1. Theories of contract law

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INTRODUCTION

Theorizing about contract law has a long history – its origins coincide with the origins of thinking of about contract law as a separate area of law.\(^1\) However, there has been a particular flourishing of work (at least in English) on contract theory in recent decades, prompted in large part by the publication of Charles Fried’s influential book, \textit{Contract as Promise}\(^2\) (about which, more below). Despite the long history and recent increase in theorizing about contract law, the nature and purpose of such theorizing remains under-discussed and many basic questions remain unanswered.

In this chapter, section I will discuss general considerations relating to theorizing about contract law, section II offers an overview of some major types of theories, and section III raises some of the skeptical challenges to theorizing in this area.

I. THEORIZING ABOUT CONTRACT LAW

A basic question about theories of contract law is, what is the nature and purpose of such a theory? Surprisingly, while there is a growing literature regarding which is the best theory of contract law, there is relatively little discussion of this foundational inquiry. At a basic level, a theory of a social practice could be descriptive (describing what is the case), prescriptive (making claims about how the practice should be organized or how existing practices should be reformed), or interpretive (sometimes called ‘rational reconstruction’, this is a combination of description and prescription, where existing practices are reformed or at least re-characterized to make them better: more coherent, more legitimate, etc.). It is crucial to understand what sort of claim is being made for or

\(^1\) See Simpson (1981).

by a theory, though this is a matter that theorists (and their critics) too often leave undiscussed. Sometimes a theory and its critics are talking past one another: it is not a fair criticism of a purely prescriptive theory that it does not accurately describe current practices, and so on.

Additionally, we need to know something about a theory’s purported scope. Is the theory meant to be (at one end of the spectrum) about the contract law of a particular jurisdiction at a particular time, (at the other end of the spectrum) about all existing, past or possible contract law systems, or something in-between? For example, when Charles Fried offers a ‘theory of contract Law’, is it a theory of American (or, perhaps, Anglo-American) contract law, a theory about (say) ‘American, English, and similar common law’ legal systems, or about all possible legal systems? Fried never makes that clear.

In the different area of general theories about the nature of law, it is often reported that the theories are ‘conceptual’ – meaning that they are true of any existing or possible legal systems, that they describe simply and basically what must be true for something to be a legal system. Would it make sense to make comparable claims for a theory of contract law (or tort law or property law), that there are certain characteristics that must be true for something to be contract law? One could certainly imagine a functional-style theory of this sort, e.g., that ‘contract law’ is whatever set of legal remedies are made available for the enforcement of promises, exchanges and transactions.

At times the claims made regarding a doctrinal area of law are said to be ‘explanatory’, but in a way that is more abstract or metaphorical. When contract law is said to be ‘essentially about promise’ (or tort law to be ‘essentially about corrective justice’), the theorist is usually not saying that every rule, principle and practice of this doctrinal area perfectly reflects that value, but more that this value pervades the practice and is the primary component of the practice’s justification.

One final line of questioning regards the data that grounds the theory: is the theory meant to explain or justify the outcome of particular cases or is the theory meant to operate at a more general level, e.g., explaining the rules or principles that cover whole categories of cases? To put the issue another way, when it is said on behalf of a theory on contract law that it ‘explains’ or ‘justifies’ contract law, what precisely within or about

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3 Ibid.
4 See Bix (2012a).
7 See, e.g., Coleman (1992).
Contract law is being explained or justified? The alternatives are perhaps more sharply differentiated in common law legal systems (like those of the United States and England), where (a) much of the contract law has developed from judicial decisions rather than being stated in or derived from a Code or other collection of statutes; and (b) the law continues to be developed (modified) by contemporary judicial decisions (which also bind lower courts and, generally, later decisions by the same court). At least in relation to common law legal systems, one can reasonably ask whether the ‘data points’ that the theory purports to explain are the particular case outcomes, or rather the ‘black-letter’ rules (and principles) that one may find in treatises, Restatements, and other summaries of the field (but which have no authoritative status in (most) legal systems). 8

It has already been mentioned that one type of theorizing about contracts would involve ‘interpretive’ claims, also known as ‘rational reconstruction’. Interpretation/rational reconstruction has the advantage of being similar to what lawyers do in many legal systems while arguing a case: lawyers offer arguments that take into account relevant legal texts and past judicial decisions, trying to offer a coherent and principled justification of the whole area. In legal practice, this form of theorizing is often part of advocating that the law be changed, filled in or clarified in a way that is advantageous to one side of a legal dispute. There is a robust argument that this is the best and most natural use for theories of doctrinal areas: to offer guidance to judges who need to decide novel questions of law (in a way that may also combine with the judges’ improvement of the legal rules). 9

There are, of course, other kinds of theories of, or relating to, contract law, beyond those already mentioned. For example, Dagan and Heller have offered what could be thought of as a theory of contract law, though one that would be part of a larger moral or political theory, in that it focuses on how the state can and should use contract law to promote a good (and autonomous) life for its citizens. 10 There is also, of course (and as already mentioned), room for purely prescriptive theories, suggesting what the ideal set of contract rules and principles would be (in general, or for a particular country).

