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Contract's Influence on Feminism and Vice Versa

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Abstract

Feminist legal theory has both embraced and rejected contract. While contract-based conceptual and doctrinal tools have improved women's economic and social status, feminists also critique contract-based reforms for colluding with hierarchies of gender, race and class. This chapter charts influential work on both sides of the contract debate and identifies a third approach that sees contract as a mechanism for law to move away from a hierarchal regime by stopping at a contractual way station en route to a more equal system of public ordering. It concludes by identifying ways that feminist legal theorists have injected feminist insights into traditional contract law via doctrines such as good faith in employment contracts, debtor rights in lending relationships, and defenses including unconscionability and duress.

Keywords

contract, feminism, legal theory, prenuptial agreements, postnuptial agreements, cohabitation, marriage, homemaking labor, reproductive technologies, gender and debt

Feminist legal theory and contract theory have a long and complex relationship. On the upside, conceptual and doctrinal tools imported from contract have upgraded women's status

from doormats to fuller citizenship, especially in families. But a number of feminists express concern that contract-based reforms do less good than the procontract camp acknowledges, and indeed inflict harm.

This tension between pro- and anticontract views likewise appears in the more abstract discussions of legal, social, and economic hierarchies. Political theorists and philosophers have long hypothesized that a mythical social contract established the civil state. Traditional social contract theory justifies law—state power over individuals—on the grounds that the regulated individuals were party to these hypothetical contract negotiations that gave the state the power to make and enforce laws in exchange for people’s health, safety, and welfare. Feminist theorist Carole Pateman’s highly influential 1988 book challenged this conventional wisdom. She argued that the social contract only masquerades as a deal made by everyone, for everyone, when it actually constitutes and continues to justify patriarchal rule of men over women.¹

Philosopher Charles Mills extended Pateman’s analysis of the social contract’s faux neutrality to encompass race, arguing that the social contract actually created and sustains white supremacy.² His logic, however, leads to a different destination, one that sees contractual thinking as a vehicle for reform and reparations. Where Pateman and others would scrap the whole social contract metaphor—and presumably reforms that rest on contract—Mills would retain contract’s liberal promise of equal opportunity for all. He built a compelling case for

¹ CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

² CHARLES MILLS, *THE RACIAL CONTRACT* (1997).

reparations for people of color who have been and continue to be systemically harmed by racial breaches of the social contract.

The combination of Pateman's distrust of contractual rhetoric and Mills's embrace of its progressive potential reflects the range of feminist positions regarding contract. Feminists have voiced both enthusiasm and serious concerns about contracts in, for example, marital and reproductive technology contracts. This chapter echoes that focus on family law since many contract-related reforms seek to improve women's economic and other interests in adult relationships and parenthood.³

First- and second-wave feminists used contract as a tool to remedy the status-based strictures grounded in gender that define traditional marriage. Status-based rules of coverture deprived wives of the right to enter contracts, enjoy an equal share of household wealth accumulation, and say "no" to their husbands' sexual advances. Feminist reforms to remedy those injustices included Married Women's Property Acts in the nineteenth century, repeal of the marital rape exception in the 1970s, and today's continuing struggles to gain adequate respect

³ Contracts and not legally binding exchanges in the intimate sphere pack a strong gender punch. LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS AND THE LAW* (1981); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985); ARLIE RUSSELL HOCHSCHILD, *THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME* (1989); Hila Keren, *Feminism and Contract Law*, in *RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE* 406 (Robin West & Cynthia Grant Bowman eds., 2019).

and pay for housework and other care work. Another feminist reform based on contractual thinking is the still-evolving advocacy for law to recognize alternatives to marriage such as cohabitation and expand ways to relinquish and attain legal parenthood via reproductive technologies and adoption. These feminists note that contract can reflect how families actually function, in contrast to status-based notions that designate only one type of family as “real” or “natural”—a heterosexual married couple raising kids to whom they are genetically related.

In contrast, anticontract feminists flag the dangers of gender, race, and class subordination in contract-based reforms. For example, attempts to protect wives in prenuptial agreements overlook lower rates of marriage among African-American women, race-related patterns of wealth accumulation that make prenups more likely in marriages of white people, that many if not most divorcing couples have more debts than property to divide, and continuing power disparities between spouses.⁴ Likewise, contract skeptics see reproductive technology contracts as protecting white, propertied motherhood while courting eugenics and commodifying children.⁵

This chapter charts influential work on both sides of the contract debate and identifies a third approach that sees contract as a mechanism for law to move away from a hierarchal regime

⁴ RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE?* (2011); DOROTHY ROBERTS, *KILLING THE BLACK BODY* (1997); Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 *GEO. L.J.* 2481 (1994); CYNTHIA GRANT BOWMAN, *UNMARRIED COUPLES, LAW, AND PUBLIC POLICY* (2010).

⁵ MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996); ROBERTS, *supra* note 4.

by stopping at a contractual way station en route to a more equal system of public ordering.⁶ One example of such an innovation is known as collaborative family law, in which disputing couples essentially contract out of using traditional litigation-focused dispute resolution and into a system that honors the role of emotions and integrates social workers or other therapists into dispute resolution.⁷

The first section of this chapter sets out examples of feminist theory that portray contract as a route to gender equality. Section II discusses feminist scholarship that cautions against colluding with gender subordination. Section III introduces the view of contract as a private law laboratory of sorts to try out new forms of relation that can mature to public law rules that recognize gender equality. Finally, section IV identifies ways that feminist legal theorists have injected feminist insights into traditional contract law via doctrines such as good faith in employment contracts, debtor rights in lending relationships, and defenses such as unconscionability and duress.

I. Contracts as Instruments of Gender Equality

Some feminists disagree with poet and essayist Audre Lorde that “the master’s tools will never dismantle the master’s house.”⁸ They point to the crucial role that contract played in dismantling foundational elements of the patriarchal master’s house by chipping away at coverture’s refusal

⁶ See, e.g., Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443.

⁷ See, e.g., JANE C. MURPHY & JANA B. SINGER, *DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION* (2015).

