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THE COMFORT OF CERTAINTY: PLAIN MEANING AND THE PAROL EVIDENCE RULE

Peter Linzer*

It is an honor to take part in this Festschrift for Joseph M. Perillo, scholar of contract law and friend and mentor to so many contracts teachers and practitioners. As the General Editor of the Revised Edition of Corbin On Contracts, Professor Perillo is advancing contracts scholarship on the widest scale. He has, of course, also made many important contributions to specific areas of the subject. In particular, with his longtime collaborator, the late John D. Calamari, Professor Perillo contributed a famous article, A Plea For a Uniform Parol Evidence Rule and Principles of Contract Interpretation, 42 Ind. L.J. 333 (1967), to the literature of contract interpretation. I have been revising Corbin’s discussion of the parol evidence rule, so I have the benefit of Joe both as editor and as fellow scholar. I hope that this essay does him justice.

I. NEITHER HOLY NOR ROMAN: PLAIN MEANING AND THE PAROL EVIDENCE RULE(S)

Underlying the dreaded parol evidence rule1 is the notion that words have plain meanings. The list of contracts authorities that have

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1. It is obligatory at this point to quote Thayer on the parol evidence rule: “Few things are darker than this, or fuller of subtle difficulties.” James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law 390 (1898). Wigmore quoted Thayer and added: “[A]nd this condition of the law all members of the profession will concede. . . . [I]t is not strange that the so-called Parol Evidence rule is attended with a confusion and an obscurity which make it the most discouraging subject in the whole field of Evidence.” 5 John Henry Wigmore, Wigmore on Evidence § 2400, at 235-36 (2d ed. 1923).
denied or derided the concept of plain meaning is long, very long.\(^2\) and Professor Margaret Kniffin, in her revision of the chapter of *Corbin On Contracts* dealing with interpretation, created a twenty-five page section attacking the concept and stating that the judicial trend is to abandon it.\(^3\) Yet Professor Kniffin was too honest a scholar not to admit an important truth. Buried in the midst of this section is one sentence that gives the game away: “the ‘plain meaning rule’ is adhered to by a majority of the jurisdictions in the United States.”\(^4\)

Professor Arthur L. Corbin discussed the plain meaning rule in his chapter on interpretation,\(^5\) and argued that the parol evidence rule had nothing to do with interpretation.\(^6\) Corbin’s reasoning ran as follows: the parol evidence rule means only that, if the parties agree that a written document will be the exclusive contract between them, they necessarily terminate and supersede any earlier agreements, whether written or oral.\(^7\) While this later “integration” bars evidence of earlier agreements, which are no longer valid, it does not bar extrinsic evidence of its own meaning, even if that interpretation is different from the “plain meaning.”\(^8\) Corbin’s position is fully

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2. See, e.g., 3 Arthur Linton Corbin, Corbin On Contracts § 542, at 108-10 (rev. ed. 1960) [hereinafter 3 Corbin On Contracts 1960 ed.] (“There are, indeed, a good many cases holding that the words of a writing are too ‘plain and clear’ to justify the admission of parol evidence as to their interpretation. . . . Such statements assume a uniformity and certainty in the meaning of language that do not in fact exist; they should be subjected to constant attack and disapproval.”); 9 John Henry Wigmore, Evidence § 2462, at 198 (James H. Chadbourn ed., 1981) (“The fallacy consists in assuming there is or ever can be some one real or absolute meaning.” (emphasis omitted)); see also John D. Calamari & Joseph M. Perillo, The Law of Contracts § 3.10, at 148 (4th ed. 1998); E. Allan Farnsworth, Contracts § 7.12, at 476 (3d ed. 1999); 5 Margaret N. Kniffin, Corbin On Contracts § 24.7, at 30 (Joseph M. Perillo ed., 1998); John Edward Murray, Jr., Murray On Contracts § 86 (4th ed. 2001); Arthur L. Corbin, The Interpretation of Words and the Parol Evidence Rule, 50 Cornell L.Q. 161 (1965) [hereinafter Corbin, Interpretation of Words]; Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 417 (1899).


4. Kniffin, supra note 2, § 24.7, at 34.


7. 3 Corbin On Contracts 1960 ed., supra note 2, § 539.

8. No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation it is determined what the writing means. The “parol evidence rule” is not, and does not purport to be, a rule of interpretation or a rule as to the admission of evidence for the purpose of interpretation. Even if a written document has been assented to as the
supported by other distinguished writers, including Allan Farnsworth\(^9\) and John Murray,\(^10\) as well as by the more recent editions of Williston’s treatise.\(^11\) The only problem with this approach is that stated by Professor Perillo,

> The logic of this dichotomy is unassailable, so is its impracticality.
> The very same words offered as an additional term that are rejected because the court deems the writing to be a total integration, can be offered as an aid to interpretation of an ambiguous written term.
> Able courts look at both proffers of evidence as governed by the “parol evidence rule.”\(^12\)

Thus, the parol evidence rule and the plain meaning rule are conjoined like Siamese twins. Even though many academics and more than a few judges have tried to separate them, the bulk of the legal profession views them as permanently intertwined.\(^13\)

I would like to examine these two concepts, and try to understand why courts and lawyers stick to them. Of course, not all their defenders are thoughtless. Recent scholarship, particularly by law and economics types, has shown considerable support for plain meaning and for a rigid parol evidence rule. Again, however, figuring out the reasons for such support can help us to decide if it is time for academics to catch up with practitioners, or vice versa.

The concept of plain meaning, while it has some variations, is pretty straightforward. Most courts that find plain meaning to exist do not spend a lot of time explaining what they mean by it, even in odd situations such as that in the famous *Pacific Gas and Electric Co. v. G. W. Thomas Drayage & Rigging Co.*,\(^14\) where the trial court and the...
intermediate appellate court found different—and conflicting—plain meanings.  

In contrast, the parol evidence rule has many variations. In fact, like that political anachronism, the Holy Roman Empire, the parol evidence rule fits none of the words in its name: it is not limited to parol—that is, oral—testimony, it is not evidentiary, and it is not really a rule. Even its most basic rationale is strongly disputed: is it an adjunct to the Statute of Frauds, designed to discourage self-serving oral testimony, or does it merely express a presumption that the last statement of the parties’ words supersedes what came before, a presumption that may easily be displaced by other evidence, oral or written? There have been extravagances on both sides (assuming there are only two) of the issues. Even assuming that we can figure out how to state the parol evidence rule(s), we then need to ask why we have them and how they fit with the presence or absence of a concept of plain meaning. Perhaps if we knew more about the underlying rationales suggested for various versions of the rule, and, even more interesting, the psychology of those who support one position or another, we might be better able to decide what rules we want, and why.

The inquiry involves psychology, philosophy and politics, as well as the more mundane aspects of contract interpretation. The questions raised by both the parol evidence and plain meaning rules mirror political and social views having nothing to do with contract interpretation. The rationale is intimately connected with an underlying psychology in which certainty and stability battle with party autonomy and intent. On the side of strong reliance on the written document there is a range of emotional and instrumental justifications. A strict parol evidence rule combined with a strong view of plain meaning gives some people psychic comfort as well as predictive stability. It is reassuring to believe that the words on a page provide order, and order is unquestionably comforting.

Writers on semantics, linguistics, philosophy generally, and literary criticism have all spent a lot of time on meaning in general and plain meaning in particular, but the eyes of lawyers and judges glaze over when these discussions are mentioned. While legal writers have often

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15. This is described in Harry G. Prince, Contract Interpretation In California: Plain Meaning, Parol Evidence and Use of the “Just Result” Principle, 31 Loy. L.A. L. Rev. 557, 577-78 (1998). It is not mentioned in the Supreme Court’s opinion, but can be seen in the report of the Court of Appeal decision, 62 Cal. Rptr. 203 (Ct. App. 1967).

16. In discussing positivism and referring to the great German-American legal philosopher, Hans Kelsen, who was neither a fool nor a reactionary, Lon Fuller mentioned “Kelsen’s casual admission, apparently never repeated, that his whole system might well rest on an emotional preference for the ideal of order over that of justice.” Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 632 & n.1 (1957).
debated issues of intent, particularly in matters of constitutional and statutory interpretation, with the exception of H.L.A. Hart and Lon Fuller, few have gone very deeply into the meaning of plain meaning.

In its most rigid form, the plain meaning rule bars extrinsic evidence unless the word is ambiguous on its face. The flaw in plain meaning is, of course, the notion of a latent ambiguity. Everyone concedes that such things exist, and a few piquant examples are often cited, for example, In re Soper's Estate, a Minnesota case in which a man had bought a life insurance policy payable to his "wife." "Wife" is a pretty clear word, and the man had only one wife, but extrinsic evidence showed that he had deserted her and pretended suicide, and was living with another woman when he entered into the insurance contract. The court concluded that he intended to make the second woman his beneficiary, despite the fact that she was not legally his "wife" and another woman was. Similarly, in Raffles v. Wichelhaus, the famous case of the two ships Peerless, the name of the ship on which the cotton was to arrive was clear on the face of the contract, and the existence of another ship also named Peerless became apparent only by extrinsic evidence. Holmes tried to fit Raffles into his objective theory of interpretation because it involved a name, and perhaps he could have fitted Soper in as well, but it is not hard to find similar ambiguities involving ordinary words. Consider a contract providing that a certain act must be done "in the same month" as a demand. The complaint states that a demand was made on June 3 and that the act was performed on June 30, but payment was not made. Extrinsic evidence might show, however, that months of the Islamic or Jewish calendar were intended and that the day corresponding to June 3 was in a different month from the day corresponding to June 30.

A rather homey illustration of latent ambiguity can be found on a cereal box. On the nutrition information panel of the side of Shredded Wheat boxes is a notice reading "Not a low calorie food." This is surprising because all unsweetened dry cereals have about 100 calories per ounce of weight. However, Shredded Wheat is a fairly dense cereal, so a cup of it weighs considerably more than a cup of a

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18. Fuller, supra note 16.
19. 264 N.W. 427 (Minn. 1935); see Kniffin, supra note 2, § 24.7, at 31-32.
21. Actually, we are told by A.W. Brian Simpson that there were nine British ships named "Peerless," and two more from America, plying the seas in 1863, when the contract was made. See A.W. Brian Simpson, Contracts for Cotton to Arrive: The Case of the Two Ships Peerless, 11 Cardozo L. Rev. 287, 295 (1989).
cereal such as Puffed Wheat, which is mostly air. The densest cereal, Grape Nuts, has about the same number of calories by weight as Puffed Wheat, but a cup of it weighs about ten times as much and has more than ten times as many calories. Is it a higher calorie cereal? Because we do not eat air, we can make a strong argument that the two cereals have the same amount of calories, but since we tend to eat a bowlful at breakfast we can also argue the opposite. Although “[n]ot a low calorie food” seems perfectly understandable on its face, the phrase is actually filled with ambiguity, ambiguity that becomes apparent only with the aid of extrinsic evidence of weight, volume and eating habits.

While a rigid plain meaning rule is a poor reason for restrictions on extrinsic evidence, one can add a genuine instrumental justification: strict rules protect against the fear that the more we allow the words of a contract to be challenged in the name of the parties’ actual intent, the more we produce disorder or even chaos, waiting to be exploited by unscrupulous litigants who demand a bonus to do what they already promised to do. This, in turn, leads to a different form of comfort. Strict rules satisfy those who feel that, if you learn the rules and follow them, you should be assured that they will be applied firmly and without exception, even if this produces a result that appears unfair in the short run. According to this view, fairness is whatever result the rules produce, because in the long run predictability and invariance usually make for just results.

