

. . . AND CONTRACTUAL CONSENT

RANDY E. BARNETT*

Although the title of this symposium is "Default Rules and Contractual Consent," the contributors have devoted the bulk of their papers to the issue of default rules and very little, if any, to the role that consent plays, either in contract or in the default rules debate.¹ In these comments, I intend to rectify this imbalance by concentrating on the issue of contractual consent. I do so because I consider it my duty to try to inject the proper sensitivity to contractual consent whenever this aspect of contract theory has slipped between the cracks. As I proceed, however, readers may wish to keep in mind something that my late and very dearly beloved grandfather used to say to me. "Randella," he would say, "I'm so glad that I have a grandson like you, because if I had *two* grandsons like you, I don't know what I would do." Just be grateful there is one (and only one) of my ilk in this symposium.

The approaches to default rules presented by the symposium participants can be divided into three groups: the economists, the philosophers, and the atheists. The economists, such as Ian Ayres and Jason Johnston, argue that default rules should be set so as to maximize efficiency. The philosophers, such as Steven Burton and Richard Warner, think that default rules should be set so as to better conform contractual enforcement to the requirements of justice. The atheists, such as

* Professor of Law, Boston University School of Law. This article is based on remarks made to the "Symposium on Default Rules and Contractual Consent," held at the University of Southern California Law Center, March 12-13, 1993. I have retained much of the informality of those remarks.

1. *But see* Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 73-74 (1993) (discussing the implications of competing legal systems on the consensual nature of legal regimes); Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. CAL. INTERDISC. L.J. 115, 154-55 (1993) (arguing that consent is limited in its ability to justify default rules); Richard Craswell, *Default Rules, Efficiency, and Prudence*, 3 S. CAL. INTERDISC. L.J. 289, 296-97 (1993) ("If parties have more accurate information about their own needs, and if the market is working well, the parties' choices may be a more reliable guide to the allocation that is really efficient than the decision of even the most well-informed judge or legislature.").

Jay Feinman and Dennis Patterson, do not believe in the entire default rules conceptual scheme.

In these comments I respond to the arguments made by the principal paper authors in three different ways. In Part I, I contend that when economists persistently ignore the importance of contractual consent, they are missing the crucial problem of legitimacy. In Parts II and IV, I respond to the criticisms of my consent theory of contract advanced by Jay Feinman and Dennis Patterson. Both Feinman and Patterson object to the enterprise in which I and others are engaging, and I shall explain why each is wrong to dismiss the current debate over default rules. Finally, in contrast, in Part III I will try to show how Steven Burton's theory of default rules, which I find most congenial, is quite compatible with mine despite the fact that he thinks we disagree.

I. EFFICIENCY AND LEGITIMACY

In this section, I do not intend to respond directly to the articles and comments of those in this symposium who are pursuing a law-and-economics approach.² Instead, I will discuss this approach in a general fashion. I will try to identify what I think an efficiency approach to default rules misses that is better captured by other approaches. I begin by asserting what I have asserted elsewhere: that *theories are problem-solving devices*.³ That is, theories are human intellectual constructs that are formulated to solve some intellectual problem. According to this view, theories can best be evaluated by analyzing the nature of the problem they seek to solve and by how well they solve it as compared with rival theories. Often what separates theorists or schools of thought are not so much the validity of their claims, but disagreements about the existence, nature or relative importance of the underlying problems they seek to address.

There is also what might be called a "motivational" implication of this pragmatic view of theorizing that is not often recognized: you will

2. In their contributions, both Jason Johnston and Ian Ayres continue their research projects of analyzing the problem of selecting default rules from an efficiency perspective. See Jason S. Johnston, *Default Rules/Mandatory Principles: A Game Theoretic Analysis of Good Faith and the Contract Modification Problem*, 3 S. CAL. INTERDISC. L.J. 335 (1993); Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L.J. 1 (1993).

3. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 269 (1986) ("Theories are problem-solving devices. We assess the merits of a particular theory by its ability to solve the problems that gave rise to the need for a theory.").

not care about or value a theory unless you care about the problem it is formulated to solve. This is one reason why law students, for example, are often indifferent or even hostile to the presentation of theories in the classroom. They simply have not wrestled with the subject long enough or hard enough to appreciate the intellectual problems that particular theories are intended to solve. To interest most students in contract theory you must first get them to appreciate the problems that these theories are supposed to address.

I maintain that what separates the economists from the non-economists—or what I call here the “philosophers,” meaning philosophically-inclined lawyers—is the fact that these two groups are concerned about two very different problems, and therefore each group finds useful a very different theory than the other. Conversely, members of each group do not care much about the problems of concern to the other group and therefore fail to grasp the point of the other group’s theories. And even if they do see the point of these theories in the abstract, these theories just do not matter to them very much.

This situation is not, however, completely symmetrical. I think the philosophers tend to *understand* the kind of problems that the economists are addressing even though they may not themselves be addressing these problems. I also think most thoughtful non-economist contract theorists *appreciate* what the economists are trying to accomplish. But it has been my experience both in dabbling in the literature as well as attending conferences such as this symposium—and here I am, perhaps, overgeneralizing a bit to make a point—that the economists neither understand nor appreciate the *kind* of problem that the philosophers are preoccupied with. For this reason, while many philosophers are rather sympathetic and tolerant of the economic way of thinking and are willing to integrate that approach into a larger normative view of law,⁴ I find there is much less generosity extended in the other direction. By and large, economists are rather indifferent, if not antagonistic, to more philosophical approaches to contract theory. They simply do not view such approaches as useful ways of looking at contract law because they basically do not care

4. Although many—but far from all—on the political left are unremittingly critical of law-and-economics, these same persons are likely to be equally unsympathetic to nonleftist philosophical approaches as well. Jay Feinman’s contribution to this symposium probably falls into this category. See Jay M. Feinman, *Relational Contract and Default Rules*, 3 S. CAL. INTERDISC. L.J. 43 (1993).

about or understand the problems that these philosophically inclined lawyers are addressing.

