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Extrinsic Evidence, Parol Evidence, and the Parol Evidence Rule: A Call for Courts to Use the Reasoning of the Restatements Rather than the Rhetoric of Common Law

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EXTRINSIC EVIDENCE, PAROL EVIDENCE, AND THE PAROL EVIDENCE RULE: A CALL FOR COURTS TO USE THE REASONING OF THE RESTATEMENTS RATHER THAN THE RHETORIC OF COMMON LAW

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I. INTRODUCTION

From the first year of law school, law students, lawyers, and judges encounter the terms "parol evidence,"[1] "parol evidence rule," and "ex-

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* George E. Allen Chair, University of Richmond. As the senior author, let me make two ministerial points. First, my name appears first because I am a law professor, and putting my name first is the kind of arbitrary, egotistical thing that law professors do. Second, Tim and Shalayne's names appear as authors, even though they are law students, because they spent virtually all summer working on this article. In light of the quality and quantity of their work, my simply acknowledging their contribution to this article in a footnote would be a really "tacky" thing to do, even for a law professor.

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1. In some states, they will also encounter the term "parole evidence." *E.g.*, Robledo-Soto v. United States, No. 1:11-cr-00328-LJO, 2012 WL 5396395, at *2 (E.D. Cal. Nov. 2, 2012) ("[C]ourts apply contract principles, including the parole evidence rule"); Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 268 (Utah 1995) ("Simply stated, the [parole evidence] rule operates . . . to exclude evidence of prior or contemporaneous conversations, representations, or statements." (citing Hall v. Process Instruments & Control, 890 P.2d 1024, 1026 (Utah 1995))). New Mexico courts also utilize the term "parole." *E.g.*, Diversified Development & Inv., Inc. v. Heil, 1995-NMSC-005, ¶ 36, 119 N.M. 290, 889 P.2d 1212 ("this Court held that parole evidence was not admissible"). Some courts use the terms "parol evidence" and "parole evidence" interchangeably. *E.g.*, Bettis v. Hall, 852 F. Supp. 2d 1325, 1334 (D. Kan. 2012) ("Where a contract is complete and unambiguous on its face, the court must determine the parties' intent from the four corners of the document, without regard to extrinsic or parole evidence. Even if the parties' interpretations of the contract differ, the Court need not resort to parol evidence to interpret the contract meaning if the contract is complete and unambiguous." (footnotes omitted)); Miller v. Reminger Co., L.P.A., No. 3:11-cv-315-CRS, 2012 WL 2050239, at *11 (W.D. Ky. June 6, 2012) ("The overarching principle suggested in *Rivermont Inn, Inc.* applies just as clearly to the common law parol evidence rule as it does to the statute of frauds. Kentucky views the parole evidence rule as a firm and well-established rule of law." (citing Rivermont Inn, Inc., v. Bass Hotel Resorts, Inc., 113 S.W.3d 636 (Ky. App. 2003)); *cf.*

trinsic evidence." They use and misuse these terms. For example, consider the following questions: can parol evidence be distinguished from extrinsic evidence? Do courts distinguish between parol evidence and extrinsic evidence when they examine questions related to the terms of a written contract? Should courts distinguish between parol evidence and extrinsic evidence when they examine questions related to the terms of a written contract? Does the parol evidence rule apply to both parol evidence and extrinsic evidence? Does the parol evidence rule govern the terms can be added to a written contract? Does the rule apply when interpreting the meaning of the terms in a written contract? More generally, to what extent should the trier of fact prefer the final written version of the deal over evidence of the parties' prior discussions, or evidence of common understanding? What is more important—rigid rules that provide certainty, or more "liberal" rules that provide justice?[2]

To put these abstract questions into a practice context, consider these hypothetical problems. Assume that Archer Building, Inc. ("AB") enters into a written contract with Davis Janitorial Services Corp ("DJ") to provide janitorial service on a daily basis for US$800 a month, paid by the twentieth of each month.

> Problem 1: AB and DJ disagree as to what time DJ can begin its work. Their final written contract, while lengthy, does not expressly address this question. In answering this question of starting time, will/should the court consider AB's testimony that prior to executing the contract, AB and DJ had agreed that AB could not begin work until after 10 p.m.? What about DJ's evidence that starting janitorial work at 8 a.m. is a well-known trade custom?

In addition, consider this problem:

> Problem 2: AB and DJ disagree as to the meaning of the word "daily" in their final written contract. AB contends that daily means "every day" and has pre-contract e-mails that support this contention. DJ relies on trade usage to support its position that

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Scott J. Burnham, *The Parol Evidence Rule: Don't Be Afraid of the Dark*, 55 MONT. L. REV. 93, 97 n.17 (1994) (suggesting that, while both terms are used, it is erroneous to use the term "parole").

2. It can be argued that rigid rules provide a just result: "Strict rules satisfy those who feel that, if you learn the rules and follow them, you should be assured that they will be applied firmly and without exception, even if this produces a result that appears unfair in the short run. According to this view, fairness is whatever result the rules produce, because in the long run predictability and invariance usually make for just results." Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 FORDHAM L. REV. 799, 804 (2002).

> "daily" means business days, i.e., Monday through Friday. Again, will a court consider AB's evidence? or DJ's evidence? Should a court consider the evidence? Should a court distinguish between AB's evidence and DJ's evidence?

In both problems, we assume that there is a final written contract. This is often a hotly contested issue.[3] (To assume what is often a hotly contested issue is one of the wonderful luxuries of law school and law review articles in particular.) Problem 1 involves contract supplementation. AB and DJ are asking the court to add a time of performance term to their final written contract. Problem 2 involves contract interpretation.[4] AB and DJ are asking the court to give meaning to the term "daily" in their written contract.

A third problem could arise in practice. While we are mindful of the popularity, power, and simplicity of the "rule of three" in rhetoric,[5] storytelling,[6] and speaking,[7] we resisted the temptation to include a third problem involving contract contradiction. Consider for example, a problem in which the written contract provides for a monthly payment of US$800.

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3. *See generally* STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION 70–93 (2009) (illustrating the numerous difficulties that arise in establishing existence of a written contract).

4. "Interpretation" was distinguished from "construction" by F. Lieber, the 19th century hermeneutics scholar (who should be distinguished from F. Leiber, the 20th century science fiction writer). According to Lieber, "[i]nterpretation is the art of finding out [with respect to words] . . . the sense which their author intended to convey." FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 23, 55 (Roy M. Mersky & J. Myron Jacobstein eds., WM S. Hein & Co., Inc. 1970) (1889). In contrast, "[c]onstruction is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text." *Id.* at 56.

5. *See* WHAT IS A TRICOLON, http://www.speaklikeapro.co.uk/What_is_tricolon.htm (last visited Aug. 13, 2013) (emphasis removed) ("A Tricolon (sometimes called the 'Rule of Threes') is really more of a general principle than a rhetorical technique, but it is very effective. For some reason, the human brain seems to absorb and remember information more effectively when it is presented in threes . . . [for example,] '[v]eni, vidi, vici' . . . Julius Ceasar [or] . . . 'The few, the proud, the Marines'—advertising slogan, United States Marine Corps").

6. *E.g.*, *Silly Symphony: The Three Little Pigs*, YOUTUBE (Jan. 20. 2013), http://www.youtube. com/watch?v=Olo923T2HQ4; *Goldilocks and the Three Bears*, YOUTUBE (Jan. 20. 2013), http://www.youtube.com/watch?v=63w9aPO-W_E; Rachel Kramer Bussel, *'50 Shades of Grey' Is the Subject of a Course at American University*, THE DAILY BEAST (Aug. 13, 2013), http://www.thedailybeast.com/articles/2012/12/28/50-shades-of-grey-is-the-subject-of-a-course-at-american-university.html.

7. *See* Richard Nordquist, *What Is Barack Obama's Secret for Giving a Great Speech? How to Inspire an Audience With the Magic Number Three*, ABOUT.COM, http://grammar.about.com/od/essaysonstyle/a/Barack-Obamas-Victory-Speech-And-The-Magic-Number-Three.htm (last visited Jan. 20, 2013).

AB argues that they had agreed earlier that the payment would be US$5,000 a year, and DJ argues that the trade custom calls for weekly payments.[8] Unlike Problem 1 and Problem 2, there is neither precedent nor policy to support AB and DJ in their efforts to contradict an express term in a final written contract.[9]

As should be clear from our two practice context problems, this article is an example of what Professor Richard Epstein[10] would call "Contracts small." According to Professor Richard Epstein, "'Contracts small' relates to contract law at the doctrinal level; it focuses on the rules of contract formation and performance; the everyday 'stuff of lawyer's law.'"[11]

This article looks to the Restatement of Contracts (hereafter "Restatement") and the Restatement (Second) of Contracts (hereafter "Restatement Second") for answers to the questions raised by the two problems. The Restatements generally have both been praised and condemned for their focus on doctrinal issues—on what Richard Epstein

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8. There are of course situations where it is less clear whether trade custom is being argued to contradict an express term in a final, written contract (like our Problem 3) or to interpret an express term in a final written contract (like our Problem 2). For example, in *Hurst v. W.J. Lake & Co., Inc.*, 16 P.2d 627, 628–31 (Or. 1932), the contract for a sale of horsemeat scraps expressly required that the scraps be greater than 50% protein. The scraps delivered were more than 49.5% protein but less than 50%. The court held that greater than 50% protein could be interpreted as greater than 49.5% because of trade usage. Interpretation or contradiction?

9. *But cf.* David W. McLauchlan, *The Inconsistent Collateral Contract*, 3 DALHOUSIE L.J. 136, 162 (1976–77) ("The object of this article has been to suggest that inconsistency ought not to operate as a bar to the enforcement of an oral agreement as a collateral contract where the making of the oral agreement has been proved to the court's satisfaction. However, it must be conceded that the long line of authorities to the contrary means that the courts will probably not feel free to accept this suggestion.").

10. Professor Richard Epstein is not related biologically or intellectually to the senior author of this article.

11. Richard A. Epstein, *Contracts Small and Contracts Large: Contract Law Through the Law of Laissez-Faire*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACTS 25, 26 (F.H. Buckley ed., 1999). Others have already written the "Contracts large" articles on the parol evidence rule—articles that explore the broader questions of political theory, such as the proper role of the state in regulating private agreements. *See, e.g.*, Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1756 et seq. (2000); Alan Schwartz and Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 958 et seq. (2010). Additionally, others have written on interdisciplinary questions such as the gender bias history of the parol evidence rule. *See* Hila Keren, *Textual Harassment: A New Historicist Reappraisal of the Parol Evidence Rule With Gender in Mind*, 13 AM. U. J. GENDER SOC. POL'Y & L. 251 (2005).

calls the "everyday stuff of lawyer's law."[12] As indicated earlier, the "everyday stuff of lawyer's law" includes the terms "extrinsic evidence," "parol evidence," and "parol evidence rule."[13] Let's start by choosing some working definitions.

II. DEFINITIONS OF "EXTRINSIC EVIDENCE," "PAROL EVIDENCE," AND THE "PAROL EVIDENCE RULE"

A. Oxford English Dictionary

The United States Supreme Court regularly looks to the Oxford English Dictionary.[14] The Oxford English Dictionary provides the following definition for "parol" as an adjective: "Expressed or given orally; verbal, oral. Now only in Law; in such phrases as parol evidence as distinguished from documentary evidence."[15]

B. French Dictionary

The words "parol" and "parole" have a common origin in the old French and "Law-French"[16] word "parol."[17] Prisoners on parole have given their word that they will not again commit crimes.[18] In French, the word "parol" has become "parole." An online French-to-English diction-

12. *See generally* Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205 (2007) (discussing common criticisms of the American Law Institute and the Restatement movement).