More “liberal” rules give a different sort of comfort, one in which justice appears to trump formalism, although even among those who dislike a strict parol evidence rule, there are many who still want to protect contract stability. While they reject a rigid exclusion of extrinsic evidence, they would, in fact, admit the evidence only if the judge found it “reasonably susceptible” of the meaning for which it was offered, thus allowing a judge to reject it on the merits with relative ease. Others find this an unacceptable compromise with formalism, because it still prefers the written word to the proffered evidence of the parties’ intent. The partisans of various positions are

23. According to the side panels of both cereals, Grape Nuts is about 0.07 higher in calories by weight, but 10.5 times higher in calories by volume. One ounce by weight of Grape Nuts has about 101 calories while one ounce of Puffed Wheat has about 93.4 calories. One and one-quarter cups of Puffed Wheat weighs 15 grams (just over half an ounce) and contains 50 calories. One-half cup of Grape Nuts weighs 58 grams (just over two ounces) and has 210 calories. Therefore, one cup of Puffed Wheat would weigh 12 grams (0.42 ounces) and have 40 calories while one cup of Grape Nuts would weigh 116 grams (4.14 ounces) and contain 420 calories!

24. Incidentally, Puffed Wheat is about three times as expensive by weight as Grape Nuts.

25. The most honest statement of this position was made by Professor Harry Prince. Prince, supra note 15, at 578-80.
often uncompromising in their advocacy of a position—evidence, in my view, of the deeply emotional component of the issue.

What we call the parol evidence rule is better thought of as a spectrum. Some courts, old and new, presume that almost all documents, however skimpy or haphazard, represent the final word. Others will not go that far, but still apply Williston’s famous “four corners rule” strictly, rejecting extrinsic evidence unless questions of integration and ambiguity of meaning are patent on the face of the writing. Other courts, although they recite the four corners approach, actually require the facial uncertainty to be much less palpable, and admit extrinsic evidence more readily. Still others allow extrinsic evidence to show non-integration and ambiguity themselves, and some even go as far as the Restatement (Second) of

26. Compare Corbin’s disdain for “semantic stone walls,” Corbin, Interpretation of Words, supra note 2, at 186-88, with Judge Alex Kozinski’s rather shrill attack on what he saw as an impossibly loose California standard, Trident Ctr. v. Conn. Gen. Life Ins. Co., 847 F.2d 564, 568-70 (9th Cir. 1998). With respect to the California standard, compare Roger Traynor’s flights of fancy in Pacific Gas and Electric Co. v. G.W. Thomas Drayage Co., 442 P.2d 641, 643 n.2 (Cal. 1968), the second of the famous 1968 trilogy of cases that appeared to some to have completely eviscerated the Rule in California, with the dissent of Justice Burke to Traynor’s opinion in Masterson v. Sine, 436 P.2d 561, 567-71 (Cal. 1968), the first of the three cases. For a more modest, and thoughtful, criticism of a loose parol evidence rule, see the dissent of Justice Stanley Mosk to the third case of the trilogy, Delta Dynamics, Inc. v. Arioto, 446 P.2d 785, 789-90 (Cal. 1968). Justice Mosk joined in the first two opinions. Most of these authorities are discussed in the body of this essay.

27. This approach, finding a roughly drawn document to be an integration, can be observed in cases that are a century apart. See the bill of sale in Thompson v. Libbey, 26 N.W. 1 (Minn. 1885), bare bones and apparently handwritten, and the release in Hershon v. Gibraltar Building & Loan Ass’n, 864 F.2d 848 (D.C. Cir. 1989), done by a “cut-and-paste approach,” “obviously cobbled together from form books,” and rushed to completion because a party was anxious to leave for Europe. Id. at 854-55 (Williams, J., dissenting).

28. See, e.g., Savik v. Entech, Inc., 923 P.2d 1091, 1093-94 (Mont. 1996) (finding no facial ambiguity and refusing to allow in extrinsic evidence to show that “those benefits that are afforded to other employees under Entech’s employment policies” included permanent employment, rather than just fringe benefits (internal quotations omitted)). Not as extreme but still remarkably rigid is the opinion of the distinguished Justice Ellen Peters in Tallmadge Brothers v. Iroquois Gas Transmission System, 746 A.2d 1277, 1289 (Conn. 2000):

We decline to abandon the basic principle of contract law that we construe contract language by reference to the words chosen by the parties. Especially in the context of commercial contracts, we assume that definite contract language is the best indication of the result anticipated by the parties in their contractual arrangements.


30. See, e.g., Masterson, 436 P.2d at 563-66 (admitting extrinsic evidence to show integration); Pac. Gas, 442 P.2d 641 (admitting extrinsic evidence of ambiguity); Ward v. Intermountain Farmers Ass’n, 907 P.2d 264 (Utah 1995) (admitting extrinsic evidence of ambiguity). A strange amalgam can be found in Admiral Builders Savings & Loan Ass’n v. South River Landing, Inc., 502 A.2d 1096, 1098-1101 (Md. Ct. Spec. App. 1986) (allowing collateral evidence to be admitted to show an ambiguity, but forbidding its use to vary, alter or contradict the writing’s “clear
Contracts and admit evidence to show meaning without regard to ambiguity.\textsuperscript{31} Often lower courts stick to older, more rigid rules and ignore, or at least do not follow, liberalizing cases from their state’s supreme court.\textsuperscript{32}

The parol evidence rule serves a legitimate end. We enter into written contracts to avoid disputes in the future, and if every contract were simply the beginning point in a testimonial battle, we would gain little by writing things down. But the written word is not as infallible a guide as some think, and people often do not read agreements and often do believe themselves protected when they are told “don’t worry about that clause.”\textsuperscript{33} A detailed survey will reveal countless variations around the country and remarkable gradations of what seem to be fixed rules, even within a given jurisdiction. And even the most rigorous versions of the rule admit many exceptions and allow oral proof of matters such as oral conditions,\textsuperscript{34} evidence of fraud or mistake,\textsuperscript{35} and collateral agreements.\textsuperscript{36}


\textsuperscript{32} See, for example, Student Loan Guarantee Foundation v. Barnes, Quinn, Flake and Anderson, Inc., 806 S.W.2d 628 (Ark. Ct. App. 1991), in which the Arkansas Court of Appeals refused to admit extrinsic evidence on the question whether a parking lot used in connection with an office building could be “office space” within the meaning of a real estate brokerage contract. The court of appeals relied solely on dictionary definitions of “office,” although it cited an Arkansas Supreme Court decision, C & A Construction Co. v. Benning Construction Co., 509 S.W.2d 302 (Ark. 1974), which said that extrinsic evidence would be admissible when latent ambiguities arose “from undisclosed facts or uncertainties of the written instrument.” Id. at 303. For examples of the California Courts of Appeal not following the California Supreme Court, see Prince, supra note 15, and Susan J. Martin-Davidson, Yes, Judge Kozinski, There Is a Parol Evidence Rule in California—The Lessons of a Pyrrhic Victory, 25 Sw. U. L. Rev. 1 (1995). A similar, if perhaps somewhat wishful, description of lower Utah courts is contained in Mark O. Morris and Elizabeth Evensen’s article, What’s Happening to the Parol Evidence Rule? More Holes In the Dike, 67 Def. Couns. J. 209 (2000).

\textsuperscript{33} I recall being about to sign an apartment lease and calling the manager’s attention to a provision requiring window curtains to have a white backing. I mentioned that I had curtains that did not have the required backing and she said, “Oh, they don’t enforce that rule.” I went ahead and signed the lease, but thought to myself how foolish I would look in landlord-tenant court if “they” tried to evict me, a contracts teacher who tried to rely on an oral contradiction of the “plain words” of the lease. At least I knew that I would have to rely on the landlord’s grace (or indifference). A non-lawyer would assume that she could enforce the manager’s assurance.

\textsuperscript{34} See Restatement (Second) of Contracts § 217 (1981); 3 Corbin On Contracts 1960 ed., supra note 2, § 589.

\textsuperscript{35} See Restatement (Second) of Contracts § 214(d) (1981); 3 Corbin On Contracts 1960 ed., supra note 2, § 580.

\textsuperscript{36} See 3 Corbin On Contracts 1960 ed., supra note 2, § 594.
So, instead of a parol evidence "rule," there is a continuum of many different approaches, all using the same name and often using the same words. In 1967 the young Joe Perillo joined Professor John D. Calamari to complain that

[T]here is no uniform parol evidence rule. Rather, there are at least two rather dissimilar rules which, for convenience, may be denominated the Corbin Rule and the Williston Rule. In view of the confusion engendered by having two contradictory rules expressed in the same terminology, it is remarkable that a few states have shown a degree of consistency. New York, despite some inconsistent cases, generally maintains a rigorously Willistonian approach. Rhode Island seems recently to have adopted the Corbin approach with a Willistonian touch . . . . Some states, such as Connecticut, reach results consistent with Corbin’s test, while utilizing the most varied reasoning. Perhaps most states are consistently erratic. Such is the confusion that in any state a decision may be reached which is ludicrous in result and analysis, or sensible in result but strained in analysis.37

More than thirty years later, the even younger Eric Posner, after sketching out what he called the “hard-PER” (roughly the Williston, four-corners, plain meaning approach) and the “soft-PER” (roughly that of Corbin and the Second Restatement of Contracts),38 cautioned his readers that they

[S]hould, for now, understand that the reality is more complex than the stylized versions of the parol evidence rule developed for the purpose of analysis. Although some jurisdictions use something like the hard-PER, while other jurisdictions use something like the soft-PER, many jurisdictions take different and often conflicting approaches to the treatment of extrinsic evidence. In some jurisdictions, for example, the courts adopt a hard attitude toward the incompleteness exception, while taking a soft attitude toward the ambiguity exception. In other jurisdictions, the courts do the opposite . . . . In addition, within a single jurisdiction, the parol evidence rule may vary considerably over time . . . . In virtually every jurisdiction, one finds irreconcilable cases, frequent changes in doctrine, confusion, and cries of despair.39

In trying to make sense of these variations we must ask why a given court chooses a particular form of the parol evidence rule. Often the answer appears to be nothing more than ignorance or sloppiness, but at other times the motivation of the courts is discernible and worth

39. *Id.* at 538-40 (footnotes omitted).
discussing. I will attempt to make some sense by looking at a number of way-stations along the continuum.

II. THE TRUE BELIEVERS

We might start with those who take the strictest view, applying the "plain meaning" of the words of a contract despite strong evidence of the parties' contrary intentions. An example of this is one of my favorite bad decisions, the majority opinion in *Hershon v. Gibraltar Building & Loan Ass'n*.

*Hershon* was a diversity case in which the D.C. Circuit purported to be applying Maryland law. Simon Hershon and Anton Vierling, together with some associates and family members, had had many business dealings with Lawrence B. Goldstein, who owned the Gibraltar Bank. Eventually, the relationship turned sour and the parties became embroiled in five different lawsuits. On August 24, 1984, the many parties, including Simon Hershon, his brother Leo, Leo's wife, and Vierling and his wife, settled with Goldstein and Gibraltar and entered into a "Mutual Release and Discharge Agreement" (the "Release"), which provided in Paragraph 2 that the parties released and discharged each other "absolutely, unconditionally and forever... from any and all Claims" that each ever had against the other. The term "Claims" was defined in Paragraph 1(d), in familiar boiler-plate language, as

> [A]ny actions, causes of action, suits, debts, dues, liens, sums of money, accounts, reckonings, specialities, covenants, promises, judgments, expenses, costs, attorneys' fees, liabilities, claims for relief, proceedings, debts, contracts, damages, defenses, obligations, responsibilities, demands and interest of any kind or nature whatsoever, known or unknown, tangible or intangible, fixed or contingent.

