CARDOZO LAW

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

To: Contracts Section C
From: Professor Jared Mayer
Re: First class meetings and readings
Date: August 11, 2025

Our first Contracts class meeting will be on **Wednesday, August 20th** in **Room 303**.

For the first assignment, **please read the following pages from the Studies in Contract Law casebook: 1-5 (until "The Structure of This Book"), 13-17 (until Notes), and 51-56 (from "3. Studies in Contract Law" until "Consequentialist Theories").**

.

UNIVERSITY CASEBOOK SERIES®

STUDIES IN CONTRACT LAW

TENTH EDITION

IAN AYRES
William K. Townsend Professor of Law
Yale Law School

GREGORY KLASS
Frederick J. Haas Chair in Law and Philosophy
Georgetown University Law Center

REBECCA STONE
Professor of Law
University of California Los Angeles School of Law

Authors on previous editions:

EDWARD J. MURPHY
Late John N. Matthews Professor of Law
Notre Dame Law School

RICHARD E. SPEIDEL
Late Beatrice Kuhn Professor of Law
Northwestern University School of Law

FOUNDATION PRESS

860 Blue Gentian Road, Suite 350
Eagan, MN 55121
1-877-888-1330

Published in the United States of America

ISBN: 978-1-64708-544-5

CHAPTER ONE

INTRODUCTION TO CONTRACT LAW

1. INTRODUCTION

(A) CONTRACT AS LEGALLY BINDING AGREEMENT

What is a Contract? We all know that the law imposes duties on us. It says that we must or must not do this or that. We have legal duties not to murder, not to steal, not to drive drunk. We have legal duties to take reasonable care to avoid harming others and to pay our taxes. A parent has a legal duty to support their minor children, a doctor to provide professionally competent care. None of these legal duties are chosen. People do not get to decide whether or not to be subject to criminal, tort, or tax law. And while a person can decide whether or not to become a parent or physician, they do not get to decide what legal duties attach to those roles.

Contract law is different. The obligations imposed by the law of contract are *chosen obligations*. They are the products of agreements, promises, or other voluntary undertakings. In order to have a contractual *duty* to *x*, one must first *agree* to *x*. Lon Fuller, one of the great American contract theorists, compared the power to contract to the power to pass laws: "When a court enforces a promise it is merely arming with legal sanction a rule or *lex* [law] previously established by the party himself. This power of the individual to effect changes in his legal relations with others is comparable to the power of a legislature."[1] The analogy is not perfect. Whereas a legislature typically makes laws for the public at large, the parties to a contract make laws only for themselves. And the formation of a contract can be much more informal than the legislative process ever is. Still, this legislative aspect of contracting gives contract law a different structure from other, purely duty-imposing bodies of law. For a basic understanding of tort or criminal law, for example, you have to answer only two questions: (1) What is the legal duty? (For example, which acts count as first-degree murder?) (2) What are the legal consequences of its violation? (What is the punishment for first-degree murder?) In contract cases, another question always comes first: Did the parties undertake legally enforceable duties to one another? That is, was there a contract between the parties?

[1] Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 806–07 (1941). For more on contract law's legislative aspect, see Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. Rev. 1726 (2008).

Another way of putting this point is that contract cases always involve a story about how the legal duty came into existence. Parties start out having no contractual obligations to one another. Then at some point in time they do something that creates a legal obligation. Usually this means they enter into an agreement, but, depending on the jurisdiction, a legal obligation might also arise when one of them makes a promise and the other relies on it or when one of them makes a promise under seal. Only after a court has established that a contract has been formed does it ask whether a contractual duty was breached and, if so, what the right remedy is. Thus, to understand contract law, you have to know how contracts are formed. You have to know what the conditions of contractual validity are. Once you've figured that out, you can then ask about the scope of the contractual obligation and the available legal remedies for its breach.

A standard answer to the formation question is that it is necessary (though not sufficient!) that one or both parties *promise* some performance. The promise both creates the obligation and determines its scope. A canonical source for U.S. contract law, the Restatement (Second) of Contracts, therefore defines "contract" as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) § 1.

This definition is fine as far as it goes, so long as one does not read too much into the word "promise."[2] Exactly what a promise is and entails is contested. On a narrow definition, a promise involves intentionally undertaking an obligation to do as one promised. But, as we will see, persons can find themselves under contractual obligations to perform things that they did not promise to do in this narrow sense but they can be seen as having agreed to do.

There have been times and places where the law required formal promissory acts of parties who wanted to enter into a legally enforceable agreement, thus ensuring that legal obligations arose from promises in the narrow sense.[3] In ancient Rome, a creditor could request a legally binding obligation using the word "*spondesne*," to which the debtor had to reply "*spondeo*." Sales agreements in the Middle Ages were sometimes formalized by the buyer giving the seller a "God's penny," a small coin that marked the agreement. Or the parties might consummate the deal with a drink. Medieval Germans would sometimes put their palms together as they held them over their heads. In many African societies, a

---

[2] For more on the ways that contracts are different from promises, see Gregory Klass, *Promise Etc.*, 45 Suffolk U. L. Rev. 695 (2012); Michael Pratt, *Contract: Not Promise*, 35 Fl. St. L. Rev. 801, 802 (2008); Dori Kimel, From Promise to Contract: Towards a Liberal Theory of Contract (2003).

[3] All of the examples in this paragraph come from Bernard J. Hibbitts's wonderful article, *"Coming to Our Senses": Communication and Legal Expression in Performance Cultures*, 41 Emory L.J. 873 (1992). See also Peter Meijes Tiersma, *Rites of Passage: Legal Ritual in Roman Law and Anthropological Analogues*, 9 J. Legal Hist. 3 (1988).

buyer and seller communicate their agreement by "waving their right hands up and down and then touching each other's palms with the fingers stretched away."[4] And of course today parties often "seal the deal" with a handshake.

Although we still sometimes use formalities like these to indicate a binding commitment, the U.S. law of contract generally no longer requires any special acts, words, or other expressions of intent to undertake a moral or legal commitment. Indeed, it often does not require an express promise. In many cases, all that is necessary is that the parties enter into an agreement whereby they commit to some performance, even if only implicitly. And as David Hume observed, "Two men, who pull the oars of a boat, do it by agreement or convention, tho' they have never given promises to each other."[5] Consider the following example of what is known as an implied-in-fact promise: "A telephones to his grocer, 'Send me a ten-pound bag of flour.' The grocer sends it." Restatement (Second) § 4, ill. 1. Has A promised to pay for the flour? Not in the playground sense of the word. But by ordering the flour, A has implicitly agreed to pay for it. That is all that the law requires.

Another way of putting this is that contracts are promises only under a capacious understanding of the word "promise." A promise in the legal sense is more than a prediction or an expression of intent. But it need not involve *saying* that one means to undertake a legal or moral obligation. All that is necessary is some "manifestation of intention to act or refrain from acting in a specified way, so made as to justify the recipient of the promise (the "promisee") in understanding that a commitment has been made." Restatement (Second) § 2(1).[6] As you confront the materials in this book, you should try to develop the legal skill of "hearing" the implicit commitments that often attend our verbal and non-verbal acts, and when these implied commitments constitute an agreement sufficient for the purposes of contract law.

Although it is helpful to think of contracts on the model of agreements rather than promises, we employ the language of promising throughout this book. Courts and commentators regularly talk of "promises" when doing or describing the law of contract. So long as the reader keeps the above caveats in mind, it works well enough. In fact, the language of promising has a distinct advantage. A typical contract dispute focuses on a subset of the legal obligations that are generated by a larger agreement—usually those alleged to have been breached by a party. With respect to any given contractual obligation that is the subject

---

[4] Leonard W. Doob, Communication in Africa: A Search for Boundaries 70 (1961).

[5] David Hume, *Of Morals*, A Treatise of Human Nature (L. A. Selby-Bigge and P. H. Nidditch, eds.) 490, 1739–1740 (1978).

[6] The Uniform Commercial Code (UCC) analogously defines "contract": "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." UCC § 2–204(1). For a good discussion of different definitional approaches, see Corbin § 3 (1952).

of the dispute, we can use the terms "promisor" to identify the party under the duty and "promisee" for the party to whom the duty is owed.

One final comment about the meaning of words. Arthur Linton Corbin, one of the two most important treatise writers on US contract law, wrote the following about the meaning of "contract":

> The term contract has been used without much discrimination to refer to three different things: (1) the series of operative acts of the parties expressing their assent and resulting in new legal relations; (2) the physical document executed by the parties as an operative fact in itself and as the lasting evidence of their having performed the necessary operative acts; (3) the relations resulting from the operative acts, consisting of a right or right *in personam* and the corresponding duties, accompanied by certain powers, privileges and immunities.[7]

In everyday conversation, people often use the word "contract" to refer to a written document—for example, the papers you sign when you apply for a credit card, rent an apartment, or take a job. In this book, we will almost always be using the word in a more abstract sense, to refer to the totality of the legal rights and duties that arise from an agreement between two or more parties. Thus a writing between two parties—even one that is very formal and detailed—might not represent the entire contract between them. The writing is a physical thing; the contract is that physical thing's legal effect.

Who Contracts? With a few exceptions, the U.S. law of contract does not provide different rules for different sorts of parties. (An important exception is the Uniform Commercial Code's special rules for merchants, discussed later in this Chapter.) In particular, the rules of the common law of contract do not ask whether a party is a *natural person* (a human being) or a *firm* (a corporation or other legal entity). Alan Schwartz and Robert E. Scott have argued, however, that in fact contemporary contract law applies primarily to agreements between firms:

> Parties to transactions can be partitioned into individuals and firms. This yields four transactional categories: (1) A firm sells to another firm, (2) an individual sells to another individual, (3) a firm sells to an individual, and (4) an individual sells to a firm. Category 2 contracts, between individuals, are primarily regulated by family law (antenuptial agreements and divorce settlements) and real property law (home sales and some leases). Few litigated contracts between individuals are regulated by the rules of contract law. Category 3 contracts, between a firm as seller and an individual as buyer, are primarily regulated by consumer protection law, real property law (most leases), and the securities laws. Category 4 contracts,

---

[7] Arthur L. Corbin, Offer and Acceptance, and Some of the Resulting Legal Relations, 26 Yale L.J. 169, 169 (1917).