13. *But cf.* Lawrence A. Cunningham, *Toward a Prudential and Credibility-Centered Parol Evidence Rule*, 68 U. CIN. L. REV. 269, 271 n.5 (2000) ("Based on the author's experience as editor of CORBIN ON CONTRACTS, moreover, approximately 30% of the reported contracts opinions in the past several years have involved issues arising under the parol evidence rule.").

14. *E.g.*, Christopher v. SmithKline Beecham Corp., 132 S.Ct. 2156, 2170 (2012); Freeman v. Quicken Loans, Inc., 132 S.Ct. 2034, 2042 n.6 (2012).

15. XI THE OXFORD ENGLISH DICTIONARY 248 (2d ed. 1989) (emphasis omitted).

16. For a discussion of the role of Law-French in the development of law, see PETER TIERSMA, LEGAL LANGUAGE 28–36 (1999).

17. Crooks v. Sanders, 115 S.E. 760, 762 (S.C. 1922) ("The English word 'parole' is a shortened form of the French parole d'honneur (word of honor), the derivation of which the lexicographers trace to the late Latin parabola and the Greek πγργβωλη story, parable, adopted into English as 'parol,' i.e., verbal, oral, word of mouth, as now used in the legal term 'parol evidence.'").

18. Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 497–98 (2008).

ary uses the terms "word" and "speech" in its various English definitions of the French word "parole."[19]

C. Law Dictionaries

According to a 19th century law dictionary: "Parol, or more properly *parole*, (says Bouvier) is a French word, which means literally *word* or *speech*."[20] The leading 21st century law dictionary, Black's Law Dictionary,[21] defines "parol evidence" as "[e]vidence of oral statements"[22] and defines "extrinsic evidence" as "[e]vidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement."[23] This language supports the conclusions that (1) parol evidence is a form of extrinsic evidence, and (2) parol evidence is not the only form of extrinsic evidence, since extrinsic evidence includes the circumstances surrounding the agreement.[24]

There is, however, additional, relevant language in Black's definition of extrinsic evidence and parol evidence. The definition of extrinsic evidence continues to say "[a]lso termed extraneous evidence, parol evidence, evidence aliunde," and the definition of parol evidence goes on to say "[s]ee extrinsic evidence."[25]

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19. *Parol translation English: French Dictionary*, REVERSO.NET, http://dictionary.reverso.net/french-english/parol (last visited Jan. 20, 2013).

20. Yarborough v. West, 10 Ga. 471, 473 (1851) (quoting 2 Bouvier's Law Dictionary 262 (3d ed. 1851)).

21. Sarah Yates, *Black's Law Dictionary: The Making of an American Standard*, 103 LAW LIBR. J. 175, 181 (2011) ("Black further described the intended scope of the dictionary in his preface: 'The dictionary now offered to the profession is the result of the author's endeavor to prepare a concise and yet comprehensive book of definitions of the terms, phrases, and maxims used in American and English law and necessary to be understood by the working lawyer and judge. . . .'").

22. BLACK'S LAW DICTIONARY 638 (9th ed. 2009).

23. *Id.* at 637.

24. *See generally* BLACK'S LAW DICTIONARY 698 (3d ed. 1933) (Providing similar support for this conclusion can be found in the third edition that was published roughly contemporaneously with the Restatement. The third edition does not use the term "extrinsic evidence" but defines "evidence aliunde" as "[e]vidence from outside, from another source. In certain cases a written instrument can be explained by evidence *aliunde*, that is, by evidence drawn from sources exterior to the instrument itself. e.g., the testimony of a witness to conversations, admissions, or preliminary negotiations.").

25. *See generally id.* (showing, again, that there is similar language in the earlier 3d edition of Black's which concludes its definition of "parol evidence" with the statement "[i]n a particular sense, and with reference to contracts . . . parol evidence is the same as extraneous evidence or evidence *aliunde*.").

D. This Article's Definitions

1. "Parol evidence" and "extrinsic evidence"

In this article, we will use the term "parol evidence" to refer to pre-contract words of one or both of the parties. These words could be spoken or written. Even though the dictionaries' definitions limit "parol" to oral statements, courts and commentators consistently apply the term "parol evidence" to both written and oral statements.[26] So will we in this article. We will use the term "extrinsic evidence," and not the term "parol evidence" to refer to usage, to any other evidence outside the writing, and to evidence other than the words of the parties. There is a bit of Lewis Carroll in this approach.[27] We understand that words of the parties spoken or written before they enter into a written agreement are actually extrinsic to that written agreement, i.e., they could be viewed as extrinsic evidence.

In applying the parol evidence rule, there is ample case support for limiting the term "parol evidence" to words of the parties. Consider the following statements from federal district courts: "The parol evidence rule, however, only governs admissibility of prior agreements and negotiations, not other forms of extrinsic evidence";[28] "[t]he parol evidence rule bars the introduction of the most questionable form of extrinsic evidence—self-serving testimony by one of the parties as to what the parties 'really' agreed to in the negotiations leading up to the signing of the contract."[29]

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26. *See* Nat'l Blvd. Bank of Chicago v. Corydon Travel Bureau, Inc., 238 N.E. 2d 81, 86 (Ill. App. Ct. 1968) ("[O]ral and written evidence which limited his guaranty .... Such parol evidence...."); Quicksilver Res., Inc. v. CMS Mktg. Servs. & Trading Co., No. 2-03-251-CV, 2005 WL 182951, at *5 (Tex. App. Jan. 27, 2005) ("oral or written parol evidence"). *See also* Juanda Lowder Daniel, *K.I.S.S. The Parol Evidence Rule Goodbye: Simplifying the Concept of Protecting the Parties' Written Agreement*, 57 SYRACUSE L. REV. 227, 235 (2007) ("[T]he word 'parol' means by word of mouth [citing to Webster's Collegiate Dictionary] as opposed to in written form. However, from early on, the parol evidence rule has been applied to exclude both oral and written matters occurring prior to creation of the written agreement.").

27. *See* LEWIS CARROLL, ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS 254 (Alfred A. Knoph) (1872) ("When I use a word, it means just what I choose it to mean—neither more nor less."); Parker B. Potter, Jr., *Wondering About Alice: Judicial References to Alice in Wonderland and Through the Looking Glass*, 28 WHITTIER L. REV. 175, 176 n.6 (2006).

28. Klosek v. Am. Express Co., No. 08-426, 2008 WL 4057534, at *13 n.9 (D. Minn., Aug. 26, 2008).

29. Hoover v. ABF Freight System, Inc., No. 06–1301, 2008 WL 1805392, at *8 (C.D. Ill., Apr. 18, 2008) (quoting *Regency Commercial Associates, LLC v. Lopax, Inc.*, 869 N.E.2d 310, 327 (Ill. App. Ct. 2007), quoting Judge Richard Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1600 (2005)).

2. Conflation

Courts sometimes "conflate"[30] the terms parol evidence and extrinsic evidence.[31] Consider this statement from one opinion: "The parol evidence rule bars extrinsic evidence of prior negotiations offered to contradict or supplement a written contract."[32] In another opinion, the court said, "since the liberalization of California's parol evidence rule, parol evidence of custom and usage is admissible to interpret the meaning of written words."[33] For the purposes of this article, we define "evidence of prior negotiations" as parol evidence, and "evidence of custom" as extrinsic evidence, and not parol evidence.

3. Parol evidence rule and parol agreements

Let's now establish a working definition of the phrase "parol evidence rule." Law review discussions of the parol evidence rule often[34] begin with the following quotation from a nineteenth century evidence treatise: "Few things are darker than this [the parol evidence rule], or fuller of subtle difficulties."[35]

"In part, the parol evidence rule is so 'dark and difficult' . . . because . . . there exists even today no definitive statement of the [parol evidence]

30. *See generally* Margaret Kniffin, *Conflating and Confusing Contract Interpretation and the Parol Evidence Rule: Is the Emperor Wearing Someone Else's Clothes?*, 62 RUTGERS L. REV. 75 (2009) (providing background and meaning for the word "conflate" which we decided to use after a December 12, 2012 Westlaw search of the JLR data produced 7,189 hits for the word "conflate" and a Westlaw search of the Yale Law Journal database produced 113 hits).

31. *Compare* Utica Mutual Ins. Co. v. Vigo Coal Co., 393 F.3d 707, 713 (7th Cir. 2004) (using the phrase "parol (i.e. extrinsic evidence)"), *with* Bohler-Udderholm Am., Inc. v. Elwood Group, Inc., 247 F.3d 79, 93 (3d Cir. 2001) (using the phrase "extrinsic evidence, i.e., parol evidence"). *See also* Addicks Servs. Inc. v. GGP-Bridgeland Lp., 596 F.3d 286, 294 (5th Cir. 2010) (using the phrase, "course of performance"—i.e., what the contracting parties have done post-contract—as a form of "parol evidence").

32. Hofeldt v. Mehling, 658 N.W.2d 783, 787 (S.D. 2003). *See* C.R. Anthony Co. v. Loretto Mall Partners, 1991-NMSC-070, ¶ 16, 112 N.M. 504, 817 P.2d 238 ("parol evidence rule . . . bars admission of extrinsic evidence").

33. Buchanan v. U.S. Dept. of Health and Human Services, 177 F.Supp.2d 1005, 1008–1009 (N.D. Cal. 2001).

34. Charles, L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1310 n.457 (1998) ("obligatory").

35. JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 390 (1898). *See* Clark v. Sideris, 1982-NMSC-151, ¶ 11, 99 N.M. 209, 656 P.2d 872 ("The parol evidence rule is a source of considerable confusion.").

rule."[36] The differences among the statements of the parol evidence are often substantive. Carefully reread the two quoted excerpts from court opinions that were reproduced in the last paragraph of Part II.D.1 in this article. Notice that the two statements differ not only as to what evidence is affected by the parol evidence rule, but also as to what questions are governed by the parol evidence rule.

The first quoted excerpt uses the term "parol evidence rule" to examine whether terms can be added to an agreement that has been reduced to writing—like our Problem 1 in which adding a time of performance term to the written janitorial services contract is to be examined. The second quoted excerpt applies the parol evidence rule to a question of interpreting a term in a written contract—as in our Problem 2, in which interpreting the term "daily" in the written janitorial services contract is to be examined.

Courts and commentators agree that the parol evidence rule applies to questions of whether terms can be added to an agreement that has been reduced to writing. As Professor Steven Burton writes:

> The most widely endorsed version of the common law parol evidence rule may be stated in two parts as follows, synthesizing the authorities read for this study: (1) Where an enforceable, written agreement is the final and complete expression of the parties' agreement, prior *oral and written* agreements and contemporaneous oral agreements (together '*parol agreements*') . . . do not establish contract terms when the *parol agreement* contradicts or adds to the terms of the writing; (2) in addition, when an enforceable, written agreement is the final, but not the complete, expression of the parties' agreement, a *parol agreement* may add to, but may not contradict, the written terms. This doctrinal statement, as far as it goes, is a matter of wide consensus.[37]

For purposes of this article, we will use Professor Burton's doctrinal statement as the parol evidence rule. Note in particular, Professor Burton's use of the phrase "oral and written."

The first case that applied the parol evidence rule involved oral testimony. Scholars[38] trace the parol evidence rule's origins back to *The*

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36. Ralph James Mooney, *A Friendly Letter to the Oregon Supreme Court: Let's Try Again on the Parol Evidence Rule*, 84 OR. L. REV. 369, 372 (2005). *See also* Linzer, *supra* note 2, at 807 ("So, instead of a parol evidence 'rule,' there is a continuum of many different approaches, all using the same name and often the same words.").

37. BURTON, *supra* note 3, at 64 (emphasis added).

38. *See, e.g.*, Keren, *supra note* 11, at 259; Lawrence M. Solan, *The Written Contract as a Safe Harbor for Dishonest Conduct*, 77 CHI.-KENT L. REV. 87, 91 n.7 (2001).

