

# 9 Christian contract law and the morality of the market

## A historical perspective

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### Introduction

The concept of “Christian contract law” comes with a troubled past. A standard part of the first-year law experience includes exposure to the notion that moral values and legal rules are to be neatly distinguished from one another. “The coercive power of the state, exercised or brandished, makes the difference between the pious hopes of morality and the grim certitudes of law,” as Michael Barkun, a political scientist, once summarized the positivistic creed underlying modern legal systems.<sup>1</sup> Even more so, the thought of judges taking into account exclusively religious arguments, or of religious authorities enacting rules that are enforceable in courts of law, is alien and even hostile to the modern mindset. The separation of church and state, or for that matter, of religious beliefs and legal norms, is a fundamental tenet of Western legal systems since the nineteenth century. As a consequence, the notion that Christianity could have to do anything with law appears like a contradiction in terms. John Austin (1790–1859), one of the most influential theoreticians of legal positivism in the Anglo-Saxon world, allegedly claimed that “an exception, demurrer or plea founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment.”<sup>2</sup> This chapter will nevertheless show that legal

1 Michael Barkun, *Law without Sanctions. Order in Primitive Societies and the World Community* (New Haven, CT, London: Yale University Press, 1968), 8, also cited in Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius commune (c. 1500–1650)* (Leiden/Boston, MA: Brill/Nijhoff, 2013), 86.

2 According to Herbert L.A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review*, 71 (1958): 593–629 (616) and Alan Watson, *Failures of the Legal Imagination* (Philadelphia, PA: University of Pennsylvania Press, 1988), 122. However, it is worthwhile noting that the passage attributed to John Austin does neither figure in the original, 1832 London edition of his *The Province of Jurisprudence Determined*, nor in the second, posthumous 1861 London. Hart refers to the 1954 Library of Ideas edition, p. 185, which takes as a starting point the fifth, London 1885 edition of Austin’s lectures, which was never seen by John Austin himself, but “revised and edited by Robert Campbell with the assistance of the notes taken by John Stuart Mill of the original lectures.” In any event, Hart’s citation has been copied by countless scholars, and it may reflect the spirit of Austin’s positivism, irrespective of the original content of his lectures.

positivism is not a good guide to understand the historical foundations of Western law, especially in the field of contracts.

### Christians, contract law, and the morality of the market

The fact that we have been accustomed to think morality, law, and religion separately does not mean that Western law does not bear any historical relations to moral and religious culture, quite the contrary. If anything, John Austin would not have had to reject the use of religious arguments in court so emphatically, if his opinion had already been common currency in nineteenth-century Britain. In the passage quoted above, he was obliged to oppose the contrary view advocated by William Blackstone (1723–1780), an icon of the British Enlightenment. Faithful to a centuries-old tradition in European jurisprudence,<sup>3</sup> Blackstone adhered to the view that the civil laws could be invalidated by contrary natural laws, which he considered as God's dictates.<sup>4</sup> In recent decades, recognition of the religious foundations of Western legal culture has received strong impetus by the work of Harold Berman (1918–2007), the late Harvard law professor, and of John Witte Jr., his intellectual heir at Emory's Center for the Study of Law and Religion. Berman's book *Law and Revolution: The Formation of the Western Legal Culture* (1983) has had a tremendous impact on the way scholars across the world have come to acknowledge the Christian element in the historical development of both the common and the civil law traditions.<sup>5</sup>

In the field of contract law, in particular, the Christian origins of modern law have been laid out in great detail by James Gordley in his *Philosophical Origins of Modern Contract Doctrine* (1991). In a world that was not yet characterized by the modern division between state and church, it were not only the civil lawyers specialized in Roman law and statutory law, but also the experts in canon law, that is the law of the Church, who were responsible for shaping contract doctrine, along with Christian theologians. While Roman law had a lot to say about specific contracts such as sale and lease, what it had to offer was a collection of cases and precedents, without much in the way of systematic reflection or principles. As Gordley has shown, medieval canon lawyers and scholastic theologians in the sixteenth and seventeenth centuries combined the technical vocabulary of Roman contract law with evangelical principles and Aristotelian-Thomistic virtue ethics. As a result, they came up with general principles such as good faith in contracts, the bindingness of bare agreements, and the principle of fair bargaining.

<sup>3</sup> R. H. Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge, MA: Harvard University Press, 2015).

<sup>4</sup> William Blackstone, *Commentaries on the Laws of England*, vol. 1, book 1, section II, p. 41, Philadelphia, 1893 [1753], [http://files.libertyfund.org/files/2140/Blackstone\\_1387-01\\_EBk\\_v6.0.pdf](http://files.libertyfund.org/files/2140/Blackstone_1387-01_EBk_v6.0.pdf).

<sup>5</sup> Thomas Duve, "Law and Revolution – Revisited," *Rechtsgeschichte – Legal History*, 21 (2013): 156–159.

The medieval and early modern canonists and theologians – often referred to simply as the “schoolmen” or the “scholastics”<sup>6</sup> – would not have defined themselves as legal theorists. They were pragmatic thinkers, involved in the business of counseling and confessing merchants, bankers, and princes.<sup>7</sup> As a result, the treatment of contract law in the works of medieval and early modern canon lawyers and theologians cannot be severed from their concern with the morality of the marketplace. Confessors needed to evaluate the righteousness and sinfulness of individual Christians’ behavior, especially in day-to-day transactions in the marketplace such as money exchange, commercial loans, and credit sales.<sup>8</sup> To better understand the moral issues involved in those transactions, theologians and canonists analyzed business transactions through the lens of contract law. It offered them a technical framework to determine rights and obligations of contracting parties with a high degree of precision. It is certainly not a coincidence that one of the first treatises on contracts in the Western legal tradition was written by Peter of John Olivi (ca. 1248–1298), a Franciscan theologian and counselor of merchants in Southern France.<sup>9</sup> After studying in Paris with Thomas Aquinas, Olivi taught at the Franciscan convent in Narbonne, where he also became one of the principal confessors to the new urban class of prosperous businessmen. His treatise on contracts, dealing mostly with the law of sales, money-lending, and restitution, grew out of his combined experience as a lecturer and an adviser in the marketplace. Sylvain Piron, a French historian, has convincingly shown that Olivi delivered a remarkably liberal account of contract law, where the free will of the contracting parties occupied a central role.<sup>10</sup> His analysis of specific commercial and financial contracts was pervaded by a spirit of liberalism that fully acknowledged the economic value of capital and industry.

