A Charitable Reading of Grey Holes

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As Choi, Gulati and Scott describe in their work on "grey holes," standard language may be replicated across contracts in an industry without attention to its meaning. At some point, parties may be aware that a writing contains a certain term but are either unsure or simply indifferent as to its precise meaning. Their understanding of the contract term detaches from the particular choice of words that ostensibly memorialize it.

The relationship between party intent, a writing, and resulting contractual obligations is more complex than the mantra of 'fidelity to party intent' often cited in case-law would suggest. Where the written term has an unambiguous meaning, it appropriately trumps any other meaning that the parties might attach to it. But based on a theory of "normative triangulation" elaborated here, where the writing is ambiguous, we can look to background legal duties, including the soft norm of reciprocity, to inform the meaning of a written term. A "principle of charity" recommends interpreting ambiguous written terms as compliant with background duties. In some cases, this approach counsels a sticky default that preserves default legal entitlements. In other contexts, the background norm supplies a market-conforming default rule.

One advantage of default rules that do not theoretically derive from party intent is that they help to supply meaning to written terms to which we know parties did not attach any particular meaning themselves. Indeed, the advantages of a default rule are greatest where parties avoid undertaking a costly effort to learn and agree upon obligational content. Grounding default rules on hypothetical intent is less plausible than a substantive state preference in the case of grey holes and other written terms where we know for a fact that actual intent does not align with imputed hypothetical intent.

The paper discusses the example of liability waivers. Liability waivers are typical in consumer service contracts even though consumers do not read them. They are rational not to do so, of course, since the terms do not reliably reflect the scope of service providers' obligations (given legal constraints) and consumers often cannot alter either the writing or their own conduct. Consumers have expectations about what providers' owe them, however, even if those expectations are not tied to any written language. Applying the principle of charity to such liability waivers, courts should strike overbroad waivers (which can be read as permitting reform or not) in order to require parties to opt out of default tort regimes with absolute clarity. And they should assign little weight to small variations among waivers where they represent an isolated departure from the market standard.

Courts enforce the most reasonable interpretation of an ambiguous contract term.[1] Sometimes that is the most reasonable reading of a written agreement. At other times it is the most reasonable understanding of what a person has said or done. Either way, the content of a contractual obligation often turns on the most reasonable interpretation of it.

What is the most reasonable interpretation? Courts sometimes suggest that the most reasonable understanding of a contractual obligation turns only on the parties' words and acts.[2] But reasonableness is not reducible to party intent, and courts already, if inconsistently, read

[1] "Our goal must be to accord the words of the contract their 'fair and reasonable meaning.'" *Sutton v. East River Sav. Bank*, 55 N.Y.2d 550, 555 (1982). *See also Ehlinger v. Hauser*, 758 N.W.2d 476, 488 (Wis. 2008) (resolving ambiguity in favor of "the most reasonable construction" of the term at issue); *Harrah's Entertainment, Inc. v. JCC Holding Co*., 802 A.2d 294, 313 (Del. Ch. 2002) ("In the event of ambiguity in a heavily negotiated contract, it is generally the most reasonable meaning of the words used…to which courts look in order to define contractual rights and duties."); *Wrenfield Homeowners Ass'n v. DeYoung*, 600 A.2d 960, 963 (Pa. 1991) ("In cases of contract language ambiguity, Pennsylvania law requires that the court adopt an interpretation that is most reasonable and probable."). This Essay concerns the interpretation of *ambiguous* terms. In line with existing law, it presumes that unambiguous terms are either enforced in a manner consistent with their unavoidable meaning, or rejected altogether.

[2] *See, e.g., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) ("the parties' intentions control"); *ACE Am. Ins. Co. v. Freeport Welding & Fabricating, Inc.*, 699 F.3d 832, 842 (5th Cir. 2012) ("The primary concern of a court construing a written contract is to ascertain the true intent of the parties as expressed in the instrument."); *Walker v. Martin*, 887 N.E.2d 125, 135 (Ind. Ct. App. 2008) ("[I]t is the court's duty to ascertain the intent of the parties at the time the contract was executed as disclosed by the language used to express their rights and duties."); *Flores v. Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 368 (2005) ("In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds."); *Jones Associates, Inc. v. Eastside Properties, Inc*., 704 P.2d 681, 685 (Wash. 1985) ("Where the parties' contractual language is ambiguous, the principal goal of construction is to search out the parties' intent."); *Robert F. Felte, Inc. v. White*, 302 A.2d 347, 351 (Pa. 1973) ("When interpreting a contract the intention of the parties must be determined. ").

ambiguous contracts to impose substantively reasonable obligations.[3] They are right to do so. It is the more expansive understanding of reasonableness that is relevant to legal interpretation.[4]

Although courts are appropriately focused on parties' objective intent, their inquiry into the most reasonable construction of that intent is *in part* an inquiry into how they can understand an agreement such that it is reasonable, i.e., how they can read it as compliant with background duties that parties in contract have toward one another. The most reasonable interpretation of an agreement takes into account what people owe each other whether they intended to comply with those duties or not. Attempting to deduce the legal effect of words and acts in contract without attending to background rights and duties is akin to calculating the position of an object by reference only to the force applied to it, without attention to its starting position.

The tension in case law between the dominant language of party intent, on the one hand, and occasional references to substantive reasonableness, on the other, reflects a deep ambivalence in the attitude of the state toward contract. On the one hand, the state is committed to regulating the market to promote distributive justice and protect people from harm. On the other hand, a liberal state recognizes a moral interest in a sphere of autonomy in private affairs. These goals compete in the domain of contract: The former commitment weighs in favor of taking the state's substantive preferences over contract terms into account in the course of enforcing ambiguous terms. The commitment to private autonomy entails a more formal approach limited to deciphering parties' own intentions. Every incursion into a private transaction that is intended to promote systemic goals or protect third parties has the effect of narrowing the scope of individual choice in contracting.

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[3] *See, e.g., Columbia Propane, L.P. v. Wisconsin Gas Co.*, 661 N.W.2d 776, 787 (Wis. 2003) ("In ascertaining the meaning of a contract that is ambiguous, the more reasonable meaning should be given effect on the probability that persons situated as the parties were would be expected to contract in that way as opposed to a way which works an unreasonable result."); *Glenn Distributors Corp. v. Carlisle Plastics, Inc.*, 297 F.3d 294, 301 (3d Cir. 2002) ("Courts must be mindful to adopt an interpretation of ambiguous language which under all circumstances ascribes the most reasonable, probable, and natural conduct of the parties, bearing in mind the objects manifestly to be accomplished.") (internal citations omitted); *Tessmar v. Grosner*, 23 N.J. 193, 201 (1957) ("Where the common intention of the parties is ambiguous, the fairest and most reasonable construction imposing the least hardship on either of the contracting parties should be adopted so that neither will have an unfair or unreasonable advantage over the other.").

RESTATEMENT (SECOND) OF CONTRACTS §207 expressly allows that "in choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred." Unfortunately, the principle has not caught on outside of limited contexts, such as those involving the provision of public services. *See* Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1723-24 (1997) (describing situations where the rule has been applied). Zamir is among the few scholars to argue that substantive reasonableness is given inadequate weight in orthodox theories of interpretation.

[4] Scholarly debate regarding contract interpretation primarily concerns the question of whether interpretation should be formalist or contextualist – but scholars on both sides of this debate defend their position on the grounds that it is most likely to capture party intent. *See* Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010) (advocating formalism); STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION (2009) (advocating middle course of "objectivism"); Shawn J. Bayern, *Rational Ignorance, Rational Closed-Mindedness, and Modern Economic Formalism in Contract Law*, 97 CAL. L. REV. 943 (2009) (advocating contextualism).

