily distinct from inherent agency).

335. *See supra* Part V.A (suggesting that elimination of inherent agency in draft of Third Restatement contradicts precedent).

336. *See supra* Part V.C (elaborating on these policy arguments against elimination of inherent agency).

337. *See supra* Part V.B (suggesting that elimination of inherent agency is substantive change and does not simplify law, and therefore is inappropriate in Restatement).

338. *See supra* notes 300-01, 304 and accompanying text (identifying original intent of Restatement forefathers in commissioning ALI to prepare Restatements).

339. *See supra* notes 305-11 and accompanying text (suggesting that elimination of inherent agency does not simplify law).

complicated change.³⁴⁰ On the other hand, a failure to expand apparent authority to the full scope of inherent agency contradicts decades of precedent and becomes a matrix for courts' confusion in years to come.³⁴¹

340. *See supra* notes 305-06 and accompanying text (noting that elimination of apparent authority would produce same result as elimination of inherent agency followed by expansion of apparent authority to cover all of former inherent agency, and suggesting that former would better satisfy ALI's goal of simplifying law).

341. *See supra* Part V.A (noting that elimination of inherent agency contradicts precedent).

