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*Coleman on Gap-Filling and Default Rules*

ABSTRACT:

Critics of consent theorists of contract have argued that autonomy-based theories of contract law do not provide any guidance in understanding how courts do or should decide cases when an issue on which the parties have not explicitly agreed upon arises. In *Risks and Wrongs*, Jules Coleman takes the challenge of rescuing the consent theorist from this attack. He defends a rational bargaining approach to gap-filling and default rules in contract law. In this comment, I pose a challenge to Coleman's argument. Against his view, I suggest that, in order to solve many of the disputes between the parties to a contract regarding contingencies for which no explicit adequate provisions have been made ex ante in the parties' agreement, the consent theorist need not resort to the ex ante rational contract. Coleman's argument is based on the assumption that, whenever the parties do not explicitly agree on something, the relevant issue falls into a contractual gap. My claim is that not everything should be explicit in order for the parties to a contract to be able to understand what the terms of their agreement might be. My argument relies on – what I will call – a “public” conception of consent. In light of such an account of consent, the consent of the parties covers more than what the parties actually included or mentioned in their agreement. The paper concludes by suggesting that Coleman's argument is relevant in those cases where implied-in-fact understandings are vague and courts have no option but to stipulate terms into the contract.

KEYWORDS:

contract law, gaps, default rules, consent theory, autonomy based theory, public conception of consent

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1. *Coleman's Argument in a Nutshell* – 2. *The Public Nature of Consent* – 3. *The Objective Approach* – 4. *The Ex Ante Contract as Implied-in-Law Terms* – 5. *Conclusion*

Rational, autonomous individuals have their own purposes. In order to pursue their projects, sometimes individuals get together to agree to give what they own to others, or agree to perform a service for them, either in the form of a gift or in exchange for something that another person owns. No one forces us to enter into these agreements: contract law is a tool that we can voluntarily use in order to pursue our aims. This is why the *consent* of both parties is central to the existence of a contract. Consent theorists believe that the justification for imposing contractual rights and responsibilities is that, through the expression of their rational, autonomous will, the parties have imposed those obligations on themselves.

Now, as we know, although the parties to a contract are willing to cooperate with one another, sometimes they can fail to do so. For instance, they can agree that they have an agreement, but not necessarily what their agreement entails. Or, the parties to a

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contract may disagree on the meaning of a particular clause: the terms of a contract can be vague or indeterminate. So, for example, if a contract stipulates that certain goods are to be delivered by Friday at the purchaser's residence, it might not be clear whether those goods should be brought inside that residence and, even if the contract stipulates that they should, it might not be clear whether the vendor has a duty to take the goods to the room the goods are ultimately destined for<sup>1</sup>.

When the parties have a controversy with regards to an issue on which they have not explicitly agreed upon, economic analysts say that we are before a contractual gap. The existence of gaps leads to the idea that there should be both gap-filling rules – those that are used to complete contracts where the parties do not anticipate all the contingencies that may arise – and default rules – background rules within which the parties conclude their contract and that, depending on each legal system, may or may not be contracted around<sup>2</sup>. When we are before a contractual gap, the question then becomes: how are incomplete contracts to be interpreted? By what principle are incomplete contracts to be completed<sup>3</sup>?

Critics of consent theorists of contract have argued that autonomy-based theories of contract law do not provide any guidance in understanding how courts do or should decide

<sup>1</sup> I borrow this example from SMITH 2004, 277.

<sup>2</sup> SMITH 2004, 459, n. 2. Stephen Smith argues that calling these rules “default rules” is confusing. He claims that default rules, as default terms in computer software, are made by those who are “in charge” of the system. And he says that this is precisely what is at stake, that is, whether the so called default rules are in some way part of the agreement of the parties or imposed by judges and legislatures. See SMITH 2004, 277. In spite of Smith's concern, I still think that this way of addressing the problem is helpful.

<sup>3</sup> COLEMAN 2002.

cases when an issue on which the parties have not *explicitly* agreed upon arises. For instance, Richard Craswell has argued that this is serious a problem for autonomy theories of contract because, by definition, if the parties have not agreed on something, an external standard has to be used in order to supplement the “will” of the parties<sup>4</sup>.

