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RELIGION, STORY AND THE LAW OF CONTRACTS: REPLY TO PROFESSOR BERMAN

*Andrew W. McThenia, Jr.**

Contract law, pronounced dead¹ within the last decade, has undergone a Lazarus-like resurrection. The revival of scholarship runs the gamut from Professor Charles Fried's writing asserting promise as "the moral basis of contract law,"² through the *Second Restatement of Contracts*³ which concedes the legitimacy of more communal based doctrines such as promissory estoppel,⁴ to the writings of Professor Ian MacNeil who argues that community is "the fundamental root, the base" of contract⁵ and the even more collectivist writings of scholars in the Conference on Critical Legal Studies.⁶

This revival of contract scholarship does not yet suggest any unifying theme, but it does, I think, indicate a vigorous search for some means of weaving together seemingly intractable concepts. This symposium on Law and Religion suggests an important area of search. That is, it invites us to examine the shared ethos of our culture.

I agree with Professor Berman's observation made elsewhere that law and religion are "two different but interrelated aspects . . . of social experience" and that one cannot flourish without the other.⁷ Because both law and religion are aspects of our social experience, one's view of God and the world must certainly affect one's view of the law. Similarly, one's view of the law probably affects how that person views God.⁸

If one's view of the world is that of man as a high stakes gambler,

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1. G. GILMORE, *THE DEATH OF CONTRACT* (1974).

2. C. FRIED, *CONTRACT AS PROMISE* (1981).

3. *RESTATEMENT (SECOND) OF CONTRACTS* (1981).

4. *Id.* § 90 (1981).

5. I. MACNEIL, *THE NEW SOCIAL CONTRACT* 1 (1980).

6. See, e.g., Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984); Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983) (hereinafter *Critical Approaches*); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983).

7. H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 11 (1983).

8. Shaffer, *Jurisprudence in Light of the Hebraic Faith*, 1 NOTRE DAME J. OF LAW, ETHICS & PUBLIC POLICY 77, 108 (1984).

a lonely Robinson Crusoe, or a latter day Horatio Alger living in a minimalist state, then that would suggest a view of contract law not out of sorts with Professor Fried's world of promise.⁹ If one thinks that the world is not quite so lonely or individualistic, then she might think of contract in terms of more communal norms of reliance or the prevention of unjust enrichment.

I disagree with Professor Fried's conclusion that the moral basis of contract is promise, for that seems much too limiting to me. I am of the view that Professors MacNeil and Unger are more nearly correct in viewing the essence of contract as community. I think the social matrix of the world is more fundamental than promise.

Many Americans, probably a majority, view the world from within the Jewish and Christian traditions. I think it is in our heritage of a covenantal community that we should begin our conversation and search.

As recorded in Mark's gospel:

Jesus said, 'The first commandment is this: Hear, O Israel: The Lord our God is the only Lord. Love the Lord your God with all your heart, with all your soul, with all your mind, and with all your strength. The second is this: Love your neighbor as yourself. There is no other commandment greater than these.' *Mark* 12:29-31.

That "restatement" of the law by Rabbi Jesus contains an important negative principle and the basis for an extremely radical ethic.

The important limitation which we as lawyers need always be mindful of is that the law is not God, the state is not God, Marx is not God nor is capitalism God. To make the law a civil religion is to be idolatrous.¹⁰ One of the two major themes of the biblical tradition is the fear of idolatry, "the fear that man might accept a limited worldly objective as an adequate goal of his striving."¹¹ We are warned to be especially skeptical of social structures that seek to take the place of God. The political, social, and economic institutions we inherit and are a part of have a profound effect on how we view the world. Yet we often are unaware of how important the effect of institutional forms is upon our moral perceptions.¹² The negative admonition of the Torah and the Gospel warns us to be careful lest we accept the "is" as the "ought."

9. See FRIED, *supra* note 2.

10. See Shaffer, *supra* note 8, at 77.

11. R. UNGER, *PASSION* 26 (1984).

12. See *ESSAYS IN THE SOCIOLOGY OF PERCEPTION* (M. Douglas ed. 1982).

The positive theme of this “restatement” of the law by Rabbi Jesus is that love is to be the driving force of humanity. We are called to a personal encounter with one another. It is in our relations with each other that we are transformed.¹³ What is fundamental about the Christian tradition is that our identity is constructed around the narrative of the cross. Our identity as individuals and community is reinterpreted by means of the identity of Jesus Christ, a story which culminates in the passion, in the cross.¹⁴ For Christian believers, the point of the passion narratives is not that Jesus died in heroic despair, but that his death was followed by resurrection. It was that resurrection which has enabled Christians down through the ages to identify Jesus as the crucified Messiah; and it is that event which links memory to hope. The resurrection compels the Christian community to look to the future in hope and anticipation of the consummation of the Christian story. The death and resurrection of Jesus represent for Christians that call to a personal encounter and love.

