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Book Review: Legal Tenderness

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Book Review:
Legal Tenderness:
Feminist Perspectives on Contract Law

Martha M. Ertman[†]

I. INTRODUCTION.....	546
II. A BRIEF SURVEY OF THE CHECKERED PAST OF GENDER, RACE, AND CONTRACT LAW	552
III. THE THREE SENSES OF “TENDER”	555
A. Legal Tender.....	555
B. Tenderness	556
1. Tenderness and the Postal Rule	561
2. Tenderness and Premarital Agreements.....	561
3. Tenderness and Alternative Dispute Resolution	562
C. Tend Her	563
IV. CONCLUSION	570

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I. INTRODUCTION

At first blush, feminism and contract law seem to occupy different realms. Feminism seeks to distinguish women from doormats,¹ while contract law provides theory and doctrine for state enforcement of certain kinds of promises. But the two realms overlap more than many people realize.² In particular, both are fundamentally concerned with consent and agency. Having the capacity to contract—to freely order one's affairs—has been a benchmark for distinguishing full citizens from everyone else. Since much of feminism is about women becoming citizens through contract and other means, some feminists embrace contractarianism as a mechanism and reflection of empowerment.³ Other feminists are skeptical about whether most women

1. Describing the traditional goals of feminism in a single sentence, let alone a clause, is difficult. Feminists disagree on many issues, including whether gender is innate or socially constructed and whether law and society should treat men and women the same or account for women's particular life experiences, such as primary responsibility for child care. A century ago Rebecca West coined the doormat comparison to provide an overarching, if arch, description of feminism: "I myself have never been able to find out precisely what Feminism is: I only know that people call me a Feminist whenever I express sentiments that differentiate me from a doormat or a prostitute." Rebecca West, *Mr. Chesterton in Hysterics: A Study in Prejudice*, THE CLARION, Nov. 14, 1913, reprinted in YOUNG REBECCA: WRITINGS OF REBECCA WEST 5 (Jane Marcus ed., 1989).

2. Some contracts scholars have explored interconnections between feminism and contract law. See, e.g., MARY JOE FRUG, POSTMODERN LEGAL FEMINISM 53-125 (1992); MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 51 (1993); LENORE J. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW 98-120 (1981); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 16, 33, 40-41 (1991); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029, 1030 (1992); Gillian K. Hadfield, *The Dilemma of Choice: A Feminist Perspective on The Limits of Freedom of Contract*, 33 OSGOODE HALL L.J. 337 (1996); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 309; Kellye Y. Testy, *An Unlikely Resurrection*, 90 NW. U. L. REV. 219 (1995). Legal historians have weighed in as well. See, e.g., Ariela R. Dubler, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885 (1998). In the wake of the landmark surrogacy decision *In re Baby M*, 537 A.2d 1227 (N.J. 1988), a wide variety of scholars analyzed the enforceability of surrogacy contracts. See, e.g., ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993); MARTHA A. FIELD, SURROGATE MOTHERHOOD 28-29 (1988); CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY 86 (1989); Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139, 147-48 (1990); June R. Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581, 592 (1988); Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 515 (1990).

3. See LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX (1998); VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY (2005); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999); Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 35-42 (2003); Martha M. Ertman & Joan C. Williams, *Preface* to RETHINKING COMMERCIALIZATION: CASES AND READINGS IN LAW & CULTURE 1 (Martha M. Ertman & Joan C. Williams eds., 2005); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491 (2005); Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421 (1992); Shultz, *Contractual Ordering of Marriage*, supra note 2; Shultz, *Reproductive Technology and Intent-Based Parenthood*, supra note 2; Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997).

possess the bargaining power essential to making a deal work for all concerned.⁴ Linda Mulcahy and Sally Wheeler's book *Feminist Perspectives on Contract Law*⁵ enters this discussion by tracking some ways that contract law has played a role in women's struggle for citizenship, and offers a point of departure to discuss cases commonly studied in law school contracts classes.

Feminist Perspectives on Contract Law makes its contribution to this endeavor with a largely British set of essays. The essays range widely, including grand theory, case crunching, and legal archaeology.⁶ Of particular interest are the British spousal-guarantee cases, which shed light on American cases such as *Vokes v. Arthur Murray, Inc.*,⁷ *In re Baby M*,⁸ and *Williams v. Walker-Thomas Furniture Co.*⁹ Also of interest are chapters demonstrating that gender lurks where it is least expected. Peter Goodrich's chapter explains how the postal rule established in *Adams v. Lindsell*,¹⁰ a seemingly gender-neutral rule dictating that acceptance is effective on the offeree's dispatch, has gendered roots in that it extends the rule of marital contracting to commercial contracts.¹¹ In this light, marital contracts become the template instead of the exception in contract law, a considerable departure from conventional wisdom.¹² Other chapters similarly reveal gender cross-currents running

4. See, e.g., Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 DENV. U. L. REV. 1169 (1996); Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989 (1995); Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403 (2001); sources cited *supra* note 2 (discussing surrogacy contracts).

5. FEMINIST PERSPECTIVES ON CONTRACT LAW (Linda Mulcahy & Sally Wheeler eds., 2005) [hereinafter FEMINIST PERSPECTIVES].

6. Legal archaeology investigates the facts behind a particular case to tell the case's back story. Debora L. Threedy, *Legal Archaeology: Excavating Cases, Reconstructing Context*, 80 TUL. L. REV. 1197, 1238 (2006). Examples of the genre include Kellye Y. Testy's research on the relational background of *Odorizzi v. Bloomfield School District*, excerpted in RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 1003-08 (3d ed. 2003); Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975); Judith L. Maute, *Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucile*, 89 NW. U. L. REV. 1341 (1995); A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287 (1989); A.W.B. Simpson, *Quackery and Contract Law: The Case of the Carbolic Smoke Ball*, 14 J. LEGAL STUD. 345 (1985); Debora L. Threedy, *A Fish Story: Alaska Packers Association v. Domenico*, 2000 UTAH L. REV. 185 (2000); and Lea S. Van der Velde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775 (1992).

7. 212 So. 2d 906, 907 (Fla. Dist. Ct. App. 1968) (holding that a "widow of 51 years . . . [who] was incessantly subjected to over-reaching blandishment and cajolery" and was "induced" to pay in excess of \$31,000 for dance lessons could bring a claim for rescission of the contracts).

8. 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *rev'd*, 537 A.2d 1227 (N.J. 1988). In this famous surrogacy case, the New Jersey trial court ordered specific enforcement of the surrogacy contract, compelling Mary Beth Whitehead to relinquish parental rights and obligations to the child she conceived and bore pursuant to a surrogacy contract with William Stern. *In re Baby M*, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987). The New Jersey Supreme Court, in contrast, refused to enforce the surrogacy contract because it conflicted with adoption law and public policy, observing that "[t]here are, in a civilized society, some things that money cannot buy." *In re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988).

9. 350 F.2d 445 (D.C. Cir. 1965).

10. (1818) 106 Eng. Rep. 250 (K.B.).

11. Peter Goodrich, *The Posthumous Life of the Postal Rule: Requiem and Revival of Adams v. Lindsell*, in FEMINIST PERSPECTIVES, *supra* note 5, at 75-89.

12. My students generally find heart balm actions ridiculous, heartily agreeing with states' repeal of actions such as breach of promise to marry in the early twentieth century.

through contexts that seem gender-neutral, such as Bela Chatterjee's contribution, which argues that cyber-contracting provides opportunities for rethinking contract doctrine,¹³ and Linda Mulcahy's chapter championing alternative dispute resolution as a means for importing feminist methodologies to dispute resolution.¹⁴

The British spousal-guarantee cases appear again and again in *Feminist Perspectives*, notably *Barclays Bank plc v. O'Brien*,¹⁵ a recent statement of the "special tenderness" doctrine toward married women and other cohabitants in noncommercial guarantee cases, and *Royal Bank of Scotland v. Etridge (No. 2)*,¹⁶ which specifies methods for banks to rebut the presumption of undue influence in these cases. New to many American readers, these cases involve wives asserting undue influence, mistake, or misrepresentation to avoid their guarantees of their husbands' business debts with the goal of preventing the bank from foreclosing on the family home. This braiding of family and commerce provides a new context for common contracts class discussions such as the surrogacy cases¹⁷ and the classic case defining consideration, *Hamer v. Sidway*.¹⁸

The spousal-guarantee cases are particularly suited for classroom discussion because classical contract theory cannot quite resolve the issues they raise. If parties are autonomous individuals engaged in discrete transactions, why not enforce a surrogacy contract against Mary Beth Whitehead?¹⁹ Why not hold an uncle to his promise to give his ne'er-do-well nephew \$5000 for refraining from the vices of smoke, drink, and gambling?²⁰ The holdings in these cases turn on the fact that they arise out of complex social relations of love, duty, and trust. They thus raise questions about the boundaries between autonomy and altruism, and consequently, between markets and families.²¹

13. Bela Bonita Chatterjee, *Different Space, Same Place? Feminist Perspectives on Contracts in Cyberspace*, in *FEMINIST PERSPECTIVES*, *supra* note 5, at 109. Chatterjee contends that cyberspace, in addition to being economic, is a political space in which power relations are renegotiated, and further contends that a postmodern perspective on the fluidity offered by cyberspace enables the refiguring of gender and other power relationships. *Id.* at 110-11. She concludes that in this context "law could move from being a mere framework for commerce to a facilitator of justice." *Id.* at 112.