> between an individual as seller and a firm as buyer, commonly involve the sale of a person's labor, and are regulated by laws governing the employment relation. That leaves Category 1 contracts (those between firms) as the main subject of what is commonly called contract law—namely, the rules in Article 2 of the Uniform Commercial Code (UCC) and the provisions of the Restatement (Second) of Contracts. Such provisions are primarily invoked to resolve disputes arising under Category 1 contracts.[8]

Schwartz and Scott argue that these distinctions are important because, unlike individuals, firms are less likely to be prey to cognitive error, firms are more often legally sophisticated, firms are subject to other forms of legal regulation, and firms are designed with a single goal in mind: maximizing the profits for their shareholders.[9] A law that is designed for Category 2, 3, or 4 contracts might not be suitable for Category 1 contracts.

Schwartz and Scott are certainly correct that most of the major litigation in the contracts arena concerns Category 1 transactions. It is not so obvious—and Schwartz and Scott do not argue—that the contract law we have is designed with this fact in mind. Nor would everyone agree with Schwartz and Scott's thesis that the rules of contract law should aim to assist firms in their profit-maximizing goals—that "the state should let the preferences of firms control because firms can better pursue the objective [increased social welfare] that both the state and firms share."[10] Finally, the above categories are not exhaustive. They ignore, for example, contracts that involve governmental bodies, which often raise other important issues.

Still, Schwartz and Scott's basic classification provides a helpful starting point. It illustrates the ways in which some sorts of agreements get pulled out of the arena of contract law and put into other areas of the law—family law, consumer protection law, real property law, etc. And Schwartz and Scott are certainly correct that when thinking about the rules of contract law, we should keep in mind the differences between different types of parties, including the differences between individuals and firms. That is another question to think about as you work your way through this book: For whom is contract law designed, and for whom should it be designed?

The Structure of This Book. As we said above, agreement is a necessary condition of contractual validity, but not a sufficient one. Though all contracts involve an agreement, not all agreements produce an enforceable contract. Chapters Two through Four of this book explore the conditions of contractual validity and enforcement. Some of those

---

[8] Alan Schwartz and Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L.J. 541, 544 (2003).

[9] Id. at 544–46.

[10] Id. at 549.

2. INTRODUCING SOME BASIC ISSUES

Howard E. Bailey v. Richard E. West

Supreme Court of Rhode Island, 1969.
105 R.I. 61.

■ PAOLINO, JUSTICE. This is a civil action wherein the plaintiff alleges that the defendant is indebted to him for the reasonable value of his services rendered in connection with the feeding, care and maintenance of a certain race horse named "Bascom's Folly" from May 3, 1962 through July 3, 1966. The case was tried before a justice of the superior court sitting without a jury, and resulted in a decision for the plaintiff for his cost of boarding the horse for the five months immediately subsequent to May 3, 1962, and for certain expenses incurred by him in trimming its hoofs. The cause is now before us on the plaintiff's appeal and defendant's cross appeal from the judgment entered pursuant to such decision.

The facts material to a resolution of the precise issues raised herein are as follows. In late April 1962, defendant, accompanied by his horse trainer, went to Belmont Park in New York to buy race horses. On April 27, 1962, defendant purchased "Bascom's Folly" from a Dr. Strauss and arranged to have the horse shipped to Suffolk Downs in East Boston, Massachusetts. Upon its arrival defendant's trainer discovered that the horse was lame, and so notified defendant, who ordered him to reship the horse by van to the seller at Belmont Park. The seller refused to accept delivery at Belmont on May 3, 1962, and thereupon, the van driver, one Kelly, called defendant's trainer and asked for further instructions. Although the trial testimony is in conflict as to what the trainer told him, it is not disputed that on the same day Kelly brought "Bascom's Folly" to plaintiff's farm where the horse remained until July 3, 1966, when it was sold by plaintiff to a third party.

While "Bascom's Folly" was residing at his horse farm, plaintiff sent bills for its feed and board to defendant at regular intervals. According to testimony elicited from defendant at the trial, the first such bill was received by him some two or three months after "Bascom's Folly" was placed on plaintiff's farm. He also stated that he immediately returned the bill to plaintiff with the notation that he was not the owner of the horse nor was it sent to plaintiff's farm at his request. The plaintiff testified that he sent bills monthly to defendant and that the first notice he received from him disclaiming ownership was " * * * maybe after a month or two or so" subsequent to the time when the horse was left in plaintiff's care.

In his decision the trial judge found that defendant's trainer had informed Kelly during their telephone conversation of May 3, 1962, that " * * * he would have to do whatever he wanted to do with the horse, that he wouldn't be on any farm at the defendant's expense * * *." He also found, however, that when "Bascom's Folly" was brought to his farm,

plaintiff was not aware of the telephone conversation between Kelly and defendant's trainer, and hence, even though he knew there was a controversy surrounding the ownership of the horse, he was entitled to assume that " * * * there is an implication here that, 'I am to take care of this horse.' " Continuing his decision, the trial justice stated that in view of the result reached by this court in a recent opinion[24] wherein we held that the instant defendant was liable to the original seller, Dr. Strauss, for the purchase price of this horse, there was a contract "implied in fact" between the plaintiff and defendant to board "Bascom's Folly" and that this contract continued until plaintiff received notification from defendant that he would not be responsible for the horse's board. The trial justice further stated that " * * * I think there was notice given at least at the end of the four months, and I think we must add another month on there for a reasonable disposition of his property."

In view of the conclusion we reach with respect to defendant's first two contentions, we shall confine ourselves solely to a discussion and resolution of the issues necessarily implicit therein, and shall not examine other subsidiary arguments advanced by plaintiff and defendant.

I

The defendant alleges in his brief and oral argument that the trial judge erred in finding a contract "implied in fact" between the parties. We agree.

The following quotation from 17 C.J.S. Contracts § 4 at pp. 557–560, illustrates the elements necessary to the establishment of a contract "implied in fact":

> " * * * A 'contract implied in fact,' * * * or an implied contract in the proper sense, arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract.
>
> "It has been said that a contract implied in fact must contain all the elements of an express contract. So, such a contract is dependent on mutual agreement or consent, and on the intention of the parties; and a meeting of the minds is required. A contract implied in fact is to every intent and purpose an agreement between the parties, and it cannot be found to exist unless a contract status is shown. Such a contract does not arise out of an implied legal duty or obligation, but out of facts from which consent may be inferred; there must be a manifestation

[24] [In *Strauss v. West*, 100 R.I. 388 (1966), the court held that Bascom's Folly was "sound" at the time delivery was tendered by Strauss, that title had passed to West, and that West was liable to Strauss for the purchase price of $1,800.—Eds.]

of assent arising wholly or in part from acts other than words, and a contract cannot be implied in fact where the facts are inconsistent with its existence."

Therefore, essential elements of contracts "implied in fact" are mutual agreement, and intent to promise, but the agreement and the promise have not been made in words and are implied from the facts.

* * *

The source of the obligation in a contract "implied in fact," as in express contracts, is in the intention of the parties. We hold that there was no mutual agreement and "intent to promise" between the plaintiff and defendant so as to establish a contract "implied in fact" for defendant to pay plaintiff for the maintenance of this horse. From the time Kelly delivered the horse to him plaintiff knew there was a dispute as to its ownership, and his subsequent actions indicated he did not know with whom, if anyone, he had a contract. After he had accepted the horse, he made inquiries as to its ownership and, initially, and for some time thereafter, sent his bills to both defendant and Dr. Strauss, the original seller.

There is also uncontroverted testimony in the record that prior to the assertion of the claim which is the subject of this suit neither defendant nor his trainer had ever had any business transactions with plaintiff, and had never used his farm to board horses. Additionally, there is uncontradicted evidence that this horse, when found to be lame, was shipped by defendant's trainer not to plaintiff's farm, but back to the seller at Belmont Park. What is most important, the trial justice expressly stated that he believed the testimony of defendant's trainer that he had instructed Kelly that defendant would not be responsible for boarding the horse on any farm.

From our examination of the record we are constrained to conclude that the trial justice overlooked and misconceived material evidence which establishes beyond question that there never existed between the parties an element essential to the formulation of any true contract, namely, an "intent to contract." Compare Morrissey v. Piette, 103 R.I. 751, 753.

II

The defendant's second contention is that, even assuming the trial justice was in essence predicating defendant's liability upon a quasi-contractual theory, his decision is still unsupported by competent evidence and is clearly erroneous.

The following discussion of quasi-contracts appears in 12 Am.Jur., Contracts, § 6 (1938) at pp. 503 to 504:

"* * * A quasi contract has no reference to the intentions or expressions of the parties. The obligation is imposed despite, and frequently in frustration of, their intention. For a quasi

contract neither promise nor privity, real or imagined, is necessary. In quasi contracts the obligation arises, not from consent of the parties, as in the case of contracts, express or implied in fact, but from the law of natural immutable justice and equity. The act, or acts, from which the law implies the contract must, however, be voluntary. Where a case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfil that obligation. The duty, which thus forms the foundation of a quasi-contractual obligation, is frequently based on the doctrine of unjust enrichment. * * *

"* * * The law will not imply a promise against the express declaration of the party to be charged, made at the time of the supposed undertaking, unless such party is under legal obligation paramount to his will to perform some duty, and he is not under such legal obligation unless there is a demand in equity and good conscience that he should perform the duty."

Therefore, the essential elements of a quasi-contract are a benefit conferred upon defendant by plaintiff, appreciation by defendant of such benefit, and acceptance and retention by defendant of such benefit under such circumstances that it would be inequitable to retain the benefit without payment of the value thereof. * * *

The key question raised by this appeal with respect to the establishment of a quasi-contract is whether or not plaintiff was acting as a "volunteer" at the time he accepted the horse for boarding at his farm. There is a long line of authority which has clearly enunciated the general rule that "* * * if a performance is rendered by one person without any request by another, it is very unlikely that this person will be under a legal duty to pay compensation." 1 A Corbin, Contracts § 234.

The Restatement of Restitution, § 2 (1937) provides: "A person who officiously confers a benefit upon another is not entitled to restitution therefor." Comment *a* in the above-mentioned section states in part as follows:

"* * * Policy ordinarily requires that a person who has conferred a benefit * * * by way of giving another services * * * should not be permitted to require the other to pay therefor, unless the one conferring the benefit had a valid reason for so doing. A person is not required to deal with another unless he so desires and, ordinarily, a person should not be required to become an obligor unless he so desires."

