

Intent to Contract

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There is a remarkable difference between black-letter contract laws of the United States and England. In England, as in most civil law countries, the existence of a contract depends, at least in theory, on the parties' intent to be bound. The rule dates to the Court of Appeal's 1919 refusal to enforce a husband's promise for consideration to his wife, on the grounds that "the parties did not intend that [the agreement] should be attended by legal consequences."¹ Section 21 of the Second Restatement of Contracts adopts something like the opposite rule: "Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract."² In neither England nor the United States is an intent to be legally bound sufficient to create a contract. An agreement must, for example, be supported by consideration. But in England such an intent is said to be necessary, while the Restatement says that it is not.³

But a closer look reveals a number of exceptions. The enforcement of a preliminary agreement in the United States "depends on whether [the parties] intend to be bound."⁴ In Pennsylvania, a written gratuitous promise is enforceable if it "contains an additional express statement, in any form of language, that the signer intends to be legally bound."⁵ The comments to section 21 suggest that in the case of domestic agreements and social arrangements, "some unusual manifestation of intention is necessary to create a contract."⁶ And the Minnesota Supreme Court has

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¹ *Balfour v. Balfour* [1919] 2 K.B. 571, 578.

² RESTATEMENT (SECOND) OF CONTRACTS (hereafter "Second Restatement") § 21 (1981).

³ While section 21 accurately represents the rule in almost all U.S. jurisdictions, the United States is a signatory to the United Nations Convention on Contracts for the International Sale of Goods (CISG). Article 14(1) of the CISG establishes something like the English rule for contracts for the international sale of goods: "A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it . . . indicates the intention of the offeror to be bound in case of acceptance."

⁴ Alan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 Col. L. Rev. 217, 255 (1987).

⁵ 33 PA. STAT. § 6 (1997).

⁶ Second Restatement § 21 cmt. c.

refused to enforce a reporter's confidentiality promise to a source because it was "not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract."⁷

Nor is the supposed requirement of an intent to contract in England so meaningful in practice. A presumption that commercial agreements are intended to be legally binding, together with other evidentiary rules, mean that, as Atiyah observes, in most cases it "is more realistic to say that no positive intention to enter into legal relations needs to be shown."⁸

These various ways that the U.S. and English laws of contract diverge are all the more remarkable because they have been so little remarked upon. The divergence between the black-letter English and Restatement rules is among the starkest differences between the jurisdictions' laws of contract. Yet scholars on this side of the Atlantic have paid little systematic attention to section 21, or to the supposed exceptions to it. This neglect is surprising not only because of the doctrinal tensions – the difference between the English and Restatement rules, and between section 21 and exceptions to it. It is also surprising because parties' contractual intent is of such obvious theoretical interest. It is much easier, for example, to argue for sanctioning the violation of a legal duty the promisor intended to undertake than it is for one that she incurred by accident. Randy Barnett goes so far as to argue that liability for breach of contract is justified only if the parties manifested an intent to be bound.⁹ Or there is Dori Kimel's argument that the English rule is necessary to protect from legal interference the special relationships morally binding promises create.¹⁰ And the parties' contractual intent should be highly relevant from the perspective of economic theory, for

⁷ *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203 (Minn. 1990).

⁸ P. S. ATIYAH, *AN INTRODUCTION TO THE LAW OF CONTRACT* 153 (5th ed. 1995).

⁹ Thus Randy Barnett's theory consent theory of contract:

In a system of entitlements where manifested rights transfers are what justify the legal enforcement of agreements, any such manifestation necessarily implies that one intends to be "legally bound," to adhere to one's commitment.

Therefore, the phrase "a manifestation of an intention to be legally bound" neatly captures what a court should seek to find before holding that a contractual obligation has been created.

Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 304 (1986) (footnotes omitted). See also Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 861 (1992) ("To make a contract according to this approach . . . a party must explicitly or implicitly manifest an intent to be legally bound.").

¹⁰ DORI KIMEL, *FROM PROMISE TO CONTRACT: TOWARD A LIBERAL THEORY OF CONTRACT* 136 (2003). [Check where else in book.]

thirty years the dominant mode of analysis among contract scholars in the United States. Whether the parties intended legal liability affects the incentives the law creates, for legal incentives have traction only on parties who expect legal liability. And the parties' intent to be legally bound is also strong evidence of the efficiency of legal enforcement, as informed parties will choose incentives that create the most value for them.¹¹

This Article examines various common law rules that condition the enforcement of an agreement on the parties' intent to contract. It treats the question of contractual intent primarily as a design problem: Assuming *arguendo* that the law sometimes wants to condition the legal enforcement of an agreement on the parties' manifest intent that it be enforceable, what rules should the law use to do so. Rules for determining whether the parties, at the time of formation, intended to contract are rules of interpretation, and I recommend evaluating them using the familiar theory of contractual default and opt-out rules systematically described in several articles by Ian Ayres and Robert Gertner.¹² That framework allows me to identify four general approaches to interpreting the parties' intent to contract. Each is defined by, first, whether it adopts an enforcement or nonenforcement interpretive default and, second, whether the parties are required to expressly state their intent to opt-out of the default or courts instead determine their intent by looking at all the available evidence.

¹¹ Eric Posner propounds a version of the second claim:

Economics assumes that people exchange promises when both benefit from the exchange, but it does not follow that the law should enforce all promises. Courts make errors, and legal sanctions are sometimes clumsier than nonlegal sanctions. As a result, people who make and receive promises often do not expect, and would not want, courts to provide legal remedies if the promisor breaks the promise. But when the promisor wants the promise to be legally enforceable, and the promisee expects the promise to be legally enforceable, courts should enforce promises. Economics, then, implies that courts should enforce promises when parties want their promises to be enforceable, and not otherwise.

Eric A. Posner, *Economic Analysis of Contract Law after Three Decades: Success or Failure?*, 112 Yale L.J. 829, 849-50 (2003) (footnotes omitted). See also Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765, 1788-89 (1996); Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 Wis. L. Rev. 943, 951-58.

¹² See especially Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Ian Ayres and Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 Stan. L. Rev. 1591 (1999).

When evaluating the relative advantages and disadvantages of these interpretive approaches, there are several special considerations to take into account. The first is the asymmetry of the default question when the parties' intent is among the conditions of contractual validity. In some case, parties do not intend to contract not because they intend not to contract, but because they do not have a preference one way or the other or because the possibility of legal enforcement has not occurred to them. In such instances, the parties do not have the knowledge necessary to purposively opt-out of a legal default. This is a problem if the goal is to impose liability only on parties who intend it, as an enforcement default will be systematically more sticky than a nonenforcement default. The second point concerns a special advantage of sticky defaults in determining the conditions of contractual validity. This advantage is premised on the idea that there is sometimes a social interest in imposing duties on parties for reasons other than their antecedent choice. Sticky defaults can serve that interest. The last point concerns the costs of expressly opting-out of either an enforcement or nonenforcement default. These include not only the out-of-pocket costs usually associated with opting-out, but in many cases relational costs as well. Interpretive rules that require parties who want, or who do not want, legal liability expressly to say so can interfere with and erode extralegal forms trust that otherwise create value in transactions.

The Article applies this analytic framework to evaluate the best rule for in interpreting the parties' contractual intent in four types of transactions lying at the periphery of contract: gratuitous promises, preliminary agreements, domestic agreements and reporters' promises of confidentiality. To the extent that we want to condition the enforcement of such agreements on the parties' manifest intent to contract, the analysis recommends different rules for the different transaction types. The discussion of these transaction types illuminates the special legal questions at issue in each. It also provides particular content to and demonstrates the value of the proposed analytic framework.

From the perspective of contract theory, the analysis shows how different rules for interpreting the parties' intent with respect to legal liability strike different balances between the sometimes conflicting reasons the law has for holding breaching promisors liable for their breaches. I have argued elsewhere that one of the most distinctive features of contract law is that it is at one and the same time both a power-

conferring and a duty-imposing rule.¹³ Rules for interpreting the parties' contractual intent provide a tool for mediating between these different, sometimes conflicting functions. This provides the material for a deeper understanding of the generic rule in Section 21, which holds that the parties' contractual intent is not a condition of their legal liability, but also allows that a manifest intent not to be bound can prevent the formation of a contract.

Part I of the Article summarizes the black-letter rules governing the effect of the parties contractual intent, both in England and in the United States. Part II then describes the English experience with an intent-to-contract requirement, which largely consists of its practical erosion. That experience demonstrates the drawbacks of an all-things-considered test for the parties' contractual intent. Part III constructs a general analytic framework for evaluating rules that condition contractual validity on the parties' intent with respect to legal liability. Part IV applies that framework to the four transaction types that lie at the penumbra of contract: gratuitous promises, preliminary agreements, domestic agreements and reporters' confidentiality promises. The Conclusion suggests a few implications of the analysis for the best interpretation of the Restatement's generic rule for intent to contract.

I. Common law rules on intent to contract

Continental civil codes include among the conditions of contractual validity a requirement that, at the time of formation, the parties intend to be legally bound.¹⁴ In the German and Austrian codes, one finds the condition in the definition of "contract" as a juristic act, achieved by a party's declaration of her intent to be bound (*Willenserklärung*), which the law effectuates because it is so intended.¹⁵ French law holds that a person is bound in contract only if it is her "real" intention to be bound, though a party who appears to intend to contract but can show that she did not might still be liable for damages in tort.¹⁶ Belgian authorities are divided as to whether a real or apparent intent to be bound is required, but agree that it must be one or the other.¹⁷

¹³ Gregory Klass, *Three Pictures of Contract: Duty, Power and Compound Rule*, 83 N.Y.U. L. Rev. 1726 (2008).

¹⁴ See generally THE COMMISSION OF EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, Arts. 2:101, 2:102 and accompanying notes (Ole Lando & Hugh Beale eds., 2000) (discussing European sources of law).

¹⁵ [German and Austrian civil codes; IEL.]

¹⁶ [French civil code; IEL.]

¹⁷ [Belgian civil code; IEL.]

The common law is less unified in its black-letter rules. This Article focuses on U.S. contract law, and so begins with Section 21 of the Second Restatement, which I will refer to as the “Restatement rule”: “Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.”¹⁸ It is a familiar fact that the parties’ intent to contract does not suffice under the common law to create a contract. A lack of consideration or of a required writing, for example, might each defeat the parties’ intent to enter into an enforceable agreement. The first clause of section 21 says that the parties’ manifest intent to contract is also not a necessary condition of enforcement.

The second clause says that a manifest intent not to be bound can prevent the formation of a contract. On their face, then, the difference between the continental rules and the Restatement rule should make a difference only in the no-intent case, when one or both parties manifest no intent with respect to legal liability, neither an intent to be bound, nor an intent not to be bound. Thus the comments to section 21 explain that even a mutually mistaken belief that an agreement is not legally binding will not prevent the creation of a contract.

A orally promises to sell B a book in return for B’s promise to pay \$5. A and B both think such promises are not binding unless in writing. Nevertheless there is a contract, unless one of them intends not to be legally bound and the other knows or has reason to know of that intention.¹⁹

Or to take an example suggested by Corbin:

There seems to be no serious doubt that a mutual agreement to trade a horse for a cow would be an enforceable contract, even though it is made by two ignorant persons who never heard of a legal relation and do not know that society offers any kind of a remedy for the enforcement of such an agreement.²⁰

Parties to an agreement might not have an intent one way or the other with respect to legal enforcement because they have not considered the legal consequences of their agreement, because they are unsure whether or not

¹⁸ Second Restatement § 21. Or in a rare judicial articulation of the rule: “It is not necessary that the parties are conscious of the legal relationship which their words or acts give rise to, but it is essential that the acts manifesting assent shall be done intentionally.” *Sulzbach v. Town of Jefferson*, 155 N.W.2d 921, 923 (N.D. 1968).

¹⁹ Second Restatement § 21, cmt. a, ill. 2.

²⁰ 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 34, at 135 (1st ed. 1950) (hereafter “Corbin 1950 Edition”).

they want enforcement, or because they mistakenly believe their agreement is unenforceable on other grounds. Alternatively, no matter what the parties' actual intent, it might not be manifest in their behavior. The Restatement rule says that in all of these cases, if the parties' agreement satisfies the other conditions of contractual validity, they have a contract.

As a historical matter, the Restatement rule is tied to the objective theory of contract. The earliest modern articulation of something like the Restatement rule appears to be in the first edition of Williston's *Law of Contracts*.²¹ Pollack's and Anson's earlier contract treatises had both adopted Savigny's will theory of contract, which conditioned the formation of a contract on an act of mental assent.²² Williston's treatise introduces the idea behind the Restatement rule in a passage that also rejects their subjective theory of contract.²³ And in both Williston's early

²¹ 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 21 (1st ed. 1920) (hereafter "Williston 1920 Edition"). Neither Williston's treatise nor the First Restatement cites a clear judicial authority for the rule. The only case remotely on point is *Davison v. Holden*, 55 Conn. 103, 10 A. 515 (1887) (cited by Williston 1920 Edition § 21 at 22 n.12). But *Davison* is more about corporations and agency law than contracts, holding that a group of individuals who had informally joined together to purchase wholesale meat were individually liable to the sellers for payment, despite not having intended to be so liable. It is worth noting, however, that one of the cases Williston cites for the opt-out rule, *Wellington v. Apthorp*, elsewhere suggests that an intent to be bound *is* an element of legal liability. 145 Mass. 69, 13 N.E. 10 (1887) (stating that a contract existed only if "it appears there was a promise by the defendant's testator sufficiently definite to be enforced, and made with the understanding and intention that she would be legally bound thereby.").

