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Brian H. Bix

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Philosophical Problems of Contract Law

Contract law is a category within legal practice (and legal education), although there are many occasions in which contract law has significant overlaps with other categories, or where the borderline is not especially clear. (For example, some commentators have argued that contract law should be seen as a mere subcategory of tort law;¹ and, in different ways, the boundary lines between contract law and areas such as restitution and property are fluid and uncertain much of the time.)

Contract law is a category of particular rules and decisions, but (as elsewhere in law) it is a mistake to focus too narrowly on the “facts” of the actual decisions and the “black-letter rules” of treatises. Law is, and likely has always been, a reflective exercise, in which there is a natural tendency (among practitioners and observers both) to seek more general principles, to explain and justify past decisions and give guidance for future decisions.

One of the problems facing those who wish to reflect on contract law – or on any other area of law – is the appropriate level of generality or abstraction. There is an obvious attraction to finding the essence of contract law (perhaps of contract law everywhere, and in all possible legal systems). Part of the argument of this book (particularly, Chapters 8 and 9) is that this is not the right – or at least not the best – focus. In short (the longer argument is detailed in those chapters), the claim is that approaches to promises and agreements vary too greatly (both in substantive rules and in procedural constraints and remedial options) from one jurisdiction to another, and over time, for any universal theory to be justifiable (for such a theory to create more benefits and insights than costs and distortions). This book emphasizes a narrower focus: on this particular legal system, at this time, and more topic by topic than grand narrative. However, the hope is that this book has things of value

¹ *E.g.*, Gilmore 1974.

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to offer even to those who disagree about the best direction for contract theory and about the ultimate conclusions.

This book offers an overview of the major doctrines and principles of American contract law while also looking at the themes and theories that ground them. Additionally, the book gives a summary of the major theoretical debates that surround the various topics and rules of contract law.

This text is primarily an exploration of American contract law as it currently is. At different points, the analysis may indicate possible criticisms of the current law, with implications for what government (whether legislatures, courts, or administrative agencies) might do to improve the law, although law reform is not the primary task of the text.

A persistent theme in this text – and it is certainly not distinctive to contract law – is that government regulation (and, here, both legislation and common law judicial legislation are understood as regulation of individual contracting) is hampered to some extent by its need to be general and predictable. The need for generality is most obviously true in legislation and administrative regulation, but it is also true for judicial action – which, although it decides particular cases, sets precedent for an indefinite number of future cases.² Parties are differently situated in their levels of knowledge, rationality, sophistication, bargaining power, vulnerability, resources, and so on. Similarly, agreements can be viewed as quite various, whether considering the kinds of parties (e.g., business to business, consumer contracts, informal agreements among friends and family members) or the subject matter of the agreement (e.g., sales of goods, employment agreements, residential leases, commercial leases, franchise agreements, premarital agreements).

The extent to which it would be better to have quite general rules and principles, applied to all agreements, or better to have rules and principles responsive to the context of individual agreements remains a matter of dispute among theorists, with the different views reflected in (rather than resolved by) the doctrines and case law.

As is discussed in greater detail here, it is not the view of this book that there is a single theory of contract law (although the text summarizes the views of theorists who take that approach). The philosophical aspects of contract law considered here partly are reflections on that question but, to a greater extent, are the theoretical disputes reflected in particular doctrines and lines of judicial decisions.

Among the persistent issues and themes that we will see are the extent to which the contracting parties' subjective understandings should prevail when they differ from the "objective" meaning of the terms used or the actions undertaken; what role, if any, the fairness of the contractual terms should play in determining whether agreements are enforced; the extent to which law should impose and enforce formal requirements for the enforcement of transactions; and what the appropriate remedy is for a breach of contract.

² E.g., Schauer 1987.

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At the end of Chapters 2–7, there are brief discussions of the theoretical implications of the chapter's discussions. Chapters 8 and 9 offer more extended considerations of larger contract law theory topics.

SUGGESTED FURTHER READING

Peter Benson (ed.), *The Theory of Contract Law: New Essays* (Cambridge: Cambridge University Press, 2001).

Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA: Harvard University Press, 1981).

2

History and Sources

Whether one thinks of law primarily as a kind of social practice or social institution or as an integral part of practical reasoning – developing reasons for action – law is a purposive human enterprise. As such, it is useful to consider legal history: the original context in which legal rules and practices were developed and the circumstances and concerns that prompted their development. This chapter attempts to give an overview – necessarily a brief and somewhat sketchy overview – of the history of American contract law.

