Legal Theory (2026), 32: e3, 1–29
doi:10.1017/S135232522610086X

CAMBRIDGE UNIVERSITY PRESS

RESEARCH ARTICLE

Autonomy, Implication, and Interpretation

Hanoch Dagan* and Mark P. Gergen**

University of California Berkeley School of Law, Berkeley, CA, USA
Corresponding author: Mark Gergen; Email: mgergen@berkeley.edu

(Received 14 April 2025; Revised 14 April 2025; Accepted 29 March 2026)

Abstract

This Article develops a liberal theory for one of the most discussed topics of contract law (its rules of interpretation) and one of the most neglected (implication). It considers these topics in tandem because they both address contractual obligations that ostensibly flow from the parties' own choices. We reject the view which misrepresents the task of distilling these choices as value-neutral, and offer in its stead an approach that grounds interpretation and implication on liberal contract's commitment to proactively support people's joint plans, while securing contract's compliance with relational justice. This account offers conceptual clarity, vindicates and elucidates significant parts of contemporary law, and suggests several pathways for reform. Notably, it allows us to sketch a liberal doctrine for the interpretation of contractual writings in which at least one party is an individual, rather than a legally sophisticated wealth-maximizing firm.

I. Introduction

Traditional theory tells us that contract law is all about effectuating the parties' mutual will, intent, or consent (traditionalists sometimes add adjectives like "apparent" or "presumed," as in "apparent consent" or "presumed intent").[1] But this account is untenable, at least insofar as modern American contract law is concerned. Contractual rights and obligations are always prescribed by what the law deems to be the parties' agreement plus pertinent mandatory or default background rules. Under these rules, contractual outcomes often cannot be reliably connected to the parties' conscious

*Elizabeth J. Boalt Distinguished Professor of Law & Founding Director of the Berkeley Center for Private Law Theory, Berkeley Law School.

**Robert and Joann Burch D.P. Professor of Tax Law and Policy, Berkeley Law School. Thanks to Adam Badawi, Andrew Baker, Ken Bamberger, Andrew Bradt, Seth Davis, Dhammika Dharmapala, Avihay Dorfman, Ira Ellman, Catherine Fisk, Stavros Gadinis, Kinch Hoekstra, Felipe Jiménez, Roy Kreitner, Prasad Krishnamurthy, Chris Kutz, David Messner-Kreuzbauer, Chris Mills, Crescente Molina, Jennifer Nadler, Nick Sage, Pam Samuelson, Catherine Valcke, and two anonymous referees for their helpful comments.

[1] *See, e.g.*, Peter Benson, Justice in Transactions: A Theory of Contract Law (2019).

© The Author(s), 2026. Published by Cambridge University Press. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (http://creativecommons.org/licenses/by/4.0), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

choices.[2] This seems to vindicate Richard Craswell's influential claim that while normative commitments like respect for autonomy and individual freedom may justify the practice of contract and prescribe its limits, they have only very limited input regarding most of contract law.[3]

Craswell's proposition may be correct regarding the specific theories he criticized. But it does not apply to what we refer to in this Article as liberal contract theory, namely: the view that contract's mission is to enhance people's autonomy.[4] Earlier work considers liberal contract's prescriptions for contract law's many default rules regarding such matters as performance, enforcement, and excuse,[5] and for contract law's formalities.[6] In this Article we focus on contract law rules that directly effectuate (or at least purport to directly effectuate) people's will—i.e., people's conscious choices—when they make a contract. These rules cover the interpretation of what people communicate about when they make a contract, and what people put in a written agreement. They also include the rules on implied-in-fact contracts, which are based on people's actions.[7]

What people consciously choose when they make a contract is a fact, and, of course, an important goal in designing rules to effectuate people's choices is to get this fact right. But other values bear on the design of these rules because people's joint choices may be unclear or incomplete. The law must also resolve misunderstandings when parties to a contract make different choices. Moreover, ascertaining people's choices is not cost-free. How the law tries to recover people's choices in making contracts necessarily implicates, as we'll see, value judgments.[8]

This Article considers how these rules should be designed if the value is autonomy. We argue that autonomy can be crucially informative in designing rules that distill from people's expressions and actions what law regards as their agreement.[9] Our account refines and to some extent complicates the question of the significance of people's (actual or apparent) will in contract. We show that adherence to people's will

[2] *See* Hanoch Dagan, *Two Visions of Contract*, 119 Mich. L. Rev. 1247 (2020); Mark P. Gergen, *Contract as an Object of People's Will*, 70 Am. J. Jurispr. 1 (2026).

[3] *See, e.g.*, Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 Mich. L. Rev. 489 (1989).

[4] For a defense of autonomy's determinative role, see Hanoch Dagan & Michael Heller, The Choice Theory of Contract (2017), at 19–47; Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined*, 40 L. & Phil. 213 (2021); Hanoch Dagan & Michael Heller, *Why Autonomy Must Be Contract's Ultimate Value*, 18 Jerusalem Rev. Legal Stud. 148 (2019). The gist of the argument is that autonomy-enhancement is the ultimate (and indeed the only valid) justification for the normative power of contract, namely: the legitimacy of enforcing wholly executory contracts, as well as its irreducible function (so that other functions contract currently performs, e.g., organizing aspects of production and consumption that don't implicate people's autonomy interests, could legitimately be transferred to technology).

[5] *See* Hanoch Dagan & Michael Heller, *Autonomy Defaults*, 77 UC L.J. 1 (2025); Hanoch Dagan & Avihay Dorfman, *Justice in Contracts*, 67 Am. J. Jurisp. 1 (2022); Hanoch Dagan & Michael Heller, *Specific Performance: On Freedom and Commitment in Contract Law*, 98 Notre Dame L. Rev. 1323 (2023); Hanoch Dagan & Ohad Somech, *When Contract's Basic Assumptions Fail*, 34 Can. J.L. & Jurisp. 297 (2021).

[6] *See* Hanoch Dagan & Mark P. Gergen, *Autonomy and Form*, 53 Hofstra L. Rev. 1 (2024).

[7] We do *not* discuss contracts implied-in-law, which are of course not contracts. *See, e.g.*, Continental Forest Products v. Chandler Supply Co., 518 P.2d 1201, 1205 (1974).

[8] *Cf.* Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 Harv. L. Rev. Forum 105 (2017).

[9] It is difficult to imagine a taxonomy of contract law that does not treat interpretation rules, which are responsible for assigning legal meaning to people's expressions and actions, as distinct from rules that set terms (both default and mandatory) and formalities.

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

is at times insufficient, in other cases unnecessary (or unnecessary regarding one party), and oftentimes crucial regarding some aspects of a contract, but not with respect to others.[10]

Part II sets the stage by briefly sketching liberal contract's tenets and offering a preview of the general lessons of liberal contract theory for implication and interpretation. Part III looks at implications more closely, which takes us into implied-in-fact contracts. Part IV looks at the rules of interpretation, particularly as they pertain to writings.

II. Liberal Contract in a Nutshell and General Lessons

Under liberal contract theory—originally termed "choice theory"[11]—contract's mission is enhancing people's autonomy. This has implications for the scope and structure of contract law, as well as for the values contract law serves. With respect to scope, liberal contract defines contract law broadly to encompass all human interactions that involve voluntary interpersonal commitments (i.e., joint plans), the state needs to back to enhance people's autonomy.[12] With respect to structure, liberal contract provides different rules for different contract types. This multiplicity is necessary even with respect to rules of interpretation (which might seem value neutral) because both the problems in ascertaining people's choices and the stakes to people's autonomy of getting their choices right vary widely across different contract types. With respect to both scope and structure, liberal contract is in stark contrast with the traditional, Willistonian model of contract, which defined the field of contract law narrowly as the law governing the enforcement of promises made in (paradigmatically commercial) bargain-exchange transactions, and established a single, general set of rules to govern all transactions in this field.

Interpretation might seem value neutral because it is about recovering and implementing people's intention. But as Gregory Klass reminds us, this cannot be true when it comes to *designing rules* of interpretation because this enterprise requires answering the questions of whose meaning should govern, what type of meaning governs, and what facts determine that meaning.[13] Inevitably, the answers to these

[10]Our theory joins Eyal Zamir's claim regarding law's significant input in contract interpretation. *See* Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 Colum. L. Rev. 1710 (1997). But our approach is quite different from Zamir's. Two salient differences are that (1) ours is a monistic liberal theory, which insists on grounding law's input in contract's service to people's self-determination (Zamir's theory is normatively pluralist), and that (2) we do *not* think that the hierarchy of sources is uniformly inverted—as the text indicates, we think that the significance of the pertinent sources varies across contract types.

[11]*See* Hanoch Dagan & Michael Heller, *Choice Theory: A Restatement, in* Research Handbook on Private Law Theory 112 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020). The discussion of liberal contract in this Part heavily draws on that piece as well as on Hanoch Dagan, *Autonomy and Contracts, in* Research Handbook on The Philosophy of Contract Law 43, 50–54 (Mindy Chen-Wishart & Prince Saprai eds., 2025). For the most recent statement, see Hanoch Dagan & Michael Heller, Liberal Contract Theory – Part I of Freedom of Contract, ssrn.com/abstract=5284381.

[12]*See* Hanoch Dagan & Mark P. Gergen, The Many Beneficiaries of Liberal Contract, ssrn.com/abstract=5176909.

[13]*See* Gregory Klass, *Contracts, Constitutions, and Getting the Interpretation-Construction Distinction Right*, 18 Geo. J. L. & Pub. Pol'y 13, 24 (2020). *See also, e.g.*, Felipe Jiménez, *The Power to Contract, in* The Institution of Contract (2026).

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

three critical questions must be informed by contract law values.[14] We maintain that the answers should be found in autonomy.

Getting down to particulars, we show that liberal contract theory helps to resolve the current debate over textualist vs. contextualist (New York vs. California) approaches to interpreting writings. Liberal contract indicates that, rather than the Willistonian "one size fits all" approach to interpretation, rules for interpreting writings should vary across contract types based on the autonomy stakes and the mechanics of choice. Textualist rules for interpreting writings are appropriate in commercial transactions between sophisticated wealth-maximizing firms because the autonomy stakes are minimal, and so the law may appropriately accept inaccurate outcomes (i.e., an outcome that is not in accord with the parties' intent) to reduce adjudication costs, and because legally sophisticated firms can be expected to play by these rules. Textualist rules are also appropriate for interpreting formal wills (a noncontractual writing), but here because the autonomy stakes are enormous, the relevant autonomy interests are largely those of the testator, and the nature of a formal will (and formalities surrounding its execution) increases the likelihood that a writing reflects a testator's intent. On the other hand, contextualist rules of interpretation are appropriate for contractual writings in transactions involving people with significant autonomy stakes because of the importance of getting people's choices right, and because the mechanics of choice create a significant risk that a writing will not reflect people's intent.