In *Risks and Wrongs*, Jules Coleman takes the challenge of rescuing the consent theorist from this attack. Coleman defends a rational bargaining approach to gap-filling and default rules in contract law<sup>5</sup>. Coleman explains that «in default of explicit agreement, the consent theorist stands prepared to rely in normatively significant ways on the rationality of a bargain as a ground for imposing rights and responsibilities *ex post*». Coleman suggests that «the best argument available to the consent theorist is that the terms that are rational for the agents provide the best evidence of the terms to which they would have agreed»<sup>6</sup>. Coleman calls the rational default or gap-filling rule “the *ex ante* contract”.

In this comment, I want to pose a *challenge* to Coleman’s argument<sup>7</sup>. Against his view, I want to suggest that, in order to solve *many* of the disputes between the parties to a contract regarding contingencies for which no *explicit* adequate provisions have been made *ex ante* in the parties’ agreement, the consent theorist need not resort to the *ex ante* rational contract. Coleman’s argument is based on the assumption that, whenever the parties do not explicitly agree on something, the relevant issue falls into a contractual gap. My claim is that not

<sup>4</sup> CRASWELL 1989, 504 f. Craswell says that «[s]ome method must be found to interpret the parties’ agreement, to provide rules governing any topic not explicitly settled by the parties».

<sup>5</sup> COLEMAN 2002, ch. 8.

<sup>6</sup> COLEMAN 2002, 173.

<sup>7</sup> As well as to that of economic analysts of law.

everything should be explicit in order for the parties to a contract to be able to understand what the terms of their agreement might be. My argument relies on – what I will call – a “public” conception of consent. In light of such an account of consent, the consent of the parties covers more than what the parties actually included or mentioned in their agreement.

I will proceed in the following sequence. In Section 1, I introduce Coleman’s argument. Section 2 explains why the fact that the parties to an agreement have not explicitly dealt with a certain issue does not mean that their agreement is silent with regards to that issue. In Section 3, I explain how the reasonable person standard in contract law reflects the ideas from the previous section in the doctrine of contract formation and how that standard is used to determine the content of an agreement. I conclude by suggesting that Coleman’s argument is relevant in those cases where implied-in-fact understandings are vague and courts have no option but to stipulate terms into the contract.

### 1. *Coleman’s Argument in a Nutshell*

When disagreements between how a contract should go about a contingency that the parties did not explicitly considered in their agreement, and the parties are unable to solve the dispute privately, issues end up in litigation before the courts. Coleman asks: «What rights and responsibilities can a judge, legitimately exercising his or her authority, impose on them in default of explicit agreement?»<sup>8</sup>.

The first alternative is for the courts to impose their own views on how the parties should go about the contract, regardless of whether that implies imposing terms that the parties did not choose explicitly or would not have chosen *ex ante*:

<sup>8</sup> COLEMAN 2002, 165.

«We can imagine a range of possible default or gap-filling provisions. A court may be guided by a sense of fairness and use the fact that the parties have not spoken as an opportunity to achieve some measure of fairness the parties themselves may have been unwilling or unable to provide. Or a court may look at the opportunity the parties have provided as an occasion to create efficient incentives of one sort or another. Or courts may use default rules to encourage cooperation at earlier stages of the contractual process, and so on»<sup>9</sup>.

The first alternative is problematic for the consent theorist because imposing terms to the parties is inimical to the idea that contracts are voluntary, self-imposed obligations.

The second alternative is to resort to the idea of hypothetical consent, that is, to terms that the parties would have consented to *ex ante*. Of course, hypothetical consent is not actual consent. This is why the consent theorist would still not accept the reference to hypothetical consent. In light of that, Coleman resorts to the rationality of the parties to a contractual agreement. Coleman's suggestion is that

«the court complete the contract as the parties would have agreed *ex ante*. If the contract is a scheme of rational cooperation for mutual advantage, then it should be completed by imagining the terms of a hypothetical rational agreement. Let's refer to this sort of default or gap-filling rule as the *ex ante* contract»<sup>10</sup>.

