THE RELIGIOUS SOURCES OF GENERAL CONTRACT LAW: AN HISTORICAL PERSPECTIVE

*Harold J. Berman**

In his dramatic, if not mystical, account of the birth, growth, senescence, and death of American contract law, and of its ultimate dissolution into the law of tort, Grant Gilmore certainly did not intend to join forces with those who would later seize on his story as evidence that both contract and tort, and, indeed, law all together, are merely artificial devices to support a hierarchical and hegemonic political structure and to facilitate economic exploitation of the weak by the strong.[1] Yet Gilmore's exposé of the logical circularities and fallacies of contract doctrine (especially as it is taught in first-year courses in American law schools) does add fuel to the already raging fires of skepticism—skepticism not only about the coherence of individual branches of the legal tree (contracts, torts, property, etc.) but also about the validity of doctrinal legal analysis and ultimately of law itself.

Arthur Corbin—Gilmore's mentor and the hero of his book—did not share that skepticism, although he strongly opposed the rigidities of the then prevailing contract doctrine, especially as represented in the teachings of his friend and rival, Samuel Williston. Unlike Williston, Corbin was prepared to give a contractual remedy for losses caused by reliance on a promise, and thus to bring contract and tort into a common focus. He was also more willing than Williston to expand concepts of fairness at the expense of strict liability for breach. Nevertheless, Corbin did not doubt, and surely did not seek to undermine, the coherence of contract law.

Although Gilmore went farther than Corbin in his critique of traditional doctrine, he, too, was concerned to restructure contract law, not to destroy it. Above all, Gilmore retained a commercial law-

* Woodruff Professor of Law, Emory University School of Law; Ames Professor of Law, Emeritus, Harvard University School of Law. The valuable contribution which John Witte, Jr., has made in the preparation of this article is gratefully acknowledged.

1. G. GILMORE, THE DEATH OF CONTRACT (1974). *Cf.*, Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1012, 1040-43, 1067-71, 1084-87 (1985); Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753 (1981); Gabel and Feinmann, *Contract Law as Ideology*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 172, 177 (D. Kairys ed. 1982).

yer's respect for *contracts*—in the plural; his attack was rather on the notion of *contract*—in the singular—as an abstract entity, a thing-in-itself, reflecting in its very essence the coherent body of concepts, principles, and rules that had come to surround it: offer and acceptance, consideration, formal requirements, defenses of fraud and duress and mistake, excuse based on impossibility or frustration, and the rest. This entire body of learning was now thought to be based on a questionable theory of the priority of intent, or will, which in turn was based on a questionable theory of the priority of party autonomy. It was the logical symmetry of the doctrines and their basis in the will-theory and the autonomy-theory of contract law that came under attack in Gilmore's *Death of Contract*, as it had come under attack for the preceding fifty years — in the first instance by those scholars who called themselves "legal realists," but also by other legal scholars, like Corbin, who opposed the Legal Realist Movement, and, most important, by courts and legislatures which, by their decisions and statutes, were breaking down the old categories in response to fundamental changes in the economy itself.

Looking back at what has happened to contract law *in action* during the twentieth century, and especially to accepted contract practices, one is struck by the fact that the priorities of contractual intent and party autonomy, which still form the basis of contract law *in theory*, no longer correspond to reality in most situations. Contracts of adhesion, regulated contracts, contracts entered into under economic compulsion, and other types of prefabricated contractual arrangements, are now typical rather than exceptional. Doctrines of frustration and of substantial performance have been greatly expanded. The defense of unconscionability has become a reality in consumer sales and is a potential obstacle to contractual autonomy in other types of transactions as well. Duties of cooperation and of mitigation of losses have begun to change the nature of many types of contractual relationships. Promissory estoppel has spawned non-promissory estoppel, notably in the form of implied warranties which, though contractual in theory, nevertheless "run with the chattel"—as someone has said, "half way around the world."

The breakdown of traditional contract law in practice has given some support to those legal theorists who contend that all law must be judged not in terms of doctrinal consistency but in terms of social consequences. Some of these theorists go so far as to contend that the very effort to apply rules on the basis of their consistency with other legal rules, or their conformity to underlying legal principles, serves

only to obfuscate the political and economic functions that every such purported application inevitably performs.

To understand the significance of the attack that has been launched against general contract law in the past two generations, however, one must go back much farther in time than Gilmore went. One must also go much farther in space. Gilmore imagined that Christopher Columbus Langdell and Oliver Wendell Holmes, Jr., invented the modern system of contract doctrine which Williston later refined. In fact, Langdell in 1870 carried over into American legal thought ideas that had been propounded in France, Germany, England, and elsewhere for a hundred years. The Enlightenment of the late eighteenth century stimulated the desire to rationalize and systematize the law in new ways. In England, Jeremy Bentham called for the "codification"—a word of his own creation—of the various branches of law. In the wake of the French Revolution, France adopted separate codes for civil law, civil procedure, criminal law, criminal procedure, and commercial law. Although England and the United States, like Germany, resisted codification of substantive civil law, nevertheless the idea was taken up everywhere in the West that the entire body of civil law, and, within it, its component parts, should be rationalized and systematized anew, whether in a code (as in France) or in scholarly treatises (as in Germany) or in court decisions collected by law teachers (as in England and the United States). Indeed, in the United States, a generation before Langdell, William Story wrote *A Treatise on the Law of Contracts Not Under Seal* (1844) and Theophilus Parsons wrote *The Law of Contracts* (1853).

And so Langdell and others did for American contract law what Powell (1790), Chitty (1826), Addison (1847), and Leake (1867) had done for English contract law, and, in effect, what the French commentators on the Code Civil and the German Pandectists had done for contract law in their respective countries. They attempted to reduce it to a set of concepts, principles, and rules which would be applicable to all contracts.