### A Plethora of sources – waiting for further analysis

Peter of John Olivi’s *Treatise on Contracts* remained unknown until the late 1970s, when Giacomo Todeschini and other Italian and French scholars discovered the text and soon realized that it deserved a place of honor in the history of

6 John T. Noonan, *The Scholastic Analysis of Usury* (Cambridge, MA: Harvard University Press, 1957), 48.

7 Nicole Reinhardt, *Voices of Conscience. Royal Confessors and Political Counsel in Seventeenth-Century Spain and France* (Oxford: Oxford University Press, 2016).

8 Michael Thomas D’Emic, *Justice in the Marketplace in Early Modern Spain. Saravia, Villalón and the Religious Origins of Economic Analysis* (Lanham: Lexington, 2014).

9 Peter of John Olivi, *A Treatise on Contracts*, critical edition and commentary by Sylvain Piron, trans. Ryan Thornton (from Latin) and Michael Cusato (from French) (Saint-Bonaventure: Franciscan Institute Publications, 2016).

10 Sylvain Piron, *Parcours d’un intellectuel franciscain. D’une théologie vers une pensée sociale: Pœuvre de Pierre de Jean Olivi (ca. 1248–1298) et son traité ‘De contractibus’* (Paris: EHESS, 1999), unpublished PhD thesis. See also Juhana Toivanen, “Voluntarist Anthropology in Peter of John Olivi’s *De contractibus*,” *Franciscan Studies*, 74 (2016): 41–65.

economic thought.<sup>11</sup> As a matter of fact, they found that Olivi's work had been a major source of inspiration for Bernardine of Siena (1380–1444) and Antonine of Florence (1389–1459) – two late medieval theologians whose moral support for the spirit of commercial enterprise was even recognized by Max Weber (1864–1920), the famous legal historian and sociologist, in *The Protestant Ethic and the Spirit of Capitalism*. Bernardine of Siena and Antonine of Florence are just two among the more famous medieval theologians who dealt with issues at the crossroads of market morality and contract law. Since the thirteenth century, hundreds of treatises on sale, money-lending, and restitution were written by canonists and scholastic theologians at universities and convents across Europe, the enormous depth of which has been revealed to us in a merely fragmentary way, despite the seminal investigations by eminent scholars such as Odd Inge Langholm and Lawrin Armstrong.<sup>12</sup>

Something that has consistently surprised researchers examining the source material is that they reveal a great compatibility between everyday market behavior and the moral-legal framework developed by medieval Christian thinkers.<sup>13</sup> This sense of surprise is due to many reasons, but not in the least to the huge impact of Weber's *The Protestant Ethic*, a reductionist interpretation of which has exerted undue influence on the popular imagination.<sup>14</sup> Yet, the spirit of entrepreneurship and capitalism did certainly not have to wait for ascetic Protestant sects to find legitimation in Christian writings on contracts and commerce.<sup>15</sup> The apotheosis of the canon law and scholastic theology of contract came in the sixteenth and seventeenth centuries, against the background of the first wave of globalization, the rise of inter-continental trade networks, and the emergence of financial capitalism. Catholic theologians and canon lawyers across Europe wrote vast treatises on commerce and contracts that were even more ambitious in scope than their late medieval predecessors. They also contained unprecedented acceptance of new commercial and financial practices in the marketplace.<sup>16</sup> Incidentally, while the Catholic theologians in the sixteenth and seventeenth

11 Giacomo Todeschini, *Un trattato di economia politica francescana: il 'De emptionibus et venditionibus, de usuris, de restitutionibus' di Pietro di Giovanni Olivi* (Rome: Istituto Storico Italiano per il Medioevo, 1980).

12 Odd Inge Langholm, *Economics in the Medieval Schools: Wealth, Exchange, Value, Money and Usury According to the Paris Theological Tradition, 1200–1350* (Leiden/Boston, MA: Brill, 1992); Lawrin Armstrong, *Usury and Public Debt in Early Renaissance Florence: Lorenzo Ridolfi on the Monte Comune* (Toronto: Pontifical Institute of Medieval Studies, 2003).

13 James Davis, *Medieval Market Morality. Life, Law and Ethics in the English Marketplace, 1200–1500* (Cambridge: Cambridge University Press, 2012), 411–413.

14 A discussion of the Weber thesis would largely exceed the limits of this paper. A good starting point is Peter Ghosh, *Max Weber and the Protestant Ethic: Twin Histories* (Oxford: OUP, 2014).

15 Giacomo Todeschini, *Ricchezza francescana. Dalla povertà volontaria alla società di mercato* (Bologna: Il Mulino, 2004); Paolo Prodi, *Settimo non rubare. Furto e mercato nella storia dell'Occidente* (Bologna: Il Mulino, 2009); Sylvain Piron, *L'occupation du monde* (Brussels: Zones Sensibles, 2018).

16 For concrete examples, see Wim Decock, "Lessius and the Breakdown of the Scholastic Paradigm," *Journal of the History of Economic Thought*, 31 (2009): 57–78; Wim Decock, "In Defense of Commercial Capitalism: Lessius, Partnerships and the Contractus Trinus," in *Companies and*

centuries were more prolific than ever writing about business and contracts, Protestants started to advocate the idea that religious authorities should leave legal and political matters to the jurists and concentrate exclusively on spiritual matters. Against the Catholics, Protestant jurists such as Charles Dumoulin (1500–1566) in France and Alberico Gentili (1552–1608) in England urged theologians “to keep silent about matters outside their province” – a warning that has often been interpreted as the beginning of the modern age, since it emphasized the separation between law and religion that a modern jurist or theologian is still familiar with. But, again, this statement should not lead us into the temptation of neglecting the profound contribution of theologians and Church lawyers to the development of contract law in the pre-modern era.