What are these problems about which lawyer-economists are indifferent? One stands out: the problem of *legitimacy*. By legitimacy I mean the answer to the questions, What gives one party the right to recruit the power of a court to enforce a judgment against the other party? What gives a court the authority to intervene? In sum, how is contractual enforcement to be justified? By "justified," I mean something like *morally* as opposed to legally justified. By "morally," I mean that such enforcement is proper or *just*; it is what *ought* to occur. In his contribution to this symposium, Steven Burton offers the following moral criticism of efficiency theories:

To be legitimate, a default principle should require the parties to do that which they have a genuine political obligation to do. But individuals have no general obligation to do the efficient thing, and it is mysterious why parties to result-indeterminate contracts might have such obligations when people generally do not. Even if efficiency justified enforcing deals the parties never made, the justification for enforcing a deal made by the parties is not a justification for enforcing a deal they did not make.⁵

Lawyer-philosophers believe that this is a genuine problem that needs to be addressed. Lawyer-economists generally do not share this concern—at least not in their scholarship. Or, if they do care, they assume without much, if any, argument that some version of an efficiency approach is a satisfactory answer to this problem.

Nothing of what I have said so far applies to the purely positive or descriptive and explanatory uses of economics. Such uses of economic theory address distinctly non-normative questions (though the answers to these questions may affect significantly more normative inquiries). My gross generalizations about economists are intended to apply to circumstances in which economists are making explicit normative claims⁶ (which are rare) or are implicitly making normative claims (which I think happens all the time). In either of these circumstances this friction between the philosopher and economist lawyers is likely to develop.

5. Burton, *supra* note 1, at 138-39.

6. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 91 (1989) ("This Article provides a theory of how courts and legislatures *should* set default rules.") (emphasis added).

What the many philosophically inclined lawyers who are otherwise sympathetic to economic analysis are really asking of the economists is not that they present completely satisfying answers to the problem of legitimacy—something that no one has presented to date—but that they come out of the closet and grapple with lawyer-philosophers in trying to articulate a justification of the implicit normative claims economists are often making. What rankles is the superior posture assumed by some economists who remain silent on the question of legitimacy, while belittling those who are pursuing a more philosophical agenda.

Ten or fifteen years ago there was a round of debates in the literature about this issue. Richard Posner was very active in it as was Ronald Dworkin.⁷ That debate exhausted itself, just as the current default rules debate will eventually exhaust itself. Scholars of all stripes said what they then had to say about the normative implications of law and economics and then withdrew from the field. Nonetheless, I do think the outcome of that debate was that the ball was left in the economists' court. The way I read the literature, the critics of the legitimacy of economic analysis had the better of the day; and that is where the situation was left in stasis. Having survived is not the same thing as having prevailed, and it would not hurt economists to revisit the normative questions once in a while.

In his remarks at the symposium, Alan Schwartz posited the situation facing a future Russian legislature trying to decide whether to adopt some version of the Uniform Commercial Code. He asked what more we could tell such a legislature beyond the fact that a particular commercial code was more or less efficient. My answer is that, while an efficiency analysis might be relevant to such a legislative decision, it is hardly sufficient. For legislatures enact statutes that not only identify punishable behavior, but also purport to create a duty of obedience in the citizenry. Rightly or wrongly, most people believe that they have a duty to obey a properly enacted statute. For this belief to be warranted, statutes must have whatever quality or qualities engender such a duty. Perhaps efficiency is that quality, but I for one would disagree.

7. See, e.g., Ronald M. Dworkin, *Is Wealth a Value?* 9 J. LEGAL STUD. 191 (1980); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980); Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243 (1980); Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980); see also Jules L. Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980).

If I were a resident of the Poletown neighborhood of Detroit, and the city authorities came to me and said that I and all my neighbors must vacate our homes and shops so that a GM Cadillac assembly plant can be built on our land, would I have a moral duty to obey this order? That is, would I be justified if I exercise self-defense when the bulldozers come to raze my house, or would I have a duty adhere to the dictate? One possible answer to this question is that a duty of obedience exists if this edict was properly or "legally" enacted. But, to be frank, this answer without much more tells me little about *why* I might have a duty to obey a legally valid command. History is replete with examples of properly enacted yet unjust orders that we all agree carried with them no duty of obedience. Perhaps this edict is one of them (it surely feels like one of them to me). And this decree carries very little more weight with me even if I am persuaded by an economist that it is efficient that I and my neighbors abandon our lives and our common bonds and disperse to the four corners of the United States so that a new GM plant can be built.

So this, I think, is the burden that is being placed on the economists by the philosophers. Not every critic of law-and-economics contends that its methods are completely irrelevant to the normative problem of distinguishing binding from nonbinding obligations. I for one have written about the potential relevance of economic analysis.⁸ But neither do I think that economic analysis alone can answer the normative question. Nor do I think that most economists have attempted to tell us exactly (or even approximately) how their approach is relevant to the normative question of whether the people of Poletown have a moral obligation to accept the compensation that is being offered and to abandon their homes and community so that a GM plant can be built. Indeed, the fact that most economists are so indifferent to the theories that *have* attempted to come to grips with this question suggests to me that they are indifferent to the question itself—at least as theorists.

To be fair, some economists might concede that a major difference between contract law and my Poletown example is that, unlike the law of eminent domain, most of the rules of contract law are default rules that can be contracted around by the parties. The morality of enforcing rules of contractual transfer that apply by default is

8. See Randy E. Barnett, *Foreword: Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses*, 12 HARV. J.L. & PUB. POL'Y 611 (1989).

somehow distinguishable from an immutable law that empowers government to condemn people's houses.

In my view, however, any such response implicitly invokes the concept of consent to legitimate this type of legal enforcement. What makes default rules different from the immutable law of eminent domain is the freedom of contract that parties can exercise to deflect the operation of contract law, in contrast to the residents of Poletown who must get out of the bulldozer's way. And in some circumstances, when parties fail to exercise their power to alter the law of contract for their transaction, their silence has a normative consequence as well.⁹

So when economists point to the difference between default rules and the sort of immutable rules that eminent domain represents, they are pointing to consent. Yet when I have laid the consent thesis on the doorstep of economists, it has been somewhat of an unwelcome baby. This indifference is exemplified by Richard Craswell's highly critical treatment of my approach in his *Michigan Law Review* article.¹⁰ Although Professor Craswell is willing to be nice to me in social gatherings, and in his article he tries—and you can see he is striving mightily—to be polite about what I've written, it is patent that he just does not think my thesis matters very much. He demands to know what difference a consent approach makes in the normal run of contract disputes. I think this is because he does not consider the legitimacy question to be either very important or very interesting.