In mid-September, several weeks after the Release had been signed, it dawned on the Hershons and Vierlings that they all owned apartments in the Admiral Dupont condominiums in Washington, D.C., with their promissory notes subject to deeds of trust held by Gibraltar, and that on a literal reading of the Release, they were freed of nearly $300,000 of debt on the three condominiums, debts that had never been in dispute. They all had made the monthly payments due on September 1, 1984, and Vierling had even tried to refinance his loan a few days after the Release was signed, but now they asserted that their obligations had been discharged by the Release. Gibraltar threatened to declare the notes in default and to accelerate the debts, and the borrowers and their wives sought determinations that their liability had been released. The suits, originally filed in the Superior

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40. 864 F.2d 848 (D.C. Cir. 1989).
41. *Id.* at 849.
42. *Id.*
Court for the District of Columbia, were removed to the United States District Court on diversity grounds and later consolidated. Paragraph 11 of the Release specified that the case was governed by Maryland law, and there does not seem to have been any dispute over the choice of law.\footnote{Id. at 851.}

The district judge found an ambiguity on the face of the Release and admitted extrinsic evidence showing that the condominiums were not part of the settlement.\footnote{Id. at 850-51.} The ambiguity came from the fact that Paragraph 4 of the Release said that it was expressly agreed that the Release "is, and shall be, a full and complete termination, settlement and satisfaction of any and all Claims alleged and matters in dispute in" the five pending cases between the parties.\footnote{Id. at 850.} Moreover, Paragraph 12, the merger clause, recited that it was an integration of all promises, etc., "with respect to Gibraltar, IFS, 633 JV and/or M-AFSLP," described by the court as "being four among the more than twenty individuals, corporations, and partnerships listed in paragraph 1(a) and (b) as 'Releasees' or 'Dischargees.'"\footnote{Id. at 851.} To the district court this suggested that the global definition of "Claims" in Paragraph 1(d) could be read as limited by the more restrictive language in the later paragraphs, creating an ambiguity on the face of the Release.\footnote{Id. at 850.} In addition, the district court allowed extrinsic evidence of the debtors' conduct after the Release was signed, namely that they all made the September payments and that Vierling tried to renegotiate the terms of the loan.

The D.C. Circuit Court of Appeals reversed in an opinion by Judge James Buckley, joined by Judge Harry Edwards. Judge Stephen F. Williams dissented. Judge Buckley began his discussion of the parol evidence rule by saying that

Maryland has consistently refused to adopt the "subjectivist" approach championed by Arthur Corbin, the American Law Institute, and our dissenting colleague. Instead, it adheres to the traditional "objective" test in interpreting contracts: where an agreement's language is clear, judges must give effect to its plain meaning, as understood by reasonable people in the parties' position—regardless of what the parties subjectively thought or intended. Where contractual terms are unambiguous, resort to extrinsic evidence is barred.\footnote{Id. at 851 (citations omitted).}
The district court had relied on a Maryland intermediate appellate court decision, *Admiral Builders*, 49 which, in Judge Buckley’s own words, “had ruled that a trial judge may consider extrinsic evidence both to determine whether a contract ambiguity existed (unless that evidence varied, altered, or contradicted the writing’s clear meaning) and to resolve any ambiguity by ascertaining the parties’ intent.” Judge Buckley, however, said that *Admiral Builders* “requires that extrinsic evidence reveal an ambiguity in the contract’s language and prohibits the use of parol evidence to contradict the clear, ordinary meaning of the contract’s words,” 50 and held that the district court “failed to identify any facts or external evidence to support its conclusion that the Release was facially ambiguous—a point conceded by appellees at oral argument.” 51

The incoherence of the use of extrinsic evidence to show facial ambiguity is apparent, and the dissent shows pretty effectively that *Admiral Builders*, the Maryland appellate case relied on by both opinions, did not require this oxymoron. 52 The real thrust of the majority opinion is a combination of an extreme view of plain meaning and a strict insistence on playing by what the majority considered to be the rules:

We find nothing in paragraphs 4 or 12 that can reasonably be interpreted to except the Dupont obligations from the expansive reach of paragraph 6, which declares that “[e]xcept as herein set forth, it is the specific intent and purpose of the parties . . . to release and discharge each and the other from any and all Claims of any kind or nature whatsoever, . . . whether specifically mentioned herein or not.” The fact that paragraph 4 listed pending litigation, or that the integrated documents referred to in paragraph 12 settled certain disputed matters and debts, does not mean that obligations and documents not expressly mentioned or integrated were not released. Clearly, if the parties had intended to exclude the Dupont notes and deeds from the scope of the Release, it was incumbent upon them to

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50. Hershon, 864 F.2d at 851.
51. Id. at 852.
52. Id. The dissent disputed both the existence of this alleged concession and its legal relevancy. See id. at 856 n.1 (Williams, J., dissenting).
53. As the court here correctly notes, Maryland subscribes to the standard precept that the parol evidence rule requires that evidence which “varies, alters, or contradicts the clear meaning of the writing” be excluded from the fact-finder. Id. at 852 (quoting *Admiral Builders*, 502 A.2d at 1100). But the court does not dispute the offsetting precept of Maryland law—that extrinsic evidence is relevant to identifying the existence of an ambiguity within the language of the contract. Id. at 851-52 (citing the famous Peerless case, *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (Ex. 1864)); see also *Admiral Builders*, 502 A.2d at 1099-1100 (noting that it is correct to use extrinsic evidence in making the “primary” finding of ambiguity).

Id. (Williams, J., dissenting). To some extent, the dispute over *Admiral Builders* may turn on what is meant by the words “within the language of the contract” and “primary” finding of ambiguity.
identify those debts explicitly, as they did in paragraph 2 with
respect to certain accounting bills. Appellees must accept the
consequences of their failure to do so.\textsuperscript{54}

It is worth noting that Judge Buckley does not say that, had the
parties intended to exclude the Dupont notes, they presumably would
have identified them explicitly. He asserts that, if this was their
intention, "it was incumbent upon them" to do so.\textsuperscript{55} The parties did
not follow the rules as he understood them, and that was the end of
the matter. It was irrelevant that the Release was "obviously cobbled
together from form books,"\textsuperscript{56} that "Paragraph 1(d) most patently illustrate[d] the cut-and-paste approach by gratuitously repeating the
term 'debts,'"\textsuperscript{57} and that the maxim, \textit{ejusdem generis}, while typically
used for words in proximity to each other, could be applied to read
the "broad general terms"\textsuperscript{58} of Paragraph 4 in light of the narrower
ones of Paragraph 12, which, eight paragraphs later, was on the same
topic. None of these \textit{facial} anomalies was sufficient even to put the
issue of interpretation into play.

The paragraph just quoted from the majority opinion is striking not
because it resolves the issues against the bank—maybe the Hershons
and Vierlings were justified in their arguments—but rather because it
did not allow arguments about facial ambiguity to be considered. By
refusing to allow anything other than what the majority saw as plain
meaning to be considered, the majority was able to review what it
considered to be a decision of law under a de novo standard; had the
court of appeals viewed the question of facial ambiguity as a factual
question, it would have had to limit its review of the trial judge's
decision to a clearly erroneous standard, which would have been much
harder to justify.\textsuperscript{59} And, of course, if the majority had allowed the
extrinsic evidence to be considered on the question of ambiguity, it
certainly would have been limited to "clearly erroneous" review. The
dissent, which found a facial ambiguity and also independently
determined that the extrinsic evidence was proper to consider under
Maryland law,\textsuperscript{60} concluded as follows:

Thus, still assuming that the language of the Release and the
documents executed under Paragraph 12 did not alone establish an
ambiguity, the critical question would be simply whether those facts,

\textsuperscript{54} Hershon, 864 F.2d at 852-53.
\textsuperscript{55} Id. at 853.
\textsuperscript{56} Id. at 854-55 (Williams, J., dissenting).
\textsuperscript{57} Id. at 855 (Williams, J., dissenting).
\textsuperscript{58} Id. (Williams, J., dissenting).
\textsuperscript{59} Compare the majority's argument on this point, id. at 852, with that of the
dissent, id. at 858 (Williams, J., dissenting). In \textit{Admiral Builders} the Maryland Court
of Special Appeals upheld the trial judge by using the clearly erroneous standard of
review. Admiral Builders Sav. & Loan Ass'n v. S. River Landing, Inc., 502 A.2d 1096,
\textsuperscript{60} Hershon, 864 F.2d at 856-58.
together with the events before and after execution of the Release, undermine the borrowers' claim that it unambiguously released them from their condominium loans.\footnote{Id. at 857-58.}

I have no idea who the good guys and the bad guys were in this case, but I have no doubt that the decision is wrong. Maybe Goldstein and his bank deserved to get done out of nearly $300,000, but even the majority had to concede that this result was nothing that the parties had in mind.\footnote{"We acknowledge that the application of the objective test and its corollary, the parol evidence rule, can lead to harsh consequences, and this may well be such a case." Id. at 853.} Unlike some of the famous parol evidence rule cases,\footnote{E.g., Trident Ctr. v. Conn. Gen. Life Ins. Co., 847 F.2d 564 (9th Cir. 1988); Masterson v. Sine, 436 P.2d 561 (Cal. 1968).} the argument against "plain meaning" in Hershon is not fanciful, yet the majority is almost atavistic in refusing to consider the bank's interpretive argument. Given the gaps in the Release and the debtors' actions in making loan payments after signing the Release, not to allow a factfinder to consider what the parties intended by the word "Claims" is to go back to a sporting view of law. Even more, this approach resurrects a romantic world that never existed, a never-never land where there is always plain meaning and certainty,\footnote{Thayer's other famous aphorism is about the lawyer's Paradise where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but with fulness; and where, if the writer has been careful, a lawyer, having a document referred to him, may sit in his chair, inspect the text, and answer all questions without raising his eyes. James Bradley Thayer, A Preliminary Treatise On Evidence at the Common Law 428-29 (Boston, Little, Brown, & Co., 1898).} even if achieved only by turning deals upside down.\footnote{Immediately following the words quoted above, see supra note 62, the court continued, "Nonetheless, it is fundamentally important that parties be able to rely on the explicit language of written contracts. The public interest in certainty and finality is too critical to allow every agreement to be subjected to collateral attack." Hershon, 864 F.2d at 853.}

When Ronald Reagan appointed him to the D.C. Circuit, James Buckley, who wrote the majority opinion in Hershon, was better known as Bill Buckley's brother than as a great legal mind. It is tempting to view his Hershon opinion as a one-dimensional application of the unsubtle values that Buckley had espoused during his one term in the United States Senate. However, we have to remember that his opinion was joined by Judge Harry Edwards, a highly respected judge and a professor at Michigan before Jimmy Carter put him on the bench. There is no way to caricature Judge Edwards as a legal Neanderthal, and the dissenting Judge Stephen Williams was also a Reagan appointee.
One can make similar observations about the venerable New York case of Mitchill v. Lath,\(^6\) in which the Laths, sellers of a parcel of land, orally promised Mrs. Mitchill, the buyer's wife, that they would remove an unsightly icehouse that they apparently owned on an adjoining parcel owned by a third party. Nothing about this promise appeared in either the contract for sale between the Laths and Mr. Mitchill or the deed by which they transferred the parcel directly to Mrs. Mitchill. The Laths later refused to make good on their promise, and Mrs. Mitchill sued.