Hundreds of treatises *On Contracts*, *On Justice and Right*, *On Laws*, and similar subjects rolled from printing presses in Antwerp, Ingolstadt, Leuven, Madrid, Mainz, Paris, Rome, Salamanca, Venice, and many other cities.<sup>17</sup> Except for big names such as Francisco de Vitoria (1483/1492–1546), Domingo de Soto (1494–1560), Luis de Molina (1535–1600), and Leonardus Lessius (1545–1623), they have received only scarce attention by modern jurists and economists, undoubtedly because the majority of them were never translated into modern languages. It deserves mentioning that the outburst of voluminous treatises on legal subjects written by scholastic theologians and canonists was not limited to mainland Spain, even if early modern scholasticism has largely become associated with the so-called “School of Salamanca,” since the University of Salamanca played a paramount role in disseminating the scholastic revival movement across the globe.<sup>18</sup> The first huge treatise *On contracts* in the early modern scholastic tradition was published in 1502 by Conrad Summenhart (1455–1502), a German theologian at the University of Tübingen, and the apex of the tradition was reached with the publication in 1646 of a four-volume work on both general contract law and special contracts by Pedro de Oñate, a Jesuit theologian who spent his career in South America. A practical consequence of this is that the next paragraphs will not be able to discuss all these authors or go into the details of scholastic contract law, let alone discuss their analysis of specific contracts or dozens of cases occurring in the marketplace. References to primary sources and Latin citations will be kept to a minimum, but can be checked in the secondary literature.<sup>19</sup>

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## Bare agreements and promissory morality

The sheer volume of the primary source material, combined with the so-called “dialectic” nature of scholastic culture – which left room for “dialogue” and a

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*Company Law in Late Medieval and Early Modern Europe*, eds. Bram Van Hofstraeten and Wim Decock (Louvain: Peeters, 2016), 55–90.

17 An overview of the most important sources is included in Wim Decock and Christiane Birr, *Recht und Moral in der Scholastik der Frühen Neuzeit* (Berlin: De Gruyter, 2016).

18 Marjorie Grice-Hutchinson, *The School of Salamanca: Readings in Spanish Monetary Theory (1544–1605)* (Oxford: Clarendon, 1952).

19 Especially in Decock, *Theologians and Contract Law*, passim.

multitude of divergent opinions to co-exist – makes generalizations hazardous. Yet, a commonly accepted principle of Christian contract doctrine from the late Middle Ages onward was that bare agreements are binding by virtue of mutual consent alone. Moreover, from the late sixteenth century onward theologians started to articulate the notion of contract through the concept of “promise,” which first only meant gratuitous promises or, alternatively, the offer made by the promisor, but eventually denoted the entire agreement. Binding promises or contracts were analyzed as the combination of an offer (or promise in the strict sense of the word) and an acceptance. The following paragraphs will give a brief introduction to the development of these two general principles in pre-modern Christian contract doctrine.

The principle that agreements are binding by virtue of consent alone reaches back to the classical period of canon law (ca. 1100–1300). Canon law in this period touched the lives of virtually everyone and dealt with about every possible subject that a modern jurist would expect today to fall within his exclusive competence, including contracts.<sup>20</sup> The principle that agreements, however naked, are binding was formulated by Huguccio, one of the leading canonists at the university of Bologna in the late twelfth century.<sup>21</sup> It is also known as the principle of consensualism. Agreements are enforceable by virtue of mutual consent alone. The motivation behind the rule was religious in nature, since Huguccio argued that God made no distinction between what a Christian says and what he swears (Mt 5:37: “let your word be ‘yes, yes’ or ‘no, no’”). Therefore, a contracting party who does not respect the agreement commits a sin. Concerned as they were with the salvation of souls, subsequent canonists and theologians unanimously adopted the principle that all bare agreements are binding, to prevent the debtor from sinning. In the ecclesiastical courts, a creditor could file a claim against a debtor who failed to fulfill his contractual obligations by virtue of the mutual consent underlying the contract. Unlike in the Roman law tradition, or in the medieval civil courts, the canon law largely ignored formality requirements and the existence of specific writs or legal remedies. What mattered to the canon lawyers was substance, not form, since God’s eyes saw all the evidence.

From the early sixteenth century onward, the consensualist principle developed by the canonists was gradually adopted by the civil courts, too, as kings sought to restrain the power of the Roman Catholic Church and concentrate jurisdictional power in their own hands. They borrowed judicial precedents and legal doctrines from the canon law tradition.<sup>22</sup> The explanation why this happened was made explicit by Matthew Wesenbeck (1531–1586), a major jurist from the Catholic Southern Netherlands who went on to teach at the Lutheran University of Wittenberg: “each time we are dealing with the protection from

<sup>20</sup> James Brundage, *Medieval Canon Law* (London and New York: Longman, 1995); Richard H. Helmholz, *The Spirit of Classical Canon Law* (Athens, CA: University of Georgia Press, 1996).

<sup>21</sup> Decock, *Theologians and Contract Law*, 123.

<sup>22</sup> Laurent Waelkens, *Anne adverso. Roman Legal Heritage in European Culture* (Louvain: Leuven University Press, 2015), 111–113.



sin and a matter of conscience, even in the civil court the canon law has to be observed.”<sup>23</sup> This is clear evidence not only of the persistence of substantive doctrines of canon law in Protestant lands, but also of the profoundly religious considerations about the law of contracts even in the work of a “pure” jurist, of Lutheran convictions, in the early modern period. Even in the Protestant tradition, juridical and theological thinking remained closely intertwined, if only because the civil authorities were expected to lay down laws according to Christian principles. For example, the Augsburg Confession of 1530, one of the first texts to outline the major points of the Lutheran faith and its consequences for civil and ecclesiastical governance, considered the civil authorities as part of the divine order. Laws enacted by civil authorities required absolute obedience from the citizens, unless that would have obliged them to commit a sin. To use the words of Harold Berman, the fact that Luther and his followers consigned law to a secular realm under civil authority does not mean that law and religion became mutually irrelevant.<sup>24</sup>

In the meantime, the Catholic theologians, for whom law was clearly not consigned exclusively to the secular realm, further refined the conceptual framework for analyzing contracts, developing a general law of contract centered around the notion of “promise.”<sup>25</sup> Previously, the notion of “promise” had been mainly used to refer to a gratuitous promise or a gift, which was motivated by gratitude or liberality. Whether those promises were binding was a matter of controversy that goes beyond the scope of this chapter.<sup>26</sup> The notion of “promise” could also refer to the “offer” made in an agreement by the promisor. But in the work of Jesuit theologians such as Lessius and Oñate, “promise” additionally became a generic concept to articulate the basic structure behind all kinds of contracts, namely the combination of offer and acceptance. “Every binding agreement is composed of promise and acceptance,” Oñate explained,<sup>27</sup> “just as a physical thing is composed of matter and form, or a human being of soul and body.” Observing that “promise” had now also simply become synonymous with “contract,” he went on to specify that “if promise is understood in the second manner [sc. as a combination of offer and acceptance], then it does not differ from contract, just as a man does not differ from the combination of his soul and body.” The principle that all binding agreements are the result of a combination of offer