As already noted, it may be instructive to compare theories about doctrinal areas of law with the perhaps better established and more widely known and discussed theories about the nature of law – the type

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8 See Kraus (2007).
9 See Moore (2000).
of theory one finds in general jurisprudential discussions, and the works of theorists like H.L.A. Hart, Hans Kelsen, Ronald Dworkin and John Finnis.11 There are parallel questions regarding whether the claims of these sorts of theories should be understood to be descriptive, interpretive or conceptual, and whether it makes sense to speak of a general or universal theory. One difference is that it may be sensible and valuable to have a parochial theory of contract law (e.g., a theory of German, or French, or American contract law) in a way that a ‘(general) theory of German, or French, or American law’ would likely seem less sensible and useful.

There are obvious connections between the topic of this volume, ‘comparative contract law’, and the issues surrounding theorizing about contract law. ‘Comparative contract law’ starts by assuming something like the following: that there is a general category, ‘contract law’, such that there are examples of that category in many, and perhaps all, legal systems. And once one concludes (or assumes) that there are examples of ‘contract law’ in most, and perhaps all, legal systems, then it seems sensible, or at least possible, to have a theory of what all (actual, or perhaps actual and possible) members of that category (‘contract law’) have in common.

Additionally, it might be said that one needs to have at least an intuitive sense of the nature and boundary lines of the category ‘contract law’ in order to do comparative contract law. One must know what to include and to exclude in comparing one legal system with another: for example, does comparative contract law extend to a country’s legal rules regarding pension obligations? Landlord-tenant rules? Mandatory terms for insurance policies? Requirements for separation agreements? Standards for when charitable pledges are enforceable? And so on.

While having a category of ‘contract law’ gives one a subject for theorizing, it still of course leaves open the question of whether anything interesting can be said about that category, and also what are the nature of claims being made within the theory. As already noted, a theory of contract law could be making descriptive claims about what is true about all the contract law systems one knows, or it could be making a conceptual claim about what must be true of all contract law systems, about what makes something a contract law system as opposed to something else. (There is, inevitably, a certain amount of circularity in the conceptual inquiry: if one is trying to determine what makes

11 See, e.g., Hart (2012); Kelsen (1997); Dworkin (1986); Finnis (2011); see also Raz (2005).
something 'contract law' as opposed to something else, one will look at all examples of what one calls 'contract law', to see what distinguishes them from other things, e.g., legal rules of tort or restitution, or moral rules about keeping promises. There is thus a certain 'reflective equilibrium' between conventional or intuitive views about what fits into a category, and potential theoretical views about what makes up the boundary lines of the category.)

The next section considers some prominent examples of contract law theories.

II. CURRENT THEORIES

A. Autonomy Theories

This is a broad category that could include not only the will theories of contract that were popular in continental Europe in the nineteenth century, but also more recent examples, like Charles Fried’s promissory theory and Randy Barnett’s consent theory. These all qualify as 'autonomy theories' because they tend to focus on the choice of (potential) contracting parties, and the importance of respecting and enforcing such choices. The whole ideal of 'freedom of contract' (and its cognate, 'freedom from contract') is that contract law is distinctive (relative both to public law and many other parts of private law) in giving individuals significant power to choose which duties will bind them: in principle, one chooses whether one enters any contracts at all, and the terms of the contracts one does enter. And there is another tie to autonomy: contractual partners are able to create legally enforceable rights and obligations to help them achieve objectives it would be difficult to achieve without legal enforcement of those commitments.

The most influential modern autonomy theory is probably the promissory theory. The impetus for a promissory theory of contract law is the likely connection between the generally accepted moral obligation to keep promises and the legal enforcement of contracts. However, there are theorists who have questioned the connection between promises and contracts; and, in any event, in almost all legal systems, a significant

14 See, e.g., Barnett (1986); Barnett (2012).
15 Kraus (2009).
16 See, e.g., Pratt (2008); Shiffrin (2012).
portion of promises are not legally enforceable (in common law systems, generally only promises that are part of an exchange are enforceable; in many civil law systems, there is a requirement that promises be sufficiently important before they are enforced). The fact that not all promises are enforced, and that courts often focus only on whether a party has sufficiently outwardly/publicly consented to the legal duties in question, has motivated the competing ‘consent’ theory of contract law.17

B. Property Theories

Theories like Peter Benson’s theory of contract law posit that a contract involves a transfer of a property right, or something like a property right, at the time the contract is entered.18 The advantage of this approach is that it justifies the rule in many jurisdictions that in the case of a breach, the non-breaching party has the right to full performance, or its economic equivalent, even if the breach occurred so early that the non-breaching party has not suffered any harm from the breach and has not relied on the contract in any significant way.

