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Gaps in Contracts: A Critique of Consent Theory

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## ARTICLES

### GAPS IN CONTRACTS: A CRITIQUE OF CONSENT THEORY

**Lawrence Kalevitch***

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What is the best interpretation of contract-like behavior? The past decade has seen a wealth of commentary and judicial dicta on the subject of contracts. "Default" rules have preoccupied contract scholarship. Commentators try to determine which default rules are best under an image of contract law operating like a computer program supplying the rules for parties whose contract keyboard does not express another choice.

The analogy to computer programs and their default rules is flawed. This deceptive analogy stems from the use of data processing programs that provide default rules whenever a program user does not indicate otherwise. The rules of contract interpretation apply likewise by default when parties are silent on certain matters. The rules of contract are said to fill the "gaps" in contracts. Traditional thought holds that gaps existing in contracts should be filled by someone other than the parties to contracts. If we revise this traditional thinking and let contract parties speak, however, we might find that correcting our ignorance of what parties mean fills the gap. Under the analogy to data processing, filling contract gaps is tantamount to creating computer programs. Computer programmers, like parties to contracts, have personalities, purposes, and goals. Programmers and promisors manifest these qualities in their programs and contracts. Outsiders do not catch clues to a programmer's identity from the program alone; similarly, outsiders such as members of the legal system cannot interpret contract language out of its context. Supposing that legal knowledge in the form of the best legal rules produces good contract interpretation is like supposing that the best word processing program produces good writing. Ironically, computer programs have no gaps. Like lawyers, programmers cannot create form programs that fit everyone well. Nor can Solomon or lawmakers create contract rules that fit everyone.

The best contract rules can only come from the best theory of contract. Yet, the best theory need not provide substantive rules. In fact, a refined will theory of contract, as suggested in this Article, requires non-substantive rules. Similarly, many of the gap-fill-

1 Default rules of contract law refer to both the law of contract which applies regardless of the intentions of the parties, immutable rules of law, and the rules of contract law which apply unless the parties indicate otherwise, mutable rules of law. Writers usually refer to the latter. I shall discuss both. Indeed, in my nontraditional view, immutable rules of contract law are oxymoronic and paradoxical.

2 This Article critiques Professor Randy Barnett's consent theory of contract. See Randy Barnett, A Consent Theory of Contract, 86 COLUM. L. REV. 269, 321 (1986) [hereinaf-
ers of the Uniform Commercial Code (U.C.C.) take a non-substan-
tive form, as does much of the Restatement (Second) of Contracts. Will theory derives its force from leaving the substantive agree-
ment of the parties to the parties.

No singular substantive interpretation of people and their in-
stitutions exist. There are too many personalities, too many histo-
ries, and too many aspirations. People make contracts and so the
same is true for any suggested right or best interpretation of con-
tracts or contract-like behavior. People are worthy of too much re-
spect for contract law to ask them to wear any convenient, off-the-
rack interpretive or default rule. The interpretation of contracts
must rest on the primacy of the consent of the parties—their wills.

But it has been said that where the parties have not spoken, where
their agreement has left gaps, the emphasis on consent is
misplaced. Thus, default rules serve the wills of contract parties
as well as any other, for a court has to decide a case of missing
wills. This analysis errs grievously because it means that in cases of
unclear or ambiguous expressions, the law might take any interpre-
tation at all. Indeed, all expressions pose the problem of interpre-
tation. It is hornbook law, however, that we search for the mean-
ings of contract terms in the customs and practices of the parties

Barnett, Consent). Barnett recently continued his elaboration of a liberal theory of jus-
tice as applied to contracts. See Randy Barnett, The Sound of Silence: Default Rules and
Barnett takes what he calls the emerging heuristic of contract law discussion, default rules,
and attempts to show how our existing model of consent is too narrow. In particular, the
gap-filler rules of Article 2 of the U.C.C., as default rules, are not necessarily imposed by the
force of law, as generally supposed, but are actually consented to by parties to contracts
under certain circumstances. Part III.A. of this Article sets forth Barnett’s consent theory;
part V.A.-B. sets forth Barnett’s thinking on default rules.

Barnett’s theory exemplifies what is right and what is wrong with modern contract law
and theory. He adopts an interpretive formalism that forgets what contract is
about—honoring party intentions. Many of the recent formalistic writings on default rules
have drawn upon the work of Lon Fuller, and especially his great article, Consideration and
Form. See, Lon L. Fuller, Consideration and Form, 41 COLUM. L. REV. 799 (1941). Fuller
appreciated the value and limits to formalism. That he offered an explanation, an analysis
of the several functions of the law of consideration, including formal functions, shows only
that formalism can serve some functions. Adopting formalism in any particular legal matter,
however, requires more than a bow to the occasional usefulness of formalism. All schools of
contract thought have repudiated the traditional doctrine of consideration.

3. E.g., David Charny, Hypothetical Bargains: The Normative Structure of Contract
Interpretation, 89 Mich. L. Rev. 1815 (1991). But conduct other than words may express
assent even under the traditional view. RESTATEMENT (SECOND) OF CONTRACTS § 19 (1979).
Even in objective theory, then, to say that parties left a gap in their agreement, requires a
review of not only their agreement but also their conduct. Until one conducts an extensive
investigation, one cannot say the contract is incomplete or has a gap. The alternative is to
ignore or deny what Barnett calls the “Sound of Silence,” which includes the tacit assump-
tions or understandings that contracts might be shown to share.
or the groups to which they belong. Why should we conduct this factual investigation only when express terms are at issue? Are parties who are silent on a given matter undeserving of the same respect? One might also believe that because most people prefer efficiency, efficient default rules should be adopted. If this is true, the efficiency theorist need not limit rule-making to instances of party silence. Since words do not define themselves, the efficiency theorist ought to construe even express contract terms under this norm. Interpretation does not begin after the contract's last page.

Moreover, the only way to minimize the political dilemma of siding with one or another theory of contractual interpretation, be it for example, efficiency or fairness, is to maximize party autonomy by refraining from sanctioning any of the respectable views on the best interpretation of contract. Maximizing party autonomy also coincides with the fundamental notion of contract, party-centrism and not legal control. This is not a mere coincidence.

We need to rethink whether the traditional view that contract

4. Charny, supra note 3, at 1825-30. "What about cases in which the parties' intentions, as gleaned from the language of the contract or perhaps even from testimony, are at variance with the court's notion of what would be the efficient term to interpolate into the contract? If the law is to take its cues from economics, should efficiency or intentions govern? Oddly, the latter." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 93 (4th ed. 1992).

5. The problem with an economic interpretation of behavior is no different in principle than any singular interpretive canon. Unless the parties fit the descriptive premises of an interpretation, the interpretation cannot be correct. Choosing to adopt any particular interpretive canon requires knowledge that these premises are either true or should be true. The latter normative judgment must then be defended as better than others apart from the descriptive premises unless they are true. See, e.g., Coleman et al., infra note 13. Even if it is true that contract is wealth-maximizing behavior, the descriptive premises of the economic account presume wealth-maximization arises from the choice of the parties. But, if that is true, then it is also wealth-maximizing to choose to forsake a contract already made. A normative theory must account for individual freedom of choice only at the inception of a contract but not later on when a dispute occurs, lest economics portray parties as rational at the time of contract formation but irrational at the time of breach. Nevertheless, an economic interpretation of the behavior of particular parties may offer the best account of what those parties intended on matters which turn out to be important to resolve. But no interpretive theory needs to be legislated so that all parties are bound to one interpretation.

Nor is an economic interpretation alone in this; an altruistic or a cooperative descriptive premise cannot explain why one choice an altruistic or a cooperative party makes at formation of a contract should receive legal protection, but later choices, such as breach, should not.

Finally, it would still be foolish to suppose that no parties to contract fit a model of efficiency, altruism, or cooperation. Instead of choosing any one of these, or other paradigms of intention, contract law should leave all paradigms that are credible available for any particular contract dispute. That this open-ended methodology leaves courts or juries with discretion also means that it empowers parties to contracts. Thus, all theorizing offering a new interpretation of contract behavior is welcome under will theory so long as a substantive interpretive theory does not claim to be the right objective theory. Will theory is right merely because will theory makes no substantive interpretive claim.
law needs default rules is plausible. Professor Randy Barnett's traditional consent theory rests on an efficient markets theory. I contend that no particular idea of contract emerges from this market-pricing theory. Moreover, Barnett's claim for an important informative role for consent in the calculus of default contractual rules is weak because his theory leaves the case for any contractual rules, and perhaps contract, in doubt. This may require a reconceptualization of standard contract discourse, such as gaps in contracts. This Article argues that will theory represents a useful reconceptualization of contracts discourse because will theory leads one away from the false choice of fraudulent or hypothetical legal rules. Will theory conforms contract to the liberal ideal of party autonomy. A will theory of contract lacks a set of substantive default rules, and contract law itself may need no substantive rules at all. A default mechanism need not have rule-like, result-oriented characteristics. Default mechanisms might well be a set of procedures and factors, or as I prefer, an autonomy guidebook.6

This Article uses Professor Randy Barnett's consent theory as a figure for the traditional view of contract law. Part II of this Article contrasts basic premises underlying traditional contracts theory and will theory. Part III sets forth Barnett's consent theory and suggests that the related problems of ignorance and substantive contract law jeopardize any meaningful moral basis of contract in autonomy.7 Part IV criticizes consent theory for its failure to take seriously the correspondence between actual and manifested assent. Part V examines and criticizes Barnett's recent claims that consent theory helps identify appropriate default rules of contract. Part V.C. suggests that the model for gap-filling default rules, the U.C.C., provides instead a paradigm for will theory, nonsubstantive guidelines for fact-sensitive adjudication of contract disputes. Part VI calls for even more nonsubstantive contract rules than the many nonsubstantive rules that already fill contracts cases, texts, and codes.


7. A future article continues the critique and begins a positive exposition of will theory. It compares the objective theory of contracts to will theory and shows how practically relevant philosophical difficulties may be managed by will theory and not objective theory in three philosophically and doctrinally troubled areas: gift promises, social promises, and duress. What will theory does in these areas it can do throughout contract law. Yet, in this Article I do not carry out the implications of will theory through all of contract law.
II. CONTRASTING THE UNDERLYING PREMISES OF CONSENT AND WILL THEORIES

Theories of contract law may draw on several meanings of assent to a contract. Assent may range from the actual understandings of the contract parties to the sometimes fictitious licensing of courts to fill gaps in agreements. Default rules of contract law fit the latter idea of assent premised in objective theory, such as Barnett's consent theory. Evidence of the parties' understandings fit the former idea of assent premised in will theory.

A. Several Meanings of Assent

Contract uses several ideas of assent. Sometimes assent in contract law means actual, subjective assent.\(^8\) At other times, perhaps more often, assent means giving the appearance of having actually assented, or objective consent.\(^9\) Finally, assent sometimes refers to

8. This, of course, was the nineteenth century will theory of assent that included the metaphor of the “meeting of the minds.” Although easy to caricature (e.g., Steven J. Burton, The Case of the Homunculean Explorers, 1988 Ann. Surv. Am. L. 299), the received wisdom of a movement from will to objective theory in the twentieth century has not been doctrinally complete nor without philosophical headaches. The individualist ethic of will theory has not seemed compatible with either the objective theory of contract assent or the rise elsewhere in modern law of a communitarian ethic. See PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); Anthony T. Kronman, Contract Law and Distributive Justice, 89 YALE L.J. 472 (1980). What is subjective, actual assent is not mysterious: it ascribes intent to parties who act in certain socially conceived ways. As with other concepts such as “electrons” or “university,” subjective or actual assent may be ridiculed simply by asking to see an example. See generally GILBERT RYLE, THE CONCEPT OF MIND (1949). For a comparable caricature of orthodoxy's objective test of assent, see infra note 9.

9. The conventional belief holds that because we lack direct evidence of subjective assent, we should use an objective test that locates indirect evidence of intent. Thus, when Able says yes to Baker's offer, we interpret Able's objective assent as present when Able gives a common indication of that assent, by her saying yes, for example. But this objective test of Able’s assent depends on something different: that Baker believed Able agreed. Suppose we point out a hard lesson of experience to Baker, that in fact Able's saying yes does not preclude the possibility that Able might have her mental fingers crossed, and so she does not mean what she appears to mean.

Baker should not deny this is always possible. But Baker will tell us that he would not be making a deal with Able if he thought there were any real possibility that was the case. Baker would tell us that is not the case because he has direct evidence: Abel said yes. Baker trusts that when Able says yes, she means it. They share a social convention when they might have had, instead, a code. Baker might further inform us that if Able were to break the deal, Baker would have no problem showing that anyone who knew Baker would know that Abel meant yes when she said yes.

An objective test of indirect evidence of assent would also require that we rearrange how we talk generally. Thus, to communicate how I conclude that Able only gave indirect evidence of assent, I shall prefatorily have to say this is indirect evidence of my conclusion because there is no way of your getting into my mind to see for yourself. Thus, bear in mind that my tongue has lately been on a frolic of its own and may only tomorrow return to corresponding with my true thoughts.
a legal conclusion under contract law lacking any pretense of resting on either party's actual intention, as where contract parties are said to have assented or consented to default rules of contract law unless they provide otherwise. In this last meaning of assent neither subjective nor objective assent is typically present; assent is merely an assumption of risk or a license for the rules of contract law.

Three bases of contract mirror the differences between agreement, consent, and risk-assumption. First, will theory holds that people bind themselves to contracts by actually agreeing or promising. Contrary to this assumption theorists and jurists have denied that promisors are liable for what they actually intended. Second, an objective theory of promissory liability holds that people are liable for what they have said and not what they meant. Third, the rise of the premise of validity for indefinite agreements in the past fifty years has led to a third form of promissory liability under which parties are said to have impliedly agreed to the terms a

These unremarkable points in no way suggest that Baker should trust everyone but point out that if contract parties were to obsess, as lawyers are wont, about dishonesty from even those with whom they share a basis of trust, there would not be contracts for lawyers to worry. Because nearly everyone means yes when they say yes, we share a convention which entitles us to call that direct evidence. Will theory does not require the objective theory's superfluous preface. Compare "assent is not a mere appearance . . . . [t]here must be conduct and a conscious will to engage in that conduct," Restatement (Second) of Contracts § 19 cmt. c (1979), with, "a mental reservation of a party to a bargain does not impair the obligation he purports to undertake." Id. § 17 cmt. c. But even if Able does not purport to undertake any obligation, and so her "conscious will" is lacking, the objective theory may bind Able to a contract obligation because a reasonable person could believe Able's "mere appearance" manifested assent. Objectivists might explain that where Able ostensibly appeared to assent, she did assent. That is a deep contradiction. For, we may not need to rely on mere appearances; we rely on mere appearances under the objective theory because we do not know what Able intended. Nevertheless, Baker must actually believe that Able's appearance of assent meant that Able did assent. Otherwise, protecting Baker from Able's appearance of assent serves no party interest other than Baker's advantage-taking. If Baker thus needs to show his genuine subjective appreciation of Able's behavior, the objective theory rests upon what it meant to deny subjective intention. Just why Baker's subjective intention should trump Able's in this way requires explanation. This and other mysteries of the objective theory are examined in a future article.

