Contract Theory: Collisions of Contracting and Culture

Fall 2006
Tuesdays & Thursdays 8:45-10:00 A.M. Rm 307

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SYLLABUS AND POLICIES

What Is This Course About?

This course will challenge students’ understanding of contract law beyond the traditional lens of a first year contracts course. Unfortunately, there is not sufficient time in the first-year course to cover various theories and trends underlying what we see as “contract law.” There is robust debate among scholars and policy-makers about the underpinnings and effects contracts have on not only commercial planning, but also societal culture and norms. Contract scholarship and jurisprudence is far more complex and textured than students realize after a first-year, survey course.

Furthermore, theory underlying and questioning contract law impacts contracting cultures. It is fairly easy to see how cultural issues have become increasingly important as we move from paper to electronic contracting and international contracts become common. Consumers now regularly create contracts over the Internet with companies based all over the world. “Contracting culture” therefore includes consideration of how ethnicity, nationality and religion affect negotiations and decision-making. “Contracting culture,” however, does not simply implicate these common conceptions of “culture.” Instead, it encompasses relations, connections, norms and understandings within various exchange areas and contexts. Indeed, these factors play significant roles in many, if not most, contracts. This, in turn, impacts contract performance and enforcement.

A prime example of an area that has its own, distinct contracting culture is the construction context. Those in the construction industry have developed unique sets of standards and norms that shape contracting behaviors. For this reason, some theorists posit construction contracts as highly “relational.” Indeed, “relational contract theory” has thrived using construction contracts as prime examples.
In contrast to the relational contracting culture in the construction industry, exchanges in the consumer context tend to be less communal or relational. Consumers usually have little personal connections with manufacturers and service providers, and they often agree to form contracts without reading or understanding the “boilerplate” terms included in such forms. Nonetheless, classical contract law revived by law and economics tends to condone enforcement of these contracts. They are generally deemed efficient, and necessary to smooth workings of our modern economy. We will explore this during the semester.

Accordingly, students in the seminar will read, discuss and debate articles, book excerpts and other materials that explore various contract theories and principles emanating from classical and neoclassical law, legal realism, law and economics, critical legal studies, law and society, relational theory, and other schools of thought. They will then consider and critique these theories as applied to particular contracting cultures, especially as applied to construction and consumer contracts.

The seminar also seeks to “humanize law” by inviting students to consider the “human” aspects of real-world contracting. This is especially important in contracts because it is a subject that students traditionally learn in a more doctrinal manner. The quest is to provide you with opportunity to expand your understanding and analysis of contracts beyond the basic concepts, and to explore and question tensions among theories, norms, goals, and functions of contract law. Throughout the year, please consider the functions and policies contract law should promote, and whether it accomplishes such promotion. Should the law treat all contracts alike? What reforms are necessary to protect public policies? What are the costs and benefits of these reforms? Are these reforms practical?

Please note that class attendance and participation will be very important. In addition, there will be short reflection papers (most ranging from a few sentences to one page) that will help focus class preparations and discussions. Meanwhile, each student also must complete a seminar paper. Students will select topics early in the fall, begin research at that time, and prepare class presentations on the selected topics. These papers will give each student an opportunity to explore an area of construction or consumer contracting, or another “contracting culture” of their choosing, from both theoretical and empirical angles. In addition, as you may note from the various paper deadlines in the assignment listings below, I truly want to give students an opportunity to improve their writing skills and produce a publishable article.

I am both enthusiastic and nervous about this course! It is a new course, and we will all be learning together. Indeed, I warmly welcome your comments and insights throughout the semester. I hope this course will prove to be worthwhile for all involved.

**Required Materials:**

You must read and prepare assigned materials that are available on-line (i.e., Westlaw, Lexis, and other on-line sources). In addition, I will hand out additional assigned readings. This means that you will not need to purchase a book or an expensive course packet. Instead, you will be able to get the assigned materials in class on on-line (depending on the materials) – but note that most will ONLY be available through on-line sources. I chose to pursue this strategy in order to provide contemporary assignments and minimize your costs.
TWEN:

Note also that I have created a Contract Theory course page on TWEN. All students in this course must register on TWEN, and check it periodically. The TWEN course page will post announcements, assignments, class materials, etc. The TWEN site will be tremendously important in this class, especially due to its flexibility.

