



2009

## Intent to Contract

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### Intent to Contract

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## INTENT TO CONTRACT

*Gregory Klass\**

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THERE is a remarkable difference between the black-letter contract laws of England and the United States. In England, and in most civil-law countries, the existence of a contract depends, at least in theory, on the parties' intent to be bound. The rule dates to the Court of Appeals' 1919 refusal to enforce a husband's promise to his wife, on the grounds that "the parties did not intend that [the agreement] should be attended by legal consequences."<sup>1</sup> Section 21 of the Second Restatement of Contracts adopts something like the opposite rule: "Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract."<sup>2</sup> In neither England nor the United States is an intent to be

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\* Associate Professor, Georgetown University Law Center. This Article has greatly benefited from several presentations to my colleagues at Georgetown and at SMU Dedman School of Law, the University of Georgia Law School, and Yale Law School. I also thank Kerry Abrams, Chris Elmendorf, Brandon Garrett, Jed Purdy, Christian Turner, Robin West, and Eyal Zamir for comments on earlier drafts, and Jason Daniels, Conrad Deitrick, Allison Meredith, and Gregory Zlotnick for excellent research assistance.

<sup>1</sup> *Balfour v. Balfour* [1919] 2 K.B. 571, 579.

<sup>2</sup> Restatement (Second) of Contracts § 21 (1981).

legally bound sufficient to create a contract. An agreement must, for example, be supported by consideration. But in England, such an intent is said to be necessary, while the Second Restatement says that it is not.<sup>3</sup>

A closer look, however, reveals a more complex picture. For example, the enforcement of a preliminary agreement in the United States “depends on whether [the parties] intend to be bound.”<sup>4</sup> In Pennsylvania, a written gratuitous promise is enforceable if it “contains an additional express statement, in any form of language, that the signer intends to be legally bound.”<sup>5</sup> The comments to Section 21 suggest that in the case of domestic agreements and social arrangements, “some unusual manifestation of intention is necessary to create a contract.”<sup>6</sup> And the Minnesota Supreme Court has refused to enforce a reporter’s confidentiality promise to a source because it was “not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract.”<sup>7</sup> Furthermore, it turns out that England’s more general intent requirement is not so meaningful in practice. A presumption that commercial agreements are intended to be legally binding, together with other evidentiary rules, means that, as P.S. Atiyah observes, in most cases it is “more realistic to say that no positive intention to enter into legal relations needs to be shown.”<sup>8</sup> These differences between and within the U.S. and English laws of contract are all the more remarkable because they have been so little remarked upon. The divergence between the black-letter English and Restatement rules is among the starkest differences between the jurisdictions’ laws of

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<sup>3</sup> While § 21 accurately represents the rule in almost all U.S. jurisdictions, the United States is a signatory to the United Nations Convention on Contracts for the International Sale of Goods (CISG). Article 14(1) of the CISG establishes something like the English rule for contracts for the international sale of goods: “A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it . . . indicates the intention of the offeror to be bound in case of acceptance.” United Nations Convention on Contracts for the International Sale of Goods art. 14, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1980), 1489 U.N.T.S. 3.

<sup>4</sup> E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 *Colum. L. Rev.* 217, 253 (1987).

<sup>5</sup> 33 Pa. Cons. Stat. Ann. § 6 (1997).

<sup>6</sup> Restatement (Second) of Contracts § 21 cmt. c (1981).

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

<sup>8</sup> P.S. Atiyah, *An Introduction to the Law of Contract* 153 (5th ed. 1995).

contract. Yet scholars on this side of the Atlantic have paid little attention to Section 21, or to the supposed exceptions to it. This neglect is surprising not only because of the doctrinal tensions—the difference between the English and Restatement rules, and between Section 21 and exceptions to it—but also because the parties’ contractual intent is of obvious theoretical interest. It is much easier to justify holding a person legally liable for the violation of a legal duty she chose to undertake than it is for one that she incurred by accident. Randy Barnett goes so far as to argue that liability for breach of contract is justified only if the parties manifested an intent to be bound.<sup>9</sup> Thomas Scanlon argues that expectation damages are justified only when the parties had such an intent, and that otherwise reliance is the right measure.<sup>10</sup> And Dori Kimel maintains that the English rule is necessary to protect from legal interference the special relationships morally binding promises create.<sup>11</sup> The parties’ contractual intent should also be highly relevant from the perspective of economic theory, which for the past thirty years has been the dominant mode of analysis among contract scholars in the United States. Whether or not the parties intended legal liability affects the incentives the law creates, for legal incentives have traction only on parties who expect legal liability. And the parties’ intent to be legally bound is strong evidence of the efficiency of legal enforcement, since informed parties will choose enforcement only when it creates value for them.<sup>12</sup>

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<sup>9</sup> Consider, for example, the following claim of Barnett’s:

In a system of entitlements where manifested rights transfers are what justify the legal enforcement of agreements, any such manifestation necessarily implies that one intends to be “legally bound,” to adhere to one’s commitment. Therefore, the phrase “a manifestation of an intention to be legally bound” neatly captures what a court should seek to find before holding that a contractual obligation has been created.

Randy E. Barnett, *A Consent Theory of Contract*, 86 *Colum. L. Rev.* 269, 304 (1986) (footnotes omitted); see also Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 *Va. L. Rev.* 821, 861 (1992) [hereinafter Barnett, *Sound of Silence*] (“To make a contract according to this approach . . . a party must explicitly or implicitly manifest assent to be legally bound.”).

<sup>10</sup> T.M. Scanlon, *Promises and Contracts*, in *The Theory of Contract: New Essays* 86, 104 (P. Benson ed., 2001).

<sup>11</sup> Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* 136–39 (2003).

<sup>12</sup> Eric Posner propounds a version of the second claim:

This Article examines various common-law rules that condition the enforcement of an agreement on the parties' intent to contract. It treats the question of contractual intent primarily as a design problem. Assuming *arguendo* that the law sometimes wants to condition the legal enforcement of an agreement on the parties' manifest intent that it be enforceable or nonenforceable, what rules should the law use to do so? Rules for determining whether the parties, at the time of formation, intended to contract are rules of interpretation, and I recommend evaluating them using the familiar theory of contractual default and opt-out rules described by Ian Ayres and Robert Gertner.<sup>13</sup> That framework allows me to identify four general approaches to interpreting the parties' intent to contract. Each is defined by, first, whether it adopts an enforcement or nonenforcement interpretive default and, second, whether it requires parties with non-default intentions to state their intentions expressly or instructs courts to determine their intent by looking at all the available evidence.

When evaluating the relative advantages and disadvantages of these interpretive approaches, there are several special considerations to take into account. The first is the asymmetry of the default question when the parties' intent is among the conditions of contractual validity. In some cases, parties do not intend to contract

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

Economics, then, implies that courts should enforce promises when parties want their promises to be enforceable, and not otherwise.

Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 *Yale L.J.* 829, 849–50 (2003) (footnotes omitted); see also Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 *U. Pa. L. Rev.* 1765, 1788–95 (1996); Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 *Wis. L. Rev.* 943, 951–58.

<sup>13</sup> Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *Yale L.J.* 87 (1989) [hereinafter Ayres & Gertner, *Filling Gaps*]; Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 *Stan. L. Rev.* 1591 (1999) [hereinafter Ayres & Gertner, *Majoritarian vs. Minoritarian*].

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not because they intend not to contract, but because they do not have a preference one way or the other or because the possibility of legal enforcement has not occurred to them. In such circumstances, the parties do not have the knowledge necessary to opt out of a legal default purposively. This fact is a problem if the goal is to impose liability only on parties who intend it, for it follows that an enforcement default with an express opt-out rule will be systematically stickier than a nonenforcement default. In other words, fewer parties who would, on balance, prefer the non-default interpretation of their agreement will get it. The second point concerns a special advantage of sticky defaults in determining the conditions of contractual validity. This advantage is premised on the idea that there is sometimes a social interest in imposing duties on parties for reasons other than their antecedent choice or preference. Sticky defaults can serve that interest. Put another way, sticky enforcement defaults serve the duty-imposing function of contract law, while at the same time recognizing and enabling the purposive use of contract as a legal power. The last point concerns the costs of expressly opting-out of either an enforcement or a nonenforcement default. These include not only the out-of-pocket costs usually associated with contracting around a default, but in many transactions relational costs as well. Interpretive rules that require parties who want, or who do not want, legal liability expressly to say so can interfere with and erode extralegal forms of trust that otherwise create value in transactions.

The Article applies this analytic framework to evaluate the best rule for interpreting the parties' contractual intent in four types of transactions: gratuitous promises, preliminary agreements, spousal agreements, and reporters' promises of confidentiality. To the extent that we want to condition the enforcement of such agreements on the parties' intent to contract, the analysis recommends different rules for the different transaction types. I criticize, for example, Alan Schwartz and Robert Scott's proposed efficiency-based test for the enforcement of preliminary agreements, and suggest instead a requirement that parties who want such agreements to be legally binding say so. With respect to agreements between spouses, on the contrary, I take recent feminist critiques to recommend an enforcement default, though I argue that the relational costs of expressly opting out of enforcement recommend examin-

ing the totality of the circumstances for evidence that the parties intended no legal enforcement. The discussion of these transaction types illuminates the special concerns for the law each raises. It also demonstrates the value of the proposed analytic framework.

From the perspective of contract theory, the analysis shows how different rules for interpreting the parties' intent with respect to legal liability strike different balances between the sometimes conflicting reasons the law has for holding promisors liable for their breaches. I have argued elsewhere that a distinctive feature of contract law is that it is at the same time a power-conferring and a duty-imposing rule.<sup>14</sup> Rules for interpreting the parties' contractual intent are tools for balancing these different, sometimes conflicting functions. This provides the material for a deeper understanding of the generic rule in Section 21, which holds that the parties' contractual intent is not a condition of their legal liability, but also allows that a manifest intent not to be bound can prevent the formation of a contract.

This Article focuses on attempts in the United States and England to condition contract enforcement on the parties' initial intent to contract. As I note in the next Part, intent-to-contract requirements are a common feature of civil-law systems. It would be extremely interesting also to examine judicial application of these rules. There is no reason to assume that the experiences of common-law courts, with their adversarial procedures, lay juries, and generalist judges, is the same as that of courts in other legal systems. It may well be that intent-to-contract requirements work differently or serve different purposes in those contexts. But that is not the subject of this Article, whose claims and conclusions relate only to the common law of contract.

Finally, a word about terminology. This Article is about the legal relevance of parties' intentions with respect to legal enforcement. It assumes that a person might intend to enter into an agreement without intending that the agreement be legally enforceable—that she might intend to undertake a moral or personal duty to perform without intending to undertake a legal duty to do so. This Article uses several different formulations to describe an intent to under-

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<sup>14</sup> Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 *N.Y.U. L. Rev.* 1726 (2008).



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take the legal duty, including “intent to be bound,” “intent to contract,” and “contractual intent.” As I note in the next Part, in some contexts these phrases can be interpreted only as an intent to agree, or whatever intention the law requires to make a contract. In this Article, however, they denote the parties’ intent to be legally bound, or that their agreement be legally enforceable.

Part I of the Article summarizes the U.S. and English black-letter rules on the relevance of the parties’ contractual intent. Part II describes the English experience with an intent-to-contract requirement, which largely consists of its practical erosion. That experience suggests some of the drawbacks of an all-things-considered test for the parties’ contractual intent. Part III constructs a general analytic framework for evaluating rules that condition contractual validity on the parties’ intent with respect to legal liability. Part IV applies that framework to four transaction types: gratuitous promises, preliminary agreements, agreements between spouses, and reporters’ confidentiality promises. The Conclusion suggests a few implications of the analysis for the best interpretation of the Restatement’s generic rule for intent to contract.

#### I. COMMON-LAW RULES ON INTENT TO CONTRACT

Continental civil codes include among the conditions of contractual validity a requirement that, at the time of formation, the parties intend to be legally bound. The Commission on European Contract Law restates the rule: “In order to be bound by a contract a party must have an intention to be legally bound.”<sup>15</sup> In the German and Austrian codes, one finds the condition in the definition of “contract” as a juristic act, achieved by a party’s declaration of her intent to be bound (*Willenserklärung*), which the law effectuates because it is so intended.<sup>16</sup> French law holds that a person is bound in contract only if it is her “real” intention to be bound, though a party who appears to have intended to contract but can

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<sup>15</sup>The Commission of European Contract Law, *Principles of European Contract Law* art. 2:101 cmt. B (Ole Lando & Hugh Beale eds., 2000). See generally *id.* at arts. 2:101, 2:102 and accompanying notes (discussing European sources of law).

<sup>16</sup>*Id.* at 139 n.2.

show that she did not might still be liable for damages in tort.<sup>17</sup> Belgian authorities are divided as to whether a real or apparent intent to be bound is required, but appear to agree that it must be one or the other.<sup>18</sup>

The black-letter rules of the common law are less unified. This Article's primary focus is U.S. contract law, and so it begins with Section 21 of the Second Restatement, which I will refer to as the "Restatement rule": "Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract."<sup>19</sup> It is a familiar fact that the parties' intent to contract does not suffice under the common law to create a contract. A lack of consideration or of a required writing, for example, might each defeat the parties' intent to enter into an enforceable agreement. The first clause of Section 21 says that the parties' manifest intent to contract is also not a necessary condition of enforcement.<sup>20</sup>

The second clause of Section 21 says that a manifest intent not to be bound can prevent the formation of a contract. On its face, then, the difference between the continental rules and the Restatement rule should make a difference only in the no-intent case. The rules agree that an agreement is enforceable where there is a manifest intent to be bound and that it is unenforceable when there is a manifest intent not to be bound. They differ on those cases in which one or both parties manifest no intent with respect to legal liability, neither an intent to be bound, nor an intent not to be bound. According to the continental rules, such agreements are not to be enforced; according to the Restatement rule, they are. Thus the comments to Section 21 explain that even a mutually mistaken

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<sup>17</sup> *Id.* at 146 n.2(b).

<sup>18</sup> *Id.* at n.2(c).

<sup>19</sup> Restatement (Second) of Contracts § 21 (1981). Or as one court observed in a rare judicial articulation of the rule: "It is not necessary that the parties are conscious of the legal relationship which their words or acts give rise to, but it is essential that the acts manifesting assent shall be done intentionally." *Sulzbach v. Town of Jefferson*, 155 N.W.2d 921, 923 (S.D. 1968).

<sup>20</sup> Section 2-313(2) of the U.C.C. similarly provides that it "is not necessary to the creation of an express warranty that the seller use formal words such as 'warranty' or 'guarantee' or that he have a specific intention to make a warranty."

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belief that an agreement is not legally binding will not prevent the creation of a contract:

A orally promises to sell B a book in return for B's promise to pay \$5. A and B both think such promises are not binding unless in writing. Nevertheless there is a contract, unless one of them intends not to be legally bound and the other knows or has reason to know of that intention.<sup>21</sup>

Or as Corbin suggests:

There seems to be no serious doubt that a mutual agreement to trade a horse for a cow would be an enforceable contract, even though it is made by two ignorant persons who never heard of a legal relation and who do not know that society offers any kind of a remedy for the enforcement of such an agreement.<sup>22</sup>

Parties to an agreement might have no intent one way or the other with respect to enforcement because they have not considered the legal consequences of their agreement, because they are unsure whether they want enforcement, or because they mistakenly believe their agreement is unenforceable on other grounds. Alternatively, no matter what the parties' actual intent, it might not be manifest in their behavior. The Restatement rule says that in all of these cases, if the parties' agreement satisfies the other conditions of contractual validity, they have a contract.