On one hand, while the assertion that some sort of entitlement passes between the contracting parties at the time the agreement is entered does justify certain doctrinal outcomes, it seems to do this by assuming what is to be proven. Perhaps more problematic: to claim that one party has an entitlement or property right against the other leaves open many of the intricate questions a working contract law system must answer regarding the contours of that right, e.g., when does the party have the right that a court order the other party to perform, and in the case of money damages, how are damages to be measured, and what are the limits of what can be recovered (e.g., in US contract law, there are limitations based on causation, foreseeability, mitigation and certainty)? The assertion that one has a property-like contractual right would only open the inquiry on such questions, and would seem to leave a great deal still to do before the questions are resolved.

C. Reliance Theories

Some theorists have noted that while the doctrinal rules in some legal systems may allow the recovery of significant damages for breach of contract at any point after the contract has been entered (as mentioned in the previous section), in practice parties may not expect to recover

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17 See Barnett (1986); Barnett (2012).
18 Benson (2001); Benson (2007).
damages, and courts may be reluctant to award damages, unless the non-breaching party can prove that the breach caused significant damage (e.g., because of the non-breaching party’s reasonable reliance on the contract). It is additionally argued that, in any event, the moral claim for damages is strongest when there has been such reliance, and weak when no such detrimental reliance has occurred.\(^\text{19}\) This line of argument has sometimes been thought to make up a reliance theory of contract law, and some theorists have strongly urged a focus on (reasonable) reliance, though it is hard to find fully-worked-out theories of contract law along these lines.\(^\text{20}\) In any event, any theory that purports to ground the rights party do (or should) have on their reliance, will need also to have a theory regarding when such reliance is reasonable, and that will in turn require some reference to other values (promise? consent? efficiency?).

D. General Theories, with Application to Contract Law

Along with theories aimed particularly at contract law, there are also forms of legal theory whose scope is broader, but the scope includes an application to contract law.

The most influential such general theory (at least in the United States) is ‘law and economics’. Speaking in very rough terms, law and economics involves the application of various resources of economic thought to the understanding of legal rules, practices and institutions, and argues that legal norms generally do, and generally should, promote economic efficiency. A large number of theorists have used economic analysis as a way to explain current contract law doctrine or to prescribe changes in the current contract law rules (within a particular legal system, though prescriptions may also range more broadly across legal systems).\(^\text{21}\)

One advantage the economic analysis of law has over other (mostly ‘deontological’) approaches to contract law is that economic analysis has the resources to make recommendations regarding detailed contract law rules and principles (e.g., when in a breach of contract case should a non-breaching party be granted ‘specific performance’ as opposed to being confined to money damages? When should damages in a breach of a construction contract case be measured in terms of ‘cost of completion’ as against ‘diminution of value’? And when should a seller have a contract law obligation to disclose information?). A general reference to

\(^{19}\) See, e.g., Fuller and Perdue (1936–1937).

\(^{20}\) The usual names here are Patrick Atiyah, e.g., Atiyah (1979) and Grant Gilmore, e.g., Gilmore (1974).

\(^{21}\) See, e.g., Posner (2011); Kronman and Posner (1979); Craswell (1989).
‘autonomy’, ‘fairness’, ‘corrective justice’ or ‘property’ is unlikely to offer much guidance, while economically focused theorists at least purport to have recommendations on most detailed questions, based on efficiency.\(^{22}\)

There are other comparably general theories with potential application to contract law: e.g., utilitarian moral theories,\(^{23}\) Marxist and other critical theories,\(^{24}\) feminist theories,\(^{25}\) and so on, with examples of such applications in the notes.

E. Mixed Theories

As there are arguments in favor of a variety of approaches, it is not surprising that some theorists have argued for a theory of contract law that combines different approaches: in particular, combining autonomy and consequentialism (law and economics).\(^{26}\) The difficulty with such mixed theories is they require the theorist to offer a meta-theory that can ground which justifications go to which part of the theory, or regarding what the priority will be among the theory’s justifications if and when they conflict.

III. DOUBTS ABOUT THEORIES

There are theorists who have expressed skepticism about the possibility or value of any general theory of contract law. This skepticism has been grounded on a number of grounds, some of which are detailed below.