Along with the general context value of history, there is sometimes a specific need for historical explanation – where moral or consequentialist reconstructions of rules and practices fail, a reference to the historical reasons for a certain rule may be the only valid explanation.¹ This becomes an explanation in the minimal terms of showing why we have the rules we have, not any more robust sense of offering a moral or policy justification for keeping (or obeying) those rules.² (Of course, one justification for keeping a rule might be that, although it would not be sensible to adopt the rule if starting from scratch, it would be too costly – and insufficiently beneficial – to change the rule at this point.³)

Historical origin, as a simple causal narrative, may explain why or how a rule originated, but something further may need to be said about why the rule has

¹ Cf. Holmes 1897: 468–473; Calabresi 1998. I want to be clear that in advocating the occasional importance of history in explaining contract law (and perhaps other areas of law), I am not thereby endorsing the rather ambitious claims about the relationship of society, law, and history associated with the school of historical jurisprudence (a school associated with the works of Sir Henry Maine and Friedrich Carl von Savigny, and sympathetically discussed in Berman 2005).

² As Holmes famously wrote: “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” Holmes 1897: 469.

³ I am grateful to Daniel Schwarcz for this point.

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persisted.⁴ Although there are some strange rules from the seventeenth century that persist in Anglo-American contract law to this day, there are, of course, many, many more strange rules from that time that justifiably fell by the wayside long ago. One might suppose that rules that have persisted have done so for some reason: that the rule has some benefits, or at least no burdens on practice that are too significant.

If one wants to trace the history of American contract law, one would focus on two distinct sources: ancient Roman law and the English common law. These will be discussed in turn;⁵ there follow sections here on the sources of contract law and international rules and principles. An additional historical survey connected with the doctrine of consideration appears in Section B of Chapter 3.

A. ROMAN LAW

Early Roman law is interesting for the study of contract law, as it is one of the first systematic attempts to regulate promises and transactions, as well as the first documented example of enforcing consensual contracts without the requirement of formalities.⁶ In addition, Roman law is the source of the civil law tradition, an approach distinct from the common law tradition, and an approach that displays interesting alternative ideas about whether, when, and how to enforce promises and transactions (as we will see, in passing, at various points in this book).

At least one Roman jurist, Gaius, offered the beginning of a general view of (if not a general theory of) contract law, when he introduced the term *contractus* (and distinguished it from *delictus*, which corresponds to our tort law).⁷ Contract here meant, roughly, any lawful conduct that gave rise to liability (again, the contrast with tort).⁸ However, most commentators seem to think that “in fact the Romans had no abstract concept of ‘contract.’”⁹

Roman law in this area was not a matter of general principles but a series of more scattered functional forms.¹⁰ There were set rules for loans, deposits, pledges, leases, sales, and partnerships.¹¹ The result seemed, from a modern perspective, “uneven”; for example, the state “enforced an agreement to exchange goods for money, but not an agreement to exchange goods for services.”¹² If an agreement did not fall

⁴ I am grateful to Brett McDonnell for this point.

⁵ The history of American commercial law is a distinct topic, mostly beyond the scope of this text, but is well summarized in Rogers 1995.

⁶ Watson 1984: 8.

⁷ Gaius, *Institutes* 3.88, as cited and discussed in Gordley 2002: 11–12.

⁸ Kaser 1980: 197.

⁹ Watson 1984: 2.

¹⁰ “It is often said that the Romans never developed a system of contract but only of individual contracts” (Watson 1984: 3 (footnote omitted)), and even these developed separately, over the course of centuries. Watson 1984: 2–3.

¹¹ Kaser 1980: 202–232.

¹² Watson 1984: 1.

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under one of the set forms, it might nonetheless be binding if the parties had used specified language (*stipulatio*).¹³ However, the *stipulatio* failed as a general form of contract, as it required the parties to be in one another's presence, and therefore precluded enforceable transactions in many cases where the parties were merchants living some distance apart.¹⁴

The influence of Roman law of contracts on the English writ system (discussed in the following section), and subsequently on modern American law, has been largely sporadic and indirect.¹⁵ One can see aspects of the Roman law view of contracts in the treatise writers of Continental Europe, and in the civil law codes that developed in those countries, and those sources in turn had occasional effects on the development of English law. There is also Roman law influence on the ecclesiastical law, which seems to have affected the way English contract law developed. The extent to which the English common law "received" or was influenced by Roman law remains a matter of some controversy,¹⁶ but the resolution of that dispute need not concern us. It is sufficient to note the significant evidence that the civil law tradition influenced the development of English and American contract law at a crucial time – the nineteenth century – when many significant doctrinal concepts were developed or solidified.¹⁷

