Law in the Cultivation of Responsibility and Trust

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Seana Shiffrin, *Enhancing Moral Relationships through Strict Liability*, 66 **U. Toronto L.J. 353** (2016).

Consider the following everyday scenario as a simplified version of complex contracting. Having been invited to a dinner party a guest asked the host what to bring. “A dessert would be nice,” replied the host, to which the guest responded: “consider it done!” On the morning of the party the guest purchased a delicious cake from a celebrated bakery and was ready to make good on the promise. Sadly, in the evening, as the guest got the cake out of the fridge, it was covered with odd green spots and seemed inedible. Clearly, the guest is at no fault for what just happened, but what should the guest do next: Get another dessert on the way to the party or just go empty-handed? Seana Shiffrin’s thought-provoking article *Enhancing Moral Relationships through Strict Liability* describes and answers this dilemma as it manifests itself in the domain of contracts’ performance (fault is irrelevant and thus the guest should get another dessert before heading to the party!) — but it goes further and also compellingly explains why demanding full performance of contracts, irrespective of fault, is the appropriate legal approach, both morally and legally.

The article offers a defense of the performance phase of the contractual strict liability doctrine from a novel perspective. The doctrine sets a default rule: unless otherwise agreed between the maker of a promise (promisor) and its recipient (promisee), the promisor is the one who is responsible for full performance, even if reasons outside of his or her control make the task arduous. The “strictness” of the promisor’s duty to perform is restrained only by the doctrine of impracticality that may release the promisor from the burden of performance but merely in extreme and rare cases.

So why, as a general rule, should the promisor be responsible even if he or she is at no fault? Shiffrin’s brilliant analysis offers a fresh justification for this traditional principle. Strict liability, she argues, promotes “a healthier moral cooperative relationship between contracting parties more than a fault-based system would,” offering a “structural background” that plays an important “supportive role in fostering trust.” One salient component of this structural background is Shiffrin’s special theorizing of responsibility—not as emerging from a faulty past but rather as generated by the agency of promisors as they utilize the prospective power of their promises. By divorcing the notion of responsibility from the idea of fault, a strict liability rule allows, indeed empowers, promisors to stretch their agency beyond the limits of their control. In the face of obstacles that make performance harder, strict liability encourages promisors to devote all their energy, creativity, persistence, connections and any other resources to achieving performance, even when—like in the case of the bakery that supplied a defective cake—someone else is at fault. And, as Shiffrin explains, expanding the responsibility of the promisor has a dramatic impact on the promisee. The latter is thereby invited to trust the promisor and is released from having to constantly worry about the performance process, invest resources in preventive efforts, or intrusively scrutinize the promisor. In the dinner party scenario the host can thus focus on, say, cooking and need neither call her guest again (and again) nor purchase a spare dessert. Accordingly, the promisor’s increased responsibility combined with the promisee’s decreased policing has the potential to allow the promisee to depend more on the promisor while granting the promisor a greater moral respect; a positive dynamic that Shiffrin calls “an environment that is more conducive to a morally healthy relationship between the parties.” To illustrate: in such an environment the guest’s effort to get a substitute dessert is not only required, it is also essential to the success of the party and

to the preservation of the relationship between the parties.

Shiffrin's philosophical defense of the strict liability doctrine is forceful and is accompanied by a criticism of the duty to mitigate the harm caused by the breach—a duty that contract law assigns to promisees. Imposing such broad duty on promisees, argues Shiffrin, shifts too much of the burden of failed performance to them while wastefully releasing promisors from the very valuable responsibility they assume under the strict liability rule. In that way, mitigation operates to undercut the relational and moral benefits that strict liability is structured to achieve. Coupled, Shiffrin's defense of strict liability and her criticism of the duty to mitigate is highly convincing.

And yet, I worry that when a significant imbalance of bargaining power exists between stronger promisees and weaker promisors, strict liability joined with a narrow duty to mitigate may allow immoral behavior and exploitative use of contracts. For example, should a borrower of a payday loan who promised to repay it upon receiving his salary be expected to go as far as selling his most necessary belongings—as the strict liability rule would demand—if his employer doesn't pay him on time, preventing the borrower from performing? Given the high interest in such transactions and assuming a short delay—shouldn't the lender be expected to allow for a late-payment? And, although Shiffrin defends strict liability only as a default rule, isn't it true that weaker promisors in the borrower's position cannot negotiate away their strict liability? The conventional unforgiving rule is especially troublesome given the fact that our current doctrine of impracticability, as Shiffrin notes, "imposes a rather high bar," leaving promisors unprotected when events outside of their control undermine their ability to perform. Because I am persuaded by Shiffrin's general argument and share her belief in the moral value of contractual relationships, I think that a more nuanced treatment of the issue would have been beneficial. Somewhere between the expanded rule of liability and the harsh rule of impracticability there should be room for greater empathy and enhanced protection when applying the general rules to the interactions of destitute promisors with affluent promisees.

Perhaps most importantly, Shiffrin's article is inspiring much beyond its pronounced premise as it offers a theoretical breakthrough broader than its immediate subject. Readers of scholarship focused on contract law are frequently exposed to the arguments that contract law has (and should have) nothing to do with morality and effective default contractual rules are aimed at creating efficient incentives for parties that are by definition rational self-interested people, not to say selfish. Shiffrin's approach, in this article and more generally in her notable body of work, envisions an utterly different world and invites a deeper conversation regarding the role of contract law. In this world, contracts are not a battlefield but rather are conceptualized as relationships between humans—humans who are far less rational and selfish than others assume. Equipped with good amounts of emotional and social intelligence such humans are amenable to moral "messages" expressed by the law. Moreover, according to Shiffrin the law itself is not confined to its traditional regulative roles. Instead, the law is portrayed as a unique social institution that has the ability, to use some of the article's expressions, to proactively "generate," "facilitate," "foster," and "encourage" morally healthy relationships between contractors. Indeed, Shiffrin reminds us that even as the quintessential strain of *private* law, contract law must serve a *public* interest: "cultivating and facilitating habits and practices of promissory fidelity and relations of trust, elements of a well-ordered just society." On this view, supporting the market is not the sole goal of contract law; "Enhancing trust," to denote the article's title, is a much more promising aspiration.

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