Coleman characterizes the *ex ante* contract in terms of rational bargaining terms: «If the actual contract expresses

<sup>9</sup> COLEMAN 2002, 165.

<sup>10</sup> COLEMAN 2002, 165.

what the parties take to be a rational agreement between them, then when their agreement is incomplete and needs to be interpreted or filled in by a court it should express what it would have been rational for the parties to agree to. The move from the actual to the hypothetical should not change the content of the principle»<sup>11</sup> Coleman concludes that «the best argument available to the consent theorist is that the terms that are rational for the agents provide the best evidence of the terms to which they would have agreed»<sup>12</sup>.

To sum up, rational bargaining theory provides the justification for choosing default rules to fill in gaps. These rules reflect hypothetical consent, which is normatively relevant because it expresses what is rational for the parties to a contract to have chosen, regardless of whether they have actually chosen those rules.

In the next section, I attempt to show why the consent theorist need not accept his conclusions.

## *2. The Public Nature of Consent*

I will make my point by introducing a famous example posed by Wittgenstein that legal theorists often use (which I borrow from Langille and Ripstein). The example is helpful for understanding what is entailed in contractual interactions: «Someone says to me, “Show the children a game”. I teach them gaming with dice. And the other says, “I didn’t mean that sort of game”. Must the exclusion of the game with dice have come before his mind when he gave me the order?»<sup>13</sup>.

<sup>11</sup> COLEMAN 2002, 166.

<sup>12</sup> COLEMAN 2002, 173.

<sup>13</sup> See WITTGENSTEIN 1972, 33, cited in LANGILLE and RIPSTEIN 1996, 70.

Let's assume that we say there is a contract between the parent and the babysitter. In this scenario, the fact that the parent did not explicitly specify what sorts of games she wanted the babysitter to teach to his children is irrelevant; the babysitter has clearly breached<sup>14</sup>. The example is about the discussion of an expressed term – “game” –, but it is also useful to understand the process of establishing implied terms in a contract<sup>15</sup>. In Wittgenstein's view, someone's words may carry more meaning than the speaker thought at the time. Moreover, the meaning of words can never be determined by what's inside the speaker's mind<sup>16</sup>. It's like learning to add. Of course, someone who is teaching a child how to add should know how to add. But the teacher cannot possibly have in mind the sums of all possible pairs of numbers: there are infinite possibilities; the child does not merely need to be able to formulate the rule; otherwise, it

<sup>14</sup> WITTGENSTEIN 1972.

<sup>15</sup> SMITH 2004, 300.

<sup>16</sup> Those who are unhappy with consent theories of contract may be happy with this example because they may say that this is precisely what shows that autonomy theories are deficient. They may argue that in a situation like that of the parent and the babysitter, the issue becomes a tort issue. In this scenario, I do not mean to commit to do something, but since the other understands this as a commitment to that something, I have to perform because of her reliance. In this view, by accepting what I never thought I was asking for (an obligation not to teach the children how to gamble), the babysitter is forced to perform. The anti-consent theorist would say that this has nothing to do with contract theory: it is a matter of tort that happens to occur within the setting of a contract. Now, this kind of reasoning assumes that contracts are about what goes on in the minds of the contractors. Precisely, my point is that such a view is wrong because, again, contracts are about agreements in a shared world, and not about the subjective inner state of mind of the parties to a contract.

would be very easy and there would be no need to show examples. The pupil needs to have some understanding of how to add and that understanding enables her to keep learning. Both the student and the teacher need to share something in order for the student to make more progress. But they cannot share all the possible pairings of numbers because neither of them can grasp that<sup>17</sup>. The same applies to the intentions of the parties to a contract. An intention in this sense is not what a party to a contract has “in mind” when the agreement is concluded. Wittgenstein’s approach takes us out of the “mentalistic” understanding of meaning. The parties to a contract always mean more than what they thought when they concluded an agreement. Intentions in this sense are seen as related to public objects, that is, as referring to a world of enduring public objects that the parties to a contract share. Whatever the intentions of the parties, they could be carried out or frustrated in so many different ways that it’s impossible for the parties to imagine all of them in advance. It would be impossible for the parties to produce a list of all the possible contingencies. And it’s not even necessary for the parties to have such a list in order to form an intention in the first place. All the parties need to say is “it went without saying”<sup>18</sup>. And what goes “without saying” is this world of public objects that is the subject matter of agreements<sup>19</sup>.

