

**Contracts**  
**Professor Keith A. Rowley**  
**William S. Boyd School of Law**  
**University of Nevada Las Vegas**  
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**Course Introduction**

I. **What is a “Contract?”**

- A. **Epstein, Markell & Ponoroff** (p. 1): “[A] promise or set of promises that the law will enforce.”
- B. **Restatement (Second) of Contracts § 1**: “A *promise* or a set of promises for the *breach* of which the law gives a *remedy*, or the performance of which the law in some way recognizes as a *duty*.”
- ◆ **R2 § 2(1)**: “A **promise** is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.”
- C. **Uniform Commercial Code § 1-201(b)(11)**: “[T]he total legal obligation that results from the parties’ *agreement as determined by* [the UCC] as supplemented by any other applicable law.”
- ◆ Compare **Uniform Electronic Transactions Act § 2(4)**: “[T]he total legal obligation resulting from the parties’ agreement as *affected by* [UETA] and other applicable law.”
1. **“Agreement”**: “[T]he *bargain* of the parties *in fact*, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in [§ R1-303].” UCC § 1-201(b)(3).
- ◆ Compare **UETA § 2(1)**: “[T]he bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.”
2. **Course of Performance**: “[A] sequence of conduct between the parties to a *particular transaction* ... if (1) their agreement ... involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity [to object] to it, *accepts* the performance *or acquiesces in it without objection*.” UCC § 1-303(a).

3. **Course of Dealing:** “[A] *sequence* of conduct concerning *previous transactions* between the parties ... that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.” UCC § 1-303(b).
4. **Usage of Trade:** “[A]ny practice or method of dealing having such *regularity of observance* in a place, vocation, or trade so as to justify an expectation that it will be observed with respect to the transaction in question.” UCC § 1-303(c).

## II. Aspects of Contract

- A. **Agreement-in-Fact:** The deal to which the parties actually agreed, as the law recognizes it. The agreement-in-fact is not always the deal the parties thought they made.
  - ◆ For example, in the classic case of *Raffles v. Wichelhaus*, a seller agreed to sell and a buyer agreed to buy a quantity of cotton arriving from Bombay on a ship named *Peerless*. The problem was that there were (ironically) two different ships named *Peerless* scheduled to arrive at the designated port from Bombay some months apart; the seller understood the buyer to have agreed to take cotton from one *Peerless*; and the buyer understood the seller to have offered to sell cotton arriving on the other *Peerless*. The parties thought they had agreed to buy and sell cotton *ex Peerless*; the court found that they had not agreed at all.
- B. **Agreement-as-Written:** The formal statement of the parties’ agreement (which may or may not be identical to the agreement-in-fact).
- C. **Legal Corollaries:** The parties’ agreement expressly or implicitly
  1. imposes on each party one or more **duties**; and
  2. affords each party
    - a. one or more **rights**, as well as,
    - b. one or more **remedies** if the other party fails to perform its duties;
  3. subject to one or more
    - a. **defenses** to enforcing the agreement, in part or in whole, and
    - b. **excuses** for the non-performing party’s failure to fully perform.

### III. Functions of Contract Law

- A. **Protecting Property Rights:** Our society and legal system recognize and protect the rights of individuals to own, use, and consume property.
- ◆ While property rights are also legally protected by, *inter alia*, constitutional law, criminal law, intellectual property law, and real property law, parties often rely on negotiated bargains to protect their property rights.
- B. **Promoting Exchange:** In many instances, an individual may benefit more by exchanging – rather than consuming or using for her own benefit – some of her property for something she does not possess or desires to possess more of.
1. Some exchanges involve almost instantaneous performance, such as when you exchange \$50 in cash for gasoline to fuel your car.
  2. Other exchanges involve trading current performance for future performance, such as when you charge that same gasoline purchase on a credit card, implicitly promising to pay the owner of the gasoline at a later date in exchange for gasoline now.
  3. Contract law promotes **contemporaneous exchanges** by, *e.g.*,
    - a. imposing duties on buyers and sellers to perform and enforce their agreement in **good faith**;
    - b. creating implied **warranties** in favor of buyers; and
    - c. providing a **remedy** if one party to a contemporaneous exchange fails to act or refrain from acting as required.
  4. Contract law promotes **non-contemporaneous exchanges** by protecting the reasonable expectations of parties to an agreement whereby one or more parties agrees to perform at some future date.