Liberal contract differs from the traditional, Willistonian model in another respect as well that bears on implication and implied terms. With the important exception of remedies, the traditional model assumes contract terms generally emanate from the parties.[15] Liberal contract, by contrast, celebrates law's proactive role in providing a rich inventory of contract types (both commercial and non-commercial) with robust sets of rules (often default rules) to facilitate people's joint plans. These rules consolidate people's expectations regarding different types of joint plans and address numerous types of familiar impediments—e.g., information costs, cognitive limitations, and heightened risks of opportunistic behavior—that these interactions often entail.

We begin with implication and implied terms to challenge the traditional position that terms supplied by contract law always follow in a straightforward way from choices people make and do not require normative justification beyond a commitment to implementing people's choices. We concede that some terms do follow in a straightforward way from choices people make, and that this includes not only clear express terms but also terms that people tacitly intend (like a parent who tells someone to teach a child a game tacitly intends a child-appropriate game[16]) and terms that can be implied as a matter of transactional necessity. Terms that can be implied in either of these ways require no normative justification beyond a commitment to implementing people's choices, like clear express terms. But, we argue, many of contract law's default rules cannot be explained in either of these ways—i.e., either as tacitly intended or implied as a matter of transactional necessity—and do require additional normative justification. These rules, we argue, should (and largely can) be explained by liberal values and autonomy.

[14]The qualified language of the text accounts for the effects of external-to-contract values. *See* Omri Ben-Shahar, David A. Hoffman & Cathy Hwang, *Nonparty Interests in Contract Law*, 171 U. Pa L. Rev. 1095 (2023).

[15]*See, e.g.*, Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 Yale L.J. 97, 1014 (1985) ("our principal vision of contract law is still one of a neutral facilitator of private volition.").

[16]*Cf.* Ludwig Wittgenstein, Philosophical Investigations 33 (1953 tr.).

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

What is true of implied terms is also true of implied-in-fact contracts. Traditionalists marginalize implied-in-fact contracts as if the possibility of a contract based on what people do (and not what they promise to do) is limited to the familiar implied-in-fact contract in an informal bargain-exchange transaction, such as the expectation you will pay the taxicab driver upon arrival at your destination. We use U.C.C. § 2-207(3) to illustrate the expanded scope of implied contracts and refine the two essential formal characteristics of a rule basing a contractual obligation on people's actions, namely: identifying the action giving rise to the obligation and prescribing the obligation that arises. Finally, we use a proposed alimony-like obligation on dissolution of unmarried cohabitation to illustrate that rules with these formal characteristics can facilitate human interactions other than bargain-exchange transactions. Traditionalists may object that this obligation would be patently created by law, but so were some obligations created by § 2-207(3) and some obligations implied in the familiar implied-in-fact contract.

Finally, liberal contract rejects the premise that contract law must take the existing distribution of wealth and power as given and allow people to use contracts to exploit advantages they have over other people. Liberal contract demands more of people. These demands are embodied in the principle of relational justice, which requires that people respect each other's rights to self-determination.[17] We show that relational justice explains and justifies substantive rules of interpretation, like the venerable *contra proferentem* rule, which advances liberal values by tilting interpretation in favor of the weaker or more vulnerable party. And it justifies interpretive rules in the areas of personal insurance, employment, and prenuptial agreements that balance the goal of preserving people's future autonomy with the goal of effectuating their present choices.

Some of this may sound radical, but we will show that much of contract law on implication and interpretation is consistent with liberal theory. More generally, the modest burdens and duties law imposes on people to respect reciprocal rights to self-determination in making, performing, and enforcing contracts typify the premise of a genuinely liberal private law: the interpersonal right to reciprocal respect for self-determination (and not merely independence).[18] As H. L. A. Hart observed, not all such affirmative duties "ignore the moral importance of the division of humanity into separate individuals and threaten the proper inviolability of persons." Because "different restrictions on different specific liberties" variously affect "the conduct of a meaningful life," duties of right need not be only duties of abstention.[19]

III. Autonomy and Implication

Our interest in this Article is contract law rules that directly effectuate people's choices when they make a contract, or that at least purport to do so. We begin with two related topics where traditionalists insist that contract law simply responds to people's mutual choices. Section A focuses on implied terms, arguing that many terms supplied by contract law cannot be explained as implicit in people's choices in a

[17]For example, liberal contract rejects the *laissez faire* model of regulating the bargaining process (by, for example, imposing affirmative duties of disclosure or instantiating the unconscionability doctrine); and it solidifies a cooperative conception of contract performance through the good faith and fair dealing doctrine (and related rules). *See* Hanoch Dagan & Avihay Dorfman, Relational Justice: A Theory of Private Law chs. 9-10 (2024).

[18]*See generally* Dagan & Dorfman, *Id.*

[19]H.L.A. Hart, *Between Utility and Rights*, 79 Colum. L. Rev. 828, 835–836 (1979).

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

way that requires no normative justification beyond a commitment to implementing people's choices. These terms must be justified by other values. We take the position that enhancing people's autonomy is the preeminent value in liberal contract. Section B turns from implied terms to implied-in-fact contracts. We explain the formal structure of obligations implied to facilitate people's voluntary joint plans and show rules of this structure are not limited to the familiar implied-in-fact contract, and that such rules can and do facilitate interactions other than bargain-exchange transactions.

A. The Limits of Implication

1. Tacit Intent Plus Transactional Necessity

Some terms enforced by contract law follow in a straightforward way from choices people make and do not require a normative justification beyond a commitment to implementing peoples' choices. An example is a clear express term (by which we mean a term that people think and communicate about when they make a contract), in the absence of vitiating circumstances (like duress or mistake). Of course, the commitment to implementing peoples' choices itself requires normative justification (we justify it by the value of autonomy), but once this commitment is made, no further justification is required for enforcing the term itself (though further justification might well be required with respect to how the term is enforced).

Terms that people tacitly intend are like clear express terms. They require no further normative justification beyond a commitment to implementing people's choices. The classic example of tacit intent is when a parent requests that a babysitter teach their child a game. In the context, the babysitter knows the parent intends a *child-appropriate* game even though the parent does not say this and may not think this. Similarly, when a traveler books a hotel room on the phone, saying nothing about furnishings, the hotelier knows the traveler intends a room with a bed.[20]

These are easy cases, which easily comply with the "officious bystander test" for determining when a term can legitimately be implied. According to this test, which is often taken to be outdated,[21] "that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"[22]

Traditional theorists go much further than that. They suggest that implication can account for a large swath of contract law, including rules on damages, rules governing contract termination, and the duty of good faith, even though these terms cannot be described as intended in the way the traveler intends a hotel room to come with a bed. Peter Benson offers the most powerful recent articulation of this view. Loyal to the traditionalist normative conviction in which "parties can be bound only to what they have done," Benson insists that these legal rules are implications of the parties'

[20]Gergen, *supra* note 2, at 29. The example is from Adam Kramer, *Implication in Fact as an Instance of Contractual Interpretation*, 63 Cambridge L.J. 384, 392 (2004).

[21]*Cf.* Stephen A. Smith, Contract Theory (2004), at 280 (terms can be either implied-in-fact or implied-in-law).

[22]Southern Foundries (1926) Ltd. v Shirlaw [1939] KB 206 (MacKinnon LJ). *See also* Andrew Phang, *Implied Terms, Business Efficacy and the Officious Bystander—A Modern History*, (1998) J. Business L. 1.

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

particular "self-regulating" transaction.[23] Objectively construed, he argues, "enforceable agreements are not contractually incomplete." Rather, they have "all the internal resources needed to determine what can and should be implied." By spelling out "what is reasonably required to make sense and to secure the full and fair value of the terms actually agreed to," implication can "specify" the "'secondary' or 'dependent' terms and conditions" of a transaction, which "fill out, qualify, and further determine the performances owed as between the parties." Implication must follow the presumed intent of the parties of the actual transaction. It "refers to what the parties to a given contract *must* reasonably have intended because *necessary* to avoid," so that their contract won't be "futile, without value or benefit, or just manifestly absurd."[24]

We agree with Benson that terms that meet this demanding test of "transactional necessity" do not require further normative justification beyond a commitment to implementing peoples' choices.[25] We think these terms might also meet the "officious bystander" test.

In the U.S., routinely supplied terms are described as "default rules." Some of these default rules may be explained by transactional necessity. Cardozo's famous ruling in *Wood v. Lucy, Lady Duff-Gordon* is an example. Cardozo acknowledged that Wood did not "promise in so many words that he will use reasonable efforts to place the defendant's endorsements and market her designs," but nonetheless concluded "that such a promise is fairly to be implied." The implication, Cardozo explained, is necessary because Lady Duff-Gordon's promise to give up the right to market her own endorsements during the period of the contract would be senseless, or in Benson's words "manifestly absurd," without a return obligation by Wood to expend efforts in marketing them. Thus, while "[A] promise may be lacking," the parties' agreement is "'instinct with an obligation,' imperfectly expressed."[26]

In the case, transactional necessity sufficed to resolve the only issue before the court, which was whether Wood had an obligation to Lady Duff-Gordon to satisfy the consideration requirement. If Lady Duff-Gordon had brought a claim for breach of this obligation, then transactional necessity could not resolve the question of the specific content of Wood's obligation. Courts have struggled in answering this question in other exclusive dealing cases. A leading case, *Bloor v. Falstaff Brewing*

[23]Benson acknowledges these terms are not intent-based. Benson, *supra* note 1, at 122, 132, 137–140. His position is that "what the parties prefer or choose in the pursuit of their individual or joint interests" sets the framework of their exchange, and having made these framework-setting choices "the parties may be objectively viewed as having placed themselves under the protection of the reasonable, trusting in the law's articulation of it." *Id.*, at 143–44.

Benson's reference to "the reasonable" here—as well as a few similar "softening" references elsewhere (e.g., to "fair value," *id.*, at 134)—may suggest that his position is closer to ours than the text implies. But this would make his theory incoherent, given his espousal of the Kantian idea of "juridical autonomy," which "presupposes particular notions of freedom and equality specified in terms of the innate mutual independence of all persons in relation to others." This conception emphatically excludes any reference to the parties' self-determination, namely: their "forming and rationally pursuing a conception of their substantive good." It likewise rejects any consideration of substantive equality, subscribing instead to formal equality in which "the claims parties make in relation to each other must be absolutely the same." *Id.*, at 373, 468–469.

[24]Benson, *supra* note 1, at 23, 123–124, 131–134, 142.

[25]*Cf.* Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. Cal. Interdisc. L.J. 115, 117, 120 (1993).

