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A Pluralist Approach to Interpretation: Wills and Contracts

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I. INTRODUCTION: SINGLE-INQUIRY AND PLURALIST ACCOUNTS OF INTERPRETATION

This account of legal interpretation focuses mainly on wills and contracts. It adopts a pluralist approach, one that treats a number of factors as potentially relevant and does not assume that all relevant factors necessarily reduce to one overarching inquiry that is the same whatever legal text is being interpreted.

The major controversy among the participants at the illuminating conference which gave rise to this issue's essays was whether this kind of pluralist approach is defensible or, instead, interpretation of textual meaning in law (and indeed more broadly) reduces itself to a single inquiry. Although this article is primarily designed to explicate particular theoretical questions about the interpretation of wills and contracts, it is also intended to be a defense of a pluralist approach.

Getting a handle on the exact disagreement between single-inquiry theorists and pluralists is not simple; doing so constitutes a crucial first step for evaluating what follows. Proponents of a single-inquiry view typically claim that interpretation of the meaning of a communication reduces to a factual determination about the circumstances of the communication's origin. Larry Alexander, a convener of the conference, has consistently

adopted a writer's (or speaker's) intent approach,[1] and that was the version of the single-inquiry view that attracted the widest support at the conference from other legal scholars and from literary critics. According to this view, if I mean "shut the door," but I slip and say "shut the window," my communication means "shut the door," however much I mislead listeners. Put differently, the true meaning of what I have said is "shut the door." "Author's intent" theorists do not deny that sentence meaning often diverges from speaker meaning, but they privilege the latter as the real meaning of the communication and the object of interpretation in a strict sense. We can easily imagine a more textualist, listener-reader centered version of the single-inquiry view. The objections I shall suggest to a single-minded author's intent account of meaning apply to a single-minded reader's understanding approach as well.

"Pluralists," among whom I count myself, believe "meaning" is a practical concept, that interpretation to discern meaning is not reducible to a single inquiry. Pluralists believe that the best account of meaning will vary among disciplines and among subfields within disciplines.[2] Exactly how to interpret a writing, exactly how to assign it meaning, will depend on the purposes of engaging in that endeavor, and these purposes may render many factors relevant. When they look at law, pluralists note that judges and scholars consult multiple factors in discerning the meaning of legal texts.

Were this consideration totally decisive, the pluralists would definitely win the day, because no one doubts that judges and other actors ascribe meaning to legal texts on the basis of many factors. But the single-inquiry theorists mount a twofold response. First, judges and lawyers may engage in a plurality of inquiries to decide how a text will apply to a situation,

1. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?", Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004); Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authorities of Intentions*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 357 (Andrei Marmor ed., 1995).

2. For example, criteria for the meaning of poems may differ from those for the meaning of ordinary private letters; criteria for the meaning of constitutional provisions may differ from those for the meaning of wills. Since I submitted this article, Judge Aharon Barak of the Israeli Supreme Court has published PURPOSIVE INTERPRETATION IN LAW (2005), a book aptly called magisterial by an advance reader. Barak adopts a purposive approach to all fields of legal interpretation, but recognizes that differences among fields call for differences in which elements carry weight. Were I to write this article today, I would draw heavily from his account and explicitly compare his views with my own.

but these efforts can be partly understood as their relying on the answer to one inquiry (say, sentence meaning) as evidence for the answer to another, controlling, inquiry (writer meaning). In practice, the "controlling" inquiry (writer's meaning) might even fade into the background if bars on evidence preclude most of the ways of discerning that meaning apart from sentence meaning.

Second, insofar as interpreters self-consciously accord independent weight to the results of inquiries other than the focal one, to that degree they are not, whatever they may say, asking about the text's meaning; they are surveying reasons that might incline them to displace that meaning with some alternative. This aspect of their overall evaluation is a different exercise from interpretation in a strict sense (which is to discern meaning). It may be that judges appropriately undertake this different exercise. The single-inquiry theorists do not claim that their conceptualization of meaning and interpretation yields a direct answer to the practical question about how judges should decide legal cases; and these theorists do not even mind if we call this different exercise a *form* of interpretation. But we must understand that interpretation in the true or strict sense it is not. One way in which this idea was offered at the conference was that interpretation in the strict sense bears no interesting theoretical relation to other exercises in practical decision that are sometimes loosely included within "interpretation" in a broader sense.

Let me say straight out that I think the conceptualization favored by single-inquiry theorists can work. These theorists can provide a strict account of meaning and interpretation that does not do violence to social facts and relevant values. I believe that, without doubt, a pluralist account can also work—a point that most of the single-inquiry theorists at the conference did not concede.

How then should we choose between the two kinds of accounts? Conceptual clarity, present understanding within the discipline, and relation to desirable practice are three obvious criteria.

The single-inquiry approach may seem to have a conceptual advantage over its competitor in sharply delineating various questions of fact and evaluation. But pluralists do not blindly suppose that all aspects of interpretation are the same; they see as clearly as do the single-inquiry theorists that writer's intent is not the same thing as modern reader understanding or coherence with other texts. It is *conceivable* that the same single-inquiry approach works best for other fields of interpretation, such as literary criticism and religious hermeneutics, and that the desirability of a unifying theory should lead us to adopt that conceptual approach for law. Without undertaking the effort here, I shall simply assert my strong skepticism that across diverse disciplines, the same single inquiry is best understood as the key to interpretation of meanings.

In regard to present understanding within the law of common law systems, the pluralists win hands down. Relatively few judges and scholars talk as if the meaning of legal texts reduces to a single inquiry.[3]

The question about desirable practice is more subtle. The single-inquiry theory contemplates a two (or multi) step approach: figure out meaning and then decide whether to displace it. But what if much judging never undertakes step one, that is, never tries to determine exactly what is a text's meaning according to the crucial single inquiry? That, in fact, is the reality, *whatever* one takes as the favored single inquiry. (To be more precise, I do not deny that likely writer's intent will often play a role and will sometimes be decisive. I claim only (1) that judges will sometimes resolve what counts as a text's meaning without settling the question of writer's intent, *and* (2) that proceeding in this manner is desirable.) The single-inquiry theorist has the resources to accommodate this reality about practice, acknowledging that in some legal cases judges may desirably reach a practical resolution without discerning meaning. But, along with present understanding in law, this feature of desirable practice strongly favors the pluralist account as yielding less confusion and greater clarity.

The disagreement over the better conceptualization very likely reflects underlying convictions, agendas, or tastes that are ideological. Although the single-inquiry approach to meaning and (strict) interpretation does not rule out other bases for practical decisions in legal cases, it does seem to cast them in a suspicious light. Who could doubt that judges should interpret statutes to discern meaning? If they displace meaning, are they not indulging themselves in creative disregard of legislative authority? On the other hand, if, as the pluralist account supposes, judges possess a stock of standards of interpretation to determine meaning, when they employ these they seem naturally to be doing what they should. An example I raised during discussion illustrates the rhetorical connection between conceptual theories of meaning and practical

3. Even Justice Scalia, who strongly emphasizes the ordinary understanding of textual language, makes some limited room for canons of construction and for interpretation that renders a legal provision coherent with other parts of the law. *See, e.g.*, West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100–01 (1991). For one defense of a single approach to interpretation in law, *see* James L. Robertson, *Myth and Reality—Or Is It "Perception and Taste"?—In the Reading of Donative Documents*, 61 FORDHAM L. REV. 1045 (1993).

appraisals of judging.[4]

Arizona treats as confidential "any confession made to [a clergyman] in his character as clergyman or priest in the course of discipline enjoined by the church to which he belongs."[5] I assumed (hypothetically) that the law was adopted early in the twentieth century when a number of states had priest-penitent privileges that were quite limited; but that the overwhelming modern view is that the privilege should extend to communications to clergy made in ordinary counseling sessions. For years, let us imagine, Arizona prosecutors have not sought testimony from clerics about what they have learned in counseling; but now a divorce lawyer seeks to require testimony from a minister of the United Church of Christ about what a parishioner-husband said to her in counseling.

The judge first looks at the natural language of the law. "Confession" made in the "course of discipline enjoined" by the church does not seem to cover a husband's admission in marital counseling that he struck his wife, given to a minister of denomination that has no discipline of confession to individual clerics. But, if the church encourages couples with marital difficulties to seek counseling, privileging such an admission is not an extreme stretch of the language. Reflecting both on the fact that the population of Arizona in the early twentieth century was substantially Roman Catholic, and on the narrowness of the priest-penitent privilege as it was then conceived, the judge concludes that the relevant legislators (probably) meant to privilege only formal Roman Catholic confession and *perhaps* confession in the few other churches (such as the Episcopal Church) that retain individual confession but do not make it mandatory or encourage it strongly.

I asserted that many judges in this position, influenced by modern conceptions of clerical privilege and concerned about favoring some religions over others,[6] would now conclude that the language should be taken in a broader, more inclusive (though somewhat strained) sense.

On a pluralist, multifactor understanding, this example shows how the meaning of a law can change over time; the judge's interpretive question is what ingredients should figure in a modern interpretation of the language. For the single-inquiry (author's intent) theorist, meaning was fixed at enactment. The judge who reaches the conclusion that the authors most probably intended a restricted meaning is left only with the

4. I here give the illustration more precision than I managed in the give and take of oral comments.

5. ARIZ. REV. STAT. ANN. § 12-2233 (West 1956).

6. A judge might worry that limiting the privilege to clerics of a few religious groups would impermissibly establish those groups; but I do not mean to rely here on any judgment that the more restricted privilege would actually be unconstitutional.

question whether to displace that meaning. Now, as far as logic is concerned, a pluralist could well contend, "Leave a change like this to the legislature," and a single-inquiry theorist might say, "Let the judge go ahead and displace this meaning instead of imposing a tiresome task on legislators." But readers will not be surprised that most single-inquiry theorists did not look favorably on this exercise in judicial creativity; most pluralists thought that such an interpretation (in their sense) could well be within the bounds of judicial authority. Thus, the conceptual rhetoric connected to practical conclusions in a predictable fashion.

What follows in this essay, excerpts from an introduction and chapters on wills and contracts in a book on legal interpretation on which I am now working, represents a pluralist approach. Most of us who write about legal interpretation think mainly about statutory and constitutional texts and common law principles. Wills and contracts are also legally authoritative texts, ones serving mainly private objectives. Because they do not present the same issues of multiple authorship and continuity over long periods of time as do statutes and constitutions, their analysis yields sharp insight into interpretive issues that arise even when the connections of author and text are comparatively simple.

My examination is limited in two important respects. Although most of the basic questions about textual interpretation that we shall examine are also raised within civil-law countries, I focus on common-law systems. I do not consider how much guidance we might glean from forms of nonlegal interpretation; these might provide helpful analogies or provide reasons to think some approaches are more promising than others.

Although the body of this essay does not directly contest single-inquiry theories, it demonstrates how extremely awkwardly such theories apply to wills and contracts.

II. FUNDAMENTAL INTERPRETIVE QUESTIONS AND POSSIBILITIES

A. Illustrative Problems

After Dr. Rowland agreed to work in the South Pacific Health Service, covering hundreds of islands, he and his wife, a nurse who was going with him, made wills. They knew they would be taking many trips from island to island in small ships. Using printed forms and without consulting a lawyer, each provided that the other would receive everything if he or she survived the writer of the will. In the

event of Mrs. Rowland's death "preceding or coinciding with" his, Dr. Rowland left his property to his brother and niece. Mrs. Rowland's will, using the same language, left her estate to her niece. When a ship on which they were traveling in the Solomon Islands went down, no one survived. The Rowlands had drowned quickly or been eaten by fish. Under English law, when the order of deaths was uncertain, the younger person was presumed to have outlived the older. The English courts had to decide whether the deaths of the Rowlands "coincided," in which case Dr. Rowland's property would go to his relatives, or their deaths did not coincide, in which event his property would pass to his wife and then on to her niece.[7]

Ivo Planić, a Croatian soccer star playing in a German league, signs a contract to play with the American Metro Stars "during its season." The Metro Stars agree to pay half of his $300,000 salary if he is unable to play with them because he is injured before he joins the team. During the last game of the German season, Ivo suffers a severe fracture, which will take a year to heal. At the time of his injury, the Metro Stars had had a month of training and had begun to play exhibition games; the beginning of the regular schedule was three weeks off. To determine if the team owes Ivo $150,000, a court must decide whether he breached the contract by not joining the team during its training camp and exhibition schedule or whether the language "during its season" limited his obligation to the regular season.[8]

In 1964, as part of comprehensive civil rights legislation, Congress adopted Title VII forbidding employers to "discriminate" against anyone because of his or her race, color, religion, sex, or national origin.[9] A section of the statute inserted during deliberations in Congress provided that the law should not be interpreted "to require"[10] any employer to grant preferential treatment based on factors such as race. As part of an employment contract for a plant in Louisiana where very few African-Americans held skilled jobs, Kaiser Aluminum Co. and the United Steelworkers Union agreed that some places in a craft training program would be reserved for African-Americans even if they had less seniority than white applicants. In a case that proved highly controversial as well as important, the Supreme Court needed to decide whether this form of affirmative action violated the statute.[11]

Law enforcement officers often plant electronic devices that transmit

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7. *In re* Rowland, 1963 Ch. 1, 7 (Eng. C.A.).
8. This is an imaginary case.
9. 42 U.S.C. §§ 2000e to 2000e-17 (2000).
10. 42 U.S.C. § 703(j) (2000).
11. United Steelworkers v. Weber, 443 U.S. 193, 197–98, 209 (1979) (deciding that the law did not bar such affirmative action).

or record conversations on undercover agents and informants. Under the Fourth Amendment, the government is not permitted to engage in "unreasonable searches."[12] The standard requisites to make a search "reasonable" are that officers have a substantial probability of finding evidence of a crime and that they obtain a search warrant. If one person in a conversation, a government agent or informer, uses an electronic device without the knowledge and consent of the other party, does that constitute a "search" within the meaning of the Fourth Amendment?[13]

B. Dimensions of Inquiry: Textual Interpretation

These illustrations from a will, a contract, a statute, and a constitutional provision vary in many respects, but each involves a text with legal authority that needs to be interpreted. For any text of this sort, an interpretive approach, whether explicitly or implicitly, must answer certain questions. With a degree of arbitrariness in categorization, we can discern seven dimensions of choice that characterize the interpretation of legal texts. How an interpretive endeavor in law should go forward depends on just how elements of these dimensions should be combined; few will be surprised to learn that the right (or a good) combination shifts among different kinds of legal texts.

Here is a quick summary of dimensions of choice, followed by some further explorations.

1. Writer or Reader?

Should interpretation rely on the perspective of the writer or that of the reader, or some combination of the two? Of course, the typical interpreter *is* a reader, but that does not settle whether the interpreter should try to adopt the perspective of the writer. Thus, a court might or might not interpret Dr. Rowland's will in accord with what Rowland probably wanted and understood.

2. Subjective or Objective?

Should an interpreter seek to understand how actual writers or readers have understood a text, or should he focus on what a reasonable writer

12. U.S. CONST. amend. IV.
13. United States v. White, 401 U.S. 745 (1971). A divided Supreme Court determined that no search was involved. *Id.* at 752–54.

or a reasonable reader would understand? One form of subjective interpretation is definitely not appropriate in law. An interpreter is not justified in merely settling on his own personal reaction to a text, whatever others might think about the text (as the reader of a poem *might* be justified in doing). The interpreter tries to rely on bases of interpretation that will be, or should be, persuasive to others.

3. Abstract or Contextual?

Are words and phrases to be interpreted to have a more or less uniform meaning across a range of situations or tied closely to specific context? To take the crucial word in the *Rowland* case, should "coinciding" mark out the same degree of temporal proximity, regardless of the occasions someone foresaw when he wrote his will and of the actual circumstances of his death, or should the term be treated flexibly in relation to particular situations?

4. Specific Aim or General Objective

The apparent aims of a specific textual provision typically fit broader objectives. But sometimes an interpreter identifies a tension or conflict between the two. How then should she interpret the provision? To take our Title VII example, suppose that the statute's language forbidding employers to "discriminate" seems to bar all preferential treatment based on race, *and* that the statutory scheme as a whole is largely designed to prevent outright discrimination against African-Americans. A judge might infer that if employers are forbidden to engage in voluntary affirmative action, they will fail to correct much outright discrimination against African-Americans that is less than obvious, instead waiting to see if anyone directs enforcement efforts against them.[14] Because, given limited resources, public enforcement can be focused on only a small slice of discriminating employers, the consequence of reading the statute to bar voluntary affirmative action will be to perpetuate much illegal discrimination against African-Americans.[15] How should judges then interpret the significance of "discriminate" as it applies to affirmative action?

5. Meaning, External Policies, and Justice

How far should courts, and other interpreters who can make binding

14. *See generally* United Steelworkers v. Weber, 443 U.S. 193, 209–16 (1979) (Blackmun, J., concurring).
15. *Id.*

judgments about the significance of texts, take considerations of justice and external policies into account—even when they were probably not embraced by the writers of the text and might not figure in an ordinary reader's account of what the text means? One question of justice is achieving what seems to be a fair resolution of the particular dispute the parties bring to court. An important external policy may be the efficient use of resources: perhaps courts should hesitate to interpret wills, contracts, and statutes to require waste, even if that is what they seem to say.

6. Inquiry Limited to the Document or Including External Evidence

A critical question in every area of interpretation of legally authoritative texts is how far outside the documents courts should go. If Ivo's contract with the Metro Stars is written, can judges hear testimony about what the parties said orally to each other, or should they limit themselves to the writing? Should judges consider legislative history or restrict themselves to the language of statutes? Exactly what outside sources judges should consult is controverted in major areas of modern law.

7. Time of Writing or Time of Interpretation

Should interpretation focus on the time a legal document was written or the time it is interpreted? Of course, interpreters logically must act at the later stage, but they may or may not see their job as discerning how things looked when a legal document was written. This question about time becomes critical if the authority of a statute or constitution stretches out over decades or centuries.

Let us now retrace our steps to deal with some nuances.

1. An interpreter focusing on writers and readers must implicitly decide who counts and for how much. With wills, is it the understanding of the testators that matters or that of their lawyers? Within a legislature, do the views of an active sponsor of a law count more, or less, than those of a passive member whose vote is crucial to passage? Among possible readers of a statute, should an interpreter focus on experts in the field (say, atomic energy), on lawyers, or on ordinary people; on those who will be regulated by a law, on administrative officials, or on outsiders? In some instances, notably when one individual has acted under the

instructions of another, the person who must later make an authoritative interpretation may be mainly interested in how a particular original reader (the individual who received the instructions) did (reasonably) understand them.

If an interpreter thinks the perceptions of both readers and writers matter, he must combine these in some way. That may entail giving conclusive force in particular respects to what a writer or a reader thinks; it may mean giving the views of each some vague, indeterminate weight.

2. An interpreter seeking to discern the subjective view of writers or of readers must determine exactly what attitude or understanding matters. Three possible candidates in respect to writers are hopes, expectations, and sense of proper understanding. Ordinarily these will coalesce: the writer will expect his words to be taken a certain way, he hopes that will happen, and he thinks that should happen. But these perspectives can split apart, in which event an interpreter must decide which to credit. Another question about appraisal of a writer's intentions concerns the place of hypothetical intentions: how far should an interpreter consider what a writer would have thought about matters she did not consider? Although the point is less obvious, similar questions can arise when the interpreter appraises reader responses to a text.