Countess of Rutland's Case.[39] The case concerned a transfer of land.[40] Edward Earl of Rutland, willed his property, Eykering, to his wife, the Countess, and by a later, second document to "heirs males of the body of the said Thomas Earl of Rutland," his father.[41] By these contradictory documents, Edward's nephew, Roger, stood to take Eykering, because he had been granted the property the day after the will was executed. The Countess wanted to use the oral testimony of trustees to prove that Edward really meant to give the property to her at his death. In ruling for Roger, the court relied in part on a rationale that can be read as limiting the parol evidence rule to alleged oral agreements: "[I]t would be inconvenient that matters in writing made by advice and on consideration, and which finally import the *certain truth* of the agreement of the parties should be controlled by averment of the parties to be proved by the *uncertain testimony of slippery memory*."[42]

According to Professor Farnsworth, this language is no longer the important language from the case: "Now the conceit that the parol evidence rule is rooted in the relative unreliability of testimony based on 'slippery memory' in contrast with the 'certain truth' afforded by a writing has fallen from favor."[43] And, there is other language in *Countess of Rutland* that supports Professor Farnsworth's "conceit": "If other agreements or limitation of uses be made by writing or by other matter as high or higher, then the last agreement shall stand; for every contract or agreement ought to be dissolved by matter of as high a nature as the first deed."[44] Since this *Countess of Rutland* language extends the parol evidence rule to prior written agreements, it must have a policy base other than concern about the "uncertain testimony of slippery memory."

Professor Marvin Chirelstein agrees with Farnsworth's conceit:

> The purpose of the rule is apparent.[45] Since the completion and execution of a written contract is typically the concluding point in

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39. The Countess of Rutland's Case, (1604) 77 Eng. Rep. 89 (K.B.).

40. *Id.*

41. *Id.*

42. *Id.* at 90 (emphasis added).

43. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.2, at 213 (2d ed 1998). *But cf.* Mark O. Morris & Elizabeth Evensen, *What's Happening to the Parol Evidence Rule? More Holes in the Dike*, 67 DEF. COUNS. J. 209, 219 (2000) ("The policy behind the parol evidence rule is 'to give the writing a preferred status so as to render it immune to perjured testimony and the risk of uncertain testimony of slippery memory.'" (internal quotation marks omitted)).

44. *Countess of Rutland*, 77 Eng. Rep. at 90.

45. *But cf.* Patton v. Mid-Continent Systems, Inc., 841 F.2d 742, 745 ("Why this [the parol evidence rule] should be so is one of the common law's enduring puzzles.").

> the bargaining process, one's ordinary expectation is that the document itself will contain all the conscious and important elements of the deal. . . . The parol evidence rule assumes that the formal writing reflects the parties' minds at a point of maximum resolution and, hence, that *duties and restrictions* that do not appear in the written document, even though apparently accepted an earlier stage, were not intended by the parties to survive.[46]

Notice also that Professor Burton uses the phrase "parol agreements" instead of Professor Chirelstein's phrase "duties and restrictions," or the more widely used term "parol evidence." Professor Burton explains: "Parol agreements should be distinguished from parol evidence; the latter may not amount to an agreement and therefore would not bind either party. The parol evidence rule applies to render parol agreements inoperative when they are offered to establish contract terms."[47]

Thus, we have a "parol evidence" rule that is (1) not limited to "parol" insofar as that originally meant "oral," but (2) is limited to "parol agreements" and not to other words of one or both of the parties, and (3) is further limited to questions of whether parol agreements can add terms to a written contract. In sum, questions on whether parol evidence can be used to interpret terms in a written contract are outside the purview of the parol evidence rule.

Courts do not necessarily embrace Professor Burton's parol evidence rule. As noted earlier, some courts go further than Professor Burton, and invoke the term "parol evidence rule" when deciding whether to consider parol evidence and extrinsic evidence to determine the meaning of a term in a written contract. The use of the parol evidence rule has been widely (but not uniformly) criticized by law professors[48] and by the courts. According to *Lee v. Flintkote Co.*,[49] "[s]trictly speaking, the parol evidence rule does not bar extra-contractual evidence of meanings assigned to the terms of an agreement; that is the function of the plain meaning rule which prohibits consideration of extrinsic evidence of intent

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46. MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 98 (5th ed. 2006) (emphasis added).

47. *See* BURTON, *supra* note 3, at 67.

48. *Compare* Kniffin, *supra* note 30, at 81–90 section B entitled "The Scholars Who Have Discerned the Difference," *with* Eric Posner, *The Parol Evidence Rule, the Plain Meaning Rule and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 534 (1998) ("Most courts would subscribe to something close to the following statement of the parol evidence rule: A court will refuse to use evidence of the parties' prior negotiations in order to interpret a written contract unless the writing is (1) incomplete, (2) ambiguous or (3) the product of fraud, mistake, or a similar bargaining defect.").

49. Lee v. Flintkote Co., 593 F.2d 1276 (D.C. Cir. 1979).

when the contract is unequivocal."[50] Similarly, *Burlison v. United States*[51] tells us:

> More recently, academic authority has recognized that although courts often conflate the parol-evidence rule with the plain-meaning rule, '[a] clear conceptual division would treat the plain meaning rule as about interpreting the provisions of contracts, and the parol evidence rule as about establishing what count[s] as the controlling terms of integrated contracts.'[52]

In this article, we will use the term "plain meaning rule" and not the term "parol evidence rule" in addressing questions on the meaning of a word in a written contract.[53] We will address questions about whether courts should look to parol evidence in determining whether the meaning of a written term is "plain" and suggest that courts look to policy rather than the parol evidence rule to resolve these questions. Further, we will address the uncertainty in the law caused in part by the courts' differing uses of terminology.[54] With this background, we will now apply the Re-

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50. *Id.* at 1281.

51. Burlison v. United States, 533 F.3d 419 (6th Cir. 2009).

52. *Id.* at 430 (quoting Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 SAN DIEGO L. REV. 533, 587 (2005)). *See also* Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. Q. 161 (1965); Kniffin, *supra* note 30, at 75. *But see* BRIAN H. BIX, CONTRACT LAW: RULES, THEORY AND CONTEXT 59 (2012) ("The parol evidence rule deals with the admission of other ('extrinsic') evidence to help in the interpretation of a written document."); Linzer, *supra* note 2, at 801 ("the parol evidence rule and the plain meaning rule are conjoined like Siamese twins"); Posner, *supra* note 48, at 534 n.1 ("Because both the parol evidence rule and the plain meaning rule concern the same issue—under what circumstances extrinsic evidence can be used to supplement a writing—they are best analyzed together.").

53. *See* BURTON, *supra* note 3, at 109 ("The most widely adopted statements of the plain meaning rule say that '[a]n unambiguous contract will be given its plain meaning.'"); *see also* Linzer, *supra* note 2, at 803 ("In its most rigid form, the plain meaning rule bars extrinsic evidence unless the word is ambiguous on its face. The flaw in plain meaning is, of course, the notion of a latent ambiguity.").

54. We will address the question of whether courts should use either the "parol evidence rule" or the "plain meaning rule" or neither the "parol evidence rule" nor the "plain meaning rule" in resolving questions as to what a term in a written agreements means. *But cf.* Linzer, *supra* note 2, at 838–39 ("Formalism of the kind found in plain meaning and an 'objectivist' parol evidence rule is much easier to carry out than weighing context, credibility, linguistic sensibility, and the many other factors that can go into an interpretation of words that may or may not mean what we think they mean. It is comforting to live in a world of plain meaning. But that world just isn't real.").

statement and the Restatement Second to the questions raised by our two problems.

III. RESTATEMENT[55]

Uncertainty as to the governing law, generally caused by different outcomes in cases, drove the Restatement movement.[56] The Restatement was the first work product of the American Law Institute (ALI). The ALI was incorporated in 1923. According to the statement of purpose in the ALI's certificate of incorporation: "The particular business and objects of the society are educational, and are to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."[57] People who attended the first meeting of the ALI were told that achieving the purposes described in the ALI's certificate of incorporation would be impossible unless the existing law could be first established with some degree of certainty, and that the two causes of uncertainty were (1) "lack of agreement among lawyers concerning the fundamental principles of the common law" and (2) "the lack of precision in the use of legal terms."[58] They were also told that the ALI should create a "Restatement of the Law" to cure (1) and (2).[59]

The first such Restatement, the Restatement of Contracts, was completed nine years later. Each Restatement was the result of the work of a Reporter, an exceptional scholar in the field; a committee of Advisors; and a Council to supervise and provide recommendations on the work of the Reporter and his Advisors. Tentative drafts were prepared and submitted to all ALI members well in advance of the ALI annual meetings.

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55. Some reported decisions still make use of the Restatement First provisions relating to parol evidence and extrinsic evidence. *E.g.*, *In re* E. Airport Dev., LLC, 443 B.R. 823, 829 (B.A.P. 9th Cir. 2011); Filmlife, Inc. v. Mal "Z" ENA, Inc., 598 A.2d 1234, 1236 (N.J. Super. Ct. App. Div. 1991).

56. *Proceedings of 1923 Annual Meeting*, 1 A.L.I. PROC. 14 (1923). *E.g.*, Edward White, *The American Law Institute and The Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 2 (1997) ("[T]he starting point of the ALI project, [began with] its founders' conclusions that the American legal system was suffering from its increased 'uncertainty.'" (alteration added)); *see also* Robert W. Stayton & Marian O. Boner, *The Plastic Code in Operation: II*, 36 TEX. L. REV. 733, 734–35 (1958). *See generally* John P. Frank, *The American Law Institute, 1923–1998*, 26 HOFSTRA L. REV. 615 (1998).

57. *See* Bennett Boskey, *The American Law Institute: A Glimpse at its Future*, 12 GREEN BAG 2D 255, 256 (2009).

58. Frank, *supra* note 56, at 615–17.

59. *Id.*

"The goal was to have each Restatement represent the considered legal judgment, not merely of the Reporter, nor even of his Advisers, but of the profession throughout the country."[60]

Whether the Restatement of Contracts represents the "considered legal judgment . . . of the profession throughout the country" has been questioned. Professor Samuel Williston,[61] author of the leading Contracts treatise, was the Reporter for the Restatement of Contracts. According to Professor Arthur Corbin,[62]

> [Williston] was older than the advisers (13 [years] older than I) and he had published *much* more. Also, he had had large contacts with bench and bar, and 'he had a way with him.' He asked his advisers (if they would) to go through his treatise and point out spots needing correction or amendment. Nobody did this but me .... Williston was hard to move from a position (*justly* so) ....[63]

Professor Alan Milner, a Fellow at Trinity College, Oxford, made the same point more bluntly "Williston's *Restatement of Contracts* is only Williston on Contracts under a new name and reduced in size. . . ."[64] The "reduced size" product consisted of two volumes. It was more than 1,200 pages long, and included 609 sections of black letter law, with comments and illustrations that accompanied most sections, but contained no citations.[65] The 609 sections were divided into chapters which were further subdivided into topics. Chapter 9 was entitled "The Scope and Meaning of Contracts," and that chapter was subdivided into three topics: "Topic 1. Interpretation," "Topic 2. Parol Evidence Rule," and "Topic 3. Usage." Note that the Restatement treated "Contract Interpretation" and "The

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60. *Id.* at 620.

61. *See* Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 (2005) (an intellectual history); SAMUEL WILLISTON, LIFE AND LAW: AN AUTOBIOGRAPHY (1940) (personal history).

62. Professor Corbin was one of the eight selected advisers to Samuel Williston. *See* RESTATEMENT (FIRST) OF CONTRACTS, at ix, x (1932). Corbin later stated that Williston "chose me as his chief critic and adviser." Arthur L. Corbin, *Samuel Williston*, 76 HARV. L. REV. 1327, 1327 (1963).

63. Joseph M. Perillo, *Twelve Letters from Arthur L. Corbin to Robert Braucher*, 50 WASH. & LEE L. REV. 755, 768–69 (1993).

