THE ROLE OF THE JURY (AND THE FACT/LAW DISTINCTION) IN THE INTERPRETATION OF WRITTEN CONTRACTS

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Over the years there has been a great deal of writing about the interpretation of contracts, and appropriately so. What aspect of interpretation is fashionable varies over time. Only a few years ago, gap filling was clearly the fashionable subject. Today interpretation of the words used in a written contract is more fashionable, and that is my topic.

My special focus will be on the role of the jury in the interpretation of written contracts.[1] When writing in an area about which so much has been written over the past century, it is hard to be original. Others have pointed out, as will I, that fear of the jury has helped shape the law in the area of interpretation, with the result that the law often seems confused and inconsistent with some basic contract values.[2] I will point out, as few have, that juries nonetheless decide a great number of contracts cases. I will raise questions about whether shaping legal rules to avoid letting the jury interpret written contracts is essentially futile. If it is futile, then perhaps we should consider abandoning the civil jury. This is the nearly uniform course elsewhere in the world but it is probably not politically feasible here. If not feasible, then I will suggest that perhaps we should learn to livc with the jury and give up the confusing and distorting efforts to keep contract interpretation issues from the jury. This, too, I will conclude is not likely to happen. I will then examine some less radical alternatives to improving the confused state of the law, concluding that it is questionable whether they will work. My overall conclusion will be tempered despair—the law is confusing and inconsistent and likely to

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1. Because juries only sit when the case is "at law" rather than "at equity," mostly I will be presuming a case in which monetary damages, and not specific or declaratory relief, is sought.

2. Most famously, Charles T. McCormick, *The Parol Evidence Rule as a Procedural Device For Control of the Jury*, 41 YALE L.J. 365 (1932). For a more recent discussion of the jury's role, argning that there is more coherence in the tasks assigned to thc jury than I believe there is, see Mark Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407 (1999).

remain so, but we have survived that way for a long time so maybe the problems generated by confusion and inconsistency are not as great as they might appear.

As with all articles about the interpretation of written contracts, this article will be importantly about the parol evidence rule, and its companion, the plain meaning "rule." But I want to begin at a more general level. A basic principle for distinguishing which issues are appropriate for the jury is the distinction between questions of fact and law. And because the fact/law distinction is also used in defining the scope of appellate review, that issue will be discussed as well.

I. THE FACT/LAW DISTINCTION AND CONTRACT INTERPRETATION

Statements are legion that the interpretation of a written contract raises a question of law for the judge (and for the appellate court).[3] I will begin by demonstrating that this proposition is problematic from the perspective of generally prevailing standards for distinguishing fact and law issues.

A. The Fact/Law Distinction in General

The most important standard for distinguishing questions of fact from questions of law is the general/particular distinction. If the siguificance of a determination is limited to a particular case, we call it a fact issue, even though by no means would it be considered a "fact" as that term is used in ordinary language. Consider for example an issue that often arises in determining expectation damages for breach—in what situation would the plaintiff be if the contract had not been broken (e.g., how much profit would she make). A layman would term such a determination an informed guess at best, but because its significance is limited to the case, we consider it a fact rather than a law question. Consider also a determination about a person's subjective intent in doing an earlier act or making an earlier expression. These determinations require ascertaining a subjective state of mind, something not amenable to an objective measurement of physical reality (such as the speed at which a car is traveling, which can be measured by radar), but again because the significance of the findings are limited to a particular case, we consider them determinations of fact rather than law.

The general/particular distinction has its gray areas, as all

3. There is conflict in the authorities whether the reason for this rule is that interpretation is a question of law, or a fact question that is reserved for the judge. The authorities are reviewed thoroughly in Judge Newman's concurrence in *Antilles Steamship, Ltd. v. Members of the Am. Hull Ins.*, 733 F.2d 195, 202 (2d Cir. 1984), and I will not repeat the analysis here. Along with Judge Newman, I will consider the general approach to be to treat textual interpretation (of a writing) as a question of law, unless I indicate otherwise in the context of a specific discussion.

dichotomies do. The indistinctness is most prominent in issues of law application, sometimes called mixed questions of fact and law.[4] Many law application issues involve the specification of a general legal standard to particular facts. A common example is the determination of negligence in a tort case. Sometimes we use the occasion of a law application to further specify a general standard, in a way that will help determine the outcome of future cases through the doctrine of precedent. In such circumstances, the general/particular distinction suggests that law application should be considered a question of law. In other circumstances we regard each law application as sui generis (as is typically the case when applying the negligence standard), and in those circumstances law application is likely to be considered a question of fact, even though a good deal of discretion is exercised in applying a general standard to particular facts.

A consideration distinct from the general/particular dichotomy for distinguishing between fact and law questions is the type of reasoning process used to resolve the issue. Inductive reasoning processes are used in determine both fact and law questions.[5] However, if a deductive reasoning process is used to reach a decision, the determination is always made by a court, even if the determination is only relevant to the particular case. Sometimes we say that the determination is a factual one, because it is particular, but for the court since there is only one reasonable conclusion to be drawn (the deductively correct one), which amounts to the same thing as considering the determination a legal one.

B. Contract Interpretation Principles

In this section I will apply the general principles of the fact/law distinction to contract interpretation by approaching contract interpretation at the level of what I call "principle." "Principles" in this schema are to be distinguished from "rules," which are more detailed—what we often call black letter rules. Principles express norms that appear to show that there is a consistent social purpose underlying the rules, not just a set of arbitrary postulates.[6] "Principles" are also to be

4. My discussion here draws heavily from HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 349-60 (William Eskridge, Jr. & Philip Frickey eds., 1994).

5. Virtually all questions of historical fact are determined inductively, as inferences to be drawn from evidence (e.g., how fast was the car going at the time of the accident?). So are all questions concerning somebody's subjective state of mind. But ascertaining legislative intent, also a decision requiring an inductive approach, is considered a question of law.

6. For example, the expectation principle shows that the following rules all reflect the same vision of what constitutes an appropriate remedy for a victim of breach of contract: the contract-market price difference, U.C.C. §§ 2-708(1) & 2-713; lost profits of the lost volume seller, U.C.C. § 2-708(2); specific performance for the buyer, U.C.C. § 2-716; and the seller's suit for the price, U.C.C. § 2-709.

distinguished from "policies," a term I use to describe the social justifications for principles and rules. In this schema, principles, like rules, may simply be postulated—they are "the law" after all—but policies are always subject to debate.

The most commonly used principle in contract interpretation is that words and acts are to be interpreted from the perspective of the listener, not the speaker or actor. This is called the objective approach to interpretation. And normally the objective approach is applied by asking not what the listener understood, but what a reasonable person in the position of the listener would have understood, or perhaps more precisely believed the speaker to have intended. This was the approach advocated by Williston and Holmes,[7] and although he disagreed with Williston on many points, it was also the approach advocated by Llewellyn.

Application of this objective interpretation principle should not be understood as requiring a finding of historical or pure fact. There is no existential reality to the reasonable person; nor is ascertaining her understanding or belief a matter of taking a statistical average.[8] Rather, applying the objective interpretive principle is better understood as an instance of law application, the specification of a standard similar to application of the negligence principle in tort law. In accordance with the usual approach to law application questions, when contract interpretation is particular to a single contract, the issue of interpretation of even a written contract should be deemed a question of fact, appropriate for jury decision when there are competing plausible interpretations. One might justify an exception for standard form contracts (SFKs), especially insurance contracts, because these contracts are frequently the subject of multiple cases, and for contract language that appears in many contracts (e.g., "time is of the essence"). In each circumstance the interpretation of contract language in one case could influence the outcome of a subsequent case, and so interpretation could be considered general.[9] But in the great number of contract cases in which the language to be interpreted is idiosyncratic to the contract at issue, at the level of principle the interpretation question should be considered one of fact. The

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7. Although Holmes is often identified as the source of the objective approach to interpretation, it has been conclusively demonstrated that its roots are much older. *See* Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427 (2000).

8. *See* Judge Newman's coneurrence in *Antilles Steamship* for a good discussion of this point. 733 F.2d at 202-07.

9. Language used repetitively in standard form contacts, or as a common phrase in otherwise differentiated contracts, need not always be interpreted similarly. Under the objective approach to interpretation, the question is how a reasonable person in the position of the non-drafting party would have understood the language. That will depend in part on the social context in whieh the non-drafting parties find themselves, and that context will vary between cases. Still the interpretation in one case could influence (though not completely eontrol) the outcome in another case, and that potential influence can justify considering the interpretation issue to be a legal one.

generally stated rule with respect to written contracts is to the contrary, however.

There are several competing alternatives to the objective approach as a basic principle for interpretation. A few eommentators still advocate inquiry into the existence of a subjective meeting of minds as the first step in any interpretive process.[10] Findings of subjective intent are always particular and should be regarded as findings of fact according to the general principles guiding the fact/law dichotomy. It is more common today to accept that a divergence between parties in their subjective understandings of contractual meaning is commonplace. In such circumstances, it is argued, the contract should be interpreted consistent with the understanding of the party with lesser fault or responsibility for the divergence in subjective understandings.[11] Determining who is lesser or more at fault should probably be considered a law application question. A finding of fault is never a finding about some observable event; it is more like determining what a reasonable person would understand the writing to mean, which I also consider a law application question. As a law application matter the determination of relative fault could be considered to raise either a particular or general matter. If the finding of relative fault is based on a very contextualized inquiry into the circumstances of the particular case, then it is particular, with little possibility that it will set a precedent for other cases, and should be considered a finding of fact. If relative fault is determined on the basis of more general propositions, such as that the party drafting a written contract is responsible for possible ambiguities and so they should be interpreted against her (the *contra proferentum* rule), then a general proposition with precedential force is being established and the determination should be considered a legal one.

The fault approach to interpretation is very similar to gap filling. Gap filling is the term used to describe the process by which a court "implies" a term for a contract when it is agreed the parties' contract contains nothing on point.[12] It is generally accepted that gap filling raises a law issue, but there has been little discussion of why this is so.[13]

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10. 5 CORBIN ON CONTRACTS §§ 24.5, 24.6 & 24.7 (1993); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 305-07 (1986).

11. RESTATEMENT (SECOND) OF CONTRACTS § 201 (1979). This is also consistent with the Goetz/Scott error reduction approach. Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261 (1985).