Interpreters who rely on writers or readers taken in some objective way must determine how to construct the "objective" person. What information will she be assumed to have? Will the constructed person be the average person in a relevant category (say, expert, lawyer, or lay person), the reasonable person (free of some of the ignorance and irrationality of real people), or the most astute person (with capabilities exceeding those of ordinary people)? Almost any construction of an objective person requires an estimate of the responses of actual people, and, if we probe deeply enough, therefore requires both decision about whether hopes, expectations, or sense of proper interpretation matters most and decision about how to combine different views held by different people.[16]

Many approaches to interpretation combine appraisal of subjective and objective responses, with the particular combination depending on the kind of interpretation that is involved.

3. Although human communication rests on individuals having linguistic competence about the meaning of words in a language, the exact meaning of words uttered in ordinary conversation depends on context. Against the powerful reasons for also understanding words within legal texts in their full contexts are some countervailing arguments. One is

16. *See* Kent Greenawalt, *Are Mental States Relevant for Statutory and Constitutional Interpretation?*, 85 CORNELL L. REV. 1609, 1629–36 (2000).

that ascertaining precise context is too difficult for judges and other interpreters. Another argument is that if the drafters of legal documents know how courts will understand particular terms, they can craft the documents with a greater degree of precision and confidence than might be possible were interpreters to inquire into detailed, disputable claims about context. Such arguments would be available to support the position that "coinciding," "during its season," and "discriminate" should be given standard, uniform meanings in legal documents (or legal documents of a specific kind), despite their shifting coverage in ordinary conversation.

4. An appraisal of overall purposes can assist in identifying mistakes and in discerning the significance of a particular communication. Thus, we see that a law that says that forms must be filed "before December 31" is keyed to the end of the year. We may conclude that the failure to say "*on or* before December 31" was probably a mistake.[17] If a contract leaves open the time for performance, courts will determine what time is reasonable given the contract's purposes.

Sometimes a specific provision, not the consequence of a mistake, will seem at odds with general purposes. In that event, courts must make a choice between the two.

5. In the way that the general purposes of a statute or contract may help guide a judge who interprets specific provisions, so also may external policies. The law[18] assumes that most people do not wish to disinherit their children; if the language of a will is unclear on the point, a probate judge will interpret it not to exclude family members. Because this policy corresponds with common sentiments, one may fairly guess that a writer whose will is unclear probably did not mean to disinherit children. The serious issue arises when, despite whatever force the policy may carry about a writer's intent, he probably did aim to exclude *and* that is how the will's terms are most plausibly read. When an interpreter relies on an external policy to override apparent meaning and probable intent, *then* he relies on the policy to overcome standard techniques to discern meaning.

6. The notion of interpreters confining themselves to a document is a bit misleading. Any interpreter brings to bear her knowledge of the language and of general circumstances. For example, if a man has

17. United States v. Locke, 471 U.S. 84, 93–96 (1985).

18. *See* WILLIAM J. BOWE & DOUGLAS H. PARKER, REVISED TREATISE: PAGE ON THE LAW OF WILLS 90–91 (1961), with 2004 Cumulative Supplement [hereinafter PAGE ON WILLS].

contracted to work in an office for ten hours on Friday in exchange for $400, an interpreter will not conclude that he has broken the contract by leaving after eight hours because the building has caught fire. Interpreters commonly consult dictionaries to learn the meaning of words they do not recognize, and when texts contain phrases common in law, judges refer to the history of how those phrases are understood in law.

The serious questions about external sources concern various explanations, oral or written, that have not found their way into the text itself, such as indications in the legislative process of what a statute accomplishes, and other "external" evidences of meaning, such as past relations of contracting parties.

7. When an interpreter focuses on readers, he may consider readers at the time a text was written, or modern readers, or both. For statutes and constitutions that have stood the test of time, a modern reader may understand provisions differently than would have readers at the time of adoption. For some relatively few cases an intermediate period may be important. Suppose a statute is passed in 1800, a 1960 charter for a charitable group refers to the statute, and the charter is interpreted in 2005. A court might ask how the statute's language would have been understood in 1960.

One might initially think that the time dimension does not arise with writers of words that carry legal consequences; they, after all, engaged in a performative utterance[19]—an utterance that changes the world in some way—at one particular point in time. But one may ask how the writer of a will or contract subsequently regards its terms, and one *might* think of a legislature as a kind of writer in continuing session, reissuing or itself reinterpreting the documents it has adopted.

C. Nontextual Legal Interpretation and Its Relation to Textual Interpretation

Within common law systems, not all interpretation is of particular texts. Although textual interpretation differs from nontextual interpretation, we need to understand ways in which the distinction is less than sharp.

When judges render decisions about the common law—a rule about a manufacturer's liability for a defectively designed product—they look to all highly relevant previous common law decisions and to settled practices, and they make judgments about fairness and efficiency. Although the

19. The phrase "performative utterance" is drawn largely from J.L. Austin. I discuss various kinds of what I call situation altering utterances in KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE, 57–59, 63–65 (1989).

decision of a case in the present does not rest on the meaning of a single text, the texts of prior opinions are extremely important. And, on occasion, a determination may turn almost entirely on the language of one authoritative opinion.

Interpretation of the meaning of vague constitutional texts often includes assessment of broad historical understandings of acceptable government action. What forms of interference with speech and press did the founders regard as illegitimate? What searches did people deem reasonable? More generally, when a judge decides to interpret a particular provision in light of "the whole Constitution," that is not so different from interpreting the nature of American government, a form of nontextual interpretation. Further, in both constitutional and much statutory interpretation, judges rely heavily on what earlier judicial decisions have already settled, thus bringing elements of common law interpretation into what is formally textual interpretation. Thus, textual and nontextual interpretations are often interwoven.[20]

D. Clarifications about the Term "Interpretation"

The term "interpretation" can be given broader or narrower meanings. Lawyers often regard whatever factors figure in a court's final decision about how to treat a particular text as involving interpretation. One might differentiate "interpretation" from discerning obvious meaning, on the one hand, and from creatively filling in content by "construction," on the other. On this understanding, "interpretation" falls between two poles; an interpreter would be genuinely trying to discern a text's meaning, but meaning would not be obvious. And, as we have seen, some theorists limit interpretation in a strict sense to a single kind of inquiry.

"Interpretation" may also be distinguished from "application." Here the notion is that someone first interprets meaning and then renders an application to specific circumstances. Critics of this conceptualization argue that applications are part of how one interprets; they fill out the meaning of the text that is being applied.

If one employs these various distinctions, one must recognize that in many actual cases, saying when interpretation gives way to construction or when it yields to application will not be easy. More importantly, when judges ascribe meaning to legal texts, they rarely distinguish an

20. In this essay, I do not address the crucial questions about nontextual interpretation; these are less easily broken down than the questions about textual interpretation.

exercise that is interpretation from more activist construction and more discrete application. The sense of interpretation I employ is broad, including all efforts to discern meaning and determine particular applications that depend on that meaning.[21]

E. Tentative General Conclusions about Legal Interpretation

It may help the reader in evaluating the details of what follows to have a sense of my general conclusions about the interpretation of legal texts.

1. General theoretical considerations about the nature of language do not determine how courts do, or should, interpret texts that have legal force. On issues about which people can disagree, resolution depends on normative assessments about how a legal system should work.

2. The desirability of a method of interpretation depends only partly on what method, perfectly applied, would yield the best results. For legal inquiries, the methods must be ones fallible human beings, judges, and juries, are competent to make. These methods should not open up opportunities for intentional misuse and unconscious bias, so far as these can be avoided.

Any method should be reasonably economical. It should not be too cumbersome. And officials should not have to apply it too frequently. For the most part, people should grasp their legal rights and obligations without going to court. Ordinary people should understand contractual terms without litigating and without consulting lawyers. If many statutes need to be too complex to be grasped by ordinary people, at least lawyers and experts in the fields should be able to understand them. An expert should be capable of giving confident advice about a statute's meaning. In short, official interpretation must proceed under the assumptions that initial interpretation will often be made by nonlawyers and that in most circumstances official interpretation will not be necessary. Unofficial interpretation is the crucial backdrop for official interpretation.

3. In general, subjective and objective elements should mingle in a desirable strategy of interpretation. It matters what the people who use language and those who are the main audience of language believe the language accomplishes, but the sense that the language conveys to a broader audience is also intrinsically important. Further, reliance on objective elements may be valuable in preventing fraud and in avoiding

21. I do, however, distinguish interpretation from something that is undeniably and explicitly more creative than interpretation. Courts may say they are themselves providing terms, an exercise that they may say depends on their interpretation of an entire document. Courts may also, on grounds of changed circumstances or public policy or constitutional restraint, explicitly revise the content of a legal text. Such revisions raise sharply the issue of the authority of courts. Although the line between interpretation and outright revision matters, interpretation that stretches or substantially disregards ordinary meaning is not easily distinguishable from revision.

complicated tangles of inquiry. The exact mix of subjective and objective elements depends on the domain of law. Among the relevant considerations are the importance of the writer's intentions, the number of writers and of primary addressees, and the political authority of the writers.

For the most part, even when objective elements figure, they should be formulated in terms of specific contexts, not broad generalities.

4. Legal interpretation, textual as well as nontextual, is some mix of discerning the past and evaluating what will be best in the future; the degree of each depends greatly on the area of law and particular legal problem.

5. Counterfactual inquiries have an appropriate place in all, or nearly all, fields of legal interpretation, but they should be employed with caution.

6. Courts should adopt standards of proof and persuasion that make it difficult to overcome the "natural sense" of language that is used, but in general they should not bar otherwise relevant inquiries. Exactly what inquiries about meaning should be entertained depends partly on the kind of interpretation those who write authoritative words desire.

7. Public policy considerations play a significant part in the ways courts should understand legal texts. Of course, the aim to have a strategy of interpretation that is reliable and economical is itself one kind of public policy, but I refer here to more substantive policies, such as achieving fair results and using resources efficiently, or promoting the welfare of children. Just when courts should make interpretations guided by public policy is highly controversial, but two relevant factors are the specificity of language that is interpreted and whether "the law" for the case is privately or publicly created.

With these general observations in hand, we are ready to give more concentrated attention to the interpretation of wills and contracts.

III. WILLS

Among standard legal documents that courts interpret, wills are special in two respects. They are peculiarly unilateral; and their nominal authors are unavailable to testify about what they meant.

Wills issue from single persons who are exclusive authors from a legal point of view. Although lawyers and their staffs write many wills, and people often may not understand complex provision in their own wills, still a lawyer's main job is to carry out the aims of a testator as completely as possible, not to intrude her own views about who should

receive property.

Wills are unilateral in a way that ordinary instructions from one person to another are not. Instructions are issued to a recipient, who has a stake in how they are understood.[22] Most instructions create expectations and induce reliance, affording strong reasons to grant a recipient's perspective weight when someone reviews her performance.[23] Wills differ: unless a person has contracted to include particular dispositions,[24] she is free to alter her will up to the time she dies. Thus, no one can rely with full confidence on the terms of the will of someone who is still living. Further, when the potential beneficiaries of a will do rely, they are much more likely to depend on what the writer says about the will than on the will's actual language. It follows that if a court's interpretation fails to correspond with the apparent meaning of a will's language, that will not typically defeat legitimate expectations developed before the writer's death.[25]

The period between a will's being made public and a court's settling its content differs. Someone who then relies on the will's language might be disappointed by an interpretation that deviates from it; and uncertainty about how a court may interpret a will could interfere with transactions that depend on a beneficiary's receiving what he apparently has been given.

When courts construe wills,[26] their writers are not available to say what they were trying to do (or how their wishes might have changed by the time they died). The formal requirements of wills and principles of their construction partly respond to the harsh fact of our mortality.

A. Standards and Sources of Interpretation

With wills, as with other legal documents, courts need standards for

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22. For some "instructions," matters are still more complicated. A search warrant is issued both to guide police officers (who may themselves have written the warrant for judicial approval) while they are making a search and to provide notice to a homeowner about the search's appropriate limits (because homeowners rarely read warrants carefully and rarely are able to prevent excesses, exclusion of evidence is the main deterrent of abuse).

23. In respect to informal instructions, *see* Kent Greenawalt, *From the Bottom Up*, 82 CORNELL L. REV. 994 (1997).

24. Even if she has entered such a contract, she can change her will in a way that does not correspond with what she has agreed to. The change is effective, but her estate must meet her contractual obligations.

25. An important exception involves the wills of spouses, especially those in second marriages with children of earlier marriages. Each spouse may have legitimate expectations in what the will of the other provides, although it would not follow that a court should rely on the ordinary meaning of words rather than another standard.

26. On the kinds of lawsuits in which provisions of wills are contested, *see* PAGE ON WILLS, *supra* note 18, at § 31.

how to interpret and for what evidences of meaning to consult. Should they look to the general meaning of a will's language, at the writer's likely intent, or to a more subtle variation or mixture of elements? Should they take into account idiosyncrasies of the testator's background, her peculiar understanding of words, or what she said orally she was trying to do?

The striking English case involving the married couple who died together at sea sharply poses many of these issues about wills.[27] Aware that he and his wife would be taking trips in the South Pacific from island to island in small ships, Dr. Rowland, using a printed form, and without consulting a lawyer, provided in his handwritten will that his wife would receive everything if she survived him, but in the event of her death "preceding or coinciding with" his own, his property would go to his brother and niece.[28] What did "coinciding" mean in the will? All the judges in the Court of Chancery assumed Dr. Rowland used the word self-consciously, not that it was part of a will form to which he gave no attention.[29]

1. Standards of Meaning

If we focus on what this word in the will means, we might look at usage by the broad community or usage by the doctor himself.[30] If the Rowlands deliberately chose to use the term "coinciding," knowing that they would take many voyages together on small ships in the South Pacific, Dr. Rowland probably assumed that the term covered circumstances in which the two might be killed in a common wreck and died within seconds or minutes of each other,[31] what very probably occurred.

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27. *In re* Roland, 1963 Ch. 1 (Eng. C.A.).

28. *Id*. at 3. Under a law providing that when the order of deaths is "uncertain," the younger person (Mrs. Rowland) was presumed to have survived the older. *Id*. at 2; Law of Property Act, 1925, 15 Geo. 5, c. 20, § 184 (Eng.).

29. The facts leave unclear whether the Rowlands merely adopted standard language on a form or considered the words. It is extremely unlikely that they made up the legal sounding phrase "preceding or coinciding." The fact that their wills were handwritten probably shows they were at least aware of the words, unlike many people who sign forms.

30. An intermediate possibility is usage by a special class of persons. *See* JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2458 (1981). Wigmore also refers to usage by parties to a bilateral act. If one thought of the Rowlands as agreeing on similar terms for their wills, one might think that the understanding of Mrs. Rowland should count.

31. If Rowland did not think about the term, perhaps it should be given the effect

General usage is harder to pin down. In some contexts, to say that two events "coincided" is to say that they occurred simultaneously;[32] deaths separated by minutes do not occur simultaneously. But "coincide" is not always taken so narrowly. We might say that the reigns of two ancient monarchs coincided even though one reign began and ended three weeks before the other.[33] People pay attention to the purposes for which words are used. Recognizing that the context was a will and that a wife dying minutes later could make no use of her husband's property, many people would say that two deaths "coincided" if they occurred from a common cause and within minutes of each other.[34]

A judge who takes Dr. Rowland's perspective and assumes that he did focus on the word "coinciding" should conclude that he probably understood the word to cover deaths only seconds or minutes apart caused by a shipwreck. A court relying on general usage would have to decide how strictly "coincide" should be taken, and the extent to which people using that word would take account of the circumstances in which the Rowlands made their wills and in which they died.

The majority of Chancery judges in *Rowland* adopted a standard of general usage that was strict. Justice Harman equated "coincident" and "simultaneous," and said that Rowland's relatives had presented no evidence that the deaths were "simultaneous."[35] Justice Russell took as the standard whether "the ordinary man would say that the two deaths were coincident in point of time or simultaneous."[36] For him, it mattered neither whether

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he would have assumed, had he thought about it. But it is hard to know what he would have thought, if he did not focus on the word. On reflection, he might have thought that the standard term was inadequate.

32. "Simultaneous" appears in many dictionaries as a synonym of "coincident." *See, e.g.*, WEBSTER'S NINTH NEW COLLEGE DICTIONARY 1099 (1986) (defining simultaneous as "existing or occurring at the same time: exactly coincident").

33. One might resist this example on the ground that the reigns "coincided," except for the weeks at each end. On this view, a fairer test for whether two distinct events coincided is whether one might say that the deaths of John Adams and Thomas Jefferson, hours apart on the same day, coincided. *See* eHistory, *A Moment in Time Archives: The Strange Death of Jefferson and Adams*, http://www.ehistory.com/world/amit/display.cfm?amit_id=2191 (last visited April 25, 2005) (both Jefferson & Adams died on the same day, exactly 50 years after signing the Declaration of Independence). I am inclined to think that "coincided" is fairly flexible, depending on the time period being considered. Thus, if one asks how far apart our first four presidents died, one might say that Washington died first by many years, that Madison survived by some years, and that the deaths of Adams and Jefferson coincided.

34. Some sticklers about language might say that the deaths did not exactly coincide in a strict sense, although they were very close. Even the sticklers would acknowledge that two deaths could relevantly coincide, even though an expert could tell us that one occurred a millionth of a second before the other. For example, after a bomb blast, an expert might be able to say that a person closer to the explosion died milliseconds before someone standing five feet further away.

35. *In re* Roland, 1963 Ch. 1, 15 (Eng. C.A.).

36. *Id*. He also argued that placement in the will of "coinciding" after "preceding"

the Rowlands died by shipwreck in the Pacific or by rail or auto accident in England, nor what situations they foresaw when they wrote their wills.

Lord Denning disagreed sharply with his two colleagues. He contrasted his own approach with one favored in the nineteenth century, according to which judges inquired, "what is the ordinary and grammatical meaning of the word 'coincide' as used in the English language?"[37] Under that approach, "coincide" would mean "simultaneous" and might not cover two people holding each other as a ship sank—an absurd result. The whole approach, he said, rests on a fallacy that a will's construction should depend on the meaning of a testator's words rather than on what he meant. For Denning, "the whole object of construing a will is to find out the testator's intentions," what meaning the words bore for him.[38] Dr. Rowland and his wife intended "coinciding" to have a wider meaning of "death on the same occasion by the same cause."[39] Judge Russell rejoined that this understanding of "coinciding" suggests a time element, but one so rough that it is quite uncertain.[40]

How should we evaluate the competing approaches in *Rowland*?[41] The rule the majority adopts is convenient to administer, and will allow uniform construction of "coinciding" in wills,[42] although the judgments of ordinary people are both more contextualized to circumstance and purpose and more divergent than the justices suppose.[43] According to

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afforded a reason to construe it as dealing only with time. *Id*.

37. *Id*. at 8.

38. *Id*. at 10. As I shall subsequently explain, finding out a writer's intentions is not exactly the same as giving words the meaning they bore for him.

39. *Id*. at 11.

40. *Id*. at 18.