Class Schedule:

Class will meet from 8:45 – 10:00 a.m. on Tuesdays and Thursdays in Room 307.

Office Hours:

My designated office hours in the fall semester will be Tuesdays from 1:30 - 3:30 p.m. or by appointment. Of course, please feel free to talk to me after class or stop by my office. I am in my office most days.

Class Attendance, Preparation and Participation (15%):

Participation will account for 15 percent of your final grade. Your class attendance, preparation and participation are essential to everyone’s course experience. In other words, you should make every effort to attend and participate in every class. I understand there may be illnesses and unavoidable conflicts, but ask that you talk to me about any such absences or conflicts.

Short Reflection/Writing Assignments (15%):

During the semester, students must complete short reflection/writing assignments as noted on the syllabus and may be updated on TWEN. These assignments are due at the start of the class for which they are assigned. Performance on these assignments will account for 15 percent of your final grade.

Seminar Paper (70%):

You also will be required to write a seminar paper ranging from 20-25 pages. “Paper plans” outlining topics and research strategies will be due Thursday, October 5. On Thursday, November 9, more detailed drafts will be due and students will then meet with me individually during the next week to discuss these drafts (which must be at least 15 pages long). Students will then be paired as “paper buddies” in order to facilitate mutual written feedback among students in the course. Students will give paper presentations during the final 2 classes, and the final papers will be due Wednesday, December 13. This paper will account for 70 percent of your final grade.

As is true with all your courses, you are subject to the Honor Code. This, of course, includes all the applicable rules on plagiarism, digital sources, etc.
Class Assignments:

- Reading assignments are subject to change.
- Complete reflection/writing assignments before the class for which they are assigned.
- Assume materials are available online (Westlaw or Lexis) unless indicated otherwise.
- Please note that reading assignments are shorter than they appear. With respect to review and journal articles, the assignments list page numbers that correspond to the hard copies. However, this translates to far fewer Westlaw or Lexis pages of text.
- Check TWEN for changes, focus questions, additional assignments, etc.

WEEK 1

Tuesday August 29

- Please read the following:
  - This Syllabus and the attached Overview of Contract Theories
  - George A. Nation III, Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured, 94 Ky. L.J. 101-37 (2005) (easy to read and only 12 WL pages)

*Reflection/writing Assignment*: Please look at form contracts you have (especially for appliances, common goods, cars, credit cards, home-related, etc.) and see if they contain surprisingly "unfair" term(s) (i.e., not expect it, bothers you, seems "wrong"). After you find at least one contract with term(s) you deem particularly "unfair," then do the following with respect to each contract you find:

1. Copy the contract (blacking out any personal info).
2. Highlight the term(s) you deem "unfair.
3. Staple a cover page on each contract copy, BRIEFLY (use bullet points, no need for eloquence or full sentences) responding to the following questions:
   - What do the term(s) basically “do”/”say”?
   - Why do you believe the term(s) are unfair?
   - Do you believe they are enforceable? Why or why not?
   - Did you agree/would you have agreed to the contract if you read/understood the term(s)?
   - Would you rather pay a higher price/incur higher interest in exchange for elimination of the term(s)?
   - Anything else you want to say about the contract?

- Be prepared to more fully discuss these contracts and questions in class, especially in light of the reading assignment.
- Also consider generally (for Week 1 and throughout the year): What policies and norms should contract law promote? How should courts carry out this promotion? Should “fairness” matter in contract law?
- What issues struck you after reading the hospital billing article? What is fair? What about the benefits and burdens involved – who should bear them?
Thursday, August 31

The readings for this day are geared to spark your thinking about “culture” generally before we go further into contract theory, and then consider “culture” in contracts and contracting. Think about what “culture” means in a broad sense: Not simply as a matter of ethnicity or origin but in terms of a variety of factors including relations, understandings, norms, etc. within a community or among individuals making a “deal.” The following articles focus on ADR and conflict resolution but the same principles can apply in contract negotiations. At core, negotiating a contract involves resolution of disputes or differences.