12. For a discussion of the relation of interpretation and gap filling, see E. ALLAN FARNSWORTH, CONTRACTS 497-503 (3d ed. 1999); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 204 (1979). This section specifically states that in gap filling the term is to be supplied "by the court."

13. The traditional approach to gap filling is to ask what terms reasonable persons in the position of the parties would have negotiated if they had taken the time to do so. This approach asks a question similar to the question raised by an objective interpretation of a written contract. But because we commonly answer it for a category of contracts

The final principle of interpretation to be discussed here is the so-called plain meaning rule. If words are deemed to have a natural meaning, then interpretation of a writing may be viewed as raising a legal issue because the reasoning process is deductive. There is only one right answer, even assuming the words being interpreted are idiosyncratic and no precedent is being set. Even if the court does not consider words as such to have a natural or plain meaning, it may wish to anoint certain words when appearing in a contract with a given meaning (e.g., "time is of the essence"). This enables future parties to contract knowing that certain words will be interpreted in a particular way, and that if they intend a different meaning, they need to choose different words. In such circumstances, interpretation of a contract using the anointed words[14] might be understood as applying a plain meaning principle, though in fact it is an earlier decision and not a dictionary that gives the words their "plain" meaning. In either case, however, interpretation of the contract requires only deductive reasoning and for that reason should be considered to raise a question of law.

C. Conclusion

The often stated rule is that the interpretation of a written contract is a question of law. There are many exceptions to this statement, as will be detailed in the next section. In this section, however, I have evaluated the general proposition from the point of view of what I call "principle." Unless one adopts a plain or natural meaning approach to interpretation, making the reasoning process deductive, the better arguments from principle are that the textual interpretation of a writing raises a fact question whenever the conclusion is particular to the individual case and contract. When interpreting words that appear in many contracts, or where the interpretive task involves the assiguing of fault for a lack of a mutual subjective understanding about the meaning of a contract, these arguments may be less strong. From the perspective of principle, the textual interpretation of written contracts, even assuming no relevant extrinsic evidence, should sometimes be given to the jury but not always.

(with an "off the rack" rule, like the implied warranty of merchantability), the answer given sets a precedent and is properly considered a law question according to the usual standards for drawing the fact/law dichotomy. The same conclusion can be drawn for the same reason if the more contemporary "penalty default" approach is taken to gap filling. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

14. Of eourse, a court decision giving particular words an anointed meaning creates a general rule and hence should be considered a "legal" decision.

II. THE BLACK LETTER LAW AND THE LAW-IN-ACTION: WHY JURIES OFTEN INTERPRET WRITTEN CONTRACTS

Whatever the professed rule about interpretation of written contracts raising solely a legal issue, it is beyond question that juries frequently decide many cases involving written contracts. Marc Galanter's contribution to this symposium makes clear that not only is there a considerable amount of litigation concerning contract, but well over twenty-five percent of the cases that go to trial are tried to a jury.[15] We do not know how many of these cases involved written contracts, but a considerable percentage must have.

People who know contract law should not be surprised that many contracts cases go to a jury. First, despite the importance attached to the baseline rule about the interpretation of written contracts raising legal issues, the parol evidence rule frequently permits "extrinsic evidence" to be considered even though the contract is in writing. Extrinsic evidence includes both evidence about trade customs and evidence about interchanges between the parties—concerning the course of performance of the current contract, the course of dealing in prior transactions, or the bargaining history of the current contract. Very often this extrinsic evidence will not be solely documentary and will require evaluation of oral testimony about conversations between the parties. Evaluation of oral testimony about conversations commonly requires a jury determination to deal with issues of credibility. Unless a special verdict is used, the jury will also be directed to ascertain the terms of the contract, weighing both the writing and the extrinsic evidence that is deemed credible in applying whatever interpretive principle (objective, subjective, etc.) is deemed to govern interpretation. A second reason that contract cases are often sent to juries is because issues other than interpretation (e.g., fraud) require jury determination. There will commonly be a contested interpretation issue in these cases, which the court may decide as a matter of law, instructing the jury on what they are to assume that the contract means. Unless the court uses jury control devices like special verdicts, however, the jury will have the opportunity to "nullify" the court's interpretation, contained in the jury instructions, in rendering a general verdict.

In the balance of this part, I will develop more extensively the two points summarized in the previous paragraph.

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15. Marc Galanter, *Contract in Court; Or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577. Table 2 shows that over 50% of the tried contract cases in federal courts are tried to a jury. *Id.* at 594. Table 4 is drawn from a large sample of state court cases. *Id.* at 600. In 1992, 29% of the trial verdicts in contract cases reported in that table were tried to a jury. In 1996 the comparable figure was 37%.

A. The Parol Evidence Rule

There is nothing original in this account of the parol evidence rule (PER), which is intended for readers not already versed in the vast literature about the rule. The first issue in any PER analysis is to determine whether the writing should be privileged as a source of contract terms. If the writing is privileged, then other evidence of the parties' intentions is not permitted to prove a term of the contract that contradicts the writing. A writing that is privileged in this respect is called an "integration" (partial or final) in the language of PER analysis, meaning that it is intended as the final expression of the parties' agreement. Most written contracts are deemed integrations.

Llewellyn advocated a major challenge to this tradition. He believed that in most cases both the writing and any relevant extrinsic evidence should be considered, with the court ascertaining which evidence best pointed to the parties' intentions.[16] The mere fact that the writing was the final step in the contracting process, and was intended to signify that an agreement had been reached, should not privilege the writing as a source of terms, in Llewellyn's view. Despite arguments that have been advanced that Llewellyn succeeded in getting his view incorporated into the UCC's definition of "agreement"[17]—a pervasive term in the Code—virtually all courts reject Llewellyn's view.[18]

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16. More properly, how a reasonable person would understand the parties' intentions, since Llewellyn was an advocate of the objective approach to interpretation.

17. U.C.C. § 1-201(3). *See* Dennis Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169, 191-98 (1989); see *also* Zipporah Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987).

18. Llewellyn was able to get written into Article 2's section on the parol evidence rule the provision that in all cases the terms of a writing may be "explained . . . by course of dealing or usage of trade . . . or by course of performance." U.C.C. § 2-202(a). On the surface this provision would appear to permit consideration of extrinsic evidence—which commonly raise jury issues—in virtually every case. However, U.C.C. §§ 1-205(4) and 2-208(2) state that in the event of a conflict between the written terms and trade usage, course of dealing, or course of performance, the written terms prevail. In aecordance with these provisions, most courts find that if the written terms have a clear or plain meaning, summary judgement is appropriate, and jury consideration of the meaning of extrinsic evidence is not necessary. Once the terms contained in a writing are privileged, extrinsic evidence ean be considered only if the writing is deemed ambiguous or incomplete, an issue to which I next turn in the text. Interestingly, the Convention on the International Sale of Goods provides differently with respect to the preeminence of a writing in determining meaning, adopting instead a position very similar to the one advocated by Llewellyn. *See* MCC-Marble Ceramie Ctr. v. Ceramiea Nuova D'Agostino, 144 F.3d 1384 (11th Cir. 1998).

This account of the law suggests that applieation of the PER under the Code is not much different from the common law. Dean Robert Scott has recently published an important article in which he contests this view. He claims that under the Code courts consistently take what I describe (in the subsequent text) as a soft PER approach, whereas at common law "a strong majority of jurisdictions" take a hard PER approach. Robert E.

Because writings are privileged, extrinsic evidence becomes relevant to interpretation only in two circumstances. If the writing is ambiguous, extrinsic evidence can be considered to resolve the ambiguity. If the writing is incomplete, extrinsie evidenee can be considered to supplement the written terms. The great issue in PER scholarship, debated endlessly over the years, and with ample case law available to support all points of view, is how a court should determine whether a writing is ambiguous or incomplete.[19] Advocates of a hard PER, particularly Williston, contend that the initial decision whether a document is ambiguous or incomplete must be made from the document itself, without consideration of extrinsic evidence bearing on the issue. Advocates of a soft PER, including most prominently Corbin, favor hearing all relevant extrinsic evidence, including the bargaining history of the contract, before deciding whether there is ambiguity or incompleteness in the writing. Even soft PER advocates normally will have a judge make the initial deeision (sometimes called a "provisional review") about the ambiguity or incompleteness of the writing, a result consistent with the general rule that interpretation of a writing is a legal issue.[20] However, hearing all extrinsic evidence before reaching that decision can greatly affect the result. As all linguistie scholars know, language in context is often understood quite differently than language which appears solely in a decontextualized, written form. Written language that appears to have a plain meaning when considered alone suddenly appears ambiguous when evidence suggests that the parties understood the language to have a different meaning.[21] Once it is determined that there is an ambiguity or incompleteness, the question of how to resolve the ambiguity or what terms were intended to supplement the written contract is commonly sent to the jury, because the determination is based in part on contested extrinsie evidence.

This description of the PER emphasizes the existence of conflicting

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Scott, *The Case For Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 866-71 (2000). An Illinois Supreme Court decision confirms this distinction between Code and non-Code law in the application of the PER. J&B Steel Contractors v. C. Iber & Sons, 642 N.E.2d 1215 (Ill. 1994). However, this case has not been subsequently cited in Illinois, and a number of lower court decisions in Illinois have taken a soft PER approach in non-Code cases. *E.g.*, Insurance Co. of Ill. v. Stringfield, 685 N.E.2d 980 (Ill. App. 1997). I extensively discuss Illinois law on the PER at notes 68-79 *infra* and accompanying text, concluding that there is a major inconsistency in the application of the PER in Illinois. The vast majority of commentators note a similar inconsistency in the case law throughout the country and lament it. *See* note 19 *infra*. I know of no contemporary commentator other than Dean Scott who believes that distinguishing Code and non-Code cases can bring order to seeming disorder in the case law.

19. For good summaries of the arguments, see John Calamari & Joseph Perillo, *A Plea For a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333 (1967); Eric Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 534-40 (1998).

20. *See* FARNSWORTH, *supra* note 12, at 480-83 (discussing California law).