[26]118 N.E. 214, 214 (1917) (citing McCall Co. v. Wright, 133 App. Div. 62).

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

Corp.,[27] suggests multiple standards without settling on one. Obviously, the choice among these standards is not a matter of transactional necessity or presumed intent.

2. Beyond Tacit Intent and Transactional Necessity

Wood v. Lucy Lady Duff Gordon shows that while some default terms can be explained by transactional necessity (that Wood was under some obligation) many others cannot (the specific content of Wood's obligation). Many default rules presented by judges as implied terms cannot be explained by implication or transactional necessity.[28]

Take *Taylor v. Caldwell*, another contract casebook classic, in which the defendant's music hall burned down prior to the time it was supposed to be used by the plaintiff for the purpose of presenting a series of concerts. The court wrote that the contract should be subject to "an implied condition" to "fulfill the intention of those who entered into the contract." But the only reason it offered for ascribing this intent to the parties was that "from the nature of the contract there is an implied condition of the continued existence of … a given person or thing [so that] the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."[29] At least insofar as things (as opposed to people) are concerned, this reason must be wrong.[30] Certainly, the parties neither consciously nor tacitly intended that the contract be conditioned on the hall not being destroyed (all we know about their state of mind is that they didn't anticipate this possibility).[31] Nor can the supplied condition be explained as a matter of transactional necessity. The defendant could have been held liable under the contract and ordered to pay damages, which is, of course, the standard remedy for breach.[32]

Back to Cardozo, this time to his celebrated *Jacob & Youngs v. Kent* "Reading" pipe decision,[33] which Benson treats as one of his primary examples of implication based on transactional necessity.[34] Cardozo, however, is quite clear that the substantial performance rule he embraces does not pass the strict test of transactional necessity. This rule, he wrote, is prompted by "[c]onsiderations partly of justice and partly of

[27]601 F.2d 609 (2nd Cir. 1979). The issue in the case was what level of effort Falstaff had to make to sell Ballentine beer when it purchased the brand and agreed to pay a $.50 royalty for each barrel sold. The backdrop is a general decline in demand for regional beers. The contract had a "best efforts" clause. The court observed that even without this clause Ballentine would have been "bound to make a good faith effort to see that substantial sales were made" under *Wood*. The court agreed that the best-efforts clause "did not require Falstaff to spend itself into bankruptcy" to sell Ballentine, but that it was sufficient to establish a prima facie case of breach "to show that Falstaff simply didn't care about Ballantine's volume," and that "[t]he burden then shifted to Falstaff to prove there was nothing significant it could have none to promote Ballantine sales that would not have been financially disastrous." This is multiple standards none of which answers the ultimate question of precisely how much of a cost Falstaff had to bear to sell Ballentine.

[28]*Cf.* Hugh Collins, *Implied Terms: The Foundation in Good Faith and Fair Dealing*, 67 Current Legal Probs. 297, 298 (2014).

[29]122 Eng. Rep. 309, 314 (1863).

[30]As the text implies, we do not deny that insofar as persons—as opposed to things—are concerned, the idea that "parties must have contemplated such continuing existence as the foundation of what was to be done" (*Id.* at 312) may well be, at least in some cases, more plausible.

[31]*Id.*, at 312.

[32]*See* Robert E. Scott & Jody S. Kraus, Contract Law and Theory (6th ed., 2023), at 798–799.

[33]129 N.E 889 (N.Y. 1921).

[34]Benson, *supra* note 1, at 137–139.

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

presumable intention"; but for Cardozo the former—preventing "harshness" and "oppression"—dominates the latter. By using "apt and certain words," parties can "effectuate a purpose that performance of every term shall be a condition of recovery." But "the law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture." Justice, rather than intention, is the rule's ultimate justification: from the proposition "that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that"—absent clear opt-out from law's default rule —"they may not be so treated without a perversion of intention."[35]

Indeed, as one of us has argued elsewhere, *Jacob & Youngs* is a milestone in the development of default rules regulating a party's response to nonperformance of a contract.[36] Over several centuries, the law shifted from treating promises as independent so nonperformance did not discharge a promise, to treating promises as wholly dependent so a party had a near absolute right to terminate a contract in response to nonperformance, to the nuanced approach in *Jacob & Youngs*, under which a response to nonperformance must be reasonable, balancing the loss resulting from nonperformance, the risk of forfeiture to the defaulter, and the defaulter's bad faith. Each of these approaches probably *seemed* inevitable to many lawyers in their day. But these changes hardly could have seemed a matter of transactional necessity, much less something parties tacitly assumed "went without saying," when the changes occurred.

3. Hypothetical Agreement?

The transactional necessity test is more demanding than the familiar hypothetical agreement (or bargain) test, which supplies a term by asking what the parties probably would have agreed to if the issue had been presented to them when they made the contract. As David Charny claims, a term explained in these terms requires further justification. The court must decide who the hypothetical bargainers are—these specific persons or persons like them generally—and what the mechanics of the hypothetical bargain are—a real-world bargain with constrained information and behavioral quirks or an idealized bargain with perfect information and a "greater degree of rationality." The court must also decide the goal of the hypothetical bargain. Is the goal efficiency (i.e., minimize transaction costs and maximize the joint return)? Or is the goal to enhance people's autonomy? Or is the goal something else like advancing solidarity or equality? And is the realization of whatever the goal may be assessed on an ex ante or ex post basis?[37]

The transactional necessity test implies a term only if the court is certain the parties would have agreed to the term if asked. The old officious bystander test nicely captures the level of certainty required. This level of certainty makes it unnecessary to resolve questions like those raised by Charny. But if a term could be supplied only if it met these demanding tests, it would prevent law from fulfilling its potential to

[35]129 N.E at 892.

[36]*See* Mark P. Gergen, *Termination, in* Research Handbook on The Philosophy of Contract Law, *supra* note 11, at 461.

[37]David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 Mich. L. Rev. 1815, 1815–1816, 1820–1821, 1823–1824 (1991).

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

proactively facilitate transactions. For example, a term will not satisfy the demanding transactional necessity and officious bystander tests if it involves a tradeoff between efficiency and autonomy, or a tradeoff between people's present and future autonomy. Liberal contract theory resolves questions like those raised by Charny and so provides a principled basis for supplying terms that involve such tradeoffs.

4. The Importance of Truth in Labeling

So, we think Cardozo was right to abjure implication (i.e., resting the rule on "presumable intention") in *Jacob & Youngs* and instead to ground the rule on what justice (we would say relational justice) requires in the situation. In addition to encouraging candor, this approach yields substantively better outcomes for it encourages lawmakers to look for and adopt the rule that best facilitates the parties' joint plan when a term cannot be justified as a matter of tacit intent or transactional necessity.

The fact that—like *Taylor v. Caldwell*'s excuse-for-impossibility and *Jacob & Youngs*' substantial performance rules—contract law's default rules cannot be justified as a matter of tacit intent or transactional necessity is not a blemish; it does not mean that these cases are wrongly decided. Quite the contrary. In sharp contrast to the traditionalist position, liberal contract recognizes—indeed, celebrates—the critical proactive role of contract law in facilitating human interaction.

Efficiency-minded theorists would agree with everything we have said to this point. Indeed, they coined the concept of a "default rule" and undertook a project to explain contract law's many default rules on efficiency grounds. Liberal contract insists instead that law's defaults should be autonomy-enhancing when they have significant autonomy stakes and explains both *Taylor v. Caldwell* and *Jacob & Youngs* as *safeguarding defaults* that attend to contract's potential autonomy-diminishing effects.[38] Excuse rules, including *Taylor v. Caldwell*'s impossibility rule, ensure that contracts made today do not unnecessarily impinge on the autonomy of promisors' *future selves*.[39] *Jacob & Youngs*' substantial performance rule guards against the *relational injustice* of a party exploiting their counterparty opportunistically.[40]

There is no need to expand on or defend these propositions here because the crucial point for this Article, which focuses on legal rules that try to excavate the parties' agreement (i.e., the joint expression of their conscious choices), is more general. Terms supplied by law that do not meet the tests of tacit intent or transactional necessity are clearly part of their contractual obligations, but they are *not* part of their agreement. These rules are better described as supplied terms and not implied

[38] *See* Dagan & Heller, *Autonomy Defaults*, *supra* note 5. As Dagan and Heller argue, even where the familiar majoritarian default paradigm typically employed by efficiency-minded theorists can explain default rules it cannot *justify* them. They also claim that alongside safeguarding defaults modern contract law includes *empowering defaults*, which proactively facilitate people's autonomy. Many of them play the familiar role of replicating majoritarian preferences, thus helping legally sophisticated, symmetrically situated parties to economize on their transaction costs, thereby maximizing joint welfare. Other empowering defaults may diverge from this efficiency canon, because the contract asymmetrically affects the autonomy interests of the typical parties to that contract type.

[39] *See* Dagan & Somech, *supra* note 5, at 313–320.

[40] *See* Dagan & Dorfman, *supra* note 5, at 4–6, 21–24; Gergen, *supra* note 2, at 29.

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

terms.[41] They do not necessarily follow the parties' choices, and we should not misrepresent them as if they did.

Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.[42] illustrates the importance of truth in labeling. The issue in the case was whether an arbitration clause that was silent on the point should be interpreted to permit class arbitration. The Supreme Court's majority held "no," and chastised an arbitration panel for answering "yes" based on policy reasons. The majority framed the question as whether "it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize" class arbitration. It answered "no" to this question "because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."[43] But this reasoning is disturbingly wrong. At best it arrogantly assumes the majority's views about the nature of arbitration were shared by the parties. At worst it is using presumed intent as a fig-leaf to smuggle in the majority's view that the law should not bother enforcing claims that are only worth enforcing in the aggregate. This answer wrongly prioritizes hoped-for savings from not litigating small claims over autonomy.

B. Implied-in-Fact Contracts: Refining the Scope of Informal Contracting

1. A Perplexing Challenge to Contract Theory

We turn from implied terms to implied-in-fact contracts. Contract traditionalists in common law systems have difficulty explaining implied-in-fact contracts because the parties "do not agree or promise or undertake to do anything. Rather they simply do something."[44] It is difficult to explain how and why a contract can follow from what people do if, like Williston, you equate contract law with the body of rules that instruct people how to make express promises and agreements legally binding. On its face, the objective standard solves this difficulty by suggesting that the reasonable meaning of their actions can supply the missing content. But the objective standard can do so on a value-neutral basis only if people generally think and communicate about the relevant term, or if the relevant term can be established as a matter of tacit intent or transactional necessity. Only then can it be said that a term flows from the parties' choices.[45]

Legal theorists in civil law systems also have difficulty explaining implied-in-fact contracts because they are not based on a declaration of intent. As Ludwig Raiser explains, here "there is generally no doubt as to whether the parties' behaviour was free and conscious"; rather, the issue for civilians is "whether a relationship created by the parties' factual behaviour can be recognized by the legal order as a particular kind of legal relationship, or whether it should be ignored because the legal system's

[41] *Cf.* Frederick Wilmot-Smith, *Express and Implied Terms*, 43 Oxford. J. Legal Stud. 54, 69 (2023).

