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Contract Rights and Remedies, and the Divergence Between Law and Morality

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Abstract

There is an ongoing debate in the philosophical and jurisprudential literature regarding the nature and possibility of Contract theory. On one hand are those who argue (or assume) that there is, or should be, a single, general, universal theory of Contract Law, one applicable to all jurisdictions and all times. On the other hand are those who assert that Contract theory should be localized to particular times and places, perhaps even with different theories for different types of agreements. This article considers one facet of this debate: evaluating the relevance of the fact that the remedies available for breach of contract can vary significantly from one jurisdiction to another. This wide variation in remedies for breach of a (contractual) promise is one central difference between promises in morality and enforceable agreements in law. The article asserts that variation of remedies strongly supports the conclusion that there is (and can be) no general, universal theory of Contract Law.

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Introduction

This is a paper about contract and promise, essentialism and nominalism, universal theories and particular theories, and why any of it matters.

There is an ongoing debate in the philosophical and jurisprudential literature regarding the nature and possibility of Contract theory. On one hand are those who argue (or assume) that there is, or should be, a single, general, universal theory of Contract Law, one applicable to all jurisdictions and all times. On the other hand are those who assert that Contract theory should be localized to particular times and places, perhaps even with different theories for different types of agreements. This article considers one facet of this debate: evaluating the relevance of the fact that the remedies available for breach of contract can vary significantly from one jurisdiction to another. This wide variation in remedies for breach of a (contractual) promise is one central difference between promises in morality and enforceable agreements in law. The article asserts that variation of remedies strongly supports the conclusion that there is (and can be) no general, universal theory of Contract Law.

I have argued at length in other places\(^2\) that we should not seek a single theory of Contract Law, but rather a series of theories, localized to particular jurisdictions and particular categories of agreements. That conclusion was grounded on a number of arguments, one of which I would like to explore at greater length in the present paper: the relationship between legal rights and the remedies the law provides for them.

\(^2\) See Bix (2006, 2007). Both of these texts contain selections from a larger work, *Contract Law*, forthcoming from Cambridge University Press. As I discuss in those other works, I do not claim to be the first or the only one arguing against a general theory of Contract Law. Recent exponents of similar views include Robert Hillman (1988), Dennis Patterson (1991), James Gordley (1996), Nigel Simmonds (1997), Nathan Oman (2005), and Ethan Leib (2005). However, my argument diverges from theirs at a number of points.
As I argue that legal rights must be understood in terms of the available remedies, the fact that remedies for contracts vary significantly from one jurisdiction to another (e.g., Cohen & McKendrick 2005) becomes another significant reason to favor a local rather than a universal theory of Contract Law (whether it is a sufficient argument on its own I leave to others to decide).

Part I introduces the idea of theories of doctrinal areas of law and gives a brief overview of the major alternative approaches to theories of Contract Law. Part II evaluates some conventional and historical claims regarding the connection between rights and remedies. Part III turns the question to what the connection between rights and remedies might tell us regarding the differences between law and morality. Part IV returns to the debate between general and particular theories of Contract Law, before concluding.

I. General Theories of Contract Law

Theories about doctrinal areas of law – theories of property, contract, tort, or even labor law – are common and well-known. Most such theories sit uneasily between description and prescription/evaluation. On one hand, they purport to fit most of the existing rules and practices; on the other hand, they re-characterize the practices to make them as coherent and/or as morally attractive as possible. This sort of approach to theorizing comes under various titles: rational reconstruction, “philosophical foundations

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4 Moore (1990, 124-129) points out that theories of a line of cases or a whole area of doctrine can never be entirely descriptive, for there are an indefinite number of alternative theories that completely (or, assuming the possibility of dismissing some cases as mistaken, fit adequately) the relevant cases. To choose among those alternative theories, one must have an evaluative standard.
of the common law,” and constructive interpretation (Dworkin 1986). As both Ronald Dworkin (1986) and Michael Moore (1990, 128-29) have argued, there is a strong connection between theories of law understood this way, and the way judges and advocates argue about what the law requires in a case of first impression.