The origin of the Restatement rule is connected to the objective theory of contract. The earliest modern articulation of the rule appears in the first edition of Williston's *Law of Contracts*.<sup>23</sup> Pollack's

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<sup>21</sup> Restatement (Second) of Contracts § 21, cmt. a, illus. 2 (1981).

<sup>22</sup> 1 Arthur Linton Corbin, *Corbin on Contracts* § 34, at 135 (1st ed. 1950).

<sup>23</sup> 1 Samuel Williston, *The Law of Contracts* § 21 (1st ed. 1920) [hereinafter Williston 1920 Edition]. Neither Williston's treatise nor the First Restatement cites a clear judicial authority for the rule. The only case Williston cites that is remotely on point is *Davison v. Holden*, 10 A. 515 (Conn. 1887), cited in 1 Williston 1920 Edition § 21, at 22 n.12. But *Davison* is more about corporations and agency law than contracts, holding that a group of individuals who had informally joined together to purchase wholesale meat were individually liable to the sellers for payment, despite not having intended to be so liable. It is worth noting, however, that one of the cases Williston cites for the opt-out rule, *Wellington v. Apthorp*, elsewhere suggests that an intent to be bound is an element of legal liability. 13 N.E. 10, 13 (Mass. 1887), cited in 1 Williston 1920 Edition § 21, at 23 n.15 (stating that a contract existed only if "it appears there was a promise by the defendant's testator sufficiently definite to be enforced, and

and Anson's earlier contract treatises had both adopted Savigny's will theory of contract, which conditioned the formation of a contract on an act of mental assent.<sup>24</sup> Williston's treatise introduces the rule in a passage that also rejects the subjective theory of contract.<sup>25</sup> And in both Williston's early drafts of the First Restatement and in the final approved version, the rule appears alongside the objective theory of assent.<sup>26</sup>

While Williston's campaign against the subjective theory is part of the history of the Restatement rule, the rule is not a mere corollary of the newer objective approach. Section 21 rejects as a condition of contractual validity not only the parties' "real . . . intention that a promise be legally binding," but also their "apparent intention" to be bound. This objective prong of the Restatement rule must find its support elsewhere.<sup>27</sup>

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made with the understanding and intention that she would be legally bound thereby").

<sup>24</sup> Williston's named target in the first edition is Pollock, whose 1911 treatise argued that social arrangements (for example, an appointment to have dinner) are not contracts "[o]nly because no legal bond was intended by the parties." Frederick Pollock, *Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England* 4 n.c (8th ed. 1911). A similar rule appears in the 1906 edition of Anson's *English Law of Contract*. William R. Anson, *Principles of the English Law of Contract: And of Agency in Its Relation to Contract* 2, 11 (11th ed. 1906).

<sup>25</sup> 1 Williston 1920 Edition, *supra* note 23 § 21, at 21. Williston's argument in § 21 of the first edition regularly lapses into arguments based on the objective theory, and even cites *Hotchkiss v. National City Bank of New York*, the source of Learned Hand's famous "twenty bishops" pronouncement, for the proposition that "the law, not the parties, fixes the requirements of a legal obligation." *Id.* at 22 n.13 (citing *Hotchkiss v. Nat. City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911)); see also *id.* at 23 n.18 (quoting objective theory expressed in *Hoggard v. Dickerson*, 165 S.W. 1135 (Mo. App. 1914)).

<sup>26</sup> Thus the First Restatement reads:

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

Restatement of Contracts § 20 (1932) (emphasis added). The text of this section is nearly identical to that of the earliest available of Williston's tentative drafts. Restatement of Contracts § 20 (Tentative Draft, Mar. 31, 1925).

<sup>27</sup> Williston was hardly oblivious to such details. The first edition of his treatise contains, in addition to the rejection of the subjective theory, at least three other arguments for the Restatement rule: where such a rule is in place, "the intent is frequently fictitiously assumed"; an intent-to-contract requirement is not necessary to prevent

The logical gap between the Restatement rule and the objective theory is illustrated by the very different approach of the black-letter law in England. One year before Williston published the first edition of his treatise, the King's Bench decided *Balfour v. Balfour*, holding that a husband's promise to his wife to pay her £30 per month while he was abroad, though supported by consideration, did not result in a contract "because the parties did not intend that [the agreement] should be attended by legal consequences."<sup>28</sup> *Balfour*'s reasoning and its handling of the facts have prompted a good deal of criticism. It is often argued, for example, that the promise was without consideration.<sup>29</sup> Nonetheless, English courts and most English commentators have consistently read *Balfour* to require the opposite of the Restatement approach, which I will refer to as the "English rule": "For a contract to come into existence, there must be . . . an intention to create legal relations."<sup>30</sup> Subsequent decisions have held that the test is an objective one. As a recent edition of Anson explains, "[i]t may be that the promisor never anticipated that the promise would give rise to any legal obligation, but if a reasonable person would consider that there was an intention

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the enforcement of social or domestic arrangements; and intent-to-contract requirements run counter to the principles of the common law of contract, as embodied in the doctrine of consideration. 1 Williston 1920 Edition, *supra* note 23 § 21, at 22–24. I discuss the first of these arguments in Part II, the second in Section IV.C, and the third in the Conclusion.

<sup>28</sup> *Balfour v. Balfour* [1919] 2 K.B. 571, 579. Williston discusses *Balfour* in the second edition of his treatise. 1 Samuel Williston, *A Treatise on the Law of Contracts* § 21, at 38 n.14 (2d ed. 1936) [hereinafter Williston 1936 Edition].

<sup>29</sup> See, e.g., B.A. Hepple, *Intention to Create Legal Relations*, 28 *Camb. L.J.* 122, 128–29 (1970); Raphael Tuck, *Intent to Contract and Mutuality of Assent*, 21 *Can. Bar Rev.* 123, 124–25 (1943); J. Unger, *Intent to Create Legal Relations, Mutuality and Consideration*, 19 *Mod. L. Rev.* 96, 98 (1956).

<sup>30</sup> *Baird Textile Holdings Ltd. v. Marks & Spencer plc* [2001] EWCA (Civ) 274, [59] (Eng.); see also 1 *Chitty on Contracts* 198 (H.G. Beale ed., 29th ed. 2004) ("[I]t has been held that an agreement, though supported by consideration, was not binding as a contract because it was made without any intention of creating legal relations." (footnotes omitted)); J. Beatson, *Anson's Law of Contract* 69 (28th ed. 2002) ("[I]t is now established that an agreement will not constitute a binding contract unless it is one which can reasonably be regarded as having been made in contemplation of legal consequences."); M.P. Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* 121 (14th ed. 2001) ("[I]n addition to the phenomenon of agreement and the presence of consideration, a third contractual element is required—the intention of the parties to create legal relations."); Guenter Treitel, *The Law of Contract* 149 (10th ed. 1999) ("An agreement, though supported by consideration, is not binding as a contract if it was made without any intention of creating legal relations." (footnote omitted)).

so to contract, then the promisor will be bound.”<sup>31</sup> Where the Restatement unequivocally states that a manifest intent to be bound is not necessary for contractual liability, English courts and treatises regularly say that it is.

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

There are, however, exceptions in U.S. law. A number of black-letter rules stipulate or suggest that in some cases a court should look to the parties’ manifest intent.

The most widely discussed of these is the rule for preliminary agreements. In a preliminary agreement, the parties have reached agreement on some but not all material terms, expect to continue negotiating, and fill in the remaining open terms, but something happens to prevent the conclusion of the agreement.<sup>32</sup> The question is then whether the partial agreement has created any legal obligations.<sup>33</sup> It is generally accepted that preliminary agreements should

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<sup>31</sup> Beatson, *supra* note 30, at 71; see also Chitty on Contracts, *supra* note 30, at 200 (“In deciding issues of contractual intention, the courts normally apply an objective test . . . . The objective test is, however, here (as elsewhere) subject to the limitation that it does not apply in favour of a party who knows the truth.” (footnotes omitted)); Treitel, *supra* note 30, at 158 (“The test of contractual intention is normally an objective one, so that where, for example, an agreement for the sale of a house is *not* ‘subject to contract,’ both parties are likely to be bound even though one of them subjectively believed that he would not be bound till the usual exchange of contracts had taken place.” (footnotes omitted)).

<sup>32</sup> There is another type of preliminary agreement: when the parties have reached agreement on all the material terms they expect to put in the agreement, have finished negotiating, and are only awaiting a formal expression in writing. The test for enforceability of such agreements is similar to that for preliminary agreements with open terms. See Restatement (Second) of Contracts § 27 (1981).

<sup>33</sup> A separate question is what obligations an enforceable preliminary agreement imposes on the parties. While courts generally agree on when a preliminary agreement should be enforced, they take different approaches to the parties’ obligations under them. Under one approach, the preliminary agreement is simply an incomplete

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be enforced only when the parties manifestly so intended. In his influential 1987 decision in *Teachers Insurance and Annuity Association v. Tribune Co.*, Judge Leval described the rule as follows:

In seeking to determine whether such a preliminary commitment should be considered binding, a court's task is, once again, to determine the intentions of the parties at the time of their entry into the understanding, as well as their manifestations to one another by which the understanding was reached. Courts must be particularly careful to avoid imposing liability where binding obligation was not intended. There is a strong presumption against finding binding obligation in agreements which include open terms, call for future approvals and expressly anticipate future preparation and execution of contract documents. Nonetheless, if that is what the parties intended, courts should not frustrate their achieving that objective or disappoint legitimately bargained contract expectations.<sup>34</sup>

That year Alan Farnsworth described the same rule: "Whether the parties reach an agreement with open terms, either preliminary or ultimate, depends on whether they intend to be bound even if they are unable to agree on the open terms."<sup>35</sup> Two years later, Judge Easterbrook applied the test in *Empro Manufacturing Co. v. Ball-*

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contract. The court enforces the terms the parties have agreed upon and supplies missing ones with generic gap-fillers. The other approach reads the preliminary agreement as an agreement to negotiate. Rather than enforcing the partial agreement and filling in gaps, a court will find a breach only if one party walks away from or otherwise improperly terminates negotiations. See Farnsworth, *supra* note 4, at 249–53.

<sup>34</sup> 670 F. Supp. 491, 499 (S.D.N.Y. 1987). With respect to the content of the agreement, *Teachers Insurance* took the latter of the two approaches identified in the preceding footnote. Rather than filling in missing terms and enforcing the incomplete agreement, Leval concluded that the preliminary agreement created a duty to negotiate open terms in good faith. *Id.*

<sup>35</sup> Farnsworth, *supra* note 4, at 253. Farnsworth distinguishes between how courts approach preliminary agreements with open terms and how they approach agreements to negotiate. In the former, the salient question is more often the substance of the parties' agreement, as opposed to whether they intended legal liability. *Id.* at 263–69.

*Co Manufacturing*,<sup>36</sup> and it continues to be the dominant approach in preliminary agreement cases.<sup>37</sup>

Similar rules appear elsewhere in U.S. law. The comments to Section 21 suggest that the parties' contractual intent is a condition of the contractual validity of domestic agreements and social arrangements: "In some situations the normal understanding is that no legal obligation arises, and some unusual manifestation of intention is necessary to create a contract. Traditional examples are social engagements and agreements within a family group."<sup>38</sup> Another example can be found in the Minnesota Supreme Court's decision in *Cohen v. Cowles Media Co.*, which held that a reporter's promise of confidentiality to his source did not create a contract:

We are not persuaded that in the special milieu of media news-gathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract. They are not thinking in terms of offers and acceptances in any commercial or business sense. The parties understand that the reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract.<sup>39</sup>

Finally there is the largely unsuccessful Model Written Obligations Act, today the law only in Pennsylvania, where the statute reads as follows: "A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, *if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.*"<sup>40</sup>

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<sup>36</sup> 870 F.2d 423, 425 (7th Cir. 1989) ("Parties may decide for themselves whether the results of preliminary negotiations bind them.").

<sup>37</sup> See, e.g., *Brown v. Cara*, 420 F.3d 148, 156–58 (2d Cir. 2005); *Trianco, LLC v. IBM Corp.*, 583 F. Supp. 2d 649, 657–60 (E.D. Pa. 2008); *Cochran v. Norkunas*, 919 A.2d 700, 710–11 (Md. 2007).

<sup>38</sup> Restatement (Second) of Contracts § 21 cmt. c (1981).

<sup>39</sup> 457 N.W.2d 199, 203 (Minn. 1990), *rev'd on other grounds*, 501 U.S. 663 (1991).

<sup>40</sup> 33 Pa. Cons. Stat. Ann. § 6 (1997) (emphasis added); see also Uniform Written Obligations Act § 1, in *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings* 584 (1925). I refer to the latter source as the "Model Written Obligations Act" throughout this Article, which has become common practice given most states' failure to enact it. See James D. Gordon III, *Consideration and the Commercial-Gift Dichotomy*, 44 Vand. L. Rev. 283, 311 n.176 (1991).



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Part IV discusses in greater detail each of the above exceptions to the Restatement rule. Another doctrinal example that bears mention, but which I will not examine in detail, can be found in the rules for incomplete or indefinite agreements. The idea appears in Cardozo's 1916 dissent in *Varney v. Ditmars*:

I do not think it is true that a promise to pay an [employee] a fair share of the profits in addition to his salary is always and of necessity too vague to be enforced. . . . The promise must, of course, appear to have been made with contractual intent. . . . But if that intent is present, it cannot be said from the mere form of the promise that the estimate of the reward is inherently impossible.<sup>41</sup>

Had the seeds in Cardozo's dissent grown into a full-fledged doctrine, courts might have viewed the rule for preliminary agreements as a special application of the rule for incomplete or indefinite ones. As it is, the idea never took root, and it appears in U.S. law as more of a suggestion than a rule. Thus, Section 33 of the Second Restatement provides that "[t]he fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance," and the comments explain that where "the actions of the parties . . . show conclusively that they have intended to conclude a binding agreement, . . . courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain."<sup>42</sup> One finds similar gestures towards an intent-to-contract test in the U.C.C.'s rules for incomplete agreements. Section 2-204(3) reads: "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."<sup>43</sup> And Section 2-305 confirms

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<sup>41</sup> 111 N.E. 822, 826 (N.Y. 1916) (Cardozo, J., dissenting).

<sup>42</sup> Restatement (Second) of Contracts § 33(3) & cmt. a (1981); see also id. § 33 cmts. c ("The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement.") & f ("The more important the uncertainty, the stronger the indication is that the parties do not intend to be bound.").