14. Linda Mulcahy, *Bargaining in the Shadow of the Flaws? The Feminisation of Dispute Resolution*, in *FEMINIST PERSPECTIVES*, *supra* note 5, at 141.

15. (1992) 4 All E.R. 983 (C.A.).

16. (2001) 4 All E.R. 449, 466-68 (H.L.).

17. Some casebooks begin with surrogacy cases. *See, e.g.*, BARNETT, *supra* note 6, at 19, 30, 42 (excerpting *In re Baby M*, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987) and related material). Carol Sanger uses *Baby M* to preview the entire contracts class. Carol Sanger, *Great Contracts Cases: (Baby) M Is for the Many Things: Why I Start with M*, 44 ST. LOUIS U. L.J. 1443 (2000). Other casebooks that include the surrogacy cases include STEVEN J. BURTON, *PRINCIPLES OF CONTRACT LAW* 217 (2d ed. 2001); LON L. FULLER & MELVIN ARON EISENBERG, *BASIC CONTRACT LAW* 174 (7th ed. 2001); and AMY HILSMAN KASTELY ET AL., *CONTRACTING LAW* 462, 465 (2d ed. 2000).

18. 27 N.E. 256 (N.Y. 1891).

19. *See Baby M*, 525 A.2d 1128.

20. *Hamer*, 27 N.E. 256.

21. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

Enter relational contract theory. Relational contract theory critiques classical contract law for its failure to account for the lack of real agreement in contracts where terms appear in pre-printed forms and bargaining power is sufficiently unbalanced so that only one party has the power to determine those terms. In place of the assumptions of autonomy and choice that inform classical contract theory, relational contract theory offers norms of cooperation and reciprocity to guide contract theory and practice.²²

As an ongoing venture, spousal contracts are as relational as they get, which may explain the prominence of both relational contract theory and spousal-guarantee cases in *Feminist Perspectives*. In Mulcahy's introduction she suggests that relational contract theory can import an "ethic of care" they deem "feminine" to contract law through norms of role integrity, flexibility, and reciprocity.²³ The close relationship of the cultural feminist goals of cooperation, trust, and altruism in relational contract theory is widely recognized.²⁴ However, the introductory chapter's insistent contrast of "feminine values" with "masculine abstracted relations," even with caveats about social construction,²⁵ seems a bit two-dimensional in light of anti-essentialist feminist scholarship of recent years.²⁶

This talk of gender may sound foreign to most American contracts scholars and students, since contract doctrine tends to employ gender-neutral analysis, rarely acknowledging that women might have special interests in contract law. Judicial recognition of women's special interests might relegate women to second class citizenship, which would be inconsistent with courts' liberal commitment to parties' individuality. This respect for individuality and choice, which contracts theorists call the will theory of contract,²⁷ forms the foundation

22. See, e.g., IMPLICIT DIMENSIONS OF CONTRACT (David Campbell et al. eds., 2003); David Campbell, *Introduction* to IAN MACNEIL, *THE RELATIONAL THEORY OF CONTRACT* 3, 5-11 (David Campbell ed., 2001).

23. Linda Mulcahy, *The Limitations of Love and Altruism—Feminist Perspectives on Contract Law*, in *FEMINIST PERSPECTIVES*, *supra* note 5, at 1, 13. Relational contract theory materials on which Mulcahy relies include IAN MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); and Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 L. & SOC'Y REV 507 (1977).

24. See, e.g., Elizabeth Mertz, *An Afterword: Tapping the Promise of Relational Contract Theory—"Real" Legal Language and a New Legal Realism*, 94 NW. U. L. REV. 909 (2000); Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225 (1998); Shultz, *Contractual Ordering of Marriage*, *supra* note 2, at 301-03; Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue, and Norms*, 28 HOUS. L. REV. 791 (1991); John Wightman, *Intimate Relationships, Relational Contract Theory and the Reach of Contract*, 8 FEMINIST LEGAL STUD. 93 (2000).

25. Mulcahy, *supra* note 23, at 1, 3.

26. See, e.g., Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993).

27. Conventional wisdom justifies the legal enforcement of certain promises in contract law on the grounds that parties voluntarily consented to the terms of the agreement. E. ALLAN FARNSWORTH, *CONTRACTS* 20-21 (2d ed. 1990). A classic example of this approach is CHARLES FRIED, *CONTRACT AS PROMISE* (1981). Alternative justifications for legal enforcement of some agreements include economic

of contract law. It defines courts' job as interpreting and enforcing contracts, but not revising parties' agreements.²⁸ In contrast, English law expresses a "special tenderness" toward married women in a line of cases that Gillian Hadfield has dubbed "spousal guarantee cases." These cases, discussed in several chapters of *Feminist Perspectives on Contract Law*,²⁹ involve wives securing their husbands' business debts with the family home, often without knowing the amount of the debt, that the loan jeopardizes the family home, or even that they are signing loan documents.³⁰ English courts, expressing a "special tenderness"³¹ to married women as well as those "in a like position,"³² presume undue influence in cases where non-commercial sureties guarantee debts, and allow lenders to rebut this presumption by showing that the wives/sureties fully understood and freely consented to guaranteeing their husbands' business debts.³³

Despite American law's formal commitment to neutrality, many American contracts teachers are familiar with the way that gender sometimes makes a difference in contracts cases, albeit less explicitly than in the English spousal-guarantee cases. American courts and students do not entirely ignore the fact that Mrs. Vokes was a lonely widow, that Mary Beth Whitehead's surrogacy contract concerned a service only women can provide, and that Ora Lee Williams was a poor, African-American mother supporting seven children on

efficiency and distributive justice. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (6th ed. 2002); Anthony T. Kronman, *A New Champion for the Will Theory*, 91 *YALE L.J.* 404, 411 (1981) (reviewing FRIED, *supra*).

28. FRIED, *supra* note 27, at 2-3. Benjamin Cardozo famously articulated this reason for refusing to enforce a contract with an ambiguous price term: "We are not at liberty to revise while professing to construe." *Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co.*, 139 *N.E.* 470, 471 (*N.Y.* 1923).

29. Rosemary Auchmuty, *The Rhetoric of Equality and the Problem of Heterosexuality*, in *FEMINIST PERSPECTIVES*, *supra* note 5, at 53, 65 (citing *Barclays Bank plc v. O'Brien* (1992) 4 *All E.R.* 983, 998-1009 (C.A.) [hereinafter *O'Brien I*]). Another commentator observes that "[I]aw's gentle concern and ministrations protect the role of the wife as the guarantor of continuity between generations and properties." Adam Gearey, *Women Lie Back Everywhere: The Symbolic Economy of Restitution*, in *FEMINIST PERSPECTIVES*, *supra* note 5, at 91, 98.

30. *O'Brien I*, (1992) 4 *All E.R.* 998-1009; *Royal Bank of Scotland v. Etridge* (No. 2), (2001) 4 *All E.R.* 449 (H.L.).

31. *Barclays Bank plc v. O'Brien*, (1993) 4 *All E.R.* 417, 424 (H.L.) [hereinafter *O'Brien II*].

32. *Etridge* (No. 2), (2001) 4 *All E.R.* 456. As the court explained in *O'Brien II*, [T]his special tenderness of treatment afforded to wives by the courts is properly attributable to two factors. First, many cases may well [establish] . . . undue influence because the wife demonstrates that she placed trust and confidence in her husband in relation to her financial affairs and therefore raises a presumption of undue influence. Second, the sexual and emotional ties between the parties provide a ready weapon for undue influence: a wife's true wishes can easily be overborne because of her fear of destroying or damaging the wider relationship between her and her husband.

O'Brien II at 424.

33. In cases where the relationship between the debtor and the surety is not commercial (i.e., family), banks can rebut the presumption of undue influence by retaining counsel to advise the wife/surety (1) of the nature and consequences of the loan transaction; (2) of the seriousness of the risks involved, including the loan amount and the bank's rights to increase the debt or change the terms; (3) that she has a choice; and (4) to determine whether she wants to proceed with the transaction. *Etridge* (No. 2), (2001) 4 *All E.R.* 470.

\$218 a month.³⁴ Thus the question arises: To what extent do and should wives, women, and feminine persons generally receive “tender” treatment by contract law?

This Review tackles this question by using the English spousal-guarantee cases’ assertion of legal “tenderness” to women as a point of departure, exploring how three possible meanings of “tender” might influence feminist understandings of contract law:

- (1) legal tender, i.e., women’s access to cash, or lack thereof;
- (2) solicitude toward a particularly vulnerable person, such as a child (as in the tender years doctrine); and
- (3) splitting the word in two to voice an imperative “tend her,” which raises questions of individual responsibility and liability, asking whether, and when, legal doctrine should and does treat women as autonomous individuals.³⁵

Some feminists might blanch at the prospect of legal “tenderness” specially directed at women.³⁶ Against this grain, I contend here that a feminist view of contract law and theory would do well to attend to these three enumerated senses of “tender.”