⁸ AUDRE LORDE, *SISTER OUTSIDER* 110 (rev. ed. 2007).

to recognize women's independent legal identities. Those modifications to the marriage contract allowed law to finally recognize and remedy intimate partner violence, marital rape, and women's economic subordination.⁹ In addition, the framework of contract paved the way for law to expand the definition of family beyond marriage to include cohabitation, polyamory, living-

⁹ See, e.g., Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000); Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2147 (1996); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1243 (1998); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 211 (1982); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001); Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11 (2012).

apart-together, and relations of dependency,¹⁰ and also to recognize a range of parent-child relationships made possible by reproductive technologies.¹¹

¹⁰ BOWMAN, *supra* note 4; NANCY POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008); Laura A. Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189 (2007); Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010); Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 291, 334–338 (2010); William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881 (2012); Cynthia Grant Bowman, *Living Apart Together, Women, and Family Law*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 47 (2017); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55 (2016); JUDITH STACEY, UNHITCHED: LOVE, MARRIAGE, AND FAMILY VALUES FROM WEST HOLLYWOOD TO WESTERN CHINA 151 (2011); GILLIAN CALDER & LORI G. BEAMAN, POLYGAMY'S RIGHTS AND WRONGS: PERSPECTIVES ON HARM, FAMILY, AND LAW (2014); Melissa Murray, *Accommodating Nonmarriage*, 88 S. CALIF. L. REV. 661 (2015); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

¹¹ See, e.g., Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297; Courtney Meghan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617 (2016); April L. Cherry, *Choosing Substantive Justice: A Discussion of "Choice," "Rights" and the New Reproductive Technologies*, 11 WIS. WOMEN'S L.J. 431 (1997); Kimberly D. Krawiec, *A Woman's Worth*, 88

A. *Contract as an Upgrade from Status*

One benefit of a contractual framework is that it presupposes the possibility of modification. Thus, family law can change, evolving to recognize new family forms such as same-sex marriages and nonmarital cohabitation. Cohabitation and other alternative family forms often take shape via contracts, such as living-together, surrogacy, and sperm donation agreements. Status is the alternative to a range of legally recognized families structured by contracts and legal rules that reflect their particular situations. A status-based view of family asserts that God or biology has designated only one form of family as natural and worthy of legal protection and social respect—married, heterosexual couples, raising genetically related kids.

Many feminist legal reforms have prompted a shift away from status and toward contract. For example, the nineteenth-century Married Women’s Property Acts displaced elements of common-law coverture rules and gave wives the power to make contracts and own property. Along the same lines, the 1866 Civil Rights Act provided—and still provides—that “[a]ll persons . . . have the same right . . . to make and enforce contracts . . . as is enjoyed by white

N.C. L. REV. 1739 (2010); Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER, L. & JUST. 22 (2015); Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375 (1996); Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CALIF. L. REV. 1177 (2010); BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES (Michele Bratcher Goodwin ed., 2010).

citizens.”¹² Yet even contract enthusiasts acknowledge that contract was hardly a silver bullet that eradicated race and gender subordination. As historian Amy Dru Stanley pointed out regarding the nineteenth-century Married Women’s Property Acts, wives of all races had the right to their own labor and person, yet the reforms left intact a husband’s legal title to his wife’s service at home.¹³ Along the same lines the post-Reconstruction South reinstated debt peonage and sharecropping systems—within larger Jim Crow limits on African Americans’ participation in civil and economic life—that mimicked enslavement in many respects.¹⁴ Still, the turn to contract and away from status has revamped the strictures of marriage.

B. Marriage and Beyond

Marriage has long been a mix of status and contract, in different proportions at different times and contexts. Even the status-focused coverture framework presupposed that a woman entered a civil contract by which she subsumed her legal identity under that of her husband. Gradually, reforms eroded much of the status elements of the marriage contract to make it more of a formally equal partnership. Those modifications contributed to legal recognition of sexual assault within marriage and intimate partner violence more generally, as well as proposals to better value homemaking labor.

¹² 42 U.S.C. § 1981; AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998).

¹³ STANLEY, *supra* note 12, at 175.

¹⁴ ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION (1988); Guyora Binder, *The Slavery of Emancipation*, 17 CARDOZO L. REV. 2063 (1996).

Contract requires genuine consent, and conversely rape involves the lack of consent. Catharine MacKinnon, in her signature brand of take-no-prisoners prose, excoriated the law for treating “[u]nvirtuous women, like *wives* and prostitutes, [as] consenting, whores, *unrapable*.”¹⁵ The myth that marriage vows constituted a blanket consent every time the husband sought sex fell under this feminist challenge. By the late twentieth century, men no longer could rape their wives with impunity, though the punishments for rape often treat rape within marriage as less serious than stranger rape.¹⁶

Contracts also feature prominently in feminist legal theory addressing the persistent devaluation of homemaking labor and other care work.¹⁷ The wages-for-housework movement dates back to the first wave of feminism,¹⁸ but its modern incarnation came out of socialist feminists’ engagement in Marxist thought. Advocacy and academic discourse coalesced in

¹⁵ CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 175 (1989) (emphasis added).

¹⁶ *See, e.g.*, Hasday, *supra* note 9; LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* (2012).

¹⁷ Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 *Nw. U. L. Rev.* 65 (1998); Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women’s Work through Premarital Security Agreements*, 77 *Tex. L. Rev.* 17 (1998); MARTHA M. ERTMAN, *LOVE’S PROMISES: HOW FORMAL & INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (2015)[hereinafter ERTMAN, *LOVE’S PROMISES*].

¹⁸ *See, e.g.*, CICELY HAMILTON, *MARRIAGE AS A TRADE* (1912).

movements such as the 1970s International Wages for Housework Campaign and a Global Women’s Strike in 2000, which aimed to show the value of caregiving work by going a day without it.¹⁹ “Wages for housework” became a rallying cry that morphed into an avalanche of law review articles seeking to commodify homemaking labor through a theory justifying alimony as a payment to which divorced wives were entitled instead of charity that terminated when a woman remarried.²⁰

Legal reforms altered not just the terms of the marital contract but also the outdated status-based limits on who can marry. Landmark cases that allowed interracial and same-sex

¹⁹ SILVIA FEDERICI, *WAGES FOR HOUSEWORK* (2d ed. 2017); SELMA JAMES & MARIA DALLA COSTA, *THE POWER OF WOMEN AND THE SUBVERSION OF COMMUNITY* (1972); SELMA JAMES, *WOMEN, THE UNIONS AND WORK: OR WHAT IS NOT TO BE DONE* (1972); GLOBAL WOMEN’S STRIKE, <https://globalwomenstrike.net/2000/03> (last visited Apr. 7, 2021).

