TOURO LAW
Touro College Jacob D. Fuchsberg Law Center

Touro Law Review

Volume 16 | Number 4 Article 3

March 2016

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COMMON SENSE AND CONTRACT LAW: FEAR OF A NORMATIVE PLANET?

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I. *HILL V. GATEWAY* AND COMMON SENSE

The topic of this symposium, the role of "common sense" in contract law, was inspired by a rhetorical question posed by the Seventh Circuit in *Hill v. Gateway 2000*:[2] "Where's the sense in that?" The argument that contract law should follow "common sense" seems rather innocuous, but it often provides rhetorical cover for unspoken normative assumptions. This observation is not meant to imply that contract law should, or can, be free of normative baggage. Rather, I would simply suggest we pay more attention to the role that normative assumptions play in contract law.

Gateway was a class action suit customers brought against a personal computer seller. According to the court, the nominal plaintiffs, Rich and Enza Hill,[3] responded to a printed advertisement by ordering a home computer by telephone from Gateway 2000. When they received the computer, the shipping box also contained a form stating additional terms not discussed

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[1] Acting Professor, School of Law, University of California, Davis (King Hall). I would like to thank Deborah Post, former Chair of the AALS Section on Contracts, for choosing the topic of the symposium and allowing me to moderate the panel discussion. I owe a great debt to the panel participants, John Conley, Shubha Ghosh, Beverly Horsburgh, and Lenora Ledwon, as well as Deborah Post, for the fascinating discussions and email exchanges that helped develop the symposium presentation and contributed greatly to this Essay. Thanks to Ed Imwinkelreid and Deborah Post for their constructive comments on earlier drafts, and thanks to the UC Davis School of Law and Dean Rex Perschbacher for financial support of my attendance at the AALS 2000 Annual Meeting.

This Essay is dedicated to the memory of my father, Young Don Joo.

[2] 105 F.3d 1147 (7th Cir. 1996).

[3] Although the case was a class action, the court presents and analyzes the facts as if the Hills were the only plaintiffs. Aside from the caption, the court acknowledges that the case is a class action only in passing, when it states that the Hills filed the original suit claiming "treble damages under RICO for the Hills and a class of all other purchasers." *Gateway*, 1147 F.3d at 1148.

over the phone. These terms included a clause requiring disputes regarding the purchase to be submitted to arbitration. According to the form, buyers were bound by these terms unless they returned the computer within 30 days. The Hills stated that they noticed the form, but did not read it carefully enough to notice the arbitration clause.

The Hills did not return the computer. After more than 30 days had passed, they complained to Gateway about the computer's performance and alleged that its components did not match those advertised. When Gateway did not respond to their satisfaction, the Hills filed suit. Gateway sought, and ultimately obtained, enforcement of the arbitration clause. According to the Seventh Circuit,[4] the Hills became bound by the arbitration clause by failing to return the computer within 30 days.

The Seventh Circuit's *Gateway* opinion relies on the idea of "common sense" in at least two different ways. First, it suggests that the Hills lacked common sense if they failed to understand that their telephone conversation did not embody all the terms of their contract with Gateway. A standard, traditional application of contract law would characterize the phone call as the formation of a sales contract, and the shipment of the computer as performance of that contract. Under this view, when the phone conversation ended, it was too late for either party to unilaterally add or change the terms of the contract.[5] According to the court, however, "Although this is one way a contract could be formed, it is not the only way."[6] Following an earlier Seventh Circuit case, *ProCD v. Zeidenberg*,[7] the court argued that in a consumer purchase, the vendor is the offeror, who makes an offer by tendering the product. As "master of the offer," Gateway could impose any conditions of acceptance, including the accept-or-return condition.

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[4] The district court had refused to enforce the arbitration clause. *See id.* at 1148.

[5] Alternatively, the Hills offered to buy a computer and Gateway accepted by performance by mailing one. By invoking UCC § 2-207, the Hills' lawyer seems to have advocated this more complicated theory.

