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Creativity and responsibility – Covenant, contract and the resolution of disputes: Introductory notes

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EMORY UNIVERSITY SESQUICENTENNIAL COLLOQUIUM

CREATIVITY AND RESPONSIBILITY: PERSPECTIVES ON COVENANT, CONTRACT AND THE RESOLUTION OF DISPUTES

INTRODUCTORY NOTES

by
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Emory University celebrated its 150th birthday in December of 1986. To mark its sesquicentennial the University scheduled a number of events during the 1986-87 academic year. Among these were a series of scholarly exchanges that involved various members of the University faculty. The papers that follow are the products of the first of the Sesquicentennial Colloquia. The participants represented a wide range of disciplines: theology, law, business administration, and political science.[1]

The essential subject of the colloquium was the degree to which the learning of humane disciplines, such as theology and philosophy, intersect with and guide the development and application of rules of law. The consideration of this general subject took place within a specific discussion of methods for the resolution of disputes, especially disputes that arise from intimate relationships. The interplay of theory and praxis led to a lively debate among the

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[1] The principal papers were presented by Professor Everett of the Candler School of Theology and Professor Terrell of the School of Law. The respondents were Professor Karen O'Connor of the Political Science Department, Professor Roderick Gilkey of the School of Business Administration, and Mr. Tom Bertrand, Secretary of the University. After the colloquium and in response to some of the issues raised during the discussion, Mr. John Witte prepared an additional essay that also appears in this issue. Mr. Witte is the Director of the Law and Religion Program at Emory University. I served as moderator - author.

participants that reflected the constant tension in American society between individual and community interests.

In his paper, Professor Everett outlines an argument that has been made in one guise or another for centuries: individual actors are members of a larger community whether they like it or not, and the traditions of that community are important to an understanding of the individual's role and rights. Everett's community is one that is defined by reference to God and to the overarching concept of covenant. He argues for a reaffirmation of the concept of covenant and suggests that such a reaffirmation would help to diminish the atomization of individuals and to smooth the resolution of disputes by emphasizing notions of compromise and community.

Professor Terrell, ever the lawyer, does not disagree with Everett's point that there is a community that is important to the definition of the individual. Terrell's community, however, is not based on a covenant with God but on secular rules of law. The law *is* the community. Law defines the community, governs it, and is the essential protector of the individual as well as the community. In what comes close to a polemic against the currently popular "alternative dispute resolution,"[2] Terrell argues the importance of the law to the protection of rights. Picking up on this theme, Professor O'Connor suggests that the procedures often criticized as unnecessarily complex ("inhumane") in courts of law protect those who most need protection by assuring them of due process and by preventing the automatic application of community norms that might be inimical to the interests of the individual.[3]

Professor Gilkey is correct in noting that Terrell's paper is conservative; indeed, it might be called profoundly conservative. But Everett's argument is also conservative. Both seek to identify and to protect those elements that are essential to the health of a just

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[2] Loosely speaking, this refers to any extra-judicial method for the settling of disputes. More particularly, there are an increasing number of informal panels that provide an arbitrator or mediator for disputants who agree to submit their disputes to this form of settlement rather than to a court.

[3] Hers is the long respected argument that adversarial proceedings, rules, hearings, and the rule of law protect the minority from the community norms defined by the insensitive and sometimes oppressive majority.

and humane society. Because of that, there is more that is common to the two papers than may first appear.

Everett sets up his argument by drawing a contrast between contract and covenant. Contract is quintessentially the law of the individualist in Everett's scheme. Covenant represents the common strands of community. In this framework contract partners are essentially antagonistic and each strives to maximize his selfish interests in the transaction that is the subject of the contract. There is a great deal of truth in this model of contract. For example, the law does not attach fault to the breach of a contract. To the contrary, the rules of damages encourage what modern commentators refer to as the "efficient breach" which occurs when there is a bad deal and it is better to cut losses and to start anew.[4] The classic statement is by Holmes: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else."[5] This is a cold, bloodless approach that has its utility in commercial dealings, but that may seem inappropriate for more personal relations such as those between spouses. Therein lies much of Everett's concern, for he uses marriage as the relationship in which contract, as a model for pure individualism, is particularly inappropriate.