[42] 559 U.S. 662 (2010).

[43] *Id.* at 685.

[44] Smith, *supra* note 21, at 176.

[45] Benson's discussion of the objective standard tries to avoid this inevitable conclusion, but his account ends up *ascribing* intentions to the parties, rather than *ascertaining* what their actual intentions are likely to be. *See* Benson, *supra* note 1, at 113–114.

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

requirements for validity have not been met." Raiser rightly acknowledges that "[t]he problem can only be resolved by making a value judgment."[46]

2. Facilitating Autonomy-enhancing Informal Contracting

Liberal contract theory, by contrast, has no difficulty accounting for implied-in-fact contracts because it has a broader vision of contract law. This vision is of a body of law that provides not only instructions on how to make binding promises and agreements but also a rich set of default rules to facilitate all types of voluntary joint plans that require legal backing. The two autonomy-based polestars of liberal contract law—proactively facilitating people's joint plans and securing relational justice—instruct when the law may dispense with an expression of intent to undertake an obligation as a requirement for a legal obligation and the design of the resulting legal obligation.

On its face, these propositions suggest that the term implied-in-fact contract is a *misnomer* because the law defines when conduct is a basis for a legal obligation and the content of the resulting obligation. But it is not. The contract *is* implied (in the strict sense) since the basis for the parties' obligations in all these cases is their shared choice to do something together that the law then facilitates by treating the interaction as contractual and by supplying terms. Law's additional work—it specifies the types of joint plans that are treated as contractual, and it supplies terms to facilitate people's choices—is not unique to these contracts. We began with the discussion of implication and implied terms to show that the law also supplies terms in express contracts.

We acknowledge that law's contribution creates a risk of involuntariness, i.e., people being subjected to an obligation they did not and would not have chosen, which can be autonomy-reducing, especially regarding constitutive choices. As we argue elsewhere, this tension explains the significant role of formalities as contract law's safeguards against the endemic risks of involuntariness.[47] But the law's failure to treat an interaction as contractual, and to supply terms, also can undermine people's autonomy by creating unnecessary barriers to enlisting the law to back up a joint plan. Imagine what the world would be like if the law did not recognize even the most primitive implied-in-fact contracts, or if the law enforced promises given in exchange for each other only if the parties declared they intended the promises to be enforceable.

3. Primitive Implied-in-fact Contracts: Informal Bargain-exchanges

The inability of traditional contract theory to explain implied-in-fact contracts follows from its narrow focus on contract as promise, specifically an exchange of promises. The most primitive type of implied-in-fact contract predates contract law. Under the common law writ system, the action of debt was available to collect a debt based on a half-completed informal bargain-exchange.[48] The market supplied the price, which was the only supplied term needed to protect the seller. No further formalities were necessary because performance and acceptance of performance

[46]Ludwig Raiser, The Function of Contract and Freedom of Contract, 31, English version published in New Private Law Theory: A Pluralist Approach (Stefan Grundmann, Has-W. Micklitz, and Moritz Renner, eds., Cambridge University Press, 2021), originally published as L. Raiser, "Vertragsfunktion und Vertragsfreiheit," Festschrift Deutscher Juristentag 101–131 (1960).

[47]*See* Dagan & Gergen, *supra* note 6.

[48]*See* Mark P. Gergen, *Debt as a Contractual Type*, *in* Research Handbook on The Philosophy of Contract Law, *supra* note 11, at 474.

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

"involves a kind of natural formality, which satisfies the evidentiary, cautionary, and channeling purposes of legal formalities."[49] Indeed, to require additional formality would reduce people's autonomy by raising needless barriers to simple bargain-exchanges.

A taxicab ride is a 20th-century exemplar of this primitive type of implied-in-fact contract. A contract is formed when a passenger boards a cab that stops at a passenger's signal (raising an arm or queuing at a cab stand). The only words that must pass between a passenger and a driver are the passenger's destination. The precise fare is set by law. The driver's duty of reasonable care and the passenger's right to compensation if they are injured in an accident by a breach of this duty are also set by law. Other terms—the passenger will pay a fare, the driver will take the quickest or cheapest route, the passenger will not leave trash in the vehicle, &c.—are established by implication because they "go without saying."

This most primitive type of contract is changing. Bargain-exchange transactions that used to be conducted on an informal basis increasingly involve one party presenting the other party with terms electronically through a cell phone or other electronic device.[50] There is a danger here. Unless an electronically transmitted term figures in a party's choice to engage in a transaction (e.g., the price quoted by an electronic platform to a passenger and a driver for a ride arranged through the platform), the law should not allow such a term to displace a term that would otherwise be set by law. The low cost of transmitting a form does not change the human reality that people appropriately give little thought to the terms of many types of transactions because little thought is warranted.[51]

4. UCC § 2-207(3)

Our second example illustrates that the category of implied-in-fact contracts is not limited to half-completed exchanges and helps refine the formal properties of rules establishing a contract based on what people do. It is also ironic because the rule we focus on applies in cases where people try to make a contract by exchanging promises, but they fail to do so because the promises exchanged, while seemingly in the legally approved form of offer and acceptance, do not satisfy the law's traditional requirement for making a contract because they have different terms.

Under the traditional common law rule, an acceptance must be the "mirror image" of an offer to make a contract. A response to an offer with an additional or different term is treated as a counteroffer even if the sender intends the response to be an acceptance, and the recipient (the original offeror) reasonably understands the response to be an acceptance.[52] This mirror-image rule gives both parties the right to withdraw from the agreement before performance. Under the traditional common law (so-called last shot) rule, if the original offeror performs or accepts performance, this is treated as an implied acceptance not just of *a* contract, but also of the terms of the counteroffer.[53]

[49]Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 815 (1941).

[50]*See, e.g.*, David A. Hoffman, *Defeating the Empire of Forms*, 109 Va. L. Rev. 1367, 1393–1402 (2023).

[51]We elaborate on liberal contract's analysis of consumer contracts in Hanoch Dagan, Mark P. Gergen, and Michael Heller, *Making Consumer Contracts Legally Unremarkable*, 105 N.C. L. Rev. * (2026).

[52]*See* Ardente v. Horan, 366 A.2d 162 (R.I. 1976).

[53]*See* McGurn v. Bell Microproducts, Inc., 284 F.3d 86 (1st Cir. 2002).

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

UCC § 2-207(3) makes a small change and a big change in the law. The small change is to expand conduct that forms a contract beyond performance to include "[c]onduct by both parties which recognizes the existence of a contract."[54] Under this expanded rule, expected reliance by one party (such as incurring expenses to prepare to perform) can also give rise to a contract. The big change is that neither party's conduct is treated as implied acceptance of the other party's writing as an expression of contract terms (i.e., an "integrated agreement"). Instead, in keeping with modern law's commitment to supply terms to facilitate contractual interactions, UCC § 2-207(3) creates a contract for the parties drawing on several sources.

The statute provides that "[i]n such cases the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under other provisions of this Act."[55] This, of course, incorporates statutory default rules, like the warranty of merchantability[56] and standard remedies. Additional terms can be derived from course of performance, course of dealing, and trade usage.[57] This regime is not, and it does not pretend to be, based on implication (it relies neither on the parties' tacit intent nor on transactional necessity).[58] But it is fully loyal to liberal contract's autonomy-enhancing mission: it "ensure[s] that a party will not be held to terms that are directly contrary to the terms it has included in its own form"[59]; it verifies the parties' choice to commit to an exchange by their actions; and it proudly embraces modern law's empowering gap-filling apparatus.

UCC § 2-207(3) also illustrates the formal properties of a rule establishing an obligation based on what people do. The rule must define, first, the action giving rise to the obligation (here "conduct by both parties which recognizes the existence of a contract"), and second, the terms of the obligation ("terms on which the writings of the parties agree," &c.). The rules governing primitive implied-in-fact contracts are in the same form. On the buyer's side, the action is accepting performance in a bargain-exchange transaction and the resulting obligation is to pay the market price for the performance received. On the seller's side in transaction involving a service, the action is undertaken to render a service to another person and the resulting obligation is to use reasonable care in rendering the service.

The obligations created by UCC § 2-207(3) are naturally described as contractual because they involve a bargain-exchange transaction and since the sources the law looks to for terms are familiar sources of contract terms in incomplete contracts. The happy innovation in § 2-207(3)—and this is no small thing—is to refuse to treat a party's choice to proceed with a transaction as assent to the terms in the other party's form, opting instead to apply default rules or terms derived from context.

[54]UCC § 2-207(3). The same rule appears in § 2-204(3). This is a small change for contract law, and earlier sales law recognizes the general possibility of an implied in fact contract. *See, e.g.*, Uniform Sales Act of 1906 § 3 (stating "a contract … may be inferred from the conduct of the parties.") This rule was interpreted to require an "affirmative course of conduct which in fact manifests assents to an offer," such as "performance by one party received by the other." Lawrence Vold, Handbook of the Law of Sales 26 (1931).

[55]UCC § 2-207(3).

[56]*See* UCC § 2-314.

[57]*See* UCC § 1-103.

[58]Terms derived from sources like trade usage (i.e., what people do, and not what they say) sometimes satisfy the demanding tests of tacit intent or transactional necessity, but this is not required. *See* Gergen, *supra* note 2, at 18.

[59]Ionics, Inc. v. Elmwood Sensors, 110 F.3d 184, 184, 190 (1997).

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

Readers may resist describing our next example as an implied-in-fact contract because it does not involve a bargain-exchange transaction.[60] But liberal contract theory rejects the position that contract law is all and only about bargain-exchange transactions.

5. Default Financial Obligations between Unmarried Cohabitants

Our third example involves implied financial obligations between unmarried cohabitants on dissolution of a relationship. Not too long ago, the law would not enforce an express agreement between unmarried cohabitants providing for a financial obligation on dissolution of a relationship. Happily, this is starting to change, as many courts are receptive to claims for a share of property accumulated during a relationship.[61] But U.S. courts generally have not been willing to prescribe an alimony-like obligation to equitably allocate financial losses on dissolution of a relationship.[62]

Liberal contract supports a 2002 proposal by the American Law Institute ("ALI") to change the default rule on dissolution of a relationship between unmarried cohabitants to impose an alimony-like obligation when there is an imbalance of wealth (including earning capacity) between partners to reduce the economic impact on the poorer partner.[63] Because of the diminishing utility of wealth, this default rule significantly enhances the autonomy and life-prospects of the poorer partner without unduly limiting the autonomy and life-prospects of the richer partner.[64] For similar reasons, the default rule is required as a matter of relational justice.[65] Tying the default rule to well-established rules in divorce law mitigates a major problem with regulating the disposition of household wealth with vague open-ended standards: that people will destroy household wealth in fighting over who gets it. Tying the default rule to the norm of relational justice may also lessen enmity bred by the rule. And this rule is unlikely to deter people from forming such relationships.