21. Masterson v. Sine, 436 P.2d 561 (Cal. 1968), is a good example of this point.

precedents but does not quite do justice to the extent of inconsistency in the law. It is not just that some states follow one rule and other states another, but that very often within a single jurisdiction there are both hard and soft PER decisions, with limited basis at best for determining when to apply one line of precedent as opposed to another. To quote from a recent decision:

> To answer these two questions [raised by the parol evidence rule], we, in Missouri, no different than the courts in most other jurisdictions, have used a variety of principles, chosen randomly with no consistency, from the common law, the treatises of Professor[s] Williston and Corbin, and the First and Second Restatement[s] . . . . [T]he random selection[s] of principles . . . has made the parol evidence rule in Missouri, no different than in most other jurisdictions, a deceptive maze rather than a workable rule.[22]

B. Other Contract Issues

Contracts cases can go to the jury for decision on issues other than interpretation questions. There will commonly be an interpretation issue in these cases, which the court may decide as a matter of law, instructing the jury on what they are to assume the contract means. Unless the court uses jury control devices like special verdicts, however, the jury will have the opportunity to "nullify" the court's interpretation in rendering its verdict. Those who fear jury irrationality are probably convinced jury "nullification" is a real risk. In this part I will describe a number of reasons a case can go to a jury in a way that gives the jury the ability to nullify a judicial interpretation of the contract. I exclude damages issues because of the possibility that a case will not submitted to a jury on damages issues until after a verdict on liability.

A contested fact issue may arise in the litigation concerning one or both parties' performance of the contract—for example, when a delivery or payment was made, or whether a performance met required quality standards.[23] If the evidence involves the testimony of witnesses, the court

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22. Jake C. Byers, Inc. v. J.B.C. Invs., 834 S.W.2d 806, 811 (Mo. Ct. App. 1992). I learned of this case from its citation in Posner, *supra* note 19, at 540 n.17. Posner's own summary of the law is: "In virtually every jurisdiction, one finds irreconcilable cases, frequent changes in doctrine, confusion, and cries of despair." *Id.* at 540. Robert Scott has recently dissented from this conventional view of the state of the law, arguing that except in Code cases there is widespread acceptance of a hard PER rule. *See* Scott, *supra* note 18, at 869. I doubt that Scott's account of the state of the law is accurate, as I state in note 18, *supra*.

23. An excellent example is *Binks Manufacturing v. National Presto Industries*, 709 F.2d 1109 (7th Cir. 1983). The case concerned the sale of an industrial machine that did not function properly. Seller claimed the machine malfunctioned because of

will rarely be able to direct a verdict, because the credibility of the witnesses is likely to be an issue. The judge might charge the jury about what each party's obligations were under the contract—treating issues of interpretation as legal—but if the jury disagrees with these interpretive conclusions, it could impose its will in the form of a general verdict.

Cases can also go the jury on waiver or modification issues. It is generally accepted today that the parties can modify a contract, or one party can agree to waive a contract right, without a new consideration, or even any reliance on the post-contract promise. Furthermore, most clauses in an original written contract requiring any waiver or modification to be in writing are not enforced (because, presumably, even the written modification only clause can be waived orally).[24] The evidence relating to waiver/modification and the extrinsic evidence bearing on interpretation can be similar. Normally to be relevant to an issue of interpretation, we think that the evidence must pertain to the period before formation. But this is not always true. Course of performance evidence can provide insights into what the parties intended when the contract was made. The very same evidence may suggest a waiver or modification. Even if the PER excludes consideration of such evidence when interpreting the contract, the same evidence may be admitted to establish a waiver or modification. The jury verdict may be cast in terms of waiver or modification, but the jury may well have reached the same result as an interpretation of the original contract if allowed to do so.[25]

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inappropriate installation and misuse of the machine by the buyer. Buyer claimed that the malfunction resulted from inappropriate design or manufacture of the machine. The parties introduced conflicting evidence as to the exact cause of the malfunctions, and for this reason the case necessarily went to the jury. Before sending the case to the jury, the court applied the parol evidence rule to exclude evidence, sought to be introduced by the buyer, bearing on what the parties intended to be the designed capacity of the machine. The excluded evidence suggested that the parties intended a greater capacity than suggested by the more evident meaning of a written contractual term. If the buyer's theory on the intended capacity of the machine had been accepted, it would have undercut seller's theory that the machine malfunctions were caused by the buyer's misuse of the machine. Relying strictly on the plain meaning of the written term, the court instructed the jury as to the required capacity of the machine in a way that favored the seller. In the case the jury ruled for the seller, but if the jury had believed the machine should have had a greater capacity than the court instructed was required, it could have given a general verdict for the buyer. If it had, the verdict would have been irreversible, because there was evidence that could have led the jury to conclude that the machine was improperly manufactured. Application of the parol evidence rule prevented the jury from hearing all the evidence that might have persuaded it to hold the machine to a higher design standard, but it did not ultimately prevent it from making a judgment about the required design capacity of the machine.

24. U.C.C. § 2-209; *see* David V. Snyder, *The Law of Contract and the Concept of Change: Public and Private Attempts to Regulate Modification, Waiver, and Estoppel*, 1999 WIS. L. REV. 607, 645-49.

25. Oral promises made during the bargaining preceding the signing of a written contract can never provide the basis for a waiver or modification argument, but they can

The parol evidence rule is usually not applied to bar introduction of extrinsic evidence relevant to a claim that the contract is invalid for duress or fraud.[26] Especially in the case of fraud, it is often possible to get before the jury evidence that could bear on interpretation of the contract, even if in addressing interpretation issues the written terms are considered privileged over other evidence of the parties' intentions. A recent Wisconsin case provides an excellent example. Extrinsic evidence about bargaining history showed that the parties traded several written drafts of a proposed employment contract. In the final draft, one party changed a term that had been previously negotiated and discussed, and the other party signed the contract without noticing the change. The court held it was fraud to present the written draft knowing the other party thought it contained a different term than was in fact written, and it invalidated the contract.[27] Were it not for the tradition of privileging the writing, the court could have relied on the extrinsic evidence to hold that the contract properly interpreted included the earlier negotiated term, before it was secretly and unilaterally altered in the writing.

C. Conclusion

I earlier suggested that at the level of principle it is not possible to justify a general rule that interpretation of a written contract raises exclusively legal issues. And in this section I suggest that in fact many interpretation issues get to the jury. At the level of black letter law and legal practice, there is no consistency in the allocation of the interpretive task to judge or jury. At the level of rule as well as principle, this is an area where the law can be characterized as confusing and conflicting. I will next turn to discussion of policy to see if clearer guidance can be found at that level of analysis.

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provide the basis for a promissory estoppel argument. For example, the preecontractual oral statements in *Mitchill v. Lath*, 160 N.E. 646, 647 (N.Y. 1928) (concerning removal of the ice house), excluded from consideration in interpreting the written contract by the PER, could today be held to create an obligation independent of the contract because of promissory estoppel. The jury issue would then have been whether the oral promise, enforceable by promissory estoppel, was really made, and if so, what were its terms. While such use of promissory estoppel is possible, the evidence suggests that the promissory estoppel doctrine has not in fact been frequently employed by courts in this fashion. Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1308-30 (1998). Hence this avenue for getting interpretive issues to the jury appears not be an empirically important one.

26. Some courts will apply a hard PER to bar extrinsic evidence suggesting fraud if the evidence seeks to show that a representation was made that conflicts with the provisions of a written contract. This is a minority rule, at least in the absence of a merger clause in the contract. *See* FARNSWORTH, *supra* note 12, at 442-43.

27. Hennig v. Ahearn, 230 Wis. 2d 149, 601 N.W.2d 14 (Ct. App. 1999); *cf.* Market St. Assoc. v. Frey, 941 F.2d 588, 597 (7th Cir. 1991) (bad faith for one party to a contract not to call other party's attention to a term of contract requiring it to take certain actions to avoid unfavorable consequences).

III. POLICY: THE JURY

United States makes greater use of the civil jury than any other country. It is rarely used today in England, the origin of most of our legal traditions. It is common to think of the civil jury as a reflection of this country's willingness to abide by the results of popular democracy, or of our faith in the wisdom of the common person. After all, the right to civil jury in enshrined in both state and the federal constitutions. Yet at the same time there is much evidence of ambivalence about civil juries. The federal guarantee of a civil jury has never been applied to the States through the Fourteenth Amendment. State and federal constitutional standards governing the jury have changed significantly over time. At one time the jury was empowered to find the law as well as apply it.[28] Today, the fact/law distinction is generally applied to define the jury's zone of competence, and this is a distinction thought to have constitutional significance. Perhaps in the future, however, this constitutional requirement will prove to be malleable, just as courts have now constitutionally validated six-person juries and non-uniform jury verdicts.

For the balance of the Article I will put aside constitutional considerations and address the appropriate role of the jury in contract interpretation strictly as a policy issue. Especially in recent years, there have been many criticisms of the civil jury, which seem to focus around four points. (1) Because jurors are not well informed on the ways of the business world, they will not be able to understand or resolve sensibly the sophisticated questions that often arise in contract law, including questions about what contract terms the parties intended.[29] Not only will this lack of sophistication sometimes cause a contractual interpretation at variance with the parties' true intentions, but, especially when combined with the next stated jury concern, it leads to an unpredictability in the result of litigation. (2) There is a constant fear that jurors will be influenced by perjured testimony, especially about precontractual bargaining. Jurors are thought to be more easily swayed than judges by persuasive but dissembling witnesses.[30] (3) There is concern that juries

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28. *See Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1411-21 (1997).

29. Llewellyn was sympathetic with this view. He favored a fact-oriented jurisprudence that would allocate many issues to the jury if the fact/law dichotomy continues to be used to define the jury's jurisdiction. Reflecting his skepticism of the common jury, he proposed that special merchant juries be formed for contract cases, but his proposal quickly died in the article 2 drafting process. *See* Wiseman, *supra* note 17, at 512-15.