The trade-off is not new, but at least as a tension *within* the law, it is not ancient either. Under *Lochner v. New York*[5], it might very well have been appropriate – or at least, consistent -- to interpret contracts with almost exclusive attention to party intent. *Lochner* struck down a New York state statute that limited the number of hours that bakers could work in a day and in a week on the grounds that it was an "unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty."[6] The case stood for a broad doctrine of economic liberty under which individuals were free to contract on the terms of their choosing with little interference from the state. Under *Lochner*, the state's interest in preserving a free space within which individuals choose the terms on which they deal with others did not compete with a state interest in regulating the marketplace because the latter was not a valid exercise of its police power.[7]

But the *Lochner* era is long over. In *West Coast Hotel Co. v. Parrish*[8], the Supreme Court reversed its course of resistance to the New Deal and upheld a Washington state minimum wage statute. More important, the seventy years since the New Deal have witnessed an explosion in statutory regulation of commerce and administrative oversight of the market. Although we remain reluctant to interfere in private exchange, and though some observers remain radically opposed, regulation of private exchange is now commonplace.

Regulation of exchange removes intent as an exclusive anchor to private obligation in the context of commercial transactions. Still, contractual intent retains a privileged status in modern contract law, as well as in the account offered here. Courts are appropriately focused on the overlapping points of agreement between contracting parties and in the ways each reasonably understood the other. Contract and its legal offshoots (including much of business law) are distinctive in law because of the weight they assign parties' own choices. In fact, contract may have a special place in a liberal regime due to the deference contract law affords private persons in their choice of whom to deal with and on what terms. When courts give legal effect to private commitments they allow individuals to rewrite the normative ties that bind persons to others in a political economy. Contract thereby expands the scope of moral agency.

Liberal states are especially sensitive to the advantages of allowing private individuals to control their relations with others, but they are also interested in regulating the justice of the marketplace. Individuals engaged in exchange constitute public markets with public consequence. Parties to exchange can harm each other and others. States are thus interested in the terms of private exchange.

Our modern regulatory state can, and sometimes does, directly regulate those terms. Mandatory systems like tort directly control the terms on which individuals deal with one another. Federal and state statutes and their related administrative agencies, focused on matters ranging

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[5] 198 U.S. 45 (1905).

[6] 198 U.S. at 56.

[7] "[W]e think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act." 198 U.S. at 57.

[8] 300 U.S. 379 (1937).

from consumer protection[9], labor or employment[10], securities[11], insurance[12], health care[13], antitrust[14] and civil rights[15] all constrain the terms of acceptable exchange. Private contract, or at least its voluntary dimension, is an *alternative* to those regimes. In the realm of private agreement, states capitalize on the economic and moral advantages of allowing parties to use private information about their own preferences to navigate a web of bilateral relations.

But background duties that the law leaves individuals to navigate on their own persist in a regime of contract – not only morally, but legally. Duties of reciprocity, fair play and nonexploitation are manifest in legal duties inside and outside of contract; those duties are not suspended but apply precisely in the context of private exchange. The background duties I refer to throughout this discussion are thus immanent in existing legal norms. Voluntary commitments in contract are undertaken in the shadow of these background duties.

Contracts discharge background duties regardless of whether contracting parties consciously think about contract in this way. Even where a background duty does not motivate a promise, it mediates between the obligation that an individual intends to assume or avoid and the ultimate scope of her legal obligation. "Penalty defaults" are intended to force information out of

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[9] *See, e.g.*, Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2012); Graham-Leach-Bliley Act, 12 U.S.C. § 1841 (2012); Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399 (2012). *See also* Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903, 1928 (2013) (Appendix: Fifty-State Survey: State Consumer Protection Laws).

[10] *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2012); Employee Retirement Income Security Act, 29 U.S.C.A. § 1001 et seq (2012); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-35 (2012); Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq (2012); Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601-54 (2012); Occupational and Safety Health Act of 1970, 29 U.S.C. §§ 651-78 (2012); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq (2012); National Labor Relations Act, 29 U.S.C. §§ 651-78 (2012); Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09 (2012). Other important regulation of employment, including additional minimum floors and workers' compensation and unemployment insurance schemes, takes place at the state level.

[11] *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77a et seq (2012); Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. (2012); Investment Company Act of 1940, 15 U.S.C. §§ 80a-1–64 (2012).

[12] Most states have adopted model laws promulgated by the National Association of Insurance Commissioners, including their Model Unfair Trade Practices Act, Replacement of Life Insurance and Annuities Model Regulation, and Model Unfair Claims Settlement Practices Act.

[13] 42 U.S.C.A. § 300gg-3 (prohibiting insurers from denying coverage based on pre-existing medical conditions).

[14] *See, e.g.*, 15 U.S.C. § 13(a) (prohibiting price discrimination; *Utah Pie v. Continental Baking Co*., 386 U.S. 685 (1967) (bakeries engaged in unlawful geographic price discrimination); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co*., 472 U.S. 284, 293 (1985) (concerted refusals to deal violate Section 1 of Sherman Act); *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 4411, 434 (1990) (same); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (owner of essential facility may be required to make it available to competitor).

[15] *See, e.g.*, 42 U.S.C. § 2000(a)-(h)6 (2012) (outlawing racial discrimination in provision of goods and services by places of public accommodation); 42 U.S.C. §§ 12101-213 (2012) (outlawing discrimination on the basis of disability in a number of contexts).

a party that might be tempted to withhold certain information.[16] Interpretive defaults sometimes also encapsulate involuntary duties in that they read the promisor's words and acts in such a way as to render the resulting obligation reasonable in their light.[17] Consider sticky interpretive defaults that require collective bargaining agreements and employment contracts to very expressly waive the right to litigate discrimination claims, even if less clear language would be strong evidence that the parties intended to see the right waived.[18] This is a different exercise than classic accounts of contract would expect; the latter would focus at best on what the promisee might reasonably have understood the promisor to intend. In reality, defaults cannot be reduced to our best guess about the parties' intentions.

Involuntary duties thus inform the obligations we "freely" assume when those obligations are not very well specified.[19] Not all moral duties are relevant, though, to the particular perspective of the state at the moment of adjudication. Whether courts should read our expressed intentions in light of background duties depends on whether these duties are of a political nature. Where courts can glean a background duty from existing legal norms – in much the same way they already extract principles of "public policy" from statutes, case law and common law history[20] – promises made to discharge such a duty should be interpreted in its light.

I label this method of interpretation "normative triangulation." Drawing on Donald Davidson's concept of triangulation, Brian Langille and Arthur Ripstein have suggested that contracts are and should be interpreted by incorporating facts about the world into party intent, irrespective of whether parties actually thought about those facts.[21] We cannot know what others mean directly. We rely on language, and language has no meaning except in the common space

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[16] *See* Ian Ayres & Robert Gerner, *Filling the Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 93-94 (1989).

[17] *See, e.g.*, *Morin Bldg Prod Co. v. Baystone Constr Inc*., 717 F.2d 413 (7th Cir. 1983) (interpreting clause in light of reasonable default notwithstanding evidence of contrary subjective intent). *See also* Larry A. DiMatteo, et. al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NORTHWESTERN J. INT'L L. & BUS. 299, 320 (2004) ("Many of the CISG articles provide very general, vague default rules tied to the concept of reasonableness."). David Slawson goes further and claims that under "the new meaning of contract," contracts entail just those obligations which consumers would reasonably expect, though businesses are free to spell out and give definition to those obligations within the bounds of reasonableness. W. David Slawson, *The New Meaning of Contract: The Transformation of Contract Law by Standard Forms*, 46 U. of Pitt. L.R. 21, 28 (1984-85).