10. For example, under the U.C.C. the conventional account holds that by consenting to a goods contract lacking agreement as to price but nevertheless intending to contract, parties are obligated to a court's setting a reasonable price. U.C.C. § 2-305(1) (1990). In this view the parties did not actually agree to the court's setting the price, but they assumed the risk of that eventuality when they failed to reach agreement. Will theory offers a better account: Consult the parties' past behavior for what these or parties like these meant the price term to be. If you want to say such standards are only indirect evidence of what the parties meant, see U.C.C. sections 1-205 and 2-208.

court constructs to complete the indefinite agreement.

The several ideas of assent represent different theories of contract obligation. A will theory of contract appreciates the special self-imposed nature of contract obligation and uses evidence of actual party intentions to derive obligation. The appearances principle of the succeeding, and perhaps yet ascendant, objective theory of assent, triumphed because it could resolve hard cases in which the parties' subjective understandings differed. Further, using the seeming scientism of the objective test of consent even in easy cases removed the metaphysics of the storied "meeting of the minds."

B. Contracts and Gaps: The Need for Default Rules

The question of indefiniteness in agreements or gaps in contracts has received much attention in recent years. Contract scholarship has aimed at reconstructing how gaps in contracts should be filled. Thus, the issue has been framed: "What are the best default rules of contract law?" Yet, contract default rules are justifiable only by the third and weakest form of assent: risk assumption.

Why contract law should choose any particular default rules remains largely unexplained. Perhaps an indirect empiricism supports an efficiency thesis. An efficiency theorist might argue that since contract law has traditionally tried to give parties what they

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14. Perhaps this has occurred in reaction to the vision of contract as dead, a denial of the death of contract (see Grant Gilmore, The Death of Contract (1974)): That contract should not be dead. "[T]he 'resurrection of contract' is a recognition of contract law's proper function as a transfer mechanism that is conceptually dependent on more fundamental notions of individual entitlements." Barnett, Consent, supra note 2, at 321 (emphasis added). For the most part (Fried here is the lonely exception, see supra note 12), the renewed interest is in contract qua contract, as opposed to the 1970s banners of contract qua tort or contract as relationalism. See Gilmore, supra; Ian R. MacNeil, The New Social Contract: An Inquiry Into Modern Contractual Relations (1980); Ian R. MacNeil, The Many Futures of Contract, 47 S. CAL. L. REV. 691 (1974). This stems from writers interested in law and economics. See generally, Lewis A. Kornhauser, The Resurrection of Contract, 82 COLUM. L. REV. 184 (1982) (Book Review).
15. See, e.g., Coleman et al., supra note 13, at 641-49; supra part II.A.
intended in their contract, giving parties efficient gap-fillers will most likely produce the agreements parties would have made had they expressly agreed about the undetermined16 events. Thus, parties to contracts would choose in advance the most efficient term that entitles the law to presume the parties consciously chose the term. Therefore, parties pre-consent to efficient gap-fillers. Yet, a leading contract theorist, Professor Randy Barnett, has disclaimed a general normative force of economic theory as a basis for contract law. Barnett has said that because efficiency theory presupposes some agreements are enforceable, efficiency theory cannot distinguish the unenforceable from the enforceable.17 Yet Barnett’s thesis that consent supports certain default rule choices would seem to require some theory about party behavior. Even if efficiency could not explain why some agreements are enforceable and others are not, efficiency could perhaps inform some default rules.18 Thus, if consent theory alone does not lead to particular

16. “Undetermined,” under the traditional view, means that the express terms, including those fairly implied-in-fact, do not provide a basis for resolving a contractual dispute. At this point, interpretation is then thought to end and construction of the parties’ intent to begin. For there really are gaps in contracts. This is similar, if not identical, to the traditional belief that law has gaps. Ronald Dworkin has steadily and convincingly maintained that this view confounds judges and legal philosophers. See, e.g., Ronald M. Dworkin, The Model of Rules, 35 U. CHI. L. REV. 14 (1967); Ronald M. Dworkin, Hard Cases, 88 HARV. L. REV. 1057 (1975); RONALD M. DWORIN, LAW’S EMPIRE ch. 1 (1986). Will theory acknowledges that interpretation neither begins nor ends but pervades communicative activity.


18. One major problem provoked by the new analyses of contract default rules is the meaning of efficiency and its relation to autonomy. For example, Ayres and Gertner claim that default rules in the form of “penalty rules” will produce efficiency which therefore should guide the selection of default rules. Ayres & Gertner, supra note 13, at 92. Barnett uses their idea of penalty defaults for rationally informed parties. Barnett is at the same time committed to at least the objective test of consent and has recently highlighted the need for default contract rules to come as close as possible to the real intentions of the parties when the parties are not rationally informed. Yet, Barnett chooses penalty default rules despite his commitment to consent to provoke contracting parties, who should know the rules of the legal system, to express their actual intentions in the contract and avoid the penalty rule. In so doing Barnett, like Ayres and Gertner (and others), refers to such self-expressions as efficient. Given Barnett’s foundational philosophy, it would appear that he, and perhaps others, include in the term efficient, or mean instead, autonomous. For to choose for oneself is to act autonomously. Under Barnett’s theory society wants people to choose for themselves because individuals and associations have greater knowledge than the state. Thus, autonomy and efficiency are for this purpose quite similar. On Barnett’s theory, however, autonomy seems to be the philosophical surrogate for a detailed scientific notion of efficiency. Most “off-the-rack” default rule theorists seem to proceed the other way: some sort of economics is the surrogate for the parties’ autonomy, what they would have agreed to if. See, e.g., Goetz & Scott, supra note 13, at 262 n.4.

Indeed, the introduction of the metaphor of efficiency should lead both ethical autonomists and economic autonomists on the same paths in contract law. By commitment to party control of contracts, each school should find its way to the same general conclusions that: (1) that contracts should strive to match legal ideas to party intentions, and (2) that
contract law rules, efficiency theory might.\textsuperscript{19}

Nevertheless, this last suggestion presupposes that consent theory and efficiency theory are discrete. Barnett’s consent theory, however, rests on a market-pricing theory that he believes overcomes several problems of social organization.\textsuperscript{20} A market-pricing theory would seem, however, to support a will theory of contract as well as Barnett’s objective consent theory. Moreover, Barnett’s claim for an important informative role for consent in the calculus of default contractual rules is weak because his theory leaves the case for any contractual default rules, and perhaps contract, in doubt. While this Article questions Barnett’s liberal theory of contract and consent on several major matters, it uses Barnett as a figure for the traditional view of contract law. The traditional view of contracts rests on notions like Barnett’s.\textsuperscript{21}

Barnett takes contract law to serve a property transfer system resting on liberal principles of voluntary resource allocation. First, the liberal principles from which Barnett reasons can secure the blessings they promise without a law of contracts of any particular
distributive or consequentialist ideas cannot do so.

Despite this common ground the ethicists find the economists quite troubling. Here the difference is one of basic philosophy: the ethicist looks at human history and finds remarkable complexity in human behavior. The economist looks at human history as a challenge to know the science of social organization. As to that, the economist almost has to be optimistic and the autonomist, skeptical. Thus, each time central planning, which must not be distinguished from the legal system, claims to know who knows what, autonomists of every stripe need to worry.

19. See Barnett, Consent, supra note 2, at 281-82.
21. This Article does not critically address much of market libertarian theory, except the claim that a market economy “explains or justifies” contract doctrine including default rules better than writers such as Fried, supra note 12. To find in the economic markets a justification of contract law does not commend the nature of any particular contract law or system of property entitlements or rights. Barnett sees contract as part of a larger legal system responding to the needs or aims of a property transfer system. It may be true that market needs or aims narrow the choice of nonconsensual concepts in transfer law. For example, a negotiable instruments transfer law may suggest concepts like holder in due course. Another transfer system might be more fully consensual.

The conflicting claims to property by the true owner and the bona fide purchaser produce the same problems in property law as do the claims of parties to misunderstandings in contract law. By viewing contract as part of a larger property law, one may conclude that the needs or aims of transfer/property suggest the latter’s nonconsensual response in contract law. Put another way, if people may be held to property transfers to which they did not actually assent, it follows they should be held to promises they did not actually intend to make. But even if this is true about property, more than symmetry should support the same for contract lest one substitute a minor transfer function of contract for the central function of contract. This is the premise that drives Barnett’s contract theory of consent: contract as transfer. Barnett needs to explain, however, why we should prefer that paradigm to others, especially in these times when we have seen the claim for normative primacy for allocative efficiency so widely rejected.
form. These principles concern freedom to hold and transfer property that in turn presumes a fundamental consensualism that some of our ideas of assent betray, such as the objective theory and the assumption of risk theory. But contract as we know it is in no way necessarily nested in these principles. In fact the tendency toward legalistic consent ideas threatens the consensual transfer system as well as the true basis of contract in autonomy. Contract rests on autonomy and actual assent as the moral basis of contract.

Second, even if a law of contract may be desirable as a part of a more effective transfer system, and even if consent is important to the latter, it does not follow that what may be an appropriate notion of consent within a transfer system is a valid notion of consent for contract. But assuming what the law takes as consent for contract should be symmetrical with a legal system’s concept of consent in transfer law, what transfer law should say about consent needs to be normatively defended. Thus, if people like Barnett think contractual consent is logically determined by property or transfer law, they must normatively explain the latter. Barnett dresses up the old chestnut about clear boundaries and the like, but that is unconvincing because neither the reliance of the true owner of property nor the reliance of the bona fide purchaser has an abstractly higher claim. For that reason, neither wins every conflict within the doctrine; courts struggle through litigation; and the wise take precautions such as obtaining title insurance.

Third, if autonomy is the ground for enforcing promises, as liberal principles suppose, the idea of autonomy limits the notion of consent in contract: the intent to contract becomes dominant and not the seeming vestige of an old and disreputable will theory. Whether or not one accepts the function of contract as a voluntary resource allocation system, understanding contract as voluntary behavior under liberal principles promotes the actual intentions of the parties and not the use of the most rational hypothetical intentions.

Courts have used the hypothetical bargain technique to re-

22. I make no argument against a law of contract per se nor, in the strongest sense, any particular version. My argument is with any version. See supra text accompanying notes 2-3. Rather, I want to show that the traditional views, such as Barnett’s, lack a moral foundation in autonomy by adopting particular substantive contract rules. Barnett would cure the moral infirmity some of the time by claiming that only “conventionalist” default rules may be justified in contract law. Some of the time does not suffice. Furthermore, in advocating a conventionalist rule solution, Barnett perpetuates the notion of gaps that muddles the problem of interpretation; by adopting the objective test of intention, he perpetuates a transfer-preoccupied dichotomy between legal and actual intent. We would do better by removing the cracked lens of the objective theory of assent and interpretation. Will theory transforms legal questions into largely factual issues.
solve so-called gaps in agreements. Given an indefinite agree-
ment, modern courts try to figure out what the parties would have
done had they thought about the event that occurred to which
the expressed agreement of the parties was silent. This technique
is a part of the American interpretive process that transcends con-
tract law and may be seen in constitutional, statutory, and other
documentary interpretation. Nor is the hypothetical bargain form
of expression limited to contractual or documentary matters: Tho-
mas Jackson has set forth a theory of bankruptcy in such
terms. But asking what hypothetical bargaining parties would
have done is merely a stylistic introduction to a theory of inter-
pertation and alone does not state such a theory. What particulars
one should attribute to the parties to a hypothetical bargain is a
normative choice that needs justification. For contract, where par-
ties are real not imaginary, that choice should be autonomy.

For contract, Barnett has suggested that some contract default
rules should be "conventionalist ... based on the commonsense
expectations of most persons." Barnett claims that such conven-
tionalist default rules follow from his consent theory. But Barnett
also finds favor in penalty default rules of contract law for parties
who may be expected to know the rules. Yet Barnett's consent the-
ory does not make a plausible case for any conventional institution

23. See Charny, supra note 3, at 1816. Charny and others have taken the position that
the analysis of contract expectations through a hypothetical bargain technique resolves
nothing until one decides, for example, what level of idealization or generalization one
should use in the analysis. From that Charney appears to conclude, with others, that when
parties are silent, contract law may choose any idealization or generalization. But that de-
dpends on a strong justification for the conclusion that the parties really were silent—that
gaps really exist. Compare negligence: What idealization or generalization of the reasonable,
prudent person, does negligence choose? We do not often specify this in advance because
the issue of fault would require a different moral basis if we did. Notice, however, that strict
products liability imposes from above a legal standard based on some putative and contro-
versial capacity of central planning to know what a proper allocation of responsibility is. It
is no accident that similar theorizing supports strict liability in tort and default rules of
substance in contract. What is strange is a common source in economic libertarianism.

24. See, e.g., W. David Slawson, Legislative History and the Need to Bring Statutory

critique see David G. Carlson, Philosophy in Bankruptcy, 85 MICH. L. REV. 1341 (1987)
(Book Review).

26. See Charny, supra note 3, at 1816 ("Yet fundamental issues of method and justifi-
cation remain unresolved [by the hypothetical bargaining technique].").

27. Barnett, Sound of Silence, supra note 2, at 886. Certainly, Barnett limits default
rules only in cases of rationally ignorant parties and finds the choice of default rule inma-
terial to rationally informed parties. The key idea there is that only some parties do take the
risk of an unexpected default rule—those rationally informed parties who by definition have
or should have the knowledge of an unconventional rule. These ideas are critiqued infra
part V.B.
of contract. Charles Fried has taken another course in his will theory of contract, and Fried has opined that “[t]he gaps cannot be filled, the adjustments cannot be governed, by the promise principle.” Fried’s solution is “residual general principles of law.”

To ask how contract law might choose default rules implies that contract should provide rules for parties who have not expressed themselves. Because recent default theorizing has presumed that default rules are justifiably imposed on parties, the case for imposing efficient or any default rules on parties has not been made. If it were true in a given case that the parties would have preferred invalidation of the contract in the event that occurred, as of the time the contract was formed, adopting this or that rule would subordinate party autonomy. Were it true that the contract-making conventions and the legal rules of contract-making converged and also that both practices enjoyed high esteem, then it would be foolish to question the notion of contract, the desirability of a set of default rules or any particular default rules. Indeed, were there congruence between actual conventions of contract-making and legal rules, an objective imputation of party assent would never be necessary, for will theory would fully explain the congruence. Instead, the persistence of objective theories of assent shows wide disagreement about the legitimacy of contract, as for example, the legal effect of signing what many conceive as pieces of paper not contracts with a capital C, and the duty to read.

28. See infra parts III-IV.
29. Fried, supra note 12, at 69.
30. Id.
31. The problem of assent in contract law is largely overlooked. Writers recognize a need to justify the obligation of a default rule but seem to ignore that this applies as well to expressed contract terms which a party did not appreciate. Barnett recognizes this central issue, but his commitment to traditional views (such as gaps and objective tests) precludes his suggesting more than the band-aids of additional formalities or penalty rules to solve the problem. See Barnett, Sound of Silence, supra note 2, at 888-90; infra note 158. Using actual assent to justify default rules may be difficult, but the greater problem is justification of most of what lies in writings the law calls contracts by assent under any theory other than will theory.
32. The duty to read what is in a document one signs has been arguably transformed into a duty to be bound only to what one should reasonably notice, legal rules of conspicuousness (e.g., U.C.C. § 2-316(2) (1990)), or reasonably expect. Id. § 2-302. Indeed, this transformation mirrors Barnett’s distinction between the kind of default rules one may impose on rationally knowledgeable contract parties and rationally ignorant parties. The latter are not culpably ignorant of default rules they would not expect. The same seems to be true of small type in contract forms and terms too onerous to be expected. Barnett, Sound of Silence, supra note 2, at 890 n.183.

