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Philosophical Foundations of Contract Law, by Gregory Klass, George Letsas & Prince Saprai, eds

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Book Note

**PHILOSOPHICAL FOUNDATIONS OF
CONTRACT LAW, by Gregory Klass,
George Letsas & Prince Saprai (eds)¹**

KENDALL GRANT

RECENT YEARS HAVE WITNESSED a revitalization of interest in the philosophical study of contract law. Driven by the “contract and promise debate” introduced in 1981, this new collection of essays combines work by leading philosophers, contract lawyers, and legal theorists to provide a comprehensive snapshot of contemporary scholarship on the topic and a roadmap for future research.

Part one, comprised of the first eleven essays, presents several theoretical approaches and focuses on general questions related to moral and political theory, conceptual analysis, sociological theory, empirical psychology, and economic analysis. Charles Fried expands on his groundbreaking original work² and defends contract as a moral³ institution dependent on trust and a “recursive and transparent mirroring of mutual recognition and respect.”⁴ Next, Randy Barnett proposes an alternative model of “contract as consent” that applies no matter

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1. (Oxford: Oxford University Press, 2014) 416 pages.
 2. Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, Mass: Harvard University Press, 1981).
 3. For Fried’s recent explanation of morality, see Charles Fried, “The Convergence of Contract and Promise” (2007) 120:1 Harv L Rev F 1 at 2-3.
 4. *Supra* note 1 at 21.

what the moral relationship⁵ between the parties, thereby encompassing the default rules of contract.⁶

Joseph Raz and David Owens then consider the normative position of the promisee. Raz explains that a promise gives the promisor a reason to perform because of the “normative assurance” it provides; the value of that assurance, and thus its associated strength, varies with each promise.⁷ For Owens, one cannot deprive oneself of the dignity of control simply by declaration;⁸ promises rather serve the promisee’s “authority interest.”⁹

Dori Kimel signals caution with respect to the “risky business” of strict promissory obligations given the potential for breach and its impact on the promisor’s autonomy. However, because promises are typically exchanged in relationships that “generate a wealth of relationship-specific norms,”¹⁰ the resulting moral obligations on the promisee may release the promisor from the promise, therefore reducing the “threat” of promising.

Some hold that contractual obligations are moral obligations but are not promissory in nature.¹¹ James Penner contends that contracts should be understood as involving agreements rather than promises: promises are unilateral undertakings, while contracts are bilateral exchanges built on trust.¹² On the other hand, Charlie Webb allows that contracts give rise to promissory obligations, but is not convinced that the promise is the reason for legal enforcement.¹³ Webb urges that inquiry into the philosophical foundations of contract law “need neither begin nor end with an account of promissory obligations.”¹⁴

5. For a more skeptical account of morality, see Seana Valentine Shiffrin, “The Divergence of Contract and Promise” (2007) 120:3 Harv L Rev 708.

6. *Supra* note 1 at 52-55.

7. *Ibid* at 76.

8. For a full discussion of choice and consent, including a formulation of Hume’s Point, see David Owens, *Shaping the Normative Landscape* (Oxford: Oxford University Press, 2012).

9. *Supra* note 1 at 89.

10. *Ibid* at 110.

11. For a rejection of contract as promise and a thought experiment which recounts the possibility of undertaking contractual obligations while abjuring promissory ones, see Michael G Pratt, “Contract: Not Promise” (2008) 35:4 Fla St U L Rev 801.

12. *Supra* note 1 at 119-20.

13. Similarly, the assumption of a legal obligation in the context of a contract need not inevitably mean the assumption of a moral obligation. See *e.g.* Gregory Klass, “Promise Etc.” (2012) 45:3 Suffolk U L Rev 695.

14. *Supra* note 1 at 150.