23 Decock, *Theologians and Contract Law*, 157.

24 Harold Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 2003), 72.

25 Decock, *Theologians and Contract Law*, 176–214.

26 On the status of lucrative contracts, see Decock, *Theologians and Contract Law*, 174–176. A seminal attempt to argue that donations were fully fledged contracts was made by Conrad Summenhart, who was followed by Fortunius García, Lessius, and Oñate. They argued that lucrative contracts are also true contracts because they are composed of offer and acceptance, which are the necessary elements to form a binding contract. Their main opponent was Domingo de Soto, who argued that gifts were the fruit of the virtue of liberality and were therefore excluded from the rules of commutative justice.

27 See Decock, *Theologians and Contract Law*, 178 (citing Oñate).

and acceptance became almost universally accepted by the Catholic theologians. The binding status of specific types of unilateral promises, for instance offers for public building projects, known in Roman law as *pollicitationes civitati*, led some theologians to nuance that standpoint, but generally they agreed that an offer could not bind the promisor until it had been accepted.<sup>28</sup>

In the Protestant tradition, the conceptual shift from contract as “agreement” to contract as “promise” was taken up by influential Calvinist natural lawyers such as Hugo Grotius (1583–1645) and Lutheran theologians such as Johann Adam Osiander (1622–1697). In his work *On the Law of War and Peace* (1625), Grotius developed a general law of contract against the background of a chapter on promises, just as Lessius had done a few years before.<sup>29</sup> Occasionally, Grotius referred to early modern Catholic theologians and canonists such as Martín de Azpilcueta (1492–1586), Diego de Covarrubias y Leyva (1512–1577), and Tomás Sánchez (1550–1610) in his text. In similar fashion, Protestant theologians such as Osiander borrowed extensively from the Catholic theologians in their treatment of contractual issues in works on moral theology.<sup>30</sup> In a chapter of his *Theology by Cases* (1680), Osiander elaborated upon the notion of promise, emphasizing the need for promises to be accepted in order to become binding. He extensively borrowed from theologians such as Sylvester Mazzolini da Prierio (1456–1523), a Dominican theologian and author of one of the most important manuals for confessors in the Catholic tradition.

The early modern Christian doctrine of contracts was committed to the notion that the enforceability of contracts resulted from the moral obligation to keep promises. In this regard, modern promissory theories of contract resemble those of the early modern theologians, even if modern jurists such as Charles Fried refer to Kantian philosophy rather than early modern scholasticism as the foundation of their promissory account of contract law.<sup>31</sup> However, one should be clear about the “legal” character of the “moral” obligation to keep promises in the scholastic tradition. The modern distinction between law and morality is unhelpful in reading the early modern sources, since, as has been highlighted earlier, canonists and theologians conceived of “morality” in remarkably juridical terms.<sup>32</sup> Even conscience was thought of as a juridical space, a tribunal or forum (*forum internum*, *forum conscientiae*), where man’s conduct was judged according to objective standards by confessors trained not only in biblical studies but also in the law.<sup>33</sup> A much better guide to understand the discussions

28 Decock, *Theologians and Contract Law*, 187–192.

29 Martin Hogg, *Promises and Contract Law: Comparative Perspectives* (Cambridge: Cambridge University Press, 2011), 128.

30 Paolo Astorri, *Lutheran Theology and Contract Law in Early Modern Germany (ca. 1520–1720)* (Paderborn: Ferdinand Schöningh, 2019), 220–222.

31 Charles Fried, *Contract as Promise: A Theory of Contractual Obligation*, 2nd ed. (Oxford: Oxford University Press, 2015).

32 Decock, *Theologians and Contract Law*, 69–86.

33 Wim Decock, “Confessors as Law Enforcers in Mercado’s Advice on Economic Governance (1571),” *Rechtsgeschichte – Legal History*, 25 (2017): 103–114.



about the bindingness of contracts in the sources from the sixteenth and seventeenth centuries is Thomas Aquinas's (1225–1274) virtue ethics. Thomas made a distinction between two kinds of debt, namely moral debt and legal debt. Legal debt is the object of the virtue of justice in exchange, while moral debt is governed by virtues that are similar, but not identical to the virtue of justice, such as piety, fidelity, and honesty.

The principle that promises create not only moral debt but also legal debt was supported by most early modern canonists and theologians. They rejected the opinion that contracts were binding merely by virtue of honesty, fidelity, or the moral duty to speak the truth. The promisor deliberately binds himself to the promisee in order to give or to do something, Lessius explained, thereby conferring a right to the promisee to enforce the promise.<sup>34</sup> All contracts are therefore binding as a matter of justice in exchange. Grotius followed Lessius in adopting this “juridical” conception of promising, conceiving of perfect promises in terms of the transfer of rights and the alienation of a part of the promisor’s liberty. Lessius, Grotius, and their colleagues would have agreed that promises were morally binding, too, because it was morally necessary to speak the truth and to be honest, but that was not the main point of their legal reasoning, which started from a juridical analysis of the relationship between promisor and promisee. “Promising is not merely a matter of truth, but of commutative justice,” Domingo de Soto emphasized.<sup>35</sup> In doing so, he wanted to distance himself from the contrary opinion of Thomas Cajetan (1469–1534), an authoritative Dominican theologian in the early sixteenth century, who had argued that a contracting party was bound to keep his promises only as a matter of honesty, truth, or faith.<sup>36</sup>

### Freedom of the will and legal security

The turn toward an open and consensualist doctrine of contract, articulated around the notion of “promise,” reached a climax in treatises on justice, law, and contracts written by Jesuit theologians in the first half of the seventeenth century. They fully endorsed the evolution of the doctrine of contract in the canon law tradition since the principle that all agreements are binding by virtue of consent alone guaranteed one of the values they esteemed most: freedom – a word they designated with the Latin term *libertas*. According to Oñate, who saw free will as the basis of the entire doctrine of contract, the consensualist principle and the promissory theory allowed the contracting parties to fully exercise their freedom of action. “Liberty has very wisely been restored to the contracting parties,” he explained in his four-volume treatise on contracts,

<sup>34</sup> Decock, *Theologians and Contract Law*, 210–211.