²⁰ 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); Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721 (1993); Joan C. Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994); Jana B. Singer, *Alimony & Efficiency: The Gendered Costs and Benefits of the Economic Justification of Alimony*, 82 GEO. L.J. 2423 (1994); Katharine B. Silbaugh, *Commodification and Women’s Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997); Ertman, *Commercializing Marriage*, *supra* note 17.

couples to marry dramatically modified the marriage contract.²¹ A crucial step in extending marriage equality to same-sex couples occurred when law and culture first recognized that a heterosexual couple living together outside of marriage were not criminals and thus entitled to enter into cohabitation contracts.

Living together has increased over 1000 percent since 1960. Fully 10 percent of American households included a cohabiting couple as of the 2010 Census, and by 2019 more Americans ages eighteen to forty-four had lived together than had been married.²²

Prior to the mid-1970s, the law refused to recognize cohabitation agreements, labeling them “meretricious,” or akin to prostitution. A California case changed that view. In the mid-1960s, actor Lee Marvin and aspiring singer Michelle Triola moved in together. Michelle took his name, as many cohabiting women do. They agreed that he would support her for life in exchange for her giving up her singing career to become his full-time “companion, homemaker,

²¹ Legitimizing interracial marriage required a century of struggle, culminating with *Loving v. Virginia*, 388 U.S. 1 (1967). Marriage equality for same sex couples followed a few decades later, first in reforms to state law, then in federal cases that worked their way up to the U.S. Supreme Court. *See, e.g.*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

²² ERTMAN, *LOVE’S PROMISES*, *supra* note 17, at 118; Nikki Graf, *Key Findings on Marriage and Cohabitation in the U.S.*, FACT TANK (Nov. 6, 2019), <https://www.pewresearch.org/fact-tank/2019/11/06/key-findings-on-marriage-and-cohabitation-in-the-u-s/>.

housekeeper, and cook.”²³ After they split up, Michelle sued for breach of contract. In 1976, the California Supreme Court recognized her right—and other cohabitants—to sue for breach of this contract. That decision brought the term “palimony” into popular speech, or “galimony” when the cohabitants were both women. This new terminology helped family law and the public see cohabitation as an alternative to marriage instead of a crime. Other states quickly followed suit and today, live-ins can contract with each other nearly everywhere in the United States, though they often have to also satisfy procedural requirements such as getting the agreement in writing.²⁴

Marvin played a key role in the LGBT rights movement’s progress toward marriage equality and other legal rights. Between the 1970s and 2000, same-sex couples increasingly used contracts such as cohabitation agreements, wills, and powers of attorney to make the law at least partly recognize that they saw themselves as family. By the 1990s, domestic partnership employment policies in employment contracts and some municipalities, which gave couples

²³ *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976).

²⁴ Despite the utility of these agreements, most unmarried couples do not enter them. For an analysis of that phenomenon, see, e.g., Helen Reece, *Leaping without Looking*, in ROBERT LECKEY, *AFTER LEGAL EQUALITY: FAMILY, SEX, KINSHIP* 115 (2015).

more recognition and a measure of protection, further paved the way for same-sex couples to enjoy marriage equality.²⁵

This expansion of contract within family law led scholars in the 1990s and early twenty-first century to debate whether the law ought to go all the way, abolishing civil marriage and replacing it with contracts.²⁶ Martha Fineman was among the first feminists to champion contract as an improvement over status-based understandings of adult relationships, finding it “a useful tool with which to examine family relationships—relationships that have their roots in the more ancient realms of status and hierarchy.”²⁷ Fineman touted the value of giving individuals “the means to voluntarily and willingly assume obligations and gain entitlements,” so as to bring stability to relationships while remaining open to the potential for change.²⁸ Fineman’s highly influential body of work—and that of the many scholars who follow her lead—seeks to redefine

²⁵ Martha M. Ertman, *Contractual Purgatory for Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996); Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. Rev. 1235 (2010).

²⁶ See, e.g., FINEMAN, *supra* note 10; MARY LYNDON SHANLEY, JUST MARRIAGE (Joshua Cohen & Deborah Chasman eds., 2004); KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY (2015); POLIKOFF, *supra* note 10; Summer L. Nastich, *Questioning the Marriage Assumptions: The Justifications for “Opposite-Sex Only” Marriage as Support for the Abolition of Marriage*, 21 LAW & INEQ. 114 (2003).

²⁷ Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1408 (2001).

²⁸ *Id.*

“family” as parent-child and other relationships of dependency and vulnerability, instead of the current definition that centers on a sexual dyad in marriage. The core problem with having marriage define family, for Fineman, was that it privatizes responsibility for care and its costs. Fineman would instead demote marriage to a private, perhaps religious status and “collapse all sexual relationships into the same category-private-not sanctioned, privileged, or preferred by law.”²⁹ Law would instead provide rights and responsibilities to support the inevitable dependency of children and others requiring care, and the derivative dependency of the caregivers (often mothers).

But not all feminists agreed with Fineman’s push to replace marriage with contract. Anita Bernstein predicted that an explicit transition from status to contract would mean that

All domestic relations between adult individuals would be formed by issue-specific agreements. Family law would survive in order to regulate the care of children, but two would no longer become one in any legal sense. The law would intervene in a couple’s life just as it now uses the law of contracts, torts, crimes, and property to moderate relations between any other adults.³⁰

Bernstein concluded that abolishing marriage-as-a-status would do more harm than good, since the role played by marriage would be replaced by “either the state or capital, an unrelenting press

²⁹ FINEMAN, *supra* note 10, at 5.

³⁰ Anita Bernstein, *For and against Marriage: A Revision*, 102 MICH. L. REV. 129, 135 (2003).

of the market.”³¹ With “[n]o blithe, freeing, choice-affirming alternative to this extraordinary institution . . . available,” she concluded that marriage should be mended, not ended.³²

C. Expanding Parent-Child Relationships

Contracts also played a crucial role in creating and supporting families beyond the traditional mold of one man and one woman and their biological children. The law and a multi-billion-dollar reproductive technology sector allow gamete “donors” to contract out of legal parenthood when they sell their eggs or sperm to an egg or sperm bank, making room for “intended parents” who can step in as the legal parents of children born through alternative insemination or surrogacy. This reproductive labor provides new ways for women to earn money in work they deem fulfilling.³³ Increasingly, law recognizes three-parent families, such as a lesbian couple that contracts with a gay man for him to provide the sperm and all three of them to be legal parents.³⁴

³¹ *Id.* at 212.