The trial court ordered specific performance and the Appellate Division affirmed, but the New York Court of Appeals reversed in an opinion by Judge William Andrews. The Court of Appeals did not dispute the fact that the sellers had made the oral promise. The only issue was whether its enforcement was barred by the parol evidence rule. Judge Andrews did not formally state the rule, but there seems to be little doubt that he would have agreed with the dissent's statement of the rule:

There is a conclusive presumption that the parties intended to integrate in that written contract every agreement relating to the nature or extent of the property to be conveyed, the contents of the deed to be delivered, the consideration to be paid as a condition precedent to the delivery of the deeds, and indeed all the rights of the parties in connection with the land. The conveyance of that land was the subject-matter of the written contract, and the contract completely covers that subject.\(^6\)

The disagreement between the majority and the dissent is over the issue of how to determine whether the oral promise was "collateral" to the written contract.\(^6\) Judge Andrews posits conditions that govern the issue, the most critical being that the agreement "must be one that parties would not ordinarily be expected to embody in the writing."\(^6\) Also, he focuses on "[h]ow closely bound" the oral agreement was with the later written agreement: "[A]n inspection of this contract shows a full and complete agreement, setting forth in detail the obligations of each party. On reading it, one would conclude that the reciprocal obligations of the parties were fully detailed."\(^7\) Andrews did say that surrounding circumstances might be considered, but his discussion of them was limited to a single sentence, in which he said that "[t]he presence of the icehouse, even the knowledge that Mrs. Mitchill thought it objectionable, would not lead to the belief that a separate agreement existed with regard to it."\(^7\)

\(^6\) 160 N.E. 646 (N.Y. 1928).
\(^7\) Id. at 648 (Lehman, J., dissenting).
In contrast, Judge Irving Lehman, writing in dissent, stated the issue in terms of the parties' actual intent. Quoting Wigmore, he wrote that,

[t]o determine what the writing was intended to cover, "the document alone will not suffice. What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered." 72

Judge Lehman, who would soon succeed Cardozo as Chief Judge, and who is viewed as one of the giants of the New York Court of Appeals, has the better of the argument. Judge Andrews and the other members of the 6-1 majority in *Mitchill* seemed to have no doubt that Mrs. Mitchill and the Laths had, indeed, agreed that the Laths would remove the icehouse, yet the court refused to hold the Laths to their promise. Unlike Judge Buckley, Judge Andrews enjoys a high reputation (torts students still study his dissent in *Palsgraf v. Long Island R.R. Co.*, 73 and compare it, often favorably, with Judge Cardozo's majority opinion). In addition, other than Judge Lehman, all the members of the New York Court of Appeals, including Cardozo, joined Andrews in applying the parol evidence rule. The Court of Appeals, then at the peak of its prestige and quality, was certainly not a bunch of legal lightweights seeking comfort in a false stability. Thus, we may have to look further at the question of motivation.

### III. AND NOW A WORD FROM CALIFORNIA

In contrast to *Mitchill*, where everyone seems to have agreed that the Laths made the oral promise to remove the icehouse, and *Hershon*, where it is pretty clear that the parties had not intended the Release to include the condominium notes, many other parol evidence rule cases involve inherently unlikely stories by parties who look like they are trying to renege on the deal they made. An example is an opinion by Alex Kozinski, another Reagan circuit judge, one whose legal ability is unquestioned, even by those who are not of his political outlook. In his famous opinion in *Trident Center v. Connecticut General Life Insurance Co.*, 74 Judge Kozinski was dealing with two prominent Los Angeles law firms that had borrowed $56 million in 1983 at 12½% interest to finance an office building project. By 1987, interest rates had dropped sharply, but the note stated that

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72. *Id.* at 649 (quoting 5 John Henry Wigmore, *Wigmore on Evidence* § 2430 (2d ed. 1923)).
73. 162 N.E. 99 (N.Y. 1928).
74. 847 F.2d 564 (9th Cir. 1988).
“[m]aker shall not have the right to prepay the principal amount hereof in whole or in part” before January 1996, twelve years into the fifteen year loan. The law firms sought a declaratory judgment that, despite the prepayment ban, they could still pay off the mortgage at an early date by defaulting and then paying off the accelerated indebtedness plus a ten percent prepayment fee. The firms sought to offer extrinsic evidence to support this reading of the acceleration provisions of the loan agreement, but the trial judge, treating their argument with the disdain it probably deserved, dismissed their action and assessed Rule 11 sanctions on their attorneys for filing a frivolous law suit. On appeal, the Ninth Circuit reversed. Because federal jurisdiction was based on diversity of citizenship, the federal courts were, of course, bound by Erie v. Tompkins to apply the law that would have been applied by the appropriate state court, in this case, California’s, and Judge Kozinski held that California case law entitled the plaintiffs to a chance to prove their case. He also held that, given the California precedents, the attorneys could not be held to have violated the rules by filing their complaint.

Had Judge Kozinski stopped there, no one would remember Trident. In fact, the decision might not even have been published. But Kozinski seized the opportunity to read to the California Supreme Court a lecture in what he thought the California parol evidence rule should be. His principal bête noir was the second of the three famous parol evidence rule opinions written by Roger Traynor in 1968, Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.: Two decades ago the California Supreme Court in Pacific Gas... turned its back on the notion that a contract can ever have a plain meaning discernible by a court without resort to extrinsic evidence. The court reasoned that contractual obligations flow not from the words of the contract, but from the intention of the parties. Under Pacific Gas, it matters not how clearly a contract is written, nor how completely it is integrated, nor how carefully it is negotiated, nor how squarely it addresses the issue before the court: the contract cannot be rendered impervious to attack by parol evidence. If one side is willing to claim that the parties intended one thing but the agreement provides for another, the court must consider extrinsic evidence of possible ambiguity. We question whether this approach is more likely to divulge the original intention

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75. Id. at 566 (alteration in original).
76. Id. at 568.
77. Id. at 566, 570; see Fed. R. Civ. P. 11.
78. Trident, 847 F.2d at 570.
79. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see Trident, 847 F.2d at 570.
80. Trident, 847 F.2d at 568-70.
81. 442 P.2d 641 (Cal. 1968).
of the parties than reliance on the seemingly clear words they agreed upon at the time.

Pacific Gas casts a long shadow of uncertainty over all transactions negotiated and executed under the law of California. . . .

It also chips away at the foundations of our legal system. . . .

. . . With the benefit of 20 years of hindsight, the California Supreme Court may wish to revisit the issue. If it does so, we commend to it the facts of this case as a paradigmatic example of why the traditional rule, based on centuries of experience, reflects the far wiser approach.82

Judge Kozinski's opinion in Trident has had many devotees,83 but it has always struck me as remarkably impertinent, given the passive role assigned by Erie to the federal courts in diversity cases.84 In addition, several courts and writers of various political hues have criticized his reading of Pacific Gas and the other California parol evidence rule cases.85 Why, then, did he make such a strong attack? In part, we may attribute it to his genuine irritation at the chutzpah of these wealthy and highly skilled law firms in putting forth so unlikely a story with a straight face. In part, Kozinski may have seen these facts as giving him an excuse to attack a rule that bothered his sense of decorum as much as it would have bothered James Buckley's. Or perhaps he was genuinely concerned about the opportunity that the California cases seemed to give to the unscrupulous to attempt to rewrite contracts unilaterally and after the fact. This was the reason that he put forth, and in support of it he cited the dissent of the distinguished and liberal Justice Stanley Mosk, who had joined the

82. Trident, 847 F.2d at 568-70.
84. On this point, see Prince, supra note 15, at 583-85.
first two of Traynor’s three 1968 opinions, but dissented in the last, saying

[Given two experienced businessmen dealing at arm’s length, both represented by competent counsel, it has become virtually impossible under recently evolving rules of evidence to draft a written contract that will produce predictable results in court. The written word, heretofore deemed immutable, is now at all times subject to alteration by self-serving recitals based upon fading memories of antecedent events. This, I submit, is a serious impediment to the certainty required in commercial transactions.\(^{86}\)

So here we have a Reagan Republican and a Jerry Brown Democrat agreeing on something that sounds neither psychological nor particularly philosophical, a common sense feeling that people should not be allowed to chisel their way out of written contracts. At this point it makes sense for us to look at those three California cases and their progeny, to see if they do indeed give bad men a second bite of the apple, and if they do, to figure out why Roger Traynor, called the “ablest judge of his generation” by no less than Henry Friendly,\(^{87}\) was willing to give them that second bite.

Chief Justice Traynor’s three 1968 opinions have been the subject of many studies. In a sense, all three cases could have been decided on grounds that would not have changed the parol evidence rule one whit. Instead, they have become the best known and most controversial cases on the topic. Yet their holdings have been misstated by many writers, both supportive and critical. The first case, \textit{Masterson v. Sine},\(^{88}\) was essentially the mirror image of \textit{Mitchill v. Lath},\(^{89}\) the 1928 New York icehouse case. Like \textit{Mitchill}, \textit{Masterson} involved a claim of an oral collateral agreement that supposedly modified a subsequent written real estate transaction that made no reference to it.\(^{90}\) In \textit{Masterson}, however, the very existence of the oral agreement was disputed, along with its admissibility under the parol evidence rule.\(^{91}\)

Dallas Masterson and his wife, Rebecca, had conveyed a ranch to Dallas’s sister Medora Sine and her husband Lu.\(^{92}\) The deed reserved an option in the Mastersons to repurchase the ranch for the “same consideration as being paid heretofore plus the depreciation value of any improvements” made by the grantors.\(^{93}\) When Dallas went bankrupt, his trustee and Rebecca sought to exercise the option so

\(^{88}\) 436 P.2d 561 (Cal. 1968).
\(^{89}\) 160 N.E. 646 (N.Y. 1928).
\(^{90}\) \textit{Masterson}, 436 P.2d at 562.
\(^{91}\) \textit{Id.}
\(^{92}\) \textit{Id.}
\(^{93}\) \textit{Id.}
that they could sell the ranch, which had apparently appreciated in value, but Dallas and the Sines proffered Dallas's testimony that the parties had wanted the ranch to stay in the family and that the option to repurchase was thus personal and non-assignable, testimony that the trustee and Rebecca objected to on parol evidence rule grounds.\textsuperscript{94}

As in \textit{Mitchell v. Lath}, the issue in \textit{Masterson} was not one of interpretation; it was simply whether there was a collateral agreement that supplemented, rather than contradicted, the terms of the written deed.\textsuperscript{95} Like Corbin,\textsuperscript{96} Judge Traynor saw the collateral agreement issue as whether the written document was fully integrated: did the parties intend to supersede the alleged oral agreement? Older California cases had said that integration had to be determined solely from the face of the instrument, with the court asking itself if the document appeared to be a complete agreement.\textsuperscript{97} Traynor, however, said that the courts had not applied these criteria consistently, and ran through a number of rationales for the parol evidence rule: a belief that written evidence is more accurate than human memory, fear of fraud or self-interested delusion, and protection against jury sympathy for the underdog.\textsuperscript{98}

Traynor then stated a new rule, which, in his opinion, satisfied the various policies.\textsuperscript{99} According to Traynor, "[e]vidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled."\textsuperscript{100} He then mentioned the tests of the first Restatement (evidence is not barred if it is in an agreement that might naturally have been made as a separate agreement)\textsuperscript{101} and the Uniform Commercial Code (evidence is to be excluded only if it certainly would have been included in writing),\textsuperscript{102} and flirted in a footnote with Corbin's suggestion that a collateral agreement could even be found when it would not be natural for the parties to have made such an agreement, "if the court is convinced that the unnatural actually happened in the case being adjudicated."\textsuperscript{103}

\textsuperscript{94} \textit{Id.} Ironically, when the trustee and Rebecca offered extrinsic evidence to explain the meaning of "same consideration" and "depreciation value," Dallas and the Sines objected on the same grounds. Both the trial court and the California Supreme Court agreed that the parol evidence rule was no bar to this explanation of the language of the deed. \textit{Id.} at 562-63. In fact, even the dissenters in the Supreme Court agreed that this evidence was not barred by the parol evidence rule. \textit{Id.} at 567.