[18] See *Warfield v. Beth Israel Deaconess Med Ctr*, 454 Mass. 390 (2009) (employment agreements); *Wright v. Universal Maritime Service Corporation, et al.,* 525 U.S. 70 (1998) (collective bargaining agreements).

[19] As with other theories that speak to the selection of default rules, the interpretative method endorsed here applies primarily to contracts subject to some ambiguity. Such ambiguity may arise because a written text is ambiguous; the initial determination of whether the text is ambiguous or completely integrated is subject to some uncertainty, or; evidence of the terms of an oral agreement is subject to uncertainty. Where parties have made a contractual term entirely clear, the court is left with the questions of enforceability and remedy. Although my discussion of the sometimes competing interests of the state in regulating exchange are relevant to the question of whether to enforce a term as well as the scope of remedy available, I focus here on implications for interpretation.

[20] *See* RESTATEMENT (SECOND) OF CONTRACTS § 179 (1981).

[21] *See* Brian Langille & Arthur Ripstein, *Strictly Speaking – It Went without Saying*, 2 LEG. THEORY 63-64 (1996).

shared by speaker and listener. Ripstein and Langille argue that in contract as in ordinary speech, in light of the inherent limitations on the intelligibility of others we "must take his or her beliefs to be largely true" and figure out what people are saying "by finding a way to make most of what a speaker says come out true."[22] The factual world thus serves as a reference point for filling in apparent gaps in the meaning of words in contract.

The practice that I describe and defend here extends this method to reference shared *norms* (in a way Langille and Ripstein would probably reject). Normative triangulation is doubly normative. First, the facts at which it is directed, i.e., the objects of interpretation, are normative. What are the parties' obligations toward one another? Second, normative triangulation is normative in motivation. Unlike interpretation of ordinary descriptive speech ("the cat is on the mat"), courts interpreting contracts bring normative criteria to bear on the choice of interpretative rules *and* on their interpretation of ambiguous terms.[23] Courts try to find a way to make most of what contracting parties are saying come out right – that is, compliant with hard and soft legal norms.

My discussion will proceed in three parts. First, I will defend an extension of one pillar of Davidsonian triangulation: courts should apply a "principle of charity" in their construction of contractual obligation that reads obligations as compliant with background duty. The basic triangle in Davidson triangulation runs between a speaker and her object, between object and interpreter, and between speaker and interpreter. Davidson's principle of charity holds that the interpreter should maximize agreement with the speaker, or interpret the speaker so as to make as much as possible of what she says true. The principle follows from the relation between speaker and interpreter, and in particular, the interpreter's belief that they will respond similarly to stimuli.[24] In the context of contract interpretation, a court charitably reading an agreement will read it as "in agreement with" or just compliant with background duties that attend exchange.

Courts' reasons for applying a principle of charity are very different than those which motivate Davidson's interpreter. I will argue that because contract is a method of regulating private exchange, courts do not have to interpret agreements as if indifferent to their content. They have content-dependent reasons[25] for enforcing obligations that manifest in something like a principle of charity. At this stage I will compare the aims of contract interpretation to those of legal interpretation to show that limitations inherent in contracting parties' authority over the terms of their exchange justify content-dependent rules of interpretation.

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[22] *Id*. at 73-74.

[23] *Cf.* Robert Myers, *Finding Value in Davidson*, 34 CAN. J OF PHIL. 107-136 (2004) (arguing that we must make assume that others' values and desires, not just their reactions/perceptions, are the same as our own, but on epistemic grounds).

[24] *See* DONALD DAVIDSON, SUBJECTIVE, INTERSUBJECTIVE, OBJECTIVE 119 (2001).

[25] Content-independent reasons "are supposed to be reasons simply because they have been issued and not because they direct subjects to perform actions that are independently justifiable." By contrast, a "content-dependent reason is…a reason for conforming to a directive because the directive has a certain content." Scott J. Shapiro, *Authority, in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 382, 389 (Jules Coleman & Scott Shapiro eds., 2002).

The second Part of the article will apply normative triangulation to standard form liability waivers. These waivers are sometimes ambiguously worded. It would be anomalous to choose among available meanings by reference to authorial intent since there is reason to believe that neither party attached any definite meaning to the written language – they are in that sense "grey holes." We can resolve ambiguity, at least in part, however, by looking to the substantive background norms that permit civil recourse for injury and that reflect a pervasive expectation of reciprocity. Even if parties have no understanding of the written language that should have articulated their contractual obligations, background legal norms can advise which obligations they effectively assumed.

I. Normative Triangulation in Contract Interpretation

The starting point for the analysis is that, contrary to occasional rhetoric, parties in contract are not inevitably "free" to contract as they see fit.[26] The overturning of *Lochner* and the more fundamental rejection of wide-ranging economic liberty ushered in by the New Deal has more profound implications for contract that we have acknowledged. The post-*Lochner* era is characterized by a broad, if imperfect, consensus that the state has a legitimate interest in regulating exchange for purposes other than policing consent. Indeed, the state actively regulates the terms of exchange in a wide range of activities.[27] Denying the exclusive right of individuals to control the terms on which they engage in "private" exchange does not merely expand the scope of regulation and thereby reign in the boundaries of private contract. From the inside out, it alters the meaning of contract and contracts.

In the post-*Lochner* era, the state has a recognized interest in regulating exchange. Because contracts are restricted in law to agreements for exchange (by the requirements of consideration[28] and mutuality of obligation[29]), the state's interest in contract is not reducible to its interest in promise.[30] The state's interest in regulating the economy extends to regulating the transactions that constitute markets. That interest derives from the cumulative effects of private exchange and the implications for public justice (including the aggregate level of wealth and its distribution), the privately-borne externalities that any given class of exchange imposes on discrete groups, the harms that contracting partners may inflict on each other, and the moral status of claims that individuals seek to vindicate through state enforcement of contracts. The result is that the state's interest in the terms of individual contracts is over-determined.

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[26] *See Printing and Numerical Registering Co v. Sampson L R.,* 19 EQ. 462, 465 (1875) ("if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the Courts of justice").

[27] *See supra* notes 8-14.

[28] *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 cmt. d (1981) ("The element of exchange is embodied in the concept of consideration.")

[29] *See Jordan v. Diamond Equip. & Supply Co*., 207 S.W.3d 525, 533 (Ark. 2005) ("Mutuality of obligation involves the exchange of promises.")

[30] *See* Gregory Klass, *Promise Etc*., 45 SUFFOLK U. L. REV. 695 (2012).

We regard contract as voluntary because contracting parties exercise normative power[31] over their relations with contracting partners; they are the source of their own obligations. But in fact their power rivals the regulatory power of the state; individuals and state *both* have say over how transactions proceed. Contract is the peculiar method by which states *mostly* leave it to individuals to sort out the terms of private transactions but as a tool of governance it is subject to a logic separate from the private practice of promise. Contractual promises create promissory reasons for parties to follow through on their agreements but they generate *separate* reasons for the state to enforce those agreements. Because the state has a range of regulatory interests in contract outside of promise, even if parties' intentions control their promissory obligations in contract, they do not similarly control the scope of legally binding agreement.