³² *Id.*

³³ HEATHER JACOBSON, *LABOR OF LOVE: GESTATIONAL SURROGACY AND THE WORK OF MAKING BABIES* (2016); JOSHUA GAMSON, *MODERN FAMILIES: STORIES OF EXTRAORDINARY JOURNEYS TO KINSHIP* (2015); RENE ALMELING, *SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM* (2011). Works documenting and critiquing dehumanizing and exploitative elements of this work include JULIA DEREK, *CONFESSIONS OF A SERIAL EGG DONOR* (2004), and RADIN, *supra* note 5, at 150.

³⁴ See ERTMAN, *LOVE’S PROMISES*, *supra* note **Error! Bookmark not defined.**, at 45–66.

California and the District of Columbia allow a man who is the genetic father of a child to

So many gay men, lesbians, and single women became parents via this route that it's jokingly called a "gayby boom."³⁵

One prominent case served as a pivot point. In 1988, the New Jersey Supreme Court case *Baby M* refused to enforce a surrogacy contract on the grounds that it violated public policy and perhaps even state law criminalizing baby selling.³⁶ That opinion—and the worldwide press coverage of the case—unleashed a deluge of debate about evolving methods of family formation and whether contracts—and contractual thinking—were good for women, children, and society more broadly. New Jersey's Supreme Court declared that "there are, in a civilized society, some things that money can't buy."³⁷ Yet the court used family law doctrine to achieve much of what

contractually agree to be the third legal parent along with a lesbian couple. CAL. FAM. CODE § 7613(b)(2012); D.C. CODE § 16-909 (2009). Progressive developments have also moved from contract to status. For example, until the 1970s, a man was a legal stranger to children born out of wedlock and had no duty to support them. Paula A. Monopoli, *Nonmarital Children and Post-Death Parentage: A Different Path for Inheritance Law?* 48 SANTA CLARA L. REV. 857, 860–861 (2008).

³⁵ Tosca Langbert, *The Gayby Boom Is Here to Stay*, HARV. POL. REV. (Feb. 14, 2020),

<https://harvardpolitics.com/the-gayby-boom/>.

³⁶ *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

³⁷ *Id.* at 1249.

the surrogacy contract contemplated: the intended parents had legal custody of the child, and the genetic mother and surrogate was allowed occasional visits.³⁸

Just five years later, the California Supreme Court opened the golden state's doors to the reproductive technology industry via *Johnson v. Calvert*, which validated a surrogacy contract that differed from the one in *Baby M* in one crucial aspect.³⁹ By the 1990s, advances in in vitro fertilization (IVF) allowed a surrogate to bear a child to whom she had no genetic relationship because the egg was provided by another woman. The sperm typically came from the intended father. IVF, in short, enabled intentional parents and surrogates to “contract around” the legal and ethical specter of surrogate mothers relinquishing children to whom they are genetically related. Today more than nine of ten surrogacies are gestational, a method that, as of 2014, brought more than 1,600 children into the world each year.⁴⁰

While California's willingness to enforce gestational surrogacy contracts made that state the center of the multi-billion-dollar reproductive technologies industry, other states also enforce commercial surrogacy agreements, though some others ban or sharply curtail the terms of those

³⁸ Carol Sanger, *Developing Markets in Baby-Making*, in *CONTRACTS STORIES* 127–159 (Douglas G. Baird ed., Foundation Press 2007).

³⁹ *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

⁴⁰ Sanger, *supra* note 38, at 144–145; Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, *N.Y. TIMES*, July 5, 2014, at 1.

agreements. Liberal feminists whose work has supported that recognition include Marjorie McGuire Shultz and Carmen Shalev.⁴¹

II. Contract as an Instrument of Gender Subordination

Some feminists contend that contract is an unsuitable tool to dismantle the master's house. These scholars highlight how neoliberal principles radiating from the ideal of "freedom of contract" ignore that many people lack the socioeconomic resources to get to the bargaining table.⁴²

A. *Limited Benefit of Modified Marriage Contract*

Scholars such as Robin Lenhardt and Nancy Polikoff warn against using marriage reform to serve feminist ends because marriage has long benefited white, middle-class Americans more than everyone else.⁴³ Most of this literature aims for intersectionality, with some scholars focusing more on racial inequalities and others seeing marriage as hopelessly heteropatriarchal and thus antithetical to feminist and LGBTQ interests.

For much of U.S. history, enslaved people were legally banned from marrying, and the post-Civil War expansion of marriage equality that purported to be part of the freed-people's newly equal status failed to deliver on that promise. Instead, in Lenhardt's words, "marriage

⁴¹ Shultz, *supra* note 11; CARMEN SHALEV, *BIRTH POWER: THE CASE FOR SURROGACY* (1991).

⁴² BRENDA COSSMAN & JUDY FUDGE, *PRIVATIZATION, LAW, AND THE CHALLENGE TO FEMINISM* (2002).

⁴³ Robin A. Lenhardt, *Marriage as Black Citizenship*, 66 *HASTINGS L.J.* 1317 (2015); BOWMAN, *supra* note 4; POLIKOFF, *supra* note 10; MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* (2010); FRANKE, *supra* note 26.

regulation—not unlike Jim Crow segregation in public schools or housing—has been instrumental in locking African America into a second-class citizenship from which it has not yet fully emerged.”⁴⁴ For example, extravagant government support for families such as the GI Bill and Social Security largely denied African Americans that social and economic capital. Instead of a new deal, African Americans were subjected to the same old deal via welfare regulations predicated on purported failures of personal responsibility that disrupted relationships, compromised autonomy, and exacerbated racial disadvantage and stigma.⁴⁵

Today, marriage continues to benefit haves more than have-nots. White Americans are much more likely to marry than African Americans, and college graduates are more likely to marry than those with less education and thus more modest socioeconomic resources.⁴⁶ Those data, coupled with declining marriage rates across demographic groups, strengthen contract-skeptics’ contention that we should abandon the marriage contract altogether.⁴⁷

Nancy Polikoff’s book *Beyond (Gay and Straight) Marriage* made perhaps the most comprehensive case for moving beyond conjugality. Where Martha Fineman focused on fragile economic circumstances of dependents and those who care for them, Polikoff would also

⁴⁴ Lenhardt, *supra* note 43, at 1319; *see also* FRANKE, *supra* note 26.