30. The idea that fear of perjured testimony underlies the exclusion of evidence under the PER is commonly discussed. *E.g.*, Calamari & Perillo, *supra* note 19, at 341-42. Fear of perjured testimony would continue to exist even if civil juries were abolished, but

are biased in favor of the less endowed party, without proper appreciation that creating inefficiencies and imposing unnecessary costs on a business can increase the costs of all those entering into contracts with the business, because the extra costs imposed by the jury (resulting from the jury decision) will simply be passed along. (4) Jury trials are thought to be more expensive than bench trials. Partly this is because jury trials take longer, on the average, than bench trials. It is also because discovery tends to be more extensive in jury trials than bench trials, as parties prepare more thoroughly for what is usually a well-rehearsed performance (a jury trial) and seek to avoid the potential embarrassment of unanticipated testimony at trial.[31]

There has developed in recent years a considerable revisionist literature calling into question some of these criticisms. The revisionist literature is mostly directed at the use of civil juries in tort cases. Empirical evidence suggests that civil jury verdicts in tort cases are not much less predictable than, or very different from, judicial decisions.[32] If true, it undercuts many of the criticisms of the civil jury stated above, but it is a matter of speculation whether such findings would apply as well to jury decisions on contract interpretation issues. It is certainly possible that there is a greater variance between jury and judge dispositions in contract cases than there are in tort cases. Evidence has also shown that the time from filing to disposition is not longer in jury cases than in judge cases.[33] However, I am not aware of evidence countering the common assumptions that in jury cases the lawyers spend more time in the courtroom and there is likely to be more discovery. If those assumptions are true, then it is likely that total litigation costs are higher in cases tried to the jury than in cases tried to a judge. Since most cases are settled, perhaps these extra costs are not so significant as a general policy matter,

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there might be a greater willingness to rely on the trial process to detect untruthful testimony, as opposed to excluding testimony that might be perjured by evidentiary rule.

31. *See* George Priest, *The Role of the Civil Jury In a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161, 191-200. Professor Priest also argues that by enhancing the uncertainty of outcome—because he believes that jury verdicts are less predictable than judicial decisions—the presence of juries decreases the settlement rate (as compared to what it would be if juries were abolished) and inereases overall costs in that way. *Id.* at 199 ("The principal benefit from shifting routine litigation from the civil jury to the bench calendar is that the shift is likely to increase dramatically the settlement rate.").

32. *See* Roscllе Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 812 (1999):

> The dominant theme of these findings is one of considerable similarity across the various groups of decisionmakers in the structure of thinking about injury severity and awards . . . . These findings suggest that commonly voiced speculations about the inability or irrationality of jurors in evaluating injuries are misconceived, because on that task jurors were nearly indistinguishable from judges and lawyers.

33. *See* Marc Galanter, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201, 206 (summarizing other studies) ("[S]tudies showed that juries could not be credited with delay and congestion.").

though they are probably significant on some occasions to the parties to the litigation.

Civil juries have been passionately defended as contributing importantly to the quality of justice. Many of the reasons given for why juries enhance the quality of justice have little or no applicability for contract litigation, however. Galanter, for example, sees juries as providing an outside perspective in tort litigation where all the other participants are likely to be repeat players. The plaintiff is likely represented by a member of the plaintiff's bar, the defendant by an insurance company and its counsel, and the judge is regularly involved in tort cases. A jury can provide a fresh perspective on such recurrent problems as how pain and suffering should be valued or how much should be received for loss of a leg or marital consortium.[34] Perhaps a similar argument could be made with respect to the interpretation of some standard form contracts (especially insurance contracts), but in general I believe Galanter's argument has less applicability to contract litigation. Another defense of juries in tort cases is that some cases present "tragic choices" to the courts (e.g., how to value lessened life expectancy as a result of medical malpractice), and in such circumstances it is better to avoid judicial decision, in order to avoid the delegitimating effects of a judicial decision where there is a conflict of values, strong feelings about how the case should come out, and no way to convince anybody that the result reached is logically correct. It is more an argument about preserving the political legitimacy of courts than an argument that juries improve the quality of the results reached in litigation.[35] However meritorious, it is not an argument that would appear to have much application to contract cases.

I am convinced that, although not frequently written about in the law reviews, much of the favorable feeling for civil juries is derived from a belief that they are predisposed to rule in favor of the little guy, and more so than judges are. Empirical justification for a systematic jury predisposition in this direction is hard to come by, though surely some juries are so disposed. This predisposition may seem appealing if one believes that better endowed interests exert more influence on the content of legislation, or even the Restatements,[36] than they should have. The

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34. *Id.* at 256-57.

35. *See Developments in the Law—The Civil Jury, supra* note 28, at 1434-36; *see also* Oliver Wendell Holmes, Jr., *Law in Science and Science in Law,* 12 HARV. L. REV. 443, 457 (1899).

36. The influence of well endowed interests on the drafting of the Restatements, and proposed uniform laws (like the UCC), is discussed in Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures,* 143 U. PA. L. REV. 595, 597 (1995) ("[C]lear, bright-line rules that confine judicial discretion [are proposed] . . . when and because dominant interest groups influence the [uniform laws] process. These bright-line rules ordinarily advance the interest group's agenda."); *see also* Robert E. Scott, *The Politics of Article 9,* 80 VA. L. REV. 1783 (1994); note 64 *infra.*

jury may counter-balance in the law application process a bias deemed inappropriate in the law formulation process, more so than judges would acting alone. This justification for a civil jury, to the extent deemed valid, has considerable application to contract law, and I will return to it in my next section, where I discuss contract law policies.

A final policy issue relevant to the existence of civil juries concerns the inefficiencies that result in appellate practice because of the presence of the jury. Because the fact/law distinction is used to define the compctencies of the jury, trial judges issue detailed instructions to juries about what legal principles they should apply when reaching a verdict. The same fact/law distinction is used to define the competencies of the appellate court, making the trial judge's instructions but not the jury's verdiet subject to appellate review. If an appellate court decides the instructions were wrong, the appropriate response is to dircct a new trial, before a new jury, with new instruetions. The harmless error doctrine is designed to avoid a new trial where it is unlikely that the erroneous instructions had any impact on the jury's verdict, but few think the harmless error doctrine can work perfectly, limiting new trials only to situations where erroneous instructions had an impact. As a consequence, some appeals are taken, on the ground of erroneous jury instructions, not because the party appcaling believes a new instruction in itself will have much effect, but because a new trial means a new jury, and the new jury may come to a different conclusion about factual issues.[37] The result is probably more appeals, and more retrials, than there would be if civil juries were abolished, and upon appellate remand the case was returned to the same judge who issued the original verdict. In such a system parties would have not have the same incentives to appeal raising a marginally relevant legal issue, because a consequence of winning would not be an opportunity for another fact finding by a different decision-maker.

In conclusion, most of the policy arguments respecting the civil jury favor removal of contract interpretation issues from the jury's domain, a result that would bring United States law into conformity with the law of

37. A potential example is *Sullivan v. O'Connor*, 296 N.E.2d 183 (Mass. 1973). In this case the defendant appealed an adverse jury verdict on the ground that erronous instructions were given respecting the measure of damages (for breach of a guarantee of the outcome of cosmetic surgery). Richard Danzig has provided us with extensive background on this case, including interviews with the jurors. RICHARD DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW 15-41 (1978). That background makes clear that the jury paid little attention to the trial judge's instructions concerning the measure of damages, and that they would almost ccrtainly havc reached the same verdict whatever those instructions. In the end the appellate court avoided the nced for another trial, cven though the instructions were erroneous, because they found that the instructions were prejudicial to the plaintiff, not the defendant, and the plaintiff was prepared to accept the jury's verdict. There is little doubt, however, that the defendant's motive in taking the appeal was to obtain an opportunity to have the case heard before another jury; he was under no misapprehension that erroneous jury instructions had influenced the first jury adverscly to the defendant.

other nations. The strongest arguments for retaining the civil jury are applicable to tort but not contract cases. The exception is the argument, strongly felt but not often articulated or empirically validated, that juries perform a redistributional function. I suspeet that the preservation of the civil jury in contract cases is partly due to such feelings, though one cannot discount the forces of inertia which make it difficult to discard received traditions. It is those received traditions which underlie constitutional guarantees of a civil jury, guarantees that appear malleable but nonetheless partly account for the jury's continuing role in contract litigation.

IV. POLICY: CONTRACT LAW

I will consider three basic contract law policies, in an effort to assess the appropriate role of the jury and the fact/law distinction in contract interpretation: autonomy (which includes concerns both about freedom of contract and protection of reasonable expectations); efficiency in contract performance, which often counsels certainty (or predictability) for law; and redistribution (called fairness by some).

A. Autonomy

Autonomy policies stress the importance of individualism and self-determination. They include the freedom of contract values—that parties should be allowed to set the rules of their bargain—that have been fundamental in our contract law for two hundred years. They also include protection of reasonable expectations and reliance, on which there has been greater emphasis in the twentieth century.[38] Autonomy is often defended on (*ex ante*) efficiency grounds. Ignoring the possibility of

38. *See* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979). To some it is inconsistent with autonomy values to find a person liable for breach of a promise that he did not intend to make in order to protect another person's reasonable reliance, but I disagree. Autonomy values imply that all individuals should be secure from unauthorized injury to person and property, and that in the name of individual freedom the state should guarantee such security. It is not a great leap to argue, in the name of individual autonomy, that individuals should also be protected from harm to their economic interests caused by acting on the misleading statements of others, and that is the essential basis for an emphasis in contract law of protection of reasonable expectations and reliance. Finding a defendant liable for fraud, or for the failure of a representation about the future that the defendant did not intend to be promissory but which was reasonably understood to have been so, is analogized in this way to thinking of tort liability for battery or trespass. The so-called "fault" theory of contract law, analogizing contractual liability to tort liability, is often associated with Malcolm Sharp. *See* Malcolm Sharp, *Promissory Liability I*, 7 U. CHI. L. Rev. 1 (1939). Professor Sharp was strongly individualistic in his basic political philosophy, and supported the position stated in the text that autonomy values are consistent with protection of reasonable reliance in contract law.

externalities, and assuming both parties are well informed, standard economic theory suggests that parties to a contract have the ability and the greatest incentive to set the terms that will maximize the social benefit from the cooperative enterprise provided for in the contract. If courts or others were empowered to establish those terms, they would not be likely to do as good a job.