Why not think that enforcing contracts is about enforcing promises, even if our reasons for enforcing promises include non-promissory norms? As a descriptive matter, the principle of objectivity in contract already suggests that the law is uninterested in enforcing party's actual intentions, including what they undertook to promise.[32] But maybe the obligations created by promise turn on a promisor's objective intent too, such that the law's interest in objective intent is consistent with the morality of promise. The question is whether objective intent should turn on how each party is *most likely* to have interpreted the other party's intentions or on the most *reasonable* interpretation of each person's intentions. If contractual commitments arise spontaneously from a vacuum, these two variations on objective intent might collapse into one: the most reasonable interpretation of intent would be the other party's best guess about those intentions. That is indeed how courts sometimes casually describe the practice of contract interpretation.[33]

However, if private contract is to govern the terms of an exchange, it must actually function as an alternative to mandatory regulation. That is, it must reasonably specify the duties implicated in exchange – which is to say, as I argue further below, that it *must be read* to reasonably specify the relevant duties. There are many reasons to harness the practice of promise for purpose of specifying duties in exchange; it allows individuals to set our own prices, choose our own products and providers, ratchet our warranty protections up and down based on our particular levels of risk aversion and productive capacities. Private individuals are usually better at setting the terms of exchange than is a third party like the state. But courts' reasons for deferring to our terms are

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[31] A person has normative power where she can change her normative position by communicating an intention to do so. *See* Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 928-31 (1982); DAVID OWEN, SHAPING THE NORMATIVE LANDSCAPE 4-6, 127-8 (2012).

[32] *See, e.g., SAS Inst Inc v. Breitenfeld*, 167 S.W.3d 840, 841 (Tex.2005) ("a court interprets a contract by ascertaining the true objective intentions of the parties, based on the contract language"); *Cochran v. Norkunas*, 398 Md. 1, 17, 919 A.2d 700 (2007) ("the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant"); *Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 168 (2d Cir.1997) ("When interpreting the meaning of a contract, it is the objective intent of the parties that controls. The secret or subjective intent of the parties is irrelevant.").

[33] *See, e.g.*, *United Rentals, Inc v. RAM Holdings, Inc*, 937 A.2d 810, 829 n. 92 (Del. Ch. 2007) ("Fact finding leads to the best reconstruction of the parties' intentions while drafting the contract, and the purpose of contract interpretation is to discover the common intent of the parties."); *Schering Corp v. Illinois Antibiotics Co* 62 F.3d 903, 909 (7th Cir. 1995) (aiming for "a proper reconstruction of the parties' intentions"); *Shannopin Min Co v. Com., Dept of Labor & Industry, State Workmen's Ins Fund*, 556 A.2d 488, 491 (Pa. 1989) ("Our appointed task is to reconstruct the intention of the two parties.").

instrumental; contract expands individual agency while regulating conduct in the course of exchange. Although individuals' authority on the terms of exchange is not entirely epistemic – grounded in their superior information – it is not fully jurisdictional either. We are authoritative only inasmuch as the terms we choose are consistent with the regulatory functions served by contract. Thus even if, by virtue of state's commitment to private ordering, our promises generate some content-independent reasons for state enforcement, our terms are effective substitutes for the background legal scheme only where they fall within certain bounds – and that inquiry is content-dependent.

At this point it is useful to observe one point of contrast between interpreting contracts and interpreting law, and a separate point of similarity. First, the point of contrast: Post-*Lochner*, individuals have no inherent claim of authority over the terms on which we deal with others. In this respect, courts interpreting individual *promises* in light of background political duties are differently situated than individuals or courts interpreting *laws* in light of related moral principles. At least in a positivist account of law, the sources of legal obligation do not depend directly on the moral attributes of law. Political authority is content-independent to the extent that our reasons for respecting political authority do not depend on the substance of particular laws. For that reason, depending on how we construe the scope and basis of authority and the process of law-making, we (or courts) might care whether the legal authority that passed a law intended it to prohibit or permit some conduct.[34]

Individuals possess no comparable *authority* to dictate the terms on which we will discharge our involuntary duties. Our *interest* in moral agency is among the reasons for leaving it to us to decide how we deal with others and that interest may be advanced irrespective of the content of our choices. Material constraints on choice limit how importantly contract can contribute to this sense of agency but, again, our interest in agency is not the only relevant interest. The interests of others must also be well-served by our contribution to a system of private ordering. Whether these interests are well-served is content-dependent.[35] That is, the force of public reasons for deferring to private terms of exchange depends in part on the terms that contracting parties choose.

Indeed, political authorities dissatisfied with the substantive terms on which whole classes of market transactions take place regularly override those terms through consumer, labor, tenant-landlord, antitrust and many other statutes. When courts find the terms of individual transactions wholly inadequate they have the doctrinal resources to refuse to enforce those contracts (by declaring them unconscionable or against public policy). In all the less dramatic cases, courts should read contracts sympathetically as our effort to carve out some moral space in a world already saturated with duty.

Although contract interpretation differs from legal interpretation in the authority of the speakers whose words are subject to interpretation, contract interpretation is similar to legal

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[34] Andrei Marmor endorses intentionalism "if, and only if, a certain law is justified on the basis of the expertise branch of the normal justification thesis." INTERPRETATION AND LEGAL THEORY 139 (2005).

[35] Even Joseph Raz allows, though he does not pursue, the possibility that promissory norms may be justified on grounds which "combine content-independent and content-dependent arguments." *Promises and Obligations, in* LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H. L. A. HART 96 (P. M. S. Hacker & J. Raz eds., 1977).

interpretation in that the best rules of interpretation depend on our conception of the practice and its purposes. The practice of contract as a method of regulating exchange depends for its legitimacy or at least its appeal on the theory of interpretation it presupposes. A silly theory of interpretation will result in a contract regime that no one would endorse. A better interpretive practice will deliver a better practice of contract, and might make it a more attractive alternative to mandatory regulation than it would otherwise be.

In the context of jurisprudence, Ronald Dworkin's proposal that that law as a practice involves constructive interpretation of legal rules to cast them in their best light, or to exemplify the values in law, depends on his underlying conception of law.[36] Similarly, my more modest point that courts should read contract terms to render them reasonable where possible turns on my account of the function of contract law. The feature of Dworkin's conception of law that may most importantly drive his theory of interpretation is his accounting of law's authority; similarly, what does work in my account of contract interpretation is the relatively narrow bases I identify for contracting parties' authority.

Legal positivists argue that, though we can expect law to take into account certain moral values, we ought not to directly reference those values in interpretation. Similarly, most contract theorists are likely to say that, though freely negotiated contract can be expected to advance values related to reciprocity and fair exchange (and we have reason to believe parties take into account duties pertaining to exchange), those duties ought not to inform contract interpretation. Without commenting on the jurisprudential debate, my argument here is that because contract is not an inevitable but instrumental regime for governing exchange we should select its interpretive rules such that they serve underlying normative values. There is nothing in the apparatus of contract that requires it operate on auto-pilot, forbidding judges and other state actors from looking backward at its purposes in the course of implementation.

Notably, in contrast to Dworkin's theory of legal interpretation, I am not proposing that we read contracts to be the *most* reasonable terms of exchange possible. Contract enforcement is content-dependent but not content-determined. First, normative triangulation kicks in only where ambiguity is present. Second, normative triangulation aims to bring terms within the bounds of reasonableness while remaining agnostic about the most reasonable term. That is because a regulatory regime must make a decision about the bounds of reasonableness but it is characteristic of a regime of contract (as opposed to mandatory regulation) that it is agnostic as to the "best" term.