\textsuperscript{95} See \textit{id.} at 567 (Burke, J., dissenting).

\textsuperscript{96} See \textit{3 Corbin On Contracts 1960 ed., supra} note 2, § 594, at 564-67 (Burke, J., dissenting).

\textsuperscript{97} \textit{Masterson}, 436 P.2d at 563.

\textsuperscript{98} \textit{Id.} at 564.

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} Restatement of Contracts § 240(1)(b) (1932).

\textsuperscript{102} U.C.C. § 2-202 cmt. 3 (2000).

\textsuperscript{103} \textit{Masterson}, 436 P.2d at 565 n.1 (citing \textit{3 Corbin on Contracts 1960 ed., supra} note 2, § 485 [sic; should be § 584], at 478, 480).
After running through the facts (no merger clause, deed silent on assignability, family transaction, deed an awkward place to put the side agreement, parties inexperienced), he concluded that the collateral agreement satisfied both the lenient test of the Uniform Commercial Code and the stricter test of the first Restatement, and found it not barred by the parol evidence rule. A long and bitter dissent by Justice Burke argued both that the story of the bar on assignment was a fraud and that the majority’s holding subverted the parol evidence rule and would lead to “confusions and inconsistencies which will arise to plague property owners and, incidentally, attorneys and title companies, who seek to counsel and protect them.”

From one point of view, Masterson does not seem to change the law that much, given that it applies Williston’s thirty-six year old first Restatement test along with looser, more modern tests. From another perspective, Traynor’s new basic rule, that “[e]vidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled,” is a major change. After all, in Mitchell v. Lath there was no dispute over the authenticity of the icehouse agreement, but even Judge Lehman did not dispute the basic point that the written agreement was dominant. In addition to Traynor’s less than reverential approach to the parol evidence rule, Masterson’s importance comes from the fact that Dallas Masterson’s story is inherently unbelievable. The dissent makes a great deal over the self-serving nature of Dallas’s story, and if the purpose of the parol evidence rule is to prevent fraud, the dissent makes a good case that his testimony should be excluded. But as Traynor pointed out, citing McCormick On Evidence, that reasoning would exclude all oral testimony whenever a writing exists.

It is worth remembering that we allow juries to hear all kinds of tall tales in tort cases, leaving it to their common sense to sort the true from the false. The fact that Masterson’s testimony about the alleged oral agreement was allowed into evidence does not mean that the trier of fact had to believe it. To exclude evidence of this nature is to distrust juries. Assuming hypothetically that Masterson could have produced a signed and notarized side agreement that the option was

104. Id. at 574 (Burke, J., dissenting).
105. Id. at 564; see supra text accompanying notes 98-102.
106. Aside from the fact that the restriction on the option apparently was never told to anyone before Dallas went bankrupt, the most striking fact is that there was no restriction on Dallas’s selling the property to a stranger after he exercised the option. Thus, even if the option were not assignable, Dallas could have gotten around the alleged restriction to family members by selling the property after he exercised the option. There was only one circumstance in which this two-step process would not work—a bankruptcy. For another skeptical view of Dallas’s story, see Marvin A. Chirelstein, Concepts and Case Analysis in the Law of Contracts 92-93 (4th ed. 2001).
to be non-transferable, it is difficult to see why such a document should be excluded. That the agreement here, if it even existed, was oral makes an immense difference factually, but should not affect the parol evidence rule question. If we ignore our suspicions and leave the fact question to the jury, we are left with an opinion that agrees with Judge Lehman’s dissent in Mitchell v. Lath, a dissent that has aged well. Neither Masterson nor Mitchell explicitly addresses why a prior oral agreement should be excluded if its existence is not in doubt. The reason, according to Corbin, is that the parties’ later agreement may have superseded it. Traynor seems to be saying implicitly that, if it makes sense (under one of the tests for collateral agreements) that the parties intended the side agreement to survive the later writing, the jury ought to get to hear about the oral agreement, and decide for itself whether to believe the self-serving story.\textsuperscript{108} Yes, Masterson is an important case, but it is far from a radical one.

It is the second case of the 1968 trilogy, Pacific Gas and Electric Co. v. G.W. Thomas Drayage Co.,\textsuperscript{109} that has excited the most comment. It is unquestionably an important way-station in the evolution of the parol evidence rule, and a major authority against the plain meaning concept. In some ways Pacific Gas is quite radical, yet it basically walks a middle ground. Ironically, Pacific Gas could have been decided on a narrower and totally uncontroversial ground—that the four corners of the document showed a patent ambiguity. Chief Justice Traynor went out of his way to expand the means of finding an ambiguity and then added some very intriguing—and provocative—dicta that rejected the idea of plain meaning. The combination has made Pacific Gas a favored target of those who would go back to the good old days.\textsuperscript{110}

In Pacific Gas, G.W. Thomas, a contractor hired to replace the cover of a steam turbine owned by PG&E, agreed to ‘‘indemnify’’ plaintiff ‘‘against all loss, damage, expense and liability resulting from . . . injury to property, arising out of or in any way connected with the performance of this contract.’’\textsuperscript{111} During the course of the project, the cover fell and damaged an exposed rotor of the turbine. PG&E sued Thomas for more than $25,000 on both a negligence theory, which it withdrew at trial, and the indemnification clause. PG&E obtained a judgment based on the theory that the indemnification language covered PG&E’s own losses as well as any damages that it had to pay to third parties. At trial, Thomas offered to prove ‘‘by admissions of plaintiff’s agents, by defendant’s conduct under similar contracts entered into with plaintiff, and by other proof,\textsuperscript{112}.

\begin{footnotes}
\item[108] Accord Chirelstein, supra note 106, at 93-94.
\item[109] 442 P.2d 641 (Cal. 1968).
\item[110] See supra text accompanying notes 81-85.
\item[111] Pacific Gas, 442 P.2d at 643.
\end{footnotes}
that in the indemnity clause the parties meant to cover injury to property of third parties only and not to plaintiff's property." The trial court held that the plain meaning of the word "indemnify" barred any extrinsic evidence of a narrower meaning. Strangely, the trial court conceded that the clause used "the classic language for a third party indemnity," but still found that the plain meaning of "indemnify" required Thomas to reimburse PG&E for its losses, and that any attempt to limit this plain meaning would be contradictory and would violate the parol evidence rule.

After stating this background, Traynor immediately described the trial court's actions in Corbin's language. He said that "[w]hen a court interprets a contract on this basis, it determines the meaning of the instrument in accordance with the '... extrinsic evidence of the judge's own linguistic education and experience,'" and continued by stating that "[t]he exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief in the possibility of perfect verbal expression. This belief is a remnant of primitive faith in the inherent potency and inherent meaning of words." This was strong language to begin with, but it also had the support of Corbin and Wigmore, whom Traynor cited. At this point, however, Traynor threw in a famous footnote, which a writer in the Wall Street Journal later characterized as an example of "1960s judges citing moonbeam legal evidence," in "what may be the single weirdest footnote in the history of U.S. courts." The footnote reads,

E.g., "The elaborate system of taboo and verbal prohibitions in primitive groups; the ancient Egyptian myth of Khern, the apotheosis of the word, and of Thoth, the Scribe of Truth, the Giver of Words and Script, the Master of Incantations; the avoidance of the name of God in Brahmanism, Judaism and Islam; totemistic and protective names in mediaeval Turkish and Finno-Ugrian languages; the misplaced verbal scruples of the 'Précieuses'; the Swedish peasant custom of curing sick cattle smitten by witchcraft, by making them swallow a page torn out of the psalter and put in dough . . . ."
Now this footnote may be a bit over the top, but the authorities it cites are not moonbeam, and its point is not foolish. Chief Justice Traynor is implicitly saying that the written document is not the contract. The agreement between the parties is the contract, and to limit it to the written words and to treat the parties' actual intent as irrelevant is to invest the writing with a potency similar to what primitive faith does. In fact, Wigmore had made the same substantive point two generations earlier in 1904 in the first edition of his treatise on evidence, when he wrote of the parol evidence rule that:

This principle assumes that, by some provision of law, or by the parties' intent, the act effective in law is a single written memorial, and that no parol act is to be regarded as of any effect for the purpose... .

In consequence of this principle of Integration, then, the question is constantly presented whether a specific writing has become the sole act material to the case; and this is purely a question of the substantive law applicable to the kind of transaction involved.  

Following his semantics discussion, Traynor crafted his own rule:

The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.

He justified this rule in language very similar to what Wigmore had said in 1904:

Some courts have expressed the opinion that contractual obligations are created by the mere use of certain words, whether or not there was any intention to incur such obligations. Under this view, contractual obligations flow, not from the intention of the parties, but from the fact that they used certain magic words. Evidence of the parties' intention therefore becomes irrelevant.

In this state, however, the intention of the parties as expressed in the contract is the source of contractual rights and duties.  

Despite the furor that Pacific Gas has spawned, a closer look at Traynor's rule shows that it is, in fact, moderately conservative. In Trident Judge Kozinski said that under Pacific Gas, "[i]f one side is willing to claim that the parties intended one thing but the agreement provides for another, the court must consider extrinsic evidence of possible ambiguity." At best, this description is incomplete. At

Semantics 43 (3d ed. 1963)).

120. 2 John Henry Wigmore, Wigmore on Evidence § 1346, at 1634 (1st ed. 1904).
121. Pac. Gas, 442 P.2d at 644.
122. Id.
worst, it is misleading. The Traynor opinion does instruct the judge to consider the proffered evidence, but the test of admissibility is "whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." This "reasonably susceptible" language makes the judge a gatekeeper, who retains the power to withhold the extrinsic evidence from a jury. Indeed, Professor Ralph James Mooney, in his article on the conservative "new conceptualism" in contract law, cited several examples of state courts retreating from the broad Restatement (Second) position to what he viewed as the more conservative Pacific Gas "reasonably susceptible" rule.

