

CONTRACT AS AGREEMENT

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For generations law students have been taught that the law governing the formation of contracts is by and large objective in nature, although it has some subjective elements. It is the appearance of intent that matters most. Yet theories of contract law, whether based upon the rights of the individual as an autonomous actor, the benefits to society of encouraging people to engage in bargained-for transactions, or the justice due those who have relied on the promises and representations of others, are intentional in nature. No one speaks, for example, of the freedom to be bound by something one didn't intend. Bargains imply volition. Acts in reliance come only after an understanding that someone has made a commitment. However contract law is constructed, at the very least one would expect it to take as its point of departure the players' actual psychological states underlying the various theories that motivate it.

This article argues for an approach to contract law whose focus is on the actual agreement of the parties, although it privileges objective evidence of intent. It further argues that that plain language is not in conflict with the intent of the speaker. Rather, it results from a combination of that intent and cognitive structures that speakers of a language share. The result of this shift in focus is much greater descriptive adequacy and greater coherence among contract doctrines. Most significantly, this subjective account of contract formation eliminates anomalies in available remedies, and brings the formation of contracts in harmony with the rules governing contract interpretation.

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