The committed agnosticism of the state as to the ideal terms of exchange might at first appear to render the analogy to Davidson's triangulation inapt. Davidon's concept of triangulation is bound up with objectivity, that is, an awareness that thoughts are true or false. Only beings that possess this concept and thus see their own perceptions and those of others as capable of falsity will use triangulation to prefer interpretations that render utterances largely true. One might think that triangulation is never possible with respect to normative facts such as the obligations of parties in exchange toward each other if one is a skeptical about the existence of any objective obligation. However, judges at least must adopt the perspective that legal norms are objectively binding and constitute a shared normative framework for contracting parties, who after all seek to invoke some of those norms.

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[36] RONALD DWORKIN, LAW'S EMPIRE 52 (1986).

More problematic for our purposes, one might doubt that the state can triangulate to impute meaning to contracting parties' utterances if we see the state as committed to neutrality with respect to those terms, i.e., not committed even to the existence of any optimal terms. While we have reason to believe that we should be responding to a cat on the mat in the same way as others (or at least, observing the same phenomenon), a liberal state should not expect contracting parties to perceive normative facts similarly, and judges should not expect parties to see their obligations in exchange as judges might themselves construe them.

A liberal state is in a bit of bind on this question. On the one hand, I have just described it as committed to a certain agnosticism about the correctness of normative perception, i.e., whether the obligations parties choose to assume are the right ones. On the other hand, a liberal state is committed to regulating exchange and its aggregate outcomes, and this means having some preferences about precisely those terms it delegates to private parties.

We can reconcile the tension by characterizing obligations as only partially indeterminate to the state. The state can be committed to certain boundaries – e.g., a maximum price or a minimum duty of care – without ranking terms within the acceptable range. The result is that the state is not committed to maximizing agreement, as an interpreter in Davidson's triangulation would be; instead, it is committed to a presumption of reasonableness. Courts attribute reasonableness to the obligations parties have selected by reading obligations as falling within the range of reasonableness.

To put it another way, the state reads ambiguous terms as if they were uttered by a reasonable person. Andrei Marmor describes interpretative statements as counterfactuals about the communicative intent of a hypothetical speaker.[37] In contract, the hypothetical speaker is one committed to successfully navigating background duties in contract. Thus, a court interpreting an ambiguous term must answer the question: what would a reasonable person (intending to comply with her background duties) mean by these words? In this way courts are properly constrained by the words actually chosen and are not merely asking what a reasonable person would do. They can give proper weight to background constraints while respecting the underlying policy choice to regulate a given transactional space by way of contract rather than mandatory rules.

This view of contracts and the correct attitude of judges in interpreting them is subject to the following challenge: I have referred to the obligations of exchange as indeterminate within a range. But this suggests the obligations are out there before contracting parties "assume" them. I speak as if parties are themselves only interpreting background duties rather than authoring them through the exercise of normative power (as in promise).

It is true that the picture of contract offered here entails a certain externalism about normative powers. Davidson's perceptual externalism is the view that the meaning of what one says is partly determined by what usually causes them, i.e., by external objects.[38] In contract,

[37] Marmor, INTERPRETATION , *supra* note 34, at 23.

[38] Davidson, *supra* note 24, at 193-204.

parties make promises or grant permissions in response to the facts of prospective exchange. How ever these normative powers may operate in other contexts[39], in contract at least, promises are made and permissions are granted in response to the material facts that drive exchange and in coordination with another person simultaneously offering promises and permissions of her own. Normative powers are not exercised spontaneously but in response to external facts. We can use those external facts to interpret how those powers were used in the way we use external facts about the world to interpret utterances that purport to describe them.

We exercise normative powers in reaction to the external world in another respect. The moral situation that prompts us to promise or permit is not of our making. We act on imperfect duties[40] even where no one has a particular claim against us. We seek to comply with vague legal obligations to our partners in exchange that are only substantiated occasionally, ex post through adjudication. Although we create new obligations to our contracting partners through contract, we do not create them randomly but in recognition of existing commitments. Indeed, the normative powers we exercise in contract might be considerably less valuable instances of moral agency if their exercise involved no moral deliberation.

Externalism about normative powers does not require that we view promises as merely interpretive, however. Or at least, this would be only a metaphorical and highly reductivist way to describe the activity. I am not claiming, as Patrick Atiyah did, that our promises are merely evidence for existing duties.[41]

Even a linguistic description of the external world is original in its perception. Although committed to the possibility of falsehood, interpreters engaged in triangulation are not committed to the existence of any *single* true description of the world we observe. Similarly, moral agents exercising normative powers in contract can be responsive to external facts and constraints while still creating obligations that did not exist before. We can presuppose some similarity in how moral agents react to external events without assuming that we will all navigate our moral situations in the same way.

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[39] There is reason to believe that the exercise of normative power may be always constrained by background duties in a way that most discussion of the concept has obscured. After all, only a moral agent capable of obligation is capable of exercising normative power, but such an agent will always already have obligations attached. The idea of normative power seems to presuppose a blank state on which the agent acts where it might usually be more appropriate to speak of an indeterminate terrain. Inasmuch as we expect agents to exercise normative powers in response to externally (if partially) determined normative facts, it might be appropriate to interpret the utterances by which normative powers are exercised always by reference to background duties. However, this article is focused only on the appropriate bases for interpreting normative powers exercised in contract.

[40] Imperfect duties prescribe a general course of conduct (e.g. giving money to the poor, cultivating one's talents, helping one's friends) but do not require particular actions or correspond to entitlements in others. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 153 (Mary Gregor ed. & trans., 1996) (defining imperfect duties as those which "prescribe only the maxim of actions, not actions themselves," or those which "leave[] a playroom (latitudo) for free choice in following (complying with) the law, that is, that the law cannot specify precisely in what way one is to act and how much one is to do.").

[41] *See* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 143 (1979).

The presumption that contracting parties are responding to the circumstances of exchange in a way that complies with background duties is not an epistemic presumption justified by some belief about how people actually operate, though it may be buttressed by some psychological theory.[42] Courts presume that parties comply with some minimal standards of efficiency or fairness in exchange in the context of contract interpretation because only such a regulatory presumption justifies deference to the terms parties have chosen. Parties are left to navigate the ethics of exchange only to the extent they do so in a plausible way. While Davidson's interpreters may have reason to believe that speakers react to a common world in a similar way, the state has reason to interpret contracts *as if* parties are responding to the facts of exchange in a reasonable way.[43]

II. Interpreting Standard Form Liability Waivers

I have argued that the state's reasons for enforcing an agreement depend on its terms and whether they are consistent with background duties that parties have toward each other – duties that the state could otherwise enforce by way of a mandatory regime. Interpreting agreements thus turns in part on the content of those background duties.

As discussed above, Langille and Ripstein introduced the idea of interpreting contracts by way of triangulation. But like Davidson, their triangulation is epistemic and committed to discovering meaning without attributing it.[44] They are true to Davidson in that they take the interpreter (courts) to be interested exclusively in speakers' intentions. In fact, they argue that after triangulation there are no gaps in contracts that courts must – or may – fill by reference to exogenous considerations. The primary implication of the content dependence for which I am arguing is that such an exclusive interest in party intent is unjustified.