64. Alan Milner, *Restatement: The Failure of a Legal Experiment*, 20 U. PITT. L. REV. 795, 798 (1959). *See also* Frank, *supra* note 56, at 621 ("[R]eporters like Williston . . . were essentially codifying the treatises with the Restatements . . . .").

65. *See* Edwin W. Patterson, *The Restatement of the Law of Contracts*, 33 COLUM. L. REV. 397, 402–403 (1933) ("The text is most abstract in character; the comment explains, qualifies, and justifies in general terms; the illustrations have the same concreteness as law school examination questions, the latter being usually much more complex and difficult.").

Parol Evidence Rule" as separate topics. So did the edition of Williston's Contracts treatise published shortly after the Restatement. Professor Herbert Wechsler,[66] Director of the ALI, described the relationship between the Restatement and Williston's treatise as follows: "[V]ouching, as it were in his famous treatise, as warranty for the positions that the Institute espoused."[67]

Let's now examine the Restatement's (and Williston's Contract treatise's) "The Parol Evidence Rule" using our two Problems.[68]

A. Parol Evidence and Contract Supplementation

In Problem 1, AB's testimony that AB and DJ had agreed on a starting time is parol evidence. No section in the Restatement topic entitled "The Parol Evidence Rule" uses the term "parol evidence rule" or even parol evidence in the text. Section 237, the first of eight sections in Topic 2, "Parol Evidence Rule," is the only section with "Parol Evidence Rule" in its title,[69] and is generally referred to as the Restatement's parol evidence rule.[70] The other sections in Topic 2 can be treated as qualifications or exceptions to the parol evidence rule. The words in Section 237 are consistent with the words of the first part of Professor Steven Burton's "most widely endorsed version of the parol evidence rule."[71] Section 237 provides:

> Except as stated in §§ 240, 241 the integration of an agreement makes inoperative to add to or to vary the agreement all contemporaneous oral agreements relating to the same subject matter; and also, unless the integration is void, or voidable and avoided, all prior oral or written agreements relating thereto. If either void

66. *See generally* Ruth Bader Ginsburg, *In Memory of Herbert Wechsler*, 100 COLUM. L. REV. 1359 (2000).

67. *Foreword* to RESTATEMENT (SECOND) OF CONTRACTS, at vii (Tentative Draft Nos. 1–7, 1973).

68. *See generally* John H. Wigmore, *A Brief History of the Parol Evidence Rule*, 4 COLUM. L. REV. 338, 338–39 (1904) (explaining that the Parol Evidence Rule did not originate in the Restatement. Its origins are generally traced to the Middle Ages and the superior evidentiary value of sealed documents).

69. *See* RESTATEMENT (FIRST) OF CONTRACTS § 237 (1932) (showing the other sections in Topic 2 can be treated as qualifications or exceptions).

70. *See* Rodriguez v. Secretary of the Treasury of Puerto Rico, 276 F.2d 344, 349 n.2 (1st Cir. 1960) ("1 Restatement, Contracts § 237, Com. (b) (1932), . . . where the parol evidence rule is set forth. . . ."); Arman v. Structiform Engineering Co., Inc., 24 N.W.2d 723, 727 (1946) ("In Restatement of the Law, Contracts, § 237, p. 331, the parol evidence rule. . . .").

71. *See supra* text accompanying note 37.

> or voidable and avoided, the integration leaves the operation of prior agreements unaffected.

Section 237 contains the phrase "integration of an agreement" that requires reference back to Section 228 which defines integration.[72] In a contracts context, integration means (1) in written agreement between two people that is (2) "a final statement of their intentions as to the matters contained therein."[73] The Restatement's Section 237 phrase "makes inoperative to add" would seem to be a blanket prohibition on a court's decision to look to parol evidence in contract supplementation problems like our Problem 1. Section 237, however, should be read together with Sections 239–40.

Section 239 provides in pertinent part, "Effect of Partial Integration. Where there is integration of part of the terms of a contract[,] prior written agreements and contemporaneous oral agreements are operative *to vary* these terms only to the same extent as if the whole contract had been integrated." (emphasis added). Section 239, and in particular, the words "to vary," should be read carefully. What is important are the words that are not in Section 239—the words "to add." Under Section 239, a partial integration makes "inoperative" parol agreements that "vary" it does not expressly make inoperative parol agreements that add terms. Williston restates Restatement Section 239 as follows: "[a]n incomplete writing may be added to by parol."[74] In essence, Restatement Section 239 is the second part of Professor Burton's parol evidence rule.[75]

When examining Problem 1, a court could rely on the Restatement to support its consideration[76] of AB's e-mails that DJ would not begin work until 10 p.m. More precisely, a court could rely on Restatement Section 239 to support its consideration of AB's e-mails if the written contract was final but incomplete—i.e., a "partial integration."

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72. RESTATEMENT (FIRST) OF CONTRACTS § 228 (1932). *See Proceedings of 1971 Annual Meeting*, 48 A.L.I. PROC. 446 (1971) (according to Professor Braucher, "I think there is a certain sorrow about the phrase 'integrated agreement' and if you had a better word, it could well be an improvement." Apparently, no one had a "better word.").

73. RESTATEMENT (FIRST) OF CONTRACTS § 228 cmt. a (1932).

74. 3 SAMUEL WILLISTON & GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS 1830 (rev. ed. 1936).

75. *See supra* text accompanying note 37.

76. *Cf.* Burnham, *supra* note 1 at 121 ("Law students always focus initially on this question, believing that . . . the most important issue is whether the agreement was made."); *id.* (supporting that in considering AB's evidence of e-mails, the court would have to determine whether the e-mails establish whether an agreement was made as to starting time).

Restatement Section 229, entitled "Partial Integration," expressly acknowledges the possibility that "[p]art of the terms of an agreement may be integrated"; but it does not explain how courts are to determine whether a writing is only a partial integration.[77] Under the Restatement, courts are to look only to the writing itself to determine whether it is a partial integration.[78] Williston's treatise provides the following justification for this "four corners"[79] approach: "[I]f the court may seek this intention from extrinsic circumstances, the very fact that the parties made a contemporaneous oral agreement will of itself prove that they did not intend the writing to be a complete memorial."[80]

Section 240(b) provides an alternative ground for a court's consideration of additional terms as parol evidence—if "the agreement is not inconsistent with the integrated contract, and . . . is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract." A determination of "naturalness" would seem even more difficult than a determination of whether

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77. RESTATEMENT (FIRST) OF CONTRACTS § 229 (1932).

78. *See* Universal Major Elec. Appliances v. Glenwood Range Co., 223 F.2d 76, 78 (4th Cir. 1955) ("[O]nly a partial integration of the contract since it . . . showed of itself that something was needed to complete the agreement. *See* Restatement of Contracts, § 229.").

79. *See* Helen Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 FORDHAM L. REV. 35, 45 (1985) (Supporting that neither the Restatement nor Williston used the term "four corners." Others have so described this approach to determining whether an agreement is a partial integration.) ("Williston's test for determining whether an integration is total or partial is a liberalization of the "four corners" test because, under Williston's test, facial completeness of the writing does not necessarily result in finding a total integration. Under Williston's highly influential test, adopted by the Restatement of Contracts (First Restatement)"); Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 534 (2008) ("Williston . . . took the view that the question of integration could be resolved by looking within the 'four corners' of the writing."); Daniel, *supra* note 25, at 243 ("'four corners' approach as adopted by Professor Samuel Williston"). *But see* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 113 (6th ed. 2009).

80. WILLISTON, *supra* note 74, at 1820. *See also* Movsesian, *supra* note 61, at 267, 268 ("Williston's penchant for abbreviated policy arguments—his tendency to describe the effect of legal rules in intuitive terms—can strike a contemporary academic reader as unsophisticated, even banal. . . . Today most legal scholars think of themselves as writing primarily for other academics. . . . Williston understands the enterprise of legal scholarship quite differently. . . . Williston believes that his most important task as a scholar consists of creating a doctrinal system that attorneys and business people can use on an everyday basis, one that simplifies the law and makes it more comprehensible.").

the written contract is a "partial integration."[81] The most helpful word in Section 240(b) is "might." It is much easier to meet a "might be in a separate agreement" test than to meet a "would be in a separate agreement" test. As Comment (d) to Restatement Section 240 explains, "[i]t is not essential that the particular provision would always or even usually be made in a separate collateral agreement. It is enough that making such a provision in that way is not so exceptional as to be odd or unnatural." One of the illustrations of an agreement that might "naturally be made" without inclusion in an integrated contract involves time of performance,[82] i.e., our Problem 1.

The Restatement provides a two-part "justification" for the "Parol Evidence Rule" in a Comment to Section 240:[83] (1) most written contracts set out everything that was included in the bargain, and (2) certainty is attained by making a general rule that the written contract does set out everything that was included in the bargain.[84] Recall that certainty was one of the basic goals of the American Law Institute in promulgating the Restatements.[85] Note that Williston's work has been generally described as a "shrine to certainty."[86]

B. Extrinsic Evidence and Contract Supplementation

In Problem 1, DJ's evidence about customary starting times is extrinsic evidence. The Restatement neither uses the term "parol evidence," nor the term "extrinsic evidence." The Restatement does, however, in a

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81. *See* Hadjiyannakis, *supra* note 79 at 47–48 ("Not surprisingly, the courts have not found the 'naturalness' test helpful in this context. . . . [M]ost cases that admit proof of the oral agreement resort to the 'incomplete on its face' approach."). *But cf.* Phipps v. Union Stock Yards Nat. Bank, 34 P.2d 561, 563 (Kan. 1934); Markoff v. Kreiner, 23 A.2d 19, 24 (Md. 1941).

82. *See infra* note 86.

83. Section 237, comment a, of the Restatement provides "this Section states what is known as the parol evidence rule" but does not provide a justification for the parol evidence. RESTATEMENT (FIRST) OF CONTRACTS § 237 cmt. a (1932). Comment d to § 240 is the only place the Restatement addresses justification, and the only place the Restatement capitalizes the Parol Evidence Rule. RESTATEMENT (FIRST) OF CONTRACTS § 240 cmt. d (1932).

84. RESTATEMENT (FIRST) OF CONTRACTS § 240 cmt. d (1932).

85. *See* 1 A.L.I. PROC. 7–8 (1923), *supra* note 56; Frank, *supra* note 56, at 617. *But cf.* Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute–The Fairchild Lecture*, 1995 WIS. L.REV. 1, 13–14.

86. Anthony J. Waters, *For Grant Gilmore*, 36 MD. L. REV. 270, 272 (1976–1977) (reviewing GRANT GILMORE, THE DEATH OF CONTRACT (1974) describing Williston's work as a "shrine to certainty"). *See also* Allen D. Boyer, *Samuel Williston's Struggle With Depression*, 42 BUFF. L. REV. 1, 23 (1994) ("Williston held up simplicity and certainty as intrinsic values toward which the law should aspire.").

topic separate from the Parol Evidence Rule, utilize the term "usage," which as that term is defined in Restatement Section 245[87] includes DJ's evidence about usual starting times. The general rule under Restatement Section 246(b) is that courts can look to usage to add terms to a written contract.[88] This general rule is limited by the somewhat cryptic phrase "not inconsistent with the agreement or manifestations of intention."[89] Since there was nothing in the written agreement in Problem 1 as to time of performance, DJ's extrinsic evidence of when janitorial work customarily begins is not "inconsistent with the agreement." What about Restatement Section 246(b)'s other limiting phrase "manifestations of intention"? The Comment to Restatement Section 246(b) explains "[t]he test . . . is the practical one, whether a reasonable contracting party might enter into the written contract in question and have intended to be bound by both its express terms, and also by the terms of the usage or collateral parol agreement in question."[90]

Restatement Section 246 then sets forth four Illustrations of Clause (b). In each instance, usage became a part of the contract. Similarly, in the four reported cases that expressly considered Section 246's "not inconsistent with the . . . manifestations of intention" limitation, the courts included usage as a term of the contract, relying primarily on one or more of the illustrations.[91] Section 246's Illustration 10 which deals with a trade usage as to time performance when the contract is silent as to time of performance, seems indistinguishable from Problem 1:

> A contracts to sell and B to buy a hundred barrels of flour at $8 a barrel. By an operative usage in contracts for the sale of flour where the contract fixes no time for the payment of the price, payment is regarded as due ten days after delivery. The meaning of B's promise is a promise to pay the price ten days after delivery of the flour.