[6] 105 F.3d at 1148-49.

[7] 86 F.3d 1447 (7th Cir. 1996). Judge Easterbrook authored both *Gateway* and *ProCD*.

Of course, this theory would fail if a contract of sale had already been formed over the phone.[8] The court attempts to show that the Hills knew that the telephone conversation did not constitute a contract. Of course, it does not argue that the Hills were familiar with the *ProCD* rule. Nonetheless, according to the court, "the Hills *knew* before they ordered the computer that the carton would contain some important terms, and they did not seek to discover these in advance."[9] The court apparently does not mean that the Hills *actually* knew this, but rather that they *should have* inferred it from Gateway's advertisement. Why, according to the court, should the Hills have inferred this? Because, according to the court, "Gateway's ads state that their products come with *limited warranties and lifetime support*."[10] Apparently, however, the ads, like the telephone agent, did not

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[8] In its analysis of formation, the *Gateway* court refuses to apply UCC § 2-207. The court follows *ProCD*'s odd insistence that § 2-207 does not apply "when there is only one form," 105 F.3d at 1150, (citing *ProCD*, 86 F.3d at 1452). This interpretation has no basis in the language of § 2-207, which refers to communications that purport to accept an offer while varying its terms. The Official Comment to § 2-207 notes the exchange of purchase and acknowledgement forms as *one example* of a situation in which the section applies, but the statute is *not* limited to the exchange of forms. The statute makes no reference to "forms," and does not require even one form, much less multiple forms. *See* Klocek v. Gateway, Inc., 2000 U.S. Dist. LEXIS 9896 at 16-21 (D. Kan., June 15, 2000) (criticizing Hill v. Gateway and denying Gateway's motion to dismiss based on a similar arbitration clause); Thomas McCarthy et al., *Survey: Uniform Commercial Code*, 53 BUS. LAW. 1461, 1465-66 (1998). Prior cases, including at least one from the Seventh Circuit, have applied § 2-207 where only one "form" was involved. *See, e.g.*, C. Itoh & Co. v. Jordan Int'l Co., 552 F.2d 1228 (7th Cir. 1977); Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972).

The court's hostility to § 2-207 is not only unjustified, but also ironic. If indeed the Hills and Gateway did not form a contract on the phone, § 2-207 provides a straightforward argument for Gateway. Gateway could argue that the Hills offered to purchase a computer. By mailing the computer with additional terms, Gateway can be said to have tendered an acceptance that was "expressly conditional" on the Hills' assent to the additional terms — that is, it was in effect a counteroffer that included an arbitration provision. *Cf.* Klocek v. Gateway, *supra*, at 26-27. By keeping the computer, the Hills accepted this counteroffer.

[9] 105 F.3d at 1150.

[10] *Id.*

mention arbitration. The court seems to suggest that because Gateway's ads mention warranties and product support, the Hills should have surmised that their purchase could be subject to any number of other additional terms not mentioned in the ads or by the telephone agent. It was up to the Hills to ask the agent about undisclosed terms.[11]

Second, the court argues that the law must make "sense," by which it means something very specific: legal rules must maximize wealth. The Hills argued that *ProCD* should be restricted to contracts involving software, but the court scoffed, "where's the sense in that?"[12] According to the court, disclosing the terms over the phone would be costly to vendors and would bore and discourage customers, thus harming both classes.[13] The court implies that contract formation and terms are based on whether they make "sense" and not on whether they are actually assented to; and, further, that the Hills, as reasonable buyers, should have known this. There is no finding that the Hills actually knew that efficiency required the telephone clerks to omit important terms, that they knew that a judicial analysis of contract formation would rely on a principle of wealth maximization rather than on the Hills' own manifestations of assent, or that the Hills based their contracting choices on long-term wealth maximization rather than on short-term rent-seeking considerations.