Applying those principles to the facts in the case at bar it is clear that plaintiff cannot recover. The plaintiff's testimony on cross-examination is the only evidence in the record relating to what transpired between Kelly and him at the time the horse was accepted for boarding. The defendant's attorney asked plaintiff if he had any conversation with Kelly at that time, and plaintiff answered in substance that he had noticed that the horse was very lame and that Kelly had told him: "That's

why they wouldn't accept him at Belmont Track." The plaintiff also testified that he had inquired of Kelly as to the ownership of "Bascom's Folly," and had been told that "Dr. Strauss made a deal and that's all I know." It further appears from the record that plaintiff acknowledged receipt of the horse by signing a uniform livestock bill of lading, which clearly indicated on its face that the horse in question had been consigned by defendant's trainer not to plaintiff, but to Dr. Strauss's trainer at Belmont Park. Knowing at the time he accepted the horse for boarding that a controversy surrounded its ownership, plaintiff could not reasonably expect remuneration from defendant, nor can it be said that defendant acquiesced in the conferment of a benefit upon him. The undisputed testimony was that defendant, upon receipt of plaintiff's first bill, immediately notified him that he was not the owner of "Bascom's Folly" and would not be responsible for its keep.

It is our judgment that the plaintiff was a mere volunteer who boarded and maintained "Bascom's Folly" at his own risk and with full knowledge that he might not be reimbursed for expenses he incurred incident thereto.

The plaintiff's appeal is denied and dismissed, the defendant's cross appeal is sustained, and the cause is remanded to the superior court for entry of judgment for the defendant.

NOTES

(1) What were Howard Bailey's two theories of recovery? How did they differ? On what grounds did the court reject each?

(2) Suppose Richard West personally delivered Bascom's Folly to Bailey's farm, but nothing was said specifically about Bailey's caring for the horse or West's paying for that care. Would West be liable? If so, on what theory?

One court has described implied-in-fact promises as follows:

> An implied-in-fact contract has the same legal effect as an express contract. The only difference between them is the means by which the parties manifest their agreement. In an express contract, the parties manifest their agreement by their words, whether written or spoken. In an implied-in-fact contract, the parties' agreement is inferred, in whole or in part, from their conduct. * * * [Nevertheless] an implied contract must still have discernable terms * * * For such a situation to exist, the parties must exhibit mutual expressions of assent.

Novak v. Seiko Corp., 37 Fed.Appx. 239, 243 (9th Cir. 2002) (unpublished) (citations and internal quotation marks omitted).

If an implied-in-fact contract existed in *Bailey*, what would be the terms? For additional discussion of implied-in-fact contracts, see Chapter Three, Section 1.B.

rights cannot be eroded by agreement with the creditor; and the debtor is given extensive private remedies if the creditor fails to comply with Article 9. Even so, many feel that this protection is inadequate for the consumer. Efforts for reform can be found in the 1997 revision of Article 9 (which has been adopted by every state) and legislation such as the Uniform Consumer Credit Code (which has not been widely adopted). A more extensive treatment of financing patterns and problems where personal property or real estate is involved (whether by mortgage or installment sales contract) must be reserved for another course.

3. STUDIES IN CONTRACT LAW

As you study contract law, you will confront two different types of question. One type is descriptive and predictive: What is the law? What do the authoritative legal materials (constitutional texts, statutes, judicial opinions) say it is? How is a court likely to resolve this dispute? Another type is normative: Is this rule or decision just? What should the law be? What are the purposes of the law we have? What justifies it?

(A) WHAT LAW IS, WHAT LAW SHOULD BE, AND OLIVER WENDELL HOLMES'S "BAD MAN"

When we are in predictive mode, it is often helpful to have Oliver Wendell Holmes's infamous "bad man" in mind:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.[45]

Holmes' bad man is squarely in predictive mode when he thinks about legal questions. All he cares about is avoiding the negative consequences that the law might impose on him for actions he otherwise would like to take in furtherance of his own goals and projects. When he considers whether to breach a contract he has entered, for example, he weighs the benefits he might derive from doing so against the likely sanctions he will face should he do so if the promisee successfully sues him for breach of contract.

Holmes's bad man is a heuristic device, designed to help new lawyers (it appears in an address to law students!) avoid confusing what is morally right with what the law requires. It is not, and was not intended as, a complete description of how law works. Many laws establish standards of conduct to which we might want to conform for reasons other than the negative consequences attached to their breach. In fact, the threat of those negative consequences would often be insufficient to

[45] Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897), reprinted in 110 Harv. L. Rev. 991, 993 (1997).

deter the bad man. Legal sanctions follow only if the rule is enforced, and enforcement even of egregious rule breaking isn't a sure thing. In contract law, enforcement requires (among other things) that the nonbreaching party knows they have a legal claim and that they successfully vindicate it via a lawsuit. Many small stakes breaches of contract are unlikely to result in a lawsuit because the expense of hiring a lawyer dwarfs any payment of damages the plaintiff is likely to receive. And even when the stakes are large, legal vindication is not a sure thing.

These facts would cause the bad man to breach fairly often. Yet in the real world, many choose not to breach their contracts, even when there will likely be no legal consequences. The reason is that they treat legal rules as standards of conduct to which they ought to conform. This might be because they think that following the rules is the right thing to do, because they are fearful of some non-legal sanctions such as those that arise from getting a bad reputation with future contracting partners that arise from breaking the rules, or perhaps because they have decided that it just makes their lives easier to follow the rules rather than engage in a complex weighing of costs and benefits every time they must make a decision whether or not to breach. [46]

When we move from the descriptive to the normative realm, from what law is to what it should be, it still matters why people follow the law, and whether they resemble Holmes' bad man. To determine whether a law is successful, we need to understand how and why it shapes people's behavior. If many people resemble the bad man, we need to know how the bad man will respond to the rules to figure out what effects the rules will have. But legal compliance is not an end in itself. We must also ask what values and principles a law is supposed to serve, what we as a society want it to accomplish.

When it comes to contract law, the answers to those questions are contestable and contested. Contract law is part of the warp, and contracts the weft, of the social fabric. Political disagreements about how society should be organized therefore include disagreements about what contract law should aim to do. Although some contract rules are relatively uncontroversial (Should an acceptance be effective when it is dropped in a mailbox or when the offeror receives it?), others are highly charged (Should courts ever look to the fairness of an agreement when deciding whether to enforce it?).

The fact that contract cases can involve fundamental questions about how society should work does not mean that there are not better and worse answers to normative questions about contract law. It means that answering such questions is difficult and sometimes controversial. The next Section describes several answers that scholars of contract law

[46] For an argument that we should pay attention to the "good man" as well as the bad man when analyzing the law, see Rebecca Stone, *Economic Analysis of Contract Law from the Internal Point of View*, 116 Columbia L. Rev. 2005 (2016); Rebecca Stone, *Legal Design for the 'Good Man'*, 102 Va. L. Rev. 1767 (2016).

have in recent years proposed and defended. The Section after that canvasses several other influential approaches to contract law.

(B) WHY CONTRACT LAW?

Why does the law enforce promises and agreements between private parties? What should the particular rules and doctrines of contract law look like? Answering such questions requires taking a position on several questions on which theorists disagree, including: What is the moral significance of a promise or agreement? What ought to be its legal significance? And what is the relationship between the two—that is, to what extent are justifications of contract law bound up with the moral significance of the promises and agreements that it enforces?

Promissory Theories. At one end of the spectrum are theories that locate the justification for contract law directly in the moral duty to keep one's promises. Charles Fried sets out such an approach in his book *Contract as Promise.*[47] On such views, our contractual legal duties track closely our moral duties to keep our promises and the reason we have contract law is to hold people, at least to some extent, to their moral obligations to perform.

The details of any such promissory theory depend, in part, on how one understands promising. On some conceptions a promise effects a kind of transfer of right, akin to the transfer of a (moral) property right. When the promisor fails to perform her promise, the promisee is deprived of something that rightfully belongs to him: the promised performance. Defenders of rights-transfer conceptions of promising often point to considerations of freedom and flourishing in our relationships to explain why promises effect such transfers. Seana Shiffrin argues, for example, that the ability to obligate oneself to another via promise enables persons to manage and assuage inequalities and vulnerabilities that threaten to undermine their relationships with others.[48] If this is the right way to understand promising, then contract law ought to be designed to support the relational values promising instantiates.

On other conceptions of promising, our reasons to keep our promises derive from the importance of not harming others to whom we have given certain assurances and who may have relied on those assurances or formed an expectation that we will perform. When we make a promise to others, we know they may act in reliance on it, undertaking costs and expositing themselves to losses they would not otherwise have. If such reliance explains the duty to perform, a contract law that seeks to vindicate our promissory duties should protect the reliance interest of promisees. As Lon Fuller puts it: a "substantive basis of contract liability lies in a recognition that the breach of a promise may work an injury to

[47] Charles Fried, Contract as Promise (1981). See also Stephen A. Smith, Contract Theory (2004).

[48] Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 Phil. Rev. 481 (2008).

one who has changed his position in reliance on the expectation that the promise would be fulfilled."[49] If, moreover, the promisee's reliance directly benefits the promisor, as when the promisee has performed his part and the promisor reneges on her duty to pay, there is an additional reason to hold the promisor to their promise: preventing the promisor's unjust enrichment. Where A pays B five dollars in return for B's promise to give him a bicycle and B breaks his promise "we may regard this as a case where the injustice resulting from breach of a promise relied on by the promisee is aggravated ... because not only has A lost five dollars but B has gained five dollars unjustly."[50]

Notice that reliance and enrichment alone can't do all the justificatory work. I might rely on a person's statement that she intends to come to the office today by going into the office myself, hoping that I will be able to catch her to discuss something with her. We wouldn't think that the person is morally bound to come in in virtue of my reliance. Likewise, if my neighbor makes his garden beautiful and I enjoy looking at it every day, we wouldn't think that I have a duty to compensate him just because I benefit from the beautification of his garden.

So we need more than reliance or enrichment to generate a duty to perform. We need something that makes that reliance the moral responsibility of the person who caused it, or something that makes it unjust that the person was enriched. A promise looks like a likely candidate.

