

From Promise to Contract: Towards a Liberal Theory of Contract

Dori Kimel
(Hart Publishing, 2003)

Dori Kimel's objective in this book is to distinguish what he calls 'promise' from what he calls 'contract'. Each has special characteristics which, he claims, make it suitable to special purposes. Promise, above all, rests on trust and is particularly suitable in long term personal relations. A contract, typically, is legally enforceable and is particularly suitable for permitting detachment from personal relationships and making agreements with strangers.

Before looking at this thesis, it is important to understand what Kimel does and does not claim to do. First, he does not claim to define a series of necessary conditions for an arrangement to be called either a promise or a contract. He looks to what he regards as the 'normal conditions and circumstances for promising as opposed both to the necessary conditions and to circumstances in which or purposes for which the practice may be used but which are, in one sense or another, marginal, esoteric, atypical' (7). For example, we would describe a car as a means of transport. 'That some people choose to buy cars and never drive them poses no challenge to a theory that depicts the value of cars as lying, *inter alia*, as a means of transport' (83). Similarly, he claims, one should not object to his theory because some people use what he calls 'promises' and 'contracts' in ways he regards as marginal or atypical.

Second, Kimel does not claim his thesis explains the difference between contract and promise in the law as it is, or how the terms 'promise' and 'contract' have been used by jurists. His thesis 'does not depend for its validity on the existence of incongruity between certain aspects of the law of contract (or the law of contract of any other jurisdiction) and promissory logic — an incongruity that, it should be recognized, could play but an evidentiary and, in any event inconclusive role in this context' (3).

I agree with these two claims about method, although subject to some qualifications as to the second. Nevertheless, even granting these claims, I do not think he establishes his thesis.

The first claim concerning how terms should be defined is as old as Aristotle. Aristotle said, that in examining anything, be it an organism or a political institution, we should identify the ultimate function or purpose which its parts are structured to perform. We should study any object as we would a couch.¹ For Kimel, too, a structure is to be explained in terms of its

¹ Aristotle, *Parts of Animals* I.i 641a. In the *Politics*, he called this 'the

function. If we want to know how a Jeep differs from a car, we must recognize, that while both provide transport,

a Jeep also possess certain characteristics cars do not normally possess, and is capable of fulfilling certain functions which are not normally attributed to and cannot be fulfilled by cars, and that at a price in terms of its proficiency in fulfilling certain functions that cars typically do fulfill (1).

A couch is built so that more than one person can sit on it, although more than one person may, and even though someone might buy it to exhibit it in a museum. Those facts would not bother Aristotle any more than it troubles Kimel that both a Jeep and a car provide transport, or that one might buy a car to exhibit in a museum rather than to drive. And rightly so.

Nor do I question in principle his second methodological claim, that one can have important philosophical insights into the law without showing how they fit the law of any given jurisdiction. Again, the best example may be Aristotle. As I have shown elsewhere, in the 16th century, the few paragraphs Aristotle wrote about commutative justice were used by jurists to develop the first systematic explanation of Roman law, of which Aristotle had been entirely ignorant.² In the process, they had to discard some Roman rules which did not fit, or, as the jurists said, rules which must belong to Roman positive law and have been adopted for special reasons because they could not be explained by Aristotle's general principles. There is no reason, in principle, why it would be impossible for Kimel to do something similar. Nevertheless, the cases are not the same, and that is why I can accept his claim only with qualifications. Unlike Aristotle, Kimel has available to him a vast legal literature written over centuries dealing with the problems he is examining. Had Aristotle been in a similar position, I think he might have looked at this literature rather carefully in hopes of learning from it. He collected the constitutions of the Greek city states of his time to help him develop a political theory. While it is possible to make philosophical contributions to the law without examining the law in some detail, I don't see why one would choose to do it that way.

I have two objections to Kimel's book that follow on the heels of these two methodological claims. First, I don't think he succeeds in defining 'promise' and 'contract' in terms of a function which is typical in the sense that it is intrinsic or rooted in their structure. What he does instead is declare that functions are 'typical' when they happen to fit his thesis. When they do not, he calls them 'marginal, esoteric, atypical.'

method that has hitherto guided us' (I.i 1252a) or 'our usual method' (I.viii 1256a).

² James Gordley, *The Philosophical Origins of Contract Doctrine* (1991) 69–111.

Second, if he examined how jurists have used the terms ‘promise’ and ‘contract’ today and over the centuries, he would find they have made his basic points but in a cleaner and more enlightening way.

Sometimes, Kimel quite properly concludes that a certain function of promising is tied to the structure of a promise. By examining such a case, we can more easily contrast it with others in which he does not. Kimel is right when he says that

[p]romises are normally solicited, and given, when special reassurance concerning the promisee’s future action is required. And such reassurance is normally required, we now may add, with regard to matters which are of some significance to the promisee (24).