41. I put aside whatever force precedents may have had. The majority could claim that its stance followed earlier cases that had been very strict about when deaths "coincide." The court had refused to say that deaths coincided when a husband and wife clung to each other as a ship went down. *See* Underwood v. Wing Ch. 459, 4 De. G.M. & G. 633 (1855); Wing v. Angrave (1860) 8 H.L.C. 183. However, judges found that the deaths of sisters from the same bomb were simultaneous in *In re* Pringle, 1946 Ch. 1, 124, 124, 129–31 (Eng. C.A.).

42. If the judges in effect tell testators, "Whenever you use the word 'coinciding,' it will have the uniform meaning the law ascribes to the word," how would an author's intent theorist account for the meaning of "coinciding" in a will? He might say that the real meaning is what the individual testator intends, even though judges will disregard that meaning; he might say the judges who set the standard are the real authors; or he might say that the testator and judges are authors whose meanings' diverge. This is an example of how a single inquiry approach can produce awkward circumlocutions.

43. It is conceivable that understandings of "coinciding" differ in England and the United States or have changed significantly since the case was decided.

their approach, very few deaths coincide, and language in wills about deaths coinciding will rarely be effective.[44]

The majority's approach possesses the merit of not requiring extrinsic evidence, but it turns out that Lord Denning's competing approach does not require much of that either. Denning looked at undisputed facts about the Rowlands' lives; because he does not rely on any claims about personal peculiarities of theirs, his inference about Rowland's sense of "coinciding" must be based on what a reasonable person in that situation would have understood.[45] Although Denning did not rely on any disputed evidence about Rowland's own sense of "coinciding," a critic could complain that an approach that makes the writer's own sense determinative could draw judges into just such evidence in future cases, unless judges imposed limits on what they would consider—disregarding potentially debatable evidence about what a single individual understood by his words.[46]

Another problem with Denning's approach is its vagueness about what counts as "coinciding." Suppose Dr. Rowland died when the ship sank, but his wife swam to an uninhabited island with a fellow survivor, living two weeks before succumbing to her wounds. Dr. Rowland probably would not have conceived "coinciding" as comfortably covering that situation, instead understanding the term to include a time element briefer than two weeks.

In the actual circumstances of the case, a judge who used Rowland's probable desires as a guide would reach the same practical conclusion as one who adhered to the words in the will *as Rowland probably understood them*. But the island variation suggests how these two points of reference might diverge. If a friend had posed that variation in advance, Rowland might have said, "Since my wife would have no ability to use my property, I'd rather have it go to my relatives, not hers. But I see that our deaths wouldn't really coincide. Maybe I would need different language for that situation, but it is too remote to make redoing the will worthwhile."

If this would have been Dr. Rowland's response, what was his

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44. That Dr. Rowland could have used different language to cover the circumstance of death by shipwreck may also be urged in favor of the result, *see* Michael Albery, *Coincidence and the Construction of Wills*, 26 MOD. L. REV. 353, 363 (1963), but it seems unfair to interpret his will in light of his failure to use an alternative a lawyer might have recommended.

45. Alternatively, one might say that judges should ascribe the meaning that a reasonable person in the situation would want and understand. In that event, whether Rowland himself paid attention to the language of his will would become irrelevant.

46. Albery, *supra* note 44, at 357–58, assumes that Lord Denning would not have allowed into evidence testimony concerning a conversation between the Rowlands about what they meant.

intention? When he wrote the will he had no narrow intention about the island scenario; he did not consider it. His understanding of the word "coinciding" was not broad enough to cover that possibility, but the overall purpose that led him to choose "coinciding" would have reached it. Were a court faced with such a two week survival, victory for the husband's relatives would depend on the judges using a particular component of Rowland's intentions—his more general ones—to override his own sense of what the words he chose signified, as well as the general understanding of those words.

Our analysis of *Rowland* reveals a number of possibilities concerning standards of interpretation, possibilities that arise in other areas in which legal texts are interpreted. Courts might rely on: the general, or ordinary, sense of words and phrases, allowing greater or lesser attention to the context in which the words and phrases are used; the sense of individuals situated as was the writer; the writer's own sense of the words he has employed; the writer's specific intentions for dealing with a situation; his broader purposes in disposing of his estate; or his hypothetical intentions about what he would have understood or wanted if he had focused on the situation.

If we could put aside all problems of evidence and convenient administration, there would be much to be said for trying to satisfy the testator's dominant wishes. But if the will is a result of compromise or agreement, we can see that it is the writer's *understanding* that should count, if that differs from his wishes. To concoct a bizarre hypothetical, suppose the Rowlands were aware just how narrowly previous decisions had interpreted "coinciding," and Dr. Rowland suggested broadening that language to cover other situations where the spouse who survives does not live long enough to use the property of the spouse who died first. Mrs. Rowland, also aware of the rule assuming survival of the younger, adamantly objected, reminding her husband of all the sacrifices she was about to make for him. He quickly dropped the proposed change, silently hoping a court would give an unexpectedly broad reading to "coinciding," if it ever came to that. If Dr. Rowland's subjective intentions were to matter, here it would be his understanding of what his words meant, not his hopes about what judges might do.[47]

47. Perhaps the hopes of a testatrix should prevail over her understanding if she misperceives the limits of what a will can do, she hopes her will can do more than she believes she has accomplished, she has managed to choose words that fit her hopes well, and it turns out those can be carried out consistently with the law of wills.

Judges might pick one of the conceivable standards as an ultimate criterion for interpreting a will, making inquiries according to other standards only to assist them in reaching a conclusion about how to apply the ultimate criterion. Thus, if Rowland's probable sense of his words was the ultimate criteria, an idea of his general purposes might help inform what he meant by "coinciding." Alternatively, judges might regard more than one standard as of final significance, somehow resolving instances in which the standards yield competing answers. For example, a court believing that it had strong reasons to fulfill a testator's wishes *and* to give words their common meaning would determine in individual cases—in which answers under the two standards are not congruent—which considerations carry more weight.

Figuring out whether a judge or scholar is thinking in terms of one final standard or several may not always be simple. Writing about the *Rowland* case, Michael Albery remarks that all three judges agreed that the "proper object of inquiry on construction of a will is . . . . the objective meaning of the words as used by the particular testator."[48] That definitely sounds like a single ultimate standard. But Albery goes on to say that the factors determining interpretation of a crucial word are (1) its meaning as ordinarily used, (2) the context provided by the accompanying words of the will, (3) surrounding circumstances that help connect the will to the outside world, and (4) the inherent reasonableness of a possible interpretation.[49] The "objective meaning" turns out to be the meaning the law will ascribe, consisting of an amalgam of the factors the law treats as relevant.[50]

According to a leading American treatise, "The primary purpose in construing a will is to determine the very disposition which the testator wanted to make, to determine if possible his actual intent rather than an intent presumed by law."[51] But it is the "testator's intention as expressed in his will when read in the light of the surrounding circumstances and in view of the admissible evidence . . . ."[52] "The question . . . before the mind of the court is not what should testator have meant to do or what words would have been better for testator to use, but what is the

48. Albery, *supra* note 44, at 358. What the judges disagreed about, he claims, is "the extent to which and the means whereby it is permissible to divert a word from its ordinary meaning." *Id*.

49. *Id*. at 358–60. Albery remarks that the weight attached to each ingredient is not "at the discretion of the court, but is governed by well-established principles." *Id*. at 360. But these principles do not tell us that the various ingredients lead to some singular sense of meaning (nor, I think, do they give us a precise ordering of criteria); rather they tell us what the courts will count as the meaning.

50. *Id*. at 358–60.

51. PAGE ON WILLS, *supra* note 18, at 2.

52. *Id*. at 3–4.

reasonable meaning of the words which he has actually used."[53] Courts cannot rewrite wills to conform to presumed intentions.[54] These various formulations point in different directions;[55] they settle neither the degree to which a court will accede to a testator's idiosyncratic formulations or correct his outright mistakes, nor what evidence they should consider. In wills, as in many branches of the law, "meaning" may come down to an uncomfortable combination of relevant factors.

2. Sources of Evidence

Whatever standards of judgment they employ, courts might investigate every relevant source of evidence that could contribute to a decision under those standards, or they might impose limits. Courts have traditionally assumed that if the text of a will has a plain meaning, they should not go beyond the text; and more generally courts have refused to consider what testators said at the time about what they were trying to do or how they understood particular words they used in the will.[56] The barring of evidence of testators' statements about their aspirations significantly restricts the field of information about their specific intentions.[57]

Why would anyone adopt such a restriction? A major reason is evidentiary unreliability.[58] Opportunities arise for outright fraud and honest disagreement about what the testator said at the time. A related rationale concerns predictability in the interpretation of the language of

53. *Id*. at 44.
54. *Id*. at 32.
55. James Robertson sharply notes this problem. *See* Robertson, *supra* note 3, at 1045, 1065–66. Robertson, a former judge on a state supreme court, has suggested that combining "internal and external standards . . . yield[s], at best, a forced and awkward fit." *Id*. at 1053.
56. Thus, one way to understand *Rowland* is that if a term has a standard meaning, a court will not pay attention to any evidence that the writer probably intended a different meaning.
57. If evidence were barred only when the meaning is regarded as plain, a more precise way to view the approach would be that plain meaning is the controlling legal standard; only if that fails do facts about the testator become legally relevant. This nuance of conceptualization is one indication of how thin the line can become between a narrow standard of interpretation (plain meaning controls) and a constraint on sources of evidence (no way to show testator's intention). For an argument that restrictions on evidence in the early nineteenth century rendered statements about the relevance of subjective intentions of contracting parties misleading, *see infra* note 152.
58. Scott Jarboe provides one account of modern justifications. Scott T. Jarboe, Comment, *Interpreting a Testator's Intent from the Language of Her Will: A Descriptive Linguistics Approach*, 80 WASH. U. L.Q. 1365, 1373–75 (2002). Jarboe recounts reasons for earlier English restrictions on external evidence. *Id*. at 1371–73.

wills. Further, the status of wills has often been regarded as a reason to avoid external evidence. Crediting external remarks has been thought to violate the rule that a will's provisions cannot be overthrown by contrary dispositions, oral or written, outside the will (or to fall too close to a violation of the rule to be allowed).

When someone wants to dispose of her property by will, she must put her disposition in writing, sign the document, and have it attested by two or three witnesses; or (in many states) she must write the entire will in her own handwriting.[59] Given other devices by which people pass money when they die—designating beneficiaries in insurance policies, retirement funds, and some kinds of bank accounts without having the forms witnessed[60]—one may make a strong argument that will formalities should be relaxed. The Uniform Probate Code reduces statutory requirements for execution and also confers on courts a power to dispense with requirements if a proponent presents clear and convincing evidence of a testamentary intention.[61] Nevertheless, most courts still apply requirements strictly. If, for example, a signed document was undoubtedly meant to be a will but was not witnessed, most probate courts will not treat it as valid.

Will formalities are thought to serve at least five purposes.[62] One is evidentiary; the formalities help ensure that one can simply and confidently determine how a person wished to dispose of her property.[63] The second purpose is cautionary.[64] The ritual of making and signing a will, and having it witnessed, emphasizes to the writer the seriousness of what she does. A will is not a casual offhand remark; it elicits careful deliberation and decision. A third purpose is self-protective.[65] The formalities help guard against a person's being defrauded or unduly influenced into accepting a disposition she does not really want to make. Finally, the formalities serve two channeling functions. They allow courts to settle efficiently what disposition to make of an estate.[66] They also help guide

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59. *See* Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1071 (1996) (discussing "holographic wills"—entirely handwritten and signed by the testator—which are allowed in approximately twenty-nine jurisdictions).

60. For a discussion of will substitutes, see John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 503–09 (1975); Nathaniel W. Schwickerath, *Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes*, 48 DRAKE L. REV. 769 (2000).

61. UNIF. PROBATE CODE §§ 2-502, 503 (1990). John H. Langbein earlier wrote favorably on a similar development in South Australia. John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987).

62. *See* Langbein, *supra* note 60, at 491–98.

63. *Id*. at 492–93.

64. *Id*. at 494–96.

65. *Id*. at 496–97.

66. *Id*. at 493–94.

those who consult lawyers or look at will forms to accomplish their objectives.[67] In addition to providing precise language with clear legal effect, lawyers can suggest previously unconsidered contingent possibilities and legal devices to allocate control of property and minimize tax burdens.

A crucial question about interpreting wills is the import of the writing requirement. We can quickly see why wills should not be open to challenge on the basis that their writers changed their minds between the time they made their wills and the time they died, as evidenced by oral statements.[68] Signed and witnessed documents are much easier to authenticate than claimed oral remarks by a person who has died.[69] The core of what is called the parol evidence rule is a principle of substantive law that other expressions will not be taken to supersede the terms of an authoritative written document.[70] A will cannot be superseded by either an oral expression or a writing that is not formalized in the way a will must be.

As Wigmore has emphasized, allowing evidence of what the testator *meant* in a will is not the same as allowing the will to be superseded; but many courts have taken the parol evidence rule to bar evidence of the writer's statements about what she meant to do with her will.[71] That a court is interpreting the will, not supplementing it, is clear if its inquiry is limited to what a testator aimed specifically to do with the language of his will—the inquiry in which Lord Denning engaged in *Rowland*.[72]

The two purposes of the writing requirement that might be compromised, were external evidence about a testator's intention considered in respect to the will's interpretation, are simplicity of administration and evidentiary reliability. The more courts need to consider, the more complicated the process of settling wills can become. Just how serious the risk of

67. *Id*. at 497–98.

68. It would be comforting to suppose that because anyone can change her will, the will almost certainly reflects her wishes up to the time of death. But many people put off revising wills even after their wishes have changed; and death overtakes some procrastinators.

69. I pass over situations in which an oral statement might be irrefutably authentic, as when a person sends a videotape to all family members.

70. Wigmore emphasizes that the rule is properly seen as one of substantive law, not evidence. WIGMORE, *supra* note 30, at § 2400. If the rule is used to bar evidence of intent or of how a testator understood words that a court would consider relevant under its criteria of interpretation, then the rule operates as a genuine one of evidence.

71. *See* PAGE ON WILLS, *supra* note 18, at 39–44.

72. The line between interpretation and supplementation becomes thinner if the testator's general intent, not revealed in the will itself but established by external evidence, is used to provide a specific disposition the testator did not conceive. The following section provides an example of how this line can become elusive in relation to a contract.

unreliability is depends heavily on the kinds of statements involved; claims about oral comments made to prospective beneficiaries are susceptible to fraud and distortion to a degree that is not true of more "objective" evidence of how a testator used terms in various contexts, such as letters, recordings, and diaries, other than his will.[73]

The purposes of cautioning, self-protection, and guidance that will formalities serve are not affected by techniques of interpretation. Were courts to credit external evidence about what a writer meant in his will, that would not detract from the careful consideration he would give to what he wants to accomplish and how that can be done.[74]

One way to reflect on the evidence courts should allow for wills is to assess a radically inclusive approach suggested by Jane Baron.[75] Claiming that the law of wills pays too much attention to words and not enough to stories, she provides the example of her father's will, which left his "personal property" to her and the rest of his estate to his wife, Baron's stepmother. Did he mean by "personal property" only tangible items like chairs and tables or intangible property like stocks and bank accounts?

One might conceivably take Baron's proposal in a highly revisionist way, to allow the father's general wishes a kind of priority over the will itself; but it does not take too many conversations with members of the same family to realize that they can disagree sharply over a person's comparative affections. People represent themselves differently to different people, and perceptions of the same events vary widely. A judge could find it hard to build a composite story from the stories a daughter and her stepmother would tell about her father. If judges regarded wills as no more than helpful guides to wishes, their task would become nearly impossible, and the number of controverted cases would rise exponentially. Such a broad use of stories would undermine the choice someone has made to place his disposition in formal writing.

The more modest and plausible use of the father's story would be to illuminate what he meant by "personal property." The closer he was to his daughter, the more estranged from his wife, the more likely it was that he used the term expansively. Although the court's focus would remain on the will, the relevant evidence would still be very broad. Even if contestants told the truth as they understood it, competing claims about comparative affection could be personally divisive, as well as

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73. *See* Jarboe, *supra* note 58, at 1388.

74. Similarly, a relaxation in will formalities does not deprive people of reason to have their wills written precisely, *see* Langbein, *supra* note 61, at 51–52; Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 466–68 (2002).

75. Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 661–64 (1992).

troublesome for courts to evaluate. There is powerful reason not to admit such personal accounts of the father's general dispositions. Evidence drawn from the will itself and undisputed objective circumstances (such as the Rowlands' projected trip to the South Pacific) are less susceptible to distortion. If Baron could show that her father in his business dealings typically used the terms "personal property" to include stocks and bank accounts, that would give credence to the conclusion that he meant this broader notion in his will. The risk of admitting specific statements about the will's contents would depend on the kinds of statements involved. If her father wrote Professor Baron and her stepmother (with a copy to Baron) that Baron would receive his stocks that would be highly reliable. Oral comments allegedly made to the person who would benefit would be unreliable.[76] Leaving judges with a somewhat less rich picture of the aims of the testator is an acceptable price to pay for keeping out untrustworthy claims of oral statements and controverted and controversial testimony about the balance of someone's affections.

B. Plain Meaning, Exceptions, and Alternatives

One possible approach to standards of interpretation and sources is to make everything depend on the apparent clarity of a will's language. When they find that a will has a plain meaning, judges have often barred any reliance on external sources that might establish a different meaning.[77] Modern courts would not use this rule to bar evidence of local or trade usages, but a court faithfully applying the rule in a case such as *Rowland* would not consider evidence that would establish a writer's own special sense of words or his intent, unless the written words were ambiguous in context or vague in relation to some borderline situation.

Legal scholars of the last century have not looked kindly on plain meaning rules, and leading modern scholars have supported a focus on the intent of a will's author in preference to reliance on plain meaning.[78] Some scholars have regarded plain meaning rules as incoherent or based on a logical error. Thus, Wigmore has said that the plain meaning rule

76. Ordinary rules barring hearsay evidence would reach some evidence of this sort, even without any special exclusion for the law of wills.

77. WIGMORE, *supra* note 30, at § 2461.

78. *See, e.g.*, *id.* at § 2462; John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change in Direction in American Law?*, 130 U. PA. L. REV. 521, 522 (1982); Joseph W. deFuria, Jr., *Mistakes in Wills Resulting from Scriveners' Errors: The Argument for Reformation*, 40 CATH. U. L. REV. 1, 1–3 (1990).

rests on the fallacy that "there is or ever can be *some one real* or absolute meaning."[79] Adam Hirsch writes that each of us has his or her own idiolect, that words can have multiple meanings, and that the plain meaning rule is theoretically incoherent.[80]

Whatever misconceptions about language people may have entertained during the origins and development of the plain meaning rule, a defender of the rule need not assume that meanings are fixed and absolute. He may acknowledge that community sense determines meaning, that meaning varies with context, and that not everyone shares exactly the same meanings. All he need claim is that when certain words in context convey a meaning on which the vast majority of speakers of the language agree, that meaning is relevantly "plain."[81] In the law, meaning can also count as "plain" if legal tradition or legislation has established a definite, precise, meaning for particular words such as "heirs" that does not depend on popular usage.