²² Williston's named target in the first edition is Pollock, whose 1911 treatise argued that social arrangements (e.g., an appointment to have dinner) are not contracts "[o]nly because no legal bond was intended by the parties." Frederick Pollock, *Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England* 4 note c (8th ed. 1911). A similar rule appears in the 1906 edition of Anson's *English Law of Contract*. WILLIAM REYNELL ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT: AND OF AGENCY IN ITS RELATION TO CONTRACT* 2, 11 (11th ed. 1906) (Hereafter "Anson 1906 Edition").

²³ Williston 1920 Edition § 21, at 21. Williston's argument in Section 21 of the first edition regularly lapses into arguments based on the objective theory, and even cites *Hotchkiss v. National City Bank of New York*, the source of Learned Hand's famous "Twenty bishops" pronouncement, for the proposition that "the law, not the parties, fixes the requirements of a legal obligation." Williston 1920 Edition § 21 at 22 n.13 (citing *Hotchkiss v. Nat. City Bank*, 200 Fed. 287, 293 (____)); see also *id.* at 23 n.18 (quoting objective theory expressed in *Hoggard v. Dickerson*, 180 Mo.App. 70, 165 S.W. 1135 (Mo. App. 1914)).

drafts of the First Restatement and in the final approved version, the rule appears alongside the objective theory of assent.²⁴

But while Williston's campaign against the subjective theory is part of the history of the Restatement rule, the rule is not a mere corollary of the objective theory. Section 21 rejects as a condition of contractual validity not only the parties "real . . . intention that a promise be legally binding," but also their "apparent intention" to be legally bound. This objective prong of the Restatement rule must find its support elsewhere.²⁵

The logical gap between the Restatement rule and the objective theory is illustrated by the very different approach described by the black-letter law in England. One year before Williston published the first edition of his treatise, the English Court of Appeals decided *Balfour v. Balfour*, holding that a husband's promise to his wife to pay her £30 per month while he was abroad, though supported by consideration, did not result in a contract "because the parties did not intend that [the agreement] should be attended by legal consequences."²⁶ *Balfour's* reasoning and its handling of the facts have come in for a good deal of criticism. It is often argued, for example, that the promise was without consideration.²⁷ Nonetheless, English courts and most English commentators have consistently read *Balfour* to require the opposite of the Restatement

²⁴ Thus the First Restatement stipulates:

A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts; *but . . . neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.*

Restatement of Contracts § 20 (1932). The text of this section is identical to that in Williston's first tentative draft. See Restatement of Contracts § 20 (Tentative Draft, March 31, 1925).

²⁵ Williston was hardly oblivious to such details. The first edition of his treatise contains, in addition to the rejection of the subjective theory, at least three other arguments for the Restatement rule: where such a rule is in place, "the intent is frequently fictitiously assumed; an intent-to-contract requirement is not necessary to prevent the enforcement of social or domestic arrangements; and intent-to-contract requirements run counter to the principles of the common law of contract, as embodied in the doctrine of consideration." Williston 1920 Edition § 21, at 23. I discuss the first of these arguments in Part II, the second in Part IV.C, and the third in the Conclusion.

²⁶ *Balfour v. Balfour* [1919] 2 K.B. 571, 578. Williston discusses *Balfour* in the second edition of his treatise. 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 21, at 38 n.14 (2d ed. 1936) (hereafter "Williston 1936 Edition").

²⁷ See, e.g., B.A. Hepple, *Intention to Create Legal Relations*, 28 Camb. L.J. 122, 128-29 (1970); J. Unger, *Intention to Create Legal Relations, Mutuality and Consideration*, 19 Mod. L. Rev. 96, 98 (1956); Raphael Tuck, *Intention to Contract and Mutuality of Consent*, 21 Can. Bar Rev. 123, 128 (1943).

approach, which I will refer to as the “English rule”: “For a contract to come into existence, there must be . . . an intention to create legal relations.”²⁸ I will refer to this statement as the “simple English rule.” Subsequent decisions have held that the test is an objective one. As Anson explains, “[i]t may be that the promisor never anticipated that his promise would give rise to any legal relations, but if a reasonable man could consider that he intended so to contract, then he will be bound by his promise.”²⁹ Where the Restatement unequivocally states that a manifest intent to be bound is not necessary for contractual liability, English courts and treatises regularly say that it is.

The Restatement and English rules are black-letter rules, and do not necessarily describe judicial practice. As I discuss in Part II, the black-letter English rule is something of a doctrinal fiction. While English authorities continue to treat *Balfour* as good law, courts have adopted evidentiary rules that in the vast majority of cases render the English rule irrelevant. In U.S. jurisdictions, on the contrary, courts rarely cite section 21, but they largely follow it in practice. Thus contract plaintiffs are almost never required to provide evidence that the parties thought or appeared to think that they were entering into a legally binding agreement.

There are, however, exceptions in U.S. law. A number of black-letter rules stipulate or suggest that in some cases a court should look to the parties manifest intent. These rules apply at what might be described as the penumbra of contract, where a party has asked for enforcement of an agreement that differs in some significant way from the archetypical contractual transaction.

The most widely discussed example can be found in the rule for preliminary agreements. In a preliminary agreement, the parties have

²⁸ *Baird Textile Holdings Ltd v. Marks & Spencer plc* [2001] EWCA Civ. 274 ¶ 59 (Mance L.J.); see also GUENTER TREITEL, *THE LAW OF CONTRACT* 149 (10th ed. 1999) (“An agreement, though supported by consideration, is not binding as a contract if it was made without any intention of creating legal relations.”); M.P. FURMSTON, *CHESHIRE, FIFOOT AND FURMSTON’S LAW OF CONTRACT* 121 (14th ed. 2001) (“in addition to the phenomenon of agreement and the presence of consideration, a third contractual element is required – the intention of the parties to create legal relations”); [additional treatises].

²⁹ ANSON, *LAW OF CONTRACT* 31 (21st ed. YEAR) [replace with 28th ed.]; see also TREITEL, *THE LAW OF CONTRACT* at 158 (“the test of contractual intention is normally an objective one, so that where, for example, an agreement for the sale of a house is *not* ‘subject to contract,’ both parties are likely to be bound even though one of them subjectively believed that he would not be bound till the usual exchange of contracts had taken place.” (footnotes omitted)); *Chitty 2-156* (“In deciding issues of contractual intention, the courts normally apply an objective test . . . The objective test is, however, here (as elsewhere) subject to the limitation that it does not apply in favour of a party who knows the truth.” (footnote omitted)).

reached agreement on some but not all material terms, expect to continue negotiating and fill in the remaining open terms, but something happens to prevent the conclusion of the agreement.³⁰ The question is then whether the partial agreement has created any legal obligations.³¹ It is generally accepted that preliminary agreements should be enforced only when the parties manifestly so intended. In his influential 1987 decision in *Teachers Insurance and Annuity Association v. Tribune Co.*, Judge Leval described the rule as follows:

In seeking to determine whether such a preliminary commitment should be considered binding, a court's task is, once again, to determine the intentions of the parties at the time of their entry into the understanding, as well as their manifestations to one another by which the understanding was reached. Courts must be particularly careful to avoid imposing liability where binding obligation was not intended. There is a strong presumption against finding binding obligation in agreements which include open terms, call for future approvals and expressly anticipate future preparation and execution of contract documents. Nonetheless, if that is what the parties intended, courts should not frustrate their achieving that objective or disappoint legitimately bargained contract expectations.³²

That year Alan Farnsworth described the same rule: "Whether the parties reach an agreement with open terms, either preliminary or ultimate,

³⁰ There is another type of preliminary agreement: when the parties have reached agreement on all the material terms they expect to put in the agreement, have finished negotiating, and are only awaiting a formal expression in writing. The test for enforceability of such agreements is similar to that for preliminary agreements with open terms. See Second Restatement § 27.

³¹ A separate question is what obligations an enforceable preliminary agreement imposes on the parties. While courts generally agree on when a preliminary agreement should be enforced, they take different approaches to the parties' obligations under them. On one approach, the preliminary agreement is simply an incomplete contract. The court enforces the terms the parties have agreed upon and supplies missing ones with generic gap-fillers. The other approach reads the preliminary agreement as an agreement to negotiate. Rather than enforcing the partial agreement and filling in gaps, a court will find a breach only if one the party walks away from or otherwise improperly terminates negotiations. See E. Farnsworth, *Precontractual Liability and Preliminary Agreements*, 87 Col. L. Rev. at 249-53.

³² *Teachers Ins. and Annuity Ass'n of America v. Tribune Co.*, 670 F.Supp. 491, 498-99 (S.D.N.Y. 1987). With respect to the content of the agreement, *Teachers Insurance* took the latter of the two approaches identified in the preceding footnote. Rather than filling in missing terms and enforcing the incomplete agreement, Leval held that the preliminary agreement created a duty to negotiate open terms in good faith. *Id.* at ____.

depends on whether they intend to be bound even if they are unable to agree on the open terms.”³³ Two years later, Judge Easterbrook applied the same test in *Empro Manufacturing Co. v. Ball-Co Manufacturing*, and it continues to be the dominant approach in preliminary agreements.³⁴

While the rule for preliminary agreements is the most clearly articulated example in U.S. law of the parties’ manifest intent to contract figuring into the conditions of contractual validity, similar rules crop up elsewhere. The comments to Section 21 suggest that the parties’ contractual intent is a condition of the contractual validity of domestic agreements and social arrangements: “In some situations the normal understanding is that no legal obligation arises, and some unusual manifestation of intention is necessary to create a contract. Traditional examples are social engagements and agreements within a family group.”³⁵ Yet another example can be found in the Minnesota Supreme Court’s decision in *Cohen v. Cowles Media*, which held that a reporter’s promise of confidentiality to his source did not create a contract.

We are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract. They are not thinking in terms of offers and acceptances in any commercial or business sense. The parties understand that the reporter’s promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract.³⁶

Finally there is the largely unsuccessful Model Written Obligations Act, today the law only in Pennsylvania: “A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.”³⁷

Part IV discusses in greater detail each of the above exceptions to the Restatement rule. Another doctrinal example that bears mention, but

³³ Farnsworth, 87 Col. L. Rev. at 255. Farnsworth distinguishes between courts’ approach preliminary agreements with open terms and to agreements to negotiate. In the former, the salient question is more often the substance of the parties agreement, as opposed to whether they intended legal liability. *Id.* at 263-69.

³⁴ 870 F.3d 423, 425 (7th Cir. 1989) (“Parties decide for themselves whether the results of preliminary negotiations bind them.”). [Add contemporary cites.]

³⁵ Second Restatement § 21 cmt. c.

³⁶ 457 N.W.2d 199, 203 (Minn. 1990), *reversed on other grounds* 501 U.S. 663 (1991).

³⁷ MODEL WRITTEN OBLIGATIONS ACT § 1, *in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 584 (1925) (emphasis added); 33 PA. STAT. § 6 (1997).

which I will not examine in detail, is the rule for incomplete and indefinite agreements. The core idea can be found in Cardozo's 1916 dissent in *Varney v. Ditmars*.

I do not think it is true that a promise to pay an employee a fair share of the profits in addition to his salary is always and of necessity too vague to be enforced. . . . The promise must, of course, appear to have been made with contractual intent. . . . But if that intent is present, it cannot be said from the mere form of the promise that the estimate of the reward is inherently impossible.³⁸

Had the seeds in Cardozo's dissent grown into a full-fledged doctrine, courts might have viewed the rule for preliminary agreements as a special application of the rule for incomplete and vague ones. After all, a preliminary agreement is simply a special type of agreements with open terms. As it is, the idea never fully took root, and it appears in U.S. law as more of a suggestion than as a rule. Thus section 33 of the Second Restatement provides that "[t]he fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance," and the comments explain that where "the actions of the parties . . . show conclusively that they have intended to conclude a binding agreement . . . , courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain."³⁹ One finds similar gestures towards an intent-to-be-bound test in the Uniform Commercial Code's rules for incomplete agreements. Section 2-204(3) provides: "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."⁴⁰ And Section 2-305 confirms that the same rule applies to the special case of agreements missing a price term: "The parties if they so intend can conclude a contract for sale even though the price is not settled."⁴¹

³⁸ 111 N.E. 822, ___ (N.Y. 1916) (Cardozo dissenting).

³⁹ Second Restatement §§ 33(3) & 33 cmt. a. *See also id.* cmts. c ("The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement.") & f ("The more important the uncertainty, the stronger the indication is that the parties do not intend to be bound.").

⁴⁰ U.C.C. 2-204(3).

⁴¹ U.C.C. 2-305(1). There is an argument that 2-305 as drafted has a problem with the neglected middle. While the first subsection suggests that an agreement with an open price term is binding only if the parties so intended, the fourth stipulates that where "the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract." U.C.C. 2-305(4). The rule does not say what the outcome is where the parties manifest no intent one way or another. *See also* Second Restatement §

The meanings of these provisions, however, are far from transparent. Thus it is not clear that intent “to conclude a binding agreement” in the comment to section 33 means the intent to conclude *legally* binding agreement. And the UCC’s intent “to make a contract” might be read to mean an intent to conclude an agreement, not a legally binding one. More importantly, while a few courts have followed Cardozo’s lead and read these provisions to condition enforcement on the parties’ intent to contract,⁴² many more apply the rules without an inquiry into to the parties’ contractual intent.⁴³ While the gestures towards on intent-to-be-bound test for incomplete and indefinite agreements suggest the justificatory role such intent might play, without more evidence it cannot be said that the law includes the rule.

II. Verifying contractual intent under the English rule

It is one thing to say that the existence of a contract should sometimes depend on the parties’ manifest intent to be legally bound, another to say how legal actors charged with the enforcement of contracts should determine when the parties manifested such an intent. Part III provides a systematic analysis of different verification procedures. This Part describes the English experience with one approach: a factual, all-things-considered inquiry into the parties manifest intent. The deficiencies of this approach cast new light on the alternative the Restatement rule, and provide materials for the discussion of other design options in Parts III and IV.