<sup>35</sup> *See* Decock, *Theologians and Contract Law*, 200 (citing Domingo de Soto).

<sup>36</sup> James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon, 1991), 73.

so that whenever they want to bind themselves through concluding a contract about their goods, this contract will be recognized by the civil or the ecclesiastical court before which they will have brought their case, and it will be upheld as sacrosanct and inviolable.<sup>37</sup>

Oñate's exposition on the enforceability of accepted promises abounds with references to the "will" and to verbs expressing that will. Oñate also emphasized the connection between the law of goods and contract law, conceiving of contracts as the instrument to transfer property rights. In Oñate's eyes, private property and freedom of contract were two sides of the same coin: "Man would not be the true and perfect owner of his goods unless he could dispose of them by contractual agreement when he wanted, with whom he wanted, in whatever way he wanted."<sup>38</sup> Strong property rights necessitated freedom of contract. Oñate was not alone in making that explicit connection. Molina, a Jesuit famous for his treatise *On Justice and Right*, of which the second volume is entirely dedicated to contract law, explained at the beginning of his treatment of contracts that his aim was to demonstrate how property rights are transferred by virtue of the will of the contracting parties.<sup>39</sup> Gregorio de Valentia (1549–1603), a fellow Jesuit teaching in Ingolstadt, talked about the individual's "right to love his own goods."<sup>40</sup> Juan de Mariana, a Jesuit famous for his scathing critique of absolutist kings, was highly suspicious of laws and policies that might violate the property rights of the citizens, considering monetary debasement without consent of the people as a form of disguised robbery by the government.<sup>41</sup>

The central value of the individual's intent in the theologians' conceptualization of contractual obligation facilitated the emergence of a Christian contract doctrine centered on autonomy of the will, but it also raised numerous questions. For example, what is the legal status of fictitious promises or contracts in which the underlying intent of the parties is doubtful? If the will of the parties is the ultimate criterion to interpret contracts, judges, or, for that matter, confessors, may have difficulties in upholding a contract to which one of the parties did not want to be bound entirely. For example, what if a man promised to marry a girl just to be able to have sexual intercourse with her, but actually did not intend to be bound by his promise? In dealing with this issue, theologians such as Lessius developed the so-called "reliance theory" of promising, arguing that the will was still the main criterion, but that the promisee's reliance on the promisor's declaration should be protected. Deceit could not be tolerated.

37 See Decock, *Theologians and Contract Law*, 163 (citing Oñate).

38 See Decock, *Theologians and Contract Law*, 170 (citing Oñate).

39 See Decock, *Theologians and Contract Law*, 164 (citing Molina).

40 Decock, *Theologians and Contract Law*, 595.

41 W. Decock, "Quantitative Easing Four Centuries Ago: Juan de Mariana's *De monetæ mutatione* (1609)," in *Texts and Contexts in Legal History: Essays in Honor of Charles Donahue*, eds. J. Witte Jr, S. McDougall, and A. di Robilant (Berkeley, CA: Robbins Collection, 2016), 365.

“Faith in contractual affairs would crumble,” Lessius warned,<sup>42</sup> “if promisors could free themselves of their obligation simply by saying that they had made a fictitious promise.”

Another issue that was complicated by the emphasis on the will concerned the doctrine of changed circumstances. For centuries, Christian contract law took for granted that contractual obligation would be frustrated by a significant change in the contextual circumstances of the contract, for instance if war broke out, or if one of the contracting parties was confronted with health issues.<sup>43</sup> The early modern theologians took this idea from Thomas Aquinas and the medieval canon lawyers, who introduced the idea that there is an “implied term” or “tacit condition” in every agreement. This tacit provision means that the agreement will no longer be binding if the context in which the agreement was made changes considerably. One of the most radical formulations of this principle was offered by the Jesuit Manuel de Sá (1528–1596), who argued that “in a general obligation, even if strengthened by an oath, those things which you did not intend are not included,” specifying that “those things seems to be all the things to which you would not have bound yourself if you had then thought about them.”<sup>44</sup> Lessius explained that the will does not cover what is unknown, concluding that ignorance about a future change in circumstances could be considered as a kind of mistake that had vitiated the contract from the beginning.<sup>45</sup> Even Oñate, who went further than anyone else in advocating the autonomy theory of contract, considered the principle of changed circumstance as a universally applicable principle and the supreme expression of equity (*epikeia*):<sup>46</sup>

Just as under those changing circumstances *epikeia* is to be applied to the laws and constitutions of the princes, so will it be equitable to apply *epikeia* to the promises made by private persons. For promises are like laws which private persons impose upon themselves.

The fact that the doctrine of implied terms posed a threat to legal security went not unnoticed to most Christian jurists and theologians. The issue was addressed explicitly in Juan de Lugo’s (1583–1660) treatise *On Justice and Right*. Lugo pleaded for a maximum restriction of the use of the “tacit condition,” expressing fears that all contractual exchange would become unstable if the principle of changed circumstances was adhered to without reserve. In the course of refuting the doctrine of implied terms, he referred to business interests and the “security of contract.”<sup>47</sup> Consent to onerous contracts must be unconditional. Such contracts must have the stable and indissoluble character of marriage contracts,

42 See Decock, *Theologians and Contract Law*, 195 (citing Lessius).

43 Gordley, *The Philosophical Origins of Modern Contract Doctrine*, 90–91.

44 See Decock, *Theologians and Contract Law*, 202 (citing Manuel de Sá).

45 Decock, *Theologians and Contract Law*, 203.

46 See Decock, *Theologians and Contract Law*, 207 (citing Oñate).

47 Decock, *Theologians and Contract Law*, 320–321.

Lugo argued, urging contracting parties to think twice before they engaged themselves. It deserves mentioning that Lugo also provided one of the most nuanced accounts of a Christian approach toward debt collection. Although it would take us too far afield to discuss debt collection in Christian contract doctrine, there was general consensus that the general principle of the bindingness of agreements by virtue of mutual consent opposed a laxist attitude toward bad debtors.<sup>48</sup> Debt cancellation or debt relief was not thought of as an adequate way to address the problem of bad debt. Balancing the rights of the creditors and the obligations of the debtors, the canonists and theologians generally saw deferral of repayment as the most fair solution. Lugo fully recognized that courts had good reasons to enforce contracts in the strictest of ways, not least to prevent moral hazard. At the same time, he appealed to higher principles such as charity and “a kind of natural law equity” to urge Christian judges and Christian creditors to make all efforts to prevent poor and destitute debtors from collapsing into what he called the “abyss of despair.”<sup>49</sup>

