FOUNDATIONS OF CONTRACT LAW

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PREFACE

The selections in this book emphasize economics and, to a lesser extent, moral philosophy. Obviously, this emphasis is partly a reflection of our own biases (biases for which we make no apology). In ways that are not so obvious, however—at any rate, they were not obvious to us when we began this project—the emphasis on economics and philosophy also results from three other goals we consciously adopted from the outset.

First, we wanted readings that took explicit stands on the normative question of what the law *ought* to be. In particular, we have not included any excerpts whose only aim is to describe current patterns in the case law. However, this selection criterion also led to the underrepresentation of other important disciplines that traditionally do not speak directly to normative issues. For example, there is little historical analysis in this volume (although the excerpt by Clare Dalton is an exception). For better or worse, in modern legal scholarship it is the economists and philosophers (or the lawyers most influenced by those disciplines) who have taken the most explicit normative stands.

Second, we wanted readings that help explain why parties make the contracts they do make. Economists recently have created a rich literature devoted to explaining contracting behavior. Much of this literature is quite mathematical, and the empirical work often uses rigorous econometric techniques; we have excluded those articles as well. However, the technical economic literature has already influenced legal articles, and we have included some of that work here.

Third, we wanted readings that addressed particular legal issues that arise in a first-year course in contract law. Our goal was a set of readings that could be used throughout the semester or throughout the year, rather than being relegated to a "theoretical overview" at the beginning or end of the course. Thus, there are very few readings in this volume that address the system of contract law as a whole. Most of the readings address specific legal topics—the limits on the recovery of consequential damages under *Hadley v. Boxen-dale*, for example, or the scope of liability during preliminary negotiations under decisions such as *Hoffman v. Red Owl*. In effect, we take the pragmatic position that normative perspectives are best understood by examining what they have to say about specific issues, rather than by trying to analyze them in the abstract. But this criterion, too, may have excluded perspectives whose principal contribution is to provide a theory of contract law as a whole without having much to say about particular contract issues.

The organization of this volume reflects our aim of integrating these readings with the first-year contract course. The core of the readings are

in Chapters 2 through 5, which are organized in the "backwards" or remedies-first manner originally introduced by Lon Fuller. Thus, Chapter 2 discusses legal remedies for breach of contract, on the assumption that a valid contract has been formed and that one party has failed to do what the contract requires (whatever that might be). Chapter 3, "Defining the Performance Obligation," discusses how to determine what it is that the contract requires, while retaining the assumption that a valid contract has in fact been formed. This is the chapter that deals with implied excuses (impracticability, frustration, mistake) and implied warranties; it also includes the recent scholarship on long-term "relational" contracts. Finally, Chapters 4 and 5 discuss the formation of a valid contract. Chapter 4 deals with consideration and traditional offer-and-acceptance issues; Chapter 5 addresses unconscionability and other defenses to formation.

Obviously, this division is somewhat arbitrary. For example, the readings on rescission and restitution damages (infra at pages 115–26) also relate to the interpretation of conditions and the assessment of whether one party's performance was "substantial," those being two of the legal tests for rescission and restitution. These readings could therefore have been included in Chapter 3 ("Defining the Performance Obligation") rather than in Chapter 2 ("Remedies for Breach") where we actually put them. The readings on nondisclosure have been placed in Chapter 3 (infra at pages 160–74) in connection with mutual and unilateral mistake, but they could just as easily have been placed with the defenses to contract formation discussed in Chapter 5. Examples like these merely confirm the observation that the law is indeed a seamless web. Responding on a practical level, we have tried to make each section of the book self-contained (with cross-references to related sections) so that the selections can be assigned in any order.

This self-contained or "modular" principle is also reflected in Chapter 1, which contains readings potentially relevant to every part of the course. The three topics discussed in Chapter 1—the enforcement of promises, the selection of default rules, and the distributional effects of contract law—are as relevant to contract formation as they are to the remedies for breach; thus, these readings could be assigned at any point in the course. Our placement of these selections at the beginning of the book does not reflect any judgment that a first-year contract course ought to begin with these readings. (Neither of us teaches the readings in that order ourself.) Instead, these selections have been placed in a separate chapter precisely so that they can be used wherever they best fit the organization of any given course. If these selections had instead been parceled out to the various parts of the reader dealing with particular legal doctrines, this flexibility would only have been hampered.

Though our organizational scheme derives from the first-year law course, this book is intended to be useful to a wider audience. The readings, taken as a whole, reflect much of the contract theory that norma-

tively minded lawyers, economists, and philosophers have produced in the last fifteen years. These have been rich years for contract theory. The book can therefore be used in advanced law school seminars (we have so used it), and it can also be part or all of the reading for an undergraduate or graduate law and economics course or a course in contract theory.

Many people assisted us in the preparation of this collection. Particular thanks are due to our series editor, Roberta Romano; and to Ian Ayres, David Carroll, Jason Johnston, and David Slawson for helpful comments and suggestions. We have also benefited from the research assistance of Stacey Cole, Hanoch Dagan, and Terrence Gallagher. Deletions from the original texts are indicated by ellipses, but footnotes and subheadings have been deleted without indication.

R.C.
A.S.

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