

**SEMINAR IN ADVANCED CONTRACTS
FALL, 2019**

Prof. Yonathan Arbel
Thursday, 282, 3:30-5:20
Office 318
yarbel@law.ua.edu
Anonymous Feedback: <https://goo.gl/fByVag>

Office Hours
Thursday
1:00-2:30
and by appointment

COURSE SUMMARY

This seminar introduces law students to advanced topics in contract theory.

The seminar is divided into three parts that are aimed to provide the student with a rich and comprehensive set of tools, useful for transactional and litigation lawyers as well as for aspiring judges and academics. The first is an introduction to the main theories of contract law, the second is the theory of contract design, and the third is an exploration of the relative merits of various mechanisms used to enforce agreements: contracts, reputation, collateral, and ex-ante regulation. This is a research seminar, and students will develop their own independent research project.

The seminar emphasizes economic theories and concepts. Students registering to this seminar are not required or even expected to have *any* previous knowledge of economics, but it is required that all students will have a strong sense of curiosity and willingness to engage with complex ideas.

DETAILED COURSE DESCRIPTION

In the first part of the course, we will explore the leading theories in contract theory: deontology, consequentialism and welfarism, behavioral psychological analysis, and socio-legal analysis. Our goal in studying these theories is to develop a rich toolset that would enable students to develop—and criticize—the sort of arguments that are common in litigation. The discussion of these theories will be firmly grounded in contract law and doctrine, and we will highlight the practical implications of each theory.

The second part will introduce the theory of contract design. This theory, mainly drawn from economics, was originally created by economists to understand existing practices and legal doctrines, but it provides powerful tools and deep insights to lawyers wishing to design better contractual agreements. In class, we will develop an intuitive understanding of this theory through a series of negotiation and drafting games.

In the third part, we will move to discuss the enforcement of contracts. This is an important question because both litigation and transactional lawyers care about the ability of contracts to bind parties to their promises. We will try to understand when contracts are useful and necessary by comparing legal enforcement to non-legal enforcement which relies on mechanisms such as reputation, repeat dealings, collateral, and social norms.

The research paper is developed throughout the semester with active feedback and guidance. Students may choose any topic in contract law and investigate it, developing their own ideas and engaging individually with scholarly work. The research paper may also involve soft empirical methodology, allowing the students to interact with contracting parties, lawyers, and other actors.

COURSE DUTIES AND GRADING

- Class presentation: Research Proposal: 5%
- Class presentation: Research Project: 15%
- Draft Submission: 5%
- Active, informed participation: 15%
- Final paper: 55%

SYLLABUS

Class 1 & 2

Ks & Rights:

Deontological Theories of Contract Law

- Eyal Zamir and Barak Medina, LAW, ECONOMICS, AND MORALITY, 41-50 (2010)
- CHARLES FRIED, CONTRACT AS PROMISE (1981) 7-21
- Randy E. Barnett, *Contract is not Promise; Contract is Consent*, 45 SUFFOLK U. L. REV. 647 (2012) (SSRN version) pp. 9-18
- Seanna Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 709-13, 722-24 (2007).
- Aditi Bagchi, *Separating Contract and Promise*, 38 FLA. ST. U. L. REV. 709 (2010) (excerpts)

Optional:

- Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989)
- *The last two readings will be covered in class 2.*

Guiding questions:

- Before you start reading, ask yourself—is there a moral obligation to perform a contract? Does this duty apply when performing the contract runs against one's interests? If so why? Are there any exceptions to this duty? If not, why?
- Supposing that a moral duty exists, is this a valid reason to use the law to enforce obligations? What should the legal system do if someone breaches an obligation without a proper excuse? What if they have an excuse?
- Contract as a promise—as opposed to what? What else can be the content of a contract? What did people think before, or after, Fried?
- What does it mean for the law to “diverge” from morality? Is that a problem? What is Shiffrin's moral philosophy?

Class 3

Ks and Consequentialism:

Consequentialism, Welfarism, and Economic Theories of Contract

- LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2006) (Read the file on the web folder, footnotes are optional)
- EYAL ZAMIR AND BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 9-40 (2010)
- *Peevyhouse v. Garland Coal & Mining Company*, 382 P.2d 109 (1962)

Optional:

- Eric Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 146 YALE L. J. 829 (2003), Part I

- Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541, 543-55

Guiding questions:

- What is welfarism? How is it different from fairness?
- If individuals care about fairness, doesn't that imply that welfarism is fairness? Why not?
- How would you decide the *Peevyhouse* case as a welfarist? As a moralist?
- Is the welfarist critique of the fairness approach persuasive? What do you agree with and what is wrong with it?

