Contract Law

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CHAPTER 1

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Contracts project our intentions outwards, prolonging our autonomy into an uncertain future.[1] They allow people to create new legal structures; to 'make arrangements for themselves, and so to change their respective rights and duties'.[2] Law promises to support that creative agency; women often distrust that promise. The first debate here introduces critiques of freedom of contract which are concerned with gender and power. The second explores efforts to address those critiques through relational contract theory. For reasons of space, I focus here on the common law rather than statute, and on commercial contracting rather than consumer law.

Debate 1

Is 'freedom of contract' really freedom?

Berlant uses the phrase 'cruel optimism'[3] to describe things we desire and hope for even though they are obstacles to our flourishing. 'Freedom of contract' exemplifies cruel optimism. The cases you read during your studies involve people who bargain for things – dream homes,[4] beautiful objects,[5] financial security,[6] or maybe even chances of fame[7] – that speak to their identity and goals. Marx wrote of contractual exchange that 'what seems to throb there is

[1] Marieke De Goede, *Virtue, Fortune, And Faith: A Genealogy of Finance* (University of Minnesota Press, 2005); Hannah Arendt, *The Human Condition: Second Edition* (University of Chicago Press, 2013) p. 238.

[2] Arthur Ripstein, *Force and Freedom* (Harvard University Press, 2010) p. 107.

[3] Lauren Berlant, *Cruel Optimism* (Duke University Press, 2011).

[4] *Farley v Skinner* [2001] UKHL 49; Ronnie Cohen and Shannon O'Byrne, 'Burning down the house: Law, emotion and the subprime mortgage crisis' (2011) *Real Property, Trust and Estate Law Journal* 677.

[5] *Leaf v International Galleries* [1950] 2 KB 86.

[6] *Beswick v Beswick* [1967] UKHL 2.

[7] *Chaplin v Hicks* [1911] 2KB 786.

my own heartbeat'.[8] However, contractual freedom is a thin equality of opportunity, in limited circumstances, to participate in certain capitalist projects. 'Classical'[9] contract law emerged alongside capitalism, as markets became objects of specialist knowledge and regulation. Contract law supposedly mirrors the market, responding to bargains rather than shaping them. 'Freedom of contract' promises that states make no detailed public plan for market transactions. Nineteenth-century laissez-faire economists maintained that, left to their own devices, individuals would voluntarily exchange scarce resources with one another, allowing them to gravitate to their most efficient uses.[10] Law, accordingly, insists that, although the state stands ready to resolve disputes,[11] intervention is exceptional and only takes place at the end of the contract's life. Then law defers to our intentions.[12] Thus, contract is 'private' rather than 'public' law, produced by autonomous individuals rather than by government fiat.

We should be suspicious of easy distinctions between (public) governmental regulation and (private) self-regulation. Law actively constructs opportunities for judicial intervention in contractual disputes: those are neither obvious nor neutral.[13] For example, the promise of judicial deference to parties' intentions is misleading. One of the first lessons you learn is that subjective intentions do not matter to contract doctrine: only the outward 'objective' appearance of agreement counts.[14] As Radin writes, law idealises the bargaining process as an occasion for detailed communication and clear expression of voluntary consent to each contractual term. But law does not actually require any such communication. It is enough for contract terms to bind us that we assent to them, for example by signature.[15] The law on incorporation of terms means that we need not always have specific knowledge of each element of our obligations. Informed consent is not always required: it is enough that we have 'reasonable notice' of the contract's terms (whether or not we fulfil the corresponding duty to read them).[16] Thus, passivity, not shared creativity, is often contract's hallmark.[17]

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[8] Karl Marx, *Capital, Volume 1* (Penguin, 1990) p. cxxiv.

[9] On the relevance of classical contract law to modern contract, see John Wightman, *Contract: A Critical Commentary* (Pluto Press, 1996) pp. 48–51; Danielle Kie Hart, 'Contract law now – reality meets legal fictions' (2011) 41 *University of Baltimore Law Review* 1. For an alternative history of nineteenth-century contract law, see Anat Rosenberg, 'Classical contract law, past and present', https://works.bepress.com/anat_rosenberg/2/, accessed 9 March 2017.