For other theorists of promising, promises don't create duties owed by the promisor to the promisee. Rather, our duties to keep them arise from the fact that the making and keeping of promises is a valuable social practice that we all benefit from. This is because we can use promises to assure others of our future performance. Consider David Hume's famous example of two farmers:

> Your corn is ripe to-day; mine will be so tomorrow. It is profitable for us both, that I should labour with you to-day, and that you should aid me tomorrow. I have no kindness for you, and know you have as little for me. I will not, therefore, take any pains upon your account; and should I labour with you upon my own account, in expectation of a return, I know I should be disappointed, and that I should in vain depend upon your gratitude. Here then I leave you to labour alone: You treat me in the same manner. The seasons change; and both of us lose our harvests for want of mutual confidence and security.[51]

A social practice of promising and promise keeping can solve this basic mistrust problem. The practice of promising and promise keeping is an

---

[49] Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 810 (1941).

[50] Id. at 812.

[51] David Hume, *Of Morals*, A Treatise on Human Nature (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1739–1740).

essential part of how we organize our lives with and show respect for one another. On practice conceptions of promising, the reasons to keep one's promises derive from the benefits that everyone in society derives from having this useful social practice. When a person breaks their promise, especially if the breach is well publicized, they chip away at everyone's confidence that people keep their promises. The wrong is like the wrong of free riding: the promisor takes the benefit of the practice by exploiting the promisee's trust in the practice while not paying the cost of maintaining the practice by keeping their promise.[52] If this is the correct way to understand promising, and contract law is about enforcing promissory duties, then the justification for contract law ought to be understood as about supporting—indeed, perhaps improving upon—this valuable moral practice. The most obvious way it does this is by attaching a negative legal consequence to breach that reinforce trust in the practice.[53]

Autonomy Theories. Other theorists of contract regard it as an error to look for the justification of contract law in promissory morality. Consider Holmes's observation in the aforementioned 1897 address that "[n]owhere is the confusion between legal and moral ideas more manifest than in the law of contract."[54] Perhaps the divergence between contract law and the morality of promising is too stark for the latter to do work in justifying the former. For example, the legal remedy for most breaches of contract does not require the breaching party to perform, but only grants payment of damages. But morality seems to say *pacta sunt servanda*—agreements are to be kept. To some this suggests that a breaching promisor ought to be required to perform, rather than to merely pay money for failing to do so. Theorists who deny that we find a justification for contract in promissory morality will need to look elsewhere for a justification for the practice.

One type of justification appeals to the ways contract law enhances people's autonomy by empowering them to alter their legal relations through the creation of legally binding agreements. As Lon Fuller explains:

> [T]he law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations. The man who conveys property to another is exercising this power; so is the man who enters a contract. When a court enforces a promise it is merely arming with legal sanction a rule or *lex*

[52] See John Rawls, A Theory of Justice 304 (1971) ("[S]uppose that a just practice of promising exists. Then in making a promise ... one knowingly invokes the rule and accepts the benefits of a just arrangement. ... since, by hypothesis the practice is just, the principle of fairness applies and one is to do as the rule specifies.").

[53] For a defense of instrumental conceptions of contract and promise, see Liam Murphy, *The Artificial Morality of Private Law: The Persistence of an Illusion*, 70 U. of Toronto L.J. 453 (2020).

[54] Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897), reprinted in 110 Harv. L. Rev. 991 (1997).

> previously established by the party himself. This power of the individual to effect changes in his legal relations with others is comparable to the power of a legislature.[55]

There is value in allowing people to determine the rules that regulate their relationships in this way so long as each's freedom to do so is compatible with the freedom of all. Indeed, some theorists view a principle of equal freedom as the preeminent value that contract law should be designed to promote.[56] Alternatively, we might view contract law as justified by the ways in which it constitutes a particular kind of valuable relationship between free and equal persons—a type of relationship that, in the view of some theorists, wouldn't be possible without it.[57]

Consequentialist Theories. Theorists of a more consequentialist bent—those who focus on the effects of a law, as distinguished form its intrinsic value—find the justification for contract law in the social goods it produces. Law and economics scholars, for example, typically justify contract law in terms of its effects on social welfare: we enforce freely chosen agreements because that is a way of giving people tools to credibly commit themselves to one another, so that everyone has the assurances they need to engage in mutually beneficial transactions. A is willing to enter into the agreement where A pays B $5 now and B gives A a bicycle tomorrow, because the threat of a legal remedy deters B from breaching the agreement by taking the money and running. Such justifications of contract law therefore track closely the practice theories of promissory obligation described above. The difference is that they don't depend on the existence of a moral practice of promising. Social welfare is likely to be increased by the creation of an institution of contract, even if there is no moral practice of promising to piggyback on.

Intermediate Theories. Intermediate positions on the relationship between law and promissory morality are available too. It might be important that contract law be defined in ways that support our moral practices even if its point is not to directly enforce them. Suppose the aforementioned law and economics scholars are correct, and contract law ought to be designed to promote social welfare by giving people the tools of commitment on which much productive activity depends. Suppose also that the rules of contract law look suboptimal from this standpoint, because they track too closely the morality of promising. Still, if promising is an entrenched social practice that promotes productive

---

[55] Lon Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 806–07 (1941)

[56] See, e.g., Jody P. Kraus & Robert E. Scott, *The Case Against Equity in American Contract Law*, 93 S. Cal. L. Rev. 1322 (2020); Jody P. Kraus, *The Correspondence of Contract and Promise*, 109 Colum. L. Rev. 1602 (2009); Randy E. Barnett, *A Consent Theory of Contract*, 86 Colum. L. Rev. 269 (1986).

[57] See Peter Benson, Justice in Transactions 369 (2019) (arguing that contract law instantiates a conception of persons as possessing "two moral powers: first, a moral capacity to assert their sheer independence from their needs, preferences, purposes, and even their circumstances; and, second, a moral capacity to recognize and to respect fair terms of interaction that treat everyone as independent in the specific sense supposed by the first moral power").

brings A a veggie burger, fries, and an iced tea. Does A have an obligation to pay for the food? If so, on what grounds?

(2) B wants to transfer $10,000 to C, but makes an error filling in the online form, and the money ends up in A's account. Does A have an obligation to return the money to B? If so, on what grounds?

(3) Every morning, A stops by B's newsstand for a morning paper. One morning, there is a long line. A grabs a paper from the pile and holds it up for B to see. B winks at A, and A walks away with the paper. Does A have an obligation to pay for the paper? If so, on what grounds?

(4) Same as in (3), except A simply grabs a paper and walks away with it. Does A have an obligation to pay for the paper? If so, on what grounds?

(5) A is injured in a car accident and taken unconscious to hospital B. B treats A and sends A a bill for B's services. Does A have an obligation to pay the bill? If so, on what grounds?

(6) A's 15-year-old daughter C injures her ankle playing basketball. A looks at the ankle and decides that it is merely a sprain. Three days later, when C is visiting a friend, the friend's father D notices that the area around the ankle has turned purple. D immediately takes C to see B, who is a physician. B X-rays C's ankle and finds a hairline fracture. B sends both A and D a bill for B's services. Does either A or D have an obligation to pay the bill? If so, on what grounds?

Ora Lee Williams v. Walker-Thomas Furniture Co.

United States Court of Appeals, District of Columbia Circuit, 1965.
121 U.S.App.D.C. 315.

■ J. SKELLY WRIGHT, CIRCUIT JUDGE. Appellee, Walker-Thomas Furniture Company, operates a retail furniture store in the District of Columbia. During the period from 1957 to 1962 each appellant in these cases purchased a number of household items from Walker-Thomas, for which payment was to be made in installments. The terms of each purchase were contained in a printed form contract which set forth the value of the purchased item and purported to lease the item to appellant for a stipulated monthly rent payment. The contract then provided, in substance, that title would remain in Walker-Thomas until the total of all the monthly payments made equaled the stated value of the item, at which time appellants could take title. In the event of a default in the payment of any monthly installment, Walker-Thomas could repossess the item.

The contract further provided that "the amount of each periodical installment payment to be made by [purchaser] to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by [purchaser] under such prior leases, bills or accounts; *and all payments now and hereafter made by [purchaser] shall be credited pro rata on all outstanding leases, bills and accounts* due the Company by [purchaser] at the time each such payment

is made." [Emphasis added.—Eds.] The effect of this rather obscure provision was to keep a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated. As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings.

On May 12, 1962, appellant Thorne purchased an item described as a Daveno, three tables, and two lamps, having total stated value of $391.10. Shortly thereafter, he defaulted on his monthly payments and appellee sought to replevy all the items purchased since the first transaction in 1958. Similarly, on April 17, 1962, appellant Williams bought a stereo set of stated value of $514.95.[1] She too defaulted shortly thereafter, and appellee sought to replevy all the items purchased since December, 1957. The Court of General Sessions granted judgment for appellee. The District of Columbia Court of Appeals affirmed, and we granted appellants' motion for leave to appeal to this court.

Appellants' principal contention, rejected by both the trial and the appellate courts below, is that these contracts, or at least some of them, are unconscionable and, hence, not enforceable.

* * *

In other jurisdictions, it has been held as a matter of common law that unconscionable contracts are not enforceable. While no decision of this court so holding has been found, the notion that an unconscionable bargain should not be given full enforcement is by no means novel. In *Scott v. United States*, 79 U.S. (12 Wall.) 443, 445 (1870), the Supreme Court stated:

> "* * * If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to. * * * "

Since we have never adopted or rejected such a rule, the question here presented is actually one of first impression.

Congress has recently enacted the Uniform Commercial Code, which specifically provides that the court may refuse to enforce a contract which it finds to be unconscionable at the time it was made. 28 D.C.Code § 2–302 (Supp. IV 1965). The enactment of this section, which occurred subsequent to the contracts here in suit, does not mean that the common law of the District of Columbia was otherwise at the time of enactment, nor does it preclude the court from adopting a similar rule in the exercise of its powers to develop the common law for the District of Columbia. In fact, in view of the absence of prior authority on the point, we consider

[1] At the time of this purchase her account showed a balance of $164 still owing from her prior purchases. The total of all the purchases made over the years in question came to $1,800. The total payments amounted to $1,400.

the congressional adoption of § 2–302 persuasive authority for following the rationale of the cases from which the section is explicitly derived. Accordingly, we hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case." Corbin suggests the test as being whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place." . . . We think this formulation correctly states the test to be applied in those cases where no meaningful choice was exercised upon entering the contract.