While Williston introduced the Restatement rule in the course of rejecting subjective theories of contract, the first edition of his treatise puts forward several additional arguments for the rule. Among other things, Williston suggests that it “may be guessed that where it is stated that an intent to create a legal relation is the test of a contract, intent is frequently fictitiously assumed.”⁴⁴ Ninety years of experience with the English rule have born this prediction out. That experience shows that in the absence of legal formalities, the parties’ manifest intent with respect to legal liability

33 cmt. e (describing the U.C.C. rule in terms of only two cases: where the parties “intend to conclude a contract” and where they “manifest an intent not to be bound”).

⁴² See, e.g., *Lee v. Joseph E. Segram & Sons, Inc.*, 552 F.2d 447, 453 (2d Cir. 1977) (The test for incomplete contracts is whether “the parties themselves meant to make a ‘contract’ and to bind themselves to render future performance.”); *Schade v. Diethrich*, 760 P.2d 1050 (Ariz. 1988) (finding that by their actions, “the parties clearly manifested their joint understanding that they were bound by their promises”).

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⁴⁴ WILLISTON 1920 EDITION at 23.

is often unverifiable, and therefore unsuitable as a condition of contractual validity. English courts have responded to that fact with evidentiary presumptions that have for practical purposes all but suspended in commercial cases the English rule's supposed intent-to-contract requirement.

The English rule says that a contract exists only when the parties manifest an intent to be legally bound, that is, when a reasonable person in the parties' circumstances would have understood them to have such an intent. The parties' manifest intent is presumably a question of fact, to be answered by looking at the totality of the circumstances. These circumstances can include the type of agreement, the completeness and specificity of the terms, the nature of the parties' relationship, as well as more general considerations as to the parties' reasonable background beliefs.⁴⁵ When factfinders fully engage in this inquiry, however, the results are in many cases difficult to predict.

Consider Guenter Treitel's analysis of *J. Evans & Sons (Portsmouth) v. Andrea Merzario*, in which the Court of Appeal considered a carrier's telephone assurance to a long-term customer that the customer's goods would henceforth be carried in containers under deck.⁴⁶ The trial court held, based on the existence of a written sales agreement and the fact that the carrier's oral assurances did not relate to a particular transaction, that the conversation did not evince a contractual intent.⁴⁷ The Court of Appeal reversed, observing that the defendant made the promise "in order to induce [the plaintiff] to agree to the goods being carried in containers."⁴⁸ Treitel argues that the trial court's decision was the better one, since the plaintiff's subjective understanding was irrelevant. But the appellate opinions rely entirely on objective evidence – available to both parties at the time of the agreement – that the promise was meant as an inducement. Based on the evidence discussed in the opinions, it is impossible to say what the parties' intent was.

Stephen Hedley has examined a large number of cases applying the English rule and concludes that "the tests ostensibly aimed at discovering the parties' intentions almost invariably lead the courts to *impose* their

⁴⁵ See TREITEL, THE LAW OF CONTRACT at 151-159.

⁴⁶ [1975] Lloyd's Rep. 162, *reversed by* [1976] 1 W.L.R. 1078, 40 M.L.R. 227; *see also* TREITEL, THE LAW OF CONTRACT at 159.

⁴⁷ [1975] Lloyd's Rep. at 167-68. Reading the decision, it appears that a U.S. court would have more likely applied the parol evidence rule to the case.

⁴⁸ [1976] W.L.R. at 1081 (Denning, M.R.); *see also id.* at 183 (Roskill, L.J.) (employing similar reasoning).

view of a fair solution to the dispute.”⁴⁹ Hedley identifies several techniques courts use to reach their preferred outcome. The first turns on the fact that the English rule does not expressly provide for the no manifest intent case. “In cases where there was no intention either way, this insistence that the parties must have had some intention or other forces the courts to *invent* an intention.”⁵⁰ Courts can also manipulate outcomes through evidentiary rulings. As *J. Evans & Sons* demonstrates, courts can allow or disallow evidence by adopting a broader or narrower interpretation of what counts as the parties’ “objective” intent. They can also influence outcomes by permitting the factfinder to make assumptions about the parties’ background understandings or awareness of the availability or unavailability of legal sanctions. In addition, courts sometimes read the intent question narrowly, asking only whether the parties foresaw a lawsuit, as distinguished from whether they believed themselves to be entering into a contract.⁵¹ Finally, there is the “selectively morbid imaginations” of lawyers, who mistakenly infer from their professional knowledge of past litigation that similar liability was within the contemplation of the parties.⁵² In sum, in cases where the question of the parties’ contractual intent gets to the factfinder, the outcome of that factual inquiry is often both unpredictable and especially subject to judicial manipulation.

There are at least three reasons why it is in many cases difficult to verify the parties’ manifest intent with respect to legal liability under the English rule’s all-things-considered approach. The first concerns the sort of intention at issue. The parties’ contractual intent is not an intention *to do* some act in the future (for example, to perform one’s promise), but *that* their present actions shall have a certain legal effect. In other words, the parties’ intent to contract is comprised of their reasons for and beliefs about their own present actions, as distinguished from plans to act in the future. Evidence of future-oriented intentions can often be found in the agent’s subsequent acts – namely, the steps she takes towards realizing her plan.⁵³ That form of evidence is not available when it comes to interpreting a person’s present intentions in action. Rather, unless the agent tells us them, we must infer her purposes and beliefs from the totality of what we know about her practical attitudes and epistemic

⁴⁹ Stephen Hedley, *Keeping Contract in Its Place* – Balfour v. Balfour and the Enforceability of Informal Agreements, 5 Oxford J. Legal Stud. 391, 393 (1985).

⁵⁰ Hedley, 5 Oxford J. Legal Stud. at 394.

⁵¹ Hedley, 5 Oxford J. Legal Stud. at 395-96.

⁵² Hedley, 5 Oxford J. Legal Stud. at 397.

⁵³ See IAN AYRES AND GREGORY KLASS, *INSINCERE PROMISES* ____ - ____ (2005).

situation. In some cases this is easy. If a person flips off a light switch, she probably intends to turn off the lights. But as the connection between act and consequence becomes more attenuated, we must know more about the actor and the surrounding circumstances to interpret her present intent. We need to know much more about the switch-flipper to ascribe her an intent to save electricity, and even more to ascribe her an intent to do her part to avoid global warming. Where the parties' agreement does not include obvious markers of a contract, such as legal formalities or terms that presupposes enforcement or an express statement of intent, we can attribute them an intent to contract only on the basis of a great many other assumptions about the motives and knowledge with which they act, assumptions that are often contestable.

Second is an issue of salience. Stuart Macaulay famously observed that legal liability often plays a secondary role in transactions between business people.⁵⁴ Many parties enter into an agreement on the basis of personal trust, or because there exist extralegal sanctions or other incentives that suggest performance will happen. This is not to say that they do not also know that they are entering into a contract. But the legal consequences of their agreement might not be especially salient. If an awareness of legal liability exists, it is better characterized as a background belief, as opposed to an occurrent thought. While such background beliefs might well satisfy the intent-to-contract test, they are much more difficult to verify. As Randy Barnett points out in a somewhat different context, a person's tacit assumptions "are notoriously difficult to prove directly – even the person possessing this sort of knowledge may be unaware of it."⁵⁵

A final source of indeterminacy lies in the objective theory itself. The use of "objective" in "objective intent" refers not to scientific verifiability – as in, "the rate of acceleration due to gravity is an objective fact" – but to the possible gap between a person's actual, or "subjective," intent and her manifest or publicly observable intent. A party's objective intent is, roughly speaking, the intent a reasonable person in the parties' shared epistemic situation would attribute her. This is an interpretive fact, as distinguished from a scientifically verifiable one. The factfinder must project herself into the parties' position, balancing her own sense of what is reasonable against what she knows about the norms, understandings and

⁵⁴ Stuart Macaulay, *Noncontractual Relations in Business*, 28 AM. SOCIOLOGICAL REV. 45 (1963). See also Hedley, 5 Oxford J. Legal Stud. at 396; Mary Keyes and Kylie Burns, *Contract and the Family: Whither Intention?*, 26 Melb. U. L. Rev. 577, 585-87 (2002).

⁵⁵ 78 Va. L. Rev. at 880. The statement occurs in Barnett's analysis of interpretive rules, as opposed to rules governing formation.

assumptions that applied to the parties in the context of the transaction. Because there are no fixed rules for deciding either what the parties' epistemic and normative situation was or how to balance it against the factfinder's own sense of what is reasonable, such judgments are inherently contestable.

The point of these observations is not that the parties' manifest intent with respect to legal liability is simply inaccessible. In many cases it is entirely verifiable. This is most obviously so when the parties say what they intend by using words like "This is a legally enforceable agreement," or "This is not a legally enforceable agreement," or by employing a legal formality like the seal. The parties' contractual intent is also unequivocally manifest when their agreement includes terms that presume enforceability, such as a liquidated damages or choice of law clause. In yet other cases, the parties' past behavior (a suit on an earlier, similar agreement) or their relationship with one another (the use of lawyers, the natural expectations about an invitation to dinner) might make their intent with respect to legal liability clear. But between transactions in which the parties clearly intend legal liability and those in which they clearly do not lies a wide band of gray. Experience with literal applications of the English rule has shown that the evidence of the parties' intent is in a significant number of cases equivocal at best, that courts exercise broad discretion in evaluating its relevance and weight, and that the outcomes of such all-things-considered judgments can be difficult to predict. In short, for many agreements the parties' intent with respect to contractual liability at the time of formation cannot be verified at the time of litigation.

Because of the unpredictability of the all-things-considered test for contractual intent, English courts have adopted evidentiary rules that effectively preclude litigation of the issue in the vast majority of commercial cases, which constitute the vast majority of contract cases. The most important is the presumption that parties to a commercial agreement satisfying the other elements of contractual liability intended to be legally bound.⁵⁶ Thus in *Edwards v. Skyways Ltd.*, which considered

⁵⁶ See TREITEL, *THE LAW OF CONTRACT* at 157 ("But where a claim is based on a proved or admitted *express* agreement the courts do not require, in addition, proof that parties to an ordinary commercial relationship actually intended to be bound."); ATIYAH, *INTRODUCTION TO THE LAW OF CONTRACT* at 154 ("[T]here is a strong presumption that business or commercial dealings are intended to have legal effect."); CHESHIRE, *FIFOOT AND FURMSTON* at 126 ("In commercial agreements it will be presumed that the parties intended to create legal relations and make a contract."); Chitty 2-154 ("In the case of ordinary commercial transactions it is not normally necessary to prove that the parties to an express agreement in fact intended to create legal relations.").

an employer's promise of an "ex gratia payment" to a dismissed employee, the court reasoned:

In the present case, the subject-matter of the agreement is business relations, not social or domestic matters. There was a meeting of minds – an intention to agree. There was, admittedly, consideration for the company's promise. I accept the propositions of counsel for the plaintiff that in a case of this nature the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one.⁵⁷

That is, in commercial cases the defendant bears the burden of proving that the parties did not intend legal liability – as under the Restatement rule the defendant must demonstrate a manifest intent not to contract. English courts have raised the bar even higher by reading ambiguous expressions of intent against the defendant. Thus in *Edwards*, the court found that the term "ex gratia" did not indicate an intent to be free of legal liability. Other courts have found contractual intent despite stipulations that the agreement was "fixed in good faith,"⁵⁸ that it was to be "interpreted as an honourable engagement,"⁵⁹ and where letters discussing settlement terms included the words "without prejudice."⁶⁰ Finally, English courts have held that one-sided or partial performance of the agreement negates even an unambiguous statement that it is not intended as a contract.⁶¹

The net effect of these evidentiary rules is that in most commercial cases, the English rule produces the same outcome as the Restatement rule would. More to the point, in the vast majority of commercial contract cases, there is no point to litigating the question of contractual intent. Hedley concludes, "Where the parties are dealing at arms' length, the rule is simple: there is no requirement of an intention to create legal relations."⁶² P.S. Atiyah, quoting Williston, makes the same point: "It is

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⁵⁸ *The Mercedes Envoy* [1995] 2 Lloyd's Rep. 559.

⁵⁹ *Home Ins. Co Ltd v. Administratia Asigurarilor* [1983] 2 Lloyd's Rep. 674, 677; *Home and Overseas Ins Co Ltd v. Mentor Ins. Co (UK) Ltd* [1989] 1 Lloyd's Rep. 473.

⁶⁰ *Tomlin v Standard Telephones & Cables Ltd* [1969] 1 W.L.R. 1378. *See also* TREITEL, *THE LAW OF CONTRACT* at 150-51; CHESHIRE, FIFOOT AND FURMSTON at 27-30. [add Rose-Frank.]

An exception is the phrase "subject to contract" in agreements for the sale of real estate. This phrase has taken on a conventional meaning in such transactions, and English courts interpret it to negative contractual intent. *See* ATIYAH, *INTRODUCTION TO THE LAW OF CONTRACT* at 159-62.

⁶¹ *See* ATIYAH, *INTRODUCTION TO THE LAW OF CONTRACT* at 154-55 (describing cases).

⁶² Hedley, 5 *Oxford J. Legal Stud.* at 412.

more realistic to say that no positive intention to enter into legal relations needs to be shown, and that ‘a deliberate promise seriously made is enforced irrespective of the promisor’s views regarding his legal liability.’⁶³

The practical erosion of the English rule makes perfect sense. Contracts create legal rights and duties. The conditions of contractual validity function not only to assign responsibility for wrongs after the fact, but also to inform people of their legal rights and duties *ex ante*. This guidance function, which is perhaps especially important in commercial transactions, requires that parties be able to know when they have entered into a contract. It therefore requires a degree of certainty and predictability as to whether a given transaction has satisfied the conditions of contractual validity. Absent a strong presumption one way or the other, the English rule’s all-things-considered manifest intent requirement does not provide that certainty.