#### IV. Sources of Contract Law

##### A. Primary Authority

1. **Judicial Opinions:** The decisions of courts of law remain the primary source of contract law
  - a. *Stare Decisis:* Common law systems function on the basis of precedent that is, by following earlier decisions made by courts of competent jurisdiction considering facts and law similar to the case at hand. This adherence to precedent – as opposed to having every case decided solely on its own merits without recourse to prior authority – offers two primary advantages:
    - (1) a high degree of **predictability**; and
    - (2) a natural **restraint on subjective decisionmaking**, colored by a judge’s personal biases, emotions, social, political, or economic agenda, etc.
  - b. Notwithstanding this adherence to precedent, common law “evolves” as technology, economics, and other underlying factors evolve.
  - c. The challenge for a common law system is to balance the need for stability against the creativity required to adapt to change:

*Law must be stable and yet it cannot stand still.... The social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests.... Thus the legal order must be flexible as well as stable ....*

ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1922).

- d. **“Binding” vs. “Persuasive” Precedent:** A particular precedent is **binding** on a subsequent court only if it was decided by that same court or by a higher court to whose jurisdiction the later court is subject. Decisions of lower courts or courts in other jurisdictions are merely **persuasive**.

- e. **“Avoiding” Precedent:** A court faced with unsavory binding precedent may
    - (1) **overrule** the precedent, if the court has the power to do so;
    - (2) **distinguish** the present case from the prior case on the basis of
      - (a) differences in **operative facts**;
      - (b) differences in **underlying law**; and/or
      - (c) differences in the **“equities.”**
  - f. **“Making” Precedent:** A court faced with a situation for which there exists no binding precedent may
    - (1) consider how courts in **other jurisdictions** have treated similar cases;
    - (2) consider whether one outcome furthers **“public policy”** more than another;
    - (3) weigh **“the equities”**; or
    - (4) look for guidance to **secondary sources** of law.
2. **Statutes:** When deciding a case governed by a valid statute, any court, even the highest court of jurisdiction, must follow the provisions of the statute as they apply to the dispute at hand.
- a. Even more fundamental to our system of law and government than the doctrine of stare decisis is judicial deference to the legislature, *as long as it acts within the bounds of its constitutional authority.*
  - b. Of particular and recurring interest to our study are the
    - (1) **Uniform Commercial Code (UCC)** Article 2, which every state except Louisiana has adopted in whole or in part, and which “trumps” contrary common law in cases involving most domestic contracts for the sale of goods;
    - (2) **U.N. Convention on Contracts for the International Sale of Goods (CISG)**, which the U.S. and 75 other countries, including many of our major non-OPEC trading partners (but not the United Kingdom), have ratified, and which trumps the UCC and common law in many cases involving a contract for the sale of goods across national borders;

- (3) **Uniform Electronic Transactions Act (UETA)**, which forty-seven states (including NV) and the District of Columbia have adopted to facilitate electronic contract formation, performance, and enforcement; and
- (4) **Electronic Signatures in Global and National Commerce Act (“E-SIGN”)**, a federal statute having much the same effect as UETA, which explicitly yields to UETA.