It is, however, a great mistake to suppose that this was the first time that any such attempt had been made, and an even greater mistake to suppose that the nineteenth century systematizers of contract law simply invented the concepts, principles, and rules upon which they founded their new system. The "general law of contract" was, in fact, invented much earlier, and the nineteenth century jurists drew upon the older learning, and the older tradition, in establishing their

new version of it.[2]

Yet the nineteenth century jurists differed from their predecessors in several crucial respects. Perhaps the most important of these was their concern to cut the general law of contract loose from its moorings in a religious—more specifically, a Christian—belief system. They sought to replace those moorings with their own Enlightenment belief system, based on rationalism and individualism. It was that Enlightenment faith which found expression, in nineteenth century contract law, in the overriding principles of freedom of will and part autonomy. Those principles were applied, however, to an already existing system of contract law, many of whose basic features were preserved.

I. THE ORIGINS OF MODERN CONTRACT LAW IN THE CANON LAW OF THE ROMAN CATHOLIC CHURCH

Modern contract law originated in Europe in the late eleventh and early twelfth centuries. It was that epoch that gave birth to the modern Western belief in the autonomy of law, its professional character, its integrity both as a system of institutions and as a body of learning, and its capacity for organic growth over generations and centuries; it was then that consciously integrated systems of law came to be formed, first in the church and then in the various secular polities—kingdoms, cities, feudal domains, mercantile communities; and it was then that various branches of law, within those systems, were first given structure: criminal law, family law, corporation law, mercantile law, and others.[3]

Starting in the last two decades of the eleventh century, the glossators of Roman law began to construct out of Justinian's massive texts, newly discovered after more than five hundred years of virtual oblivion, a coherent *corpus juris* that had only been adumbrated in the original writings. (Justinian had not called his texts a *corpus juris*.) Equally important, the canon lawyers began to create, partly with the help of the new Romanist legal science, a consciously integrated legal system to be applied in the newly created hierarchy of ecclesiastical administrative and judicial agencies, culminating in the papal curia.

2. *See* Gordley, Book Review, 89 HARV. L.REV. 452, 453-54 (1975) (reviewing G. GILMORE, THE DEATH OF CONTRACT (1974)). Gordley stresses the Romanist contract law of the twelfth century and thereafter. The canon law of contract that emerged in those centuries was in some ways even more integrated and systematized. See *infra*, section I, on canon law.

3. This is the main theme of H. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

Eleventh and twelfth century Roman law (I shall henceforth call it "Romanist law," to distinguish it from the earlier Roman law whose vocabulary and rules it selectively adopted and transformed) was not as such the positive law of any jurisdiction; it was law taught as *ratio scripta* in the emerging universities of Europe and it was drawn upon selectively by every jurisdiction, ecclesiastical and secular, as a subsidiary law, to fill gaps, to interpret, and sometimes to correct the positive law. Canon law, on the other hand, after 1075, was the positive law of the church, replenished by papal decrees and decretals and by the legislation of church councils; it was directly applicable throughout Western Christendom to most aspects of the lives of the clergy and to many aspects of the lives of the laity.[4]

To say that modern contract law was gradually formed in the late eleventh and the twelfth centuries is not to say that there were not, before then, contracts, in the sense of legally binding agreements. There was, however, among the peoples that inhabited Western Europe in the year 1000, no general principle that a promise or an exchange of promises may in itself give rise to legal liability. Legal liability attached to promises only if they were embodied in formal religious oaths, which were almost always secured by some kind of pledge. The obligation that was enforced was not the mutual contractual obligation of the parties but the oath, that is, the obligation to God (or, before Christianity, to the gods); the legal liability that was imposed was the forfeiture of the pledge. Originally the pledge might consist of the surrender of the oath-taker's own person, symbolized in the formal transfer of his faith (*fides facta*) through the ritual of shaking hands. Alternatively, other persons could be pledged as hostages, and eventually property could also be pledged as security.[5] A sharp distinction was made between the oath-taker's obligation (*Schuld*) and his liability (*Haftung*). The breach of obligation triggered liability but was not itself a basis of liability. In itself it had no legal consequences, though it had spiritual consequences and could be punished as a sin in the penitential processes of the local monastic order or

4. Pope Gregory VII's revolutionary document of 1075, Dictates of the Pope (*Dictatus papae*), declared for the first time the independence of the Roman church from secular rulers and the supremacy of the papal curia over all ecclesiastical courts. *See* BERMAN, *supra* note 3, at 94-99. Though the Dictates were never made a formal part of the canon law, they formed the basis of many of its main principles.

5. *See* Berger, *From Hostage to Contract*, 35 ILL. L. REV. 154 (1940) and literature cited therein; Barmann, *Pacta sunt servanda: Consideration sur l'histoire du contrat consensual*, REVUE INTERNATIONALE DE DROIT COMPARE 6-7 (1961).

parish priesthood.[6] The legal consequences were wholly interwoven with the pledge, and consisted simply of its forfeiture. If forfeiture was resisted, resort was had either to conciliation or to blood-feud.

Germanic law (including Frankish, Anglo-Saxon, Burgundian, Lombard, and many other varieties of clan law) also recognized a duty of restitution arising from a half-completed exchange: a party who had transferred property to another was entitled to receive from the other the purchase price or other equivalent. This also was *not* a contractual remedy in the modern sense of the word "contractual."

The older Roman law of contracts, reflected in Justinian's compilation, was, to be sure, much more sophisticated than the Germanic law. Names were provided for various ways of forming contracts and for various types of contracts that fell within those forms. Thus certain named ("nominate") contracts were formed by following a prescribed verbal formula, others by formal entry in certain account books, a third category by delivery of the object covered by the contract, and a fourth by informally expressed consent. The fourth category included sale, lease, partnership, and mandate (a form of agency). Unnamed ("innominate") contracts included a gift for a gift, a gift for an act, an act for a gift, and an act for an act. Innominate contracts were actionable only after one party had performed his promise. In addition to an elaborate classification of categories and types of contracts, the Justinian texts included hundreds of scattered rules—opinions of jurists, holdings in decided cases, decrees of emperors, and so forth—concerning their operation.