The 2021 Uniform Cohabitants' Economic Remedies Act ("UCERA"), which provides that "[a] cohabitants' agreement may be oral, in a record, express, or implied-in-fact,"[66] is a step in the wrong direction. The history of the Act suggests that "implied-in-fact" here was intended to invite an inquiry into the parties' intent (i.e., what their plans were with respect to dividing assets on dissolution of the

[60]Another possible worry may be premised on the contract/status distinction. But this binary obscures a more refined taxonomy, in which contract types, such as cohabitation (or employment contracts), play a key role. *See* Hanoch Dagan & Elizabeth S. Scott, *Reinterpreting the Status-Contract Divide: The Case of Fiduciaries*, *in* Contract, Status, and Fiduciary Law 51 (Paul B. Miller & Andrew S. Gold, eds., 2016).

[61]*See* Restatement (Third) of Restitution And Unjust Enrichment § 28(1) (2011).

[62]*See* Barbara Atwood & Naomi Kahn, *The Uniform Cohabitants' Economic Remedies Act: Codifying and Strengthening Contract and Equity for Nonmarital Partners*, 57 Fam. L. Q. 1, 5-11 (2004).

[63]*See* American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations §§ 6.06 (2000).

[64]As the text implies, the marginal autonomy-enhancement of each additional dollar is only likely to be diminishing. But this is also the case with utility, of course; and in both cases, as well as *all* others where legal rules are justified by reference to some underlying values, law's reliance on such proxies is justified by the rule of law, which requires relatively clear rules. *See* Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and in Life (1991), at 47–52.

[65]*See also* Hanoch Dagan, *Intimate Contracts and Choice Theory*, 18 Eur. Rev. Contract L. 104, 117–118 (2022).

[66]Uniform Cohabitants' Economic Remedies Act § 6.

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

relationship), and requiring intent be established by "clear and convincing" evidence.[67] This heightened standard was justifiably rejected because it "would be a step backward in most states."[68]

But the problem is deeper. Tying the content of this implied-in-fact contract to people's intent is an error. An obligation based on people's actions, and not their express commitments, must be in the form of the ALI's proposal. The law must define the action giving rise to the obligation and the obligation that arises. In addition, the triggering action should clearly demonstrate a commitment to an interaction that justifies the resulting obligation the law imposes. The ALI's proposal is thus correct to treat the parties' cohabitation—the action they both clearly voluntarily undertake that justifies the resulting obligation—as the triggering action. It is also right to set an alimony-like obligation as the default rule, given its support of the parties' voluntary joint plan (to cohabit) and compliance with relational justice. Contract law can require no more when a contract is implied in fact because while people surely have in mind the action giving rise to the obligation, they are unlikely to have in mind the resulting obligation.

We concede that this default rule cannot be justified as a matter of tacit intent or transactional necessity. Like many other default rules (recall *Taylor v. Caldwell* and *Jacob & Youngs*), it expresses what the background rule *should be* for cohabitants in an autonomy-based contract law. The risk of involuntariness—people being subjected to an obligation they would not have agreed to undertake, if they had been asked in advance—is mitigated by allowing people to disclaim the obligation.

Contract traditionalists will resist describing this obligation as contractual. Not only is the obligation based on people's actions, and not their express promises, but the interaction that is the basis for the obligation is not a bargain-exchange transaction.[69] But modern contract law does not confine its ambition to facilitating "this-for-that" interactions, nor should it.[70] To be sure, contract law should recognize that in some non-bargain contexts law's involvement is unnecessary and even potentially detrimental (this is the case where legally imposed obligation tends to crowd out internal motivations) and that some impositions on people's autonomy—think an intimate touching—require actual or apparent consent. But we think the ALI's proposal will facilitate the relationships it covers, and that it will enhance people's autonomy and secure relational justice when a relationship ends.

Contract traditionalists may also object to describing the alimony-like obligation on dissolution of a relationship of unmarried cohabitation as contractual because it is patently created by law. But so too long ago was the primitive implied-in-fact contract to pay for performance obtained in a bargain-exchange transaction. If the primitive implied-in-fact contract seems natural and not a legal creature, it is only because it

[67] *See* Atwood & Kahn, supra note 59, at 16.

[68] *Id.*

[69] UCERA tries to stipulate this problem away by declaring "[c]ontributions to the relationship are sufficient consideration for a cohabitants' agreement." Unif. Cohabitants Econ. Remedies Act § 6 (Unif. L. Comm'n 2021). This should suffice to make an express agreement that is made at the outset of a relationship enforceable. But this does not alter the traditional presumption that services conferred in an intimate relationship are gratuitous, which precludes finding an implied-in-fact contract even when services are of a type that would be paid for if performed by a stranger.

[70] *See* Hanoch Dagan, *The Liberal Promise of Contract, in* Private Law and Practical Reason: Essays on John Gardner's Private Law Theory 311 (Haris Psarras & Sandy Steel eds., 2023).

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

was recognized long ago.[71] The alimony-like obligation is appropriately described as contractual because it arises from people's choice to enter a mutually beneficial relationship. And the obligation's purpose is to facilitate this choice, and to prevent relational injustice on dissolution of the relationship.

IV. Autonomy and Interpretation

Part III demonstrated that many implied terms and all rules basing contractual obligations on people's interactions (i.e., implied-in-fact contracts) must be justified by a value judgment and it argued that autonomy-enhancement can and should supply the necessary value judgment. This part shows that autonomy can play a similarly critical role in designing rules to distill the content of the parties' agreement when it comes to the interpretation of written agreements.

Contract interpretation has been a significant focus of both judicial and scholarly attention in recent years, and we do not pretend to summarize the rich jurisprudence and literature on the topic. Section IV.A briefly recapitulates the familiar textualist-contextualist divide, situates this schism in a broader set of questions posed in the design of rules on interpretation, and explains that the answers to these questions must be found in contract law values (which for us is enhancing autonomy). Section IV.B then shows that liberal values offer instructive and normatively appealing guidelines regarding the rules of interpretation that should apply—and to some extent already do apply—to a diverse set of contract types.

A. Interpretative Dilemmas and Contract Theory

1. The Textualist/Contextualist Debate

There are various formulations of the warring positions that judges and commentators occupy under what is often referred to as the textualist/contextualist debate. For our purposes, it is enough to present one version of each: the U.C.C., which codifies the position taken by the Restatement Second, can represent the modern/California contextualist approach; the Restatement First can stand for the classical textualist position (which approximates New York and Texas law).

The U.C.C. rejects the plain meaning rule. It prescribes that to reach the parties' "true understanding" of their agreement, even an unambiguous writing "may be explained or supplemented by course of dealing or usage of trade … or by course of performance." The premise is that these "were taken for granted when the document was phrased," and are the best indication of what the parties intended the writing to mean.[72] The U.C.C. also takes the position that the goal is to determine the parties' agreement in fact, which may not be reflected by a writing they adopt as an expression of their agreement.[73]

[71]If this seems tendentious, then consider how a claim to recover payment for performance rendered in a half-completed exchange is described when the statute of frauds is not satisfied. This literally is described as a claim on an implied-in-law contract (aka quasi-contract or restitution). Ironically, this claim is understood to be created by law because it overcomes a hurdle for a contract claim that is created by law. We consider all these rules to be part of contract law because they facilitate people's voluntary joint plans. On this view, the restitution claim is an ameliorating rule that qualifies a legal formality. Dagan & Gergen, *supra* note 6, at 38–41.

[72]U.C.C. § 2-202(a) & cmts 1-2.

[73]U.C.C. § 1-201(b)(3).

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

The Restatement First takes the position that when a writing the parties adopt as an expression of their agreement speaks unambiguously to an issue, interpretation begins and ends with the writing. This position is embodied in the plain meaning rule. The Restatement First does not employ the strictest version of the plain meaning rule,[74] for it allows a court to "stretch" the meaning of terms as needed to interpret a writing purposively so that it makes sense in the context of the agreed exchange[75]; and it also allows courts to consider evidence of "surrounding circumstances," including trade usage or local practice, even when a writing is unambiguous.[76] But it does not allow courts to consider evidence of course of performance or course of dealing, for this goes to the parties' actual intent which is irrelevant when a writing is unambiguous.

A well-known skirmish between Judges Roger Traynor and Alex Kozinski illustrates these different positions. In *Pacific Gas v. Thomas Drayage & Rigging*, Traynor (writing for the California Supreme Court)—proudly adopting the modern approach—held that "a court must ascertain and give effect" to the intentions of the parties by "determining what the parties meant by the words they used." Traynor argued the nature of language makes it impossible to ascertain intent from a writing itself, decrying this view as "a remnant of a primitive faith in the inherent potency and inherent meaning of words." Courts must not "presuppose a degree of verbal precision and stability our language has not attained," and therefore should consider "all credible evidence offered to prove the intention of the parties."[77]

In *Trident Ctr. v. Conn. Gen. Life Ins.*, the district court rejected the plaintiff's claim that the agreement was something other than what their written contract plainly said, while refusing to look at the plaintiff's evidence supporting the claim. The court added a sanction for making a frivolous legal claim for good measure. Kozinski (writing for a panel of the 9th Circuit) held California law did not permit this, even though the case involved a "lengthy and detailed" multi-million-dollar commercial loan between "highly sophisticated business people" negotiated "at arm's length from position of roughly equal bargaining strength." The agreement, moreover, "squarely address[ed] the precise issue that is the subject of this dispute," leading Kozinksi to observe "[i]t is difficult to imagine language that more clearly or unambiguously expresses" the parties' prescription for the contingency at hand. While following *Pacific Gas*, the *Trident* court questioned the wisdom of a rule that opened the door to "costly and protracted litigation."[78]

2. Why the Textualist Position Should Govern Commercial Transactions

Insofar as commercial transactions between sophisticated firms are concerned, we think Judge Kozinski has the upper hand both conceptually and substantively. Conceptually, contract law values, and not (or not only) the nature of language, govern the design of rules of contract interpretation. Substantively, the textualist position is indeed appropriate for commercial transactions like that in *Trident*. But,

[74] *Compare* Steuart v. McChesney, 444 A.2d 659 (Pa. 1982) discussed *infra* text accompanying notes 110–111.

