

A Compelling Case for a General Theory of Contracts

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Robin Kar, [*Contract as Empowerment*](#), 83 **U. Chi. L. Rev.** 759 (2016).

Contract in the common law lacks a unifying theory. In this article, Robin Kar offers an intriguing descriptive and normative theory of “contract as empowerment” to explain and harmonize the relationships of core contract doctrines such as consideration, the expectancy damage default rule, and fairness rules such as unconscionability. The result is a highly coherent, aesthetically pleasing, and jurisprudentially compelling account of contract that sets the stage for what promises to be an important scholarly project.

Typically, I read articles propounding new general theories of contract with a jaundiced eye. Contract law has long resisted a true general theory because the body of what Kar refers to as “true contract”—e.g., excluding other theories of obligation such as promissory estoppel and restitution—suffers from a schizophrenia that extolls private autonomy on the one hand while demanding deference to communitarian interests on the other. Many scholars have attempted to justify the institution of contract law on the basis of economics, the morality of promising, reliance, fairness, autonomy, consent, and a host of other contenders for the Sauronian theory that rules all contract doctrines. But each attempt fails to establish a general theory that harmonizes contract because contract doctrines appear to serve so many different and incompatible goals. Thus, theories of contract that work well for some aspects of contract crash in heaping wrecks upon the shoals of others that serve countervailing goals.

Kar begins with the descriptive (and later normative) proposition that the common law of contract “should be set up to empower people to use promises as tools to induce others to action and thereby meet a broad range of human needs and interests.” From this point, contracts become legal obligations because the promisor uses the promise as a tool to induce the promisee to act in a manner sought by the promisor and to achieve the promisor’s ends. Where the promisor’s ability to induce the promisee to action depends upon the promisee having the legal ability to enforce that promise, the promisor must accede to the legitimacy of the promisee actually using that enforcement capability in the event of promisor breach. Thus, by providing parties with the capability to make promises that are legitimate, legally enforceable obligations, contract law generally empowers those parties to use promises to satisfy their personal needs and desires.

The harmonizing power of this basic theory is best illustrated by Kar’s examination of the default expectancy remedy. Here, Kar focuses upon the degree of control that expectancy damages provide to promisors in determining the amount of inducement they want to assert over the promisee. In contrast to Lon Fuller’s and William Perdue’s famous argument that expectancy damages are justified because they serve as a rough proxy for the actual costs incurred by non-breaching parties, L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages (Part I)*, 46 **Yale L.J.** 52, 60 (1936). empowerment theory justifies the expectancy damages default rule on the basis that such damages are measured against the legally enforceable promises that the parties used to induce each other into the contract. Rather than being a mere proxy for reliance damages, expectancy damages are normatively justified by the empowerment theory because they empower the parties to choose exactly the level of inducement to associate with their respective promises at the time of contracting.

Kar's subsequent analyses of empowerment theory with respect to alternative expectancy damages jurisprudence, consideration, interpretation, and fairness doctrines all continue building a careful and thoughtful case that the theory harmonizes the disparate influences of private autonomy and communitarian interests (among others) that riddle common law contract doctrine. At each stage of the argument it becomes steadily more apparent that this is a compelling argument that may answer many of the difficult theoretical issues in contract. But it is Kar's normative case for empowerment theory that makes me excited about future engagements with this project.

Kar's empowerment theory is intriguing in that it justifies contract in contractualist, rather than consequentialist, morality. "Rather than asking which rules produce the best economic consequences without more, it asks whether certain rules, with certain expected consequences are ones that no one could reasonably reject in light of the available alternatives." As Kar later notes, this moral justification of contract as empowerment necessarily acknowledges individuals' economic motivations but also recognizes moral reasons for engaging in promise making. Individuals engaging in contract must, under this theory, treat each other as "moral equals" rather than mere instrumentalities toward achieving economic ends. The result is a satisfyingly humanized model of contract that partakes of economic thought but adds a moral axis upon which to assess contracting behavior.

I truly enjoyed this article. As Kar notes, the purpose of this article is to introduce the theory of contract as empowerment, and the article offers a few hints throughout regarding further investigations Kar plans in this area. I am eagerly looking forward to those later installments.

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