[10] See further, Alice Belcher, 'A feminist perspective on contract theories from law and economics' (2000) 8 *Feminist Legal Studies* 29.

[11] On the contract enforcement and violence, see Walter Benjamin and Peter Demetz, *Reflections: Essays, Aphorisms, Autobiographical Writing* (Schocken Books, 1986) p. 288.

[12] P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1985) p. 404.

[13] Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press, 1990) p. 280.

[14] *Carlill v Carbolic Smokeball Co.* [1892] 1 QB 256.

[15] *L'Estrange v Graucob* [1934] 2 KB 394.

[16] Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2013). *Parker v South Eastern Railway* (1877) 2 CPD 416.

[17] Patricia J. Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991) p. 224.

Nevertheless, courts treat contracts *as if* they embodied freely choosing subjects' active intentions. This fiction[18] has a pragmatic technical function: it allows courts, by formalistically reasoning through contractual disputes, to bypass the lived difficulties of contracting. Thus, it eliminates a source of market uncertainty: if we know that the vagaries of human intention have limited impact on judicial decision-making, we feel more confident about entering into complex contracts. This minimalist approach makes some transactions more secure and more readily calculable. It also performs a political function.[19] It allows courts to bypass detailed engagement with the conditions in which contractual intention is formed, producing rules that are 'singular, daunting, rigid and cocksure'.[20] Leaving messy reality behind, law can turn to idealised narratives of contractual freedom. The idea of 'objectivity', so often repeated in your contract course, suggests rigour and certainty, but also responsiveness to shared market rationality. That rationality, however, may not be shared by all market actors:[21] the preferred practices of some are made the universal rule in order to discipline others. This is where gender inequality comes in.

Ideal contractual subjects are strong, independent, self-possessed and productive. They are autonomous beings who possess and trade in concrete legal rights.[22] This ideal is rooted in a particular theory of equality. Classical contract theorists were influenced by liberal political thinkers who argued that men should be owners of their own labour and property, and trade them freely with others. Contract was often contrasted with status:[23] freedom to contract implies equal capacity to bargain in the market, unshackled from traditional authority. This vision of universal equality seems admirable, but some subjects will have to work harder than others to claim that equality.[24] Recall nineteenth-century feminist struggles for married women's right to form property and employment contracts. As Pateman writes, the originary contract between men and women was the sexual contract, under which married women supposedly willingly subordinated themselves to their husbands.[25] Women were not

[18] Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press, 2011) p. 24.

[19] Ibid. p. 176.

[20] Mary Joe Frug, 'Rescuing impossibility doctrine: A postmodern feminist analysis of contract law' (1992) 140 *University of Pennsylvania Law Review* 1029, 1035.

[21] Patricia J. Williams, 'Metro Broadcasting, Inc. v. FCC: Regrouping in singular times' (1990) 104 *Harvard Law Review* 525, 534.

[22] Angela Mitropoulos, *Contract and Contagion: From Biopolitics to Oikonomia* (Minor Compositions, 2012) p. 176.

[23] Minow (n. 13) pp. 121–122.

[24] Ibid. p. 151.

[25] Carole Pateman, *The Sexual Contract* (John Wiley & Sons, 2014); Colin Dayan, *The Law Is a White Dog – How Legal Rituals Make and Unmake Persons* (Princeton University Press, 2013) p. 149.

fully in possession of themselves,[26] but were rather objects to be exchanged between men.[27]

Contract law now formally includes a wider range of subjects, including women, but substantive inclusion is another matter. We have said that contract rarely enquires into the forces that produce our thoughts, plans or desires: it flattens and generalises experience. If contract law presumes some equality between market actors, it is 'equal measure'[28] with idealised commercial men. Contract makes persons equivalent to one another in an abstract sense, apportioning and rationalising inequality rather than transcending it.[29] This is problematic because structural inequalities of class, race or gender often mean that we will not be able to contract for ideal opportunities. We contract for compromise because nothing better is available,[30] and we find that our contracts are more expensive to perform. If you are from the UK you could consider, for example, how issues of inequality interact with your own student loan contract. Of course you all formed the same online contract on the same terms: you were formally equal. But behind the mask of formal equality lie deep issues of class and gender. Most of you would have preferred not to take out a loan at all, but that option is no longer available, except perhaps for those with wealthy parents. Those of you raised in a single-parent household are less likely to enjoy that wealth, especially if it is female-headed. You may have had to borrow more, in fact; since maintenance grants were abolished, many of you will be borrowing (as well as working) to fund living costs, in addition to the debt you have taken on to pay fees. The contract also costs more to perform if you earn less: you are in debt for longer, and you pay back more in total.[31] Women, as you will know, are still likely to earn less than men and to suffer earning penalties for fulfilling caring responsibilities, so they are more likely to be affected by this inequality.[32] Meanwhile, others do very well out of the market in student loans, particularly private investors who have benefited from sales from the