A plain meaning *rule* treats plain meaning as controlling, even if the speaker's subjective meaning may differ. When others rely on what a legal document says, giving substantial weight to the understandings of readers makes sense; but, if beneficiaries have only limited expectations based on the language of wills, and the main point of wills is to afford people wide discretion in how they wish to dispose of their property after death, reasons to privilege a general understanding of terms over that of the testator are much less powerful.[82] Any justification for privileging general meaning in wills must lie mainly in the benefits of convenience, uniformity, and reliable evidence.

To evaluate those benefits, we need to look more closely at when evidence of individual meanings or intent is permitted or not permitted under the plain meaning rule, and we also need to review some possible alternatives. The rule does not apply if a will is ambiguous—if the words as applied to external circumstances do not clearly convey one meaning rather than another. Most straightforwardly, words may be ambiguous on their face. Suppose T leaves "my most beautiful painting to my daughter Ann." The words taken by themselves do not signify which of a number of paintings is meant. Although historically, some courts refused to

79. WIGMORE, *supra* note 30, at § 2462 (citing Locke for the proposition that individuals signify different things by words).

80. Hirsch, *supra* note 59, at 1116–21.

81. I here put aside the possibility that a particular person's usage is so well established that the meaning of his words can be plain even if others, including those in his circumstances, would not use words in that way. Such a personalized version of meaning is not considered plain meaning in the law of wills.

82. PAGE ON WILLS, *supra* note 18, at 8–9 explains that courts are more liberal about construing intent in wills than in deeds and that American courts are more liberal than are English ones.

accept evidence to resolve such patent ambiguities,[83] regarding the terms as too indefinite to be applied, courts now will usually admit evidence to discern the writer's intent.[84]

Evidence has consistently been allowed to resolve latent ambiguities, apparent only when the language of the will is applied to the testator's property.[85] If T leaves "my diamond necklace," the direction is ambiguous if she owns two diamond necklaces. Evidence may show which necklace she meant.[86] Courts wanting to avoid unjust results will often strain to find ambiguity without explicitly abandoning the plain meaning rule.[87]

The crucial issue about plain meaning concerns claims about individual meanings, when no evidence of ambiguity exists except assertions about the writer's particular understanding. An example is a will that leaves property to "Mother." If the writer's mother is alive when his will is written, the word has a plain meaning,[88] and it does not refer to the writer's wife. Under a plain meaning rule, the wife would not be able to show that her husband referred to her as "Mother."[89] Suppose a widow offers disinterested witnesses who testify that her husband always referred to her in this way. Might the husband not have realized that in his will, he should use formal designations, not intimate terms of reference? A court might view the effort to get back to the husband's individual meaning as fraught with difficulty.

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83. WIGMORE, *supra* note 30, at § 2472.

84. *See, e.g.*, Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP. PROB. & TR. J. 811, 819–20 (2001). Some courts will admit extrinsic evidence, but not evidence of the testator's intent. *Id*.

85. *Id*. at 820–23.

86. This kind of uncertainty may be regarded as a separate category of "equivocation," a description that "fits two or more external objects equally well. . . ." JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 437 (5th ed. 1995).

87. According to Andrea Cornelison, *supra* note 84, at 824, "the language of ambiguity largely has swallowed the plain meaning rule . . . ."

88. I assume there is no complication about a birth mother and an adoptive mother.

89. ARNOLD DUNCAN MCNAIR, THE LAW OF TREATIES: BRITISH PRACTICE AND OPINIONS 175 (1938), refers to a will that said, "All for mother," and the court allowed evidence that that was how he referred to his wife. Perhaps it could be relevant that this usage is not entirely idiosyncratic. Many husbands refer to their wives as "Mother" or "Mom" when talking to their children, and some address their wives directly in this way. Few would use these terms for their wives in a formal legal document, but if a writer's actual mother had died before he wrote his will, it could appear likely that he meant to refer to his wife. Some courts maintain a personal use exception to the plain meaning rule. *See* Cornelison, *supra* note 84, at 825.

But is a total bar on evidence of idiosyncratic understanding a wise response? It may be better to indulge a strong assumption that words are meant in their ordinary sense, but to admit evidence of a different meaning, perhaps requiring the proponent of a special meaning to meet a high burden of proof. When one looks at the range of cases in which "plain meaning" can produce unjust results, this possibility gains in attractiveness. We can divide cases very roughly into those in which the testator has made an outright mistake and those in which the problem is less simple.

One form of outright mistake is that the language of the will, even as understood by the testator, definitely fails to accomplish his purpose. Either he has made a slip in writing the will, or some failure occurs between his instructions to his lawyer and his signing of the will that both fail to catch.

Some wills omit clearly intended provisions. One provided that a daughter could receive a portion of the principal of Fund A, but not of Fund B, when she reached the age of forty, although other language in the will indicated that the aim was to allow her receipt of some of the principal of both funds.[90] Extrinsic evidence showed that a typist had made an error.[91] In another kind of case, a husband and wife read their respective wills carefully, but each ends up signing the other's will.[92]

A somewhat different form of mistake involves terms with a precise legal significance and application that the testator does not recognize. Thus, one testatrix acting on her lawyer's advice designated her "heirs at law," not realizing that at her death, her aunt might be her sole heir, with priority over her cousins.[93] In another case, the lawyer had used the term "heirs" after a woman had asked that the residue in her will go to her own blood relatives; in California the family of her late husband counted as half of her heirs.[94]

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90. *In re* Estate of Dorson, 196 N.Y.S.2d 344, 345–47 (Sur. Ct. 1959).

91. *Id*. at 346–47.

92. In one New York case, the court admitted the will the husband signed to probate and reformed it in accord with the provisions his wife had actually signed. *In re* Snide, 418 N.E.2d 656, 656–58 (N.Y. 1981).

93. *See* Mahoney v. Grainger, 186 N.E. 86 (Mass. 1933) (relying on a will execution statute, the court refused to correct the apparent error). I am not treating an idiosyncratic use of ordinary terms as a "mistake," so long as the terms reflect the writer's actual understanding and wishes, but one might say the writer is making a mistake in failing to adhere to general usage.

94. Estate of Taff, 133 Cal. Rptr. 737 (Cal. Ct. App. 1976). The court interpreted the will to carry out her intention. *Id*. at 742. It noted that the trial court properly considered evidence to create an ambiguity and to resolve it. *Id*. at 741. John Langbein and Lawrence Waggoner have remarked that "this way of stating the matter obliterates the fundamental distinction between ambiguity and mistake." Langbein & Waggoner, *supra* note 78, at 557–58. (It does not *necessarily* follow that the court would have taken the same approach if the will had used words that the testatrix herself would have

Relatedly, a testator may misunderstand legal consequences, in a way that does not depend on the meaning of a single term. In one case, a couple wanted their estates divided between their two families if neither of them or their children survived.[95] Their lawyer wrote the wills to provide that the estates would be divided between the two mothers.[96] The wife's mother, but not the husband's, survived the couple, who died with their children in a hotel fire.[97] According to ordinary legal principles, the wife's mother would have taken everything.[98]

Some mistakes concern the external world to which the will applies. The writer may fail to benefit a child because he mistakenly believes she has died. Or he may make a mistake about how to describe a piece of property or about a name.

With names, the writer often could not identify the mistake if he read his will very carefully, but he would recognize that he had picked the wrong name if the correct names of individuals or organizations were explained to him. If no one exactly fits a name in the will, courts will consider evidence to resolve the latent ambiguity, but what if the will perfectly matches an actual person or organization? One will contained a devise to Robert J. Krause (with his correct address); the testator did not know him, but Robert W. Krause was a long-time friend and employee.[99] In a more piquant case, Nasmyth, a resident of Edinburgh, left a legacy to the "National Society for the Prevention of Cruelty to Children."[100] It turned out that a society with just this name existed in London; the name of the analogous society in Edinburgh began with the word "Scottish." According to a handbook on legal construction, "a number of circumstances . . . rendered it highly probable that [he] would have preferred to extend his bounty to the Scottish Society."[101]

Courts have strong reason to correct mistakes in wills. Nasmyth

realized did not accomplish her objectives if she had read the words over.)

95. Engel v. Siegel, 377 A.2d 892, 893 (N.J. 1977).

96. *Id*.

97. *Id*.

98. In *Engel*, the Supreme Court of New Jersey followed the couple's intent and treated the mothers as representatives of the wider families. *Id*. at 896.

99. *In re* Estate of Gibbs, 111 N.W.2d 413 (Wis. 1961). The testator had apparently looked in the telephone book for his friend, and had put down the middle initial and address of the stranger. *Id*. at 416. Believing that the proof established the mistake to a high degree of certainty, the court corrected it. *Id*. at 418.

100. Michael Hancher, *Dead Letters: Wills and Poems*, 60 TEX. L. REV. 507, 515 (1982).

101. *Id*. The House of Lords gave the money to the English organization.

thought he had used the name of the society in Scotland;[102] the California testatrix thought that her "heirs" were her blood relatives.[103] Why should courts not give effect to words as the words are understood by those who write them, if there is powerful, acceptable, evidence that this understanding deviates from general usage?[104] The result should be the same if a lawyer tells the testator that he is using words he won't bother to explain that will do the job the testator wants.[105]

If we focus on fair treatment for the testator, it also makes sense for courts to correct mistakes about which words the will contains. If it is clear that the testator wanted the beneficiary to receive principal from Fund B, or to sign the will drawn up for himself, not his wife, or to leave money to his friend Robert W. Krause, a court should rectify the mistake. Courts *could* require that evidence of a mistake be, as it was in the Fund B case, from within the will,[106] but sometimes external evidence can be reliable and powerful, as with the written donation to Robert J. Krause,[107] even though nothing in the will itself sounds an alarm.[108]

A tentative conclusion that courts should correct evident mistakes does not resolve what standard they should employ in interpreting wills, what evidence they should consider that a mistake has been made, and what burden of proof they should place on the person who is urging the existence of mistake. The approach most influentially urged in the last two decades is that courts should inquire about the actual intent of testators, that any evidence, or at least any evidence not barred by ordinary principles of evidence, should be permitted, but that the proponent of mistakes of fact or law should have to establish the mistakes by clear and convincing evidence.[109]

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102. Hancher, *supra* note 100.

103. Estate of Taff, 133 Cal. Rptr. 737 (Cal. Ct. App. 1976).

104. In the National Society case, there is a further argument that in context the title of the organization meant generally what Nasmyth assumed. Someone who says in New York that he is to get a dog at the S.P.C.A. means the American S.P.C.A., although the organization with the formal title Society for the Prevention of Cruelty to Animals is in England. The National Society issue is more complicated because the title is in a formal document, and some people living in Edinburgh might choose to donate to the organization in England.

105. That is, it should not matter whether the lawyer says, "I've used 'heirs' to benefit your blood relatives," or, "I've used technical language to do what you wish."

106. *In re* Estate of Dorson, 196 N.Y. S. 2d 344, 345–47. (Sur. Ct. 1959).

107. *In re* Estate of Gibbs, 111 N.W.2d 413 (Wis. 1961).

108. I treat this names case as one of a mistake about what words appeared in the will, but, if the testator did not know his friend's middle initial or address, one might say he chose the words he wanted and that his mistake was about the individual to whom those words referred. On my analysis, which of these two characterizations is preferable does not matter.

109. *See* Langbein & Waggoner, *supra* note 78. Robertson, *supra* note 3, at 1089, points out that these authors would impose a less exacting standard of proof for clerical errors.

We shall look at two recent challenges to this combination of elements, both of which agree that a strategy of interpretation should correct obvious mistakes. James L. Robertson offers an objective approach to interpretation, based on his experience as a judge on a state supreme court and heavily influenced by Oliver Wendell Holmes.[110] He suggests that discerning the actual intent of a testator many years ago is commonly an impossible inquiry.[111] Further, given the influence of various aids to interpretation that are external to the donor, it is "forced and awkward" to combine internal and external standards.[112]

In contrast to a major thesis of this essay and much other writing about interpretation, Robertson suggests that the same objective approach can apply to all aspects of legal interpretation.[113] According to him, "We do and should seek circumstanced external meaning, not by invading the mind of the person who made the donative transfer, but by referring to the hypothetical, yet reasoned, intent of an external character, an imagined semi-sovereign donor ('SSD') . . . ."[114] A court should ask what the words of the document would mean to a "normal hearer of English seeing them in the circumstances in which they are spoken."[115] Robertson is open to courts considering external evidence, including the lawyer's testimony in one of the "heirs" cases that the testatrix did not want her money to go to her one aunt rather than her twenty-five cousins.[116]

Just how Robertson's approach differs from an inquiry about subjective intent is elusive, in part because the exact range of evidence he would allow about circumstances is not clear. As a hypothetical in which a court would not, and should not, deviate from the words of the will, he suggests an instance in which a father's will leaves a Chickering piano to one daughter (Maria), although he meant to leave it to another daughter (Christina).[117] If Dad had written both daughters many times that Christina was to get the piano and Maria the painting, if his lawyer's

110. Robertson, *supra* note 3, at 1045 n.4.
111. *Id.* at 1045–49.
112. *Id*. at 1053.
113. *Id*. at 1047.
114. *Id*. at 1055. *See also* Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611 (1988), who suggests that courts "impute" intent. *Id*. at 612. It is not clear how far imputed intent will ordinarily diverge from a probabilistic judgment about actual intent, although Fellows does say that testators do not have intents about matters they did not consider.
115. Robertson, *supra* note 3, at 1076.
116. *Id*. at 1096–99.
117. *Id*. at 1061.

notes reflected that intent, if Maria was an artist who despised piano music, a court employing an actual intent approach might decide that Christina should receive the piano. In principle, this case does not seem different from the Robert Krause problem.[118] Of course, people rarely leave money to strangers with names almost like those of good friends they fail to benefit, and people often leave pianos to daughters. But one can load the circumstances heavily so a gift of the piano to Maria seems highly implausible. If an external circumstanced approach would correct the gift to Robert J. Krause,[119] why could it not correct the gift to Maria?

And how are we to regard situations in which the testator uses terms in an unusual way? A normal speaker of English would not use terms in that way, but ordinary speakers of English can understand from an enriched picture of circumstances that another person is using terms in a nonstandard way.[120] If all circumstantial evidence is admitted, including evidence about the inclinations and idiosyncrasies of the testator, it is doubtful if a judge employing Robertson's objective approach would reach practical results different from one asking about actual intent. She would, of course, not admit to making an uncertain determination about probable intent; she would be able to say instead that she adopts the conclusion that the normal speaker of English who matched the will to circumstances would reach.

Emily Sherwin has urged that using a standard of clear and convincing evidence for proof of testamentary intent by someone who has failed to comply with will formalities does not achieve a rational compromise between formality and adjudicative justice.[121] Her basic argument is that a mistaken failure to recognize testamentary intent is as bad as a mistaken recognition of testamentary intent when it is absent. Using a standard of clear and convincing evidence, rather than the ordinary civil standard of preponderance of evidence, will result in a greater number of misjudgments. Sherwin does not herself extend her reasoning to issues of interpretation,[122] but her challenge requires us to examine carefully possible reasons for a standard of clear and convincing evidence in that context.

One may think of such a standard partly as a caution against weighing certain kinds of evidence too highly. Some years ago, and perhaps up to

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118. *See In re* Estate of Gibbs, 111 N.W.2d 413 (Wis. 1961).

119. I am not certain Robertson would correct that gift; if he would not, his approach can be faulted on that ground.

120. An extreme illustration is when a listener understands that the speaker grossly misunderstands the meaning of a word in a foreign language.

121. Sherwin, *supra* note 74, at 473–74.

122. *But see* Robertson, *supra* note 3, at 1084–85. Although rejecting a heightened standard of proof, Robertson says his approach would be inhospitable to claims of mistake based on the hearsay testimony of drafting lawyers. *Id*. at 1102.

the present, the Princeton philosophy department did not interview persons they were considering for appointments. The rationale was that the members recognized they would give undue importance to personal impressions. A heightened standard of proof might be a restraint on a judge giving too much weight to present testimony in relation to what can be discerned from the will itself. The standard can also operate as an exercise in tact. A judge need not say he thinks someone is probably lying, only that the proponent has failed to overcome the burden of producing clear and convincing evidence.

Perhaps most important, when claimed mistakes are at issue, misjudgments in one direction seem more tolerable than misjudgments in the other. If a testator or his lawyer has messed up, holding him to what the will's language actually conveys may be harsh; but it is not as bad as rewarding fraudulent claims of mistake. Many assertions of mistake that are not obviously correct may be true in fact, but some may be the fruit of outright fraud. The clear and convincing evidence standard is a protection against such fraud succeeding.

When measured against these various critiques, both an inquiry that focuses on actual intent, at least as to matters as to which the testator almost certainly had a definite intent, and a standard of clear and convincing evidence, seem appropriate.

Courts have commonly said that they can construe wills, but not reform them to correct mistakes by adding new provisions.[123] However, distinguishing construction from addition is hard to do when a name is substituted, or a will the husband signed is given the terms of the will his wife mistakenly signed. Langbein and Waggoner argue persuasively that many American decisions have eroded any line between construction and reformation (or addition), and that courts should drop the pretense of "no-reformation."[124] Rather, they should alter explicit terms when they have clear and convincing evidence that the terms do not reflect the intentions of the testator.[125]

How far should courts be guided by a testator's intent when something more complex than a mistake is involved? When a general intent in a will, say to provide equally for different branches for a family, conflicts with more specific language about a disposition, courts rightly seek to

123. Langbein & Waggoner, *supra* note 78, at 521–23.
124. *Id.* at 566.
125. *Id*. at 568.

give effect to the paramount intention.[126] These situations usually arise when the testator has failed to foresee the contingency that actually occurs.

Courts will not alter specific language merely because it appears to be in some tension with a testator's overall objectives, judged from the body of the will or external evidence. Wills are not public-regarding in the manner of statutes; their writers are free, within bounds, to be arbitrary or capricious. They need not be consistent in fulfilling purposes outsiders can identify. Judges have no occasion to substitute their judgments for what the writers have specifically provided.[127]

It is conceivable that a writer's intent for a specific situation and his sense of his words may fly apart. Suppose that Dr. Rowland picked "coinciding," imagining that it covered shipwrecks in which his wife and he would die together. In most circumstances, the two would die seconds or a few minutes apart. Dr. Rowland loosely assumed that the term would be adequate even if the deaths were a half hour apart, but if he had focused carefully on that question, he would have acknowledged that deaths a half hour apart do not coincide. Here, his specific intent about a situation would not fit his reflective sense of his own words, and yet he has not exactly made a mistake. In the absence of a mistake, a court is highly unlikely to have sufficient evidence to conclude that a writer's own sense of the words she uses fails to conform to her specific intent.

A more likely possibility is that a testator's general intent will seem frustrated by a specific disposition, even though the general intent is not directly provided in the will itself. One might view the Rowlands' circumstances in this way if the wife survived too long to make the deaths coincide (by any understanding), but not long enough to make any use of her husband's property. Courts do not treat wills "liberally" in such instances; they do not fulfill assumed general purposes by disregarding specific provisions; but if a court can develop a clear sense of the objectives of the writer, perhaps it should regard itself as free to provide dispositions such as saving taxes that reach beyond the language of the will, but would certainly be preferred by the testator.[128]

C. Interpretation, General Assumptions, and Public Policy

I have, thus far, largely omitted one significant topic, interpretation in

126. *See* PAGE ON WILLS, *supra* note 18, at 88–89.