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[11] The court cites *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991) as another example of a "commercial transaction in which people pay for products with terms to follow." *Gateway*, 103 F.3d at 1148. In *Carnival*, passengers purchased cruise ship tickets by mail and subsequently challenged a forum-selection clause printed on the ticket. The Court held that the clause was enforceable. *Carnival* differs significantly from *ProCD* and *Gateway*, however, in that the *Carnival* Court specifically stated, "we do not address the question whether respondents had sufficient notice of the forum clause before entering the contract for passage. Respondents essentially have conceded that they had notice . . . ." 499 U.S. at 590.

[12] 105 F.3d at 1149.

[13] *See id.* Ultimately, of course, *someone* must pay the cost of disclosure/nondisclosure. Although the court purports to reduce costs, the court's rule does not, and cannot, eliminate the cost of disclosure. Rather, it makes a distributive choice as to who shall bear that cost: Gateway or the Hills.

The *Gateway* court posits a model of "sensible" human behavior. The court evaluates the reasonableness of both the conduct and contractual expectations of the parties against this model. [14] Gateway's expectations accorded with common sense, while the Hills harbored deviant expectations; thus it is only natural that Gateway wins and the Hills lose. That is, according to the court, the law's presumptions about contractual expectations reflect not only the result favored by the law, but also the natural tendency of most people.

One problem with this approach is that judges' models of baseline human behavior are colored by their personal experience and ideological leanings. Doesn't everyone know that a vendor taking phone orders can't be bothered to disclose all the terms of sale? On the other hand, doesn't everyone know that when I agree to buy something over the phone, I agree only to the terms discussed in the phone call? Legal doctrine has no methods of its own for describing and modeling human behavior and expectations.

Hill v. Gateway, of course, follows the influential Seventh Circuit practice of importing the model of the "rational person" from neoclassical economics. The neoclassical law and economics approach assumes as a descriptive matter that the process of self-interested bargaining yields efficient outcomes.[15] Hence, it suggests that the efficiency of terms is itself evidence that most parties would have assented to them. One reason the

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[14] Professor Barnett is the most prominent academic proponent of the use of "common sense" in contract law. *See, e.g.*, Randy Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992) ("To the extent that judges are selected from the relevant community of discourse, they may discover the commonsense understanding of the parties--particularly the understanding of rationally ignorant parties--by introspection."); Randy Barnett, *...And Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 421, 430 (1993) ("For most of what anyone takes for granted, everyone takes for granted."). To his credit, rather than casually assuming that "common sense" should govern contractual interpretation, Professor Barnett makes clear that his concept of "common sense" is based on a normative concept — that contractual legitimacy must derive from consent.

[15] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 105 (5th ed. 1998).

Hills "knew" that additional terms would be in the box was that, according to the court, such was the more efficient practice. Thus it is unnecessary to examine assent directly. Because freedom of contract results in efficient terms, efficiency and assent are effectively collapsed into a single inquiry.

The rational behavior hypothesis is often criticized for being overly simplistic, and for lacking empirical basis. In this symposium, Professor Ledwon argues that in application, the description of the "rational person" suffers from a "failure of imagination" — that the describer tends to describe him or herself. Professor Ghosh claims that the rational behavior hypothesis suffers, rather, from an overabundance of imagination, in that it describes a world too unlike the one in which we actually live. The participants in this symposium suggest (among other things) that other nonlegal disciplines can assist the law in building more nuanced and empirically accurate models of human behavior.

II. THE NORMATIVE SIGNIFICANCE OF BEHAVIORAL DESCRIPTIONS

It is certainly a worthy, and necessary, project to expose the law's facile assumptions about human behavior. It is a standard legal argument to support a preferred result on the ground that it reflects normal human behavior and expectations: "The law should reflect X (*e.g.*, efficiency, reasonableness, compassion, usage of trade) because people naturally follow X." The descriptive part of the argument helps disguise the normative part of the argument.[16] But it is not enough to ask, or even, indeed, to answer, the empirical question of how people actually behave.[17] Regardless of who has the most descriptively accurate model of behavior, the question remains "Why should we care?"