Nowhere, however, did the texts of Justinian contain a systematic explanation of the reasons for the rules of contract law or for the classification of types of contracts. Nowhere was there stated a theory or even a general concept of contractual liability as such. Law in the Justinian texts, including those parts of it which we think of today as "contract" law, was not only unsystematized but casuistic in the extreme; its rules were sometimes classified, but the taxonomy was not explained in theoretical terms.[7]

The glossators of the late eleventh and the twelfth centuries, in indexing the Roman texts, collected the various statements of the older Roman jurists on contracts and, in glossing them, elaborated

6. *See* J. T. MCNEILL AND H. GAMER, MEDIEVAL HANDBOOKS OF PENANCE: A TRANSLATION OF THE PRINCIPAL LIBRI POENITENTIALES AND SELECTIONS FROM RELATED DOCUMENTS (1938). *See* BERMAN, *supra* note 3, at 68-84.

7. *See* J. P. DAWSON, THE ORACLES OF THE LAW (1968), 114 ff. (1968); F. SCHULZ, THE HISTORY OF ROMAN LEGAL SCIENCE (1946); BERMAN, *supra* note 3, at 127 ff.

general concepts and principles that they found to be implicit in them. The canonists went even farther, offering a general theory of contractual liability and applying that theory to actual disputes litigated in the ecclesiastical courts.

The canonists developed for the first time the general principle that an agreement as such—a *nudum pactum*—may give rise to a civil action. Drawing partly on the texts of Justinian but also on the Bible, on natural law, on the penitentials, on canons of church councils and of bishops and popes, and on Germanic law, the canonists drew a conclusion which none of those sources, taken individually, had ever before drawn: that consensual obligations as such are, as a general principle, binding not only morally but also legally, even though they were entered into without any formalities. By legally binding, the canonists meant that the promisee had a right against the promisor, enforceable in an ecclesiastical court, to the performance of the promise or else to compensation for losses. This general principle was in sharp contrast to the then prevailing Germanic law, under which a contractual obligation (*Schuld*) was in itself unenforceable, and a pledge accompanying such an obligation (*Haftung*) was only enforceable if its transfer had been carried out with the proper formalities. The new principle of the canon law erased the Germanic distinction between obligation and liability. It was also in sharp contrast to the rules of the earlier Roman law set forth in the Justinian texts, under which formalities were essential to the validity of most types of contracts, part performance was essential to the validity of innominate contracts, and special requirements existed for the limited class of contracts that could be concluded informally.

The general principle of contractual liability arising from agreements, developed by the canonists, rested, in the first instance, on the theory that to break a promise is a sin. A sin, however, in and of itself, gave rise not to legal liability but to penitential discipline; it was to be confessed and repented in the internal forum of the church. Legal liability, imposed in the external forum, that is, in the bishop's court, was based not only on the sin of the obligor but also on the protection of the rights of the obligee. This required a new development in moral theology, which was closely connected with new developments in political, economic, and social life.

The twelfth century witnessed an enormous expansion of commerce, including economic transactions between ecclesiastical corporations. In addition, the ecclesiastical courts sought and obtained a large measure of jurisdiction over economic contracts between lay-

men, where the parties included in their agreement a pledge of faith; the faith that was pledged, it was now said, created an obligation not only to God but also to the church. To justify enforcement of contracts in the external forum of the church it was necessary to add to the theory that to break a promise is a sin the theory that the claim of the party who has suffered from such breach is morally justified. The canonists developed the two theories together. They concluded that a morally binding promise should also be legally binding if it is part of an agreement (a *pactum*, or consensual obligation) that is itself morally justified. The object or purpose (*causa*) of the contract had to be reasonable and equitable.

Based on the theory that contracts should be legally binding if they serve a reasonable and equitable cause, the twelfth-century canonists, with the help of their contemporary Romanists, developed a whole series of principles which, taken together, justify the characterization of "general contract law." Some of these principles were the following:[8]

—that agreements should be legally enforceable even though they were entered into without formalities (*pacta sunt servanda*), provided that their purpose (*causa*) was reasonable and equitable;

—that agreements entered into through the fraud of one or both parties should not be legally enforceable;

—that agreements entered into through duress should not be legally enforceable;

—that agreements should not be legally enforceable if one or both parties were mistaken concerning a circumstance material to its formation;

—that silence may be interpreted as giving rise to inferences concerning the intention of the parties in forming a contract;

—that the rights of third-party beneficiaries of a contract should be protected;

—that a contract may be subject to reformation in order to achieve justice in a particular case;

—that good faith is required in the formation of a contract, in its interpretation, and in its execution;

—that in matters of doubt rules of contract law are to be applied in favor of the debtor (*in dubiis pro debitore*);

—that unconscionable contracts should not be enforced.

8. *See* Barmann, *supra* note 5, at 18-25; BERMAN, *supra* note 3, at 245-50.

These principles of the canon law of contract embodied what may be called a *moral* theory of contract law.

The last point, relating to unconscionability, deserves further elaboration. Equity, for the twelfth-century canonists and Romanists alike, required, in contracts, a balancing of gains and losses on both sides. This principle took form in the doctrine of the just price. Both the Romanists and the canonists started with the premise that normally the just price is the common estimate, that is, the market price; a sharp deviation from the market price was prima facie contrary to reason and equity. Usury, which was defined as a charge for the loan of money in excess of the normal rate of interest, was also condemned by both Romanists and canonists as a breach of market norms.[9]

The canonists, however, in contrast to the Romanists, were more concerned with another aspect of a sale in excess of the just price, or a charge for money in excess of normal interest, namely, the immoral motive that often underlay such practices. Profit making in itself—contrary to what has been said by many modern writers—was not condemned by the canon law of the twelfth century. To buy cheap and sell dear was considered to be proper in many types of situations — as where one's property had increased in value or a craftsman had improved an object by his art or a merchant resold goods at a profit in order to maintain himself and his dependents. What was condemned by the canon law was "shameful" profit (*turpe lucrum*, "filthy lucre"), and that was identified with avaricious business practices. Thus for the canonists, rules of unfair competition, directed against breach of market norms, were linked also with rules of unconscionability, directed against oppressive transactions.

