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Agency By Analogy: A Comment on Odious Debt

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I. Introduction

This brief paper focuses on how one might think about the phenomenon of odious debt from the standpoint of common-law agency. The odious-debt phenomenon itself is well-described in other literature.[1] Although aspects of agency doctrine appear to hold promise as solutions for odious debt incurred by a sovereign borrower, this promise may be offset by other agency doctrines. More generally, it's important to keep in mind that agency doctrine is more complex than first appearances may suggest. Its complexity for present purposes stems largely from its reticulated quality that generates web-like interactions among separate doctrines. Each poses dilemmas for the application of agency to the odious debt phenomenon, whether directly or through analogy. In particular, identifying the principal within the sovereign debt context has awkward implications, as does the fact that common-law agency assumes a consensual relationship between the principal (however defined) and the agent.

To make these points concretely, I develop a series of comparisons between the

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*David F. Cavers Professor of Law, Duke University School of Law. Many thanks to my colleague, Mitu Gulati for encouraging me to write this paper and for good conversations about agency doctrine and odious debt. I presented an earlier version of this paper at the 2006 Vanderbilt University conference on Law and Business and benefited from the suggestions that the paper provoked.

[1]I rely on the description in Lee C. Buchheit, G. Mitu Gulati, & Robert B. Thompson, *The Dilemma of Odious Debts*, (draft Sept. 20, 2006), available at http://ssrn.com/sol3/papers.cfm?abstract_id=932916.

consequences of borrowing by a sovereign and by a private corporation afflicted with inept or corrupt management. The paper contrasts the Republic of Ruritania, a sovereign borrower with Zenda, Inc., a publicly traded corporation.[2] Zenda has a board of directors elected by its shareholders. Its board appoints and keeps in office a cohort of senior officers who incur obligations on behalf of Zenda. Zenda's officers include an autocratic CEO–coincidentally also named Rudolf–who incurs indebtedness on behalf of Zenda, Inc. In contrast, the government of the Republic of Ruritania is elected by voters who are citizens of Ruritania. Rudolf, Ruritania's President, incurs debt that binds Ruritania.

II. The Lure of Agency Doctrine

It's not surprising that scholars who examine the odious debt phenomenon turn to domestic agency law as a source of basic concepts and doctrines. Within the common-law and civilian traditions, agency relationships are understood as ones in which one person's actions carry legal consequences for another, who has consented to representation by the actor.[3] Agency

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[2]Thinking about the odious debt incurred by Ruritania's rulers furnished a good excuse to reread Anthony Hope's novel, *The Prisoner of Zenda*, a late-nineteenth-century classic in the genre of adventure fiction. Its English narrator and hero, Rudolf Rassendyll, impersonates his look-alike cousin, Prince Rudolf of Ruritania, who has secretly been imprisoned in the Castle of Zenda to prevent his coronation as King of Ruritania. Prince Rudolf's imprisonment was the consequence of a scheme on the part of the novel's chief villain, Michael, the Prince of Strelsau, aided by the odious Rupert of Hentzau. "Anthony Hope" was the pseudonym of Anthony Hope Hawkins (1863-1933), a barrister who also succeeded as a novelist.

[3]As defined by the Restatement (Third) of Agency, "[a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). For definitions within a contemporary civilian code, see LA. CIV. CODE art. 2987 & 2989 (Supp. 2004). On the history of the agency provisions in the Code, see Wendell H. Holmes & Symeon C. Symeonides, *Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law*, 73 TUL. L. REV. 1087 (1999).

doctrine specifies legal consequences for agent, principal, and third parties whose interactions with the principal are mediated by the agent. Most importantly, these include the circumstances that determine whether the legal consequences of the agent's acts are attributed to the principal and the duties that agent and principal owe to each other. Contemporary accounts of agency do not depend on merging the agent's legal identity into the principal's; that an agent retains a legal personality distinct from that of the principal underlies the existence of limits on the scope of the agency relationship and the principal's responsibility for actions taken by the agent. In contrast, in earlier accounts of agency – most notably that of Justice Holmes – an assumed identity between principal and agent was crucial.[4] More contemporary accounts of agency thus appear to correspond to the distinction between a sovereign state and its officers or members of its incumbent government, who through their official actions represent the state but who retain legal personality distinct from that of the state itself.[5] As we'll see, contemporary accounts of agency also must take into account the temporal dimension of a principal's assessment of the consequences of any agent's actions – that is, the principal's assessment necessarily reflects how it understands its interests at the time of making the assessment, which may diverge from any assessment made by the principal at the earlier time of the agent's action.

