Contracts

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THE FIVE ESSENTIAL CONCEPTS

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This book is fondly dedicated to small groups everywhere…
and especially to those of you who like to draw in the margins.

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Acknowledgments

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Foreword

What you have in front of you now is an introduction to the law of contracts. It is designed for students just entering law school, for readers who are curious to get a small dose of American contracts law, for those who find particular aspects of contract law confusing or illogical, and for people who want to brush up on contracts law that they once knew but now suspect that they've forgotten. It is structured around a small number of basic concepts, ones that students find difficult to understand in a first-year contracts course. Many years of teaching the subject have left me confident that if students can be given clear and logical explanations of things like the consideration doctrine or the parol evidence rule, they grasp such basic concepts quickly. I'm afraid that my explanations have never been clear and logical enough, however, to empirically test this assumption.

The five concepts this book is organized around are: consideration, offer and acceptance, parol evidence, conditions, and quasi-contracts. They are simple in principle and intuitively obvious once understood. Like other simple and obvious concepts, however, they can be difficult to communicate and are often for this reason the source of considerable pain to students studying contracts for the first time. The object in learning the subject is to internalize these ideas to the point that they seem entirely natural and automatic and go almost unnoticed when they are relied on. (The task of critiquing the subject, it goes without saying, is to reverse the process: to uncover assumptions that we have internalized to the point that we no longer recognize them as assumptions.) The five concepts align with Chapters Two through Seven of this book. Here, in brief, is what those chapters say:

Consideration (Chapter Two): Contracts enforcement implicates the interests of both the current parties to a case and those individuals who may need to make similar commitments in the future. Promises that are not supported by consideration do not need legal enforcement because they are not designed to induce other people to act.

Offer and Acceptance (Chapters Three and Four): The common law approached contract formation as a process of achieving complete convergence of the parties' positions through *negotiation*: a back-and-forth process of offer and counteroffer. The Uniform Commercial Code's approach to the subject supports a newer model, as well: a *comparison shopping* model in which complete convergence is not expected and there is little or no negotiation. In this model, the parties seek to select from the options available from different sellers.

The Statute of Frauds and the Parol Evidence Rule (Chapter Five): A key problem in determining contract rights is whether to make a negative inference from the fact that the parties did not write down their agreement or did not include a particular provision in their agreement. The answer depends on whether the parties ever undertook a *consolidation of* their agreement, meaning, the reduction to writing of an authoritative version of what they had agreed to.

Conditions (Chapter Six): Contracts are designed both to increase the two parties' resources (the bargain) and to distribute risk (the bet). The contract will cease to be enforceable if the events that transpire were not foreseeably within the scope of the bet that the parties made. This depends on whether the unforeseen event was a *known unknown* or an *unknown unknown*.

Fairness (Chapter Seven): Does contracts law leave room for extrinsic fairness concerns to play a role? A declaration of unconscionability is sometimes necessary because satisfaction of the technical rules of contracting may not be a *sufficient* condition for a legal remedy to be fair; quasi-contract is necessary where the technical rules are not all *necessary*.

The chapters themselves will unpack these terse and somewhat cryptic descriptions, clarifying as we go along how they reflect contract's five essential concepts.

This book is an introduction, not a comprehensive treatise with detailed exposition of contract law doctrines and thorough surveys of various jurisdictions' approaches. Because it is a simple explanation of certain basic concepts of the subject, the book's footnoting is minimal. It tends to generalize about what "the common law of contracts" says, even though—as we all know—there is no "general" common law, but only the common law of specific jurisdictions. Illustrative examples are typically used instead of extended surveys of case authority. Most of these examples are taken from the experiences of a single family (the Jones family), their friends and relatives, and the people they do business with. You'll meet them soon. Although one family member is a law student (Harrison) and another (Chuck) a lawyer, at least as much attention is paid to "what makes sense" to the average thoughtful person as to legal doctrine.

The emphasis placed on intuition as the basic way of learning and understanding the subject may be somewhat unusual. But beginning law students and laypeople alike seem to have pretty good intuitions about what the law of contracts requires, at least at the more general level. This book aims to reinforce in the reader his or her own sense of intuitive mastery of the subject, rather than to substitute learned doctrines and hoary precedents for good ole' common sense. Taking a page from the playbook of the medical profession—"first, do no harm"—we teachers should really try to take advantage of our students' preexisting grasp of what works and not to mess it up.

Some of us really loved our contracts course and teacher when we were law students, like Harrison does. Our fellow students mostly found this strange; they thirsted after the First Amendment, international human rights, critical legal theory, or distributive justice. Love for things like the consideration doctrine, the mailbox rule, the Uniform Commercial Code, and the parol evidence rule is sort of like love for a steamy hot chicken pot pie. Keep it simple. Take it easy. Have fun.