⁴⁵ Lenhardt, *supra* note 43, at 1323. *See also* Michele Estrin Gilman, *Welfare, Privacy, and Feminism*, 39 U. BALT. L.F. 1 (2008).

⁴⁶ BANKS, *supra* note 4; NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* (2010).

⁴⁷ POLIKOFF, *supra* note 10.

recognize as “family” sexual adult relationships. She proposed a postconjugal legal regime in which law allocates rights and duties based on how intimate relationships function, whether they are between adults, caretaking relationships, between adults and children, or adult dependents. Instead of requiring marriage to trigger a person’s rights and duties, Polikoff would use households or a similar reflection of who functions as a person’s family.⁴⁸

B. Dangers of Contractual Parenthood

Feminists also flag dangers in contracting for parenthood through surrogacy and other reproductive technologies, raising objections about limited access and market-inflicted harms. Regarding access, Libby Adler pointed out that these methods of family formation require advance planning, which “may be a class-based, racially, and regionally selective luxury.”⁴⁹ Procedures can also be expensive, particularly surrogacy, in which intended parents pay as much as \$150,000 - \$200,000 to bring genetically related children into their families.⁵⁰

⁴⁸ See also CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014)(proposing a legal regime with rules to disrupt bias against nonmarital families).

⁴⁹ Libby Adler, *Inconceivable: Status, Contract, and the Search for a Legal Basis for Gay & Lesbian Parenthood*, 123 PENN. ST. L. REV. 1, 36 (2018); See also Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER RACE & JUST. 187 (2013).

⁵⁰ Devon Quinn, *Her Belly, Their Baby: A Contract Solution for Surrogacy Agreements*, 26 J.L. & POL’Y 805, 814 (2018).

The market is structured for white, middle-class women to access reproductive technologies, instead of facilitating access for everyone, including women of color. For example, intended parents order eggs or sperm off the internet through banks that stock genetic material from “donors” with sought-after traits such as height, education, health, and markers of whiteness such as skin color and hair texture. By stocking their shelves with much more genetic material from white donors than from donors of color, they essentially retail whiteness.⁵¹

On the seller side of reproductive technology contracts, surrogate mothers and egg donors usually have fewer resources than intended parents. Those power disparities take on international dimensions when fertility tourists travel to countries such as India to cut costs and take advantage of more lax regulatory environments.⁵²

⁵¹ See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

⁵² Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT’L L. 1429, 1430 (2009); Seema Mohapatra, *Stateless Babies and Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT’L L. 412 (2012). Many of the same inequalities define adoption, which despite bans on child-selling is also structured by payments for the transfer of parental rights and duties. Martha M. Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 8–10 (2003) ; Martha M. Ertman, *Adoption*, in ENCYCLOPEDIA OF LAW AND ECONOMICS (Alain Marciano & Giovanni B. Ramello eds., 2019).

Surrogacy contracts have attracted substantial criticism.⁵³ Philosopher Elizabeth Anderson contended that surrogacy treats children and women’s reproductive capacities as commodities, what she regarded as an “unconscionable commodification.”⁵⁴ Along the same lines, Nancy Ehrenreich questions whether surrogates really exercise freedom of contract, since they are often low-income women with children who need a job that does not require them to leave their homes.⁵⁵

Additional objections are that surrogacy contracts exploit women and collude with eugenics in ways that harm gamete donors, surrogates, and, more generally, people of color, women, people with disabilities, and the wider culture. As Anita Allen reminds us, legal rules commodified enslaved African American women’s reproductive capacity by tracing children’s

⁵³ See, e.g., DEBRA SATZ, *WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS* (2010); RADIN, *supra* note 5.

⁵⁴ See, e.g., Elizabeth S. Anderson, *Is Women’s Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 71 (1990); ELIZABETH S. ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1995). For a discussion of commodification more generally—the discussion of what is and should be in or excluded from market-based transactions, see MARTHA M. ERTMAN & JOAN C. WILLIAMS, *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW & CULTURE* (2005).

⁵⁵ Nancy Ehrenreich, *Surrogacy as Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts*, 41 DEPAUL L. REV. 1369, 1379–1380 (1992) (reviewing SHALEV, *supra* note 41).

status as slave or free to their mothers.⁵⁶ That single rule delivered a zero-sum bonanza to white men at the expense of Black women by exponentially increasing white male economic, social, and psychological power over African American women, men, and children.⁵⁷ Khiara Bridges tied this history to today's surrogacy law and practices, noting that legalized surrogacy has the potential to "magnify racial inequalities inasmuch as wealthy white people will look to poor women of color to carry and give birth to the white babies that the couples covet."⁵⁸

Dorothy Roberts's work in this vein may well be the most influential, in particular her 1997 book *Killing the Black Body*.⁵⁹ Roberts tied that history to today's reproductive technology practices and regulation.⁶⁰ Through this lens, (largely) white women's freedom of contract to hire surrogates matters less than continued reproductive race injustices such as involuntary sterilization, mandatory birth control for public assistance recipients, incarcerated pregnant

⁵⁶ Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER J. 17, 17–19 (1991).

⁵⁷ *Id.*

⁵⁸ Khiara Bridges, *Windsor, Surrogacy, and Race*, 89 WASH. L. REV. 1125 (2014).

⁵⁹ ROBERTS, *supra* note 4.

⁶⁰ Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587 (1993); Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1961–1969 (1993); Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935 (1996).

women being forced to give birth in shackles, and racial disparities in child-removal decisions.⁶¹ Roberts also flagged the dangers of discrimination against people with disabilities, exacerbated by surrogacy.⁶²

Finally, Naomi Cahn's influential critiques of contractual views of parenthood focused on the sale of gametes used in IVF and alternative insemination. *Test Tube Families* argued for increased state regulation of families created through assisted reproduction such as surrogacy and alternative insemination. She decried the current laissez-faire system in which would-be mothers may purchase sperm from anonymous donors via sperm banks, expressing concern that this practice denies children the right to know their origins. Cahn's proposed solutions included

⁶¹ In addition to Roberts's extensive writings, *see also* MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* (2020); April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 *TEX. J. WOMEN & L.* 83 (2001); Beverly Horsburgh, *Jewish Women, Black Women: Guarding against the Oppression of Surrogacy*, 8 *BERKELEY WOMEN'S L.J.* 29 (1993); Lisa C. Ikemoto, *Destabilizing Thoughts on Surrogacy Legislation*, 28 *U. SAN FRANCISCO L. REV.* 633 (1994); Isabel Marcus et al., *Looking Toward the Future: Feminism and Reproductive Technologies*, 37 *BUFF. L. REV.* 203 (1989); Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 *NEW ENG. L. REV.* 913 (1994).