[75] *See* Restatement (First) of Contracts §§ 235 & 236 (1932). *See also, e.g.*, Outlet Embroidery Co. v. Derwent Mills, 172 N.E. 462 (N.Y. 1930).

[76] *See* Restatement (First) of Contracts §§ 230 (1932).

[77] 442 P.2d 641, 645 (1968).

[78] 847 F.2d 564, 569 (1988). Judge Kozinski misstated California law to put it in a bad light. California law then and now permits a trial judge to dismiss the claim on a motion for summary judgment after they considered the evidence.

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

as we shall argue later, the California contextualist approach is appropriate for many other types of transactions.

The conceptual point is helpfully elucidated by Gregory Klass. Meaning, as Klass explains, "is a social fact, one whose existence depends on the relevant social interpretive practices." This means that "there are multiple, sometimes overlapping social interpretive practices," and thus also "multiple, sometimes overlapping types of meaning." It is conceptually fallacious to think (as friends of the California approach often suppose) that "[t]he enriched pragmatic meaning that often anchors the parties' understanding of their agreement is [] the only meaning the law might look to." Deciding "[w]hich interpretive practice we deploy in given situation—that is, what type of meaning we care about"–*necessarily* "depends on the goal of the inquiry." This is a matter of contract law values, or, as Klass puts it, "considerations of principle, policy, and practicality."[79]

The substantive reason builds on, but reframes, the economic theory advanced by Alan Schwartz and Robert Scott for why the interpretation of transactions between legally sophisticated wealth-maximizing firms (like the parties in both *Pacific Gas* and *Trident*) should be interpreted based on limited, mostly textual, evidence.

Schwartz's and Scott's account rests on the proposition that because "*any* theory 'on the ground' must trade off the gains from increased accuracy in interpretation against the costs," choosing the proper rules of interpretation necessarily requires "trading off accuracy against contract writing and adjudication cost."[80]

Schwartz and Scott observe that risk-neutral business parties will commonly prefer judicial interpretations to be made on a limited evidentiary base, the most important element of which is the writing itself. The reason is simple. Being aware of both writing and litigation costs, but particularly concerned with the latter, sophisticated commercial parties are expected to "write contracts that are sufficiently detailed to ensure that the most likely interpretations of their contracts are correct when courts interpret those contracts using the minimum evidentiary base we specify." Because parties "know better than courts how best to trade off these front-end and back-end contracting costs," courts should follow this presumed (second order) preference of commercial parties.[81]

The key point is that while the task of interpretation may seem to be about recovering the parties' intentions, the design of interpretive rules necessarily involves a value assessment, specifically a tradeoff between accuracy and cost. Schwartz and Scott present a compelling case for the proper (default[82]) rule in the commercial setting on which they focus,[83] at least (and this is an important qualification) where

[79]Klass, *supra* note 13, at 23, 34. We do not find the sharp distinction Klass draws (*id.*, at 16–17) between interpretation and construction useful.

[80]Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 Yale L.J. 926, 930, 937, 944 (2010).

[81]Schwartz and Scott assume, arguendo, that on average contextualist interpretation will yield more accurate results, i.e., courts on average are more likely to discern the parties' true intent if they consider more evidence. Their basic point is that sophisticated parties can limit the risk of inaccurate interpretation ex ante by taking greater care in drafting writings, and that large businesses are willing to live with the residual ex post risk of error because they are risk neutral and these losses are randomly distributed. Less sophisticated arguments for textualism rest on the hypothesis that contextualism increases the risk of error by increasing the range of possible interpretations. We know of no evidence in support of this hypothesis.

[82]*See Id.* at 926, 946–947, 963.

[83]Robert Scott's more recent research (with other co-authors) on commercial boilerplates may require refining the scope of application of this conclusion. *See* Stephen J. Choi, Mitu Gulati, & Robert E. Scott, Contract Hazards: Lawyers and Their Landmines (2026).

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

no externalities are at stake. It is compelling because of the low autonomy stakes in transactions between legally sophisticated wealth-maximizing firms.[84] In this important category of contractual interactions, the (legitimate) name of the game is maximizing expected contractual surplus with default rules (including rules of interpretation) that "reflect majoritarian party preferences."[85]

3. More (Inevitably) Normative Choices

Before we can get to our own sketch of an autonomy-based theory of contract interpretation, we need to mention another contribution of Klass, this time regarding the questions lawmakers must answer when designing rules of interpretation. The current debate misleadingly suggests that the choice between textualism and contextualism is the only pertinent one. Not so, says Klass. There are in fact three critical questions: "Whose meaning governs? What type of meaning governs? And what facts determine that meaning?"[86]

The third question (what facts determine meaning) roughly corresponds to the textualist/contextualist divide,[87] and the first (whose meaning) seems trivial in the commercial context (where the answer is clearly "both parties"), though (as discussed below) it is crucial in transactions involving people (on one or both sides) with significant, asymmetric autonomy stakes. The second question (what type of meaning) involves the choice between authorial, pragmatic, and semantic meaning.[88] We put semantic meaning off the table. As noted, even courts (such as the New York Court of Appeals) and scholars (such as Williston) who take a highly textualist approach do not limit themselves to the literal (semantic) meaning of the parties' words, but rather read them purposively.[89] This consensus is hardly surprising: unlike the textualist/contextualist divide which (as we explain) raises a tradeoff in terms of autonomy and efficiency, it is hard to think of any autonomy or efficiency-based case for relying exclusively on the semantic meaning of a writing regarding any type of contract.[90]

Liberal contract provides an answer to a question that is anterior to these three questions. Klass claims that the answers to these three questions turn on "considerations of principle, policy, and practicality"[91] that vary across different domains of law. This vague proposition invites the anterior question, namely: what values should

[84]These firms are fictional persons "whose autonomy the [law] need not respect." *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L.J. 541, 556 (2003). And because shareholders typically arrange their affairs to shield themselves personally from claims against the firms they own, it is unlikely firms can raise any genuine autonomy-based claims. *See* Meir Dan-Cohen, rights, persons, and organizations: a legal theory for bureaucratic society 74, 77 (1986).

[85]*See Id.*, at 930, 941. *See generally* Dagan & Heller, Autonomy Defaults, *supra* note 5.

[86]Klass, *supra* note 13, at 24.

[87]We say "roughly" since Klass includes the choice between "the popular conventional meaning and a local conventional meaning," which is often discussed as an aspect of the textualist/contextualist divide, under the second question. *See Id.*, at 26.

[88]*Id.*

[89]*See supra* text accompanying note 71 and Klass, *supra* note 13, at 27–28.

[90]*See also* Peter M. Gerhart & Juliet P. Kostritsky, *Efficient Contextualism*, 76 U. Pitt. L. Rev. 509 (2015). *Cf.* Lorenz Kaehler, Are There Reasons in Contract? (unpublished manuscript).

[91]Klass, *supra* note 13, at 34.

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

bear on the design of rules of contract interpretation? What values determine which considerations should count (or count more) regarding each contract type?

A conventional answer to this question sets the preeminent goal of "freedom of and freedom from contract," which is qualified by subsidiary goals like "security of transactions," "predictability," and "formulating legal rules that are administrable." On this account, "[f]ar less important in contract interpretation is a group of possible values involving general fairness, equality, and justice."[92] Liberal contract instead answers that the values that should bear (and to some extent already do bear) on the design of rules of contract interpretation are enhancing autonomy and securing relational justice.[93]

B. Toward a Liberal Theory of Contract Interpretation

1. A Broad Coverage Attending a Diverse Inventory of Contract Types

Liberal contract theory happily endorses the economic case for adopting the classical approach to contract interpretation for commercial transactions between sophisticated wealth-maximizing firms. It also embraces Schwartz's and Scott's suggestion that when commercial parties prefer that their agreement be interpreted using a broader evidentiary basis, they should be able to opt out of the classical approach with minimal difficulty.[94]

Our interest is in designing rules of interpretation for other contractual settings. These include the vast domain of voluntary joint planning that pervades our lives—in the spheres of work, consumption, housing, and intimacy. In none of these spheres does the practice of contracting resemble the model that justifies the textualist approach, and Schwartz and Scott are indeed properly cautious not to suggest otherwise.[95]

Liberal contract's starting point should be obvious by now. Interpretive rules—like all other rules of contract law—should serve contract's autonomy-enhancing mission. This goal implies that contract law must not apply a uniform set of interpretive rules across all contract spheres. The reason for this should also be clear. While the differences among contract spheres do not affect the choice between pragmatic and semantic meaning, as autonomy always favors either authorial or pragmatic meaning over semantic meaning, these differences *are* critical to the other questions.

[92]Steven J. Burton, Elements of Contract Interpretation (2009), at 2, 7–8.

[93]Liberal contract also offers a more satisfying conception of freedom of contract than the conventional one. *See* Hanoch Dagan, Freedom of Contract, Properly Understood (WJS uitgevers, 2025).

[94]Gregory Klass, *Parol Evidence Rules and the Mechanics of Choice*, 20 Theoretical Inquiries L. 457, 477–479 (2019), proposes establishing a formality to enable sophisticated parties to opt into the classical, strict form of the parol evidence rule. Schwartz and Scott would make this the default rule so what is needed is a formality to enable sophisticated parties to opt out of the strict form of the parol evidence rule.

[95]In fact, elsewhere, Scott and co-authors argue, in line with our conclusion below (but for different reasons), that rather than opting for a full-blown textualist or contextualist form of interpretation, law should apply the former approach to commercial transactions of sophisticated parties and the latter to categories of exchange in which at least one of the parties is legally unsophisticated. *See* Ronald J Gilson, Charles F. Sabel, and Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 Cornell L. Rev. 23, 25–34 (2014).

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

As the following pages demonstrate, liberal contract generates answers to these three questions for all types of contracts. Beginning with the first question (whose meaning), liberal contract insists that where the writing is not (or not really) co-authored, the perspective of a voiceless natural person should be particularly emphasized. Turning to the second question (what meaning), when a party is an individual, and not a large company with a legal office, interpretation often begins with an inquiry into authorial meaning and ends with an inquiry into pragmatic meaning, which takes us back to implication and implied terms. This is because people's choices tend to be general and not fine grained. Inevitably, if the law is to effectuate people's *general* choices, the law must take a proactive approach to supply and regulate terms. Finally, on the third question (what facts determine legal meaning), liberal contract generally requires the law to honor the choices people (that is, natural persons) actually make when they enter into contracts. It thus requires courts to consider all helpful evidence to get this crucial fact right, though there are exceptions to this. We now turn to elaborate and demonstrate these significant takeaways, beginning with the "whose meaning" question.

