

The touching contract

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Máiréad Enright
The Touching Contract

When *The Touching Contract* – an immersive performance work by Sarah Browne and Jesse Jones – was performed for the first time in Dublin in 2016, the radical midwife Philomena Canning was still alive. At that time, she was three persons in one; midwife, campaigner for reproductive rights, and courageous, stubborn litigant caught in an endless battle around state control of home births. When she died in March 2019, some of us who had become friends through *The Touching Contract* went together to see her body at the funeral home in Bray. Afterwards, we walked along the seafront in the dark, remembering her. Jesse Jones said that once, in devising *The Touching Contract*, she asked Philomena what the midwife’s most important tools were. Philomena held up those powerful hands.

Law was always in the background of the story of Philomena’s skilled touch. She knew how law can inaugurate, prevent, shape, or punish touch. When she was working, every grasp, squeeze, stroke, and hold carried within it a palpable trace of law; the trace of contractual authorisation by the State Claims Agency, who determine which medical risks the state agrees to indemnify. As a self-employed community midwife working on home births, she was not permitted to stray from the Memorandum of Understanding (MoU) she had signed with the Health Service Executive. When she was wrongfully accused of straying, it triggered years of distressing litigation against the state, lasting almost until the day she died.¹ That constant threat had inhabited the space between her hands and a woman’s body, always underwritten by law. When she had to withdraw from practice, her powerful touch decommissioned, law was the controlling cause.

On a summer evening in 2016, Philomena sounded her triangle and *The Touching Contract* began in an events space attached to the Rotunda maternity hospital.² Participants passed through two rooms: a reception space called the Oval Room, and then the Pillar Room, where they would encounter five performers. In the Oval Room, each participant signed the Declaration of Consent.

¹ See Marie O’Connor, ‘Obituary of Philomena Canning, September 1959 – March 2019’, *Aims Journal* 31, no. 1 (2019): 143–45, <https://www.aims.org.uk/journal/item/philomena-canning>. ‘Obituary of Philomena Canning, September 1959 – March 2019’, *Aims Journal* 31, no. 1 (2019): 143–45, <https://www.aims.org.uk/journal/item/philomena-canning>; Michael Clifford, ‘“I Have the Peace of Mind I Longed For”: Philomena Canning “vindicated” by HSE Settlement’, *Irish Examiner*, 3 March 2019, <https://www.irishexaminer.com/news/arid-30908379.html>; and Sharon Tobin, ‘Home Births Advocate Canning Dies after Cancer Battle’, *RTE News*, 23 March 2019, <https://www.rte.ie/news/ireland/2019/0323/1038175-philomena-canning-death/>.

² *The Touching Contract* is an immersive performance artwork, originally devised as part of the year-long project *In the Shadow of the State*, by Sarah Browne and Jesse Jones, co-commissioned by Artangel and Create. Supported by ART: 2016, the Arts Council’s programme as part of Ireland 2016, Dublin City Council, and Heart of Glass (St. Helen’s). *The Touching Contract* took place twice in 2016, at the Rotunda Hospital, Dublin, and at Toynbee Hall, London. It has since been purchased for the IMMA Collection.

The declaration was part of the ‘legal score’ shaping the performance. Signing it was a condition of being permitted to fully experience the rest of the performance in the Pillar Room.³

The declaration was drafted to mimic a medical consent form. The text draws on an archive produced for the performance: medical consent forms, the application forms that set strict conditions for access to redress schemes, and older documents that legitimated and concealed coerced adoptions.⁴ The position of participant, then, mirrors older contractual and consent-based relationships that have already harmed Irish women.⁵ The declaration describes, in some ways, the basic terms of the touching contract. One statement by the artists outlines the risks of participation, and a corresponding statement is provided by each participant, confirming that they understand those risks. Participants are asked to consent to a range of potential touches, rather than to any specific form of touch by any specific person. These are laid out in a pinwheel, suggesting perhaps a gamble or an element of play. The declaration informs participants that they were bound by further terms and conditions. In the first iteration of the work, these were posted on the walls of the Oval Room, though few participants read them before signing.

Each declaration is signed by the participant and countersigned by the artists or their representatives. It is then vouched for by ‘mediators’ who accept it, seal it in an envelope, and return it to its signatory. Legal relationships are often structured by the ‘movement of paper’.⁶ The declaration of consent interpellates every ticket-holding ‘member of the public’ who signs it into the position of participant.⁷ Participants in *The Touching Contract* cannot fully understand what they have promised to do or foresworn from doing. By reading the declaration, participants only know that they are agreeing to ‘improvised, direct and non-forceful’ touch ‘applied at the [female] Performers’ discretion using their Body, an Object or Instrument’ and ‘delivered by one or more Performers or by another Participant or Participants at their instruction’. The associated risks are described in ambivalent and open-ended terms. The performers enjoy significant discretion; while the declaration makes clear that participants are not agreeing to any act of physical violence, it does not draw clear distinctions between legitimate and illegitimate touch. The agreement between the participants and the artists is fragile and one-sided. The artist, who controls the terms of the declaration, is in a position to potentially make seemingly infinite demands.