The transformation seems to have been understood as the invasion of distributive or fairness of the bargain ideas into contract. But Karl Llewellyn said this about unconscion-
A consensualist premise of contract can, however, use contract rhetoric to develop any sort of scheme of contractual default rules. Parties who did not plausibly agree to something may be said to consent thereto. Parties for whom one cannot plausibly make a case for consent may be said to have run the risk of assuming the liability of a default rule. In this way the door opens for non-autonomous default rules, such as penalty default rules that are not intended by any party. Consent as autonomy suggests that default rules be left to the parties. Non-substantive default rules are required so long as social conventions remain controversial, as they shall in a pluralistic society.

C. Hypothetical Bargains: Assent as Licensing

Contract law has traditionally conducted the elaboration of agreements under the idea of hypothetical analysis of what the parties might have done about the missing or difficult contract term. At one time the doctrine of indefiniteness constrained hypothetical contract elaboration. Indefiniteness fell to a presumption of validity. The presumption of validity takes the agreement behavior of the parties as a license to elaborate as fully as necessary the missing terms of the agreement. An agreement with missing terms is perceived the way one would view a person in an oarless rowboat. Because one expects that what that person wants is oars, one also expects that the parties have licensed courts to supply the missing oars to the agreement.33


33. David Charny’s discussion recalls Cardozo’s typically arresting metaphor of an instrument, “instinct with an obligation” in the casebook favorite, Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917). Charny, supra note 3, at 1825. The metaphor no doubt cheers those who have faith in the law’s systematic exposition of those agreements that deserve enforcement. Still, I believe that great jurist ought to have had evidence of the context and purpose, the trade background and the parties’ basic assumptions, and the extent of Wood’s reliance before he uttered the question-begging metaphor—for none of that
The licensing to which modern law has moved in the field of incomplete contracts reflects also a popular form of statutory interpretation under which courts understand their function in interpreting legislation as supplying missing or explicating difficult terms. Like promisors, legislators are said to consent to, in the sense of licensing, judicial interpretation of their intentions. This interpretive methodology has become so familiar and dogmatic that one must sometimes struggle to recognize any difference between exegetic conclusions and factually accurate statements. That one or the other exegesis was the intent of a promisor or a legislature portrays a legal conclusion as a finding of fact. To say that a promisor licensed the court to impose an obligation is neither to say that a promisor in fact made such a promise, nor that the promisor agreed. Rather, the license acted as an assumption of risk.

Unlike judicial licensing in the matter of statutes or constitutions that may be constitutionally (inter-institutionally) compelled, judicial licensing in the matter of contracts may be defended only on the premise of parties’ intent. Unless the parties mutually preferred that a court resolve their dispute over missing or unclear terms, courts might leave such parties as they were through modest restitutionary principles. Asking what such parties would have preferred had they known of the problem in advance seeks a true or perfect theory of justice. Such a theory of justice would explain what particular parties would want by explaining everything. Everyone would assent to such a theory. We can explain why we lack such a theory of justice by observing that people hold different ideas about justice. That is what libertarianism means.

III. Barnett’s Traditional View of Consent in Contract Law

A will theory of contract focuses on the parties’ actual assent. Parties bind themselves to contractual obligation because they actually assent to promises or agreements. The liberty principle entitles parties to bind themselves to contracts. Parties do not incur contractual liability because they merely manifest assent without intending to assent. The justification of contractual liability is the actual assent of the parties. Binding parties to contracts or rules of law that neither their express agreement, their past practices, nor their legitimate expectations support, creates justifications from came before Cardozo’s court. The case arose on the pleadings and Cardozo reasoned only from the document the parties executed. The only issue was whether the motion by defendant for judgment on the pleadings had been properly denied by the trial court. Wood, 118 N.E. at 118. Perhaps that is all Cardozo said. See also Posner, supra note 4, at 92.
outside the parties' assent. These justifications may have sufficient force to prevail. Yet, non-party justifications cannot draw on the principle of liberty to tip the scales in a particular contract dispute if the parties' exercise of their liberty to contract never adopted such a justification. The common justification for filling contractual gaps has exploited the liberty principle by justifying legal rules as those of which the parties assumed the risk or licensed the court by making such a contract.

A. Barnett's Consent Theory

Whether one heeds the rhetoric and dogma of contract doctrine or the elaborate principles set forth by Barnett's consent theory, one would likely want to tie contract default rules to the intentions of parties to contract disputes. Where actual intentions are difficult to discern, one would want to turn to some second-best theory, such as the test of objective intention or consent, as I have suggested above. Finally, along with modern commentary, one would be accustomed to adopt assumption of risk notions of intent or consent to justify default rules as to which neither subjective nor objective manifestations of intent seem to be available.

Barnett's consent theory follows three philosophical principles that state a liberal theory of justice. To say that these principles are familiar would understate the clarity and originality of his presentation. First, contract or private ordering of resources is better than centralized ordering because of the problem of personal or local knowledge held by individuals and associations and beyond the reach of central planners. 34 Second, a consent theory is required to implement the knowledge goal, and yet remains independent of the knowledge problem because of the problems of interest and partiality. 35 Third, communicating knowledge of justice is necessary so that the actions required by justice may be accessible to all. 36 This third principle implements the first principle by establishing a legal regime in which an objective theory of assent will emerge. "Only a general reliance on objectively ascertainable assertive conduct will enable a decentralized system of rights to perform its allotted boundary-defining function .... Within contract law, [the objective approach] provides a way of handling the second-order problem of knowledge," which is to communicate the requirements of justice. 37 This consent theory derives from the polit-

34. Barnett, Sound of Silence, supra note 2, at 837.
35. Id. at 849-55.
36. Id. at 855-59.
37. Id. at 857-58.

https://scholarship.law.umt.edu/mlr/vol54/iss2/1
lical-economy theory symbolized by Friedrich Hayek. In that orbit freedom of the individual is dominant and is consistent with a market-centered economic order or market-efficiency. Individual economic choice subordinates communitarian choice.

Individuals make their economic choices through contract law that is part of a wider system of property entitlements. Default rules, continues Barnett, are consented to by parties who “man-

38. Id. at 835 nn.44-45.
39. On the issue of the proper norm by which to choose default rules for contract gap cases, this political philosophy could as well adopt efficiency as nullification of the contract. That is, one may believe that Hayek-inspired individualism would bar the state from coercing a fictitious contract term on a party. Charles Fried, the leading autonomy or will theorist, stated that “[t]he further courts are from the boundary between interpretation and interpolation, the further they are from the moral basis of the promise principle and the more palpably are they imposing an agreement.” FRIED, supra note 12, at 61. Although the expressed rationale was perhaps different, classical contract took that view and invalidated many agreements for indefiniteness. Early applause for the U.C.C.’s conquest of indefiniteness and the common law reluctance (and frequent refusal) to make contracts for the parties, now seems strained: “The Uniform Commercial Code has made a valiant attempt to correct the shortcomings of the common law and to bring contract law into line with the expectations of businessmen and to honor their belief that a deal is on.” FRIEDRICH KESSLER & GRANT GILMORE, CONTRACTS: CASES AND MATERIALS 173 (2d ed. 1970). How do they (or we) know when a deal by others is on? See, e.g., U.C.C. §§ 2-204, -207 (1990). The third edition of the cited casebook deletes the “valiant attempt to correct the common law” and adds: “To remedy the situation once and for all.” FRIEDRICH KESSLER ET AL., CONTRACTS: CASES AND MATERIALS 260 (3d ed. 1986). Section 2-207 quickly became controversial because of the problematical substantive conclusion section 2-207(1) imposed. Under the first rule of section 2-207(1), a party may assent to a proposed contract even though she includes in her response additional or different material terms. So long as a response to an offer is “a definite and seasonable expression of acceptance or a written confirmation,” assent is present. U.C.C. § 2-207 (1990). Yet, as the law had been for many years before the Code, her inclusion of additional or different material terms may signal her intention merely to make a counter-offer. Nevertheless, the Code makes the substantive interpretive choice for the offerer rather than leave the issue to one of (interpretive) fact.

It may be true that this presumption of assent rule has become trivial as parties may, and probably do generally, include “conditional acceptance” language in their responsive forms. The effect of language such as the second rule of section 2-207(1) is that the response to an offer is a counter-offer. Should the parties nevertheless subsequently act as though a contract exists, section 2-207(3) defines the contract terms on the basis of traditional implied-in-fact contract principles.

A largely negative commentary has followed the solution to the battle of the forms presented in section 2-207(1). I believe this results from the substantive rule the subsection adopts: people who respond to offers with materially additional or different terms may nevertheless intend to be bound without further negotiation of their differences. This rule converts what should be an interpretive issue into a presumptive rule of law. It follows the objective theory of contracts by dismissing evidence of actual adverse intent, even actual adverse intent known to the offeror. True, one may interpret this rule to permit evidence of actual adverse intent on the question of whether the response was an “expression of acceptance.” But a generation of commentary and case law shows this to be no more than a small possibility.

The hostility to section 2-207(1) bespeaks hostility to the objective theory of contracts. As with the original Statute of Frauds, this objective strategy may violate the real intentions and expectations of parties.
fested an intention to be legally bound."\textsuperscript{40} Parties who consent to be bound confer jurisdiction to some adjudicative body.\textsuperscript{41} Yet, parties who consent to be bound but who leave gaps in their contract may prefer either no adjudicative jurisdiction or adjudicative jurisdiction.\textsuperscript{42} The resolution of this question, Barnett says, is possible either way on logical grounds.\textsuperscript{43} But Barnett states:

[B]ecause the concept of consent is a communicative one, we must always seek the most plausible interpretation of the conduct of the parties within the relevant community of discourse. In my judgment, the second of these propositions more accurately expresses the actual intentions of most contracting parties when they consent to be legally bound.\textsuperscript{44}

Consent to be legally bound means a court "may allocate the loss according to some set of principles."\textsuperscript{45} Still, parties may opt out of this consent.\textsuperscript{46} Absent opt-out, "when courts enforce these back-

\begin{footnotes}
\textsuperscript{40} Barnett, \textit{Sound of Silence}, supra note 2, at 864-65.
\textsuperscript{41} \textit{Id.} at 865.
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} Because "all real world contracts are not completely specified [fully stated], it follows that a consent to be bound \textit{entails one of two propositions.}" \textit{Id.} at 861 (emphasis added) (note omitted). The propositions are that consent to be legally bound either does authorize or does not authorize courts to fill in the gaps. But these two propositions do not logically follow from the "concept" of consent to be bound unless one defines consent to be bound to mean both propositions, in which case these are conceptual propositions and are only as good as the concept. Barnett's conceptualism fuels this logic. And neither the appeal to deductive discourse nor what he has to say about his concept is convincing.
\textsuperscript{44} Barnett, \textit{Sound of Silence}, supra note 2, at 862 (footnote omitted). But why should this be a matter of anyone's "judgment" if "we must always seek the most plausible interpretation of the conduct of the parties within the relevant community of discourse"? \textit{Id.} If contract law looks to the parties' background, the relevant community to which they belong, it should not ask rigged questions; it should ask for the whole story. For example, contract law traditionally has asked whether this is conduct that shows intent to be bound, but sometimes retreated back to contract law if the answer were yes, the parties intended to be bound. The same autonomy that shows the good sense in resolving whether the parties intended to be bound needs to go further. Barnett's seeming reluctance to take this next step exemplifies the traditional inconsistency of resting contract on a liberal principle of decentralization yet managing central value judgments. Why should one indulge a central presumption that the relevant community of discourse will support a court's allocation of losses in cases of so-called gaps?
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.}
\end{footnotes}
ground rules, they do so with actual, not merely hypothetical, consensual authorization."

Because at least some default rules are variable by contracting parties, Barnett says that “it is unrealistic to depict implied-in-law default rules as being ‘imposed upon’ the parties in the tort-like sense that this phrase has acquired over the years.” "Silence in the face of default rules can constitute an ‘indirect’ consent to courts using these default rules to supply terms when a gap exists in the parties’ expression of consent."

Nevertheless, for most parties silence is consent to some set of default rules and not to any particular default rule. Parties consent to particular default rules only when a party had reason to know a rule and when it would not have been too costly to contract around the rule. “In the presence of rules that are costly to discover or contract around, silence is highly ambiguous. It may or may not signify consent to the imposition of the default rule.”

In the opposite case, where the rules are neither costly to discover nor costly to contract around, consent justifies the enforcement of the existing particular rules on such parties. But where the parties face substantial costs of discovery or negotiation to cir-

47. Id.

48. Id. This “consensual authorization” appears to be the same as consent in licensing. Thus, the parties by consenting to be legally bound actually license the courts to fill in the gaps. Happily for moral credibility, Barnett does not make the license carte blanche. See id. at 886.

49. Id. at 865. But if all my consent to be legally bound does is authorize the court to apply default rules to me, how is my silent choice in this regard more interesting and differentiating than my choice to drive my car runs the risk of my having the law of torts fall upon me? I could walk, therefore I have given my consensual authorization to tort law and traffic courts by driving. Why is my choice to contract different than my choice to risk negligence? Barnett’s answer rests on the opportunity that torts does not give me to opt-out by varying my contract terms. Many of us would also say that the express terms of most contracts we enter are “imposed” just as much as the law of torts is imposed on us.

50. Id. at 865-66. I do not know whether this “indirect” consent means subjective assent, objectively imputed consent, or assumption of risk/licensing. The quoted text follows an analogy to evidence law that makes silence in the face of an accusation an admission. Id. at 865 n.104. I suppose the law of contracts might naturally be expected to have something itself to say about silence as assent. The dynamic of assent by silence in contract law recognizes some difference between the kind of situation captured by the cited evidence rule and run-of-the-mill contract activity. Silence is not assent, nor even “indirect” assent under the Restatement of Contracts section 69, unless exceptional circumstances are present as are present under the evidence rule. RESTATEMENT (SECOND) OF CONTRACTS § 69 (1979). As to the expression, indirect assent, see supra note 9 and accompanying text.


52. Id.

53. Id. I understand this to embrace an assumption of risk idea of consent. I assumed the risk of a bad default rule whenever I could reasonably discover and contract around it. All that is necessary for my being obligated to this rule is my consent to be legally bound. Id.
cumvent a default rule, consent to be legally bound only justifies particular default rules "if they are of a certain type." These rules must be "conventionalist" default rules—"rules that reflect the conventional expectations that attach to silence in the relevant community of discourse." "[W]here there is tacit subjective agreement between the parties, enforcing default rules that reflect conventional understanding is likely to reflect subjective assent."56

Barnett’s consent theory has thus begun to develop a theory for the selection of the rules of contract law. These rules would close the gap between hypothetical and actual assent.

B. Problems of Consent and Traditional Contract

Consent theory’s liberal philosophy endorses freedom of contract as the most practical alternative available to perform the functions outlined in this theory of justice.57 This confuses a deduction from a theorem with a practical alternative. For no one can appreciate the problems that Barnett posits without taking the quasi-deductive inference he offers in praise of consent. If the

54. Id. at 867.
55. Id. at 875.
56. Id. at 900. One cannot posit that a court knows the parties shared a tacit agreement on something, but the court does not know what that tacit agreement is. Thus, the court has no need for conventional substantive rules which are merely likely to reflect that subjective assent. Barnett claims “[i]t is also possible, however, even likely, that there are mutually shared tacit subjective intentions that cannot be established and that influence the meaning of what has been manifested.” Id. at 877. Barnett assumes that we do not know what the subjective agreement of the parties was, but he assumes that an agreement exists and that the relevant community of discourse, such as trade usage, will come closest to the subjective agreement. Of course, we should apply an available trade usage. But, then, what is the point of any default rule other than a trade usage-type rule.