Courts interpreting ambiguous agreements often find themselves reconstructing the bargain that parties made, as incompletely indicated by its express terms.[45] They can proceed in

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[42] People tend to divide and expect others to divide fixed amounts equally. *See* Martin A. Nowak, Karen M. Page & Karl Sigmund, *Fairness Versus Reason in the Ultimatum Game*, 289 SCIENCE 1773, 1773-74 (2000) (describing experiments in which most individuals prefer to walk away empty handed rather than permit highly asymmetrical division of fixed amount between themselves and another person); *see also* Hoffman & Spitzer, *Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice*, 14 J. LEG. STUD. 259 (1985); Hoffman & Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 J. L. & ECON. 73 (1982).

[43] Because normative triangulation is differently motivated than Davidson's triangulation, it is not subject to the critique that Marmor lodges against application of the principle of charity in interpreting particular utterances. Marmor says that because "the principle of charity amounts to the claim that one cannot have a theory of meaning for natural language whereby the bulk of the speakers' beliefs would turn out to be false," the principle "only makes sense with respect to language and thought as a whole, not to bits and pieces of it." Marmor , *supra* note 37, at 17. The counterpart principle of charity in contract interpretation does not only justify the enterprise of contract as a whole but also enforcement of particular agreements. Marmor may be right that because individuals are capable of uttering false statements, we cannot operate on a theory of interpretation that disallows that possibility. But because contracting parties need not be capable of binding themselves on socially unacceptable terms, we can interpret contracts to disallow that possibility.

[44] *Cf.* Langille & Ripstein, *supra* note 21, at 63 ("when the relationship between the meaning of an agreement and the world in which it is made is properly understood, agreements themselves turn out to be highly determinate").
[45] *See Sayers v. Rochester Tel. Corp*., 7 F.3d 1091 (2d Cir.1993) ("The primary objective in contract interpretation is to give effect to the intent of the contracting parties 'as revealed by the language they chose to use.'").

two ways. They can reconstruct the bargain parties actually made, for which they may be uncertain evidence. Or they can reconstruct a hypothetical bargain. Scholars have challenged the propriety of enforcing a bargain that parties might have made; hypothetical consent is no substitute for actual consent.[46]

One need not rely on hypothetical consent as a normative substitute for actual consent, however, in order to justify inquiry into the circumstances of the parties at the time of contract or prevailing market practice. Courts may not be merely *assuming* that bargains were intended to reflect background duties and market conditions but *imposing* compliant terms as a normative matter, at least where they doubt that contract terms reflect special features of the transaction. Why should they do this? As an example, if courts suspect that a possible departure from market terms reflects market or bargaining failure (as a result of transaction costs), and in particular, if they think that one party would disproportionately bear the costs of the suboptimal bargain, then they can avoid this result by reading the ambiguous agreement to render it reasonable.

Courts do this already because contracts are always incomplete and the more straightforward rules of contract interpretation are sometimes indeterminate with respect to specific terms.[47] Thus judges are regularly left with the ultimate question before them: what it was "reasonable" for one party to infer that the other intended.[48] Reasonableness is a famously flexible standard. It can be interpreted in multiple ways.

First, an intepretation may be *empirically* reasonable in that it is consistent with how most parties would interpret agreements under comparable circumstances. Second, a reading may be *normatively* reasonable in that as a substantive matter the agreement is equitable on that reading. Third, it may be *procedurally* reasonable to privilege one party's understanding of terms over that of the other party because of their relative expertise or control over the agreement. Finally, an interpretation may be more *publicly* reasonable in that it may be desirable as a matter of public policy that obligations be construed in that way.

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[46] *See* Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 MICH. L.R. 1551, 1567 (2009).

[47] *See* Timothy Endicott, *Objectivity, Subjectivity and Incomplete Agreements, in Oxford Essays in Jurisprudence, 4th Series* 163-65 (J. Horder, ed., 2000) ("there is commonly more than one good answer to [the] interpretive question" so reference to principles exogenous to party intent is unavoidable). *But see* Langille & Ripstein*, supra* note 21, at 63 (arguing contracts are highly determinate when properly interpreted in light of context facts).

[48] *See, e.g., Schwartz v. Family Dental Group, P.C.*, 106 Conn.App. 765, 771 (2008) ("[I]ntent ... is to be ascertained by a fair and reasonable construction of the written words and ... the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract."); *Dickenson v. State, Dept of Wildlife*, 877 P.2d 1059, 1061 (Nev.1994) ("An interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract."); *Wilkes-Barre Township School District v. Corgan*, 170 A.2d 97, 98-99 (Pa. 1961) ("Where the language of a contract is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred. If one construction would make it unreasonable, while another would do justice to both parties, the latter will be adopted").

Sometimes courts use the notion of reasonableness in just one of these ways. But often courts invoke a default, which may be motivated by an array of reasons that roughly correspond to the considerations that bear on the reasonableness inquiry.[49]

Only empirical reasonableness, or majoritarian defaults, are designed to reconstruct bargains as they really were. Each of the other types of reasonableness justify incorporating information about background legal obligations and markets and the constraints they imposed on parties independent of their intentions. Notably, most types of reasonableness are market-correcting. This does not mean interpretation "toward" such reasonableness runs counter-market; these interpretive modes are not necessarily intended to resist the consequences of market pressures for one of the parties (though in extreme cases, they may do that). More often, judges reading for reasonableness correct market failures, especially information failures, that may have distorted a bargain, resulting in terms less favorable for the less advantaged party than those available elsewhere in the market.

A contract that reflects market failure of this sort has the effect of enriching one party at the expense of the other due to a defect in the process by which their agreement came about. Parties are free to make poor bargains but courts have no reason to make such agreements on their behalf by way of interpretation. Where a court chooses among interpretations of a term, one of which will render a term consistent with market practice and the other of which facilitates an unwitting transfer, it should prefer the former interpretation.

A view of contract in which parties are free to deal with each other on any terms will be hostile to every conception of reasonableness save the empirical mode, which amounts to a best guess about what obligation a party voluntarily assumed. But post-*Lochner* judges are no longer guided by the presumption that parties are free to contract on any terms. Private ordering is an alternative to direct regulation of markets; the state can reference other kinds of reasonableness in deciding how to handle a transaction. Contracts are the product of markets and markets are in many ways the products of states. Courts can and do read contracts in a way that preserves and promotes the market institutions for which states are responsible.

Contracting parties' intention remains an anchor to contract interpretation under a principle of normative triangulation. It will remain central to any account of contract that understands contract to be a kind of private arrangement between two parties. Indeed, I have assumed not only that contracts involve the exercise of normative powers (like promise) that obligate parties to each other but also that the state chooses to regulate through contract in order to facilitate and perhaps elevate the private practice, to allow individuals a greater measure of control in their bilateral relations and also to harness the information about values and preferences that individuals tend to possess only about themselves. Contract will not serve those purposes unless states remain committed to enforcing bargains essentially as conceived by contracting parties. But these interests of the state in contract are not exhaustive. They sit alongside other legitimate interests – including interests of justice – in the terms of private exchange. The best regime of contract must be one that gives adequate weight to both interests and thus cannot be indifferent to either. Because the choice of contract as a method of regulating exchange necessarily turns on its adequacy in serving interests other than ones related to private agency, the state has content-dependent reasons

[49] *See* Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 SO. CAL. INTERDISC. L.J. 389, 390 (1993) (describing types of defaults).

for enforcing contracts. It flows from that fact that interpretation is more than a series of guesses about what parties were thinking or even what thoughts each ought to have attributed to the other. Courts bring to bear interpretative defaults that reflect substantive preferences about the terms of exchange.