³ Those who refused consent could act as Witnesses. This meant that they could be in the room to hear the performance, but not see it. They would not be touched. The Declaration confirmed that those who had consented could leave the performance at any time.

⁴ For further details, see Máiréad Enright and Tina Kinsella, ‘Legal Aesthetics in The Touching Contract: Memory, Exposure and Transformation’, *Law, Culture and the Humanities* (2021), <https://journals.sagepub.com/doi/full/10.1177/1743872120987113>. .

⁵ Carole Pateman, *The Sexual Contract* (New York: John Wiley & Sons, 2014), 207.

⁶ Matthew S. Hull, *Government of Paper: The Materiality of Bureaucracy in Urban Pakistan* (Berkeley: University of California Press, 2012).

⁷ Marie-Andrée Jacob, ‘Form-Made Persons: Consent Forms as Consent’s Blind Spot’, *PoLAR: Political and Legal Anthropology Review* 30, no. 2 (2007): 249–68.

There is some limited room for participant resistance. Participants need not give their real name, use their real signature, or provide accurate answers to the few questions asked on the declaration.⁸ However, they have little power to shape the terms of engagement with the performers through the declaration. They can refuse to sign, but not while maintaining a full role in the performance. The contract created here is essentially one of adhesion in which all of the power to set the terms of the encounter seems to be on one side. Once they had signed, participants at the Rotunda waited to be admitted to the Pillar Room.

In the Pillar Room, the participants encountered a handful of female performers, each dressed in a light blue uniform. The uniform did not identify them. It may have suggested healthcare workers, religious habit, or the staff (or inmates) of an institution. Given the site of the performance, many participants would have associated the performers' touch with the treatment of pregnant women in the ancient maternity hospital next door. In Dublin in 2016, however, public awareness of law and touch as dimensions of reproductive violence exceeded any one site or experience. The performance may have recalled regimes of touch imposed in other places: the Magdalene Laundry fifteen minutes walk away on Seán McDermott Street; the Mother and Baby Homes then being investigated by the Commission on Lower Baggott Street; the courtroom on Inns Quay, where judges heard evidence from grandmothers subjected to obstetric violence as young women; and the English clinics where Irish women obtained abortions then not yet legal in Ireland.⁹

Gradually, and one at a time, these performers led participants through a range of actions, touching them firmly, authoritatively, but not forcefully, and generally without speaking, as others watched and anticipated their turn. The obligations between participants and artists now appeared as embodied. The bounded, signed text was replaced with 'promising bodies'.¹⁰ Crossley writes that 'bodily techniques' communicate embodied meaning,¹¹ and the performers here chose modes of touch that arranged bodies in space in ways that invoked law and produced the Pillar Room as a distinct legal space. The forms of touch used suggested inspection, examination, stopping and searching, detaining, herding, and categorisation. However, their touch also organised the bodies they were not touching, as other participants responded to the atmosphere they created: by drawing closer to witness an encounter between a performer and a participant, intervening in an encounter, making their bodies available, or withdrawing in an effort to avoid being touched themselves. Each touch was negotiated at an interpersonal level, between bodies; worked out in small adjustments.¹²

⁸ On forms and agency see, for example, Marieke van Eijk, 'Studying Health Care Institutions: Using Paperwork as Ethnographic Research Tools', *Ethnography* (2019): 1–20.

⁹ Kate Antosik-Parsons, 'Touch in Irish Performance Art: Haptic Encounters in *Becoming Beloved* (1995) and *The Touching Contract* (2016)', *Scene* 8, nos. 1–2 (2020): 159–74.

¹⁰ David Haekwon Kim, 'An Unruly Theory of Race', *Hypatia* 7, no. 4 (Autumn 2018): 898.

¹¹ Nick Crossley, 'Researching Embodiment by Way of "Body Techniques"', *The Sociological Review* 55, no. 1, suppl (2007): 80–94.

¹² On law and the organisation and distribution of bodies in space see, for example, Joshua David Michael Shaw, 'The Spatio-Legal Production of Bodies through the Legal Fiction of Death', *Law and Critique* 32, no. 1 (April 2021): 69–90, <https://doi.org/10.1007/s10978-020-09269-5>.