First, a feminist view should maximize women’s access to capital, and thus to choices in their lives. Second, it should recognize the systemic vulnerabilities of certain classes of people, in particular dependents and those who care for them.³⁷ Third, it should strive to recognize the integrity of individual women, resisting the powerful cultural tendency to subsume women into relationships (daughter, mother, wife) and deprive them of that crucial element of citizenship, individual choice.³⁸ Taken together, these three concerns account for cultural feminists’ attention to the relational roles played by women, liberal feminists’ concerns with autonomy, and material feminists’ concerns about control over the means of production. The fact that the spousal-guarantee cases raise all three of these issues may explain why they get more attention than other topics in *Feminist Perspectives on Contract Law*.

34. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. Dist. Ct. App. 1968); *In re Baby M*, 537 A.2d 1227 (N.J. 1988); *In re Baby M*, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987).

35. A fourth meaning of “tender” may spring to contracts scholars’ minds. “Tender” also describes one party to a contract offering or undertaking to perform. Sellers tender goods to buyers, and buyers tender payment for those goods. This sense of “tender” as “offer” coheres with the spirit of both this essay and *Feminist Perspectives on Contract Law* in the sense of making feminism available to contract theory and doctrine and vice versa.

36. See, e.g., Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1247 (1998).

37. MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

38. This combination of material concerns, protection of vulnerability, and assertion of individuality is at least as canonical as *Adams v. Lindsell*, (1818) 106 Eng. Rep. 250 (K.B.). Virginia Woolf, herself a British feminist, famously asserted that for a woman to write, she needed money and a room of her own. VIRGINIA WOOLF, *A ROOM OF ONE’S OWN* 2 (Harcourt Brace & Co. 1991) (1929).

II. A BRIEF SURVEY OF THE CHECKERED PAST OF GENDER AND RACE IN CONTRACT LAW

Historically, the legal doctrine of coverture limited married women's ability to enter or enforce most contracts. Similarly, by not allowing them to marry, contract doctrine deprived both male and female slaves of the capacity to contract, placing them in a category with what were then called idiots, lunatics, and infants. (While terminology has changed, mental disease or defect and youth still deprive people of contractual capacity, for the most part.)³⁹ Legislation such as the married women's property acts and the Civil Rights Act of 1866 extended a measure of citizenship to white women as well as people of color.⁴⁰ The latter legislation explicitly linked contract and the freedmen's citizenship by providing that "all persons . . . shall have the same right . . . to make and enforce contracts . . . as enjoyed by white citizens . . ."⁴¹ These doctrinal changes resonated with larger changes in nineteenth-century law, culture, and politics.

The seismic changes that defined the nineteenth century affected contract doctrine and contractual aspects of political theory in ways that continue to this day. Slavery was contested and abolished, marriage was redefined from a practical institution based on economics and community to a romantic institution focused on love and companionship, industrialization changed the ways Americans lived, and the modern welfare state emerged. Contract played a key role in each of these changes: abolition replaced slavery with wage labor,⁴² contract provided a metaphor signaling individuality and choice in marriage,⁴³ contract and commercial law evolved to facilitate industry,⁴⁴ and social contract theory provided a rationale for the expansive growth of the

39. RESTATEMENT (SECOND) OF CONTRACTS §§ 14-15 (1981).

40. Civil Rights Act of 1866, Ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981(a) (2000)). One early married women's property act was Ohio's 1809 statute allowing married women to devise property using wills. 1809 Ohio Laws 146, cited in Sarah Miller Little, *A Woman of Property: From Being It to Controlling It: A Bicentennial Perspective on Women and Ohio Property Law*, 16 HASTINGS WOMEN'S L. J. 177, 185 (2005).

41. 42 U.S.C. § 1981 (2000) was passed initially as the Civil Rights Act of 1866, then re-enacted on firmer constitutional footing after the passage of the Fourteenth Amendment as the Civil Rights Act of 1870. For a fuller discussion of the history of § 1981 and citizenship for the freedmen, see Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor*, 116 YALE L.J. 170, 185-87 (2006). Discrimination resting in contract continues. To remedy it, Congress passed measures such as the 1974 Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691(f) (2000), which prohibits discrimination in credit transactions on the basis of race, color, religion, national origin, sex or marital status, or age, provided the applicant has the capacity to contract. Moreover, employment discrimination claims are often grounded in contract, making § 1981 relevant in those cases. Tarantolo, *supra*.

42. See, e.g., AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998).

43. See, e.g., PETER BARDAGLIO, *RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH* (1995); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA* (1985).

44. See, e.g., William A. Schnader, *The New Movement Toward Uniformity in Commercial Law: The Uniform Commercial Code Marches On*, 13 BUS. LAW. 646 (1958).

welfare state.⁴⁵ In 1864, Sir Henry Maine captured the importance of contract for these changes, both doctrinally and in terms of political theory, in his now-famous dictum: “[T]he movement of the progressive societies has hitherto been a movement *from Status to Contract*.”⁴⁶

One strand of political theory has questioned the extent to which women and other marginalized people have truly been parties to this transition from Status to Contract. Some feminists, for example, contend that women and Blacks were left out of the social contract that forms the basis of liberal political philosophy.⁴⁷ More concretely, empirical research has demonstrated that women and people of color get less favorable terms in particular contracts, such as car sales, than white men.⁴⁸ If parties do not have equal bargaining power, contractual consent may not be genuine or complete.⁴⁹ Thus, contract doctrine and theory must account for differences in bargaining power. Although legal doctrine no longer deprives married women and African Americans of contractual capacity, legal doctrine drags its disinherited self behind it by incorporating elements of the old rules in canonical cases. Recognizing this continued relevance of gender and race in contract doctrine, albeit in altered form, provides new perspectives on classic contracts cases.

Turning to the present day, it is important to note that contract law already incorporates much of what editors Mulcahy and Wheeler champion as feminist approaches. Black-letter doctrine, a mix of law and equity, imports concerns of justice to complement aims of certainty in basic rules such as the statute of frauds, the parol evidence rule, and contract modification provisions. The Uniform Commercial Code (U.C.C.) allows considerable flexibility in defining what constitutes an agreement—the bargain-in-fact between the parties, as indicated by their words and conduct, course of performance, course of dealing, and usage of trade.⁵⁰ Moreover, the U.C.C.’s version of the statute of frauds provides safe harbors to prevent a party who actually entered into an agreement from evading its legal enforceability on the grounds that she did not sign a

45. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971); BETH A. RUBIN, *SHIFTS IN THE SOCIAL CONTRACT: UNDERSTANDING CHANGE IN AMERICAN SOCIETY* (1996); BRIAN SKYMS, *EVOLUTION OF THE SOCIAL CONTRACT* (1996).

46. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 165 (3d ed., H. Holt 1873) (1864).

47. See, e.g., CAROL PATEMAN, *THE SEXUAL CONTRACT* (1988); WILLIAMS, *supra* note 2, at 15-16.

48. See, e.g., IAN AYRES, *PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* (2001); WILLIAMS, *supra* note 2, at 44-51.

49. WILLIAMS, *supra* note 2, at 15-43, 224-28.

50. U.C.C. §§ 1-201(3), 1-205, 2-208 (2003). Course of dealing is conduct between the contracting parties prior to entering the contract in question, while course of performance is repeated conduct between parties under contract. Trade usage, in contrast, is practice in the trade or place that parties justifiably expect will be observed. *Id.* §§ 1-205, 2-208 (2003). Defining a contract to include relationship-based evidence of what the parties have done, as opposed to limiting the terms to what they said they would do in a writing, recognizes the importance of relationships, cooperation, and changed conditions in contract law.

document.⁵¹ Similarly, the U.C.C. Article 2 parol evidence rule allows even writings that the parties intend to express their final agreement to be “explained or supplemented” by course of dealing, course of performance, and usage of trade, and also by consistent additional terms unless the parties also intended the writing to be the “complete and exclusive” expression of their agreement.⁵² Finally, Article 2’s damage provisions create incentives to cooperate by granting sellers a right to cure nonconforming tender in many circumstances,⁵³ and by limiting consequential damages to those that cannot be mitigated by cover or otherwise.⁵⁴ In short, contract law already endorses a number of principles that Mulcahy and Wheeler term feminist.

While these provisions demonstrate that a number of contract doctrines already recognize interests Mulcahy and Wheeler dub feminist, that insight leaves a larger question unanswered. We need an understanding of where hard line contractarian analysis of traditional legal economics becomes subject to the law of diminishing returns. Claims to individuality and cost-benefit analysis are helpful, as two generations of legal economic scholarship and case law have demonstrated.⁵⁵ But having a hammer in your hand does not mean that everything in the world is a nail. Identifying the limits of the classical contract theory assumptions that form the foundation of legal economic analysis serves everyone, not just women, and not just feminists. Thinking about “tenderness” in the three senses of money, solicitude, and independence can help students of both feminism and contracts rethink their position on contracts, and thus on legal economic liberal commitments to autonomy, choice, and wealth maximization.