Agency doctrine addresses two central problems that are relevant in this context. First is the risk that a principal will use the situational advantage that any agency relationship creates as

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[4]*See* OLIVER WENDELL HOLMES, THE COMMON LAW 232 (1923).

[5]For this distinction in the context of the odious debt phenomenon, see Ashfaq Khalfan, Jeff King & Bryan Thomas, *Advancing the Odious Debt Problem* (Centre for International Sustainable Development Law, Working Paper March 11, 2003), at 36, available at www.cisdl.org. On the earlier differentiation between a king and the office he held, see ERNST H. KANTOROWICZ, THE KING'S TWO BODIES (1957).

a basis for opportunistic speculation to the detriment of third parties with whom the agent deals on the principal's behalf. Time typically elapses between action taken by an agent and the point at which the principal may assess whether the legal consequences of that action are beneficial or detrimental to the principal's interests as the principal understands them at that later time. A principal may find it advantageous to deny that an agent lacked authority to take an action at an earlier time when, in retrospect and with the advantage of knowledge of subsequent developments, the consequences are ones the principal would wish to avoid. Acting through an agent might enable a principal to take opportunistic advantage of third parties with whom the agent deals on the principal's behalf because the specifics of the relationship between the agent and the principal – and in particular the scope of the agent's authority as communicated to the agent by the principal – is not transparent to the third party.[6] And if an agent takes action without authority that subsequently appears advantageous to the principal, the principal is not likely to object.

Contemporary agency doctrine mitigates against the risk that a principal will opportunistically deny that an agent acted with actual authority through a robust doctrine of apparent authority, which protects third parties who reasonably believe the agent acts with authority on the basis of manifestations by the principal, which may include placing the agent in a position that carries a particular title or customarily has authority of a particular scope associated with it.[7] Thus, if all CEOs in Zenda's industry have unilateral authority to bind their

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[6]For fuller development of this point, see RESTATEMENT (THIRD) OF AGENCY § 2.03, cmt. c (2006).

[7]*See id*. cmt. d & § 3.03, cmt. b. Section 1.03 defines "manifestation."

corporation to agreements to refurbish their own office spaces, a contractor whom Rudolf engages to redo his office who doesn't know that Zenda's directors have restricted Rudolf's authority should be able to enforce the refurbishing contract against Zenda, Inc.[8]

Second, not all agents act loyally in the principal's interest. Moreover, agents may – perhaps even with the principal's interests at heart as the agent erroneously then understands them – take action that exceeds or in some other way departs from the scope of the agent's actual authority. Agency doctrine responds to the risks of slippage and disloyalty on the part of agents in numerous ways, many of which are beyond the modest scope of this paper. Three general points warrant brief introductions. First, a principal may assent to be subject to the legal consequences of an agent's prior action although the agent did not act with actual authority. Ratification is a unilateral act on the principal's part and may occur even though the agent's action has not been beneficial to the principal. Second, if the principal does not ratify an agent's unauthorized action, the third party may, as discussed briefly above, nonetheless hold the principal on the basis that the agent acted with apparent authority. The principal then has a claim against the agent for loss suffered by the principal; the basis for the claim is the agent's breach of the agent's basic duty to act only within the scope of the agent's actual authority.[9] If the agent breaches other duties owed the principal–in particular the agent's duties of loyalty–many remedies are available to the principal, including ones not tied to any showing of loss.[10] Rescinding tainted or unauthorized transactions that the agent has entered into with third parties

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[8]On the apparent authority of corporate officers and other organizational executives, see RESTATEMENT (THIRD) OF AGENCY § 3.03, cmt e.

[9]*Id*. § 8.09.