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87. "Usage is habitual or customary practice." RESTATEMENT (FIRST) OF CONTRACTS § 245 (1932).

88. RESTATEMENT (FIRST) OF CONTRACTS § 246(b) (1932) ("Operative usages have the effect of . . . adding to the agreement . . . not inconsistent with the agreement or manifestations of intention.").

89. *Id.*

90. *Id.* at cmt. b.

91. Certain cases invoke Section 246 to exclude evidence of custom that was contrary to the agreement. *See* Atl. Richfield Co. v. Good Hope Refineries, Inc., 604 F.2d 865, 875 (5th Cir. 1979); Distillers Distrib Corp. v. Sherwood Distilling Co., 180 F.2d 800, 804 (4th Cir. 1950); State *ex rel* Porter Co. v. Nangle, 405 S.W.2d 501, 504 (Mo. Ct. App. 1966); Hopper v. Lennen & Mitchell, 52 F.Supp. 319, 324 (S.D. Cal. 1943); Heiden v. General Motors Corp., 567 S.W.2d 401, 405 (Mo. Ct. App. 1978).

Therefore, when applying Restatement Section 246 to Problem 1, a court could consider DJ's extrinsic evidence of when janitorial work customarily begins to determine DJ's starting time.

C. Resolving Inconsistent Parol Evidence and Extrinsic Evidence During Contract Supplementation

Problem 1, unlike Section 246's Illustration 10 above, involves both parol evidence (AB and DJ's agreement) and extrinsic evidence (trade custom) that are in conflict with each other. This then raises the question of how to resolve this conflict. Comment (b) of Section 246 suggests that greater weight be given to extrinsic evidence: "Concrete cases seem to indicate that reasonable persons are much more likely to rely on a recognized usage to affect the otherwise natural implications of their written contracts than on collateral parol agreements."[92] However, this language in Comment (b) to Restatement Section 246 is inconsistent with Illustration 4 of Section 240:

> A and B in an integrated contract respectively promise to sell and to buy specified goods. No time or place for delivery is specified. If no agreement is made as to these matters the rule of law is that the goods are deliverable in a reasonable time at the seller's place of business. A contemporaneous oral agreement that the goods shall be delivered within thirty days, at the buyer's place of business, is operative.

Williston's treatise, published only a few years after the Restatement, supports the result in Illustration 4. According to Williston, where no time for performance is fixed in a written contract, the law fixes the time in accordance with certain rules irrespective of what the parties actually intended. Williston writes "'[W]hen an ordinary contract does not state the time for performance, and the parties orally agree on a particular time,' the legal implication that they intended a reasonable time is an implication 'fictitiously invented by the law.'"[93] Williston's use of the phrase "and the parties orally agree" assumes away too many litigable issues. Often, as in Problem 1, one party will contend either that there

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92. RESTATEMENT (FIRST) OF CONTRACTS § 246 cmt. b (1932).

93. SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 640, at 1840 (3d ed. Jaeger rev. 1963). Professor Hadjiyannakis explains that the Restatement and Williston regard custom and usage as implied in law and the terms of a written contract as implied in fact and "[a]ccording to Williston and the First Restatement, parol evidence is admissible to contradict implications of law but it may not be used to contradict the implied in fact terms of the writing." Hadjiyannakis, *supra* note 79, at 55–56.

was never an oral agreement as to time of performance, or that if there was such an agreement by later entering into a written contract that was silent as to time of performance, the parties intended to discharge the earlier oral agreement as to time of performance.[94]

When there is a conflict between parol evidence and extrinsic evidence, a court would be required to answer two different questions: (1) is the parol evidence admissible and if so, (2) which should control: parol evidence or extrinsic evidence. Under the Restatement, parol evidence is admissible under Section 239 if the writing is a partial integration, or under Section 240 if the oral agreement meets the "naturalness" test. The Restatement's standards for answering the second question are less clear. At best, language found in a comment and in an illustration support conflicting arguments.

D. Parol Evidence and Contract Interpretation

Problem 2 involves contract interpretation—the meaning of the term "daily" in the written agreement is an issue that should be resolved. As noted earlier, the Restatement chapter entitled "The Scope and Meaning of Contracts" is divided into three separate topics: "Topic 1. Interpretation," Topic 2. Parol Evidence Rule," and "Topic 3. Usage." The Restatement's separation of the parol evidence rule from contract interpretation was based on Williston's belief that the parol evidence rule "is not a rule of interpretation or construction. It is a rule of substantive law which, when applicable, defines the limit of a contract. It fixes the subject matter for interpretation though not itself a rule of interpretation."[95] In contrast, under the Restatement, the parol evidence rule will not preclude a court's consideration of parol evidence when the question is one of contract interpretation. Under the Restatement, the parol evidence rule precludes consideration of parol evidence in the form of agreements between the parties only when the question is one of adding new terms to a written contract, and not one of interpreting terms already in the writing.[96]

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94. *Cf.* Hadjiyannakis, *supra* note 79, at 46 ("An alleged agreement fixing the time for performance is such an integral part of the transaction that if the agreement were intended to be a part of the contract, one might ordinarily have expected the parties to have included it in the writing.").

95. WILLISTON, *supra* note 74, at 1813.

96. RESTATEMENT (FIRST) OF CONTRACTS § 237 cmt. a (1932) ("Nor is it [the parol evidence rule] a rule of interpretation.").

When does interpretation end and supplementation begin?[97] Interpretation is limited to giving meaning to actual words in a contract whose meaning is unclear or ambiguous.[98] Obviously there will be some[99] situations in which it is not obvious whether evidence is being offered to add a term to a written contract, or to give meaning to a term that is already in the writing.

Consider, for example, the "Chicken Case,"[100] *Frigaliment*,[101] which is a classic case in a typical first year Contracts law course. There, the buyer sued for breach of a "sale of goods" contract that described the goods to be sold as "U.S. Fresh Frozen Chicken."[102] The seller delivered boiling hens. The buyer contended that the contract required the delivery of young chickens suitable for broiling and frying. Judge Friendly[103] concluded that the issue was one of contract interpretation—"what is chicken?"[104] Alternatively, Judge Friendly could have concluded that the issue in *Frigaliment* was one of contract addition—can parol evidence[105] or extrinsic evidence[106] add the term "young" or the term "suitable for

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97. C.R. Anthony Company v. Loretto Mall Partners, 1991-NMSC-070, ¶16, 112 N.M. 504, 817 P.2d 238 ("The operative question then becomes whether the evidence is offered to contradict the writing or aid in its interpretation. We leave these distinctions to case-by-case development by our lower courts.").

98. E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 962–63 (1967). *See also* STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION 120–22 (2009).

99. And "some" law professors would substitute the word "most" or the word "all" for "some." *See* CALAMARI AND PERILLO ON CONTRACTS, *supra* note 79, at 129 ("The very same words that are offered as an additional term that are rejected because the court deems the writing to be a complete integration can be offered as an aid to interpretation of a written term.").

100. *See* (yes, actually see) R.B. Craswell, *Chicken in a Contract (Frigaliment Importing Co. v BNS International Sales)*, YOUTUBE (Jan. 18, 2013), http://www.youtube.com/watch?v=ELwt-KXz8GA.

101. Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F.Supp. 116 (S.D.N.Y. 1960).

102. *Id.* at 117.

103. The *Frigaliment* case was heard by the United States District Court for the Southern District of New York shortly after Judge Friendly's appointment to the United States Court of Appeals for the Second Circuit. Prior to his appointment, Judge Friendly had been a founding partner of Cleary, Gottlieb, Friendly & Cox. While he had participated in numerous appeals, his trial court experience was very limited. And so, he volunteered to sit as a district court judge in the *Frigaliment* case. *See* DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 60, 81, 315 (2012).

104. *Frigaliment Importing Co.*, 190 F.Supp. at 117.

105. *Id.* at 118.

106. *Id.* at 119.

broiling for frying" to the written contract?[107] Problem 2 is unlike *Frigaliment*. In Problem 2, it is clear that parol evidence and extrinsic evidence is not being offered to add a term to the written contract which contains the term "daily." The argument is whether the word "daily" is or is not "ambiguous."

The word "ambiguous" is a critical part of Restatement Section 230 which is entitled "Standard of Interpretation Where There is Integration." Section 230 provides:

> The standard of interpretation of an integration, *except where it produces an ambiguous result*, . . . is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, *other than oral statements by the parties of what they intended it to mean.*[108]

Subject to its "ambiguous" exception,[109] the standard for interpretation in Restatement Section 230 is an objective one—"the meaning that would be attached . . . by a reasonably intelligent person." Therefore, Section 230's test for determining whether a term is ambiguous is an objective one.[110] As Professor Perillo explains:

> For Williston the contract acquires a life and meaning of its own, separate and apart from the meaning the parties attach to their agreement. It is not primarily the intention of the parties which the court is seeking, but the meaning of the words at the time and place when they were used. He is explicit in stating why this should be so. A facility and certainty of interpretation is obtained,

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107. *Cf.* Omri Ben-Shahar, *Contracts Without Consent: Exploring a New Basis for Contractual Liability*, 152 U. PA. L. REV. 1829, 1857 n.61 (2004) (explaining an alternate legal principle under which to settle *Frigaliment*) ("Indeed, a year after issuing the Frigaliment Importing decision, Judge Henry Friendly admitted that the case might better have been decided on substantive assent grounds." (citing Dadourain Exp. Corp. v. United States, 291 F.2d 178, 187 n.4 (2d Cir. 1961) (Friendly, J., dissenting))).

108. RESTATEMENT (FIRST) OF CONTRACTS § 230 (1932) (emphasis added).

109. RESTATEMENT (FIRST) OF CONTRACTS § 230 (1932); *see also* RESTATEMENT (FIRST) OF CONTRACTS § 230 cmt. a (1932) (explaining that both the first sentence of RESTATEMENT (FIRST) OF CONTRACTS § 230 and the first sentence of RESTATEMENT (FIRST) OF CONTRACTS § 230 cmt. a thereto use the article "the" before the word "standard" indicating the authors contemplated a single, fixed approach to contract interpretation).

110. RESTATEMENT (FIRST) OF CONTRACTS § 230 cmt. a (1932) ("The objective viewpoint of a third person is taken.").

> which, though not ideal, is so much greater than is obtainable by use of a less rigid standard. The certainty so obtained is more than adequate compensation for the slight restriction put upon the power to grant and contract.[111]

Whether the court can consider what the parties said about the meaning of the word "daily" in the written contract in Problem 2 would turn on whether the word "daily" is unclear or ambiguous to a reasonable person.[112] Section 230 expressly provides that "oral statements of the parties" cannot be considered when determining whether the words in a contact are ambiguous.

In Problem 2, AB's parol evidence is something other than an oral statement. E-mails are not "oral statements by the parties" but are still parol evidence as that term is used in this article, and in general, by courts.[113] Neither the language of Restatement Section 230 nor the comments thereto expressly preclude a court from considering earlier writings of the parties in interpreting words found in their final writing. Section 230 bars only "oral statements by the parties as to what they intended it to mean." Nonetheless, the underlying objective policy as explained by Williston would seem equally applicable to exclude parol evidence in the form of e-mails when determining whether the word "daily" in Problem 2 was ambiguous.

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111. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 132 (6th ed. 2009) (internal footnotes and quotation marks omitted). *See also* RESTATEMENT (FIRST) OF CONTRACTS § 230 cmt. b (1932) ("They have assented to the writing as the expression of the things to which they agree, therefore the terms of the writing are conclusive, and a contract may have a meaning different from that which either party supposed it to have.").

