

# Contracts II

Spring 2023

*LAW 103 (003)*  
*Monday-Wednesday, 9:50 –11:15 am*

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Contracts II is the second part of a two-part course, following Contracts I in the prior Fall Term. The two courses are separate, with different exams and different subject matters.

The casebook is Robert E. Scott and Jody S. Kraus, *Contract Law and Theory* (5<sup>th</sup> ed.), as well as the statutory supplement from first term. If I thought it helpful, I'd assign a treatise. I don't and I won't. On occasion I'll refer you to an article you might read. Apart from that, the assiduous student can easily find further readings on the web, and at times I'll assume that you've done that. I'll also assume that you've been taught how to access periodical literature off Lexis and (from the GMU Library web site) JSTOR and HeinOnline.

## ***Administrative Matters***

The class will be an extended conversation about a fundamental institution of private ordering. For the most part, the problems we'll encounter can be answered by the application of common sense—a proposition I'll test by asking you to think about the contours of contract law before and during class. Each student is expected to be prepared for every class, and to be ready, willing and able to answer any questions regarding the assigned reading material. Occasionally you'll encounter unfamiliar legal terms in your

readings, and when this happens you are responsible for looking them up in a legal dictionary such as Blacks (which is available on Lexis and Westlaw).

When you speak in class, address yourself to the entire class. If you're in the front row and whisper, people at the back won't hear you. Neither will I, for that matter. You are aspiring members of a profession whose members must speak out, if they are to be successful. We aren't meant to be potted plants.

In the Syllabus I provide the readings in segments of two classes at a time. Because we begin on a Wednesday, that's not on a week-by-week basis.

Once each year a student tells me he's erased a file—which is why I recommend saving files on the cloud, through programs such as Dropbox.

I use PowerPoint, and will post my slides on my web site after each class. You'll find them at my (discontinued) blog at <http://buckleymix.com> (“blog”), under “Contracts II.” These may be downloaded and saved by you, but not shared with anyone outside of this class.

PowerPoint has its pluses and minuses. It's useful to highlight a point, and invaluable when illustrating a technical issue in economics. That said, it can lull students into a state of passivity. Don't let that happen. For my part I'll try to avoid that by calling on you to answer questions. For your part, you should want to discuss ideas and cases in class. It's the only way to learn.

You are not permitted to tape our classes or record them by any electronic means.

I don't know whether office visits will be permitted this spring. If they are, my office is on the 4th Floor, and my phone number is 703-993-8028. Unless a matter requires immediate personal attention, I encourage you to contact me at [fbuckley@gmu.edu](mailto:fbuckley@gmu.edu). If you anticipate that you will be stopping by my office, please drop me an email or let me know after class that you will be coming. If my door is open and I'm not on the phone, feel free to drop in.

### ***Grading and Exam***

The Final Exam will be on Thursday, April 27 at noon. Your grade in the class will be based on the final exam. I reserve the right to increase (but not decrease) a student's grade by one mark (e.g., B+ to A-) on the basis of exemplary class participation, and on average have done so for 10-15 per cent of the students.

### ***First Assignment***

The assignment for the first class is the readings for Class 1 below.

# Reading Assignments

## Contracts II (Spring 2023)

Classes (two at a time)	Questions	Assignments
1 A:97	<p><b><i>Exam Review</i></b></p> <p><b><i>Common Law Illegality</i></b></p> <p>Contracts might be void either for illegality as a matter of common law (“common law illegality”) or statute (“statutory illegality”). But when should a contract, freely entered into by parties of full capacity, and mutually beneficial, be held to be unenforceable?</p> <p>Explain the <i>in pari delicto</i> and the <i>ex turpi causa</i> maxims.</p> <p>Should every contract that violates a statute be unenforceable?</p> <p>Should a state seek to shape the moral character of its citizens? Note that those who think that it should are called perfectionists, while those who think not are called neutralists.</p>	<p>Printing and Numerical Reg. Co. v. Sampson, at blog</p> <p>John Stuart Mill, at blog</p> <p>Scott 480-487</p> <p>Virginia Code, at blog</p> <p>Rest. §§ 178-79, 192-96, 189, 190 (illustrations 3 and 5)</p> <p>Revised UCC § 1-103(b)</p> <p>Rest. §§ 179, 181 (illustrations 1-4),</p> <p>Scott 487-500</p> <p>Humane Society, Animal Fighting at <a href="https://www.humanesociety.org/all-our-fights/ending-animal-fighting">https://www.humanesociety.org/all-our-fights/ending-animal-fighting</a></p>

