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The Theory of Contract Law New Essays

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Edited by

PETER BENSON

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New Essays

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内容简介

虽然合同法在很大程度上已经定型，但就目前的情况而言，无论在它的主要原则和学说，还是在它的规范基础方面，都还没有得到普遍认可的系统理论。合同法理论提出的问题涉及到法律和道德的关系、权利的角色地位和重要性、正义与经济效果的联系、以及私法和公法之间的区别等。本文集由6篇原创性的长篇论文构成，它们由本领域一些杰出的学者撰就，从不同的理论角度探讨了合同法的一般理论。

本书致力于探讨范围广泛的问题，既有方法论上的也有实体内容上的，既有合同法的理论也有合同法的实践。这些论文在整合过去的理论贡献的同时，也意图推进合同理论，并提出发展合同法理论的新的、充满希望的途径。

《合同法理论新作集》表现出一种雄心勃勃的意图，即顺应时势地提升合同法的一般理论。它将激发法律和哲学领域专家和学者的兴趣。

Peter Benson 是多伦多大学的法律教授。

The Theory of Contract Law

Although the law of contract is largely settled, there is at present no widely accepted comprehensive theory either of its main principles and doctrines or of its normative basis. Contract law theory raises issues concerning the relation between law and morality, the role and the importance of rights, the connection between justice and economics, and the distinction between private and public law. This collection of six full-length original essays, written by some of the most eminent scholars in the field, explores the general theory of contract law from a variety of theoretical perspectives.

The volume addresses a wide range of issues, both methodological and substantive, in the theory and practice of contract law. While the essays build upon past theoretical contributions, they also attempt to take contract theory further and suggest new and promising ways to develop the theory of contract law.

The Theory of Contract Law represents one of the most ambitious attempts to date to advance the general theory of contract law. It will be of interest to professionals and students of law and philosophy.

Peter Benson is Professor of Law at the University of Toronto.

Cambridge Studies in Philosophy and Law

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For My Parents

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For my wife, Ann, gratitude deeper than words can express. And finally to my parents, Norma Betty and Robert Benson, I dedicate this book: for their unconditional love, all the opportunities they have given me, and their respect for human individuality.

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He is the recipient of the 1999 Molson Prize for contributions to the humanities and social sciences in Canada.

Contents

Introduction

PETER BENSON

Although the six essays that comprise the present collection may differ widely in approach, they are all animated by a shared belief in the possibility and in the importance of a theory of contract law that aims to be comprehensive in scope and normative in character. They are intended as contributions to the ongoing elaboration of such a theory. All the essays have been specifically prepared for this volume and appear now for the first time in print. In keeping with the goals of the Cambridge Law and Philosophy Series, the contributors have been encouraged to present their ideas and arguments in as fully developed and detailed a manner as possible. Each essay stands on its own as a sustained effort to explore a distinct theoretical point of view via an engagement with specific aspects of the law of contract. Before introducing the contents of the individual essays, however, I should say something about prior theoretical discussions that form their immediate intellectual backdrop. The following remarks are necessarily brief and selective.

In the twentieth century, it may be fairly said that theoretical writing about the common law of contract is inaugurated by one piece: Lon L. Fuller's 1936 article "The Reliance Interest in Contract Damages."[1] It is only a slight exaggeration to say that all subsequent efforts either take up and elaborate lines of argument suggested by this essay or attempt to forge an alternative approach in response to it. In one way or another, it has dominated the course of theoretical discussion since its publication.

What is the article's primary theoretical contribution on the basis of which it may be said to have inaugurated common law contract theory in the twentieth

1. (1936) 46 Yale L.J.52. I should say that although the article is co-authored by Fuller and his research assistant William Perdue, Jr., I take, as do others, Fuller to be the writer of the article and certainly of its theoretical parts. For recent discussions of the article, see T. Rakoff, "Fuller and Perdue's *The Reliance Interest* as a Work of Legal Scholarship" (1991) Wis. L. Rev. 203; D. Friedmann, "The Performance Interest in Contract Damages" (1995) 111 Law Q. R. 628; P. Benson, "Contract" in *A Companion to Philosophy of Law and Legal Theory*, ed. D. Patterson (Oxford: Blackwell); and R. Craswell, "Against Fuller and Purdue" (2000) 67 Univ. Chic. L. Rev. 99.

century? It is not, as one might think, Fuller's well-known specification of the three interests – expectation, reliance, and restitution – which, he argues, constitute the three principal purposes that may be pursued in awarding contract damages.[2] Nor is it his effort to show that courts protect the reliance interest in ways that are not ordinarily recognized or acknowledged. Although these aspects of the article undoubtedly have exercised wide influence, particularly in legal scholarship, they do not go beyond ordinary legal classification and analysis. In themselves, they do not pose a question that goes to the very basis and intelligibility of contractual obligation. The article's theoretical contribution lies elsewhere.