This kind of theorizing can clearly be quite valuable – both in terms of explaining an ongoing practice, and because of the role such theorizing has in the development (and teaching) of law. Theorizing (at any level of generality) is an effort to make sense of material, to display – and encourage – principled consistency across cases, and perhaps to show the decisions in the area to be legitimate (or what needs to be changed for them to become legitimate).

In this section, I will give a brief overview of the general, universal theories of Contract Law that contemporary theorists have offered. Most contract law theories seem to be analyses in terms of promise/autonomy, reliance, or efficiency; I will look at these in turn.5

The promise-based or autonomy approach to Contract Law may be the most straightforward,6 and the one that best connects with people’s conventional attitudes towards contracts: contracts are promises, and one has a moral obligation – and should have a legal obligation – to keep one’s promises. At a more abstract or more philosophical level, the discussion is often in terms of “autonomy.” Promises are, on one hand, normative acts of self-regulation (one takes only those obligations one chooses to take on); on the other hand, the enforceability of promises, agreements, and other

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5 For one recent, useful overview, see Smith (2000). I do not have the space here to discuss Peter Benson’s Hegelian, property-transfer theory of contract law. (e.g., Benson 2001b, 2007)
6 What has come to be known as the promise or autonomy approach in the US and the UK, was also developed under the rubric of “will theory,” particularly in Continental Europe. (e.g., Gordley 1991)
commitments allows one opportunities that would otherwise be unavailable. The promise or autonomy position is most extensively (and famously) expounded in Charles Fried’s *Contract as Promise* (Fried 1981).

There are well-known difficulties with the “contract as promise” explanation or justification: among the most obvious being that our legal system fails to enforce many promises – the whole doctrine of consideration being aimed at distinguishing enforceable bargains from unenforceable “mere” promises⁷ -- and that a focus on promise or autonomy fails to explain (and frequently seems inconsistent with) many details of Contract Law doctrine – in particular the background rules (e.g., remedial and formation rules) and waivable default rules."⁸ Contracting parties are often ignorant of these background rules, and, in any event, cannot usually be characterized as having actively chosen them.⁹

Modern consent theories of Contract Law (e.g., Barnett 1986, 1992) shift the focus away from an act of promising to “a manifest intention to be legally bound.”¹⁰ Barnett (1986, 270) emphasized that this theory of Contract Law should be seen within the context of a larger theory of entitlements, and the conditions under which entitlement transfers are valid.

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⁷ There are equitable doctrines, like promissory reliance (*Restatement (Second) of Contracts* § 90) and promissory restitution (*id.*, § 86), which make some non-bargain promises enforceable, but the disjunction between the category of promises and the category of enforceable actions remains significant.

⁸ *E.g.*, Craswell (1989); *cf.* Kraus (2001, 430-436). Fried did not claim otherwise, and presented his theory as much as an argument for reforming current doctrine as an explanation of or justification for existing law. For an important partial defense of Fried against Craswell’s critique, see Kraus (2002, 717-732).

⁹ “As Lon Fuller and William Perdue pointed out …, the fact that a person has promised to do something does not explain what should happen if he fails to do it.” (Gordley 2001a, footnote citing Fuller & Perdue (1936) omitted)

¹⁰ Barnett (1992, 1027); see also Smith (2000).
There is something eminently sensible about a theory of Contract Law centered on consent. For while promise, reliance, or wealth maximization (understanding each of these in a robust, rather than diluted or metaphorical sense) is only unevenly present in the various kinds of transactions we associate with contract, some form of assent is universally present – and universally required (at least nominally (cf. Robertson 2005)) for valid and enforceable contracts.

The objection is that “consent” does little to explain what contract is, what should be enforced, how, and to what extent. What one basically has is “consent to contract”11 – thus consent does little of the work of determining the nature and scope of contract.12 Consent theory thus may be true only at the cost of being trivial and unhelpful.