Respecting autonomy values forces consideration of Llewellyn's idea that the writing should not be privileged when determining the terms of a contract.[39] If one observes how contracting parties actually behave, there are many circumstances in which what they say to each other, or how they behave, is much better evidence of what they mutually intend than what is said in the writing. The writing is often drafted by one party and not carefully read by the other, because the non-drafting party does not expect that the drafting party will attempt to enforce a contract at variance with common understanding.[40] In other circumstances, of course, the writing deserves to be privileged, as the best evidence of what the parties intended. From an autonomy perspective, not all contracts should be treated the same in deciding whether the writing is to be privileged.[41]

A primary difficulty with this Llewellyn approach is that it makes all contract interpretation a factual question. Every interpretation issue raises a question of what is the best evidence of the parties' intentions (or what reliance is most reasonable), and extrinsic evidence about bargaining history and perhaps course of dealing or trade usages is likely to be relevant. Consideration of extrinsic evidence often means a jury trial. Llewellyn shared the common skepticism about the ability of juries to come to sensible judgements in commercial situations. His proposed solution was to create merchant juries—juries of experts[42]—but this solution has not come to pass. In the absence of specialist juries, a person wedded to autonomy values must balance the errors that juries will make against the distortions of true intent that will result from privileging the writing, and applying a plain meaning rule to it, in order to steer decision-

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39. *See supra* notes 16-18 and accompanying text. There is not a great deal of difference in practical application between Llewellyn's approach to interpretation and the approach of those who advocate a soft PER, like Corbin.

40. The recent Wisconsin case, *Hennig v. Ahearn*, 230 Wis. 2d 149, 601 N.W.2d 14 (Ct. App. 1999), almost perfectly illustrates this point. The case is discussed in text accompanying *supra* note 27.

41. The question is not whether the writing is intended as the final expression of the parties' agreement. This is the question posed by the integration issue in application of the PER, and the answer is that the writing almost always marks the conclusion of the negotiations. It is in that sense the parties' final expression. The issue is whether the writing should be privileged in ascertaining the terms of that agreement. Many written contracts intended to symbolize the end of negotiations (e.g., the signing of a sales contract) are not intended, at last by the non-drafting party, as the best evidence of what the deal is.

42. *See* Wiseman, *supra* note 17, at 512-15.

making to judges by framing the questions as ones of law.[43] Some have argued that the adoption of rigid rules of interpretation by the courts, based on a plain meaning principle applied to a writing, will not prevent well-informed parties from achieving their ends. The parties will need to express their agreement in a way that courts will interpret consistently with their intentions. This will involve costs, as the parties need both to inform themselves of the rigid interpretive rules and negotiate the written language that will be interpreted consistently with their intentions. For some parties these costs will be less than the costs of risking erroneous jury interpretation of their intentions. For these parties, a plain meaning rule applied to privileged writings will be a superior way to achieve autonomy values.[44]

Framing the interpretation debate in this way likens a plain meaning approach to a formality. A standardized interpretation of particular written words (e.g., "time is of the essence") creates a "channel" by which the parties can achieve the mutual goals, with little risk that intentions will be frustrated by judicial or jury error.[45] In the latter part of the twentieth century, the majority of academic commentators have disapproved mandated formalities. Their concern has been that requiring formalities prevent courts from effectuating the parties' true subjective intent, or from protecting the most reasonable reliance in the very many cases in which parties are either unaware of the need to express their agreement in a formalized way or chose not to take the trouble to do so because at the time of contract formation the risk of future litigation

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43. Robert Scott has made an argument for what he calls formalist contract interpretation (what I would call privileging the writing and applying a plain meaning rule to it) without considering the special vagaries of jury decision-making. He is concerned that judges make so many errors in trying to ascertain the parties' intentions from extrinsic evidence that autonomy values are better served by the strategy detailed subsequently in the text. *See* Scott, *supra* note 18, at 871-75.

44. *See* Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781 (1999).

45. *See* Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). This is the classic article on the social functions of formalities in contract law, listing channeling as one of three functions (the others being the cautionary and evidentiary functions). The channeling function seems particularly relevant to the question of establishing standardized interpretative methods that de-emphasize the importance of the parties' subjective intentions. *See* Masterson v. Sine, 436 P.2d 561 (Cal. 1968) (one of Traynor's famous decisions on the PER providing an excellent fact situation for thinking about interpretive rules as formalities). The case concerned whether an option to repurchase conveyed land was assignable. A standardized, formalized interpretation would provide that all written options are assignable, unless expressly stated otherwise in the writing. Such a rule would avoid the risk that courts or juries would erroneously find unassignable options that the parties intended to be assignable; it provides a safe "channel" for parties who want their options to be assignable. But from an autonomy perspective this rule would force the wrong result in cases in which parties expressed the option in writing, without noting their intent that it be unassignable—perhaps because they were ignorant of the legal requirement that any variation from the usual intent (assignability) be noted.

seemed low. For these commentators the costs associated with such results outweigh the costs of erroneous judicial or jury interpretations under particularized or Llewellyn-like rules of interpretation.[46] Ultimately the question whether a formalized or particularized approach to interpretation best achieves autonomy values raises empirical questions about how well contracting parties adapt or would adapt to formalized interpretive rules for written contracts, and how often juries or judges make mistakes applying particularized interpretation rules. It is the kind of empirical question on which empirical investigation can throw light but is unlikely ever to resolve completely. Probably the answer is not the same for all written contracts, so that for some types of contracts (perhaps negotiable instruments) the best way to maximize autonomy values is to adopt formalized interpretative approaches, whereas for other written contracts (perhaps most SFKs involving consumer parties)[47] autonomy values are better served by a Llewellyn-like approach.

B. Efficiency in Contract Performance

The efficiency concerns discussed in the preceding section and often associated with autonomy values are called *ex ante* efficiency concerns. Their focus is on enabling the parties to make accurate judgments about what level of investment in the contractual enterprise will maximize their returns. These investment decisions necessarily involve a comparison of investment alternatives. *Ex ante* efficiency is sometimes called resource allocation efficiency, because the focus is on facilitating the decisionmaker's rational allocation among investment alternatives of scarce resources.

In this section I will focus on a different kind of efficiency concern, which can sometimes suggest contractual interpretations deviating from autonomy values. I call this concern efficiency in contract performance. It is an *ex post* efficiency concern. It assumes that a contract has been entered and that the initial decisions about how many resources to invest in the contractual enterprise have already been made. The parties, however, have yet to perform the contract.

When disagreements arise about the obligations of each party under the contract, resources must be expended to resolve that disagreement. Efficiency in contract performance focuses most importantly on minimizing the costs of that dispute resolution. Relational contract theory

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46. *See* G.H.L. Fridman, *The Necessity for Writing in Contracts Within the Statute of Frauds*, 35 U. TORONTO L.J. 43, 46-48, 61 (1985); Calamari & Perillo, *supra* note 19, at 342 ("The authors believe . . . that the possibility of perjury is an insufficient ground for interfering with freedom of contract by refusing to effectuate the parties' entire agreement.").

47. Bill Woodward's contribution to this symposium discusses this problem at greater length and comes to a similar conclusion. *See* William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971.

teaches that disputes about contract performance will usually be resolved by agreement, with the parties' mutual desire to reestablish trust and to continue a business relationship insuring that the resolving agreement balances the competing interests in some reasonably fair way. Indeed, these same concerns about maintaining trust, in order to facilitate future cooperative endeavors, can cause the parties to agree to alter the original terms of the contract, to the apparent disadvantage of one party and contrary to its enforceable contractual rights.[48] There are some circumstances, however, in which negotiations about disputes that arise during contract performance take place "in the shadow of the law," with either or both parties threatening to take the dispute to court despite the relationship-threatening consequences of such action. In those less common situations, it is quite possible the settlement negotiations will be facilitated if the outcome of any threatened lawsuit is relatively predictable. Standard law-and-economics theory about when cases settle predicts that the more predictable law is, the more likely a lawsuit will be settled without coming to trial.[49]

Settlements of contract performance disputes may not always be best facilitated by predictable law, but that is a topic beyond the scope of this article. I will assume, for purposes of this analysis, that predictable law yields, on average, quicker settlement of disputes and hence greater efficiency in contract performance. I will also assume that efficiency in contract performance is the most important goal, even when it conflicts with autonomy values.[50] The question then becomes how to achieve

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48. *See generally* Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law,* 72 NW. U. L. REV. 854 (1978). Of course the possibility of future modifications is something the parties can contemplate at the time of formation, so it is not always clear that one-sided modifications later the assumptions on which investment decisions were made.

49. George Priest & Benjamin Klein, *The Selection of Disputes for Litigation,* 13 J. LEGAL STUD. I (1984) is commonly cited for this proposition.

50. Autonomy values, associated with *ex ante* efficiency, and efficiency in contract performance, associated with *ex post* efficiency, can be consistent with each other. Lowering the cost of dispute settlement will often both lower and make more reliable the predicted cost of the joint activity established by the contraet, and by doing so will often facilitate more accurate investment allocation decisions. But autonomy values are not always consistent with the goal of efficiency in contract performance. Sometimes contractual parties do not bargain in detail about the best language to express clearly in writing an agreed commitment, either overlooking the advantage in doing so or believing it cheaper to permit the courts to ascertain their true intentions without clear guidanee from the written contract in the unlikely event of litigation. If the predieted cost of dispute settlement is lowered by adopting interpretation rules that prevent a court from enforcing what the parties intcnded, or what one party reasonably believed and relied upon, then there is a tradeoff. *Ex ante* efficiency is eompromised in some circumstances by a departure from the parties' intentions even as it is served in other situations by predictably lowering the cost of contract performance, and it is not clear whether the balance for all transaetions is favorable or unfavorable to *ex ante* efficiency. This potential conflict between *ex ante* and *ex post* efficiency goals could be avoided if it could be established that *ex ante* efficiency is best served by the adoption of a formal requirement for the

predictable law with respect to contract interpretation. The common assumption is that interpretive rules that emphasize plain meaning approaches to written contracts and a hard PER yield greater predictability in judicial outcomes. Partly this is because these rules render irrelevant extrinsic evidence about bargaining history, courses of dealing, or trade usages—extrinsic evidence that will often be conflicting and cause uncertainty about how the conflicts will be resolved. Partly this is because it is hoped these rules avoid the irrationalities of jury decisions on interpretive issues. We have seen, however, that contract cases frequently go to the jury, even if the interpretation issues are resolved as a question of law, and it is far from clear that juries always obey judicial instructions about contractual meaning. If one assumes that juries usually follow instructions about contract meaning, and that judicial decisions about contact interpretation are more predictable than jury decisions on that issue,[51] the result of the plain meaning rule and a hard PER is more predictable law.