Because the trial court and the appellate court did not feel that enforcement could be refused, no findings were made on the possible unconscionability of the contracts in these cases. Since the record is not sufficient for our deciding the issue as a matter of law, the cases must be remanded to the trial court for further proceedings.

So ordered.

■ DANAHER, CIRCUIT JUDGE (dissenting). The District of Columbia Court of Appeals obviously was as unhappy about the situation here presented as any of us can possibly be. Its opinion in the *Williams* case, quoted in the majority text, concludes: "We think Congress should consider

corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar."

My view is thus summed up by an able court which made no finding that there had actually been sharp practice. Rather the appellant seems to have known precisely where she stood.

There are many aspects of public policy here involved. What is a luxury to some may seem an outright necessity to others. Is public oversight to be required of the expenditures of relief funds? A washing machine, e.g., in the hands of a relief client might become a fruitful source of income. Many relief clients may well need credit, and certain business establishments will take long chances on the sale of items, expecting their pricing policies will afford a degree of protection commensurate with the risk. Perhaps a remedy when necessary will be found within the provisions of the "Loan Shark" law, D.C.Code §§ 26–601 et seq. (1961).

I mention such matters only to emphasize the desirability of a cautious approach to any such problem, particularly since the law for so long has allowed parties such great latitude in making their own contracts. I dare say there must annually be thousands upon thousands of installment credit transactions in this jurisdiction, and one can only speculate as to the effect that these cases will have.

* * *

The Walker-Thomas Furniture Company

NOTES

(1) What is the test for unconscionability according to Judge Wright? Where exactly does it appear in the opinion? Does Judge Danaher, writing in dissent, believe that this is the wrong test, or that there should be no unconscionability defense?

(2) In an important 1967 article, Arthur Leff distinguished between procedural unconscionability and substantive unconscionability. *Unconscionability and the Code—The Emperor's New Clause*, 115 U. Pa. L. Rev. 485, 487 (1967). "Procedural unconscionability" refers to defects in the

(5) Should it matter if the contract was written by one party and presented to the other on a take-it-or-leave-it basis? Doesn't this describe most contracts that most of us enter?

Comment: The *Ex Ante* and *Ex Post* Perspectives

Breach of contract is often a wrong that harms the nonbreaching party. In many cases, there is a strong intuition that the breaching party should compensate the nonbreaching party for their losses—that the breaching party should be made to pay for the breach because justice between the parties requires it. One purpose of awarding damages is to enforce such post-breach obligations. This aspect of contract law is backward looking, or takes an "*ex post*" (after the event) perspective on the transaction.

At the same time, one of the great benefits of having a law of contract is the assurance it gives parties entering into agreements. When you enter a contract, you know that the other side has a new reason to perform: the threat of legal liability for breach. And you know that you are at least partly insured against breach, most likely in the form of money damages awarded to you as the nonbreaching party. These legal protections make possible value-creating transactions (exchanges in which both sides gain) between parties who otherwise might not trust one another. A second function of contract law is to provide such assurances by giving parties the right incentives. This is a forward looking, or "*ex ante*" (before the event), aspect of contract law.

Contract is hardly the only area of the law that has both *ex ante* and *ex post* functions. A criminal law, for example, can serve both deterrent and retributive functions. Criminalizing theft deters people *ex ante* from stealing by attaching new costs (possible imprisonment) to the act. It also serves to express society's disapproval of the bad act *ex post* by punishing the individual who has committed it.

That said, the distinction between the *ex ante* and *ex post* perspectives is especially important in contract law, and can create significant tensions within it. When, for example, should the law require that a contract be in writing? From the *ex ante* perspective, requiring a writing is a good idea because it gives parties a new reason to put their agreements on paper. Enforcing oral agreements is more expensive for the courts and less reliable for the parties. Yet we know that no matter what the rule, some parties will enter into agreements based on no more than a handshake. When there is clear proof that the parties entered into an oral agreement, should we let the breaching party get off scot-free simply because it was not reduced to writing? What is the best rule from the *ex post* perspective?

Another area where we will see the two perspectives at work is in the interpretation of contracts, and especially in the difference between formalist and contextualist approaches. Simplifying a bit, formalists tend

to emphasize the plain meaning of writings, whereas contextualists are willing to admit more evidence of the circumstances that gave rise to the writing. From the *ex ante* perspective, one advantage of formalism is that case outcomes are more predictable. If an insurance contract says that the insured is protected "against all loss, damage, expense and liability resulting from injury to property," the parties know that it protects against *all* such losses. That is what the written contract says. From the *ex post* perspective, however, a focus on the text can lead to injustice. Perhaps both parties to the contract unquestionably intended to insure only against losses to third parties, not against losses to the insured. True, they did a poor job expressing that agreement in writing. But where there is clear evidence that the parties intended a different meaning, wouldn't it be unjust to ignore that evidence? And yet to allow the evidence is to muddy the waters for future parties, who will be less certain about how a court will interpret their written contract.

One way to explore the *ex ante* perspective is to ask, "Who are the future parties rooting for?" Many litigating parties (if they are not repeat players) just want to win the lawsuit. They view the transaction from the *ex post* perspective. Future parties, who have not yet contracted and so are in the *ex ante* perspective, are often in a better position to evaluate what the law should be. Consider, for example, whom the future parties are rooting for in *Williams v. Walker-Thomas Furniture*. It is unsurprising that consumer groups representing future consumers would oppose the kind of advantage-taking in *Walker-Thomas*. But it is possible that an industry group representing future furniture sellers would also oppose the *Walker-Thomas* practices. Can you see why? Then again, if the new rule drives Walker-Thomas out of business, will anyone be left to sell home furnishings to poor people? While the effect of the decision on future parties is far from certain, considering this effect provides a very different perspective on the decision in the case.

Alice Sullivan v. James O'Connor

Supreme Judicial Court of Massachusetts, 1973.
363 Mass. 579.

■ KAPLAN, JUSTICE. The plaintiff patient secured a jury verdict of $13,500 against the defendant surgeon for breach of contract in respect to an operation upon the plaintiff's nose. The substituted consolidated bill of exceptions presents questions about the correctness of the judge's instructions on the issue of damages.

The declaration was in two counts. In the first count, the plaintiff alleged that she, as patient, entered into a contract with the defendant, a surgeon, wherein the defendant promised to perform plastic surgery on her nose and thereby to enhance her beauty and improve her appearance; that he performed the surgery but failed to achieve the promised result; rather the result of the surgery was to disfigure and deform her nose, to cause her pain in body and mind, and to subject her to other damage and

activity effectively without legal intervention, making the rules of contract too discordant with the everyday morality of promising could have the unintended consequence of disrupting the moral practice in ways that might undermine the very objective of maximizing social welfare—and perhaps erode our moral culture more generally. Some law and economics scholars, for example, have argued that it is a good thing if people breach contracts where it is in their interests to do so, so long as they fully compensate the other party by paying them full expectation. Such "efficient breaches" increase social welfare: the breaching party does better because she prefers to breach than perform, while leaving the breach victim no worse off because he gets an amount of money in damages that makes him indifferent between breach and receiving the performance. But if such an idea gets too entrenched, that might promote the idea that it is morally okay, worthy even, to breach one's promises, which could undermine people's trust in the moral practice.[58]

A skeptic might respond that we don't need the moral practice once we have an institution of contract. But there are significant costs to legal enforcement, suggesting that it is better to leave the enforcement of some agreements to the non-legal realm. Most obviously, there are the costs of administrating the legal processes involved in creating and sustaining the legal institution. Less obviously, but more importantly:

> There is a real need for a field of human intercourse freed from legal restraints, for a field where men may without liability withdraw assurances they have once given. Every time a new type of promise is made enforceable, we reduce the area of this field. The need for a domain of "free-remaining" relations is not merely spiritual. Business deals can often emerge only from a converging series of negotiations, in which each step contains enough assurance to make worthwhile a further exchange of views and yet remains flexible enough to permit a radical readjustment to new situations. To surround with rigid legal sanctions even the first exploratory expressions of intention would not only introduce an unpleasant atmosphere into business negotiations, but would actually hamper commerce. The needs of commerce in this respect are suggested by the fact that in Germany, where the code makes offers binding without consideration, it has become routine to stipulate for a power of revocation.[59]

(C) THREE MORE PERSPECTIVES ON CONTRACT LAW

Law and Economics. We have already mentioned law and economics as a justificatory theory of contract law. The approach has also been

[58] For a discussion of the ways in which contemporary contract law may be eroding our moral culture, see Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 Harv. L. Rev. 708 (2007).

[59] Lon Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 813 (1941).

enormously generative in thinking about doctrine. For the past fifty years or so, much contract scholarship in the United States has employed economic methods. The economic approach focuses on the incentives legal rules create and their likely effects on human behavior. What, for example, is the probable effect of the unconscionability doctrine on the prices that poor people will pay for goods? How might different damages measures influence parties' decisions to perform or breach? How will the *Hadley* rule affect the flow of information at the time of contracting? When answering such questions, law and economics scholars have traditionally assumed that parties are rational, self-interested utility maximizers. They have assumed that, when deciding how to act, (1) people rationally weigh all costs and benefits of their various options, and (2) each is indifferent as to the costs or benefits that their actions might impose or confer on others.

The economic approach described above is predictive. It aims to tell us what effects one or another legal rule will have on people's behavior. To assess the significance of those effects for the evaluation of legal rules, we will need to add normative assumptions to this predictive method. As noted above, many law and economics scholars argue that the goal of the law should be to maximize social welfare, or overall preference satisfaction. In the second edition of his enormously influential book, *Economic Analysis of Law*, Richard Posner (who was later appointed a judge on the Seventh Circuit Court of Appeals) identified three functions of contract law. First, it furnishes "incentives for value-maximizing conduct in the future," i.e., conduct that exploits economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized. Second, it reduces the "complexity and hence cost of transactions by supplying a set of normal terms that, in the absence of a law of contracts, the parties would have to negotiate expressly." Third, it furnishes "prospective transacting parties with information concerning the many contingencies that may defeat an exchange, and hence. . .assist[s] them in planning their exchange sensibly."[60]

More recently, empirically-minded scholars have begun to explore alternatives to the rational actor model.[61] Results from experimental psychology suggest that people are often systematically non-rational in the ways in which they process information (they employ heuristics and are subject to biases) and that their preferences are not exclusively self-interested (they are often other-regarding and motivated to conform to applicable legal and social norms for their own sake). These behavioral economists argue that the lawmakers can and should take into account these biases, heuristics and non-self-interested preferences in designing

[60] Richard Posner, Economic Analysis of Law 68–69 (2d ed. 1977).