Please read the following:

- Hoffman, E, “Confrontations and Compromise: Dispute Resolution at a Worker Cooperative Coal Mine,” Law & Social Inquiry, 26: 555-596 (HANDOUT)

Please consider:

- What does “culture” mean? Do these authors agree or disagree, and in what ways?
- Why does “culture” matter in dispute resolution? Does it also matter in contracting? In what ways?
- Do you think the law adequately considers “culture” in contract issues?

*Reflection/writing assignment:* Explain in a paragraph your understanding of “culture” and its role in contracting.

WEEK 2
Tuesday, Sept. 5

The “Theory Overview” materials are quite rudimentary, meant to provide general descriptions of various theories. Each theory, however, is highly textured, and subject to clarifications and provisos. The Atiyah essay introduces you to the liberal theory of contract at the heart of contract law and doctrine.

Please read the following:

- Theory Overview materials (Handout).

- Please consider the following as you prepare the readings for class:
  - How would you describe these various theories?
  - What are your initial views of these theories, and what do you see as their respective strengths and weaknesses?
  - What functions and values do these different theories seek to promote? Are they successful? If so, how do they accomplish such promotion?

*Reflection/writing assignment:* Based solely on these readings, please explain in a short paragraph which general theory of contract you find most compelling and why you chose that theory.
Thursday, Sept. 7

The Atiyah essay introduces you to the liberal theory of contract at the heart of contract law and doctrine and the Mather excerpt raises issues regarding the role of morality in contract law.

Please read the following:
- Henry Mather, CONTRACT LAW AND MORALITY 15-44 (1999) – This is Chapter 2 of the book, and it is shorter than it appears due to the endnotes. (Handout)

- Please consider the following as you prepare the readings for class:
  - What is Atiyah’s “liberal theory of contract?” What are its strengths and weaknesses?
  - Should “justice” and/or morality be relevant in contract law? If so, what role or “place” should each have in a contract regime?
  - Is there a universal morality that contract law should promote? Why or why not? Where would a “universal morality” come from, and what would it entail?

*Reflection/writing assignment: List key ideas that come to mind when you think about goals of contract law (as you understand them to be).

WEEK 3

Tuesday, Sept. 12

Please read the following:
- As you read the article, consider the following:
  - What is the “Efficiency Theory” of Contract?
  - Why is contract enforcement important in an industrialized society? Why ever allow exceptions to contract enforcement?
  - What other “functions” of contract are important besides enforcement? Why are they important?
  - What do Schwartz and Scott propose?

*Reflection/writing assignment: State in one paragraph what contract law you think commercial parties would want the state to provide?

Thursday, Sept. 14

Please read the following:
• Peter Benson, *The Basis of Corrective Justice and its Relation to Distributive Justice*, 77 *Iowa L. Rev.* 515, 529-49 (1992). (This is Part I of the article, in which Benson takes a different view than Gordley of Aristotelian notions of justice.) (WL)

• Consider the following as you prepare for class:
  • What are “Aristotelian notions of justice”?
  • What are the different views of Gordley and Benson? How do these views differ? How are they alike?

*Reflection/writing assignment*: Interview 5 people and ask them to describe what “justice” means to them with respect to contracts they accept. Create a table with 2 columns: The first indicating the age, gender and occupation of the person asked and the second quoting the person’s response.

**WEEK 4**

My concept of “Humanizing Contracts” asks students to consider and question the “human” side of contract law, theory and practice. A strong proponent of a human view of contractual exchanges is Professor Ian Macneil, often deemed the “father” of relational contract theory. Professor Macneil has been very prolific in his writings, and it was very difficult for me to choose only a few of his writings for this class. Indeed, I could devote an entire course to Macneil’s relational contract theory. Nonetheless, I chose the following article excerpts because Macneil wrote these articles during the same general period and they are all fairly readable and accessible. I hope that discussion of relational theory continues throughout this course.

**Tuesday, Sept. 19**

Please read the following:
• Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 *Wis. L. Rev.* 483, 483-493 (thus excluding Part III). (This merely summarizes some of Macneil’s ideas in roughly only 5 pages of body text per Westlaw prints.)