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[16] Professor Leff painted a convincing picture of neoclassical law and economics doing exactly this in his review of Judge Posner's *Economic Analysis of Law*. *See* Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism,* 60 VA. L. REV. 451 (1974).

[17] Judge Posner, for example, has criticized behavioral economics as mere description without predictive capability. *See* Richard A. Posner, *Behavioral*

Because this symposium takes *Hill v. Gateway* as its starting point, I use the rational behavior model as an example. But this essay is not intended as an anti-rational choice screed. Rather, it is intended to draw attention to the parallel normative-positive structure, which is by no means unique to the neoclassical model. Judges have long invoked the standard of the "reasonable man [sic]," which purports to encompass both what we would do and what we should do. Any legal theory that seeks results consonant with human nature tends to engage in the same practice.[18]

Is a law favoring behavior X good because people naturally engage in X? This seems to assume that law's main goal is to serve individual liberty. In this vein, both critics and some defenders of the neoclassical law and economics approach have argued that it serves human freedom because it is grounded in individual consent.[19] The efficient legal rule serves the

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Economics and the Law, 50 STAN. L. REV. 1551, 1558-59 (1998). I do not mean to suggest that the symposium participants are solely concerned with modeling behavior. Professor Ghosh, in particular, specifically renounces that approach. Nor do I mean to suggest that modeling behavior is an unworthy exercise. Rather, the point is that normativity is a necessary bridge between describing behavior and law.

[18] So, as you read this essay, feel free to substitute the name of your least-favorite behavioral assumption for each instance of "rational behavior model."

My colleague Ed Imwinkelreid points out that Llewellyn employed a kind of normative-positive argument in his anaylsis of form contracts. Llewellyn wrote:

> Instead of thinking about 'assent' to boilerplate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has *in fact* been assented to, specifically, are the few dickered terms, and the broad type of the transaction, but one thing more. That one thing more is a blanket assent (not a specific assent) to any *not unreasonable or indecent* terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.

KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960) (emphasis added).

[19] *See, e.g.*, Richard Posner, *The Ethical and Political Basis for the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Leff, *Realism About Nominalism*, *supra* note 16.

libertarian goal because, by hypothesis, people naturally tend to reach efficient contracts in the absence of law.

Lawmaking based on a descriptive model of behavior seems less true to the libertarian ideal, however, if we look critically at the limits of a generalized description of human behavior. Such a model can, at best, predict with certainty what most people would do most of the time, but not what any particular individual would have done at any given time. The neoclassical law and economics approach, for example, is founded on the assumption that, as a general matter, people bargain to efficient results. It does not inquire into whether specific parties—the Hills and Gateway, for example — subjectively agreed to such an efficient result in a given instance.[20] Nor does it account for the possibility that in some

[20] The *Gateway* court's imputation of assent is similar in structure to Judge Posner's assertion that if I buy a lottery ticket and lose, I have consented to the loss. *See* Posner, *Ethical and Political Basis for the Efficiency Norm*, *supra* note 19. But I have not literally agreed to lose money. Indeed I may not have even agreed to run the *risk* of losing money, as I may have "wildly overestimated" my chances of winning. *See* Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980). Rather, the claim is that had I been a reasonably informed and logical person (whatever that means) I would have known what I was getting into; therefore I *should have* known what I was getting into; therefore, I should be treated *as if* I assented. This is simply an example of the classic "constructive" or "objective" theory of assent. For the classic critique of this approach, *see* Morris Cohen, *The Basis of Contract*, 4 HARV. L. REV. 553 (1933).