[26] We could make similar points about enslaved people: Diane J. Klein, 'Paying Eliza: Comity, contracts, and critical race theory – 19th century choice of law doctrine and the validation of antebellum contracts for the purchase and sale of human beings' (2006) 20 *National Black Law Journal* 1; Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (Cambridge University Press, 1998); Sora Han, 'Slavery as contract: Betty's case and the question of freedom' (2015) 27 *Law & Literature* 395.

[27] Luce Irigaray, *This Sex Which Is Not One* (Cornell University Press, 1985) p. 173. See similarly Saskia Lettmaier, *Broken Engagements: The Action for Breach of Promise of Marriage and the Feminine Ideal, 1800–1940* (Oxford University Press, 2010).

[28] Drucilla Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (Rowman & Littlefield, 1999) p. 114.

[29] Mitropoulos (n. 22) p. 25.

[30] Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge University Press, 2013) p. 118.

[31] See further http://blogs.lse.ac.uk/politicsandpolicy/student-debt-and-the-next-generation-of-british-public-sector-professionals/, accessed 17 January 2018.

[32] https://www.fawcettsociety.org.uk/policy-research/the-gender-pay-gap/, accessed 17 January 2018.

student loan book.[33] Insofar as law ignores the effects of economic inequality on contractual freedom then, as Williams says, it 'reduces life to fairytale'.[34]

Of course, law reassures us that unjust contracts will not be enforced. The fiction of contractual intention only temporarily forecloses enquiry[35] into the circumstances of the contract's formation. Wronged parties can always demand law's attention. However, courts administer corrective justice:[36] redressing wrongs done by one to the other rather than addressing contracts' substantive fairness, or their tendency to facilitate unequal accumulation of resources.[37] The courts' role is to uphold relations of commodification based on the parties' subjective valuation of the thing bought or sold. It is rarely law's concern if a commercial contract is one-sided, or an individual sells at apparent gross undervalue. There is no general principle that allows a contract to be set aside merely because it is unfair, without some additional evidence of morally reprehensible conduct.[38] The law on damages, based primarily in expectation loss, restores to me only what I had bargained for, rather than a fair price for my lost goods or wasted services. Thus, contractual freedom is not a substantive right to transform one's position by entering into emancipatory legal relations.[39] In many cases, contractual freedom means making the best of a precarious bargaining position.

You might have learned that, although contract law is not concerned with substantive unfairness, it carefully polices procedural unfairness: where some defect in the contract's formation taints one party's consent to the bargain. Duress, for example, only allows a contract to be set aside where one party's consent is produced by the other's serious and illegitimate threat. Coercion must be traceable to some act of the aggressor. The victim must show that they had no reasonable alternative but to accept the contract. Gan argues that these requirements exclude consideration of pre-existing inequality of bargaining power as between the parties.[40] They trivialise domination and legitimise subtle exploitation of economic inferiority. Even very harsh or discriminatory bargains can be enforced. Duress solidifies contract's commitment to preserve 'the rough and tumble of the normal pressures of commercial bargaining'.[41] It asks each party to look after their own interests without requiring concessions from the other. There is no independent doctrine of inequality of bargaining

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[33] Andrew McGettigan, 'Cash Today', https://www.lrb.co.uk/v37/n05/andrew-mcgettigan/cash-today, accessed 17 January 2018.

[34] Williams, *The Alchemy of Race and Rights* (n. 17) p. 224.

[35] Riles (n. 18) p. 167.

[36] See Ernest J. Weinrib, *The Idea of Private Law* (Oxford University Press, 2012).