III. THE THREE SENSES OF “TENDER”

Having made the case for linking contract, citizenship, and feminism, we can chart how *Feminist Perspectives on Contract Law* engages the three understandings of “tenderness”: money, solicitude, and individuality. The following discussion explores ways in which the three senses of tenderness arise in relation to the spousal-guarantee cases and also notes instances where tenderness comes up in other contexts in the book, such as chapters about the postal rule of *Adams v. Lindsell*, premarital agreements, and alternative dispute

51. *Id.* § 2-201 (2003) (providing for enforceability of agreements even without a writing signed by the person against whom enforcement is sought where a merchant sends a confirming memorandum, goods are specially manufactured, the party resisting enforcement admits to contract formation, or the parties have delivered and/or accepted the goods or payment).

52. *Id.* § 2-202.

53. *Id.* § 2-508.

54. *Id.* § 2-715. A buyer covers, in Article 2, when she obtains substitute goods in the wake of the seller’s breach. *Id.* § 2-712.

55. See, e.g., POSNER, *supra* note 27.

resolution. I focus on spousal-guarantee cases since nearly a third (two of seven) of the substantive chapters of the book focus on them.⁵⁶

A. Legal Tender

It makes sense to start with money, since contracts are usually about money. Courts are better able to award money damages than things like cheerful participation in a family dinner, and the doctrine of consideration distinguishes enforceable (legal) agreements from non-enforceable (extralegal) ones.⁵⁷ Conventional wisdom accepts the bargain theory of consideration, which justifies legal enforcement on the fact that parties give and get something of value to induce promises or performance.⁵⁸ In addition to affecting doctrine, money matters on a practical level. Money might not buy happiness, but it can buy things that facilitate happiness, such as therapy, an apartment, three square meals a day, mammograms, chemotherapy, flattering blue jeans, dinner out with a date, CDs, music lessons, and beach vacations.⁵⁹

Some scholars flag the importance of money to full participation in the polity with the term “economic citizenship,” as distinguished from “political citizenship.” First-wave feminism sought political citizenship for women through reforms such as female suffrage,⁶⁰ and second-wave feminists similarly fought to reform rape law and secure reproductive freedoms. But feminists in both eras also pursued economic citizenship for women.⁶¹ Women’s liberty to pursue a profession, to be free from sex discrimination in compensation and

56. See Auchmuty, *supra* note 29; Adam Gearey, *Women Lie Back Everywhere*, *supra* note 5, at 91. In addition, Belinda Fehlberg and Bruce Smyth mention the spousal-guarantee case *Royal Bank of Scotland v. Etridge (No.2)* in passing. Belinda Fehlberg & Bruce Smyth, *Binding Prenuptial Agreements in Australia: The First Year*, in *FEMINIST PERSPECTIVES*, *supra* note 5, at 125, 130.

57. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981) (requiring mutual assent and consideration for an agreement to be legally enforceable).

58. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (“To constitute consideration, a performance or a return promise must be bargained for A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”). Some contracts scholars disagree on precisely what makes certain agreements legally binding, such as the intent to be legally bound, or reliance. See, e.g., GRANT GILMORE, *THE DEATH OF CONTRACT* 72 (12th prt. 1982) (1974); Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

59. Money of course also buys things that bring misery, such as illegal and addictive drugs, or an expensive education culminating in a lifetime of soul-deadening employment.

60. Other nineteenth-century feminist reforms included raising the age of consent. Jane E. Larson, “*Even a Worm Will Turn at Last*”: *Rape Reform in Late Nineteenth-Century America*, 9 YALE J.L. & HUMAN. 1 (1997).

61. In the eighteenth century, only male property holders were entitled to exercise the citizenship right of voting, and married women could not hold property in their own names. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 146 (3d ed. 2005). Although married women’s property acts entitled married women to own property, among other things, American women did not obtain the right to vote until 1920. U.S. CONST. amend. IX. Even now, property ownership continues to convey citizenship rights. Homeowners enjoy more security physically and financially than do renters, and both of these more than residents of single-room-occupancy hotels and homeless people. Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17 (1998).

work conditions, and to take out loans are all related to economic citizenship.⁶² Indeed, the feminization of poverty has been a major strand of feminist theory and activism in the last generation.⁶³ The fact that financial wherewithal facilitates protection of both intimate and public freedoms that constitute citizenship reveals an overlap between political and economic citizenship.⁶⁴ The right to decide whether to terminate a pregnancy is constrained by restrictions on the use of federal funds to perform abortions.⁶⁵ Moreover, given women's continued responsibility for most care-giving labor, one can say that the cases protecting women's power to control when and whether one has children⁶⁶ helped facilitate women's entrance into the professions in significant numbers starting in the 1970s.⁶⁷

Like most contracts and many feminist issues, spousal-guarantee cases deal with money. For example, if a bank wants to collect a loan that it extended to cover a husband's business debts, the bank can foreclose on the family home if the wife signed as surety. The facts of the eight separate cases heard together in *Etridge (No. 2)* illustrate some ways these obligations may arise:

- Mrs. Moore signed a blank mortgage application form at her husband's urging after he misinformed her of the amount of the loan, and without receiving any legal advice.⁶⁸
- Mrs. Harris signed documents upon her husband's request without knowing what she signed "because she trusted him."⁶⁹
- Mrs. Coleman, a Hasidic Jew, had been raised "to expect and to accept a position of subservience and obedience to her husband," so that she was "not merely disinclined to second-guess her husband on matters of business, but appears to have regarded herself as obliged not to do so."⁷⁰
- Mrs. Gill signed the document under pressure to act quickly, despite a "heated altercation" with her husband after he asked her to mortgage the family home, believing (along with the solicitor

62. See, e.g., Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000(e) et seq. (2000); Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 et seq. (2000); *Bradwell v. Illinois*, 83 U.S. 130 (1872); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

63. KATHRYN EDIN & LAURA LEIN, *MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK* (1997); LINDA GORDON, *PITIED BUT NOT ENTITLED* (1994).

64. Charles A. Reich, *Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor*, 71 *CHI.-KENT L. REV.* 817, 817 (1996).

65. 42 U.S.C. §§ 1396(a)(5), (a)(17), (a)(21), (b)(1), (b)(7) (1994). These patterns are not new. Long ago, Jacobus ten Broek observed that there are two branches of family law, one for the rich, and another for the poor. See JACOBUS TEN BROEK, *FAMILY LAW AND THE POOR: ESSAYS* (Joel Handler ed., 1971).

66. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1976); *Roe v. Wade*, 410 U.S. 113 (1973).

67. *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (citing ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM* 109, 133 n.7 (rev. ed. 1990)).

68. Auchmuty, *supra* note 29, at 66.

69. *Id.* at 67 (citing *Royal Bank of Scotland v. Etridge (No. 2)*, (2001) 4 All E.R. 524 (H.L.)).

70. *Id.*

who advised her) that the loan was for £36,000 rather than the actual amount of £100,000, and feeling that she “had no alternative but to sign.”⁷¹

Because these facts raise serious questions about the genuineness of wives’ consent to the guarantees, English courts presume undue influence or misrepresentation in cases where the surety and debtor are spouses or cohabitants. However, banks are allowed to rebut this presumption by establishing that the surety fully understood the nature and consequences of the transaction—that she could lose her home.⁷² This rule causes banks to give special notice to each wife/surety of the amount of her potential liability and of the risks involved, and to advise her to get independent legal advice.

Contracts scholar Gillian Hadfield has introduced this line of cases to American students of contracts.⁷³ She recognizes that the notice required under English law does little to remedy the tangle of sexual and emotional factors producing marital agreements. Instead of notice, she proposes that the will theory of contract be supplemented with a reliance-based theory of contract in certain special cases, such as spousal-guarantees, surrogacy, and marital separation agreements. In these cases, Hadfield contends, reliance should supplement the will theory because the parties’ consent might not represent a true balancing of future costs and benefits as it would in commercial transactions.⁷⁴

Rosemary Auchmuty’s chapter in *Feminist Perspectives*, “The Rhetoric of Equality and the Problem of Heterosexuality” takes Hadfield’s discussion further. Auchmuty proposes a ban on using the family home as collateral in place of the undue influence doctrine’s bar to enforcement of some guaranties. Auchmuty explains in her chapter that the House of Lords extended the “tenderness” English courts ordinarily show to married women in mortgage cases as a matter of equity to “a wife (or anyone in a like position)” and “a husband (or anyone in a like position).”⁷⁵ Auchmuty takes issue with this extension.

Auchmuty begins with Cicily Hamilton’s 1909 assertion that “marriage for woman has always been not only a trade, but a trade that is practically compulsory,” which she then links to Adrienne Rich’s contention seventy years later that heterosexuality is compulsory.⁷⁶ What bothers Auchmuty is how the

71. *Id.* at 68.

72. *Id.* at 52-53.

73. Hadfield, *supra* note 36, at 1245. Hadfield also suggests that giving notice to wives but not husbands might give rise to sex discrimination claims on the ground that women, but not men, are required to incur the expense of independent legal advice. *Id.* at 1247.

74. *Id.* at 1282-84.