In place of shelves of these conventionalist default rules, conventionalism might simply follow the open-ended methodology of the U.C.C., the songs of reasonable price and the like under will theory. Eschew this muddled talk of cases in which we know there was a mutual tacit assumption, but do not know what it is. Only probative evidence of a claim that there was a tacit assumption the parties shared will back that conclusion. And that evidence will show what the tacit assumption was. Barnett is uncharacteristically muddled only because he is resisting his tacit assumption, along with most of the legal community, that will theory is bad. That is the perceived wisdom from Holmes and Hand no less. But even Holmes and Hand were glad to have trade usage, and neither would suppose they were imposing a rule in these cases. Parties choose their own tacit assumptions, their own trade usages, their own social customs. See infra part V.A.

57. This Barnett claims, and he throws down a gauntlet: “[F]reedom of contract performs . . . well enough, in fact, to place the burden on anyone who would undermine this principle (for whatever reason) to explain how the problems it handles can be handled satisfactorily in some other manner.” Barnett, Sound of Silence, supra note 2, at 855 n.73. Other “practical” devices are available depending on what one means by practical. Modern law limits freedom of contract arguably as much as it legitimates freedom of contract. If practical alternatives are limited to those that produce efficiency, a voluntary resource transfer right is all that is implied by the liberal principles.
problems of knowledge and interest are sufficiently intractable or sufficiently grave to capture our concern, then a practical alternative to consensualism may not exist. Without serious explanation Barnett has accepted either the intractability or the gravity of these issues of social organization. Without this pricing tour de force, even individuals or associations who hold personal or local knowledge could not function, because their personal or local knowledge would not suffice for their decisions on what resources to trade, what to keep, et cetera. Yet, prices become known and discoverable such that general knowledge of various resource prices develops. This general knowledge, conveyed by markets creating prices and thus known values, could be marshalled by central planning in a variety of ways and projects, as we do daily to constrain freedom of contract and freedom from contract. To say that no practical alternative exists to pricing by markets is to ignore the huge body of law, inter alia, under which without consent we take by regulation, eminent domain, or the law of torts resources from one party and give them to another. It may be true that without some minimum active consensual markets, nonconsensual pricing would become more difficult in areas such as property, personal injury, and governmental entitlement and allocational programs. Yet, there is no active market directly in body parts, and thus the surrogative costs of remediation and rehabilitation are used. That some "free market" activity facilitates pricing judgments leaves entirely open the issue of how much contract is enough. The decline of freedom of contract in this century has occurred precisely because any value consensualist efficiency brought was in this matter or that too high a price. In addition to the problem of knowledge which impairs central planning, modern contract law rediscovered another principle of justice: the problem of ignorance.

1. The Problem of Ignorance

Just as central planning has imperfect information about the values held by its constituents, its constituents also have imperfect information. How to value the problem of knowledge over the problem of ignorance is a first question for political organization. The only word that describes the choice modern government and law have made is pragmatism, a focused effort to appreciate that neither problem has a higher claim. The problem of ignorance commends political action to ameliorate the effect of market organization on individuals and groups. We pick and choose
pragmatically and not necessarily correctly.58

Indeed, Barnett's remarks on the choice of default rules separate two kinds of contract actors in conformity with the questions of knowledge and ignorance. The kinds of default rules a consent theory of contract may adopt are different when the parties to a contract are knowledgeable or ignorant of the default rule. Recall that if the parties either have no reason to know the default rule or cannot by reasonable cost contract around the default rule, then the state may only adopt conventional default rules that match conventional expectations. In contrast, any default rule may be adopted for knowledgeable parties.59

Even for variable default rules, to endorse a limitation on the kind of default rule one might legislate is to invite or acquiesce in a kind of immutable contract rule. Parties who cannot be held to know and appreciate what their contract documents expressly say are bound not to unconventional terms, such as price, but only to a conventional term such as a reasonable price. Facing up to the problem of ignorance regarding variable default rules because of the criterion of consent seems to lead to confronting ignorance as well as to the immutable rules such as one's duty to read what one signs. More problematically, the question is whether the problem of ignorance will ever block any conceptually acceptable answer to when people are legally bound. Modern contract development once focused on the general question of "when," but now focuses on the more pragmatic question "to what" do these appearances of consent agree to be bound, as in the modern doctrine of unconscionability.60

As the consent theory has been presented, as a structural representation of a theory of contract justice, it could be seen from, so to speak, the outside. Its key structural parts combined local empowerment as a solution to a stipulated problem of knowledge as well as a requirement that rules be promulgated so that they might be known in advance. As to these two structural requirements, Professor Richard Crasswell observed that this consent theory along with others, such as Fried's will theory of promising,61 left unguided the choice of what the contract rules might be, as though a philosophy of contract that did not provide guidance as to the appropriate rules might be indifferent to or irrelevant for the sub-

58. The right theory of contract cannot solve the policy questions involved in the right theory of social justice.
59. See supra text accompanying notes 49-53.
61. See Fried, supra note 12.
stance of the rules.62 Apparently Crasswell’s critique led Barnett to elaborate his theory in *Sound of Silence*.63

Consent theory confines the default rule-making power as follows: the default rules of contract law must be knowable in advance and variable by parties at reasonable cost. This promulgation principle is the second principle of the consent theory. Presumably the variability point merely mines the message of the first principle, the knowledge principle, which empowers those with better or local knowledge to contract as they wish. Furthermore, the promulgation principle requires that default rules be substantively in accord with the consent notion.

Barnett claims his consent theory explains contract doctrines such as consideration.64 Consideration doctrine, of course, is part of the pantheon of contract law, the immutable, invariable rules of contract law. What the contents of that immutable law of contracts should be is, of course, at least as important as what default rules should fill in gaps in agreements already marked by contract law as valid. Because a theory of consent as licensing by knowledgeable parties justifies any contract default rules, it would apparently follow that the same form of consent should justify any contract law. That seems nonsensical. Consent is important to justify the enforcement of default rules, says Barnett. Barnett calls for default rules that are most likely the rules which parties tacitly assumed—conventionalist rules; this furthers a weak or soft form of consent. If one thought there were anything to the idea behind the

64. Barnett identifies the miserable history of controversy over the bargain principle as applied to issues like nominal consideration and claims for his consent theory a norm which surpasses the bargain principle. Barnett’s consent theory, however, retains the idea that parties autonomously choose to be bound. Only by presuming that parties to nominal consideration agreements do intend to be bound does Barnett’s theory permit him to overthrow the controversy. But the factual intent issue does not change whether we ask whether the widow really bargained for the deceased’s worthless notes or whether the formal bargaining behavior evidences her intent to be bound. The question has been whether, on this borderland of contract behavior, the parties intended to be bound. The bargain principle cannot uncontroversially manage these cases that put into question whether there really was a bargain. Similarly, if Barnett would hypothesize a nominal consideration case in which he did not know whether the parties intended to be bound, his theory could not resolve that case in any simple manner. Barnett’s theory also would leave the case to the jury. That he would then need to call upon other aspects of his theory to do the job would not ensure that it would rule all nominal consideration bargain cases in the same way. If consent theory left disarray in the cases, I would not doubt the consent theory as I believe experience shows that nominal consideration cases are as likely to bear parties who did not intend to be bound as those who did. See Barnett, *Consent*, supra note 2, at 312; infra text accompanying note 102.
weak form of consent or any real consensualism, one would not need to create default rules based on suppositions about what parties most likely mutually and tacitly intended. Perhaps because one grudgingly accepts the attribution of weak consent, one turns to conventionalist default rules. If a stronger form of consent will inform the choice of default rules, and if these default rules can be located, then being bound to contract default rules may be plausibly different from my being bound to the tax law. That these conventionalist rules are not obviously available goes without saying. That finding these substantive rules does not erode the principle of local knowledge, or autonomy, will be a surprise.

A perhaps different kind of approach to consent would choose nonsubstantive rules of the sort the U.C.C. often uses, essentially empty phrases telling the court to find out what the parties' subjective agreement most likely had been: a reasonable price, a reasonable time for delivery, et cetera. For if the strategy of conventionalist rules is "to reduce the probable discrepancy between the actual subjective agreement of the parties and the default rules," adopting a substantive rule is unnecessary except for the sake of having a rule. Let the arbitrators, lawyers, courts, or juries do their best to discover the actual subjective agreement.

Yet liberalism is not egalitarian in its quest for individual empowerment until everyone either knows the rules (of contract, for example) or has the capacity to know these rules. Even if everyone knows these rules and the promulgation principle is met, however, to be truly individual-empowering, these rules must all be variable or there must not be any rules. For if central planning does not know how best to allocate the goods in society, central planning a fortiori does not know any true rules of law that will allocate in disputes some of the goods in society. Thus, all of central planning's rules will have to be variable by parties in their contracts. A liberal theory of contract such as Barnett's leads to one characteristic of contract rules: they are always variable or mutable and none may be a true rule of law—one to which we are obliged regardless of a contractual provision otherwise.

Hierarchical ignorance, which is the problem of personal and local knowledge, means that individuals and not states should

65. See Barnett, Sound of Silence, supra note 2, at 906-11.
66. Id. at 882.
67. One might join those who insist that empowerment is merely academic until everyone shares the resources sufficiently to participate.
68. The U.C.C. gap-fillers find, for the most part, a comfortable anarchic path in their substantive emptiness: nonsubstantive default rules. Liberalism can favor only these. See infra part V.C. Central planning can know only these kinds of rules.
make the rules of contract. Experience suggests that giving free rein to individual contract actors often produces abuse in one form or another. Liberalism has reacted to this experience by promoting the idea of limits to freedom of contract and has endorsed doctrines such as duress and unconscionability that are said typically to "police" the bargain. In so doing liberalism has resisted the more consistent idea that people who know better what their contracts should be also know better when their contracts should not be enforced. By embracing a law of contracts and yet also a doctrine of contract-excuse, liberalism needs to explain why individual knowledge is not best exploited by an individual's retaining the right to exit from a contract as freely as entering a contract.

A classic approach to this question has been to require consent of both parties to both contract formation and contract rescission. Yet with liberal principles of knowledge, it would be more consistent in my view to permit the same knowledge to operate evenly throughout the contractual relationship. Thus, those who have discovered after the fact that they have made a bad bargain might be thought free, by this way of thinking, to repudiate their remaining promises. To bar this premise of contracting supposes that more good comes from enforcing the bad bargain than not. Who claims to make that judgment better than an individual promisor? The answer is, only the two parties to an agreement.

2. The Question of Contract Substance

The problem of ignorance troubles the claim that contract better organizes resource use. Rational actors back the market idea. Tapping personal or local knowledge of all actors taps ignorance and knowledge. The most efficient allocation of resources that a market will presumably create depends on the proper assumption of rationality. This leads to the best use of resources and produces more wealth. Not surprisingly, therefore, consent theory rests on the maximization of wealth. Freedom of contract, then, might be said to represent the best method to obtain more wealth. However, the general idea of contract as a state-legitimized transfer right cannot prescribe the kind of contract law even a state bent on wealth-maximization should adopt. The right to trade resources

69. I am not proposing a general ad hoc right of exit. Only this: that a will theory can support doctrines such as duress and unconscionability. The previously cited passage from Llewellyn shows how unconscionability may arise from the idea of actual assent, and not merely from distributive notions. Llewellyn, supra note 32, at 370. Cf. Kronman, supra note 8, at 477-97. Duress may receive like analysis and justification, but only on a will theory in which actual expectations matter.
backed by state recognition of the transfer is all that efficiency may require. While this does seem to support the element of consent as Barnett claims, this need not entail any further implications about contract law. Thus, consistent with efficiency or wealth-maximization, a state might recognize only barters. Enforcement of uncompleted barters or the law of contracts as we know it is neither logically entailed by the premise of consent nor materially entailed by efficiency theory. The most efficient institutional framework for any society depends on the features of that society. Contract law would only succeed in serving a fundamental purpose of deterring opportunistic behavior, with an ethic against opportunism. In the popular language of default rules, only when efficiency is fully specified will we see everything that efficiency intends. Thus, any particular doctrine of contracts is extrinsic to consent and efficiency. Without executory contracts, for example, fewer occasions exists for default rules. Promises or promising are consistent with a consensual property transfer system that produces the informational benefit of a resource pricing. But this informational benefit might be achieved by many routes. Thus, a practical alternative to the common law theory of contract may be a barter theory or a reliance theory. These may produce the benefits of ordering actions that appear to be required by the problems of knowledge, interest and communication. The quality of individual choice might be achieved by a variety of exchange or transfer systems.

Indeed, to speak about contract law beyond barter-recognition is to surpass economic theory and bespeaks faith and not science. It is to talk like Charles Fried about trust and respect and other moral values. It is to talk like Ronald Dworkin about wealth-maximization as a value. A philosophy of contract law cannot rest on

70. Some may find these remarks controversial, but I do not mean to stir the pot. Judge Posner, for example, holds the view that contract law has the "fundamental function . . . to deter people from behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity." Posner, supra note 4, at 91. Posner quickly points out that what constitutes opportunistic behavior is a problem of interpretation. Id. Posner also ranks parties' intention above putative efficiency. Id. at 93.

71. Long-term contractual relationships are manifest in a variety of legal formats such that if contract law per se abandoned the executory contract, which seems so essential to long-term relationships, little would change in our business and social practices. Most obvious is the corporation in which parties join together to achieve the benefits of a long-term association but also acquire further rights against the parties with whom in essence they are contracting by altering the contractual or arms-length paradigmatic relation into a fiduciary set of standards.

CRITIQUE OF CONSENT THEORY

an efficacious functional account of how contract might fit within a transfer system. Embedded within an institution like contract are other goals and values that might, in any given case, trump transfer values.\(^\text{73}\)

Liberal principles argue for a consensual transfer system and do not imply promissory enforcement. These principles do not independently suggest an entirely or even a largely consensual transfer system, and so cannot determine how pure or how mixed an economy might be and still provide the "encoded knowledge" prices convey about resource use.

IV. CONSENT THEORY: ASSENT AND CONSIDERATION

Objective theories of contract typically confront conflicting purposes. Barnett's consent theory would rest the moral basis of contract on the consent of the parties. Nevertheless, consent is not the will of the parties but manifested consent. Unfortunately for a meaningful moral basis in consent, contract law might find anything a person voluntarily does to be a manifestation of consent. Manifested consent must correspond with actual consent to secure the primacy of consent. Barnett's consent theory holds that contract obligation requires something more fundamental than concepts of will, reliance, bargain, efficiency, or fairness.\(^\text{74}\)

A framework or theory is needed to order these fundamental concerns, to show where each "principle" stands in relation to others. . . . The process of contractual transfer cannot be completely comprehended, therefore, without considering more fundamental issues, namely the nature and sources of individual entitlements and the means by which they come to be acquired.\(^\text{75}\)

Barnett explains the meaning of an entitlements or rights theory as follows:

The principal task of legal theory, then, is to identify circumstances when legal enforcement is morally justified.