	<p>What reasons can you give for refusing to enforce a contract, from an economic perspective? Are there other, non-economic reasons why a contract should be unenforceable?</p>	<p>Externalities, at <a href="http://www.econlib.org/library/Enc/Externalities.html">http://www.econlib.org/library/Enc/Externalities.html</a></p> <p>Social Capital, at <a href="https://www.investopedia.com/terms/s/socialcapital.asp">https://www.investopedia.com/terms/s/socialcapital.asp</a></p> <p>Slippery Slopes, at <a href="http://en.wikipedia.org/wiki/Slippery_slope">http://en.wikipedia.org/wiki/Slippery_slope</a></p>
<p>2: B:167</p>	<p><b><i>Capacity</i></b></p> <p>What are the assumptions behind the claim that contracts entail Paretian improvements?</p> <p>A contract is not enforceable if one of the parties lacked capacity to enter into it (“paternalism”). How broad should the capacity barrier be? Could you improve on age-related standards of capacity for minors? Are merchants adequately protected against the defense of incapacity, and who pays if they are not?</p> <p>Is there a stronger argument for merchant protection when the defense of lack of capacity is raised with respect to the mentally incapable?</p>	<p>Rational Choice, at blog</p> <p>Kaldor-Hicks Efficiency, at <a href="http://en.wikipedia.org/wiki/Kaldor%E2%80%93Hicks_efficiency">http://en.wikipedia.org/wiki/Kaldor%E2%80%93Hicks_efficiency</a></p> <p><u>Children</u></p> <p>Scott 464-73</p> <p>Rest. §§ 12-14</p> <p><u>The Mentally Incapable</u></p> <p>Scott 473-80, 14-18</p> <p>Rest. §§ 15-16</p>

	<p>Should the definition of incapacity be broadened, to take account of new studies in behavioral law-and-economics?</p> <p>Akrasia (weakness of the will)</p>	<p><u>Cognitive Paternalism</u></p> <p>Self-serving bias, at <a href="https://www.psychologytoday.com/us/blog/in-practice/201301/the-self-serving-bias-definition-research-and-antidotes">https://www.psychologytoday.com/us/blog/in-practice/201301/the-self-serving-bias-definition-research-and-antidotes</a></p> <p>Hindsight bias, at <a href="http://www.youtube.com/watch?v=MW_w5CO0-fI">http://www.youtube.com/watch?v=MW_w5CO0-fI</a></p> <p>Gerg Gigerenzer, at <a href="http://www.youtube.com/watch?v=DdEEwoKkfMA">http://www.youtube.com/watch?v=DdEEwoKkfMA</a> (up to minute 10.08)</p> <p>Resisting Temptation, at <a href="http://www.youtube.com/watch?v=G7LN96jEXHc">http://www.youtube.com/watch?v=G7LN96jEXHc</a></p> <p>The Divided Self: St Augustine, Confessions, at blog</p> <p>Rational Addiction, at <a href="http://en.wikipedia.org/wiki/Rational_addiction">http://en.wikipedia.org/wiki/Rational_addiction</a></p> <p>Baby M, Scott 487-99</p> <p><u>Self-binding</u></p> <p>Ulysses and the Sirens, The Odyssey XII, paragraphs 5, 13-16, at blog</p>
<p>3: C:125</p>	<p><b><i>Fraud</i></b></p> <p>What constitutes a representation? When should a promisee be responsible for his own excessive reliance? What is a “mere puff”? What is the parol evidence rule? Can the parties bargain around liability for fraud?</p> <p>When should silence be a defense and when is an omission to speak actionable as</p>	<p>Scott 420-48</p> <p>Rest. §§ 159, 162-64, 167-73, 211</p> <p>UCC § 2-316</p> <p>Scott 438-64</p> <p>Rest. §§ 160-61</p>