Nonetheless, we know that there are many who find Pacific Gas dangerous and unsettling. What, then, was Traynor's motive in supposedly muddying the waters of contract interpretation? According to Olivia and Louis Karlin, in their 1991 article, The California Parol Evidence Rule, "Justice Traynor was clearly a man with a mission." And what was that mission? "[T]o undermine the foundations of the parol evidence rule and stretch the rule's contours beyond recognition." Why? Because "through a debilitated parol evidence rule, the judge obtains freer reign to 'do justice.' It is this desire to expand the scope of judicial inquiry and action that most likely underlies Justice Traynor's opinion." Is this possible? Could the sainted Roger Traynor have been conducting guerrilla warfare in favor of free-wheeling judicial legislating? In a comprehensive article on contract interpretation in California, Professor Harry Prince criticized murky parol-evidence-rule-thinking of recent years and suggested that courts admit when they are unable to figure out what the parties to a contract intended, and simply try to do justice. While Prince's intriguing argument supports the Karlins' view in one

125. See Mooney, supra note 85, at 1159-71.
126. Karlin & Karlin, supra note 83, at 1368.
127. Id.
128. Id. at 1370.
129. See Prince, supra note 15, at 649-50. Professor Prince was particularly concerned with parol evidence rule cases involving technological change and contracts entered into many years ago, where one party stood to get a windfall if a possible but questionable interpretation was followed. See City of Manhattan Beach v. Superior Court, 914 P.2d 160 (Cal. 1996) (suit for the reversion of unclear land grant for a now obsolete railroad, brought by "laughing heirs" rounded up by heirhunters who would have received fifty percent of the recovery); Lee v. Walt Disney Co., No. B058897 (Cal. Ct. App. Sept. 30, 1992) (unpublished opinion) (involving a suit by Peggy Lee over VCR and DVD rights to "Lady and the Tramp," in which Disney made millions from these formats but arguably did not have to pay royalties on them to Lee, who had provided both songs and voices for the movie); cf. Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E. 163, 165-68 (N.Y. 1933) (reinterpreting contract waiving rights to use of story in motion pictures, under good faith principles, in light of development of sound).
sense,\textsuperscript{130} his reasoning also indicates that courts have generally not engaged in much social engineering under the guise of admitting specious extrinsic evidence.

In fact, Roger Traynor was enough of a legal realist to call for courts to be explicit in doing social engineering. Consider, for example, his famous concurrence in \textit{Escola v. Coca Cola Bottling Co.},\textsuperscript{131} written in 1944, shortly after he joined the California Supreme Court. \textit{Escola} was an exploding bottle case in which the majority found for an injured waitress under reasoning that Richard Epstein happily called “an heroic and tortured application of the \textit{res ipsa loquitur} doctrine.”\textsuperscript{132} Justice Traynor agreed that the victim should recover, but revealed how weak the \textit{res ipsa} reasoning was under the facts of that case, and instead argued for strict liability in products cases such as \textit{Escola}.\textsuperscript{133} His concurrence, of course, was adopted as the law everywhere in the United States a generation later, but from the beginning he called for courts to be honest and explicit about the role that social values played in their reasoning process. This hardly squares with the Machiavellian motives that the Karlins impute to Traynor. It is just as probable that Traynor was saying what he really meant: that words are not always reliable, and that the intention of the parties is what makes a contract, not the words on a piece of paper. This was not a radical idea when Traynor wrote \textit{Pacific Gas}. We have already seen what Wigmore wrote in 1904;\textsuperscript{134} in addition, Karl Llewellyn had built much of the Uniform Commercial Code upon a rejection of the plain meaning rule\textsuperscript{135} and upon a concept of the “agreement in fact,”\textsuperscript{136} and by 1968, the Code had been adopted

\textsuperscript{130} Prince, \textit{supra} note 15, at 640, 649.
\textsuperscript{131} 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring).
\textsuperscript{133} \textit{Escola}, 150 P.2d at 440 (Traynor, J., concurring).
\textsuperscript{134} \textit{See supra} text accompanying note 120.
\textsuperscript{135} \textit{See U.C.C. § 1-205 cmt. I} (2000):
This Act rejects both the “lay-dictionary” and the “conveyancer’s” reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.
\textit{Id.}
\textsuperscript{136} \textit{See, e.g., id. § 1-201(3)} (“‘Agreement’ means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208).’’); \textit{id. § 1-201(11)} (“‘Contract’ means the total legal obligation which results from the parties’ agreement as affected by this Act and any other applicable rules of law. (Compare ‘Agreement.’)’’); \textit{id. § 2-202} (stating that the terms of a written agreement may be supplemented by course of dealings, usages of trade and course of performance); \textit{id. § 2-204} (stating that “[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by
throughout the United States. So a straightforward doubt about plain meaning and a straightforward rejection of contract as a piece of paper rather than as the parties' actual agreement are both more likely motivations than scheming on Traynor's part.

Well then, what about the idea that Traynor was simply impractical, a "1960s judge[] citing moonbeam evidence," as the Wall Street Journal put it,137 or merely unaware of how much uncertainty he was adding to contract predictability, as Judge Kozinski in Trident138 and Justice Mosk in Delta Dynamics, Inc. v. Arioto139 both charged? Given that Traynor served on the California Supreme Court from 1940 until 1970 and has a legacy that is well documented, I will pass on the Wall Street Journal without further comment. The Kozinski and Mosk charges have more substance, but are belied by the very terms of the Pacific Gas test: "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is . . . whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible."140 As already noted, this rule has the potential to keep extrinsic evidence from juries because trial judges must find that the material is reasonably susceptible of the meaning which the evidence is offered to support before admitting it.141 But the clearest proof that the Pacific Gas rule will not cause the sky to fall comes from Trident itself. Professor Susan Martin-Davidson reports that, on remand, the insurance company, against which the extrinsic evidence was offered, successfully moved for summary judgment, which was granted together with attorney's fees.142 Far from being a naif about business, Traynor seems to have walked a middle ground in producing a rule that is criticized from the left as much as from the right.143 It is ironic that his attempt to temper

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138. See supra text accompanying note 82.
139. See supra text accompanying note 86.
141. See supra text accompanying notes 123-24.
142. Martin-Davidson, supra note 32, at 4 n.22.
143. I am aware that Traynor's famous opinion in Drennan v. Star Paving Co., 333 P.2d 757 (Cal. 1958) (holding a subcontractor to its unaccepted bid when the general contractor relied on it in bidding on the prime contract), has been criticized as being insensitive to the greater power that general contractors have over subcontractors. See, e.g., Franklin M. Schultz, The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry, 19 U. Chi. L. Rev. 237 (1952) (arguing against what later became the Drennan rule on this ground). Nonetheless, Drennan is described as having been followed by "the overwhelming majority of courts that have considered this type of case." Charles L. Knapp et al., Problems in Contract Law 251 (4th ed. 1999); accord 3 Eric Mills Holmes, Corbin On Contracts § 8.12, at 79 n.79 (Joseph M. Perillo ed., 1996) (stating that Drennan has a "considerable following").
Corbin's all-out attack on the parol evidence rule and plain meaning in interpretation has become the lightning rod for criticism from adherents to the traditional rigid rules.

IV. CORBIN'S WAY

Finally, we might look at the "pure Corbin" position: the parol evidence rule never bars the use of extrinsic evidence to learn the meaning of words, even if those words are contained in a fully integrated document. This was incorporated into Section 214(c) of the Restatement (Second) of Contracts, which permits extrinsic evidence of prior or contemporaneous agreements and negotiations to be admitted to establish "the meaning of the writing, whether or not integrated," and without a prior showing of ambiguity, either patent or latent.144 Within the past dozen years or so, a number of state supreme courts have adopted this position, either as a new rule of law or as a continuation of existing law. Let us briefly look at three.

A. Corbin's Way: Washington

In *Berg v. Hudesman*,145 the Washington Supreme Court had before it a question of the proper rent on a ninety-nine year ground lease. The lease contained a fairly complicated formula, which included a payment of ten percent of "net rentals received."146 The term "net rentals," in turn, was defined as gross rentals received from tenants less a number of specified expenses paid by the ground lessee.147 In August of 1987 the landlord sued, claiming that the tenant had underpaid the rent for several years, and the trial court granted the landlord partial summary judgment, reasoning that the rental provisions were clear and unambiguous.148 The tenant moved to vacate the order and offered affidavits supporting its argument that reimbursements from its subtenants had to be excluded from gross rental unless the expenses being reimbursed were themselves deductible; the landlord rested on the words of the lease, which appeared to include all payments from subtenants as rental income.149 The trial court granted final summary judgment for the landlord, stating that the affidavits submitted by defendant "are not subject to being considered, and, even if considered, do not alter or modify the

144. Restatement (Second) of Contracts § 214(c) (1981). Equally consistent with Corbin's position are Sections 214(a) and (b) of the Second Restatement, permitting extrinsic evidence to be used to establish whether a writing is integrated or not and whether the integration is partial or complete. Id. § 214(a)-(b).
146. Id. at 225.
147. Id. at 224-25.
148. Id.
149. Id. at 225.
clear and unambiguous language of Section 3 of the Lease." The tenant appealed, and the Court of Appeals reversed in part, modifying the computation of gross rentals to carry out what it believed was the intent of the drafter of the lease. From this, the landlord appealed to the Supreme Court of Washington.

The Washington Supreme Court began its opinion by quoting Corbin: "The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties." The Washington court then stated that every court should heed Corbin's strong words that it can hardly be insisted on too often or too vigorously that language at its best is always a defective and uncertain instrument, that words do not define themselves, that terms and sentences in a contract, a deed, or a will do not apply themselves to external objects and performances, that the meaning of such terms and sentences consists of the ideas that they induce in the mind of some individual person who uses or hears or reads them, and that seldom in a litigated case do the words of a contract convey one identical meaning to the two contracting parties or to third persons.

The Court then discussed the plain meaning rule and conceded that, in the past, "[i]n following this rule, this court has held that only if a contract is ambiguous on its face will the court look to evidence of the parties' intent." After listing several of the prominent critics of the plain meaning rule (Corbin, Wigmore, Farnsworth, Calamari and Perillo) and noting the rule's rejection by Article 2 of the Uniform Commercial Code, the court said that it had not consistently applied the plain meaning rule, and cited decisions going back as far as 1922 in which it had allowed trial courts to consider surrounding circumstances "not for the purpose of contradicting what is in the agreement, but for the purpose of determining the parties' intent." It then cited a number of out-of-state cases that supported the "context rule" as opposed to the plain meaning rule. Among those cited were Pacific Gas, as we might have expected, and, more surprisingly, Admiral Builders, the Maryland case that Judge Buckley had insisted rejected the Corbin approach and insisted upon a strictly

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150. Id. (quotation omitted).
151. Id. at 226. The Supreme Court stated that the Court of Appeals erred because the intent of the drafter was irrelevant unless it expressed the intent of the parties. Id. at 226 n.1.
152. Id. (quoting Corbin, Interpretation of Words, supra note 2, at 162). Contrast this passage with the words of Holmes, the supreme objectivist: "The law has nothing to do with the actual state of the parties' mind. In contract, as elsewhere, it must go by externals, and judge parties by their conduct." Oliver Wendell Holmes, The Common Law 242 (Mark DeWolfe Howe ed., 1963)(1881).
154. Id. at 228.
155. Id.
objective analysis of meaning.\textsuperscript{156} The Washington court then concluded that the case at hand "presents a clear opportunity for this court to resolve the long-standing confusion engendered by inconsistent holdings in this area,"\textsuperscript{157} and announced a holding that "extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent," and quoted and adopted Sections 212 and 214(c) of the Restatement (Second) of Contracts.\textsuperscript{158}

The \textit{Berg} court quoted at length from a 1944 Washington opinion,\textsuperscript{159} which in turn relied on a 1915 decision,\textsuperscript{160} in holding that

parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence, however, is admitted, not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed.\textsuperscript{161}