It should not come as a surprise to us, living in an age when an economic interpretation of history is often taken for granted, that the newly developing contract law of the Roman Catholic Church provided an important source of support for the rapid expansion of capitalist commercial and financial activities in western Europe in the late eleventh, twelfth, and thirteenth centuries. Perhaps more interesting, however, is the other side of the coin: that within the church, which embraced almost the entire population of western Europe, there was articulated at that time a public morality, based on a shared belief in a transcendent good which informed the actual development of the new law of contract.

9. *Id.* at 247-49; Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587, 1638 (1981). *See* J. NOONAN, JR., THE SCHOLASTIC ANALYSIS OF USURY 105 ff. (1957).

In subsequent centuries, many of the basic principles of the canon law of contract were adopted by secular law and eventually came to be justified on the basis of the will-theory and party autonomy. It is important to know, however, that originally they were based on a sin-theory and a theory of equity. Our contract law did not start from the proposition that every individual has a moral right to dispose of his property by means of making promises, and that in the interest of justice a promise should be legally enforced unless it offends reason or public policy.[10] Our contract law started, on the contrary, from the theory that a promise created an obligation to God, and that for the salvation of souls God instituted the ecclesiastical and secular courts with the task, in part, of enforcing contractual obligations to the extent that such obligations are just.

II. THE PURITAN CONCEPT OF CONTRACT AS COVENANT AND OF STRICT LIABILITY FOR BREACH

If we jump from Roman Catholic Christendom in the late eleventh, twelfth, and thirteenth centuries to Anglican and Puritan England in the seventeenth and eighteenth centuries, we confront a startling paradox. On the one hand, the political, economic, and social situation has changed drastically. On the other hand, the terms of the debates concerning law and government have remained remarkably stable; that is, the same issues continue to be addressed, although the emphasis is different and the answers are different.

Brian Tierney has recently shown the remarkable continuity of Western constitutional theory from the twelfth to the seventeenth centuries—from Gratian and John of Salisbury to Althusius and Locke. "The judicial culture of the twelfth century," Tierney writes, ". . . the works of the Roman and canon lawyers . . . formed a kind of seedbed from which grew the whole tangled forest of early modern constitutional thought."[11] Tierney's study is a challenge to legal historians to show that continuity existed in the realm not only of constitutional theory but also of criminal and civil law, including the law of contracts.

Prior to the sixteenth century the law in England governing what we would today call contractual liability had been divided among various jurisdictions, each with its own procedures and its own legal

10. That our modern contract law is based on these propositions is a major thesis of C. FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).

11. B. TIERNEY, RELIGION, LAW AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150-1650 1 (1982).

rules. The English ecclesiastical courts, which had a wide jurisdiction over contract disputes involving not only clerics but also laymen, applied the canon law of the Roman Church. In the numerous cities and towns of England, as well as at fairs, mercantile courts applied a customary commercial law, sometimes called the law merchant, whose general features were more or less uniform throughout Europe. English county courts as well as feudal and manorial courts enforced various types of agreements, applying chiefly local and feudal or manorial custom. The royal courts of Common Pleas and King's Bench resolved contract disputes chiefly through the common law actions of debt, detinue, account, deceit, covenant, and trespass on the case. In the fourteenth and fifteenth centuries the chancellor also acquired a wide jurisdiction over contracts in cases which fell outside the common law (such as many types of parol promises, uses, actions by third-party beneficiaries) or which the common law courts were unable to decide fairly (for example, because of pressures exerted by powerful persons or because of inadequacy of common law remedies). The chancellor's "court of conscience" (as it was often called in those centuries) drew upon canon law, mercantile law, common law, and its own ingenuity and sense of fairness.

All the diverse types of law applicable to contracts were strongly influenced by the religious beliefs that prevailed during those centuries in England as in the other countries of Western Christendom. In the canon law, as we have seen, contractual liability was based ultimately on the sin of the defaulting promisor and the right of the promisee to require performance or compensation insofar as the agreement served a reasonable and equitable purpose. The law merchant stressed the element of trust among merchants and, in the event of dispute, their need for a speedy, informal procedure and for decisions based on mercantile reasonableness. The chief common law actions relating to agreements were founded on the concept of moral wrong as expounded in Roman Catholic theology: debt, detinue, and account presupposed the wrongfulness of retaining money or property that was due the other party to a half-completed exchange; deceit presupposed an intentional wrong; covenant presupposed the wrongfulness of violating a solemn oath; assumpsit—more accurately, trespass on the case upon an assumpsit—developed in the fifteenth century to permit recovery for the wrongful act ("trespass" is, of course, Law French for the Latin *transgressio*, "sin") of negligently performing an undertaking (misfeasance). In Chancery, the influence of moral theology was even more apparent, if only because the chancellor, in those

centuries, was almost invariably an archbishop or bishop, quite familiar with the basic features of the canon law, and his decisions were often grounded expressly in Christian teaching. Indeed, his jurisdiction may be said to have rested on three principles that were attributed to Christian faith: the protection of the poor and helpless, the enforcement of relations of trust and confidence, and the granting of remedies that "act on the person" (injunctions, specific performance, and the like).