75. Auchmuty, *supra* note 29, at 51, 52.

76. *Id.* at 57-58 (citing CICYL HAMILTON, MARRIAGE AS A TRADE 28 (1909) and ADRIENNE RICH, BLOOD, BREAD AND POETRY 23 (1980)). I made the same link between Hamilton and Rich in Martha M. Ertman, *Marriage as a Trade, Bridging the Private/Private Distinction*, 36 HARV. CIV. R. & CIV. LIB. REV. 79, 95-96 (2001).

new doctrine obscures the abuses inherent in heterosexuality by extending the undue influence doctrine beyond marriage to same-sex couples.⁷⁷ She contends that she is not “advocating the introduction of a special rule for women but, rather, an acknowledgment that the ‘normal’ expectations of gendered roles and conduct within heterosexual relationships are neither inevitable nor natural but socially constructed, structurally inequitable, and potentially oppressive to women.”⁷⁸ Specifically, Auchmuty critiques the extension of the undue influence rule to gay people, because, she argues, they are less likely to need it since they are “more egalitarian” and “free of gendered power differential.”⁷⁹ Therefore, Auchmuty contends, women suffer injury through heterosexuality itself rather than through discrete injuries resulting from a particularly bad deal. Her solution to this injury is not the band-aid of presumptions of undue influence, but rather a tourniquet—cutting off the entire class of transactions.

Auchmuty proposes “a ban or limitation . . . on the availability of the family home as security for business debts” and presents this solution as reflecting a “prioritization of what is important to most women—their home and family—over the masculine concern of business profits.”⁸⁰ Auchmuty herself, however, is pessimistic about courts adopting her proposal.⁸¹ While Auchmuty’s proposal is not inconsistent with American limitations on particular kinds of collateral, such as wages, bank accounts, and consumer goods,⁸² American law does not prevent debtors (directly or as sureties) from mortgaging their homes to secure business debts.

American law formerly evidenced some concern for wives in spousal guarantee cases, but that concern seems to have gone out of fashion with the corset. “Voluntary” sureties, who guarantee loans without compensation, are generally family members or other intimates. Recognizing this special context, legal doctrine has long treated voluntary sureties as “favorites of the law,” strictly construing the agreement in the surety’s favor.⁸³ In 1923, the Maine

77. Auchmuty, *supra* note 29, at 51 (“I argue that the case law reveals that undue influence is the consequence not of the dangers of intimacy per se, but of the dangers of heterosexual intimacy, or simply of heterosexuality itself.”).

78. *Id.* at 71.

79. *Id.* While data does suggest that gay men and lesbians are more egalitarian than heterosexual couples in dividing housework, gendered differences do exist within same-sex relationships, in which one man may take on more masculine work, for example, than the other. CHRISTOPHER CARRINGTON, NO PLACE LIKE HOME: RELATIONSHIPS AND FAMILY LIFE AMONG LESBIANS AND GAY MEN (2002).

80. Auchmuty, *supra* note 29, at 71.

81. *Id.*

82. Article 9 of the U.C.C. does not govern transactions in which the debtor’s wages are collateral, federal law and state statutes closely regulate wage assignments. U.C.C. § 9-109(d)(3) cmt. 11 (2003). Similarly, Article 9 does not cover transactions in which bank accounts are collateral in consumer transactions. *Id.* § 9-109(d)(13). Moreover, section 9-204 prevents creditors from taking security interests in consumer goods acquired by debtors more than ten days after the secured party gives value, *id.* § 9-204, and a Federal Trade Commission regulation limits creditors’ rights to obtain security interests in “household goods.” 16 C.F.R. § 444.1 et seq. (1999). A home is usually the most valuable thing people own, making it considerably more attractive to creditors than wages, deposit accounts, and consumer goods.

83. *See, e.g.,* Royal Indem. Co. v. Northern Ohio Granite & Stone Co., 126 N.E. 405 (Ohio 1919).

Supreme Judicial Court recognized that sureties who guarantee debts for family members faced relaxed proof requirements in establishing duress:

Ordinarily the claim of duress . . . must be sustained by threats which create a reasonable fear of loss of life or of great bodily harm or of imprisonment But there are exceptions to this rule, based on the nearness and tenderness of family relations and the obviously constraining force of close family ties.⁸⁴

In 1926, the Supreme Court of Kansas described the protection of voluntary sureties as an “old rule.”⁸⁵ By 1961, the Supreme Court of Minnesota enforced Miss Dorothy Lewis’s guarantee to pay the rent of a gift shop called The Purple Door for Richard Pohl, despite the fact that she received no consideration, specifically rejecting “judicial tenderness in dealing with the rights and liabilities of sureties.”⁸⁶ Today, wives who guarantee their husbands’ business debts can avoid losing their homes only if they show that the lending institution knew of or participated in the husband’s duress, misrepresentation, undue influence, or fraud.⁸⁷ Thus, in one case, a wife was not bound where she signed an incomplete promissory note with her husband, and the husband then forged her signature on the check that was jointly issued to both of them and used the funds to buy stock in his name alone.⁸⁸ However, these facts are extreme. In another, more typical, case, a court enforced a promissory note which a wife signed only “because I trusted my husband and his judgment on business affairs. I understood from my husband that if the document was not signed my husband’s business relationship with his attorney would be harmed.”⁸⁹ In this case, the court reasoned that a husband’s mere persuasion did not overcome his wife’s free will. In short, American contract law worries less than English law about the validity of married women’s agreements to guarantee their husbands’ debts, a difference that also plays out in Australian and American doctrine governing marital contracting.

Before transitioning from *legal tender* to *tenderness*, it is worth pausing to note the counterintuitive conclusion of Belinda Fehlberg and Bruce Smyth’s chapter in *Feminist Perspectives*, which reports the results of their empirical

84. *Flynt v. J. Waterman Co.*, 122 A. 862, 863 (Me. 1923). The court goes on to cite cases involving fiancées, spouses, parents and children, aunts and nephews, and siblings. *Id.*

85. *Headley v. Post*, 243 P. 1042, 1044 (Kan. 1926) (“[T]he old rule that a surety is a favorite of the law arose from judicial tenderness toward voluntary and accommodation sureties.”).

86. *Southdale Ctr. v. Lewis*, 110 N.W.2d 857, 862 (Minn. 1961).

87. CORBIN ON CONTRACTS § 28.10 (2006). Corbin lists the four elements of a prima facie case of undue influence: (1) susceptibility of the party influenced (such as mental or physical weakness); (2) the opportunity to exercise undue influence (such as through a confidential relationship, including spouses or cohabitants); (3) a disposition to exercise undue influence (i.e., whether the influencer took the initiative in the transaction and whether the person influenced had independent advice); and (4) the unnatural nature of the transaction (as when a testator leaves significant property outside the family). For two cases in which wives did not satisfy the burden of proof, see *Sims v. First Nat’l Bank*, 590 S.W.2d 270 (Ark. 1979); and *Lesser v. Strubbe*, 171 A.2d 114, 119 (N.J. Super. Ct. App. Div. 1961), *aff’d* 1887 A.2d 705 (N.J. 1963).

88. *Conn. Nat’l Bank v. Giacomi*, 699 A.2d 101 (Conn. 1997).

89. *Sun Forest Corp. v. Shvili*, 152 F. Supp. 2d 367, 393 (S.D.N.Y. 2001).

study of changing doctrines governing Australian prenuptial agreements.⁹⁰ They begin with the familiar observation that men tend to benefit more than women from prenuptial contracts. Since men are more likely to have economic and social power, they are often able to induce their wives to contract around the default rules of property and support.⁹¹ Thus, one would expect that feminists—and women generally—would oppose Australia’s adoption of the American and Canadian rules enforcing prenuptial agreements. While Fehlberg and Smyth found that people were likely to use prenuptial contracts when one spouse had more assets than the other, they also found that prenuptial agreements tend to appear when one or both parties are marrying for a second time, have had previous family court involvement, or want to quarantine a family asset or business.⁹² Contrary to their expectations—and to American conventional wisdom—Fehlberg and Smyth found that women were just as likely as men to seek premarital agreements. They point out that this data is not necessarily surprising, since older women entering second marriages may want to protect property and finances.⁹³ Viewing their chapter in the context of the rest of the book, one can say that the tenderness that law expresses to women in facilitating the protection of their assets cuts various ways. Some women benefit from contract (as when they quarantine individually held assets from the claims of a second husband), and others do not (as when a richer partner quarantines his own assets from her).

B. Tenderness

Legal protections for women based on their vulnerability as dependents and as caregivers for dependents similarly cut both ways. On the one hand, it makes sense to protect vulnerable parties. Commercial and corporate law do that through a variety of rules protecting, for example, debtors and minority shareholders in close corporations.⁹⁴ But the history of women and African-Americans’ second-class citizenship, and the way contract law reflected and perpetuated that hierarchy, signal a downside to such an approach. I have already discussed the way that tenderness (in particular protecting women’s access to legal tender) plays out in the spousal-guarantee context. The

90. Fehlberg & Smyth, *supra* note 56, at 125.

91. *Id.* at 127.

92. *Id.* at 133.

93. *Id.* at 134. The authors do not say that these women might want to protect property for children from their first marriages. However, this would trigger the second sense of “tender”: kindness toward vulnerable parties.