Reliance arguments try to construct a theory of obligation from the idea of reasonable reliance.13 The well-known difficulty here is that it is not easy to ground the “reasonableness” of one’s reliance without some foundational notion of when someone should do what they have said they would do – some argument usually of promise and/or efficiency.14 Thus, reliance arguments seem to be derivative, grounded in another form of argument (promise-based or perhaps economic). Additionally, thinking of contractual obligations in terms primarily of reasonable reliance does not seem to match either the way most contracting parties view their interactions or the way that courts and doctrinal commentators discuss contract doctrine.

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11 Or, more precisely, consent to the transfer of rights or entitlements, or consent to the legal enforcement of such transfers. (Barnett 1986, 303-305)
12 For another critique of consent theory, see Braucher (1990, 703-706).
13 See Gilmore (1974); Atiyah (1979).
14 The critique is presented in greater detail in Barnett (1986, 274-276).
Law and economics theorists\textsuperscript{15} argue that most Contract Law doctrine can be explained as efforts to maximize the individual and social gains from trade.\textsuperscript{16} This is often phrased in terms of the ability of parties to make a commitment on which another party can rely (R. Posner 2004); allowing parties to authorize or assent to state-enforced awards of expectation damages where performance is defective empowers parties to make such commitments. Economic analysis is offered as both descriptive/interpretive and prescriptive claims: both describing/interpreting current Contract Law rules, and prescribing how courts should decide future cases.

There are two standard criticisms of economic explanations of common law doctrines – that apply to all such theories (the critique may be most common in response to economic theories of tort law), but are certainly applicable to economic theories of Contract Law. First, economic theories fail as a matter of fit, in that a maximizing theory leaves out much of the participants’ (judges’, lawyers’, and contracting parties’) own understanding of what is going on in contract: that Contract Law does (or should) reflect foundational moral ideas about promises, agreements, and/or fairness, not just consequentialist calculation.\textsuperscript{17} Second, there is a concern that economic analysis may be too “flexible”: able to offer a plausible explanation or justification of any doctrine (for

\textsuperscript{15} With most law and economics theorists, it is not so much that they have an economic theory of Contract Law – rather, they have a general theory of law (or, at least, of private law), which they hold to apply to Contract Law (as well as other areas). (e.g., Shavell 2004) There is also a growing list of detailed economically-based discussions of Contract Law, including Bolton & Dewatripont (2005), Brousseau & Glachant (2002), Craswell (e.g., 2000), Edlin & Schwartz (2003), Goetz & Scott (e.g., 1977), Goldberg (2006), Katz (e.g. 2004), Kronman & Posner (1979), E. Posner (e.g., 2005), R. Posner (e.g., 2007, 93-142), Schwartz (e.g. 1992), and Schwartz & Scott (2003).

\textsuperscript{16} As Craswell (2001) has pointed out, it is important to understand that economic analysis of Contract Law has focused on which rules create the optimal incentives and disincentives, \emph{not} on when performance would be efficient.

\textsuperscript{17} E.g., Kraus (2002); Smith (2004, 132-136). Of course, to the extent that economic or efficiency theories are recharacterized as prescriptions for Contract Law rather than rational reconstructions, descriptions or explanations of (existing) Contract Law, the “fit” objection would fall away.
any given rule, explaining or justifying the rule and its opposite equally well). One prominent economic theorist, Richard Craswell, argued that economic analysis properly sees Contract Law as being about which rules created the optimal/efficient incentives for contracting (or potentially contracting) parties, but then listed eight different types of decisions, where the effect of any given rule might affect many at once, in ways that interact or may conflict (Craswell 2001, 26-32), resulting in overall consequences hard to predict (even under a simplified model). This creates a theory extremely hard to either apply or falsify.