On the very first page of the article, Fuller refers to the basic, perhaps the most basic, principle of contract law that a plaintiff is entitled to receive as compensation for breach of contract the value of what he or she was promised and that in giving such damages the law aims to protect the "expectation interest," that is, to put the plaintiff in the position that he or she would have been in had the defendant performed as promised. It is not by chance that Fuller refers here to Samuel Williston's statement of the principle. Williston's *A Treatise on the Law of Contracts* represents the most systematically and carefully worked-out presentation of the legal point of view that culminates several decades of intensive and highly sophisticated efforts by such masters of the common law as Pollock, Holmes, Langdell, Ames, Holdsworth, Salmond, and Leake, to bring order and internal consistency to the law of contract.[3] These writers, and Williston in particular, were remarkably successful in achieving this aim. For all that, however, their work remains *un*theoretical: They simply presuppose the premise that the expectation remedy is a form of compensation without exploring its normative basis and they stipulate the existence of a deep connection between the expectation principle and the basic doctrines of contract formation without explaining its necessity.

The reason why twentieth-century contract *theory* begins with Fuller's article is precisely because it in contrast to the work of these other scholars, does not simply *take* the expectation principle as the fundamental principle of compensation but clearly and decisively questions it. In doing so, Fuller challenges the coherence of contract on a point that goes to its very core. For the first time in the twentieth century, contract scholarship *must* ask at a fundamental level what is the normative basis of contract.[4]

2. This division was already suggested by Fuller's contemporaries. See, for example, G. Gardner, "An Inquiry into the Principles of the Law of Contract" (1932) 46 Harv. L. Rev. 1.
3. Their writings are collected in one remarkable volume, *Selected Readings on the Law of Contracts*, The Association of American Law Schools, ed. (New York: The Macmillan Company, 1931). This monumental volume, which is more than one thousand three hundred pages in length, is, in the present writer's opinion, the single most important collection of essays ever published on the common law of contract.
4. In *The Death of Contract*, Grant Gilmore sees the work of Fuller, Corbin, and others as causing the "general theory of contract" developed by such jurists as Langdell, Holmes, Pollock, and

To elaborate a little, Fuller suggests that the expectation remedy "seems on its face a queer kind of compensation"[5] because it gives the promisee something that he or she never lost. Now if breach of an executory contract does not as such deprive the promisee of anything, it plainly follows that the promisee never had anything to lose in the first place. In other words, an executory contrat does not as such give the promisee anything that can count as a legally protected interest against the promisor. This must be Fuller's underlying premise. Yet, the idea of compensation in private law presupposes just that the defendant has injured something which belongs to the plantiff by exclusive right as against the defendant. On Fuller's view, the expectation remedy cannot be a form of compensation because contract is not a mode of acquiring such entitlements. This represents Fuller's theoretical challenge at its deepest level.

Accordingly, on Fuller's view, the expectation interest presents a lesser claim in justice to judicial intervention than do the reliance and restitution interests. Whereas protection of the latter interests restores a disturbed equilibrium and so exemplifies corrective justice, enforcement of the former "brings into being a new situation"[6] and represents an exercise of distributive justice. From the standpoint of corrective justice, Fuller contends, it is by no means clear "why a promise which has not been relied on [should] ever be enforced at all."[7] Thus the expectation remedy, the so-called normal measure of recovery for breach of contract, appears anomalous from the standpoint of private law itself. Yet it is precisely the availability of the expectation remedy for breach of a wholly executory contract that is the distinctive hallmark of contract law.

Despite Fuller's view that the expectation principle is "as a matter of fact no easy thing to explain" and a problem that "throws its shadow across our whole subject,"[8] he thinks himself obliged to provide a satisfactory rationale for this settled rule of law. Fuller's answer that expectation damages cure and prevent reliance losses as well as facilitate general reliance on business arrangements would appear to be the only justification available once breach of an

Williston to "come unstuck." G. Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974), p. 102. This assessment is wrong, I think, in at least two respects. First, it mistakenly attributes to these writers a general *theory* of contract, whereas, as I have already indicated in the text above, these jurists did not so much develop a theory as systematically present the legal point of view by clarifying the definitions of contract principles and doctrines and by exploring, within limits, their implications and their conceptual interconnections. Second, far from coming unstuck, their work still represents to date the most sophisticated and successful effort to present the legal point of view in one integrated compass. Of course, insofar as contract law has developed in certain ways since they wrote – I am thinking here primarily of the full reception of a doctrine of unconscionability – this presentation would have to be revised. Fuller's challenge does not so much undermine their work as require an elaboration and a defence of the conception of contract that informs it. And what we chiefly lack at present is just such a theory that attempts this. For an instructive and careful discussion of Gilmore's assessment of the work of these contract scholars, see J. Gordley, Review of Grant Gilmore *The Death of Contract*, in (1975) 89 Harv. L. Rev. 452, esp. pp. 457ff.

5. *Supra* note 1 at p. 53. 6. Ibid. 7. Ibid., at p.57. 8. Ibid.

unrelied-upon promise is seen as causing no injury to the plaintiff and the expectation remedy is characterized as an exercise of distributive justice. On this rationale, reliance becomes the Archimedian point in the understanding of contractual liability and the instrumental relation between contract and economic efficiency becomes a central consideration.