94. For protections of debtors in secured transitions, see generally U.C.C. § 9-601 et seq. (2003). For discussions of protections for minority shareholders being frozen out of closely held corporations, see F. HODGE O’NEAL & ROBERT B. THOMPSON, *OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS* § 9.26 (3d ed. 1998). Those protections undercut claims that other vulnerable or minority groups should not enjoy protections through affirmative action and family law. See Aunpam Chander, *Minorities, Shareholder and Otherwise*, 113 *YALE L.J.* 119 (2003); Ertman, *supra* note 76, at 115, 119-120, 129, 131.

following discussion addresses solicitude for women in three other doctrinal areas in *Feminist Perspectives*: the postal rule in *Adams v. Lindsell*; prenuptial agreements; and alternative dispute resolution.

1. *Tenderness and the Postal Rule*

Peter Goodrich's intriguing chapter in *Feminist Perspectives on Contract Law* sets out a genealogy of the postal rule, linking it with the formation of contracts to marry. Goodrich traces the history of the rule's evolution, explaining that the rule was not widely accepted for nearly a century.⁹⁵ The most interesting point for our purposes is his assertion that "every contract is like a marriage."⁹⁶ He argues that the ecclesiastical rules governing marriage migrated into assumpsit cases through breach of promise to marry cases, and that this migration included the postal rule. The postal rule gives preference to the offeree's interests by making an acceptance legally valid at the moment it leaves the offeree's hands, protecting her from an offeror's fickleness by depriving him of the right to revoke after dispatch but before receipt. This deference, one might say tenderness, to the offeree is directly related to the breach of promise to marry cases that proliferated in the nineteenth century. Since men proposed marriage and women accepted, the postal rule expressed tenderness toward the woman's honor. As Goodrich explains, "[r]ecognition of the social standing and the cultural expectations of the feminine offeree, and attention to her position and predicament, meant that equity clearly favoured protecting her reliance interest in the offer and preventing the offeror from speculating."⁹⁷ While Goodrich is careful not to overstate his case for the link between marriage and commercial contracts,⁹⁸ he unequivocally asserts that the "doctrinal root of that desire to protect the offeree can be traced directly to cases of breach of promise to marry."⁹⁹ Beyond the particulars of the postal rule, this observation reminds students of contracts that tenderness for systemically vulnerable parties (debtors and tenants as well as women on occasion) is an integral part of contract doctrine. It is, moreover, not always a bad thing.

2. *Tenderness and Premarital Agreements*

Like the spousal-guarantee cases, the premarital agreement doctrine discussed above in the Fehlberg and Smyth's study seeks special protections for women in contracts associated with marriage. As Australian law changed to allow enforcement of premarital contracts as well as contracts entered during

95. Goodrich, *supra* note 10, at 81-82.

96. *Id.* at 81-86.

97. *Id.* at 85.

98. *Id.* at 81.

99. *Id.* at 83.

marriage, it built in protections for women. Yet some of these protections inhibited the effectiveness of the new statute.¹⁰⁰ Most notably, insurers refused to provide malpractice insurance to cover the attorney certification that the new law made a prerequisite to legal enforceability. The statute required attorneys to certify whether the agreement was to the signer's advantage, was fair, and was prudent. Legal malpractice insurers refused to extend coverage for the required certifications, contending that an attorney's views on these matters amounted to financial rather than legal advice.¹⁰¹ Moreover, even if an attorney did state in the certificate of independent legal advice that the client was signing "under a continuing economic disadvantage—for example emotional pressure," the statement might not prevent enforcement of the agreement since suretyship case law provides that independent legal counsel may be enough to bind the client despite such a statement.¹⁰² But the rarity of marital contracting—Fehlberg and Smyth found that only 13 couples out of 650 surveyed entered into such agreements¹⁰³—makes the discussion as much or more about the expressive function of the law as about a pressing legal issue. Perhaps spousal-guarantees get more attention in the book because they have generated considerable case law, which may occur because the banks involved can absorb the transaction costs of litigation better than individuals.¹⁰⁴

3. *Tenderness and Alternative Dispute Resolution*

But there can be downsides to special treatment, and indeed to theoretical approaches that make general claims about contract law and gender. Linda Mulcahy's chapter, "Bargaining in the Shadow of the Flaws? The Feminisation of Dispute Resolution," both flags and falls into this trap. Mulcahy begins with the premise that mediation benefits women in three ways: (1) by rejecting "masculine values of the courtroom"; (2) by "privileging values associated with feminism, which reflect an ethic of care and the importance of context and relationship"; and (3) by "facilitating political goals by raising awareness of masculine paradigms."¹⁰⁵ But her contention that classical contract doctrine, more than other legal doctrines, articulates "hostile egoism and possessive

100. The Australian statute in place at the time of the study dictated that premarital and postmarital agreements bind if they are in writing, signed by both parties, each party has received independent legal advice, and the agreement has not been terminated by the parties. Fehlberg & Smyth, *supra* note 56, at 129. The requirement of independent legal advice is satisfied if an attorney appends a statement that she provided independent legal advice as to the effect of the agreement on her client's rights, whether it was to the advantage, financially or otherwise, of the client, whether it was prudent for that party to make the agreement, and whether the agreement's provisions were fair and reasonable. *Id.* The authors note that these rules soon faced legislative amendment to relax the attorney certification provisions. *Id.* at 125 n.1.

101. *Id.* at 135.

102. *Id.* at 136-37.

103. *Id.* at 128.

104. Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000).

105. Mulcahy, *supra* note 14, at 145.

individualism” by taking people away from the “preexisting web of community”¹⁰⁶ overlooks the facts that individualism and possession of property, as discussed above, can be a good thing for many women, and also that communities can enforce gender norms at the expense of individual interests. Moreover, describing Richard Posner’s approach as “high octane masculine values” and condemning privatization¹⁰⁷ overlooks the fact that some feminists have relied on his work and contractual norms of “performance, control, security of transaction and standardization”¹⁰⁸ to justify feminist reforms and believe that privatization can both help and hurt women.¹⁰⁹ These insights bring us to the third sense of “tender,” relative to contract law and women’s independence.

C. *Tend Her*

The phrase “tend her,” a play on the “tenderness” theme of this Review, is admittedly an oblique way to raise issues of individuality within the “tender” rubric. But it does question the advisability of legal doctrine protecting women, as opposed to leaving them to tend to themselves. I raise it here to pull out the strand associated with tending oneself, and in doing so to engage any systemic conflicts between classical views of the will-based theory of contract on the one hand and feminist impulses to occasionally protect women from bad deals on the other. As discussed above, some chapters in *Feminist Perspectives* propose that contract law adjust to protect women from bad choices in some contexts, such as with the spousal-guarantee cases.

David Campbell’s afterword makes it clear that he thinks this is a bad idea. He directly engages the question of contracts protecting the individual’s interests by contesting Auchmuty’s proposed ban on wives guaranteeing their husbands’ business debts with the family home. Campbell suggests that Auchmuty seeks a special rule to protect women and argues that her rule harms the very people she seeks to protect by infantilizing them.¹¹⁰ He contends that feminist theory works better in alternative dispute resolution than contract formation, lauding Linda Mulcahy’s chapter championing alternative dispute resolution as “the most accomplished chapter” in the book.¹¹¹

106. *Id.* at 147.

107. *Id.* at 147, 153.

108. *Id.* at 147.

109. *See, e.g.,* HIRSHMAN & LARSON, *supra* note 3, at 284-86; Martha M. Ertman, *Commercializing Marriage*, 77 TEX. L. REV. 17, 97-110 (1998); Silbaugh, *supra* note 3.

110. David Campbell, *Afterword: Feminism, Liberalism and Utopianism in the Analysis of Contracting*, in FEMINIST PERSPECTIVES, *supra* note 5, at 165.

111. *Id.* at 162. He does not mention that a line of American feminist scholarship has questioned whether the soft and fuzzy norms of ADR might disserve some women in divorce proceedings, nor that ADR can be more rigid than litigation in its norms and substantive rules. *See, e.g.,* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1766-71 (1996); Penelope Eileen Bryan, *The Coercion of Women in Divorce Settlement Negotiations*, 74 DENV. U. L. REV. 931 (1997).

Many feminists would share his view that special rules protecting married women in contracting situations with their husbands smack of the kind of “repugnant paternalism”¹¹² that created the need for feminism in the first place. Rejecting Hadfield’s proposed importation of Elizabeth Anderson’s expressive values in contract to supplement the will theory of enforcement, Campbell asserts that contract law based on any value other than party autonomy is not contract law:

The chapters in this volume show that feminism certainly can make a considerable contribution to the critique of the classical law of contract, and they link to an economic and philosophical literature in which feminism is putting forward a powerful general critique of bourgeois individualism. However, if they do not place a pre-eminent value on autonomy, feminists cannot really respect the law of contract, for a law of contract that does not turn on autonomy and choice becomes something like a law of planned, paternalistic exchanges, that is, not contract at all.¹¹³

If Campbell is right, then the entire book is a contradiction in terms, except to the extent that “feminist” views of contract are limited to liberal critiques of contract rules that exclude women from the rights that men enjoy. But feminism is much broader than that, incorporating cultural feminist focus on relationships (and legal protections of the vulnerabilities that arise from those relationships), as well as radical feminist efforts to upend cultural categories of sex and gender.