[61] See, e.g., Christine Jells, Cass R. Sunstein and Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471 (1998); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 Vand. L. Rev. 1499 (1998).

the law. In the area of contracts, this has produced new arguments for mildly paternalistic rules, such as pro-employee defaults in employment contracts, and for the penalty rule, which prevents parties from contracting for punitive damages for breach.[62]

Relational Contract Theory. To evaluate the rules of contract law, we need to know how contract law plays out on the ground and how it interacts with other social forces. Law and economics aims to do this within the individualistic confines of the rational actor model, or, in the case of behavioral economics, using that model tweaked to reflect the findings of empirical psychology. Relational contract theory takes a less reductive and less individualistic approach by studying the ways contract law plays out among actors who find themselves situated in a complex web of social relationships often governed by overlapping legal and non-legal norms, and are therefore at the mercy of multiple social forces.

The foundational article in this tradition is Stuart Macaulay's article, *Non-Contractual Relations in Business: A Preliminary Study*, published in the American Sociological Review in 1963. Macaulay used interviews with businesspeople and lawyers to attempt to answer the questions "What good is contract law? Who uses it? When and how?"[63] He concluded that among business people, "contract and contract law are often thought unnecessary because there are many effective non-legal sanctions."[64] Those non-legal sanctions included, for example, refusal to deal with a party in the future and the reputational costs of breach. Macaulay also argued that personal relationships and trust often provided all the assurance that was necessary. In fact, businesspeople reported that too much law and lawyering got in the way of successful transactions:

> Not only are contract and contract law not needed in many situations, their use may have, or may be thought to have, undesirable consequences. Detailed negotiated contracts can get in the way of creating good exchange relationships between business units. If one side insists on a detailed plan, there will be delay while letters are exchanged as the parties try to agree on what should happen if a remote and unlikely contingency occurs. In some cases they may not be able to agree at all on such matters and as a result a sale may be lost to the seller and the buyer may have to search elsewhere for an acceptable supplier. Many businessmen would react by thinking that had no one raised the series of remote and unlikely contingencies all this wasted effort could have been avoided.

---

[62] See, e.g., Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. Rev. 106 (2002); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan. L. Rev. 213 (1995).

[63] Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 55, 55 (1963)

[64] Id. at 63.

> Even where agreement can be reached at the negotiation stage, carefully planned arrangements may create undesirable exchange relationships between business units. Some businessmen object that in such a carefully worked out relationship one gets performance only to the letter of the contract. Such planning indicates a lack of trust and blunts the demands of friendship, turning a cooperative venture into an antagonistic horse trade. Yet the greater danger perceived by some businessmen is that one would have to perform his side of the bargain to its letter and thus lose what is called "flexibility." Businessmen may welcome a measure of vagueness in the obligations they assume so that they may negotiate matters in light of the actual circumstances.
>
> Adjustment of exchange relationships and dispute settlement by litigation or the threat of it also has many costs. The gain anticipated from using this form of coercion often fails to outweigh these costs, which are both monetary and non-monetary. Threatening to turn matters over to an attorney may cost no more money than postage or a telephone call; yet few are so skilled in making such a threat that it will not cost some deterioration of the relationship between the firms. One businessman said that customers had better not rely on legal rights or threaten to bring a breach of contract law suit against him since he "would not be treated like a criminal" and would fight back with every means available.[65]

Since the publication of *Non-Contractual Relations in Business*, many other scholars have studied how parties use non-legal norms, practices, and sanctions, as well as the advantages and disadvantages of those mechanisms compared to legal enforcement and how the law can interfere with and support those non-legal forms of assurance. Different scholars draw different conclusions from the data. For some, the lesson is that contract law should be more attuned to the customs and practices surrounding the parties' agreement and to the fact that contractual arrangements change and grow over time, and that courts should seek enforcement mechanisms that tend to support the extralegal relationship between the parties.[66] Others have argued that more formal and less flexible interpretations are better for parties who want to "allocate aspects of their relationship between the legal and extralegal realms in ways that seek to maximize the value of their transaction."[67]

Critical Approaches. Courts in the United States give reasons for their decisions. Critical legal scholars commonly argue that the reasons

---

[65] Id. at 64.

[66] See, e.g., Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 Loy. L.A. L. Rev. 789 (1993); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. Cal. L. Rev. 691 (1974).

[67] Lisa Bernstein, *Merchant Law In a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765, 1788 (1996). See also Robert E. Scott, *The Case for Formalism in Relational Contracts*, 94 Nw. U. L. Rev. 847 (2000).

a court gives for a case outcome or rule is often not the whole story. Judicial (and legislative) decisions are influenced by many factors. These can range from case-specific factors such as the quality of legal representation, the sympathies of the judge or jury, or a court's hidden agenda, to broader social facts such as raw political power, economic forces, or the subordination of classes of persons.

Critical contracts scholarship has taken many forms. Morton Horwitz, in his monumental The Transformation of American Law, for example, argued that developments in nineteenth century contract law functioned to protect commercial interests and the mercantile class:

> The emergence of the objective theory, then, is another measure of the influence of commercial interests in the shaping of American law. No longer finding it necessary to enter into battle against eighteenth century just price doctrines, they could devote their energies to establishing in the second half of the nineteenth century a system of objective rules necessary to assure legal certainty and predictability. And having destroyed most substantive grounds for evaluating the justice of exchange, they could elaborate a legal ideology of formalism, of which Williston was a leading exemplar, that could not only disguise gross disparities of bargaining power under a façade of neutral formal rules of contract law but could also enforce commercial customs under the comforting technical rubric of "contract interpretation."[68]

Other historically minded authors have argued that courts in the Reconstruction South used facially neutral contract rules to enforce the continued subjugation of formerly enslaved Black people,[69] that in the late nineteenth century negative injunctions were used primarily against female performers to effectively bind them to their male managers,[70] and that judicial hostility toward the enforcement of agreements between spouses has historically systematically disadvantaged women.[71]

At times subjugated persons were able to use contract law to their advantage. As Dylan Penningroth explains: "Already by 1873 . . . Black people were actively participating in the South's country and state courts, amplifying and extending a pattern set during slavery. And they continued to do so during the era of Jim Crow when they lost the right to vote and were violently subjugated in public life."[72] At the same time, contract law was often part of the apparatus that sustained white

---

[68] Morton J. Horwitz, The Transformation of American Law, 1780–1860 201 (1977).

[69] Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. Chi. L. Rev. 1161 (1984).

[70] Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 Yale L. J. 775 (1992).

[71] Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 Harv. L. Rev. 491 (2005); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings*, 1860–1930, 82 Geo. L.J. 2127 (1994).

[72] Dylan C. Penningroth, *Race in Contract Law*, 170 U. Penn. L. Rev. 1199, 1212 (2022).

supremacy: "[L]ife's ordinary business could not go on if you could not make contracts with Black people. White people *needed* to be able to treat African Americans as competent, reasonable people. They needed Black people to have a working legal knowledge, to be co-participants in the speech community that turned otherwise ordinary behavior, like touching a pen, into legally binding acts."[73] "Black people's exercise of contract rights in a world defined by white supremacy required whites to think of them as both ordinary and set apart, as people who were inferior yet capable of transacting business."[74] Indeed, victories won by Black litigants often depended on wringing tactical advantages from the ideology of white supremacy, as when their lawyers were able to defend them against enforcement of contracts by white plaintiffs by invoking their ignorance and illiteracy.[75] And, as Brittany Farr's work on labor contracts involving sharecroppers and share-tenants in the post-slavery South shows, extralegal threats of retribution and doctrinal obstacles served to seriously limit their ability to fully vindicate their contractual rights, even, perhaps especially, when infringements of their rights involved violence.[76]

Such critical studies show the importance of sometimes taking a skeptical attitude toward the law. Contract law is a tool. Like other tools, it can be put to many different uses. It can serve those uses well or poorly, depending on its design. And the uses themselves can be more or less praiseworthy. The careful study of contract law requires an inquiry into the nature of the tool, the usefulness of its design, and the value of the ends it serves.

DRAFTING EXERCISE: SELLING AN EGG CLEANER

The following exercise draws extensively from William K. Sjostrom, Jr., *An Introduction to Contract Drafting* (2012), which is an excellent resource for identifying basic contractual components and learning how agreements are structured.

(A) Read the contract below and try to identify the following types of provisions: title, preamble, recitals, words of agreement, performance provisions, consideration, representations and warranties, and concluding provisions. In other words, try to identify the function and legal effect of each provision.

(B) If you represented the buyer, Yoko E. White, what changes might you request to the proposed contract? Ask ChatGPT for suggestions of how to redraft the contract to be more favorable to the buyer.

---

[73] Id. at 1243.

[74] Id. at 1296 (references omitted).

[75] Id. at 1238–43.

[76] Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South*, 69 UCLA L. Rev. 674 (2022).

4. Which of the foregoing answers can the parties contract around (and how)?

(B) SOURCES OF CONTRACT LAW

The Common Law of Contract. Most contracts in the United States are governed by state law. Strictly speaking, therefore, there is no single U.S. law of contract. We have fifty laws of contract spread among the fifty states, plus separate laws of contract that govern the District of Columbia, Puerto Rico, other U.S. jurisdictions, as well as a federal contract law for contracts with the federal government and the like. These separate laws of contract differ from one another in important ways, many of which will be discussed in this book. But almost all these bodies spring from a single source: the English common law. (The most important exception is Louisiana, whose contract law derives from the French Civil Code.) And as these laws of contract have grown and changed over the years, courts and legislatures have looked to one another for guidance and to a small number of national authorities. As a result, though it is important to keep local differences in mind, one can say that there is a distinctive U.S. law of contract. That law is the subject of this book.