Entitlements theories seek to perform this task by using moral analysis to derive individual legal rights . . . . A theory of contractual obligation is the part of an entitlements theory that focuses on liability arising from the wrongful interference with a valid rights transfer.\(^\text{76}\)

73. That contracts are vitiated by fraud, duress, and other so-called concepts of invalidation may be said either to arise from transfer values or subordinate transfer values.
74. Barnett, Consent, supra note 2, at 293.
75. Id. at 293-94.
76. Id. at 296.
This entitlements theory of contract requires consent from the rights holders to transfers. “[A] valid transfer of rights must be conditioned on some act of the rights holder. . . . [L]egal enforcement is morally justified because the promisor voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights.”

But this consent theory may only appear to look like a will theory of contract. It is not. The difference, it is said, is fundamental: “A will theory bases contractual obligation on the fact that an obligation was freely assumed. . . . [A will theory] is hard pressed to justify contractual obligation in the absence of an actual exercise of the will.” Thus, says Barnett, will theory creates inevitable tension in that people must be able to rely on appearances, apparent manifestations of assent. Because consent theory rests on a rights theory, it can do what will theory cannot: “account for the normal objective-subjective relationship in contract law.” Rights theory specifies boundaries between areas in which people can operate. Rights theory “demands that the boundaries of protected domains be ascertainable, not only by judges who must resolve disputes that have arisen, but, perhaps more importantly, by the affected persons themselves before any dispute occurs.”

The mechanism for this boundary function is, as one might expect, the objective theory of contract. The consent that is required for a transfer of rights is a “manifestation of an intent to alienate rights.” In contract one “incurs a contractual obligation to perform only when she manifests to a promisee her intention to be legally bound. The basis of contractual obligation is not promising per se. The basis of contract is consent.”

A. Correspondence of Manifested and Actual Consent

Promising is an objective manifestation of a possible, even likely, intent to be bound. No one has claimed that promising is legally sufficient. Not even Charles Fried believes that a promise is legally sufficient. On the same page that Barnett states that consent is the basis of contract, Barnett cites Fried for having care-

77. Id. at 300.
78. Id.
79. Id. at 300-01.
80. Id. at 300.
81. Id. at 301.
82. Id. at 302.
83. Id. at 304.
84. Id. at 305.
fully said that a promisor incurs a moral obligation because she intentionally invokes a social convention whose purpose is to cause others to expect the promised performance. It is not legal theory that has created the boundary-defining functions of either the social conventions of promising or promising that is serious enough to create legal obligation. Contract follows society and not vice-versa. Barnett supports this proposition by announcing that intention to contract, or consent as he calls it, may be evidenced by a variety of behaviors that turn out to be the actions by which contract law has striven to find obligation. Intention to contract or what Barnett calls “manifested consent” does all the work in his theory, but like contract doctrine, he cannot provide any further explanation of this “boundary-definer” except to explain its function. In Sound of Silence, Barnett later says this of manifested consent:

I postpone for now the important issue of how manifested consent is related to subjective assent. Suffice it to say that, for me, a manifested consent can be “real” even when it is not accompanied by subjective assent. This is because the concept of consent that is at the root of contract theory is communicated consent, though one reason for the centrality of communicated consent is its close empirical correspondence with subjective assent.

The sole reason why communicated consent is at the deeper root of contract is that we presuppose that communication is successful. If our legal ideas did not match the subjective intentions of parties’ contracts, contracts would betray Fried’s will theory and Barnett’s consent theory, as well as the liberty principle that backs both. Were objective and subjective intention not empirically close, contract would be a random transfer system and not a voluntary enterprise. What little we have in the way of law about objective manifestations of intent to contract, may err in application to parties in lawsuits. Legal theory should test legal presuppositions, such as particular manifestations of intent, against what parties actually mean. Formulations of contract rules of law, mutable or variable rules of law, about manifestations of assent or about mundane damages rules create grave risks. Contract law lacks much in the way of clear and precise rules about intent to contract for the best of reasons: parties provide that information. Off-the-rack rules of contractual intention do not fit.

85. Id.
86. Id. at 309-19.
87. Barnett, Sound of Silence, supra note 2, at 859 n.81.
88. The noisy debate about the “battle of the forms” since the U.C.C.’s conception
In two critical respects, theories like Barnett's consent theory of contract (and property) cannot explain or justify contract law for a dynamic or pluralistic society. First, by setting forth a formal theory about which agreements courts should enforce (those in which formal, manifested consent is present), consent theory must offer definition to the phrase "manifested consent." Consent theory rests merely on the largely uninformative formal statement that courts enforce agreements in which parties have manifested consent. Any definition of manifested consent can fit within that statement. That may be all one means by a formal statement. Contract doctrine has traditionally used "intent to contract" in this way.

Second, the modern problem of contract law has been the lack of consensus on what, if any, formal or informal, legal or social, conventions may be trusted under the objective theory of manifested consent. Thus, if everyone believed that conventions like shaking hands, recitals of consideration, or bargains actually reflected the subjective assent of the parties, a formal theory might become breezily practical by adopting conventions such as contractual consent. Once conventions become controversial, as in quantum physics where presently experiments show both that quantum entities exhibit behavior of waves but also particles, and as in contract, which now entertains serious doubts about conventions like recitals of consideration and bargains, these formal concepts of intent to contract lose both explanatory and justificatory force.

Barnett defines manifested consent, or the conditions under which courts will enforce promised exchanges, by referring to traditional contract doctrine as to what promises will be enforced, such as bargain theory of consideration and promissory reliance. This is likely to offend the intuition of a lawyer who has been trained to separate the concept of consent from the concept of consideration. But the formal statement is not objectionable on that ground. Convenient analytical separations made for the purpose of learning contract law need not confine the different purpose of the attempts to comprehend and critique the drafter's apparent willingness to impose off-the-rack terms onto contract parties. What must be noticed about all of that is that section 2-207 first requires contractual intention. Section 2-207(1) provides the threshold test of intent to contract by requiring either an acceptance or a confirmation. As in section 2-204(3), the Code does not impute any terms to parties who refrain from manifesting assent. Further, the Code's creative ambivalence on supplementary terms such as warranty, may be a rejection of the general idea of particular, substantive off-the-rack rules and reflect a will theory premise. Compare U.C.C. § 2-314 (1990) with U.C.C. §§ 2-316(2), (3) (1990).

89. This formal statement is not wholly without value. It separates contracts from tort, restitution, and crime, among others.

oretically specifying the necessary conditions of legal enforcement. Likewise, what lawyers take as necessary for legal enforcement is very strong evidence of what should be included in a detailed formal statement. But a general, formal statement may incorporate offer and acceptance, consideration, capacity, and the myriad contract doctrines, into a simple formal word or phrase.

That this is Barnett's intention appears both from his rejection of any one of the lawyer's grounds for enforcing agreements and from his accepting the several positive grounds for enforcement as prima facie evidence of legally enforceable agreements.91 Almost all of the theories of contract Barnett rejects as inferior to his consent theory find their way into his theory, which he claims rescues these useful legal arrangements [e.g., nominal consideration] from their present uncertain status in contract law. By providing a clear, common-sense test of enforceability that avoids the need for courts to distinguish "reasonable" from "unreasonable" reliance in determining whether a contract was formed, a consent theory enables parties to calculate better who bears the risk of reliance and, hence, facilitates reliance on interpersonal commitments.92

For the moral basis of legal enforcement of contract is consent.93 "[C]onsent of the rights holder to be legally obligated is the moral component that distinguishes valid from invalid transfers of alienable rights in a system of entitlements."94 But what is consent? Again Barnett too cryptically offers a manifestation of an intent to be legally bound.95 Further, this manifestation of intent to be bound must be communicated, and so an objective test of interpretation of when parties intend to be legally bound is necessary and arguably required by the word "manifested." Barnett rests his case for the objective test on the familiar, practical ground that "we never have direct access to another individual's subjective mental state."96 He does not rest on any moral theory, such as utilitarianism, which might render the will of an individual immaterial. Had he direct access to an individual's subjective mental state, that would evidently animate consent. Still, to say formally what contract law has said for generations, that consent must be manifested and must portray an intent to be legally bound, lacks

91. See Barnett, Consent, supra note 2, at 313-19.
92. Id. at 271.
93. Id. at 297.
94. Id. at 299 (notes omitted).
95. Id. at 304.
96. Id. at 305.
substance. For any voluntary action by an individual might be thought to qualify as sufficient consent: "The hard work facing any legal system based on entitlements includes determining what constitutes 'valid' title and what acts constitute 'consent.' Only when these concepts are properly defined can we 'expect' the legal system to act in a predictable enough manner to make our reliance 'reasonable' or 'justified.' "

But how are the acts that constitute consent to be defined? If they are to be defined by the legal system, and this really is hard work, perhaps this signals the lack of a moral basis in consent. The channeling function of a formality, such as the contract under seal, may serve a legal system’s definition of consent. Likewise, the consent theory differs from the "current rule that the falsity of . . . [recitals of consideration] permits a court to nullify a transaction because of a lack of consideration." That the present rule of nominal consideration is "contrary to a consent theory" is apparently the promised rescue of "useful legal arrangements." But if consent is a manifestation of intent to be legally bound, the only legally useful aspect of nominal consideration is that it portrays that manifestation of intent to be legally bound. Barnett assumes this portrayal to correspond with actual intentions of parties. But no channeling function succeeds unless this is true.

1. Consideration

Whether the function of a formal concept, such as the seal or nominal consideration, has served the channeling function of consent is a question of correspondence of the formality with the actual intentions of the parties. These formal concepts fail when social consensus about their significance breaks down or is never achieved. The demise of consensus is the end of the convention that was the sole justification for believing the legal idea of consent corresponded with the behavior of contract parties. Whether the formal symbol in play is a handshake over a barrel head, a seal, or a recital of legal gibberish, the symbol can never determine whether actors understand the formality in the way in which someone else might. The ambivalent attitude of the two Restatements of Contracts on nominal consideration suggests the breakdown of consensus on that particular formal means of manifesting assent to be legally bound. If it is true that consensus has failed (or never

97. Id. at 307.
98. Id. at 312.
99. Id.
100. Id. at 271.
existed), and philosophy cannot answer that question without evidence about what people who use the formal symbol subjectively intend, then Barnett has not rescued the doctrine of nominal consideration at all. For all a philosopher can know, recitals of consideration like any other token of formal assent may be an instrument of oppression or expression. In advocating the enforceability of nominal consideration, Barnett risks having law enforce agreements for reasons other than the actual consent of parties who use a formal symbol. Although the contrary recommendations of the current Restatement view are no more clearly correct than Barnett's, perhaps the personal experiences and knowledge of many lawyers and judges surpass the views of any one of us. In any case, if the use of nominal consideration is controversial, it cannot serve the channeling role Barnett expects unless these cases are handled cautiously. That is the effect, and likely intent, of the change in the Restatement rule.

Moreover, the widest lesson to be drawn from the newer Restatement's pervasive shift from rule to principles or standards, strikes more deeply into the heart of Barnett's quest to build a formal transfer and entitlements theory of contract. It was not merely that a few contract conventions had broken down during the period after the first Restatement revolutionized contract law. The revolution affected the fundamental way law was conceived. Formalities are not inherently good or bad, we learned. Like guns, formalities can be misused. Only legal sociology can discover whether the actual behavior of parties converges with consensual formalities like a rule validating nominal consideration.

These lessons are lost when philosophy supposes that any concept—be it manifested consent or quantum theory—matches reality. A concept works when it captures what it seeks. Manifested consent cannot explain any nominal consideration case for a society itself unsure of the consensual significance of any or particular magic words. It may be no more significant, in fact, than that the parties signed the document or even that a document exists. Either we have good evidence that certain conduct is a convention of consent or we should be cautious until the evidence affirms one or an-

101. Barnett takes another position that, in philosophical language, can only be contingently true: that parties do not consent in a meaningful way to so-called "invisible" terms. Barnett, Sound of Silence, supra note 2, at 889-90. But if formal statements of consent could capture the reality of a particular manifestation of consent, as by signing one is bound because of the "duty to read," parties would in fact consent to "invisible" terms. They would appreciate their commitment to even obscure and unexpected terms buried in the fine print.
other view.\textsuperscript{102}

Any selection a theory commends of particular facts from the welter of facts the world presents must relate to the theory's purpose. A consent theory must, of course, select conventional behavior that exhibits consent. But the nagging problem of common sense is that it supports both recognizing nominal consideration and ignoring nominal consideration, as the diversity of contract law demonstrates. Thus, to say that the rules of contract law should be conventional and commonsensical is to support everything. That is why the only solution that can make sense for consensual contracts is will theory guided by a list of commonsense factors. That is why contract law cannot settle the question once and for all of contracts of nominal consideration and the rest of the concepts that try to capture consent. This is also why all formal concepts, including the objective theory of contracts, cannot always be presumed to have enduring usefulness.

2. Intent to Contract

What has happened in the revolution in contract law, the real mortality of contract, has been the loss of faith in the objective test. Why is it that signing a contract cannot suffice, for Barnett and so many of us, to bind one to obscure and unexpected terms, "invisible" terms? Because we think that no consensual link exists between the formality of signing and true consent to the troubling contract term. The objective manifestation of consent to be legally bound diverges, we think, from the actual subjective assent of the parties.\textsuperscript{103}

But Barnett cannot both insist that conventional, commonsensical contract rules square with his consent theory and explain why one conventional, commonsensical expectation deserves less respect than another. To say that Drafter's expectation is worth less, that it is illegitimate, requires a showing that Drafter knew or should have known the contrary conventional common sense of the other party. But this is circular because Signer, who claims the term was invisible, must now show why the term was invisible and why she did not and should not have known Drafter's expectation.

\textsuperscript{102} Barnett may be correct about the recital of consideration as a sufficient ground of contract enforcement on a theory of moral deserts. One willing to sign a paper with this gibberish deserves a penalty. But consent and not deserts is his theory.

\textsuperscript{103} If one assumes that the put-upon party has no idea or expectation of the invisible term and that the contract drafter knows this, there may be no legitimate expectation that the term has received the other's consent. See Barnett, Sound of Silence, supra note 2, at 890 n.183.
Common sense cannot choose between two commonsensical norms. ⁱ⁰⁴ When conventions break down, objective tests do also. To insist on the objective test of manifested assent requires one to abandon true consent as the moral basis of contract law so long as the consent conventions are controversial. Like all substantive rules, manifested consent must choose a priori to believe the story of Drafter or Signer. The alternative is to entrust the common sense of judges and juries. In the end neither we nor Barnett can have both. For the will theorist this is no problem. Knowing that no rules can promise a priori to capture parties’ intentions and expectations, the will theorist resists rules and theories of human behavior, hoping thereby to animate and empower the contracting parties. For the entitlement theorist who would place contract in the larger setting of transfer law, this could also be true. For the legal theorist who sees the function of law as governing human conduct by rules, but who finds consent in the well of moral justification, manifested consent is problematical. A legal theorist must keep the pocket part of conventional consent practices handy to revise his rules as practices shade in one direction or another. Another legal theorist might leave the issue to the parties and their evidence.

