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PARABLES ABOUT PROMISES: RELIGIOUS ETHICS AND CONTRACT ENFORCEABILITY*

*E. Allan Farnsworth*¹

INTRODUCTION

Lee Taylor assaulted his wife, who then took refuge in Lena Harrington's house. Taylor gained entry into the house and began another assault on his wife. The wife knocked Taylor down with an axe and was about to cut his head open when Harrington deflected the axe, saving Taylor's life but badly mutilating her hand. Taylor then orally promised to pay Harrington damages, but paid only a small sum. When she sued him on his promise, the trial court sustained his demurrer and the Supreme Court of North Carolina affirmed, being "of the opinion that, however much the defendant should be impelled by common gratitude to alleviate the plaintiff's misfortune, a humanitarian act of this kind, voluntarily performed, is not such consideration as would entitle her to recover at law."² Students encountering the case in the Calamari, Perillo and Bender casebook are likely to be critical of this result.³ Those who track the case down in the one-volume Calamari and Perillo treatise may be further distressed to find it cited as one of "the majority of cases" that reject "the moral obligation concept" and refuse to enforce such promises.⁴

On encountering the doctrine of consideration, and in particular its application to the moral obligation cases, students often experience dissatisfaction with the common law's treatment of promise-keeping. Is one not morally obligated to keep one's promises?

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1. Alfred McCormack Professor of Law, Columbia University. This article is based on a paper presented at a conference sponsored jointly by the law and theology faculties of the Southern Methodist University under the auspices of its Maguire Center for Ethics and Public Responsibility. Thanks for suggestions go to colleagues Sherif Omar Hassan and Michael K. Young and to Columbia students Craig Leen, Yosef Rothstein, Matthew Schwartz and Jonathan Van Ee.

2. *Harrington v. Taylor*, 36 S.E.2d 227, 227 (N.C. 1945).

3. John D. Calamari, Joseph M. Perillo & Helen Hadjiyannakis Bender, *Cases and Problems on Contracts* 259 (3d ed. 2000).

4. John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 5.4, at 228 (4th ed. 1998).

Should the law not reflect that moral obligation? Some students may come with answers to these questions derived from philosophers from Aristotle through Kant.⁵ Others—perhaps particularly at a great Jesuit institution—may come with answers based on what they perceive to be conventional religious teachings. This piece is designed for the latter. I propose to consider the extent to which traditional religious sources are relevant in answering these two questions. I confine my discussion to promises made between private parties, the kinds of promises that are governed by the law of contracts.

Views differ on the extent to which religion has influenced the law on promise-keeping. Near the beginning of the Calamari and Perillo treatise, mention is made of the view of “canon lawyers and rabbinical scholars in the late middle ages and the Renaissance [that] promises were binding in natural law as well as in morality because failure to perform a promise made by a free act of the will was an offense against the Deity.”⁶ That there was a shift in emphasis during the Enlightenment “from a theological to a humanistic basis” does “not imply that the religious basis was abandoned.”⁷ James Gordley, however, concludes that medieval jurists did not arrive at the conclusion that promises were binding “by borrowing the teaching of the Canon law that it is sinful to break a promise,” and the common lawyers “did not borrow the ideas that consent was binding because of a virtue of promise-keeping.”⁸ Indeed, the nineteenth-century jurists “did not ground their legal doctrines on any definite philosophical or political commitments.”⁹

I begin my own reflections with this parable:

There was once a wayfaring seaman who fell ill among strangers in Samaria, where a good man at some expense gave him shelter and comfort. Hearing of this, the seaman's father wrote to the Samaritan promising out of gratitude to pay his expenses. When the father, later regretting his decision, refused to pay, the Samaritan took the father to court. But the court refused to enforce the father's promise, saying that the Samaritan had not given anything in exchange for it. As a wise judge explained, the father might be under a moral obligation to pay, but “the law of society has left most of such obligations to the interior forum, as the tribunal of the consciences has been aptly called.”

5. Much has been written on promise-keeping by scholars using philosophical and other sources, and I will not here examine their work. Two representative works are P.S. Atiyah, *Promises, Morals, and Law* (1981) and Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (1981).