<sup>43</sup> U.C.C. § 2-204(3) (1968). While the 2003 proposed amendments to Article 2 would change some of the language of §§ 2-204(3) and 2-305(1), they would not change the substance of those provisions. As of the publication of this Article, no

that the same rule applies to the special case of agreements missing a price term: “The parties if they so intend can conclude a contract for sale even though the price is not settled.”<sup>44</sup>

The meanings of these provisions, however, are far from transparent. Thus it is not clear that intent “to conclude a binding agreement” in the comment to Section 33 means the intent to conclude a *legally* binding agreement. Similarly, the UCC’s intent “to make a contract” might be read to mean an intent to conclude an agreement, not that one be legally bound to it. In 1990, a National Conference of Commissioners on Uniform State Laws study group recommended substituting “intended to conclude a bargain” in Section 2-204(3) for “intended to make a contract” on the grounds that “[i]t is unlikely that the latter intention is present in most cases and doubtful that it should be required.”<sup>45</sup> That change, however, did not make it into the first Council Draft,<sup>46</sup> and the group’s other proposed revisions to Article 2 were eventually withdrawn for other reasons.<sup>47</sup> While a few courts have followed Cardozo’s lead and read Sections 2-204(3) and 2-305 to condition enforcement on the parties’ intent to contract,<sup>48</sup> many more apply the rules without

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states have adopted the 2003 amendments. See [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-ucc22A03.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucc22A03.asp) (last visited May 26, 2009).

<sup>44</sup> U.C.C. § 2-305(1) (1968). There is an argument that 2-305 as drafted has a problem with the neglected middle. While the first subsection suggests that an agreement with an open price term is binding only if the parties so intended, the fourth stipulates that where “the parties intend not to be bound unless the price is fixed or agreed and it is not fixed or agreed, there is no contract.” U.C.C. § 2-305(4) (1968). The rule does not say what the outcome is where the parties manifest no intent one way or another. See Restatement (Second) of Contracts § 33 cmt. e (1981) (describing the U.C.C. rule in terms of only two cases: where the parties “intend to conclude a contract” and where they “manifest an intention not to be bound”).

<sup>45</sup> PEB Study Group Uniform Commercial Code Article 2, at 63 (Preliminary Report, Mar. 1, 1990).

<sup>46</sup> U.C.C. Revised Art. 2 Sales § 2-203(b) (Council Draft No. 1, Nov. 9, 1995) (“If the parties so intend, an agreement is sufficient to make a contract even if . . . one or more terms are left open or to be agreed upon.”).

<sup>47</sup> Linda J. Rusch, A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance, 52 SMU L. Rev. 1683 (1999); Richard E. Speidel, Revising UCC Article 2: A View from the Trenches, 52 Hastings L.J. 607 (2001).

<sup>48</sup> See, e.g., *Lee v. Joseph E. Seagram & Sons, Inc.*, 552 F.2d 447, 453 (2d Cir. 1977) (stating that the test for incomplete contracts is whether “the parties themselves meant to make a ‘contract’ and to bind themselves to render a future performance”); *Schade v. Diethrich*, 760 P.2d 1050, 1059 (Ariz. 1988) (finding that by their actions, “the parties clearly manifested their joint understanding that they were bound by their promises”).

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a separate inquiry into the parties' contractual intent.<sup>49</sup> And it is difficult to find any cases in which the parties' intent makes a difference in the outcome—in which the court holds that incomplete terms are “reasonably certain,” but then refuses enforcement because the parties did not intend to be legally bound.<sup>50</sup> Though the gestures towards an intent-to-contract test for incomplete and indefinite agreements suggest the justificatory role such intent might play, without more evidence it cannot be said to be the law.

## II. VERIFYING CONTRACTUAL INTENT UNDER THE ENGLISH RULE

It is one thing to say that the existence of a contract should sometimes depend on the parties' manifest intent to be legally bound; it is another to say how courts charged with the enforce-

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<sup>49</sup> See, e.g., *Lush v. Terri & Ruth*, 324 F. Supp. 2d 90, 92–94 (D. Maine 2004) (inferring parties' lack of intent from the absence of key terms in the contract); *Price v. Grimes*, 677 P.2d 969, 974–75 (Kan. 1984) (finding “sufficient evidence” of a contract in the parties' actions); *Grayson v. La Branche*, 225 A.2d 922, 923 (N.H. 1967) (same); *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 548 N.E.2d 203, 206 (N.Y. 1989) (concluding that “the price term was sufficiently definite for an enforceable contract”); *Nilavar v. Osborn*, 738 N.E.2d 1271, 1284 (Ohio App. 2000) (quoting Second Restatement, but discussing no evidence of intent); *McCarthy, Lebit, Crystal & Haiman Co. v. First Union Mgt., Inc.*, 622 N.E.2d 1093, 1097–98 (Ohio App. 1993) (holding that “[a] contract is binding and enforceable if it encompasses the essential terms of the agreement”).

<sup>50</sup> Terms are reasonably certain “if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.” Restatement (Second) of Contracts § 33(2) (1981). I know of no systematic study of judicial application of this rule. But an examination of the first 50 cases generated by “Keyciting” § 33 and listed under the “Citing Cases” heading revealed no cases in which the outcome turned on the parties' intent with respect to legal enforcement. Out of the 50 cases examined, 27 held the agreement unenforceable. Of those 27, 16 did not mention the parties' intent at all. See, e.g., *Jessen Elec. & Serv. Co. v. Gen. Tel. Co. of Cal.*, Nos. 95-56175, 95-56176, 1997 WL 30328, at \*1 (9th Cir. Jan. 21, 1997) (finding insufficient definiteness for enforcement without discussing the parties' intent). Of the remaining 11 decisions, none examined the parties' intent to be legally bound, as distinguished from their intent to finalize the agreement, and many separately found that the reasonable certainty requirement was not satisfied. See, e.g., *Spurling v. The Forestland Group, LLC*, 187 F. App'x 566, 572 (6th Cir. 2006) (concluding that there was no current intent to recognize parties as an agent without further negotiations); *Pae Young Chung v. Byong Jik Choi*, No. 07-2187, 2008 WL 3852237, at \*3 (E.D. Pa. Aug. 18, 2008) (finding “that defendants did not manifest an intent to enter into a bargain on the terms proposed in plaintiffs' offer”); *SDK Invs., Inc. v. Ott*, No. CIV. A. 94-1111, 1996 WL 69402, at \* 7–12 (E.D. Pa. Feb. 15, 1996) (finding that whether or not parties intended to be bound, terms were so uncertain as to be unenforceable).

ment of contracts should determine when the parties manifested such an intent. Part III provides a systematic analysis of different verification procedures. This Part describes the English experience with one method: a factual, all-things-considered inquiry into the parties' manifest intent. The deficiencies of this approach cast new light on the alternative to the Restatement rule and provide materials for the discussion of other design options in Parts III and IV.

The first edition of Williston's treatise advanced several arguments for what would become the Restatement rule. Among other things, Williston suggested that it "may be guessed that where it is stated that an intent to create a legal relation is the test of a contract, the intent is frequently fictitiously assumed."<sup>51</sup> Ninety years of experience with the English rule have borne this prediction out. That experience shows that in the absence of legal formalities, the parties' manifest intent with respect to legal liability is often unverifiable, and therefore unsuitable as a condition of contractual validity. English courts have responded to that fact with evidentiary presumptions that have, for practical purposes, all but suspended the English rule's supposed intent-to-contract requirement in commercial cases.

The English rule says that a contract exists only when the parties manifest an intent to be legally bound, that is, when a reasonable person in the parties' circumstances would have understood them to have such an intent. The parties' manifest intent is a question of fact, to be answered by looking at the totality of the circumstances. These circumstances can include the type of agreement, the completeness and specificity of the terms, the nature of the parties' relationship, as well as more general consideration of the parties' reasonable background beliefs.<sup>52</sup> When factfinders fully engage in this inquiry, however, the results can be difficult to predict.

Consider Guenter Treitel's analysis of *J. Evans & Sons (Portsmouth) v. Andrea Merzario*, in which the Court of Appeal considered a carrier's telephone assurance to a long-term customer that the customer's goods would thenceforth be carried in containers under deck.<sup>53</sup> The trial court held, based on the existence of a writ-

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<sup>51</sup> 1 Williston 1920 Edition, *supra* note 23 § 21, at 22–23.

<sup>52</sup> See Treitel, *supra* note 30, at 151–59.

<sup>53</sup> [1975] Lloyd's Rep. 162, *rev'd*, [1976] 1 W.L.R. 1078, 40 M.L.R. 227; see also Treitel, *supra* note 30, at 159.

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ten sales agreement and the fact that the carrier's oral assurances did not relate to a particular transaction, that the conversation did not evince a contractual intent.<sup>54</sup> The Court of Appeal reversed, observing that the defendant made the promise "in order to induce [the plaintiff] to agree to the goods being carried in containers."<sup>55</sup> Treitel argues that the trial court's decision was the better one, since the plaintiff's subjective understanding should have been irrelevant to the court's analysis.<sup>56</sup> But the appellate opinions rely entirely on objective evidence—available to both parties at the time of the agreement—that the promise was meant as an inducement. Based on the evidence discussed in the opinions, it is impossible to say what the parties' intent was.

Stephen Hedley has examined a large number of cases applying the English rule and concludes that "the tests ostensibly aimed at discovering the parties' intentions almost invariably lead the courts to *impose* their view of a fair solution to the dispute."<sup>57</sup> Hedley identifies several techniques courts use to reach their preferred outcome. The first turns on the fact that the English rule does not expressly provide for the no manifest intent case. Hedley observes that "[i]n cases where there was no intention either way, this insistence that the parties must have had some intention or other forces the courts to *invent* an intention."<sup>58</sup> Courts can also manipulate outcomes through evidentiary rulings. As *J. Evans & Sons* demonstrates, courts can allow or disallow evidence by adopting a broader or narrower interpretation of what counts as the parties' "objective" intent. They can permit the factfinder to make assumptions about the parties' background understandings or awareness of the availability or unavailability of legal sanctions. And courts sometimes read the intent question narrowly, asking only whether the parties foresaw a lawsuit, as distinguished from whether they believed themselves to be entering into a contract.<sup>59</sup> Finally, Hedley

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<sup>54</sup> [1975] Lloyd's Rep. at 167–68. Reading the decision, it appears that a U.S. court would have more likely applied the parol evidence rule to the case.

<sup>55</sup> [1976] W.L.R. at 1081 (Denning, M.R.); see also *id.* at 1083 (Roskill, L.J.) (employing similar reasoning).

<sup>56</sup> Treitel, *supra* note 30, at 159.

<sup>57</sup> Stephen Hedley, Keeping Contract in Its Place—*Balfour v. Balfour* and the Enforceability of Informal Agreements, 5 Oxford J. Legal Stud. 391, 393 (1985).

<sup>58</sup> *Id.* at 394.

<sup>59</sup> *Id.* at 395–96.

points to the “selectively morbid imaginations” of lawyers, who mistakenly infer from their professional knowledge of past litigation that similar liability was within the contemplation of the parties.<sup>60</sup> In sum, in cases where the question of the parties’ contractual intent gets to the factfinder, the outcome of that factual inquiry is often unpredictable and especially subject to judicial manipulation.

There are at least three reasons why it is in many cases difficult to verify the parties’ manifest intent with respect to legal liability using the English rule’s all-things-considered approach. The first concerns the sort of intention at issue. The parties’ contractual intent is not an intention *to* do some act in the future (such as to perform one’s promise), but an intention *that* their present actions shall have a certain legal effect. In other words, the parties’ intent to contract is comprised of their reasons for and beliefs about their present actions, as distinguished from their plans to act in the future. Evidence of future-oriented intentions can often be found in the agent’s subsequent acts, including steps taken or not taken towards realizing that intention.<sup>61</sup> That form of evidence is not available when it comes to interpreting a person’s present intentions in action. Unless the agent tells us her purposes and beliefs, we must infer them from the totality of what we know about her practical attitudes and epistemic situation. In some cases this is easy. If a person flips off a light switch, she probably intends to turn off the lights. But as the connection between act and consequence becomes more attenuated, we must know more about the actor and the surrounding circumstances to interpret her present intent. We need to know much more about the switch-flipper to ascribe her an intent to save electricity, and even more to ascribe her an intent to do her part to avoid global warming. Where the parties’ agreement does not include obvious markers of contractual intent, such as legal formalities, terms that presuppose enforcement, or an express statement of intent, we can attribute them an intent to contract only on the basis of a great many other assumptions about the motives and knowledge with which they act, assumptions that are often contestable.

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<sup>60</sup> Id. at 397.

<sup>61</sup> See Ian Ayres & Gregory Klass, *Insincere Promises: The Law of Misrepresented Intent* 119–26 (2005).

Second, there is an issue of salience. Stuart Macaulay observes that legal liability often plays a secondary role in transactions between business people.<sup>62</sup> Many parties enter into an agreement on the basis of personal trust, or because there exist extralegal sanctions or other incentives that suggest performance will happen. This is not to say that they do not also know that they are entering into a contract. But the legal consequences of their agreement might not be especially salient. If an awareness of legal liability exists, it is better characterized as a background belief, as opposed to an occurrent thought. While such background beliefs may well satisfy the intent-to-contract test, they are much harder to verify. As Randy Barnett indicates in a somewhat different context, a person's tacit assumptions "are notoriously difficult to prove directly—even the person possessing this sort of knowledge may be unaware of it."<sup>63</sup>

A final source of indeterminacy lies in the objective theory itself. The use of "objective" in "objective intent" refers not to scientific verifiability—as in, "the rate of acceleration due to gravity is an objective fact"—but to the possible gap between a person's actual, or "subjective," intent and her manifest or publicly observable intent. A party's objective intent is, roughly speaking, the intent a reasonable person in the parties' shared epistemic situation would attribute to her. This is an interpretive fact, as distinguished from a scientifically verifiable one. The factfinder must project herself into the parties' position, balancing her own sense of what is reasonable against what she knows about the norms, understandings, and assumptions of the parties in the context of the transaction. Because there are no fixed rules for deciding either what the parties' epistemic and normative situation was or how to balance it against the factfinder's own sense of what is reasonable, such judgments are inherently contestable.

The point of these observations is not that the parties' manifest intent with respect to legal liability is inaccessible. In many cases it

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<sup>62</sup> Stuart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 *Am. Soc. Rev.* 55, 60 (1963); see also Hedley, *supra* note 57, at 396; Mary Keyes & Kylie Burns, *Contract and the Family: Whither Intention?*, 26 *Melb. U. L. Rev.* 577, 585–87 (2002).

<sup>63</sup> Barnett, *Sound of Silence*, *supra* note 9, at 880. The statement occurs in Barnett's analysis of contract gap-filling rules, as opposed to rules governing formation.

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

Because of the unpredictability of the all-things-considered test for contractual intent, English courts have adopted evidentiary rules that effectively preclude litigation of the issue in the vast majority of commercial cases, which constitute the vast majority of contract cases. The most important is the presumption that parties to a commercial agreement that satisfies the other elements of a contract intended to be legally bound.<sup>64</sup> Thus, in *Edwards v. Skyways Ltd.*, which considered an employer’s promise of an “ex gratia payment” to a dismissed employee, the court reasoned:

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<sup>64</sup> See Atiyah, *supra* note 8, at 154 (“[T]here is a strong presumption that business or commercial dealings are intended to have legal effect.”); Cheshire, Fifoot and Furmston, *supra* note 30, at 126 (“In commercial agreements it will be presumed that the parties intended to create legal relations and make a contract.”); Chitty on Contracts, *supra* note 30, at 199 (“In the case of ordinary commercial transactions it is not normally necessary to prove that the parties to an express agreement in fact intended to create legal relations.”); Treitel, *supra* note 30, at 157 (“But where a claim is based on a proved or admitted *express* agreement the courts do not require, in addition, proof that parties to an ordinary commercial relationship actually intended to be bound.”).