[10]*See id*. § 8.01, cmt. d.

is a remedial possibility although, as discussed in more detail below, rescission carries complications of its own. Third, if the agent's unauthorized action does not bind the principal–that is, if the principal does not ratify the action and the third party is unable to establish that the agent acted with apparent authority–the third party may have a claim against the agent on the basis that the agent breached the agent's implied warranty of authority that the agent's action would be effective to bind the principal.[11]

III. Identifying the Principal

Determining the identity of the principal poses dilemmas within the sovereign debt context. In their recent paper, Buchheit and his co-authors identify, as the principal, the people of Ruritania, as opposed to either the government of Ruritania or the state itself.[12] But presumably the state of Ruritania is the obligor, the party (albeit a legally-constructed one) bound to pay the debt resulting from the money borrowed by Ruritania's incumbent government. Likewise, borrowing by Zenda Inc.'s incumbent management results in an obligation that binds Zenda. It's Zenda, Inc. that's the principal, not its shareholders or its stakeholders more broadly defined. Zenda's officers who act on its behalf are its agents in dealings with third parties, such as lenders. In the corporate context, agency doctrine has generated a rich body of cases addressing the consequences that follow for corporate obligors and their shareholders when the corporation is poorly served by its agents, through either ill-conceived or corrupt dealings with third parties.

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[11] *Id*. § 6.10.

[12] *See* Buchheit et al, *supra* note 1, at 36 ("we view Ruritania (meaning the country and its population over time) in the position of the 'principal'"); 37 ("[v]iewing the people of a country as the principal"; 43 ("the principal here (the people")). In contrast, Khalfan and his co-authors identify the state as the principal. *See* Khalfan et al, *supra* note 5, at 37 ("[t]he government would be seen as acting as the agent for the state, which is the principal.").

These consequences don't turn on identifying a corporation's shareholders as the principal nor are they diminished by the formal point that a corporation's officers (and directors, for that matter) owe duties of loyalty to the corporation.[13]

It's not self-evident why the principal should be identified differently in the context of borrowing by a sovereign with inept or corrupt officials. Perhaps identifying the principal as Ruritania's people makes more obvious the point that their interests–or at least the interests over time of most of them–have been betrayed by Ruritania's government of the day. Identifying Ruritania's people as the principal also serves to reinforce the point that revenues from taxes they pay will service the debt or, more generally, that debt service will displace other uses of Ruritanian resources that would be immediately beneficial to its people. However, such consequences for Ruritania's people seem parallel to those borne by the shareholders of Zenda, Inc., as a consequence of obligations incurred by its management that bind Zenda, Inc. Shareholders, of course, don't pay taxes to the corporation, but cash distributions to shareholders through dividends and share repurchases may well be reduced as Zenda, Inc. becomes more indebted.

Moreover, identifying the principal as the "people of Ruritania" inevitably raises the question, which people? Only those who pay taxes or who will be adversely affected when Ruritania reduces services to service its debt? The composition of Ruritania's people will also shift over time, making the people as opposed the Ruritanian state less tractable as a principal. This difficulty becomes especially vexing if we turn to standard agency prospect that a principal

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[13]For the basis point, see PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, Part V, Introductory Note at 200 (1994).

may ratify prior action taken by the agent that would not otherwise bind the principal. Ratification has the effect of creating, after the fact of the agent's action, the legal consequences had the agent acted with actual authority.[13] Suppose that, following Rudolf's ouster as CEO of Zenda, Inc., his successor and Zenda Inc.'s board of directors–awakened perhaps from their torpor during Rudolf's term–discover that Rudolf has, acting without either actual or apparent authority, committed Zenda Inc. to a still-executory contract with a third party. Might Zenda Inc.'s new CEO and its directors determine to ratify Rudolf's action? The contract, although unauthorized, may nonetheless promise to be beneficial to Zenda, Inc. Even if the new regime assesses the contract as a loser from Zenda, Inc.'s standpoint, ratifying the contract may still make sense if, for example, Zenda, Inc. wishes to retain a reputation as a reliable counter-party or if it wishes not to antagonize the other party to the contract with which Zenda, Inc. anticipates future dealings. In any event, ratification requires only unilateral action from the principal through a manifestation of assent–which need not be made to the third party[14]–to be bound by the agent's action. It's not additionally requisite that the principal have benefited through the agent's action,[15] although a principal who knowingly retains a benefit from an agent's unauthorized action may be held to have ratified that action.[16] Knowing retention of benefit functions as a basis on which the principal's consent to the action may be inferred. In any event,

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[13]*See* RESTATEMENT (THIRD) OF AGENCY § 4.02(1).

[14]*Id.* § 4.01, cmt. b.

[15]*But see* Buchheit et al., *supra* note 1, at 43 (characterizing "general rule" of ratification as "'[a] person may ratify an act...by receiving or retaining benefits it generated if the person has knowledge of material facts and no independent claim to the benefit,'" quoting RESTATEMENT (THIRD) OF AGENCY § 4.01 (g) (Tentative Draft No. 4, 2003).