6. Calamari & Perillo, *supra* note 4, at 8.

7. *Id.*; see also Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 *Fordham L. Rev.* 39, 66 n.155 (1974) (describing the influence of canon law).

8. James Gordley, *The Philosophical Basis of Modern Contract Doctrine* 41, 135, 227 (1991).

9. *Id.*

This parable, of course, is not from Scripture but from the venerable case of *Mills v. Wyman*, decided by the Supreme Judicial Court of Massachusetts in 1825 and speaking through its Chief Justice, Isaac Parker.¹⁰ The lesson of the parable is that, at least where promises are concerned, there is a barrier that separates moral obligations from legal ones.

We do not know whether Chief Justice Parker, a devout New England Unitarian, saw a religious basis for the father's moral obligation—he made no mention of any religious source for what the “tribunal of the conscience” might require. Nor do we know whether he approved of the barrier between the legal and the moral—he did no more than yield to it.¹¹ I argue, at the risk of offending some readers, that traditional sources in the Judeo-Christian tradition—particularly those with which students are likely to be familiar—have surprisingly little to say about my moral obligation to perform my promises; that they have even less to say about when the law should enforce my promises; and that, at least as to the second of these points, it is just as well for our society that they do not have much to say.

In my days at Sunday school I surely supposed that someone in Biblical times had said that I should honor my promises. But who was it? God? Moses? Jesus? Had I looked in Scripture I would have been hard pressed to support my supposition.

A. Another Realm

Here is a parable from Another Realm:

There was once a strange and distant realm in which Holy Writ told the people that God said: “O ye who have attained to faith! Be true to your covenants.” And when the people heard this they hung these words upon the walls of their courts so that their judges and all who attend court might know that promises were to be honored.

This parable fairly accurately describes the situation in many Islamic lands, where the quoted Qur'anic injunction, which “emphatically upholds the moral obligation to fulfill one's contracts,”¹² is indeed said to be found on the walls of courts.¹³ One

10. *Mills v. Wyman*, 20 Mass. (3 Pick.) 207, 210 (1825).

11. As to Parker's religious affiliation, see Curtis W. Nyquist, *Contract Theory, Single Case Research and the Massachusetts Archives*, 3 Mass. Legal Hist. 53, 83-85 (1997). See also Geoffrey R. Watson, *On the Tribunal of Conscience: Mills v. Wyman Reconsidered*, 71 Tul. L. Rev. 1749, 1781 (1997).

12. Frank E. Vogel & Samuel L. Hayes, III, *Islamic Law and Finance* 66 (1998); see Qur'an, Al-Ma'idah (The Repast), 5:1 (as translated in Muhammad Asad, *The Message of the Qur'an* (1980)). The covenants referred to include those “between the individual and his fellow-men.” *Id.* at n.1. It is said that the quoted phrase “has been justly admired for its terseness and comprehensiveness,” the Arabic including not only obligations to God but those among persons. “We make a promise, we enter into a commercial or

lesson of the parable is that a great religion need not ignore the obligation to honor promises. I do not contend that a system of contract law can be deduced from such general phrases alone,¹⁴ but Islamic law as later elaborated to deal with the enforceability of contracts has a distinctly religious basis.

B. Biblical Sources

One can find in the Bible a tradition of honoring promises. God said to Noah: "Then will I remember the covenant which I have made between myself and you and living things of every kind."¹⁵ God said to Abraham: "I will give you and your descendants after you . . . all the land of Canaan, and I will be God to your descendants."¹⁶ And this time God wanted something in return: "For your part, you must keep my covenant, you and your descendants after you, generation by generation."¹⁷ And the same was true when God spoke to Moses on Sinai: "Here and now I make a covenant. . . . Observe all I command you this day . . ."¹⁸ The focus in the Hebrew Bible is not on promise-keeping between private parties, not on what we think of as contracts. It is rather on promises by God and to God. As Moses cautioned the people of Israel, "When a man makes a vow with the Lord or swears an oath and puts himself under a binding obligation, he must not break his word."¹⁹ But there is no eleventh commandment like the injunction in the Qur'an to honor our contracts with others.

social contract . . . we must faithfully fulfil all obligations in all these relationships." 1 Abdullah Yusuf Ali, *The Holy Qur'an: Text, Translation and Commentary* 238 n.682 (3d ed. 1938). For similar Qur'anic injunctions, see 9:4 ("[O]bserve, then, your covenant with them [idolaters with whom you have made a covenant and who have not failed you] until the end of the term agreed with them."); 17:34 ("[B]e true to every promise," for on Judgment Day "you will be called to account for every promise which you have made!").