Promising entails commitment, and it is hard to see why, normally, one would want a commitment unless one wanted reassurance as to how the promisor will act as to some matter of importance to oneself. That is so, even though, as Kimel remarks, one can imagine ‘abnormal’ purposes which are less usual and ‘logically derivative’ from the normal function: for example, one might solicit a promise in hopes the promisor will break it and thereby show he is untrustworthy (22).

I don’t see a similar connection between making a promise and other characteristics he attributes to promising which are critical to his thesis.

[P]romising, not only as a practice by which people undertake obligations to others, but particularly as a practice grounded, as it is, in trust and respect, may be valuable — intrinsically valuable — for its capacity to promote and reinforce personal relationships (28).

In particular, promises that are altruistic can be ‘highly valuable in personal relationships’ (73). Contracts differ from promises because ‘[e]nforceability is built into a contract in a way that no equivalent source of reassurance is built into a promise’ (58).

[W]hereas promises are normally made in the context of some on-going personal relationship, with the case of promises between strangers counted as the exception, in the case of contract the opposite is true: the practice as a whole is designed, first and foremost, to facilitate co-operation or mutual reliance among strangers (65).

‘[A] contract normally involves a bilateral undertaking of special obligations whereas a promise is, essentially, a unilateral undertaking’ (67). The counter-examples, he believes, are extrinsic to the normal or typical use of a promise or contract the same way as to buy a car without intending it to be driven is extrinsic to its normal use (83). For example, sometimes, the promisee might have good reason to expect performance aside from personal trust (61) or might promise ‘and not see herself as having any

meaningful form of personal relations or any personal bond' with the other party (72). Conversely, a contracting party might trust the other party to perform though no legal remedy is available and to do so 'may indeed be desirable or valuable or even inevitable in certain circumstances' (83). These cases are supposedly atypical or marginal.

These characteristics, it seems to me, are not functions which are intrinsic to a promise or a contract in the way that furnishing transport is intrinsic to a car. Rather, Kimel is packing into the very concept of promise and contract functions which they sometimes serve and then declaring them to be typical or intrinsic. Of course, some voluntary arrangements serve to strengthen personal relationships by a one-sided and typically altruistic commitment, and the legal enforceability of this commitment could undermine the relationship of trust it is supposed to strengthen. Other voluntary arrangements do establish a relationship, often with strangers, which is legally enforceable and 'detached' from any personal relationship with the other contracting party. Still other voluntary arrangements do neither. It is helpful to draw these distinctions in order to decide what the legal consequences of different voluntary arrangements should be. But what do we learn by labeling the first arrangement a 'promise,' the second a 'contract,' and calling every other voluntary arrangement as 'marginal,' 'esoteric' or 'atypical'?

Which brings me to my second point. It is admittedly true that a philosophical analysis of concepts such as contract or promise can prove helpful even absent a discussion of what these concepts have meant for jurists or the law that jurists study. But I think that here, Kimel could have learned from the jurists. They have a cleaner and more helpful way of drawing the distinctions that are important to him.

Common law jurisdictions have traditionally regarded promises as a way of entering into what they would now call a contract. Traditionally, what is now called a contract was usually enforced by one of two actions recognized by common law courts. One was an action in covenant in which almost any promise could be enforced provided it was contained in a document which was written and sealed. The other was an action in assumption which required not only a promise but 'consideration'. As A W B Simpson has said, quoting the Solicitor General in *Golding's Case* (1586), in an action in assumpsit, 'there are three things considerable, consideration, promise, and breach of promise.'³

³ A W B Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *Law Quarterly Review* 247, 257, quoting *Golding's Case* (1586) 2 Leon 72.

In the 19th century, as I have shown elsewhere,⁴ Anglo-American jurists began defining promise in terms of an expression of the assent to assume an obligation, and consideration in terms of bargain or exchange. In both instances, I have shown, they were borrowing ideas from the civil law, although they claimed merely to be clarifying the ideas underlying their own. They concluded that altruistic promises required the formality of a seal to be enforceable while bargains were enforceable even without a formality. By that interpretation, the common law came to parallel the civil law where altruistic promises usually require a formality to be enforceable (typically, notarization) while promises to exchange do not.⁵

In any event, in both common law and civil law jurisdictions, promises are regarded as expressions of assent or of the will to be bound. Standard doctrine is that, to be binding, every contract requires such an expression of assent, although not all expressions of assent are legally binding. Common lawyers, for the historical reason just described, are more inclined than civil lawyers to use the word 'promise' to refer a person's assent to be bound, but civil lawyers have no trouble with that terminology. I recently edited a book called *The Enforceability of Promises in European Contract Law*.⁶ Jurists from twelve European Union jurisdictions described which promises were enforceable in their own legal systems. All of them understood that they were being asked which voluntary commitments their law would enforce. Nearly all of them said that altruistic promises were generally unenforceable absent some formality. But none of them had trouble with the idea that of a promise is a voluntary commitment, or that a voluntary commitment is necessary to form a contract.

