

Contract law and theory

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Contract thus falls in between tort and fiduciary obligation. §2-302 generated an apprehension, including in Gilmore 1974 and Fried 1981, that lawmakers were codifying the relevant public norms and legal morality, at least for consumer contracts and possibly beyond.

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Furthermore, and again in contradistinction to tort obligation, contract obligation is forward-rather than backward-looking; contract concerns realizing promised gains rather than restoring a status quo ante disturbed by a wrong. This has led lawyer-economists to suggest that economic analysis ends at an impasse—neither orthodox contract nor fiduciary revisionism is more efficient than the other. Fiduciary loyalty would forbid this.

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Indeed, orthodox theories observe, tort law proper retains basic principles that demur to encroach directly or generally on contract. §50 These requirements entail that all orthodox contracts contain promises.

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This obligation amounts to a requirement that promisors display greater benevolence for their promisees in respect of unallocated gains within the contract than they were required to display in negotiations concerning these gains without the contract. The duty of good faith in performance, including specifically by resisting altruism and ratifying side-constrained self-interest within the contract relation, insists that all contractual sharing must be fixed ex ante, according to the intentions of the contracting parties.

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