13. On the practice of putting the phrase quoted in the text on the walls of courts in the Middle East, see Saba Habachy, *Property, Right, and Contract in Muslim Law*, 62 *Colum. L. Rev.* 450 (1962).

14. The system of contract law elaborated by jurists is based on the general Qur'anic injunctions and the Sunnah (Traditions) of Muhammad.

For conflicting interpretations of the Quranic injunctions, see Muhammad Yāsuf Māsā, *The Liberty of the Individual in Contracts and Conditions According to Islamic Law*, 2 *Islamic L.Q.* 79 (1955). As to their limited role as a source of a law of contract, see Chafik T. Chahata, *Essai d'une théorie générale de l'obligation en droit musulman* 47 (1936) ("Les quelques préceptes que l'on y rencontre [au coran] sont autant de recommandations ou de règles morales."). *But see* Henri Laoust, *Essai sur les doctrines sociales et politiques de Taka-D-Dan Ahmad B. Taimaya* 445-56 (1939) (discussing doctrines based on such sources).

15. *Genesis* 9:15; *Genesis* 9:11 ("I will make my covenant with you: never again shall all living creatures be destroyed by the waters of the flood, never again shall there be a flood to lay waste to the earth.") (Biblical quotations are taken from the New English Bible (1970) unless otherwise indicated.).

16. *Genesis* 17:8.

17. *Genesis* 17:9.

18. *Exodus* 34:10-11.

19. *Numbers* 30:2-3.

The focus of the New Testament is the same. John speaks of “the promise that he himself gave us, the promise of eternal life.”²⁰ And Paul tells us that

it was not through law that Abraham, or his posterity, was given the promise that the world should be his inheritance, but through the righteousness that came from faith. . . . The promise was made on the ground of faith, in order that it might be a matter of sheer grace. . . .²¹

It is not easy to find Biblical authority for the specific proposition that I should perform the promises that I make to other persons. Perhaps this is not surprising in an account of events primarily of religious significance in relatively primitive societies. But as a lawyer, I have no difficulty in inferring such a proposition. The Bible is, after all, replete with references to the righteousness of a God that performs his promises. Thus Solomon said, “Blessed be the Lord who has given his people Israel rest, as he promised: not one of the promises he made through his servant Moses has failed.”²²

And since Jesus, in the Sermon on the Mount, urged his followers to be “perfect, even as your Father which is in heaven is perfect,”²³ I infer that he was urging them as a general matter to honor their promises as God honors his. I have, however, found no Christian theologian who advances this argument, and so I turn to other sources.

The Hebrew Bible does recount a few agreements to which God was not a party.²⁴ Two of these involve Abraham, described by Hannah Arendt as

the man from Ur, whose whole story . . . shows such a passionate drive toward making covenants that it is as though he departed from his country for no other reason than to try out the power of mutual

20. *1 John* 2:25.

21. *Romans* 4:13-16.

22. *1 Kings* 8:56.

23. *Matthew* 5:48 (King James).

24. Sometimes promises were mixed—in part to God and in part to others. When the Gadites and the Reubenites promised to be drafted as a force to go into battle with the Israelites, Moses replied,

If you stand by your promise . . . then you may come back and be quit of your obligation *to the Lord and to Israel*; and this land shall be your possession in the sight of the Lord. But I warn you, if you fail to do all this, you will have sinned *against the Lord*, and your sin will find you out. So . . . carry out your promise.