[16]*Id.* § 4.01, cmts f & g.

which of Ruritania's people may ratify what's been done by a present or prior regime?

Casting the "people of Ruritania" as the principal raises a further and related dilemma, which stems from the likelihood that some of the people of Ruritania may well have supported the regime that incurred the debt, just as some may have benefited from actions taken by the regime, including the incurrence of debt. Similarly, it's likely that Rudolf, the autocratic CEO of Zenda, Inc., enjoys or enjoyed the support of at least some of its shareholders. At what level of popular support, we might wonder, is the conduct of Ruritania's (let's suppose) corrupt officials fairly to be charged to the people of Ruritania? Or should some proportion of the consequences fairly be chargeable to Ruritanians, set as a function of the degree of popular support?

Basic agency concepts, in stark contrast, have a yes-or-no, on-or-off quality that is profoundly incompatible–almost as an aesthetic matter–with proportionality. Likewise, basic agency doctrines operate without regard to determinations of fault.[17] That is, Zenda, Inc. either is or is not affected by the legal consequences of its officers' conduct. The degree to which Zenda's shareholders support the officers is beside the point, as is whether Zenda, Inc.'s directors or shareholders were somehow at fault in connection with its officer's actions. At least for private-sector principals like Zenda, Inc., the stark quality of basic agency doctrines underlies the principal's accountability to third parties for actions taken by its agents.

Agency is, of course, not the sole source of general legal doctrine to which one might turn for guidance. In contrast to basic agency principles of attribution, the common-law defense of *in pari delicto* may be applied in a manner that's sensitive to variations among degrees of

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[17]I've argued elsewhere that these properties of agency doctrine may help explain why it's been out of academic fashion for may years. *See* Deborah A. DeMott, *When Is a Principal Charged with an Agent's Knowledge*, 13 DUKE J. INT'L & COMP. L. 291, 319 (2003).

culpability. Buchheit and his co-authors draw an intriguing analogy between a successor Ruritanian government and a corporate receiver, who may be able to recover assets improperly transferred to third parties by the corporation's former controlling party.[18] *In pari delicto* may become inapplicable when the wrongdoer is no longer in the picture and only innocent investors will benefit from recoveries effected by the receiver. The post-reform picture in Ruritania may not, by contrast, be comparably clean because members or supporters of its former government may benefit if Ruritania may avoid its debts. Moreover, if the principal for purposes of analysis is "the people," as opposed to the state, the continuing presence of citizens complicit with the former regime clouds the analogy with corporate receivership.

The larger contrast with agency doctrine is that *in pari delicto* is not insensitive to degrees of responsibility for an underlying wrong. In a well-known illustration of this point, the Supreme Court held in *Bateman Eichler, Hill Richards, Inc. v. Berner* that the common-law defense of *in pari delicto* should not bar an action for damages for securities fraud brought against corporate insiders and broker-dealers by an investor who was induced to invest by the defendants' misrepresentations that they were tipping the investor with inside information about the corporation.[19] To be sure, reasoned the Court, to trade on the basis of what's believed to be an illegal tip of inside information would be wrongful, but corporate insiders and broker-dealers who hatch a scheme to profit by manipulating a stock's price by making misrepresentations to

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[18]*See* Buchheit et al, *supra* note 1, at 53, *citing* Scholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995).

[19]472 U.S. 299 (1985).

tippees duped into trading are "far more culpable."[20] Along the same lines, even if some members of the newly reformed Ruritanian polity may bear some responsibility for actions of the prior regime, the relative degree of their responsibility might be contrasted with that of lenders to the regime.

IV. The Role of Consent

The second set of agency dilemmas is a consequence of the basic point that agency is a consensual relationship. A relationship is not one of agency within the common-law definition unless both principal and agent consent to a relationship in which an actor's conduct will carry consequences for the legal position of the other party, the principal.[21] Of course, it's not necessary that the principal consent to be bound by the legal consequences of the agent's conduct on a transaction-by-transaction basis, just that the principal assent to an ongoing relationship with an agent with power to affect the principal's position. The common-law definition also requires that the agent act subject to the principal's control, an element that may become highly attenuated in practice. Thus, neither the shareholders nor the directors of Zenda, Inc. may as a practical matter exercise ongoing control over Zenda's senior officers.