There is a sense, then, in which what I have been calling “the English rule” is not the rule in England at all, but something like a doctrinal fiction, or a story that some courts and commentators tell themselves about contract law. Despite the striking differences between the U.S. and English black-letter rules on contractual intent, courts in England and the United States have applied those rules in ways that largely converge in their results, evidence perhaps that if the common law does not always work itself pure, it can work itself practical.

That said, I do not want to dismiss the English rule as a mere fiction. An all-things-considered inquiry into the parties’ manifest intent is one way to design a legal test for the parties’ contractual intent. And while it might be a bad design for most contract cases, it might be appropriate for certain types of agreement. Or so I will argue in the next two parts.

III. Intent and interpretation

The previous Part has described the problem with the English rule as one of verification: In too many cases, an *ex post*, all-things-considered inquiry into the parties manifest intent with respect to legal liability does not yield predictable results. Because the parties manifest intent is often nonexistent or not verifiable, their intent to contract is ill-suited as a condition of contractual validity.

Because we are talking about the parties’ manifest intent, the problem is not only one of verification, but also of interpretation. To

⁶³ ATIYAH, INTRODUCTION TO THE LAW OF CONTRACT at 153 (quoting 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 39 (3d ed. 1957)).

identify the parties' manifest contractual intent is to interpret the meaning of their words and actions. Restating the problem as an interpretive one has the advantage of locating it within a well-developed theoretical framework. The design of rules for contract interpretation has received a good deal of attention in the 20 years since Ian Ayres and Robert Gertner published their article on penalty defaults.⁶⁴ In the Ayres-Gertner framework, the difference between the English rule and the Restatement rule looks to be a difference in interpretive defaults. The discussion in the previous Part has shown, however, that the problem with the English rule lies not in the default, but, again in the language Ayres and Gertner use, in the rules it adopts for opting-out of that default. This suggests a more complex account of the available options for including the parties intent to contract among the conditions of contractual validity.

A. Interpretive defaults and opt-out rules

The interpretation of contracts is different from the interpretation of literature or dreams. The law and legal interpretive rules cast a long, dark shadow, one that many parties contract in. For this reason, we should expect legal rules for interpreting contracts to systematically influence parties' behavior – which is also the object of the interpretive rule. One of Ayres and Gertner's innovations was to take this fact seriously and more systematically investigate the incentives legal interpretive rules create. A second difference between the interpretation of contracts and many other sorts of texts is that in the former case, the interpretive rule functions to assign legal rights and obligations. Whether there was an act or an omission, the court must determine what those rights and obligations are. The law therefore requires an interpretation not only for cases where the parties manifested an intent, but also for cases in which they did not. This is the basis for Ayres and Gertner's second innovation: their observation that nonmandatory legal interpretive rules have two component parts: an interpretive default, which stipulates an act's legal effect absent evidence of the actor's contrary intent, and an opt-out rule, which stipulates what evidence of a contrary intent suffices for a non-default interpretation. Each component of the interpretive rule can create incentives for parties to disclose or withhold information in one form or another. Ayres and Gertner's third innovation was to think more systematically about the value of information disclosure and withholding, as well as the other secondary effects of interpretive rules.

⁶⁴ Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

The most commonly discussed piece of the Ayres-Gertner framework is their analysis of interpretive defaults, and their arguments for sometimes adopting nonmajoritarian defaults, defaults that are not the terms that most parties would choose. Majoritarian defaults can have several advantages. They reduce drafting costs, as most parties don't need to add additional words to get the terms they want. They reduce verification costs, since in a greater number of cases the absence of evidence of a contrary intent decides the issue. And they can increase accuracy, for in the majority of cases where the default corresponds to the parties' preferences courts are more likely to arrive at that interpretation. As Ayres and Gertner point out, however, in some instances we want one or both parties to undertake the costs of revealing information, either to each other or to a court that might be called upon to enforce their agreement. Thus the idea of "penalty" defaults. By adopting an interpretive default that runs against the preferences of one or both parties, the law can give the parties an incentive to opt-out of the default in a way that generates value-creating information.

The less-often discussed side of the Ayres-Gertner framework is their analysis of opt-out rules. A legal interpretive rule must specify not only an interpretive default, but also what suffices as evidence of legal actors' intent to contract around the default. That is, it must also include an opt-out rule. An opt-out rule can require from the parties more or less evidence that they intend a non-default term. To take a simple example from Ayres and Gertner, many U.C.C. rules provide that the legal default applies "unless the parties otherwise agreed." Section 2-206, however, stipulates that an offer invites acceptance in any reasonable manner "[u]nless otherwise *unambiguously* indicated."⁶⁵ Section 2-206 requires more of offerors who want to contract around the default acceptance rules – an unambiguous expression – than do many other UCC opt-out rules. The design of opt-out rules, therefore, also provides an opportunity to engineer incentives to disclose or withhold information. Different forms of opting-out are more or less effective as means of sharing information, whether with the other party or with a future adjudicator.

These two components of legal interpretive rules – interpretive default and opt-out – are related to one another. The best opt-out rule depends on what the default is, while the best default depends on the costs and benefits of the available opt-out rules.

For the purposes of the analysis that follows, it will be helpful to distinguish three categories of costs that a default and opt-out rule might

⁶⁵ Ayres & Gertner, 99 Yale L.J. at 120 (discussing U.C.C. §§ 2-303, 2-206).

impose. The first is the cost to parties with a non-default preferences of creating the evidence required by the opt-out rule. Thus, for example, section 2-206 imposes on offerors who wish to limit the modes of acceptance the cost of unambiguously stating their intent. Second are the costs to the court of determining whether that evidentiary standard has been satisfied. While section 2-206's "unambiguously intended" standard imposes greater costs on offerors, in theory it should reduce costs to the courts, as it frees them from the task of resolving ambiguities. Third are error costs. One category of error costs comes from parties' failure to opt-out when they should have done so, or their choice to opt-out when in fact the default corresponds to their preferences. Another sort of error occurs when courts fail to recognize that the parties opted-out of the default when they have, or wrongly conclude that the parties opted-out when they did not.

In comparing the relative desirability of interpretive rules, one consideration is the extent to which they impose the above sorts of costs. But that is not the only consideration. Another way of putting Ayres and Gertner's thesis about the occasional value of penalty defaults is that in some cases otherwise costly opt-out rules also bring benefits. Their 1989 article emphasized the benefits from the disclosure of information by one party to the other, or by both parties to a neutral decisionmaker, such as a court. Opt-out rules that require one or both parties to speak where they might otherwise remain silent are more costly to the parties, but can force value-creating information transfers. A second possible benefit comes from what might otherwise be considered error costs. Adopting an opt-out that is especially costly to the parties makes the default stickier: fewer parties who would otherwise choose non-default terms are willing to pay the costs of opting-out.⁶⁶ This is a cost to the parties with respect to getting the agreement they want. But if we want to encourage the parties to adopt one term over another, with limited regard to their preferences, expensive opt-outs serve a positive channeling function. By making the socially preferred default stickier, an interpretive rule can cause more parties to adopt it.

This framework can be applied to identify different rules courts might use to determine whether the parties to an agreement intended it to be legally enforceable. An obvious problem with the English rule is that it imposes a minoritarian default for commercial agreements. Read literally,

⁶⁶ Ayres and Gertner discuss this potential benefit in Ian Ayres and Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 *Stan. L. Rev.* 1591, 1598-1600 (1999). See also Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 *Colum. L. Rev.* 1710, 1738-53, 1755-58 (1997).

the rule would impose high verification and high error costs in many commercial cases. English courts have addressed this defect with evidentiary presumptions that effectively flip the default for commercial agreements – bringing application of the English rule in line with the text of the Restatement rule. That is, they have adopted a majoritarian default, thereby avoiding in most cases the high costs of verifying the parties' manifest intent.

If this reading is correct, the exceptions to the Restatement rule described in Part I can be understood as more tailored alternatives to the rule for commercial agreements. Most parties to preliminary agreements, domestic agreements, social arrangements and reporters' confidentiality promises do not intend, on this theory, their agreement to be legally binding. The majoritarian default for such agreements is therefore something more akin to the English rule: no contract unless the parties manifest an intent to be bound.

While there is something to this default-based reading of the rules, it neglects the other component of legal interpretive rules: what it takes to opt-out of the default. The discussion in Part II has shown that the problem with the English rule is not so much its nonenforcement default, as its rule for determining when parties have opted-out of that default – the all-things-considered investigation of the parties manifest intent. While in theory the English rule's manifest intent opt-out should impose few out-of-pocket costs on the parties, as it does not require them to say or do anything special to manifest a non-default intent, it imposes significant verification costs on the legal system when the parties' intent is actually litigated. More importantly, absent strong evidentiary presumptions, the all-things-considered manifest intent opt-out involves significant error costs, creating uncertainty *ex ante* about when a contract exists.

If the problem with the simple English rule's manifest-intent opt-out is one of verification, an obvious solution is to require parties who want enforcement express that preference more clearly, producing unequivocal evidence of it for the courts. An example is the writ of covenant's seal requirement. Like the simple English rule, the writ of covenant set the default no legal enforcement. Unlike the English rule, it required those who wanted enforcement to express that preference in a formal act: putting their agreement in writing and affixing a seal to it.⁶⁷

⁶⁷ See A. W. B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* 22-25 (1987) (describing the specialty requirement for the writ of covenant). In fact, the historical seal requirement was considerably more complicated than is being presented here, as exceptions were often made and

But conventional legal forms are only one type of express opt-out. The rule might not demand and magic words or symbols, but only an express statement of intent. Thus the Model Written Obligations Act requires only a writing that “contains an additional express statement, in any form of language, that the signer intends to be legally bound.”⁶⁸

The availability of an express opt-out does not depend on what the default is. The text of Section 21 suggests an all-things-considered test for the parties’ intent not to contract, for it speaks of “a manifestation of intention that a promise shall not effect legal relations.” But in practice U.S. courts refuse enforcement in run-of-the-mill commercial cases only when an agreement includes a TINALEA (“This is not a legally enforceable agreement”) clause, expressly stating the parties’ intent not to be bound.⁶⁹ That is, in practice courts following the Restatement rule adopt an enforcement default together with an express opt-out rule.

These observations suggest two different solutions to the problem with the English rule. One solution – the one adopted by English courts and by the text of section 21 of the Second Restatement – is to flip the interpretive default to a majoritarian one and establish a high evidentiary bar, so that the parties’ manifest intent will rarely be litigated. Another is to adopt an express opt-out rule, which provides courts better information about the parties’ intent. Or the law might do both. We can therefore distinguish four general approaches the law might take to identifying the parties’ contractual intent, depending on what the default and opt-out rules are:

enforcement might be had under other writs. My point is not about the historical function of the seal, but about its possible uses.

⁶⁸ MODEL WRITTEN OBLIGATIONS ACT § 1, *in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 584 (1925) (emphasis added).

⁶⁹ In fact, the comments to Section 21 appears to assume that the “manifestation of intention that a promise shall not affect legal relations” will appear as a “term” in the agreement. Second Restatement § 21 cmt. b. [add cases]

		Opt-Out Rule	
		Manifest Intent	Express Statement
Default	No Enforcement	I	II
	Enforcement	III	IV

Oversimplifying somewhat, we might fill in these boxes as follows. Category I is occupied by the English rule absent any evidentiary presumptions, which imposes a nonenforcement default combined with an opt-out rule that requires courts to look at the parties' all-things-considered manifest intent. In practice, English courts today apply that rule mainly in penumbral cases, such as domestic agreements.⁷⁰ In category II are both the old writ of covenant, which also adopted a no enforcement default but required a formal act to opt-out of it, and the Model Written Obligations Act, which would impose the same no-enforcement default for gratuitous promises, but allow an opt-out by any express statement of an intent to be bound. Category III includes the Restatement rule as written, as well as the English rule as applied to commercial agreements, with its strong evidentiary presumption of an intent to contract. Both adopt an enforcement default, while the opt-out rule requires courts to engage in an all-things-considered inquiry into the parties' manifest intent. Finally, an example of a category IV rule can be found in the application of the Restatement rule to commercial agreements. In practice, U.S. courts adopt an enforcement default and require parties expressly to state their intent not to be bound in order to opt-out of it. Depending on strong the presumption of a contractual intent in commercial cases is, this might also describe courts' application of the English rule.

B. Interpretive asymmetries, beneficial stickiness and relational costs

The above table establishes a basic menu of design options for identifying the parties' intent with respect to legal liability. We can choose

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from the menu by asking which combination of opt-out and default creates the greatest value at the lowest cost. The next Part explores which we should choose for four categories of penumbral transactions: gratuitous promises, preliminary agreements, domestic agreements and reporters' confidentiality promises. Before getting there, I want to identify three considerations that are especially salient to interpreting parties' intent to contract.

The first concerns the relative stickiness of different interpretive defaults. In the defense of his thesis that autonomy theories don't tell us much about what the rules of contract law should be, Richard Craswell argues for the "symmetry of the default rule problem":

In one sense, a default rule of implied commitment represents a greater "imposition" than a default rule of noncommitment, since an implied commitment can lead to judicially enforceable damages while an implied noncommitment cannot. However, neither rule is "imposed" in the sense of forcing S to accept a legal relationship against her will, since each is merely a default rule which allows her to specify a different relationship whenever she chooses. For this reason, the intuition that legal relationships should not be "imposed" on a party cannot, by itself, provide a reason for selecting one default rule over the other.⁷¹

This cannot be right if we are talking about rules that test for parties' contractual intent as a condition of contractual validity.⁷² If the goal is to condition legal liability on the parties' intent to contract, and if the law uses an express opt-out rule, an enforcement default will be systematically stickier than a nonenforcement default. Express opt-outs work only for parties who know what the default is, what it takes to contract around it and, most importantly for present purposes, that the rule applies to them. If, for example, the parties have not thought about legal liability (Corbin's livestock traders) or mistakenly think that there is no contract for other reasons (the Restatement's book seller and buyer), they do not know enough to expressly opt-out of legal liability. Parties who intend legal

⁷¹ Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 Stan. L. Rev. 481, 485-86 (1996). See also Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 Mich. L. Rev. 489, ____ (1989).