Numbers 32:20-24 (emphasis added). See also the treatment of Joshua’s oath that the Gibeonites acquired through deception in *Joshua* 9:19-23 (The chiefs replied, “But we swore an oath to them *by the Lord the God of Israel*; we cannot touch them now. What we will do is this: we will spare their lives . . . [but] they shall be set to chop wood and draw water for the house of my God.” (emphasis added)).

promise in the wilderness of the world, until eventually God himself agreed to make a Covenant with him.²⁵

One is the pact that Abraham made with Abimelech for the use of the well at Beersheba (which seems to have been the only Biblical place named after a contract).²⁶ The other is the agreement that Abraham made with Ephron the Hittite for the cave at Machpelah to bury his dead. Abraham, declining a gift, said to the Hittites: "I give you the price of the land . . . [and he] came to an agreement with him and weighed out the amount that Ephron had named . . ."²⁷

Another agreement to which God was not a party was that between Rahab the prostitute and Joshua's spies. Two spies sent by Joshua to reconnoiter the country around Jericho spent the night at the home of a prostitute named Rahab, who said to them:

Swear to me now by the Lord that you will keep faith with my family, as I have kept faith with you. Give me a token of good faith; promise that you will spare the lives of my father and mother, my brothers and sisters and all who belong to them, and save us from death. To this the spies replied, "Our lives for yours, so long as you do not betray our business," warning her "that they would be released from the oath she had made them take unless she did what they told her." And because she did as they said, her family was spared when Jericho fell.²⁸

The New Testament has less to say about the obligation to perform one's promises than it does about the obligation to release others from their promises. (Only the contract with Judas comes to mind.)²⁹ According to Luke, Jesus told his followers to "lend without expecting any return,"³⁰ and according to Matthew, Jesus taught us to ask that we be forgiven "our debts, as we forgive our debtors."³¹ Consider, then, this parable:

There was once a landowner who went out early one morning to hire laborers for his vineyard, agreeing to pay each the usual day's wage of one denarius. An hour before sunset, he went out and found another group of laborers and told them to join the others. When

25. Hannah Arendt, *The Human Condition* 243-44 (1958).

26. *Genesis* 21:28-32 (To settle Abraham's complaint against Abimelech about a well, "the two of them made a pact. . . . Therefore that place was called Beersheba [meaning Well of an Oath], because there the two of them swore an oath.").

27. *Genesis* 23:13-16.

28. *Joshua* 2:12-18. See also, on the pact arranged by Moses with the Gadites and Reubenites, *Numbers* 32:20-24 ("Moses answered, 'If you stand by your promise . . . this land shall be your possession in the sight of the Lord. But I warn you, if you fail to do all this, you will have sinned against the Lord . . .'").

29. A rare New Testament contract is that made with Judas. See *Luke* 22:5-6 ("They . . . undertook to pay him a sum of money. He agreed . . ."). See also, on Paul's apology for failing to keep his commitment to the Corinthians, *2 Corinthians* 1:17-18 ("That was my intention; did I lightly change my mind?").

30. *Luke* 6:35.

31. *Matthew* 6:11 (King James).

evening came, he called the laborers to give them their pay. Those who started work an hour before sunset came forward and were paid one denarius each. When the men who came first were also paid one denarius, they grumbled because they expected something extra, saying: "These late-comers have done only one hour's work, yet you have put them on a level with us, who have sweated the whole day long in the blazing sun." The owner turned to one of them and replied, "My friend, I am not being unfair to you. You agreed on one denarius, did you not?"

This is a condensed version of the parable told by Jesus to his disciples according to Matthew. The lesson, said Jesus, is, "The kingdom of Heaven is like this. . . . Thus will the last be first, and the first last."³² But any lawyer can tell you that there is here also an earthly lesson—that one who has made a contract with another cannot simply disregard the contract and claim restitution for performance rendered under the contract. But to apply that lesson to this parable is to say that the landowner was right to hold to their promises the laborers who had come in the morning because they had "agreed on one denarius." Might it not seem un-Christian to disregard the benefit that they had conferred by sweating in the blazing sun the whole day long? Would not a truly Christian landowner have released them from their promise?³³ I return to this parable below, but I want first to turn to another parable.

C. *Fidei Laesio*

The next parable is this:

There was once a virtuous merchant who sold sheep, lambs, and hogs to another merchant, who paid only part of what he had promised. When the virtuous merchant demanded the balance, the other promised "by my faith" to pay it by a certain day, but when the day came he had not done so. When the virtuous merchant took the other to court, the judge ordered the other "to observe this promise and faith before an appointed day under pain of major excommunication."