Just as the performance seemed to build to its crescendo, the performers appeared to collapse, exhausted, and in some cases, tearful. Gradually, some participants offered their hands. The revived performers guided these participants, one by one, into the centre of the room, before returning for each of us in turn. A performer wordlessly guided our hands onto the bodies of the participants in front of us. By the end of this process, we had been coordinated into a near-silent, tight, breathing mass in the centre of the Pillar Room – intimately aware of the touch of other hands on our bodies and the touch of ours on others’ heads, faces, shoulders. Our efforts at self-control and self-withdrawal or restraint were unsettled. The performers left us like that, compliant, for a moment, and then began to untangle us, drawing us out of the mass by the hand. Each of us received one last insistent embrace from a performer, before we were led back into the Oval Room. Four years later, I still remember that moment, from the performance I participated in. It was confusing not knowing whether to feel reconciled to the performers, cared for by them, or somehow invaded. Discussing it afterwards, my friends and I could not agree. There had been tenderness, but there was no moment of accountability in which the performers or the artists explained what had been done. Thinking of Philomena Canning, I realise that we often depend on others – a teacher, lawyer or midwife – to interpret the legal knowledge communicated by touch for us; to explain why force might be applied, to ask permission, to categorise what we are feeling according to a list of risks. *The Touching Contract* provided no such figure – no advocate, no one to whom to appeal. Perhaps this was why it was so difficult to know how to feel about the performers, their tears and their eventual, uninvited hugs.

Meeting Law’s Touch

Philomena Canning’s copy of her MoU with the HSE set out the terms on which the HSE agreed to insure her practice. Practising without this insurance is a serious crime under Irish law.¹³ Appendix 1 to the MoU contained six tables. These detailed the medical risks that might require her to withhold her touch; to seek the permission of an obstetrician before proceeding, to transfer the woman to hospital, to allow obstetricians to administer touch of a different, approved kind. The contract promised ‘cover’: a protective space within which she could offer home birth care. At the same time, the contract was a disciplinary technique.¹⁴ The touch of a midwife was a potential source of risk and disorder, requiring legal restraint. That restraint was reinforced every time she and a prospective client signed the application consent form for a homebirth. The HSE’s procedures required her to discuss the risks with them, working their way through the Appendix, before the woman agreed in writing that if any of the risks specified in the memorandum arose during her pregnancy, she would give up on a home birth and go to hospital.

¹³ S. 40(3) Nurses and Midwives Act, 2011. Potential penalties include significant fines and a prison sentence of up to five years on indictment.

¹⁴ Angela Mitropoulos, *Contract and Contagion: From Biopolitics to Oikonomia* (London: Minor Compositions, 2012).

The Touching Contract is, in part, a critique of documents like this consent form and the MoU lying in wait beneath it. *The Touching Contract* asks participants to sign a document they cannot fully understand, in order to access complex touch that has never been explained or formally accounted for. The text of the declaration places the participants in an inherently vulnerable position. Like any consent form, the declaration asks the person signing to accept an expectation of prudence and self-enterprise;¹⁵ one should interpret the text, weighing risks and deciding which to run, before promising to modify one's behaviour to avoid obvious harm and take responsibility for any misjudgments.¹⁶ Consent forms typically promise forewarning, control, and future accountability;¹⁷ if what is done exceeds the consent given, perhaps there will be a remedy. But the declaration offered during *The Touching Contract* is open-ended, allowing the performers wide discretion and doing little to clarify the risks the participant have notionally accepted. Consent forms conceal unequal power relations, by allowing them to appear as if they had been coproduced by their signatories.¹⁸ To this end, Angela Mitropoulos argues that contract's role is to 'turn contingency into necessity'.¹⁹ In *The Touching Contract*, contingency and inequality is made unusually visible; the text of the declaration does little to outline the precarious relationship of obligation emerging between participant and artist.

It is not unusual for legal documents to be silent about some things, or at some times. Contract is not utterly reliant on writing. In law, a contract might be binding on people who have never read it. It might lie dormant, but binding, not consulted until the moment of a dispute. It may never be written, but may emerge through consistent conduct over time. Relational contract theory emphasises that a contract is not only its text but finds its meaning in later improvisations and negotiations between the parties, once the time for performance comes.²⁰ In the Pillar Rooms, without oral or written communication, much of my understanding of the contract I had entered

¹⁵ Pat O'Malley, "'Uncertainty Makes Us Free': Liberalism, Risk and Individual Security', *BEHEMOTH – A Journal on Civilisation* 2, no. 3 (2009): 24–38.