Relating to the criticisms of poor fit and conflicting incentives, one might consider a parallel to a critique of the economic explanation of tort law. The economic explanation of that area claims that the doctrinal rules create incentives for optimal levels of precaution for both the potential victim (and plaintiff) and the potential injurer (and defendant). However, as a number of theorists have pointed out (e.g., Coleman 2001, 13-40), the economic approach does not explain -- as a corrective justice explanation would -- the bilateral character of tort law: where negligent defendants make payments only to injured plaintiffs, and the amount of compensatory payments is set by the amount of damage proximately caused (rather than being based on the tortfeasor’s level of negligence, as one might have expected had the objective been optimal deterrence). A similar critique could be grounded on the bilateral character of Contract Law: if Contract Law were primarily about proper levels of incentives, it would not be clear why the payments should always go from breaching party to the party that was injured by the breach (rather than, say, to a state fund), and one might raise questions about remedial

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doctrines like mitigation and certainty, that can significantly affect the level of damages in ways unconnected to the appropriate level of (dis)incentives for defendants.\textsuperscript{19}

One can combine the different kinds of general theories in various ways: \textit{e.g.}, using an autonomy theory to justify the doctrinal areas and to set its basic parameters, while using an economic theory to select the more detailed rules.\textsuperscript{20} Of course, the different theories might also be “combined” in a different sense, if one saw them as having different objectives: \textit{e.g.}, a purely prescriptive autonomy theory, combined with or contrasted to an explanatory or justificatory role for an economic theory. (Kraus 2002, 689)

The alternative to a general and universal theory of Contract Law would either be theories localized to a particular jurisdiction and/or to particular sub-categories of Contract Law, or, perhaps, a rejection of theorizing about doctrinal areas altogether (Alces 2007). This paper is part of a larger project of arguing for the first alternative: localized theories rather than a general theory (and rather than no theory at all).

II. Rights and Remedies

1. Rights as Separate from Remedies

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\textsuperscript{19} Cf. Smith (2004, 397-98); Oman (2007). One can make an argument that mitigation is tied to the optimal level of incentives (regarding reliance) for the non-breaching parties, but that just adds to the general point that a bilateral structure of Contract Law will inevitably be in tension with trying to create the right level of incentives for both parties, as the optimal amount of damages to be paid by the defendant, to create the right incentives for future defendants, may not be the optimal level of payments to be received by the plaintiff, to create the right incentives for future plaintiffs.

For a spirited defense of economic explanations against this line of critique, see Kraus (2007).

\textsuperscript{20} See Kraus (2001); Oman (2005); cf. Farber (2000).
Stephen Smith, in a recent important work on Contract theory, offers one view about the relationship between rights and remedies in Contract Law, arguably the mainstream view of the topic:

“[I]t is not assumed that the rules regarding remedies for breach of contract are a part of ‘contract’ law, strictly speaking. To the contrary, … while remedial rules tell us important things about contractual obligations, they are separate from such obligations, strictly speaking. … [C]ontract law, properly understood, is limited to the rules that govern the creation and content of contractual obligations.” (Smith 2004, 388)

Smith’s argument seems straightforward: contracts, and the duties that arise from them, are one thing, the remedies available for the breach of those duties are another. And this is a claim that has significant intuitive appeal (as will be discussed), reinforced by the way law is taught in many English and American law schools: with many “Contract Law” course offering minimal coverage of remedial issues, which are either a brief afterthought at the end of the course or are left to a separate “Remedies” course.

Perhaps an additional argument for considering remedies as something separate and apart from contracts is that while some of those remedies are peculiar to contract claims (within a jurisdiction), others are more general remedial rules that may apply to all private law actions.21 Thus, while rules about mitigation, foreseeability, and the availability of particular equitable remedies may arguably fall in the first category, the

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21 Cf. Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Company, Inc., 313 F.3d 385 (7th Cir. 2002) (refusing to grant attorney’s fees as general damages in a CISG action, in part because rules regarding prevailing parties’ right to such fees is a general rule rather than a rule of contract law). In Zapata, Judge Richard Posner states that “no one would say that French contract law differs from U.S. because the winner of a contract suit in France is entitled to be reimbursed by the loser, and in the U.S. not.” Id. at 388. I respectfully disagree with Judge Posner (though I do not disagree with the outcome in Zapata), for the reasons discussed in this article.
rule that (in the United States), generally speaking, attorney’s fees are not awarded to (all) victorious parties\textsuperscript{22} belongs to the second. My argument about the connection between rights and remedies extends over both general and contract-only remedial rules. In both sorts of cases, I argue, the scope and limits of the remedy affect the essential nature of the right.