This parable is loosely based on a case brought in an English ecclesiastical court in 1511.³⁴ The lesson of this parable is plain.

32. *Matthew* 20.

33. For an example from the present day, see Andrea Adelson, *A Done Deal Redone Anyway: Sellers' Remorse Prompts Company to Forgo \$333 Million It Was Due*, N.Y. Times, Jan. 19, 1998, at D3 (recounting how the two founders of a corporation that they sold to a Japanese bank "agreed to forgo the final \$333 million in payments that Softbank owed them," agreeing instead "to revise the terms of their company's acquisition, even without a contractual obligation to do so, because [its] earnings failed to meet expectations").

34. The case is set out in R. H. Helmholz, *Assumpsit and Fidei Laesio*, 91 L.Q. Rev. 406, 413 (1975) [hereinafter *Fidei Laesio*]. For the judge's order, taken from one in a 1497 case, see *id.* at 424. The "by my faith" was sufficient as an oath. See R. H. Helmholz,

Though no court would sanction the breach of a *promise*—even one to a virtuous merchant—the Church would sanction as a sin the breach of an *oath* made in the face of God,³⁵ if not by excommunication then, perhaps, by public whippings or the wearing of penitential garb in a parish procession.³⁶ Because the king's central common-law courts afforded no satisfactory basis for enforcing promises, litigants went by default to other courts, including merchant and ecclesiastical courts. For centuries after the Conquest, Church courts maintained a foothold in the domain of contract by enforcing such “promissory oaths,” by which a Christian could pledge his hope of salvation to secure the fulfillment of a promise. Although Jesus had said to his disciples, “You are not to swear at all,”³⁷ canon law had become in the words of one scholar “an ‘oath-dominated’ sort of justice.”³⁸ During the fifteenth and sixteenth centuries, hundreds of these *fidei laesio* (breach of faith) cases, typically arising out of informal oral “promissory oaths” involving small sums, were brought each year to the ecclesiastical courts, where they came to dominate litigation. Although in 1164, long before the case on which my parable is based, the Constitutions of Clarendon had forbidden the Church to hear such cases, Church courts heard them largely unmolested. Half a century after 1511 all the judges in Exchequer Chamber united to formally reaffirm that *fidei laesio* could not be the means of giving the Church courts general jurisdiction over contracts.³⁹ Not until the common law courts provided a satisfactory alternative in the form of *assumpsit*, which took them nearly one hundred more years after 1511, did the Church courts lose their foothold in the domain of contract.⁴⁰

The Church courts had not been alone in infusing religious notions into the common law. In 1489 it was argued in Chancery that where one of two executors had released a debtor of the deceased testator the common law allowed no remedy, this being one of those matters that “lie in conscience between a man and his confessor.” To this Chancellor John Morton, then archbishop of Canterbury, replied,

The Spirit of Classical Canon Law 161 (1996) [hereinafter Classical Canon Law].

35. See *Deuteronomy* 23:21-22 (“When you make a vow to the Lord your God, do not put off its fulfillment; otherwise the Lord your God will require satisfaction of you and you will be guilty of sin. If you choose not to make a vow, you will not be guilty of sin.”); *Numbers* 30:2 (“When a man makes a vow to the Lord or swears an oath and so puts himself under a binding obligation, he must not break his word. Every word he has spoken he must make good.”).

36. For mention of cases imposing such sanction, see *Fidei Laesio*, *supra* note 34, at 424.

37. *Matthew* 5:34; see also *James* 5:12 (“Above all things, my brothers, do not use oaths . . .”).

38. Classical Canon Law, *supra* note 34, at 145-46 (discussing the lawfulness of the oath).

39. 2 W. S. Holdsworth, *A History of English Law* 252 (1909).

40. See *Slade's Case*, 76 Eng. Rep. 1074, 1077 (K.B. 1602).

Sir, I know well that each Law is, or ought to be, in accord with the Law of God; and the Law of God is that an executor, who is of evil disposition, must not waste all the goods, etc. And I know well that if he does so waste and makes no amends or satisfaction . . . or will not make restitution . . . , he shall be damned in Hell. And to make remedy for such an act . . . is well done according to conscience.⁴¹

The matter was not to be left to “the tribunal of the conscience,” as Chief Justice Parker left the obligation of the father of the wayfaring seaman four centuries later.