A. Basic Task

Contract law is a sub-category of law, and some of the same difficulties that come with theorizing about law apply to theorizing about contract law. In general, there are complications inherent in the task of offering a theory of an ongoing social practice. Social practices change over time, and vary from place to place. They are human creations, not defined by chemical composition or species category the way ‘natural kinds’ are. There are reasons to doubt that there is a stable category, ‘contract law’,

\(^{22}\) See Craswell (1989).
\(^{23}\) See, e.g., Cohen (1933).
\(^{24}\) Unger (1986); Feinman and Gabel (1990).
\(^{25}\) See, e.g., Frug (1985).
\(^{26}\) See, e.g., Kraus (2001); Kraus (2002).
to offer theories about, and also reasons to doubt that there is anything valuable that could be said at a descriptive, analytical or conceptual level about contract law (even skeptics would allow for the option of a purely prescriptive theory of contract law, arguing for what would be the best contract law system for a particular country).

B. Pluralism

A number of theorists have rejected theories of contract law on the basis that it is mistaken or misleading to point to a single ‘essential’ or ‘nature’ of contract law, because, the argument goes, contract law serves a variety of goods. For example, in most legal systems, there are numerous limits to autonomy (‘freedom of contract’): one can be held to contractual terms even if one did not know about or fully understand them, and there are categories of terms that will not be enforced (e.g., on public policy grounds) even if the parties consented to them with full knowledge. Contract law systems generally include mandatory rules, default rules and rules of interpretation which may frequently serve interests other than respecting party choice (e.g., values of general fairness, protecting vulnerable parties and expressing different public policies on particular issues). And similar counter-examples can be raised to other alleged ‘essential’ values for contract law. Indeed, one might see the range of different essentialist or prescriptive theories as themselves giving proof of the variety of values that contract law can and should promote: e.g., while Ian Macneil famously argued that contract law does and should promote long-term relationships,\(^{27}\) other writers have emphasized the way that contract law does (and should) facilitate cooperation between those who have been, and will remain, strangers.\(^{28}\) The obvious response is that some types of contracts are primarily about supporting long-term relationships, and some types of contracts are primarily about facilitating short-term cooperation among strangers; contract law does and should promote these quite different values, and many other values as well.

C. Variation

The challenge of variety responds to the (express or implicit) scope of contract law theories that purport to be general, universal or conceptual. The argument is that the rules, principles and practices of contract law are sufficiently diverse over time, across jurisdictions, or even across

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\(^{27}\) See Macneil and Campbell (2001).

\(^{28}\) See, e.g., Kimel (2003).
transaction types within a single jurisdiction, that no single theory can capture the whole range of contract law without either being so general, or so cumbersome and detailed, as to be of little value as a theory.

For example, the analysis goes, across jurisdictions some contract law systems protect ‘naked promises’ (promises made without any return promise, and without any detrimental reliance upon the promise) and some do not; some jurisdictions prefer the remedy of ‘specific performance’ (a court order that a party perform what it promised) for breach of contract, while others do not; some jurisdictions allow awards of exemplary (punitive) damages or damages for pain and suffering and emotional distress while others do not, and so on.

Some theorists have argued that we should favor theories of contract law that are general (at least within a single legal system) because reinforcing common contract law principles may prevent the rules and principles covering particular transaction types from being ‘captured’ by the interests and values of powerful groups (e.g., lawyers and lobbyists for insurance companies determining the law of insurance policies, or large businesses similarly determining the rules for consumer and employment contracts). However, there is also a concern sometimes expressed in the other direction: that the talk of a single essence to contract law, especially when this is part of legal education or part of a public image of contracts that presents them as paradigmatically involving two parties of equal bargaining power and sophistication negotiating terms at arm’s length, may be a way to hide (to legitimate) the real injustices and inequalities of contracting practices.

D. Summary

The debate between advocates of contract law theories and skeptics often seems to be primarily one of emphasis. For example, those favoring having a general theory of contract law will usually concede that there is significant variety across transaction types and across jurisdictions and that there are some rules and practices that do not fit neatly under a single rubric, but they urge that what is common and constant across contract law(s) is more important than what varies. From the other direction, skeptics of contract law theory do not deny that there are common principles, rules and themes across transaction types and across jurisdictions, likely based on shared intuitions about keeping promises

\[29\] See Oman (2005).

\[30\] Bix (2012b).
and the regulation of transactions, but argue that what is common is less important than what differs.31

CONCLUSION

The area of contract law theory remains largely unformed and unsettled. Those offering such theories often ignore basic methodological questions regarding what such theories are meant to accomplish and what the criteria are for success. Two likely models for such contract law theories are to see them as efforts to ‘explain’ contract law, or to ‘rationally reconstruct’ its rules and principles. There remain issues as to whether such theories should be seen as covering all existing, past and possible contract law systems, or only contract law systems of the theorist’s home nation and perhaps comparable current systems. Those who challenge the possibility or value of contract law theories tend to emphasize the wide variety of rules, remedies and practices across jurisdictions, over time, and even across transaction types within a particular jurisdiction. Challenges may also focus on the plurality of goods that contract law rules and practices promote, arguing that contract law theories that focus on only one value inevitably distort the underlying contract law system too much to be useful.

REFERENCES


18 Comparative contract law