V. CENTRAL PLANNING’S DEFAULT RULES

A paradox of liberal legal theory haunts contract law and theory: If the autonomy of contracting parties surpasses the authority of central planning, how might central planning enact rules of contract law? The default rule school of thought apparently resolves the problem by providing rules of contract law that the parties may vary. Variable or mutable rules of contract law will apply only if the parties do not agree otherwise. When parties do not otherwise agree, they are assumed to assent to the default rules. Under this weak notion of assent, central planning may both bring administrative order and yet animate autonomy if only for sophisticated parties. For sophisticated parties variable default rules present opportunities both for empowering their will and for overpowering the unsophisticated. Choosing the variable default rules as well as the invariable or immutable rules of contract law requires one to confront this tension between empowerment and oppression. Barnett sensibly suggests that a consent theory of con-

tract favors default rules that most likely mirror what the parties actually agreed to. He imagines two kinds of cases, cases of subjective agreement and cases of subjective disagreement. Recognizing in the latter that no default rule can mirror what the parties did not agree to, Barnett's consent theory favors default rules that will provide incentives for getting the parties to agree. These incentives may take the form of penalty default rules.

First, I will discuss this curious idea of default rules for cases of subjective agreement. Then, the perhaps more curious idea of building subjective agreements by penalty default rules receives due attention.

A. Default Rules for Subjective Agreements

Barnett has found two traditional legal criteria by which the consent theory helps decide the appropriate default rules. He makes no claim that consent theory alone decides the right default rules—merely that these considerations flow from the account of consent theory. First, Barnett finds that conventionalist default rules flow from the consent account because of the need for contractual enforcement to reflect the actual subjective agreement of the parties. Where the parties have left a gap in their expressed agreement, they may have in fact shared the same tacit assumption. Barnett supposes this would arise from their sharing participation in a particular community which conventionally would handle a particular issue in the way the parties subjectively assumed the law would have.

Assuming the case in which the parties' objective indicia would show a gap in their agreement but also assuming actual subjective agreement of the parties, Barnett notes that the objective theory of contract is inapposite to this problem. The objective theory manages the cases of actual or subjective disagreement of parties. The objective theory of assent cannot guide the choice to the better default rule for the situation of actual subjective agreement. But the consent theory does help in this case because it will favor a conventionalist default rule. Barnett claims a conventionalist default rule will more likely come closer to the parties' subjective agreement. He does not claim that a conventionalist default rule will come closer to the parties' subjective agreement than would a factual hearing.

The issue raised is how contract law might help to choose the default rule for the gap in the agreement when the parties subjectively agree. The answer given by Barnett is that conventionalist default rules are more likely than any other default rules to get
closer to the parties actual subjective agreement. Additionally, not only will these default rules get us closer to the real agreement, they "will lead to fewer interpretive mistakes" when gaps need to be filled. This argument claims more broadly that courts will get to the right answer and not merely closer to the right answer.

Barnett then turns to an apparently immutable default rule to illustrate this point. That he should do so is curious because the only reason we should seek to enact a default rule better than other prospective default rules would be to give parties the default rule that is most likely closest to their actual subjective agreement. An immutable or background rule, such as a good faith performance rule, hardly serves this objective unless one knows that all contracting parties do agree to a particular immutable rule. Under consent theory, local knowledge is more likely to

105. Barnett, Sound of Silence, supra note 2, at 880. Barnett's discussion of default rules and subjective agreement addresses only the situation in which the subjective agreement cannot be shown. Only because we have all been trained against subjective agreement could we suppose one could both conclude there was a subjective agreement about a contract term and yet not have sufficient evidence of what that agreement was.

106. Id. at 882.

107. Parties may agree to fair play standards that differ from those someone else understands as good faith performance under will theory. That is what most conventional legal writing means by commencing with statements such as "good faith is not easy to define." Objective theory continues to seek to promulgate the same for everyone as though central planning knows everything. But if central planning knew everything, in most instances no contracting would exist.

108. Barnett also gives examples from agency and partnership law, which I do not evaluate here.


110. Barnett makes this point in a penultimate section that merits attention. Id. at 905. Barnett points out that a market in legal jurisdictions would provide the basis for consent to immutable contract rules. Moreover, he begs the real consent, actual assent, by assuming because there is a market and people participate in the market, they actually assent to all market transactions. Barnett had already embraced an inscrutable conventionalist law of contract because he had acknowledged that some people (rationally uninformed people) may not mean what contract law ascribes to them. But a market in legal jurisdictions cannot solve the ignorance problem, any more than excessive formalities can.

The final section of Sound of Silence, titled "Common Sense and Common Law," suggests that surrogates for the absence market in legal jurisdictions might be found in moral theory or economic analysis. Id. at 906-11. But moral theory had already led Barnett to recognize the difficulties with just a market theory. Moral theory required that transfers be voluntary or actually assented to. The market showed it did not guarantee that actual assent.

The problem of immutable contract rules has perhaps influenced a number of legal and quasi-legal developments that might offer more hope for the problem of consent to immutable rules. First, we should not be blind to the steady decline over the past half-century in repute of immutable rules (and the covert climb of will theory), as for example in the doctrine and rules of consideration. Second, all these immutable rules require interpretation and in that process may be tailored to particular litigants and their expectations. Third, lawyers have been escaping immutable rules by specifying choice of law clauses and moving clients into more subjectively congruent legal concepts since the idea of law arose. We might
lead to the truth of the subjective agreement. Instead, consent theory suggests, without explaining, why central planning and not the conventional rule of the relevant community of discourse should have jurisdiction over the issue of how one should interpret contractual obligations. Moreover, consent theory suggests that those immutable legal rules of contract get us closer to parties' subjective agreements.

Contract law has nothing substantive to offer cases in which the parties subjectively agreed. If the parties had been in subjective agreement, assumedly at the time of contracting, and are now in dispute about what they had subjectively agreed, two assumptions arise. First, either the court knows by a factual finding of this previous subjective agreement or, second, it does not know. In either event Barnett's claim for the consent theory must fail.

If the court knows of the subjective agreement, then no default rule matters to the resolution of a dispute. Where parties have an ascertainable subjective agreement, no gap exists for default rules to fill. Thus, a claim that any theory of contract can contribute to the substance of default rules that will provide better outcomes than alternative default rules cannot be established under the first assumption, that the court has determined what the agreement was.111

If the parties' actual agreement is disputed, there is a real opportunity to discover the subjective agreement better than any possible default rules. Another approach is better than Barnett's conventional default rule and better than asking the court to choose the meaning or the term the parties most likely would have chosen, in effect placing itself in the same position as the parties when they made their agreement.112 Rather, the court should listen to the parties' evidence supporting their version of the actual

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111. It would be possible but meager to claim that the consent theory influenced the default rule of party-autonomy which led to revealing the parties' subjective agreement. Consent theory is beside the point as to the creation of this rule because consent theory, he has said, is not a will theory. Barnett, Consent, supra note 2, at 300-01. But if that would be the claim for consent theory, then such a pan-default rule converts consent theory into a will theory.

112. The text on this good faith duty rule could concern subjective agreement of what a term in the contract means or what an objectively unexpressed but subjectively agreed-upon term is. I assume either as a possibility.
agreement. This is nonsubstantive, meaning that neither party is favored or disfavored a priori under the rule in light of their attributes. "Bring evidence" is the canon of will theory—be it self-serving testimony, prior dealings with the promisor, or proof of general or eccentric practice. The fact-finding task is Herculean only if we should expect the court to come up with the right answer. Under our current expectations, it is the daily practice of courts to interpret the conduct of the actors whose intentions are at issue. In will theory the rule is party autonomy.

No doubt the approach of will theory will not achieve congruence with the parties' subjective agreement in every case. In this imperfect world in which evidence of what truly happened may be missing, justice will not be done in every case of tort, crime, or contract. But the will theory approach to an imperfect world of contract interpretation succeeds in the only relevant aspiration. Will theory tries to do the job of implementing the moral basis of contract obligation. Default rules renounce actual intention for fear of wrongly doing the job and in that renunciation guarantee that the job will sometimes not be done. Will theory surpasses any substantive immutable rule. The default rule I propose is, of course, a basic part of modern and classical contract law and merely moves the judge from legal hypothesizing to adjudicating the facts.

Suppose for example, that Sam and Belle have a shared cutthroat morality about business and contracts. Everyone knows they play the contract game as close to the edge of conventional decency imaginable. Good faith performance for them is no more than self-interested opportunism. Sam and Belle read their contracts narrowly and strive to do only what they are expressly required. None of this finds its way into their written deals, but each is well aware of the other's disposition. Sam and Belle execute a written contract that either leaves the meaning of an express term unclear or makes no provision about a term that ordinarily parties would have expressed. Sam and Belle eventually dispute their obligations under the deal. Sam's version relies on a notion of good faith in which opportunism is permissible; Belle's version makes opportunism impermissible.

To rule that Sam and Belle's conception of good faith performance is the same as the paradigm of the U.C.C.'s duty of good faith and general contract law is to fail to grasp the most correct interpretation of their subjective agreement, but instead to pro-
pound for Sam and Belle an imaginary commercial morality. If this good faith morality was in fact perceived by the promulgators of modern contract law, it nevertheless does not hold for Sam and Belle whose tacit assumption was otherwise. Interpreting their intentions on the basis of “good faith” tacit assumptions cannot produce fewer interpretive errors unless the perception of Sam and Belle held by modern contract law is correct: that they are the odd people out.

I do not know why Barnett or traditional contract accords reality to this particular conception of modern contract law. Approval of this default rule as immutable rests on the supposition that no one would agree to a term other than “good faith performance” except under involuntary consent. Alternatively, approval of such a default rule rests on nonconsensual contract theory which consent theory does not inform. The latter is immaterial to this discussion of consent theory’s effects on the choice of default rules. The former would only be a fair supposition if we have the knowledge that some greater number of people would not voluntarily agree otherwise, and that greater number somehow, under consent theory, counts sufficiently. What we have, instead, is an inference from the legal conception of good faith about what the rest of the world is like. The world is composed, however, of people who either do or do not, in varying degrees, tacitly assume that all promisors share a good faith morality.

Consent theory should resist legislating the best rule of law given the uncertainty about what is best. Were local knowledge animating the consent theory, it would resist avoidable rules of law such as immutable default rules. Without evidence that our theoretical inclinations are supported by the facts of the real world, we are all inclined to substitute our own view of what we think is most likely. Those acculturated by the regnant legal system to believe good faith should be the way buyers and sellers behave hardly suggests that we capture any or all of their tacit assumptions on that matter. What Barnett proves about the substantive impact of

113. Barnett claims that a good faith conception, such as the surrender of opportunities bargained-away in making the contract, provides a response to those who deny any “universal conventional understanding” that contracts must be performed in good faith. Barnett, Sound of Silence, supra note 2, at 883 n.163. Perhaps it is enough to say that if something is universal, it is not conventional—and vice-versa.

114. The problem with good faith as Barnett apprehends the legal idea is this: Sam and Belle cannot be presumed to have bargained away an opportunity. That is the nature of their contracting with each other. If you assume particular parties like these apparent rogues, you do not enforce their agreement. You enforce an idealized version: yours or the law’s.
his consent theory is the substitution of the subjectivism of the parties with the idealization of the legal regime. If one remembers that consent theory rests on a justification concerning local knowledge having superiority over general or particular knowledge from other sources, one may be confused when the issue becomes whether people might bargain away or misunderstand their rights to receive good faith performance.

Similarly, an old Florida case refused to enforce a conjuring contract.\(^{115}\) This case illustrates liberal traditional theory's failure at its most critical juncture. The court refused to dignify such contractual intention.\(^{116}\) Whether extra-party considerations or a factual issue of actual assent led to the court's decision is not clear. But to rule the contract invalid on party-bound considerations requires some reason and even some common sense. The judge would not carry whatever liberalism he or the parties held so far as to dignify their intentions. Similarly, the occasional modern breach of contract case of "date-break" for failure to abide by a "social" obligation sometimes goes the same way. I too might think conjuring contracts, date contracts, and the like odd in some sense, but I do not think my opinion counts very much on what these parties may have thought about the seriousness and dignity of their arrangements.

The missing default rule for these cases, however, is intention to be bound and this highly factual issue cannot be drowned in a rule of law. Here, as everywhere, we must seek information about the subjective agreement as to intention to be legally bound. Procedural legal rules remind us to ask but they cannot answer the question. Nevertheless, we might enact immutable default rules for these cases as with the duty of good faith performance. There is a great temptation to do that because of the apparent certainty, efficiency, and stability that legal rules bring. The error this breeds is the creation of conventionalist rules for cases that may be less likely to happen than actually do. If the aim is to maximize congruence between legal results and the subjective agreements of parties, then to assume these subjective agreements are more likely than not a reflection of conventional rules may misconstrue parties who fight over waivers of seemingly central legal rules like good faith performance, conjuring contracts, or date-breaks. If these are people more unconventional than most, it would seem that if any default rules will capture their subjective agreement, which is the

\(^{115}\) Cooper v. Livingston, 19 Fla. 684 (1883).

\(^{116}\) The Florida Supreme Court ruled that conjuring was not a valid consideration and that no one would voluntarily pay $250 for a conjurer.
assumption in Barnett’s claim and implicit in contract law, they will be generally unconventional and locally conventional default rules. This is why hierarchically imposed rules are less likely to maximize finding the subjective agreement.

If consent theory leads to preferences over default rule-candidates, they are the wrong preferences. What matters is the parties’ mutual subjective agreement. Where no disagreement between the parties exists, worrying about the applicable default rule is naive. The parties do not need helpful presumptuousness. It is one matter that the parties agreed. The only legal issue presented is how the legal system gathers the evidence. It is perfectly tolerable in an imperfect world of knowledge that parties may choose to roll the dice in front of a jury. Letting that happen accords best with the contractual aim of effectuating the parties’ intentions. If traditionalists like Barnett agree with this, they need to focus on the proceduralism of contracts cases. My computer cannot operate without a default rule because it has no mind of its own. Real people can and do. Discovering their consent if they had subjectively agreed requires listening to their stories.

Furthermore, default rules may not be the best way to gather the intentions of parties who actually subjectively agreed, unless we assume that the parties entered an agreement that will never be clear enough operationally. People so situated do not report, by way of preface, being in subjective agreement, and the only issue is whose view of our agreement is correct. Thus, if consent theory favors a conventionalist rule of the particular community for such cases, that same rule would apply as well in other cases in which there had been subjective disagreement. Unless we knew how many of each would arise, or more importantly how to identify cases of subjective agreement from subjective disagreement, default rules cannot promise interpretation that corresponds to the actual agreement of parties.