Except where displaced by statute, the general law of contract in the United States is a product of judicial decisions in individual cases. This form of lawmaking is one of our most important inheritances from England. The English law of contract emerged largely from the decisions of the common law courts together with those of the competing Chancery Court (discussed below).[11] Although the judges of these courts proceeded modestly on a case-by-case basis, adjudicating individual controversies brought before them, they did not act without guidance. Important sources for the common law of contract included Roman Law (most significantly, Justinian's *Corpus Juris Civilis*), Canon Law (the law of the Church), and the Law Merchant (customary law developed by merchants in their dealings with one another). Most important, however, was the principle of *stare decisis*, which required that courts follow the holdings of earlier judicial decisions. Judicial adherence to this principle meant that over the course of centuries, there emerged a judicially created, well-defined body of legal rules. The core of U.S. contract law remains largely a creature of the common law. Contract law lives in the records of judicial decisions.

The fact that the law of contract lives in the decisions of courts can make it difficult to find. As a result, treatises and other secondary sources have had a significant influence on the development and harmonization of the law of contract in the United States. The two most important treatises have been and remain Samuel Williston's *The Law of Contracts*

[11] See A.W.B. Simpson's monumental work, A.W.B. Simpson, A History of the Common Law of Contract: The Rise of the Action of Assumpsit (1975).

(1920) and Arthur Linton Corbin's *Corbin on Contracts* (1950).[12] Williston's work is generally regarded as taking a more formalist approach, emphasizing fixed rules and principles. Corbin's is considered more realist, focusing on practical realities and tensions within the law. But one must be careful not to oversimplify. Both works combine detailed discussions of the case law with theoretical reflection on underlying principles. Over the years, both have also had multiple new editions and new editors, and each has expanded into many volumes. Although Williston's and Corbin's treatises are not law, they enjoy a considerable degree of persuasive authority with courts.

Even more important than these individually authored treatises have been the Restatements of the Law. The American Law Institute (ALI) is a group of lawyers, judges and legal scholars founded in 1923 "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."[13] Among the ALI's major early accomplishments was the preparation of the Restatement of Contracts. As the title implies, the work attempted to systematically restate the prevailing law of contract in the United States. Drafting of the Contracts Restatement (along with those covering Torts, Conflict of Laws and Agency) began in 1923, with Samuel Williston serving as the Reporter on the contracts volume and Arthur Corbin as Williston's most important advisor. The final draft was approved in May 1932. Williston reported that "the endeavor in the Restatement is to restate the law as it is, not as new law."[14] The end product, however, also had strongly normative aspects. Several provisions had only marginal support in the case law and were clearly advanced as improvements upon prevailing doctrine. The Restatement of Contracts, today often referred to as the "First Restatement," was enormously influential and has been cited in thousands of judicial opinions.

In the early 1960s, the ALI began work on the Second Restatement of Contracts with Robert Braucher as the Reporter. Braucher served in that capacity until 1971, when he was appointed to the Supreme Judicial Court of Massachusetts and was succeeded by E. Allan Farnsworth. Sixteen tentative drafts were produced, culminating in a final version adopted by the ALI in 1979 and published in 1981. Like the First Restatement, the Second Restatement's primary purpose is to restate the law as it is, not as it should be. Nevertheless, it too contains some outright innovations, the most significant of which is the increased recognition of reliance as a basis of liability.[15]

---

[12] For more on Williston and Corbin, see Todd D Rakoff, *Professor Samuel Williston (1861–1963)*, and Gregory Klass, *Professor Arthur Linton Corbin (1874–1967)*, *in* Scholars of Contract Law 175 & 201 (J. Goudkamp & D. Nolan eds., 2022).

[13] Restatement viii.

[14] 3 ALI Proceedings 159 (1925).

[15] See E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 Colum. L. Rev. 1 (1981).

In the Spring of 2022, the ALI membership approved a new Restatement of the Law, Consumer Contracts ("Restatement of Consumer Contracts"). This work supplements the Second Restatement for the special category of contracts between businesses and consumers.

For all their persuasive authority and importance for the development of the common law, it must be remembered that the Restatements are not the law. They represent the collective judgments of a highly respected body of legal experts about what the law is or, in a few instances, what it should be. That said, individual Restatement provisions and the comments to them often provide especially clear and carefully drafted statements of legal rules. For this reason, we will refer extensively to both the First and especially the Second Restatement of Contracts throughout this book.

Legislative Codification. At the end of the nineteenth century, the English Parliament began to codify large segments of commercial law. One of the early statutes was the English Sale of Goods Act, enacted in 1893.

In the United States, the National Conference of Commissioners on Uniform State Laws), today known as the Uniform Law Commission ("ULC"), composed of Commissioners appointed by the governors, was created in 1892 to promote efforts to codify and homogenize state laws. In 1902, the ULC entrusted to Samuel Williston the task of drafting a model statute for the sale of goods.[16] The result was the Uniform Sales Act, approved by the Commissioners and recommended to the state legislatures in 1906. Over thirty states eventually adopted the Uniform Sales Act, which largely followed the English statute, often copying its language verbatim. Because, as in England, an effort was made to preserve a continuity with the common law, the Uniform Sales Act did little to change the basic structure of contract law.

The next major effort at codification, the Uniform Commercial Code (UCC), took a very different approach. Like the Uniform Sales Act, the UCC is a model statute that becomes law only if enacted by a legislature. Whereas the Uniform Sales Act dealt only with the sale of goods, the UCC covers a wide range of commercial transactions, including the sale of goods. Work on the Code began in the early 1940s, under joint sponsorship of the ULC and the ALI. The first edition was approved in 1952. After the New York legislature rejected the 1952 version, revisions were made and a new edition, known as the 1958 Official Text with Comments, was published. New York enacted this revised version, after which many states followed. Today, forty-nine states, plus the District of Columbia and the Virgin Islands, have enacted the UCC. Louisiana has adopted Articles 1, 3, 4 and 5. The focus of this book will be Article 2, which governs the sale of goods.

---

[16] For a history of earlier and largely unsuccessful efforts to codify American law, see John Honnold, The Life of the Law 100–145 (1964).

The primary architect of the Code was Karl Llewellyn,[17] a leading member of the American legal realist movement. Unlike earlier projects, Llewellyn and his colleagues did not feel obliged to follow existing law. As a result, the UCC often departs from the common law. Although UCC statutes govern only commercial transactions of specified types, some of their new rules have influenced the subsequent development of the common law of contract.

The UCC has been amended numerous times over the years. Once the ULC has approved a set of amendments, state legislatures usually amend the state statutes to conform. The ULC website keeps an updated list of all uniform rules that the organization has promulgated, as well as of the most recent amendments and which states have enacted them. In 2003, after a fifteen-year revision process, the ULC approved major amendments to Article 2. The proposed changes were quite controversial, and no state adopted the 2003 amendments.[18] Taking note of the lack of enthusiasm on the part of the states, the ULC withdrew the 2003 amendments in the summer of 2011. Although the 2003 amendments are no longer part of the UCC, much less state law, we occasionally discuss them as possible alternatives to or clarifications of existing law. The most recent amendments to the UCC were adopted in 2022. The changes to Article 2 are more minor than those in the 2003 project and will likely be less controversial.

Other Domestic Law. State and federal constitutional and statutory law also have bearing on the law of contract. The Contract Clause of the U.S. Constitution prohibits states from "impairing the Obligation of Contracts." Art. 1 § 10. Also relevant is the 13th Amendment of the U.S. Constitution abolishing slavery. Many state and federal statutes regulate particular types of contracts, such as statutes on consumer protection, employment, and landlord-tenant relationships. And there are federal and state statutes that prohibit forms of discrimination in contracting. For example, the federal Civil Rights Act prohibits racial discrimination, mandating that "all persons ... shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens." 42 U.S.C. § 1981.

International Developments. Two important developments in international commerce will be referred to throughout the book.

As of May 2023, the United Nations Convention on Contracts for the International Sale of Goods (CISG) had been ratified by 95 countries, including Canada, Mexico and the United States. The United Kingdom has not ratified the Convention. The CISG applies to contracts for the sale of goods between parties who do business in different countries when both countries have ratified the Convention. CISG Art. 1(1)(a). When

---

[17] For a study of Llewellyn, his life, times, ideas and role in UCC drafting, see William Twining, Karl Llewellyn and the Realist Movement (1973).

[18] For some background, see William H. Henning, *Amended Article 2: What Went Wrong?*, 11 Duq. Bus. L.J. 131 (2009).

advice. Can Smirgo recover the contract price from Bisko under Article 2 of the UCC? If not, what other remedies are available? Study the remedy options in UCC § 2–703, and explore the possibilities in Sections 2–704 through 2–710. What formulas would a court calculate damages for Bisko's breach under Sections 2–706(1), 2–708(1) and 2–709(1)? What must the seller prove and/or do to recover under each? Do the damage measures described in these Sections protect Smirgo's restitution, reliance or expectation interests?

(2) Suppose, instead, that on November 1, the time agreed for delivery, Smirgo informed Bisko that while the new ovens were completed, they would not be delivered unless Bisko paid $30,000 cash. There was no justification for this demand; it was clearly a breach of contract since a 90-day credit term had been agreed upon. On November 2, Bisko discovered that there were three custom oven manufacturers within a hundred-mile radius that would manufacture the custom-made ovens at an average price of $29,500. The estimated time of delivery was in six months, however, and no business concern had the type of oven Bisko needed in stock. On November 3, Caraway Co. announced that it was marketing a new bread almost identical to that developed by Bisko. The next day, the Bisko sales manager informed the president that unless the ovens were obtained within ten days, Bisko would lose an estimated $20,000 in profits on six long-term contracts already made and an estimated $100,000 in profits on contracts under negotiation but not yet signed. During the past five years, Bisko's net profits have averaged $100,000 per year.

On the afternoon of November 4, the president of Bisko came to you for legal advice. Assume that Smirgo is in breach of contract and that the Uniform Commercial Code governs this case. Based upon an analysis of UCC Sections 2–711 through 2–717 and the business situation described, what would you advise Bisko to do? Go as far as you can with the relevant statutory provisions. What formulas would a court calculate damages for Bisko's breach under Sections 2–712(2) and 2–713(1)? Again, do the UCC damage measures described protect the nonbreaching party's restitution, reliance or expectation interests?