2. The History of Rights and Remedies

The issue regarding the relation between rights and remedies is a perennial one.\textsuperscript{23} In the early history of Western law, there arguably were only remedies. Jurists under both Roman Law and medieval English law “started life with a list of transactions which were actionable through the procedural forms within which they had to work, rather than with a general principle of accountability.”\textsuperscript{24} Advocates had to claim whatever peculiar set of facts warranted the remedy they were seeking. Advocates, judges, and commentators in those periods did not speak of anything comparable to a Contract Law right.

Peter Stein (1993) has located an important part of the origin of our modern ideas about legal rights in the work of Hugo Donellus (1527-1591). As already noted, prior to Donellus, the legal analysis in the Roman Law and Civil Law traditions involved the combination of a fact-situation with the remedy the legal system granted under those

\textsuperscript{22} This is a sharp contrast to the rule in England and Wales, where the winning party usually has its legal costs paid for by the losing party.

\textsuperscript{23} For a recent contribution, made in the context of discussing contract law, see Friedmann (2005).

\textsuperscript{24} Simpson (1975, 186). He adds: “Indeed for most purposes it was not in the least necessary that they should do more.” (Id., 187).
facts. Donellus spoke instead in broader, more abstract terms, of the plaintiff having a right that grounded his or her claim to a remedy.

In a sense, my argument here seems a step backward: away from the general rights rubric of modern law, back towards thinking of law as granting specific remedies to a pleaded combination of facts. In advocating this position, I am following a basic lesson of the American legal realists: that it is an error to view a legal right completely abstracted from the remedy the legal system will make available for its violation. (e.g., Llewellyn 1931, 1244) Under this approach, to say that one has a (contractual) right means different things depending on what kind of remedy one can receive in court for that right: specific performance, full compensation for one’s expected benefit, a small fraction of that expectation (as when damages are severely reduced due to doctrines like mitigation and certainty), etc.

One might point out that the remedy available for a given set of facts is often uncertain prior to court determination (and that there were periods in the history of Contract Law where the jury’s determination of damages was relatively unconstrained by rules or judicial oversight (Simpson 1975, 549-51)). However, this does not prove any

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25 See also Gordley (1990, 371: “Roman law was a law of particular contracts, each with its own rules as to when it become binding.”). Of course, what was true of Roman law was, if anything, more true of the medieval English writ system: where particular remedies were available tied to a plaintiff’s ability to fit the claim within quite specific parameters. See generally Simpson (1975).

26 Llewellyn, in one of his articles, went further, arguing that one should keep in mind not only the remedy nominally available for the violation of a particular right, but also how the practical availability of that remedy is affected, e.g., by the delays, costs, and uncertainties involved in obtaining the remedy. (Llewellyn 1930, 437-438)

27 Thus, if one has a fixed number of items to sell, and more buyers than items, then a breach of an agreement to purchase may yield only minor, incidental damages. (cf. Murray 2001, § 122, at 802-03)

28 One sub-category of uncertainty/speculation that is in some jurisdictions treated as a per se rule holds that new businesses will not be allowed to claim lost profits; however, some jurisdictions now allow plaintiffs in such cases to at least try to show their lost profits with sufficient certainty. (Murray 2001, § 121, at 792-93)
general conclusion, though it is an important point to be incorporated: that the nature of a legal right may entail significant uncertainty as to what can be recovered for breach.

One need not deny that, at the level of general moral and legal theory, there is a point to thinking about rights as separate from their associated duties and remedies. Thinking of rights separately from duties and remedies helps to emphasize the way that rights can be the justification (in policy discussions or judicial opinions) for new duties and remedies. (e.g., Raz 1986, 170-71) However, I think that this insight does not foreclose a closer association of right with remedy in one’s theorizing about a substantive area of law, like Contract Law. I would add that the argument in this paper in no way entails, or relies upon, either a strong skepticism about rights, or a belief (like that of Alf Ross (e.g., 1957)) that rights are nothing more than short-hand statements of the connection between facts and legal remedies.