<sup>17</sup> LANGILLE and RIPSTEIN 1996, 70.

<sup>18</sup> LANGILLE and RIPSTEIN 1996, 72.

<sup>19</sup> It has been suggested to me that there might be a slight logical leap from the analogy to contracts. When a teacher teaches a pupil how to add, she offers him the formula. Any two sets of numbers put into the formula will produce a predictable result. Thus, although not all of the examples of additions have been thought of, a rule governing what to do with any given example has been established. The problem

As Langille and Ripstein say: «What counts as normal depends on what each other of the parties knows about the other. There is nothing more to what a person means by their words than what others reasonably take them to mean»<sup>20</sup>.

Now, in some sense, Wittgenstein's point was negative; it was an attack on "mentalistic" views on understanding. But, in order to understand what the parties to a contract were doing, and, thus, to approach the problem of gap filling, it is also necessary to find a way to unpack what those parties shared<sup>21</sup>. However, as Martin Stone explains, most of the puzzles about interpretation in general grow out of the assumption that people are not already in some situation as they interpret each other<sup>22</sup>. And there is something in

is that contractual interpretation is not like that because the shortcomings may be such that even a determinate formula had never crossed either of the parties' minds. When that happens, we ask whether the promisor should be excused, whether the parties should act fairly to one another, strategically, and so on. But there is no formula to work with to deal with that. The problem with this view is that it assumes that contracts are fundamentally and only about what goes on in the mind of the contractors. So, in this view, if the parties do not think of something in advance, or do not include a clause in the contract that deals with a specific problem, we are faced with a serious problem that the judge is expected to solve. As I will suggest later on in this comment, my argument, however, is that contracts should not be seen in this way, but as agreements in a shared public world.

<sup>20</sup> LANGILLE and RIPSTEIN 1996, 73.

<sup>21</sup> LANGILLE and RIPSTEIN 1996, 73.

<sup>22</sup> See STONE 1995, 31. Stone argues against the view that all legal rules are indeterminate and that are always in need of interpretation in light of some political or social ideal. In this view, even in *easy cases*, the judge applies considerations that, even though may not be contested in their application to these cases, are not *uncontestable*. «To pretend that they are [...] is [...] to repress potential conflict by means of a fictitious formalism»

particular with respect to which “the minds” of the party actually met. The parties to a contract do have something in common when they get together. As a result, the relevant question about a contract is a question about what it is that the parties were doing. The meaning of the interaction between the promisor and the promisee is found in the common space that they share, and not elsewhere. For there to be an agreement, the promisor and promisee must take each other to be referring to a public object, as opposed to an internal, mentalistic meaning. These public objects «are the only things that could provide [the promisor’s] words with a subject matter [that the promisee] could comprehend»<sup>23</sup>. As a result, *even in those cases where the parties do not explicitly say or write down everything*, a contract is about what is reasonable as between the parties to an agreement<sup>24</sup>.

and, thus, to present political judgments as if they were no more than purely legal conclusions. So, for example, in this line of thought, Stanley Fish argues that, because there is no such a thing as a “clear meaning” of words, it follows that legal rules are indeterminate. As Cornell put it, «[i]t is interpretation that gives us the rule, not the other way around». See STONE 1995, 37. Against these views, Stone suggests that «legal judgment, even in hard cases, does not always require interpretation; nor do such cases in and of themselves pose a threat to the distinction between law and politics» (Stone 1995, 80).

<sup>23</sup> STONE 1995, 74.

<sup>24</sup> LANGILLE and RIPSTEIN complete Wittgenstein’s argument by making reference to the work of Donald Davidson, who offers an argument that enables us to identify which should be the legal answer in cases that the parties did not anticipate. I will recast the argument here. For Davidson, the meaning of words and actions is always found in the common space between speaker and interpreter. Langille and Ripstein explain that Davidson uses the word “triangulation” «for this process of figuring out what words mean by finding a way to make most of what a speaker says come out true» (LANGILLE and RIPSTEIN

In the next section, I explain how this “public” account of consent is reflected in the common law of contracts.