[37] Partha Chatterjee, *Empire and Nation: Selected Essays* (Columbia University Press, 2010) p. 255.

[38] *Portman Building Soc v Dusangh* [2000] 2 All ER (Comm 221).

[39] Williams, 'Metro Broadcasting, Inc. v. FCC' (n. 21).

[40] Orit Gan, 'Contractual duress and relations of power', https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2134630, accessed 9 March 2017.

[41] *Atlas Express v Kafko* [1989] QB 833, 839.

power.[42] Moreover, the few doctrines allowing courts to address contractual injustice, or excuse non-performance, are made piecemeal and remain on law's margins.[43] (The concepts of undue influence and unconscionable bargain, for example, come from Equity.) Ordinary bargains may contain elements that are freely chosen, and others that are less so.[44] However, as Mulcahy argues, law exceptionalises failure to meet the standards of the robust contracting agent. Those who call on law for protection are imagined as presumptively deficient victims.[45] In this way, law suggests that most bargains are freely chosen rather than coerced.[46]

So far, we have talked about contractual freedom in terms of power and potential. But contract is also marked by hazard and uncertainty. Johns' work on the lived experience of transnational corporate deals presents parties less as powerful and assured than as inhabiting 'fraught' processes of deal-making on a 'hazard-riddled' landscape suffused with risk which is at once 'invigorating', 'bountiful', 'life-giving' and a constant reminder of the deal's fragility.[47] Mitropoulos suggests that contract is about 'proliferation of limits'[48] at risky 'frontiers'.[49] Early capitalism identified risk-taking as essential to accumulating wealth. As national and international commercial markets expanded under industrialisation and colonisation,[50] market actors had to master new profitable risks. They had to be willing to trade in markets for untested products, deal with unknown partners in faraway jurisdictions, and form executory contracts which might not reap financial rewards for years.[51] Law had to stabilise these new behaviours by generating 'an injunction to perform'[52] contracts, disciplining unruly responses to market risk.

Contract law cannot eliminate all market risks, but it can make us responsible for managing them. The rules governing the end of the contractual relationship make clear that we must weather risk; even if keeping our contractual

[42] *National Westminster Bank v Morgan* [1985] AC 686.

[43] Grant Gilmore, *The Death of Contract* (Ohio State University Press, 1977) pp. 52–53.

[44] Gillian K. Hadfield, 'An expressive theory of contract: From feminist dilemmas to a reconceptualization of rational choice in contract law' (1998) 146 *University of Pennsylvania Law Review* 1235, 1238.

[45] Linda Mulcahy and Sally Wheeler, *Feminist Perspectives on Contract Law* (Routledge, 2005) p. 11.

[46] Gan (n. 40) pp. 192–193; Alan Thomson, 'The law of contract' (1992) in Ian Grigg-Spall and Paddy Ireland (eds), *The Critical Lawyers' Handbook*, vol. 1: http://nclg.org.uk/wp-content/uploads/2011/10/The_Critical_Lawyers_Handbook_Volume_1.pdf, accessed 17 January 2018.

[47] Fleur Johns, 'Performing power: The deal, corporate rule, and the constitution of global legal order' (2007) 34 *Journal of Law and Society* 116, 125.

[48] Mitropoulos (n. 22) p. 18.

[49] Ibid. p. 45.

[50] Ibid. p. 19.

[51] Anthony T. Kronman, 'Contract law and the state of nature' (1985) *Journal of Law, Economics, & Organization* 5.

[52] Mitropoulos (n. 22) p. 40.

obligations entails hardship, inconvenience or significant financial loss,[53] we cannot lightly escape it. There are high thresholds for termination of a contract[54] or for frustration.[55] We must mitigate our losses. The courts will not save us from so-called 'bad bargains'.[56] This position is purportedly justified because we are understood to have the opportunity, at the point of contract formation, to exercise foresight; to calculate how risks might materialise in future[57] and to use express terms to allocate them between ourselves. To this end, law expects us to articulate our intentions clearly in advance.[58] In consequence, courts respect formal contractual documents, and are reluctant to alter or supplement a contract's express terms. Courts will construe an existing contract to determine responsibility for the consequences of non-performance, but will not 'make' a new contract for the parties after the event.[59] Thus, for example, the courts' acknowledged power to imply a term into a contract will only be exercised where it is 'necessary' to do so.[60]

