Creating Norms

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Jody S. Kraus, Personal Sovereignty and Normative Power Skepticism, 109 **Colum. L. Rev. Sidebar** 126 (2009).

In this brief companion piece to his longer work, "The Correspondence of Contract and Promise," Jody Kraus displays how a "personal sovereignty" account of individual autonomy can explain the ability of individuals to impose moral obligations on themselves.

Contract Theory has become increasingly focused on the related issues of the philosophical foundations of promising, and the relationship between promise and contract. As Kraus points out in his longer *Columbia Law Review* piece ("Correspondence"), one cannot reach any conclusions about whether contract law deviates from the morality of promising until one determines the source and extent of the moral obligation of promising.

One view in the area has been that the normative force of promises comes from the social practices and conventions which a community established to make an act of promising sufficient to impose an obligation on the promisor. Kraus notes that Joseph Raz appears to argue that individuals have the power to create normative obligations through promising, *because* it would be valuable for them to be able to do so. (128) As Kraus discusses in "Personal Sovereignty," views like these have elicited the skeptical response that one cannot simply create a moral obligation out of thin air. For these skeptics, neither the presence of a social practice or convention nor the claim that the ability to be able to bind oneself would be a good thing, could be sufficient to allow individuals to create new obligations in this way. The skeptics continue, whether a promise creates an obligation depends on some other more basic axiom of moral philosophy (e.g., for the consequentialist, whether keeping this promise will increase overall social utility).

Kraus's response, in "Personal Sovereignty," is that personal sovereignty can explain promissory obligation in a way that avoids the skeptical reply. Personal sovereignty "recognizes the fundamental right of individuals not only to choose their system of ends but also to choose how to pursue those ends." (127, quoting Krause, "Correspondence," at 1609) Kraus argues that this account of individual autonomy would include the ability of parties to impose obligations on themselves. This approach would escape skeptical objections because "personal sovereignty" is a foundational axiom, that neither requires nor allows further justification (that is, it plays the same role as "maximizing utility" does for those who argue that enforcing promises must be justified on consequentialist grounds).

This all may seem parochial, of interest only to contract law theorists, but comparable debates are going on in many other parts of legal and moral philosophy. The version of legal positivism Scott Shapiro presents in *Legality* (Harvard University Press, 2011) is built on the idea that when we (as individuals or as a collective) make plans for ourselves, we give ourselves reasons for action (to do what we planned, and to do what we need to do to execute those plans successfully) that we did not have before. (Though, for Shapiro's theory, which is built on Michael Bratman's work, it will be *collective* plans, not individual plans, that are central.) Again, this is a picture of what might be called "boot-strapping" within practical reasoning, of individuals being able to create prescriptions where none existed before – and, in the case of plans, without the level of commitment or the background of social

practices and conventions that is arguably present for promising.

When, how, and under what circumstances people can morally bind themselves – either individually, bilaterally, or collectively – is a crucial topic for many aspects of moral, legal, and political philosophy. Jody Kraus in “Personal Sovereignty” has offered a powerful, straight-forward and intuitive answer to one version of the question, that might well resolve some basic problems in contract theory (as he argued in “Correspondence”), but there are still related problems in explore in general jurisprudence and political theory.

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