The consensual quality of agency relationships often justifies holding the principal to the legal consequences of the agent's conduct. The principal elected to have a relationship with a

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[20] *Id.* at 314. Thus, *in pari delicto* bars a tippee's claim only when the tippee beats "at least equal" responsibility for "the violations he seeks to redress" and permitting the defense would not interfere significantly with effective enforcement of the securities laws. *Id*. at 312-13.

[21] *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (defining agency as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

particular agent. It was within the principal's power to choose another agent; to determine how best to structure the relationship with the agent chosen; and to control the agent through incentive structures, monitoring systems, and other control mechanisms within the principal's organization. Common-law agency also empowers the principal to terminate the agent's actual authority to deal on the principal's behalf as the principal's representative, even when the termination breaches a contract between principal and agent.[22] Thus, the principal has a choice on an ongoing basis–albeit one that may be exercised at the price of paying damages for breach of contract–whether to continue to be represented by any particular agent.

Consider now basic contrasts between Ruritania and Zenda, Inc. Zenda, Inc's board of directors has power to terminate the services of its officers, including Rudolf, although perhaps at the price of paying damages for breach of contract depending on the reasons for the termination and the terms of any employment agreement between Zenda and Rudolf. Moreover, the board has this power even if Zenda's CEO, Rudolf, has chosen the board's members. Interestingly, a controversial issue at present in US corporate governance is the degree to which Zenda's directors should be insulated from removal by its shareholders, and, relatedly, whether each member of Zenda's board (in particular, Rudolf) should be off the board unless a majority of shares cast in an election affirmatively support the director's re-election.

In contrast, removing Ruritania's incumbent government may prove much more difficult, even if it is, as I've characterized it, a "republic." Ruritania likely has an elected legislature and a set of executive officers, whether popularly elected or appointed. Once elected or otherwise chosen, Ruritania's public officials have a capacity to remain in office–most likely with the co-

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[22] *Id*. § 3.10(1).

operation of Ruritania's military forces–that's unavailable even to Rudolf, the most autocratic of CEOs at Zenda, Inc.

The consensual quality of agency relationships creates a dilemma if the circumstances under which a loan could be avoided by Ruritanian citizens turn on the reputation of the Ruritanian regime that incurred the debt. Wide-spread knowledge of the regime's corruption might place a lender on notice and require it to investigate to determine how loan proceeds will be used.[23] This is because agency doctrine does not protect third parties who are in cahoots with a corrupt agent, or, put less colloquially, who know or have reason to know that the agent's action is self-serving or otherwise disloyal to the principal.[24] The dilemma arises as a consequence of the agency doctrine of ratification, discussed above, which creates after-the-fact of an agent's action the effects of actual authority on the basis that the principal has manifested assent to be bound by the agent's conduct or has acted in a manner that justifies a reasonable assumption that the principal has consented.[25] A knowing failure to repudiate what an agent has done is a conventional basis on which the common law finds that a principal has ratified the agent's conduct. Thus, that the Ruritanian regime has a reputation for corruption, which justifies imposing a duty of inquiry on lenders, also calls into question whether the people of Ruritania have ratified borrowings by corrupt officials through knowing acquiescence. If so, then the

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[23] *See* Buchheit et al., *supra* note 1, at 44.

[24] *See* RESTATEMENT (THIRD) OF AGENCY §§ 8.01, cmt. (d)(1) & 8.02, cmt. e. For this point in the sovereign-debt context, see NOREENA HERTZ, THE DEBT THREAT 179-84 (2004); ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN 209 (2006). Third parties in cahoots with disloyal agents who act entirely adversely to the principal are also denied the benefit of claims and defenses that turn on imputing the agent's knowledge to the principal. *See* RESTATEMENT (THIRD) OF AGENCY § 5.04, cmt. b.

[25] *Id.* § 4.01.

lenders' conduct appears less problematic. Why should Ruritania be empowered to avoid a loan that its citizens may well have ratified? And Ruritania's affirmative claims against the lenders for inducing breach of fiduciary duty appear much less compelling when Ruritanians themselves condoned the officials' conduct.

