CONTRACT LAW AND THEORY

Third Edition Volume 1

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To

Elizabeth, Christy, and Adam

and

Pare and Atticus

Preface to the Third Edition

In the first edition to this casebook, we began with the question: Why do we need another casebook on Contracts? Our claim then, which we believe to be true today, is that this casebook and the approach to the study of contract law that it develops are unique. We began with a belief that colors much of the analysis that follows— theory works. Not only is it more interesting to study legal rules against a background of legal theory, but the effort has practical payoffs as well. There are clear, discernable themes and patterns that underlie much of contract law, and by developing them explicitly we invite the student to develop a working model of contract law. This framework for analyzing and predicting the outcome of contract disputes is then tested through careful case and doctrinal analysis.

Our commitment to the practical uses of theory commits us as well to a functional analysis of contract law. We ask: What discernable purposes are the various legal rules (as announced in cases and statutes) designed to serve? Are the policy goals desirable and how effectively are they implemented through contract doctrine? This functional approach begins with an instrumental analysis that focuses on the incentive effects of contract rules. We often ask a question familiar to students of economics: How are the rules likely to influence the behavior of similarly situated parties in the future? We use this economic perspective as an organizing principle because we believe it does the best job of any contemporary theory in explaining contract law. But both of us recognize that other perspectives on contract law deserve careful attention as well. In particular, throughout the casebook we use autonomy and related moral theory as an alternative framework for analyzing the law of contracts. In short, we believe that a commitment to a functional analysis of contract law does not demand the acceptance of any particular dogma. Skeptics will find that the organizing themes of the book are sufficiently explicit so as to provide ample opportunity for counter-examples and dissent.

The theoretical perspective of the book also shapes our pedagogical objectives. We begin, in Chapter 1, with a thorough doctrinal and theoretical overview. The Chapters that follow are in-depth elaborations of the introductory themes. This approach has several benefits. In particular, once the analytical framework is introduced in Chapter 1, the thick analysis of individual doctrines that follows is more readily digested and integrated by the student learning law for the first time. This allows us to focus in subsequent chapters on the counseling functions that contract lawyers perform. We remind students that they study past disputes in order to draft contractual provisions that will avoid similar problems in the future. We develop this theme through questions and problems as well as textual notes that explore the underlying objectives of parties entering into various contractual relationships.

We continue to work on improving and updating this book because teaching contract law and theory has been so rewarding for us and (apparently) for

our students. We hope those of you who try our approach will experience a similar success.

ROBERT E. SCOTT
JODY S. KRAUS

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Note on Editing

We have omitted numerous footnotes in editing judicial opinions and other secondary sources. In most instances, we have maintained the numbering from the original text for those notes that we have retained. Where footnotes have been renumbered we have noted that fact in the text. Within many of the edited opinions, the paragraph structure has been changed and the citations to other opinions and secondary sources within the body of the case have been deleted without any special note to that effect. Ellipses signal most instances where text has been omitted.

R.E.S.

J.S.K.

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