Counterbalancing the usual assumption that a hard PER coupled with a plain meaning rule yields more predictable decisions, however, is a concern discussed in my previous section focusing on the jury as an institution. Since this interpretive approach will not prevent jury consideration of many contract cases, it will increase the prospects of appellate reversal of a jury verdict, by increasing the possibility that an appellate court will find error in the trial court's jury instructions on interpretation issues.[52] A Llewellyn-like approach to interpretation, which makes all interpretation questions into factual ones, would make appellate court response to a trial court decision more predictable, so long as appellate courts remain reluctant to reverse factual determinations. Which approach yields the greatest predictability of judicial decision after accounting for the appellate process is not clear.

There is a second contract performance situation in which contract interpretation rules can yield greater *ex post* efficiency. Imagine a large corporation needing to plan for contract performance—e.g., an insurance company organizing claims administration. What characterizes this

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expression of the parties' intentions—a requirement that the agreement be expressed in writing in language having a plain meaning consistent with the parties' intentions. I have discussed earlier the possibility that such a formal requirement would best serve autonomy values—see *supra* notes 44-47 and accompanying text—concluding that the advocates of that position are asserting a position that at least until recently was rejected by a considerable majority of informed observers.

51. It must be the case that the combination of a plain meaning rule and a hard PER keep some cases out of the jury's hands altogether (i.e., permit disposition on summary judgment) in circumstances where alternative interpretive rules would require submission of the case to a jury. Hence, if judicial decisions are more predictable than jury decisions, the effect of a plain meaning rule and a hard PER would be a net increase in the predietability of legal outcomes at the trial level, even if juries do not reliably follow judicial instructions about contract meaning.

52. *Supra* note 37 and accompanying text.

situation is that the individuals making decisions about contract performance are not the same persons who negotiated the contracts. A plain meaning interpretive approach and a hard PER lessen the need that the individuals planning contract performance to communicate with the individuals who negotiated the contract. That can contribute considerably to cost savings within the large organization. It makes possible a bureaucratic scheme that centralizes contract performance decisions while decentralizing contract negotiations, and indeed such schemes are a common form of bureaucratic organization.[53] At the same time it increases the potential that other party to the contract is misled as to the contractual obligations,[54] and that can cause mistaken investment decisions by the other party at the time of contract formation. Which is to say that efficiency in contract performance can conflict with autonomy values and *ex ante* efficiency, as observed above.

C. Redistribution

Contract is a legal device that can increase wealth disparities whenever there is a disparity in the choices or information practically available to the contracting parties. The party with the bargaining advantage will usually be able to appropriate a larger proportion of the surplus created by the contractual exchange. These disparities in choices or information practically available do not always exist but they are very common, especially in transactions memorialized by standard form contracts. Marketplace competition can reduce the advantages that would otherwise be available to the party with better resources or more information. If we let marketplace forces operate unfettered, the extraordinary profits gained by the advantaged parties will attract new entrants, and the resulting increased competition will increase the choices, and possibly the information, available to less advantaged parties. But marketplace forces work better in some situations than others, and almost nobody is willing to rely solely on marketplace forces to counteract the inappropriate use of contract to increase wealth disparities. That is why we have a law of duress and fraud. There is great controversy about how much regulation, which I will call redistribution, is desirable.

Redistribution becomes relevant to the interpretive debate because

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53. Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772 (9th Cir. 1981) (providing an excellent fact situation for thinking about this efficiency concern).

54. The large organization will have a certain incentive to have the individuals negotiating their contracts mislead the other party about the legal obligations to be established by the contract, since this misleading will have no effect on the large organization's subsequent legal obligations. I recognize, however, that concerns about marketplace reputation and a desire for repeat business provide non-legal disincentives to such opportunistic behavior and will lessen its incidence. Misleading the other party can also increase the possibility for disputes during contract performance, and in that way reduce efficiency in contract performance.

one way to counteraet undue advantage gained through contract is simply to interpret contracts consistently with substantive justice, regardless of the words used in the writing. It is no news that there is a long history of such interpretations.[55] Sending interpretive issues to the jury, which requires rules defining the interpretive issues as factual, may yield ad hoc redistributions, as the juries interpret the contract favorably to the little guy, even if inconsistent with the parties' intentions.[56] The irony with this approach, however, is that many theorists of contract regulation suggest that redistribution is most likely to be effectively accomplished through the adoption of bright line rules. Here above all else predictability in outcome is desired, because it enhances the possibility that the stronger party will actually acquiesce in the regulation without the need for litigation.[57] Ad hoc redistribution through jury decision will benefit the little guy in the particular case, but is likely to have little impact on the vast majority of little guys who won't litigate and are likely to acquiesce in most evident meaning of the language of a written contract, no matter how unfair. However, if one despairs of legislative action creating bright line rules benefiting consumers and other little guys, ad hoc redistribution through jury decision may be all that can be done.[58]

D. Conclusion

I began this article by exploring interpretation issues from the perspective of what I call principle. Unless one adopts a view that language has a natural or logically correct meaning, I argued that the usual criteria for drawing the fact/law distinction imply that most interpretation issues raise fact questions, even when only written evidence is being considered. At the level of doctrine and practice, I found great confusion and conflict about when interpretation questions are reserved for the judge, as a question of law, and when assigned to the jury, as a question of fact. I have now turned to the level of policy for guidance. I have considered three important policies underlying contract law, and not

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55. See Karl N. Llewellyn, *Book Review*, 52 HARV. L. REV. 700 (1939).

56. On the tendency of juries to favor the little guy, see text preceding *supra* note 36. Unconscionability can be seen as another redistributive principle in the law. Interestingly, the UCC makes clear that all decisions about unconscionability are legal decisions, while at the same time encouraging the court to consider all the surrounding circumstances. In other words, the unconscionability decision is to be very particularized, and hence not general, yet it is labeled a legal decision. A desire to avoid the jury, with their presumed favoritism for the little guy, best accounts for this anomaly.

57. Arthur Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970). William Whitford, *Contract Law and the Control of Standardised Terms in Consumer Contracts: An American Report*, 3 EUR. REV. PRIVATE L. 193 (1995).

58. Unfortunately, establishing a judicial tradition of providing ad hoc redistribution may discourage the legislature from enacting more effective regulation. The legislature may use as an excuse for inaction that the courts are dealing with the problem.

surprisingly all are a bit ambiguous in indicating whether contract interpretation questions should be considered legal or factual (and therefore for the jury). When underlying policies are inconclusive in their implications, it should not be surprising that the rules of law associated with these policy issues are confused and conflicted.

What follows is a brief summary of the preceding policy analysis. Most advocates of redistributive policies in contract favor assigning interpretation issues to the jury, though clearly as a second choice. They would prefer bright line, redistributive rules applied as a matter of law, but despair of ever getting them. Devotees of efficiency in contract performance, on the other hand, are most likely to favor categorization of interpretation issues as legal, which they believe will make it more predictable how courts will interpret contracts. But because treating interpretation as legal increases the risk of appellate reversal, and because we don't know how often juries obey trial court instructions about contractual meaning, it is possible that treating all interpretation as factual would increase overall predictability. Autonomy values have traditionally been the most cherished in contract policy analysis. Along with Llewellyn, and for most part consistent with the views of Corbin, I believe autonomy values are best served by treating interpretation as completely factual question, to be determined after considering more evidence than just the writing. There is an argument, however, that autonomy values are best served by establishing standardized, and therefore legal, interpretations of particular phrases or clauses, which would then perform the function of formalities in contract law, and this view seems to have gained some adherents in recent years.[59]

V. WHAT IS TO BE DONE

A. Assessment

Not all the confusion and uncertainty about contract interpretation can be assigned to the existence of the jury. Even if there were no civil juries in America, there would likely still be controversy about whether extrinsic evidence would be allowed to suggest an interpretation at variance with the most evident meaning of a writing. And there would still be controversy about when an appellate court could reverse a trial court decision on interpretation, so the fact/law distinction with respect to interpretation issues would remain part of the debate. I join many before me, however, in thinking that the rules governing interpretation have often been bent to keep interpretive issues from the jury. And I join others in thinking that this bending of the rules has tilted the law away from the rules that would best serve autonomy values.[60]

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59. *See* authorities cited *supra* notes 43-44.

60. Most famously, Corbin:

There is an irony in the tilting of rules to avoid the jury. The intent in privileging writings and adopting a hard PER is primarily to increase predictability of decision about interpretation (but also, perhaps, to avoid the ad hoc redistribution by the jury). But the rules are bent without acknowledging that in doing so the law is being tilted away from autonomy values, which after all virtually everybody purports to uphold. Llewellyn famously observed in another context "[c]overt tools are never reliable tools."[61] Not all judges will share the "secret agenda" of discarding autonomy values to champion efficiency in contract performance and predictability by avoiding the jury, with the result that the black letter law will inevitably be conflicted. The irony is that, although the goal is to enhance predictability, the result of bending the rules to avoid the jury may be even greater unpredictability in result, because it is hard to predict when a court will apply a soft or a hard PER in interpreting a written contract.

B. Extreme Solutions

In thinking about what to do in situations like this, it is often an useful analytic exercise to consider extreme solutions, even if they are politically impractical. One extreme solution would be abolish the civil jury in contract cases, which would bring the United States into line with virtually every other country. I believe there is a lot to be said for this solution, though I cannot imagine it happening.[62] To the extent that

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> The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties. The criticized [parol evidence] rule, if actually applied, excludes proof of their actual intention. It is universally agreed that it is the first duty of the court to put itself in the position of the parties at the time the contract was made; it is wholly impossible to do this without being informed by extrinsic evidence of the circumstances surrounding the making of the contract.

Authur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 162 (1964). Professor Eric Posner has recently criticized this point of view, on the ground that it ignores the possibility that the parties may actually intend a hard PER, in the belief the risk that courts and juries will misinterpret extrinsic evidence is greater than the risk that the plain meaning of the writing will not accurately reflect their intentions. He points out that written contracts sometimes include merger clauses but virtually never include anti-merger clauses. Posner, *supra* note 19, at 570-71. Posner's point is a theoretically interesting one, but my view is that parties almost never have a mutual intention about which version of the PER they prefer at the time of formation. Merger clauses are included in the contract when one party prefers a hard PER because it drafted the SFK, and a hard PER will provide greater efficiency in contract performance for that party. But that hardly serves autonomy values, as I have argued earlier. *See supra* note 54 and accompanying text.