**B. Secondary Authority**

1. **Restatements:** “Black letter” statements of the majority or “preferred” view of common law, accompanied by comments and illustrations.
2. **Legislative History:** Prior statutes, legislative reports and transcripts of hearings, and, in the case of the UCC, the “Official Comments.”
3. **Legal Commentary:** Writings in the form of:
  - a. **Treatises**
    - (1) *Corbin on Contracts*;
    - (2) *Farnsworth on Contracts* (also a hornbook); and
    - (3) *Williston on Contracts*;
  - b. **Hornbooks (large and small)**
    - (1) Chirelstein, *Concepts and Case Analysis in the Law of Contracts*;
    - (2) Ferriell, *Understanding Contracts*;
    - (3) Hillman, *Principles of Contract Law*;
    - (4) Perillo, *Calamari & Perillo on Contracts*; and
    - (5) White & Summers, *Uniform Commercial Code*;
  - c. **Monographs:** books devoted to one topic or a small cluster of topics; and
  - d. **Law Review (and Other) Articles, Notes & Comments**
    - ◆ Yes, it’s true: If you make the *Nevada Law Journal*, and you publish your note or comment, a court may cite it as authority for reaching, or at least supporting, its conclusion of a contested legal issue in a case.

## V. A Very Brief Introduction to Contract Theory

### A. Functions of Contract Theory

1. **Description:** *What is* the law of a particular case, dispute, or transaction? While this might not seem particularly “theoretical,” at a minimum, the language we use to describe a thing or process (*vocabulary*), the way we choose to characterize or categorize a thing or process (*taxonomy*), and the very decision to study a thing or process derive from and reflect an underlying theory.
2. **Explanation:** *Why is* the law as described the law of a particular case, dispute, or transaction? Even an answer as deceptively simple as “Because the judge said so” or “That’s what the statute requires” involves assumptions that may not be universally shared and invites testing to determine, *inter alia*, veracity (or at least earnestness), accuracy, reproducibility, and exceptions. If we challenge those assumptions, or if an offered explanation appears untrue, disingenuous, inaccurate, too context-specific, or too prone to exceptions, this task becomes more complicated (more interesting) and leads to less certainty (more reality).
3. **Prescription:** *What should be* the law of a particular case, dispute, or transaction (and why)? Now we are entirely within the realm of theory – or, if you prefer, “policy” (which depends on theory for its “legitimacy” – whatever *that* means).

### B. Schools of Contract Theory

1. **Formalism:** Contract law is a set of universal principles that judges “discover” in precedent and statutes and apply mechanically to reach a doctrinally “correct” result. Judges should not allow personal or societal moral or political values to divert them from the doctrinally correct path; those values are matters for the legislature or executive, not the judiciary.
2. **Realism (a.k.a. Contextualism):** Judges do not, and should not, decide cases solely by neutrally applying doctrinally “correct” principles to a given set of facts. Judges decide, and should decide, cases taking into account “all relevant knowledge of human affairs,” including equity, public policy, and case-specific facts present in any particular dispute.
3. **Law and Economics:** Contract law tends toward efficiency over time, as it should; and, to the extent that an inefficient rule persists, judges will and should modify it to promote greater efficiency.
  - ◆ **Behavioral Law and Economics** attempts to expand the factors more traditional L&E considers to include cognitive processes and biases, social mores, non-monetary preferences, and the like.

4. **Relational Theory:** Many contracts arise amidst long-term commercial or personal relationships or in closely-knit, self-regulating markets, often resulting in customary law or relational norms that supplement, or even supplant, formal law. That is as things should be: contracts between “repeat players” ought not be governed by the same rules that apply to complete strangers bargaining “in the dark” – unless the default rule is the best rule in a given relationship or relational transaction.
5. **Positivism:** Contract law should promote fairness, morality, and consent.
6. **Critical Theory:** Contract law must account for foundational issues such as transaction-specific disparities in bargaining power, education, and sophistication, as well as more pervasive disparities in the distribution of power and wealth due to, *inter alia*, gender, sexuality, race, ethnicity, nationality, citizenship, and other status metrics.
7. **Feminism:** Feminist theory can be positivist, critical, or both. Feminist theory often turns to “outside” texts to inform or illustrate a viewpoint and advocates a contract law that is more inclusive than contract law traditionally has been and that traditional legal theory has advocated.

