

Contract Theory and Policy (LAW 790C)
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University of Nevada Las Vegas
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Syllabus (Revised)

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....¹

[All] theories of contract offer insight and ... some are better at explaining different aspects of contract law. [No] one meta-principle or theory can explain all of contract law. By implication, ... any general theory of contract must be integrative in nature – it must build upon different “unified” contract theories....

....

Ultimately, contract theory should reflect the pragmatism of contract law. Contract law is a reflection of a continuing framework of compromises between competing values, interests, and norms....²

Goals and Objectives

In your first-year Contracts course, you devoted most of your time to studying and discussing contract *law*. Fair enough. This is, after all, *law* school. But simply knowing the law, while necessary, is not sufficient to consider yourself well educated and well prepared to face the myriad challenges that will present themselves in your life after law school. Law changes. Society changes. Business practices change. With apologies to any vegans among you, give someone a fish and you feed her for a day; teach her to fish and you feed her for a lifetime (or at least until rising surface water temperatures kill all the edible fish or we overfish them into extinction³). Many of the changes in contract *law* that have occurred in the past and that will occur in the future – whether at the hands of judges, legislatures, or others – were and will be driven by theoretical or policy-based critiques of existing law and were and will be shaped by theoretical or policy-based prescriptions.

¹ THE THEORY OF CONTRACT LAW: NEW ESSAYS i (Peter Benson ed. 2001).

² LARRY A. DIMATTEO ET AL., VISIONS OF CONTRACT THEORY: RATIONALITY, BARGAINING, AND INTERPRETATION 3-4 (2007) (footnote omitted).

³ Cf. http://www.halfbakery.com/idea/Give_20A_20Man_20A_20Fish_2e_2e_2e#1170354680.

In this course, I aspire to, among other things:

- ◆ (re-)introduce you to a number of schools of positive and normative contract theory and some of the ways in which they can be – indeed, in many cases, already have been – applied to understanding, critiquing, and improving existing legal rules and institutions;
- ◆ further hone your research, analytical, and writing skills in ways that will serve you well in your future legal endeavors;
- ◆ apply those skills to discussing and assessing the explanations and arguments made in the assigned course materials and in one another’s written work and in-class discussion and presentations; and
- ◆ enable those of you who have chosen to do so to satisfy the graduation writing requirement.

Class Meetings and Individual Conferences

Class will meet every **Thursday** from **3:05 to 5:00 p.m.** in **Room 203** unless I announce otherwise. I reserve the right to schedule a make-up for any class I must miss. I will also meet with each of you individually once during the semester to discuss your choice of paper topic and at least once later in the semester to discuss the status of your paper.

Office Hours

My office is **Room 428**. My “posted” office hours this semester will be **Wednesdays** from **1:15 to 4:15 p.m.** I am in my office (except for occasional forays to the Library or committee meetings) most afternoons and many mornings, too. Feel free to “drop in.” I will either see you at that time, or arrange a time to meet with you. I will also make every effort to accommodate you in the event that you would like to schedule an appointment either during or outside of my posted office hours. You may also e-mail me at keith.rowley@unlv.edu. I check my e-mail frequently, usually beginning around 8:00 a.m. and often as late as 1:00 a.m., whether I am in town or not. I will respond to your e-mails as promptly as I am able.

Course Materials

There are three required books: Stephen A. Smith, *Contract Theory* (2004); Larry A. DiMatteo, Robert A. Prentice, Blake D. Morant & Daniel D. Barnhizer, *Visions of Contract Theory: Rationality, Bargaining, and Interpretation* (2007); and Peter Benson ed., *The Theory of Contract Law* (2001).⁴ I have placed copies of each of the required texts, as well as a number of other books of interest, in the Weiner-Rogers Law Library Reserve Room.

⁴ Collectively, they cost about as much as one casebook. I have not asked the UNLV Bookstore to order these books, but they are available online from their publishers (Oxford University Press, Carolina Academic Press, Rowley/K Theory & Policy Syllabus (Revised) 2 Fall 2008

Reading Assignments

In addition to readings from the three required books, I will also assign and recommend book chapters and essays (generally, though not exclusively, from the books I have placed on reserve), law review articles, essays, and notes, and working papers, which I will distribute in class, post copies of or links to on the class web site, or make available at the law library.

I want to customize the course readings to some extent based on your interests. Thus, I don't yet have a Reading List for the full semester and I reserve the right to modify the readings as the semester progresses. I also intend to make some "menu" reading assignments, giving each student a choice of what to read (and hoping that each reading will appeal to at least one student), so that we can benefit from a greater variety of perspectives without requiring everyone to read everything. We'll talk more about this the first day of class.

For our first class meeting, read Stephen A. Smith, *CONTRACT THEORY*, pp. vii-viii, 3-6 & 41-53; Peter Benson ed., *THE THEORY OF CONTRACT LAW*, pp. 1-8; Robert A. Hillman, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* (1997), pp. 267-274; Brian Bix, *Contract Law Theory* (2006), available at <http://ssrn.com/abstract=892783>; and Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine?*, 100 NW. U. L. REV. 517 (2006).

Grades

Unlike most (or all) of the courses you have taken to date in law school, your grade in this seminar will not be determined primarily (or exclusively) by your performance on an end-of-semester exam. Instead, your grade will be based on your participation in class discussions and the paper you will write between now and the end of the semester.