127. An exception involves the wills of people who have become incompetent. Then the argument is strong that courts should be able to reform their terms to carry out their objectives. *See* Fellows, *supra* note 114, at 621–26.

128. *See id*. at 613 (proposing that courts should reform wills to achieve competent estate planning).

light of general assumptions and public policies. Statutes constrain testators to a limited extent, requiring, for example, that spouses receive a substantial share; but beyond these restraints, various judicial and statutory principles of interpretation may affect how a will is construed. In circumstances of doubt, a court interprets a will to do what most people would want[129] and in a manner that reflects ideas of desirable distribution. Courts assume that most people do not wish to disinherit their children and that they wish equality of distribution for heirs of equal degree.[130] If a will leaves the matter in doubt, it will be interpreted not to disinherit and to provide equality. But, these interpretive principles go beyond generalizations about likely wishes; they reflect a social sense of desirable distribution.[131] Thus, it has been said, "Every reasonable construction in the will must be made in favor of the heir at law; and he can be disinherited only by words which provide that effect clearly and necessarily. . ."[132]

In all areas of law, judges interpret in light of likely and accepted behavior. Because of the freedom of the writers of wills, there may be less room for public policy to affect interpretation here than elsewhere;[133] nonetheless, judges properly give some more weight to appropriate standards of behavior than a pure estimate of the testator's probable intentions might warrant. Thus, given the policy that caring for children is desirable, a court may construe an unclear will to do that, even if the balance of probabilities suggests that the testator wished otherwise.

IV. CONTRACTS

The law of contracts is a major part of modern private law, and scholars in the United States have devoted extensive attention to the law's treatment of contracts. The basic questions about contract interpretation are similar to those concerning wills. How far should courts be guided by objective meaning, how far by the subjective intent of the parties? How general or contextual should objective meaning be taken to be? When should courts "write in" terms that parties have

129. *Id*.
130. PAGE ON WILLS, *supra* note18, at 90–91, 111.
131. Fellows, *supra* note 114, at 613.
132. PAGE ON WILLS, *supra* note 18, at 111.
133. However, some contracts scholars argue that courts should give effect to what the parties wanted or would have wanted over any considerations of public policy they were at liberty to disregard. *See infra* notes 213–14 and accompanying text.

failed to supply, a power that is quite limited for wills, and how should courts go about that task? If various contractual provisions point in different directions, should a court give each its apparent meaning, even at the cost of an unwieldy totality, or bend the language of some terms to make the whole contract work well? What evidences of meaning should courts allow? Should courts assign meaning to contracts based on public policy, rather than the apparent significance of words or the intent of parties, if the explicit terms are unenforceable or seem to require actions that are permitted but generally disfavored, in the manner of disinheriting one's children?

Should the answers to these proceeding questions depend on the expressed or probable wishes of the parties about how courts should interpret their contracts? Should strategies of interpretation vary according to the nature of the parties and the contracts they have made?

Beyond the obvious point that contracts, unlike wills, are subscribed to by at least two persons, contracts differ from wills in usually being performed without legal officials playing any role. In contrast to statutes and constitutional norms, contracts are formulated to achieve private objectives, not to set rules for public life. Although many contracts involve three or more parties, we shall concentrate on the common written contract between two persons, or two companies, or one company and one person. Most of the discussion proceeds without distinguishing among kinds of contracts, although we shall examine some proposals by scholars that how judges interpret contracts should depend on their subject matter and on the sophistication of the parties, that, for example, prenuptial agreements should be regarded differently from sales contracts, and contracts between experienced business firms differently from contracts between individuals.[134]

We shall not touch, except in passing, disputes that arise over whether the parties have entered into contractual relations and over what the bargained terms of a contract are.

A. Basic Issues of Interpretation: Objective v. Subjective and General v. Contextual

We saw in connection with wills that if courts could reliably and easily know the specific intentions of testators, fulfilling those intentions would be desirable; and we considered arguments that courts should,

134. *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003). *See also* Robert Childres & Stephen J. Spitz, *Status in the Law of Contracts*, 47 N.Y.U. L. REV. 1 (1972) (arguing that courts take categories of contracts and parties into account *sub silentio* in deciding whether to use the parol evidence rule).

nevertheless, focus on general meanings of terms, because discerning particular intentions is difficult and because allowing individual understanding to trump objective meaning encourages sloppy drafting, temptations to lie, and costly litigation. Placing a heavy burden of proof on someone who claims that a will was intended to have an application different from its apparent terms seemed a better judicial answer to these worries than imposing rigid restraints on evidence of what the testator intended by the terms of her will.

The analogous problems in contracts are similar but more complicated, because contexts may be richer and more variable, because the people involved may have had different understandings of what terms signified or different perceptions of what terms the contract contained, and because one party may realistically have been much more the author of terms than the other. Unlike the writer of a will, contractual parties are available to testify about what they intended, but when their relationship has frayed to the degree that brings them to court, each party's report of what he believed is likely to be unreliable and self-serving.

The typical problem of ignorance about terms looks considerably different in contracts than it does in wills. The actual writer of a will, often a lawyer, is trying to carry out the desires of one person. Contracts involve bargains. Better terms for one side are worse terms for the other. Many contracts formed between large companies and individual purchasers (or users) are composed of forms that the individual must sign if she wishes to make a deal. Backs of forms may contain terms highly favorable to the company printed in small letters. Only an extremely conscientious (or compulsive) consumer reads through all these terms, let alone understands their significance; indeed it would often be irrational for the consumer to take the time and effort required to read and understand terms that are highly unlikely ever to make a difference. Courts and legislatures must decide whether such terms will have legal effect.

A related problem that arises for contracts, but not interpretation of wills, statutes, or constitutions, is that parties may believe their relations will not be governed by the terms of the written contract, but rather by principles of fair dealing.[135] Even a party aware of some unfavorable

135. *See* Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1765–66 (1997). Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 FORDHAM L. REV. 799, 806 n.33 (2002), notes a lease he signed that required window curtains to have a white

term may not believe her contracting partner will rely upon it. Suppose a salesman explains carefully that if you have a problem with the television set you are about to buy, the sales agreement provides you must seek redress from the manufacturer, not the store. You understand perfectly well but assume, nevertheless, that if your television fizzles when you turn it on for the first time, the store will take it back and give you another. Your understanding of fair business practice differs from what you know are the written terms of your agreement. Whether judges should give effect to such understandings is a substantial question.[136]

Yet another difference between wills and some contracts concerns the wishes of their authors about techniques of interpretation. Each writer of a will is going to have her will interpreted only once. From her point of view, the best form of interpretation is the one which best promises to carry out the aims of her will.[137] For certain kinds of contracts, such as prenuptial agreements, the considerations are similar. But business firms entering a large number of contracts in which they will be both buyers and sellers may well prefer a less expensive interpretive approach that will work best for them over the long run. If they estimate that they will be winners as often as losers when courts "get it wrong", they may prefer that courts interpret in an inexpensive, uncomplicated manner. Employing such an analysis, Alan Schwartz and Robert Scott argue that business firms dealing with each other should be able to get the standards of interpretation they want. Instead of seeking a "correct" approach to interpreting contracts, courts should treat the parties as sovereign about interpretation, adopting the "interpretive style parties [would typically] want courts to use when attempting to find the correct answer."[138] Most firms, Schwartz and Scott claim, will commonly prefer an objective "textual" approach that considers little, if any, extrinsic evidence.[139]

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backing; he relied on the manager's assurance that "they don't enforce that rule," but, as a contracts teacher, realized he was depending on the landlord's grace. One can imagine an analogy for administrative or legislative regulations when a person subject to the regulations assumes that their strict terms will not be enforced, and practice supports that assumption.

136. According to Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 181 (1965), assertions that the written words do not manifest an actual understanding are not "interpretation[s]" of the written words. A claim of that sort may be one for reformation or some other remedy. *Id*. at 174–75.

137. More precisely, the degree of risk of serious failure would be relevant. Also, the projected cost of litigation could count, but not many testators would choose what would otherwise be a less desirable strategy of interpretation in order to save their estate money that might be spent on litigation costs.

138. Schwartz & Scott, *supra* note 134, at 569.

139. *Id*. at 544–49, 584–94. Avery Katz has suggested the difficulty of generalizing about the interpretive strategy parties will want courts to use; the traditional scholarly approach "founders on a lack of information about the likely consequences of formal and substantive modes of interpretation." Avery Wiener Katz, *The Economics of Form and*

The fact that parties usually comply with contracts on their own can affect desirable methods of interpretation in litigated cases. If courts interpret particular terms in the same fashion, parties will be able to gauge more accurately how they will be treated, and this degree of predictability may reduce litigation. Thus, systemic considerations like those that apply to standard form wills favor interpreting standard form contracts "objectively," so their terms will always mean the same thing. But it may be countered that parties will be more secure and less likely to litigate if they realize they will be held to ordinary trade usages and fair practices.

1. Objective and Subjective Elements

If we put aside system-wide concerns and ask what are the fairest and most desirable standards of interpretation for the parties to a contract, *and* we assume both that a court (with or without a jury) can accurately assess each party's understanding at acceptable expense and that the parties have not intended interpretation that makes their specific understandings irrelevant,[140] the answer, across a range of cases, is a mix of objective and subjective elements.

A party's subjective intentions may diverge from the objective significance of the written contract if the writing contains an error in one of the terms (or in punctuation), or the party is unaware of terms, or the party understands the terms differently from their most plausible meaning from an objective standpoint.

The error case is simple. S agrees to sell her painting to B for $1000. When writing up the contract, S mistakenly adds an extra zero, so the contract reads $10,000. Because S is a new painter, whose work has no established market value, the error is not obvious from the face of the contract plus external facts (other than the parties' expressed intentions). If both parties agreed the painting was to sell for $1000, fairness calls for

Substance in Contract Interpretation, 104 COLUM. L. REV. 496, 538 (2004). *See also* William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971, 973, 991–1004, who urges both that the needed empirical evidence for a move toward formalism is lacking and that such an approach could have counterproductive effects on the behavior of many parties.

140. Eric A. Posner, *The Parol Evidence Rule, The Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 568–73 (1998), discusses parties who fear that judges will err or that litigation will become too expensive, and consciously desire that courts not undertake inquires about their subjective understanding. *See also* Schwartz & Scott, *supra* note 139, at 584–90.

that price, the price for which the parties bargained, despite the $10,000 in the written contract.[141]

What if parties have different understandings of what the terms of a written contract should be, so that one party (honestly) thinks a mistake has been made and the other party (honestly) believes the written terms accurately reflect the agreement, or one party is ignorant of a term the other knows is in the contract? If the two parties are equally situated, and if neither has an advantage in sophistication or bargaining power, a court should enforce the written terms. A person should be able to rely on a contract's terms without having to worry that the other party is under a misconception about what they are. (Matters are different when the terms are in form contracts and in fine print; then a party who has written the form is under some responsibility to meet likely misperceptions of the other about what the terms are.)

In the more interesting case, no one has made a mistake in writing down the terms of the contract, but at least one party understands the terms differently from what an objective reading would suggest. (In a much more rare case that we will not consider, the parties have different understandings of some term, and neither understanding is more reasonable than the other.)

As we saw with respect to wills, whereas a subjective approach is necessarily individual—its application depending on what specific persons (probably) believed—an "objective" approach may be more or less contextual. The "objective theory" of contracts is sometimes conceived as taking terms in a general way that abstracts from the details of any particular contractual relationship.[142] But if *the key* to an objective approach is a reliance upon external manifestations and events,[143] an approach that asks what terms probably mean when used by people with the particular backgrounds and interactions of the parties can be "objective." That is, the terms would mean what a reasonable person aware of all the relevant circumstances would assume they mean in context.

In fact, exactly how to draw the line between what counts as objective and what counts as subjective is not so simple. Whether, for practical purposes, a standard that is apparently subjective reaches beyond a

141. *See* Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CAL. L. REV. 1575, 1610 (2003), writing of mistranscriptions as mistakes that do "not affect the terms of the bargain." These fall within a broader category of what he calls mechanical errors, for which a party should obtain relief, except insofar as the other party relied reasonably. *Id.* at 1584-1611.

142. Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1108–10 (1984).

143. For this notion to be meaningful, external events cannot include mental states, and they probably cannot include many statements about one's mental states.

contextualized objective approach depends heavily on just what evidence is admissible. Joseph Perillo has noted that in the late eighteenth and early nineteenth centuries when some judges and text writers suggested that the crucial inquiry concerned subjective understanding, parties were not allowed to testify.[144] Thus, the main sources of evidence that the parties' subjective understanding differed from a contextual objective understanding were unavailable. The crucial practical question may be which among many evidences about the meaning of contractual terms will be admitted, and what weight these various evidences will be given. With contracts as well as wills, the chance of a discrepancy between the actual subjective understanding of both parties and the objective meaning of the terms they choose decreases as the evaluation of "objective" meaning becomes less general and more contextual.

Let me illustrate some of these issues with the imaginary contract that a Croatian soccer star, Ivo Planić, signed to play for an American team, the Metro Stars, "during its season." Understanding that Ivo will not be with the team during the weeks of training and exhibition games that precede the regular season, the team has agreed to pay half of his salary even if he is injured before he joins it. When Ivo breaks his leg in a European game that takes place after the Metro Stars has begun training, the team claims it owes him no money, because he breached the contract by not showing up at training camp. The judge concludes that the standard meaning of "during its season" includes training camp and exhibition games, but the judge also concludes that both parties understood the term differently here.[145]

In this situation, that is, when the parties have had a common understanding, implementing that understanding is the fair approach. What other parties might mean when they employ the same terms is irrelevant.[146] Many modern courts do pay attention to the actual intent of the parties,[147] an approach straightforwardly provided under the

144. Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 443–44 (2000).

145. I do not discuss just *whose* understanding counts for a large firm, or for anyone who is represented by a lawyer, a problem that resembles somewhat the discerning of legislative intent in statutory cases. But if people choose to have lawyers represent them in contract negotiations, they are ordinarily bound to the lawyers' understandings.

146. *See, e.g.*, E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 949–51 (1976).

147. Melvin Aron Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 CAL. L. REV. 1127, 1133–34 (1994); Farnsworth, *supra* note 146, at 949–51. *But see* Posner, *supra* note 140, at 534–40 (reporting that some courts

Restatement (Second) of Contracts, Section 201(1), which says: "Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning."[148]

What reasons might a court have to interpret the term "during its season" according to what most people, or most people in the soccer business, or a reasonable person, would understand? One might believe that figuring out what individual parties actually meant is too difficult, that adopting a generalized objective approach reduces incentives of parties to lie and even might match actual intentions better in most instances than an approach that tries to determine individual understandings directly.[149] But let us assume here that the team president and Ivo told reporters after the signing that he would not have to report prior to the regular season. In that event, an uncontextualized objective approach could not reduce the likelihood of error about the actual understandings of these parties.

A court might, instead, rely on a conceptual argument that the meaning of a contract does correspond with what its terms would convey in common usage or to reasonable observers. In what is sometimes called the classical conception of contracts, various writings may seem to reflect such a view. In one of his famous comments about contracts, Oliver Wendell Holmes suggested that the law does not concern itself with the actual mental states of individuals:

> [N]o one will understand the true theory of contract . . . until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of the two minds in one intention, but on the agreement of two sets of external signs,—not in the parties' having *meant* the same thing but on their having *said* the same thing.[150]

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continue to apply what he calls a "hard" version of the parol evidence rule, according to which they exclude extrinsic evidence of prior negotiations and rely on the writing, unless the writing on its face is incomplete or ambiguous or a party claims a bargaining defect such as fraud or mistake).

148. RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (1981). This approach differs from the more objective one of the first Restatement. For integrated contracts, its standard was "the meaning that would be attached . . . by a reasonably intelligent person" knowing the circumstances. RESTATEMENT OF CONTRACTS § 230 (1932). For unintegrated contracts, the meaning was what "the party making the manifestations should reasonably expect that the other party would give to them . . . ." *Id*. at § 233.

149. In Steuart v. McChesney, 444 A.2d 659, 662 (Pa. 1982), the Supreme Court of Pennsylvania noted that the plain meaning rule "has been supported as generally best serving the ascertainment of the contracting parties' mutual intent."

150. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897). Perillo, *supra* note 144, at 474–76, writes that Holmes followed the lead of some courts in adopting an objective approach. Holmes propounded a similar objective approach to virtually all branches of law. *Id*. Citing Holmes's The Common Law, Eisenberg remarks that for some proponents of the classical model, it may "have reflected a broader program in which a single norm could generate all legal rules: Actors

Learned Hand, one of our most distinguished appellate judges, put it colorfully:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties . . . . If . . . it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held . . . ."[151]

According to E. Allan Farnsworth, this fully objective approach to the meaning of contractual language arose in the late nineteenth century in response to expressions that contracts require a "meeting of the minds."[152] Sweeping formulations of the objective approach may be understood as responsive to overstated notions about "the meeting of minds," and as attempts to render law more scientific,[153] rather than as refined evaluations of just when subjective intent should matter.

Any defense of an objective approach cast in terms of conceptual necessity would be misconceived. Interpreters face no logical compulsion to adopt an objective approach toward the meaning of texts. If two friends exchanging informal promises have a shared sense of meaning, they will be guided by that, not some objective meaning. The law of contracts can adopt the same perspective.

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must conform their activity to the conduct one could reasonably expect of the average person." Eisenberg, *supra* note 142, at 1108–09.

151. Hotchkiss v. Nat'l City Bank, 200 F. 287, 293 (S.D.N.Y. 1911) *aff'd*, 231 U.S. 50 (1913). Hand's quote does make an exception for cases of "mutual mistake, or something else of the sort," but that apparently refers to mutual mistake about the subject of the contract, not about the significance of terms. *Id*. Lawrence Friedman has written, "'Pure' contract doctrine is blind to details of subject matter and person. . . . Contract law is abstraction—what is left in the law relating to agreements when all particulars of person and subject-matter are removed." LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA 20–24 (1965).

152. Farnsworth traces this subjective theory back to 1551, Farnsworth, *supra* note 146, at 943, and notes that it "accorded well with the 'will theory' of contracts which attained hegemony on the nineteenth century . . . ." *Id.* at 945. Farnsworth goes on to say, "[n]o responsible authority seems ever to have suggested that the process of interpretation deals only with those terms on which there was a meeting of the minds at the time of agreement." *Id.* Joseph Perillo, *supra* note 144, at 435, 443–44, emphasizes the objective elements in contract interpretation from the earliest times, and notes that the inability of parties to testify before the mid-nineteenth century undercut the practical relevance of comments that subjective understanding was the guide to meaning.

153. *See* Eisenberg, *supra* note 142, at 1108.

Holmes's objectivist stance was grounded in a utilitarian concern about a well-functioning legal system;[154] and those who now support a similar approach defend it on the basis that contracts will be better written and more economically or faithfully enforced if courts stick with objective meaning.[155] One might favor judges disregarding the possibility that both parties *shared* a meaning that deviates from a general one, if one thought that possibility was infrequently realized.