When another economist such as Alan Schwartz formulates his question about the Russian parliament in a conference on contract law, there is implicit in his analogy the notion that the commercial code under consideration is going to be a set of default rather than immutable rules, and that is what makes these rules somehow distinguishable from the edict in the Poletown case. In my writings, I am trying to put my finger on the "somehow"—at least with regard to the issue of legitimacy. From the legitimacy standpoint, what is the difference between those two regimes? I think this is a question both worth asking and worth answering.

9. See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992).

10. See Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 523-28 (1989).

None of this is to deny that—the legitimacy question to one side—positive efficiency analysis may not have something quite interesting and valuable to say about default rules that are discovered and normatively justified by some other means. To use Dennis Patterson's terminology,¹¹ efficiency theory may tell us something descriptive *about* contract law. But although it may tell us something descriptive about the consequences of the default rules that are chosen by legislators or judges and although these consequences may well have important normative implications, efficiency theory alone cannot tell us how legislators or judges ought to determine the content of default rules or whether the default rules so determined are normatively justified.

Moreover, economic analysis may provide us with consequentialist reasons why consent is a prerequisite of contract that, taken together with other reasons, provide a normative justification for requiring such contractual consent.¹² But a consent to be legally bound is what gets contract off the ground such that filling gaps in consent becomes an issue. Or, to put the matter as I have elsewhere, we are only concerned with the concept of default rules at all because we are or ought to be committed to honoring the consensual obligations of the parties to a transfer of entitlements, and the consensual origin of this obligation also figures in the way we fill gaps in parties' consent.¹³ More than passing reference must be made to contractual consent if an efficiency account of default rules is to have normative implications.

All this is missed by the sort of efficiency analysis that purports to tell us—by recourse to efficiency analysis alone—which default rules courts should adopt. With rare exception,¹⁴ efficiency theorists continue to talk solely to each other and, consequently, nonefficiency theorists are unmoved by much of their labor.

11. See Dennis Patterson, *The Pseudo-Debate Over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 235, 239-40 (1993).

12. See, e.g., Craswell, *supra* note 1.

13. See Barnett, *supra* note 9, at 826-27.

[T]he concept of default rules reveals consent to be operating at two distinct levels of contract theory. First, the presence of consent to be legally bound is essential to justify the legal enforcement of any default rules. Second, nested within this overall consent to be legally bound, consent also operates to justify the selection of particular default rules.

Id.

14. See, e.g., Craswell, *supra* note 10 (criticizing promise, consent, and misrepresentation theories of contract).

II. RELATIONAL THEORY AND CONTRACTUAL CONSENT

Jay Feinman contends that the current discourse over default rules "just leaves [him] cold."¹⁵ I cannot say that I blame him. For, as I have tried to show,¹⁶ the concept and rhetoric of default rules undermines the now-hoary rhetoric of the legal realist critiques of consensual obligation that underlies those versions of relationalism that are intended to serve a leftist or communitarian, as opposed to a liberal, political agenda.

Realists pointed to the gaps in contractual assent and gleefully observed that policy must be operating where the parties are silent. And since contractual silence is pervasive, the realm of state-imposed policy-driven default rules covers most of the contract law terrain, overwhelming in importance any consent-based obligation. Of course, in the hands of some neorealists and all Critical Legal Studies (CLS) and communitarian relationalists, this realist critique is used not merely to put contractual consent in its proper place, but to delegitimize it altogether. And in the academic world this argumentative ploy worked all too well.

Owing largely to the insights of law-and-economics scholars in the corporate law arena and imported into contract theory by other legal economists, the concept of default rules has helped to stem this seemingly irresistible tide.¹⁷ It turns out that, just as silence is pervasive when parties are contracting, default rules are pervasive in filling this void. And since default rules can be displaced by the manifested assent of the parties, consent is always lurking in the background, just as an operating system such as MS-DOS is always in the background of the computer applications software we currently use. This is true notwithstanding the fact that the only time most of us are aware of DOS is when we boot up our computer. In other words, contractual consent is (at a minimum) the shell program that must be run before our gap-filling program can work. It can no more be dispensed with than can the operating system of our computers. In contract law, a manifested consent to be legally bound is what justifies a court in enforcing default rules on parties who made incomplete commitments to each other, however those default rules are chosen.

15. Feinman, *supra* note 4, at 44.

16. See Barnett, *supra* note 9, at 822-28.

17. I give full credit to economists for seeing what was before our very eyes but had been missed. I fault them for failing to appreciate fully the implications of what they saw.

This insight alone would make the concept of default rules a powerful antidote to communitarian relational theory. But there is more. Once we realize that contractual consent is what gets contracts up and running, and that it always is in the background of parties' silence, we can see that contractual consent can play a further role in telling us how the gaps in consent should be filled. For even when parties are silent, they are making a near limitless number of tacit assumptions about the world they inhabit. In sum, nested within an overall consent to be legally bound that justifies the enforcement of default rules, is another consent based on tacit assumptions that unavoidably colors the meaning of what parties make explicit and provides the sound of silence.¹⁸

Although these tacit assumptions are not conscious, they are nonetheless quite real and they account for much, though not all, of the parties' silence. Therefore, if the default rules of contract are to reflect the agreement actually made by the parties, we must make an effort to conform to these pervasive tacit understandings. But how? It is really not so hard as it would at first appear. For most of what *anyone* takes for granted, *everyone* takes for granted. When it comes to tacit assumptions, people, at least people in the same community of discourse, are more alike than different. Consequently, sometimes these tacit understandings can be discerned by examining the course of dealings between the parties; at other times they can be found by examining the custom and usage in the trade. These are the normal interpretive techniques by which silence has traditionally been interpreted. And when these sources of conventional common sense are unavailing, the more formal rationality analysis provided by economists and the moral analysis provided by philosophers can discern what presumably rational and fair persons would have desired, thus

18. The first contracts scholar to acknowledge explicitly the importance of tacit assumptions to contract theory and doctrine was Lon Fuller. See LON L. FULLER, BASIC CONTRACT LAW 666-70 (1947).