B. Penalty Default Rules for Subjective Disagreements

The growing literature on contractual default rules even embraces the unconventional suggestion of penalty default rules. Penalty default rules serve as incentive for getting one party to a contract to reveal a preference for a contract provision contrary to the otherwise applicable default rule. Penalty default rules have also been said to have value in inducing one party to share impor-

tant information with another.\textsuperscript{118} Leading penalty default theorists have made it plain that penalty default rules are purposely set counter-intuitively just so they may have the sought-after effect on party-behavior: the parties must express their own preferred contract term.\textsuperscript{119} Nevertheless, Barnett claims that his consent theory offers a "justification for using conventionalist default rules as penalty defaults."\textsuperscript{120} The idea of a conventionalist yet penalty default rule seems oxymoronic because a definition of a penalty rule is one that "the parties would not want."\textsuperscript{121}

Not only must the liberal principles that ground the consent theory not be indifferent to the choice of default rules for any parties or indulge the gamesmanship of penalty defaults, they also must not risk the precious price knowledge by centrally planning contract terms. Barnett cannot give up the core of will theory, sub-

118. Ayres & Gertner, \textit{supra} note 13, at 91.
119. \textit{Id}.
121. Ayres & Gertner, \textit{supra} note 13, at 91. Evidently, these writers mean this stronger sense of a penalty rule, a symmetrical penalty, as in their question-begging example of the U.C.C. rule that a failure to agree upon a quantity of goods invalidates an agreement for the sale of goods. Ayres and Gertner suggest that this penalty default cannot be explained by what the parties would have wanted: "Obviously, the parties would not have gone to the expense of contracting with the intention that nothing be exchanged." \textit{Id}. at 96. But many of us go to the expense of bargaining without reaching what we expect to be a binding agreement. In such cases we do not regard not being bound to our agreement because we cannot or have yet to agree on the quantity as any penalty at all. Likewise, as Ayres and Gertner seemingly believe, the U.C.C. is not inconsistent as between open price and open quantity terms because the Code requires an intent to contract where the price term is left open. U.C.C. § 2-305(1) (1990). What they might mean is that the Code could have provided the same test for open quantity cases. Ayres and Gertner explain the Code's refraining from setting the quantity as a "reasonable" quantity by the claim that it is systematically harder for the courts to figure out quantity than price. Thus, price can be determined from market information. "But to estimate a reasonable quantity, courts would need to undertake a more costly analysis of the individual litigants of the type 'How much did the buyer and seller value the marginal rutabagas?'" Ayres & Gertner, \textit{supra} note 13, at 96. This assumes that for a price term market, and not individualized, valuation is accepted, but the contrary for quantity.

Aside from the latter discussion, Ayres and Gertner use a weaker form of penalty default to mean a rule that one party would not want, an asymmetrical penalty. That is Barnett's use as well. Thus, a default rule may be conventionalist in Barnett's sense because it reflects the ordinary expectations of parties to such contracts, but at the same time the rule may be a penalty from the point of view of the other party to the contract who does not expect such a default rule. Rationally informed parties are the object of the penalty rule. Their superior knowledge or reason to know makes them the party to be penalized by a penalty rule that creates an incentive to agree otherwise. Unless parties do agree to another rule, the penalty rule applies. This is defensible from the point of view of consent because of the conventional nature of the penalty rule, which accords with the common sense expectation of the party to the contract who was not rationally informed about the applicable rule. Perhaps there are conventional but penalty rules of this sort, but Barnett's use of the damages rule of \textit{Hadley v. Baxendale} does not advance his claim for conventional penalty rules. \textit{See infra} text accompanying note 123.
jective assent, because to do so risks an objectification of contract that would eventually fictionalize personal or local knowledge. Thus,

[w]hen one party is rationally ignorant of the background rules of contract and the other party is not—that is, the other party is either knowledgeable or irrationally ignorant—default rules can reduce the instances of subjective disagreements arising between parties who otherwise are manifesting mutual consent.\textsuperscript{122}

Barnett illustrates the idea that default rules can reduce actual disagreement by a rule he calls conventional, which is familiar to all lawyers, the rule of damages for consequential loss spawned by\textit{ Hadley v. Baxendale}.\textsuperscript{123} Carriers are repeat players in the delivery game for whom knowing the law of damages for their misperformances is rational.\textsuperscript{124} Those who use these services might do so only occasionally and are unlikely to need or be expected to know the current versions of that great case. Therefore, this is a good example in which default rules may do their job of reducing parties’ disagreements as to the extent of damages for a carrier’s breach.

The default rule should reflect everyday common sense in instances as this so that the onus is placed on the repeat player, the rationally informed party, to express a preference for a damages term that deviates from common sense. But what constitutes everyday common sense of people who use carriers on the issue of appropriate damages is doubtfully a matter of common knowledge. I suspect that most people would say, “all of the above,” given a list of four “losses,” even if only two of the four were reasonably foreseeable. Even so, these consumers may well be rationally uninformed people and so not expected to know the rule. Yet I wonder whether the test of reasonably foreseeable losses can be considered a part of anyone’s common knowledge. Lawyers, too, will disagree about what is or is not a foreseeable loss under\textit{ Hadley}. Similarly, commentators have noted that\textit{ Hadley} might well be viewed as protectionist.\textsuperscript{125} Calling\textit{ Hadley} a conventional rule within every-

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\footnote{122. Barnett, \textit{Sound of Silence}, supra note 2, at 887.}
\footnote{123. 9 Ex. 341, 156 Eng. Rep. 145 (1854). Indeed, it seems to be something of a rule lately that anyone who writes about contract rules cannot omit\textit{ Hadley}. See, e.g., Ayres & Gertner, supra note 13, at 101-04.}
\footnote{124. Barnett, \textit{Sound of Silence}, supra note 2, at 887-90.}
\footnote{125. On one hand, it has been suggested that this narrow liability for consequential damages protected particular groups. See Morton J. Horwitz, \textit{The Transformation of American Law}, 1780-1860, at 188 (1977). Another commentator suggested how the rule benefited the judges who invented it. See Richard Danzig, Hadley v. Baxendale: \textit{A Study in the Industrialization of the Law}, 4 J. Legal Stud. 249, 267-74 (1975).}
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day common sense may rank with Holmes' objectification of *Raffles.*

Substantive default rules may derive from consent theory by a preference for penalty default rules whenever one of the parties is rationally informed about the default rule while the other party is not. When only one party knows the rule, consent theory favors adopting a default rule penalizing the rationally informed party. By such a penalty the law would encourage the rationally interested party to discover the rule and educate the other (rationally uninterested party) about the rule in the course of bargaining a different rule. The result of this legally encouraged behavior will likely reduce subjective disagreements on the matter covered by the default rule.

A penalty default rule encourages one party to inform the other party of the law. For example, the Federal Express disclaimer of liability conspicuously attached to the package lets the customers, who are unlikely to spend money learning their legal rights, learn these rights by the expenditure of money by Federal Express, the party best situated to learn and share these rights. This, it is said, exemplifies a penalty default rule that by being penal encourages the penalized party to obtain agreement other than what the law provides. I do not know why anyone should think that the very narrow contract law rule as to consequential damages should be thought so penal as to encourage Federal Express to act as they do. The rule is that unless a carrier such as Federal Express knows or has reason to know of an unusual loss its customer will suffer, it has no liability for any loss beyond the typically minor loss of use that ordinarily follows from late delivery. To view this rule, which may well destroy the expectations of the

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127. This means their willingness to learn the default rule arises from the benefit received exceeding the costs of learning the rule. Barnett, *Sound of Silence,* supra note 2, at 866. With the exception of Coleman, recent default rule commentary seems to ignore the several assumptions this makes about people—what I briefly described as the problem of ignorance. See supra part III.B.1.
128. The rationally uninterested party does not appreciate the immediate risk of ignorance and lacks motivation for self-education.
130. I think the point, if practical, encourages one party to obtain the other's consent to a different rule. There is some difference between that, and providing by a legal rule a duty to inform. At least the latter fairly enables the rationally uninformed party to know of the stakes a contractual variation adduces. Merely encouraging agreement around the rule is likely to see many ignorant consents to the variation. A more consensual-forcing device might attempt to impose on the rationally informed party to dicker expressly for the variable rule or directly provide the relevant information. Yet, this is all too likely to dissipate into formularism.
relatively and understandably weaker party to such a transaction, as penalizing a carrier is peculiar. We may pierce the gloom by substituting the more familiar expressions "stronger" and "weaker" parties to the transaction for the elusive expressions "rationally informed" and "rationally uninformed."

First, this does not at all follow from the liberal philosophy behind the consent theory. Only the parties themselves, under the principle of personal knowledge, know best. 131 To tinker with their knowledge as would a default theorist cannot be supported unless there is a well-defined "tinkering" line. A nonpenal default rule might be known by either a rationally interested, disinterested, or uninterested party; 132 and any of these parties might at reasonable cost change the rule. Though it may be true that rationally interested parties may more likely learn and bargain for a change in any rule that disfavors them 133 than the others, it does not clearly

131. It is noteworthy here to recall how even a will theorist such as Fried, supra note 12, avoids the inconsistencies of a more explicit (or candid) philosopher like Barnett by refraining from plumbing the depths of his autonomy principle. By doing so, Fried manages to allow for any sort of theory to justify gap-filling. But in itself, that appears to be an inconsistency or incompleteness that weakens his will theory which believes in gaps. Reconciled under the refined will theory, the rhetoric of gaps and incompleteness turn out to have been a feature of an objective theory produced by conceptualizing manifestations of intention as material only when expressed by particular modes: in documents or by particular speech or conduct. By conceptually widening the lens of legal materiality, will theory converts a problem of contract theory into a problem unique to a particular theory, the objective theory of contracts. That is the general point of a different theory: to provide another way of analyzing a problem.

132. Some people who make contracts may generally appreciate damages for breach. The general categories of expectation, reliance, and restitution may even be intuitively understood by those who, for the most part, work out their differences. Any contract theory should strive to match whatever these intuitions are. Proposals to produce consent on the basis of non-intuitive or counter-intuitive damages rules such as penal rules risk confounding understanding and producing artificial legal incentives.

133. I am not convinced that this is as likely as would appear from its frequent recitation in the default rule literature. The repeat maker of a certain kind of contract, such as Federal Express, can try to spread the cost of learning and bargaining around a legal rule; an occasional or one-time maker of the same contract cannot spread the cost. Thus, those who can spread costs may be able to bear these costs. But for the firm to spread costs assumes that the firm can afford to spread these costs, which implies either substantial control over prices or that the competition will do the same. A firm that has price control lacks incentive to spread costs or is indifferent about the substance of the legal default rules. A firm so positioned may be able to recover losses post hoc and may lack the incentive supposed. A competitive market firm may no more have the ability or incentive to learn and educate people about substantive default rules unless to do so does not impair its competitive position, as where every similarly situated firm is doing so. But this begins to build assumptions about behavior that need not be correct. If the assumptions do not hold in particular markets this would result in penalty default rules becoming unjustifiable not only on the moral ground of their involuntariness, but also on the ground that they do not serve the informational role Barnett and others seek. Penalty defaults are supposed to cure irrationality by this informational function. To presume they will is dangerous unless we are
follow that the cost of learning the rule is unreasonable to others, unless Barnett meant by reasonable cost the cost a reasonably interested party would originally pay. If that is true, however, more problems for consent theory may emerge than it helps resolve.  

Barnett’s argument from the differently situated parties seeks to show that the penalty default rules are more likely to reduce subjective disagreements between the parties. But the result of penalty default rules in these cases may merely be binding the rationally uninformed party on the risk-assumption principle. The product of encouraging the informed party to educate the uninformed party may be an agreement objectively manifested by the parties. Even if the latter is true, as in Barnett’s example of the Federal Express packaging conspicuously disclaiming liability beyond what it states, this provides incomplete evidence that the parties had subjectively agreed to the disclaimer. The argument begs the question, which is whether the parties had subjectively agreed. Unless we know they had agreed and that the disclaimer reflected that agreement, we cannot know that the penalty default rule produced the happy result imagined.

A penalty default rule might incite the party penalized to make an agreement otherwise if he could. Whether this would affect the real world at all is not clear. If it would not, then a penalty default rule’s justification as an incentive fails. What Barnett expects from a penalty default rule need not follow from knowledge of that rule. All promisors have a very good reason to seek the consent of their promisees to limit liability. Like others, Federal Express has a motive to include its disclaimer prominently in the bargain whether or not the default rule harmed or favored them. This boiler plate may have an in terrorem effect against making claims.

Moreover, consent theory has nothing whatever to do with ensuring that the penalty default will work or that the penalty rule well serves the expectations of the weaker party who now, as under Hadley, must live with it without having had the opportunity to know she should have taken other precautions. Ayres and Gertner write as though the lawmakers should be ready to enact their penalty defaults, yet their article seems to suggest some data might first be collected. See Ayres & Gertner, supra note 13, at 92-93, 107.

134. Consent theory would seem to create a proliferation of default rules by requiring that stronger parties always bear the risk of penalty default terms. Since we may never know in advance which party is the rationally informed party, we seem to need multiple and different default rules for every problem we might foresee.

135. The Hadley rule is, of course, penal to the customer and not the carrier as I previously suggested and is not conventional to the customer though it may appear so to the carrier. That is precisely why the rhetoric of commonsense and conventionalist rules in Sound of Silence is bewildering. If conventionalism and common sense may be so trusted, why central planning cannot be entrusted to discover the same, the problem of personal or local knowledge, is mysterious. This theme haunts the objective consent theory of contract.
couraging parties with good reasons to overthrow default rules. These parties are those who would come out poorly under a default rule. The disfavored party should serve her own interest by gaining agreement on another rule. This is a beneficial effect of the theory of promulgation, which informs the choice of a penalty default rule so that parties may learn of their rights under the default rule and then may choose their own contract rules. Working perfectly, this would seem to lead to the blessings of consent and bargain theory under which in exchange for my surrendering my right to the default rule, my promisor gives up something in exchange. Barnett makes no such claim but implies that a properly drawn penalty default rule can encourage such beneficial behavior.\(^{136}\) At the least a penalty default rule encourages making the private contrary contract rule express in the bargain. Although this makes it legally easier, on the objective theory, to deny the disfavored party’s claim not to have consented to such a private rule, I do not know what it means if the “duty to read” is inapplicable. And this takes us back to the supposition that central planning, here the legal community, should control the issue of consent—that the law should dictate a “duty to read” or any other immutable rule of consent.

C. The U.C.C. Default Rules and Contractual Intent

Two accounts may be given for the concept of the U.C.C. default rules. First, the Code drafters thought that they knew the substantive default rules intended by parties. Second, gap-fillers permitted a freer presumption of validity to goods contracts. The realists who prepared the Code held no brief for the classical contract law notion of indefiniteness under which a court might invalidate a contract if the parties left too much unexpressed in their agreement. The gap-fillers wrote indefiniteness out of the U.C.C. sales article. Thus, parties who intended to contract might have enforcement of their contract if there would be any way to do so.\(^{137}\)

The drafters’ assumption was that commercial goods transactions should enjoy a presumption of validity, and the cryptic rule of section 2-204(3) accomplished that. In order to believe in the presumption of validity, one must also believe that open terms (as opposed to indefinite terms) do not presumptively bespeak a lack of contractual intention. Open terms signify an incomplete contract, so to speak, and not the absence of a contract. The issue then becomes how the drafters know this. Barnett’s answer seems

\(^{136}\) See Barnett, Sound of Silence, supra note 2, at 889.

\(^{137}\) This free paraphrase is from U.C.C. § 2-204(3) (1990).
to be that parties consent to default terms. However, neither Barnett nor the Code knows this to be true of all parties or of most parties. For example, real estate lease renewal contracts have been problematic because we do not know whether the parties have signaled the courts to find a reasonable price or not. Whether real estate lease renewal contracts should share a presumption of validity remains controversial.

The Code drafters thought they knew merchants well enough to presume validity. But even the Code drafters provided the vague traditional test of intent to contract as a way out of open term cases in which parties were shown not to share a zest for validity. The U.C.C. gap-filling premise assumes that the parties would prefer resolution of the case to the invalidation of the agreement, even if in advance neither would have chosen the particular default rule. This is not the same as consent theory's premise: agreements entail some genuine consent to a gap-filler. Consent to gap-filling exists but only if there is an intent to contract. This gap-filling is as comfortably fit within will theory as within consent theory. Thus, the classical indefiniteness notion could betray as much in will theory as it found support in will theory. Intention to be bound might be present, but indefiniteness might yet prove fatal.