	fraud?	<p>Cicero, Offices, at blog</p> <p>Aquinas, Summa, at blog</p>
4: D:75  E:66	<p><b><i>Statute of Frauds</i></b></p> <p>What purpose does the Statute serve? What constitutes a note or memorandum in writing? What is part performance?</p> <p><b><i>Duress</i></b></p> <p>When is duress actionable, in the absence of physical force? Can a defense of duress be asserted against one who merely threatens to do that which he otherwise has a right to do?</p> <p>Can you explain why the admiralty rule as to rescues at sea might make economic sense?</p> <p>Are there some callings that should be subject to price controls and regulation because they lend themselves to duress? Can you think of some unregulated industries that should properly be considered natural monopolies in need of</p>	<p>Scott 514-33</p> <p>Rest. §§ 110-12, 124, 125, 129-132, 134, 136, 139, 90, 145</p> <p>Rest. §§ 124 (illustrations 1 and 5, comments a-d), 129 (comment a, illustrations 1-3), 130 (comment a), 131 (illustration 2), 134 (illustrations 1, 3)</p> <p>UCC §§ 2-201, 1-201(37) Scott 403-17, 380-89</p> <p>Rest. §§ 174-77, 73, 89</p> <p>The Highwaymen, at <a href="https://www.youtube.com/watch?v=UDPgJ8g91ek">https://www.youtube.com/watch?v=UDPgJ8g91ek</a></p> <p>The Highwayman, at <a href="https://www.youtube.com/watch?v=aFkcAH-m9W0">https://www.youtube.com/watch?v=aFkcAH-m9W0</a></p> <p>Scott 417-20</p> <p>Hale, de Portibus Maris, at blog</p> <p>Natural Monopoly, at <a href="https://en.wikipedia.org/wiki/Natural_monopoly">https://en.wikipedia.org/wiki/Natural_monopoly</a></p>

	regulation?	
5: F:88	<p><b><i>Unconscionability</i></b></p> <p>What do you think of Peter Birks’ claim that unconscionability is to lawyers as “small brown birds” are to ornithologists?</p> <p>Can signaling theories explain why parties might enter into what seem as one-sided bargains? Can courts do anything intelligently to police one-sided bargains?</p> <p>Are fairness constraints deep-wired in all of us, and if so does that have implications for common law rules?</p>	<p>Scott 52-65, 501-14</p> <p>Lloyds Bank v. Bundy, at blog</p> <p>Rest. §§ 205-08, 206 (comment a)</p> <p>UCC § 2-302</p> <p>Moral hazard, at blog</p> <p>Signaling, at blog</p> <p>Dictator game, at <a href="http://en.wikipedia.org/wiki/Dictator_game">http://en.wikipedia.org/wiki/Dictator_game</a></p> <p>Background reading: Kahneman, Knetsch and Thaler, Fairness as a Constraint on Profit Seeking: Entitlements in the Market, 76 Am. Econ. Rev. 728 (1986)</p>
G:79	<p><b><i>Terms</i></b></p> <p>How does one distinguish a collateral contract from an integrated agreement?</p> <p>Under Traynor’s interpretation of integration, can the parties opt into the parol evidence rule? Under Burke’s interpretation, can one opt out of the parol</p>	<p><u>Collateral Contracts</u></p> <p>Scott 537-46</p> <p><u>Integration</u></p> <p>Scott 546-52</p> <p>Rest. §§ 209-17</p>



	evidence rule? Do the parties have a sufficient incentive to memorialize their agreement in a writing? What is the difference between an integrated and an unintegrated agreement? Between complete and partial integration?	
6: G:79-106	<p><b><i>Terms (cont.)</i></b></p> <p>Can the parties, through a merger clause, bargain around the threshold question of whether a contract is completely integrated? Does “fraud corrupt all”?</p> <p>How do the Restatement and the UCC differ on these questions?</p>	<p><u>Merger Clauses</u></p> <p>Scott 553-61</p> <p>Rest. § 216 cmt. e, § 209, cmts. a-c.</p>
H:107	<p><b><i>Interpretation</i></b></p> <p>In interpreting a contract (or a poem), should one seek to capture the writer’s intention or merely look at the text? Are bright-line legal rules to be preferred to vague legal standards in contract law? When does it make most (least) sense to admit oral evidence as to the intention of the parties? When might a court look to trade usage in interpreting a contract?</p>	<p><u>The UCC Parole Evidence Rule</u></p> <p>Scott 561-68</p> <p>UCC §§ 2-202, 2-316</p> <p>Scott 568-93</p> <p>Rest. §§ 200-04, 219-23</p> <p>Scott 593-609, 401-03 (rules vs. standards)</p> <p>UCC §§ Revised 1-303, 2-202, 2-208</p>
7: I:154	<p><b><i>Conditions</i></b></p> <p>Some “conditions” are promises and some not. What’s the</p>	<p>Scott 74-84</p>