In the sixteenth and early seventeenth centuries, the English law applicable to contracts underwent significant development. After the Act of Supremacy (1534), the ecclesiastical courts, now subordinate to the Crown, lost a substantial part of their jurisdiction over matters of property and commerce. The Tudor monarchs created an array of new "prerogative" courts, including the Court of Star Chamber, the High Court of Admiralty, the Court of Requests, and others, and also transformed the chancellor's court into the High Court of Chancery; with the rapid growth of both domestic and overseas trade, these courts exercised an enormously expanded commercial jurisdiction, applying to commercial cases the traditional law merchant as well as many rules and concepts derived from canon law and from Romanist legal science. Partly, no doubt, in order to meet the new competition, and in the spirit of the times, the common law courts also began to reform the action of assumpsit, making it available in certain types of cases of nonfeasance, and simplifying procedures in order to make the action a less unwieldy instrument for settling commercial disputes. In *Slade's Case* (1602), assumpsit was made available in cases of half-performed contracts and half-performed sales of goods, which previously had been subject to the archaic remedies of debt and detinue. By that time the common law courts had also elaborated a doctrine of consideration, similar to that of chancery and of the canon law, by which the validity and enforceability of an undertaking—whether in the case of the half-completed exchange or in the case of a simple promise—was tested in terms of the circumstances which caused or motivated it.[12]

Despite the significant changes in the law of contracts which took place in the sixteenth and early seventeenth centuries, in all the legal systems that prevailed in England, including the common law, the underlying presuppositions of contractual liability remained what

12. *See* A. W. B. SIMPSON, A HISTORY OF THE LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 297-302 (Slade's Case) and 316-488 (consideration) (1975).

they had been in the earlier period. Breach of promise was actionable, in the first instance, because—or if—it was a wrong, a tort, and in the second instance, because—or if—the promisee had a right to require its enforcement in view of its reasonable and equitable purpose. With some qualifications, the common lawyers accepted these premises no less than the canon lawyers. Prior to the latter part of the seventeenth century, assumpsit was essentially an action for breach of (unilateral) promise, not breach of (bilateral) contract in the modern sense, and the required consideration was conceived in terms of the moral justification and purpose of the promise. The action of covenant, on the other hand, was not seen to be a contractual remedy; duress was a defense but fraud in the inducement was not, although relief might be obtained from the Chancellor. The fact that the common law courts used distinctive procedures in enforcing promises, applied distinctive technical rules (often required by the different procedures), and gave only limited contract remedies, reflected the division between the ecclesiastical and the secular spheres and the subdivision of the secular sphere into plural jurisdictions. These divisions and subdivisions were themselves associated with the specific religious worldview that had emerged in the eleventh and twelfth centuries.

The Puritan Revolution of 1640 to 1660 established the supremacy of the common law over its rivals. In 1641 the Long Parliament, dominated by Puritans, abolished the prerogative courts. Eventually a separate admiralty jurisdiction survived, but it was greatly restricted in its scope and was subordinated to the common law. Chancery also survived but it, too, suffered a reduction of jurisdiction and was no longer able to assert its superiority over Common Pleas or King's Bench. Under the Puritans the common law courts heard cases of breaches of promise to marry, actions for legacies, and other ecclesiastical causes, on the ground that the ecclesiastical courts were not sitting. After 1660 some of that jurisdiction was retained, and the ecclesiastical courts, like the others, were ultimately bound by the common law as interpreted by Common Pleas and King's Bench.

With respect to commercial matters, the vast increase in the amount of variety of cases that came before the common law courts required an expansion and revision of their remedies and doctrines. Especially after 1660, when some of the most important reforms of the Puritan period were confirmed under a restored, chastened, and limited monarchy, the common law courts gradually adopted a great many of the remedies and rules that had been elaborated in the previous hundred years by the prerogative courts and by Chancery.

Other changes, however, in the common law of contracts, as it developed in the latter seventeenth and eighteenth centuries,[13] cannot be attributed to the adoption or adaptation of doctrines previously elaborated in rival jurisdictions. There was, in fact, a shift in some of the basic presuppositions of contract law that had developed over the previous five centuries. This shift may be summarized in three interrelated propositions.

First, the underlying theory of liability shifted from breach of promise to breach of a bargain. The emphasis was no longer placed primarily on the sin, or wrong, of the defaulting promisor but rather on the binding character of an agreement as such and the disappointment of the expectations of the promisee. This change raised more acutely than before the question whether the promises of the two sides were to be treated as independent or interdependent. The tendency of the courts in the century from 1660 to 1760 was to treat them increasingly as dependent.[14]

Second, the emphasis on bargain was manifested in a new conception of consideration. The older conception of consideration as purpose or motive or justification for a promise (analogous to the canonists' conception of causa) gave way to a conception of consideration as the price paid by the promisee for the promise of the promisor. This change raised more acutely than before the question of the adequacy or inadequacy of the consideration. The tendency of the courts in the century after the Puritan Revolution was increasingly to en-

13. Simpson's definitive study, *supra* note 12, is concerned with "the rise" of assumpsit, which, he concludes, had risen by the early 1600s. He therefore deals only cursorily with developments after the 1620s and 1630s. P. ATIYAH, on the other hand, in his volume THE RISE AND FALL OF FREEDOM OF CONTRACT (1979), is concerned with "the rise" of freedom of contract after 1770, and deals only cursorily with developments prior to that date. Similarly, M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977), makes broad characterizations of English and American law as it existed before 1780 without, however, presenting substantial evidence for them. Partisans of the approach taken by Simpson, which is the traditional approach of English legal historians, are able to show that the transformation of "medieval" to "modern" contract doctrine took place long before the late eighteenth century. *See* Simpson, *The Horwitz Thesis and the History of Contract*, 46 U. CHI. L. REV. 533 (1979). On the other hand, partisans of the approach taken by Atiyah and Horwitz, which emphasizes the origins of contemporary contract ideology, though they often ignore or misinterpret earlier doctrinal developments, are able to show that there was an important ideological shift in the nineteenth century. Both sides would be greatly aided by a systematic exploration of the *terra incognita* of English legal development in the century and a half after the outbreak of the Puritan Revolution. Some steps toward filling this hiatus have been taken by S. STOLJAR, A HISTORY OF CONTRACT AT COMMON LAW (1975) and Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 COLUM. L. REV. 35 (1983). *See infra* notes 14, 15, 18, 19.

14. *See* Stoljar, *supra* note 13, Chapter 12; Francis, *supra* note 13, pp. 122-125; Holdsworth, IV *History of English Law*, 64, 72, 75 (1924).

force agreements regardless of the inadequacy of the consideration.[15]

Third, the basis of liability shifted from fault to absolute obligation. The promisee was entitled to compensation for nonperformance with the terms of the bargain itself; excuses for nonperformance were to be confined, generally speaking, to those provided for within those terms.