The first major wave of theorizing after Fuller, which takes place during the late 1970s and early 1980s, consists of writers who, almost without exception, either elaborate one or more facets of his answer or, where they propose an alternative vision of contract, do so in ways that attempt to answer his challenge. Thus, the idea that protection of the reliance and restitution interests provides a more secure normative foundation for contractual liability is developed with subtlety and richness in the work of Patrick Atiyah.[9] Anthony Kronman, among others, takes seriously Fuller's suggestion that the normal remedy for breach of contract comes under distributive justice and proposes that contract law as a whole, including its core notion of consent, can *only* be understood in terms of distributive justice; if contract rules are to have any moral acceptability, they must be framed, Kronman argues, so as to promote a fair division of wealth and power among citizens.[10] Already during this first wave, the most detailed and comprehensive theoretical approach is the economic theory of contract. With the appearance in 1979 of *The Economics of Contract Law*,[11] a collection of previously published essays edited by Kronman and Richard Posner, the economic approach takes up Fuller's embryonic thesis that contract law is explicable as a means of facilitating and supporting efficient economic relations and demonstrates that it can be developed with sophistication to illuminate an unprecedented range of substantive issues in contract law. With certain notable exceptions, economic analysis during this period focuses exclusively on the question of the efficiency of carrying out the promises that form an agreement. Contract

9. The central theoretical works are his essay "Contracts, Promises, and the Law of Obligations" (1978) 94 Law Q. R. 193, reprinted with revisions and additions in P. Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986), pp. 10–56, and P. Atiyah, *Promises, Morals, and Law* (Oxford: Clarendon Press, 1981).
10. See A. Kronman, "Contract Law and Distributive Justice" (1980) Yale Law J. 472 and A. Kronman, "Paternalism and the Law of Contracts" (1983) 92 Yale Law J. 763.
11. A. Kronman and R. Posner, eds. *The Economics of Contract Law* (Boston: Little, Brown and Company, 1979). I should add here that, throughout the first and second waves of contract theory and even at present, the economic analysis of contract is the dominant theoretical approach and economic writing is by far the most prolific, although much of this writing is "normal science" rather than inquiry self-counsciously engaged in exploring and reshaping the theoretical premises and claims of the economic approach. I will not even attempt here to give an exhaustive list of the articles and works that are of special theoretical interest. That being said, in addition to the economic writing to which I refer in the text, two recent collections might be noted: They are *Foundations of Contract Law*, R. Craswell and A. Schwartz, eds. (Oxford: Oxford University Press, 1994) and *The Fall and Rise of Freedom of Contract*, F. H. Buckley, ed. (Durham and London: Duke University Press, 1999).

law is to be judged in light of the principle that voluntary exchanges move resources toward their most valuable uses.[12]

Arguably the most important, and certainly the most discussed single work of this first wave of contract theorizing is, however, Charles Fried's *Contract as Promise.*[13] It is the only book-length presentation of a theory of contract that systematically explores the normative foundation of contract and that attempts to explain the main contract doctrines on a unified moral basis. Fried challenges all the previously discussed approaches on the ground that they do not provide a normative basis for contract that is morally acceptable and that brings out its unity. Invoking the distinction between the right and the good, Fried argues that if, as is generally supposed, contractual obligation is self-imposed as well as legally enforceable, it must not entail the imposition of a conception of the good, as this would violate individual autonomy. Fried proposes instead the "promise principle," which he presents as Kantian in inspiration, as the moral basis of contractual obligation. At the same time, he emphasizes that, while central aspects and doctrines of contract law may be understood on this basis, there are others that either require additional and distinct principles or that are flatly in tension with the promise principle and so must be rejected. For instance, in Fried's view, the law of implied terms and conditions cannot be explained on the basis of the promise principle alone but requires other principles, whether of fairness, risk allocation, or custom. Moreover, endorsement of the promise principle requires, he argues, rejection of the doctrine of consideration and the objective test for contract formation. To date, *Contract as Promise* remains the one systematic effort to explain contract on the basis of a conception of Kantian moral autonomy.

The second wave of contract theory, which dates from the late 1980s, begins with and builds upon a criticism of the principal first wave theories. Neither the autonomy-based nor the economic approach, this criticism maintains, is able by itself to provide a comprehensive theory of contract.

This second wave is firmly established with the appearance of Richard Craswell's influential piece, "Contract, Default Rules, and the Philosophy of Promising"[14] which argues that autonomy-based theories, and Fried's in particular,

12. Ibid., pp.1-2.
13. C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA: Harvard University Press, 1981).
14. (1989) 88 Mich. L. Rev. 489. In connection with the start of the second wave, two earlier articles should be mentioned. First, there is Roberto Unger's essay "The Critical Legal Studies Movement" (1983) 96 Harv. L. Rev. 561, 616–648. Unger challenges globally the claims of first wave theorists – autonomy, reliance, and distributive justice theorists – by arguing that while each of their principles may be at work in contract law, none of them accounts for the whole of it. To the contrary, contract law, he contends, is a unstable conjunction of principle and counter-principle. The second is Randy Barnett's important article "A Consent Theory of Contract" (1986) 86 Col. L. Rev. 269. Barnett's piece may be viewed as part of this second