2. Liberal Contract's Answer to the "Whose Meaning" Question

Some rules of interpretation wear their values on their sleeves by stating an explicit preference for a substantive outcome. Under modern contract law, these preferred terms often serve liberal values—specifically, relational justice—by favoring the meaning of the weaker or more vulnerable party. Eyal Zamir gives examples (including rules disfavoring exculpatory terms, forfeiture, and warranty disclaimers), and concludes "[i]n all these and other instances, the courts interpret the contract so as to implement social and moral values of fairness, reasonableness, efficiency, helping the weaker party, and even protecting people from their own shortsightedness."[96]

The modern form of the venerable *contra proferentem* rule also tilts in favor of the weaker party.[97] The rule requires courts to "adopt the meaning that is less favorable in its legal effect" to the drafter,[98] and "is often invoked in cases of standardized contracts where the drafting party has superior bargaining position,"[99] to avoid "unfairness to a party in a weaker bargaining position."[100] Under California law, the party in a superior bargaining position is not even permitted to introduce extrinsic evidence that the parties intended the meaning favorable to it.[101]

[96]Zamir, *supra* note 10, at 1726.

[97]We do not deny, of course, that the rule works against the weaker party when they produce a writing with an ambiguity that they subsequently seek to exploit. But these would be a (small) minority of the cases; and if we want to avoid over-reliance on ex post discretionary adjudication that is offensive both to the rule of law and to the role of contract as a planning device, we must employ proxies. So, like most rules, *contra proferentem* is both over- and under-inclusive vis-à-vis its underlying purposes; and like many good rules, these mismatches are likely to be quite rare. *See* Schauer, *supra* note 61, at 47–52.

[98]Margaret N. Kniffin, Corbin on Contracts: Interpretation of Contracts § 24.27 (Joseph M. Perillo ed., rev. ed. 1998).

[99]Restatement (Second) of Contracts § 206 cmt. a (1981).

[100]Joanna McCunn, *The* Contra Proferentem *Rule: Contract Law's Great Survivor*, 39 Oxford J. Legal Stud. 483, 501 (2019). McCunn describes the rule as "an anomaly in the law" which "undermine[s] the coherence of the rules of contractual interpretation." *Id.* This criticism assumes the mistaken premise rules of interpretation are always and only about recovering the parties' intentions.

[101]*See* Tahoe National Bank v. Phillips, 480 P.2d 320, 327–328 (Cal. 1971). Happily, in a similar context the new Restatement of Consumer Contracts adopts a similarly strong pro-consumer *contra proferentem* rule. *See* Restatement of Consumer Contracts § 2(b-d) (2024).

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

Lamp Plus Inc. v. Varela[102] illustrates the imbalance-reducing potential of the rule. A hacker obtained the tax information of about 1,300 Lamp Plus employees. The company's employment contract included a mandatory arbitration term. The issue in the case was whether class arbitration was available. The district court and the Ninth Circuit held it was because the contract was ambiguous, applying California's *contra proferentem* rule. Relational justice requires no less. Indeed, liberal contract requires vindicating workers' interests in privacy and access to justice because it is critical to their ability to interact with others as self-determining agents.[103]

This story ends badly for reasons that underscore the general point that rules of interpretation often are designed to serve substantive values. The Supreme Court reversed in a five-four decision. The majority resolved the ambiguity in the company's favor by applying decidedly illiberal values. The majority got one thing right. It correctly characterized the *contra proferentem* rule as being based primarily on "considerations about the parties' relative bargaining strength," and as seeking "ends other than the intent of the parties."[104] Following its *Stolt-Nielsen* decision we criticized above, the majority resolved the ambiguity in the company's favor by applying a substantive rule of interpretation of its own making that prohibits an agreement to participate in class arbitration being inferred from silence or ambiguity.[105]

The majority justified this substantive rule of interpretation by citing a "first principle that underscores all of our arbitration decisions," which is that "[a]rbitration is strictly a matter of consent."[106] This is bitterly ironic, for it is unlikely that the company's employees read the employment agreement and knew that it contained an arbitration term. This is typical because often when people make contracts they only think about a few salient terms. The next Section explains how liberal contract steps in to effectuate people's general choices.

3. Liberal Contract's Answer to the "What Meaning" Question and Its Crucial Role in Effectuating People's General Choices

Interpretation cannot really be about recovering people's intent when the issue is something people do not think about in making a contract. This frequently occurs in contracts made by people (rather than companies with a legal department) because people's choices tend to be of a general type, like taking a cab in pre-app days (or cohabiting). A genuinely liberal contract law appropriately steps in proactively to facilitate people's general choices.

To demonstrate this proposition, we use three examples.[107] We begin with personal insurance contracts, which also raise the issue of the legal effect to be given to unread terms in form contracts. We then consider employment and prenuptials. In

[102]587 U.S. 176 (2019).

[103]*See* Hanoch Dagan & Avihay Dorfman, *Precontractual Justice*, 28 Legal Theory 89, 105 (2022). As the text implies, while *contra proferentem* may be sufficient in this case, relational justice may well require a more stringent vindication of these interests of workers, namely: treating them as mandatory for employment contracts.

[104]587 U.S. 176, 187 (2019).

[105]*Id.* at 185.

[106]*Id.* at 184.

[107]We acknowledge that—as we note in the text—these examples are different from one another and that they thus each may *also* stand for distinct commitments. But we think that together they bring home a critical lesson: that in many contract types, effectuating the choices of real people requires supplementing—at times, even overriding—a writing (or other expressions of intent).

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

all these cases, the law adheres to its commitment to relational justice: it designs its interpretive rules so as to vindicate the autonomy of the weaker or more vulnerable party while effectuating the parties' general choice; and it appropriately treats these interpretive rules as mandatory, rather than defaults, since allowing people to opt out of an interpretive rule only makes sense if people know of the default rule and that it is being altered, which is rarely the case when people make contracts without legal counsel.

a. Personal insurance contracts. Robert Keeton's early discussion of personal insurance contracts demonstrates that courts used the *contra proferentem* rule and other doctrines to ensure that personal insurance agreements conform with "the larger goals of insurance policy regardless of the clarity of the contractual language."[108] Keeton sought to rationalize this practice in terms of "reasonable expectations," conceived not as people's actual expectations, but rather as what people reasonably could expect a policy to cover. Thus, courts should not enforce an *un*ambiguous term denying coverage on an event that in fact did not materially increase the pertinent risk of loss. The term is not enforced because it is inconsistent with the purpose of insurance (as taken from the perspective of the insured, of course).[109]

This is surely not interpretation in the sense of trying to recover the meaning people attach to *policy terms* when they purchase an insurance policy. Nor is this what efficiency would dictate, given the deadweight cost of resolving such "unreasonable as applied" claims.[110] But it does make perfect sense on our account. Law should set a rule that is best for people as a general matter, given a choice we know they intended to make, namely: to purchase insurance, while typically neither thinking nor even reading all other terms. The rule is justified because it is crucial to autonomy. Loss of insurance coverage can have momentous negative effects on people's lives, whereas paying a few dollars more for coverage does not.

Keeton is therefore right to applaud courts that allow recovery of benefits in these cases when a policy exclusion is facially reasonable but unreasonable as applied.[111] He is also correct in treating this interpretive rule as mandatory, rather than a default, since allowing people to opt out of a rule only makes sense if people know of the default rule and of its corresponding altering rule.

b. Employment contracts. Employment contracts law offers another example of the law's crucial role in facilitating people's general choices when there are significant autonomy stakes. Liberal contract embraces the modern rule that an informal indefinite promise of job security by an employer, like a promise of "permanent employment," should be interpreted as a promise that an employee will be terminated

[108]Gilson et al, *supra* note 88, at 83. Gilson et al observe that the law has not lived up to its potential because "generalist courts have reverted insurance cases to traditional, general contract doctrine. This turns the doctrine (back) into a rule of last resort, to be applied against the drafter only after the usual interpretive means of ascertaining the parties' intent have failed."

[109]Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961 (1970), and Part Two, 83 Harv. L. Rev. 1281, 1285–1286 (1970).

[110]Since people buy insurance because they are not risk neutral regarding the covered risks, they may well prefer to pay a few dollars more for insurance to avoid the risk they will be denied coverage when there is not a reasonable basis for denying coverage. But liberal contract theory is not particularly interested in verifying and assessing these conjectures, since its justification of the rule is not dependent on people's likely preferences. (Of course, increasing the cost of insurance affects access for people at the margin, but the magnitude of this effect is likely to be small when insurance is otherwise available.)

[111]Keeton, *supra* note 102, at 976–977, 1283–1284, 1292–1293, 1298–1299.

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

only for cause.[112] The old rule was that an informal indefinite promise of job security was not sufficient to overcome the presumption of at-will employment. The modern rule is better because people's interest in job security outweighs a company's interest in having largely unfettered power to terminate employees. Indeed, liberal contract would go further than U.S. law to eliminate the presumption of at-will employment and impose stiff formal requirements (akin to those for disclaiming an express warranty) to alter the default rule of job security to ensure people know and understand what they are getting into when they take a position without job security.

Interpretation of a promise of job security begins with an inquiry into the meaning the recipient attached to the promise, but it quickly becomes an inquiry into pragmatic meaning (dare we say "reasonable expectations"). This is because the recipient of a promise of job security will have a general understanding of what job security means, but they will not have thought about the details. The law supplies the details. Some details are a matter of implication because they are based on tacit intent or transactional necessity (e.g., an employee can be fired for theft). But many other details are worked out by lawmakers with an eye to balancing the interest of an employee in job security and the interest of an employer. On this point, U.S. law is less protective of employees than the law in most wealthy societies by allowing an employer to terminate an employee when a significant change in the business means it no longer needs an employee.[113]

c. Prenuptial agreements. Our final example shows that sometimes interpretation involves a deep inquiry into an individual's understanding of a choice they made. The context is a challenge to the enforcement of a prenuptial agreement on the ground a change in circumstances makes it unfair to enforce the agreement. A leading case explains, "prenuptial agreements will be enforced in their explicit terms only to the extent that circumstances at the end of the marriage are roughly what the parties foresaw at the time they entered into the prenuptial agreement."[114] More precisely, the question is whether the party challenging the prenuptial agreement roughly foresaw the circumstances they would be in at the end of marriage. Liberal contract supports this rule because of the enormity of the autonomy stakes to the challenger. The challenger's present self can make a choice that significantly impairs the autonomy of their future self but only if they roughly understand the gravity of the implications for their future self.

4. Back to the Textualist/Contextualist Divide

Thus far, we have addressed liberal contract's instructions for the "whose meaning" and "what meaning" questions and, more particularly, for interpreting *and supplementing* contract types that involve general choices made by people with significant autonomy implications.[115] We turn now to the question of what facts determine meaning.[116]

[112]*See, e.g.*, Restatement (Third) of Employment Law § 2.03, Illustrations 2, 6, and 7, and cases collected in Reporter's Note, comment h.