The shift from a *moral* theory to what may be called a *bargain* theory of contract is well illustrated in the famous case of *Paradine and Jane*, decided in 1647, at the height of the Puritan Revolution.[16] A lessor sued a tenant for nonpayment of rent. The tenant defended on the ground that, due to the occupation of the leased premises by Prince Rupert's army, it was impossible for him to enjoy the benefit of his contract and therefore he should be excused from liability. He cited in his defense canon law, civil (i.e., Roman) law, military law, moral law, the law of reason, the law of nature, and the law of nations. Disregarding these authorities, the court held that by the common law of England a lessee for years is liable for the rent, even though the land be impossible to occupy. Although as an action of debt for rent the case could have been decided solely on the basis of the law of leasehold tenure, the court enunciated a broad principle of strict contractual liability. It said that where a duty is created by law, the party will be excused if he is not at fault, "but when the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding accident or inevitable necessity, because he might have provided against it by his contract."[17]

One may find earlier cases that suggest a doctrine of strict contractual liability.[18] Indeed, one may show that all the doctrinal ingre-

15. Simpson, *History of Contract*, *supra* note 13, at 446, shows that inadequacy of consideration had not been recognized as a defense at common law in medieval times, but that that was partly due to the fact that until some time after the sixteenth century "the conception of consideration was not that of a price for a promise, but a reason for a promise." In other words, prior to the late seventeenth century the *reason* for the promise had to be "adequate," even though the *price* paid might have been relatively low or even nominal. This distinction is often ignored by those who would trace an unbroken continuity in the doctrine of consideration from the sixteenth to the eighteenth centuries.

16. Style 47, 82 Eng. Rep. 519 (1647); Aleyn 26, 82 Eng. Rep. 897 (1648). Most discussions of the case use only the report in Aleyn. The report in Style needs also to be read in order to grasp the full significance of the case.

17. Aleyn 26, 82 Eng. Rep. 897 (1648).

18. *See* Simpson, *History of Contract*, *supra* note 13, at 31-33. Simpson shows that the sixteenth-century writer Brooke had distinguished the effect of a private contract, where liability was self-imposed, from the effect of the general law, and had stated that a man by private contract could make himself strictly liable, and that at least one case had adopted that point of view. He states that "in the leading case of Paradine v. Jane (1648) Brooke's theory eventually triumphed." *See infra* note 19.

dients of the modern action for breach of contract were present, in embryo, in the action of assumpsit as it developed in the late 1500s and early 1600s.[19] In the history of legal doctrine, it is usually not difficult to find in some earlier decision or text a source for every new development. Yet it is fair to say that before *Paradine and Jane* no English court had ever laid down the *theory* of absolute obligation for breach of a bargained exchange, namely, that obligation in contract is distinguished from obligation in tort by the fact that the parties to a contract set their own limits to their liability; and moreover, that after *Paradine and Jane* that theory was never effectively challenged.

On the other hand, some historians of English law have said that it "was not until the eighteenth century that a serious search for a general theory of contract was undertaken,"[20] and it was not until the nineteenth century that there emerged a bargain theory of contract, based on agreement of the wills of autonomous parties.[21] These statements depend for their validity on a special meaning of the phrase "general theory of contract." It can hardly be maintained that prior to the eighteenth century contractual liability was not considered to be based on a coherent set of principles, including the principle of the binding force of a bargained agreement expressing the intent of the parties.

The moral theory of contractual liability, which linked legal liability closely with the sin or wrongfulness of a breach of promise, on the one hand, and the equitable purpose of the promise or exchange of promises, on the other, was attacked in the seventeenth century in England by Puritans, including both lawyers and theologians. The attack was part of a revulsion against the discretionary justice of the chancellor. In the words of the great seventeenth century Puritan legal scholar and practitioner John Selden, "Equity in law is the same as the spirit is in religion, what everyone pleases to make it;" and again, "Equity is a roguish thing . . . ; equity is according to the conscience of him that is chancellor . . . . It is all one as if they should make the standard for the measure a chancellor's foot."[22] The distrust of equity was linked with a strict view of contractual liability. Of contracts Selden wrote: "We must look to the contract; if that be

19. This is the burden of Simpson's book. *See supra* note 14. Yet Simpson is careful to distinguish between the cases and writings that anticipate the establishment of a doctrine and those in which the doctrine eventually "triumphs."

20. T.F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 652 (5th ed. 1956).

21. *See* Atiyah, *supra* note 13; and Horwitz, *supra* note 13.

22. SELDENIANA, OR THE TABLE TALK OF JOHN SELDEN, ESQ. 45-46 (1789). Selden's Table Talk was first compiled in 1654 and first published in 1689.

rightly made, we must stand to it; if we once grant [that] we may recede from contracts upon any inconveniency that may afterwards happen, we shall have no bargain kept. . . . [H]ow to make our contracts is left to ourselves; and as we agree upon the conveyance of this house, or this land, so it must be. If you offer me a hundred pounds for my glove, I tell you what my glove is—a plain glove—pretend no virtue in it—the glove is my own—I profess not to sell gloves, and we agree for an hundred pounds—I do not know why I may not with a safe conscience take it."[23]

It was not the lawyers, however, but the theologians, who articulated the underlying premises of the new bargain theory of contractual liability. Three basic tenets of seventeenth century Puritan theology may be identified as bearing directly on that theory. (a) The first was the belief in a sovereign God of order, who requires of his people obedience and self-discipline, on pain of eternal damnation. b) The second was the belief in the total depravity of man and total dependence for salvation on God's grace. (c) The third was the belief in a contractual ("covenantal") relationship between God and man whereby God has bound himself to redeem his people in return for their voluntary undertaking to submit to his will.