Based on this history, the court said "[w]e thus reject the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible. Cases to the contrary are overruled."\textsuperscript{162}

The court spent several pages wading through the lease and the extrinsic evidence, apparently to show the courts below that there were a number of ambiguities in the contract. But it concluded its opinion with the following words:

Lest there be any doubt as to our holding, we expressly state that we are not implicitly applying the "plain meaning rule." Whether or not ambiguity is apparent from the face of a contract, evidence of the circumstances of the making of the contract is admissible. We reject the plain meaning rule and expressly adopt the context rule as the applicable rule for ascertaining the parties' intent and interpreting written contracts.\textsuperscript{163}

\begin{footnotes}
\item[156] Id.; see also supra text accompanying notes 49-52 (describing Judge Buckley's discussion of \textit{Admiral Builders}).
\item[157] \textit{Berg}, 801 P.2d at 228-29.
\item[158] Id. at 229.
\item[159] Id. at 229-30.
\item[160] Olsen v. Nichols, 149 P. 668 (Wash. 1915).
\item[161] \textit{Berg}, 801 P.2d at 229 (quoting J.W. Seavey Hop Corp. v. Pollock, 147 P.2d 310 (Wash. 1944)).
\item[162] Id. at 230.
\item[163] Id. at 234.
\end{footnotes}
A similar reliance on Corbin's writings and reasoning can be found in *Taylor v. State Farm Mutual Automobile Insurance Co.* in which the Arizona Supreme Court allowed extrinsic evidence to be admitted to construe a release agreement of "any and all other contractual claims." The plaintiff argued that the release did not bar a claim against an insurance company for bad faith. The trial court had found the release ambiguous and admitted the extrinsic evidence, but the Court of Appeals reversed a sizable jury verdict for the plaintiff on the ground that the "four corners" of the agreement "clearly release[d] all policy contract rights, claims, and causes of action that Taylor has or may have against State Farm," and thus barred the introduction of the extrinsic evidence. The Arizona Supreme Court, in turn, reversed the Court of Appeals' judgment.

*Taylor* discussed the authorities, especially Corbin, for four pages, and said that in fact Arizona had been committed to the Corbin approach to the parol evidence rule since 1983. The decision reaffirmed the Corbin approach, but interestingly considered at length and ultimately approved of the *Pacific Gas* "reasonably susceptible" language. The court closely analyzed the evidence, concluding that there were three "reasonable, but conflicting, interpretations of the language used in the agreement" and that, because the trial judge had correctly found that the issue could not be decided as a matter of law, it was correct to submit the question to the jury. Thus, in contrast to some courts, the Arizona court did not use "reasonably susceptible" to mean "clear" or "unassailable." In a revealing footnote, Chief Justice Feldman, author of the opinion, discussed the critical question whether a bad faith claim would be within a release of "any and all other contractual claims." The Chief Justice wrote that,

In the author's view, as a matter of doctrinal purity, a bad faith claim is a cause of action for breach of contract to which, for various policy reasons, a tort rather than a contract measure of damages is applied.

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165. Id. at 1146.
166. Id.
167. Id. at 1137.
170. Id. at 1140.
171. Id. at 1144.
172. Id. at 1145.
173. Id. at 1143.
Thus, to this author, a release of contractual claims necessarily releases a bad faith claim. ... [but it]he object of contract interpretation is not to satisfy a judge's compulsive devotion to jurisprudential theory but, instead, "to determine and make effective the Intention of the Contracting Parties."\(^{174}\)

Because the jury had found that the bad faith claim had not been released, and this was supported by the extrinsic evidence of the parties' intent, the Arizona Supreme Court left undisturbed the jury's resolution in plaintiff's favor.\(^{175}\)

C. Corbin's Way: Alaska

Finally, let us move north to Alaska.\(^{176}\) The Alaska Supreme Court, for years one of the most inventive state courts, had taken so many liberties with the parol evidence rule in the 1980s that it was seriously contended that the rule was a "dead letter" in that state.\(^{177}\) A series of more restrictive decisions from the mid-eighties to the early nineties led Professor Mooney, in his important 1995 article, to cite Alaska as one of the states where the "new conceptualism in contract law" was causing a shift back to the more conservative use of plain meaning and to restrictions on extrinsic evidence.\(^{178}\) About the same time, a student note in the Alaska Law Review referred to the Alaska Supreme Court's earlier "furtive move to the Corbin approach," and welcomed its swing back, hoping, however, that the court would be more explicit when it changed direction in the future.\(^{179}\)

A year later the court had before it a case with strong emotional and political overtones, Municipality of Anchorage v. Gentile,\(^{180}\) a class action arguing that a series of collective bargaining agreements involving the police and firefighters of Anchorage had included an unwritten understanding that benefits would vest at retirement and

174. Id. at 1143 n.5 (quoting the first of the rules of interpretation that Corbin added to his treatise on the eve of his ninetieth birthday in what is now 3 Arthur L. Corbin, Corbin On Contracts § 572B, at 64 (rev. ed. Supp. 2002)).

175. Id. at 1145.

176. Lest the reader think that loose versions of the parol evidence rule exist only in states served by the Pacific Reporter, we might mention Isbrandtsen v. North Branch Corp., 556 A.2d 81 (Vt. 1988), listed in Taylor as among the cases expressing approval of the Corbin and the Restatement (Second) positions with respect both to the use of extrinsic evidence even in the face of an apparent plain meaning, and to the idea that the parol evidence rule does not bar the use of extrinsic evidence to interpret a contract. Taylor, 854 P.2d at 1140-41. Isbrandtsen does adopt this approach, though it finds that there was no ambiguity and that "only one reasonable interpretation exists" under the terms of the contract in question, despite the extrinsic evidence. Isbrandtsen, 556 A.2d at 85.

177. See Mooney, supra note 85, at 1131.

178. Id. at 1148-50.


that retirees would never have their benefits reduced.\textsuperscript{181} The actual language of the provision was "coverage under this provision may not be diminished during the term of this agreement,"\textsuperscript{182} although the union negotiators had unsuccessfully proposed language of permanent vesting.\textsuperscript{183} Nevertheless, there was evidence that assurances had been given that the benefits would never be reduced, and internal memoranda showed that the City's lawyers feared that Anchorage was bound not to reduce the benefits.\textsuperscript{184} There was, however, contrary testimony. In general, the vesting argument was supported by testimony from retired politicians and negotiators who had taken part in the earlier bargaining but did not have to pay for the benefits, and opposed by current politicians faced with shortfalls and budget deficits.\textsuperscript{185}

The court's actual discussion of the law governing interpretation is very short:

The goal of the court is to enforce the reasonable expectations of the parties. In determining the intent of the parties the court looks to the written contract as well as extrinsic evidence regarding the parties' intent at the time the contract was made. The parties' expectations are assessed by examining the language used in the contract, case law interpreting similar language, and relevant extrinsic evidence, including the subsequent conduct of the parties.\textsuperscript{186}

The passage is not particularly remarkable, although it does indicate that the court had not retreated from its earlier "furtive moves to the Corbin approach." The trial court had found for the retirees. The Alaska Supreme Court said that, while the interpretation of words is usually viewed as a matter of law, reviewable de novo on appeal, where the trial court relies on conflicting extrinsic evidence, it would only reverse if the finding were clearly erroneous.\textsuperscript{187} Using this standard, it upheld the award.\textsuperscript{188}

Although the Anchorage case does not mention Corbin or the Second Restatement, it allows extrinsic evidence to be considered without a finding of ambiguity and despite its own characterization of the agreement's actual language as a compromise. The decision

\textsuperscript{181} Id. at 255.
\textsuperscript{182} Id. at 253 (emphasis added).
\textsuperscript{183} Id. at 253 n.1. The language in the agreements is described by the court as "the parties' compromise." Id.
\textsuperscript{184} Id. at 254.
\textsuperscript{185} Id. at 252-55.
\textsuperscript{186} Id. at 255-56 (citations omitted). In a footnote attached to this passage the court cited a 1979 decision noting that it did not require a preliminary finding of ambiguity before evaluating extrinsic evidence. Id. at 256 n.5.
\textsuperscript{187} Id. at 256.
\textsuperscript{188} Id. at 258; cf. supra text accompanying notes 59-61 (addressing Hershon’s discussion of review and the court’s relative willingness to interfere).
deferred to the trial court, which had adopted a meaning discerned from extrinsic evidence. It seems fair to include the opinion among the most free-wheeling views of the parol evidence and plain meaning rules.

D. Corbin's Why

Either expressly or by pretty clear implication, cases such as Anchorage, Taylor, and Berg embody the views of Arthur Corbin and the Second Restatement, itself strongly influenced by Corbin.\textsuperscript{189} And once again moving forward to give us their view of Corbin's agenda are Olivia and Louis Karlin. We are told that Corbin did not believe that words have any stable meaning, and was a literary nihilist. "The critical school most congenial to Professor Corbin's view of language is literary deconstruction... [except that] literary deconstruction probably does not even go so far as Professor Corbin does."\textsuperscript{190}

Corbin was, in fact, a conservative man who supported Barry Goldwater for President in 1964.\textsuperscript{191} He was writing about the flexibility of language before Jacques Derrida was born, and he wrote very clearly, in 1960, a section of his treatise entitled "Interpretation Requires the Weighing of Evidence, Not its Exclusion."\textsuperscript{192} Corbin fully accepted the idea that the uncertainties of language did not make all writing indeterminate, and warned against "the too ready acceptance of flimsy and prejudiced testimony motivated by subsequently realized self-interest."\textsuperscript{193} What disturbed him was denying everyone, both judge and jury, a chance to examine the extrinsic evidence, and to accept or reject such evidence on its own merits. As he wrote in an accompanying footnote, "[t]here are indeed cases in which the words of a written contract are such as to outweigh the extrinsic evidence offered by a party. But all language requires interpretation and no language is 'compelling' until it has been interpreted."\textsuperscript{194}

The Arizona Supreme Court, in a passage based on Corbin, answered the "literary nihilism" argument implicitly, and the Kozinski Trident criticism of Pacific Gas explicitly:

We too would recoil if Pacific Gas meant that mere complexity required a finding of ambiguity or that courts must listen to wholly

\textsuperscript{190} Karlin & Karlin, supra note 83, at 1379-80.
\textsuperscript{192} 3 Corbin On Contracts 1960 ed., supra note 2, § 542A. The idea is carried forth by Professor Margaret Kniffin in her revision of Corbin's chapter on interpretation. See Kniffin, supra note 2, § 24.7, at 39.
\textsuperscript{193} 3 Corbin On Contracts 1960 ed., supra note 2, § 542A.
\textsuperscript{194} Id. at 129 n.85.30.
unpersuasive extrinsic evidence to create ambiguity where words are clear beyond dispute. What this means, at least in Arizona, is that the parol evidence rule does not apply to exclude evidence unless the evidence varies or contradicts the agreement. But the court must first decide what the agreement says and, as a preliminary matter, must decide if it reasonably could be interpreted in different ways, given the language and the factual context surrounding the making of the agreement. Admittedly, the process is not without risk, but we believe the game is worth the candle. After all, the purpose is to produce the contract result the parties intended, not that which the judge intends. Some words are clear beyond dispute. Some may mean one thing to the judge but could have meant something else to the parties. It is the latter meaning that is important.195

V. PLAIN MEANING FROM MA FERGUSON TO H.L.A. HART

Ma Ferguson, the first woman governor in American history, usually deferred to her husband Pa, who had been obliged to give up the Texas governorship upon his being sent to prison. At one time, so the story goes, Pa was out of town and Ma was asked to sign a bill allowing schools near the Rio Grande to teach in Spanish. Ma vetoed the bill, saying “English was good enough for Jesus. It’s good enough for them.”