But even in theocentric England, more and more lawyers and judges were laymen, learned in the common law at the expense of the canon law. As Holdsworth said, “Thus the ecclesiastical and the common law go their separate ways. We can no longer expect to find royal judges who can show an accurate knowledge of papal legislation; nor will ideas drawn from canonical jurisprudence be used to develop our law.”⁴²

Legal historians have sometimes argued that the common law of contracts showed significant influences of the canon law⁴³ and there is disagreement as to the extent to which religious notions of morality influenced common-law courts after the sixteenth century.⁴⁴ It is noteworthy, however, that when Lord Mansfield in 1765 made his memorable if short-lived attempt to expunge the doctrine of consideration from promises made among merchants, he invoked

41. Y.B. Hil. 4 Hen. 7, f.4, p.8 (1489), *reprinted in* C.H.S. Fifoot, *History and Sources of the Common Law: Tort and Contract* 326 (1949).

42. See Holdsworth, *supra* note 39, at 254.

43. See *Fidei Laesio*, *supra* note 34, at 408 (arguing that “there is a connection between the *causa fidei laesionis* and the early history of *assumpsit* in the royal courts”); see also Charles Donahue, Jr., Ius Commune, *Canon Law, and Common Law in England*, 66 Tul. L. Rev. 1745, 1766 (1992) (“The idea of the independent promise seems pretty clearly to have been derived from the church court actions for breach of faith . . .”). But see 3 W. S. Holdsworth, *A History of the English Law* 319 (1909) (“Nor was English law influenced by the theories of the canon law; for in spite of their continual efforts, the ecclesiastical courts were not allowed to interfere with ordinary agreements.”). For more on the relationship between religion and the law of promise-keeping, see *supra* notes 6-8 and accompanying text.

44. On developments in the seventeenth and eighteenth centuries, see Harold J. Berman, *The Religious Sources of General Contract Law: An Historical Perspective*, 4 J.L. & Religion 103, 112-22 (1986). For discussion of the nineteenth-century notion that Christianity is part of the common law, see Stuart Banner, *When Christianity Was Part of the Common Law*, 16 L. & Hist. Rev. 27 (1998), from which it appears that this notion played no role in the enforcement of contracts.

For one view of history, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1725 (1976). (“Positive law [in the eighteenth century] was of a piece with God’s moral law as understood through reason and revelation. . . . The sense of a conflict between systems of thought emerged only at the beginning of the nineteenth century.”). For a different view, see Atiyah, *supra* note 5, at 4 (arguing that by 1800 “the common lawyers had largely come round to the modern viewpoint, that promises *per se* are morally binding, and that insofar as the doctrine of consideration fails to give effect to this moral ideal, it is an anomaly”).

neither the "Law of God" nor damnation "in Hell," nor did he refer to any other religious or moral ideas.

After the demise of *fidei laesio*, what religious leader urged his followers to perform their promises to other persons? Martin Luther? John Calvin? John Wesley? During the seventeenth and eighteenth centuries, Christians made generous use of the notion of "covenant" for the organization of religious groups.⁴⁵ But I have found only one religious leader who generally urged his followers to honor their promises to each other. It was Brigham Young who said, "Fulfil your contracts and sacredly keep your word. . . . I have no fellowship for a man that will make a promise and not fulfil it."⁴⁶

D. Contemporary Scholarship

Why, as a matter of religious ethics, should my promising—my mere declaration that I undertake an obligation—have the effect of imposing an obligation on me to perform my promise even if I have later changed my mind and regret having made the promise? Contemporary writers on Christian ethics have had some interesting things to say on this question, but I have several difficulties with what they say.

First, a number of distinguished scholars use what I would call a technique of avoidance, sometimes with disdain. This is common among covenant theologians. According to Robin Lovin,

[T]he self-interested, rational individual who calculates the value of proposed social arrangements in terms of his or her own purposes and makes commitments accordingly could not be the covenant-partner [the theologians] had in mind. . . . Covenant theology and contract theory thus offer us two alternative accounts of how persons move voluntarily and in history from an unacceptable state of nature to life in political community.⁴⁷

Joseph Allen agrees that

[T]o work from [the] covenant model is also to reject *some contractual* ideas as adequate conceptions for the whole of the moral life—those, for example, in which the social contract is seen as a relationship only of bargaining. . . . in which the rights and obligations of each person are limited to what has been agreed to, or would be agreed to, in the bargain.⁴⁸

45. For the Jewish tradition, see Daniel J. Elazar, *Covenant as the Basis of the Jewish Political Tradition*, 20 *Jewish J. Soc.* 5 (1978).