Words like "intention," "assumption," "expectation" and "understanding" all seem to imply a *conscious* state involving an awareness of alternatives and a deliberate choice among them. It is, however, plain that there is a psychological state which can be described as a "tacit assumption" that does not involve a consciousness of alternatives. The absent-minded professor stepping from his office into the hall as he reads a book "assumes" that the floor of the hall will be there to receive him. His conduct is conditioned and directed by this assumption, even though the possibility that the floor has been removed does not "occur" to him, that is, is not present in his conscious mental processes.

Id. at 666.

providing evidence of what rational and fair parties did in fact tacitly assume in a particular case.¹⁹

Nonetheless, I concede that tacit assumptions do not entirely fill the silent void of contractual incompleteness.²⁰ Still, if this was all that consent theory had to say about contract, we see a very different picture than the one painted by neorealist communitarian relational theory. In place of small islands of consented-to terms amid a sea of state-imposed policy-driven obligations, we see islands of imposed-by-law terms in a sea of consent-based obligation. Little wonder that CLS-relationalist Jay Feinman does not "feel that most of the members of the default rules group are [his] soul mates."²¹

But I have argued that the role of consent is not limited even by the vast domain of shared tacit assumptions. Consent may still justify the use of conventionalist default rules where no such assumptions exist. When parties have no *shared* tacit understandings, one-time contracting parties may tacitly be making a conventional assumption, while the other party—often a repeat player guided by legal counsel—is not. By adopting a conventionalist default rule, we can be more assured that agreements will reflect the actual assent of the parties by inducing such repeat players to reveal their unconventional assumptions to less sophisticated parties. In this way, the legally unsophisticated are put on notice of the intentions of the other side and may then either consent, bargain, or walk away. No matter what the relative bargaining power of the parties may be, bargaining behavior will not occur if one party's unconventional intentions are unknown to another party who is making more conventional assumptions.

By this route, the role of contractual consent is enhanced by the use of conventionalist default rules that bring the parties' actual or subjective assent closer to the meaning that they objectively manifest to each other.²² Moreover, although the legitimating character of consent may run out at some point, it can be revived in a legal order comprised of freely competing legal systems.²³ As Lisa Bernstein has

19. See Barnett, *supra* note 9, at 906-11.

20. But see Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1, 51 (1991) ("The contractual allocation of potential frustration losses is not only theoretically possible, it is effectively being made all the time.").

21. Feinman, *supra* note 4, at 44.

22. See Barnett, *supra* note 9, at 885-92.

23. *Id.* ("If meaningful competition among legal systems existed, . . . a general consent to be legally bound . . . might be construed as including a genuine consent even to those immutable rules that one cannot contract around.").

noticed,²⁴ alternative dispute resolution mechanisms are a step in this direction.

Jay Feinman ignores all this, preferring instead to caricature the approach as "posit[ing] that contracting actors are calculating, self-interested social isolates who engage in transactions the scope and content of which are well-defined by the parties."²⁵ While Feinman provides no evidence for this assertion, I cannot insist that no default rule theorist has ever made such an assumption. I can, however, deny that I have. My account of default rules recognizes that when parties *are* rational, self-interested, and well-informed about the legal background rules, we may infer their consent to *any* default rule that a legal system may adopt. We adopt *conventionalist* default rules, however, precisely to cover those great many persons who do not fit this description.²⁶ In other words, if Feinman's characterization of my approach to default rules were correct, my endorsement of conventionalist default rules would not only be insupportable, but also inexplicable. To the contrary, such default rules are needed precisely because individuals in a community of discourse are deeply embedded in a complex social matrix with others from whom they absorb and with whom they share a vast repository of tacit assumptions about their world—assumptions that they could not make completely explicit if they tried. Therefore, default rules of contract should reflect wherever possible these social understandings.

Echoing Ian Macneil, Feinman asserts that "looking at default rules as a validation of consent is incoherent unless one waters down consent to such an extent that it is unrecognizable."²⁷ Elsewhere I have challenged Ian Macneil's double vision of contractual consent.²⁸ On the one hand, when Macneil criticizes classical and neoclassical contract theory, "consent" means conscious, deliberate consent or else it is fictitious.²⁹ On the other hand, when developing his own theory,

24. See Bernstein, *supra* note 1.

25. Feinman, *supra* note 4, at 51.

26. See, e.g., Barnett, *supra* note 9, at 895 ("[I]f only one party can be counted on to know the law, the law should adopt a conventionalist default rule reflecting the common sense understanding of the community to which the rationally ignorant party belongs.").

27. Feinman, *supra* note 4, at 54. Compare this with IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* 49 (1980) (classical contract stretched the term consent "through an imaginative array of fictions. In that approach the norm of effectuation of consent was carried on to a fare-thee-well.").

28. See Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 VA. L. REV. 1175 (1992).

29. See *id.* at 1182-84.

Macneil repeatedly uses a more realistic conception of consent that is quite compatible with the one I have employed in my writings.³⁰ I shall not rehearse this evidence here, but it was gleaned from an examination of every one of Ian Macneil's published writings on relational theory. Were Feinman to permit me to use just the same notions of consent that Macneil himself uses (however inconsistently with his other more communitarian arguments with which I disagree), my analysis of default rules would work quite nicely. Instead, with a simple wave of his hand, Feinman dismisses in this single unsupported sentence the multifaceted analysis of consent that I presented in my writings and which, I have argued, is compatible with Macneil's own. Perhaps this is an example of neorealist whistling past the graveyard.