(a) "God being the God of order and not of confusion hath Commanded in his word and put man into a Capasitie in some measure to observe and bee guided by good and wholesome lawes," said a Massachusetts Puritan in 1658.[24] As John Witte has put it, "The austere ethical demands of the Puritan, frugality of time and money, severe church discipline, vocational ambition, and reformist zeal—all were tied to theological assumptions. Because the Puritan was a part of the divine unfolding of the providential plan of the world, he viewed his work as holy and he sought to perform as God's agent impeccably." By the same token, "rules and laws were essential not only to arouse people to obedience to God and to guide them in the paths of virtue but also to bring English society to good order and discipline and to reform it."[25]

The Puritans drew a connection between the belief in a God of order, who governs by strict rules and who requires his subjects also to govern themselves by "good and wholesome lawes," on the one hand, and the belief in strict contractual liability, on the other. " . . .

23. *Id.* at 37-38.

24. *The Address to the General Laws of New Plymouth* (1658), 11 RECORDS OF THE COLONY OF NEW PLYMOUTH LAWS, 1623-82 72 (Pulsifer ed. 1861).

25. J. WITTE, NOTES ON ENGLISH PURITANISM AND THE LAW (unpublished, 1985).

[W]e must keep covenant with each other, when we have contracted one with another," wrote the Puritan leader Ireton in 1647. "Abandon this principle and the result will be chaos."[26] The context of Ireton's statement was a debate among Puritan leaders concerning the duty of submitting to an unjust law enacted by Parliament, in the light of the "contract" between Parliament and the people as ruler and ruled. However, the analogy was often drawn in that debate between social contract and private contract. As Selden wrote, "To know what obedience is due to the prince, you must look into the contract between him and his people; as if you would know what rent is due from the tenant to the landlord, you must look into the lease. When the contract is broken, and there is no third person to judge, then the decision is by arms."[27]

(b) The belief in the total depravity of man, his inborn lust for power the corruption not only of his will but also of his reason—reinforced the Puritan's emphasis on strict adherence to rules, including rules agreed upon by parties to a contract. As evidenced in Selden's caustic remarks, quoted above, about the untrustworthiness of the chancellor's conscience, the Puritan view of human nature (including the human nature of judges) did not encourage a resort to general ideas of equity or fault for the resolution of conflict. The Puritan preferred to rely upon something that seemed to him to be more objective, more certain, namely, the will of the parties as manifested in the words of the contract—just as he preferred in matters of personal morality to rely on the words of Scripture rather than on the ratiocinations of moral philosophers.

(c) Perhaps the most direct link between the doctrine of absolute contractual obligation and the Puritan belief system is to be found in the Puritan concept of the covenants—a word meaning, at that time, simply "agreements"—which God has entered into with men. As Witte has written:

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26. Quoted in J.W. GOUGH, THE SOCIAL CONTRACT: A CRITICAL STUDY OF ITS DEVELOPMENT 90 (1936).

27. Quoted *id.* at 92. (Note that Selden's analogy was with the law of leases, in which the doctrine of absolute obligation was firmly established.) The obligation of both social contract and private contract was traced to the Bible by the Puritan covenant theologian Samuel Rutherford, who wrote that the king and his people should not fight with each other just as "two merchants should keep faith one to another, both because God hath said he shall dwell in God's mountain who sweareth and covenanteth, and standeth to his oath and covenant, though to his loss and hurt (Psalm xv) and also because they made their covenant and contract thus and thus." S. RUTHERFORD, LEX, REX, OR THE LAW AND THE PRINCE 201 (1644; reprint edition 1982). John Locke drew heavily on Rutherford for his doctrine of social contract.

Traditionally, theologians, both Protestant and Catholic, had discussed the Biblical covenants: the Old Testament covenant of works whereby man, through his obedience to God's law, is promised his salvation; and the New Testament covenant of grace whereby man, through his faith in the incarnation, resurrection, and atonement, is promised eternal salvation. The covenant doctrine in this earlier period, however, had remained a footnote to the more important doctrines of God, man, and salvation. In the late sixteenth and seventeenth centuries, English Puritan theologians radically expanded the doctrine with two major innovations.[28] First, they transformed the covenant of grace as a merciful gift of God into a bargained contract, voluntarily negotiated and agreed upon, and absolutely binding on both sides. This new "federal theology," as it is called (from the Latin word *foedus*, "covenant") is evident in the rhetoric of John Preston, a leading Puritan theologian in the seventeenth century: "You may sue [God] of his bond written and sealed, and He cannot deny it." "Take no denyall, though the Lord may defer long, yet He will doe it, he cannot chuse; for it is part of his Covenant."[29] What Calvin and his earlier followers had often described as God's covenant-faithfulness to man became in Puritan theology God's absolute contractual obligation to man; what they had described as God's gracious gift of faith to his predestined became man's voluntary negotiation and agreement of the terms of his covenant with God.

Second, Puritan theologians added parties to the covenant. They characterized many relationships between God and various Biblical figures as covenant relations, whose terms were negotiated and agreed upon voluntarily and were thus absolutely binding. God's relations with the prophets were interpreted as bargains. The relation between the Father and the Son was viewed as a three-fold covenant of redemption, reconciliation, and suretyship. Also the covenant of grace between God and 'man' was now understood as a covenant not only with the elected individual Christian but also with the 'elect nation' of England, which was called to reform its laws and legal institutions according to God's word.

28. On the development of covenant theology in seventeenth century English Puritanism, *see* Miller, *The Marrow of Puritan Divinity*, TRANSACTIONS OF THE COLONIAL SOCIETY OF MASSACHUETTS 247-300 (1936); M. WALZER, THE REVOLUTION OF THE SAINTS: A STUDY IN THE ORIGINS OF RADICAL POLITICS 167 ff., 222 ff. (1968).