⁷² Craswell's symmetry thesis is correct as applied to interpretive rules that concern the terms of valid contracts. With respect to these rules we cannot say a priori that the parties' ignorance of the law or of their potential legal liability will systematically make one or the other default more or less sticky. That will depend on empirical facts, such as whether more parties prefer one or another term, or the legal sophistication of parties preferring one or another term.

enforcement, on the contrary, are at least aware that enforcement is in the offing. Consequently, where the law adopts an express opt-out, a nonenforcement default is more likely to give parties who intend enforcement a reason to reveal that intent than an enforcement default is to give parties who do not intend to be legally bound an incentive to reveal theirs. In short, enforcement defaults are systematically stickier.

The asymmetry exists only if the opt-out rule requires a clear expression of intent, such as the use of a legal formality or a statement of intent. If an enforcement default is instead combined with a manifest-intent opt-out rule – that is, if it instructs courts to examine the totality of the circumstances to determine the objectively reasonable interpretation of the parties’ intent – parties might avoid legal liability despite their ignorance of the rule or of the possibility of enforcement. Because under a manifest-intent opt-out rule the parties need not do anything special to avoid the default interpretation, opting-out does not presuppose knowledge of the rule or its applicability. And while it is true that the risk of court error under a manifest-intent rule might cause sophisticated parties to expressly state their intent where unsophisticated parties might remain silent, the incentive to do so is the same whether a sophisticated party’s preferences match the default or not. Absent additional empirical assumptions, there is no reason to think that, with a manifest-intent opt-out rule, an enforcement default will be systematically stickier than a nonenforcement default.

The second point concerns the potential value of sticky defaults and therefore also costly opt-out rules. Up to this point, the analysis has largely assumed that the only goal in interpreting the parties’ intent with respect to legal liability is to better enable them realize their preferences – to enforce their agreements when the parties want to be bound and to withhold enforcement when they want no legal liability. That is, the above discussion has generally assumed that contract law’s sole function is to give parties the power to change their legal obligations when they wish. It is far from obvious, however, that this is the law of contracts’ only function.⁷³

There is little doubt that contract law is designed to give parties greater control over their legal obligations to one another. In H.L.A. Hart’s

⁷³ A more thorough discussion of the themes in this and the following paragraphs can be found in Gregory Klass, *Three Pictures of Contract: Duty, Power and Compound Rule*, 83 N.Y.U. L. Rev. 1726 (2008). The pluralist theory of contract law I describe in that article is something like a reinvention of Lon Fuller’s wheel. See Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form”*, 100 Colum. L. Rev. 94 (2000).

terms, contract law is a sort of private power-conferring rule. That fact does not preclude, however, additional and equally important duty-imposing functions. There are reasons to think that the law sometimes imposes liability on breaching promisors not because they entered into their agreements expecting or wanting enforcement, but because the promisor purposively induced a promisee to rely on an act she then failed to perform, because she accepted a present benefit in exchange for her future performance, or because there is a social interest in supporting the practice of undertaking and performing voluntary obligations.⁷⁴ Stickier defaults, and by implication costlier opt-outs, serve such duty-imposing functions. More to the point, they can mediate between the sometimes conflicting interests the law has in, on the one hand, granting parties the power to control the scope of their legal obligations and, on the other, imposing liability on parties because of extralegal wrongs they have committed, harms they have caused or other considerations.

One place where these duty-imposing reasons are obviously at work is in the treatment of cases in which the parties have no preference one way or the other with respect to legal enforcement, either because they have not considered the possibility or because they are simply indifferent. I argued above that these no-preference cases are among the reasons an enforcement default can be systematically stickier than a nonenforcement default. If the law's sole concern were to enforce only agreements that the parties manifestly intended to be legally binding, that stickiness would be a problem. It is not a problem, however, if contract law also functions to impose duties on persons. Recall Corbin's example of an agreement to trade a horse for a cow between two parties who have never heard of the law of contracts. If there are reasons to impose legal liability for breaching such an agreement, they are also reasons to prefer a sticky enforcement default, one that captures such no-preference cases.

And those reasons can extend beyond the no-preference case to support the enforcement of agreements even where, absent transaction costs, the parties would have agreed not to be legally bound. If the law has an interest, for example, in compensating promisees who have been wronged by a breach, it has that interest even in cases where one or even both parties might, at the time of formation, have preferred no

⁷⁴ For the first two functions – protecting reliance and preventing unjust enrichment – see for example P.S. ATIYAH, *PROMISES, MORALS AND LAW* (1981), and Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806–13 (1941). For the idea that contract law supports the practice of undertaking voluntary obligations, see Joseph Raz, *Promises and Obligations*, in *LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 210, ___ (P.M.S. Hacker & J. Raz eds., 1977).

enforcement, or where, in the absence of transaction costs, one party would have traded away her right to enforcement. This is not to say that a contract law supported by such principles must be entirely indifferent to party preferences. By combining an enforcement default with a relatively costly opt-out rule, we can permit sophisticated and sufficiently motivated parties to avoid the duties they would otherwise owe one another without significantly impairing the duty-imposing functions of contract law. If contract law serves both a duty-imposing and a power-conferring function, rules for interpreting the parties' contractual intent as a condition of contractual validity can mediate conflicts between those functions.

The final observation concerns a special cost to the parties of express opt-out rules. Something like the idea can be found in Lisa Bernstein's description of why parties sometimes choose not to provide in their contracts for all foreseeable eventualities.

Transactors may also fail to include written provisions dealing with a particular contingency because each may fear that the other will interpret a suggestion that they do so as a signal that the transactor proposing the provisions is unusually litigious or likely to resist flexible adjustment of the relationship if circumstances change. These potential relational costs of proposing additional explicit provisions may result in aspects of a contracting relationship being allocated to the extralegal realm, particularly in contexts where the post-contract-formation relationship between the transactors is highly relational in nature so that transactors' perceptions of the value of the transaction will be strongly affected by the attitudinal signals sent during pre-contractual negotiation.⁷⁵

The relational costs Bernstein describes attach to expressly opting-out of default terms in enforceable agreements. Bernstein's subject is contract gap-filling rules. Even more significant relational costs would seem to apply to expressly opting-out of enforcement or nonenforcement altogether. An expressed preference for legal liability early in the transaction might be taken, for example, as evidence of distrust or a propensity to litigate. An expressed preference for no legal liability might be taken as evidence that the party might not perform, or that she does not trust the other side not to engage in opportunistic litigation. A requirement that parties who want, or who do not want, a legal guarantee of performance say so will in many contexts involve such relational costs.

⁷⁵ Bernstein, *Merchant Law*, 144 U. Pa. L. Rev. at 1789-90 (footnotes omitted).

These costs are especially high at the beginning of a contractual relationship.⁷⁶ As Bernstein observes, contract law is largely designed as an “end-game norm,” sorting out what is owed to whom when an economic relationship has reached its end.⁷⁷ Many transactions, however, are sustained by extralegal “relationship-preserving” norms and incentives, such as mutual benefit, trust, industry practice and reputation. Particularly at the early stages of relational contracts, where both parties understand that the transaction’s value depends on their ability to work together to resolve disputes, one party’s expressed attitude towards the availability of legal liability as an end-game norm might be a deal breaker. And even if the deal still happens, forcing the parties to express their end-game preferences at the beginning of a relationship can erode relationship-preserving norms that would otherwise add value to the transaction. Even where expectations or preferences regarding legal liability are mutually understood, those attitudes are often better left unspoken.

The existence and magnitude of these relational costs depend on the context. Many agreements clearly contemplate legal liability, whether the parties say so or not. A choice of law, choice of forum or liquidated damages clause, for example, already signals that the parties understand themselves to be entering into a contract. In such transactions, also saying, “This is a legally enforceable agreement” would have no relational costs. In other agreements, the costs will be higher. As Stuart Macaulay observes, “[b]usinessmen often prefer to rely on ‘a man’s word’ in a brief letter, a handshake, or ‘common honesty and decency’ – even when the transaction involves exposure to significant risks.”⁷⁸ In such circumstances, a revealed preference for legal liability might do significant harm.

The relational costs of an express opt-out rule also depend on the parties’ backgrounds and expectations. Here it is worth recalling Patricia Williams’s story about the different ways she, as a black woman, and her

⁷⁶ But similar considerations might also explain why we don’t require parties who make one-sided modifications to say that they also intend to change their legal relationship. This is so, for example, when one party agrees to forgo some of her contractual rights for the sake of preserving the relationship. While both parties to the modification might understand and prefer that the modification be legally binding, expressing that preference can interfere with the function of the proffered concession, which is *inter alia* to signify cooperation or goodwill.

⁷⁷ Bernstein, *Merchant Law*, 144 U. Pa. L. Rev. at 1796-1802. See also Lisa Bernstein, The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study, 66 U. Chi. L. Rev. 710, 760-76 (1999).

⁷⁸ Stuart Macaulay, *Noncontractual Relations in Business*, 28 Am. Sociological Rev. 45, 58 (1963).

white male colleague experienced entering into a formal residential lease. The two had similar relational goals. “We both wanted to establish enduring relationships with the people in whose houses we would be living; we both wanted to enhance trust of ourselves and to allow whatever closeness, whatever friendship, was possible.”⁷⁹ For Williams’s white male colleague, this meant avoiding “conventional expressions of power and a preference for informal processes generally.”⁸⁰ Williams’s experiences as a black woman, on the contrary, led her to associate informality with the potential for exploitation and distrust, while “to show that I can speak the language of lease is my way of enhancing trust of me in my business affairs.”⁸¹ For Williams’s colleague, an expressed preference for enforcement would degrade the relationship; for Williams, such an expression would enhance it. The relational costs of an express opt-out are not only transaction relative, but also transactor specific.

IV. Applications at the periphery of contract

The above analysis has operated at a relatively high level of abstraction. I have identified four categories of rules for interpreting parties’ contractual intent, each defined by the sort of interpretive default and opt-out rule it employs. I have also described three considerations that are especially relevant to interpreting the parties’ contractual intent: the asymmetry of the default problem, the possible duty-imposing benefits of sticky defaults and costly opt-outs, and the context-specific relational costs of express opt-out rules. These considerations should figure into an analysis of the many variables – the potential costs and benefits – relevant to the relative desirability of different interpretive approaches. Some of those variables are empirical, such as the costs to the parties of expressly opting-out, the effect of such costs on the likelihood that parties will opt-out, error rates under different defaults, and the ratio of those who want legal liability to those who do not. Other relevant variables call for normative judgments – whether and when, for example, to channel some parties towards or away from legal enforcement, and to what degree the law should take account of parties’ preferences for or against legal liability.

Viewed in the abstract, the design problem can appear intractable. There are many variables, we know very little about the values of some,

⁷⁹ Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401, 407 (1987).

⁸⁰ *Id.*

⁸¹ *Id.*

and it is difficult to agree on the values of others. If the project were to discover a single rule for the broad range of agreements that lie at the center of contract law, the cost-benefit equation might well be insoluble. There is simply too little information and too much diversity to determine a single best generic interpretive rule.

The design question is easier to answer with respect to specific transaction types that lie on the outer edges of contract. Here our sense of the salient costs and benefits is clearer, and the values at stake less contested. Or so I will argue in this Part, which applies the above analytic framework to four penumbral categories of agreement: gratuitous promises, preliminary agreements, domestic agreements and reporters' confidentiality promises. The rules governing these agreement types are not of equal economic or social importance. Preliminary agreements are often litigated and commonly involve large sums, while there are few cases dealing with reporters' confidentiality promises, presumably because they are governed by strong journalistic norms. An analysis of the law's approach to these different types of agreements, however, will give specific content to the more abstract discussion in the previous Part and illustrate the value of the proposed framework.

A. Gratuitous promises

Gratuitous promises – gift promises and other promises without consideration – are a relatively easy case under the proposed framework. Many courts will not enforce a gratuitous promise in the absence of promisee reliance. This is so even if the promise is supported by nominal consideration, though the exchange of a peppercorn clearly expresses the parties' preference for enforcement. In the familiar words of Judge Woolsey, “The parties may shout consideration to the housetops, yet unless consideration is actually present, there is not a legally enforceable contract.”⁸² As Williston and others have noted, this is an odd rule. “It is something, it seems to me, that a person ought to be able to do if he wishes to do it.— to create a legal obligation to make a gift. Why not? . . . I don't see why a man should not be able to make himself liable if he wishes to do so.”⁸³ If one agrees with Williston, the design question is how the law should determine when a gratuitous promisor wishes to make herself legally liable for a breach of her promise.

⁸² *In re Greene*, 45 F.2d 428, ___ (S.D.N.Y. 1930).

⁸³ HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 194 (1925). *See also* Melvin A. Eisenberg, *The Principles of Consideration*, 67 *Cornell L. Rev.* 640, 659-60 (1982); FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 82-89 (1998).