III. CONSENT AND THE AUTHORITY OF CONTRACT

Because I find myself in general agreement with Steven Burton's insightful contribution to the default rules literature, responding to his criticisms of my treatment of default rules is particularly difficult. He thinks he is disagreeing with me, and who am I to say otherwise. Nonetheless, I will try to demonstrate how, with one possible exception, we are really defending the same turf whether he likes it or not.

Burton starts with the proposition that I defended at length and which I have already mentioned in my comment on Jay Feinman's paper: "The problem of default principles arises only after an important political judgment has already been made—that individuals should enjoy freedom of contract in some domain of social life."³¹ He and I agree that "[c]ontract law, like all law, should have legitimacy; it should enforce only the genuine political obligations of the people subjected to official coercion. The law legitimately enforces agreements because parties have obligations to adhere to their agreements (*pacta sunt servanda*)."³² Further he acknowledges his agreement with me that "where both parties are rationally informed and thus might contract around any default rules, their silence often enough will represent consent to the default rules supported by the conventions of their community."³³ He agrees as well that

30. See *id.* at 1184-90.

31. Burton, *supra* note 1, at 117.

32. *Id.*

33. *Id.* at 154. Note that my claim is stronger here. Under these conditions, silence can be taken to be consent to any default rule, even unconventional ones.

when neither party is rationally informed and can be counted on to contract around a default rule, both nonetheless may share tacit assumptions on the point. The law should use default rules that track those shared tacit assumptions which are likely to track the conventions of the relevant community. In both cases, the parties agree implicitly to do the conventional thing, which is also likely to be the most salient solution to their coordination problem.³⁴

Nevertheless, Burton denies that the full gamut of default rules can be justified on the basis of consent. He argues that “[t]o support the contract’s legitimate authority, consent must be voluntary, knowing, and deliberate. Even tacit assumptions thus may not rest on consent.”³⁵ Although I am unsure how much we disagree about this matter, I do not think that the moral implications of consent are as limited as Burton suggests. Burton appears to adopt here a highly subjective account of consent that requires actual consciousness and deliberation. Yet elsewhere in his wonderful discussion of “The Case of the Homunculean Explorers,”³⁶ he insightfully challenges the rigid dichotomy between objective and subjective assent that is exploited by critics of liberal contract theory such as Peter Linzer and Ian Macneil. According to Burton and his colleague Eric Andersen, “two persons cannot contract unless they participate in a social practice of contracting. . . . The intention of the act of promising is the world represented by the terms of the promise, interpreted in accordance with the conventions of the relevant language community”³⁷

The relevant conception of consent that justifies the enforcement of commitments is a *communicated* consent, that is, voluntary acts that express an intention to be legally bound. This act of communicating consent can justify the enforcement of *any* default rule when parties are rationally informed, and can justify the enforcement of *conventionalist* default rules under many circumstances where they are not. This is so because communicating consent to be legally bound means that one also implicitly communicates acceptance of the jurisdiction of some court that may be called upon to interpret one’s agreement. For communicated consent to create the moral obligation to adhere to the

34. *Id.* (footnote omitted).

35. *Id.* (footnote omitted).

36. Steven J. Burton, *Comments on Professor Linzer’s Paper*, 1988 ANN. SURV. AM. L. 199, 201-02.

37. Steven J. Burton & Eric G. Andersen, *The World of a Contract*, 75 IOWA L. REV. 861, 864 (1990).

expressed and implicit terms of one's agreement does not require as stringent a conception of consent as Burton appears to think.³⁸

I do not think, however, that this consent to jurisdiction is without limits. Just as I argued that one can be said to consent to *any* default rule *only* "when the transaction costs of discovering and contracting around the default rules are sufficiently low,"³⁹ the same is true of the other (default) rules governing a legal system.⁴⁰ When these conditions are not met, I argued that default rules should reflect the conventional understanding of the community of discourse of which both parties are members. Similarly, when one has consented to a legal jurisdiction, one consents only to the imposition of a "fair" and just legal process, in much the same way as one implicitly (and conceptually) consents to perform in good faith whenever one enters into a contract. Nonetheless, in the realm of contract (as opposed to tort or restitution), this consent to jurisdiction conveys or legitimizes jurisdiction. In sum, consent to jurisdiction is not a consent to all the rules entailed by the legal relations to which consent was given, whatever they may be, except under special circumstances. In the absence of these circumstances, when a party consents to jurisdiction, the rules followed by a legal system must *also* be both fair and just if they are to be morally binding on a party to a contract.

In making this argument I do not think I am contending for anything that Burton is not himself defending. To the contrary, I take Burton's own theory of default rules, based on "the fairness of doing one's part to maintain a cooperative scheme from which one derives benefits,"⁴¹ to be an argument along the same lines. For here, as in his path-breaking work on the obligation of good faith performance, Burton is going beyond the merely conventional meaning of a particular contractual act and elaborating on its conceptual meaning. That is,

38. Cf. Merton L. Ferson, *The Formation of Simple Contracts*, 9 CORNELL L.Q. 402, 407 (1924).

The fact [sic] that juristic acts do at times belie the subjective state of the actor, that such acts are sometimes ambiguous, that courts sometimes for practical reasons generalize by assimilating acts of a given kind with seeming disregard of the particular actor's mind, do not disprove the rationale or principle that a man may, by an act symbolic of his consent, subtract from his legal position.

Id.

39. Barnett, *supra* note 9, at 866.

40. Consent to jurisdiction may also confer legitimacy on immutable rules in a legal order that permits a choice among competing legal systems. *See id.* at 905. For a sketch of the possible operation of such a system, see Randy E. Barnett, *Pursuing Justice in a Free Society: Part Two—Crime Prevention and the Legal Order*, CRIM. JUST. ETHICS, Winter/Spring 1986, at 30, 37-47.

41. Burton, *supra* note 1, at 156.

just as he argued that to consent to contract was conceptually to commit oneself to a duty of good faith performance, so too does a consent to contract conceptually commit a party to coordinate his or her actions with those of the other party, either by explicit agreement or by adherence to salient gap-fillers (whether these be default or immutable rules).