29. Quoted in C. HILL, PURITANISM AND REVOLUTION: STUDIES IN INTERPRETATION OF THE ENGLISH REVOLUTION 246 (1958). *Cf.* D. ZARET, THE HEAVENLY CONTRACT: IDEOLOGY AND ORGANIZATION IN PRE-REVOLUTIONARY PURITANISM 161 (1985). Zaret draws from sermons and tracts many examples of the tendency of Puritan preachers, in the period before 1640, to analogize the covenant between God and man to commercial contracts in which each party has the right to demand of the other that he "perform his bargain."

> Moreover, within the Biblical covenants the Puritans advocated political and institutional covenants of all kinds: covenants to form families, communities, associations, churches, cities, and even commonwealths, each which was deemed absolutely binding.[30]
>
> This broad theological doctrine provided the cardinal ethical principle of Puritanism that each man was free to choose his act but was bound to the choice he made, regardless of the consequences. This principle was readily applied to contractual obligations as well. Every contract, wrote a leading Puritan minister, 'is a voluntary obligation between persons about things wherein they enjoy a freedom of will and have a power to choose or to refuse.'[31] But having chosen, they are bound to perform.[32]

CONCLUSION

The canonists and Romanists of the late eleventh and twelfth centuries and thereafter based the enforceability of contracts on two principles: first, that to break a promise is a sin, an offense against God, or, more fundamentally, an act of alienation of oneself from God; and second, that the victim of the breach ought to have a legal remedy if the purpose of the promise, or exchange of promises, was reasonable and equitable. These principles served as part of the foundation for the systematization of contract law, that is, the construction of an integrated set of concepts and rules of contract law. Many of these concepts continue to be taught today in courses in law schools throughout the world—concepts and rules concerning fraud and duress and mistake, unconscionability, duty to mitigate losses, and many other aspects of contract law that link it directly with moral responsibility. It would contribute enormously, I believe, to our understanding of modern contract law if teachers and writers were to trace its formation to the canon law of the church as it developed in a pre-capitalist, pre-individualist, pre-rationalist, pre-nationalist era. There is more "mythology" in the law of contract than Grant Gilmore chose to discuss, and more "rationalization" than its current critics on the left seem to realize. Modern contract law, as it was first developed in the West, reflects what Alasdair MacIntyre has rightly called the fundamental tension in a belief system that is concerned with the transformation of man-as-he-is into man-as-he-could-be-if-

30. *Cf.* J. EUSDEN, PURITANS, LAWYERS, AND POLITICS IN EARLY SEVENTEENTH CENTURY ENGLAND 28 ff. (1968); Gough, *supra* note 26, at 82-99.

31. Quoted in Walzer, *supra* note 28, at 24.

32. Witte, *supra* note 25.

he-realized-his-*telos*.[33]

It should be noted that its two underlying principles brought the canon law of contract into close touch with other branches of the law of civil obligations, including tort and restitution. To break a promise is prima facie a wrong, a tort. On the other hand, it may be unjust, though no wrong has been committed, to acquire or retain property or benefits at another's expense. Under what I have called here the moral theory of contract, a remedy (such as debt or detinue) may be applicable both to breaches of contract and to cases of unjust enrichment. It is of some interest in this connection that in English law the concept of unjust enrichment was also concealed in the action of general assumpsit, which is still usually classified as "quasi-contract."

The bargain theory of contract was, in its inception, also a moral theory, but in a different sense of the word "moral." It started from the premise that God is a God of order, who enters into contracts with his people by which both he and they are absolutely bound. Its second premise was that the people of God, in entering into contracts with each other, whether social contracts or private, are also absolutely bound by the contract terms, and that nonperformance is excused only to the extent that those terms permit. However, the Puritan stress on bargain and on calculability ("order") should not obscure the fact that the bargain presupposed a strong relationship between the contracting parties, within the community. These were not yet the autonomous, self-sufficient individuals of the eighteenth century Enlightenment. England under Puritan rule and in the century that followed was intensely communitarian.

As in the case of the canon law, the underlying principles of the English law of contracts, as it developed in the late seventeenth and early eighteenth centuries, brought that law into close contact with other branches of English law. In particular, English contract law was not separated from commercial law. There was therefore no independent integrated body of rules governing all kinds of contracts; in that special sense, there was no "general theory of contract." Only in the late eighteenth and early nineteenth centuries were efforts made to synthesize "contract" as an independent branch of law. Instead, English contract law in the late seventeenth and eighteenth centuries remained a law of different *types* of contracts. The parties who entered into a contract of bailment, or of lease, or an insurance contract, or a conditional sale, or a transportation contract, or the sale of land, or a

33. A. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 52 ff. (2nd ed. 1984).

contract of personal services, were bound by the rules applicable to the particular type of contract, except to the extent that they varied them by express terms. What was involved in the first instance was the will of the parties to enter into a relationship.

In the late eighteenth and nineteenth centuries there took place a secularization of the older theories of contract law, in the sense that their religious foundations were replaced by a conception based not on faith in a transcendent reason and a transcendent will, from which human reason and will are derived and to which they are responsible, but rather on the inherent freedom of each individual to exercise his own autonomous reason and will, subject only to considerations of social utility. This secular theory drew heavily on contract doctrines and rules that had originally been developed on the basis of the earlier religious theories, but it subjected those doctrines and rules to a new rationalization and a new systematization. It broke many of the links not only between contract law and moral theology but also between contract law and the communitarian postulates which had informed both the Catholic (including Anglican as well as Roman Catholic) and the Protestant (including both Lutheran and Calvinist) legal traditions. The new secular theory also tended to isolate contract law from other branches of civil law, such as the law of torts and of unjust enrichment, whose moral and communitarian aspects were less easy to suppress.

With the decline of individualism and rationalism in the twentieth century, it was inevitable that the prevailing nineteenth century theory of contract law would come under attack. Both its attackers and its defenders need to be aware, however, of its historical background, and especially of the religious sources from which it was derived and against which it reacted. In the absence of such an awareness, the issues become distorted. We are given a choice between the prevailing theory of general contract law—without its historical roots—and no theory at all. We may learn from history, however, that there is a third possibility: to build a new and different theory on the foundation of the older ones.