One advantage of contractual defaults that do not theoretically derive from party intent to conform to those defaults is that they direct interpretation of terms where the usual anchor of party intent is wholly absent. Standard liability waivers fall into this category because one or both parties is likely not to have considered the meaning of the particular language of their written agreement. Normative triangulation advises that courts help themselves to substantive background legal norms to resolve ambiguity in such terms.

Liability waivers are typical in consumer service contracts even though consumers do not read them. They are rational not to do so, of course, since the terms do not reliably reflect the scope of service providers' obligations (given legal constraints) and consumers often cannot alter either the writing or their own conduct. Consumers have expectations about what providers' owe them, however, even if those expectations are not tied to any written language. Those expectations derive from their background legal entitlements and general commercial practice: Legal entitlements that allow recourse for a variety of injuries that are the result of negligence by others are bedrock elements of our private law system, and in turn, civil society as we know it. The norms of reciprocity and against unjust enrichment are only soft legal norms but they too are well-entrenched and lead people to expect that transactions for similar goods and services provided at similar cost will proceed on roughly similar terms.

In the first section of this Part, I consider overbroad language. Courts must decide whether to reform these terms to bring them within permissible bounds or whether to strike them down altogether. Background legal entitlements here favor treating the default tort regime as a sticky default out of which parties must opt out clearly. In the second section, I consider the weight to be assigned small variations in language among waivers. I argue that courts should assign little weight to small variations where there is no evidence that parties mutually intended to depart from market norms.

A. Overbroad Terms

The idea of angled interpretation is already familiar to us in the way American courts read statutes to conform to constitutional principles. A court interpreting a statute will prefer a reading that saves it; indeed, it will prefer a reading that avoids the constitutional question altogether. [50]

One way to understand this rule is that courts are simply trying to respect the separation of powers and avoid stepping on the toes of the legislature any more than necessary, instead

[50] *See Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs*, 531 U.S. 159, 74 (2001) ("We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation."); *Edward J DeBartolo Corp. v. Florida Gulf Coast Bldg & Constr Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

prompting the legislature to act where necessary.[51] In that case, the court has reasons to strike down the law but it is outweighed by general reasons not to strike down any law. But we might go further: A reading of a statute under which it is not only constitutional but *robustly* constitutional delivers a *better* interpretation – because as a general matter, a statute that is clearly constitutional is preferable to a statute that only barely survives scrutiny. Although reasons to strike down the law are outweighed by structural considerations, those reasons do not disappear. They cut in favor of the "more constitutional" reading.

As with legislative deference, a court has many reasons to respect private ordering and the voluntary dimensions of contract by declining to substitute its own preferred terms for those selected by the parties.[52] These general reasons cut in favor of "delegating" to parties the terms of their own exchange and respecting those terms with narrow exceptions. But the political interest in the terms of exchange is not extinguished by the virtues of private ordering and a legal culture that recognizes promise; they are merely outweighed by them. Thus, the residual interest in fair exchange, or in exchange that does not undermine background justice, still appropriately shapes interpretation of private agreement.

The normative triangulation proposed in this essay is more familiar than my argument for it. Like Davidson's triangulation, it describes an interpretive strategy we continuously deploy. Facts about duty describe a common moral space inhabited by promisor and promisee (and court). Duties of all sorts make up our moral world in the way that hard facts make up our physical world. People speak -- and communicate intentions to assume obligations -- in a shared context. When a cashier says that she "will go get five" we may take her to mean that she will go get five dollars, and not five cents, because we know that she owes us five dollars. We interpret her words in light of an existing obligation.

Courts interpret contracts in the same way. Courts already interpret promises in the light of background duties of the appropriate sort. They regularly set defaults in light of prevailing expectations and norms. The interpretation of contracts so as to render them '"reasonable" similarly incorporates norms exogenous to party intent into the exercise of deciphering and constructing contractual intent.

Consider the case of *Embry v. Hagardine, McKittrick Dry Goods Co.*, in which an employee threatened to quit unless his contract was renewed. His employer replied: "Go ahead, you're all right; get your men out and don't let that worry you."[53] The court held that it was reasonable for Embry to conclude that McKittrick had thereby renewed the employment contract. One might take the court to mean just that most people in Embry's shoes would understand McKittrick to have intended renewal. But this empirical question depends on a variety of factors, including the perceived attitude and perceived practices of most employers, and of McKittrick in particular. Probably more important in this case was the fact that it is *right* or simply *better* to hold McKittrick to the agreement that he may or may not have intended to make. Labor markets

[51] *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1204-06 (1992).

[52] Unlike legislative lawmaking, however, private ordering in the broad terms conceived here is not constitutionally mandated.

[53] 127 MO. APP. 383 (1907).

operate more fairly and efficiently where employees are able to extract reliable information from their employer prior to taking steps that will limit their mobility going forward. Embry's proposed interpretation of McKittrick's statement is most reasonable from this normative standpoint.

A similar explanation is available for another classic case on objectivity in contract, *Lucy v. Zehmer*.[54] Lucy claimed that Zehmer sold him a tract of land but Zehmer claimed it was all a joke. The court described a number of facts that spoke to whether it was reasonable for Lucy to believe he had a real deal. But lurking in the background is surely the fact that Zehmer was best placed to avoid confusion. We might not be confident that Lucy was reasonable in taking Zehmer so seriously but we can be confident about the reasonableness of a penalty default that motivates funny people to be more careful.

Another line of modern cases demonstrates how courts can and should interpret agreements in a manner that brings them in line with background duties. Where agreements once regularly failed for lack of mutuality of obligation, courts now frequently imply a duty of good faith or duty to apply best efforts in order to "cure" lack of mutuality.[55] For example, in the classic case of *Wood v. Lucy, Lady Duff-Gordon*[56], Judge Cardozo reads an exclusive agreement between the fashion designer and her agent as containing an implied obligation on the part of the agent to use reasonable efforts to market the designer's endorsements. Cardozo's opinion does not rest so much on speculation that the parties intended the agent to have such an obligation as the court's confidence that the parties intended a familiar form of business relations and a legally binding agreement to govern it. The court is "not to suppose that one party was to be placed at the mercy of the other."[57] Reading the agreement as wholly lopsided would have put it outside the bounds of enforceable contract. The court instead interpreted the agreement in a way that *made* it normatively defensible, and therefore enforceable.

Bringing the normative dimension of interpetation back into focus is especially helpful with respect to grey holes, written language for which party intent reveals little. Consider the following liability waiver.

> I hereby RELEASE, WAIVE, DISCHARGE, AND COVENANT NOT TO SUE ["Company"], their officers, agents, or employees (hereinafter referred to as RELEASEES) from any and all liability, claims, demands, actions, and causes of action whatsoever arising out of or related to any loss, damage, or injury, including death, that may be sustained by me, or to any property belonging to me, while participating in such activity, while in, on or upon the premises where the activities are being conducted.

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[54] 196 VA. 493 (1954).

[55] *See, e.g.,* UCC § 2-306(2) ("A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.*"); Omni Group, Inc, v. Seattle-First Nat'l Bank*, 32 Wash. App. 22 (1982) (reading right of cancellation that was subject to feasibility report as implying duty to attempt to obtain such report in good faith).

[56] 222. N.Y. 88 (1917).

[57] *Id.* at 91.