Indeed, I would argue that Hadfield’s expressive theory of contract finds considerable ground in existing contract doctrine. Hadfield chooses three puzzles of contract law—surrogacy, spousal-guarantees, and marital separation contracts—and proposes that legal doctrine could “transcend the dilemma of choice”:

The structure of a contract law based on an appreciation of expressive choice would begin with an assessment of whether a given category of contract normally is entered into in a risk-allocation frame. Absent the risk-allocation frame, there is a need to assess the reasons there might be for enforcement.¹¹⁴

She suggests that where parties do not enter contracts conscious of risk-allocation, courts look to two things: (1) reliance interests at stake; and (2) instrumental justifications for enforcement in light of the value of the contract and the risk non-enforcement poses for contract law generally.¹¹⁵ The spousal-guarantee cases are particularly good examples of agreements entered into with a richer relational aspect than most, and a thinner risk-allocation aspect than most. Here, Hadfield persuasively argues that relational principles come to the

112. Campbell, *supra* note 110, at 172.

113. *Id.*

114. Hadfield, *supra* note 36, at 1282.

115. *Id.*

fore, including cooperation over time, reliance through coordination, communication, and commitment. In her words, “they are woven from and into a fabric of societal and relationship-specific norms.”¹¹⁶

As we evaluate the extent to which contract doctrine that accounts for hierarchy at the expense of autonomy is still contract doctrine, it is important to keep in mind that contract has never been one thing in relation to have-nots. Freedmen were held to coercive labor contracts that replicated slavery in many respects,¹¹⁷ and labor conditions entered into under purported freedom of contract were often brutal for both men and women.¹¹⁸ Reva Siegel has coined the term “preservation through transformation” to describe the process by which purported improvements to the legal status of blacks and women have also perpetuated hierarchies.¹¹⁹

Sally Wheeler’s chapter in *Feminist Perspectives on Contract Law* illustrates one strand of nineteenth century views of married women and contract. She describes how doctrines relating to coverture (including the doctrine of necessities and the state-supplied marriage contract itself) constrained Victorian women’s contractual powers to buy clothing.¹²⁰ Married women’s property acts changed much of that baseline by granting married women rights to contract as well as to hold and dispose of property, but courts interpreted them narrowly to keep most property, and thus independence, away from women.¹²¹ Interestingly, these rights of economic citizenship predated women’s political citizenship. Married women exercised their (albeit limited) rights under the married women’s property acts for half a century before they got the vote, and for nearly a century before they served on juries with any regularity.¹²²

116. *Id.* at 1283-84.

117. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877 (2002). For an argument linking nineteenth- and early twentieth-century peonage contracts to the Thirteenth Amendment and late twentieth-century welfare reform, see Julie A. Nice, *Welfare Servitude*, 1 GEO. J. ON FIGHTING POVERTY 340 (1994).

118. STANLEY, *supra* note 42, at 76-84. The high-water mark for classical liberalism in labor law is *Lochner v. New York*, 198 U.S. 45 (1905). Given the importance for women of defining the limits and beneficial applications of contract, it is hardly surprising that the demise of liberalism is conventionally linked to judicial acceptance of fair-labor laws protecting women. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

119. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1111 (1997).

120. Sally Wheeler, *Going Shopping*, in FEMINIST PERSPECTIVES, *supra* note 5, at 21. The doctrine of necessities held a husband liable for debts incurred by his wife for small items, a rule which turned on married women’s incapacity to contract under coverture. A number of courts have held the doctrine of necessities unconstitutional as applied to women, but it continues to apply when minors enter contractual relationships or where gender neutral. See, e.g., A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM L. REV. 69, 75 n.30 (1998).

121. Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994).

122. LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 136-220 (1998). Indeed, military service, one of the hallmarks of citizenship, is still not open to women on the same basis as men. For a review of the history of American women and military service, see *id.* at 221-302.

The fact that women's rights to contract laid the foundation for women's political rights makes Charles Fried's condemnation of the infantilizing effect of departures from assumptions of autonomy particularly persuasive. He explains:

If we decline to take seriously the assumption of an obligation because we do not take seriously the promisor's prior conception of the good that led him to assume it, to that extent we do not take him seriously as a person. We infantilise him [as we do quite properly when we release the very young from the consequences of their choices].¹²³

Adult autonomy is all the more important when we consider the unique role of contract in skirting majoritarian rules. For example, testators can "contract" around default rules provided by intestacy law to bequeath their property to an intimate, such as a same-sex partner, whom the state refuses to recognize through intestacy laws. Similarly, adoptive parents can "contract" with birth parents for visitation to facilitate connection between adoptive children and the birth parents despite the state's failure or refusal to recognize that relationship.¹²⁴

There is a lot to be said for contract's ability to skirt hostile background rules. In the Islamic Republic of Iran, the 1978 revolution changed the law to value women half as much as men (setting them back 1400 years). Nobel laureate Shirin Ebadi managed to contract around the new rules that gave her husband the power to divorce her at will, take custody of their children, and acquire three wives, which would have allowed her husband to stay a person while she became chattel. Outraged by these rules (despite the fact that her husband had no intention of exercising the powers they gave him), she took him to a notary's office, where he waived his newly acquired rights under the Islamic Republic's law.¹²⁵

Contract reasoning and doctrine also remedy more mundane problems. At the doctrinal level, primary homemakers' contributions to family wealth could be recognized in contractual terms.¹²⁶ On a theoretical level, I have contended that the law can and should recognize a range of intimate relationships just as it

123. Campbell, *supra* note 110, at 166 (quoting FRIED, *supra* note 27, at 20-21).

124. Even if some contracts, such as contracts to buy sperm from anonymous donors, have the downside of depriving children of contact with one genetic parent, perhaps the remedy for this kind of "bad" contract is more contracting. The demand for familial connection among sperm bank babies has created a market for that connection, satisfied through membership in an online registry of children who are genetically related but would not otherwise know each other. Membership in the registry is \$40 a year. Jennifer Egan, *Wanted: A Few Good Sperm*, N. Y. TIMES MAG., Mar. 19 2006, at 44, 81. See also Donor Sibling Registry, <http://www.donorsiblingregistry.com> (last visited Nov. 20, 2006).

125. Laura Secor, Book Review, *A Dissenting Voice*, N.Y. TIMES, July 16, 2006, § 7, at 14 (reviewing SHIRIN EBADI WITH AZADEH MOAVENI, *IRAN AWAKENING: A MEMOIR OF REVOLUTION AND HOPE* (2006)).

126. Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993). An alternative model is based on Article 9 of the U.C.C. and contends that primary wage earners are indebted to their primary homemaking spouses, giving homemakers an entitlement to part of the wage-earners' post-divorce income as repayment of the debt. Ertman, *supra* note 109.

recognizes a range of business forms, analogizing marriage to a close corporation, cohabitation to a general partnership, and polyamory to a limited liability company.¹²⁷ Jane Larson and Linda Hirshman have suggested that game theory can level the playing field of men and women in sexual matters,¹²⁸ Adrienne Davis has documented the ways that some white men's wills bequeathing property to their black paramours in the nineteenth century recognized relationships that intestacy law would not,¹²⁹ and Elizabeth Emens has recently suggested that contractual analysis of marital name changes might dislodge the practice of women taking men's names upon marriage.¹³⁰

The fruitfulness of applying feminist views to contract, and contractual views to feminist questions, is illustrated by an American case, *Borelli v. Brusseau*.¹³¹ While *Borelli* does not appear in *Feminist Perspectives* (which is hardly surprising since nearly all the cases discussed are English), it does appear in some casebooks. Discussing *Borelli* in contracts class makes sense because the case shows both the benefits and limits of contractual analysis, and also how courts selectively recognize contract doctrine in situations of contested marketization, such as contracts within families and for organ sales.¹³² Most startling is how the case demonstrates how the old rules regarding gender still bleed through to contemporary cases.

In *Borelli*, the California Court of Appeals refused to enforce a husband's promise to convey property to his wife in exchange for her promise to care for him at home after he suffered a stroke. (The alternative was a nursing home.) Three contracts were at issue: (1) a premarital agreement in which Hildegard Borelli waived her rights to Michael Borelli's property; (2) his oral promise to alter that prenuptial agreement to substitute her care for nursing home care; and (3) the state-imposed marital contract. The feminist reader with a chip on her shoulder will note that all three contracts were construed against Hildegard, and that she would have been better off in a regime that either refused to enforce the prenuptial agreement or was willing to enforce the postnuptial agreement.

Mrs. Borelli signed the premarital agreement waiving her rights to substantial property the day before their wedding.¹³³ While in a rehabilitation center after Mr. Borelli suffered a stroke, they orally agreed that Mrs. Borelli would provide nursing-home type care in their home in exchange for his promise to leave her property beyond what she would receive under the

127. Ertman, *supra* note 76.

128. See, e.g., HIRSHMAN & LARSON, *supra* note 3, at 283-86.

129. Davis, *supra* note 3.

130. Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. (forthcoming 2007).

131. 16 Cal. Rptr. 2d 16 (1993). At least one leading contracts casebook includes *Borelli*. See CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PIERCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 705 (4th ed. 2001).

132. For a discussion of marketization of human organs, see MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND FOR BODY PARTS (2006).