The current (surface) thinking about legal rights and remedies offers supporting evidence for both sides of the debate under consideration. On one hand, both legal education and legal practice still often think in broad categories -- “contract,” “tort,” “property,” etc. – and those working in comparative law (e.g. Reimann & Zimmermann 2006) implicitly affirm the application of these broad concepts across jurisdictions, suggesting some unifying essence underlying any differences.

At the same time, both educators and practitioners are well aware that one must focus as much on divergences within a doctrinal area as on similarities: e.g., that within (American) Contract Law, no practitioner would assume expertise on the law of employment, residential leases, franchise agreements, insurance agreements, or domestic
agreements simply because he or she had knowledge of basic Contract Law principles.\textsuperscript{29}

There are too many differences in rules, principles, and even basic starting assumptions. For example, state and federal statutes and regulations frequently impose mandatory terms in employment agreements (and insurance agreements and, in some states, franchise agreements); in many states, premarital agreements are subject to significant fairness review; and separation agreements, if incorporated into the a final divorce decree on one hand can be enforced by contempt orders, and, on the other hand, can be subject to later judicial modification for change of circumstances. These quite different points about the interpretation and enforcement of these forms of agreement could not be derived from general principles of Contract Law (or from meta-principles like autonomy, reliance, or efficiency).

Also, as earlier noted, anyone with relevant experience knows that fluency in American Contract Law rules means relatively little when one is asked about the rules and principles of (say) French or German Contract Law.

\section*{III. On Law and Morality}

The way that most people conceptualize morality is as a series of rights and duties that are both unchanging and universal.\textsuperscript{30} (Under this conventional rubric, we know that our views about what morality requires may change over time – but when we change our

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\textsuperscript{29} There remain casebooks more focused on “situation types” than general principles. (e.g. Macaulay, Kidwell & Whitford, 2003) This is a modern echo of “Leon Green's groundbreaking 1931 textbook on torts [that] was organized not by the traditional doctrinal categories (e.g., negligence, intentional torts, strict liability), but rather by the factual scenarios – the ‘situation types’ – in which harms occur: for example ‘surgical operations,’ ‘traffic and transportation,’ and the like. The premise of this approach was that there was no general law of torts \textit{per se}, but rather predictable patterns of torts decisions for each recurring situation-type that courts encounter.” (Leiter 2005, 55)

\textsuperscript{30} This is not the place to get into larger debates on meta-ethics or possible skeptical challenges to conventional moral beliefs. It is sufficient for the purpose of this paper to offer a broad contrast between conventional views and assumptions about morality on one hand, and law on the other hand.
mind about what morality entails, we do not think that morality has changed, only that we
have corrected an earlier mistaken view.) By contrast, it is the general expectation that
legal rules vary from place to place, and in any given location over time. Even the
advocates of Thomistic natural law, who argue that positive law is only legitimate (only
law “in the fullest sense”) to the extent that it is consistent with “higher law,” understand
that such human rules will inevitably, and properly vary from one community to another,
to reflect different circumstances and arbitrary choices among equally legitimate
alternatives. (e.g., Finnis 1980, 281-90)

While moral standards are thought to be inherent in the way the world is or in
human nature, or perhaps to be grounded in divine commandments of long ago, (positive)
laws have conventional origins; in every jurisdiction, different lawmakers (including
courts in their lawmaking capacity) make different rules to order their society. There
may – and often are – broad overlaps between the laws of different societies, but at the
level of detail the differences are inevitably substantial. By contrast, for those who
accept conventional approaches to morality, there is every reason to believe that
promising is a relatively uniform activity,\(^\text{31}\) that can be approached with a single theory
(whatever much controversy there might be about which explanatory or descriptive theory
is the best one (e.g., Scanlon 1990, 2001; Owens 2006; Pratt 2003, 2006)).

The starting point of Contract Law is that the rules will vary significantly from
one legal system to another, and in a given jurisdiction over time. (None of this, of
course, is to deny that there are not significant convergences of legal rules and practices –
many of these based on historical circumstances: e.g., different countries all having

\(^{31}\) There is inevitably some level of social practices that may differentiate slightly promising in different
societies. For example, in some societies, a promise with a handshake may have a different moral status
than one without, or one made in writing as contrasted to one made orally.
English colonial rule in their background, or different countries having based their legal system on the codes of ancient Roman Law.) The question is then whether theorizing about Contract Law should focus on the variations in the rules and practices, or on underlying similarities.