#### C. Undercurrents of Contract Theory

1. **Intuitionism:** Contracts are sacred *per se*; and, therefore, should be enforced (unless they shouldn’t ☺).
2. **Kantianism:** The duty to keep promises is essential to rational society, because both wealth and the ability to exchange rely on faith in promises.
  - ◆ With respect to both of the foregoing, do we *really* want to insist that courts enforce *all* contracts? What about illegal or unconscionable contracts? What about “efficient breach”?
3. **“Will” Theory:** The parties’ will, as their agreement manifests it, is “inherently worthy of respect.” Therefore, where there is a “meeting of the minds,” an enforceable contract follows.
  - ◆ How can we tell whether the parties have had a “meeting of the minds”? What if the parties “agree” – but never at the same time?
4. **Injurious (or Detrimental) Reliance:** Liability arises only if
  - a. one party makes a **promise**, by words or actions,
  - b. on which the second party *reasonably relies*,
  - c. causing the second party to suffer some **loss**.

5. **Equivalence:** Contracts arise as *quid quo pro*; therefore, where one party gives or agrees to give something of value, we must assume the other party also agreed to give something of value.
  - ◆ Who decides what is “equivalent”?
6. **Formality:** Parties who have gone to the trouble of formalizing an agreement, by writing it down, having it notarized, or even “just shaking hands on it,” must have intended to be bound.
7. **Risk Allocation:** Contracts allow parties to allocate the risks of future uncertainty, including the risk that a party obligated to perform at a later date may not do so or may perform incompletely or incompetently.
  - ◆ This perspective seems to assume that parties enter into contracts to protect against breach more so than to promote performance (e.g., prenuptial agreement).

## VI. The Task Before Us

### A. Nine Questions

1. What **law** governs the transaction between or among the parties?
2. Did the parties mutually consent to form a **contract**?
  - a. Did one party (the *offeror*) make an **offer**?
  - b. Did another party (the *offeree*) **accept** the offer?
  - c. Did the offeree or a third party provide the offeror **consideration**?
3. If the parties formed a contract, is it **enforceable**? An agreement the parties may think is binding may not be because of
  - a. some **formation defense** (e.g., incapacity, mistake) or because
  - b. they failed to satisfy some **formality** (e.g., the statute of frauds).
4. If the parties failed to form an enforceable contract, does contract law afford them any **alternative theories of relief**?
5. If there is an enforceable contract, what are its **terms** – that is to say, what are the parties’ rights and obligations? Most terms will be explicit, but some terms may be implied, and others may be open. Some terms may contradict one another.

6. Has a party **materially breached** the contract?
  - ◆ A “material” breach substantially deprives a party of the benefit it expected to receive from the contract.
  - ◆ A party may materially breach before its performance is due by means of *anticipatory repudiation*.
7. Does the breaching party have a valid **defense** or **excuse** to or from its obligation to fully perform?
8. What **remedy**, if any, is available to the injured party?
9. What rights or obligations, if any, do one or more **third parties** have as a result of the contract?

**B. A Very Brief Introduction to Contract Remedies**

1. **Expectation Damages** award the plaintiff the difference between the value of the benefit she reasonably expected as a result of the defendant’s agreed performance and the value she actually received (a.k.a., *benefit of the bargain damages*) – *i.e.*, put the plaintiff in the position she would have been in had the defendant fully performed.
2. **Reliance Damages** reimburse the plaintiff for any costs – monetary or otherwise – she incurred in preparing to perform or performing her part of the contract (*out-of-pocket damages*) – *i.e.*, put the plaintiff in the position she would have been in had she never contracted with the defendant.
3. **Restitutionary Damages** restore to the plaintiff the goods she provided the defendant or the fair market value of the services she rendered for the benefit of the defendant, or otherwise require the defendant to disgorge any benefit received on account of the contract, in order to prevent the defendant’s *unjust enrichment* – *i.e.*, put the defendant in the position he would have been in had the plaintiff never come along.
4. **Rescission** “undoes” the contract, returning both parties to their pre-contractual situation.
5. **Specific Performance** orders the defendant to perform as agreed.
6. **Injunctive Relief** compels the defendant to do or to refrain from doing something.
7. **Liquidated Damages** enforce a remedy on which the parties agreed in their contract, provided that the agreed remedy is not unduly harsh to the defendant and does not fail to provide the plaintiff a meaningful remedy.