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In the present case, the subject-matter of the agreement is business relations, not social or domestic matters. There was a meeting of minds—an intention to agree. There was, admittedly, consideration for the company’s promise. I accept the propositions of counsel for the plaintiff that in a case of this nature the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one.<sup>65</sup>

In commercial cases the defendant bears the burden of proving that the parties did not intend legal liability—as under the Restatement rule the defendant must demonstrate a manifest intent not to contract. English courts have raised the bar even higher by reading ambiguous expressions of intent against the defendant. Thus in *Edwards*, the court found that the term “ex gratia” did not indicate an intent to be free of legal liability. Other courts have found contractual intent despite stipulations that the agreement was “fixed in good faith”<sup>66</sup> or that it was to be “interpreted as an honourable engagement,”<sup>67</sup> and where letters discussing settlement terms included the words “without prejudice.”<sup>68</sup> Finally, English courts have held that one-sided or partial performance of the agreement negates even an unambiguous statement that it is not intended as a contract.<sup>69</sup>

The net effect of these evidentiary rules is that in most commercial cases, the English rule produces the same outcome as the Restatement rule would. More to the point, in the vast majority of commercial contract cases, there is no point to litigating the question of contractual intent. Hedley concludes, “Where the parties are dealing at arms’ length, the rule is simple: there is no require-

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<sup>65</sup> [1964] 1 W.L.R. 349, 355 (Q.B.).

<sup>66</sup> *The Mercedes Envoy* [1995] 2 Lloyd’s Rep. 559, 562 (W.B.).

<sup>67</sup> *Home and Overseas Ins. Co. v. Mentor Ins. Co. (UK)* [1989] 1 Lloyd’s Rep. 473 (Q.B.); *Home Ins. Co. v. Administratia Asigurarilor de Stat* [1983] 2 Lloyd’s Rep. 674, 676 (Q.B.).

<sup>68</sup> *Tomlin v. Standard Teles. & Cables Ltd.* [1969] 1 W.L.R. 1378, 1382; see also *Cheshire, Fifoot and Furmston*, supra note 30, at 27–30; *Treitel*, supra note 30, at 150–51. An exception is the phrase “subject to contract” in agreements for the sale of real estate. This phrase has taken on a conventional meaning in such transactions, and English courts interpret it to negative contractual intent. See *Atiyah*, supra note 8, at 159–62.

<sup>69</sup> See *Atiyah*, supra note 8, at 154–55 (describing cases).

ment of intention to create legal relations.”<sup>70</sup> P.S. Atiyah, quoting Williston, makes the same point: “It is . . . more realistic to say that no positive intention to enter into legal relations needs to be shown, and that ‘a deliberate promise seriously made is enforced irrespective of the promisor’s views regarding his legal liability.’”<sup>71</sup>

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

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

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

### III. INTENT AND INTERPRETATION

The previous Part has described the trouble with the English rule as a verification problem: In too many cases, an *ex post*, all-

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<sup>70</sup> Hedley, *supra* note 57, at 412.

<sup>71</sup> Atiyah, *supra* note 8, at 153 (quoting 1 Samuel Williston, *A Treatise on the Law of Contracts* 39 (3d ed. 1957)).

things-considered inquiry into the parties' manifest intent with respect to legal liability does not yield predictable results. Because the parties' manifest intent is often nonexistent or not verifiable, their intent to contract is ill-suited as a condition of contractual validity.

Given that the legal question is the parties' manifest intent, the problem is one not only of verification, but also of interpretation. To identify the parties' manifest contractual intent is to interpret the meaning of their words and actions. Restating the problem as an interpretive one has the advantage of locating it within a well-developed theoretical framework. The design of rules for contract interpretation has received a good deal of attention in the twenty years since Ian Ayres and Robert Gertner published their article on penalty defaults.<sup>72</sup> In the Ayres-Gertner framework, the difference between the English rule and the Restatement rule looks to be a difference in interpretive defaults. The discussion in the previous Part has shown, however, that the problem with the English rule lies not in the default but, again in Ayres and Gertner's language, in its rule for opting out of that default. This suggests a more complex account of the available options for including the parties' intent with respect to contractual liability among the conditions of contractual validity.

#### *A. Interpretive Defaults and Opt-out Rules*

The interpretation of contracts is different from the interpretation of literature or of dreams. Interpretive rules cast a long, dark shadow over many contractual transactions. For this reason, we can expect legal rules for interpreting contracts to influence many parties' behavior—the very behavior that is the object of those rules. One of Ayres and Gertner's innovations was to take this fact seriously and more systematically investigate the incentives legal interpretive rules create. A second difference between the interpretation of contracts and the interpretation of other sorts of texts follows from the fact that such legal interpretive rules function to assign rights and obligations. If Thomas Pynchon does not tell us the color of Pirate Prentice's hair, we might reasonably conclude that there is no fact of the matter or that it is up to each reader to

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<sup>72</sup> Ayres & Gertner, *Filling Gaps*, supra note 13.

decide for herself. When interpretation is used to determine legal rights and obligations, on the contrary, there needs to be a predictable, correct answer for cases in which the law's authors manifest no intent one way or the other. Legal interpretive rules of this sort must assign meaning both to expressive acts and to expressive omissions. This fact underlies Ayres and Gertner's observation that nonmandatory legal interpretive rules have two component parts. The first is an interpretive default, which stipulates an act's legal effect absent evidence of the actor's contrary intent—when there is an expressive omission. The second is an opt-out rule, which stipulates what evidence of a contrary intent suffices for a non-default interpretation—determining what counts as an expressive act and with what meaning. Each component of the interpretive rule can create incentives for parties to disclose or withhold information in one form or another. Another of Ayres and Gertner's innovations was to think more systematically about the value of those incentives, as well as the other secondary effects of interpretive rules.

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

The less-often discussed side of the Ayres-Gertner framework is their analysis of opt-out rules. A legal interpretive rule must specify not only a default, but also what suffices as evidence of legal ac-

tors' non-default intent. That is, it must also include a rule for opting out of the default. An opt-out rule can require from the parties more or less evidence that they intend a non-default term. To take a simple example from Ayres and Gertner, many U.C.C. rules provide that the legal default applies "unless otherwise agreed."<sup>73</sup> Section 2-206, however, stipulates that an offer invites acceptance in any reasonable manner "[u]nless otherwise *unambiguously* indicated."<sup>74</sup> Section 2-206 requires more of offerors who want to contract around the default acceptance rules than do many other U.C.C. opt-out rules. Like the design of defaults, the design of opt-out rules provides an opportunity to engineer incentives to disclose or withhold information. Different forms of opting out are more or less effective as means of sharing information, whether with the other party or with a future adjudicator.

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

For the purposes of the following analysis, it will be helpful to distinguish three categories of costs that a default and opt-out rule might impose. The first is the cost to parties with non-default preferences of creating the evidence required by the opt-out rule. Thus, Section 2-206 requires that offerors who wish to limit the modes of acceptance bear the extra cost of unambiguously stating their intent. Second are the costs to the court of determining whether that evidentiary standard has been satisfied. While Section 2-206's "unambiguously intended" standard imposes greater costs on offerors, it should reduce costs to the courts, since it frees them from the task of resolving ambiguities. Third are error costs. One category of error costs comes from parties' failure to opt out when they should have done so, or their choice to opt out when in fact the default corresponds to their preferences. Another sort of error occurs when a court fails to recognize that the parties opted out of the default, or wrongly concludes that the parties opted out when they in fact have not.

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<sup>73</sup> See, e.g., U.C.C. § 2-303 (1968).

<sup>74</sup> Ayres & Gertner, *Filling Gaps*, supra note 13, at 120 (discussing U.C.C. §§ 2-303 & 2-206).

In comparing the relative desirability of interpretive rules, one consideration is the extent to which they impose the above sorts of costs. But that is not the only consideration. Another way of putting Ayres and Gertner's thesis about the occasional value of penalty defaults is that in some cases otherwise costly opt-out rules also bring benefits. Their 1989 article emphasized the benefits from the disclosure of information by one party to the other, or by both parties to a neutral decisionmaker.<sup>75</sup> Opt-out rules that require one or both parties to speak where they might otherwise remain silent are more costly to the speaker or speakers, but can force value-creating information transfers. A second possible benefit comes from what might otherwise be considered party error costs.<sup>76</sup> Adopting an opt-out that is especially costly to the parties makes the default stickier: fewer parties who would otherwise choose non-default terms are willing to pay the costs of opting out. This is a cost to the parties with respect to getting the agreement they want. But if we want to encourage the parties to adopt one term over another with limited regard for their preferences, expensive opt-outs serve a positive channeling function. By making the socially preferred default stickier, an interpretive rule can cause more parties to adopt it.

This framework can be applied to identify different rules courts might use to determine the parties' intent to contract. One problem with the English rule is that it imposes a minoritarian default for commercial agreements. Read literally, the rule would impose in many commercial agreements unacceptably high verification and error costs. English courts have addressed this defect with evidentiary presumptions that effectively flip the default for commercial agreements—bringing application of the English rule in line with the text of the Restatement rule. That is, they have adopted a majoritarian default, thereby avoiding in most cases the costs of verifying the parties' manifest intent.

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<sup>75</sup> *Id.*; see also Ayres & Gertner, *Majoritarian vs. Minoritarian*, *supra* note 13, at 1593–94.

<sup>76</sup> Ayres and Gertner discuss this potential benefit in Ayres & Gertner, *Majoritarian vs. Minoritarian*, *supra* note 13, at 1598–1600; see also Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 *Colum. L. Rev.* 1710, 1738–53, 1755–58 (1997).

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

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

If the problem with the English rule's manifest-intent opt-out is one of verification, an obvious solution is to require that parties who want enforcement express that preference more clearly, producing unequivocal evidence of it for courts. An example is the old writ of covenant's seal requirement. Like the English rule, the writ of covenant set the default at no legal enforcement. Unlike the English rule, it required those who wanted enforcement to express that preference in a formal act: putting their agreement in writing and affixing a seal to it.<sup>77</sup> But conventional legal forms are only one

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<sup>77</sup> See A.W.B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* 22–25 (1987) (describing the specialty requirement for the writ of covenant). In fact, the historical seal requirement was considerably more complicated than is conveyed here, since exceptions were often made and enforcement might be had under other writs. My point is not about the historical function of the seal, but about its possible uses.

type of express opt-out.<sup>78</sup> The rule might not demand any magic words or symbols, but only an express statement of intent. Thus, the Model Written Obligations Act requires only a writing that “contains an additional express statement, in any form of language, that the signer intends to be legally bound.”<sup>79</sup>

The availability of an express opt-out does not depend on what the default is. The text of Section 21 suggests an all-things-considered test for the parties’ intent not to contract, for it speaks of “a manifestation of intention that a promise shall not effect legal relations.”<sup>80</sup> In practice, however, U.S. courts refuse enforcement in run-of-the-mill commercial cases only when an agreement includes a TINALEA (“This is not a legally enforceable agreement”) clause, expressly stating the parties’ intent not to be bound.<sup>81</sup> That

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<sup>78</sup> Further elaboration on this point can be found in Klass, *supra* note 14, at 1744–47.

<sup>79</sup> Uniform Written Obligations Act § 1, *supra* note 40, at 584.

<sup>80</sup> Restatement (Second) of Contracts § 21 (1981).

<sup>81</sup> The comments to § 21 appear to assume that the “manifestation of intention that a promise shall not affect legal relations” will appear as a “term” in the agreement. Restatement (Second) of Contracts § 21 cmt. b (1981). A search of decisions in the past sixty years revealed no arms’ length commercial transactions in which a court declined to enforce an agreement based on a finding of no intent to contract absent express language in the agreement to that effect. In *Hamilton v. Boyce*, the Minnesota Supreme Court affirmed a trial court’s finding, based on parol evidence, that an agreement between two sisters and one’s husband “was drawn up and signed by the parties not for the purpose of creating a partnership among themselves, but merely for the purpose giving plaintiff legal authority to operate the rest home while defendants were away on a proposed extended trip.” 48 N.W.2d 172, 173 (Minn. 1951). And in *Russell v. District of Columbia*, the court held that a statement in a speech by D.C. Mayor Marion Barry “was in the nature of a campaign promise, which would not have been interpreted by most listeners as creating a legally binding contract.” 747 F. Supp. 72, 80 (D.D.C. 1990). But decisions treating common forms of arms’ length commercial agreements require a TINALEA clause of one type or another. See, e.g., *Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 406 (4th Cir. 2002) (holding words “letter of intent” imply intent not to contract); *Schwanbeck v. Federal-Mogul Corp.*, 578 N.E.2d 789, 792 (Mass. App. Ct. 1991) (holding words “this letter is not intended to create . . . any binding legal obligation” created safe harbor against enforcement); *Hirschhorn v. Severson*, 319 N.W.2d 475, 478 (N.D. 1982) (finding “gentlemen’s agreement” referred to unenforceable agreement); *Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993) (holding disclaimer in employee handbook negated contract liability). See generally Effectiveness of Employer’s Disclaimer of Representations in Personnel Manual or Employee Handbook Altering At-Will Employment Relationship, 17 A.L.R. 5th 1 (1994).



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is, courts following the Restatement rule adopt an enforcement default together with an express opt-out rule.<sup>82</sup>

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

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<sup>82</sup> This is not to say that an express opt-out will always suffice to avoid legal liability under U.S. law. Wendell Holmes reports that “[a]n analysis of [the] cases suggests that, contrary to traditional dogma, [TINALEA] clauses are not regularly enforced by courts on any systematic basis.” Wendell H. Holmes, *The Freedom Not to Contract*, 60 *Tul. L. Rev.* 751, 755 (1986). I observed in Part II that English Courts often treat TINALEA clauses with suspicion, reading ambiguous terms against the defendant. Holmes's conclusions suggest that many U.S. courts are similarly apprehensive about allowing parties to expressly opt out of legal liability altogether.

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

Oversimplifying somewhat, we might fill in these boxes as follows. Category I describes the English rule without any evidentiary presumptions, which would impose a nonenforcement default, combined with an opt-out rule, that requires courts to look at the parties' all-things-considered manifest intent. In practice, English courts today apply that rule primarily in noncommercial cases, such as domestic agreements.<sup>83</sup> In category II is the old writ of covenant, which also adopted a nonenforcement default but required a formal act to opt out of it and into enforcement. Also in Category II is the Model Written Obligations Act, which would impose the same nonenforcement default for gratuitous promises but allow an opt-out by any express statement of intent to be bound. Category III includes the Restatement rule as written, as well as the English rule as applied to commercial agreements, with its strong evidentiary presumption of an intent to contract. Both adopt an enforcement default, while the opt-out rule suggests that courts engage in an all-things-considered inquiry into the parties' manifest intent. Finally, an example of a category IV rule can be found in the application of the Restatement rule to commercial agreements. As noted above, in practice, U.S. courts adopt an enforcement default and require

<sup>83</sup> See Atiyah, *supra* note 8, at 155–59 (same); Chitty on Contracts, *supra* note 30, at 204–12 (describing types of cases in which the parties' intent to contract is litigated); Treitel, *supra* note 30, at 150–57 (same).

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parties expressly to state their intent not to be bound in order to opt out of it. Depending on the strength of the English rule's presumption of a contractual intent in commercial cases, this might also describe the application of the English rule.