As Harold Berman has said: “Society moves inevitably into the future. But it does so by walking backwards.”¹⁵ It is in the shared stories of our tradition that we might find out what is at stake as we search for some way to make sense of modern contract law. The shared stories of our culture are important not to resolve conflicts inherent in modern day contract, but to place the conflicting norms in a matrix which is familiar to most Americans. We do not necessarily learn how to act from the retelling of the stories of our tradition, but we may be able to perceive what is at stake as we think about the seemingly intractable problems of our law of contract. A backward walk in our tradition may show us a way to appreciate the present and to approach the future.

I want to be clear that a return to our origins will not resolve the problems of expectation versus reliance, or, to use Unger’s language—conflicting visions of freedom of contract and freedom to contract on the one hand and counter visions of reliance and fairness on the other.¹⁶ In fact, such a journey may well heighten the conflicts. But conflict, too, is valuable.

One of the truths of modern contract law is a recognition that there are conflicting values operating in any serious dispute. But this recognition of disorder and conflict is to a large extent hidden in the

13. See UNGER, *supra* note 11, at 24.

14. S. HAUERWAS, *A COMMUNITY OF CHARACTER* 66-71 (1981).

15. BERMAN, *supra* note 7, at 41.

16. See Unger, *supra* note 6, at 567, 616-648.

way these conflicts are "resolved" in modern contract litigation. The dominant story of contract litigation is of the search for truth by balancing (or mediating) conflicting claims of individual versus communal values before an impartial tribunal. One of the major and important criticisms of contract litigation offered by the Critical Legal Studies writers is to challenge the truth of that story.¹⁷ The erroneous belief that these important conflicts can be reconciled by adjudication tends to disguise the true nature of the conflict between important norms and to knock the sharp edges from the competing values so that they seem fuzzy and relativistic.

An appeal to biblical tradition to understand the moral bases of the competing norms of contract law does not permit the glossing of the neoclassical analysis. Stories from that tradition tell us clearly what is at stake when we make moral claims.

I do not suggest that we look to the Bible to resolve contract disputes, nor do I suggest a reconsecration of law or the return to a theocracy. What I am suggesting is that stories from the Jewish and Christian traditions may shed light on what is at stake when we consider the conflicts between promise and reliance. In my view, this suggestion is legitimate if only because cultures which are influenced by the Bible have a different feeling for history than those shaped by other traditions.

It might be useful to reach back into the biblical stories to see what is involved when we appeal to norms of promise and reliance, two important norms which are often at odds in modern contract disputes.

First, promise. Why should I keep a promise made to you? Professor Fried's analysis of this question is interesting.¹⁸ He analyzes and rejects utilitarian grounds and concludes that the obligation to keep a promise has an independent moral force that cannot be explained by nonpromisory elements such as reliance or benefit.¹⁹ He concludes that the moral force of promise keeping is grounded in the concept of personal autonomy.²⁰ He does, however, emphasize the importance of trust to the moral obligation of promise keeping.²¹ He attempts to associate trust with the concept of personal autonomy,

17. See Feinman, *supra* note 6, *Critical Approaches* at 844-57.

18. See FRIED, *supra* note 2.

19. *Id.*

20. *Id.*

21. *Id.*

and to avoid linking it to reliance or other communal values.²² While his argument is powerful, it is ultimately unpersuasive.

I would like to pick up on his argument and suggest another interpretation. As Fried notes, when we use the convention of promising, we invite vulnerability. That gives us power over the other who has made herself vulnerable. What does it mean to be vulnerable? It means that we let down the walls of self-protection which shield us from pain but which also isolate us from love.

There can be nothing more important to the self than to be accepted for what she is; to be shed of the frightening howl of loneliness; to be a person. One can only be fully human when she is accepted, warts and all, by her neighbor. That is to be loved. Love can only follow if one acknowledges vulnerability, if one will tear down the walls of self protection which shield us. Yet the paradox of life is that the same walls which shield us from love also protect us from death and destruction. But we cannot have it any other way. To experience love we must risk destruction. We must be vulnerable.

The institution of promise is important in a penultimate sense; it is important because it leads to something else and that something else is the vulnerability that is the necessary soil for love. The Gethsemane story²³ is about many things, but one of its major themes is the necessity for vulnerability in our intimate personal encounters.

What is so universal about the Gethsemane story, I think, is its repeatability. If we are to be fully human, we can find ourselves where Christ was following at that time of prayer, alone and totally vulnerable. An interesting aspect of the story is that suffering is portrayed as evil. Evil is evil, and the Gospel accounts do not try to make suffering into something holy. Nor do the Gospel accounts attempt to alleviate our fears of suffering. What the Gospels tell us is that we must be ready to pick up the cross and follow Him to die. Only if we can trust that our God is a loving God and be obedient to Him can we erase the walls in which we encase ourselves in order to avoid pain and death. Jesus was obedient. To be obedient means to wipe out all the self protecting walls we build for ourselves.