B. ENGLISH WRIT SYSTEM

In medieval times, European societies generally did not treat what we now call contract as a separate category. In some Continental European communities, one might have distinguished between different kinds of claims and wrongs, but these categories would cut across the boundary lines of what we now call contract, property, and tort.¹⁸

English contract law – or the earliest even rough approximation of contract law (or, indeed, private law generally) – begins in the thirteenth century.¹⁹ Both before that

¹³ Kaser 1980: 206–209. Paradoxically, it appears that the general form and procedure for enforcing agreements, *stipulatio*, appeared in Roman law first, and the narrower forms of enforceable contracts followed later. Watson 1984: 4–5. The difference between the narrow specified agreements and all other enforceable agreements is sometimes characterized in terms of "nominate" and "innominate" agreements.

¹⁴ Watson 1984: 16–17.

¹⁵ J. H. Baker 2003: 3–13. For a view expressing a somewhat stronger influence, see Ibbetson 1999: 1: "The Common law of obligations grew out of the intermingling of native ideas and sophisticated Roman learning. The friction between them was a prime force for legal change, and has remained so right up to the present day."

¹⁶ E.g., Zimmermann 1996: xi.

¹⁷ See Simpson 1975b. This influence apparently occurred primarily from the earliest English treatise writers, who, it seemed, borrowed significantly from existing civil law treatises. Simpson 1975b: 254–257.

¹⁸ Ibbetson 1999: 1–6.

¹⁹ Ibbetson 1999: 13–23. "The twelfth-century royal courts seem to have been little concerned with personal obligations." Ibbetson 1999: 13. For the state of the civil law prior to the thirteenth century, see Glanvill 1965.

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time, and for generations afterward, disputes regarding private agreements could be brought to local (non-common law) courts and other tribunals (including church courts).²⁰ However, private law doctrines were developed not in those courts but rather in the King's Court. Over time, the common law King's Court gained greater and greater jurisdiction over private disputes, and it is in those courts that contract law doctrine and principles, as we know them, were primarily developed.²¹

In medieval English law, if an action was brought before the King's Court, the plaintiff had to plead a series of facts to make a case fit within certain accepted "writs" (causes of action): a series of facts needed to be alleged, and, if proved, the court would provide a set remedy.²² Those writs closest to the modern understanding of (breach of) contract were covenant and debt. For covenant, the agreement would have had to have been made with a "specialty" – a formal document affixed with a wax seal – and the plaintiff would have had to claim that the defendant had not complied with the terms of that document.²³ For debt, one had to claim an agreement under which one was owed a fixed sum.²⁴ Those who performed a service and had not been paid, or had lent money and not had it returned, could obviously use the writ of debt; the use of a bond allowed buyers of service and products also to use the writ. Under the bond, the person providing the product or service promised to pay a large sum of money, with that obligation becoming void if the service was done or the product delivered by a particular date.²⁵

The limitation of covenant was that most agreements were not made with the formality required to bring this action.²⁶ With debt, the limitation was that the plaintiff might be complaining of something other than the failure to pay a fixed

²⁰ E.g., Simpson 1975a: 3–5; J. H. Baker 2002: 12–27, 318–320, 327; Helmholz 1975, 1990. As discussed here, for the church courts, plaintiffs had to allege that the agreement had been made under formal oath; the action in the church court "existed . . . because it was a sin to violate one's oath." Helmholz 1975: 423.

²¹ However, there are indications that the slow development of the writ of assumpsit in the central courts might reflect the availability of "an analogous remedy in many local courts." J. H. Baker 2003: 813. For the role of the canon law in developing the idea of general contractual liability and also a number of its doctrines, see Berman 2008.

²² There is evidence that these writs developed from orders by the king to transfer property based on wrongdoing; the writs were modifications of such orders, allowing the subjects of the order to defend against the accusation in court. Simpson 1975a: 54–55.

²³ There is some evidence that the writ was not so narrowly applied in its earliest years, but the requirement of a sealed deed was firmly entrenched by 1321. J. H. Baker 2002: 318–319; *see also* Ibbetson 1999: 24–28.

²⁴ E.g., Simpson 1975a: 73. More precisely, debt was a demand that the defendant yield up some amount of an undifferentiated matter – either money or fungible goods (unspecified goods of some generic description) – that belonged to the plaintiff. J. H. Baker 2002: 321 & n.25. For the retrieval of identifiable goods (whether owed under a purchase agreement or left as a bailment), the appropriate writ was detinue. J. H. Baker 2002: 321, 391–394.

²⁵ J. H. Baker 2002: 323–324.