*B. Interpretive Asymmetries, Desirable Stickiness, and Relational Costs*

The above table provides a basic menu of design options for identifying the parties' intent with respect to legal liability. We can choose from the menu by asking which combination of opt-out and default creates the greatest value at the lowest cost. The next Part explores which combination we should choose for four categories of transactions: gratuitous promises, preliminary agreements, domestic agreements and reporters' confidentiality promises. Before getting there, I want to identify three considerations that are especially salient to the design of rules for interpreting parties' intent to contract.

The first concerns the relative stickiness of different interpretive defaults. In defending his thesis that noneconomic theories do not tell us much about what formation rules should look like, Richard Craswell argues for the "symmetry of the default rule problem":

In one sense, a default rule of implied commitment represents a greater "imposition" than a default rule of noncommitment, since an implied commitment can lead to judicially enforceable damages while an implied noncommitment cannot. However, neither rule is "imposed" in the sense of forcing [a party] to accept a legal relationship against her will, since each is merely a default rule which allows her to specify a different relationship whenever she chooses. For this reason, the intuition that legal relationships should not be "imposed" on a party cannot, by itself, provide a reason for selecting one default rule over the other.<sup>84</sup>

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<sup>84</sup> Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 *Stan. L. Rev.* 481, 485–86 (1996) [hereinafter *Craswell, Offer, Acceptance*]; see also Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 *Mich. L. Rev.* 489, 503–04 (1989).

This cannot be right for rules that test for parties' contractual intent as a condition of contractual validity.<sup>85</sup> If the goal is to condition legal liability on the parties' intent to contract, and if the law uses an express opt-out rule, an enforcement default will be systematically stickier than a nonenforcement default. Express opt-outs work only for parties who know what the default is, what it takes to contract around it, and, most important for present purposes, that the rule applies to them. If, for example, the parties have not thought about legal liability (Corbin's livestock traders) or mistakenly think that there is no contract for other reasons (the Restatement's book seller and buyer), they do not know enough to opt-out of enforcement expressly. Parties who intend legal enforcement, on the contrary, are at least aware that it is in the offing. Consequently, when the law adopts an express opt-out, a nonenforcement default is more likely to give parties who intend enforcement a reason to reveal that intent than an enforcement default is to give parties who do not intend to be legally bound an incentive to reveal theirs. In short, enforcement defaults are systematically stickier.

The asymmetry exists only if the opt-out rule requires an express statement of intent, such as adherence to a legal formality or saying that one intends enforcement. If an enforcement default is instead combined with a manifest-intent opt-out rule—if the rule instructs courts to examine the totality of the circumstances to determine the objectively reasonable interpretation of the parties' intent—parties might avoid legal liability despite their ignorance of the rule or the possibility of enforcement. Because under a manifest-intent opt-out rule the parties need not undertake special acts to avoid the default interpretation, opting out does not presuppose knowledge of the rule or its applicability. And while it is true that the risk

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<sup>85</sup> Craswell's symmetry thesis is correct as applied to interpretive rules that concern terms in a contract that are presumed valid. With respect to these rules, we cannot say a priori that the parties' ignorance of the law or of their potential legal liability will systematically make one or the other default more or less sticky. That will depend on empirical facts, such as whether more parties prefer one or another term and the relative legal sophistication of parties preferring one or another term. The distinction here is something like Craswell's between "background rules" and "agreement rules" in *Contract Law, Default Rules, and the Philosophy of Promising*, supra note 84, at 503. The above quoted text, however, addresses "agreement rules"—rules that fix the conditions of contractual validity.

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of court error under a manifest-intent rule may cause sophisticated parties to state their intent expressly where unsophisticated parties might remain silent, the incentive to do so is the same whether a sophisticated party's preferences match the default or not. Absent additional empirical assumptions, there is much less reason to think that an enforcement default combined with a manifest-intent opt-out rule will be systematically stickier than a nonenforcement default.

The second point concerns the potential value of sticky defaults and therefore also of costly opt-out rules.<sup>86</sup> Up to this point, the analysis has largely assumed that the only goal in interpreting the parties' intent with respect to legal liability is to better enable them to realize their preferences—to enforce their agreements when the parties want to be bound and to withhold enforcement when they want no legal liability. That is, the above discussion has generally assumed that contract law's sole function is to give parties the power to undertake new legal obligations when they wish. It is far from obvious, however, that this is the law of contracts' only purpose.<sup>87</sup>

There is little doubt that contract law is designed to give parties greater control over their legal obligations to one another. In H.L.A. Hart's terms, contract law is a sort of private power-conferring rule. It enables "the exercise of limited legislative powers by individuals," which they can use to impose new legal duties on themselves.<sup>88</sup> That fact does not preclude, however, additional and equally important duty-imposing functions. The law sometimes imposes liability on breaching promisors not because they entered into their agreements expecting or wanting enforcement, but because the promisor purposively induced a promisee to rely on an act she then failed to perform, because the promisor accepted a present benefit in exchange for her future performance, or because there is a social interest in supporting the practice of undertaking

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<sup>86</sup> For a discussion of the many reasons defaults tend to be sticky, see Zamir, *supra* note 76, at 1753–68.

<sup>87</sup> A more thorough discussion of the themes in this and the following paragraphs can be found in Klass, *supra* note 14. The pluralist theory of contract law I describe in that article is something like a reinvention of Lon Fuller's wheel. See Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"*, 100 *Colum. L. Rev.* 94 (2000).

<sup>88</sup> See H.L.A. Hart, *The Concept of Law* 96 (2d ed. 1994).

and performing voluntary obligations.<sup>89</sup> Stickier defaults, and by implication costlier opt-outs, serve such duty-imposing functions. More to the point, they can mediate between the sometimes conflicting interests the law has in, on the one hand, granting parties the power to control the scope of their legal obligations and, on the other hand, imposing liability on parties because of extralegal wrongs they have committed, harms they have caused, or other considerations.

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

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

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<sup>89</sup> For the first two functions—protecting reliance and preventing unjust enrichment—see, for example, P.S. Atiyah, *Promises, Morals, and Law* (1981), and Lon L. Fuller, *Consideration and Form*, 41 *Colum. L. Rev.* 799, 806–13 (1941). The reliance-protecting function of contract law is also defended by Neil MacCormick in *Voluntary Obligations and Normative Powers—I*, 46 *Proc. Aristotelian Soc'y* 59, 62–73 (Supp. 1972). For the idea that contract law supports the practice of undertaking and performing voluntary obligations, see Joseph Raz, *Promises in Morality and Law*, 95 *Harv. L. Rev.* 916, 933–38 (1982) (reviewing P.S. Atiyah, *Promises, Morals, and Law* (1981)).

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

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

Transactors may also fail to include written provisions dealing with a particular contingency because each may fear that the other will interpret a suggestion that they do so as a signal that the transactor proposing the provisions is unusually litigious or likely to resist flexible adjustment of the relationship if circumstances change. These potential relational costs of proposing additional explicit provisions may result in aspects of a contracting relationship being allocated to the extralegal realm, particularly in contexts where the post-contract-formation relationship between the transactors is highly relational in nature so that transactors' perceptions of the value of the transaction will be strongly affected by the attitudinal signals sent during pre-contractual negotiation.<sup>90</sup>

Eyal Zamir similarly observes that the costs of contracting around a default include "the adverse effects on the spirit of trust, confidence, and cooperation between the parties, which may be essential to the success of the enterprise."<sup>91</sup> The relational costs Bernstein and Zamir describe attach to expressly opting out of default terms in enforceable agreements. Both are talking about contract gap-filling rules. Even more significant relational costs can apply to

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<sup>90</sup> Bernstein, *supra* note 12, at 1789–90 (footnotes omitted).

<sup>91</sup> Zamir, *supra* note 76, at 1756–57.

expressly opting out of enforcement or nonenforcement altogether. An expressed preference for legal liability early in the transaction might be taken, for example, as evidence of distrust or a propensity to litigate. An expressed preference for no legal liability might be taken as evidence that the party might not perform, or that she does not trust the other side not to engage in opportunistic litigation. A requirement that parties who want, or who do not want, a legal guarantee of performance say so will, in many contexts, involve such relational costs.

We can expect these costs to be especially high at the beginning of contractual relationships.<sup>92</sup> As Bernstein observes, contract law is largely designed as an “end-game norm,” sorting out what is owed to whom when an economic relationship has reached its end.<sup>93</sup> Many transactions, however, are sustained by extralegal “relationship-preserving” norms and incentives, such as mutual benefit, trust, industry practice, and reputation. Particularly at the early stages of relational contracts, where both parties understand that the transaction’s value depends on their ability to work together to resolve disputes, one party’s expressed attitude towards the availability of legal liability as an end-game norm might be a deal breaker. And even if the deal still happens, forcing the parties to express their end-game preferences at the beginning of their relationship can erode relationship-preserving norms that would otherwise add value to the transaction. Even where expectations or preferences regarding legal liability are mutually understood, those attitudes are often better left unspoken.

The existence and magnitude of these relational costs depend on the context. Many agreements clearly contemplate legal liability, whether the parties say so or not. A choice of law, choice of forum, or liquidated damages clause, for example, already signals that the

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<sup>92</sup> But similar considerations may also explain why we do not require parties who make one-sided modifications to say that they also intend to change their legal relationship. This is so, for example, when one party agrees to forgo some of her contractual rights for the sake of preserving the relationship. While both parties to the modification might understand and prefer that the modification be legally binding, expressing that preference can interfere with the function of the proffered concession, which is *inter alia* to signify cooperation or goodwill.

<sup>93</sup> Bernstein, *supra* note 12, at 1796–1802. See generally Lisa Bernstein, *The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study*, 66 *U. Chi. L. Rev.* 710, 760–76 (1999).



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parties understand themselves to be entering into a contract. In such transactions, also saying, “This is a legally enforceable agreement,” would have no relational costs. In other agreements, the costs will be higher. Stuart Macaulay observes that “[b]usinessmen often prefer to rely on ‘a man’s word’ in a brief letter, a handshake, or ‘common honesty and decency’—even when the transaction involves exposure to serious risks.”<sup>94</sup> In such circumstances, a revealed preference for legal liability could do significant harm.

The relational costs of an express opt-out rule also depend on the parties’ backgrounds and expectations. Consider Patricia Williams’ story about the different ways she, as a black woman, and her white male colleague experienced entering into a formal residential lease. The two had similar relational goals: “We both wanted to establish enduring relationships with the people in whose houses we would be living; we both wanted to enhance trust of ourselves and to allow whatever closeness, whatever friendship, was possible.”<sup>95</sup> For Williams’ white male colleague, this meant avoiding “conventional expressions of power and a preference for informal processes generally.”<sup>96</sup> Williams’ experiences as a black woman, on the contrary, led her to associate informality with the potential for exploitation and distrust. As she said, “to show that I can speak the language of lease is my way of enhancing trust . . . in my business affairs.”<sup>97</sup> For Williams’ colleague, an expressed preference for enforcement would degrade the relationship; for Williams, such an expression would enhance it. The relational costs of an express opt-out are not only transactionally relative, but also transactor-specific.

#### IV. APPLICATIONS

The above analysis has operated at a relatively high level of abstraction. I have identified four categories of rules for interpreting parties’ contractual intent, each defined by the type of interpretive default and opt-out rule it employs. I have also described three

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<sup>94</sup> Macaulay, *supra* note 62, at 58.

<sup>95</sup> Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401, 407 (1987).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

considerations that are especially relevant to interpreting the parties' contractual intent: the asymmetry of the default problem, the possible duty-imposing benefits of sticky defaults and costly opt-outs, and the context-specific relational costs of express opt-out rules. These considerations should figure into an analysis of the many variables—the potential costs and benefits—relevant to the relative desirability of different interpretive approaches. Some of those variables are empirically given, such as the costs to the parties of expressly opting out, the effect of such costs on the likelihood that parties will opt out, error rates under different defaults, and the ratio of those who want legal liability to those who do not. Fixing the values of other variables calls for normative judgments—whether and when, for example, to channel some parties towards or away from legal enforcement, and to what degree the law should take account of parties' preferences for or against legal liability.

Viewed in the abstract, the design problem can appear intractable. There are many variables; we know very little about the values of some; it is difficult to agree on the values of others. If the project were to discover a single rule for the broad range of agreements that can qualify as contracts, the cost-benefit equation might well be insoluble. There is simply too little information and too much diversity to determine a single best generic interpretive rule.

The design question is easier to answer with respect to specific transaction types, where our sense of the salient costs and benefits is clearer, and the values at stake less contested—or so I will argue in this Part. I apply the above analytic framework to four categories of agreement: gratuitous promises, preliminary agreements, spousal agreements, and reporters' confidentiality promises. The rules governing these agreement types are not of equal economic or social importance. Preliminary agreements are often litigated and commonly involve large sums, while there are few cases dealing with reporters' confidentiality promises, evidence perhaps of the strength of journalistic norms. An analysis of how the law should approach these different types of agreements, however, will give specific content to the more abstract discussion in the previous Part. One goal is to cast new light on the law's treatment of these different agreement types. And whether or not the reader agrees

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with my conclusions, I hope the analysis will demonstrate the value of the proposed framework.

#### *A. Gratuitous Promises*

Gratuitous promises—gift promises and other promises without consideration—are a relatively easy case under the framework. Many courts will not enforce a gratuitous promise in the absence of promisee reliance. This is so even if the promise is supported by nominal consideration, though the exchange of a peppercorn clearly expresses a preference for enforcement. In the familiar words of Judge Woolsey, “The parties may shout consideration to the housetops, yet, unless consideration is actually present, there is not a legally enforceable contract.”<sup>98</sup> As Williston and others note, this is an odd rule: “It is something, it seems to me, that a person ought to be able to do, if he wishes to do it,— to create a legal obligation to make a gift. Why not? . . . I don’t see why a man should not be able to make himself liable if he wishes to do so.”<sup>99</sup> If one agrees with Williston, the design question is how the law should determine when a gratuitous promisor wishes to make herself legally liable for a breach of her promise.

The answer will include both an interpretive default and an opt-out rule. There are three reasons to prefer a nonenforcement default for gratuitous promises. The first is an empirical sense that nonenforcement is the majoritarian default. Most parties who make gratuitous promises neither want nor expect legal liability. Second, if the law adopts an express opt-out (and I will argue it should), there is the asymmetry in stickiness. A gratuitous promi-

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<sup>98</sup> *In re Greene*, 45 F.2d 428, 430 (S.D.N.Y. 1930). For an overview of the treatment of nominal consideration in U.S. law, see Joseph Siprut, Comment, *The Peppercorn Reconsidered: Why a Promise to Sell Blackacre for Nominal Consideration Is Not Binding, But Should Be*, 97 Nw. U. L. Rev. 1809, 1811–30 (2003).