We can conceive various approaches to deal with the problem of uncertainty about the actual subjective intentions of one or both parties. One might adhere to some form of general objective meaning whenever that seems possible. A second approach would be to admit attention to "subjective understandings" or contextualized objective meaning only when appraisal of common meaning leaves doubt, when that meaning is not plain. A third approach would be to restrict the kinds of evidence courts could examine about subjective understanding, in order to assure that evidence is reliable, and to preclude any "end run" around the rule that oral understandings cannot supplant the provisions of integrated written contracts.[156] For example, courts might limit evidence to external manifestations other than oral conversations between the parties.[157] Yet

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154. Eisenberg remarks that "despite its formal de-emphasis of policy, the classical school's philosophical, psychological, and jurisprudential assumptions seem to have reflected an extremely strong premium on certainty." *Id*. at 1110.

155. Writing that "[t]hrough the revised rules of the Uniform Commercial Code and the Second Restatement, the 'contextualists' have succeeded greatly in reducing the exclusionary potential of the interpretive process," Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 307 (1985), suggest that "[r]igorous application of the plain-meaning rule reduces interpretation error by encouraging more careful choices of clear, predefined signals." *Id*. at 311–12. *See also* Posner, *supra* note 140, at 568–73, on judicial application of the parol evidence rule in some circumstances in which the parties themselves might wish to avoid the use of external evidence of their understandings; Schwartz & Scott, *supra* note 134, at 570–85.

156. The third and second approaches could be combined; courts might restrict the occasions for evidence of intentions and the kinds of evidence they will entertain, or they might admit more evidence in some circumstances than in others.

157. Under this approach, a party who had not spoken previously could not make a claim well after signing about what he really understood at the time. Such a rule could seriously reduce the possible significance of subjective elements in contract interpretation, because parties who suppose that their understandings are shared may have no occasion around the signing of a contract to explore potential differences.

A comment to the Restatement (Second) *may* support this approach. The comment is to the innocuous Section 200, which provides that "[i]nterpretation of a promise or agreement or a term thereof is the ascertainment of its meaning." RESTATEMENT (SECOND) OF CONTRACTS § 200 (1981). Comment b says, "the intention of a party that is relevant to formation of a contract is the intention manifested by him rather than any different undisclosed intention." *Id*. at § 200 cmt. b. Most straightforwardly, the comment says that a party cannot claim an undisclosed intention that conflicts with an intention that he manifested. If Ivo had said at the time that contract was signed, "I understand I will have to be there at training camp," he could not later claim that he

another approach would be for courts to allow all sorts of external evidence of subjective understandings but impose a heavy burden of proof on anyone who claims that both parties shared a meaning that varies from a general one. Unless that burden was met, a judge would follow the objective meaning.

This last approach seemed the best for wills, and it might be best for contracts as well. However, we can reach a judgment on that score only after we take a closer look at the plain meaning and parol evidence rules, as they might apply to contracts, at the possibility that the most sensible approach varies according to the sophistication of parties and the subject matter of a contract, and at the version of objective meaning that might control. As I have said, if courts allow evidence of various dealings between the parties to establish a contextual "objective" meaning, the need to show subjective meaning will be much less frequent, because that meaning is much less likely to deviate from contextual "objective" meaning than from a general objective meaning.

Consider a case in which in 1937 a father, after a divorce, had agreed to pay his ex-wife $1200 a year for his 10 year old son "until" the son's "entrance . . . into . . . some college or . . . higher institution of learning beyond the completion of the high school grades," and then to pay $2200 per year after his son's entrance to college for a period of that education but not for more than four years.[158] Upon completing high school in 1946, the son was immediately drafted into the army. Determining that the point of the trust agreement was to educate the son and provide maintenance for him while he was in his mother's custody, the court held that the father did not have to pay while his son was in the army.[159]

Only an exceptionally farsighted person in 1937 would have foreseen the son's induction into the army; but some graduates of high school do work for a year or two and then enter college. Because these young people usually work at low paying jobs, a divorcing couple might or might not conceive that the father's obligation to contribute should continue during such a period. The more one understood about the

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harbored a different, secret, intention about the terms to which he agreed. But suppose he then said nothing about how he understood "during its season." Is he later barred from claiming that his understanding was the regular season? I do not think the comment is meant to have this consequence. It seems mainly about intentions to enter into contractual relations, cautioning that parties will be bound to manifested intentions that they may secretly not have embraced.

158. Spaulding v. Morse, 76 N.E.2d 137, 138 (Mass. 1947).

159. *Id*. at 139–40.

father and mother—their expressed assumptions about children going to college immediately after high school, their backgrounds and levels of income, the father's comments about whether parents should be generous to children or encourage their self reliance, the bitterness of the divorce—the more basis one would have to evaluate the significance of the contractual language for this circumstance.[160] One *might* regard a highly contextualized objective approach as an inquiry about how a reasonable person intimately familiar with both the father and mother, and the history of their relations, would take the language in their agreement.[161] There is no guarantee that the answer to that inquiry would fit what the parents actually had in mind, as revealed by their honest testimony at a trial or by their statements to each other when the agreement was reached;[162] but the chance of a match would be much greater than if a court inquired only about the language of the contract and what people in general who were making such an agreement would mean.

Whatever qualifications one might introduce for reasons of legal process or because the parties themselves may have wished to circumscribe the range of judicial inquiry, courts are faithful to the bargain parties actually struck if they give effect to their shared intended meaning over any opposed objective meaning.

2. Divergent Understandings

Matters become more complex if the two parties do not share the same understanding. When one party's understanding squares with a reasonable meaning that is general, and the other's does not, that understanding should ordinarily prevail. People should be able to assume that others take words in their ordinary sense; they should not be vulnerable to surprise claims that the words meant something special. This approach to situations when understandings diverge draws not only from systemic considerations but also fairness between the parties. As Melvin Eisenberg

160. This highly contextualized approach might extend beyond dealings between the parties to aspects of the parties revealed by behavior toward others. Especially insofar as such behavior was included, an objective appraisal might conclude that the two parties would assign different meanings to the terms.

161. If the inquiry concluded that these people would not have considered the option of work before college, a court would have to decide what treatment of the unforeseen circumstance of compulsory military service would best fit their objectives. If the inquiry concluded that the couple had considered ordinary work but not army service, a court would still have to decide how it should treat army service.

162. Farnsworth, *supra* note 146, at 949, notes that with many provisions of detailed contracts, there is no subjective intent. A court then has to interpret them objectively or assign a meaning that fits broader purposes the parties subjectively had in mind.

points out,[163] we can regard the approach as based on fault; the party with the less reasonable meaning is at fault for neither recognizing the other party's understanding nor informing her of his own understanding.

But this conclusion leaves open two important questions. Which should be dispositive: the *general* ordinary understanding or the understanding likely to exist among parties to this sort of contract? And might a court reasonably conclude that the party whose understanding fits a relevant general or particular one better should nevertheless lose because he bore more responsibility to have recognized the other's likely understanding or to have assured that the parties arrived at a shared understanding?

A variation on our soccer example, in which the team thinks "during its season" includes training camp but Ivo does not, illustrates both issues. Suppose that in usage among people generally, "during its season" would usually be taken not to include training camp, but that within American sports contracts, including those of soccer leagues, the standard meaning of "during its season" includes training camp and exhibition games. Courts typically allow proof of trade and local usages, and these control even when the meaning is distinctively at odds with the popular meaning of terms.[164]

On behalf of a contention that his contrary understanding should control nevertheless, Ivo might offer two related arguments, one about meaning based on the objective circumstances of his particular situation, another about the responsibility to clarify possible misunderstandings.

Ivo was already under contract to play with a German team through the American team's exhibition season. Under an objective approach that looks only at the general meaning of terms and at common usage in a trade, this fact would be irrelevant. But the Metro Stars certainly had reason to learn of Ivo's existing contractual obligations, particularly because European players almost always accord priority to European competition. The team should have supposed that he would not intend to break his German contract unless he explicitly, unambiguously said he would. The phrase "during its season" is imprecise enough to create doubt that someone signing a contract with that phrase, taken alone,

163. Eisenberg, *supra* note 147, at 1131–32. *See also* Randy E. Barnett, *A Consent Theory of Con*tract, 86 COLUM. L. REV. 269, 303 (1986) (explaining why, according to a consent theory of contract, people should be able to rely on "objectively ascertainable assertive conduct").

164. Thus, in the lumber industry, two packs of a certain size were regarded as 1000 shingles. A contract to deliver 4000 shingles could be fulfilled by delivery of 2500 shingles in eight such packs. Soutier v. Kellerman, 18 Mo. 509, 510–12 (1853).

would intend to break a conflicting contractual obligation. Thus, one might conclude that when a foreign soccer player under contract to play abroad during an American team's training camp and exhibition games signs a contract to play "during its season," the most reasonable meaning *in that context* is that "during its season" means only the regular season.[165] We see, as we did with the contract to support a son through college, that even if the controlling interpretation is to be objectively based on external circumstances, much depends on how individualized is the context.

Ivo's related argument focuses on the responsibility for any misunderstanding. The Metro Stars will contend that he should have been aware of the standard sense of the term "during its season" in soccer contracts, but he may respond that because he does not speak English well and because the team knew about his German contract, its representative should have told him precisely what "during its season" meant to the team.[166] A judge might decide that the Metro Stars had much more reason to know of Ivo's meaning than he had to know of the team's meaning, even though the team's meaning comported with that in the industry.

The last century's history of contract law and scholarship suggests various approaches to divergent understandings. According to an objective approach that looks for the standard meaning of terms, the team would win. Recall that Hand talked about "the usual meaning which the law imposes upon [the parties]."[167] Such an approach leaves no room for argument that one party's unusual understanding should control.

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165. A party who is not part of a trade is not commonly held to trade usages that differ from common usage unless it is proved "either that he had actual knowledge of the usage or that the usage is 'so generally known in the community that his actual individual knowledge of it may be inferred.'" Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 119 (S.D.N.Y. 1960) (quoting 9 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 2464 (3d ed. 1940)).

166. The persuasiveness of this argument might depend partly on whether Ivo was advised by an American lawyer; if so, perhaps he should not be able to complain that he personally did not know the meaning of crucial terms. This possibility raises the general problem of how to deal with claimed divergencies between what a party's lawyers do, or should, understand and what a client understands. We saw one aspect of this issue with wills. One must worry about perverse incentives. If clients can benefit by not understanding what their lawyers do, they have an incentive not to become fully informed. But if clients are locked in to what their lawyers understand, they may have a (slight) incentive not to consult lawyers. Unless a lawyer has made an outright mistake in formulating the terms of a contract, a party should probably be bound by the understanding of his or her lawyer, and that indeed is the prevailing law.

167. *See supra* text accompanying note 151. (I am assuming that "the usual meaning" would be contextualized enough to take into account standard usage in the industry.)

The first Restatement, following Williston, employed an objective approach to integrated contracts, but one that was somewhat more complex. The standard of interpretation was "'the meaning that would be attached . . . by a reasonably intelligent person' familiar with all operative usages and knowing all the circumstances other than oral statements by the parties about what they intended the words to mean."[168] This standard leaves us uncertain how to resolve Ivo's case. Much depends on just *how* individualized the relevant circumstances are taken to be. Would the "reasonably intelligent person" know of Ivo's contractual obligation with the German team and that virtually no European players would sacrifice the end of the European season for American training camp? (The Restatement section clearly bars consideration of oral statements about what the terms mean, but should a court allow evidence that the team and Ivo did not discuss what "during its season" means?) If a judge did consider *all* the individual circumstances, he might well conclude that "during its season" meant only the regular season in this particular contract.

The Restatement (Second) reflects Arthur Corbin's partly subjective approach to divergent understandings. Corbin suggested that a party should be able "to determine the operative meaning of the words of agreement by proving . . . that he so understood them and the other party knew that he did, or . . . had reason to know that he did."[169] In requiring someone like Ivo to show that he *did understand* "during its season" in the narrower sense (not only that he reasonably would have done so), and in allowing him then to succeed if the team was (subjectively) aware of his understanding (whether or not it should have been), this approach relies on two subjective elements that the Restatement (First) disregarded. The Restatement (Second) provides that if one party actually knows the meaning attached by the other, that meaning prevails if the other does not know of the meaning attached by the first party (even if he had reason to know).[170] Thus, if the Metro Stars knew how Ivo understood "during its season" and he was unaware of the team's contrary understanding, a court would adopt his understanding.

According to the Restatement (Second), the meaning attached by one party also prevails if that party "had no reason to know of any different

168. Farnsworth, *supra* note 146, at 959 (quoting RESTATEMENT OF CONTRACTS § 230 (1932)).
169. ARTHUR LINTON CORBIN, 3 CORBIN ON CONTRACTS § 538 at 59–61 (1960).
170. RESTATEMENT (SECOND) OF CONTRACTS § 201(2)(a) (1981).

meaning attached by the other, and the other had reason to know the meaning attached by the first party."[171] The spirit of this provision would support Ivo's claim that the team should have realized he did not plan to join it in training camp. But the section's literal language creates an obstacle to reaching this conclusion. Any party has *some* reason to learn the standard meaning of crucial terms, so Ivo had *some* reason to know the meaning the team might attach to the term indicating when he had to report for duty. In contrasting "no reason to know" with "reason to know," the Restatement does not explicitly address the situation in which each party has some reason to know the meaning attached by the other, but one of the two has a much stronger reason.[172] Our soccer example suggests that, when each party has failed to learn the other's meaning, A should prevail if B has substantially more reason to know A's meaning than A has to know B's meaning. In assessing reason to know, a court should take account of unequal bargaining power, imposing on the dominant partner a greater responsibility to learn than on the weaker partner, especially if the dominant partner chooses terms which the weaker party has little or no opportunity to contest or change. In this way, a policy of fairness in contractual obligations would influence application of "reason to know."

The modern approach of Corbin, the Restatement (Second), and the U.C.C.[173] seems fairer to the individual parties in instances of divergent understandings than any alternative.[174] Until relatively recently, it appeared that this approach had largely won the day against the classical approach;[175] but it turns out not only that many courts continue to adhere to general meaning, some noted scholars defend that approach, at least for contracts between business firms.[176] They argue that attention to subjective understandings will lead to error and unduly burden both the courts and the parties themselves.

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171. *Id*. at § 201(2)(b).

172. *Id*. I have not discovered a discussion of this exact point, but one would assume that "no reason" would at least include a very slight reason.

173. *See* U.C.C. §§ 1-205, 2-202, 2-207, 2-302 (2003).

174. At least this is true so long as one assumes that the parties have not intended a more objective form of interpretation, *see* Posner *supra* note 140, at 568–73, and one also assumes that the court's role is to give coherent content to the terms of the contract, not to strike some intermediate accommodation in such situations—splitting the difference as it were.

175. *See, e.g.* Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 206–07 (1998).

176. *See* Schwartz & Scott, *supra* note 134, at 583.

B. Plain Meaning and Parol Evidence Rules

Restrictive rules may bar certain kinds of evidence in contracts cases and they may preclude all external evidence if the meaning of the contractual language is plain. Modern courts typically allow evidence about trade and local usages. However plain the ordinary language of a provision may appear, a party may show a contrary trade or local usage. What is at issue is whether a party can show more individualized contexts, including prior dealings between the parties, negotiations, and the course of performance, to overcome a meaning that appears clear if one looks only at the written text of the contract.

According to the parol evidence rule, an integrated written contract supplants and terminates any prior agreements; thus courts will not consider evidence of undertakings that may supplement the terms of an integrated written contract if one would expect such undertakings to be in the written contract.[177] A clear conceptual division would treat the plain meaning rule as about *interpreting* the provisions of contracts, and the parol evidence rule as about establishing what count as the controlling terms of integrated contracts; and Arthur Corbin consistently maintained that the parol evidence rule had nothing to do with interpretation.[178]

Two complications render matters less sharp. The first is that, as with regard to wills, courts have spoken, and continue to speak, with some frequency of the parol evidence rule as restricting evidence about the meaning of contractual terms.[179] When a court allows certain evidence, but not other evidence, to contravene apparent meaning, it may be awkward to speak of a plain meaning rule, which typically excludes all evidence. Many courts draw no clear distinction between a plain meaning rule and a parol evidence rule when it comes to interpretation.

The second, more subtle, point is this: the distinction between evidence

177. One formulation is that a term is "not such as might naturally have been omitted;" another formulation is that a term "would certainly have been included."

178. *See* ARTHUR LINTON CORBIN, 3 CORBIN ON CONTRACTS § 579 (3d ed. 1960).

179. *See, e.g.*, Posner, *supra* note 140, 568–70. It used to be thought that parol evidence could resolve latent ambiguities, ones not evident from the text itself but revealed by external facts, but should not resolve patent ambiguities, evident from the text itself. Given the reality of the contextualization of linguistic usage, this is not a clear distinction in practice and it no longer plays a significant role in contracts discussions. Farnsworth, *supra* note 146, at 960–61. Peter Linzer writes of the parol evidence and plain meaning rules as "conjoined like Siamese twins." Linzer, *supra* note 135, at 801. The two rules *could* be conjoined in that the application of the plain meaning rule would trigger application of the parol evidence rule, but the conflation of the two rules is more thorough than that.

about the meaning of language and evidence about supplementary terms can blur if parties are free to use language as they choose. Thus, a party may claim that an omitted term was "implicit" in the contract's language as a way to escape any bar on showing supplementary terms.

Consider a case in which the court gave effect to the literal language of a contract that provided that if the couple that owned property obtained a bona fide purchaser, their neighbors could "exercise their right to purchase said premises at a value equivalent to the market value of the premises according to the [tax] assessment rolls . . . ."[180] Nine years later, the surviving widow, who wanted to sell, received offers of $35,000 and $30,000.[181] Her good neighbors then tendered her $7820, twice the assessed value on the tax rolls.[182] The Pennsylvania Supreme Court said the meaning of the terms was plain, and therefore that intent was to be discovered only from the contract's express language;[183] the trial judge erred in admitting testimony that the formula was meant to serve as "a mutual protective minimum price."[184]

So long as Mrs. Steuart claimed that *in addition* to the terms of the contract, she and her neighbors had agreed that they would pay a fair price in terms of actual market value, a court that had initially determined that the contract was integrated would bar her testimony according to the parol evidence rule.[185] If she claimed, instead, that the term "the market value of the premises according to the [tax] assessment rolls" *embodied* an implicit assumption that the value on the assessment rolls would approximate half of market value (and that the county's failure to keep its rolls up to date meant that a condition for operation of the contract was not fulfilled), the claim would be one about how to interpret the contractual language, not about supplementing it.[186] In that event, a parol evidence rule limited to evidence about supplementary terms would not prevent her testimony; only a plain meaning rule, if applicable, (or a parol evidence rule that covers interpretation) would

180. Steuart v. McChesney, 444 A.2d 659, 660 (Pa. 1982).

181. *Id*.

182. *Id*. at 661. The practice was to set assessment value at half market value, so this was the amount apparently contemplated by the contract's literal terms. *Id*.

183. *Id*.

184. *Id*.

185. However, many courts would admit this testimony as bearing on whether the written contract was integrated. The obvious possibility of an unfair price under the literal terms of the contract might be taken to suggest that the contract did not embody the full understanding of the parties.

