

Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford: Hart, 2003). Pp. viii, 149.

Contract theory has long been a fractured field of study. For decades, there has been a schism between contract law's orthodox defenders and those who question the very existence of the institution. The former claim (roughly) that contract embodies a liberal tradition wherein the law serves to facilitate the free will of individuals as that will is expressed in promises. Skeptics argue that will and promise have little to do with judicial decisions, and that contract law is merely a species of liability wherein the law will compensate those who have detrimentally relied on the representations of others.

Dori Kimel steps into this familiar argument. In *From Promise to Contract*, Kimel claims to offer a fresh perspective on the traditional contract law dichotomy that he hopes will give a new vitality to the liberal understanding of the institution. He endeavours to cast the promise-liability debate into a new framework by means of drawing attention to what are, according to Kimel, overlooked differences between promise and contract.

The project Kimel sets for himself is an ambitious one, and his approach is thoughtful and sophisticated. Initially identifying with the orthodox, promissory tradition of Charles Fried, Kimel seeks to expand that understanding by differentiating between promise and contract. The crucial difference, says Kimel, is that contracts are enforceable.

The fact that contracts are enforceable serves as the departure point for Kimel's thesis. Unlike promises, contracts attract the external sanction of the law. The result is that the intrinsic value of each institution is markedly different. As Kimel explains, making a promise amounts to weighting a statement with normative force based on trust; the institution of promising is inherently about trust. The use of the normative foundation of trust through promising thereby serves to promote personal relations which, according to Kimel, is the intrinsic value of a promise.

Contracts are different. Unlike promises, contracts are coupled with the threat of sanction. This threat serves to significantly negate any role that trust may play in a contract. But contracts are not without their own intrinsic value. That intrinsic value is personal detachment. The institution of contract law, therefore, serves to provide a forum in which willing parties can enter a relationship based on personal detachment. Such detachment is intrinsically valuable insofar as parties who do not know each other very well can enter a constructive relationship; Kimel points to the fact that parties to a contract are most often strangers.

As the paradigmatic illustration of his thesis, Kimel refers to the employment contract of an academic. Such a contract provides a circumscribed field in which a professor and a department may enter a relationship. Once the contract is complete, the professor will often proceed to engage in valuable personal relationships apart

from the contractual one, relationships in which normative values such as trust may be regularly imbued. Contract, in other words, has facilitated a detached forum in which a baseline relationship between the professor and the department can be defined. Other, personal relationships can then safely be cultivated outside of that initial contract, relationships in which trust is not negated by the legal sanctions attached to contract.

These differences between promise and contract (wherein trust is the intrinsic value of the former and detachment that of the latter) present, says Kimel, a new direction for promissory theories of contract. His observations are often convincing and his “detachment theory” may well prove a useful direction for other theorists.

Other aspects of the book are interesting but less forceful. In one of the book’s five chapters, “Remedies”, Kimel attempts to overcome another long-standing problem in contract law: the question of why expectation damages, and not specific performance, are granted as the usual remedy for breach of contract in the common law. Kimel addresses this problem by acknowledging that, theoretically, specific performance is indeed the primary remedy, but that a version of John Stuart Mills’ harm principle prevents the granting of it. In support of this, he argues that since contracts, most often, are essentially about profit, the granting of expectation damages provides an acceptable substitute to the innocent party. As such, the state’s granting of a performance remedy would thereby amount to doing unnecessary harm to the party who has committed the breach.

Kimel further employs the harm principle to investigate other doctrines of contract law. As with that on specific performance, these discussions are often erudite but somewhat superficial; he relies heavily on the harm principle without a full investigation into the nature of the rights that are obtained in a contractual situation. And his arguments often stay far above the day-to-day world of judicial decisions, making it hard to determine the “fitness” of his conclusions.