<sup>99</sup> Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 194 (1925); see also E. Allan Farnsworth, *Changing Your Mind: The Law of Regretted Decisions* 82–88 (1998); Richard A. Posner, *Economic Analysis of Law* 99 (6th ed. 2003) (“The real mystery in the ‘moral consideration’ cases is why the law doesn’t simply make available a form for making binding promises without requiring consideration . . . . Promises made under seal were enforceable without consideration. This was, seemingly, a useful device; its disappearance is a puzzle.”); Melvin A. Eisenberg, *The Principles of Consideration*, 67 Cornell L. Rev. 640, 659–60 (1982).

sor who intends her promise to be binding knows enough to at least ask what the law requires to make it so; the gratuitous promisor who does not intend that her promise be enforced because the idea has not occurred to her, or because she mistakenly believes that it is unenforceable for other reasons, does not. If the primary reason to enforce a gratuitous promise absent reliance is that the promisor wanted enforcement, the stickiness of an enforcement default is problematic. Third, there are reasons to prefer less, rather than more, enforcement of gratuitous promises. One is courts' inability to judge the defenses appropriate for gratuitous promisors. Melvin Eisenberg makes this argument with respect to improvidence and ingratitude:

An inquiry into improvidence involves the measurement of wealth, lifestyle, dependents' needs, and even personal utilities. An inquiry into ingratitude involves the measurement of a maelstrom, because many or most donative promises arise in an intimate context in which emotions, motives, and cues are invariably complex and highly interrelated. Perhaps the civil-law style of adjudication is suited to wrestling with these kinds of inquiries, but they have held little appeal for common-law courts, which traditionally have been oriented toward inquiry into acts rather than into personal characteristics.<sup>100</sup>

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

Making simple affective donative promises enforceable would have the effect of commodifying the gift relationship. Legal enforcement of such promises would move the gifted commodity, rather than the affective relationship, to the forefront and would submerge the affective relationship that a gift is intended to totemize. Simple donative promises would be degraded into bills of exchange, and the gifts made to perform such promises would be degraded into redemptions of the bills.<sup>101</sup>

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<sup>100</sup> Eisenberg, *supra* note 99, at 662 (footnote omitted).

<sup>101</sup> Melvin A. Eisenberg, *The Theory of Contracts*, in *The Theory of Contract Law: New Essays* 206, 230 (Peter Benson ed., 2001).

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

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

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

If we agree with Williston that gratuitous promisors should have the power to bind themselves legally, the sensible rule is a nonenforcement default combined with an express opt-out rule—a type II rule in my schema. This is precisely what the Model Written Obligations Act (drafted by Williston) proposes: “A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.”<sup>102</sup> Since the Model Act was promulgated in 1925, only Pennsylvania and Utah have adopted it, and only Pennsylvania retains the rule. Perhaps the problem of gratuitous promises is less important in practice than it is to the theory of contract law. Or

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<sup>102</sup> Uniform Written Obligations Act § 1, *supra* note 40, at 584.

perhaps there is a deeper resistance to the Act's premise: that promisors should be able to choose when they shall be legally bound to perform. The latter would also explain the law's refusal to enforce promises for nominal consideration, for a peppercorn also expresses an intent to be bound.<sup>103</sup> The explanation is not, however, that the Model Act is poorly drafted, or that it picks out the wrong rule for interpreting the parties' contractual intent.

### *B. Preliminary Agreements*

Turning to preliminary agreements, there is yet another design option to consider. Alan Schwartz and Robert Scott have recently argued for replacing the current, manifest-intent rule for preliminary agreements with what is, in effect, a more tailored default.<sup>104</sup> Their proposal complicates the design problem. The question is whether the current manifest-intent rule, Schwartz and Scott's more tailored default, or a generic default with an express opt-out provides the best rule.

As noted above, courts will enforce a preliminary agreement only if the plaintiff can show that the parties intended it to be enforceable. To quote Judge Leval in *Teachers Insurance* again:

There is a strong presumption against finding binding obligation in agreements which include open terms, call for future approvals and expressly anticipate future preparation and execution of contract documents. Nonetheless, if that is what the parties intended, courts should not frustrate their achieving that objective or disappoint legitimately bargained contract expectations.<sup>105</sup>

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<sup>103</sup> There is, however, a difference between a peppercorn as a signal of contractual intent and an express statement of such intent: a peppercorn does not wear its meaning on its sleeve. Another reason for rejecting the peppercorn rule therefore is that nominal consideration is a bad opt-out rule, which is likely to result in party error when one side does not understand the act's meaning or effect. This might explain why nominal consideration is sufficient to support the enforcement of an irrevocable offer or a promise to act as a surety, but not the enforcement of most other sorts of agreements. See Restatement (Second) of Contracts §§ 87–88 (1981). Irrevocable offers and surety agreements are usually made by sophisticated parties, who can be presumed to understand the legal meaning of a peppercorn.

<sup>104</sup> Alan Schwartz & Robert E. Scott, Precontractual Liability and Preliminary Agreements, 120 Harv. L. Rev. 661 (2007).

<sup>105</sup> *Teachers Ins. and Annuity Ass'n of Am. v. Tribune Co.*, 670 F. Supp. 491, 499 (S.D.N.Y. 1987).

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This approach is essentially that of the English rule, or a type I rule in my schema: it adopts a nonenforcement default combined with an opt-out rule instructing courts to look to the totality of the circumstances to determine whether the parties intended legal liability.<sup>106</sup> In *Teachers Insurance*, those circumstances included the language of agreement, the context of negotiations, with particular attention to the parties' motives, the number of open terms, the extent to which the agreement had been performed, and usage of trade.<sup>107</sup> Farnsworth lists yet more factors courts consider, including "the kind of parties involved, the importance of the deal, and above all the nature of the transaction," all of which are generally verifiable only by way of extrinsic evidence.<sup>108</sup> The result of this wide-ranging inquiry into the parties' contractual intent mirrors experience with strict applications of the English rule without the strong presumption of intent or other evidentiary rules: a high degree of indeterminacy in case outcomes. Thus, Alan Schwartz and Robert Scott observe that "[a]ny list of relevant factors confines a court's discretion to some extent, but [courts' approach to preliminary agreements] leaves the decision process largely obscure when, as with these factors, courts fail to attach weights to the factors or to specify the relationship among them."<sup>109</sup> Farnsworth is more succinct: "It would be difficult to find a less predictable area of contract law."<sup>110</sup>

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<sup>106</sup> Judge Easterbrook's opinion in *Empro* suggests that courts should limit the inquiry by excluding parol evidence when the preliminary agreement is in writing. His argument for that rule involves a sleight of hand: Easterbrook correctly observes that the question of intent is an objective one, from which he incorrectly concludes that "[p]arties may decide for themselves whether the results of preliminary negotiations bind them . . . through their words." *Empro Mfg. Co. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 425 (7th Cir. 1989). The parties' objective intent is usually understood as the intent a reasonable observer would attribute them in light of the totality of the circumstances, not only on the basis of their words. In any case, *Empro*'s textualist approach similarly ends up considering multiple factors: the text, the structure of the document as a whole, and the implicit meaning of terms. See *id.* at 425–26.

<sup>107</sup> 670 F. Supp. at 499–503.

<sup>108</sup> Farnsworth, *supra* note 4, at 261 (footnotes omitted); see also Schwartz & Scott, *supra* note 104, at 675–76.

<sup>109</sup> Schwartz & Scott, *supra* note 104, at 676.

<sup>110</sup> Farnsworth, *supra* note 4, at 259–60.

Schwartz and Scott propose a different approach.<sup>111</sup> They would replace the all-things-considered inquiry into the parties' contractual intent with a more streamlined one, designed to determine whether legal enforcement of the preliminary agreement would add value to the transaction. Parties enter into preliminary agreements, according to Schwartz and Scott, when they do not yet know if a deal will be profitable, when one or both can invest in a way that will answer that question, and when it is not possible to contract for such investments, for example, because the parties cannot observe each other's cost functions.<sup>112</sup> Schwartz and Scott provide a model of when enforcement encourages efficient investment in such situations, which involves familiar problems of sunk costs and shifting bargaining power.<sup>113</sup> For my purposes, the details of that model are not so important as Schwartz and Scott's conclusion: legal enforcement of preliminary agreements adds value when "the parties have agreed on the nature of their project, on the nature of the investment actions that each is committed to undertake, and on the order in which these actions are to be pursued."<sup>114</sup> Schwartz and Scott recommend that courts drop the current open-ended, multi-factored test for the parties' contractual intent and ask instead only whether the preliminary agreement meets those three conditions. Absent the parties' express statement of intent,

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<sup>111</sup> Schwartz & Scott, *supra* note 104. Schwartz and Scott also have a descriptive thesis: that the holdings in preliminary agreement cases generally conform to their proposed rule—that courts "appear to have an intuitive grasp of the necessary conditions for finding a preliminary agreement." *Id.* at 701. And they have something to say about the proper scope of the parties' legal duties under such an agreement and the proper remedy for its breach. Rather than have courts impose a duty to negotiate in good faith or fill the gaps in the agreement, Schwartz and Scott would have courts impose a duty not to deviate from the agreed investment sequence. In the event of a breach, they suggest that the appropriate remedy is verifiable reliance damages. *Id.* at 704.

<sup>112</sup> *Id.* at 677–78.

<sup>113</sup> *Id.* at 676–91.

<sup>114</sup> *Id.* at 701; see also *id.* at 704 ("[T]he parties must agree on the type of project, such as a shopping center or a financing; on an imprecise but workable division of authority for investment behavior; and on the rough order in which their actions are to be taken."). Schwartz and Scott's argument does not demonstrate that legal enforcement adds value *only* when these conditions are met. Their model, if successful, shows that enforcement adds value to precontractual agreements that meet these conditions, not that there are not other situations in which it does so.



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satisfaction of these conditions would be necessary and sufficient to impose legal liability.<sup>115</sup>

One can read Schwartz and Scott's thesis as a call for more tailored majoritarian defaults combined with express opt-out rules—a combination of type II and type IV rules in my schema.<sup>116</sup> Where enforcement is efficient, the parties are more likely to want it; where enforcement is inefficient, the parties are less likely to want it. For all the usual reasons that favor majoritarian defaults, Schwartz and Scott's proposed inquiry into whether the parties to a preliminary agreement should have wanted legal liability is therefore a more predictable, and perhaps even a more reliable, test for their objective intent than is the unstructured inquiry into manifest intent in which courts currently engage.

Still, this is a curious suggestion coming from Alan Schwartz and Robert Scott. The proposal is that instead of asking whether the parties *wanted* or *appeared to want* legal liability, courts should ask only whether they *should have wanted* it—whether at the time of the preliminary agreement it was in the parties' interest that their agreement be enforceable. In other words, Schwartz and Scott would replace an inquiry into whether the parties thought legal liability was in their interest with an inquiry into whether it actually was.<sup>117</sup> The suggestion is curious because it runs contrary to a common methodological assumption among economists: that the parties know best when they stand to benefit from one form of transaction or another, and that courts should therefore defer to their decisions wherever possible. Economists who study contract law commonly assume that the parties' choice is the best available met-

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<sup>115</sup> Schwartz and Scott mention only that parties should be able to opt out of legal liability when their agreement meets the three conditions. *Id.* at 704. I am assuming that they would also permit parties to opt into such liability for agreements not meeting their three criteria, so long as the agreement satisfies the other conditions of contractual validity, such as reasonable certainty of terms.

<sup>116</sup> This is not the only reading of their proposal. We might instead read it along the lines of the duty-imposing reading of § 21 described in Section III.B above. On this reading, Schwartz and Scott recommend that courts depart from the intent inquiry altogether (except when the parties expressly say they do not want legal liability) and ask instead only about the efficiency of enforcement. But this would be a curious reading, given the considerations discussed in the next paragraph.

<sup>117</sup> Craswell adopts a similar approach to a variety of formation rules. Craswell, *Offer, Acceptance*, *supra* note 84, at 544.

ric for value.<sup>118</sup> Both Schwartz and Scott, for example, have criticized the rule against penalties for licensing judicial second-guessing of the parties' choice of how to structure their legal relationship. Schwartz maintains:

Courts do not have to prevent promisees from obtaining penalty clauses if promisees do not want penalty clauses. The *ex ante* rule is not merely unnecessary: judicial review produces mischief. Courts sometimes mistake compensatory damage measures for penalties, and so have found that particular liquidated damage clauses would inevitably overcompensate promisees when those clauses only protected the expectation. Thus, the *ex ante* branch of the liquidated damage rule should be abandoned.<sup>119</sup>

Scott has similarly argued that “the very existence of a freely negotiated agreed damages provision is compelling presumptive evidence that it constitutes the cost-minimizing alternative,” though the reasons why will often evade judicial inquiry.<sup>120</sup> Schwartz and Scott's tailored defaults for preliminary agreements take the opposite approach, replacing an inquiry into whether the parties believed that legal enforcement was in their best interest with a judicial judgment as to whether it was in their best interest.

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<sup>118</sup> Richard Posner makes the general point:

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

Posner, *supra* note 99, at 96. The classic critical diagnosis of this methodological commitment can be found in Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 *Va. L. Rev.* 451, 462–69 (1974). A general defense of this thesis, without reliance on efficiency as the ultimate value, can be found in Randy Barnett's neo-Hayekian theory, the basics of which can be found in Barnett, *Sound of Silence*, *supra* note 9, at 832, and a more extended version in Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* 29–40 (1998).

<sup>119</sup> Alan Schwartz, *The Myth that Promisees Prefer Supercompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 *Yale L.J.* 369, 370 (1990).

<sup>120</sup> Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 *Colum. L. Rev.* 554, 587, 588–93 (1977).

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

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

But this defense of the Schwartz-Scott proposal also suggests an alternative to it. If the problem with the existing rule for preliminary agreements is that the manifest-intent opt-out provides too little certainty or predictability, the simpler solution is an express opt-out. Rather than attempting to tailor the default, we should

simply require parties who want legal liability for their preliminary agreements to say so, informing courts of their considered preferences. Parties entering into a preliminary agreement are best positioned to know whether they will benefit from legal liability than is a court during later litigation. By conditioning legal liability on an express contemporary statement of that preference, the law can give the parties a reason to share that information with the court and each other—to generate simple and reliable evidence of their intent. Imposing this minimal *ex ante* cost on parties who want legal liability obviates the need for Schwartz and Scott's expensive *ex post* judicial inquiry into efficiency.

What of the other variables relevant to determining the best rule for interpreting the parties' contractual intent? A few facts bear mention. Most preliminary agreement cases involve sophisticated parties represented by lawyers in negotiations over high-value transactions.<sup>121</sup> The negotiations are typically lengthy, complex, and relatively adversarial. And in most cases that reach the courts, the preliminary agreement has been reduced to writing.<sup>122</sup> Taken together, these facts suggest that it is generally clear to the parties that they are moving toward a legally enforceable agreement. What remains uncertain is whether they have yet reached one.

These observations suggest that neither the out-of-pocket costs of an express opt-out nor party error costs should be especially worrisome. Particularly where the preliminary agreement is al-

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<sup>121</sup> Of 87 cases that Westlaw identified as "examining" or "discussing" *Teachers' Insurance* (three or four stars), 53 applied the rule. Of those, 43 cases concerned preliminary agreements between corporate entities (though in several principles or other individuals were also named parties), and 44 involved claims worth one-million dollars or more. Forty-six of the 53 cases fell into one or both of those categories. See, e.g., *Tractebel Energy Mktg., Inc. v. APE Power Mktg., Inc.*, 487 F.3d 89, 95–96 (2d Cir. 2007) (finding a binding preliminary agreement in business transaction worth tens of millions of dollars); *Trianco LLC v. Int'l Bus. Mach. Corp.*, 583 F. Supp. 2d 649, 653, 657 (E.D. Pa. 2008) (finding a Type II agreement for a subcontractor bid on a \$300,000,000 government contract deal); see also *Mark Andrew of Palm Beaches, Ltd., v. GMAC Commercial Mortgage Corp.*, 265 F. Supp. 2d 366, 379 (S.D.N.Y. 2003) (finding no binding preliminary agreement on a nine-million-dollar commercial loan agreement); *Spencer Trask Software & Info. Servs. LLC v. RPost Int'l Ltd.*, 383 F. Supp. 2d 428, 441 (S.D.N.Y. 2003) (finding no binding preliminary agreement in a venture capital transaction).