⁶² Dorothy E. Roberts, *Privatization and Punishment in the New Age of Reprogenetics*, 54 *EMORY L.J.* 1343 (2005).

sperm donor registries and “donor-conceived” stamps on birth certificates of children conceived via contract instead of coitus.⁶³

III. Contracts as an Instrument of Transitional Justice

A third group of feminist legal theorists see the benefits and burdens of contract in a more nuanced way.⁶⁴ In Peggy Radin’s pragmatic formulation, which she called “incomplete commodification,” contracts can provide some but not all of the regulation for a given transaction. As such, they serve as a way station between “ideal justice” and “nonideal justice,” helping law and society “transition from where we are to a better world.”⁶⁵ An example of this

⁶³ NAOMI CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 27, 189–200, 230–231 (2009).

⁶⁴ Singer, *supra* note 6. *See also* Adrienne Hunter Jules & Fernanda Nicola, *The Contractualization of Family Law in the United States*, 62 AM. J. COMP. L. 151 (2014); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491 (2005); Hila Keren, *Can Separate Be Equal?: Intimate Exchange and the Cost of Being Special*, 119 HARV. L. REV. F. 19 (2006); Laura Weinrib, *Reconstructing the Family: Constructive Trust at Relational Dissolution*, 37 HARV. C.R.-C.L. L. REV. 207 (2002); Sara L. Ainsworth, *Bearing Children, Bearing Risk: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1084–1086 (2014); Robert Leckey, *Contracting Claims and Family Law Feuds*, 57 U. TORONTO L.J. 1 (2007); ÉLODIE BERTRAND ET AL., COMMODIFICATION OF NATURE AND BODY (2020).

⁶⁵ RADIN, *supra* note 5, at 123.

approach is Adrienne Davis's historical analysis of antebellum agreements to transfer property between white men and Black women with whom they cohabited.⁶⁶ While these concubinage agreements were hardly paragons of an idealized contractualist relationship among equal bargaining partners, they—and the law's willingness to enforce a surprising number of them—show that contract can provide a second-best solution when first-best is not an option.

In the family law context, Jana Singer is a leading proponent of the view that contract can provide a private law transition point between a publicly ordered system of gender subordination to a public law rule that more fairly allocates the benefits and burdens of family life.⁶⁷ She catalogued trends of increased privatization in the late twentieth century such as spouses' ability to contractually alter the state-supplied rules regarding property division and alimony, the shift to no-fault divorce, and contracting for parenthood through private adoptions and reproductive technology contracts. On the pro side, she noted that privatization of family law can facilitate alternative ways to form families that respect people's choice, autonomy, and diversity of family forms more than the old status-based models. However, downsides for families include the common tendency of marital and cohabitation contracts to deprive women of access to a household's economic assets, and the loss of shared values about the nature of families and what society owes them. Rather than champion particular reforms, Singer voiced appreciation for law's progression from privately ordered domestic partnership to same-sex marriage, gradually

⁶⁶ Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999).

⁶⁷ Singer, *supra* note 6.

“recogniz[ing] and affirm[ing] family relationships as both a haven for individual self-expression and a vehicle for expressing our most cherished public values.”⁶⁸ Along the same lines, Singer and Jane Murphy’s 2015 book *Divorced from Reality* applies this framework to analyze contract-based reforms to dispute resolution such as collaborative lawyering, especially in parenting disputes.⁶⁹

Empirical evidence supports this balanced approach. Sociologists Rosana Hertz and Margaret Nelson’s comprehensive data collection and analysis told a complex story about positive, negative, and neutral ways that gamete markets shape relationships.⁷⁰ Likewise, sociologist, lawyer, and former family law practitioner Hillary Berk documented the actual terms in surrogacy contracts and the social dynamics among intended parents, surrogates, egg donors, and agencies. Her data set of 115 interviews with the parties, agency personnel, and lawyers about their surrogacy arrangements showed that contractualized reproduction can be simultaneously “empowering” and “oppressive” as reproductive labor is both commodified and legitimized.⁷¹ This view acknowledges power imbalances while valuing contractual pregnancy’s ability to provide surrogates with needed income and meaningful work.

⁶⁸ *Id.* at 1567.

⁶⁹ MURPHY & SINGER, *supra* note 7.

⁷⁰ ROSANNA HERTZ & MARGARET NELSON, *RANDOM FAMILIES: GENETIC STRANGERS, SPERM DONOR SIBLINGS, AND THE CREATION OF NEW KIN* (2018).

⁷¹ Hillary L. Berk, *Savvy Surrogates and Rock Star Parents: Compensation Provisions, Contracting Practices, and the Value of Womb Work*, 45 *LAW & SOC. INQUIRY* 398, 400 (2020).

Recent articles on surrogacy accept its continued existence—and thus its contractual framework—and focus on how to regulate it to empower women and broaden the range of family creation while avoiding exploitation.⁷² For example, Rachel Rebouché mapped gaps between actual surrogacy contracts and surrogacy legislation on topics such as prenatal behaviors from alcohol consumption to manicures to who decides whether and when to terminate a pregnancy. Contract law and family law, together, may strike a balance between the freedom of choice and protecting against overreach when moneyed intended parents, agencies, and attorneys control much of the transactions.⁷³

Although most contract-focused feminist legal theory imports contractualism into family law and related doctrines, some scholars instead transport feminist insights into traditional contract doctrines.

IV. Feminist Improvements to Traditional Contract Doctrines

Feminist proposals to right wrongs in contract doctrine draw on cultural feminism's centering of relationships and connection to others. These scholars challenge contract law's traditional assumptions that people are self-interested rational actors intent on maximizing their own welfare. Instead, they propose an alternative, relational contract theory, which presumes equality

⁷² See, e.g., Courtney Joslin, *Surrogacy and the Politics of Pregnancy*, 14 HARV. L. & POL'Y REV. 365 (2020); Douglas NeJaime, Reva Siegel & Daphne Barak-Erez, *Surrogacy, Autonomy and Equality*, in 2020 GLOBAL CONSTITUTIONALISM SEMINAR VOLUME, YALE LAW SCHOOL (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3732265.