The ultimate value of promise is that it encourages us to trust and to be vulnerable. The law's chief justification and also its chief purpose is, as Harold Berman has noted, "to help create conditions in

22. *Id.*

23. See *Matthew* 26:36-56; *Mark* 14:32-50; *Luke* 22:39-53; *John* 18:1-11.

which love may flourish."²⁴ That is, I think, the most important reason for enforcing promises.

Another important concept in contract law is reliance. Let me suggest a story which might sharpen our perspective on that notion. The concept of reliance in contract law is often discussed in connection with norms of benevolence, trust, and fairness.²⁵ Consider for a moment the parable of the Good Samaritan in the Gospel of Luke.²⁶ On the level of a story of conventional morality it represents an appeal to benevolence or altruism, both aspects of the scriptural virtue of neighborliness. Both of these virtues are appealed to as support for the reliance principle. But the parable is much more radical than that. The question we are asked to consider is: Who is my neighbor? The story was addressed to Jews who would have been expected to identify not with the Samaritan, but with the injured Jew lying by the side of the road. Yet, the parable focuses on the acts of the Samaritan, his goodness, and not on the needs of the injured man. To entertain the possibility that a Samaritan, an outcast who was despised on both racial and religious grounds, would perform good deeds was not just counterintuitive, it was unthinkable. The parable confronts the hearer with a radical challenge to her preconceived notions of reality. It is like asking us to consider that perhaps our neighbors in the times of our need will be Muslim terrorists or Iranians or Russians.

We are challenged beyond benevolence or altruism and asked to reconsider our whole self-constructed universe or order, to "conceive the inconceivable."²⁷ We are asked to imagine a society in which we recognize our mutual interdependence with brothers and sisters of all kinds and from all stations in life.

It is not that these stories tell us how to act in any given situation. They certainly do not tell us how to resolve contract disputes. Their value, however, is that they tell us how to perceive. Stories tell us how we might view the world. These stories have to do with vision.

One vision these stories offer is that promise is important because it leads us to vulnerability and to love and that we are all vulnerable to pain and death. Who will be our neighbors in that time? Martin

24. H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* 82 (1974).

25. See Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52 (1981).

26. *Luke* 10:30-36.

27. N. PERRIN, *THE NEW TESTAMENT, AN INTRODUCTION* 293 (1974).

Buber captures that vision which I think is important to our consideration of contract norms:

... the inmost growth of the self is not accomplished, as people like to suppose today, in man's relation to himself, but in the relation between the one and the other, between men, that is, preeminently in the mutuality of the making present—in the making present of another self and in the knowledge that one is made present in his own self by the other—together with the mutuality of acceptance, of affirmation and confirmation.²⁸

He goes on to ask, rhetorically: Is there a way to help which is interpersonal, interhuman, beyond professionalism, and not insular: "I think no human being can give more than this. Making life possible for the other, if only for a moment."²⁹

These musings lead me to a vision of community in which promise is important, but primarily because it fosters greater trust and vulnerability and leads to love. Reliance is important because it forces us to see our mutual interdependence.

We are born in community, and I believe that the most important thing we can do in that community is to build and nurture relationships with our neighbors. The biblical call to justice is to create structures in which we can be vulnerable with one another and in which the chance for the transformative personal relationship of love is given primacy. We are called to expand our boundaries and concepts of neighborliness and to accept the stranger into our world.

I do not mean to suggest that communities cannot become tyrannical. The lessons of history are too clear on that to invite argument. We cannot deny those stories of slavery, the oppressive treatment of deviants, and so forth. Our only escape from stories of the tyranny of communities comes from having the courage to confront those stories and to participate in a world that claims our lives in a fundamental fashion, more fundamental than the claims of the state or the law. It comes only if we recognize the ultimate claim that only God is God.

It is only in such a world that any possibility of acquiring those virtues of hope and patience exists which are capable of countering a tyranny of majoritarian rule or our mutual destruction by rampant individualism. Professor Stanley Hauerwas' comments on this long view of history are apt:

28. M. BUBER, *Distance and Relation* in *THE KNOWLEDGE OF MAN* 59-71 (Ronald G. Smith trans. 1965).

29. *Id.*

Without denying that there may be nonreligious accounts of hope and patience, Jews and Christians have been the people that have stressed the particular importance of these virtues. For they are the people formed by the conviction that our existence is bounded by a power that is good and faithful. Moreover they are peoples with a deep stake in history; they believe God has charged them with the task of witnessing to his providential care of our existence. They believe their history is nothing less than the story of God's salvation of them and all people. Such a history does not promise to make the life of virtue easier or our existence safer. Rather such a story, and corresponding society, offers training in the hope and patience necessary to live amid the diversity of the world while trusting that its very plurality reflects the richness of God's creating and redeeming purposes.³⁰

My comments offer little advice on what to do. But I think far more important than deciding what to do is to understand who we are. If we talk about that enough, then we might discover what we should do.

30. HAUERWAS, *supra* note 14, at 128.