### 3. *The Objective Approach*

The last section helps to understand why in the common law the standard for contract formation and interpretation is said to be an “objective approach” to contracts. In the common law, the existence and the content of an agreement between the parties does not depend on whether the parties subjectively think, in their minds, that they’ve concluded a contract; rather, the existence and the content of agreements are determined not by either of the parties taken in isolation from the other but rather through and *only* through their interaction.

When it comes to concluding agreements, public standards are important for the following reason. Contracts involve two or more consenting parties. In this framework, consent has a public nature. If a person accepts an offer by signing a contract, but secretly thinks that she has not consented to the contract, then, against what she thinks, she has consented. Conversely, the person who rejects an offer, say, by saying “no” to the other party, and, in her mind, thinks she has consented, has not done so. This will always be the case unless both parties know that, when the offeree says “yes”, she means “no”; and when she says “no” she really means “I agree”. Again, this objective standard for contract formation is tied to the notion of the *reasonable*. The appropriate standard for contract formation is

1996, 74). The idea is that the interpreter need not know in advance what the speaker is talking about. The interpreter learns about what the speaker means by learning how the speaker understands the world that they share. That’s why they are said to «triangulate on the objects they share» (LANGILLE and RIPSTEIN 1996, 74).

a standard of behavior that is fair for individuals *in interaction with others* rather than a standard that focuses on what is fair for individuals considered on their own.

Applying this argument to a contractual interaction, the parties to a contract share a common ground that allows them to understand one another. The reasoning in a common law leading case, *Smith v. Hughes*<sup>25</sup> exemplifies my point. There Hannen J. famously noted that any contracting party's ability to attribute meaning to another contracting party depends on how a *reasonable person* would make sense of that party's utterance. As Bruce Chapman explains:

«whether two parties have a contract for the sale of, say, “new oats” or “old oats”, will not depend on whether there is a meeting (or overlap) of their (private) minds on this issue. Rather, a court will attend to the most plausible public understanding of the transaction and deem the contract to be for “old oats” if that is the most (objectively) reasonable meaning of its terms in the context in which contracting that occurred»<sup>26</sup>.

<sup>25</sup> (1871) L.R. 6 Q.B. 597. See HEVIA 2012, 96: «The facts of that case are, in a nutshell, as follows. The plaintiff, a farmer, took some oats to Hughes, the manager of the defendant, who was an owner and trainer of horses. The plaintiff claimed to have said «I have some good oats for sale» and when Hughes replied «I am always a buyer of good oats» offered forty to fifty quarters at 34 f. The plaintiff, in turn, sent to Hughes sixteen quarters, which Hughes complained were *new* oats. The plaintiff admitted they were and denied having any *old* oats. On appeal, the question was the following: was it more *reasonable* for the seller to believe that the order concerned old oats because of the other facts about the trainer's desires, price, and so on? Or, was it more reasonable to believe that it concerned new oats based on the sample?».

<sup>26</sup> As Oliver Wendell Holmes famously put it, «no one will understand the true theory of contract [...] until he has understood that all contracts

Lon Fuller wants to make a similar point when he refers to the role of lawyers with respect to contract formation and interpretation. Fuller views lawyers as people whose work is to be responsible for creating different social structures – drafting of contracts, legislation and so on. But, for Fuller, the social structures for which lawyers are responsible are not only those that end up in a written document. When Fuller discusses contracts, he says that the lawyer may also help the