⁷³ Rachel Rebouché, *Contracting Pregnancy*, 105 IOWA L. REV. 1591 (2020).

of the parties and recognizes that their intent reflects their commercial and personal relationships.⁷⁴ As Debora Threedy explained, relational contract theory shifts our focus from “the things contracted for to the relationship between the contracting parties,” which allows contract doctrine to better respond to different kinds of contracts and to differences among contracting parties.⁷⁵

Influential contributions in this literature address employment law; debtor-creditor relationships; and the defenses of duress, misrepresentation, and unconscionability that apply to any kind of contract.

A. Employment Law

Employment law evolved out of the common law rules governing households, which reflected and enforced hierarchies of men over women, adults over children, and masters over servants.⁷⁶

It involves a mix of contract and status, and as it has moved toward contractualization, feminists have argued for a relational understanding of contractual intent. These proposals tend to advocate

⁷⁴ See, e.g., Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983); Robert Leckey, *Relational Contract and Other Models of Marriage*, 40 OSGOODE HALL L.J. 1 (2002).

⁷⁵ Deborah L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 1264 (1999)[hereinafter *Feminists*].

⁷⁶ Franklin G. Synder, *The Pernicious Effect of Employment Relationships on the Law of Contracts*, 10 TEX. WESLEYAN L. REV. 33, 37 (2003).

for worker protections, perhaps because women’s socioeconomic situation is more likely to put them in the position of employee than employer.

For example, Emily Houh has shown how the duty of good faith and fair dealing that exists in every contract could modify the general rule that workers are employed-at-will. Houh’s approach would use this common law doctrine to protect employees from employers’ subordinating conduct based on race, gender, and other identity categories when statutes fail to recognize those harms.⁷⁷ Houh also proposed expanding the duty of good faith to police conduct between employers and employees before a contract is formed. Traditionally, the duty of good faith arises out of the contract itself, so it does not exist prior to contract formation. Houh reasoned that employment law should start applying good faith duties in hiring and negotiation to protect employees from discrimination in the preemployment stage. Other uses of common law contract rules might provide protection for characteristics, such as obesity, or from harmful conduct, such as bullying, which employment discrimination statutes do not (yet) cover.⁷⁸ An expansive interpretation of good faith could fill those gaps.

⁷⁷ Emily M. S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1087–1088 (2003); Emily M. S. Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, 2005 UTAH L. REV. 1 (2005).

⁷⁸ Yofi Tirosh, *The Right to Be Fat*, 12 YALE J. HEALTH POL’Y, L. & ETHICS 264 (2012); see also ROXANE GAY, *HUNGER: A MEMOIR OF (MY) BODY* (2017); Anne M. Payne, *Proof of Workplace*

Another example of feminist influence on employment contracts incorporates substantive fairness to temper harsh noncompete agreements. Rachel Arnow-Richman would recognize the relational components of employment by importing the family law requirement of substantive fairness in marital contracts.⁷⁹ She reasoned that because “noncompetes [and] premarital agreements are an attempt to control in advance the financial consequences of the dissolution of a legal relationship,” courts should evaluate their validity by the marital contracting tests regarding “the quality of the spouse’s consent and the fairness of the agreement at the time it was drafted.”⁸⁰

B. Debtor-Creditor Relationships

Traditional contract doctrine erases identity categories by assuming away peoples’ gender, race, and class, all in the name of formal equality. Granted, formal equality is an upgrade from the bad old days of coverture and enslavement when the law deprived married women and enslaved Americans of the power to enter contracts. Still, law’s supposed neutrality too often masks the law taking the perspective of more powerful parties. In the debt context, that faux neutrality can interfere with women’s access to capital—and thus life choices—and ignore or exacerbate

Bullying That Does Not Involve Class-Based Discrimination, 164 AM. JUR. PROOF OF FACTS 3d 109, §§ 1–2 & 11 (2017; updated 2021).

⁷⁹ Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163 (2001).

⁸⁰ *Id.* at 1167–1168.

gendered vulnerabilities to sexual assault and responsibility to care for children and other dependents.

For example, Elizabeth Warren and others have long flagged the higher price of debt for women.⁸¹ Two feminist proposals import relational contract insights to prevent creditors from taking advantage of debtors' gendered vulnerability.

Spousal surety cases—in which wives personally guarantee their spouses' business debts—provide fertile ground to plant feminist insights.⁸² Gillian Hadfield used spousal surety agreements as a platform to propose a reliance-based, relational theory of contract that she called an “expressive theory of contract.”⁸³ Spousal-guarantee cases have outsized effects on the lives of women and their families because the surety agreement allows a bank to sell the family home

⁸¹ Elizabeth Warren, *What Is a Women's Issue?: Bankruptcy, Commercial Law, & Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19 (2002); Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracting*, 19 CARDOZO J. L. & GENDER 437 (2013); Kristin Brandser Kalsem, *Bankruptcy Reform & the Financial Well-Being of Women: How Intersectionality Matters in Money Matters*, 71 BROOK. L. REV. 1181 (2006); Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 MICH. J. RACE & L. 1 (2010).

⁸² In one collection of essays by British legal scholars on feminism and contract law, spousal surety cases attracted more attention than any other context. LINDA MULCAHY & SALLY WHEELER, EDs., *FEMINIST PERSPECTIVES ON CONTRACT LAW* (2005).

⁸³ 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).

to collect a loan that it extended to cover a husband's business debts. That outcome is particularly unjust when the husband has misinformed the wife about the amount of the debt, a religious wife faces lifelong pressure to "accept a position of subservience and obedience to her husband," or the wife signed under duress.⁸⁴

Because these circumstances raise serious questions about the genuineness of wives' consent, English courts have presumed undue influence or misrepresentation in cases where the surety and debtor are spouses or cohabitants. However, creditors can rebut this presumption by establishing that the surety fully understood the nature and consequences of the transaction: namely, that she could lose her home. Consequently, British lenders give special notice to each wife/surety of the amount of her potential liability and its risks, and also advise her to get independent legal advice. U.S. courts, in contrast, generally let spousal sureties defeat creditors' claims only if they can show that the creditor knew of or participated in the husband's duress, misrepresentation, undue influence, or fraud.⁸⁵

Hadfield proposed a third path. She critiqued notice as insufficient to transform a surety under gendered constraints into a rational self-interest maximizer. Instead, she contended, contract law should balance gendered constraints against the danger of paternalist assumptions that women are unable to think for themselves. In Hadfield's view, the dominant contractarian

⁸⁴ Rosemary Auchmuty, *The Rhetoric of Equality and the Problem of Heterosexuality*, in *FEMINIST PERSPECTIVES ON CONTRACT LAW* 51, 66–70 (Linda Mulcahy & Sally Wheeler eds., 2002).