[113]*See* Restatement (Third) of Employment Law § 2.04(b).

[114]Gant v. Gant, 329 S.E.2d 106 (W. Va. 1985).

[115]Indeed, in these contexts, the oft-noted continuity between interpretation rules and defaults is particularly conspicuous. Unsurprisingly, all the defaults we've covered are autonomy-based; interestingly, many of them are simultaneously both safeguarding *and* empowering. *See supra* note 37 and accompanying text.

[116]Another aspect of the "what facts" question is whether recitals should carry interpretive weight. The prevailing default rule marginalizes them. Ethan Leib and Tal Kastner argue they should be "part of the

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

a. From corporations to real people. Liberal contract's endorsement of the textualist approach for contracts between legally sophisticated wealth-maximizing firms generally does not extend to contracts made by people. This is because liberal contract attaches significant value to honoring people's choices, and often people cannot be expected to ensure that a writing corresponds with their intentions. The former reason is particularly heavy when a choice implicates people's lives in fundamental ways that cannot (or should not) be reduced to the cost-benefit analysis that guides Schwartz's and Scott's account.[117] Indeed, the further the contract type at hand is from the strictly instrumental pole—the more it tends to play a constitutive role in one or both parties' lives—the more important accuracy is, and thus the less acceptable it is to trade it off against the costs of contract writing and of adjudication.

Steuart v. McChesney[118] illustrates how the plain meaning rule violates people's autonomy by ignoring their intent. The case involves the interpretation of an agreement between the Steuarts and the McChesneys giving the latter a right of first refusal on a parcel of farmland during the Steuart's lifetime. The right was triggered if the Steuarts "obtain a Bona Fide Purchaser for Value," and gave the McChesneys the right to purchase the land "at a value equivalent to the market value of the premises according to the assessment roles" for real estate taxes. After her husband died, widow Steuart got two bona fide offers of $35,000 and $30,000, both below the land's appraised value of $50,000. The McChesneys sought to exercise their right and tendered $7,820, which was twice the land's value on the assessment rolls. The trial court rejected this claim and ruled that the McChesneys would have to match the price of the first offer ($35,000). The appellate courts reversed applying the plain meaning rule.

Melvin Eisenberg shows that this result was unnecessary, even under the plain meaning rule, because the court could easily have found an ambiguity in the writing.[119] We suspect the appellate courts sacrificed widow Steuart on the altar of the plain meaning rule to demonstrate their commitment to the rule. But this violated the Steuarts' autonomy by ignoring their intent. The extrinsic evidence (including the testimony of the draftsman, an attorney employed by the McChesneys) made it clear that the parties intended the value of the assessment rolls to be a protective minimum price. Apparently, the Steuarts were not legally sophisticated and can hardly be faulted for not realizing the writing said something else. The fault lies with the McChesneys, who demanded the writing be interpreted literally when they knew this was not what the Steuarts intended.

---

interpretive baseline" because they provide "meaningful textual cues that illuminate contractual purpose." *See* Ethan J. Leib & Tal Kastner, *On Recitals and Contract Interpretation,* 54 F.S.U.L. Rev. (2026)(forthcoming). We agree. Recitals and preambles are helpful to understanding the parties' joint plan even if they are open-ended, vague, and precatory.

[117]*See* Hanoch Dagan, *Economic Analysis* in *Law*, 38 Yale J. on Reg. 566, 585–587 (2021), offering preliminary thoughts developing an appropriate autonomy audit for contract types that implicate important autonomy interests, and Mark P. Gergen, Debt and the Morality of Contract Law, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4976632, explaining what this would look like in practice in the assessment of punitive mechanisms for enforcing personal debt.

[118]498 Pa. 455, 444 A.2d 659 (1982).

[119]*See* Melvin A. Eisenberg, Foundational Principles Of Contract Law (2018), 381–382.

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

When people (again: natural persons) do make a choice about an aspect of a contract, liberal contract endorses the simple principle that the law should honor that choice, since autonomy does not lend itself to the radical commensurability that governs commerce.[120] In other words, the cost-savings analysis, which (properly) guides an account like Schwartz's and Scott's that focuses on the economic bottom line of contracts between sophisticated wealth-maximizing companies, cannot usually justify bypassing people's actual choices.[121] There are exceptions to this that we momentarily address, but outside these exceptions, autonomy requires respecting people's choices, which implies that courts should consider all helpful evidence to get this crucial fact right. This is especially true when a contract involves people's identitarian features like work and home.

Happily, the new Restatement of Consumer Contracts ("RCC") achieves this goal through a tailored parol evidence rule (PER) in which "a standard term that contradicts, unreasonably limits, or fails to give the effect reasonably expected by a consumer to a prior affirmation of fact or promise by a business does not constitute a final expression of the agreement regarding the subject matter of that term," and thus does not discharge "obligations that would otherwise arise as a result of the prior affirmation of fact or promise."[122]

The RCC also properly clarifies that this rule means the "four corners rule" of interpretation does not apply in consumer contract law. Furthermore, even though businesses often include "merger clauses" in their standard forms, these clauses "do not preclude a finding that the standard contract terms do not constitute the parties' final expression of a particular matter."[123] Because RCC's answer to the "whose meaning" question is "the consumer's,"[124] it properly instructs courts to recover what the business should have reasonably understood the consumer intended, and not to effectuate intent expressed in an unread writing.

b. An exception. Hyper-textualist rules of interpretation are appropriate when it comes to formal wills. Courts often say the rules of interpretation are the same for wills and contracts.[125] Of course (and happily), this is not true. In California, for example, the law is clear that when courts interpret wills their task is to determine the

[120]*See, e.g., supra* text following note 109.

[121]*See* Hanoch Dagan, *Why Markets? Welfare, Autonomy, and the Just Society*, 117 Mich. L. Rev. 1289, 1298–1299 (2019).

[122]Restatement of the Law, Consumer Contracts § 9 (Am. L. Inst. 2024). *See also id.* § 8. Ayres and Klass suggest that rather than a tailored PER, the RCC eliminates the PER "with respect to a business's extrinsic communications," and they encourage courts to say so explicitly. *See* Ian Ayres & Gregory Klass, *How to Use the New Restatement of Consumer Contracts: A Guide for Judges*, 15 Harv. Bus. L. Rev. 363, 375–377 (2025). We agree.

Ayres and Klass suggest the PER may still be used to exclude extrinsic evidence involving "communications to the business that the business never acknowledged." Id. at 377, n. 2. Klass, *supra* note 87, at 481, supplies a normative reason, which is that it would be costly to require businesses to respond to communications from consumers, which harms consumers as a group, without providing a clear autonomy benefit to consumers who express idiosyncratic preferences. Liberal contract theory supports such a rule so long the communications involve sheer preferences and mundane consumer goods, so the autonomy stakes are small. Businesses should be required to respond to communications when the matter is genuinely important to a consumer's life (for example, it is an unusual allergy).

[123]RCC, *supra* note 122, § 9 cmts. 2-3.

[124]*Id.* at § 9 cmt. 1.

[125]*See, e.g.*, In re Estate of Russell, 444 P.2d 353, 359–360 (Cal. 1968).

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

testator's intent based on what the will says.[126] This is appropriate because of the nature of a will. Generally, the relevant autonomy interests are those of the testator.[127] In addition, given the nature of a will (testators know that when the time comes to implement a will the document must speak for them) and the formalities surrounding its execution, it is sufficiently likely that a will reflects a testator's intent. Therefore, it is sensible to not give people the opportunity to establish an intent not expressed in the will itself.

V. Concluding Remarks

A significant subset of parties' contractual obligations springs from their own actions, utterances, and writings, i.e., their choices. But the naïve view that distilling these obligations is always and only a value-neutral enterprise of implementing people's intent is wrong and misleading. It marginalizes the role of contract doctrine and its underlying theory, obscures the value judgments being made, and thus might make existing practices either seem inevitable or inexplicable (depending on whether you accept the naïve view). This Article advances an alternative approach. Liberal contract theory, we argue, offers this body of law conceptual clarity, elucidates and vindicates significant parts of contemporary law, and suggests normatively attractive pathways for reform.

Reinvigorating the seemingly arcane "officious bystander" test for implied terms alongside Benson's helpful transactional necessity test would clarify the limited domain of implication and highlight law's responsibility for creating default rules to facilitate people's joint plans. Our autonomy-based perspective explains why the traditionalist approach to the interpretation of commercial contracts is appropriate, and it applauds quite a few other existing rules and doctrines—such as UCC § 2-207(3), the *contra proferentem* rule, and interpretive doctrines favoring the weaker party in insurance contracts, employment contracts, and prenuptials—which the traditionalist view finds troublesome or deviant. But our liberal theory is not quietist; quite the contrary. Liberal contract embraces the ALI's proposed alimony-like obligation on dissolution of unmarried cohabitation, rejects the Supreme Court's rule for interpreting arbitration clauses, and supports a rule that goes beyond the ALI's rather limited pro-employee rule for interpreting promises of job security.

More generally, liberal contract theory rejects the idea of uniform rules of contract interpretation, requiring instead rules tailored to the normatively significant features of the contract type at hand. Its lodestar is, as usual, autonomy-enhancement, and its prescriptions when at least one party is an individual, rather than a commercial entity with a legal office, are quite sharp. Liberal contract requires law to favor the meaning of a voiceless party where the parties' written agreement is not (or not really) co-authored. It takes to heart how people's choices tend to be general and not fine grained, and therefore appreciates

[126]*See, e.g.*, Estate of Flint, 25 Cal.App.3d 945, 102 Cal.Rptr. 345 (1968).

[127]The qualified language of the text anticipates cases of autonomy-reducing wills, such as discriminatory wills. *See* Hanoch Dagan & Irit Samet, *Express Trust: The Dark Horse of the Liberal Property Regime, in* Philosophical Foundations of Express Trust 139, 170–174 (Simone Degeling, Jessica Hudson & Irit Samet eds. 2023)

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press

that effectuating people's general choices requires law to supplement interpretive principles with autonomy-enhancing default and mandatory rules. Finally, subject to the two exceptions just noted, a liberal theory of contract interpretation requires courts to follow the actual choices natural persons make, and thus to consider all helpful evidence to get this crucial fact right.

Cite this article: Dagan H and Gergen MP (2026). Autonomy, Implication, and Interpretation. *Legal Theory* **32**, 1–29. https://doi.org/10.1017/S135232522610086X

https://doi.org/10.1017/S135232522610086X Published online by Cambridge University Press