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Enright, Mairead

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Contract Law



Máiréad Enright

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 fame⁷ – 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.



44 my own heartbeat'.⁸ However, contractual freedom is a thin equality of oppor-
 45 tunity, in limited circumstances, to participate in certain capitalist projects.
 46 'Classical'⁹ contract law emerged alongside capitalism, as markets became
 47 objects of specialist knowledge and regulation. Contract law supposedly mirrors
 48 the market, responding to bargains rather than shaping them. 'Freedom of con-
 49 tract' promises that states make no detailed public plan for market transac-
 50 tions. Nineteenth-century laissez-faire economists maintained that, left to their
 51 own devices, individuals would voluntarily exchange scarce resources with one
 52 another, allowing them to gravitate to their most efficient uses.¹⁰ Law, accord-
 53 ingly, insists that, although the state stands ready to resolve disputes,¹¹ interven-
 54 tion is exceptional and only takes place at the end of the contract's life. Then
 55 law defers to our intentions.¹² Thus, contract is 'private' rather than 'public'
 56 law, produced by autonomous individuals rather than by government fiat.

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

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

75 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.

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77
78 ¹⁰ See further, Alice Belcher, 'A feminist perspective on contract theories from law and eco-
 79 nomics' (2000) 8 *Feminist Legal Studies* 29.

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

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

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

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

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

85 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.

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



89 Nevertheless, courts treat contracts *as if* they embodied freely choosing
 90 subjects' active intentions. This fiction¹⁸ has a pragmatic technical function:
 91 it allows courts, by formalistically reasoning through contractual disputes,
 92 to bypass the lived difficulties of contracting. Thus, it eliminates a source of
 93 market uncertainty: if we know that the vagaries of human intention have
 94 limited impact on judicial decision-making, we feel more confident about
 95 entering into complex contracts. This minimalist approach makes some trans-
 96 actions more secure and more readily calculable. It also performs a political
 97 function.¹⁹ It allows courts to bypass detailed engagement with the condi-
 98 tions in which contractual intention is formed, producing rules that are 'sing-
 99 gular, daunting, rigid and cocksure'.²⁰ Leaving messy reality behind, law can
 100 turn to idealised narratives of contractual freedom. The idea of 'objectivity', so
 101 often repeated in your contract course, suggests rigour and certainty, but also
 102 responsiveness to shared market rationality. That rationality, however, may not
 103 be shared by all market actors:²¹ the preferred practices of some are made the
 104 universal rule in order to discipline others. This is where gender inequality
 105 comes in.

106 Ideal contractual subjects are strong, independent, self-possessed and pro-
 107 ductive. They are autonomous beings who possess and trade in concrete legal
 108 rights.²² This ideal is rooted in a particular theory of equality. Classical con-
 109 tract theorists were influenced by liberal political thinkers who argued that men
 110 should be owners of their own labour and property, and trade them freely with
 111 others. Contract was often contrasted with status:²³ freedom to contract implies
 112 equal capacity to bargain in the market, unshackled from traditional authority.
 113 This vision of universal equality seems admirable, but some subjects will have
 114 to work harder than others to claim that equality.²⁴ Recall nineteenth-century
 115 feminist struggles for married women's right to form property and employ-
 116 ment contracts. As Pateman writes, the originary contract between men
 117 and women was the sexual contract, under which married women suppos-
 118 edly willingly subordinated themselves to their husbands.²⁵ Women were not
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122 ¹⁸ Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets*
 123 (University of Chicago Press, 2011) p. 24.

124 ¹⁹ *Ibid.* p. 176.

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

127 ²¹ Patricia J. Williams, 'Metro Broadcasting, Inc. v. FCC: Regrouping in singular times' (1990)
 128 104 *Harvard Law Review* 525, 534.

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

131 ²³ Minow (n. 13) pp. 121–122.

132 ²⁴ *Ibid.* p. 151.

133 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.



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

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

162
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164 ²⁶ We could make similar points about enslaved people: Diane J. Klein, ‘Paying Eliza: Comity,
165 contracts, and critical race theory – 19th century choice of law doctrine and the validation of
166 antebellum contracts for the purchase and sale of human beings’ (2006) 20 *National Black Law*
167 *Journal* 1; Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market*
168 *in the Age of Slave Emancipation* (Cambridge University Press, 1998); Sora Han, ‘Slavery as
169 contract: Betty’s case and the question of freedom’ (2015) 27 *Law & Literature* 395.

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

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

175 ²⁹ Mitropoulos (n. 22) p. 25.

176 ³⁰ Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge University Press,
177 2013) p. 118.

178 ³¹ See further [http://blogs.lse.ac.uk/politicsandpolicy/student-debt-and-the-next-generation-
of-british-public-sector-professionals/](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.