112. RESTATEMENT (FIRST) OF CONTRACTS § 238 cmt. a (1932) ("Such statements are also admissible . . . if there is an ambiguity, but not otherwise."). *See also* RESTATEMENT (FIRST) OF CONTRACTS § 238 illus. 1 (1932); Farnsworth, *supra* note 98, at 959 ("Under the older and more restrictive [view], parol evidence may only be used for the purpose of interpretation where the language in the writing is 'ambiguous'. . . . This is the view adopted both by Williston and the *Restatement of Contracts*.").

113. *E.g.*, Fazio v. Cypress/GR Houston I, L.P., No. 01-09-00728-CV, 2012 WL 1416558, at *10 (Tex. App. Apr. 5, 2013) ("whether they were oral or written"); Matthew v. Am. Family Mut. Ins. Co., 195 N.W.2d 611, 614 (Wis. 1972) ("[T]he parol evidence rule precludes the introduction into evidence of any contemporaneous or prior agreements, written or oral. . . ."); Sullivan v. United States, 244 F.Supp. 605, 617 (W.D. Mo. 1965) ("[M]anifest obligations provided thereby are not affected by parol evidence of subjective intentions, inconsistent discussions, oral understandings, and negotiations leading up to its execution.").

E. Extrinsic Evidence and Contract Interpretation

In Problem 2, a court that follows the Restatement could consider the extrinsic evidence of trade usage to determine the meaning of the word "daily." The "reasonably intelligent person" who interprets terms of a contract per Section 230 is a person "acquainted with all operative usages."[114] Thus, DJ's evidence of trade usage can be used to interpret the word "daily" regardless of whether there is an ambiguity.[115] Why does the Restatement discriminate between evidence of usage and evidence of oral statements when interpreting the words of a contract? One possible answer is that the former offers greater certainty of proof—there is a greater certainty that the use of "daily" in janitorial services contracts means Monday through Friday—and not seven days a week as suggested by AB and DJ's agreement.[116] A stronger argument is that the Restatement takes an objective approach to contract interpretation, and trade usage, unlike statements of the parties, is objective in nature.[117] Trade usage comes from the practices of disinterested, reasonable persons.[118] We will next examine the Restatement Second's treatment of the issues raised by our two problems.

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114. RESTATEMENT (FIRST) OF CONTRACTS § 230 (1932). *See also* WILLISTON, *supra* note 74, at 1748 ("[C]ontracts apparently clear in their meaning may be shown by usage or the surrounding circumstances to be ambiguous. . . .").

115. *See* RESTATEMENT (FIRST) OF CONTRACTS §§ 235(a)–(b) (1932); *see also* WILLISTON, *supra* note 74, at 1748 ("[C]ontracts apparently clear in their meaning may be shown by usage or the surrounding circumstances to be ambiguous or perhaps clearly to mean something different from the normal or ordinary meaning of their language."). *Compare* RESTATEMENT (FIRST) OF CONTRACTS § 230 illus. 2 (1932), *with* Problem 2, *supra* Section I.

116. WILLISTON, *supra* note 74, at 1745 ("[A] reasonable degree of certainty is attained if words are interpreted according to a standard not peculiar to the parties, but customary among persons of their kind under the existing circumstances."). *See also* Posner, *supra* note 48, at 559 ("Because admission of extrinsic evidence regarding course of dealing, course of performance, and trade usage is less likely than admission of other forms of extrinsic evidence to result in judicial error, a more permissive stance toward the former is justified.").

117. BURTON, *supra* note 3, at 176 ("Trade usages and customs are objective elements.").

118. *Cf.* AM Int'l, Inc. v. Graphic Mgmt. Associates, Inc., 44 F.3d 572, 575 (7th Cir. 1995) ("By 'objective' evidence we mean evidence of ambiguity that can be supplied by disinterested third parties: evidence that there was more than one ship called *Peerless*. . . .").

IV. RESTATEMENT SECOND

In 1952, the ALI received a US$500,000 grant to underwrite the costs of reexamining and revising the Restatements.[119] At the ALI's 30th meeting in 1953, this project was announced as "Restatement Continued," starting with the Restatements of Agency, Conflict of Law, and Trusts.[120] By the time the ALI's reexamination and revision of the Restatement of Contracts began in 1962, the name of the project had been changed to Restatement Second. Professor Robert Braucher[121] of Harvard was named as the Reporter, and Professor Arthur Corbin engaged to work as "Consultant." In 1964, Professor Corbin provided the following description of his work as a Consultant:

> I at once proceeded to prepare a 'one-man revision' of the entire Restatement. . . . I worked steadily on this for about 18 months, covering the black letter sections, the comment[s] and illustrations. Many sections I rewrote entirely, especially Chapter 9 on Interpretation and the Parol Evidence Rule. . . . Thus far, the Reporter has made steady use of my revision, although [he is] in no respect bound to follow it.[122]

Understandably, contracts scholars have searched for a copy of Corbin's revision notes. Surprisingly, no law library has been able to find a copy, and the ALI's copy has apparently disappeared.[123]

In writing about the parol evidence provisions of the Restatement Second, Dean John Murray concludes "the Restatement (Second) is

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119. Minturn T. Wright III, *The American Law Institute – Thirtieth Annual Meeting*, 39 A.B.A. J. 580, 581 (1953).

120. What a meeting that must have been! A panel discussion of government investigation of communist activity featuring Abe Fortas and Bruce Bromley and "a concert which included Judge Learned Hand's recent recording of two folk songs and several renditions by Judge Augustus Hand in person." *Id. See Judge Billings Learned Hand Singing Old English Song*, YOUTUBE (Jan. 18, 2013), http://www.youtube.com/watch?v=oJpblG8ctrU (you can hear Judge Learned Hand on YouTube).

121. *See generally* Arthur Taylor von Mehren, *Preface: Robert Braucher and the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 631, 631–32 (1982).

122. *Bibliography of the Published Writings of Arthur Linton Corbin*, 74 YALE L.J. 311, 322 n.22 (1964).

123. *See* Scott D. Gerber, *An Ivy League Mystery: The Lost Papers of Arthur Linton Corbin*, 53 S.C. L. REV. 605 (2002); Joseph M. Perillo, *Twelve Letters From Arthur L. Corbin to Robert Braucher*, 50 WASH. & LEE L. REV. 755, 755 (1993).

clearly influenced by the criticisms of Professor Corbin"[124]—influenced, but not controlled. According to Professor Braucher:

> Professor Corbin went through all of this material, before I started to work on it and made rather copious notes. . . . I had started with the original formulation in the First Restatement, and with Professor Corbin's notes which left very little of the parol evidence rule, and took, I think a ground that went somewhat short of what Professor Corbin would have liked.[125]

Professor Braucher's work as Reporter ended in 1971 when he was appointed Associate Justice of the Supreme Judicial Court of Massachusetts. Professor E. Allan Farnsworth of the Columbia University School of Law succeeded Professor Robert Braucher as Reporter.[126] Work on the Restatement Second (Contracts) was largely completed during Braucher's term as Reporter.[127] The ALI completed the Restatement Second in 1979. The Restatement Second was published in 1981.

Unlike the Restatement, the Restatement Second reflects the work of more than just one man. The Restatement Second was influenced not only by the work of Professors Williston, Corbin, Braucher, and Farnsworth, but also by the work of many other men and women that included the ALI Council,[128] the advisers appointed by the ALI Council, and ALI members who participated in the fourteen ALI annual meetings at which

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124. John E. Murray, Jr., *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342, 1350 (1975).

125. *Proceedings of 1971 Annual Meeting*, 48 A.L.I. PROC. 442 (1971).

126. *See generally* Jean Braucher, *E. Allan Farnsworth and the Restatement (Second) of Contracts*, 105 COLUM. L. REV. 1420, 1421 (2005).

127. Robert Braucher, *Interpretation and Legal Effect in the Second Restatement of Contracts*, 81 COLUM. L. REV. 13, 13 (1981).

128. The ABI certificate of incorporation provides that the ALI's managers shall be called "councilors." *Certificate of Incorporation*, ALI.ORG, (Jan. 17, 2013), http://www.ali.org/index.cfm?fuseaction=about.charter. Professor Farnsworth describes the work of the Council on the Restatement Second as follows: "The draft containing revisions prompted by the Advisers, would be challenged anew when it was brought before the Council, usually in December. The Council, some fifty to sixty eminent lawyers, judges, and teachers of law, read the draft as generalists rather than specialists. . . . [T]he Council's decisions . . . were binding on the Reporter." E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1, 4 (1981). Judge Richard Posner has criticized the lack of age diversity on the Council. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 307 (1999) ("[T]he Institute should consider putting a term limit on membership in the Council.").

the Restatement Second was discussed.[129] The work of these men and women[130] on the Restatement Second also took into account case law and the Uniform Commercial Code.[131] In 1967, Professor Herbert Wechsler proposed what has become the ALI's working formula for balancing considerations of what the law is with what the law should be: "We should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs."[132]

The Restatement Second differs from the Restatement not only in the preparation process but also in the nature of the final product. The Restatement Second includes longer comments, more illustrations, and a new feature, Reporter's Note, which includes citations to cases and commentary. In a five page article that summarized the Restatement Second's treatment of parol evidence and usage, Professor Braucher wrote "Changes in style and terminology have been freely made in the interest of clarity and consistency; substantive changes have not been limited to developments since the original Restatement; comments have been expanded."[133]

The Restatement Second is similar to the Restatement in many respects: it distinguishes parol evidence from usage, and questions of contract supplementation from questions of contact interpretation; it uses the term "parol evidence rule" in the title of section but not in the text, and treats "usage" in a separate topic from the parol evidence rule; it makes clear that the parol evidence rule is not "a rule of interpretation; it defines the subject matter of interpretation";[134] and it treats the role of usage in supplementing an agreement and the role of usage in interpreting an agreement in separate sections.[135] With this background, let's revisit Problem 1 (our problem on contract supplementation) and then Problem 2 (our problem on contract interpretation).

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129. *See* Jean Braucher, *supra* note 126, at 1422–24.

130. Justice Ellen Peters, Associate Justice of the Connecticut Supreme Court (formerly a Yale Law professor) was an adviser for the American Law Institute, RESTATEMENT (SECOND) OF CONTRACTS. Ronald K.L. Collins, *Gilmore's Grant (or the Life & Afterlife of Grant Gilmore & His Death)*, 90 NW. U. L. REV. 7, 22 n.103 (1995).

131. Jean Braucher, *supra* note 126, at 1424–25.

132. Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147, 150 (1969).

133. Robert Braucher, *supra* note 127, at 13.

134. RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. a (1981).

135. RESTATEMENT (SECOND) OF CONTRACTS §§ 220, 221 (1981).

A. Parol Evidence and Contract Supplementation

Recall that in Problem 1, AB wants the court to consider evidence of a parol agreement to add a time of performance term to a final written contract. Using language that is clearer than the relevant Restatement provisions, Restatement Second Section 216(a) provides that AB's evidence of a parol agreement "is admissible to supplement" unless the written contract for janitorial services was "completely integrated." Thus, under the Restatement Second, like the Restatement, the court's consideration of AB's evidence of a parol agreement in Problem 1 would turn on whether the final written contract was completely integrated. The two significant changes effected by the Restatement Second's parol evidence provisions are: (1) whether an agreement is completely integrated is a question "preliminary" to the application of the parol evidence rule to be decided by the court,[136] and (2) in deciding this preliminary question of whether the agreement is completely integrated, the court can consider parol evidence.[137]

Professor Braucher explained the changes at the 1970 Annual Meeting of the American Law Institute:

> We have also added something which was not, I believe, in the original Restatement, which is that this [the question of whether there is a complete integration] is a question for the court. . . .
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> . . .
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> . . . The parol evidence rule is primarily a device to control jury findings, dispensing power, and assist findings of fact. The safeguard here is that this is done by the judge as a preliminary question, and the determination whether there has been an integrated agreement, and, if so, whether it's complete or partial, is to be made in the light of the entire context.[138]

Thus, under Restatement Second Section 214, in contrast to the Restatement, AB's parol evidence of an additional term can be considered by the court for the limited purpose of determining whether the agreement is completely integrated.[139] The Restatement Second (or at least its Re-

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136. RESTATEMENT (SECOND) OF CONTRACTS § 210 (3) (1981).