### **Fairness in exchange, equality, and charity**

We have been accustomed to conceive of contractual freedom and of fairness in exchange as two entirely opposite principles. The nineteenth-century developments toward a positivistic doctrine of law, briefly referred to in the introduction, played an important role in shaping that modern view. Will theorists of contract in the nineteenth century referred to the will as the central element of contract precisely to reject moral notions of justice or morality. According to Justice Joseph Story’s famous adage, “whether bargains are wise and discreet, or profitable or unprofitable, are considerations, not for courts of justice, but for the party himself to deliberate upon.”<sup>50</sup> They wanted parties to stick to their contracts, regardless of how unfair and unbalanced the bargains turned out to be.<sup>51</sup> A will theorist such as Sir Frederick Pollock (1845–1937) associated the notion of justice in exchange with a return to the natural law paradigm of contract which had certainly prevailed in the past but which he did not recommend for modern industrial society.<sup>52</sup> His admonishment that ethical considerations should remain “outside the province of jurisprudence” recalls John Austin’s plea for the separation of law and morality in *The Province of Jurisprudence Determined* to which we referred earlier.

In Christian contract doctrine, however, the opposition between freedom and fairness is a false one. The reason lies in a proper understanding of the notion of autonomy of the will. In the eyes of the canonists and the theologians, contracts

48 For further exploration of this topic, see Wim Decock, “Law, Religion and Debt Relief: Balancing Above the ‘Abyss of Despair’ in Early Modern Canon Law and Theology,” *American Journal of Legal History*, 57 (2017): 125–141.

49 Decock, “Law, Religion and Debt Relief”, 134–136.

50 See Decock, *Theologians and Contract Law*, 507 (citing Justice Joseph Story).

51 Michael Lobban, “Contract.” in *The Oxford History of the Laws of England*, vol. 12: 1820–1914: *Private Law* (Oxford: Oxford University Press, 2010), 297.

52 Gordley, *The Philosophical Origins of Modern Contract Doctrine*, 216.

were tantamount to private laws which the parties created and imposed upon themselves. In creating those private laws, they exercised “auto-nomy” in the etymological sense of the word.<sup>53</sup> The metaphor of contracts as laws privately imposed by contracting parties upon themselves has a long history that reaches back to Roman law.<sup>54</sup> It gained enormous significance in the early modern scholastic period. “A promise is a private law which the promisor imposes upon himself and through which he binds himself,” Lugo explained.<sup>55</sup> At the same time, Lugo and his colleagues were unanimous to acknowledge that the universe of laws from which individuals derived rights and incurred obligations was wider than the laws they issued themselves. That universe of laws also contained binding norms promulgated by civil government, by ecclesiastical authorities, by the voice of God as revealed in the Bible, or by dictates of nature. Between these laws, a clear hierarchy existed which, in the theologians’ eyes, indisputably followed from the social nature of man and his relation to God. The latter assumption, indebted to Aristotelian philosophy as much as to Biblical anthropology, is crucial to understand the unproblematic co-existence of the emphasis on fair bargaining and freedom of contract in Christian contract doctrine of the Middle Ages and the early modern period. This still holds true for natural lawyers such as Hugo Grotius, who thought that man was subject to the natural law principle of justice in exchange because God created man with a rational and social nature.<sup>56</sup> It is that assumption, however, which the nineteenth-century will theorists abandoned. Niklas Luhmann (1927–1998), a German sociologist of law, inferred from this observation that modern contract law has become incompatible with Christian contract law of the pre-modern era.<sup>57</sup>

A good illustration of the unproblematic co-existence of principles of contractual freedom and fairness in exchange in Christian contract doctrine can be found in Oñate’s work. While praising the fact that canon law and theology had restored freedom to the contracting parties by elevating their wills to the guiding principle of contract law, he also recalled the moral embeddedness of bargaining:

Natural law ordered that natural equity be observed in contracts. It prescribed, not only that you should not do unto others what you would not have them do unto you, but also that equilibrium be observed between the objects of these exchanges, as is required by commutative justice.<sup>58</sup>

Every single word in this passage would deserve a detailed commentary, but suffice it here to say a couple of words about the notion of “equilibrium” or

53 The word “autonomy” combines the Greek words for “self” (autos) and “law” (nomos).

54 Paul J. du Plessis, “The Roman Concept of ‘Lex contractus’,” *Roman Legal Tradition*, 3 (2006): 69–94.

55 See Decock, *Theologians and Contract Law*, 178 (citing Lugo).

56 Gordley, *The Philosophical Origins of Modern Contract Doctrine*, 123.

57 Decock, *Theologians and Contract Law*, 507.

58 See Decock, *Theologians and Contract Law*, 512 (citing Oñate).

“equality” in contracts.<sup>59</sup> Christian contract doctrine puts a lot of emphasis not only on the Golden Rule (Mt 7:12), but also on the notion that contracts should be balanced, that bargains should be fair, and that there should be an even relationship between what is given and what is received in a transaction. As Joel Kaye, a medieval historian, has rightly observed, writers in the scholastic tradition “universally identified the process of economic exchange as a process of equalization, which, is to say, a process of achieving a just balance between exchangers.”<sup>60</sup> Contracts were conceived of as instruments to advance the interests or “utility” of all parties involved, which meant that bargains must be equalized if they suffer from gross disparity or one-sidedness.<sup>61</sup>