61. Llewellyn, *supra* note 55, at 703.

62. In most jurisdictions it would require a constitutional amendment, because of state constitutional provisions preserving the right to jury trial. The federal constitution's provision on right to jury trial in civil cases does not apply to the states. *See Developments in the Law—The Civil Jury*, *supra* note 28, at 1412. There have been some

interpretive rules have been bent to avoid the jury, I would hope that with abolition the rules would "bend back" to better reflect autonomy values, at the expense of concerns about efficiency in contract performance. Furthermore, most of the best arguments favoring the civil jury have little relevance to contract litigation, as observed above.[63] I can sympathize with the advocate of redistribution values who does not want to give up however much ad hoc redistribution the jury delivers, especially given the difficulties over the past twenty plus years in getting legislatures to further redistribution goals. One must recognize, however, that any gains for redistribution that come from the jury come at a cost—in this case to autonomy values that I and many other fans of redistribution also cherish.

Another extreme solution would be to abandon the effort to control jury decision-making about contract interpretation, accepting that this question is most properly considered factual and hence within the jury's domain. Doctrinally this could be accomplished by abandoning the privileged status of writings, so that in every case (as Llewellyn wanted) it would be a factual question whether the writing was the most reliable source of what the parties intended as terms. Without a privilege for the writing, there would be no role for a PER; extrinsic evidence would be routinely admitted to determine how much weight to give to the writing. Judges would continue to remove an interpretive issue from the jury's domain when no jury could reasonably reach other than a particular result; this would include circumstances in which a writing has a reasonably clear meaning on a point, and there is no evidence of any kind that the parties had an alternative intent. While I am no fan of the civil jury in contract cases, if the jury is to remain, then there is much to be said for this solution as well. It would rid the law of the confused and conflicted PER. Persons who value consistency and simplicity in black letter rules (e.g., most law students) would benefit. It would also simplify appeals by making the jury verdict more impregnable. But the defenders of efficiency in contract performance are sufficiently strong, and the beliefs about jury irrationality, incompetence, and bias sufficiently imbedded, that it is hard to imagine this solution ever taking hold, either legislatively or through activist judicial decisions reversing years of precedent about the PER.[64]

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developments towards recognizing a complexity exception to the Seventh Amendment's guarantee of a jury trial in federal proceedings. *See* Markman v. Westview Instruments, 517 U.S. 370 (1996). It would be a real stretch, however, to extend the complexity exception to justify discarding the jury in all contract interpretation cases.

63. *See supra* notes 34-35 and accompanying text.

64. The Committee to revise article 2 of the UCC made various proposals that would have lessened the privileged status of the writing in standard form contracts. One proposal would have introduced a version of the reasonable expectations doctrine into the definition of unconscionability. The proposal was based on the RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1979), which currently reads, "Where the . . . [non-drafting] party [to a standardized agreement] has reason to believe that the party manifesting . . .

C. Denial

Brief mention should be made of denial as a reaction to the current state of the PER in our jurisprudence. A jurisprudence so conflicted makes many people uncomfortable because a core idea of law is that justice not be random, that the result of a case be determined by its facts and not by such random factors as the judge or judges (on appeal) to which it is assigned. All legal realists know that law is not always so ordered, and different results in similar cases is a common feature of our and all legal systems. But a confused and conflicted body of doctrine increases the sense of disorder, and so it is tempting to convince oneself that there is really order in what appears to be disordered.

At one time denial took the form of arguing that the doctrine was not so conflicted as it might appear—that if one put one's mind to it and considered all the factors, one could discern a consistent, albeit complicated, consistency in the decisions, applying a hard PER in some circumstances and a soft PER in others. Articles, even books, have been written in this tradition. But in the past thirty to forty years or so, there has been a consensus among most commentators that these efforts have failed, and that doctrinal inconsistency reigns.[65]

The other important effort at denial is in the law and society tradition. Professors Childres & Spitz attempted to show that by inventing new categories not recognized by doctrine, one could reveal a consistent pattern of results. They examined all reported cases in a given time period (roughly the 1960s) and assigned them to one of three categories: (1) formal contracts [roughly, contracts where the actual wording of the writing was negotiated], (2) informal contracts [roughly, contracts where there was a writing but the negotiations were oral and not explicitly about the content of the writing; the category includes cases in which one party is sophisticated in commercial/legal matters and the other is not], and (3) abuse of bargaining power cases [basically, contacts of adhesion, or where fraud was alleged]. In category (1) they found that the

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assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."

This draft of revised article 2 was dropped at a July 1999 meeting of the National Conference of Commissioners on Uniform State Laws (NCCUSL), after large sellers expressed strong opposition. *See* Richard E. Speidel, Revising UCC Article 2: A View From the Trenches, paper given at the Annual Meeting of the American Law Schools, Section on Contracts, Jan. 4, 2001 (paper on file at Wisconsin Law Review); *see also* Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. Rev. 1683 (1999). Mr. Speidel was the Reporter, and Ms. Rusch the Associate Reporter, for the draft of Revised Article 2 that was dropped at the 1999 NCCUSL meeting.

65. See authorities cited *supra* note 19; *supra* text accompanying note 22. Dean Scott has recently dissented from this consensus, arguing that there is a true consistency in decision. I discuss this view *supra*, note 18, and indicate there my dissent from it.

PER was applied to exclude extrinsic evidence where one party seeks to "substitute" an oral term for a written term, but a general willingness (though with exceptions) to admit extrinsic evidence to prove a "variation" (e.g., a side agreement) or to help interpret a written provision. In category (2) they found a general but not uniform willingness to admit extrinsic evidence for all purposes, even contradiction of the writing. Parol evidence was always admitted in category (3).[66]

There is much to be said for this style of legal research, which can find real consistencies or inconsistencies in results in circumstances not evident by examination of doctrine alone. I have no doubt that there was and is a tendency for courts to apply the PER to exclude extrinsic evidence most often in category (1) and least often in category (3). I believe, however, that Professors Childres and Spitz have found only a tendency and not a true coherence in the law. My primary quarrel is with the vagueness of their categories. The distinctions between "formal" and "informal," and between "substitution" and "variation," are not precise. The result is a great risk of coder bias, with cases applying a hard PER pushed into the "formal" contract and "substitution" categories and cases admitting extrinsic evidence pushed into other categories, in order to validate the preconceived hypotheses. Another weakness is that the study cannot show that the same pattern will prevail over time. The hypothesis is that judges bend the black letter rules to achieve what they perceive as the proper result in the case, and that there is consistency across judges in what is perceived as the just result. Today there is a greater willingness to recognize differences in judges' basic sensibilities than there once was. Some judges will be much more devoted to efficiency in contract performance as a policy goal, others to autonomy values, still others to redistribution values. And judges will differ in what is the best strategy to achieve autonomy values.[67] So even if Childres and Spitz correctly found a consistency in result in the 1960s, there is no guarantee that the consistency would continue over time, nor would I expect it to.

D. A New Compromise

In this section I will examine closely a 1995 opinion by Judge Richard Posner which is getting increased attention and deservedly so.

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66. Robert Childres & Stephen Spitz, *Status in the Law of Contract*, 47 N.Y.U. L. REV. 1 (1972). The study was later replicated for reported Wisconsin cases by a law student (now law professor), Michael Lawrence, *The Parol Evidence Rule in Wisconsin: Status in the Law of Contract, Revisited,* 1991 WIS. L. REV. 1071. Lawrence's results mostly replicated the findings of Childres & Spitz, except he found more inconsistency in the decisions in category (2).

67. Different strategies in using interpretation rules to serve autonomy values are described at *supra* notes 39-47 and accompanying text.

The case, *AM International v. Graphic Management*,[68] concerned the interpretation of a written agreement requiring payment of patent royalties on machines ordered and shipped between particular time periods. Because the key contract term concerned dates, it was easy to argue that the writing was "clear on its face," but the plaintiff wanted to introduce evidence about bargaining history to suggest the parties intended a different result.[69] Judge Posner created a rule that distinguished between objective and subjective extrinsic evidence, admitting only the former. Objective evidence is evidence that "can be supplied by disinterested third parties," and presumably would include virtually all evidence about trade custom. "Subjective evidence" means testimony by the parties themselves about the intentions of the parties, which Posner characterizes as "invariably self-serving." Much but not necessarily all evidence about bargaining history would fall into the subjective evidence category. There is a further aspect to Judge Posner's new PER. Admission of extrinsic evidence does not automatically justify sending the case to the jury. The evidence must first be reviewed by the judge and only if he/she "concludes that it establishes a genuine ambiguity is the question of interpretation handed to the jury." This preview by the judge entails more than the usual determination whether the evidence is sufficiently credible that a reasonable jury could decide that the parties intended an interpretation other than the clear meaning. The judge must find that the extrinsic evidence exposes an ambiguity in the written language, which otherwise appears "clear on its face," an ambiguity that becomes evident only after considering the peculiar viewpoint brought to the transaction by the parties. The role of the jury is limited to resolving that ambiguity only after the judge first finds it exists.[70]

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68. 44 F.3d 572 (7th Cir. 1995); see also Judge Posner's decision in *Cole Taylor Bank v. Truck Insurance Exchange*, 51 F.3d 736 (7th Cir. 1995), where only a few months later Posner, in dicta, discusscs and applauds his decision in *AM International*, an Illinois case, and suggests the holding is consistent with California case law as well. These opinions are the culmination of a series of Posner opinions on the PER that he has written over a period of years.

69. The royalty agrecment expired on July 23, 1991, but provided that royalties were to be paid nonetheless on machines delivered after that date but before December 31, 1991, provided the orders were received by defendant between January 1 and July 23, 1991. In the case plaintiff maintained that royalties were due on machines ordered before January 1, 1991 and delivered in the July 23-December 31 period. In effect, plaintiff maintained the royalty extension provision applied to all shipments in the July 23-December 31 window if the order was received between expiration of the underlying royalty agreement, an interpretation that rendered meaningless the language in the written contract stating that the extension applied to orders received after January 1st.