• Please consider the following as you prepare for class:
  • What are Macneil’s criticisms of efficient breach theory? Are these criticisms compelling?
  • How would you describe Macneil’s Relational Contract Theory? Is the theory useful, and for what purposes?

*Reflection/writing assignment*: Please make a list of what you deem to be the key characteristics of Macneil’s relational contract theory based solely on this week’s readings.
Thursday, Sept. 21

Please read the following:


  - How would you explain, and perhaps use, Macneil’s categorization and description of Common Contract Norms?
  - What does Macneil mean by “values,” and how do these values flow from and interact with his contract norms?
  - How do laws and bureaucratic structures affect and interact with these values and norms?

*Reflection/writing assignment:* Make a list of key questions you have about the Macneil readings that you would like to ask your colleagues in the class. Be prepared to lead discussion on these questions (you need not know the answers to them).

WEEK 5

Many commentators have praised and criticized Macneil’s writings and theories. Professor Randy Barnett wrote one such critique in 1992, which highlights arguable shortcomings of Macneil’s views of consent in contract law. In 2000, Northwestern University Law School held a symposium in honor of Professor Macneil. Although there were a variety of commentators, the comments by Professor Eric Posner (Professor at University of Chicago, and son of Judge Richard Posner) were particularly poignant. Professor Macneil responded to many commentators’ queries, and devoted special attention to Professor Posner’s remarks.

Tuesday, Sept. 26

Please read the following:


- Please consider the following as you prepare the readings:
  - What are Barnett’s criticisms of Macneil’s relational theory, and are they compelling?
  - What is Posner’s argument? What do Posner’s views mean with respect to Macneil’s relational theory, and are they compelling?

*Reflection/writing assignment:* Please state in two paragraphs your views regarding the strengths and weaknesses of Macneil’s relational contract theory (i.e., one paragraph for strengths and one for weaknesses).
Thursday, Sept. 28

Please read the following:


  - Does Macneil respond to the criticisms and views in his 2000 article? Are his responses adequate?
  - What is “law and socioeconomics”? Why is it relevant in the law? How is it like relational theory?
  - How does Dallas envision a law and socioeconomics course?
  - Do you think such a course would be useful and would you take it? Why or why not?

*Reflection/writing assignment*: Please state in a paragraph or two your vision of a law and socioeconomics course in contract law, and whether you think it would be useful.

WEEK 6

With the insurgence of relational and other contract theories, some question whether true “classical theory” continues to dominate contract law. Law and economics principles and “neoclassical” theory have nonetheless dominated contract law. Still, other theories have entered the debate, albeit with questionable impact on the courts’ contract decisions.

Tuesday, Oct. 3

Please read the following.

- G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 431, 495-517 (1993). (This includes only Part III(B), and constitutes roughly 7½ pages of body text per Westlaw prints.)
- Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 771-820 (1985). (This includes only Parts I (Introduction) and II, and constitutes roughly 23 pages of body text per Westlaw prints.)

  - Consider the following as you prepare for class:
    - What theories does Shell enumerate as those competing for dominance in contract law? What, if any, impacts have these theories had on the Supreme Court’s contract jurisprudence?
    - What does Rosenfeld deem the core of contract law and theory? How does this core relate to notions of justice in Rosenfeld’s view?

*Reflection/writing assignment*: Please explain in 3 sentences or less, how you would define “justice” in contract law.
Thursday, Oct. 5

Please read the following:


- Please consider the following:
  - How does Morant characterize the contract theory of Dr. Martin Luther King, Jr.? Do you believe this is accurate? Would you characterize Dr. King as a “critical theorist” or as a “relationalist” (in the Macneil sense)?
  - How do Morant’s views differ from those of Rosenfeld?
  - What does “natural law” mean or entail? How is it relevant to contract law?

*Reflection/writing assignment:* Please choose a famous person (but not a contract scholar or someone who has announced their contract theories) and explain in less than 3 pages what you believe that person’s “contract theory” would be and why.

