CONTRACT LAW AND SOCIAL MORALITY

When people in a relationship disagree about their obligations to each other, they need to rely on a method of reasoning that allows the relationship to flourish while advancing each person's private projects. This book presents a method of reasoning that reflects how people reason through disagreements and how courts create doctrine by reasoning about the obligations arising from the relationship. Built on the ideal of the other-regarding person, *Contract Law and Social Morality* displays a method of reasoning that allows one person to integrate their personal interests with the interests of another, determining how divergent interests can be balanced against each other. Called values-balancing reasoning, this methodology makes transparent the values at stake in a disagreement, and provides a neutral and objective way to identify and evaluate the trade-offs that are required if the relationship is to be sustained or terminated justly.

Peter M. Gerhart is John Homer Kapp Professor of Law at Case Western Reserve University. Professor Gerhart may hold a record for teaching the most courses in the law school curriculum: twenty-five. His three books exploring the concept of an individual's responsibility to others cover Torts, Property, and Contracts, and implement a process of reasoning that is both deontic and consequential.

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A.T. and a growing family tree.

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Preface

My aspiration in this book is to probe, unpack, and supplement the mental models we use to understand the obligations that arise from promising and contracting. The thesis I advance is straightforward, even if not intuitive. It is this: when people make or exchange promises, they do more than simply bind themselves to a future course of action. They also bind themselves to a method of reasoning about their future course of action, a method that we might call values-balancing reasoning.

I have a second, related claim – when a judge evaluates the legal obligations that arise from promising and contracting, implementing legal doctrine in the context of a dispute, the judge also employs a method of reasoning about the determinants of legal obligations. The judge considers the contextual factors and circumstances that determine how doctrine ought to be applied, which also entails a method of values-balancing reasoning.

Not surprisingly, the method of reasoning that persons ought to use to determine their promissory behavior is the method of reasoning that judges use to implement doctrine. Under the view I present, judges resolve disputes that arise from promising and contracting by using a method of values-balancing reasoning about a person's obligations, and that method of reasoning is the one they believe people should use when people in a promissory, contractual relationship decide how to behave. When people behave as they would if they had used the same method of reasoning as judges, the law's normativity is unified with the normativity of people's own reasoning. When that happens, the distance between law on the books (how people ought to behave) and law on the ground (how people actually behave) shrinks.

What is at stake is not the death, but the disintegration, of contract law. Without an integrating methodology of reasoning about obligations, contract law is in danger of disintegrating under the weight of disparate theories, pluralistic values, obtuse words, specialized doctrine shaped around kinds of contracts, and contradictory doctrine. Are obligations determined by autonomy, reliance, empowerment, consent, or wealth-maximization? If the obligations of promising and contracting are determined by the value of autonomy, which aspect of autonomy matters: freedom

from contract, freedom to bind oneself, or the right to rely on another? What justifies a separate restatement for consumer contracts, and will we soon face a restatement for sophisticated business people, and another for small businesses? Are modifications of contracts addressed as a question of consideration or by what is fair and equitable? And what does *fair and equitable* mean? And what about *good faith* and *unconsionability*? As contract design evolves, can contract doctrine adopt to the practice of contracting?

As an antidote to contract law's possible disintegration, I offer a mental model of how people ought to make decisions about their obligations. Mental models help us organize our understanding of complex systems, which is why mental models can help us organize our understanding of promising and contracting. Mental models incorporate a framework within which we can process the multifaceted data that we must organize if we are to create a coherent picture out of the particulars of the moral and legal landscape of promising and contracting. The existing mental models of contracting and promising are well known: doctrinal rules, moral principles, social practices, efficient incentives, and theories of autonomy, reliance, empowerment, consent, wealth, and well-being within cooperative relationships. In this book I suggest a supplementary mental model that I hope will add strength and nuance to these mental models.

I do not pit one mental model against another; I seek not to shift paradigms but to illuminate them, perhaps even to find consilience among them. Instead, I hope to add to our understanding of promising and contracting by articulating a mental model that seems to identify a substructure that supports existing views of promising and contracting. This book is animated by the straightforward claim that we can identify a way of nondoctrinal reasoning about obligations that a reasonable person would use, given the promises and contracts she has made. This method of reasoning determines how we ought to treat each other in the context of promising and contracting.

This approach does not require that we relitigate *The Death of Contract*.[1] That magisterial work assumed that tort law was swallowing contract law because courts were introducing the notion of freewheeling, judicially created obligations into contract law. That is not my view. Instead, I affirm that obligations in contract are derived from, and reflect, the autonomy that promising, contracting parties exercise, so that when legal sources articulate the obligations that flow from promising and contracting their analysis is grounded in choices the parties made. I seek instead to breathe new ideas into contract doctrine by suggesting that reasoning as a reasonable promising party would about the obligations implicit in promising and contracting fills spaces that existing mental models leave unattended. My inquiry is epistemic: By what circumstances and factors do we inform our intuitions about what a reasonable person would do when disputes arise under a promise or contract?

[1] Gilmore (1974).

I present a way of reasoning about relational disputes, what I call values-balancing legal reasoning, that may illuminate the circumstances that determine how disputes are resolved, without necessarily challenging outcomes or doing more than providing a more penetrating understanding of the trade-offs that underlie a dispute. Illumination, not remaking the world, is my goal. If I am able to more clearly identify the important moving parts that allow us to connect the authority of a promise or contract with the resolution of a dispute, I will have succeeded. And I do not seek a complete picture of the complex field; the test of any mental model is not whether it is always right or complete, but whether it is useful.

Values-balancing legal reasoning is embedded in the sources of law that judges use to decide disputes. In any dispute, each party has interests that it hopes to attain in the resolution of the dispute. Those interests, as interests, are largely irrelevant to dispute resolution, but interests can be understood to represent important social values. In any dispute, one party is likely to have a selfish, opportunistic interest, but we do not know which party that is until we fully understand the parties' obligations. Thus, we need first to understand the values each party represents – values such as reliance or freedom from contract. Ultimately, the resolution of the dispute implicates the well-being of each of the parties and the values each party represents; one party argues he should have been able to rely on a counterparty's actions; the other argues that they should not be bound without their consent. The determination of which party's values count, and why, is ultimately a values-balancing choice because it is based on the values that each party presents to the court as a basis for resolving the dispute. One of the parties is taking an incorrect, value-defective position because it has failed to consider adequately the well-being of the other party when reasoning about the arguments and positions it will advance. The loss must fall somewhere and the allocation of the loss is ultimately determined by the values implicated in the dispute. Once the judge determines how the exchange allocated the losses, the judge has given us a new insight into the nature of promissory obligations, and that insight can guide persons in a relationship when they must reason about their obligations. Values-balancing reasoning about promises determines promissory obligations – or so I claim.

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