A relevant example of the objective theory is Professor Baird's argument that contractual silence (that is, a failure to object to contract terms) allows us to infer consent just as the dog that didn't bark allowed Sherlock Holmes to infer the identity of a "midnight visitor." *See* Douglas G. Baird, *Self- Interest and Cooperation in Long-Term Contracts*, 19 J. LEGAL STUD. 583, 593 (1990) (citing Arthur Conan Doyle, *Silver Blaze*, in ARTHUR CONAN DOYLE, THE MEMOIRS OF SHERLOCK HOLMES (1894)), quoted in Barnett, *The Sound of Silence*, *supra* note 14, at 821.

Because no one reported the watchdog barking, Holmes surmised that the visitor must have been someone familiar to the dog, and the dog must have "consented" to the visitor's presence.

His legendary deductive skills notwithstanding, Holmes leaped to his conclusion a bit rashly in this case. His conclusion depends on many unspoken assumptions that are difficult, if not impossible, to prove. If the dog

cases, the parties subjectively agreed to an inefficient result, or that, due to their idiosyncrasies or ignorance, they "would have agreed to" such a result.[21]

The Gateway opinion refers to the Hills by name, but the decision is really not about their individual assent; it about the hypothetical rational assent of a hypothetical rational plaintiff. Recall also a crucial fact that the opinion steadfastly ignores: the case was a *class action.* The large number of plaintiffs makes analysis of subjective assent all but impossible. Moreover, in a class action, even if *Rich and Enza Hill's* subjective assent were established, that assent would be woefully insufficient to decide the case on behalf of the entire *class.* Indeed, if subjective assent plays any significant role in contract information, it is worth asking whether there can even be such a thing as a class action in "contract" law. Yet the *Gateway* court bases its entire opinion on an analysis of the Hills' assent. How is this possible? Because although Rich and Enza Hill are very real people, "the Hills" of *Hill v. Gateway*, and their "subjective assent," are no more than metaphorical constructs.[22]

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consented to a stranger's passing, it violated its master's normative directives ("common sense"). That is, if the visitor was a stranger, the dog *should* have withheld consent and barked. But this does not prove that the dog *did* consent to the visitor's presence. Holmes had to assume, for example, that the dog was so "rational" (well-trained) that it was incapable of violating its master's will; that a stranger did not obtain the dog's "consent" by coercion (a muzzle) or fraud (a juicy steak or a disguise); that the dog had perfect information (e.g., that the dog was not dozing, heedless, or ignorant); and that Holmes himself had perfect information (e.g., that the witnesses were correct in stating that the dog did not bark, an unprovable negative).

A similar analysis applies to the argument that the *Gateway* plaintiffs assented to the arbitration clause by failing to object to it. Perhaps they *should have* registered an objection, and the law should allocate to them the cost of failing to do so. But this is a normative conclusion that differs from the descriptive statement that they *did* subjectively assent to the clause.

[21] For an exploration of "would have been inefficient" scenarios, *see* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87 (1989).

[22] It might be argued that even if "what most people would have done" is not necessarily what the parties would have done, it is at least what they *most likely* would have done. Since it is usually impossible to reliably judge subjective intent, this is the closest we can come to realizing the ideal of

The contracts casebook chestnut *Jacob & Youngs v. Kent*[23] provides a similar example of abstract, constructive "intent" that predates the modern rational behavior model. Justice Cardozo openly admitted that his decision was based on "[c]onsiderations partly of justice and partly of presumable intention" — and not at all on actual intention. Although the contract specified that the builder was to use pipes manufactured by the Reading Manufacturing Company, Cardozo found that this was not a condition of the contract. A *normal* person wouldn't condition payment for a house on such a criterion, or indeed place any monetary value on it. Consequently, the owner had to pay the full contract price despite the builder's use of the wrong pipe.

My point is not to advocate a purely subjective measure of assent. Of course, subjective assent is often beyond proof. But that suggests only that gap-filling based primarily on actual

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consensual obligation. However, *Hill v. Gateway* elides the distinction between actual subjective intent and a second-best approximation of it: the opinion completely collapses the question of actual subjective assent into the "objective" question of efficiency.