Comment: The Uniform Commercial Code and the Sale of Goods

Article 2 of the Uniform Commercial Code is designed to govern (when enacted by a state legislature) all contracts for the sale of goods. UCC § 2–102. Section 2–105(1) defines "goods" as follows:

> "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (§ 2–107).

Section 2–107 describes when the sale of minerals, crops or other products attached to realty qualifies as a sale of goods. Section 2–106(1) provides that "[a] 'sale' consists in the passing of title from the seller to the buyer for a price."

Some contracts involve both the sale of goods and the provision of non-goods. A contractor renovating a house, for example, might agree to provide many goods (materials, fixtures, appliances, etc.) as well as services (construction work). Courts have held that when a contract involves both goods and services, goods and real property or some other mixture, the UCC applies only if the goods are the "predominant factor." The Eighth Circuit describes the test as follows:

> The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).

Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974). The 2022 amendments to Section 2–102 codify this predominant purpose test.

(2) In a hybrid transaction:

(a) If the sale-of-goods aspects do not predominate, only the provisions of this Article which relate primarily to the sale-of-goods aspects of the transaction apply, and the provisions that relate primarily to the transaction as a whole do not apply.

(b) If the sale-of-goods aspects predominate, this Article applies to the transaction but does not preclude application in appropriate circumstances of other law to aspects of the transaction which do not relate to the sale of goods.

The Uniform Commercial Code is not designed to replace all of the common law of contract in its areas of application. Thus Section 1–103(b) provides that the common law of contract shall supplement the provisions of the UCC where the common law's rules are not "displaced by the particular provisions of [the Code]." The Section mentions as examples of non-displaced common law rules the rules governing "capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause."

As we discussed in Section 1.B of this Chapter, the primary drafter of the UCC was Karl Llewellyn, a member of the legal realist school. Llewellyn and the other drafters did not feel beholden to the existing law, and the UCC departs from the common law in many significant respects. Individual differences are noted throughout this book. The UCC also includes some systematic innovations, both in substance and style. Three bear special mention.

First, whereas the common law of contract does not generally apply different rules to different types of parties, many Sections of the Code provide separate rules for merchants and for non-merchants.[35] Section 2–201's rule for when a contract must be in writing, for example, makes it easier to enforce an oral contract against a merchant than against a non-merchant. Section 2–205 provides that a merchant's written firm offer is enforceable without consideration, with no similar rule for non-merchants. And Section 2–207 allows terms to enter a contract between merchants even when one side has not expressly agreed to them, whereas consumer contracts require assent to such terms. The definition of "merchant" can be found in Section 2–104(1):

> "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

It is important to pay attention to whether any given UCC rule applies to all transactions, to only transactions between merchants or to only transactions involving a non-merchant.

Second, there is the Code's attempt to integrate contemporary business practices or customs into the law. As Llewellyn explained in a comment to an early draft of Article 2, "the intention of this Act is to use the standards not of past decisions but of current commerce."[36] Section 2–103(1)(b), for example, defines "good faith" in transactions between merchants to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." And Section 2–202(b) provides that the terms of a written agreement "may be explained or supplemented by . . . usage of trade," which is "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed." UCC § 1–303(c). Some scholars have criticized this approach, arguing that business custom is too indeterminate and difficult to verify to serve as an effective legal standard.[37]

Finally, unlike most statutes, the UCC is designed to invite judges to take something like a common law approach when applying it. Richard Danzig describes the approach as follows:

---

[35] See generally Ingrid M. Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 Geo. L.J. 1141 (1985).

[36] Uniform Revised Sales Act § 99(2), Comment (Proposed Final Draft No. 1, 1944). See generally Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 Stan. L. Rev. 621 (1975).

[37] See, e.g., Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765 (1996).

> Article II is rife with such open-ended words (none of them referred to in the definitional section) as "reasonable time," "reasonable medium," "reasonable grounds," even "reasonable price," "reasonable value," "fair and reasonable cause," and "material alter[ation]," as well as the notorious "unconscionability." The use of generalized guides to decision (for example, custom and usage) and open-ended terms (reasonableness, good faith, unconscionability), the injection of "official commentary" declaring the intent of the drafters, and, above all, the scarcity of provisions explicit enough to be applied without a consideration of circumstance, compel a court that would use the Code to move beyond the literalism of "mechanical jurisprudence."[38]

As a result, even if a case is governed by a UCC provision, it is often necessary to look to past judicial decisions to determine exactly what the rule is.

John Tennyson v. State

Court of Appeals of Georgia, 1915.
16 Ga. App. 214.

■ BROYLES, J. John Tennyson was convicted of the offense of cheating and swindling, under section 716 of the Penal Code, commonly known as the "Labor Contract Act," in that he obtained from the prosecutor, H.D. Brinson, an advance of $2 upon an alleged contract to cut four cords of wood at 50 cents per cord on the lands of the prosecutor; this labor to be performed between the 20th and 25th of July, 1914. From the testimony of the prosecutor it appears that Tennyson was a share cropper with Brinson, and that Brinson paid him wages of $12 per month; that after Tennyson had secured, on July 18, 1914, the advance of $2, he continued to work on his crops, and continued in the employment of Brinson until some time in October, 1914, when after "a little scrap" and "a thrashing" administered to the defendant by Brinson, he turned over all of his crop to Brinson, and left the place without cutting the wood in question, or returning the $2 advanced on the alleged independent contract.

To establish the essential elements of the offense alleged in the accusation, the burden is upon the state to prove, among other things, that the accused had no good and sufficient cause for failing to perform the contract, or for failing to return the money advanced; and also that loss to the person advancing the money resulted therefrom. In the case at bar the prosecutor testified:

> "John Tennyson was working with me as a share cropper, and had been working with me since December, 1913. He continued to work on in his crop until some time in October, when we had a little scrap, and I gave him a thrashing. He was working in

[38] Danzig, *A Comment*, supra p. 36, n. 39 at 634 (footnotes omitted).

the law. In the area of contracts, this has produced new arguments for mildly paternalistic rules, such as pro-employee defaults in employment contracts, and for the penalty rule, which prevents parties from contracting for punitive damages for breach.[62]

Relational Contract Theory. To evaluate the rules of contract law, we need to know how contract law plays out on the ground and how it interacts with other social forces. Law and economics aims to do this within the individualistic confines of the rational actor model, or, in the case of behavioral economics, using that model tweaked to reflect the findings of empirical psychology. Relational contract theory takes a less reductive and less individualistic approach by studying the ways contract law plays out among actors who find themselves situated in a complex web of social relationships often governed by overlapping legal and non-legal norms, and are therefore at the mercy of multiple social forces.

The foundational article in this tradition is Stuart Macaulay's article, *Non-Contractual Relations in Business: A Preliminary Study*, published in the American Sociological Review in 1963. Macaulay used interviews with businesspeople and lawyers to attempt to answer the questions "What good is contract law? Who uses it? When and how?"[63] He concluded that among business people, "contract and contract law are often thought unnecessary because there are many effective non-legal sanctions."[64] Those non-legal sanctions included, for example, refusal to deal with a party in the future and the reputational costs of breach. Macaulay also argued that personal relationships and trust often provided all the assurance that was necessary. In fact, businesspeople reported that too much law and lawyering got in the way of successful transactions:

> Not only are contract and contract law not needed in many situations, their use may have, or may be thought to have, undesirable consequences. Detailed negotiated contracts can get in the way of creating good exchange relationships between business units. If one side insists on a detailed plan, there will be delay while letters are exchanged as the parties try to agree on what should happen if a remote and unlikely contingency occurs. In some cases they may not be able to agree at all on such matters and as a result a sale may be lost to the seller and the buyer may have to search elsewhere for an acceptable supplier. Many businessmen would react by thinking that had no one raised the series of remote and unlikely contingencies all this wasted effort could have been avoided.

---

[62] See, e.g., Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. Rev. 106 (2002); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan. L. Rev. 213 (1995).

[63] Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 55, 55 (1963)

[64] Id. at 63.

> Even where agreement can be reached at the negotiation stage, carefully planned arrangements may create undesirable exchange relationships between business units. Some businessmen object that in such a carefully worked out relationship one gets performance only to the letter of the contract. Such planning indicates a lack of trust and blunts the demands of friendship, turning a cooperative venture into an antagonistic horse trade. Yet the greater danger perceived by some businessmen is that one would have to perform his side of the bargain to its letter and thus lose what is called "flexibility." Businessmen may welcome a measure of vagueness in the obligations they assume so that they may negotiate matters in light of the actual circumstances.
>
> Adjustment of exchange relationships and dispute settlement by litigation or the threat of it also has many costs. The gain anticipated from using this form of coercion often fails to outweigh these costs, which are both monetary and non-monetary. Threatening to turn matters over to an attorney may cost no more money than postage or a telephone call; yet few are so skilled in making such a threat that it will not cost some deterioration of the relationship between the firms. One businessman said that customers had better not rely on legal rights or threaten to bring a breach of contract law suit against him since he "would not be treated like a criminal" and would fight back with every means available.[65]

Since the publication of *Non-Contractual Relations in Business*, many other scholars have studied how parties use non-legal norms, practices, and sanctions, as well as the advantages and disadvantages of those mechanisms compared to legal enforcement and how the law can interfere with and support those non-legal forms of assurance. Different scholars draw different conclusions from the data. For some, the lesson is that contract law should be more attuned to the customs and practices surrounding the parties' agreement and to the fact that contractual arrangements change and grow over time, and that courts should seek enforcement mechanisms that tend to support the extralegal relationship between the parties.[66] Others have argued that more formal and less flexible interpretations are better for parties who want to "allocate aspects of their relationship between the legal and extralegal realms in ways that seek to maximize the value of their transaction."[67]

Critical Approaches. Courts in the United States give reasons for their decisions. Critical legal scholars commonly argue that the reasons

---

[65] Id. at 64.

[66] See, e.g., Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 Loy. L.A. L. Rev. 789 (1993); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. Cal. L. Rev. 691 (1974).

[67] Lisa Bernstein, *Merchant Law In a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765, 1788 (1996). See also Robert E. Scott, *The Case for Formalism in Relational Contracts*, 94 Nw. U. L. Rev. 847 (2000).