The first feature to consider is its overbreadth. It purports to waive liability not only for all negligence but even intentional wrongdoing that might result in injury on Company's premises. Such a waiver cannot be enforced as written because liability for intentional torts, including gross negligence, cannot be waived.[58] The resulting problem of enforcement is a species of the problem of ambiguity in that courts have to choose among several possible meanings to assign the term, each of which is plausible given background principles. The term can be read to waive liability for a variety of separate events, such that the court can strike waiver for some of them. Or it can be read as waiving liability for them as a set, in which case it should be struck if over-inclusive. Accordingly, courts will generally either reform the principle to bring it within the scope of the law, or they will decline to enforce the principle altogether on the grounds that the waiver stands or falls as written.[59]

The principle of charity might at first blush advise in favor of the former route. But the principle is not literally charitable in the sense of maximally generous to a drafter. Rather, the principle recommends assuming that the drafter set out to articulate an obligation consistent with background obligations. In this case, private law already stipulates the conditions under which private parties are liable to each other for negligence and intentional wrongdoing. Most private entitlements to recourse are alienable. We might 'read' the legal regime (or interpret public policy) to be that the state is utterly disinterested in whether a remedy is available outside of those limited cases where waiver is actually disallowed. But there are at least two reasons to think that the boundaries of alienability are rather a compromise between deference to private agreement and a more pervasive state interest in private recourse. First, the justifications for private remedy (I will not rely on any singular account) are varied and complex, and do not consistently imply a sharp conceptual boundary between permissible and impermissible waiver. Second, the system of private entitlements that civil recourse for injury informs the way business is conducted more generally, and the degree of risk aversion with which people go about their lives. That is, private waiver has broad externalities. Liability waivers are therefore a good example of private terms in which the state has a residual interest, even where it allows private agreement to control.

Importantly, because normative triangulation is a theory about interpretation and not a theory about the appropriate scope of direct regulation, it does not have anything to say about whether liability waivers should be enforced as such. It speaks only to the question of how they should be enforced when they are poorly drafted and therefore of uncertain consequence. As with interpretative defaults that require employment contracts and collective bargaining agreements to speak with crystal clarity when employees waive rights under civil rights statutes,[60]charity here suggests a sticky default in favor of the background tort regime. The parties can contract out of it – through waiver – but they have to be clear. The justification for this already common result is not the far-fetched contention that most parties do not really mean for the term to be subject to reform. The better justification for a sticky default in contract interpretation would openly rely on the state's interest in the other half of the law of obligations.

B. Small Variations

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One of the interesting phenomenon that Choi et al observe with respect to grey holes is that drafters seem to tinker with the language even if they do not report a clear understanding of it. The fact that they are changing the language would normally be taken to be evidence that they did think about it, and invite courts to reconstruct the intention behind various modifications to the language.

Where a change in language renders a written term unambiguous, then the change is consequential indeed, as it forecloses opening the box of multi-faceted criteria that courts can and should bring to bear on ambiguous terms. But once that box has been opened, small variations are important only if they really do reflect mutual agreement to depart from the rejected language. Modifications that are made by one party – as in standard form language – are not modifications to consumers unless consumers can be expected to know that the language is different from what they would ordinarily encounter on the market. They are likely to be so aware only if the seller is motivated to draw their attention to it, which they would presumably do only if the waiver was more limited than found elsewhere on the market.

Most small variations in language are likely to be restrictive as a seller attempts to expand the protection offered by a waiver that consumers will not read. A charitable reading would assign little weight to those changes (except where they render the term unambiguous) if the change is unaccompanied by any other departure from market practice (e.g., a lower price). Although courts are not tasked with ensuring equivalence of exchange in the context of deciding the enforceability of an agreement, at the point of interpreting the significance of a particular change to ambiguous language, a court can rely on a general expectation that, were such a change to provide greater protection to the seller, that the buyer would be compensated for this departure in some way.

What justifies such an expectation on the part of the court? The principle of unjust enrichment sometimes forms the independent and sufficient basis for a legal claim but unjust enrichment and reciprocity together inform a host of other doctrines such as consideration, promissory estoppel, unilateral mistake, unconscionability and restitution. Each of these doctrines, together with the default of expectation damages, may be read to directly or indirectly imply that in competitive commercial markets, absent special transaction costs, parties can be expected to contract on market terms. For example, if the price of a good is higher than the usual market price, we would expect to find some other feature of the contract, e.g. relating to time frame, delivery, or liquidated damages, that explains the premium. If an agreement is silent on price, courts default to market price.

Where the parties are clear about the terms of exchange, it is not necessary for a court to reconstruct their reasons for adhering or departing from typical market terms. But where language is ambiguous, among the relevant considerations (together with evidence of particular party intent) is prevailing industry practice (often under the heading of trade usage, though this might have a narrower meaning). Industry practice (unlike trade usage) is relevant even where the parties have no specific knowledge of those practices because it informs our collective understanding of fair exchange with respect to a particular transaction type. Again, the pragmatic advantages of a market default may be greatest where parties avoid undertaking a costly effort to learn and agree upon obligational content. Courts should allow consumers to avail themselves of the expectation that a given merchant will not deviate from market practice in only a single, largely unobservable term -- just as the *Embry* court allowed the employee to understand his employer's noncommittal response as an acceptance.

III. Conclusion

Critical to the interpretative mode recommended here is my starting point that enforcing contract is an alternative to other legal modes of regulation. Policymakers could enforce background political (but not personal) duties through mandatory rules. But policymakers have many reasons not to pursue mandatory regulation over contract. Besides the efficiency advantages, the voluntary character of contract allows individuals to exercise an important moral capacity; we bring not only private information but also values, virtues and vices to bear on transactions. We express moral personality in our dealing with others, and contract helps make space for us to do that.

Even though we have these and other good reasons not to enforce many political duties through mandatory rules and to instead delegate them to private ordering, political duties -- and the public interest behind them -- persist in a regime of contract. An extensive body of private law norms "in equity" establishes that the state prefers contracts in which both parties are treated fairly. It also prefers – and should prefer – contracts that do not undermine state objectives likes competitive markets, consumer safety or civil equality. More generally, the state should not undo with one hand, contract law, what it pursues with its other hand, its regulatory apparatus. Once we recognize that parties have no natural or constitutional right to control the terms of private transactions, the state need not feign blindness or ineptitude in the context of private adjudication. The public dimensions of exchange appropriately motivate the way in which exchange is regulated in the private domain.

Most contracts are between private persons but contract is a social regime. Contract scholars are prepared to take into account the economic significance of transactions and the moral significance of promises but we have not dwelled long enough on its distinctly legal character, and the problems of authority it raises. Because contracts are enforced by courts, it is well within the authority of the state to decide how it will go about this exercise of state power. There is nothing natural or inevitable about deferring to party intention in the course of interpretation.

We got that a while ago – around the time of the New Deal, in fact. We override contractual intent all the time through statute, regulation and the refusal of courts to enforce contracts that are unconscionable or against public policy. But the essential balance of authority this frequent overriding of party intent reflects does not sufficiently inform our formal understanding of how courts handle contracts that *are* enforceable.

This essay has concerned itself with a subset of enforceable contracts: those which are ambiguous, and which therefore present courts with the very explicit task of interpretation. Courts interpret ambiguous terms in the most reasonable manner possible, and the aim of this essay has been to emphasize the ways in which the most reasonable interpretation takes into account legal norms outside of contract itself.

The point is not limited to, but especially applicable to, written language that is used so routinely and thoughtlessly that its particular phrasing cannot plausibly reveal party intent. The essay suggests that these grey holes are less perplexing if we do not begin with the assumption that all meaning will be sourced from the fountain of intent. Once we allow that background legal norms supply independent basis for resolving ambiguity, grey holes like those found in standard

liability waivers can be filled with content that is consistent with the rest of the surrounding legal landscape.