Even if one makes one of the standard moves of theorists arguing for a unified theory of Contract Law – equating contracts with promises – one might find reasons for rejecting a general theory, in favor of categorizing legal contract rights according to their remedies. Consider the work of Thomas Scanlon (I will not here assuming the correctness of Scanlon’s analysis – which I leave to others to decide -- only the relevance of some of his distinctions). Scanlon argues that there are circumstances where it would not be appropriate to break one’s promise to perform (absent perhaps truly exceptional conditions), and other circumstances where it would be morally acceptable to break one’s promise, as long as full compensation was paid for the promisee’s losses due to the disappointed expectation of performance. (Scanlon 2001, 99-111) Under Scanlon’s analysis, one can see how these are morally distinct categories: where one must act, and where one need not act but one must at least compensate fully. Similarly (and here I am again doing nothing more than repeating the lessons of the American legal realists), a Contract right that gives one the right to enforce performance through judicial order is distinctly different from a right that earns one compensation for one’s losses in case of breach (which in turn is different from a right that will earn one only a fraction of one’s losses).32

32 Seana Shiffrin (2007) recently offered a provocative analysis of the divergence between Contract Law and promising (in Anglo-American law). Her argument was that Contract Law diverges too much from the moral obligations of promising, thus working to undermine morally appropriate behavior in that
Part IV One or Many Theories

1. Essential and Accidental

In the terms of classical Western philosophy, someone might argue that I am mistaking accidental properties for essentials. Contract Law is Contract Law everywhere, where the minor differences of rules, procedures, and remedies should not blind one to the shared essence. Of course, the argument would continue, there are small changes in form and procedure as one moves from one system to another: the stipulatio of Roman law varies from the wax seal of old English law, and the various forms of action of the old English law differ in obvious ways from the pleading rules used in modern American breach of contract cases. This view would insist, however, that it is dogmatic nominalism to insist on a non-general, non-universal theory at the first sign of difference.

To this argument I would respond that the differences over time and across jurisdictions for the types of arrangements we call “contracts” are more than trivial deviations of form. Such basic matters as whether and when a unilateral promise can be enforced, even without “consideration” or “reliance”; when a modification of a pre-existing agreement will be enforceable; and when a wronged party can obtain a court order requiring performance, vary considerably from jurisdiction to jurisdiction. (e.g., Gordley 2001b) I think that there is at least a tenable case that what we are dealing with here are not just trivial variations, but differences in essential character.

area. While I generally agree with her analysis (subject to some of the quibbles raised by Fried (2007)), the argument in this paper does not depend on accepting her argument.

2. Deciding Between General and Particular Theories

On what basis – on what criteria – would one judge the question before us: whether legally enforceable agreements are best thought of as a single category, and a proper subject for a general and universal theory, or, instead, they are best thought of as a loose cluster, where the best subject for theorizing is the Contract Law of a particular jurisdiction, or even sub-topics within that Contract Law, at a particular time?

The first focus, I would assert, should be whether more is gained than lost by a particular (type of) theory. Do we explain more (or, alternatively, do we distort more) (a) by downplaying variety, or (b) by discounting underlying commonality? My inclination is to say (for example) that an agreement that is enforceable through an order of specific performance (an order to do what was promised, backed up by the potential judicial order of contempt for non-compliance) is different in kind from a promise where the only remedy for violation is money damages; I would go further, and argue that a promise backed up by full compensation for loss is different in kind from a promise backed up by compensation that inevitably will fall far short of full compensation (due to having to pay one’s own attorney’s fees, and the various constraints on recovery). And, under this view, theories that try to put agreements with such different remedies (and different rules) into a single category distort more than they explain.

34 I recognize that characterizing the question this way leaves open the possibility that there is no fact of the matter to which the theory must respond; or, alternatively, that even if there is, that one might intentionally choose a theory inconsistent with the fact of the matter, if that theory otherwise, and overall, had better consequences.