All I deny is that this is a "consent-independent justification" of default rules. Rather, throughout his explication of his fairness and coordination approach he repeatedly relies on consent, even when he avoids using this term. Let me give some examples: Burton says that "[b]y entering a contract, each party *signifies* that the benefits exceed the costs of cooperation to him or her. Though one party may later regret that judgment, it is fair to hold them to it if keeping contracts counts for anything. A contract is a *voluntary* cooperative scheme between two parties, neither of whom is thrusting benefits on the other."⁴² In my lexicon, "entering a contract . . . voluntar[ily]" means manifesting an intention to be legally bound, or consent. Therefore consent, as I use the term, gets Burton's fairness argument off the ground. In sum, his fairness argument is consent-based, as is his reply to Nozick's criticism of Rawls: "Acknowledging the force of Nozick's criticism, we might add that a contract involves each party's *assent* based on its judgment that the benefits of cooperation outweigh the costs to him or her."⁴³

Finally, consider Burton's summary of his argument: "The default obligation to coordinate is not a background political obligation like those based in economic efficiency or communitarian values. It arises from the *voluntary* acts of individuals in forming a contract."⁴⁴ Once again, "the voluntary acts of individuals in forming a contract" is what I mean by consent. Thus, when Burton concludes that "[b]y comparison with other proposed default principles, however, the coordination principle . . . rests on a sound ground of political obligation—fairness,"⁴⁵ he need only have added that the obligatory nature of the fairness principle in turn rests upon the parties' consent.

Consequently, I take the thrust of Burton's analysis to be harmonious with mine. I have long been attracted to the coordination norm

42. *Id.* at 159-60 (emphasis added).

43. *Id.* at 162 (emphasis added).

44. *Id.* (emphasis added) (footnote omitted).

45. *Id.* at 165.

and even the salience criteria, having been stimulated by the writings of Axelrod⁴⁶ and Sugden.⁴⁷ I cited both of these writers in my *Virginia Law Review* discussion of how freedom from contract can contribute to the evolution of a cooperative regime of reciprocity.⁴⁸ I had not, however, incorporated their insights into my analysis of the choice of default rules. Burton's argument points towards a way of expanding the analysis I have presented.

Where we part company, however, is over what it takes to "enter into a contract." In this article as well as his other writings, Burton appears to accept that the act of promising is enough to create a contractual obligation of the sort that is needed to justify legal enforcement. I have argued that more than a promise is required: we need to find a manifested intention to be legally bound, or a manifested intention to create legal relations. This is a principle that animates English law,⁴⁹ and one that has unfortunately been lost to us in large part due to the efforts of Samuel Williston.⁵⁰ If I am right, then perhaps the reason why Burton thinks he and I are disagreeing is that when he speaks of "the voluntary acts of individuals in forming a contract," he means something different than I do. But even if this is true, then he cannot criticize a consent theory for inadequately respecting the authority of contract merely because it rests on a more restrictive notion of contractual consent than his theory does. Whatever notion of consent one adopts—mere promise or promise plus intention to create legal relations—the rest of Burton's analysis follows and helps provides the justification of enforcement we both seek.

IV. IS THE DEBATE ABOUT DEFAULT RULES A FALSE ONE?

Dennis Patterson, in his contribution, questions the significance, not only of my approach to default rules, but of everyone else's as

46. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

47. See ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, CO-OPERATION AND WELFARE* (1986).

48. Barnett, *supra* note 9, at 851 n.68.

49. See M.P. FURMSTON, *CHESHIRE & FIFOOT'S LAW OF CONTRACT* 97 (10th ed. 1981) ("[I]n addition to the phenomena of agreement and the presence of consideration, a third contractual element is required—the intention of the parties to create legal relations.")

50. See RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981) ("Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract . . ."); 1 SAMUEL WILLISTON & WALTER H. JAEGER, *A TREATISE ON THE LAW OF CONTRACTS* § 21 (3d ed. 1957) ("The common law does not require any positive intention to create a legal obligation as an element of contract.").

well.⁵¹ He joins with his colleague Jay Feinman in rejecting the entire conceptual enterprise. Although I disagree with him, I found his paper very helpful in clarifying the precise nature of the claims that I and others are making.

Patterson's critique stems from a distinction he makes between a proposition *about* law and a proposition *of* law:

[A proposition *about* law] attributes some trait or property to the law. . . . To justify the assertion that a proposition about the law is true, one needs to show the truth of the proposition in ways appropriate to it. Thus, a proposition about the fairness of law will be shown to be true through the use of the tools of moral philosophy. Likewise, if the asserted proposition is an economic proposition, the truth of the proposition will be demonstrated in the language of economics.⁵²

He contrasts this with propositions *of* law, which "purport to state a legal truth. . . . To show the truth of the proposition, one needs to employ legal forms of argument; the use of those legal forms shows the truth of the proposition in question and justifies the assertion of its truth."⁵³ He contends that "[p]articipants in the default rules debate in contract are engaged in a pseudo-debate because they confuse justification of propositions about law with justifications of propositions of law."⁵⁴

Patterson's distinction is plausible and attractive. Indeed, it is plausible precisely because it is so widely accepted. When I advanced my arguments about a consent theory, I did not think that I was employing characteristically legal arguments; I did not think that I was using paradigmatic legal forms. Nor do I think that any economist or communitarian relational theorist is confused about this. But if it is implausible to suppose that thoughtful legal theorists are fundamentally confused about the nature of the justifications they offer, then what remains of Patterson's critique? If Patterson's critique is important, it is not because others are confused about what they are doing, but because they are mistaken.

I contend that what separates Patterson from most of those he criticizes is not that he grasps a distinction that they have missed, but that in his view legal decisions can only be "explained" or legitimized

51. See Patterson, *supra* note 11.

52. *Id.* at 239-40.

53. *Id.* at 240.

54. *Id.*

by arguments grounded in accepted legal forms—forms of reasoning that other theorists either reject or ignore. For example, I submit, without taking the time to prove it, that most legal economists have little or no *theoretical* regard for common-law reasoning. For most, the common law is a black box producing grist for the efficiency mill. The fact that common-law rules so often appear to be efficient remains a mystery and one that economists have long since given up trying to explain.⁵⁵ Because, as I suggested in Part I, legal economists have tended to remain silent about the philosophical status of their project, it is difficult to attribute to them a particular consciousness about their work. Nonetheless, implicit in their discourse (whether they think so or not) is the claim that common-law rules have no value unless supported by an efficiency analysis.