are formal, that the making of a contract depends not on the agreement of the two minds in one intention, but on the agreement of two sets of external signs, – not in the parties' having meant the same thing but on their having said the same thing». See HOLMES 1897, 464, cited in GREENAWALT 2005, 578. Judge Learned Hand pretty much made the same point, but he put it in a different way: «A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties [...] If [...] it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held [...]». See *Hotchkiss v. Nat'l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911) *aff'd*, 231 U.S. 50 (1913). Also, as Stephen Smith recalls, Wittgenstein argued that it doesn't make any sense to talk of a purely private language because communication requires shared or public meanings. See SMITH 2004, 273. For an example of the subjective approach, see *Dickinson v Dodds*, (1876), 2 Ch. D. 463 (C.A.), which is sometimes taken to be an example of a subjective theory of contracts and of contract formation in particular. See HEVIA 2012, 96, n. 14: «In that case, the court held that no contract of sale had been formed between the parties because, when the offeree was purporting to accept the offer, he already knew that the offeror no longer intended to sell to him. The private intentions of the parties were externally observable in the case. The offeree Dickinson had been informed by someone else of the fact that Dodds, the offeror, had offered to sell the property or had agreed to sell it to someone else. The offer had been withdrawn but Dickinson had not been formally notified by Dodds about that. The fact that it was not the offeror, but someone else who had informed the offeree of the withdrawal was considered to be irrelevant».

parties to a contract understand each other's interest in a way that allows them to grasp what problem the other respective party faces upon performance of her duties. In his view:

«[t]his understanding is often itself the source of a set of reciprocally adjusted expectations that function as a basis of order without reference to the written document, and often better than the written contract would. In other words, a certain accommodation of interests takes place during the negotiation and drafting of a contract, and even if the contract itself were then thrown away, the structure of that accommodation might well govern the parties' interaction and prevent disputes»<sup>27</sup>.

Fuller's point is, I think, very similar to the point that Langille and Ripstein make. For him, it's also true that the meaning of an interaction through contract can go far beyond what the parties explicitly said.

Fuller also makes a point about the connection between contract and customary law that is helpful. For him, customary law is «the inarticulate older brother of contract»: it consists of reciprocal expectations that arise out of human interaction. Thus, two individuals, A and B, in light of past encounters, shape their conduct with respect to one another on the basis of patterns that emerge from their past interactions<sup>28</sup>. A similar situation arises in contractual relations. In commercial transactions, for instance, repetitive dealings usually create “standardized expectations”. Usually, in these scenarios, when a dispute arises, it will be solved by making reference to the “standard practice” regarding the issues at question. But, as Fuller says, the meaning of a contract can also be determined

<sup>27</sup> See FULLER 1983, 285 f.

<sup>28</sup> See FULLER 1983b, 187 and 194.

by looking at what the parties did after the agreement had been concluded. For instance, if the performance of the contract is done for a period of time, as is usually the case in commercial settings, the conduct of the parties «may control over the meaning that would ordinarily be attributed to the words of the contract itself. The meaning thus attributed to the contract is, obviously, generated through processes that are essentially those that give rise to customary law»<sup>29</sup>. Moreover, there are times when the parties do not engage in any sort of written or verbal exchange, but act towards each other in ways that evidence tacitly exchanged promises. This is where contract becomes even closer to customary law<sup>30</sup>.

In this section, I have suggested that contract law adopts the public account of consent I had introduced earlier. Now, if I am right, what is left of Coleman's argument? In the next section, I will suggest that Coleman's argument applies

<sup>29</sup> See FULLER 1983b.

<sup>30</sup> See FULLER 1983B. Fuller uses this last analogy to emphasize a common Fullerian point. Fuller claims that people are hesitant to use the expression "customary law" for those contractual interactions that are almost identical to customary interactions. For Fuller, this is due to the tendency of legal theorists to endorse the idea that all social order is imposed "from above." In other words, according to that view, law creates social order, and can only be created vertically, and never horizontally. As a consequence, law is used to refer to "state-made" law and excludes any other sort of normative relationships. Fuller thinks that this is due to the fact that it's not a common linguistic practice to use "law" to refer to a binding two-party relationship. Fuller finds it paradoxical that those same legal theorists would not hesitate to use "law" to refer to a statute that regulates the relationship between two state officials, even though it is an interaction between *only* two parties. The most elegant presentation of Fuller's account of law that I know of is posed by POSTEMA 1999, 255. See also FULLER 1969, 110-132.

to what common law courts call *implied-in-law* terms – though not to *implied-in-fact* terms.