35 As Spector comments: “The above difference [between compensation as the usual remedy in Common Law systems for breach of contract as the general availability of specific performance in Civil Law systems] indicates that civilian contract law and Anglo-American contract law are amenable to different sorts of explanations.” (Spector 2004, 530) Spector goes on to argue (2004, 530-32) that the Common Law approach to contracts should be seen as growing out of a pragmatic approach, and is thus amenable to economic explanation, while the Civil Law approach grew out of an autonomy or promissory approach, and is not amenable to an economic explanation.
I realize that the above claims may seem to some to be just as puzzling, or just as arbitrary, as the famous American case which held that a fertile cow is simply essentially different than a sterile cow (even when it is the same, identified cow). Are these just bald assertions about which reasonable persons could – and do – have differing intuitions? (A barren cow is not essentially different from a fertile cow; and a promise enforceable by an order of specific performance is not essentially different from one enforceable by full or partial compensation for losses.) However, I am not sure that the question of whether a theory succeeds at explanation, or fails by distorting the underlying subject matter, can be tested at anything other than an intuitive (and anecdotal) level.

At the least, one might assert the following as a fall-back position. Perhaps general theories and local theories each offer partial perspectives, portions of the complex overall truth. Under this view, it is not that universal theories are entirely false, but that they hide aspects of reality. And in a world of private law theory, where general theories of Contract Law dominate, it is important that the arguments for local theories be heard as well.

3. Why Does it Matter?

If there are reasonable arguments both for and against my position (that is, both for having a universal theory of Contract Law and for having localized theories), and if the conclusions each way are either grounded on esoteric ontological claims or perhaps

36 This is Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887), a foundational case for the doctrine of mutual mistake. See, e.g., Murray (2001, § 91, at 516). In Sherwood, the agreement was for the purchase of a cow both the seller and the buyer thought to be barren; in fact, the cow was with calf. The court held the agreement to be voidable for mutual mistake, on the basis that both parties had been mistaken regarding “the essence” of the subject of the agreement.
have no grounding at all, someone might understandably wonder why the debate matters at all.

One response is that I think the portrayal of the diverse contract world as exemplifying a single phenomenon frequently works both to distort the underlying reality and (at least sometimes) to legitimate unjust practices. (I should make clear that I am not accusing any theorist of intentionally distorting or legitimating unjust practices, but I do think that these are frequently the unintended consequences of such theories.)

I think it is important to realize that the theorizing here is not only a matter of academics talking among themselves. The way Contract Law (and other areas of law) is understood sometimes filters down (and across): through the discussion of the law in court decisions, legislative debates, and the discussion of legal rights to and among the public.

And we all know how far public perceptions of the law – including but hardly limited to Contracts and Commercial Law – varies from the actual legal rules. I would assert that universal theories of Contract Law tend to encourage such misunderstandings.\textsuperscript{37} For example, courts and commentators in the era of \textit{Lochner v. New York}\textsuperscript{38} treated the negotiations between employers and employees as matters of “freedom of contract” indistinguishable – in policy and morality – from two merchants negotiating at arm’s length. And in modern times, just to offer one more example, software manufacturers used the image, ideal, and rhetoric of “freedom of contract” to support a proposed uniform rule that would have allowed the imposition of one-sided

\textsuperscript{37} Though I admit I have mostly anecdotal evidence to support my supposition.
\textsuperscript{38} 198 U.S. 45 (1905).
terms on consumers unaware of the terms or the fact that they were entering an agreement.39

Conclusion

Whatever might be said about the social practice of promising, or even the social practice relating to bargains, legal contracts cannot be properly understood apart from the remedies available to enforce them; and those remedies vary significantly from one jurisdiction to the next. Given the wide variance in the remedies available for promises and bargains across jurisdictions (and even across transaction types within a single jurisdiction), it seems highly likely that a general theory of Contract Law would cause more misunderstanding than clarity, and that a more localized approach to explaining agreements is warranted.

Bibliography


pp. 1022-1033.


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