Liam Murphy identifies three functions that contract law might play: (1) it might enforce the first-order moral obligation to perform, as per Fried; (2) it might enforce second-order obligations post-breach; or (3) it might be deployed instrumentally. Murphy adopts an inclusive hypothesis: contract law “supports and shapes the social practice of making and keeping promises *and* agreements.”¹⁵

Avery Katz applies economic analysis to freedom of contract, interpretation,¹⁶ and damages.¹⁷ Due to their respective interests in maximizing efficiency gain and anticipating private activity, adjudicators, legislators, and contractors will find special value in the economic approach to contract law.¹⁸ Lastly, Aditi Bagchi asserts that not only should distributive injustices inform contract law’s approach to legal enforcement, but “some of the background duties that infuse contract are derivative from principles of distributive justice.”¹⁹

Part two, consisting of the final seven essays, delves into specific doctrinal questions of contract law. Margaret Jane Radin tackles take-it-or-leave-it contracts between unsophisticated parties. Finding that the only mechanism for enforcing such agreements—the doctrine of unconscionability—is unsatisfactory, Radin suggests a nonformalist framework for determining when to enforce boilerplate terms.²⁰ Lisa Bernstein, by contrast, criticizes courts’ willingness to give legal effect to customary business norms, as well as their use of “context evidence,” on the basis that it deters flexibility²¹ and increases transaction costs for sophisticated parties.²²

Daniel Markovits equates the duty of good faith with performance itself,²³ and elaborates a theory that explains good faith as an attitude of reciprocal recognition, a foundation of contract as “collaboration.”²⁴ In response, Mindy Chen-Wishart addresses the nature of vitiating factors in contract law and proposes both an

15. *Ibid* at 169 [emphasis added].

16. See generally Richard A Posner, “The Law and Economics of Contract Interpretation” (2005) 83:6 *Tex L Rev* 1581.

17. *Supra* note 1 at 183-86.

18. Economic accounts, like consent theories, treat contract as a legal *analog* to the morality of promising. See Eric A Posner, “Economic Analysis of Contract Law after Three Decades: Success or Failure?” (2003) 112:4 *Yale LJ* 829.

19. *Supra* note 1 at 199.

20. *Ibid* at 236-37.

21. For a case in favour of the more flexible “contracting for innovation,” see Ronald J Gilson, Charles F Sabel & Robert E Scott, “Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration” (2009) 109:3 *Colum L Rev* 431.

22. *Supra* note 1 at 258.

23. *Ibid* at 272 [emphasis in original].

24. For Markovits’ submission that contracts generate, as opposed to promises, a distinctive form of moral relationship, see Daniel Markovits, “Contract and Collaboration” (2004) 113:7 *Yale LJ* 1417.

enlarged conception of consent as well as a “two-step defeasibility approach” to legal rules that moves beyond contract as “merely” consent.²⁵

George Letsas and Prince Saprai return to trust as the defining characteristic of contractual relationships. In their view, the making of a promise triggers “altruistic duties of assistance, over and above the duty to perform.”²⁶ Exemplifying a Commonwealth tradition of interpretive legal analysis that aims to uncover the law’s immanent logic, Stephen Smith finds that it is not breach of duty, but compensation for wrongdoing, that explains damage awards: “damages are the private law equivalent of punishment.”²⁷ Finally, Gregory Klass recounts the well-known theory of efficient breach and offers an updated, more sophisticated version that reveals three features of contract law often overlooked by noneconomic theories.²⁸

Philosophical Foundations of Contract Law is an ambitious undertaking, with extensive coverage of the major theories and debates surrounding this commanding area of law. If, in its commendable efforts, it fails to engage with Hegelian, Aristotelian, corrective justice, or civil recourse theories,²⁹ or with attempts to apply behavioural economics to contract law,³⁰ it nonetheless represents a worthwhile and stimulating contribution to the literature.

25. *Supra* note 1 at 312-14.

26. *Ibid* at 325-26.

27. *Ibid* at 356.

28. *Ibid* at 363.

29. See *e.g.* Ernest J Weinrib, “Punishment and Disgorgement as Contract Remedies” (2003) 78:1 Chi-Kent L Rev 55; Nathan B Oman, “Consent to Retaliation: A Civil Recourse Theory of Contractual Liability” (2011) 96:2 Iowa L Rev 529.

30. See *e.g.* Tess Wilkinson-Ryan & David A Hoffman, “Breach Is For Suckers” (2010) 63:4 Vand L Rev 1001.