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# CONTRACT LAW

## INTRODUCTORY REMARKS: CONTRACT LAW AND MORALITY

NATHAN OMAN\*

If one listens to the voices that can be heard in many corners of the legal academy, now is not an auspicious time to construct moral theories of contract law.<sup>1</sup> Some articulate writers have suggested that virtually all of our disputes are actually empirical rather than moral. John O. McGinnis has written provocatively in this vein that

politically, most people within modern industrial society adhere to a rather narrow range of values, at least in the economic realm. They favor more prosperity, better education and health care, and other such goods that make for a flourishing life. As to these issues, what is debated is which political program will in fact broadly deliver these goods.<sup>2</sup>

According to McGinnis, we stand at the threshold of a new age of empiricism in which technology is dramatically reducing the costs of collecting, analyzing, and disseminating data. Informed opinion will gradually converge on empirically driven conclusions, and the real danger will be “the narcissism of small differences, in which individuals overlook the agreements they have to focus even more virulently on the disagreements that remain.”<sup>3</sup>

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1. See, e.g., Editorial, *The Empirical Turn in Legal Education*, 89 JUDICATURE 312, 312 (2006) (“A change is happening in America’s law schools. In myriad ways, legal education and scholarship are increasingly adopting the perspectives and tools of the social sciences.”).

2. John O. McGinnis, *The Age of the Empirical*, POLY REV., June & July 2006, at 47, 48.

3. *Id.* at 56.

In a world dominated by empiricism, the moral theory of contract seems like an anachronism, a throwback to a premodern world of ethical abstractions that ought to give way before the juggernaut of common sense and social science. In the face of increasingly attractive alternatives, would-be moral theorists of contract<sup>4</sup> must offer a defense of the continuing relevance of their conversation. One can, of course, offer cheap metadissmissals of empiricism. We have been on the doorstep of the triumph of social science before, only to see grandiose hopes give way to more modest conclusions.<sup>5</sup> Such a response, however, does not really provide an apology for moral theorizing about contract law.

William James suggests that theories are "*instruments, not answers to enigmas, in which we can rest*. We don't lie back upon them, we move forward, and, on occasion, make nature over again by their aid."<sup>6</sup> Seen in this light, moral theories of contract are tools that help us to deal with two basic kinds of puzzles: interpretive and normative. The interpretive puzzle was set up nearly a half century ago when H.L.A. Hart largely discredited the idea that law can be wholly reduced to a series of threats and incentives.<sup>7</sup> This does not mean, of course, that law cannot be fruitfully studied as a system of incentives.<sup>8</sup> It does mean, however, that the study of law is not

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4. I count myself among their number. See Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria*, 83 DENV. U. L. REV. 101 (2005); Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483 (2005) (book review).

5. One philosopher of social science has summed up the situation:

In varying social disciplines there seem to be moments at which a breakthrough to cumulating knowledge has been achieved: Adam Smith's *Wealth of Nations*, or Emile Durkheim's work in *Suicide*, or perhaps John Maynard Keynes's *General Theory of Employment, Interest and Money*, or B. F. Skinner's *Behavior of Organisms*, for instance. But subsequent developments have never confirmed such assessments. Though the social sciences have aimed at predicting and explaining human behavior and its consequences at least since Thucydides in the fifth century B.C., some say we are really no better at it than the Greeks.

ALEXANDER ROSENBERG, *PHILOSOPHY OF SOCIAL SCIENCE* 8 (1988).

6. WILLIAM JAMES, *What Pragmatism Means*, in *SELECTED WRITINGS* 3, 7 (G.H. Bird ed., 1995).

7. The decisive attack on this approach was H.L.A. Hart's *The Concept of Law*, especially chapters II, III, and IV. See generally H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

8. The incredibly rich literature on contract law produced by the law and economics movement is sufficient evidence of this. Even some of its most gifted practitioners, however, have questioned the sole sufficiency of the economic analysis of contract law. See, e.g., Eric A.

exhausted by such an approach. There is also what Hart called the “internal” point of view.<sup>9</sup> Rather than showing us the law simply as an institutional or behavioral system, the goal of elucidating the law from this internal point of view is

to understand the law from the standpoint of practitioners who ask not only, “How may we carry on this practice in a way that is faithful to its inherent norms?,” but rather, “How may we carry on this practice in a way that is faithful to norms that are both inherent in it and reflectively acceptable to us?”<sup>10</sup>

Moral theories of contract seek to provide such an internal perspective and in so doing extend our understanding of law beyond what can be offered by empiricism alone.

The second problem, for which moral theory is a tool, is normative. Before we can deploy the tools of social science to illuminate policy debates, we must have some sense of what those debates are about. McGinnis argues that there is widespread moral agreement on most economic issues, which would presumably include private law subjects such as contract.<sup>11</sup> There are, however, two reasons to suppose that moral theories of contract are far from irrelevant. First, there are some situations in which a person might be genuinely puzzled not simply about empirical imponderables, but also about questions of value. Indeed, when we pitch moral principles at the level of abstraction where they are likely to command universal assent—for example, “generally speaking, we should keep our promises”—they tend to become vacuous. Second, even when we are basically persuaded of the value of a particular approach to moral questions, we may nevertheless be confused about the precise implications of that approach.

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Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003). Needless to say, not all law and economics scholars share Posner’s pessimistic conclusions. See, e.g., F.H. BUCKLEY, *JUST EXCHANGE: A THEORY OF CONTRACT* 34 (2005) (“For a satisfactory explanation of these [puzzles about contractual obligation], we must turn from reliance, benefits and will theories to the law-and-economics account of contract law.”).

9. HART, *supra* note 7, at 88-91.

10. JULES L. COLEMAN, *RISKS AND WRONGS* 7 (1992).

11. See McGinnis, *supra* note 2, at 48.

The challenges and possibilities inherent in the discussion of contract law and its relationship to morality are on display in the essays collected here. Peter Alces questions the very possibility of a moral theory of contract by arguing that contract doctrine is not the sort of thing about which morality can speak.<sup>12</sup> At the opposite end of the theoretical spectrum, James Gordley shows that the Aristotelian view of law, which he has argued provides the best explanation of contracts,<sup>13</sup> can be extended normatively to thorny issues of paternalistic regulation.<sup>14</sup> Finally, Peter Benson and Jody Kraus address in very different ways the issue of constructing an interpretive theory of contract law. Benson uses the Rawlsian idea of public reason to explain what he takes to be the morality latent in contract doctrine itself.<sup>15</sup> Kraus, in contrast, argues that economic and deontic theories of contract have differing advantages. Economics provides determinate answers on specific questions, whereas deontic theories have less determinacy but superior justificatory force.<sup>16</sup>

In many ways, the powerful trend toward empiricism in the American legal academy is a salutary force. Theory can be given to excess for which fact can be a powerful antidote. Nevertheless, contract law continues to present questions and problems that moral theory may productively attack and discuss. At the very least, these essays demonstrate that attempts to deploy moral theory to discuss contract law can be “proved ... to be worthy of the interest of an intelligent man [or woman].”<sup>17</sup>

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12. Peter A. Alces, *The Moral Impossibility of Contract*, 48 WM. & MARY L. REV. 1647 (2007).

13. See generally JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991).

14. James Gordley, *Morality and Contract: The Question of Paternalism*, 48 WM. & MARY L. REV. 1733 (2007).

15. Peter Benson, *Contract as a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673 (2007).

16. Jody S. Kraus, *Legal Determinacy and Legal Justification*, 48 WM. & MARY L. REV. 1773 (2007).

17. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (June 1, 1922), in *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* 265 (Richard Posner ed., 1992).