¹⁶ As Nietzsche knew, there is a dark edge to the contract's promissory morality; its emphasis on responsibility, reputation, reliability and fault. The contractual subject, in this sense, is not only a calculating subject, but a subject who is made morally responsible (and often savagely punished) for his or her shortcomings if his or her calculations fail. In punishing the party who has breached, the other party is, of course, entitled to draw on the foundational violence of the state. As Valverde explains, Nietzsche does not object to the practice of contracting, but to the overlaying of contract with moral responsibility in the form of guilt, so that the vulnerable are held to contracts they cannot keep, and broken contracts become grounds for the extraction of vengeance. Nietzsche objects to liberal contracting because of his sense that contract need not be guilt-ridden. See Peter Goodrich and Mariana Valverde, *Nietzsche and Legal Theory: Half-Written Laws* (London: Routledge, 2013).

¹⁷ See Maurizio Lazzarato, *The Making of the Indebted Man: An Essay on the Neoliberal Condition* (South Pasadena, CA: Semiotexte, 2012).

¹⁸ See Sara Ahmed, *On Being Included: Racism and Diversity in Institutional Life* (Durham, NC: Duke University Press, 2012).

¹⁹ Mitropoulos, *Contract and Contagion*, 20. See also Elizabeth A. Povinelli, *The Empire of Love: Toward a Theory of Intimacy, Genealogy, and Carnality* (Durham, NC: Duke University Press, 2006), 50. On discourses of contract as stabilising discourses, Nathan Moore argues that control society uses the intensification of contract to capture movement and harness the nomad. See Nathan Moore, 'The Perception of the Middle', *Deleuze and Law* (2012): 146.

²⁰ Ian R. Macneil, 'Relational Contract: What We Do and Do Not Know', *Wisconsin Law Review* (1985): 483.

into, and its underpinning law, came from what I could discern through touch. Davina Cooper has called the understanding of law that we gain through touch ‘proximal knowledge’.²¹ It is a kind of legal knowledge that is ‘unfinished, approximate, embodied, relational and precarious’.²²

Every legal experience, Alain Pottage writes, is a constellation of ‘raw elements: texts, institutions, statements, gestures, architecture and material forms, competences and self-descriptions’.²³ Law often treats documents as the best available evidence of legal relationships, even when they describe relationships too complex to be reduced to text. By its emphasis on the potential intimacy of law as textually authorised touch-on-skin, *The Touching Contract* unsettles the primacy of legal text. As *The Touching Contract* shows, both touch and the text that prescribes it are law, and they are law together at the same time.

In devising *The Touching Contract*, Jesse Jones and Sarah Browne worked with and around the kind of legal knowledge possessed by individuals like Philomena Canning. This was knowledge of law’s authoritative, sometimes dreadful touch, how it can hover on the surface of skin. It was also knowledge of legal text: how it aspires to control when and how touch is offered or withdrawn, how it prescribes which risks may be run or not, how it threatens punitive action if its terms are not upheld.

The Touching Contract makes space for participants to dwell on how order needs touch. It is not unusual for a legal agreement to rely on the kinds of knowledge that derive from touch. For instance, knowledge of law’s touch supplemented Canning’s contract with the state. It loomed every time a client’s condition appeared to change in ways contemplated by the MoU and its tables of risk. Every touch is two-sided: received and administered. One cannot touch without also being touched.²⁴ When Canning applied skilled touch to a woman’s body, she was touched by that body in turn, in ways that could communicate the presence of risk, and trigger her legal duty to cease caring for a patient and send her to be cared for elsewhere. So, prior to and during every occasion for touch, there was always an alertness to and assessment of risk – legal as well as medical. Over time, she shaped her practice to it. Interpretation of her contract with the state was done, at least in part, through touch. Touch was central to the contract’s scope and application.

The Touching Contract serves as a conduit to a kind of knowledge of law’s text and touch that is ordinarily acquired gradually through experience. The performance doesn’t give a definitive account of how the two interact – no stability or completion. It holds participants, relatively briefly,

²¹ Davina Cooper, ‘Reading the State as a Multi-Identity Formation: The Touch and Feel of Equality Governance’, *Feminist Legal Studies* 19, no. 1 (April 2011): 3–25.

²² Cooper, 6.

²³ Alain Pottage, ‘The Materiality of What?’, *Journal of Law and Society* 39, no. 1 (2012): 167–83.

²⁴ Cooper, ‘Reading the State as a Multi-Identity Formation’.

in one of contract's transitory spaces,²⁵ where the accidents and incompletions of its texts and touches are allowed to surface.

²⁵ Kathy O'Dell, *Contract with the Skin: Masochism, Performance Art, and the 1970s* (Minneapolis: University of Minnesota Press, 1998).