46. Discourses of Brigham Young 358 (John A. Widtsoe ed. 1925); see also *id.* at 467 ("Pay your debts . . . , but do not run into debt any more.").

47. Robin W. Lovin, *Equality and Covenant Theology*, 2 *J.L. & Religion* 241, 245, 248 (1984).

48. Joseph L. Allen, *Love and Conflict: A Covenantal Model of Christian Ethics* 17 (1984).

Another covenant scholar emphasizes “the difference between a compact and a contract,” the latter has only two sides, being of limited scope and duration, and being “legalistic in nature,” binding “only with the letter of the agreement, not the spirit,” while a “compact is contrary to every characteristic just noted for a contract.”⁴⁹ Such discussions do not easily produce insights into what religious ethics has to say about my contracts.

Second, those scholars that confront the ethical questions raised by contracts sometimes resort to circularity. Margaret Farley argues that “if we ask why I ‘ought’ to keep my commitments, the first and most obvious answer is that this is what commitment *means*; what commitment *does* is produce an ‘ought.’” It does not help me when I find this supported with the statement that “When I make a commitment to another person, I dwell in the other by means of my word.”⁵⁰ In similar fashion, Donald Evans reasons that “In saying, ‘I promise to do X,’ I create a moral obligation to do X.”⁵¹

Third, when writers on Christian ethics marshal non-circular arguments, the arguments are often the same as those commonly made in purely secular analyses. Margaret Farley points out that if I do not honor my promises, “I stand to lose my reputation, or the trust of others, or my own self-respect,”⁵² but I have difficulty grasping the religious aspect of this. Donald Evans describes promising as “a linguistic act which takes place according to various conventions,” saying it has “performative force” and citing J.L. Austin’s work,⁵³ and Joseph Allen endorses this analysis,⁵⁴ but this analysis, too, is a familiar one in secular argument. Allen avoids the circularity of Evans’s argument by arguing that in covenanting “we entrust ourselves . . . to someone else,” risking “that we might be betrayed.”⁵⁵ This strikes me as a slight recasting of the widely accepted argument of contract scholars that at least one basis for the enforceability of a promise (“covenant”) is that it induces reliance (“entrusting”) in the promisee.

E. What Is Needed

It seems to me that one of two elements is needed in order for religious ethics to make a contribution to the first of my two

49. Donald Lutz, *The Evolution of Covenant Form and Content as the Basis for Early American Political Culture*, in *Covenant in the Nineteenth Century* 45 n.4 (Daniel J. Elazar ed., 1994).

50. Margaret A. Farley, *Personal Commitments: Beginning, Keeping, Changing* 17, 71 (1986).

51. Donald Evans, *Love, Situation and Rules*, in *Norm and Context in Christian Ethics* 367, 383 (Gene H. Outka & Paul Ramsey eds., 1968).

52. Farley, *supra* note 50, at 18.

53. Evans, *supra* note 51, at 383.

54. Allen, *supra* note 48, at 34.

55. *Id.* at 33.

questions: When do I have a moral obligation to perform my promises?

As to the first element, I begin with agapism: "Love your neighbor as yourself."⁵⁶ I have no difficulty in deriving from this the principle that one should be truthful and not tell lies. One should therefore not make promises that one does not intend to perform. But this is not to say that, having intended to perform my promise when I made it, I am bound to perform it if I later change my mind. Nonperformance where there has been such a change of mind is distinguishable from nonperformance where there was never any intention to perform. Although Aristotle appears to have ignored this distinction, it is well known to lawyers who call the misrepresentation implicit in the latter "promissory fraud."⁵⁷ There may be cases of what we might call a "loving promise"—a promise made in recognition of an obligation imposed by love that defines the scope of that obligation. The parable of the wayfaring seaman may be an example, and on that basis the father can be viewed as under a moral obligation. But most contracts are made, as writers such as Robin Lovin and Joseph Allen have stressed, not out of love for others but out of self-interest. What can agapism have to say to me about why I should perform such promises?