In the default rules literature, as Patterson has noted, economists often claim to be providing “a theory of *how* courts and legislatures should set default rules.”⁵⁶ That is, they imply that courts should use an efficiency analysis—perhaps exclusively—to reach their results, or at least in their effort to decide upon the legal rules they will follow. Yet it is undeniable that very few decisions have ever been made in this way. I and, I suspect, many others would be quite uncomfortable letting judges even make the attempt. I have far more confidence in judges using what Patterson calls the legal forms than I would having them constantly engage in explicit economic analysis.

Patterson’s characterization of communitarian relational theory is equally astute. What makes this approach so threatening to many is not its ideological agenda—a great many academics adopt much the same political stance. What is disturbing is the willingness to discard the legal way of thinking. The relational approach described by Feinman, based on some unspecified mix of “norms, insights, arguments, and rules of thumb,”⁵⁷ seems just too open-ended and uncertain to be safe.

To this point I have endorsed Patterson’s critique of others. What do I have to say for myself? I plead not guilty. An entitlements approach—of which a consent theory is a part—shares much in common with the other theories that Patterson criticizes. It is indeed a

55. For a good example of these efforts, see Symposium, *Change in the Common Law: Legal and Economic Perspectives*, 9 J. LEGAL STUD. 189 (1980).

56. Patterson, *supra* note 11, at 256 (quoting Ayres & Gertner, *supra* note 6, at 91) (emphasis added).

57. Feinman, *supra* note 4, at 54.

theory *about* and not *of* law—at least in part. And yet it is neither incompatible with the legal reasoning processes in which judges and lawyers engage nor irrelevant to it.

According to an entitlements approach, the relevant moral issue when evaluating legal decisions is the force that these decisions bring to bear on persons. It asks whether the decision to use force is morally justified or unjustified. It evaluates the outcomes of a legal system and passes judgment upon them. To this point, Patterson's critique of an entitlements approach is correct. It is a theory *about* law. However, in evaluating the decisions that judges and legislatures reach, an entitlements approach need not, and mine does not, suggest *how* judges or legislatures should routinely go about reaching their decisions. And I have gone to some lengths to defend the legitimacy of the legal processes that formulate and apply the law.⁵⁸ What is the nature of this defense?

Briefly, a commitment to an entitlements approach is only a part of a liberal political theory. Another commitment of liberalism is to the rule of law. Whereas an entitlements approach attempts to define the boundaries of justice within which persons are free to do as they please, the rule of law is needed to communicate knowledge of these boundaries to others. But this is only a part of its function. Theoretical understandings of justice are necessarily abstract and impossible to apply to any but the most obvious of cases. The problems thrown up by the world are far too complex to yield to armchair theory. A complex and evolutionary system of conventional rules, principles, and procedures is also needed, in Aquinas's words, to *determine* what justice in a particular case may be.⁵⁹ And these systems of conventions may vary widely among societies of different times, places, and cultures.

58. See Randy E. Barnett, *Foreword: Can Justice and the Rule of Law Be Reconciled?*, 11 HARV. J.L. & PUB. POL'Y 597 (1988); Barnett, *supra* note 8, at 620-23.

59. See 2 Thomas Aquinas, *Summa Theologica*, in 20 GREAT BOOKS OF THE WESTERN WORLD 228 (Fathers of the English Dominican Province & Daniel J. Sullivan trans., 1952).

Some things are . . . derived from the common principles of the natural law by way of conclusions; for instance, that one must not kill may be derived as a conclusion from the principle that one should do harm to no man. But some are derived from these principles by way of determination; for instance, the law of nature has it that the evildoer should be punished, but that he be punished in this or that way is a determination of the law of nature.

Accordingly, both modes of derivation are found in the human law. But those things which are derived in the first way are contained in human law not as emanating from it exclusively, but have some force from the natural law also. But those things which are derived in the second way have no other force than that of human law.

Id.

What then is the relationship between justice (as defined by entitlements theory) and the conventions discovered and promulgated by institutions conforming to the rule of law? Justice provides a vehicle, not for initial rule discovery, but for criticism and rational correction of doctrines that have been discovered by other means. If the processes adopted by a legal system are sound, the law developed in such a system is highly likely to be consistent with the abstract requirements of justice. But even the best system of conventions can err or can paint itself into a doctrinal corner. Justice, that is to say entitlements theory, helps point the way to an improvement. In sum, the methodology of justice provides a much-needed check on the methodology of the rule of law. A convergence of these two "redundant" methodologies begets confidence in the results that are reached. A divergence should stimulate a search for error, reconciliation, or reform.⁶⁰

No society can do without either methodology, yet many adherents to economic analysis implicitly and communitarian relational theory explicitly propose to discard both justice and the rule of law in favor of an exclusive reliance on their favored methods of decision making. I suggest that this is why even those who share the ideological presuppositions of these schools of thought fail to embrace entirely either. This is not to say that economic analysis could not be defended in a similar manner as I am defending entitlements theory, but only to assert that it typically is not conceived of in this way.

Patterson's approach differs from mine, however, by its apparent willingness to evaluate the legitimacy of legal decisions entirely from the internal perspective of legal reasoning and without check or supplementation from the outside. In his article, he claims that "[a] contract is *not* a certain sort of promise. Rather, a contract is a promise 'for the breach of which the law provides a remedy.'"⁶¹ As a statement of the conventional account of contract currently prevailing in American law, this statement is probably correct. It is probably even a correct statement of a part of the current underlying theory of American contract law. But although an understanding of American contract law would include this statement, a *complete* understanding cannot be limited to this conventional account. For perhaps it is

60. See Randy E. Barnett, *The Virtues of Redundancy in Legal Thought*, 38 CLEV. ST. L. REV. 153 (1990).

61. Patterson, *supra* note 11, at 236 n.3 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981)).

wrong. By wrong, I mean that adherence to it will produce conventional rules and principles that yield unjust outcomes. If so, these outcomes will gnaw at the edges of convention and cause it to unravel.