It is in the use of marriage as an example that Everett moves onto shaky ground. Marriage and other intimate, personal relationships are not now and never have been governed by the model of contract described by Everett.[6] In the Anglo-American tradition,

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[4] *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF THE LAW 88-90 (1977); Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUD. 277 (1972); Birmingham, *Breach of Contract, Damage Measures and Economic Efficiency*, 24 RUTGERS L. REV. 273 (1970); Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977). Some commentators argue, however, that the rules are too strict and result in chronic undercompensation which defeats the goal of economic efficiency. *See* Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443 (1980); Leff, *Injury, Ignorance and Spite - The Dynamics of Coercive Collection*, 80 YALE L. J. 1 (1970).

[5] Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). Professor Charles Fried has taken specific exception to this view. C. FRIED, CONTRACT AS PROMISE 17 (1981).

[6] In fairness, Everett recognizes that the "contract of marriage," in the usual sense, is a preordanied and imposed contract. Care should be taken, however, to distinguish the tradi-

marriage has been much closer to a preordained status. A couple may freely decide to become married and may negotiate about time, place and guests, but they cannot actually marry without the intervention of the state. Once married, the public law defines many of the most important obligations they have to one another and especially to any children of the union. They are not free to break the marriage contract; that can be done only with the permission and the intervention of the state. It is true that divorce is easier to accomplish today than it was a generation ago, that courts are more willing today to enforce antenuptial and postnuptial agreements for the division of property,[7] and that a number of commentators have argued for greater use of private contract in ordering marriages.[8] Nevertheless, there is little that private parties can do to amend the status of marriage by contract other than to agree on a division of property, something that each generally could have accomplished unilaterally by gift or testamentary devise.

Everett's real concern — properly analyzed — is not with the intrusion of the model of contract into the relationship of marriage but with changes in community mores that have weakened the institution of marriage. Many family disputes do wind up in the courts, but that is because the courts are the agencies of the state that have the primary responsibility for handling these kinds of disputes. They have been given that responsibility by legislatures that have responded to the popular will of the larger community. Courts and the rules of law (of contracts as well as other areas of law) have become a part of the fabric of marital disputes precisely because of community decisions. It may be that the community places too much emphasis on the individual and that is certainly a

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tional "contract of marriage" from the classical model of contract described by Everett.

[7] *See, e.g.*, Newman v. Newman, 653 P.2d 728 (Colo. 1982); Posner v. Posner, 233 So. 2d 381 (Fla. 1970), *rev'd. on other grounds*, 257 So. 2d 530 (Fla. 1972); Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982); Levine v. Levine, 56 N.Y.2d 42, 451 N.Y.S.2d 26 (1982). *See generally*, Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

[8] *See, e.g.*, L. WEITZMANN, THE MARRIAGE CONTRACT (1981); Rheinstein, *The Transformation of Marriage and the Law*, 68 NW. U. L. REV. 463 (1973); Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982).

proper issue for debate.[9] In this sense Everett's concern with the reaffirmation of covenant is apt.

Terrell is largely correct in suggesting that law is the community in the United States — that law is the covenant of this national community. In seeking to prove his point, however, he overstates the case and makes a mistake about contract that is surprisingly similar to the one made by Everett. He fails to give sufficient consideration to the role of communitarian concerns in defining and limiting the individual expression of selfish interests in the classical model of contract. The law of contract is full of principles from the courts of equity, principles that represent communal notions of fairness derived largely from norms of behavior established by the church and by ecclesiastical courts. For example, it is an accepted principle today that every contract contains an implied duty of good faith. This good faith obligation may run counter to the idea that there is no fault in a breach and that a breach is not only acceptable but should even be encouraged if it contributes to efficiency. Likewise, courts will refuse to enforce contracts that are unconscionable. Although the issue of unconscionability usually arises in connection with disputes about the process of negotiation (did a door-to-door salesman overwhelm a recent immigrant with hyperbolic descriptions of a product?), it leaves open the possibility that a court will examine the substance of a private agreement to determine whether it is objectively fair. The excuse of impracticability contained in UCC section 2-615 is based on community notions of fair dealing more than on strict adherence to the specific bargain. This list could go on and on, but the point is simple: the public law imposes on the private law of individual contracts a large number of communitarian norms of behavior. Admittedly, it is the law that does this (Terrell's covenant), but these community based legal norms of behavior reflect more than just the rule of law. They reflect many of the most important customs of the west-