The idea of equalization was articulated through Aristotle’s doctrine of justice in exchange and the concomitant notions, developed particularly by scholastics such as Thomas Aquinas, of just pricing and restitution.<sup>62</sup> Within the context of this chapter, it is not possible to go into the details of the theory of just pricing. Nevertheless, it matters to realize, first of all, that the notion of the “just price” should not be mistaken for some kind of metaphysical value inherent in all objects. It also does not refer to the so-called “labor theory of value,” which holds the just price should reflect the labor which an individual seller suffered to markets his goods. The just price, also designated as the “equal price,” was a price that signaled a balanced or equalized transaction. One of the clearest expressions of the market-friendly nature of the concept of just pricing can be found in a text by Diego de Covarrubias y Leyva, one of the most prominent canonists in sixteenth-century Spain.<sup>63</sup> He explained that reaching a just price did not depend on considering the ontological nature of the merchandise or the expenses which the merchant had incurred. The just price did not consist in one specific price, either, but rather covered a broad range of prices that reflected the merchandise’s utility according to the common estimation in the market – “even if it were insane,” Covarrubias added.<sup>64</sup> If a Flemish merchant incurred more costs than the average businessman on his way to Spanish markets, he could only charge the common estimation of his goods in the local market. Alternatively, if a merchant noticed that his good sold much dearer in another place, or that his expenses were lower than that of his rivals, he was allowed to speculate on that information and make profits.<sup>65</sup> Covarrubias and other scholastics conceived of

59 For a more extended treatment of fairness in exchange, containing references to further literature, see Decock, *Theologians and Contract Law*, 507–604.

60 Joel Kaye, *A History of Balance, 1250–1375: The Emergence of a New Model of Equilibrium and Its Impact on Thought* (Cambridge: Cambridge University Press, 2014), 20.

61 Decock, *Theologians and Contract Law*, 509–510.

62 James Gordley, “Equality in Exchange,” *California Law Review*, 69 (1981): 1587–1656.

63 Richard H. Helmholz, “Diego de Covarrubias y Leyva,” in *Great Christian Jurists in Spanish History*, eds. Rafael Domingo and Javier Martínez-Torrón (Cambridge: Cambridge University Press, 2018), 174–190.

64 See Decock, *Theologians and Contract Law*, 521 (citing Covarrubias).

65 See the famous case of the “Merchant of Rhodes”, discussed in Decock, “Lessius and the Breakdown of the Scholastic Paradigm”.



the market as a contest, in which merchants should be allowed to play the market game.<sup>66</sup> This was one of the basic intuitions from which they assessed the morality of bargaining in the marketplace.

A second observation regarding the doctrine of just pricing is that it served practical interests. It provided confessors a concrete criterion to assess the justice of transactions in the marketplace. Once the just price of goods, or rather once the range of balanced bargains had been determined – for the just price allowed for a certain “latitude”<sup>67</sup> – the confessor could decide whether the penitent had committed a violation against the principle of fairness in exchange. Under such circumstances, the penitent would be obliged “to make restitution,” which is tantamount to saying that the contract must be equalized. One of the main tasks of confessors was, indeed, to urge penitents to make restitution of illicit gains, or, more broadly, to undo any violation of the principle of equilibrium in exchange. Following a highly influential passage from a letter of Saint Augustine, the act of restitution was considered a prerequisite for the remission of sin. It found its way into the canonical tradition and became the background theory for all theologians’ engagement with the morality of the market.<sup>68</sup> Not making restitution of ill-gotten gains was considered as theft, thus constituting a violation of the Decalogue. Through restitution, violations of property rights were undone, and the equilibrium in between things restored. As the first Roman Catechism (1566) specified, confessors could not absolve the penitent unless restitution was made of the harm caused by him (e.g., by exploiting a dominant position, charging excessive interest, or selling toxic financial products).<sup>69</sup>

As Paolo Astorri has shown, Protestant theologians preserved the idea that contracts must meet the requirements of justice in exchange and make restitution to equalize unbalanced agreements. The doctrine of restitution nevertheless lost part of its practical significance for them.<sup>70</sup> Even more so than concentrating on justice in exchange, they insisted that all contracts should be permeated by the spirit of charity. The precept of equality in exchange was regarded as a species of the more universal Christian duty to be charitable toward the neighbor. In this regard, Astorri has observed a kind of altruistic shift away from the concern of merchants with gaining their own salvation, by not indulging in unfair bargaining, to the active promotion of the other contracting party’s interest.<sup>71</sup>

66 Decock, *Theologians and Contract Law*, 592–594.

67 Leonardus Lessius, *On Sale, Securities and Insurance*, trans. W. Decock (introd.) and trans. N. De Sutter in *Sources in Early Modern Economics, Ethics, and Law* (Grand Rapids, MI: CLP Academic, 2016), 10, 17.

68 Decock, *Theologians and Contract Law*, 516–517.

69 Decock, “Confessors as Law Enforcers in Mercado’s Advice on Economic Governance (1571),” 108.

70 This is to do with the Lutheran doctrine of justification by faith. The Lutherans did no longer accept the Catholic doctrine that salvation can be obtained through works (including restitution) imposed upon the penitent by the confessor; see Astorri, *Lutheran Theology and Contract Law* (ca. 1520–1720), 249–252.

71 Astorri, *Lutheran Theology and Contract Law* (ca. 1520–1720), 309–311.

Clearly, in the work of the Lutheran theologians, Christian contract doctrine became less minimalistic than in the work of the Catholic moral theologians. Christians were now stimulated to show gratitude for the salvation received by God by virtue of faith alone through caring for the interests of their contracting parties. In respecting the principle of commutative justice, Christians performed an act of charity toward their neighbor, which they owed because of their duty of obedience to God.