133. *Borelli*, 16 Cal. Rptr. 2d at 17.

prenuptial agreement.¹³⁴ When he died his estate refused to honor the oral agreement. The California Court of Appeal held that the oral agreement lacked consideration since she had a non-delegable obligation to care for her husband under the state-defined marriage contract. It relied on World War II-era case law to reach this result:

[A] wife is obligated by the marriage contract to provide nursing-type care to an ill husband. Therefore, contracts whereby the wife is to receive compensation for providing such services are void as against public policy and there is no consideration for the husband's promise.¹³⁵

At the time these cases were decided, spouses could not contract away obligations of support or property settlement.¹³⁶ However, by the time the Borellis entered their marriage the law had changed, so that Michael Borelli could have his cake and eat it, too, by altering the part of the state-provided marriage contract that mandated property-sharing with his wife, and keeping the part that compelled her to personally nurse him through illness.

Surprisingly, Mr. Borelli's alteration of his support obligations the day before the wedding did not figure into the majority opinion (and was only tangentially mentioned in the dissent). The court explained:

[T]he duty of support can no more be "delegated" to a third party than the statutory duties of fidelity and mutual respect. Marital duties are owed by the spouses personally. This is implicit in the definition of marriage as "a personal relation arising out of a civil contract between a man and a woman."¹³⁷

In essence, the court allowed Mr. Borelli to alter the "civil contract" regarding property distribution in marriage, but refused to allow Mrs. Borelli to alter her care-taking responsibilities:

We therefore adhere to the longstanding rule that a spouse is not entitled to compensation for support, *apart from rights to community property and the like* that arise from the marital relation itself. Personal performance of a personal duty created by the contract of marriage does not constitute new consideration.¹³⁸

The clause "apart from rights to community property and the like" does a lot of work. Mrs. Borelli did not get her share of community property because of the prenuptial contract, but she was still stuck personally providing round-the-clock care.

Maybe this outcome is okay. Perhaps money and love are analytically separate.¹³⁹ Maybe Mr. Borelli can contract away his obligations to share

134. *Id.* at 17-18.

135. *Id.* at 18-19 (citing *In re Estate of Sonnicksen*, 73 P.2d 643, 645 (Cal. Dist. Ct. App. 1937); *Brooks v. Brooks*, 119 P.2d 970, 971-73 (Cal. Dist. Ct. App. 1941)).

136. *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970).

137. *Borelli*, 16 Cal. Rptr. 2d at 20 (citing CAL. CIV. CODE § 4100 (1992)).

138. *Id.* at 20 (emphasis added).

139. *ZELIZER*, *supra* note 3, at 28-29.

property with her but retain her obligation to care for him during an illness. The majority opinion implies as much in defending itself against the dissent's criticism of the old case law's gendered foundations, stating that "[i]f the rule denying compensation for support originated from considerations peculiar to women, this has no bearing on the rule's gender-neutral application today."¹⁴⁰ But marriage remains highly gendered, as reflected by the fact that wives still do seventy percent of homemaking labor (a specialization that must affect how husbands and wives care for one another during illness) and husbands still have higher incomes on average and control more property than women.¹⁴¹ Indeed, in the United States, men are more likely to seek to protect their separate property through premarital agreements, and women are more likely to contest them.¹⁴²

Judge Poche's dissent argues for the benefits of contract over status by accusing the majority of resuscitating coverture and by defending contractual understandings of marriage:

Insofar as marital duties and property rights are not governed by positive law, they may be the result of informal accommodation or formal agreement No longer can the marital relationship be regarded as "uniform and unchangeable."¹⁴³

Moreover, he continues, California has long granted husbands and wives "the utmost freedom of contract" in both statute and case law.¹⁴⁴

But a close read of California's statutory creation of contractual freedom between husbands and wives may support the majority's view that Mr. Borelli may sell Mrs. Borelli down the river financially and still compel her to provide round-the-clock care. The statute provided that "either husband or wife may enter into any transaction with the other, or with any other person, *respecting property*, which either might if unmarried."¹⁴⁵ Thus it seems that, at least in this context, men are more likely to benefit from the increased contractualization of marital rights and obligations. Indeed, for over three decades courts have enforced premarital agreements, and these agreements are likely to benefit the richer spouse, who is more likely to be the husband than the wife. Under *Borelli*, caregiver spouses, who are more likely to be wives than husbands, cannot limit the obligations they are most likely to bear, i.e. care-giving. In short, what is good for the gander can stink for the goose.

140. *Borelli*, 16 Cal. Rptr. 2d at 20.

141. Yun-Suk Lee & Linda J. Waite, *Husbands' and Wives' Time Spent on Housework: A Comparison of Measures*, 67 J. MARRIAGE & FAMILY 328 (2005).

142. Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127 (1993). *But see supra* note 93 and accompanying text.

143. *Borelli*, 16 Cal. Rptr. 2d at 22 (Poche, J., dissenting).

144. *Id.* at 23 (quoting *Perkins v. Sunset Tel. & Tel. Co.*, 103 P. 190 (Cal. 1909); CAL. CIV. CODE §5103(a) (Deering 1992) (repealed 1994) (providing that "either husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried")). The rule is stated now in CAL. FAM. CODE §721 (2003).

145. CAL. CIV. CODE §5103(a) (Deering 1992) (repealed 1994) (emphasis added).

IV. CONCLUSION

Feminism and contract have more in common than many people think, in particular because both address problems of individual agency and accountability that are important elements of full citizenship. In discussing *Feminist Perspectives*, this Review has extracted themes that may enrich contracts classes and feminist theory discussions. On the doctrinal level, *Borelli v. Brusseau* tells us that perhaps courts should not enforce property agreements between spouses since they would have a hard time enforcing the non-delegable duties of sympathy, comfort, love, companionship, and affection in the state-provided marriage contract.¹⁴⁶ Or perhaps the dissent in *Borelli* is right, and Mrs. Borelli should at least be able to try to prove the oral modification of the prenuptial contract with Mr. Borelli. Like other cases, this contract dispute between spouses also tells us about the promise and danger of contract analysis, much of which is represented in *Feminist Perspectives on Contract Law*, and much of which might find its way into a contracts class:

- *In re Baby M* and *Johnson v. Calvert*,¹⁴⁷ two surrogacy cases, may provide a springboard to discuss a number of issues. Carol Sanger spends two full class sessions using *Baby M* to preview the course's basic themes, including how to read a case, choice of law, damages, and legal theory.¹⁴⁸ Within this discussion, a tension generally emerges between enforceability and contractual capacity. The impasse between capacity to contract and the dehumanizing effects of surrogacy reflects an irresolvable conflict between two equally good and important things: (1) freedom of contract; and (2) protection of dignity, solidarity, and equality.¹⁴⁹ Another route into the question of enforceability may explore who benefits from contractualization, and in particular how contract doctrine and theory are improved or harmed by using contract to regulate contested contexts such as reproduction.
- It is difficult to ignore the fact that people resisting contract enforcement in many canonical undue influence cases are female. In *Vokes v. Arthur Murray Dance Studios*,¹⁵⁰ the plaintiff was a lonely widow tricked into buying \$31,000 of dance lessons by

146. Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. L. REV. 65 (1998).

147. *In re Baby M*, 537 A.2d 1227 (N.J. 1988); *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), cert den'd, 510 U.S. 874 (1993).

148. Sanger, *supra* note 17.

149. For a fuller discussion of the antinomous qualities of freedom of contract versus equality, dignity, and solidarity in commodification discussions, see Ertman & Williams, *supra* note 3.

150. 212 So. 2d 906 (Fla. Dist. Ct. App. 1968).

high praise for her nonexistent dancing abilities from Arthur Murray Dance Studios. Does it matter that this doctrine tends to protect women? In particular, does it undercut autonomy-based definitions of contract? Is it significant that American law protects these parties without explicitly referring to their gender, while English law explicitly extends “special tenderness” to wives in guarantee cases?

- In *Williams v. Walker-Thomas Furniture Co.*,¹⁵¹ the canonical unconscionability case, Mrs. Williams is female, poor, and African-American. This combination of characteristics often leads to rich classroom discussions about whether the doctrines of undue influence and unconscionability are employed to remedy both the historic and contemporary fragility of women, people of color and poor people, and should be.
- If we recognize the marital roots of *Adams v. Lindsell*,¹⁵² the case establishing that acceptance occurs at the time of dispatch by the offeree, then at least in this context, the marriage contract rules provide the basis for commercial contract doctrine. Under this analysis, puzzles regarding marital contracts (similarly to or differently from commercial contracts) might look quite different. If marriage is the original and not the special case, the question may be whether marital rules should apply to commercial contracts, rather than vice versa. Moreover, the tremendous changes of the marriage contract over time, which are akin to the changes in employment contracts over the last century, illustrate the legal realist idea that law keeps changing as society keeps changing.

This Review has focused on English spousal-guarantee cases to provide a particularly strong foundation for discussing ways that the contract law can resolve monetary disputes, protect vulnerable parties whose consent might be less than freely given, and recognize that parties’ individuality is central to their claims as adult members of the polity. Future work may explore whether these three concerns relating to legal tenderness apply in other doctrinal areas, and in doing so demonstrate the things feminism and contract law have to offer one another.

151. 350 F.2d 445 (D.C. Cir. 1965).

152. (1818) 106 Eng. Rep. 250 (K.B.).