<sup>122</sup> Of the 53 cases applying *Teachers' Insurance* described in the previous note, 48 involved a written agreement. Of the 14 decisions from the set that held the preliminary agreement to be enforceable, 13 involved a written agreement.

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ready in writing, the costs of adding words to the effect of “This is a legally enforceable agreement” are minimal. And if the parties are sophisticated players represented by counsel, there is little chance they will forget to add those words or expect enforcement in their absence. Nor are the relational costs particularly high. In most preliminary agreements, the scope of legal liability is among the issues under discussion. Legal enforcement is already on the table. This diminishes the relational costs of having to say precisely when enforcement shall attach.

The above arguments all go to the value of an express opt-out. There are two reasons to prefer a nonenforcement default. First, that default corresponds to the general aleatory view of negotiations in U.S. law. There is no obligation to negotiate in good faith, and parties are free to walk away from negotiations for any or no reason. Unless or until there is a shift in U.S. law on this point, an enforcement default for preliminary agreements would be anomalous and potentially confusing. The second reason lies in the temporal structure of contracting.<sup>123</sup> Parties enter negotiation from the position of no contract and eventually reach a point where legal obligations attach. An enforcement default would require some test for when the parties had reached sufficient agreement to flip the default from nonenforcement to enforcement, and then require the parties to opt out again if they preferred no enforcement. The nonenforcement default means that the parties cross the enforcement line only once, and leaves it to them to tell courts when they do so.

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

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<sup>123</sup> I owe this point to Conrad Deitrick.

*C. Spousal Agreements*

Domestic agreements are exchange agreements between spouses, between parents and children, or between other family members. This Section focuses on agreements between spouses, with special attention to agreements involving a promise to support. Here the arguments for and against enforcement are more complex and less settled, as is illustrated by a brief tour through the history of U.S. and English law in this area.

It will be recalled that *Balfour v. Balfour*, the case that first established the English rule, involved a spousal agreement: a husband's promise to provide his wife a monthly stipend in exchange for her implicit undertaking not to claim failure to support.<sup>124</sup> That *Balfour* was a domestic-agreement case is not surprising. It had long been argued that domestic agreements and social arrangements posed a special problem for contract law, one whose solution lay in requiring proof of the parties' intent to contract. Hence Pollock's oft-quoted argument:

An appointment between two friends to go out for a walk or to read a book together is not an agreement in the legal sense: for it is not meant to produce, nor does it produce, any new legal duty or right, or any change in existing ones. . . .

Nothing but the absence of intention seems to prevent a contract from arising in many cases of this kind.<sup>125</sup>

*Balfour* is a judicial affirmation of Pollock's thesis.<sup>126</sup>

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<sup>124</sup> The above description follows the trial judge's account of the consideration in the case, [1919] 2 K.B. 571, 571-72.

<sup>125</sup> Frederick Pollock, *Principles of Contract at Law and In Equity: Third American from the Seventh English Edition* 3 & n.c (Gustavus H. Wald & Samuel Williston eds., 1906). One finds a similar argument in Anson:

On a like footing stand engagements of pleasure, or agreements which from their nature do not admit of being regarded as business transactions. . . . The acceptance of an invitation to dinner or to play in a cricket match forms an agreement in which the parties may incur expense in the fulfillment of their mutual promises. The damages resulting from breach might be ascertainable, but the courts would probably hold that, as no legal consequences were contemplated by the parties, no action would lie.

Anson, *supra* note 24, at 49.

<sup>126</sup> Atkin's opinion in *Balfour* makes Pollock's argument:

[I]t is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordi-

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In the first edition of his treatise, Williston considered and rejected that thesis. His argument had two parts. First, many domestic agreements and social arrangements are unenforceable in any case because they do not meet the consideration requirement: “the promise of the guest to attend the dinner is not given or asked for as the price of the host’s promise.”<sup>127</sup> Second, in those few cases where there is consideration, the agreement should be enforced: “[t]here seems no reason why merely social engagements should not create contracts if the requisites for the formation of a contract already enumerated exists.”<sup>128</sup> When Williston drafted Section 20 of the First Restatement (the ancestor of Section 21 in the Second Restatement), the text was therefore silent as to domestic or social agreements. In Williston’s view, they did not require a separate rule.

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

If the subject matter and terms of a transaction are such as customarily have affected legal relations and there is nothing to indicate that the one now asserting their existence had reason to know that the other party intended not to affect his legal rela-

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

[1919] 2 K.B. at 578–79.

<sup>127</sup> 1 Williston 1920 Edition, supra note 23 § 21, at 24 n.19. In the second edition, Williston applies the same argument to domestic arrangements: “The real difficulty, however, in finding a contract in such cases is that the parties do not manifest an intent to make a bargain, that is, to exchange a promise for an agreed consideration.” Williston 1936 Edition, supra note 28, at 39 n.14.

<sup>128</sup> 1 Williston 1920 Edition, supra note 23 § 21, at 23–24.

tions, then the transaction will be operative legally. . . . If the subject matter and terms are not such as customarily have affected legal relations, the transaction is not legally operative unless the expressions of the parties indicate an intention to make it so.<sup>129</sup>

While perhaps more attuned to what courts were doing, Corbin's solution lacks the elegance of Williston's categorical approach. Framed as a rule, it is arguably circular. A manifest intent to be bound is required where the "matter and terms are not such as customarily have affected legal relations," though such customs depend on when the law requires a manifest intent to be bound. Perhaps to avoid this objection, when the drafters of the Second Restatement added a new comment on social and domestic agreements, they reformulated Corbin's point as a rule of evidence for specified categories: "In some situations the normal understanding is that no legal obligation arises, and some unusual manifestation of intention is necessary to create a contract. Traditional examples are social engagements and agreements within a family group."<sup>130</sup> The upshot is a black-letter rule that, in cases involving domestic agreements and social arrangements, there is a contract only if the parties manifestly intended one. If, in the case of commercial agreements, application of the English rule has moved towards the Restatement approach, then in the case of domestic agreements the text of the Restatement has moved towards the English rule.

Partly for reasons described below, scholars on this side of the Atlantic have not explored the application of the Section 21 rule for domestic agreements. English and other commonwealth scholars have paid more attention to such agreements, and especially agreements between spouses. Many have criticized courts' application of the English rule to spousal agreements. Several writers ar-

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<sup>129</sup> Corbin, *supra* note 22 § 34, at 138 (footnotes omitted). Corbin also was characteristically attentive to the fuzziness of the line between these two categories:

The line of division between what is 'social' on the one hand and what is legally operative on the other, between agreements that make contracts and those that do not, can be determined only by inductive study and comparison of what the courts have done in the past. Case by case, they have drawn a line, although like other lines, it is drawn with a wide and imperfect brush, not with a draftsman's pen. Being drawn by many hands, there are gaps in places and there are conflicting lines in other places.

*Id.* at 141.

<sup>130</sup> Restatement (Second) of Contracts § 21 cmt. c (1981).



gue that the rule's real purpose in these cases is to prevent contract law from intruding into relationships that, in the opinion of individual judges, should be beyond the law's reach. The purported focus on the parties' intent is in fact a "smokescreen" for decisions whose real purpose is "keeping contract in its place."<sup>131</sup> On this skeptical reading of the English rule, the nonverifiability of the parties' manifest intent is essential to the rule's hidden function. Hedley therefore suggests that "[i]f liability were thought appropriate on certain facts, it could plausibly be made out as 'intended'; if not, it would be easy to deny the existence of the requisite intention."<sup>132</sup> Because the intent question is indeterminate and malleable, courts can use it as cover for their policy-based decisions as to the proper reach of contract law.

The decision in *Balfour v. Balfour* is exemplary on this reading. The Court of Appeal held that there was no contract based ostensibly on the fact that "the promise here was not intended by either party to be attended by legal consequences."<sup>133</sup> But the opinions discuss no evidence of what the parties before the court intended or appeared to intend with respect to legal liability. Instead, the opinions focus on the general desirability of legal interference in marital relations. "The common law does not regulate the form of agreements between spouses. . . . In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted."<sup>134</sup> Whatever the supposed *ratio decidendi* of the case, the outcome appears to have been driven by the court's view that contract law should not intrude into the marital relationship.

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<sup>131</sup> Sally Wheeler & Jo Shaw, *Contract Law: Cases, Materials and Commentary* 165 (1994); Hedley, *supra* note 57.

<sup>132</sup> Hedley, *supra* note 57, at 403.

<sup>133</sup> *Balfour v. Balfour*, [1919] 2 K.B. 571, 579–80.

<sup>134</sup> *Id.* at 579 (Atkin, L.J.); see also *id.* at 577 (Duke, L.J.) ("The proposition that the mutual promises made in the ordinary domestic relationship of husband and wife of necessity give cause for action on a contract seems to me to go to the very root of the relationship, and to be a possible fruitful source of dissension and quarrelling. I cannot see that any benefit would result from it to either of the parties, but on the other hand it would lead to unlimited litigation in a relationship which should be obviously as far as possible protected from possibilities of that kind."); Hedley, *supra* note 57, at 391–92 ("[E]ven a brief reading of their lordships' judgments will show how reluctant they were to extend the law of contract into the area of matrimonial rights and duties.").

The smokescreen criticism of the English rule combines three separate arguments. The first and mildest rests on the premise that the law should be transparent: courts should say what they mean.<sup>135</sup> If the outcomes of domestic agreement cases are being driven by factors other than the parties' manifest intent, courts should say so. Implicit in this criticism is the idea that courts will reach better results if they grapple with such considerations directly, forcing courts to weigh the costs and benefits of their decisions. The second criticism is that the English rule gives judges too much discretion in deciding when a domestic agreement will be enforced. Such discretion is problematic both because parties will not know the legal consequences of their agreement, and because we might not trust judges to reach just decisions in these cases. Third, one can read the application of the English rule to domestic agreements as yet another example of the common law's pernicious distinction between public and private, a distinction that purports to create a protected sphere of human liberty but in fact functions to sustain established inequalities and modes of domination. Accordingly, Mary Keyes and Kylie Burns argue that the nonenforcement default for spousal promises is "a highly effective default principle which impedes enforcement of family agreements, and performs a powerful symbolic function delineating the realm of law from the realm of the family and the feminine, privileging the former over the latter."<sup>136</sup> Many cases involving domestic agreements follow the fact pattern in *Balfour*: wife sues husband for breach of promise to support. By withholding enforcement in these cases, the English rule can covertly play a supporting role in a legal regime that systematically subordinates married women to their husbands.

Judicial treatment of contracts between spouses in the United States has been less uniform. While I know of no recent systematic study, a sampling indicates a variety of approaches. In cases involving economic agreements, such as a business partnership or an agreement involving title to properties, courts have provided enforcement with no inquiry into the parties' intent.<sup>137</sup> Noneconomic

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<sup>135</sup> For a general account of this principle, see Micah Schwartzman, *Judicial Sincerity*, 94 Va. L. Rev. 987 (2008).

<sup>136</sup> Keyes & Burns, *supra* note 62, at 578.

<sup>137</sup> See, e.g., *Dodson v. Nat'l Title Ins. Co.*, 31 So.2d 402 (Fla. 1947) (agreement regarding proceeds of jointly-held property); *Peaks v. Hutchinson*, 53 A. 38 (Me. 1902)

agreements appear less likely to be enforced. Some cases conform to the Restatement approach. In *A.Z. v. B.Z.*, the Massachusetts Supreme Court considered a husband and wife's agreement as to the use of frozen preembryos.<sup>138</sup> While the agreement was evinced by the signatures on a clinic's consent form, the court emphasized that "the record does not indicate, that the husband and wife intended the consent form to act as a binding agreement between them should they later disagree as to the disposition."<sup>139</sup> In other cases, enforcement is denied on grounds that have nothing to do with the parties' intent. An Illinois appeals court has held that a wife's promise to amend a land trust agreement in exchange for her spouse's "promise to continue to be a kind, loving and affectionate husband" was not supported by consideration.<sup>140</sup> Alternatively, an Arizona appellate court refused to enforce an agreement that each spouse would support the other through graduate school on the grounds that the terms were too uncertain.<sup>141</sup>

One type of inter-spousal agreement appears with relative frequency: agreements involving one spouse's promise to support the other in exchange for some economic benefit. Reva Siegal and Jill Hasday have each cataloged courts' hostility to agreements between spouses involving payment for services, which almost always involve a wife suing a husband or his estate for money owed.<sup>142</sup> They observe that U.S. courts commonly refuse enforcement in these cases for one or both of two reasons: the agreement is without consideration, since the spouse has a preexisting duty to pro-

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(agreement that building constructed by husband on wife's land would remain husband's property); *Papa v. Vacchina*, 321 P.2d 245 (Nev. 1958) (agreement to pay sum to wife's daughters); *Horton v. Horton*, 487 S.E.2d 200 (Va. 1997) (wife's promise to dissolve joint venture and execute power of attorney for payments from husband); *Klotz v. Klotz*, 117 S.E.2d 650, 651, 656 (Va. 1961) (business partnership agreement).

<sup>138</sup> 725 N.E.2d 1051 (Mass. 2000).

<sup>139</sup> *Id.* at 1056. The parties' marriage relationship was not at the core of this decision. Later in the same decision, the court stated in dicta that "even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will." *Id.* at 1057.

<sup>140</sup> *Lesnik v. Estate of Lesnik*, 403 N.E.2d 683, 687 (Ill. App. 1980).

<sup>141</sup> *Pyeatte v. Pyeatte*, 661 P.2d 196, 201 (Ariz. App. 1982).

<sup>142</sup> Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 Harv. L. Rev. 491, 500-02 (2005); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 Geo. L.J. 2127, 2174-96 (1994).

vide the bargained-for services, and the agreement is unenforceable on the grounds of public policy, since enforcement would allow the market to intrude into the marriage relationship, which should be governed by other norms.<sup>143</sup> Unlike the rule in England, these holdings close the door on enforcement entirely, whether the parties intended legal liability or not. Like the application of English rule, however, they “appear to have systematically adverse distributional consequences for women and poorer people, maintaining and increasing distributive inequality.”<sup>144</sup>

With these observations in hand, let me return to the design question, starting with spousal support agreements. First, whether or not we think the English rule as applied to agreements between spouses is an exercise in bad faith, at least it leaves room in theory for their enforcement—as distinguished from the approach of U.S. courts, which often precludes enforcement altogether. Second, the parties’ intent with respect to legal liability should not be irrelevant to the enforcement decision. There are legitimate worries here. One is undue influence. Spousal support agreements are not arms-length transactions and often involve radically unequal bargaining power. No matter how clear the evidence of a party’s intent that the agreement be or not be enforced, there is reason to worry that it was not freely given. At the same time, a mandatory enforcement or nonenforcement rule would deny altogether spouses’ legitimate interests in controlling the scope of their legal obligations to one another.