Kimel’s final chapter is dedicated to pushing contract theory back into a liberal framework. His challenge here, as it has been for other theorists, is to defend contract law as an institution embodying liberal freedom despite the fact that its operation has become increasingly dominated by judicial and legislative intrusion. Kimel’s solution for fitting the often square peg of contract law into the round hole of liberalism is to broaden the definition of liberalism. Drawing once more on moral philosophy, the author seeks to recast the liberal ideal in such a manner that it can encompass government intervention in the private law. Within this revised definition of liberalism, doctrines such as inequality of bargaining power uphold individual freedom rather than restrict it.

Whether Kimel’s reconstruction of liberalism can stand as a legitimate definition is, of course, subject to debate. Nevertheless, his efforts do suggest a new context from which contract law might be evaluated. At the same time, though, Kimel’s endeavour would have benefited from a more thorough historical investigation of contract law itself.

Poor writing is the book's greatest shortcoming. Kimel's style is cumbersome, and needlessly obfuscates his ideas. While the subject matter itself is often difficult, Kimel's poor writing requires that the reader, at times, expend enormous effort simply to follow the discussion.

Ultimately, *From Promise to Contract* represents a worthy contribution to an old and ongoing debate in contract theory.

Jeff Roberts

J. Anthony VanDuzer, *The Law of Partnerships and Corporations*, 2d ed. (Toronto: Irwin Law, 2003). Pp. xvii, 512.

It is high praise when a book aimed at law students is endorsed by judges. Such praise accompanied the first edition of this book,¹ and it will accompany the second. The content has been updated to include new cases and recent federal amendments, but the book's accessible structure has stayed the same. Chapters on partnerships, incorporation, shares, corporate governance, shareholder remedies, corporate changes, and public companies continue to offer both the essentials of the law and the reasons behind it.

A recurring theme throughout the book is the responsibility and accountability of corporate officials. For example, how must directors of a company act in response to a take-over bid? VanDuzer has updated his analysis to reflect key Ontario decisions, which indicate that if the directors of the target have followed a process that is within a range of reasonableness, Ontario courts will defer to the business judgment of the directors without additional scrutiny, so as not to dilute the business judgment rule into a weak potion.²

The accountability of corporate managers, especially lower-level managers, for harm done in a community in which the corporation operates, is another example of this recurring theme. Given the suspended prosecution of the two managers of the Westray mine on charges of criminal negligence, it is unfortunate that VanDuzer only discusses the tort liability of managers. A discussion of criminal liability would have fit well with the related question of when a court should "pierce the corporate veil" and hold managers personally liable for their actions. Parliament's response to Westray was that corporate managers should be more accountable. For criminal negligence purposes in particular, the *Criminal Code* will now expressly state that

¹ See e.g. *Backman v. Canada*, [2001] 1 S.C.R. 367 at para. 37, 196 D.L.R. (4th) 193; *Peoples Department Stores Inc. (Trustees of) v. Wise* (2003), 224 D.L.R. (4th) 509 at para. 67 (Qc. C.A.).

² *Re CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755 at 776, 160 D.L.R. (4th) 131 (Gen. Div.); *Maple Leaf Foods v. Schneider Corp.* (1998), 42 O.R. (3d) 177, 113 O.A.C. 253.

everyone who has the authority to direct how another person does work or performs a task is under a duty to take reasonable steps to prevent bodily harm to that person or anyone else.³

Another issue that VanDuzer does not discuss is who should hold corporate officials accountable. The Ontario Securities Commission is increasingly being asked to enforce corporate law duties in the context of public companies.⁴ Crown prosecutors acting on behalf of the community are another option. The risk here is that the prosecution may be too vigorous in the wake of public outrage. In an admonition of the Westray prosecutors, Justices McLachlin and Major wrote:

[T]he entire conduct of this trial has brought the administration of justice into disrepute ... We cannot be tolerant of abusive conduct and dispose of due process, however serious the crimes charged ... Throughout the proceedings the Crown bent and broke rules, and attempted to cover up when it was caught. ... The entire proceedings were tainted by prosecutors who were playing to an enraged public, and playing to win. ... [T]o win at all costs is an affront to the Canadian justice system.⁵

Private enforcement under tort law, either individually or in a class action, is a third option, but as the insolvency of Curragh Inc. shows, in an action for damages there is always the risk that what little money is available will be quickly depleted.