	<p>difference and how does one tell them apart? Can these distinctions be understood as an attempt to provide the default rules that the parties would have specified had they put their minds to it? When is a contract severable, where one condition fails?</p> <p>Of conditions that are not promises, how can one tell the difference between conditions precedent and subsequent?</p> <p>What are the differences between modification, estoppel and waiver?</p>	<p>Restatement §§ 152(1), 154, 261</p> <p>UCC §§ 2-507(1), 2-511(1)</p> <p><u>Implied Conditions</u></p> <p>Scott 613-24 (exclude Bell v. Elder)</p> <p>Rest. §§ 224-27, 230, 234, 237-38, 240</p> <p>UCC §§ 2-307, 2-612</p> <p><u>Express Conditions</u></p> <p>Scott 624-32, 634-36 (exclude Gray v. Gardner)</p> <p><u>Modification, Estoppel, Waiver</u></p> <p>Scott 636-49</p> <p>UCC §§ 2-209, Revised 1-306</p>
<p>8: J:166</p>	<p><b><i>Warranties</i></b></p> <p>What is expected monetary value? Do you always accept a bet with the highest expected monetary value; and if not, why not? What is the “insurance idea” in tort law? As between a manufacturer/seller and a consumer, how many different reasons can you think of for placing the risk of loss on the manufacturer/seller?</p> <p>What is “merchantability” and “fitness”? What is an “as is” clause?</p>	<p>Expected Monetary Value, at <a href="http://www.dummies.com/how-to/content/how-to-calculate-expected-monetary-value-emv.html">http://www.dummies.com/how-to/content/how-to-calculate-expected-monetary-value-emv.html</a></p> <p>Pascal, The Wager, at blog</p> <p>Risk Neutral, at <a href="http://en.wikipedia.org/wiki/Risk_neutral">http://en.wikipedia.org/wiki/Risk_neutral</a></p> <p>Scott 775-78</p> <p><u>Express and Implied Warranties</u></p> <p>Scott 649-69</p> <p>UCC §§ 2-314 – 2-316, 2-501, 2-504</p>

	<p>What is the perfect tender rule? What are Cardozo’s “dependent” and “independent” promises, and how do they compare to the different kinds of conditions we saw? Do you think that, had the parties specified their remedies in <i>Jacob &amp; Youngs v. Kent</i>, they would have arrived at Cardozo’s result? Or did Cardozo rewrite their bargain?</p> <p><b><i>Acceptance, Waiver, Cure</i></b></p> <p>How is the UCC’s perfect tender rule modified by its rules about acceptance and cure? Might cure rights at times be asserted opportunistically?</p>	<p><u>Substantial Performance vs. Perfect Tender</u></p> <p>Scott 66-74, 669-87</p> <p>UCC §§ 2-601</p> <p>Rest. §§ 237, 241-42, 227</p> <p>Signaling, at blog</p> <p>Adverse selection, at <a href="http://en.wikipedia.org/wiki/Adverse_selection">http://en.wikipedia.org/wiki/Adverse_selection</a></p> <p>Just for fun: The Reading Pipe flyer, at <a href="https://archive.org/stream/ReadingPipeGenuineWroughtIronKnurledForInstantAndPositive/ReadingPipe#page/n0/mode/2up">https://archive.org/stream/ReadingPipeGenuineWroughtIronKnurledForInstantAndPositive/ReadingPipe#page/n0/mode/2up</a></p> <p>UCC §§ 2-106, 2-503, 2-507, 2-508, 2-601, 2-602, 2-606-08, 2-703, 2-705, 2-708, 2-709, 2-711-715</p>
<p>9: K:109</p>	<p><b><i>Mistake</i></b></p> <p>Were they to put their minds to it, what events would the parties specify in their bargain as ones that would bring their obligations to an end? When, by contrast, would they assign the risk of an event to one of the parties? Can the parties contract around the doctrine of mistake? What is the difference between unilateral and mutual mistake, and why should it matter? When should clerical mistakes</p>	<p>Force Majeure clauses (example 1 only), at <a href="http://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/force-majeure-checklist/sample-clauses">http://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/force-majeure-checklist/sample-clauses</a></p> <p>Scott 691-727</p> <p>Restatement § 20, illustration 1-3</p> <p>Restatement §§ 151-4, 157</p>

