

VISIONS OF CONTRACT THEORY

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RATIONALITY, BARGAINING, AND INTERPRETATION

by

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DDB

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PREFACE

This book is the product of extended research by four scholars working in the area of contract theory. Each scholar wrote in his specialty, and his contribution was built on years of research. The book reviews and critiques some of the major theories of contract law. The theories selected for coverage include law and economics, behavioral decision theory, inequality of bargaining power, law as interpretation (idealism), and critical legal theory. Chapters 2 through 4 examine the use of the themes of rationality and efficiency to rationalize contract law. Chapters 5 and 6 analyze the role of bargaining power in contract law. Chapters 7 and 8 analyze the idealism of Karl N. Llewellyn and Ronald Dworkin, which advances the proposition that law is able to obtain internal integrity through a process of theory building. Chapter 9 explores the major tenets of Critical Legal Studies, Critical Race Theory, and Feminist Legal Theory. As the capstone of the book, Chapter 9 also integrates much of the analysis in the earlier chapters.

The book provides new theoretical insights into more specific areas of interest, such as the problems of rational choice theory, the role of bargaining power, a theory of interpretation, and the use of contextualism as a positive methodology of critical legal theory. In addition, each writer's chapter offers original insight into contract law and pays at least some attention to the concept of promissory estoppel. As a result, the novice in contract theory is provided the basics and the contract scholar is provided additional theoretical exposition. In the end, the book should be viewed as a series of independent essays under the umbrella of contract theory.

Although this work is intended to be a holistic product of scholarly cooperation, it is appropriate that we describe the specific contributions of the coauthors. Professor Robert A. Prentice, in Chapter 2, provides a clear and eloquent review of the major tenets of law and economics and behavioral decision theory. In Chapter 3, he critiques both the rational and behavioral schools of decision making. In Chapter 4, Professor Prentice applies the insights developed in the preceding chapters to the areas of gift promises and

promissory estoppel. Professor Daniel D. Barnhizer's research on bargaining power is provided in Chapters 5 and 6. In Chapter 5 he analyzes the role of bargaining power in contract law. In Chapter 6 he presents an original proposition entitled "Bargaining Power as Contract Theory." Professor Larry A. DiMatteo, in Chapter 7, analyzes the idealism of Karl N. Llewellyn and Ronald Dworkin. The contextualism of Llewellyn and the principles-focused, interpretive methodology of Dworkin are based upon the view that law is able to obtain internal integrity through a process of theory building. In Chapter 8, Professor DiMatteo offers a theory of interpretation that blends the dual-track theory of Llewellyn with Dworkinian theory building. Professor Blake D. Morant's analysis of critical legal theory in Chapter 9 includes a review of the major tenets of Critical Legal Studies, Critical Race Theory, and Feminist Legal Theory. He uses the insights gained from these schools of critical theory to advance a positive methodology based upon contemporary realism and a broadened contextual analysis. His methodology uses contextual factors to guide the decision maker in ferreting out the inequities in the law and in law application that are products of bias, prejudice, inequality of bargaining power, and opportunistic conduct.

INTENDED AUDIENCE

The book presents a descriptive analysis of contract theory and offers some novel theoretical insights. It is intended to be a general reference work aimed at scholarly researchers and law students.

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Larry A. DiMatteo is the Huber Hurst Professor of Contract Law & Legal Studies in the Warrington College of Business Administration at the University of Florida. He is a graduate of the Cornell and Harvard Law Schools. He served previously as president of the International Law Section of the Academy of Legal Studies in Business and recently completed his term as the editor in chief of the *American Business Law Journal*. He is the author of numerous publications dealing with contract law, contract theory, and international business transactions. His books include *International Business Law: A Transactional Approach* (West 2006); *International Sales Law: A Critical Analysis of the CISG* (Cambridge University Press 2005); *Equitable Law of Contracts: Principles and Standards* (Transnational 2001); *The Law of International Contracting* (Kluwer 2000); and *Contract Theory: The Evolution of Contractual Intent* (Michigan State University Press 1998).

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Blake D. Morant is the Roy L. Steinheimer, Jr. Professor of Law, former Director, Frances Lewis Law Center, and Associate Dean for Academic Affairs, Washington and Lee University School of Law. He is a Phi Beta Kappa graduate of the University of Virginia, where he also received his JD. He has visited at the University of Michigan Law School and was a Visiting Fellow at University College of the University of Oxford. In 2002, he served as the John S. Stone Visiting Professor of Law at the University of Alabama. He has written numerous articles in the area of contract law and theory and has presented his work to universities, agencies, and associations throughout the United States, the University of Kent in England, and the University of Gothenburg in Sweden. He has served on the editorial board of the American Association of Law Schools' *Jour-*

nal of Legal Education and was a member of the planning committee for the American Association of Law Schools' 2005 Conference on Contract Law.

Daniel D. Barnhizer is an Associate Professor of Law at Michigan State University College of Law. He is a graduate of Harvard Law School, where he served as managing editor of the *Harvard Environmental Law Review*. Before joining the faculty of the MSU College of Law, he served as a clerk for the Honorable Richard L. Nygaard, U.S. Court of Appeals for the 3rd Circuit, and for the Honorable Robert B. Krupansky, U.S. Court of Appeals for the 6th Circuit; sat by designation on the U.S. District Court for the Northern District of Ohio; and practiced as a litigator with the law firms Hogan & Hartson and Cadwalader, Wickersham, & Taft. At the MSU College of Law, he teaches Contracts, Legal History, and Contract Theory.