The answer will include both an interpretive default and an opt-out rule. There are three reasons to prefer a nonenforcement default for gratuitous promises. The first is an empirical sense that nonenforcement is the majoritarian default. Most parties who make purely gratuitous promises neither want nor expect legal liability. Second, if the law adopts an express opt-out (and I will argue it should), there is the asymmetry in stickiness. A gratuitous promisor who intends her promise to be binding knows enough to at least ask what the law requires to make it so; the gratuitous promisor who does not intend that her promise be enforced because the idea hasn't occurred to her, or because she mistakenly believes that it is unenforceable for other reasons, does not have the knowledge she needs to opt-out of an enforcement default. Third, there are general reasons to prefer less rather than more enforcement of gratuitous promises. One is courts' inability to adequately judge the defenses appropriate for gratuitous promisors. Melvin Eisenberg makes this argument with respect to improvidence and ingratitude:

An inquiry into improvidence involves the measurement of wealth, lifestyle, dependents' needs, and even personal utilities. An inquiry into ingratitude involves the measurement of a maelstrom, because many or most donative promises arise in an intimate context in which emotions, motives, and cues are invariably complex and highly interrelated. Perhaps the civil-law style of adjudication is suited to wrestling with these kinds of inquiries, but they have held little appeal for common-law courts, which traditionally have been oriented toward inquiry into acts rather than into personal characteristics.⁸⁴

Alternatively or in addition, one might see a risk that widespread enforcement will erode the value of gratuitous promises. Eisenberg makes this point as well:

Making simple affective donative promises enforceable would have the effect of commodifying the gift relationship. Legal enforcement of such promises would move the gifted commodity, rather than the affective relationship, to the forefront and would submerge the affective relationship that a gift is intended to totemize. Simple donative promises would be degraded into bills of exchange, and the gifts made to perform such promises would be degraded into redemptions of the bills. It would never be clear to the promisee, or even the promisor, whether a donative promise

⁸⁴ Eisenberg, *The Principles of Consideration*, 67 Cornell L. Rev. at 662 (footnote omitted).

that was made in an affective spirit of love, friendship, affection, gratitude, or comradeship, was also performed for those reasons, or instead was performed to discharge a legal obligation or avoid a lawsuit. Affective moral values are too important to be trumped by the value of autonomy, and would be undermined if the enforcement of simple affective donative promises was mandated by law.⁸⁵

Though enforcement is the stickier default, some promisors who prefer enforcement will fail to contract around a nonenforcement default. This residual stickiness is a good thing given the social preference for not enforcing gratuitous promises.

What of the opt-out rule? If Eisenberg's arguments are correct, we should also prefer an opt-out rule that is more costly to the parties, which will in turn increase the stickiness of the nonenforcement default. This will be an express opt-out, rather than an all-things-considered examination of the parties' manifest intent. But greater stickiness is not the only or most significant reason for an express opt-out. Such a rule also avoids the verification costs associated with manifest-intent rules, which include both the cost of judicial resources and the cost of judicial error. The risk of error may be of special concern in the case of gratuitous promises, for reasons Eisenberg describes.

The relational costs of requiring gratuitous promisors who want enforcement to state that preference are minimal. These are not cases where enforcement is requested as the price of a return promise or performance. Rather, a gratuitous promisor's declaration that her promise shall be enforceable is freely given along with the promise. In most cases, such an additional gift would not undermine the purpose of the gratuitous promise as a whole, or otherwise erode the parties' trust in one another.

If we agree with Williston that gratuitous promisors should have the power to legally bind themselves, the sensible rule is a nonenforcement default combined with an express opt-out rule – a type II rule in my schema. This is precisely what the Model Written Obligations Act (drafted by Williston) proposed: “A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the

⁸⁵ Melvin A. Eisenberg, *The Theory of Contracts*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 206, 230 (Peter Benson ed. 2001).

signer intends to be legally bound.”⁸⁶ Since its promulgation in 1925, only Pennsylvania and Utah have adopted the Model Act, and only Pennsylvania has retained the rule. The explanation may be that the problem of gratuitous promises is less important in practice than it is to the theory of contract law. Or perhaps there is a deeper resistance to the Act’s premise: that promisors should be able to choose when they shall be legally bound to perform. The latter would also explain the law’s refusal to enforce promises for nominal consideration, for a peppercorn is also an expression of the parties’ intent to be bound. The explanation is not, however, that the Act is poorly drafted, or that it picks out the wrong rule for interpreting the parties’ contractual intent.

B. Preliminary agreements

Turning to preliminary agreements, there is yet another design option to consider. Alan Schwartz and Robert Scott have recently argued for replacing the current, manifest-intent rule for preliminary agreements with what is in effect a more tailored default. Their proposal complicates the design problem. The question is whether the current manifest-intent rule, Schwartz and Scott’s more tailored default, or a generic default with an express opt-out provides is the best rule.

As noted above, most courts currently follow the rule that a preliminary agreement will be enforced only if the plaintiff can show that the parties intended it to be legally binding. To quote Judge Leval in *Teachers Insurance* again:

There is a strong presumption against finding binding obligation in agreements which include open terms, call for future approvals and expressly anticipate future preparation and execution of contract documents. Nonetheless, if that is what the parties intended, courts should not frustrate their achieving that objective or disappoint legitimately bargained contract expectations.⁸⁷

This approach is essentially that of the English rule, or a type I rule in my schema: it adopts a nonenforcement default combined with an opt-out rule instructing courts to look to the totality of the circumstances to determine whether the parties intended legal liability.⁸⁸ In *Teachers Insurance*, those

⁸⁶ MODEL WRITTEN OBLIGATIONS ACT § 1, *in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 584 (1925) (emphasis added).

⁸⁷ *Teachers Ins. and Annuity Ass’n of America v. Tribune Co.*, 670 F.Supp. 491, 498-99 (S.D.N.Y. 1987).

⁸⁸ Judge Easterbrook’s opinion in *Empro* suggests that courts should limit the inquiry by excluding parol evidence when the preliminary agreement is in writing. 870 F.2d at 423.

circumstances included the language of agreement, the context of negotiations, with particular attention to the parties' motives, the number of open terms, the extent to which the agreement had been performed, and usage of trade.⁸⁹ Farnsworth lists yet more factors courts consider, including "the kind of parties involved, the importance of the deal and the nature of the transaction," all of which are generally verifiable only by way of extrinsic evidence.⁹⁰ The result of this wide-ranging inquiry into the parties' contractual intent mirrors experience with strict applications of the English rule (without the strong presumption of intent or other evidentiary rules): a high degree of indeterminacy in case outcomes. Thus Alan Schwartz and Robert Scott observe that "[a]ny list of relevant factors confines a court's discretion to some extent, but [courts' approach to preliminary agreements] leaves the decision process largely obscure when, as with these factors, courts fail to attach weights to the factors or to specify the relationship among them."⁹¹ Farnsworth is more succinct: "It would be difficult to find a less predictable area of contract law."⁹²

In a 2007 article, Schwartz and Scott propose a different approach.⁹³ They would replace the all-things-considered inquiry into the parties' contractual intent with a more streamlined one, designed to determine whether legal enforcement of the preliminary agreement would add value to the transaction. Parties enter into preliminary agreements,

His argument for that rule involves a slight of hand: Easterbrook correctly observes that the question of an intent is an objective one, from which he incorrectly concludes that "[p]arties decide for themselves whether the results of preliminary negotiations bind them . . . through their words." 870 F.2d. at 425. The parties' objective intent is usually understood as the intent a reasonable observer would attribute them in light of the totality of the circumstances, not only their words. In any case, even *Empro's* textualist approach ends up considering multiple factors: the text, the structure of the document as a whole and the implicit meaning of terms. *See* 870 F.2d at 425-26.

⁸⁹ 670 F.Supp. at 499-503.

⁹⁰ 87 Colum. L. Rev. at 261. *See also* Schwartz & Scott, 120 Harv. L. Rev. at 675-76.

⁹¹ 120 Harv. L. Rev. at 676.

⁹² 87 Colum. L. Rev. at 259-60.

⁹³ Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 Harv. L. Rev. 661 (2007).

Schwartz and Scott also have a descriptive thesis: that the holdings in preliminary agreement cases generally conform to their proposed rule – that courts "appear to have an intuitive grasp of the necessary conditions for finding a preliminary agreement." 120 Harv. L. Rev. at 701. And they have something to say about the proper scope of the parties' legal duties under such an agreement and the proper remedy for its breach. Rather than imposing a duty to negotiate in good faith or gap-filling the agreement, Schwartz and Scott suggest that the duty should simply be not to deviate from the agreed investment sequence, and that the appropriate remedy for its breach is verifiable reliance damages. 120 Harv. L. Rev. at 704.

according to Schwartz and Scott, when they do not yet know if a deal will be profitable, when one or both can invest in a way that will answer that question, and when it is not possible to contract for such investments, for example because the parties cannot observe each other's cost functions.⁹⁴ They provide a model of when enforcement encourages efficient investment in such situations, which involves familiar problems of sunk costs and shifting bargaining power.⁹⁵ For my purposes, the details of that model are not so important as Schwartz and Scott's conclusion: legal enforcement of preliminary agreements adds value when "the parties have agreed on the nature of their project, on the nature of the investment actions that each is committed to undertake, and on the order in which those actions are to be pursued."⁹⁶ Schwartz and Scott recommend that courts drop the current open-ended, multi-factored test for the parties' contractual intent and ask instead only whether the preliminary agreement meets these three conditions. Absent the parties' express statement of intent, satisfaction of these conditions would be a necessary and sufficient conditions of legal liability.⁹⁷

One can read Schwartz and Scott's thesis as a call for more tailored majoritarian defaults combined with express opt-out rules – a combination of type II and type IV rules in my schema.⁹⁸ Where enforcement is efficient, the parties are more likely to want it; where enforcement is inefficient, the parties are less likely to want it. For all the reasons that usually apply to majoritarian defaults, Schwartz and Scott's proposed

⁹⁴ 120 Harv. L. Rev. at 677-78.

⁹⁵ 120 Harv. L. Rev. at ____.

⁹⁶ 120 Harv. L. Rev. at 701; *see also id.* at 704 ("the parties must agree on the type of project, such as a shopping center or financing; on an imprecise but workable division of authority for investment behavior; and on the rough order in which their actions are to be taken"). Schwartz and Scott's argument does not demonstrate that legal liability adds value *only* when these conditions are met. Their model, if successful, shows that it adds value to precontractual agreements that meet these conditions, but not that there are no other situations in which it might add value.

⁹⁷ Schwartz and Scott mention only that parties should be able to opt-out of legal liability when their agreement meets the three conditions. 120 Harv. L. Rev. at 704. I am assuming that they would also permit parties to opt-in to such liability for agreements not meeting their three criteria, so long as the agreement satisfies the other conditions of contractual validity (e.g., sufficient certainty).

⁹⁸ This is not the only reading of their proposal. We might instead read it along the lines of the duty-imposing reading of Section 21 described in Part II.A above. On this reading, Schwartz and Scott recommend that courts depart from the intent inquiry altogether (except when the parties expressly say they don't want legal liability) and ask instead only about the efficiency of enforcement. But this would be a curious reading, given the considerations discussed in the next paragraph.

inquiry into whether the parties to a preliminary agreement should have wanted legal liability is arguably therefore a more predictable, and perhaps even a more reliable, test for their objectives intent than is the unstructured inquiry into manifest intent that courts currently engage in.

Still, this is a curious suggestion coming from Alan Schwartz and Robert Scott. The proposal is that instead of asking whether the parties *wanted* or *appeared to want* legal liability, courts should ask only whether they *should have wanted* it – whether at the time of the preliminary agreement it was in the parties’ interest that their agreement be enforceable. In other words, Schwartz and Scott would replace an inquiry into whether the parties thought legal liability was in their interest with an inquiry into whether it actually was.⁹⁹ The suggestion is curious because it runs contrary to a common methodological assumption among economists: that the parties know best when they stand to benefit from one form of transaction or another, and that courts should therefore defer to their decisions wherever possible. Economists who study contract law commonly assume that the parties’ choice is the best available metric for value.¹⁰⁰ Both Schwartz and Scott, for example, have criticized the rule against penalties for licensing judicial second-guessing of the parties’ choice of how to structure their legal relationship. In Schwartz’s version:

Courts do not have to prevent promisees from obtaining penalty clauses if promisees do not want penalty clauses. The *ex ante* rule is not merely unnecessary: judicial review produces mischief. Courts sometimes mistake compensatory damage measures for

⁹⁹ Craswell has adopted a similar approach to a variety of formation rules. Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 Stan. L. Rev. 481 (1996).

¹⁰⁰ Richard Posner makes the general point:

Now consider what to do about cases in which the parties’ intentions, as gleaned from the language of the contract or perhaps even from testimony, are at variance with the court’s notion of what would be the efficient term to interpolate into the contract. If the law is to take its cues from economics, should efficiency or intentions govern? Oddly, the latter. The people who make the transaction – thus putting their money where their mouths are – ordinarily are more trustworthy judges of their self-interest than a judge (or jury), who has neither a personal stake in nor the first-hand acquaintance with the venture on which the parties embarked when they signed the contract.

RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 96 (6th ed. 2003). The classic critical diagnosis of this methodological commitment can be found in Arthur Leff, *Some Realism About Nominalism*, 60 Va. L. Rev. 451 (1974). A general defense of this thesis, without reliance on efficiency as the ultimate value, can be found in Randy Barnett’s neo-Hayekian theory, the basics of which can be found in Barnett, *Sound of Silence*, Part I, 78 VA. L. REV. at ___ - ___, and a more extended version in RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998).

penalties, and so have found that particular liquidated damage clauses would inevitably overcompensate promisees when those clauses only protected the expectation. Thus, the *ex ante* branch of the liquidated damage rule should be abandoned.¹⁰¹

Scott has similarly argued that “the very existence of a freely negotiated agreed damages provision is compelling presumptive evidence that it constitutes the cost-minimizing alternative,” though the reasons why will often evade judicial inquiry.¹⁰² Schwartz and Scott’s tailored defaults for preliminary agreements take the opposite approach, replacing an inquiry into whether the parties believed that legal enforcement was in their best interest with a judicial judgment as to whether it was in their best interest.

