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.

   ♦ 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 two ships named *Peerless* scheduled to arrive at the designated port from Bombay some months apart, and the seller understood the buyer to have agreed to take cotton from one *Peerless*, while the buyer understood the seller to have offered to sell cotton arriving on the other *Peerless*.

B. **Agreement-as-Written**: The formal statement of the parties’ agreement (which may or may not result in the same rights and obligations as the agreement-in-fact).

C. **Duties, Rights, and Remedies** created by (A) and (B).

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 $30 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 bargain and perform in **good faith**; 
   b. creating implied **warranties** in favor of buyers; and 
   c. providing **remedies** in the event that 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**: Where does contract law come from and where and how do we, as lawyers, “find” and help “make” it?

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, is **bound** to 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 of contract law will be

   (1) **Uniform Commercial Code** (UCC) Article 2, which has been adopted in whole or in part by every state except Louisiana, and which “trumps” contrary common law in cases involving most domestic contracts for the sale of goods;

   (2) The **U.N. Convention on Contracts for the International Sale of Goods** (CISG), which the U.S. and sixty-two other countries, including most of our major trading partners, have ratified and is binding law that “trumps” the UCC and common law in many cases involving a contract for the sale of goods across national borders; and

   (3) The **Uniform Electronic Transactions Act** (UETA), which has been adopted in forty-six states (including NV) and the District of Columbia, and which updates both common and statutory contract law to facilitate electronic contract formation, performance, and enforcement.

   (4) The federal **Electronic Signatures in Global and National Commerce Act** (“E-SIGN”), which has much the same effect as UETA. However, unlike most instances where federal and state legislation overlap, E-SIGN explicitly yields to UETA.

B. **Secondary Authority**

1. **Restatements:** “Black letter” statements of the majority or “preferred” view of various aspects of contract 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 of legal scholars, practitioners, and judges, in the form of:

a. **Treatises**
   
   (1) *Corbin on Contracts*
   
   (2) *Farnsworth on Contracts*
   
   (3) *Williston on Contracts*

b. **Hornbooks**
   
   (1) Calamari & Perillo (5th ed. 2003)
   
   (2) Farnsworth (4th ed. 2004)
   
   (3) Murray (4th ed. 2001)
   
   (4) White & Summers (5th ed. 2000) [for UCC issues]

c. **Law Review (and Other) Articles, Notes & Comments**

   ♦ Yes, it’s true. If you make the *Nevada Law Journal* and your note or comment is published, some day a court may cite it as authority for reaching, or at least supporting, its conclusion of a contested legal issue in a case.

IV. **Schools of Contract Theory**

A. **Formalism**: Contract law is a set of universal principles which judges “discover” in decided cases and statutes and apply mechanically to reach a doctrinally “correct” result. Formalist judges are “forbidden” from considering personal or societal moral or political values.

B. **Realism (a.k.a. Contextualism)**: Court decisions should not be a product of neutral application of doctrinally “correct” principles to a given set of facts; rather, they should result from taking into account “all relevant knowledge of human affairs,” permitting the judge to consider not only existing “law” but also the facts, equities, and public policy issues present in any particular case.

C. **Law and Economics**: Contract law tends, in general, to become more “efficient” over time. And, to the extent that an “inefficient” rule persists, it should be modified in order to promote greater efficiency.

   ♦ *Behavioral Law and Economics* attempts to make L&E more “socially conscious” and aware of more than the “bottom line.”
D. **Relational Theory:** Many contracts arise from long-term commercial or personal relationships; therefore, they ought not be governed by the same rules that apply to complete strangers bargaining “in the dark.” Habitual contract parties often develop their own customary law that supplements, or even supplants, common and statutory law.

E. **Legal Positivism:** Contract law should promote fairness, morality, and consent.

F. **Critical Legal Studies:** Contract law must account for fundamental issues such as the distribution of wealth and power in our society, gender inequities, or racial biases.

G. **Feminism:** Feminist theory can be positivist or critical, and sometimes both. Feminists often reach out to “outside” texts and other sources and advocate a contract law that is more inclusive than law traditionally had been and that traditional legal theory has advocated.

V. **Undercurrents of Contract Theory**

A. **Intuitionism:** Contracts are sacred *per se*; and, therefore, should be enforced (unless they shouldn’t 😁).

B. **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 *all* contracts be enforced? What about illegal contracts, unconscionable contracts, etc.? What about “efficient breach”?

C. **“Will” Theory:** The will of the parties, as manifested by their agreement, is “inherently worthy of respect.” Therefore, where there is a “meeting of the minds,” there follows an enforceable contract.

   ♦ How can we tell whether the parties have had a “meeting of the minds”? (Ex: the *Peerless* case again)

   ♦ What if the parties “agree” – but never at the same time?

D. **Injurious (or Detrimental) Reliance:** Liability arises *only* if

1. one party makes a *promise* explicitly by words or implicitly by acts,
2. the second party *reasonably relies* thereon,
3. causing the second party to suffer some *loss*. [See R2 § 90]
E. **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”?

F. **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.

G. **Risk Allocation:** Contracts permit parties to allocate the risks of future uncertainty, including the possibility that the party who is “obligated” to perform at a later date may not do so or may perform incompletely or incompetently.

♦ This assumes that contracts are entered into to protect against breach more so that to promote performance (e.g., prenuptial agreement).

VI. **The Task Before Us**

A. **Nine Questions**

1. What **law** governs the (proposed) transaction between or among the parties?

2. Did the parties form a **contract** – that is, a consensual agreement?

   ♦ Did one party make an **offer**?

   ♦ Did another party **accept** the offer?

   ♦ Did the party who made the offer (the **offeror**) receive **consideration**?

3. If the parties formed a contract, is it **enforceable**? The parties may have reached an agreement they think is binding, but it may not be because of some **formation defense** (e.g., incapacity, mistake) or because 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 there been a **material breach** of the contract?
   ♦ A breach is “material” if it substantially deprives a party of the benefit it expected to receive from the contract.
   ♦ A material breach signaled by a party prior to the time its performance is due is an **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, does one or more **third party(-ies)** 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**: “Undo” the contract – *i.e.*, return both parties to their pre-contractual situation.

5. **Specific Performance**: Order the defendant to perform as agreed.

6. **Injunctive Relief**: Order the defendant to do/refrain from doing a particular act.

7. **Liquidated Damages**: Enforce the remedy the parties agreed to when they first entered into their contract, provided that the agreed remedy is not unduly harsh.