#### 4. *The Ex Ante Contract as Implied-in-Law Terms*

My previous remarks should not be taken to mean that contracts are completely determinate. Sometimes, even though the parties may think that they do have an agreement, the degree of uncertainty could be such that, as a matter of fact, and against what they think, the parties may have failed to reach an agreement<sup>31</sup>. Take, for instance, *Raffles v. Wichelhaus*<sup>32</sup>. In that famous case, the plaintiff had agreed to sell the defendant cotton that would arrive from Bombay to Liverpool on a ship called “Peerless”. The problem was that there wasn’t just one ship with that name. One of the Peerless ships would arrive in October and the other one in December. The defendants argued that they had intended to accept the cotton that was shipped in the October Peerless, but not the cotton shipped in December. When the December Peerless arrived, the defendants refused to buy. The plaintiffs argued that whether the cotton had been shipped in October or in December was irrelevant because the purpose of naming the ship in the contract had been to make the contract void in case the ship sunk before arriving. The court finally held for the defendants. It stated that the parties had failed to reach an agreement because, for there to be one, the parties must agree on what the thing contracted for is; otherwise, there cannot be a binding contract.

Consider the following distinction from the common law. The common law distinguishes between *implied-in-fact*

<sup>31</sup> FULLER 1969.

<sup>32</sup> (1864) 2 H & C 906.

contractual and *implied-in-law* contractual terms. The first type of implied terms are terms that are taken to form part of the parties' agreement in spite of the fact they are terms that are not explicitly included in the agreement at stake. It is usually said that these terms "go without saying"<sup>33</sup>. When it comes to these type of terms, the language of the courts makes reference to the content of the agreement, that is, courts say that a certain term is implied because, although it is not explicit in the agreement, the parties meant to include it, or can be understood to think that the terms forms part of the agreement. As I discussed earlier, courts would say that what they do when they imply those terms is an exercise of interpretation. Implied-in-fact terms are the type of terms that I discussed in Sections 2 and 3 of this comment.

In contrast, *implied-in-law* terms are those that are also implied, but the basis for them are external to the parties' agreement. For instance, if a court implies a term because it is necessary for a contract to be fair, regardless of the will of the parties, the term at stake would be an implied-in-law term<sup>34</sup>. The same applies whenever a court determines that an agreement has to be interpreted in good faith.

The distinction between these types of implied terms is not clear-cut. As Smith explains, identifying whether certain terms fall under one rubrique or the other is the conclusion rather than the starting point of a theoretical discussion about implied terms.

Now, implied-in-fact understandings can also be vague. In that scenario, sometimes courts will have no option but to stipulate terms into the contract<sup>35</sup>. That would not provide courts with freedom to act as they wish. Court may be required

<sup>33</sup> SMITH 2004, 280.

<sup>34</sup> SMITH 2004, 280.

<sup>35</sup> SMITH 2004, 302.

to take important considerations into account; for instance, consistency with precedent may restrict the available options<sup>36</sup>. Now, here is where I think Coleman's proposal would fit better. I suggest that implied-in-law terms can be understood in terms of Coleman's *ex ante* contract. Let me explain.

Courts may invoke efficiency or fairness considerations to stipulate terms. Those considerations, however, would not necessarily be acceptable to the consent theorist of contracts: they would imply an imposition of terms that the parties to the agreement may not necessarily accept. In contrast, appealing to the rational *ex ante* contract would not be objectionable in that sense. If the contract is a scheme of rational cooperation for mutual advantage, and the terms that are rational for the agents provide the best evidence of the terms to which rational agents would have agreed, rational implied-in-law terms would be acceptable to the consent theorist.

## 5. Conclusion

In *Risks and Wrongs*, Coleman argues that, in default of explicit agreement between the parties to a contract, the consent theorist of contract law should endorse the *ex ante* contract because it is the best evidence of what the parties would have agreed. I have suggested that Coleman's point of departure is mistaken because, if a public account of consent is adopted, the consent of the parties to an agreement covers more than what the parties actually included or mentioned in their agreement. I have also argued that, although Coleman's argument is not helpful to explain what common law courts call implied-in-fact terms, it explains the nature of implied-in-law contractual terms.

<sup>36</sup> SMITH 2004.

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