	<p>absolve a party?</p> <p><b><i>Impossibility and Impracticability</i></b></p> <p>What is the difference between mistake (on the one hand) and impossibility and impracticability (on the other)?  What is the difference between impossibility and impracticability?</p>	<p>UCC §§ 2-613-615, 2-107, 2-501</p> <p>Scott 84-94</p>
<p>10: L:109</p> <p>M:43</p>	<p><b><i>Impossibility and Impracticability (cont.)</i></b></p> <p>Should there be an expanded doctrine of impracticability to deal with large price fluctuations?</p> <p><b><i>Frustration</i></b></p> <p>Can you tell when to apply the doctrine of frustration and when the “work before pay” rule?  How would you account for the common purpose requirement?</p>	<p>Scott 84-94, 727-59</p> <p>Restatement §§ 261-66, 152-53, 224, 230</p> <p>Scott 759-72</p> <p>Just for fun: Coronation of Edward VII, at <a href="https://www.youtube.com/watch?v=rVNFeQe4Nhk">https://www.youtube.com/watch?v=rVNFeQe4Nhk</a></p>
<p>11: N:70</p>	<p><b><i>Anticipatory Breach</i></b></p> <p>Were bargaining costless, would the parties want to specify what remedies are available on breach? If the court knew what they would choose, should that inform its decision about remedies? When there is</p>	<p>Scott 778-97</p> <p>Rest. §§ 237, 241, 250-57, 350</p> <p>UCC §§ 2-507, 2-511, 2-609-611, 2-702</p>

<p>O:93</p>	<p>a breach, what rule would the parties want to adopt—one that gave the breaching party an incentive to minimize damages or one that did not do so in order to punish him for the breach? If the goal is cost reduction, how would the party in breach be incentivized to minimize costs?</p> <p><b><i>The Contractual Measure of Damages</i></b></p> <p>What is the goal of a damages award? When is it appropriate to award reliance or restitutionary relief as opposed to expectation damages? Should the choice rest with the innocent party?</p>	<p>Scott 94-103, 841-46</p> <p>Rest. §§ 344-53</p>
<p>12: P:50</p> <p>P:52</p>	<p><b>Efficient Breach</b></p> <p>What is the efficient breach doctrine? What assumptions are made by the efficient breach theory and is there an efficient breach “fallacy”? Should a court award diminution of value damages when this is less than the cost of repair?</p> <p><b><i>Specific Performance</i></b></p> <p>When would the parties bargain for specific performance? In what sense is specific performance a discretionary remedy? What makes goods “unique”? In what sense does the question whether to award specific performance resemble problems we saw in Jacob and</p>	<p>Scott 103-08, 846-56</p> <p>Scott 108-15, 857-65</p> <p>Rest. §§ 345, 357-67</p> <p>UCC §§ 2-709, 2-716, 2-501</p>

<p>Q:1-92</p>	<p>Youngs v. Kent and Peevyhouse? Could a court order specific performance of a personal services contract?</p> <p><b>Reliance, Restitution</b></p> <p>When might reliance and restitutionary claims succeed when they would the expectation measure?</p>	<p>Scott 865-96</p> <p>Rest. §§ 347, 349, 370-71, 373-77, 353, 355</p>
<p>13</p> <p>R; 44</p> <p>S:81</p>	<p><b>Punitive Damages, Lost Volume Sellers</b></p> <p>Would efficient contract remedies seek to deter wasteful conduct?</p> <p><b>Emotional Distress</b></p> <p>What is the difference between exogenous and endogenous factors?</p> <p><b>Uncertainty, Foreseeability, Mitigation, Penalty Clauses</b></p>	<p>Scott 896-907</p> <p>UCC 2-706, 2-708, 2-710</p> <p>Scott 927-28</p> <p>Rest. § 353</p> <p>Scott 96-99, 915-20, 115-24, 921-47</p> <p>Rest. § 352, 350, 351, 356</p> <p>UCC § 2-704, 2-718</p>