The history and distributive effects of nonenforcement of spousal support agreements suggests flipping the default and adopting a rule that such agreements are presumptively enforceable. We can expect an enforcement default for spousal agreements to be especially sticky. The parties are less likely to be legal sophisticates or to be thinking about legal consequences. The argument for flipping the default adopts a positive attitude towards

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<sup>143</sup> A recent example can be found in *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993). There, the court reasoned both that “[p]ersonal performance of a personal duty created by the contract of marriage does not constitute a new consideration,” and that the negotiations involved in “sickbed bargaining . . . are antithetical to the institution of marriage as the Legislature has defined it.” *Id.* at 20.

<sup>144</sup> Hasday, *supra* note 142, at 517. Siegel too emphasizes the “immense distributive consequences for women” of the prohibition on interspousal contracts for household labor. Siegel, *supra* note 142, at 2209.

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that stickiness. A presumption that spousal support agreements are enforceable would work to erase the distinction of a protected private sphere and provide the same protection to the victim of a spouse's breach that the law provides victims of commercial breaches. This argument is not a majoritarian claim that most parties to such agreements want enforcement. Nor is it a claim that the costs of contracting out of enforcement are less than those of contracting out of nonenforcement, or that enforcement would be an information-forcing default. The argument is rather that there is a social interest in enforcing spousal agreements for support, one that does not turn on the parties' initial intent. Greater enforcement will disrupt bad power relationships that the law otherwise enables. And this is not the only social benefit. Promisee reliance in such cases often presents an especially compelling case for enforcement.<sup>145</sup> And society has an obvious economic interest in enforcing a spouse's promise of economic support or continuing care. We should flip the default because defaults in general, and the default for spousal agreements in particular, are sticky.<sup>146</sup>

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<sup>145</sup> Hedley argues that in most noncommercial transactions, judicial intuitions about the appropriateness of contractual liability turns on whether there has been any detrimental reliance.

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

Hedley, *supra* note 57, at 406.

<sup>146</sup> Oddly enough, this argument suggests a defense of the form of the court's argument in *Balfour*, if not its substance. In *Balfour*, the Court of Appeal decided a legal question of first impression: in contemporary terms, the appropriate default for spousal agreements. One might argue that the answer to that question should turn on the sorts of general policy considerations that the court discussed—the costs and benefits of treating “each house [as] a domain into which the King's writ does not seek to run.” *Balfour v. Balfour*, [1919] 2 K.B. 571, 579. This is not to say that the *Balfour* court correctly identified or weighed those costs and benefits. Similar partial defenses might be made for several other commonly criticized decisions under the English rule. See, e.g., *President of the Methodist Conference v. Parfitt* [1984] Q.B. 368, 377 (refusing to find a contract of service based on an ecclesiastical employment agreement); *Ford Motor Co. v. Amalgamated Union of Eng'g and Foundry Workers* [1969] 1 W.L.R. 339, 355 (finding that no legal obligation arose from a collective bargaining agreement).

What of the opt-out rule? The above considerations recommend a more costly opt-out rule—for example, a requirement that the parties expressly say when they do not want enforcement. The more the opt-out costs the parties, the stickier the default. An express opt-out rule would also address the first and second criticisms of the English rule: covert policy judgments and judicial discretion. But we must also take account of the relational costs of express opt-outs. In general, express opt-outs have relational costs because, as it is often said, contracts are often like marriages. Marriages are even more like marriages. An expressed preference that a promise to a spouse not be enforceable is much more likely to interfere with the relationship as a whole than the same expressed preference in a commercial agreement. The concern here is not only that parties to spousal agreements who choose to opt out will pay a high relational price for doing so. If we care about party choice, it is just as important that, as a result of those costs, many who would otherwise prefer to opt out will choose not to do so. Depending on how often the latter is the case, the more accurate test for the parties' objective intent might well be the manifest-intent test that English courts currently use (but instead with an enforcement default), which requires courts to examine the totality of the circumstances, asking whether it would be reasonable to ascribe the parties such an intent in those circumstances.

It is difficult to say in the abstract how these relational and party error costs should be weighed against the costs of judicial discretion and court error that a manifest-intent opt-out imposes. If courts were to adopt a rule that applied only to spousal *support* agreements, I believe they would do better to require an express opt-out. The social interest in the enforcement of such agreements outweighs any unexpressed preference one or both parties might have for nonenforcement. Spousal support agreements should then be subject to a type IV rule: an enforcement default with an express opt-out.

If the project is to craft a *generic* rule for spousal agreements, the relational costs of an express opt-out rule should weigh more heavily. Here too we might want an enforcement default. But where the social interest in enforcement is less compelling, a requirement that spouses express their intent not to be legally bound might well result in too much enforcement. In many significant agreements be-

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tween spouses, it is unrealistic to expect the parties to state expressly their preference for or against enforcement in future disputes. In these cases, we might do better with a type III rule: an enforcement default combined with a manifest-intent opt-out. This judgment depends in part on an empirical sense of how marriages work. It is also partly based on a sense that social attitudes towards marriage have changed, and that, with an enforcement default, judges today would be less likely to use a manifest-intent inquiry as an excuse for insulating spousal agreements from the law. But this is just to make the familiar point that the more we trust judges, the more comfortable we will be with less formalist modes of interpretation.

#### *D. Reporters' Promises of Confidentiality*

Similar considerations suggest a different rule for when courts should enforce a reporter's promises of confidentiality to a source—a fact pattern that is rarely litigated, but whose analysis further illustrates the proposed framework. In *Cohen v. Cowles Media Co.*,<sup>147</sup> the Minnesota Supreme Court held that such a promise was not enforceable in contract, and that recovery under a theory of promissory estoppel would violate the First Amendment. The court arrived at the first holding by departing *sub silentio* from the Restatement rule, explaining that it was “not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract.”<sup>148</sup> The promissory estoppel holding was based on the free press clause of the First Amendment and was subsequently overturned by the U.S. Supreme Court.<sup>149</sup> On remand, the Minnesota

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<sup>147</sup> 457 N.W.2d 199 (Minn. 1990). Other courts that have considered the issue have generally followed *Cohen's* holding, if not always its reasoning. See *Ruzicka v. Conde Nast Publ'ns, Inc.*, 939 F.2d 578, 582 (8th Cir. 1991) (applying Minnesota law); *Pierce v. The Clarion Ledger*, 452 F. Supp. 2d 661, 663–64 (S.D. Miss. 2006); *Steele v. Isikoff*, 130 F. Supp. 2d 23, 31–32 (D.D.C. 2000); see also *Ventura v. The Cincinnati Enquirer*, 396 F.3d 784, 791–93 (6th Cir. 2005) (holding that a reporter's confidentiality promise related to information concerning criminal activity was unenforceable on grounds of public policy). But see *Doe v. Univision Television Group, Inc.*, 717 So.2d 63, 65 (Fla. App. 1998) (holding that source should have been permitted to plead breach of contract and promissory estoppel).

<sup>148</sup> *Cohen*, 457 N.W.2d at 203.

<sup>149</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–70 (1991).

Supreme Court concluded that the source was entitled to recovery on the basis of promissory estoppel.<sup>150</sup>

While the Minnesota Supreme Court's first decision framed the contract issue in terms of the parties' intent, the court did not discuss any particulars of the transaction between the parties. Instead, like the opinions in *Balfour*, the court focused on the general wisdom of enforcing agreements of that type. It explained that "contract law seems here an ill fit for a promise of news source confidentiality. To impose a contract theory on this arrangement puts an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship."<sup>151</sup> The court's First Amendment concerns about applying promissory estoppel also likely informed its decision as to enforcement in contract.<sup>152</sup>

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

*Cohen* does not say what the opt-out rule should be. But the court's refusal to look at the specifics of the transaction or to remand the case for additional findings suggests an express opt-out: A reporter or source who wants a confidentiality promise to be legally enforceable must say so. This too seems right. First, the express opt-out rule makes the default all the more sticky, promoting society's interests in not enforcing such agreements. And unlike spousal agreements, expressing a preference for legal enforcement is unlikely to damage the reporter-source relationship. While such relationships are often based on a degree of trust, the interests of the parties rarely align, and are sometimes—as in *Cohen*—at odds.

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<sup>150</sup> *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 390–92 (Minn. 1992).

<sup>151</sup> *Cohen*, 457 N.W.2d at 203.

<sup>152</sup> See *id.* at 203–05 (holding that First Amendment barred a promissory estoppel claim against the newspaper).



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The mere fact that the source prefers the protection of contract law suggests a trust deficit, or that the relationship is already relatively adversarial. In such a context, expressing that preference is unlikely to cause the relationship much harm. Reporters' confidentiality promises should therefore be subject to a type II rule: a nonenforcement default together with an express opt-out.

#### CONCLUSION: FURTHER THOUGHTS ON THE RESTATEMENT RULE

The various categories of agreements I have discussed involve different empirical predicates and implicate different social interests. In each case, however, we can construct a rule for conditioning enforcement on the parties' intent with respect to legal liability that roughly balances the various reasons for or against imposing legal liability. In the case of gratuitous promise, a straightforward majoritarian argument, together with a social interest in not enforcing such promises, support a sticky nonenforcement default, while the express opt-out is recommended to simplify ex post litigation and because of its minimal relational costs. When it comes to preliminary agreements, the preferred rule is again a nonenforcement default combined with an express opt-out. Here, however, the reason involves information-forcing considerations: such a rule gives parties an incentive to tell courts when they think enforcement is in their interest. For spousal support agreements, an enforcement default is supported by social interests in enforcement that do not depend on the parties' intent to be legally bound and that also suggest an express opt-out. In the case of spousal agreements more generally, relational costs recommend a manifest-intent opt-out rule. Finally, the reasons for not enforcing reporters' confidentiality promises recommend a sticky nonenforcement default together with an express opt-out, which in this context is likely to have fewer relational costs.

Taken as a whole, the analysis demonstrates the potential value of tailored defaults and opt-out rules that condition legal liability on the parties' intent to contract. The law's interests in enforcing voluntary obligations depend on the type of agreement at issue. Tailored rules for interpreting the parties' intent to contract can partially incorporate those considerations into the conditions of contractual validity, striking different balances between reasons for granting persons the power to control their legal obligations to one

another and reasons for enforcing or not enforcing agreements that do not depend on the parties' preferences or intentions.

The above discussion provides new material for the interpretation of the generic rule described in Section 21 of the Second Restatement. I have suggested elsewhere two possible readings of the Restatement rule.<sup>153</sup> On the first reading, the rule expresses a principled commitment to sometimes imposing contractual duties for reasons other than the parties' contractual intent. Contract law requires "[n]either real nor apparent intention that a promise be legally binding"<sup>154</sup> because our interests in holding breaching promisors legally liable do not all involve party choice. On the second reading, the Restatement rule is not a statement of principle, but reflects a judgment about the epistemic limitations of courts and the practical requirements of contracting parties. Even if the only function of contract law is to give parties the power to alter their legal obligations when they wish, the English experience has shown that the parties' manifest intent to contract is unsuitable as a condition of contractual validity. Absent formalities like the seal, that intent is simply too difficult to verify. The Restatement rule, on this power-conferring reading, establishes a majoritarian default, leaving it up to parties who do not intend legal liability to inform courts of their preference.

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

The asymmetry of the default problem presents a challenge to power-conferring readings of the Restatement rule. Other things being equal, a commitment to party choice should recommend a nonenforcement default, which we can expect to be systematically less sticky. Power-conferring readings of the Restatement rule must explain why the rule adopts the stickier default: enforcement, plus what is in practice an express opt-out rule. That explanation will likely involve two empirical claims: that the vast majority of

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<sup>153</sup> Klass, *supra* note 14, at 1754–56.

<sup>154</sup> Restatement (Second) of Contracts § 21 (1981).

parties to agreements for consideration want and expect legal enforcement, and that the costs of requiring those parties to opt out of a nonenforcement default would be greater than the opt-out and error costs the existing enforcement default imposes on the minority of parties that prefer no legal liability.

In *What Price Contract?* Karl Llewellyn challenged the second of those claims. He observed that “a business economy demands a means of quick, not one of ‘informal’ contracting,” and that a formal expression of the parties’ intent to contract could be so cheap, quick, and transparent that its inconveniences would not “be so material as not to offer some hope of being outweighed by the gain in adequacy and unambiguity of proof.”<sup>155</sup> It is at this point that we arrive at a second payoff of the above analysis. If there is an answer to Llewellyn’s challenge, it lies in part in the relational costs of express opt-outs in even arms-length commercial transactions. The costs of opting into contractual liability expressly are not only the costs of uttering or writing down a few extra words, but the erosion of extralegal bases of trust between the parties.

This argument rests on a theory that contract law functions to supplement, rather than transplant, extralegal assurances of performance, such as reputation, trust, honor, and friendship. Consequently, as a defense of the power-conferring reading of the Restatement rule, it might not be available to theorists, like Dori Kimel, who view contract as a substitute for those extralegal promissory norms.<sup>156</sup> It suggests that contract law as a whole takes more fully relational contracts as the paradigm, and that contract law is in this sense “relationally constituted.”<sup>157</sup>

The relational costs of express opt-outs also cast new light on the interplay between legal enforcement and extralegal norms. I have already mentioned Eisenberg’s worry that the enforcement of gratuitous promises will “commodify[] the gift relationship.”<sup>158</sup> Along similar lines, Kimel argues that contract liability can interfere with extralegal relationships of trust by casting “a thick and all-

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<sup>155</sup> Karl Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 *Yale L.J.* 704, 741 (1931).

<sup>156</sup> Kimel, *supra* note 11, at 57–60, 78–80 (2003).

<sup>157</sup> See Dori Kimel, *The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model*, 27 *Oxford J. Legal Stud.* 233, 238, 250–53 (2007).

<sup>158</sup> Eisenberg, *supra* note 101, at 230.

encompassing veil over the motives and the attitudes towards each other attributable to parties to contracts.”<sup>159</sup> And for somewhat different reasons, Seana Shiffrin has argued that the divergence between promise and the remedies for breach of contract “may sometimes make it harder for the morally decent person to behave decently.”<sup>160</sup> All these theorists claim that the enforcement of promises threatens the moral relationship between promisor and promisee. The above analysis suggests that the interplay between contract law and extralegal relationships of trust is more complex. At least as important as the brooding background presence of legal enforcement are parties’ express invocations of the law, especially at the beginning of the relationship and often in response to incentives that the law creates.

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

One finds something like this idea too among Williston’s various arguments for the progenitor of the Restatement rule:

In a system of law which makes no requirement of consideration, it may well be desirable to limit enforceable promises to those where a legal bond was contemplated, but in a system of law which does not enforce promises unless some benefit to the promisor or detriment to the promisee has been asked and given, there is no propriety in such a limitation. . . . The views of parties

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<sup>159</sup> Kimel, *supra* note 11, at 74.

<sup>160</sup> Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 *Harv. L. Rev.* 708, 710 (2007).

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to an agreement as to what are the requirements of a contract, as to what mutual assent means, or consideration, or what contracts are enforceable without a writing, and what are not, are . . . as immaterial as the views of an individual as to what constitutes a tort. In regard to both torts and contracts, the law, not the parties, fixes the requirements of a legal obligation.<sup>161</sup>

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

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<sup>161</sup> 1 Williston 1920 Edition, *supra* note 23 § 21, at 21–22. Williston makes a similar argument from quasi-contractual liability, highlighting that “[e]ven where one party makes it clear to the other that he is unwilling to enter into a contract, the law may nevertheless impose one upon him.” *Id.* at 24.