Although Buchheit et al. acknowledge that a principal may condone an agent's self-interested conduct, they characterize as "fanciful" any argument that Ruritania's citizens "would ever have condoned" their official's conduct.[26] But this does present a dilemma. Common-law agency does not require that a third party establish that a principal affirmatively condoned an agent's conduct. The determinative question frequently is the inference that third parties will draw from the principal's failure to repudiate the agent's action. It's otherwise too tempting to principals to keep an corrupt agent in place, when on balance the agent's efforts seem likely to be worthwhile, then disown the agent later once the balance of advantage to the principal has shifted.[27]

One might resolve the dilemma by recognizing that the citizens of Ruritania lack the power of Zenda Inc.'s board of directors to discipline and discharge agents. Ruritanian citizens' relationship with Ruritanian officials is not meaningfully, for this purpose at least, captured by

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[26]*See* Buchheit et al, *supra* note 1, at 44.

[27]Within a principal that is an organization, perspectives may differ among managers at different levels of the organizational hierarchy. For a recent example in the securities industry, see Susanne Craig & Tom Lauricella, *How Merrill, Defying Warnings, Let 3 Brokers Ignite a Scandal*, Wall St. J., Mar. 27, 2006, at A1 & A14. Merrill fired three brokers who helped brokerage clients make rapid (but not necessarily illegal) trades in mutual funds, to the disadvantage of long-term investors in the funds and the displeasure of the funds themselves and New York's Attorney General. The brokers succeeded against Merrill in arbitration the basis that local managers knew about their activities.

common-law agency. It may not be consensual (or may have been at one point but not thereafter). Moreover, Ruritanian citizens lack the power to exercise control over their officials on an interim basis that is an additional defining element of common-law agency.

Indeed, one might consider characterizing the relationship as one in which Ruritania's officials have usurped the position of principal, such that they exercise dominance over their nominal principals, the citizens. Common-law agency recognizes situations in which a principal and an agent should be treated as one, for example when an agent so controls the principal's decision-making that the principal is charged with notice of the agent's wrongdoing although the agent has dealt with the principal on the agent's own account.[28] The separateness of the agent from the principal collapses. Somewhat similarly, one might argue that a lender to Ruritania–on inquiry notice that its officials represent only their own interests–should have only the officials as obligors on the debt.

Another possibility is whether the relationships between the Republic of Ruritania, officials of its government, and its lenders are better examined though a lens defined not by analogies to agency but to trust law or to other situations in which courts impose fiduciary duties on actors. Officers of Ruritania's government, if analogized to trustees, would be subject to fiduciary duties.[29] Thus, a trustee who exercises a power to borrow for trust purposes is obliged to act in accord with the trustee's fiduciary duties.[30]

Like agency law, trust law is relevant in this context, not directly, but by analogy. The

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[28] *See* Munroe v. Harriman, 85 F.2d 493 (2d Cir. 1936).

[29] *See* RESTATEMENT (THIRD) OF TRUSTS § 2.

[30] *Id*. § 86 (Tentative Draft No. 4, 2005).

relationships involved do not fit precisely within a conventional private-law trust structure. A trust is defined as "a fiduciary relationship with respect to property, arising as a result of a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee."[31] The Ruritanian context appears to lack two defining elements of a trust: (1) a settlor, whose intention it is to create the relationship; and (2) a corpus, the property the trust relationship concerns. As with the agency-framed analysis, it's helpful to acknowledge these gaps and then turn to what may be drawn by analogy from trust law.

In some situations, a settlor-like figure can indeed be identified, perhaps most obviously when a government is put in place by a force (whether internal or external) of liberation or when a colonial government confers independence on a colony and sees to the installation of a post-colonial government. And, of course, states themselves do own assets, although one would have to acknowledge that service as a governmental official does not effect a transfer of title to the property to the official. The relationship between governmental officials and a state's property seems more akin to asset management than trusteeship as such. This is so even if a trust is treated as an entity, as do many contemporary authorities.[32]

An alternative that may prove less awkward is the ample body of cases in which courts impose fiduciary duties in relationships not formally or conventionally characterized as fiduciary. The results in these cases tend to turn on intensive scrutiny of the facts, framed by a test that overall focuses on such factors as one party's trust in and vulnerability to the other and

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[31] *Id*. § 2.