137. RESTATEMENT (SECOND) OF CONTRACTS § 214 (b). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 210 cmt. c (1981).

138. *Proceedings of 1970 Annual Meeting*, 47 A.L.I. PROC. 536–37 (1970).

139. "[T]he difficulties arise in determining whether . . . it is completely or only partially integrated. . . . Those determinations are made in accordance with all relevant evidence, and require interpretation both of the integrated agreement and of the prior agreement." Robert Braucher, *supra* note 127, at 17. Perhaps this is an example of what Professor Braucher had in mind with the statement "not limited to developments since the original Restatement." *Id.* at 13.

porter) abandons the Restatement's four corners approach to determine whether there has been a complete integration: "Now, you will still find some cases where the court says that you look just at the document, its four corners, but I don't believe there is any court that can actually live with that. The document does not prove itself."[140] It would seem that in hearing AB's evidence that there was an oral agreement about the time of performance, the court would be more likely to conclude that a written agreement silent as to time of performance was not a complete integration, unless the court chose to disbelieve AB's evidence.

We need to use the "weasel word" "seem."[141] We can only speculate[142] as to whether the Restatement Second effects a significant change because no appellate court has expressly considered whether parol evidence as to an additional term, conclusively establishes that the writing was not a complete integration. While conducting a search using "all cases" in Westlaw's database, we only found one case that even cites to Restatement Second Section 214(b).[143]

B. Usage and Contract Supplementation

To supplement the janitorial service contract in Problem 1, DJ would want the court to determine when work begins using the extrinsic evidence of customary practice. Note that the use of parol evidence to supplement the terms of a writing turns on whether the writing is a complete integration. In contrast, the use of other extrinsic evidence such as trade custom to supplement a writing does not turn on whether the writing is a complete integration. The Restatement Second, like the Restatement, uses the term "usage," rather than "trade usage" or "custom and usage." Further, the Restatement Second's definition of "usage" is exactly the same as the Restatement's definition of "usage."[144] The Restate-

140. *Proceedings of 1970 Annual Meeting*, 47 A.L.I. PROC. 537 (1970).

141. Rafael Palomino, *Religion and Neutrality: Myth, Principle, and Meaning*, 2011 BYU L. REV. 657, 661 (2011) ("Friedrich von Hayek pointed out the perversion of language in what he referred to as 'weasel words,' a phrase inspired by an old Norse myth that attributes to the weasel an ability to suck out the contents of an egg without breaking its shell. Hayek noted the possibility of emptying words of their content, or of stripping them of their meaning, so that only the signifier remains.").

142. Professor Williston similarly speculated. *See* WILLISTON, *supra* note 74, at 1820.

143. *In re* Sabertooth, LLC, 443 B.R. 671, 694 (Bankr. E.D. Pa. 2011).

144. *Compare* RESTATEMENT (SECOND) OF CONTRACTS § 219 (1981), *with* RESTATEMENT (SECOND) OF CONTRACTS § 245 (1981). Restatement Second adds a section on "course of dealing" and treats "course of dealing" essentially the same as "usage." *See* RESTATEMENT (SECOND) OF CONTRACTS § 223 (1981).

ment Second adds definitions of "usage of trade"[145] and "course of dealing,"[146] but "usage" is the operative term in the Restatement Second's provision that governs whether usage can add a term to a written contract.[147] Under the Restatement Second, as under the Restatement, neither the section on usage that supplements an agreement[148] nor the illustrations thereunder make any mention of "complete integration." Like Illustration 10 to Restatement Section 246, Illustration 7 to Restatement Second Section 222 seems indistinguishable from Problem 1: "A contracts to employ B for twenty days. In the kind of work to which the employment relates, in the place where both reside and the work is to be performed, a day's work is eight hours. Unless otherwise agreed, B's employment is for twenty, eight-hour days."[149] Therefore, in Problem 1, the court could determine that work begins at 8 a.m.

Judge Braucher sees little difference between the Restatement and Restatement Second with respect to use of usage to supplement a final written contract. He summarizes the Restatement Second provisions on "usage" as "reorganized and rephrased, but follows the original *Restatement* in substance."[150] The differences between the Restatement Second and Restatement provisions on contract interpretation are more significant as described below.

C. Parol Evidence and Contract Interpretation

Restatement Second Section 212 replaces Restatement Section 230. Under Restatement Second Section 212, "all relevant evidence including parol evidence is admissible on the issue of interpretation."[151] Unlike Restatement Section 230, Restatement Second Section 212 does not expressly require a finding of ambiguity before a court can consider "oral statements by the parties of what they intended."[152] Unlike Restatement Section 230, Restatement Second, Section 212 does not "take the objective viewpoint of a third person." Rather the focus of Restatement Sec-

145. RESTATEMENT (SECOND) OF CONTRACTS § 222 (1981).

146. RESTATEMENT (SECOND) OF CONTRACTS § 223 (1981).

147. RESTATEMENT (SECOND) OF CONTRACTS § 222 cmt. a (1981) and RESTATEMENT (SECOND) OF CONTRACTS § 223 cmt. a (1981) provide "[t]his Section . . . states a particular application of the rules stated in section 220 [Usage Relevant to Interpretation] and Section 221 [Usage Supplementing An Agreement]."

148. RESTATEMENT (SECOND) OF CONTRACTS § 221 (1981).

149. RESTATEMENT (SECOND) OF CONTRACTS § 222, cmt. c, illus. 7 (1981).

150. Robert Braucher, *supra* note 127, at 17 ("Topic 4, 'Scope as Affected by Usage,' is reorganized and rephrased, but follows the original RESTATEMENT in substance.").

151. Hadjiyannakis, *supra* note 79, at 59.

152. *See* RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. b (1981).

ond Section 212 is on the meanings given by the parties.[153] The "no ambiguity requirement" and "look to what the parties intended" provisions of Section 212 are supported by other provisions of the Restatement Second.[154]

For example, Section 214(c) provides that parol agreements can be considered to establish "the meaning of the writing,"[155] and under Section 201(1), a term in a written contract is to be given the meaning agreed to both parties; neither Section 201(1) nor Section 214 requires a finding of ambiguity.

The illustrations provided in Restatement Second Section 212 are even more helpful. Consider Illustration 3: "A orally agrees with B, a stockholder, that in transactions between them 'abracadabra' shall mean X Company. A sends a written order to B to buy 100 shares of 'abracadabra,' and B buys 100 shares of X Company. The parties are bound in accordance with the oral agreement." If a court applies Restatement Second Section 212, it could consider evidence that the parties agreed that "abracadabra" means "X Company." It could then consider evidence in Problem 2, and conclude that AB and DJ agreed that "daily" meant every day.

D. Extrinsic Evidence and Contract Interpretation

Restatement (Second) Section 220 is entitled "Usage Relevant to Interpretation."[156] Its only express limitation on a court's consideration of "usage" when interpreting the terms in a written contract, is the parties'

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153. RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. a (1981) ("Interpretation of contracts deals with the meaning given to language and other conduct by the parties. . . ."); *see also* Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 205 n.39 (1998) ("While the First Restatement excluded evidence of the parties' intent in favor of the judge's view of a reasonable third party, the Second Restatement . . . permits evidence of prior or contemporaneous agreements and negotiations to . . . explain the meaning of the writing."). *But c.f.* Posner, *supra* note 48, at 570 ("Corbin's mistake is that, in assuming that the purpose of contract law is to enforce the intention of the parties, he overlooks the fact that the parties, in addition to their ordinary contractual intentions, have intentions about how courts should evaluate their contract in case of a dispute.").

154. And by case law and commentary. *See* C.R. Anthony Co. v. Loretto Mall Partners, 1991-NMSC-070, ¶ 15, n.3, 112 N.M. 504, 817 P.2d 238 (1991) ("We hold today that in determining whether a term . . . is unclear, a court may hear evidence of . . . usage of trade . . . [i]n this regard, we join with the Restatement (Second) of Contracts. . . ."); BURTON, *supra* note 3, at 139 ("The best reading is that the Restatement (Second) does not require a finding of ambiguity. . . .").

155. RESTATEMENT (SECOND) OF CONTRACTS § 214(c) (1981).

156. RESTATEMENT (SECOND) OF CONTRACTS § 220 (1981).

"know[ing] or [having] reason to know" of the usage.[157] As Comment (d) explains, "[l]anguage and conduct are in general given meaning by usage . . . there is no requirement that an ambiguity be shown before usage can be shown, and no prohibition against showing that language . . . [can] have a different meaning in light of usage from the meaning they might have apart from the usage."[158] The Restatement (Second) contains an illustration that is instructive to our Problem 2. The written contract provides: "A will buy and B will sell the rabbits at '60 £ per thousand.' The parties contract with reference to a local usage that 1,000 rabbits means 100 dozen. The usage is a part of the contract."[159] If a court applies the Restatement (Second) to this illustration, it could look to usage and conclude that "1,000" means "1,200." Similarly, with respect to Problem 2, the same court could then look to usage and conclude that "daily" meant Monday through Friday.

V. LEARNING FROM THE RESTATEMENT FIRST AND THE RESTATEMENT SECOND

The application of the Restatement and the Restatement Second to our two problems highlights important differences in how these two sources of law treat parol evidence, extrinsic evidence, the parol evidence rule and contract interpretation. Law professors sometimes refer to the Restatement's provisions on parol evidence, extrinsic evidence, the parol evidence rule and contract interpretation as "objective,"[160] and the comparable Restatement Second's provisions as "subjective."[161] Other law professors have referred to the Restatement's provisions as Willistonian, and the Restatement Second's provisions as Corbinian.[162] Law professors seem to refer to these sections of the Restatement and Restatement Second more than lawyers or judges which we think is regrettable. We urge

157. *Id.* cmt. b.

158. *Id.* cmt. d.

159. *Id.* illus. 8.

160. BURTON, *supra* note 3 at 26.

161. *See* GORDON D. SCHABER & CLAUDE D. ROHWER, CONTRACTS IN A NUTSHELL 73 (West Publishing Co., 3d ed. 1990); Shmuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. MICH. J.L. REFORM 747, 777 (2009).

162. *See* BIX, *supra* note 52 at 61 ("Willistonian approach . . . with the First Restatement . . . Corbinian approach . . . incorporated in the Second Restatement"); Dennis M. Patterson, *A Fable From the Seventh Circuit: Frank Easterbrook on Good Faith*, 76 IOWA L. REV. 503, 518–19 (1991) ("differences between the Willistonian (First Restatement) and Corbinian (Second Restatement) approaches to contract interpretation").

courts to make greater use of the provisions and policies of the Restatement.

As noted earlier, the questions raised by our two problems are questions that are regularly raised in reported cases. Too often in resolving these questions, courts base their decisions on the use and misuse of the terms "extrinsic evidence," "parol evidence," and the "parol evidence rule," rather than the relevant provisions and policies of the Restatement or the Restatement Second.[163] Nonetheless, both the Restatement and the Restatement Second can be instructive to lawyers, judges, and law students[164] in confronting questions of contract supplementation or contract interpretation. Three[165] important lessons can be drawn:

The first lesson from the Restatements relates to different questions. Disputes between the parties to a final written contract over the meaning of a term in that contract raise questions that are different from those raised by disputes over the addition of a term to the final written contract. In Problem 2, our hypothetical on contract interpretation, the threshold question is whether the word "daily" is ambiguous.[166] Other questions that flow from the main question are: how does a court determine whether the term "daily" is "ambiguous," and if so, what does the term "daily" mean?