70. The requirement of an initial judicial finding of ambiguity before sending the case to the jury continues a 7th Cireuit tradition established in *Sunstream Jet Express v. International Air Service*, 734 F.2d 1258 (7th Cir. 1984), and later ratified by Illinois Court of Appeal decisions cited by Posner. In this respect *AM International* is not a law-making case. The Illinois law in this respect is similar to law in other states, particularly California. See the discussion of California law in FARNSWORTH, *supra* note 12, at 480-

Judge Posner's invention in *AM International*[71] can be described as a compromise between the hard and soft PER positions, a compromise that attempts to accommodate important policy concerns underlying the competing positions. It preserves a role for the jury in interpretation, and allows persuasive evidence of the parties' true intentions, or about what conduct constituted the most reasonable reliance, to prevail over a plain meaning in some cases. That represents some deference to what I have called autonomy values. At the same time, it preserves a privileged place for the written contract. A judge must first decide that the contract is ambiguous before a jury can consider extrinsic evidence. This shows deference to the importance of the written contract in promoting efficiency in contract performance. And because subjective evidence is not allowed to overcome a plain meaning, jury skeptics are assured that juries will be not be allowed to rule in the cases in which they are most worried about jury irrationality and bias (i.e., where there is perjured testimony).[72]

A priori it seems to me that Judge Posner's opinion has the potential to have legs. It is a compromise between competing views. Because it appears to be a reasonably bright line rule, it has some potential to introduce greater predictability to this area of the law. It is likely to appeal to persons concerned about the seeming chaos in the law of interpretation and despairing of agreement on any of the possible extreme positions. Of course, one can easily imagine that even if a consensus did emerge around Judge Posner's version of the PER, conflict could soon emerge over the definition of objective evidence, as well as what precisely the judge must decide (as opposed to leaving for the jury) in his/her initial review of the extrinsic evidence. Perhaps in the end, after the meaning of *AM International* was litigated in many cases, the present conflict and confusion would simply be restated in different words, but it seems to me there is potential in *AM International* for a narrowing of historic differences.

Early returns, however, do not look promising for Judge Posner's invention. Judge Posner was writing in a case in which he was obligated to follow Illinois law. The opinion reveals that Illinois, like so many other states, has seemingly conflicting lines of precedent on the PER. A

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71. The rule of *AM International* was clearly anticipated by Judge Posner in two 1989 decisions, both also purporting to apply Illinois law. FDIC v. W.R. Grace & Co., 877 F.2d 614 (7th Cir. 1989); AGFA-Gevaert, A.O. v. A.B. Dick Co., 879 F.2d 1518 (7th Cir. 1989). The rule is thus not entirely an invention of the decision in *AM International*, though Posner's opinion in that case remains the best explication of the rule. Posner recently applied his rule in another case. Praxair, Ine. v. Hinshaw & Culbertson, 235 F.3d 1028 (7th Cir. 2000).

72. For a more extensive discussion of the advantages of Posner's compromise, by a true fan, see Lawrence Cunningham, *Toward a Prudential and Credibility-Centered Parol Evidence Rule*, 68 U. CINN. L. REV. 269 (2000).

number of cases appear to take a hard PER (or "four corners") position, others appear to adopt a soft PER position with rcspect to all kinds of extrinsic evidence, subject to a "provisional review" by the court before submitting it to a jury. In *AM International* Judge Posner argued there was a hidden consistency in these cases, a consistency reflecting his distinction between objective and subjective evidence.[73] A subsequent Sixth Circuit decision, also applying Illinois law in a diversity case, has questioned whethcr Judge Posner correctly interpreted Illinois law, noting that after the decision in *AM International* Illinois' "intermediate appellate courts often continue to rely on the principle that a contract's facial clarity precludes consideration of extrinsic evidence of other meaning."[74] There are indeed several such cases, including ones that exclude evidence that would clearly be labeled objective under Judge Posner's rule.[75] Other cases have admitted (or remanded for admission of) extrinsic evidence that would probably bc considered subjective under Judge Posner's scheme, because it involved testimony about pre-contract negotiations between the parties, but under the provisional review approach that requires a court first to determine whether the contract is ambiguous before allowing the jury to resolve the ambiguity.[76] Only one Illinois Appellate Court decision has cited and relied upon Judge Posner's decision in *AM International.*[77] The Illinois Supreme Court has addressed the PER at any length only once since the decision in *AM International* and it applied a "four corners" rule, excluding objective extrinsic evidence, without citation of Judge Posner's decision.[78] In the federal district courts in the Seventh Circuit, Judge Posner's decision has received more respect, but even in those courts there is one decision applying a hard PER rule to exclude arguably objective extrinsic evidence, citing the recent Illinois Supreme Court decision and ignoring *AM International.*[79]

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73. He claimed that the hard PER cases were ones in whieh extrinsic evidence of a subjective nature was sought to be introduced, and the soft PER cases were ones in which extrinsic evidenee of a objective nature was considered.

74. Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Assoc., 110 F.3d 318, 328 (6th Cir. 1997).

75. McDonald's Operators Risk Mgt. Ass'n v. CoreSource, Inc., 717 N.E.2d 485 (Ill. App. Ct. 1999). In this case the contract contained a merger clause, which may distinguish it from *AM International.* See the subsequent discussion of *Air Safety v. Teacher's Realty*, note 78 *infra* and aceompanying text.

76. *E.g.*, Meyer v. Marilyn Miglin, Inc., 652 N.E.2d (Ill. App. Ct. 1995); Ins. Co. of Ill. v. Stringfield, 685 N.E.2d 980 (Ill. App. Ct. 1997).

77. Ahsan v. Eagle, 678 N.E.2d 1238 (Ill. App. Ct. 1997).

78. Air Safety v. Teachers Realty Corp., 706 N.E.2d 882 (Ill. 1999). The opinion stressed that the contract contained an "integration" clause as one ground for its decision. However, the contract containing the integration clause was a standard construction contract, and the written document being interpreted was a subsequently issued change order. The change order did not itself contain an integration clause.

79. Berthold Types Ltd. v. Adobe Sys., 101 F. Supp. 2d 697 (N.D. Ill. 2000).

E. Tempered Despair

I conclude that we are likely to continue to have conflict and confusion in thc law concerning the interpretation of written contract. I despair of any solution, whether it be one of the extreme solutions or a reasonable compromise like *AM International.* When one encounters an area of law where there are so many seemingly irreconcilable decisions, onc is temptcd to conclude that the law is in some kind of disequilibrium, that in its own special way the common law is in the process of moving from one rule to another, and that eventually courts will settle on a single rule which will be an equilibrium state for a period of time. I would like to suggest, however, that conflict and confusion about the law of interpretation is itself an equilibrium state. To be sure, over time thc courts may tilt slightly in one direction or other, meaning that a higher percentage of the cases than in a previous period come down on the side of a soft or hard PER. Many academics believe that there was a tilt towards a soft PER 30-40 years ago, and the Restatement 2d of Contracts reflccts such a tilt.[80] Today there may be tilt back towards the plain meaning rule and a hard PER. Certainly there has been an outpouring of law review articles advocating such a tilt appearing in elite law reviews.[81] But at all times there rcmains a great deal of irreconcilable conflict, just as there has been and continues to be in Illinois, both before and after *AM International.*

How can law be stable in a confused and conflicted state? The norm that litigants similarly situated should be treated the same is so basic to our collective ideas of what "justice" requires that one might expect a strong impulse by judges to resolve a confusion about doctrine. Judges, after all, must constantly be made aware of the conflict in PER decisions by the citation of conflicting precedent by the parties before them. I would likc to suggest that there is another impulse helping to maintain confusion and conflict as an equilibrium. I believe all or most judges feel some responsibility to reach a just result for the litigants before them, because the outcomc of the case is somewhat within their control, and everybody feels some responsibility for decisions that they can control. From that perspective a conflicted PER can be a useful set of doctrines for judges, for it allows them greater discretion in controlling the outcome of a particular case. They can draw on the hard PER line of precedent when convenient, and the soft PER line of prccedent at other times.

This legal realist account for conflict in the law is hardly new, and it

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80. RESTATEMENT (SECOND) OF CONTRACTS §§ 209-17 (1979).

81. *E.g.*, Scott, *supra* note 18; Ben-Shahar, *supra* note 44; Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999). My colleague and mentor, Stewart Macaulay, comments on this trend in Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775 (2000).

is also too simple. Even if I am right that judges feel accountable for the outcomes they deliver to litigants, they also feel accountable to the equal justice ideal; a core idea captured by the phrase "rule of law" is that principle and not expedience or hunch accounts for legal decisions. A particular judge must hesitate before vacillating between hard and soft PER rhetoric in deciding different cases. But conflicting lines of precedent also free judges to decide interpretation cases consistent with their views of whether there should be a hard or a soft PER. There are likely always to be judges and scholars with varying views about the relative value of the sometimes conflicting goals of autonomy, efficiency in contract performance, and redistribution, as well as about the best way to achieve autonomy values.[82] So long there is disagreement, conflicting lines of precedent allow each side to decide cases consistently with their views. So long as a consensus does not emerge at the level of policy, it must be difficult for either side to acquiesce in an unfavored view in order to achieve doctrinal coherence.

The prophecy of continued confusion and conflict may be a source of despair for many. But we have lived with this conflict for decades. And maybe life isn't so bad. Undoubtedly things could be better, and it is possible that the unsettled law of contract interpretation is holding us back. It is also possible that it just doesn't make much difference whether we have a coherent and consistent law of interpretation or continued confusion and conflict. If it doesn't make much difference, then the promoters of efficiency in contract performance as an important value will need to reevaluate their position. Their position is premised on the idea that predictability in how a lawsuit will be decided is very important to the efficient performance of transactions. That is the essential rationale for keeping interpretation away from juries, assumed to be unpredictable. That we have persevered for so long with such unpredictability in how courts will decide contract interpretation cases weakens this rationale, and strengthens the case for tilting the balance more towards the pursuit of autonomy values, and perhaps even rehabilitation goals. That probably means, in light of our traditions for drawing the fact/law distinction, giving juries a more consistent role in contract interpretation.[83]

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82. See my earlier discussion about whether establishing formalities best serves autonomy values at notes 45-47, *supra*, and accompanying text.

83. It is worth noting that parties who are particularly adverse to jury interpretation of their contracts have the option of providing for arbitration. One wonders how much of the increased use of commercial arbitration can be assigned to the desire to avoid the jury in contract cases. Providing an exit for those most troubled by the continuing confusion and conflict in the interpretation rules lessens the pressure for legal change, of course.