The most noticeable addition to the book is a chapter on corporate social responsibility. The essence of this topic lies in part of the Walkerton affair, in which seven people died and more than 2,300 were injured after drinking water contaminated with *E. coli* bacteria.⁶ Under the privatized system, A&L Canada Laboratories East, Inc. was responsible for testing Walkerton's water. A&L manager Robert Deakin was required by law to report water contamination only to Stan Koebel, the general manager of the Walkerton Public Utilities Commission, which was A&L's client, and not also to the provincial authorities responsible for boil-water advisories. Deakin chose not to voluntarily notify the provincial officials even though, as Justice O'Connor wrote, the test results "showed gross contamination". Justice O'Connor determined that Deakin's decision was responsible for four hundred to five hundred illnesses, and possibly one of the seven deaths.

³ *An Act to amend the Criminal Code (criminal liability of organizations)*, S.C. 2003, c. 21, s. 3 (royal assent 7 November 2003).

⁴ In addition to the rulemaking authority over corporate governance conferred by *An Act to implement Budget measures and other initiatives of the Government* (S.O. 2002, c. 22, s. 187(3)), see also on the adjudicate side *Re Banks* (2003), 26 O.S.C. Bull. 3377, and *Re YBM Magnex International Inc.* (2003), 26 O.S.C.B. 5285.

⁵ *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537 at paras. 117-21, 144 D.L.R. (4th) 614.

⁶ All statements about the events in Walkerton are taken from Part One of the report by Justice O'Connor: Ontario, Ministry of the Attorney General, *Report of the Walkerton Inquiry: The Events of May 2000 and Related Issues* (Toronto: Queen's Printer for Ontario, 2002) especially 398-401.

VanDuzer's chapter on corporate social responsibility reviews the law and economics literature on whether the sole focus of corporate officials should be shareholder value. The previous chapters of the book show this law and economics discussion to be too academic. As the book indicates elsewhere, managers are liable in tort for harm to the community, and in any event, it is difficult to see how Deakin's decision could have ever increased shareholder value. VanDuzer states that the contractual underpinning of corporate law is of little value here because community members (1) do not engage in contractual bargaining with the corporation, (2) do face serious collective action problems, and (3) cannot force corporate officials to implement the community's wishes. By stopping there, VanDuzer has not fully answered the question: should someone in Deakin's position be held accountable for such a decision?

The easiest answer is that Deakin showed wanton or reckless disregard for the lives and safety of other people, or on the lower civil standard, did not exercise the care that a reasonably prudent person would have exercised in the circumstances. The more nuanced answer takes into account the fact that the code of ethics governing Deakin's behaviour emphasized the supremacy of public welfare, yet Justice O'Connor called it "ambiguous". If Justice O'Connor, with the perfect vision of hindsight, considered the reference to public welfare ambiguous, how accountable should corporate officials like Deakin be? Was it unreasonable for Deakin to expect that the general manager of a public body would act in the community's best interest, rather than the way in which Stan Koebel actually behaved? Would holding Deakin accountable deter skilled people from becoming corporate directors or officers? If an official like Deakin is to be held accountable, is the best place for this the corporate statutes or the multitude of regulatory ones? These kinds of issues should be discussed in the next edition of the book.

Even with its minor shortcomings, the second edition of VanDuzer's book should be required reading at every Canadian law school. It continues to bring a level of clarity and accessibility to the subject matter that is missing in other texts. It remains part of an excellent series that includes first-rate books by Vern Krishna, Ruth Sullivan, David Paciocco, Jamie Benidickson, and John Currie. It deserves the judicial attention that it will get.

Derek Smith