A well-known example of this is promissory estoppel. When contractual obligation came to be conventionally conceptualized in terms of bargained-for consideration, it excluded from recovery some parties whose claims seemed somehow to be justified. Whether or not this intuition was correct, it continued to gnaw at the edges of contract law until promissory estoppel was invented as a label to attach to circumstances in which bargained-for consideration was inadequate. All of this occurred *within* the forms of legal argumentation that Patterson extols. But must our understanding of this doctrinal development stop here? Indeed, promissory estoppel is an unsettling doctrine precisely because it is so mysterious. It cries out for a more theoretical account that can influence its doctrinal direction. Many have tried.⁶²

My admittedly extra-legal theoretical account is that in the overwhelming number of cases where bargained-for consideration is absent but we nonetheless consider a promissory estoppel action to be appropriate, there has been a manifestation of intention to be legally bound.⁶³ Of the remaining cases, many involve some sort of promissory misrepresentations. In only a very small fraction of what are themselves extraordinary cases, our intuitions that recovery is warranted are probably wrong or at least await a better account of why such recoveries are justified. Thus, I conclude that the doctrine of consideration is useful, but limited, and that the doctrine of promissory estoppel should be reformed. Judges not only can accomplish this conventionally within the normal bounds of legal discourse, but in my view they *ought* to.

Moreover, the legal convention that Patterson recites was once just a theory. The definition of contract that he cites comes from the *Restatement (Second) of Contracts*, which inherited this conception of contract from the first *Restatement of Contracts*. Both are creatures of the American Law Institute (ALI), a private group that by means of its restatement projects helped shape the direction of legal decisions. Many participants in the ALI are law professors, as were the Official

62. Perhaps the most impressive recent effort is Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903 (1985).

63. See Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations,* 15 HOFSTRA L. REV. 443 (1987).

Reporters for both *Restatements*. Both Samuel Williston and Allan Farnsworth had theories of contract in mind when they performed their tasks. In particular, Williston was a strong proponent of the promise theory of contract and a strong opponent of the view that contracts required an intention to create legal relations. This was his theory and it wound up in the first *Restatement*.⁶⁴ What privileged Williston's theory is twofold. First, he was highly respected as an authority on contracts. Second, the ALI was also well respected. In this way, Williston's theory of contract became a part of the conventional law that Dennis Patterson now recites.

Legal theorists have long been part of what I have called the "electorate of law"⁶⁵—that group of legal thinkers who participate in the evolution of law. Indeed some legal systems *require* judges to pay serious attention to the theories of legal scholars.

The Swiss civil code testifies to the impact of legal theories on the legal process. The first section of the code provides that if the code fails to resolve a legal dispute, the judge should act as though he "were a legislator" in fashioning an appropriate rule. The second half of the provision curtails this grant of legislative freedom: the judge is required to follow "customary law" and "those theories that have stood the test of time". . . . Thus the Swiss judge assesses the leading scholarly theories and attempts to gauge their substantive merit.⁶⁶

64. See RESTATEMENT OF CONTRACTS § 20 (1932).

65. Randy E. Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273, 286 (1987).

66. See George P. Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970, 990 (1981) (citation omitted). This important role for legal scholars is also more apparent in legal systems that explicitly include matters of justice or "Right" in their prevailing conceptions of law.

[T]here is a significant difference between arguing about the content of the law (as Right) and arguing about what the law ought to be. First, judges are bound by the law—both in West Germany and in the United States. Yet, in neither country are they bound by scholarly claims of what the law ought to be. The West German Basic Law (Constitution) makes it clear that the "law" that binds the judges includes not only the enacted law but also principles of Right. Therefore, in asserting conceptions of the Right, German scholars engage in discourse about the criteria that in fact bind the courts. This does not mean that judges follow the opinions of scholars, as they follow legislative directives. Yet being bound by the Right means that if they concede that a particular position is Right, they are obligated to follow it. In contrast, in a legal system founded on positivism, judges would not be bound by the scholars' conception of good law or sound policy. The judges might well concede that the scholars' recommendations are morally right, but nonetheless could maintain that it is up to the legislatures to change the law.

Id. at 986.

My criticism of Allan Farnsworth's excellent treatise—a criticism that Patterson finds fault with⁶⁷—is that, in certain areas, he did not perform his complete duty as an authority on the law he sought to report. In certain substantive areas, he might also have participated in improving upon what he reported by resolving the tensions that existed when he wrote. Had he done so, his effort may well have fed back into the legal system and been adopted by courts.

In the final analysis, a consent theory of contract is a theory *about* law to be sure. But if it is a correct view of justice, and if our contract law happens as a contingent matter to be basically just, then a consent theory of contract is, in some sense, *of* the law of contracts as well—not because it is a form of conventional legal reasoning, but because it inheres implicitly in our practice of legal reasoning in contract law and in our shared commitment to justice. That this should be so should come as no surprise. After all, it is *explicitly* a part of the English contract law from which our notions descended. In this manner, a proper theory of justice in contract—if not a consent theory then some other—provides both an account of what we are doing in a conventional system of contract law that is basically just and a means by which we can see our way clear to improve upon it.

V. CONCLUSION

In the end, if contracts are inevitably incomplete and their silence must be filled by reference to the vast amount of tacit understandings that pervade human society, why should the explicit law of contract itself be any different? It is silent about a great deal. Legal theory fills the gaps in contract law. I maintain (though I could be wrong) that lurking beneath our law of contract is a tacit understanding that obligations should not, except in extraordinary situations, be imposed on persons without their consent. Thus, what we articulate conventionally as the doctrine of contract law can often be understood more fully as ways of conforming to or falling short of this tacit assumption. In my work, I have urged only that this tacit assumption be explicitly acknowledged and that its implications ought to be acted upon.

67. See Patterson, *supra* note 11, at 260 n.91 (criticizing Randy E. Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy*, 97 HARV. L. REV. 1223 (1984) (book review)).