

Conference on Law & Morality

William & Mary School of Law

Contract Law

James Russell
Gordley

*Shannon Cecil Turner Professor of
Jurisprudence, School of Law,
University of California-Berkeley*

B.A., University of Chicago; M.B.A., University of Chicago; J.D., Harvard University

Professor James Gordley is the author of several books, including *Gratian, The Treatise on Laws with the Ordinary Gloss* (with Augustine Thompson); *The Philosophical Origins of Modern Contract Doctrine*; *The Civil Law System: An Introduction to the Comparative Study of Law* (with Arthur von Mehren); and *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (with Mauro Cappelletti and Earl Johnson Jr.). Recent publications include "Responsibility in Crime, Tort, and Contract for the Unforeseeable Consequence of an Intentional Wrong: A Once and Future Rule?" in *The Law of Obligations: Essays in Celebration of John Fleming* (1998) and "Is Comparative Law a Distinct Discipline?" in the *American Journal of Comparative Law* (1998).

Professor Gordley has been a Guggenheim Fellow, a Fulbright Fellow, a Senior NATO Fellow and a fellow of the Deutsche Forschungsgemeinschaft. He was awarded the UC Berkeley Distinguished Teaching Award in 1984 and was elected to the American Academy of Arts and Sciences in 1999. In 2001, he received the Rutter Award for Teaching Distinction.

For some scholars, contract law has little to do with morality. For others, contracts are binding for moral reasons, but they disagree about why. Some think contracts are morally binding because people should keep their promises. They have exercised their freedom to commit themselves, and so they are bound. This view was defended most notably by Kant. Today its leading proponent is Charles Fried. Others think that contracts are morally binding as long as they are made in a way that is procedurally fair. The unfairness in question here is not fraud or duress or mistake. It is a preponderance of bargaining power. This approach to contractual unfairness was taken by Roscoe Pound, Oliver Wendell Holmes, and by many today. A third view is that contracts are morally binding if they are substantively fair, that is, when the price and terms are fair. Procedural unfairness matters only because it leads one to suspect substantive unfairness. This last is my own view and the one I will defend in my paper.