The courts' expectations of contractual planning may be unrealistic. For example, Gelpern and Gulati's work on 'boilerplate' clauses shows that sometimes even sophisticated contract drafters behave irrationally. Standard form contracts and standardised clauses[61] (boilerplate) are highly efficient tools because they reduce the costs associated with making and negotiating new contracts. Terms need not be coined from scratch: drafters can use terms already accepted within the industry and, perhaps, that have been tested in the courts.[62] However, Gelpern and Gulati suggest drafters also include boilerplate in contract documents 'because they feel better for *saying it*, even where they know full well that the term will *do* little or nothing to advance their cause'.[63] Unthinking recycling, arrangement and accumulation of talismanic phrases of proven weight do not reflect thoughtful, rational agency. Instead, these phrases may symbolise desire for impossible reassurance.[64] These observations resonate

[53] *Davis Contractors v Fareham UDC* [1956] AC 696.

[54] *Decro-Wall Ltd v Practitioners in Marketing* [1971] 1 WLR 361.

[55] *Gold Group Properties v BDW* [2010] EWHC 323.

[56] *Arnold v Britton* [2015] UKSC 36.

[57] Pat O'Malley, 'Uncertain subjects: Risks, liberalism and contract' (2000) 29 *Economy and Society* 460; Beverly Brown, 'Contracting out/contracting in: Some feminist considerations' in Anne Bottomley (ed.) *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish, 1996) pp. 5, 10.

[58] Johns (n. 30) p. 117.

[59] *Hilas v Arcos* (1932) 147 LT 503.

[60] *AG of Belize v Belize Telecom* [2009] UKPC 10.

[61] See Anna Gelpern and Mitu Gulati, 'How CACs became boilerplate: Governments in 'market-based' [2010] change' in B. Herman, J.A. Ocampo and S. Spiegel (eds) *Overcoming Developing Country Debt Crises* (Oxford University Press, 2010).

[62] Riles (n. 18) p. 58.

[63] Anna Gelpern and Mitu Gulati, 'Feel-good formalism' (2009) 35 *Queen's Law Journal* 97.

[64] Anna Gelpern and Mitu Gulati, 'Public symbol in private contract: A case study' (2006) 84 *Washington University Law Review* 1627.

with feminist work on bargaining and vulnerability. Berlant describes contracting as a process which attempts

> to induce through an improvised relation with a semi-stranger an attachment that might become a solidarity that could produce more and better traction in the world.[65]

On Berlant's reading, none of us, in contracting, occupies the powerful 'self-authoring' position assumed by law. We may care deeply about a particular contract, but we must acknowledge that it is fragile: improvised, impulsive, indirect, speculative, and ultimately dependent on others' responses.

Debate 2

Can relational contract theory save freedom of contract?

Some theorists turn to relational contract theory in order to reimagine freedom of contract. Contract's autonomous, rational subjects are disembedded from wider relationships. Early capitalism presented traditional communal standards of contractual fairness[66] as incompatible with new forms of exchange between individuals who were not connected by ties of kinship, neighbourliness or even nation.[67] As part of colonialism's civilising mission,[68] it was similarly necessary to overcome cultural market ethics, and impose contractual discipline. Classical contract recoded social and religious obligations in line with modern economic logic.[69] By stripping away relational particularity, contract made everything interchangeable with money.[70] Contract imagines us as separated not only from community but from one another. We are atomistic, unattached, bargaining at arms' length, each pursuing our own projects in a series of discrete, bipolar transactions. Parties ideally do not owe one another duties unless they consented to them; they are sovereign within the contract. This is one reason for the doctrine of privity.[71] It also explains why the traditional rules on contract formation – such as those on 'the battle of the forms' – still emphasise the need to find a precise moment of agreement.[72] This approach obscures

[65] Berlant (n. 3) p. 161.

[66] Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500–1650)* (Martinus Nijhoff Publishers, 2013) p. 16.