And the same sorts of arguments that Schwarz and Scott marshal against the penalty rule can be applied to their tailored defaults for preliminary agreements. There are three reasons to think that Schwartz and Scott’s three-part test is an imperfect proxy for contractual intent. The first is the familiar point about institutional competence and the likelihood of court error. While the proposed test is relatively simple, courts will sometimes make mistakes in their evaluation of whether the parties did in fact agree on the nature of the project, on the investments that each was to undertake, or the order in which those investments were to be pursued. Second, parties too can error. If the parties mistakenly believe that their preliminary agreement satisfies or does not satisfy the three-part test, whatever legal incentives the law would otherwise provide will have no traction with them. If the point of the enforcement of preliminary agreements is to provide parties better incentives, it is important that the parties know when those incentives apply. Finally, there are reasons to doubt whether Schwartz and Scott’s model matches reality. In some cases, for example, extralegal incentives such as reputation, the value of an ongoing relationship, hostage taking, and honor provide sufficient assurances for a deal to go forward without legal enforcement. The three-part test takes no account of such extralegal incentives. Nor can it. While such extralegal assurances are generally transparent to the parties, it is difficult to devise a legal test for when they are present, and they often remain hidden from the courts. That is, such extralegal incentives are observable, but not verifiable.

¹⁰¹ Alan Schwartz, *The Myth That Promisees Prefer Supercompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369, 370 (1990).

¹⁰² Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 587, 588-93 (1977).

The point is not that Schwartz and Scott are guilty of some fundamental inconsistency. There are also important differences between the rule against penalties and the modern rule for preliminary agreements. Most importantly, the existence of a liquidated damage clause provides a simple, reliable test for party preference, while the current manifest-intent opt-out rule does not. Schwartz and Scott's argument is not that their test is perfect, but only that it is better than the current multi-factored test for the parties' intent.

But this defense of the Schwartz-Scott proposal also suggests an alternative to it. If the problem with the existing rule for preliminary agreements is that the manifest-intent opt-out provides too little certainty or predictability, the simpler solution is an express opt-out. That is, rather than attempting to tailor the default, we can simply require parties who want legal liability for their preliminary agreements to say so, informing courts of their considered preferences. The parties at the time they enter into a preliminary agreement are in a better position to know whether they will benefit from legal liability than a court is during subsequent litigation. By conditioning legal liability on an express contemporary statement of that preference, the law can give the parties a reason to share that information with the court – to generate simple and reliable evidence of their intent. Imposing this minimal ex ante cost on parties who want legal liability obviates the need for Schwartz and Scott's expensive ex post judicial inquiry into efficiency.

What of the other variables relevant to determining the best rule for interpreting the parties' contractual intent? A few facts bear mention. Most preliminary agreement cases involve sophisticated parties represented by lawyers in negotiations over high-value transactions. The negotiations are typically lengthy, complex and relatively adversarial. And in most cases that reach the courts, the preliminary agreement has been reduced to writing. Taken together, these facts suggest that it is generally clear to the parties that they are moving toward a legally enforceable agreement. What remains uncertain is whether they have yet reached one.

These observations suggest that neither the out-of-pocket costs of an express opt-out nor party error costs should be especially worrisome. Particularly where there is already a writing, the costs of adding words to the effect of "This is a legally enforceable agreement" are minimal. And if the parties are sophisticated players represented by counsel, the chance that they will forget to add them or expect enforcement in their absence is minimal. Nor are the relational costs particularly high. In most preliminary agreements, the scope of legal liability is among the issues under

discussion. Legal enforcement is already on the table. This diminishes the relational costs of having to say precisely when enforcement shall attach.

Finally, there are two arguments for a nonenforcement default. The first is the aleatory view of negotiations on finds more generally in U.S. law. There is no general obligation to negotiate in good faith, and parties are generally free to walk away from negotiations. This suggests little social interest in a sticky enforcement default. The second reason lies in the temporal structure of contracting.¹⁰³ Parties enter negotiation from the position no contract and eventually reach a point where it makes sense for legal obligations to attach. A nonenforcement default corresponds to this fact, leaving it to the parties to tell the courts when legal liability attaches.

Taken together, these facts recommend rejecting Schwartz and Scott's proposed complex test in favor of a simple type II rule: a nonenforcement default together with an express opt-out. A preliminary agreement should not be enforced unless the parties said they meant it to be. Unlike the argument with respect to gratuitous promises, the reason for such a rule is not majoritarian, but turns on the value of an information-forcing default. We can achieve greater accuracy at a minimal cost by requiring parties who want to be bound to their preliminary agreements to say so.

C. Domestic agreements

Domestic agreements typically involve exchange agreements between spouses or between parents and children. Here the arguments for and against enforcement are more complex and less settled, as is illustrated by a brief tour through the history of the U.S. and English law in this area.

It will be recalled that *Balfour v. Balfour*, the case that first established the English rule, involved an agreement between spouses: a husband's promise to provide his wife a monthly stipend in exchange for her implicit undertaking not to claim failure to support.¹⁰⁴ That *Balfour* was a domestic agreement case is not surprising, as it had long been argued that domestic agreements and social arrangements posed a special problem for contract law, one whose solution lay in requiring proof of an intent to be legally bound. Thus Pollock's oft-quoted argument:

An appointment between two friends to go out for a walk or to read a book together is not an agreement in the legal sense: for it is

¹⁰³ I owe this point to Conrad Deitrick.

¹⁰⁴ The above description follows the trial judge's account of the consideration in the case. [1919] T.L.R. 476.

not meant to produce, nor does it produce, any new legal duty or right, or any change in existing ones. . . . Nothing but the absence of intention seems to prevent a contract from arising in many cases of this kind.¹⁰⁵

Balfour effects a judicial affirmation of Pollock's thesis.¹⁰⁶

In the first edition of his treatise, Williston considered and rejected that claim. His argument has two parts. First, many domestic agreements and social arrangements are unenforceable in any case because they don't meet the consideration requirement: "the promise of the guest to attend the dinner is not given or asked for as the price of the host's promise."¹⁰⁷ Second, in those few cases where there is consideration, the agreement should be enforced. "There seems no reason why merely social engagements should not create contracts if the requisites for the formation of a contract already enumerated exists."¹⁰⁸ When Williston drafted section 20 of the First Restatement (the ancestor of section 21 in the Second), it was therefore silent as to domestic or social agreements. In Williston's view, they did not require a separate rule.

This changed in the Second Restatement, which added a new comment on domestic agreements and social arrangements. The comment reflects some of Corbin's influence on the Second Restatement. Where Williston argued from principle against the need for a separate rule, Corbin's treatise observed that courts in fact treated such agreements differently.

¹⁰⁵ Pollock at 3; 3, note (c). *See also* Anson Eleventh Edition at 2.

¹⁰⁶ Atkin's opinion in *Balfour* makes the Pollock argument:

[I]t is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife. . . . To my mind those agreements, or many of them, do not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement. . . . [T]hey are not contracts because the parties did not intend that they should be attended by legal consequences.

[1919] K.B. at 578-79.

¹⁰⁷ Williston 1920 Edition at 24 n.19. In the second edition Williston applies the same argument to domestic arrangements. "The real difficulty, however, in finding a contract in such cases is that the parties do not manifest an intent to make a bargain, that is, to exchange a promise for an agreed consideration." Williston 1936 Edition at 39.

¹⁰⁸ Williston 1920 Edition at 23-24.

1. If the subject matter and terms of a transaction are such as customarily have affected legal relations and there is nothing to indicate that the one now asserting their existence had reason to know that the other party intended not to affect his legal relations, then the transaction will be operative legally. 2. If the subject matter and terms are not such as customarily have affected legal relations, the transaction is not legally operative unless the expressions of the parties indicate an intention to make it so.¹⁰⁹

While perhaps more attuned to what courts were doing, Corbin's solution lacks the elegance of Williston's categorical approach. Framed as a rule, it is arguably circular. A manifest intent to be bound is required where the "matter and terms are not such as customarily have affected legal relations," but such customs depend on when the law requires a manifest intent to be bound. Perhaps to avoid this objection, when the drafters of the Second Restatement added a new comment on social and domestic agreements, they reformulated Corbin's point as a rule of evidence for specified categories: "In some situations the normal understanding is that no legal obligation arises, and some unusual manifestation of intention is necessary to create a contract. Traditional examples are social engagements and agreements within a family group."¹¹⁰ The upshot is that in the case of domestic agreements and social arrangements, there is a contract only if the parties manifestly intended one. If in the case of commercial agreements, application of the English rule has moved towards the Restatement approach, with respect to domestic agreements the text of the Restatement has moved towards the English rule.

Scholars have paid more attention to the enforcement of domestic agreements under the English rule.¹¹¹ Much of that attention has been critical. Several writers have argued that the rule's real purpose in domestic agreement cases is to prevent contract law from intruding into relationships that, in the opinion of individual judges, should be beyond the law's reach. The purported focus on the parties' intent is in fact a

¹⁰⁹ Corbin 1950 Edition at 138 (footnotes omitted). Corbin was also characteristically attentive to the fuzziness of the line between these two categories: "The line of division between what is 'social' on the one hand and what is legally operative on the other, between agreements that make contracts and those that do not, can be determined only by inductive study and comparison of what the courts have done in the past. Case by case, they have drawn a line, although like other lines, it is drawn with a wide and imperfect brush, not with a draftsman's pen. Being drawn by many hands, there are gaps in places and there are conflicting lines in other places." Corbin 1950 Edition at 141.

¹¹⁰ Second Restatement § 21, cmt c.

¹¹¹ [Revise in light of Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 Harv. L. Rev. 491 (2002)].

“smokescreen” for decisions whose real purpose is to “keep contract in its place.”¹¹² On this skeptical reading of the English rule, the nonverifiability of the parties’ manifest intent is essential to the rule’s hidden function. “If liability were thought appropriate on certain facts, it could plausibly be made out as ‘intended’; if not, it would be easy to deny the existence of the requisite intention.”¹¹³ Only because the intent question is so indeterminate and malleable can courts use it as cover for their policy-based decisions as to the proper reach of contract law.

The decision in *Balfour v. Balfour* exemplifies the problem. The Court of Appeal held no contract based ostensibly on the fact that “the promise here was not intended by either party to be attended by legal consequences.”¹¹⁴ But the opinions discuss no evidence of what the parties themselves intended or appeared to intend with respect to legal liability. Instead they focus on the general desirability of legal interference in marital relations. “The common law does not regulate the form of agreements between spouses. . . . In respect of these promises each house is a domain into which the King’s writ does not seek to run, and to which his officers do not seek to be admitted.”¹¹⁵ Whatever the supposed *ratio decidendi* of the case, the outcome appears to have been driven by the court’s view that contract law should not intrude into the marital relationship.

The smokescreen criticism of the English rule combines three different arguments. The first and mildest rests on the premise that the law should be transparent: courts should say what they mean.¹¹⁶ If the outcomes of domestic agreement cases are being driven by factors other than the parties’ manifest intent, courts should say so. Implicit in this criticism is the idea that courts will reach better results if they grapple

¹¹² SALLY WHEELER & JO SHAW, *CONTRACT LAW: CASES, MATERIALS AND COMMENTARY* 165 (1994); Hepple, 28 *Camb. L.J.* at ____.

¹¹³ Hedley, 5 *Oxford J. Legal Stud.* at 403.

¹¹⁴ [1919] 2 *K.B.* at ____.

¹¹⁵ [1919] 2 *K.B.* at 579-80, 579 (Atkins, L.J.); see also *id.* at 577 (“The proposition that the mutual promises made in the ordinary domestic relationship of husband and wife of necessity give cause for action on a contract seems to me to go to the very root of the relationship, and to be a possible fruitful source of dissension and quarrelling. I cannot see that any benefit would result from it to either of the parties, but on the other hand it would lead to unlimited litigation in a relationship which should be obviously as far as possible protected from possibilities of that kind.”) (Duke, L.J.); Hedley, 5 *Oxford J. Legal Stud.* at 391-92 (“[E]ven a brief reading of their lordships’ judgments will show how reluctant they were to extend the law of contract into the area of matrimonial rights and duties.”).

¹¹⁶ For a general account of this principle, see Micah Schwartzman, *Judicial Sincerity* 94 *Va. L. Rev.* 987 (2008).

directly with such considerations, forcing them to weigh the costs and benefits of their decision. The second criticism is that the English rule gives judges too much discretion in deciding when a domestic agreement will be enforced. Such discretion is problematic both because parties won't know the legal consequences of their agreement, and because we might not trust judges to reach just decisions in these cases. Third, one can read the application of the English rule to domestic agreements as but another example of the common law's pernicious distinction between the public and the private, a distinction that purports to create a protected sphere of human liberty but in fact functions to sustain established inequalities and modes of domination. Thus Mary Keyes and Kylie Burns argue that the nonenforcement default for spousal promises is "a highly effective default principle which impedes enforcement of family agreements, and performs a powerful symbolic function delineating the realm of law from the realm of the family and the feminine, privileging the former of the latter."¹¹⁷ Many cases involving domestic agreements follow the fact pattern in *Balfour*: wife sues husband for breach of promise to support. By withholding enforcement in these cases, the English rule can covertly play a supporting role in a legal regime that systematically subordinates married women to their husbands.

With these considerations in mind, let me return to the design question: Assuming still that the law should care about whether parties to domestic agreements wanted legal liability, how should it interpret their intent?