That brings me to the second element. If agapism is not a sufficient principle, is there some other principle that is relevant? And, if so, what is the source of that principle in theology? The principle, I assume, must be that of justice, the basis of most of the non-religious discussions of the question. It is difficult for me to see how this is a peculiarly religious principle, or even one to which theology has much of its own to contribute. Frederick Carney has described a

supposed duality [under which] love is a teleological principle, or a general norm that looks to consequences and causes us . . . to seek the welfare of what we value, [while] justice is a deontological principle, or a general norm that calls attention to an immediately perceived duty . . . without itself considering consequences.⁵⁸

56. *Matthew* 22:39.

57. In describing promise-keeping, Aristotle argued that "a person who breaks his word is not truthful," but while Thomas Aquinas "explained that promises are binding as a matter of . . . honesty" and promise-breaking "is like lying," he seems to have recognized the distinction between what lawyers know as promissory fraud and a mere change of mind. See Gordley, *supra* note 8, at 11-12; see also E. Allan Farnsworth, *Changing Your Mind: The Law of Regretted Decisions* 30 (1998).

For an argument, unconvincing in my view, that the nature of a promissory obligation "seems simply to be the requirement of *veracity*," so that the "reason why I should *do* what I have said I *will* do is thus . . . essentially the same as the reason why I should *say* I have done what I actually *have* done," see G. J. Warnock, *The Object of Morality* 109, 111 (1971).

58. Frederick S. Carney, *Deciding in the Situation: What is Required?*, in *Norm and Context in Christian Ethics*, *supra* note 51, at 3, 8.

My difficulty is in finding a religious mandate for justice in the contract context.

CONCLUSION: A GOOD THING

Up to this point I have been concerned with my *moral obligation* to perform my promises. What of my second question: When should the law *enforce* my promises? Recent years have seen much concern with the relationship between contract law and economics. Little attention has been paid to the relation of contract law and morality—in particular contract law and religious ethics. According to Stanley Fish, “morality is something to which the law wishes to be related, but not too closely” for “a legal system whose judgments perfectly meshed with our moral intuitions would be thereby rendered superfluous.”⁵⁹ Would we want a society in which the dictates of religion were as specific as in the parables from Another Realm or of the virtuous sixteenth-century English merchant? It might be noted that the influence of Christianity on contract law did not vanish entirely with *fidei laesio*. It lived on in laws prohibiting gambling and usury and the making of contracts on Sunday. Whether such laws suggest that a religious influence is appropriate for a diverse and secular society is at least questionable.

And finally one must ask: Whose religious ethics? Principal goals of contract law are predictability and certainty. Advocates of “situation ethics,” such as Joseph Fletcher, resist the notion that rules to meet these goals can or should be crafted.⁶⁰ Edward Leroy Long, Jr., states that “no Christian theologian wants to call himself a legalist,” noting Luther’s view that “law is the antithesis of gospel” and Calvin’s rejection of “law righteousness.”⁶¹ This is not a view likely to earn favor with those responsible for the workings of our legal system.

Indeed, what lawyer would not react to such views with relief that, as Jesus said to Pilate, “My kingdom does not belong to this world.”⁶² Nonetheless, we who live in an increasingly diverse America can be grateful that most of the time most of us regard honoring our promises as a serious matter, whatever we see as the religious or moral basis of our doing so.⁶³

59. Stanley Fish, *There’s No Such Thing as Free Speech and It’s a Good Thing, Too* 141-42 (1994).

60. Joseph Fletcher, *Situation Ethics: The New Morality* (1966).

61. Edward Leroy Long, Jr., *Soteriological Implications of Norm and Context*, in *Norm and Context in Christian Ethics*, *supra* note 51, at 265, 272, 275, 278.

62. *John* 18:36.

63. See Richard A. Posner, *Law and Legal Theory in England and America* 95 (1996) (reporting that a private rating of the risk of the non-enforceability of contracts placed the United States second best, after Switzerland and tied with the United Kingdom).

Notes & Observations