[67] Peter Gabel and Jay Feinman, 'Contract law as ideology' in David Kairys (ed.) *The Politics of Law: A Progressive Critique* (Basic Books, 3rd edn, 1998) p. 172.

[68] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2001) p. 171.

[69] Ritu Birla, 'Law as economy: Convention, corporation, currency' (2011) 1 *University of California Irvine Law Review* 1015, 1019.

[70] Ian R. Macneil, 'Contracts: Adjustment of long-term economic relations under classical, neoclassical, and relational contract law' (1977) 72 *Northwestern University Law Review* 854.

[71] *Beswick v Beswick* [1968] AC 58.

[72] Macneil (n. 70). See, e.g., *Tekdata Interconnections Ltd. v Amphenol Ltd.* [2009] EWCA Civ. 1209 [21].

the understanding that agreement may often crystallise only gradually, as the contract is performed.[73] As Tidwell and Linzer write, some obligations may be tacit and unspoken; they 'arise as mysteriously and frequently as dust … float through the central air ducts, the loud speaker, the light fixtures'.[74]

The distinction between contract and more protective forms of relationship is sharpest in its treatment of family bargains. Law assumes that these are made without intention to create legal relations.[75] Here, law relies again on a capitalist distinction between public and private;[76] between the male-dominated realm of market exchange, and the domestic sphere, where women's primary duties lay.[77] It survives in the presumption against enforcement of domestic agreements, the tentative acceptance of surrogacy contracts, the history of reluctance to enforce marital agreements,[78] and the refusal to enforce contracts for sexual services[79] as a matter of public policy. Contract's presumptive split between commercial and domestic bargains devalues social reproduction: the intimate labour of care for workers and their children which enables much market activity.[80] Split responsibility produces split governing norms. Unger argues that within families, trust rather than formal entitlement governs our relations to one another.[81] The domestic (however flawed) makes the market tolerable.[82] By excluding family from its sphere of concern, contract solidifies a vision of contractual freedom stripped both of the burdens of domestic power and of family-like expectations of selflessness. At the same time, contract law struggles to regulate anything but hard-nosed commercial bargains, or to provide damages that recognise our emotional investment in important transactions.[83]

Relational contract theory suggests that we can reintroduce family-like values to the contractual sphere, by recalibrating our understanding of market behaviour. J.K. Gibson-Graham wrote against 'economic atomism', which conceives of markets as 'cold' places where 'antipolitical, asocial, individual, disembedded,

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[73] Gan (n. 40) p. 23.

[74] Patricia A. Tidwell and Peter Linzer, 'The flesh-colored band aid – contracts, feminism, dialogue, and norms' (1991) 28 *Houston Law Review* 791, 806.

[75] *Balfour v Balfour* [1919] 2 KB 571.

[76] Nicholas Rose, 'Beyond the public/private division: Law' (1987) 14 *Power and the Family* 68. See further Jill Elaine Hasday, 'Intimacy and economic exchange' (2005) *Harvard Law Review* 491.

[77] Debora L. Threedy, 'Feminists & (and) contract doctrine' (1998) 32 *Indiana Law Review* 1247, 1251. See similarly the cases on wifely duties and consideration, e.g. *Ward v Byham* [1956] 1 WLR 496*; Williams v Williams* [1957] 1 WLR 14.

[78] *Radmacher v Granatino* [2010] UKSC 42.

[79] *Pearce v Brookes* (1866) LR 1 Ex 213.

[80] See Silvia Federici, '4. Wages Against Housework', http://www.commoner.org.uk/wp-content/uploads/2012/02/04-federici.pdf, accessed 9 March 2017.

[81] Roberto Mangabeira Unger, 'The critical legal studies movement' (1983) 96 *Harvard Law Review* 561, 623.

[82] For critique of this position see Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, 1989) pp. 120–124.