²⁶ *See, e.g.,* Simpson 1975a: 43. Even where the requisite formality was present in the agreement, parties rarely used the writ of covenant. Simpson suggests that the reason for the rarity of use might have been that most agreements were under seal, and the party seeking enforcement of an agreement under seal also had the option of enforcing a penal bond (under a writ of debt), where the recovery would likely

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sum, for example, damage caused by an inadequate performance. In addition, a defendant to an action of debt could resist the claim simply by “compurgation” (“wager of law”): having a sufficient number of (usually, eleven) other people claim under oath that the defendant was not in fact indebted to the plaintiff.²⁷ Even without considering this defense, the writs of covenant and debt left the vast majority of parties complaining of breach of their informal contract with no recourse at common law.²⁸

In part in response to the limitations of covenant and debt, the common law courts developed – slowly (over centuries) – an alternative avenue of relief. The existing writ of trespass, which had been available for public harms, was slowly extended to private wrongs (under the label “trespass on the case”). Where the claim was a private wrong based on a duty the defendant had voluntarily assumed (as in a commercial exchange), the writ became known as “assumpsit.”²⁹ Assumpsit had no requirement of a specialty and no defense by wager of law. By 1602, it was held that plaintiffs could elect to use assumpsit, even in cases that would normally have fallen clearly under debt.³⁰

Modern contract law thus developed (in a sense) out of tort law: assumpsit was a reworked action on the case.³¹ Ibbetson writes: “From its inception, the emergent

have been much greater than the damages available under a claimed breach of covenant. Simpson 1975a: 117.

²⁷ Simpson 1975a: 137–138; McGovern 1968. The idea being that most people in those times thought that perjury under oath would cause them to be damned (the vast majority of defendants chose trial by jury over wager of law (Simpson 1975a: 138–139)), so having eleven other people swear under oath to one’s position was an impressive showing. Simpson 1975a: 139–140; Milsom 2003: 9. For whatever the combination of reasons, only a small percentage of defendants (in one calculation, only 10 percent of cases in 1535) avoided liability through wager of law. J. H. Baker 2003: 836.

There is some evidence that the chancellor would sometimes allow creditors to invoke equitable jurisdiction to prevent a debtor from avoiding a debt through compurgation. Barbour 1914: 99–100. It should be noted that although lying under oath was perceived as endangering the soul of the perjurer, he or she was apparently not in danger of criminal prosecution. Simpson 1975a: 138.

There were certain categories of actions in which wager of law was not allowed (including debt on a bond and debt for rent), and the Court of Common Pleas “showed no hostility to the procedure,” whereas the King’s Bench began in the sixteenth century to resist the use of the procedure. J. H. Baker 2003: 835–837, 871–874.

²⁸ Simpson 1975a: 47. However, there may have been limited recourse in other courts: it appeared that the chancellor sometimes enforced oral contracts. Barbour 1914: 160–168. Also, as noted herein, until the late sixteenth century, promises could also be enforced in the ecclesiastical courts if the promise was made under oath, and there are indications that such actions constituted a significant portion of church court business. Helmholz 1975, 1990: 50–59.

²⁹ Simpson states that assumpsit had the sense of an undertaking, something stronger than mere agreement, with connotations that the defendant had done something or said something that gave sufficient assurance that the defendant might be strictly responsible for ensuring that some matter occurred. Simpson 1975a: 215–218.

³⁰ Slade’s Case (1602) 4 Coke Rep. 91a, 76 Eng. Rep. 1074 (Q.B.).

³¹ Helmholz (1975: 422) writes: “It is well known that when assumpsit began to be used in cases of nonfeasance in the sixteenth century, the allegations of deceit and tortious damage used in medieval assumpsit and appropriate in cases of misfeasance, did not drop out of the pleadings. . . . Most assumpsit actions also included the allegation of lost reputation and profits” (footnote omitted).

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action on the case for breach of contract was held in tension between its trespassory and contractual aspects. This tension was not to be fully resolved until the first half of the seventeenth century, and the developed form of the action was never to lose the scars of its passage through the thicket of tort.”³² Among the doctrines that show a tort law origin is the focus both in breach of contract and in “quasi-contract” (restitutionary) claims on the harm caused rather than on the promise made.³³

A separate influence on the development of the writ of *assumpsit* was the suit in the English Church courts of *fidei laesio* (breach of faith),³⁴ by which parties could enforce promises made under oath. (Although the ecclesiastical courts had been directed as early as the twelfth century not to hear cases involving agreements,³⁵ they continued to do so well through the sixteenth century, under the rubric of enforcing oaths made to God, which in the case of merchants might include oaths about the performance in a commercial exchange. Only when the common law courts developed the writ of *assumpsit* did the church courts stop having a significant role in enforcing commercial contracts.³⁶)