Even if the only objection were that Kimel is using the words 'promise' and 'contract' in a different way than jurists do, one would still expect him to explain why and to describe the advantages he sees in the change in terminology. But the more basic objection is that the change in terminology obscures the underlying question which has to be answered: why and in what way are certain voluntary commitments to be enforced as compared with others? That is a question which jurists have been asking

⁴ Gordley, *The Philosophical Origins of Contract Doctrine*, above n 2, 135–6, 175–7.

⁵ Today, the formality of the seal has been abolished in many American jurisdictions. I have argued elsewhere, however, that the result is that an altruistic promisor must use a trust to accomplish what he could once have done by seal. Technically, no legal formalities are required for a trust. But the result is much the same. Since a layperson does not know how to make a trust, he must visit a lawyer, much as a European must visit a notary, who just to be safe, will draw up a formal document. James Gordley, 'Enforcing Promises' (1995) 83 *California Law Review* 547, 570–1.

⁶ James Gordley (ed), *The Enforceability of Promises in European Contract Law* (2001).

for some time, and I don't see how Kimel's distinction between 'promise' and 'contract' helps to answer it. To get an answer, instead of speaking of the characteristics typical of 'promise' as opposed to 'contract', one should ask the question directly. Not surprisingly, some jurists who have done so believe that certain altruistic promises should not be legally enforceable for reasons like those which Kimel mentions. As my colleague Melvin Eisenberg and I have noted, sometimes, the enforceability of an altruistic promise would be inconsistent with the relationship of love and trust which the promise presumed and was meant to foster.⁷ Some jurists have said that an altruistic promise should not be enforced without a formality so that the promisor will be encouraged to deliberate before he enriches another at his own expense.⁸ Kimel does not discuss whether a promise that does so should be enforced only if it is made with more deliberation than a commercial commitment. According to Eisenberg, another reason that altruistic promises are often not enforced is that they may be subject to many implied conditions it would be impossible to prove in court: if a mother unexpectedly needs money for a medical operation, should her daughter still be entitled to the college tuition she was promised?⁹ That consideration applies equally well to altruistic promises and to the sort of contracts which Kimel does mention in which each party must trust the other because it is not feasible to state concretely and in advance all the obligations of each party under all the circumstances that might arise. Different jurisdictions deal with this problem in different ways. But I don't see what light is shed upon it by claiming that 'promises' are typically based on 'trust' whereas, in 'contracts,' trust in the other party's willingness fairly to meet indefinite obligations is the marginal case. For a marginal case, it has generated a huge academic literature and a recognition in most civil law countries¹⁰ and in all but a few American jurisdictions,¹¹ that a discretionary power conferred by a commercial contract must be exercised in good faith. There is a large body of case law attempting to describe and apply the concept of good faith even in contracts among strangers. I don't see how Kimel's approach contributes to solving this problem, whether we are dealing with altruistic or commercial contracts.

⁷ Melvin Eisenberg, 'The World of Contract and the World of Gift' (1997) 85 *California Law Review* 821, 848–9; Gordley, 'Enforcing Promises', above n 5, 577.

⁸ See Gordley, 'Enforcing Promises', above n 5, 571–2.

⁹ Eisenberg, above n 7, 830–1.

¹⁰ See Reinhard Zimmermann and Simon Whittaker, *Good Faith in European Contract Law* (2000).

¹¹ To my knowledge, only three states, Indiana, Maine and Texas, have denied that in every contract there is an implied covenant of good faith and fair dealing. North Dakota has taken no position as yet. Maryland law is ambiguous.

Kimel did well to break with a brand of philosophy that divorces concept from function and then regards any counter-example not captured by the concept as an irrefutable criticism. He should be congratulated for applying a philosophical analysis to problems of law. Jurists often neglect its importance. It would have been better, however, if he had been more careful about the link between promise, contract, and the various functions that voluntary commitments served. And in this task, just as lawyers can learn from the philosophical literature, philosophers can learn from the work of the jurists.

James Gordley
(Shannon Cecil Turner Professor of Law,
University of California at Berkeley)

Freedom and Time

Jed Rubenfeld
(Yale University Press, 2001).

In Medias Res

‘We are always *in medias res*.’ (124)

Conventional praise for a fine academic achievement is that it is unique, new, or original. I can’t say that about *Freedom and Time*. And that is exactly its point.

I can say that Jed Rubenfeld’s book flies in the face of academic fads — it doesn’t seek to invoke or explore cultural/racial/sexual diversity, it refuses to treat law as a sum of preferences or as a product of social power relations, and it even fails to marvel at the Internet. Indeed, Rubenfeld’s point is that our obsession with the new is a pathology standing in the way of a truer understanding of ourselves, our polity, and our law. We think of law as though it were a daily newspaper, judging law by how well it captures what is going on now — our current ideas, preferences, moods, concerns. Our politicians pander to our pollsters. As Rubenfeld argues,

[o]ur politics grows ever more insipid as it grows ever more attentive to what we want, or say we want, here and now. We have today a productive capacity enabling us to realize our dreams to an extent beyond the wildest dreams of those who lived before us — if only we had dreams! (16).