The same attitude often underlies faith in the plain meaning of words, whether from people as unlettered as Ma Ferguson or from federal judges such as James Buckley. Nonetheless, not everyone who believes in “plain meaning” is ignorant or simplistic. Holmes and Williston, the supreme objectivists, fully acknowledged that “plain meaning” is an oversimplification but still viewed the reasonable observer’s understanding as controlling. And serious philosophers have debated the existence of “core meanings,” particularly in the famous debate between H.L.A. Hart and Lon Fuller,196 neither of whom was a simpleton.

In April of 1957, Hart, then Professor of Jurisprudence at Oxford, gave a Holmes Lecture at Harvard entitled Positivism and the Separation of Law and Morality197 discussing whether “higher law” concepts of morality belonged in the law, and whether “what is and what ought to be are somehow indissolubly fused or inseparable.”198 Hart, a great positivist, denied this thesis. The following year, Lon Fuller, Carter Professor of General Jurisprudence at Harvard, answered Hart in an article entitled Positivism and Fidelity to Law—A

196. See Hart, supra note 17; Fuller, supra note 16.
197. See Hart, supra note 17.
198. Id. at 594.
Their underlying dispute is of great importance both in its own right and as an intellectual artifact of the time. The basic issue is relevant to our discussion, but most on our point is their insightful discussion of interpretation.

In the course of his lecture Hart gave an illustration, almost *en passant*, involving a rule forbidding vehicles in a park:

> A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called “vehicles” for the purpose of the rule or not? If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behavior be regulated by rules, then the general words we use—like “vehicle” in the case I consider—must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case. . . . [In these penumbral cases] someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in this decision.

Hart conceded, indeed insisted, that these “problems of the penumbra” had to be decided “not mechanically but in the light of aims, purposes, and policies.” He also maintained that “the hard core of settled meaning is law in some centrally important sense and that even if there are borderlines, there must first be lines.”

Fuller, in his reply, included an eight-page section called “The Problem of Interpretation: The Core and the Penumbra.” Fuller described Hart as arguing that communication is possible only because words have “standard instances” or “core meaning[s],” that a word should be regarded “as embracing its ‘standard instance’” except in unusual circumstances, and that only in penumbral areas was a judge forced to consult his notions of what “ought to be” in order to decide what the rule “is.”

Fuller responded:

> If I have properly interpreted Professor Hart’s theory as it affects the “hard core,” then I think it is quite untenable. The most obvious

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199. See Fuller, *supra* note 16.
201. Id. at 607, 614.
202. Id. at 614. I cannot do Professor Hart’s thirty-seven page lecture justice in a one-page summary. It is well worth reading.
204. Id. at 662, 663.
defect of his theory lies in its assumption that problems of interpretation typically turn on the meaning of individual words. . . .

Even in the case of statutes, we commonly have to assign meaning, not to a single word, but to a sentence, a paragraph, or a whole page or more of text. Surely a paragraph does not have a "standard instance" that remains constant whatever the context in which it appears. If a statute seems to have a kind of "core meaning" that we can apply without a too precise inquiry into its exact purpose, this is because we can see that, however one might formulate the precise objective of the statute, this case would still come within it.\textsuperscript{205}

To illustrate his point Fuller proposed an incomplete sentence beginning "All improvements must be promptly reported to . . . ."\textsuperscript{206} He continued: "Professor Hart's theory seems to assert that even if we have only this fragment before us we can safely construe the word 'improvement' to apply to its 'standard instance,' though we would have to know the rest of the sentence before we could deal intelligently with 'problems of the penumbra.'"\textsuperscript{207} But, said Fuller, the standard meaning of "improvement" varies, depending on whether the object of the sentence is "the head nurse," "the Town Planning Authority," or "the Principal of the School."\textsuperscript{208} To understand what "improvement" means, "[w]e must, in other words, be sufficiently capable of putting ourselves in the position of those who drafted the rule to know what they thought 'ought to be.' It is in the light of this 'ought' that we must decide what the rule 'is.'"\textsuperscript{209}

Fuller then made what seems to me to be an insightful point:

Throughout his whole discussion of interpretation, Professor Hart seems to assume that it is a kind of cataloguing procedure. A judge faced with a novel situation is like a library clerk who has to decide where to shelve a new book. . . . Surely the judicial process is something more than a cataloguing procedure. The judge does not discharge his responsibility when he pins an apt diagnostic label on the case. He has to do something about it, to treat it, if you will. It is this larger responsibility which explains why interpretive problems almost never turn on a single word, and also why lawyers for generations have found the putting of imaginary borderline cases useful, not only "on the penumbra," but in order to know where the penumbra begins.\textsuperscript{210}

Fuller concluded his discussion of interpretation by saying that "the theory of meaning implied in Professor Hart's essay seems to me to have been rejected by three men who stand at the very head of modern developments in logical analysis: [Ludwig] Wittgenstein,
[Bertrand] Russell, and [Alfred North] Whitehead. After giving instances from Wittgenstein and Russell, he concluded by saying that "Whitehead explains the appeal that 'the deceptive identity of the repeated word' has for modern philosophers; only by assuming some linguistic constant (such as the 'core of meaning') can validity be claimed for procedures of logic which of necessity move the word from one context to another."

To be sure, Hart and Fuller were discussing interpretation more as a paradigm for their debate over morality's place in law, and they were using statutes rather than contracts as their illustrations. But Fuller's responses to Hart seem to make an effective response to even the sophisticated version of plain meaning that Hart posited under the rubrics "core meaning" and "standard instance." Skepticism about an apparently strained interpretation is one thing, but to treat the operation as different in kind from "the problems of the penumbra" is to draw an artificial distinction, based on an assumption of core meaning that, while not as egregious as Ma Ferguson's assumptions about Jesus, is just as false.

This artificial distinction is illustrated by another sophisticated version of plain meaning analysis, one utilized by Judge Richard Posner in *AM International, Inc. v. Graphic Management Associates, Inc.* Posner agreed that the notion of plain meaning was an oversimplification, and that courts should admit extrinsic evidence to show an ambiguity. He argued, however, that only "objective" evidence should be admitted:

By "objective" evidence we mean evidence of ambiguity that can be supplied by disinterested third parties: evidence that there was more than one ship called Peerless, or that a particular trade uses "cotton" in a nonstandard sense. . . . "Objective" evidence is admissible to demonstrate that apparently clear contract language means something different from what it seems to mean; "subjective" evidence is inadmissible for this purpose.

Not only does Posner's system require a distinction based on the judge deciding that some expression is obvious in meaning, but it also sets up an evidentiary test that is more stringent than those in other areas of the law or even areas of the parol evidence rule. For instance, we would not need to use "objective evidence" to show that an oral condition had not been included in an integrated writing. While Posner's system is much more sophisticated than the ordinary plain meaning rule, it still carries with it a distrust of those who try to

211. Id. at 669.
212. Id.
213. 44 F.3d 572 (7th Cir. 1995).
214. Id. at 575.
Corbin was well aware that normally words mean what we all think they mean, but like Fuller, he argued that only when words were heard in context, which might include evidence from outside the document in which the words appeared, could they be fully understood. To be sure, the more unlikely the explanation and the more unbelievable the circumstances, the less likely we are to accept the unusual—or even egregious—meaning. In Corbin’s famous words,

The more bizarre and unusual an asserted interpretation is, the more convincing must be the testimony that supports it. Just when the court should quit listening to testimony that white is black and that a dollar is fifty cents is a matter for sound judicial discretion and common sense. Even these things may be true for some purposes. As long as the court is aware that there may be doubt and ambiguity and uncertainty in the meaning and application of agreed language, it will welcome testimony as to antecedent agreements, communications, and other factors that may help to decide the issue.216

VI. THE DISCOMFORT OF UNCERTAINTY

What is really bothersome about the Corbin/Second Restatement approach to plain meaning and parol evidence is that it is unsettling. It is easy to poke fun at young writers who overstate their case or at federal judges, such as Alex Kozinski, who set up straw men for Federalist Society audiences, but we cannot ignore Stanley Mosk, a highly respected justice who has stuck to his liberal beliefs for thirty years, even as recall elections pushed his California Supreme Court far to the right. It was Stanley Mosk, we remember, who dissented in *Delta Dynamics*, saying that “[t]he written word, heretofore deemed immutable, is now at all times [sic] subject to alteration by self-serving recitals based upon fading memories of antecedent events. This, I submit, is a serious impediment to the certainty required in commercial transactions.”217

This is not a foolish criticism, but Justice Mosk builds on clay in asserting that the written word is immutable. It simply is not; consider the changes in the meaning of the phrase “all men are created equal” between July 4, 1776 and the present. Certainly we can look to context. When “two experienced businessmen... both represented by competent counsel”218 are involved, we have much greater reason

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218. See Justice Mosk’s full quotation, *supra* text accompanying note 86. Of course, *Trident* also comes to mind.
for skepticism than when an Italian stall-keeper is dealing with office building managers. Several writers argue that we either should or already do raise and lower our skepticism based on categories of contracts and of parties. Personally, I would rather base my reaction on the specific facts; who the parties are and what kind of contract is involved are part of the context, as much as the words used and their dictionary definitions. Even in a family transaction perhaps done without lawyers, there can be room for distrust of a far-fetched story.

Thus there are some reasoned answers to Justice Mosk. In the end, though, we have a choice between greater certainty, with occasional injustices, and greater concern about what the parties actually intended, with occasional chicanery. I think we should opt for the parties' intentions, discerned from their words, read in the context of all relevant evidence, extrinsic or not. Yes, we lose some security, some peace of mind, some belief in the sanctity of the written word, but on the whole we gain truth and individual dignity at a cost to form and rules and certainty. That is a cost that I am willing to pay. And so was Corbin. At the age of ninety he wrote,

What then is “the law”? And is there no certainty in “language”? Are there not rules of law “fixed and settled” by which judges as well as other men are bound, expressed in words that are “plain and clear” with one true and “objective” meaning? A longtime researcher must reply that there are no such “rules” and no such “words.” Nevertheless, the “law” consists of “rules,” an increasing multitude of them as time goes on. They are not to be scorned merely because they are “tentative working rules,” growing and changing with the conditions of human life, and with the developing mores of mankind. Without them the world would be a chaotic and guideless world, with every man acting in accordance with his own vagrant emotion and desire.... Therefore, every student, writer, and judge has a responsibility of his own. He must make a choice among “authorities,” among “rules,” and among interpretations of the words by which a rule is expressed.

Making that choice is not easy. Formalism of the kind found in

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219. See Gianni v. R. Russell & Co., 126 A. 791, 792 (Pa. 1924) (holding that the building manager's alleged oral promise to give the stall-keeper the exclusive right to sell soda water in exchange for his not selling tobacco was inadmissible because not included in written lease).


221. See Masterson v. Sine, 436 P.2d 561 (Cal. 1968).

plain meaning and an "objectivist" parol evidence rule is much easier to carry out than weighing context, credibility, linguistic sensibility, and the many other factors that can go into an interpretation of words that may or may not mean what we think they mean. It is comforting to live in a world of plain meaning. But that world just isn't real. Rather than indulging in a fantasy of certainty, we should opt for a world of reality, however untidy it may be.