[32] *Id*., Comment *a.*

whether one party elicited the trust of the other. Overall, I've argued elsewhere, what's at issue is whether one party justifiably expected loyal service from the other.[33] At least in some U.S. jurisdictions, the relationship between a public official and that official's constituents has been characterized as fiduciary.[34]

V. Remedial Complexity

I conclude by returning to further implications of drawing on analogies to agency doctrine. As sketched above, agency doctrine confers a cornucopia of possible remedies on a principal whose agent has acted disloyally. Consider two related remedies that carry intriguing implications for the odious debt phenomenon: (1) cancellation of individual loans; and (2) remedial pursuit of now-deposed corrupt governmental officials. From the perspective of common-law agency, loan cancellation amounts to rescission by the principal of a contract to which the agent previously bound the principal. It's standard agency doctrine that a principal may avoid a contract with a third party who participated in the agent's disloyal conduct.[35] Thus, Zenda, Inc. may avoid a loan contract with a bank when a bribe to its former CEO, Rudolf, induced Rudolf to commit Zenda, Inc. to the loan. But it's also standard restitution doctrine that rescission is conditioned on return of property received from the other party to the extent

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[33] *See* Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 926 (2006).

[34] *See, e.g.,* Hobbs, Wall & Co. v. Moran, 109 Cal. App. 316, 319 (1930).

[35] *See* Restatement (Third) of Agency § 8.02, cmt. e & § 8.03, cmt. d; *see also* Restatement (Second) of Contracts § 193 (promise that tends to induce a breach of fiduciary duty is unenforceable on grounds of public policy) & § 178, cmt. d, illus. 12 ("A induces B to make an agreement to buy goods on credit from A by bribing B's purchasing agent. A delivers the goods to B. A's bribe tends to induce the agent to violate his fiduciary duty. B's promise to pay the price is unenforceable on grounds of public policy. See § 193.").

feasible.[36] Moreover, "[r]escission is not forfeiture: the fact that the basis of rescission may be the defendant's fraud does not permit the claimant to recover what has been transferred without restoring what has been received."[37] Zenda, Inc., that is, may not rescind the loan contract and retain loan proceeds it has received. When specific restitution cannot be made, the claimant must make restitution of the value of what's been received to the extent necessary to avoid unjust enrichment of the claimant.[38] Determining what's necessary to avoid unjust enrichment could, in the odious debt context, require exploring the extent to which the proceeds of a problematic loan resulted in benefit to the sovereign borrower and its people.

A principal who discovers that an agent has indulged in fiduciary transgressions also has remedies against the agent, most likely the now-former agent. In addition to claims for loss to the principal caused by the agent's disloyalty and benefits illicitly obtained by the agent, the principal's remedies include forfeiture of compensation paid or otherwise due the agent for the period of disloyalty.[39] Indeed, the principal's claims against the agent may not necessarily require showing that the value to be recovered was tainted by disloyal or illegal conduct by the agent. For example, suppose that the board of Zenda, Inc. agrees to extinguish a $25 million loan it made earlier to its CEO, Rudolf, in exchange for Zenda, Inc. shares owned by Rupert with a current market value of $25 million. Unbeknownst to Rudolf (or so he claims), Zenda, Inc.'s

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[36]*See* RESTATEMENT OF RESTITUTION § 65 (1937); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 53 (Preliminary Draft No. 8, 2006).

[37]RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 53, cmt. f (Preliminary Draft No. 8, 2006).

[38]*Id*. § 53 (4)(b).

[39]*See* RESTATEMENT (THIRD) OF AGENCY § 8.01, cmt. d(2).

financial statements contain material inaccuracies. Once this sad fact comes to light, the market value of its shares plummets. Zenda, Inc. may rescind its transaction with Rudolf, reinstating the loan and returning the shares that Rupert exchanged.[40] Were the exchange not unwound, Rudolf would be unjustly enriched regardless of whether he knew that the financials were misstated. And *in pari delicto* as against Zenda, Inc. shouldn't be an available defense for Rudolf. His responsibilities as CEO included the corporation's financial statements, which, as an officer of a public company, he signed. To be sure, Zenda, Inc. likely is subject to liability to other claimants – including purchasers of its shares during the episode of the misstated financial statements – but Rudolf was responsible to a degree that at least corresponds to that of Zenda, Inc.[41]

VI. Conclusion

The small number of us who share a keen interest in the common law of agency should welcome any expression of interest in a body of doctrine often either dismissed as intellectually insipid or (even worse in many ways) overlooked altogether. As this paper demonstrates, agency doctrine's direct applicability in the context of odious debt is limited. Nonetheless, agency may be powerful as a source of analogy, furnishing as it does a robust body of doctrine that addresses the many consequences of representation gone awry.

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[40]For parallel facts, see In re HealthSouth Corp. Shareholder Litig., 845 A.2d 1096 (Del. Ch. 2003).

[41]Nor should it be a defense to Rudolf that his subordinates effected the fraud. *See id.*