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## Intent to Contract

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Should the law care whether the parties to an agreement intended that it be binding as a contract? Stated at this level of generality, the answer is obviously, “Yes.” The parties’ intent to contract is important to the legitimacy of contract law: It is easier to justify punishing the violation of a legal obligation the promisor has freely chosen than a duty she may have unwittingly undertaken. And the parties’ intent to be legally bound makes a practical difference: Legal incentives have traction when the parties know they are entering into a legally binding agreement, but not when they have not considered legal liability or wrongly think their agreement is not enforceable.

The fact that the parties’ intent to contract makes normative and practical differences, however, does not entail that the law should condition enforcement on such an intent or its appearance. The black-letter rules of contract law in England and in the United States take appear to answer that question very differently. In England, the existence of a contract is supposedly conditioned on the parties intent to be bound, while most U.S. decisions accord with the Second Restatement of Contract’s rule that “[n]either real nor apparent intention that a promise be legally binding is essential to the formation of a contract.” While this doctrinal difference raises an interesting interpretive question – do the two rules express different fundamental commitments about the nature of contract law – closer examination reveals that judicial application of these black-letter rules has resulted in broad practical convergence. But that converge too raises questions. Though English courts have moved towards the Restatement approach in commercial cases, one finds a shift towards the English rule for domestic and social agreements between the First and Second Restatements. Why the difference? Moreover, U.S. law contains other exceptions to the Restatement rule. For example, courts have adopted a manifest-intent test for the enforceability of preliminary agreements; in Pennsylvania, a written gratuitous promise is enforceable if it “contains an additional express statement, in any form of language, that the signer intends to be legally bound”; and the Minnesota Supreme Court has refused to enforce a reporter’s promise of confidentiality to a source because it was “not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract.” Why these exceptions?

After describing these rules in a bit more detail in Part I, this Article addresses two questions about them. The first, which is the subject of Part II, is an interpretive one: What is the best explanation of the Restatement rule (which English courts have adopted in practice) that in most cases the parties to a contract need not manifest an intent to be

legally bound. I suggest two answers. According the first, the rule says something about the purpose of contract law, which is to impose duties on parties to agreements for consideration whether they wish them or not. According the second, the rule is instead based on a prudential and evidentiary judgment: whether or not the law cares about the parties' manifest contractual intent, that intent is often unverifiable, and therefore unsuitable as a condition of contractual validity. Part II does not attempt to decide between these two readings of the Restatement rule, but explores each in greater depth with the goal of better understanding what is at stake in the rule.

The second question, which is the subject of Part III, involves a design problem: Assuming *arguendo* that the law wants to condition the legal enforcement of at least some promises on the parties' manifest intent, how should the law so. Rules for determining when the parties intended to contract are rules of interpretation, and I suggest evaluating them using the familiar theory of contractual default and opt-out. After discussing some special issues involved in interpreting parties' contractual intent, I apply the theory to four transaction types: gratuitous promises, preliminary agreements, domestic agreements and reporters' promises of confidentiality to their sources. To the extent that we want to condition the enforcement of such agreements on the parties' manifest intent to contract, the analysis recommends different rules for the different transaction types.