Is Contract Law Only for the Stubborn?

Author : Shawn Bayern

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Aditi Bagchi, *Contract and the Problem of Fickle People*, 53 **Wake Forest L. Rev**. ___ (forthcoming), available at SSRN.

Whether by design or by accident (or both), the world rewards people who are stable—who have reliable desires, low discount rates, and long-term plans. Young children who pass the marshmallow test appear to do well on achievement tests ten years later. “Commitment” and “follow-through” are often prized cultural values, and focus and single-mindedness often correlate with success. We link consistency with rationality; economists often don’t even know what to do with people who don’t have consistent preferences.

As Aditi Bagchi suggests in *Contract and the Problem of Fickle People*, maybe the law inappropriately helps to enshrine this state of affairs. Even if stability contributes to productivity—we can’t build skyscrapers or microprocessors if we’re changing our minds all the time—perhaps arguments routinely made about the private law artificially and accidentally overvalue stubbornness, rigidity, and resistance to change.

As Professor Bagchi observes, different people might assign different meanings to the ability to change beliefs and moral commitments over time. “Some people pride themselves on being constant and only reluctantly let go of beliefs and values as they prove untenable. They call it personal stability,” she writes. “Others pride themselves on self-reinvention, shedding identities often. They call it personal growth.” Apart from concerns about how one person’s fickleness may harm others—which the law should clearly consider—Professor Bagchi asks whether it is appropriate for contract law to favor one approach to personal development over the other.

Her argument is mainly a challenge to theories of contract law that rest on the morality of promises alone—and particularly on a view of that morality that rests, in turn, on a traditional understanding of personal autonomy. “Our moral interest in changing our minds does not generate a right to harm others,” she argues, “but it does generate a reason not to have courts hold us to our commitments for our own sake.” Promises may promote a particular type of personal autonomy, grounded in a view of humans as stable creatures. Many people may value this conception of human morality. But Professor Bagchi’s point is that it’s not obviously desirable in all circumstances, and it’s not necessarily valued by everyone. After all, while we prize stability, we also value open-mindedness; we admire moral conviction, but we also seek to change and to grow. Holding us to a past promise just because we once made it does give a new sort of capability to stable people, but maybe it also discourages us from reevaluating our priorities; after all, on its face, a set of moral rules that prioritize our past priorities over our current ones seems, at the very least, a bit stagnant.

Of course, none of this means that promises generally shouldn’t be enforced. After all, while personal growth might encourage us to try to get out of a past commitment, so might cynical self-interest. Professor Bagchi’s point is just that while the morality of promises alone may justify the legal enforcement of promises in some cases, for some types of people, its justification is not necessarily as universal or persuasive as philosophers often take it to be. “It is surprising,” she observes, “that the philosophical literature on promise has rallied so completely around the value to one’s autonomy of

being bound."

So, instead of grounding contract law exclusively on a traditional conception of promissory morality, contract law should rest on other bases as well. As Professor Bagchi reminds us, contract law has no single justification—or as Mel Eisenberg once put it, "law generally, and contract law specifically, have too many rooms to unlock with one key."

That is, modern contract law isn't a simple implementation of analytical moral philosophy, much less particular views of human autonomy. Simple donative promises are, of course, not enforceable merely for the reason that a promise has been made. Many contract rules—principles of mitigation, *Hadley v. Baxendale*, and so on—end up splitting losses among the parties in various ways, rather than letting damages serve exclusively as a way to right the moral wrong of breach. Some legal rules exist just because they make the law more administrable. Professor Bagchi's nice questioning of the broad application of a single type of philosophical argument is a reminder that contract law is not—and should not be—easily reduced to one clean, theoretical framework.

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