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[9] Professor O'Connor makes the point that the understanding of covenant is critical to Everett's paper. In the past, communitarian concerns that express the communal covenant have been extremely important in defining the relationship of marriage, but the communitarian principles have not always been just. There greater use of a contract model in marriage is one way in which the roles of the sexes have been equalized.

ern liberal tradition as well as the teachings of the church.[10]

What all this means is that the dichotomy between contract and covenant suggested by Everett and largely accepted by Terrell is artificial. Contract did not spring up as some a priori principle of individualism. It grew from and reflected established traditions and community needs. The concept of promise and the duty to keep promises are much older than what we think of as contract law. The same holds true for trust, bargain and exchange. Contract law is a creation of the community, and its rules have their roots deep in the fabric of the community. Certainly it is a means for private law making and, as such, it is critical to the maximum development of individual opportunities. Even in purely commercial situations, however, there are rules of contract law that represent the larger interests of the community in the promotion of fair and just behavior.

Despite this criticism, the distinctions that Everett tries to draw merit close attention. The glorification of contract, especially in the late nineteenth century, as the essence of individualism and the driving force of capitalism makes it a natural object of close examination in any consideration of the ongoing tension between individual and community interests. The rules of contract law and the role of contracts in ordering commercial and personal relationships help to define the intersection of public and private law. To the extent that public law represents the community's interests, this intersection identifies the relative importance of private freedom of action in defining individuals' roles in various sectors of the society. Everett's interests go beyond this intersection because his

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[10] Further study of the points raised by Terrell and Everett in the context of a historical analysis of the role of equity courts in the development of contract law would be interesting. Many of the early chancellors were clerics and many of the general principles of equity derive from church teachings. The equity courts were more concerned with doing justice in a particular case than in setting precedents or in treating similar cases alike. Instead of a set of limited remedies, the equity courts had almost unlimited remedial authority to fashion one to fit the circumstance. In a way the equity courts were the alternative dispute resolution centers of their day. The chancellor intervened in the proceedings almost in the nature of a mediator. The outcome depended as much on the good behavior of the petitioner as on the bad behavior of the respondent. The particular issues were reviewed in light of large principles of fairness that were more a part of what Everett might call the community covenant than a part of any specific set of legal rules.

concern with covenant involves the proper understanding of public law rules as well as the public/private distinction.

People often are more concerned with how to solve a dispute than with whether the nature of the dispute is one that involves more or less concern with community norms of behavior. Full blown litigation is often time consuming, expensive, emotionally and physically draining, and unsatisfactory to winner and loser.[11] Terrell is correct in noting, however, that the cumbersome procedures of trials do provide the means for the protection and vindication of individual interests. Advocates of alternatives for formal dispute resolution have to face two serious questions: One, does the alternative conserve resources and protect rights? and two, is the alternative sufficiently predictable and available that it is a realistic option? Any two parties with the inclination to do so can agree to submit a dispute to a third party arbitrator or mediator instead of to a court. If there is to be some formal alternative, however, the questions that Terrell poses are serious. It must be better than what is now available or there seems little point in seeking an alternative. Furthermore, the cost of an expeditious result should not be the loss of the opportunity to have a fair chance to present one's position or to protect one's interests. Terrell's view of litigation is much like Churchill's view of democracy: It is terrible, but it is better than anything else.

In another paper that was not a formal part of the Sesquicentennial Colloquium but which developed in part from the discussions at that gathering, John Witte discusses the Puritan idea of covenant. His paper expands on several of the points implicit in Everett's paper and assists in an understanding of the nature of covenant as contrasted, for example, with the nature of a common law commercial contract. Witte's paper also illustrates the importance of the themes identified in both Terrell's and Everett's papers to an understanding of the dynamic interactions of religious doctrines, social customs and moral philosophy with rules of law and

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[11] Sometimes there is a subtle benefit to delay. Passions cool; the disputants become involved in other projects; the disagreement begins to seem less important. The result is likely to be a settlement that is mutually satisfactory. This does not happen all the time, but it is frequent enough to suggest that a quick trial may not always be the best answer.

their application to ordinary human relationships. One of the primary goals of any university is to spark continued debate and interchange on these kinds of perennial issues. Perhaps these papers will be the catalysts for even more exchanges.