186. Alternatively, the owner might have asserted that courts should adopt an "interpretive presumption that express terms supplement rather than trump the contractual context . . . ." Goetz & Scott, *supra* note 155, at 313. On this view, the contract includes standard assumptions one would make about fair and reasonable terms, unless they are explicitly disavowed.

stand in her way. If Steuart claimed the overall purpose of the contract was to assure a fair price between friendly neighbors, with no one seeking an economic advantage but rather with her and her husband trying to accommodate the desires of the McChesneys to buy an adjoining property, it might be hard to say whether the claim would concern supplementation or interpretation that focuses on purpose. Yet the same actual conversations among the owners and their neighbors could give rise to any of these three claims. Here the difference between adding terms and interpreting terms would have more to do with legal ingenuity than substance. Thus, one might defend a parol evidence rule that covers interpretation as necessary to protect the force of the rule against claims of supplementary agreements.[187]

We can see how such a view might work in relation to reliance on preliminary documents leading up to an integrated contract. Such documents cannot establish independent terms of agreement that one would expect in the final contract, but the documents can assist understanding of the terms of the final contract, showing what the parties were aiming to do or resolutions they rejected.[188] A ban on prior proposals to help interpret contracts might be justified as preventing deviations from the terms on which the parties finally agreed.[189]

In the remainder of this section, we will focus on a rule that bars external evidence about meaning. If "the rule" is one that declares that "the plain meaning," if one can be found, is the legally relevant meaning, whatever the parties intended and whatever a more contextualized inquiry might reveal, then the rule is one of substantive law, not evidence. A

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187. The very same words offered as an additional term that are rejected because the court deems the writing to be a total integration, can be offered as an aid to interpretation of an ambiguous written term. Able courts look at both proffers of evidence as governed by the "parol evidence rule."

JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 3.9, at 148 (4th ed. 1998).

188. It is not always easy to establish whether a proposed resolution was rejected or carried forward, but the same is true about prior legislative proposals; and that fact has never been thought to make prior drafts useless as legislative history.

189. Although worries about this problem may be lessened to some degree because interpretation is generally up to the judge, not the jury, factual disputes that bear an interpretation may be resolved by jurors. *See* Farnsworth, *supra* note 146, at 962. William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WIS. L. REV. 931, 931–32, shows not only that jurors often resolve contests over contractual interpretation but that, according to a standard understanding of the line between legal and factual issues, they should. One reason to bar external evidence is distrust that jurors will fairly decide factual issues that such evidence raises.

genuine rule of evidence bars evidence that could help establish a proposition that is legally relevant.[190]

To speak of a "rule" as if all evidence is allowed or all evidence is barred is a considerable oversimplification. As Professors Schwartz and Scott explain, one may speak of a minimum evidentiary base "composed of the parties' contract, a narrative concerning whether the parties performed the obligations that the contract appears to require, a standard English language dictionary, and the interpreter's experience and understanding of the world." To this evidentiary base, courts have added "(1) the parties' practice under prior agreements; (2) the parties' practice under the current agreement; (3) testimony as to what was said during the negotiations; (4) written pre-contractual documents (memoranda, prior drafts, letters); and (5) [relevant] industry custom . . . ."[191] As courts admit more of these forms of evidence, they move toward a maximum evidentiary base that allows them to decide what, "all-things-considered,"[192] the parties intended—the evidentiary base favored by "contextualists."[193]

A plain meaning or "hard" parol evidence rule bars evidence, not only of the parties' subjective understandings, but also of what a reasonable outsider would understand in light of the entire course of dealing of the parties. Indeed, in most cases discussing the plain meaning rule, the attempt is to introduce just such evidence of what the agreement meant "objectively" in context.[194]

A case in which a court distinguished evidence of subjective understanding from evidence of contextualized objective meaning is Home Insurance Co. v. Chicago and Northwestern Transportation Co.[195]

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190. For example, if Ivo's belief about what "during its season" meant was legally relevant, and a court refused to consider what he told reporters, the preclusion would rest on a rule of evidence. This conceptual distinction between rules of law and rules of evidence has limited practical import. If most evidence that might show that subjective understandings differ from objective ones is barred, the consequence will be a law of contracts that gives these subjective understandings little significance. *See* Perillo, *supra* note 144, at 435, on the relation between the exclusion of party testimony and an ostensible subjective approach to meaning.

191. Schwartz & Scott, *supra* note 134, at 572. This may be a quibble, but I think it is a bit misleading to treat an interpreter's experience and understanding as an aspect of an evidentiary base. No doubt, it is part of her informational base, but she does not typically consider it as evidence (though she might treat some isolated personal event like evidence.)

192. *See* Katz, *supra* note 139, at 498.

193. *See id*. at 497–98. One way of characterizing this movement from a restricted minimum base toward a fuller one is as a shift from a formal to a substantive approach.

194. Ross and Tranen write that, for contracts as well as statutes, "the real controversy is not whether to apply an objective or a subjective approach to meaning, but whether to consider evidence . . . that demonstrates, in an objective way, how the parties manifested their subjective intentions." Ross & Tranen, *supra* note 175, at 216–17.

195. 56 F.3d 763 (7th Cir. 1995). *See also* Goetz & Scott, *supra* note 155, at 307 ("In numerous cases, courts are unwilling to accept the full implications of

The Seventh Circuit Court of Appeals had to decide if a provision in the contract limiting damages covered an accident between freight cars and commuter cars for which CNW was negligent. The court said it would admit "objective" evidence of ambiguity that a person familiar with "the context of the contract would know that the contract means something other than what it seems to mean" but would not admit "subjective" evidence of ambiguity about what the parties believed the contract means, "which is invariably self-serving, inherently difficult to verify and thus, inadmissible."[196]

Whether a rule should bar any evidence of how the parties did understand, or how a detached observer would understand, the terms of the contract is controversial.[197] The traditional or conservative approach allows evidence of actual subjective understandings or contextualized objective meaning only if the terms of the contract are vague or ambiguous. The Uniform Commercial Code, the Second Restatement, and many state courts have abandoned this restraint; they permit evidence of context that would lead a reasonable outsider viewing the contract to assign a meaning that was different from the standard meaning.[198] Under this liberal approach, Ivo could introduce his contract with the German team to show that he and the Metro Stars reasonably supposed that his contract with it covered only the regular season.

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contextualization; in one guise or another, they still invoke the primacy of express, written texts to exclude extrinsic evidence.").

196. *Home Insurance Co*., 56 F.3d at 768. *See also* Judge Posner's earlier opinion in AM Int'l, Inc. v. Graphic Mgmt. Assocs., Inc., 44 F.3d 572 (7th Cir. 1995). On this division, public comments to reporters at the time of signing might be classed as "subjective," but they would not involve the problems that evidence about subjective understandings would typically involve.

197. *See generally* Farnsworth, *supra* note 146, at 952–65. *See also* Pac. Gas and Elect. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641 (Cal. 1968), a famous opinion by Roger Traynor indicating that the key issue, citing Corbin, was how the writers understood their words. *Id*. at 643. But as Peter Linzer has noted, Traynor required that extrinsic evidence "prove a meaning to which the language of the instrument is reasonably susceptible." *Id*. at 644, discussed in Linzer, *supra* note 135, at 822–23.

198. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 201–03 (1981). These sections also make relevant actual subjective understandings. An intermediate approach is to require vagueness or ambiguity before external evidence may be introduced as to meaning but to be very generous about the minimum necessary to surmount the threshold of vagueness and ambiguity. According to William Whitford, the main contention is among objective approaches, but "[a] few commentators still advocate inquiry into the existence of a subjective meeting of minds as the first step in any interpretive process." Whitford, *supra* note189, at 935.

In the discussion of wills, we have reviewed and rejected arguments that a plain meaning rule is actually incoherent. The force of the claim that, because all language is vague or ambiguous to some degree, meaning can never be plain, depends considerably on how "plain meaning" is to be understood, and particularly on how far an investigation of meaning considers individual circumstances. A claim that meaning is plain absent any reference to context may indeed be incoherent about most communications, but meaning in context is often clear. Suppose that for decades, "during its season" has, in contracts between athletes and American teams, included the entire season beginning with training camp. If one asks about the meaning of the phrase for sports contracts in general, the meaning *is* plain.[199]

When one further particularizes context, meaning may become less plain. As Avery Katz writes, "what meaning is plain will be agent-specific and context-specific."[200] If one asks about the meaning of "during its season" in a contract with a foreign athlete who is already under contract to play elsewhere during the period of the training camp and exhibition games, the meaning becomes less obvious than if one asks about sports contracts in general. As the inquiry becomes further contextualized, the chances may increase that a meaning that seems plain, in general, will seem plain no longer, although sometimes the reverse will happen—the greater context will make meaning more plain.

As we have seen, as the inquiry about meaning becomes more contextualized, the chances that actual subjective understanding will vary from apparent meaning diminish significantly. Once a judge initially determines that in the specific context a term most probably meant one thing, a party trying to show that she meant something different, *and* that either the other party agreed with her *or* that she should prevail over the party whose understanding fits what the court would expect, will carry a very heavy burden.

Putting aside convenience of administration, which some parties may desire, and the possibility that a restrictive rule will encourage better drafting of contracts and more faithful adherence to their terms, courts

199. That is the meaning according to what Schwartz & Scott, *supra* note 134, at 570–72, call "majority talk." They have in mind ordinary understandings in the population generally, but I do not think it stretches their purpose too much to include understandings that are near universal for some narrower settings, such as sports contracts. Of course, meaning can evolve over time, but right now the phrase "during its season" has a standard, widely understood, significance.

200. According to Katz, *supra* note 139, at 521, "for a given audience or interpreter, plain meaning corresponds to the interpretation associated with the interpreter's ordinary or zero-cost context—that is, the context that the interpreter can apply with minimal work." This definition either rejects or neglects what I believe is a crucial feature of the traditional meaning of the term—that a plain meaning must be "plain" or fairly obvious.

have no solid reason to refuse evidence that explains the full context of a contract. Should they bar evidence of subjective understandings that differ from what a contextual objective approach indicates about the meaning of terms? At the very least, courts should set a high burden of proof that a contract means something other than what it apparently means in context. Two reasons to bar such evidence altogether are the opportunity it presents for lying [201] and the slim chance that it will make a difference. In favor of admitting the evidence is the difficulty of winnowing out evidence of subjective understandings from evidence of contextual objective meaning, and the judgment that if two parties have really shared a bizarre understanding, it should be recognized.[202]

Exactly how much evidence to admit of contextual objective meaning and of subjective understandings may well depend of the kind of contract involved.[203]

C. Public Policy and Interpretation: Fairness to the Parties and Other-Regarding Interests

Public policy considerations involving fairness between the parties or more general public interests can play a part in contractual interpretation.

1. Unenforceability and Unconscionability

Most straightforwardly, public policy can bar the enforcement of contracts. Courts refuse to enforce agreements to commit criminal acts or to engage in other undesirable behavior, and a major doctrine of unenforceability involves contracts that are "unconscionable," or seriously

201. The worry about lying is increased when jurors resolve relevant factual matters. *See* Whitford, *supra* note 189, at 943–44. Jurors may reward a sympathetic party by crediting an implausible story. Similar risks also attend some claims about contextual objective meaning.

202. *See* Posner, *supra* note 140, at 553–55, who reviews various factors that would bear on rational decisions about how strictly to apply the parol evidence rule; see also Schwartz & Scott's treatment of contracts involving business firms, Schwartz & Scott, *supra* note 134.

203. One article suggests that the complexity of a contract's provisions matters for interpretation but that no straightforward correlation exists between a contract's degree of simplicity and the liberality with which it should be interpreted. *See* Karen Eggleston, Eric A. Posner, & Richard Zechhauser, *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 NW. L. REV. 91 (2000). Because the reasons for simplicity (and complexity) differ significantly, so also does the appropriate interpretive response; the reactions of judges should depend on the causes of simplicity (and complexity) they can identify.

unfair in how one party treats the other.[204] Although the common consequence of a determination of unconscionability is nonenforcement of the entire contract or of the unconscionable term, a court may explicitly rewrite the terms of a contract to make them fair. U.C.C § 2-302 provides that a court may "limit application of any unconscionable clause to avoid any unconscionable results."[205]

As far as interpretation is concerned, the more significant situations do not involve judges refusing to enforce terms or explicitly rewriting them, but their concluding based on public policy and fairness that contractual terms do not mean what they seem to say. According to Section 203 of Restatement (Second): "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."[206] Another section covering contracts that affect the public interests provides that "[i]n choosing among . . . reasonable meanings . . . , a meaning that serves the public interest is generally preferred."[207] Comment c to Section 203 indicates that courts should not stretch too far to interpret contracts to make them lawful or reasonable.[208] They should choose such a meaning over an unlawful or unreasonable meaning when both are plausible but they should not, in the guise of interpretation, adopt an implausible permitted meaning over a plausible meaning that is not acceptable.

This approach bears interesting comparison with the effort of courts to interpret statutes so that they are constitutional. Just how far courts should strain ordinary meaning in that setting is controversial, but some important decisions give statutes otherwise implausible renderings in order to save them from invalidity, or even from constitutional doubt. Courts may be hesitant to say that legislatures have acted invalidly, and declarations that general statutes are unconstitutional are of substantial

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204. Contractual terms may be unconscionable because one party lacked a reasonable chance to perceive and understand terms that seem unfair, or because the terms are unfair even if fully understood. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir.1965).

205. U.C.C. § 2-302 (2001). The New Jersey Supreme Court was even more creative in *Vasquez v. Glassboro Serv. Ass'n, Inc.*, 415 A.2d 1156 (N.J. 1980). Vasquez, a migrant worker from Puerto Rico living in quarters provided by a farm labor service organization, was discharged and was not permitted to remain overnight. *Id*. at 1158. Emphasizing the extreme inequality in his contract to work there, the court relied on public policy to rewrite a term of the contract, implying a provision to assure workers a reasonable time to find other housing. *Id*. at 1158–66.

206. RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981). The main idea of "reasonable" in the section concerns relations between the parties, but an agreement contrary to another public policy may also be unreasonable.

207. *Id*. at § 207. The rule this section expresses has, the comment tells us, been used to interpret grants of public franchises.

208. "If a term or contract is unconscionable or otherwise against public policy, it should be dealt with directly rather than by spurious interpretation." *Id*. at § 203 cmt. c.

moment. Saying that a private contract is unlawful carries much less practical import and involves no insult to a coordinate branch of government. Further, courts may explicitly substitute lawful for unlawful terms in a contract; they are more limited in the extent to which they can rework statutes.

How often a court interpreting contractual provisions should rely on public policies that parties are free to violate, if they do so explicitly, is more troublesome. A broad doctrine of interpreting contracts to be reasonable and in the public interest cannot be seen as simply a device to help carry out the likely intentions of the parties, because parties together may believe that their mutual advantage will be served by an agreement that fails to conform with the broad public interest. In preferring a reasonable meaning to an unreasonable one, Section 203 of the Restatement signals that considerations of fairness should matter when competing interpretations are plausible, even beyond what fairness might indicate about the parties' intentions.[209]

One aspect of this encouragement to judges to achieve fair results is acknowledgment of a connection between degrees of assent and modes of interpretation. For many contracts, thinking of assent to terms as being equal is unrealistic. One party understands terms it has chosen; the other party signs on with little choice or understanding of many specific terms and with little awareness whether a better deal is "out there" somewhere. Generalizing from some examples, William Woodward has written, "the smaller the contract and the more obscure or complex the term, the greater the chance that the nondrafter's true understanding of the deal—an understanding adequate to evaluate and 'price' the exchange—will deviate from what is in the writing."[210] By leaning toward an interpretation of terms that is fair, a court redresses an imbalance in assent to a degree. This reality suggests the more pervasive question how far courts interpreting authoritative language should take into account the conditions of its adoption, construing language in a manner that will compensate for imperfections in that process.

The rule that contracts that affect the public interests should generally be interpreted to serve the public interest has mainly been applied in cases dealing with public franchises and tax exemptions, discouraging courts from granting sweeping concessions to private interests that legislatures have not

209. *See id*. at § 203. However, a comment to Section 203 does say that "[t]he search is for the manifested intention of the parties." *Id*. at cmt. c.

210. Woodward, *supra* note 139, at 990.

clearly provided. However, Corbin indicates that the rule is not restricted to such contracts,[211] and a recent article enumerates some other situations, including standard form contracts, in which the rule has been invoked.[212]

Some scholars have rejected public policy as an independent guide to interpretation over the range in which parties could freely contract.[213] Arguing that contract law should help parties carry out their aims, they urge that interpretation should follow what parties have probably (or would have) agreed to. In part, the idea is that sophisticated parties will simply need to expend more effort in writing terms if courts will use public policy to interpret vague terms to their disadvantage. In part, the idea is that public policy is better served by independent branches of law, such as the law of marriage and divorce, environmental law, and labor relations law, than by judges trying to achieve public policies through interpreting contracts.[214] Perhaps it can be shown that for many kinds of contracts, interpreting them in accord with public policy is unproductive or unnecessary or both, but we should not assume that because of some principle of autonomy,[215] contract interpretation in general should be free from the influence of public-regarding considerations when judges must choose between competing plausible readings of contractual terms. True it may be that parties can disregard some public policies, but so also can the writers of wills and statutes.

D. Filling in Terms

Although modern American courts interpreting written contracts do not typically disregard specific terms that seem in tension with the overall purposes of the contracting parties,[216] they will often provide content for indefinite terms and supply terms that the parties have omitted.[217] A common example is a contract that omits the time for

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211. ARTHUR LINTON CORBIN, 3 CORBIN ON CONTRACTS § 550 (3d ed. 1960).

212. Zamir, *supra* note 135, at 1723–24. A concern that a public agency may be "captured" by private interests that receive franchises and exemptions is not present when purely private parties contract.

213. *See, e.g.*, Schwartz & Scott, *supra* note 134, at 554, suggesting that in contracts between business firms, courts should facilitate efforts of the parties to maximize their joint gains.

214. Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980), demonstrates that contract law cannot disregard issues of distributive justice, but he does not concentrate on interpretation of contracts between parties who could disregard such considerations.

215. *See generally* Barnett, *supra* note 163, at 276–77.

216. *See, e.g.*, Steuart v. Mc Chesney, 444 A.2d 659 (Pa. 1982), discussed *supra* text accompanying notes 180–87. Because a provision is likely to favor one party at the expense of another, courts are hesitant to say a provision consciously adopted by both parties is to be disregarded in light of an overall purpose.

217. According to RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981): "When the

performance; a court will require performance in a reasonable time. This power does not involve the court in changing a contract's explicit terms but in fashioning new ones. Yet, we do not find the same explicit power in the law of wills or in statutory and constitutional interpretation. Charles Goetz and Robert Scott describe a major shift from a traditional "presumption that the parties' writings and the official law of contract are the definitive elements of the agreement" to a law in which "[e]vidence derived from experience and practice can now trigger the incorporation of additional, implied terms."[218]

Professor Scott, however, has recently claimed that the trend toward filling in incomplete terms has not gone as far as most scholars have supposed.[219] In a significant percentage of cases, courts will not enforce agreements that the parties have deliberately left incomplete, refusing to fill in terms that do not depend on events outside the contract, and that could have been made specific, and whose performance could have been verified by the party to whom the obligations would have been owed.[220] Scott suggests that if judges fill in such terms when parties bring such agreements to court, doing so could be socially inefficient.[221]

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parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." As a Note in the 2003 Columbia Law Review indicates, all courts in the United States are generous in filling in the terms of sales contracts, covered by the Uniform Commercial Code. Some remain restrictive in dealing with service contracts. The Note argues for a flexible approach to all kinds of contracts. Nellie Eunsoo Choi, *Contracts with Open or Missing Terms Under the Uniform Commercial Code and the Common Law: A Proposal for Unification*, 103 COLUM. L. REV. 50 (2003). Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1657–61 (2003), defends the traditional practice of nonenforcement for some indefinite agreements.