The third criticism of the English rule suggests flipping the default. There are reasons to think that an enforcement default for domestic agreements will be especially sticky: The parties are less likely to be legal sophisticates and are less likely to be thinking about legal consequences. The argument for flipping the default adopts a positive attitude towards this stickiness. A presumption that domestic agreements are enforceable would work to erase the distinction of a protected private sphere, and provide the same protection to the victim of a spouse's breach that the law provides victims of commercial breaches. This argument is not a majoritarian claim that most parties to domestic agreements want enforcement. Nor is the argument that the costs of contracting out of enforcement are less than of contracting out of nonenforcement, or that enforcement would be an information-forcing default. Rather, the argument is that there is a social interest in enforcing domestic agreements, regardless of the parties' initial intent. Greater enforcement

¹¹⁷ Keyes & Burns, *Contract and the Family*, 26 Melb. U. L. Rev. at 578.

will disrupt bad power relationships that the law otherwise supports. We should flip the default because defaults in general, and the default for domestic agreements in particular, are sticky.¹¹⁸

This is not the only social benefit to the greater enforcement of domestic agreements. Promisee reliance in such cases often presents an especially compelling case for enforcement.¹¹⁹ And society has an interest in enforcing a spouse, parent or child's promise of economic support or continuing care, which commonly appear in these cases.¹²⁰ These provide additional reasons to treat the stickiness of an enforcement default as a net benefit.

Such considerations might also recommend a more costly opt-out rule – for example, a requirement that the parties expressly say when they do not want enforcement. The more the opt-out costs the parties, the stickier the default. An express opt-out rule would also address the first and second criticisms: covert policy judgments and judicial discretion. If there are policy reasons to enforce some domestic agreements and not others, the way to address them is not through the case-by-case, covert exercise of judicial discretion. Rather, the law should take account of the policy considerations with more tailored defaults, or with mandatory rules that certain categories of domestic agreements are *per se* enforceable or

¹¹⁸ Oddly enough, this argument suggests a defense of the form of the court's argument in *Balfour*, if not its substance. In *Balfour*, the Court of Appeal was deciding a legal question of first impression: in contemporary terms, the appropriate default for spousal agreements. One might argue that the answer to that question should turn on the sorts of general policy considerations that the court discussed – the costs and benefits of treating “each house [as] a domain into which the King's writ does not seek to run.” *See supra* n. 115. This is not to say that the *Balfour* court's correctly identified or weighed those costs and benefits. Similar partial defenses might be made for several other commonly criticized decisions under the English rule. *See, e.g.*, *Ford Motor Co. v. Amalgamated Union of Engineering Foundry Workers* [1969] 1 W.L.R. 339 (collective bargaining agreement); *President of the Methodist Conference v. Parfitt* [1984] Q.B. 368 (ecclesiastical employment agreements); *Ermogenous v. Greek Orthodox Community of SA Inc.*, (2002) 187 A.L.R. 92 [Australia] (same).

¹¹⁹ Hedley argues that in most noncommercial transactions, judicial intuitions about the appropriateness of contractual liability turns on whether there has been any detrimental reliance.

In [noncommercial] cases the rule is that agreements will be enforced only at the insistence of a party who has performed one side of the bargain; but there is no need to prove any intention that sanctions be available. In other words, the courts' concern is to prevent one side taking the benefits of the arrangement and refusing the burdens, but they are unconcerned with the breach of a purely executory arrangement.

Hedley, 5 Oxford J. Legal Stud. at 406.

¹²⁰

nonenforceable. Together with a general enforcement default and express opt-out rule, such tailored rules would prevent judges from imposing their own, possibly idiosyncratic view of whether the facts before them warrant enforcement. These considerations together speak for a type IV rule.

Here, however, account must be taken of the relational costs of express opt-outs. Express opt-outs have relational costs because, as the point is often put, many contracts are like marriages. Marriages are even more like marriages. An expressed preference that a promise to a spouse, child, parent or sibling be enforceable, or an expressed preference that it not be enforceable, is much more likely to interfere with the relationship as a whole than the same expressed preference in a commercial agreement. The concern here is not only that parties to domestic agreements who choose to opt-out will pay a high relational price for doing so. Just as important, if we care about party choice, is that as a result of those costs many who would otherwise prefer to opt-out will choose not to. Depending on how often the latter is the case, the more accurate test for the parties' objective intent might well be the manifest-intent test that courts currently use (albeit with a nonenforcement default), which requires courts to examine the totality of the circumstances and ask whether it would be reasonable to ascribe the parties such an intent in those circumstances.

It is difficult to say in the abstract how these relational and party error costs should be weighed against the costs of judicial discretion and court error that a manifest-intent opt-out imposes. My own sense is that while there are reasons to prefer a sticky enforcement default for domestic agreements, the relational costs of requiring an express statement to opt-out are too high. The best rule for domestic agreements would then be a type III, rather than a type IV rule. That judgment depends in part on a general sense of the way domestic relationships work. It is also partly based on a sense that social attitudes towards marriage and other family relationships have changed, and that judges are today less likely to use a manifest-intent inquiry as an excuse for insulating domestic agreements from the law. But this is just to make the familiar point that the more we trust judges, the more comfortable we will be with less formalism in contract law.

D. Reporters' promises of confidentiality

Similar considerations suggest a different conclusion for when courts should enforce a reporter's promises of confidentiality to a source – a fact pattern that is rarely litigated, but whose analysis further illustrates the proposed framework. In *Cohen v. Cowles Media*, the Minnesota

Supreme Court held that such a promise was not enforceable in contract, and that recovery under a theory of promissory estoppel would violate the First Amendment.¹²¹ The court arrived at the first holding by departing *sub silentio* from the Restatement rule, explaining that it was “not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract.”¹²² The promissory-estoppel holding was based on the free press clause of the First Amendment and was subsequently overturned by the U.S. Supreme Court.¹²³ On remand, the Minnesota Supreme Court concluded that the source was entitled to recovery on the basis of promissory estoppel.¹²⁴

While the *Cohen* opinion framed the contract issue in terms of the parties’ intent, it did not discuss any particulars of the transaction between the parties. Instead, like the opinions in *Balfour*, the Minnesota Supreme Court focused on the general wisdom of enforcing such agreements. “[C]ontract law seems here an ill fit for a promise of news source confidentiality. To impose a contract theory on this arrangement puts an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship.”¹²⁵ The court’s First Amendment analysis of promissory estoppel also likely informed its decision as to enforceability in contract.¹²⁶

While the Minnesota court did not use the analytic framework I have described, that framework supports both the court’s argument and its holding in the case. The upshot of this decision of first impression is a nonenforcement default for reporters’ promises of confidentiality. That default is supported by considerations of stickiness. Both the court’s discussion of the general wisdom of enforcing confidentially promises and its analysis of the First Amendment values at stake identify the social interest in exempting reporters’ confidentiality promises from the “legal rigidity” of contract. That interest is promoted by a sticky nonenforcement default.

Cohen does not say what the opt-out rule should be. But the court’s refusal to look at the specifics of the transaction or to remand the case for additional findings suggests an express opt-out: A reporter or source who

¹²¹ 457 N.W.2d 199 (Minn. 1990).

¹²² 457 N.W.2d at 203.

¹²³ *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

¹²⁴ *Cohen v. Cowles Media Co.*, 479 N.W.2d 387 (Minn. 1992).

¹²⁵ 457 N.W.2d at 203.

¹²⁶ *See id.* at 203-05 (holding that First Amendment barred a promissory estoppel claim against the newspaper).

wants a confidentiality promise to be legally enforceable must say so. This too seems right. First, the express opt-out rule makes the default all the more sticky, promoting society's interest in not enforcing such agreements. And unlike domestic agreements, expressing a preference for legal enforcement is unlikely to damage the reporter-source relationship. While such relationships are often based on a degree of trust, the interests of the parties rarely align, and are sometimes – as in *Cohen* – at odds. The mere fact that the source prefers the protection of contract law suggests a trust deficit, or that the relationship is already relatively adversarial. In such a context, expressing that preference is unlikely to do the relationship much harm. Thus reporters' confidentiality promises should be subject to a type II rule: a no enforcement default together with an express opt-out.

Conclusion: further thoughts on the Restatement rule

The various categories of agreements at the margin of contract law that I have discussed have different empirical predicates, and society has different interests in their enforcement or nonenforcement. In each case, however, we can construct a rule for interpreting the parties intent with respect to legal liability as a condition of contractual validity that gives something close to the right weight to the different reasons for or against enforcement. In the case of gratuitous promise, a straightforward majoritarian argument together with a social interest in not enforcing such promises support a sticky nonenforcement default, while the express opt-out is recommended to simplify ex post litigation and because of its minimal relational costs. When it comes to preliminary agreements, the preferred rule is again a no-enforcement default combined with an express opt-out. Here, however, the reason involves information-forcing considerations: such a rule gives parties an incentive to clearly tell courts when they think that enforcement is in their interest. For domestic agreements, an enforcement default is supported by social interests in enforcement that do not depend on the parties' intent to be legally bound, and the relational costs of expressly opting-out of legal liability suggest a manifest-intend opt-out rule. Finally, the social interest in not enforcing reporters' confidentiality promises recommends a sticky nonenforcement default together with an express opt-out, which in this context is likely to have fewer relational costs.

Taken as a whole, the analysis demonstrates the potential value of tailored defaults and opt-out rules that condition legal liability on the parties' intent to contract. The social interests at stake in enforcing voluntary obligations depend on the type of agreement at issue. Tailored rules for interpreting the parties' intent to contract can partially

incorporate those considerations into the conditions of contractual validity, striking different balances between reasons for granting persons the power to control the legal obligations they owe one another and reasons for enforcing or not enforcing agreements that are independent of the parties' preferences or intentions.

The above discussion also provides new material for the interpretation of the generic rule described in section 21 of the Second Restatement. I have suggested elsewhere two possible readings of the Restatement rule.¹²⁷ On the first, the rule expresses a principled commitment to sometimes imposing contractual duties for reasons other than the parties' intent to contract. Contract law requires neither "real nor apparent intention that a promise be legally binding" because our interests in holding breaching promisor's legally liable do not all depend on party choice. On the second reading, the Restatement rule is not a statement of principle, but reflects a judgment about the epistemic limits of judicial institutions and the practical requirements of contracting parties. Even if the only function of contract law is to give parties the power to alter their legal obligations when they wish, the English experience has shown that, absent formalities such as the seal, the parties' manifest intent to contract is often difficult or impossible to verify, and therefore unsuitable as a condition of contractual validity. The Restatement rule, on this power-conferring reading, establishes a majoritarian default, leaving it up to parties who do not intend legal liability to inform courts of that fact.

The above analytic framework does not say which is the better interpretation of section 21. Answering that question requires a broader inquiry into the structure of contract law as a whole and the principles that justify it. The above analysis does, however, cast additional light on the commitments of each reading.

To begin with, the asymmetry of the default problem presents a challenge to power-conferring readings of the Restatement rule as a majoritarian default. Other things being equal, a commitment to party choice should recommend a nonenforcement default, which we can expect to be systematically less sticky. Power-conferring readings of the Restatement rule must explain why the rule adopts the stickier default. That explanation will likely involve two empirical claims: that the vast majority of parties to agreements for consideration want and expect legal enforcement, and that the costs of requiring them to opt-out of a nonenforcement default would be greater than the opt-out and error costs

¹²⁷ Klass, *Three Pictures*, 83 N.Y.U. L. Rev. at ____.

an enforcement default imposes on the minority of parties prefer no legal liability.

In *What Price Contract?*, Karl Llewellyn challenges second of these claims. He observes that “a business economy demands a means of quick, not one of ‘informal’ contracting,” and that a formal expression of the parties’ intent to contract could be designed to be cheap, quick and transparent enough that its inconveniences “would not be so material as not to offer some hope of being outweighed by the gain in adequacy and unambiguous proof.”¹²⁸ If the power-conferring reading of the Restatement rule has an answer to this objection, it lies in the relational costs of express opt-outs, even for the commercial transactions that lie at the center of contract law. This defense, however, commits one to a theory of contract law as supplementing, rather than substituting for, extralegal assurances of performance such as reputation, trust, honor and friendship. The defense might not be available, therefore, to theorists like Dori Kimel, who view contract as a substitute for those extralegal promissory norms.¹²⁹

While the power-conferring reading of the Restatement rule is not incoherent, my own view is that the better reading treats the rule as expressing a legal commitment to imposing duties on parties to agreements for consideration for reasons that do not depend on the parties’ initial intent to contract. On this reading, the stickiness of the enforcement default is not a cost but a benefit. So too is the express opt-out rule that U.S. courts apply in practice. By requiring parties who do not want legal liability to expressly say so in a TINALEA clause, the rule not only gives them a new reason to inform courts of their choice, but also provides a test for the sophistication of the parties and the importance they place on opting-out of enforcement. The law will imply a duty to perform except where parties knowingly undertake the expense, both out-of-pocket and relational, of expressly disclaiming that duty.

One finds something like this idea too among Williston’s various arguments for the progenitor of the Restatement rule in the first edition of his treatise.

In a system of law which makes no requirement of consideration, it may well be desirable to limit enforceable promises to those where a legal bond was contemplated, but in a system of law which does not enforce promises unless some benefit to the promisor or

¹²⁸ Karl Llewellyn, *What Price Contract? – An Essay in Perspective*, 40 Yale L.J. 704, 741 (1931).

¹²⁹ DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARD A LIBERAL THEORY OF CONTRACT ____ (2003).

detriment to the promisee has been asked and given, there is no propriety in such a limitation. . . . The views of parties to an agreement as to what are the requirements of a contract, as to what mutual assent means, or consideration, or what contracts are enforceable without a writing, and what are not, are . . . as material as the views of an individual as to what constitutes a tort. In regard to both torts and contracts, the law, not the parties, fixes the requirements of legal obligation.¹³⁰

Contract law is somewhat like tort law, in that both impose legal duties on persons not only because they expect, want or intend them. Unlike the tort law, however, contract law is also designed to give persons the power to purposively undertake new obligations to one another. The Restatement rule functions to balance these different and sometimes divergent interests.

¹³⁰ Williston 1920 Edition at 22. Williston makes a similar argument from quasi-contractual liability, pointing out that “[e]ven where one party makes it clear to the other that he is unwilling to enter into a contract, the law may nevertheless impose one upon him.” Williston 1920 Edition § 21, at 24.