### **Contractual freedom and the morality of the marketplace**

The development of a substantial, Christian doctrine of contract was not the fruit of a mere academic interest that theologians and canonists took in the subject. Rather than defining themselves as theoreticians, they were engaged in the practical business of solving cases of conscience, especially in the marketplace. Contemporary jurists often referred to Catholic theologians as the best experts on the technicalities of financial contracts, since they were known to engage in conversations with men of practice on a daily basis. Empirical evidence or “experience” was a normative argument frequently used by Molina, Lessius, and Lugo, for instance in discussing the nature of interest as a price for money.<sup>72</sup> On account of their analytical skills in understanding the functioning of markets, which preceded their normative judgments, Joseph Schumpeter (1883–1950) has credited them with the title of “forefathers of modern economic science.”<sup>73</sup> The academic attention traditionally given to the scholastic usury doctrine has obscured the fact that theologians and canonists discussed many other types of contracts than money-lending in the strict sense of the word. In reality, discussions about bonds, annuities, credit sales, foreign exchange transactions, corporate financing, and investment vehicles received much more attention. If anything, as Joel Kaye observed, “the early solidification of the Church’s condemnation of usury had the effect of forcing scholastic moralists, legal scholars, and theologians to become expert in the ways of the marketplace.”<sup>74</sup>

To illustrate the close connection between the turn toward a principle of contractual freedom and the practical solution of cases of conscience in the early modern marketplace, the next paragraphs will offer a brief sketch of how Catholic theologians assessed the legitimacy of a new investment vehicle and corporate financing technique that was widespread in sixteenth-century Europe and the

72 Toon Van Houdt, “Money, Time and Labor. Leonardus Lessius and the Ethics of Lending and Interest Taking,” *Ethical Perspectives*, 2 (1995): 11–27; Wim Decock, “Leonardus Lessius y el valor normativo de ‘usus et consuetudo mercatorum’ para la resolución de algunos casos de conciencia en torno de la compra de papeles de comercio,” in *Entre hecho y derecho: tener, poseer, usar en perspectiva histórica*, eds. Marta Madero and Emanuele Conte (Buenos Aires: Manantial, 2010), 75–94.

73 Joseph A. Schumpeter, *History of Economic Analysis* (New York: Oxford University Press, 1954), 111.

74 Kaye, *A History of Balance*, 22.

Americas: the so-called “triple contract.”<sup>75</sup> The “triple contract” was an intellectual construct to capture the following practice: merchants borrowed money from investors for the sake of a business venture and promised those investors that they would return the invested money at the end of the project while also paying dividends on an annual basis. Clearly, this was an alternative way of lending money at interest to businessmen. To capture the practice in legal terms, it was analyzed as a combination of three contracts, viz. a partnership contract (because both parties confer something for the purpose of setting up a common venture), an insurance contract (because the merchant promises the investor to return the capital at the end of the venture), and a sales contract (because the merchant promises to pay a fixed annual price to the investor – the dividend – in exchange for the right to reap the remainder of the profits generated by the common venture). As John T. Noonan has noted, discussions about this contract are much more important to understand the Christian approach to the market in the sixteenth century than standard debates about interest titles in loans or the usury prohibition.<sup>76</sup>

A key step in justifying the practice of “triple contracts” was the breakthrough of freedom of contract. Traditionalists, on both the Catholic and the Protestant side,<sup>77</sup> opposed the practice since they considered the simultaneous conclusion of those three contracts between the capital investor and the entrepreneur as illicit. This objection did no longer convince Christians such as John Eck (1486–1543), the arch-enemy of Luther and a personal advisor to the Fugger banking family, and Lessius, a Jesuit theologian and the principal confessor to merchants in the Antwerp market. They argued that, from the point of view of the virtue of justice in exchange, it did not matter with whom the contract was concluded. One could enter into any contract with the partner of one’s choice as long as there was voluntary consensus. Once freedom becomes the starting point of contract law, it becomes futile to maintain that the investor can conclude an insurance contract only with a third party and not with his business partner. Moreover, freedom of contract frustrated the “essentialist” analysis of partnership contracts as necessarily including exposure to risk for both partners. This static view of partnership contracts was outdated, according to Eck and Lessius. They argued, instead, that the essential feature of a partnership contract was that two or more parties agreed to confer something for the sake of a common enterprise. Once that condition was met, the distribution of risk could be the object of free bargaining. Moreover, everybody was free not to enter into a partnership

75 The following paragraphs are largely borrowed from the Calihan lecture “Knowing before Judging: Law and Economic Analysis in Early Modern Jesuit Ethics,” delivered in Rome on November 29, 2017 and published in the *Journal of Markets and Morality*, 21 (2018): 309–330.

76 Noonan, *The Scholastic Analysis of Usury*, 249.

77 W. Decock, “The Catholic Spirit of Capitalism? Contrasting Views on Profit-Making through Capital Investment in the Age of Reformations,” in *Law and Religion: The Legal Teachings of the Protestant and Catholic Reformations*, eds. Wim Decock, Jordan Ballor, Michael Germann, and Laurent Waelkens (Göttingen: Vandenhoeck & Ruprecht, 2014), 22–44.

contract without also entering into an insurance contract. The capital guarantee, too, was a matter of free individuals concluding an additional insurance contract by their mutual consent. As long as the fund provider paid the merchant a just price for that insurance service, contractual freedom did not lead to a violation of the principle of commutative justice.

### Conclusion

It is natural to take the law of one's own time and country as a norm, and, hence, to consider it as "normal."<sup>78</sup> As this chapter has tried to show, however, if carried to excess, this tendency leads to an impoverished understanding of the historical roots of Western contract law. To assess the morality of the marketplace, Christian theologians and lawyers in the Middle Ages and the early modern period were brought to bear their knowledge of virtue ethics and the Bible on commercial transactions and contract law. As a result, over a period of more than five centuries, a detailed, Christian doctrine of contracts was developed in commentaries on canon law texts and in voluminous works *On Justice and Right*, *On Contracts*, *On Restitution*, etc. Imbued with the credo of nineteenth-century legal positivism, a modern lawyer might not expect to find such an elaborate treatment of both general contract law and specific contracts in the writings of theologians and jurists belonging to the Church. It may even come as a bigger surprise that their thought, influenced as it was by Aristotelian moral philosophy and evangelical principles, evolved toward a contract theory centered around the notions of freedom, autonomy, and the individual will. For several reasons, this past engagement with contract doctrine may resemble a foreign country where people did things differently, as the British novelist Leslie Poles Hartley famously said. However, reading the scholastics' expositions on promissory morality or observing their sensitivity to economic issues, a modern audience may be prompted to agree with William Faulkner that "the past is not dead, it is not even past." Christian contract doctrine as developed from the twelfth through the seventeenth century showed a remarkable ability to accommodate the rise of individual autonomy and the entrepreneurial spirit. Moreover, within a Christian universe, where man was essentially thought of as a social and religious being, it did not consider those values as incompatible with the principles of fair bargaining and evangelical charity.

<sup>78</sup> Decock, *Theologians and Contract Law*, 86.