

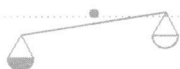
GREAT DEBATES

CONTRACT LAW

JONATHAN MORGAN



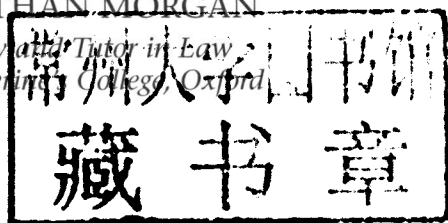
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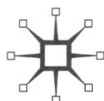
GREAT DEBATES IN CONTRACT LAW

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For Edward and Janette Morgan

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Moving house is never a good time to write a book – nor vice versa. That I somehow managed both simultaneously is entirely due to Sophie. She has had to put up with a garden like Onegin's during the authorial process – an overgrown home for pensive Dryads.¹ For this forbearance and for so much else I owe her my deepest gratitude.

The book is dedicated to my parents.

¹ Pushkin, Евгений Онегин (1833) II.1.

INTRODUCTION

This book sets out to introduce exciting debates that are taking place across the law of contract. It is not a beginner's guide but has been written for students who already have some knowledge of the legal rules. The coverage has had to be selective. The choice was made to analyse a smaller number of areas in greater depth. I hope you will find food for thought in the chapters that follow.

There are numerous schools of contract scholarship. The primary division is between those who conceive of private law as a closed system of self-sufficient doctrine based on moral rights and duties,¹ and those who view law as an instrument for various goals of social policy. The latter group is inevitably more disparate. A divide between the 'market individualist' and 'social welfarist' approaches has been identified.² But this is hardly an exhaustive classification. Other currents running through the instrumental scholarship are sociological analysis,³ regulatory approaches⁴ and, above all, Law and Economics. The present book aims to introduce all of these perspectives and subject them to critical examination. Can we really deduce all the rules of commercial contract law by reflecting on the morality of promise keeping? How are judges to apply the complex recommendations of economic analysis?

The key texts in each Debate are collected at the end of each chapter. In addition, the following works are universally recommended for further reading. For the historical foundations without which the common law cannot properly be understood, see D.J. Ibbetson, *A Historical Introduction to the Law of Obligations*.⁵ The classic reference work on Law and Economics remains R.A. Posner, *Economic Analysis of Law*.⁶ A systematic examination of theoretical perspectives (ultimately rejecting instrumental analysis) is S.A. Smith's *Contract Theory*.⁷ An unsystematic collection which is highly stimulating and rewarding to read is P.S. Atiyah's

¹ E.g. C. Fried, *Contract as Promise* (Harvard University Press, 1981); E.J. Weinrib, *The Idea of Private Law* (Harvard University Press, 1995); M. Hogg, *Promises and Contract Law: Comparative Perspectives* (Cambridge University Press, 2011).

² J. Adams & R. Brownsword, *Understanding Contract Law* (Sweet & Maxwell, 5th edn, 2007).

³ Seminally S. Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Rev* 1.

⁴ H. Collins, *Regulating Contracts* (Oxford University Press, 1999).

⁵ Oxford University Press, 1999.

⁶ Aspen, 8th edn, 2010.

⁷ Clarendon Press, 2004.

INTRODUCTION



Essays on Contract.⁸ A critical examination is J. Wightman's, *Contract: A Critical Commentary*.⁹ There are many fine textbooks and casebooks on contract; it would be tedious to list them all but invidious to choose. Nevertheless, I would single out H. Collins, *The Law of Contract* as a highly original and distinctive approach to a subject which usually follows a well-worn pattern.¹⁰ Finally, for those wishing to research the law beyond these recommendations – which I would warmly encourage! – an excellent starting point is A. Kramer, *Contract Law: An Index and Digest of Published Writings*.¹¹

⁸ Oxford University Press, 1990.

⁹ Pluto, 1996.

¹⁰ Cambridge University Press, 4th edn, 2003.

¹¹ Hart, 2009.

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