⁸⁵ *See, e.g.*, *Sun Forest Corp. v. Shvili*, 152 F. Supp. 2d 367, 393 (S.D.N.Y. 2001).

“will” theory of contract should remain the rule for commercial contracts but be supplemented with a relational or reliance-based theory of contract in special cases such as spousal guarantees, surrogacy, and marital separation agreements.⁸⁶

Another commercial context in which legal scholars have sought to import feminism to better balance debtor-creditor relations arises out of a statute, UCC article 9. Article 9 governs secured transactions, in which debtors give creditors a “security interest” in collateral so that when a debtor defaults by, for example, failing to pay down the loan, the creditor can repossess the collateral to satisfy the debt.⁸⁷ The most remarkable thing about article 9 is that creditors’ repossession rights are entirely private; courts are not involved. Upon a debtor’s default, a secured creditor can hire a private repo person to seize collateral and sell it at a private sale to satisfy the debt. Car loans are such a common—and familiar—instance of article 9’s application that an entire genre of TV shows features those repossessions.⁸⁸

Jean Braucher and Debora Threedy have both proposed that the article 9 standards for what repo people can and cannot do consider the perspective of female debtors. For example, Jean Braucher proposed a “repo code” that would supplement the current standard that

⁸⁶ Hadfield, *supra* note 83, at 1266, 1268.

⁸⁷ U.C.C. §§ 9-102, 9-203, 9-609, 9-610.

⁸⁸ See, e.g., *Operation Repo* (EGA Prods., 2006–2014); *South Beach Tow* (Bodega Pictures and Nuyorican Prods., 2011–2014); *Repo Games* (495 Prods., 2011–2012).

repossessions cannot “breach the peace” with a set of more specific rules.⁸⁹ Following the federal Fair Debt Collection Practices Act, Braucher’s repo code would prevent creditors from taking advantage of female debtors’ fear of sexual assault and desire to protect their children by, for example, prohibiting: middle-of-the-night repossession at a debtor’s home; entering a residence or garage of commercial building without contemporaneous permission; and “breaking, opening, or removing any lock gate, or other barrier.”⁹⁰

Where Jean Braucher’s “repo code” implicitly protects the expectations of female debtors, Debora Threedy argued for something more like a “reasonable woman” standard in judging whether a repossession violated article 9.⁹¹ According to this view, the traditional standard that a threat of violence impermissibly breaches the peace is not enough. Instead, Threedy contended, judges deciding article 9 cases should acknowledge that the mere fact of men showing up in the middle of the night could constitute a threat of violence. For example, one case involved a mother living with her two young children in a trailer home. Repo men woke her up at 4:30 A.M. to repossess her car.⁹² She told them to stop and insisted that she needed to get personal items out of the car, yet the two repo men refused to comply and asserted their

⁸⁹ Jean Braucher, *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 WASH. U. L.Q. 549 (1997).

⁹⁰ *Id.* at 587, 608.

⁹¹ Debora L. Threedy, “*Breach of the Peace*” in *Self-Help Repossession: Adopting a Gendered Perspective*, 7 COMMERCIAL DAMAGES REP. 245, 245 (1992).

⁹² *Williams v. Ford Motor Credit Co.*, 674 F.2d 717 (8th Cir. 1982).

control by stepping between her and the car. Although UCC article 9 formally says that repossession over debtor objection breaches the peace, the court concluded that the facts did not constitute an impermissible threat of force or risk of violence.⁹³ Threedy, in contrast, asserted that “perhaps standing in her nightclothes before two strangers in the middle of a winter night, with her two small children alone in the trailer, was intimidation enough.”⁹⁴

C. Defenses

Scholars such as Threedy have also examined how feminist interpretations of common law defenses of duress and misrepresentation could help contract law reflect the perspectives of women who assert them, instead of the people and institutions against whom they are asserted. Threedy grounded her approach in relational contract theory, urging us to question contract law’s preferences for “objectivity over subjectivity [and] for abstraction over contextualization.”⁹⁵ One influential application of this view is Threedy’s archaeological excavation of the canonical contract case *Vokes v. Arthur Murray*, in which the plaintiff claimed she was induced on false premises to enter into expensive contracts with a dancing school that misrepresented her dancing ability.⁹⁶ Threedy noted the tension between autonomy and fairness that runs throughout contract

⁹³ *Id.* at 719.

⁹⁴ Threedy, *supra* note 91, at 249.

⁹⁵ Threedy, *Feminists*, *supra* note 75, at 1249, 1257.

⁹⁶ Debora L. Threedy, *Dancing around Gender: Lessons from Arthur Murray on Gender and Contracts*, 45 WAKE FOREST L. REV. 749 (2010) (citing and discussing *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. Dist. Ct. App. 1968)).

law and suggested Hadfield's expressive choice theory of contract could better justify Audrey Vokes being able to avoid the monumental bill racked up by the dance studio via its misrepresentations.⁹⁷

Conclusion

Contract plays a prominent role in feminist legal theory. Contract has played a crucial role in overturning systemic structures of subordination such as coverture and the exclusion of same-sex couples from marriage. However, the presumptions of market access and equal bargaining power ignore or downplay systemic hierarchies of race, class, and gender in ways that can render contracts unsuitable to achieve foundational feminist goals. Perhaps the most nuanced view of contract within feminist legal theory situates it as a private law mechanism for law to transition from outdated public status-based rules to new public rules that more justly distribute resources.

Just as some feminists have used contract to improve family law, others have transported feminist insights to improve defects in traditional contract law. Often grounded in relational contract theory, these proposals would expand the duty of good faith in employment law, recognize gendered power differences in debtor-creditor relations, and reconstruct equitable defenses such as duress that apply in all contractual contexts. Although feminism has yet to

⁹⁷ *Id.* at 775. See also Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171 (2013); Orit Gan, *Promissory Estoppel: A Call for a More Inclusive Contract Law*, 16 J. GENDER RACE & JUST. 47 (2013); Orit Gan, *Anti-Stereotyping Theory and Contract Law*, 42 HARV. J.L. & GENDER 83 (2018).

radically reshape contract doctrine, feminist scholars' deep engagement with contract law has opened new possibilities for future developments in the law.