[83] Hillary L Berk, 'The legalization of emotion: Managing risk by managing feelings in contracts for surrogate labor' (2015) 49 *Law & Society Review* 143, 146–147.

rational, efficient, short-term, calculable, incontestable'[84] bargains are formed. Instead, they argued, market actors' projects are often dependent on and inseparable from one another. Relational contract theory similarly understands contractual rights as 'entangled, not delineated'.[85] It casts each contract as a node in a network of cross-cutting relationships. Contract always implies contact; a drawing together of subjects and projects.[86] Contact is rarely a discrete 'alienated moment of mutual exploitation'.[87] As Macneil shows, contracts dwell amid ongoing long-term business relationships.[88] Parties value and seek to preserve these relationships. Macaulay found that businessmen often deliberately depart from contract law's expectations. They fail to plan contracts in detail at the point of formation, instead renegotiating necessary terms as the need arises.[89] Yet deals do not collapse for want of compliance with traditional models of contracting. Rather, undergirding relationships stabilise contracts: contractual norms evolve in tune with parties' friendships.[90] In cases of conflict, parties are more likely to seek to repair a failing contract than to have resort to the courts.[91] In this sense, relational contract theory also teaches that commercial contracting shares much with domestic exchange.[92] Solidarity, reciprocity, trust and even dependency are characteristics of ordinary market behaviour.[93] These ameliorate otherwise irrational behaviour, and may drive towards deeper bargaining fairness; for example, one party may forego their more selfish interests, for the long-term benefit of the relationship.[94] For Williams, contract law is about the 'making strange, putting at a distance' which makes alienation and sale possible.[95] Relational contract theory recovers proximity and familiarity in contracting.[96]

Whatever we can say about how business works in practice, as a general matter contract law is inhospitable to relational expectations. There is no broad

[84] J.K. Gibson-Graham, *A Postcapitalist Politics* (University of Minnesota Press, 2006) p. 83. J.K. Gibson-Graham is a joint pseudonym adopted by two women, Julie Graham and Katherine Gibson, who wrote together.

[85] Riles (n. 18) p. 165.

[86] Mitropoulos (n. 22) p. 14.

[87] Robert W Gordon, 'Macaulay, Macneil, and the discovery of solidarity and power in contract law, private governance and continuing relationships' (1985) *Wisconsin Law Review* 565, 569.

[88] Macneil (n. 70).

[89] Discussed in John Wightman, 'Intimate relationships, relational contract theory, and the reach of contract' (2000) 8 *Feminist Legal Studies* 93, 103.

[90] Carl F. Stychin, 'De-meaning of contract' (2007) *Sexuality and the Law* 73, 80.

[91] See, for example, Stewart Macaulay, 'Organic transactions: Contract, Frank Lloyd Wright and the Johnson Building' (1996) *Wisconsin Law Review* 75.

[92] Mulcahy and Wheeler (n. 45) p. 12. Lisa Bernstein, 'Beyond relational contracts: Social capital and network governance in procurement contracts' (2015) *Journal of Legal Analysis* 561.

[93] See, for example, Robin West, 'Economic man and literary woman: One contrast' (1987) 39 *Mercer Law Review* 867.

[94] Stychin (n. 90) 83.

[95] Patricia J. Williams, 'Keynote address, National Conference on racism 2000', https://www.sahrc.org.za/home/21/files/Reports/national_conference_on%20racism%20report%202001.pdf, accessed 19 March 2017.

[96] Mulcahy and Wheeler (n. 45) p. 10.

duty of disclosure in contract law, for example; parties are free to keep material facts to themselves.[97] Courts have also been hostile to attempts to introduce duties to bargain, or perform, contracts in good faith, unless the parties have directly bargained for them.[98] That said, although they will not impose broad duties,[99] the courts are often responsive to market practices, and to the reasonable expectations of the individual parties. For instance, in interpreting a contract, the courts will often supplement the written document with conclusions drawn from the context of the bargain;[100] they will attempt to enforce the 'real' rather than the 'paper' deal between the parties.

We should remember that relationality is not innocent of power: informal solidarity and unwritten custom are compatible with capitalist hierarchy.[101] Williams tells a story in which she contrasts her insistence on a 'detailed negotiated finely printed lease' with her White male colleague's preference for a verbal agreement concluded on a handshake and backed by a cash deposit. She locates her caution in her childhood experience of landlords who breached Black tenants' informal leases.[102] Some of us flourish under regimes of relationality which exploit and unsettle others. *Baird v M&S* is a well-known example of this problem; the smaller company adopted a series of risky business practices in order to fulfil the interests of its larger, stronger, partner.[103] Another pressing example is that of government outsourcing of state service provision to corporations such as Serco, Atos and G4S. Although these companies' breaches of contract are well-documented,[104] the contracts' relational characteristics diminish the costs of failure, and these companies continue to flourish. The state repeatedly enters into long-term contracts with the same companies over time. These contracts build deeply interconnected relationships of dependence; service provision is eventually moulded to suit these companies' interests and working methods. Staff move from the civil service to the companies and back again. In classic relational style, the contracts' terms are flexible and rarely litigated. Even when serious breach is penalised with refusal to renew one kind of contract, these firms or their subsidiaries can successfully