Judge Posner has suggested that efficiency-minded judges should take precisely the opposite approach: he has argued that if the court believes the parties' intended result is not the most efficient result, the court must be wrong. The court should stick with the parties' intent, which is surely the truly efficient bargain. *See* POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 15, at 105. This approach tacitly serves libertarian goals without ever questioning the primacy of efficiency, by positing that the efficient and libertarian results are always the same (of course this approach does not address the problem of how to *determine* the parties' intended result). Judge Posner has elsewhere presented the mirror image of this argument, maintaining that efficiency is an ethically superior basis for lawmaking, in part because it incorporates mutual consent. *See* Posner, *Ethical and Political Basis for the Efficiency Norm*, *supra* note 19.

[23] 230 N.Y. 239 (1921). The contract for construction of a home required the builder to use plumbing pipe manufactured by the Reading Manufacturing Company. After the house was complete, the owner discovered that the builder had breached the contract by using pipe that was substantively identical but manufactured by a different company. Curing the defect would require the costly step of tearing down the walls. The owner refused to pay the builder the outstanding balance on the contract. Cardozo held that the builder's failure to use the correct pipe did not entitle the owner to withhold the balance of the contract price — in fact, it did not entitle the owner to withhold any part of the balance.

individual consent is impossible to realize in practice;[24] it does not establish that an efficiency standard is equivalent to an "actual consent" standard.

So the use of "normal" human behavior (whether rational behavior or any other model) as a standard may promote libertarianism but it may also serve its nemesis, majoritarianism. According to the *Gateway* court, the Hills should have assented to the accept-or-return device because it is efficient; therefore they constructively did assent. Could they rebut the presumption of majoritarian expectations with proof that they genuinely entertained deviant expectations (i.e., unlike most folks, they do not make Kaldor-Hicks efficient bargains)? Apparently not; the court (like most courts) is uninterested in their subjective expectations. Enforcing a contract in accord with the expectations of *most* people rewards conformist expectations and punishes nonconformist expectations. As every good law-and-economist knows, a judicial decision that sets majority sentiment as the default rule today will put all tomorrow's deviants on notice that they should bargain around the default rule; thus future deviants who do not explicitly contract around the default rule can be presumed, like non-deviants, to have subjectively assented to it.[25] However, that theory, even if we accept it,

[24] Professor Barnett has maintained that contract law derives its legitimacy from the consensual nature of contract: the idea that, except in extreme cases, persons should only be held to obligations they have taken on voluntarily. *See* Randy Barnett, *...And Contractual Consent, supra* note 14. I agree that the consent is the central idea that gives contract law its legitimacy — this is why it is so important for the law to impute cŏnsent. But in hard cases, the law uses only the rhetoric of consent, invoking its power without meeting its requirements. Where consent is entirely imputed on the basis that the parties "should have" consented without evidence that the parties subjectively consented, the principle of voluntarism is being invoked in name only. The prevalence of such cases demonstrates the power of consent as a legitimating principle, but also shows how it is honored in the breach.

[25] Professor Barnett, who distinguishes himself from law-and-economists, endorses essentially the same approach. *See id.* at 431 ("Consent may still justify the use of conventionalist default rules where no [shared tacit] assumptions exist...one-time contracting parties may be making a conventional assumption, while the other party—often a repeat player guided by legal counsel—is not."). Note that Professor Barnett seems to favor a penalty default rule against sophisticated repeat players in order to give them incentive

focuses on the contractual freedom of *future* parties and not on that of the Hills and their class — who are, after all, the parties before the court. It sounds communitarian, rather than libertarian, to sacrifice today's litigants, deviant though they may be, to enhance the contractual liberty of future parties.[26]

Another possible explanation of the significance of a descriptive model of human behavior is that it is simply icing on the cake. That is, X is not good because everyone does it (or because most people do it). Rather, X is good because X is good; by the way, people do X anyway, but even if they don't, X is still good. This pattern is evident in the following example of religious natural law reasoning: "[M]ost people believe that promises should be kept and lying is wrong because those norms are revealed truths affirmed by the foundational religious texts of our culture."[27] Again we see the same two elements: people do X and X is good. But the relationship between them is reversed. X is not good because all (or most) people do it, as libertarianism (or majoritarianism) would have it. Rather, people do X because X is good. There is a bit of circularity here: people do X because it's good, and the fact that people do it is evidence that it is good. But it's only partly circular: the fact that people do X is ancillary evidence that X is good, but it is not itself the *reason* that X is good. It is good because the ultimate authority, namely God, has told us so.