The modernist program exemplified by the U.C.C. gap-fillers thus reversed classical theory and created a presumption of validity to incomplete agreements by preparing default rules to fill the gaps. Classicists would have left the parties to the legal underground of invalidity. A leading indefiniteness case, Blackhawk Heating & Plumbing Co. v. Data Lease Financial Corp., illustrates the different approaches. The Florida Supreme Court reversed a lower court's ruling that an expression in an agreement was too indefinite and the agreement therefore lacked the definiteness necessary for legal obligation. The high court ordered the trial court to determine what the parties meant by the term. If one assumes that the parties themselves had left the term vague so

140. "[A] contract for sale does not fail for indefiniteness if the parties have intended to make a contract . . . ." U.C.C. § 2-204(3) (1990).
141. 302 So. 2d 404 (Fla. 1974).
142. The inartful phrase was "any cash flow benefit." Id. at 406.
143. Id. at 410.
that each could assent to the bargain without committing to the meaning of the term, modernists and classicists may fairly disagree about whether the court correctly resolved the dispute. Modernists believe it is morally fair to impose legal obligation in that case because the parties assumed that risk. Classicists believe it is unfair to impose obligation there because no such risk was assumed. If we further assume that the *Blackhawk* contract was entirely executory when brought to court, the classicist may have the better position while the modernist enjoys the advantage once either party puts expenditures at risk in the performance of the bargain.¹⁴⁴ Neither position is particularly attractive since passing up other pre-agreement opportunities may be as probative of true intent to be bound as is post-agreement reliance. The cardinal feature of these discussions is whether the parties intended to be bound and accepted the risk of judicial completion of their incomplete agreement. Both will theory and Barnett's consent theory brings one to this central issue. Consent theory may too quickly glide through that issue, however, if one is accustomed to presume consent to the default rules, for then the significance of gaps in the agreement may be missed. Gaps may appear either because parties are willing to be bound even if the agreement is not yet incomplete or because parties feel they are not ready to be bound.

The Code gap-fillers rest on a fundamental belief that incompleteness in contracts should not be fatal if the parties intended a

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¹⁴⁴. A reliance or unjust enrichment theory might permit the classicist to insist that even in the latter event the court might adjust the parties post-agreement situation and preclude losses in reliance on the party's mistaken assumption of the agreement's validity. But that is merely another way in which one recognizes the unfairness of the post-hoc status quo and surrenders to the modernist. Unjust enrichment rules provide default rules for the post-executory invalid agreement. The significant difference between contract and unjust enrichment rules lies in the variability permitted by contract but not by these other areas. Depending on the variability permitted, on a continuum of slight to substantial, the differences between these forms of legal obligation will be slight or substantial. Contract may permit clearer expression of the rules of obligation, ironically, by complete substantive silence. Eschewing default rules of any substance could force parties to clearer expression of their contractual obligations.

Based on another criterion, some may see will theory as the worst of all contract worlds. Default rules of substance, such as U.C.C. gap-fillers and perhaps restitution, they might say, permit the cost-savings clearer written expressions require. Thus, forms are preferred to specially drafted documents; elliptic expressions are preferred full expressions. Nonsubstantive default rules would thus seem to impose more on parties than sensible substantive rules. That is the conventional supposition. But believing that is merely a consequence of conceptualizing the "facts" of gaps. Proving that off-the-rack rules will save costs presumes that substantive rules may be found that courts or parties themselves will view as quickly dispositive. The most frequently discussed default rules, however, such as *Hadley's* broad foreseeability principle of liability for consequential damage, permits any party willing to suffer protracted litigation to do so.
contract and if looseness in their expression or agreement might be overcome. One strategy for overcoming the problem was enacting rules in the Code to fill the gaps. A second strategy was expanding the idea of contract and broadening the scope of material evidence to permit the parties to fill the gaps themselves.¹⁴⁵

Even the rules the Code adopts to fill gaps typically leave the parties free to present evidence as to what they meant. The Code section that may fill the important gap of a price term exemplifies the Code's sound resistance to imposing on parties. One may find differing views as to the conventionality of the rule regarding missing price terms and whether agreements lacking price should ever be enforced.¹⁴⁶ To regard the U.C.C. missing price term section as a substantive rule misses its point. First, the section only applies on satisfaction of the critical test of whether the parties intended a contract without an agreement as to price. Second, the section does not impose any particular price but calls for a "reasonable price," which leaves parties free to present evidence as to what they thought was a reasonable price.

Even where the Code goes perhaps too far and specifies substance, its broad idea of agreement¹⁴⁷ and its variability by agreement¹⁴⁸ limit the effect of substantive rules. For example, the mercantile exclusion of warranties by the expression, "as is," could mean something else to two consumers trading a toaster over the backyard fence. They might suppose this means that the seller is not promising to repair any obvious defects, such as stains on the finish of the toaster. Yet, that could still be consistent with a seller's warranty that the toaster would do everything the buyer said she wanted.

The zest for objectification to manage the communication problem, what Barnett labels the second-order problem of knowledge, creates tension in the solution to the first-order problem, leaving the appropriate decision-making power to those best situated. Perhaps substantive default rules molded on conventionalism cannot do a better job than nonsubstantive default rules, open-ended and neutral rules. Contract's choice of the result most likely intended by parties as they were situated when they agreed is a different choice than a substantive default rule. For the better part, the Code cultivated the former.

¹⁴⁶. The lease renewal cases represent one strained arena. See supra note 138 and accompanying text.
¹⁴⁸. Id. § 1-102(3).

Kalevitch: Gaps in Contracts
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The U.C.C. gap-filling rules may be thought to be just the sort of conventional substantive rules that the theory of consent would breed, examples of consent theory in operation in the current legal system. One who belongs to the dominant community will see her view stated in the law. From this it becomes more likely than not that the gap-fillers accord with the true subjective intents of the parties because there are more dominant. Thus, choosing conventional substantive gap-fillers is proper when judged by the criterion of reducing instances of disagreement between judicial outcomes and parties' subjective intentions.

Choosing conventional gap-fillers is quite controversial because it presumes precisely what a consent theory ought to deny: that disputes occur as often between parties of the same community of conventions as between parties of different communities. All else being equal, one might suppose otherwise and build default rules accordingly. Indeed, the U.C.C. does quite a bit of that and provides, for the greater part at least, non-substantive default rules favoring no community, as in the party-centered emptiness of reasonable price.

For example, the U.C.C. missing price term provision does not adopt either a merchant's or a consumer's standard. A merchant's standard could be that price on average of such goods in the applicable market. A consumer's standard could be the price that would induce a reasonable consumer to contract. The U.C.C. provision neutrally observes only that the court shall impose a reasonable price that leaves open either test or any other uniquely suited test to provide the most likely congruence between intent and result. Assuming a dispute between a merchant and a consumer, no test can promise to reduce the discrepancy between the actual disagreement of the parties. Barnett's theory only promises to reduce the discrepancy between silence, a gap, and actual subjective agreement. If the two parties actually agreed, the test most likely to reflect that agreement depends on whether these parties belong to the same or different communities. If the same, then use the conventional test of that community. If different, then neither community's test can be more accurate.

Default rule theory cannot establish that any substantive de-

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149. Id. § 2-305.
150. Someone might object that no difference exists between the relevant market price and the price that would induce the purchase by a reasonable buyer. Nevertheless, buyers who have regularly bought at below-market values from sellers have a prima facie claim that sellers in a particular open-ended transaction consented to a below-market price. To believe otherwise requires either better evidence of the intentions of the parties or rejection of the moral basis of contract as actual intention.
fault rules correspond to the actual intentions of the parties.\textsuperscript{151} Any substantive default rule measures up to traditional objective theory for rationally informed parties because consent is there imputed on the basis of knowledge or notice and follows the general idea of risk-assumption. Any conventional, commonsensical default rule measures up to consent theory. Nevertheless, to suppose there are conventional, commonsensical rules shared by the entire community of parties who are not rationally informed, those without legal sophistication, would be unjustified.\textsuperscript{152} Whether smaller groups might benefit from substantive default rules, conventional or penalty, may be exemplified by the U.C.C. which, in its various provisions, speaks to specific groups or classes of contracting parties.

For example, a seller of goods who is a "merchant with respect to goods of that kind" warrants that the goods sold shall be merchantable.\textsuperscript{153} This is a default rule within recent discussions because the merchant seller makes this warranty to buyers even though the express agreement of sale says nothing specific about warranties. Thus, this appears to conform to Barnett's and others' idea of a substantive, off-the-rack default rule. But it is very narrow if importantly substantive. The open question for this warranty is what obligation it imposes. That obligation is no more than that the goods conform to the trade practice.\textsuperscript{154} For example, a sale of "second-hand goods . . . involves only such obligation as is appropriate to such goods."\textsuperscript{155} Even though a seller must take action to negate a warranty of merchantability, the warranty itself is tailored to the individual case by drawing in trade standards rather than promulgating the substance of those standards. Under the merchantability warranty, as with the other warranties in sales of goods, even this specialized body of contract law refrains from imposing on parties what the law thinks they mean and leaves them to show what they meant. Nor are the parties confined in that

\textsuperscript{151} Coleman et al., supra note 13, at 648. Substantive default rules are anathema to a will theory. Although a will theory supports the motive to craft default rules producing convergence of rule and party intent, it will do so only when reliable evidence shows that the parties affected do appreciate a particular rule. But then the rule is for those parties.

\textsuperscript{152} See Barnett, Sound of Silence, supra note 2, at 888 (Rational ignorance of the default rule may be an excuse.). Query "may?" But this is not a problem Barnett creates. The traditional view must talk in this way every time its substantive default rules are unfair to a party, and the traditional view then leaps from validating party autonomy to policing autonomy without noticing that its rules created the problem that hardly exists under another conception, will theory.

\textsuperscript{153} U.C.C. § 2-314(1) (1990).

\textsuperscript{154} Id. § 2-314(2)(a).

\textsuperscript{155} Id. § 2-314 cmt. 3.
showing by their express agreements.

Merchant sellers, as well, are free by appropriate express agreement or by the circumstances to show that the parties agreed to no warranties at all. The disclaimer right given by the Code might be viewed as an informational or educational duty imposed on the more sophisticated contract party for the enlightenment of the other party to the transaction. Yet the merchantability warranty that disclaimers typically eliminated are by no means any sort of penalty default rule for the merchant who deals in trades in which quality assurance is the norm.

Disclaimers mean, however, that a seller undertakes no quality obligation and a particular disclaimer may surprise a buyer. Suppose a disclaimer is buried in the fine print on page nineteen of a contract. Barnett suggests that such a clause may not be binding for lack of manifested consent if it deviates from commonsense expectations, although some additional formality or making it prominent might validate it. In his view, without some additional formality or prominence the drafting party has no reason to believe that the other party consented to this counter-commonsense term. Here, the difficulty suggested earlier that would result from trying to tie conventional, commonsensical default terms to subjective agreement emerges. People whose commonsense expectations are offended by a term in a contract will not always or easily come around to a new convention or another legal formality. They may be no more likely to appreciate the unexpected no matter how many legal formalities we might try to promulgate. If a community is at odds in its conventions and common sense, conventions and common sense cannot assure what is appreciated by signing here or listening there. We can only present the principles and factors that bear on whether we can fairly ascribe responsibility and trust parties and the courts to listen to the stories of the parties and evaluate those in light of all the factors. After all, what

156. Id. § 2-316.
158. Barnett takes the conventional view and assumes that adding formalities beyond those of present contract law, such as signing a contract, can help solve the problem of "invisible terms." See Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1174, 1251 (1983). This misconceives the problem: there is no more reason to expect people to appreciate additional formalities than those that already exist. Nor will people, who already do appreciate existing formalities and expect that their contractual counterparts are bound by what they sign, have increased respect for one more formality. The law could haul everyone into court and warn them of their "Miranda" contract rights, but that will soon dissipate into costly incantations and nothing more. For example, the Bankruptcy Reform Act of 1978 originally provided hearings for all debt reaffirmations, but soon cut section 524 back, See 11 U.S.C. § 524 (1986).
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is "reasonable" is a nice question, just as it is also when we ask if the buyer actually assented to any particular express term.

What was said about the lack of substance in the U.C.C.'s examples of default rules may also be said about the various other supplementary Code provisions. Even the delivery terms, F.O.B. and the like, begin with the caveat "unless otherwise agreed," and so do not mean to do more than provide a definition of what the parties' actual agreement, F.O.B., means for cases in which the parties cannot show another meaning. Even then, however the parties are free to show by appropriate evidence a different understanding.

In sum, the U.C.C. eschews the imposition of substantive default rules and instead welcomes the implications of will theory by freely inviting parties to show what their actual agreement was. In this realm, there is neither sense nor need for significantly substantive or penalty defaults to induce parties to come to an actual and clearly expressed verbal agreement. Parties make their agreements in accordance with either conventional or personal standards. General contract law and sales law gain their moral force by expecting the conventional and being prepared for the unconventional agreements.

VI. CONCLUSION: NONSUBSTANTIVE DEFAULT RULES

The traditional view of contract law is essentially inconsistent in supposing that default rules and background rules of substance may be imposed on contracting parties and at the same time supposing that contract obligation rests on the morality of party choice. If contract law could know a priori what parties would have chosen, then it might proceed in that fashion. To suppose choice requires that parties, not law, choose. More modern contract law in the form of the U.C.C. and Restatement (Second) wisely refrain from imposing that choice on contracting parties. Professor Randy Barnett's consent theory cannot stem the tide returning to will theory. He thinks that central planning lacks the personal and local knowledge necessary to best organize resources. No one need disagree with that premise to reject his theory. Central planning in the form of the legislator or judge on Barnett's premises cannot predetermine penalty rules from undeserved rewards. What Barnett has said as to the conventional default rules flowing from consent theory may make the same error or it is harmlessly tautological: conventionalist default or background rules are more likely to mirror the expectations of parties who hold conventionalist suppositions. Conventional people have conventional expectations.
Barnett offers no reason beyond tautology why we should not respect experience rather than tautology on the possibilities of conventionalism for a pluralistic society. A pronounced tendency to presume certain present rules to be conventionalist and facilely applicable to the unconventionalist or the rationally ignorant person should concern anyone with a decent regard for a morally plausible law of contracts.

Nevertheless, Barnett’s theory does the best that can be done under the traditional view of contract law. The best theory of contract law, however, has no substantive rules. The courts should not propound fictitious consent so that there may be a law of contracts. Contracts can flourish without courts’ propounding the hypotheses of the elite or the oppressed. Parties who want contract enforcement may well find, as have so many, other tribunals that are willing to proceed on fact. Contract disputes do not need the kind of law propounded by objective theories. Contract does not need law;\(^{159}\) the law needs contract.

\(^{159}\) But some contracting parties might feel such a need. These will be those whom Barnett indulges with the sobriquet, “rationally informed people,” and whom others call “stronger parties.” They will come to law with an ample supply of rules from their boilerplates. Every contract theory, including consent theory, provides incentives for stronger parties to bring their own rules. When they do, consent may, just may, morally justify contract enforcement. If those stronger parties draft overreaching boilerplate, they become suspect in their claim that their promisor consented by signing the form, whether the promisor signed once or in thirty places. Central planning will respond with new spurious formalities and objective tests. The process of paradoxical consent may only be stopped by a better, more morally plausible account of consent as autonomy. No philosophical surrogates will do what will theory can.