218. Goetz & Scott, *supra* note 155, at 274. For an account of the general jurisprudential assumption of Karl Llewellyn, the major draftsman of the U.C.C., that law lies in patterns of practice rather than in explicit rules, *see* Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 621–24 (1975).

219. *See* Scott, *supra* note 217, at 1642–44.

220. *Id*. at 1642–44, 1657–61. Employing experimental analysis of behavior motivated by a sense of reciprocal fairness, as well as economic analysis of potential gains and losses to parties that deliberately leave unspecified terms such as the standards for a bonus, Scott claims that we can understand why parties rationally choose this course, depending on self enforcement. *Id*. at 1661–85. For a skeptical view about the possible merits of a formalist approach for actual contractual relations, *see* Woodward, *supra* note 139. Woodward is particularly critical of proposed reforms of the U.C.C. that would require courts to stick more closely to the explicit terms of forms. *Id*. at 991–93.

221. Scott, *supra* note 217, at 1685–92.

When courts do imply new terms for contracts, we can understand them as relying on four, not always separable, bases. One is the language of the express contract; thus, when an owner contracted to "transport" goods on his barge, the Supreme Court found an implied promise to supply the tug to tow the barge.[222] A second basis is the conduct of the parties. A third is standard usage in the trade. Finally, courts may imply terms that fit with legal policies.

Exactly how does this power to "fill in" terms relate to interpretation, and why do courts have this power for contracts? One technique that is used both for interpretation of ambiguities and for filling in omissions is to ask about a hypothetical bargain: what would the parties have agreed to had the parties specifically addressed this issue?[223] Courts often speak of an implied term, drawn from the provisions to which the parties have agreed. "Where there is tacit agreement or a common tacit assumption or where a term can be supplied by logical deduction from agreed terms and the circumstances, interpretation may be enough."[224] In some instances, one may be hard put to say whether what is needed is a direct interpretation of existing terms or filling in of new ones. Recall the case in which the father had promised to pay $1200 per year for his son's upkeep "until" the son's entrance into college, and then $2200 for his college years.[225] The issue whether the father owed money for time his son spent in the army after being drafted could be understood as an interpretation of the significance of "until" in the context of the

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222. Sacramento Nav. Co. v. Salz, 273 U.S. 326, 329 (1927) (discussed in ARTHUR LINTON CORBIN, 3 CORBIN ON CONTRACTS § 561 (3d ed. 1960)).

223. David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1816 (1991). Charny points out just how complicated are the questions why a hypothetical bargain may matter and how one should understand the bargain. In determining how individual or general and how ordinary or idealized one believes judges should make hypothetical bargainers, one may well be influenced by the theory of justification for enforcing contracts that he accepts. *Id*. at 1820–79.

224. RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. c (1981). According to Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 505 (1989), "While it is perhaps more common to speak of 'interpretation' in cases where parties attempt to resolve an issue but do so with insufficient clarity, and to speak of applying default rules in cases where the parties made no attempt to address an issue, the principle is much the same in either case." A helpful note on psychological premises underlying the idea of "tacit assumptions" in the context of changed circumstances is in LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 720–23 (6th ed. 1996). Robert Scott's treatment of non-enforcement of incomplete agreements suggests that examination of the entire agreement may indicate that the parties intended non-enforcement, or at least did not unambiguously intend enforcement. *See* Scott, *supra* note 217, at 1692–93. This is an example in which interpretation of the entire scope of an agreement can be involved in deciding whether or not a legally binding contract exists.

225. *See* Spaulding v. Morse, 76 N.E.2d 137, 138 (Mass. 1947), and *supra* text accompanying notes 158–60.

operative sentence in the contract. But one might look at the contract and respond, "The divorcing couple did not address the possibility of army service (or other work) between high school and college, so the question is how to fill in for this unforeseen contingency." Even when a term is undoubtedly omitted, the court's exercise may not be so different from when it interprets an ambiguous term.

The Restatement (Second) and its comments suggest a different approach. According to a comment, "where there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process."[226] One defense of this proposal could be that courts cannot easily discern what parties would have done about matters they did not address; but administrative convenience also counts. If courts employ standards of fairness and policy to fill in omitted terms, perhaps they can treat similar contracts similarly, not worrying about what individual parties would have agreed to. This approach may have the further advantage that parties making contracts can rely on courts to supply "default" terms when negotiation of terms would be time consuming and contentious, and unlikely to be relevant over the life of a contract, and the parties can inform themselves about what terms a court will supply, should unexpected circumstances require one.[227]

For courts that regard their job of "filling in" as drawing out the implications of the entire contract and deciding what term the parties themselves would have supplied, any distinction between discerning meaning and constructing meaning is blurred. But courts that rely mainly on standards of fairness and policy, apart from how those relate to the parties' likely intentions, have departed from trying to carry out just

226. RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981). *But see* Scott, *supra* note 217, at 1645, on why courts should not always supply "fair" terms if the parties have chosen to leave terms indefinite. Corbin says that when terms are implied because of legal policy, that does not involve "true interpretation." ARTHUR LINTON CORBIN, 3 CORBIN ON CONTRACTS § 561 (3d ed. 1960).

227. Reliance on highly specific contexts can undermine, to a degree, the value of having standard legal provisions, which parties can assume unless they direct otherwise. Goetz & Scott, *supra* note 155, at 273–80. Although the standard assumption has been that default terms should largely be guided by what most parties would want, Ian Ayres has suggested that using terms the parties would probably not want could be a helpful technique to force them to deal with issues explicitly. Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L.J. 1, 6 (1993). *See also* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 89, 91–95 (1989).

what the contractual language suggests that the parties wanted.

This subject is further complicated by the duty of good faith and fair dealing that contractual parties must assume.[228] Whether or not this duty is an independent source of contractual obligations, it can guide the way an agreement's terms are understood.[229] Judges who rely on that duty to fill in omitted terms may be seen as interpreting the entire contract.

Why are courts more willing to "fill in" terms in contracts than terms in wills or provisions for statutes? As we have noted, contracts are less formal documents than either wills or statutes. Parties making contracts rely on the willingness of each other to perform, and it may be desirable to have long term contracts, relational contracts, that are both enforceable and leave some matters open as conditions change.[230] Further, because contracts are subject to negotiation, arriving at terms can be much more difficult for contracts than for wills. And, if a contract fails, the law typically does not have an alternative scheme of enforcement; if a will fails in some respect, the property goes to a residuary legatee or passes according to legal rules for intestate succession, thus reducing any need to "fill in."

Arriving at terms is even more difficult for statutes than contracts, but it is the business of legislators to adopt legislation. Legislators often assign wide discretion to administrative agencies. Courts will give content to vague phrases in statutes, as they will with contracts, and they must sometimes harmonize provisions that do not fit well together; but they do not commonly supply crucial terms legislators have consciously omitted.

In recent years, the role of the courts in respect to omitted terms and default rules[231]—rules that parties can bargain around if they choose[232]—has been the subject of scholarly controversy. To oversimplify, some writers have strongly challenged the idea that courts should be active in creating default rules for construing contracts. Whether they

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228. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); U.C.C. § 1-304 (2004). This is a duty that parties cannot bargain around.

229. HOWARD O. HUNTER, MODERN LAW OF CONTRACTS 8–19 (rev. ed. 1993).

230. *See* Ian MacNeil, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neo-Classical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981). Elizabeth S. Scott and Robert E. Scott have suggested that marriage should be viewed as a relational contract. Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225 (1998). For a skeptical view of competence of courts to define and enforce the terms of such contracts, see Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749, 754 (2000).

231. Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 823–24 (1992) (remarking on "an almost imperceptible shift" in rhetoric from "gap filling" to "default rules").

232. Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 390 (1993).

are designed to promote efficient consequences that the parties would approve or to achieve justice between the parties or for the broader society,[233] such default rules are said to be largely misguided.[234]

The efficiency challenge is complex, but its basic outline is straightforward enough. Default rules must be cast at a broad level of generality; contracts differ greatly. To promote efficient solutions, default rules must attain a wide acceptability; otherwise parties will simply circumvent them and they will have little effect. These default rules must also correspond with information that is available to parties and to courts. (A rule that keys damages to the difference between the contract price and market price satisfies this information constraint because the relevant facts can be known by the parties and a court.)[235] Given the variability in contractual relations, few default rules can meet the acceptability and information constraints.[236]

The challenge to default rules that are designed to reach just outcomes in particular cases or to promote socially desirable behavior, or both, may or may not rest on a principled philosophy about justifications for the law of contracts. For those who see contract law, and perhaps all of common law, as resting exclusively on considerations of efficiency, courts should have no occasion to deviate from efficient outcomes, unless the parties agree to that. Similarly, those who identify consent or autonomy as the key to contractual rights[237] might perceive courts as unjustified when they swerve from trying their best to carry out the bargain of the parties.[238] For those, like myself, who see contract law as one part of a law that should serve multiple values, the idea of having some default rules that reflect social considerations beyond the wishes of the parties, and beyond the most efficient solutions to their individual

233. *See id*. at 390–91 (distinguishing problem-solving, equilibrium-inducing, information-forcing, normative, transformative, and structural default rules).

234. *See id*. at 390–92; Schwartz & Scott, *supra* note 134, at 547.

235. Schwartz, *supra* note 232, at 392.

236. *See generally* Ian Ayres, *supra* note 227 (discussing the comparative merits of rules and standards as default rules).

237. *See, e.g*., Barnett, *supra* note 163, at 269–71.

238. Richard Craswell, *supra* note 224, suggests that promissory and autonomy theories are little help in determining how to fill in substantive terms; but those theories seem to point toward respect for the parties' aims. *Cf.* Randy Barnett's response, Barnett, *supra* note 231, at 875–94 (responding to Craswell's suggestion). *See also* Jody S. Kraus, *Philosophy of Contract Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 687–90 (Jules Coleman & Scott Shapiro eds., 2002) (discussing how theorists may think terms should be filled in).

relationships, is not objectionable in principle. It is not an answer to this perspective that the parties could have explicitly provided for the outcome the court deems less just. If parties to a contract are relying on legal enforcement and one party, at least, has sought that enforcement, with its attendant costs for the whole society, judges may reasonably say that as to matters the parties have left open, the court will strike a resolution that conforms with what is just between the parties or best for society at large.

Regrettably, perhaps, the dispute cannot be settled by the theoretical premise that contract law serves multiple values. An opponent of justice-serving default rules of interpretation and gap filling may say that the general law of contracts—applied to parties by courts only in the infrequent cases that are litigated—is a very poor vehicle for trying to achieve social justice.[239] That aspiration is better attained by discrete areas of law such as family law and labor relations law. Further, default rules that fit social justice at the expense of the parties will be largely pointless because parties will bargain around them.[240] The power of this critique may depend on the sophistication of contractual parties; it is strongest in respect to experienced parties familiar enough with the law of contracts to avoid default rules that may be to their disadvantage.

E. Express Terms and Other Factors: Reassessments

The picture this account has presented, of express terms largely controlling the application of contracts, except when terms are unclear or vague or are omitted, reflects a standard approach to the interpretation of contracts. However, its accuracy and normative appropriateness can be challenged from both sides.

A convenient vehicle to examine the possibility that the texts of contracts are less important than the standard approach supposes is an article by Eyal Zamir, whose central thesis is that the traditional ordering of criteria to interpret contracts is actually inverted, and desirably so.[241] One need not accept his thesis in full to wonder if text is less central than one might assume from examining doctrines one by one, a suspicion that may be reinforced when one observes how often the courts appear to manipulate confusing doctrines to reach just results in individual cases.[242]

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239. *See* generally Schwartz & Scott, *supra* note 134, at 545–46; Schwartz, *supra* note 232, at 419.

240. Schwartz, *supra* note 232, at 418–19.

241. Zamir, *supra* note 135, at 1713–14.

242. Skepticism about doctrines of interpretation is a major theme of MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS (4th ed. 2001).

According to Zamir, in many legal systems contractual issues are supposedly resolved in an ordering that goes: express terms; parties' intentions deducible from the contractual documents, and the circumstances surrounding its making; indications from the parties' previous course of dealings; trade usages; statutory or judicial default rules; general principles of contract law such as good faith or the realization of reasonable expectations.[243] The hierarchy can be seen as involving a move from individual will to social values and from factual inquiry (about intentions) to normative evaluation.[244]

Although American doctrine has not been rigid in denying access to an inferior source if a superior source seems to provide an answer, nonetheless, something like a similar hierarchy has been presumed. That has been challenged by followers of Karl Llewellyn, who oppose any such hierarchy of sources; and the U.C.C. and Restatement (Second) emphasize the importance of implied terms, commercial context, trade usages, and ideas of fair dealing and reasonable expectations.[245]

Zamir argues that these are much more important than even the "Llewellyn position" acknowledges. Trade usages and ideas of fairness deeply influence how express terms are interpreted,[246] and their importance is greatly increased by obstacles to altering standard legal terms. Judges create some of these obstacles to assure that stronger parties have not taken advantage of weaker ones.[247] Expectations of the parties generate other obstacles; a party may hesitate to propose a term more favorable to her than the standard one, because she fears the other party may be put off, regarding her as someone who is sharply bargaining for unfair advantage.[248] Further, the course of performance is often taken to waive terms in the written contract.[249]

Zamir contends that this actual emphasis on trade usage, fairness, and reasonable expectations not only can serve values of public welfare, fair dealing, reasonable (mild) paternalism, and efficiency (in countering the

243. Zamir, *supra* note 135, at 1712.
244. *Id*. at 1718–19.
245. *Id.* at 1713. However, RESTATEMENT (SECOND) OF CONTRACTS §203 (b) (1981) orders in weight express terms, course of performance, course of dealing, and usage of trade.
246. Zamir, *supra* note 135, at 1721–27.
247. *Id*. at 1738–44.
248. *Id*. at 1756–57.
249. *Id*. at 1736.

effect of imperfect markets and bounded rationality),[250] but may also reflect the intentions of parties, who often are not aware of specific terms, and, in any event, expect relations not to be rigidly dictated by express terms.[251] One way to conceptualize the reliance on some of these nontextual sources is that courts are interpreting practices of contracting parties more than the terms of their texts. Nothing Zamir says suggests that bargaining equals cannot control their relations by express terms if together they try hard to do so, but other factors clearly play a greater role in the law of contracts than in the law of wills.

The challenge from the other direction is that express terms continue to play a greater role than one would gather from the U.C.C. and the Restatement (Second), that this is normatively desirable, and that a move back toward a textual approach to contracts that assumes that they are written in "majority talk" would serve the interests of the law of contracts as it applies to sophisticated parties dealing with each other.[252]

Part of the "anti-antiformalist" challenge against the flexible approach that derives from Llewellyn is that despite local customary trade practice, more general trade practices are necessary to make his approach work for national markets, and these are often absent.[253] Many scholars were surprised by Lisa Bernstein's claim that within trade associations themselves, those resolving disputes tend to adopt textualist approaches, not to inquire about unwritten trade practices.[254] Although it does not follow that generalist judges should necessarily take the same posture,[255] the Bernstein findings at least cast doubt on the desirability of judges relying heavily on trade practices that are reflected in a contract.

Most of the discussions about desirable interpretive strategies have been directed at the practice of courts, but Avery Katz has pointed out that parties in various ways, including how they write their contracts and how they choose those who will interpret them, can affect whether interpretation will be textualist or more encompassing.[256]

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250. *Id*. at 1777–1802.

251. Zamir, *supra* note 135, at 1771–76.

252. *See* Schwartz & Scott, *supra* note 134, at 549–50. One suggestion about the flexible standards of the Restatement and the U.C.C. is that the members of the bodies enacting them may have had self-interested reasons to prefer such flexibility. Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 597 (1995).

253. David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842, 845 (1999).

254. *See, e.g.*, Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1735–37 (2001).

255. Avery Katz points out that industry tribunals may be formalist partly because the judges are already expert and do not need external information that might help a generalist judge. Katz, *supra* note 139, at 526.

256. *Id*. at 508–12.

The particular questions about textualist emphasis that arise in contracts law do not replicate themselves exactly with statutes and constitutions; but one avenue for exploration of textualism in those domains is inquiry whether the disputes over contractual interpretation have relevance.

V. CONCLUSION

We have seen in respect to contracts and wills that deciding just how courts should treat documents that are framed by private individuals and carry legal authority is fairly complex. Here we need not worry about the complications of having hundreds of authors or the survival of a text's mandatory force over centuries, yet courts and scholars struggle with the right balance of subjective and objective elements, and what looks right for wills does not look exactly right for contracts. This investigation of wills and contracts can provide a helpful comparative perspective when one turns to statutory and constitutional interpretation.

We can understand the awkwardness of trying to apply the single inquiry approach to the job of courts. With wills, if a legal rule gives a definite meaning to a term, judges will assume that the term carries that meaning (at least barring overwhelming evidence that the testator meant something different). Suppose the will says "heirs," and a disappointed relative claims that the testator meant the term in a way that does not correspond with strict legal usage. The court finds only modest evidence to support the position. It decides to give the term its standard legal significance without trying to resolve what the testator actually meant. The author's intent theorist might respond, "Perhaps the real meaning here was the loose colloquial sense of 'heirs'; but because there was not overwhelming evidence to this effect, the court used the standard sense, realizing that it was *either* carrying out the true meaning or displacing that meaning on evidentiary grounds." This *is* a possible conceptualization, but it is unwieldy. Saying that "the meaning in this will is the standard sense in the absence of overwhelming evidence of a contrary intent" is much cleaner.

The difficulties for the author's intent approach become even greater for contracts. Shall we suppose that whenever the parties have different understandings, there is no single meaning in the contract but two meanings at odds with each other?[257] On that view, what courts are

257. On the author's intent approach, it will not do to say that the real meaning is the one that is the more reasonable.

doing is deciding which meaning will count legally, rather than determining what the meaning of the contract is. Yet those in the law typically suppose that courts are determining *the* meaning of contractual terms. And if judges are confident that at least one party adopted the more reasonable understanding, they need not resolve whether the parties shared that meaning or did not. The single-inquiry theorist may have to say that according to the rules of contract law, courts often do not even take the initial step of deciding if there was one meaning or two; rather, they decide that *a* meaning will prevail whether shared or not.

Thus, in both wills and contracts, judges often do not even resolve step one of the single-inquiry approach: what is the real meaning or meanings? If they do not resolve step one, judges also will not focus on whether to displace meaning, because they will not know if, by adopting a meaning, they will be adhering to a real meaning they have not taken the effort to discern or will be displacing the real meaning. Nothing prevents a theorist from working out all these circumlocutions, but they begin to seem like the epicycles needed to explain how the sun circles the earth. For law, the pluralist account, which acknowledges that courts consider many factors to resolve the meaning of authoritative legal texts, is vastly more straightforward.