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to reveal their "unconventional" assumptions in future transactions. *Cf.* Ayres and Gertner, *Filling Gaps, supra* note 21. The *Gateway* court, however, directs the penalty in the opposite direction, penalizing the consumer for harboring assumptions that conflict with the "sensible" assumptions of the sophisticated repeat player. This difference of course underscores the indeterminacy of the concept of common sense.

[26] Of course this criticism applies to the very idea of "objective" manifestations of contractual assent, and thus is not at all limited to the neoclassical law and economics approach.

[27] Stephen M. Bainbridge, *Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law*, 43 VILL. L. REV. 741, 752 (1998). This is consistent with Russell Kirk's description of Burke's view of natural law as "human custom conforming to divine intent." RUSSELL KIRK, THE CONSERVATIVE MIND FROM BURKE TO ELIOT 50 (7th ed. 1993) (quoted in Bainbridge, *supra,* at 751).

Natural law theorists are comfortable grounding their arguments on ultimate normative truths because of their unusual willingness to admit that they believe that ultimate normative truths a) exist, and b) have been "revealed" to humanity.[28] Secular legal theorists (and I count myself among them), however, are squeamish about saying, "People should do X because X is good."[29] In the absence of a superhuman normative arbiter, it is hard to speak of normative assumptions as anything more than fungible preferences.[30] Knowing this, we are usually too embarrassed to admit it when we make normative assumptions.[31] After all, the Realists have taught us well that the

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[28] While natural law theorists are refreshingly upfront about (a), they are a bit vague about how (b) works. Even those who agree that divine will has been revealed disagree mightily as to what those revelations are, so only the broadest moral truths can be said with any confidence to have been clearly revealed. Professor Bainbridge himself adheres to a school of natural law that invokes "practical reason" as well as revelation, *see* Bainbridge, *supra* note 27, at 754-55, which, I believe, takes us out of the natural law frying pan and back into the common sense fire.

[29] Some efficiency theorists in effect do this by articulating contract rules that enhance efficiency regardless of whether those rules reflect the parties' preferences. *See, e.g.*, Ayres & Gertner, *Filling Gaps, supra* note 21. But they often refuse to declare efficiency a normatively superior goal, leaving it to the judgment of lawmakers. *See id.* (stating that their framework may be attractive to "efficiency-minded lawmakers").

Other scholars openly encourage judges and other lawmakers to pursue normative goals in contract law. *See, e.g.*, David Charny, *Hypothetical Bargains: The Normative Structure of Contract Law*, 81 MICH. L. REV. 1815, 1878-79 (1991). Professor Charny suggests that contract law should be aimed at modifying the behavior of future transactors, not at simulating the parties' hypothetical behavior. If future transactors will be able to bargain around the court's interpretation, "the court should choose the interpretation that will induce parties to expend the least effort in bargaining around the court's interpretation." *Id.* at 1878. If future transactors will not bargain around the interpretation, however, the court should use its own judgment to choose the interpretation that will modify future behavior in a socially desirable way.

[30] *See, e.g.*, Leff, *supra* note 16 ("Normative preferences are just that; they don't get any more proved by being talked about").