***PAPER PLANS DUE!!***

WEEK 7

As may already be transparent from the readings to date, it is essentially impossible to clearly define and differentiate the various ideas and so-called “schools” of legal thought. Nonetheless, some have labeled the movement away from formulaic classical doctrine, in favor of more contextual and flexible analysis, as “Legal Realism.” In addition, some have viewed “Critical Legal Studies” (CLS) as a “critique built on” the early work of the Realists. CLS has been described as a movement exposing “the oppressiveness of legal ideology” and the law’s maintenance of a status quo skewed against less powerful groups (i.e., with respect to race and gender).

Tuesday, Oct. 10

Please read the following:


- Please consider the following as you prepare the readings:
  - How does Cook characterize CLS, and what are his criticisms of the movement?
  - What is Cook’s view regarding the theories of Dr. Martin Luther King, Jr.?

**We will hold paper meetings after we discuss this short reading**

* I did not assign the full article due to time constraints, as the article does not directly address contract law. Nonetheless, the article is quite interesting in that the author offers a different account from that of Morant regarding the theories of Dr. Martin Luther King, Jr.
Thursday, Oct. 12

Please read the following:
• Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 Conn. L. Rev. 1, 1-66 (1995). (This constitutes roughly 26 ½ pages of text per Westlaw prints.)

• How does Chase characterize the influences of race on contract law? How do these influences impact contract doctrines and decisions?
• How do the views of Cook and Chase differ and relate? What ideas and arguments do you find most compelling?
• How should contract law ultimately respond to racial concerns? What are the pros and cons of these suggested changes in the law of contracts?

*No Reflection paper so you can focus on delving into paper research and to give a reprieve in light of the longer reading assignment for next Tuesday.

WEEK 8

Now it is time to look at construction contracting and consider the unique personalities, relations and qualities of these types of contracts.

Tuesday, Oct. 24

Please read the following:

As you prepare, consider:
• What are the realities of construction contracting? Who are the key players and what are their respective roles?
• How is construction contracting unique?
• What are the relevant external and internal rules and how do they matter? What are the “structures”?
• What reforms does the author discuss and what are his proposals? Are they compelling? Why or why not?

*No Reflection paper

Thursday, Oct. 26

Please read the following:
Please consider:
• What is “partnering” and is it a good idea?
• Is construction contracting the same or different depending on the country? In what ways?
• How are ethnicity and religion relevant to construction contracting?

*Reflection/writing assignment: Explain in less than a page how you would describe the construction “contracting culture” and how it is relevant to contract negotiation and dispute resolution.

WEEK 9

Tuesday, Oct. 31

Courts apply contract defenses such as unconscionability to avoid enforcement of contracts they deem too unfair to enforce. Some critique existence and application of unconscionability, however, due to its arguable uncertainty and inefficiency.

Please read the following and study these Restatement and UCC rules:
• Restatement 2nd of Contract §208 and §211, and comments to these sections. (On-line, in the library, or in your 1st-year Contracts supplement.)
• UCC 2-302. (On-line, in the library, or in your 1st-year contracts supplement.)
• Henry G. Prince, Unconscionability in California: A Need for Restraint and Consistency, 46 Hastings L. J. 459, 466 – 489 (1995). (You are only reading Part I of the article, which summarizes the general history and construction of the unconscionability doctrine (not California-specific), and it constitutes only 7 pages per Westlaw prints.)

• Based on all you have read in this course to date, consider the following:
  • Are the Restatement 2nd provisions helpful in defining unconscionability?
  • Did the UCC do a “better job” of encapsulating an unconscionability rule for sales?
  • Where did unconscionability come from and why does it continue to exist?
  • Does unconscionability protect or police some notion of “fairness”?
  • Is “fairness” a norm worthy of promotion? Should contract law promote fairness?
  • If contract law should promote fairness, how should that be accomplished through application of unconscionability?

*Reflection/writing assignment: Please write in 3 sentences or less, your sense of what “unconscionability” means in contract law.
Thursday, Nov. 2

Unconscionability has been a prime topic for academic debate since the 1960s. It has endured an ebb and flow of support and opposition, with most scholars criticizing the doctrine and calling for its containment or demise. This has coincided with trends toward formalism and economic analysis in contract law. Nonetheless, the unconscionability doctrine as we know it emerged from the following article.