As Richard Helmholz has argued, there is significant indirect evidence that *fidei laesio* was phased out by the church courts at the same time *assumpsit* was being developed, which strongly affected the course that writ took. Especially in the early years of *assumpsit* (when it remained largely distinct from the writ of debt), the elements that needed to be pled and the obligations that could be enforced tracked those of *fidei laesio*.³⁷

The initial resistance to the expansion of the writ of *assumpsit* was understandable: where the process of proof by evidence was at a rudimentary stage, there was a fear that allowing plaintiffs to go forward without having presented a formal deed, and without allowing defendants to resort to wager of law, would create a great danger of fraud. Initially, this fear led the courts to allow *assumpsit* only in cases of misfeasance, something done poorly (as contrasted with allegations of nonfeasance, something that was not done at all), where the partial performance would give evidence of the agreement.³⁸ At that time, cases of nonfeasance, allegations of something not

³² Ibbetson 1999: 130.

³³ Helmholz 1990: 64–65.

³⁴ More precisely, the suit was “*causa fidei laesionis seu perjurii*.” Helmholz 1975: 406. The church courts could hear these cases because of their “general jurisdiction over the sins of laymen,” here, the sin “to violate one’s sworn promise.” Helmholz 1975: 406 (footnote omitted). As Remus Valsan has pointed out, the ecclesiastical courts would often focus more on what needed to be done to remove the spiritual dangers to the defendant’s soul (who had broken an oath made to God, thus putting that person’s salvation at risk) than on redressing the wrong done to the plaintiff. Valsan 2009. Canon law developed remedies to the wronged parties only gradually over time. Berman 2008: 130–131.

³⁵ Helmholz 1975: 407–408.

³⁶ Farnsworth 2002: 701–702. “Both here [England] and on the mainland the secular courts were put on their mettle, so to speak, by the competition of the spiritual power.” Pollock 1893: 390.

³⁷ Helmholz 1975: 408–428.

³⁸ Simpson 1975a: 222–227.

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being done at all, were shunted to covenant, or to no recovery at all (in the High Court) if there were no deed. However, this requirement fell away over the course of the fifteenth and early sixteenth centuries, and the writ was extended to cover nonfeasance as well.³⁹

Many of the distinctive doctrines of American contract law doctrine can be traced to nineteenth-century England – what is significant here, of course, is not the tracing of American law to England (most of American law was brought over with the British colonists and was maintained even after independence) but the fact that so many doctrines developed relatively recently. These include the doctrines of offer and acceptance,⁴⁰ the requirement of an intention to create legal relations, frustration, mistake, and foreseeability of damages.⁴¹ Many of these doctrines were in turn adapted by English jurists from civil law, or from earlier Roman law sources.⁴²

Part of the reason for the recent development of much of contract law doctrine is the distinctive nature of law and procedure under the writ system: where all the focus was on detailed rules of pleading, and there was little attention to substantive rules of proof. As Simpson states:

Under the medieval system of common law, attention concentrated upon the pleadings, and the intricate body of rules as to what must be pleaded, and what must not, gave expression to principles of substantive law. But once the case passed the pleading stage, and an issue was submitted to a jury, we enter an area of no-law. There existed at this time no law of evidence. . . . Indeed many attempts to trace back rules of law into medieval times are futile because of a failure to appreciate the fact that on many questions there were then no legal rules.⁴³

The historical origins of many of the doctrines of contract law are discussed in passing in the coming chapters, as those doctrines are analyzed. One topic, however, warrants separate discussion here – the history of the doctrine of consideration, which is considered in Chapter 3, Section B.

C. THE RANGE AND LIMITS OF CONTRACT LAW

Sir Frederick Pollock and Frederic William Maitland, in their famous history of early English law, wrote the following:

We have been laying stress on the late growth of a law of contract, so for one moment we must glance at another side of the picture. The master who taught us that “the

³⁹ Simpson 1975a: 248–273; Ibbetson 1999: 126–230.

⁴⁰ As Simpson (1975b: 260) points out, the doctrine of consideration predates offer and acceptance by 300 years.

⁴¹ Simpson 1975b: 258–277.

⁴² See, e.g., Simpson 1975b: 259–261, 266–268, 274–276.

⁴³ Simpson 1975a: 245–246 (footnote omitted). The context of this discussion was the question of what was needed (in the fifteenth century) to show that a warranty had been given. Simpson 1975a: 245–246.