Class 4:

Contracts & Psychology:

Behavioral Approaches to Contract Law

- Christine Jolls, Cass Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 1476-81, 1497-1505 (1998)
- Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 111 MINN. L. REV. 749, 749–80 (2007)
- Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 634-38, 655-664 (2010) 1-6 23-33
- *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C.1965)

Guiding questions:

- What is 'behavioral' about this approach? Behavioral as opposed to what?
- The behavioral approach is often framed as an attack on the conventional economic model. Does that mean that the behavioral approach brings us back to the way people thought about the law before law and economics?
- Given that humans are fallible and prone to known biases, does that imply more or less regulation? Under what conditions government regulation will be better than biased human judgment?
- How would an economist treat the *William v. Walker* decision? How would a behaviorist?

Class 5: (Research paper topics are due by email)

Ks & Sociology:

Contract Law in Action: Socio-Legal Investigation

- Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIAL. REV. 55 (1963)
- Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) 115-135, 138-148

Optional:

- Yonathan Arbel, *Contract Remedies in Action: Specific Performance*, 118 W. VA. L. REV. 100 (2015)

Guiding Questions:

1. We take contracts seriously, but businesspeople—Macaulay argues—do not. Do you agree with this reading of his paper? What role do contracts have in practice?
2. What role do contracts play in Bernstein's article?

3. More generally, we make a lot of transactions online. Would you characterize these transactions as contracts? Reflect critically, thinking about the distinguishing marks of contracts.
4. Qualitative methodologies (e.g, interviews and conversations) are often ignored, maybe even shunned, by economists. What are the pitfalls of these methodologies? What is the payoff?

Class 6 & 7: Theories of Drafting Ks
The Theory of Contract Design

- LOUIS KAPLOW & STEVEN SHAVELL, *CONTRACTING* (2004), pp. 1-33.
- Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 *YALE L.J.* 814 (2006). Read 816-835.

Guiding Questions:

1. Litigation is sometimes thought of as a “legal accident”. How do Scott and Triantis think about it? What lessons can you draw from their framework for drafting contracts?
2. What would be the conventional understanding of liquidated damages? What would Scott and Triantis say about the legal suspicion of liquidated damages?
3. What is an insurance K? Why is such a K profitable to each party? Are insurance Ks only limited to areas such as auto and home, or are they more prevalent?

Class 8: Default Rules, Mandatory Rules, and the Nature of Contracts

- Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87 (1989). Read 87-104
- Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 *COLUMBIA LAW REV.* 1710 (1997). Read 1712-1721; 1738-1740, and skim until 1753.

Optional:

- Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541, Read 543-550, skim 550-556, read 594-609

Guiding Questions:

1. What are default rules? How should they be designed? What is the majoritarian approach? Why would anyone set a default rule that most people do not want?
2. What are mandatory rules? How can we tell between the two? If Zamir is correct, does that affect the design of default rules? How?

Class 9 & 10:

Individual Conferences

Individual 30-minute meetings, reviewing the latest draft and receiving detailed feedback and guidance.

Class 11:

Enforcing Contracts:

Informal Enforcement

Readings (long, please prepare in advance)

- MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* (1925) 1-24
- Anthony Kronman, *Contract Law and the State of Nature*, 1 JLEO 5 (1985)
- Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989)

Review of past reading:

- Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (General Review)

Optional:

- David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373 408-26 (1990)

Class 13: Draft Submission

Enforcing Contracts:

Markets and Reputation

- Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, Working paper (2019)
- Nan Hu, Paul A. Pavlou & Jennifer Zhang, *Can Online Reviews Reveal a Product's True Quality? Empirical Findings and Analytical Modeling of Online Word-of-Mouth Communication*, PROC. 7TH ACM CONF. ELECTRON. COMMER. - EC '06 324 (2006).

Class 13 & 14:

Class Presentations

Please plan for a longer session

Class 15: (in the highly unlikely case that our progress will permit)

Enforcing Contracts:

The Limits of Formal Enforcement

- Yonathan Arbel, *The Shielding of Assets and the Theory of Credit*, 48 INT'L REV. L. ECON. 26 (2016)
- PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY 1607-1900*, (1999) Chapter 18.
- Robert M. Hunt, *Collecting Consumer Debt in America*, BUS. REV. 11 (2007).