Class Attendance, Preparation, and Discussion

I envision this class being highly interactive and, to some extent at least, directed by your own interests and intellectual curiosity. Therefore, whether you enrolled for the two- or three-credit version of this course, I expect you to attend *every* class meeting, to come prepared, and to participate in our discussion of the assigned readings, your and other students' paper topics, and your and other students' written work. **I reserve the right to drop any student from this class who misses three or more class meetings (with or without excuse). Alternatively, I reserve the right to reduce your course grade by up to one full letter grade for each class you miss following your second absence.**

I may periodically distribute discussion questions to which I will expect you to submit written answers – either as preparation for a day's discussion or as a follow-up.

and Cambridge University Press, respectively), as well as Amazon.com and other on-line booksellers, for no more than what you would have paid at the UNLV Bookstore. I am checking into publishers' discounts for law students. I am making the portions of each that are part of the first reading assignment available electronically.

Papers and Presentations

Those students who enroll for the **two-credit** version of the class must write one 15-25 page paper during the course of the semester. ***This paper will not satisfy your graduation writing requirement.*** I must pre-approve all topics, which you should choose no later than Friday, **October 10th**. Each student will discuss his or her paper topic in class. I will try to give you the option of doing so while you are still working on the paper, so that you may benefit from your classmates' comments and suggestions, or after you have finished it. While I do not require students writing short papers to submit a draft before submitting your final paper, I encourage you to do so. All short papers are due on or before Monday, **December 15th**.

Those students who enroll for the **three-credit** version of the class must write one 30-50 page paper during the course of the semester. ***This paper will satisfy your graduation writing requirement.*** I must pre-approve the topic for your paper, which you should choose no later than Friday, **October 10th**. You must both submit a substantial **first draft** of the paper to me and discuss your work-in-progress in class no later than Thursday, **November 6th**. You must submit a **second draft** no later than Monday, **December 1st**. You must submit the **final draft** of your paper no later than Monday, **December 22nd**.

When grading each paper, I will consider its substantive quality and your use and critique of positive and normative contract theory and policy, as well as the paper's structure, grammar, punctuation, style, and citation form. Citations in all papers must conform to *The Bluebook: A Uniform System of Citation* (18th ed. 2005). For general guidance on grammar, punctuation, and style, I recommend Bryan A. Garner, *The Elements of Legal Style* (2d ed. 2002), which you may want to purchase to have your own copy handy for the various types of writing you must do in law school, clerking, and practicing law. For insights into choosing a topic and writing your paper, I recommend the relevant portions of either Eugene Volokh, *Academic Legal Writing: Law Review Articles, Student Notes, Seminar Papers, and Getting on Law Review* (3d ed. 2007), or Elizabeth Fajans & Mary R. Falk, *Scholarly Writing for Law Students* (3d ed. 2005). Copies of both Volokh and Fajans & Falk are in the Weiner-Rogers Law Library Reserve Room.

I will calculate your course grade in the following manner:

Paper	70%
Class Preparation & Participation	30%

A Cautionary Note

With respect to both your written answers to any assignments I make during the semester and your course paper, your written work product must be your own. While our in-class discussions will (I hope) be highly collaborative, you may not work on the written assignments jointly with another student, and you may seek only comments and suggestions from your classmates or others regarding your course paper. **Submitting someone else's work for credit is an Honor Code violation and may result in your receiving a failing grade in this course.**

LexisNexis Web Course/Law School Portal

I will create a LexisNexis Web Course, which will include an interactive “discussion board” and e-mail list. **If you do not have a LexisNexis Custom ID or a Lexis password, please get one as soon as possible. If the e-mail address associated with your current LexisNexis Custom ID or a Lexis password is not the e-mail address you normally use, please update your e-mail address.** You should check your e-mail and the web site for announcements and assignment changes, electronic versions of supplemental cases and handouts, sample questions and answers, etc. I may also post course materials and announcements about class meetings and assignments to the law school’s portal (with which I am not yet familiar). Unless I inform you otherwise, I will not post anything to the portal that I don’t post to the LexisNexis course web site.

Accommodating Disabilities

UNLV complies with the provisions set forth in Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, offering reasonable accommodations to qualified students with documented disabilities. If you have a documented disability that may require accommodations, you will need to contact the Disability Resource Center (DRC). The DRC coordinates all academic accommodations for students with documented disabilities. The DRC is the official office to review and house disability documentation for students and to provide them with an official Academic Accommodation Plan to present to their professors if an accommodation is warranted. UNLV strongly discourages faculty from accommodating students without an Academic Accommodation Plan.

The DRC is located in the Student Services Complex (SSC), Room 137, and the contact numbers are: Tel: (702) 895-0866; TTY: (702) 895-0652; Fax: (702) 895-0651. For additional information, visit <http://studentlife.unlv.edu/disability/>.

One Final Thought

For lawyers, it goes without saying that the nature and extent of contractual liabilities are matters of enduring professional concern. But because the nature of their discipline makes them more immediately interested in practical questions, lawyers tend to adopt theories of liability without testing them too rigorously [Lawyers demonstrate] virtually no disposition to inquire into the nature of promises, or to probe into the reasons for their legal enforceability.⁵

I hope that, by the end of this semester, we will prove that Professor Atiyah’s gig at uninquisitive lawyers is an overgeneralization.

⁵ P.S. ATIYAH, PROMISES, MORALS, AND LAW 1 (1981).