Read and study:

• Arthur Allen Leff, *Unconscionability and the Code — The Emperor’s New Clause*, 115 U. Pa. L. Rev. 485, 485-547 (1967). (This constitutes only 28 ½ pages per Westlaw prints.)

• Please consider the following as you prepare for class:
  • What is Leff’s view of unconscionability and its role in contract law? What do you think about his view?
  • What did Leff predict about unconscionability, and do you believe that Leff’s predictions came to fruition?
  • Does the “2-prong analysis” that flows from Leff’s article “work” in your view?
  • How have legal, political, and social developments affected views of unconscionability in the twentieth century?
  • Are these positive or negative trends in your view?

*Reflection/writing assignment:* Please explain in a page or less how Leff envisioned the unconscionability doctrine to function, and whether/how the doctrine represents and/or fulfills that vision.

***WEEKS 10-14 TBA!!

***But note that the PAPER DRAFTS ARE DUE ON THURSDAY, NOVEMBER 9 & PAPER MEETINGS AND SWAPS WILL HAPPEN THEREAFTER, AND PAPER PRESENTATIONS WILL BE DURING THE LAST 2 OR 3 CLASSES DEPENDING ON CLASS SIZE!!
General Overview of Contract Theories:

Prior to the 19th Century, contract and tort were not separate common law doctrines.\(^1\) What we now deem common contract law is the result of academics’ efforts to describe and rationalize judicial decisions.\(^2\) Nineteenth-century lawyers sought to rationalize enforcement of exchange based on “will theories,” which defined contracts “in terms of the express will of the parties.”\(^3\) Classical doctrine, therefore, sought to foster parties’ rights to freely contract as they choose.\(^4\) This doctrine, reflected in Professor Williston’s original Restatement of Contracts, also is quite rigid, and strictly focuses contract analysis on the time of contract formation.\(^5\) It effectively limits the sources and factors that may be considered in determining meaning and substantive content of transactions.\(^6\)

Classical contract doctrine also focuses on enforcement as means to protect individualism and economic efficiency. This comports with the traditional law and economics assumption that presumed enforcement of contracts is efficient because it fosters economic planning and optimal distribution of resources in terms of relative preferences.\(^7\) Classical and economic theorists propose that enforcement leads to optimal distribution of resources based on additional assumptions that transactions are products of fully informed strangers’ economically rational bargaining in a perfect market, and involve clear quantities and little complexity or party interaction.

Neoclassical contract law emerged as a modified legal regime within the classical structure. It provided the underlying principles for the Restatement (Second) of Contracts and Article 2 of the Uniform Commercial Code (governing sale of goods). The neoclassical system seeks to accommodate some of the realists’ concerns regarding the rigidity of classical doctrine. Therefore, neoclassical law eases classical rules by preferring application of standards that allow for more flexibility and permit some gap-filling. Nonetheless, it continues to embrace classical bedrock principles such as offer, acceptance, consideration, and general performance duties. The neoclassical view, however, generally broadens classical analysis by allowing for contextual contract interpretation, and careful consideration of applicable trade custom and social values.

Several theories have developed that push and question contract law built on these classical and neoclassical constructs. For example, critical legal scholars question how the law

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2 Id. at 1817-20 (proposing that we now should “weed out the relics of the older common law” in order to complete the task begun by early treatise writers: “to give a systematic and sensible account of our law”).
3 Id. at 1849.
6 Id. at 855-65. For example, classical doctrine directed courts to interpret contracts based on writings and formal contract communications, and not parties’ identity or other circumstances outside of the formal “agreement.” Id.
marginalizes less powerful groups and individuals. In addition, Professor Ian Macneil proposed relational contract theory as an open, inductive, and individualized approach for analyzing and enforcing relations that do not fit classical or neoclassical, paradigms. His proposal has sparked consideration of transactions’ “relational webs,” including their durations, complicated personal interrelations, unclear quantities and qualities, anticipation of future disputes, expectation of cooperative behaviors, and interwoven strings of friendship, reputation, interdependence, morality, and altruistic desires.

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