[31] A notable exception is Judge Posner's defense of efficiency as an ethically superior ground for lawmaking. *See* Posner, *Ethical and Political Basis for the Efficiency Norm, supra* note 19. Professor Barnett has maintained in many of his works that the basis for contractual obligation should be (and is) consent. *See, e.g.*, Barnett, *The Sound of Silence, supra* note 14.

winners among such preferences, triumph not from logical or "legal" processes, but from sheer political power. This, I suppose, helps to explain why secularists find such comfort in evidence that our preferred normative schemes are consistent with human behavior. The state's imposition of norm X, though by its very nature an exercise of power, is a relatively harmless one when its net result is pretty much what people would have done on their own anyway.[32]

III. CONCLUSION

Again, my purpose in this essay is not simply to add to the fusillade of potshots aimed at the rational behavior model. Rather, I mean to point out that any purportedly descriptive model of human behavior—including those supported by empirical evidence and including any hypothetical perfectly accurate model—can mean nothing without normative principles to tell us why the model matters. Of course contract law will never uniformly adopt a single principle, or even a fixed priority among principles. But at the very least, academics and lawmakers should be as upfront as possible about their normative assumptions and not hide behind the "objectivity" of science.

In academic writing, we may discuss the consequences of normative precept X without having to take an express position on its relative merits: we can state that the law should seek result A *if* society values X.[33] We can add to the normative appeal of X, while still avoiding express normativity, by making the nominally descriptive assertion (preferably, but not necessarily, with some empirical support) that most people tend toward X. For the sake of intellectual honesty, we should avoid hiding in the agnostic closet. For judges, legislators, and other

[32] *Cf.* Bernard S. Black, *Is Corporate Law Trivial? An Economic and Political Analysis,* 84 NW. U. L. REV. 542, 544 (1990) (dismissing the significance of many rules of corporate law on the ground that explicit contracting would have yielded the same rules).

[33] Judge Posner very carefully does this in the early part of *Economic Analysis of Law.* Elsewhere, however, he has made a spirited defense of efficiency as the normatively superior goal of lawmaking. *See* Posner, *Ethical and Political Basis for the Efficiency Norm, supra* note 19.

lawmakers, it is even more important to step out into the sunshine. They may not make their support for result A conditional on societal normative preference; they must choose A (or B) and live with its normative implications.[34]

If the meaning of a contract can be derived from things that we all know and do, why do parties need courts at all? The parties should be able to figure things out on their own. Perhaps parties come to court only *after* they have exhausted the possibilities of their shared standards. They have given up on the possibility of a result that reflects their common understanding. Instead, they hope the court can provide some *other* standard of dispute resolution. Maybe a coin flip, as long as the flipper is impartial. Some of Professor Bernstein's work has pointed in this direction.[35] She argues against the incorporation of "course of dealing or usage of trade or course of performance" into UCC adjudication. Commercial transactors who end up in court have already tried trade practice, and it has failed. They do not want a court to reapply the same standards they themselves have found wanting. Rather, they want the law, as a legitimate and dispassionate outsider, to break the tie.

The outcome will presumably have some effect on people's future behavior. In addition, the normative assumptions communicated through the outcome can at some level affect people's values as well.[36] That is, the court does not merely reflect "common sense," but also creates it. This process would

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[34] Granted, result A may be justifiable on multiple alternative normative grounds, giving the judge some normative anonymity.

[35] *See* Lisa Bernstein, *Merchant Law in a Merchant Court*, 144 U. PA. L. REV. 1765 (1996). While Professor Ellickson presented evidence that members of a community prefer to resolve disputes by local custom, *see* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991), Professor Bernstein cites examples suggesting that where local custom fails, community members may be willing to submit to "outside" standards.

[36] Professor Danzig argued that the way a legal system answers fundamental questions about rights and redress "reflects the values of the people who control that system. Equally significantly, the constantly articulated, repeatedly implemented answers to those questions shape the values of all who are affected by that system." RICHARD DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES 1 (1978).

be more honest, and perhaps even more effective, if lawmakers were candid about their normative assumptions. If you're standing on a soapbox, why not speak out loud and clear?