Problem 1, our hypothetical on contract supplementation, raises different questions from that of Problem 2.[167] When one party proffers evidence that prior agreements of the parties included a term missing from

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163. For example, a December 30, 2012 Westlaw search of the "all cases" databases shows that 408 opinions mentioned the "parol evidence rule." Only 13 of the 408 opinions even mentioned the RESTATEMENT or the RESTATEMENT (SECOND).

164. *See, e.g.*, Roberta Cooper Ramo, *The President's Letter: A Farewell on the Horizon*, 35 THE ALI REPORTER 1, 2 (2012) ("I met with an NYU law-school class of second- and third-year students. . . . When I asked how many of them used the Restatements . . . everyone in the class raised a hand. . . . I think it is also a reflection of the need these days for law students to understand the law in more practical ways as they face a world that expects more immediate legal competence from new graduates. (Or, of course, they may have thought that part of their grade depended upon such an amiable result.)").

165. Remember the "rule of threes"? *See* WHAT IS A TRICOLON?, *supra* note 5.

166. Some would argue that this is not the threshold question because all words are ambiguous. Leonard R. Jaffee, *The Troubles With Law and Economics*, 20 HOFSTRA L. REV. 777 n.6 (1992) ("Every good poet knows . . . [a]ll words, even those of just one meaning, are ambiguous, because all symbols depend on the uncertain designs of their makers and circumstances and the uncertain perceptions of both sayers and receivers.").

167. Kniffin, *supra* note 30, at 92 ("When interpreting a contract, a court therefore has no reason to ask the set of questions designed to discover whether the parties intended to add a separate term to their contract, under the parol evidence rule.").

the final written contract, there is no threshold question of whether a term in the written contract is ambiguous. Indeed, the problem arises because there is no relevant term in the written contract. The threshold question in Problem 1 is whether the writing is the final and complete agreement between AB and DJ. If the writing is the final agreement, but not the complete agreement, and the evidence of the additional terms is an alleged earlier agreement, then other relevant questions arise. These include: (1) was there in fact such an earlier agreement? (2) did the final writing discharge the earlier agreement even though the two are not inconsistent? and (3) would the court prefer to make that earlier agreement a part of the contract, or would it look to trade usage or fashion its own term,[168] or would it leave a gap in the contract?

The questions triggered by the evidence of usage are different from the questions raised by the evidence of an earlier agreement. If in Problem 2, the writing is the final agreement but not the complete agreement, and the evidence of the additional term is an alleged custom, then the relevant questions include: (1) was there in fact such a custom? (2) did AB and DJ know or have reason to know of the custom? and (3) is making that trade custom a term of the contract preferable to the court's fashioning its own term or leaving a gap in that contract?

The second lesson to be drawn from the Restatements is balancing text with context. The Restatement Second provides some different answers to the above questions from those provided by Restatement. The answers under both sources, however, require a consideration and balancing of the relative importance of text and context.[169] The Restatement emphasizes text, giving greater weight to the written text when determining the threshold questions of whether the written contract is the complete and final agreement of the parties, and whether a term in that written contract is ambiguous, while the Restatement Second looks more into context. Some law review articles provide policy arguments that favor a Restatement-like approach that gives greater weight to text.[170]

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168. Posner, *supra* note 48, at 570 ("The parol evidence rule excludes extrinsic evidence from consideration, while allowing the judge to rely on his or her personal knowledge, even though the former, more so than the latter, would enable the court to determine the parties' intentions.").

169. The Chief Justice of the New Wales Supreme Court, J. Spigelman, recently compared the relative roles of text and context in contract interpretation in Australia, China, Hong Kong, India, Malaysia, New Zealand and United States. James Spigelman, *Contractual Interpretation: A Comparative Perspective*, 85 AUSTRALIAN LAW JOURNAL 412 (2011).

170. Linzer, *supra* note 2. *See also* William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WIS. L. REV. 931, 947–53 (2001) (substituting "autonomy" and "efficiency" for text and context).

These arguments tend to use the words "certainty" and "efficiency" and "pragmatism."[171] Other law review articles provide policy arguments that favor a Restatement Second-like approach that gives greater weight to context.[172] These articles tend to use the words "fairness" and "accuracy" and "principled."[173]

Of more interest are the law review articles that favor different approaches for different kinds of contracts.[174] For example, Professor Eric Posner argues that in "Ordinary Consumer Contracts," "[t]he court could sensibly admit extrinsic evidence that benefits buyers while excluding extrinsic evidence that benefits sellers, on the ground that sellers can put relevant promises in writing more cheaply than buyers"[175] while in "Complex Business Contracts" "[b]ecause of the large number of statements made during preliminary negotiations, the number of statements outside the contact is likely to be high. As a result of the idiosyncrasy of the terms, erroneous judicial enforcement of some of these statements is likely."[176] It is difficult to find an express consideration of these policy arguments in reported cases. Instead, courts far too often simply attribute rulings to the parol evidence rule or the plain meaning rule.[177]

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171. In this context, "certainty" and "efficiency" and "pragmatism" are "buzz words" for the proposition that the more that arbitrators and judges involved in dispute resolution refer to matters other than text, the less certain the outcome and the more expensive the process. *See* Linzer, *supra* note 2. *See also* Whitford, *supra* note 170.

172. Mooney, *supra* note 36.

173. "Fairness" or "accuracy" or "principled" in this context values determining the actual intention of the actual parties. *See* Linzer, *supra* note 2, at 838. *But cf.* Posner, *supra* note 48, at 570 ("[P]arties in addition in addition to their ordinary contractual intentions have intentions about how courts should evaluate their contract in case of a dispute.").

174. Professor Oman reminds us that the leading nineteenth century treatise on contracts was organized around types of contracts (e.g., contracts with parish officers, contracts for the purchase of real estate) rather than around general contract law concepts. Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L. J. 77, 80–81 (2009). *See also* Joseph Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal, and Upon the Usual Defenses to Actions Theron* (London, S. Sweet 1826). More recently, in 2012, the American Law Institute began work on a new restatement on contracts that will be limited to consumer contracts. *Current Projects: Restatement Third, The Law of Consumer Contracts*, ali.org, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=25 (Jan. 18, 2013).

175. Posner, *supra* note 48, at 554.

176. *Id.* at 556.

177. *E.g.*, Whitesell Corp. v. Whirlpool Corp., 496 F. App'x 551 (6th Cir. 2012) ("According to the parol evidence rule, a court may not use extrinsic evidence to interpret contract language that is unambiguous."); Ruiz v. United States, 2012 WL

The third and final lesson calls for the use of clear and simple vocabulary. The terms "parol evidence" and "extrinsic evidence" and "parol evidence rule" are neither essential nor helpful to answer questions about the terms of a written contract. These terms neither appear in the text of the Restatement nor in the text of the Restatement Second. Clear and simple language was a major objective of the American Law Institute.[178]

The Restatement Second's phrase "prior agreements" is more transparent than the term "parol evidence." It is clear that "prior agreements" includes both oral agreements and written agreements and nothing else.

Similarly, the Restatement and Restatement Second's use of the term "usage" avoids the confusion that results from the courts' use of the term "extrinsic evidence," or worse, "parol evidence." It is clear that "usage" does not include prior agreements of the parties, and therefore questions on whether usage fills a gap in a written contract or is helpful in giving meaning to words in a written contract should not be based on the parol evidence rule—a rule that is based on the proposition that a writing supplants earlier agreements of the parties.

Finally, both the Restatement and the Restatement Second limit the use of the term "parol evidence rule" to a parenthetical in section headings. Numerous professors have suggested that the parol evidence rule be renamed as "'contract supplementation' or 'contract variance' rule"[179] or "Prior Negotiation Rule"[180] or the "written contract exclusionary rule."[181]

As Shakespeare said, "[t]hat which we call a rose / By any other name would smell as sweet."[182] To question the use of a single rule to

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124442 (S.D. Cal. 2012) ("Under the parol evidence rule a court . . . does not look to extrinsic evidence to interpret the terms of an unambiguous written instrument.").

178. *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law*, The American Law Institute 50th Anniversary 29 (1973) (addressing "the importance of expressing the [R]estatement in clear and simple English, avoiding so far as possible, the use of technical and unusual terms[,]" and that "the [R]estatement should be understandable by an intelligent, educated person who is not a trained lawyer.").

179. Kniffin, *supra* note 30, at 102.

180. Burnham, *supra* note 1, at 97.

181. Daniel, *supra* note 26, at 261.

182. William Shakespeare, Romeo and Juliet, act II, sc. ii. ("What's in a name? That which we call a rose / By any other name would smell as sweet."). The senior author opposed the use of this old saying as trite until it was pointed out that both Harvard and Columbia publications included it in 2012, albeit in "secondary" Harvard and Columbia journals. *See* Gary J. Simson, *Religion By Any Other Name? Prohibitions on Same Sex Marriage and the Limits of the Establishment Clause*, 23 COLUM. J. GENDER & L. 132 (2012); Robin West, *A Marriage Is a Marriage Is a Marriage: The Limits of Perry v. Brown*, 125 HARV. L. REV. F. 47 (2012). And, even better, Nucky Thompson used it in the first season of *Boardwalk Empire*, *Quotes:*

answer the various issues raised by our two problems is more important than to question the name of the rule that resolves all issues raised by the parties who reduce an agreement to writing. The inquiry should focus on balancing the weight to be given to text with that to be given to context.

VI. CONCLUSION

From the beginning, the Restatements have been a blend of what the law is and what the law should be.[183] The Restatement of Contracts' Chapter 9, "The Scope and Meaning of Contracts" is more a reflection of what the Reporter thought courts should be doing than what courts were actually doing in 1932. In substituting "Reporters" for "Reporter," the same is true of the corresponding provisions of the Restatement Second, and of actions of courts in 1981. The same is also true of courts today. Both the Restatement and the Restatement Second suggest that courts should answer questions about adding terms to written contracts or interpreting terms in a written contract by balancing the weight given to text with the weight given to context. The Restatement and the Restatement Second disagree on principled bases about where this balance should be drawn.

Instead of the reasoned analysis suggested by the Restatement and the Restatement Second, courts too often use the terms "parol evidence," "extrinsic evidence," and the "parol evidence rule" to "explain" decisions and adopt an"[a]nalysis by epithet."[184] A court's focus on labels rather than on reasoning not only impedes law students' understanding of what the law is and how to answer questions on an exam, but also lawyers' understanding of how to advise clients and how to present arguments to arbitrators and judges. While we do not recommend that courts choose

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Boardwalk Empire, tvtropes.org, http://tvtropes.org/pmwiki/pmwiki.php/Quotes/BoardwalkEmpire (January 18, 2013).

183. Promissory estoppel and third-party beneficiary are probably the two most obvious examples of this mixture. *See generally* Joel M. Ngugi, *Promissory Estoppel: The Legal History of an Ideal Legal Transplant*, 41 U. RICH. L. REV. 425 (2007); Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109 (1985).

184. *See* Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 515 (2001) ("[F]all back on vague labels such as 'aler ego' or 'lack of separation' which has been variously characterized as analysis by epithet and reasoning by perjorative."). Great phrase. Professor Bainbridge likes it so much that he used it again in three later articles. *See also* Stephen M. Bainbridge, *How Do Judges Maximize?*, 51 EMORY L. J. 83, 148 (2002); Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 U. ILL. L. REV. 77, 98 (2005); Stephen M. Bainbridge, *The Bishop's Alter Ego: Enterprise Liability and the Catholic Priest Sex Abuse Scandal*, 46 J. CATH. LEGAL STUD. 65, 97 (2007).

the Restatement over the Restatement Second or vice versa, we argue that courts should increasingly look to the balancing of text and context that is common to both of these sources of law.