[97] *Keates v Cadogan* (1851) 10 CB 591.

[98] *Walford v Miles* [1992] 2 AC 128; *Interfoto Picture Library v Stiletto* [1989] QB 433; *Compass Group v Mid Essex* [2013] EWCA Civ 200. Contrast *Blackpool v Fylde Aeroclub* [1990] EWCA Civ 13; *Yam Seng v International Trade* [2013] EWHC 111.

[99] For examples of what a relational law of contract would look like see Melvin Eisenberg, 'Why there is no law of relational contracts' (1999) *Northwestern University Law Review* 805, 815.

[100] *Investors Compensation Scheme v West Bromwich* [1997] UKHL 28.

[101] See further, Stychin (n. 90) p. 83.

[102] Williams, *The Alchemy of Race and Rights* (n. 17) p. 146.

[103] Linda Mulcahy and Cathy Andrews, 'Baird textile holdings v Marks and Spencer plc' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing Ltd, 2010) pp. 189–204.

[104] 'Kristen Rundle – Legality in the Contracting Out State: Cues from the Case of Jimmy Mubenga', http://backdoorbroadcasting.net/2013/01/kristen-rundle-legality-in-the-contracting-out-state-cues-from-the-case-of-jimmy-mubenga/, accessed 21 March 2017; Steven Hirschler, 'Beyond the camp: The biopolitics of asylum seeker housing under the UK' (2013) 45 *Modern Law Review* 179.

compete for others. Relationality keeps these companies in the market for public services, at a significant cost to the vulnerable people (young prisoners, asylum seekers, jobseekers) whose lives are governed by these contracts. In this context, there are arguments for returning to a perhaps more formalistic approach to contract; detailing companies' obligations to re-orientate these contracts towards human rights protection, and enforcing the contracts properly. But it is also clear that a new vision of relationality is required which re-examines, not only government's dealings with these companies, but the underpinning norms of the market they have created.[105]

Conclusion

Even the more traditional textbooks you have read will criticise the artificiality of the contract law course. For example, it (i) focuses on traditional business rather than consumer contracts, (ii) marginalises specialist areas of contract such as employment law, public procurement or new familial and reproductive contracts and so suggests a unity of rules and purpose that no longer exists, (iii) talks primarily about common law doctrine rather than statute, and often marginalises Equity. The contract law syllabus cannot tell you very much about commercial practice. Instead it performs a different function. It is a core undergraduate, and often first-year module. It provides a space where you encounter detailed authoritative messages about ownership, reason and autonomy which you carry with you into new areas of study. This chapter demonstrates tools for disrupting those messages. The first debate upsets standard narratives of 'free' contracting behaviour and the unattainable expectations they uphold. The second returns us to questions of relationality as a supplement to contract doctrine, not as a means to eliminate our worries about contract law's sharp edges but as a call to contractual responsibility and to deep questioning of prevailing market norms.

Further Reading

John N. Adams and Roger Brownsword, 'The ideologies of contract' (1987) 7 *Legal Studies* 205.

Duncan Kennedy, 'Form and substance in private law adjudication' (1976) 89 *Harvard Law Review* 1685.

Linda Mulcahy and Cathy Andrews, 'Baird textile holdings v Marks and Spencer plc' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing Ltd), 2010 pp. 189–204.

Linda Mulcahy and Sally Wheeler, *Feminist Perspectives on Contract Law* (Routledge, 2005).

Carey Young, *Subject to Contract* (JP Ringier, 2013).

[105] For an overview of issues see Jody Freeman and Martha Minow, *Government by Contract: Outsourcing and American Democracy* (Harvard University Press, 2009).