179 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

181 Of course, law reassures us that unjust contracts will not be enforced. The
 182 fiction of contractual intention only temporarily forecloses enquiry³⁵ into the
 183 circumstances of the contract’s formation. Wronged parties can always demand
 184 law’s attention. However, courts administer corrective justice:³⁶ redressing
 185 wrongs done by one to the other rather than addressing contracts’ substantive
 186 fairness, or their tendency to facilitate unequal accumulation of resources.³⁷
 187 The courts’ role is to uphold relations of commodification based on the parties’
 188 subjective valuation of the thing bought or sold. It is rarely law’s concern if
 189 a commercial contract is one-sided, or an individual sells at apparent gross
 190 undervalue. There is no general principle that allows a contract to be set aside
 191 merely because it is unfair, without some additional evidence of morally reprehensible
 192 conduct.³⁸ The law on damages, based primarily in expectation loss,
 193 restores to me only what I had bargained for, rather than a fair price for my lost
 194 goods or wasted services. Thus, contractual freedom is not a substantive right
 195 to transform one’s position by entering into emancipatory legal relations.³⁹ In
 196 many cases, contractual freedom means making the best of a precarious bargaining
 197 position.

198 You might have learned that, although contract law is not concerned with
 199 substantive unfairness, it carefully polices procedural unfairness: where some
 200 defect in the contract’s formation taints one party’s consent to the bargain.
 201 Duress, for example, only allows a contract to be set aside where one party’s
 202 consent is produced by the other’s serious and illegitimate threat. Coercion
 203 must be traceable to some act of the aggressor. The victim must show that
 204 they had no reasonable alternative but to accept the contract. Gan argues that
 205 these requirements exclude consideration of pre-existing inequality of bargaining
 206 power as between the parties.⁴⁰ They trivialise domination and legitimise
 207 subtle exploitation of economic inferiority. Even very harsh or discriminatory
 208 bargains can be enforced. Duress solidifies contract’s commitment to preserve
 209 ‘the rough and tumble of the normal pressures of commercial bargaining’.⁴¹ It
 210 asks each party to look after their own interests without requiring concessions
 211 from the other. There is no independent doctrine of inequality of bargaining
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 214 ³³ Andrew McGettigan, ‘Cash Today’, <https://www.lrb.co.uk/v37/n05/andrew-mcgettigan/cash-today>, accessed 17 January 2018.

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

216 ³⁵ Riles (n. 18) p. 167.

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

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

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

221 ³⁹ Williams, ‘Metro Broadcasting, Inc. v. FCC’ (n. 21).

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

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



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

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

248 Contract law cannot eliminate all market risks, but it can make us responsible
 249 for managing them. The rules governing the end of the contractual relationship
 250 make clear that we must weather risk; even if keeping our contractual
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252
 253 ⁴² *National Westminster Bank v Morgan* [1985] AC 686.

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

255 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.

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

257 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.

258 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.

259 ⁴⁸ Mitropoulos (n. 22) p. 18.

260 ⁴⁹ *Ibid.* p. 45.

261 ⁵⁰ *Ibid.* p. 19.

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

263 ⁵² Mitropoulos (n. 22) p. 40.



269 obligations entails hardship, inconvenience or significant financial loss,⁵³ we
 270 cannot lightly escape it. There are high thresholds for termination of a con-
 271 tract⁵⁴ or for frustration.⁵⁵ We must mitigate our losses. The courts will not save
 272 us from so-called ‘bad bargains’.⁵⁶ This position is purportedly justified because
 273 we are understood to have the opportunity, at the point of contract forma-
 274 tion, to exercise foresight; to calculate how risks might materialise in future⁵⁷
 275 and to use express terms to allocate them between ourselves. To this end, law
 276 expects us to articulate our intentions clearly in advance.⁵⁸ In consequence,
 277 courts respect formal contractual documents, and are reluctant to alter or sup-
 278 plement a contract’s express terms. Courts will construe an existing contract
 279 to determine responsibility for the consequences of non-performance, but will
 280 not ‘make’ a new contract for the parties after the event.⁵⁹ Thus, for example,
 281 the courts’ acknowledged power to imply a term into a contract will only be
 282 exercised where it is ‘necessary’ to do so.⁶⁰

283 The courts’ expectations of contractual planning may be unrealistic. For
 284 example, Gelpern and Gulati’s work on ‘boilerplate’ clauses shows that some-
 285 times even sophisticated contract drafters behave irrationally. Standard form
 286 contracts and standardised clauses⁶¹ (boilerplate) are highly efficient tools
 287 because they reduce the costs associated with making and negotiating new
 288 contracts. Terms need not be coined from scratch: drafters can use terms
 289 already accepted within the industry and, perhaps, that have been tested in the
 290 courts.⁶² However, Gelpern and Gulati suggest drafters also include boilerplate
 291 in contract documents ‘because they feel better for *saying it*, even where they
 292 know full well that the term will *do* little or nothing to advance their cause’.⁶³
 293 Unthinking recycling, arrangement and accumulation of talismanic phrases of
 294 proven weight do not reflect thoughtful, rational agency. Instead, these phrases
 295 may symbolise desire for impossible reassurance.⁶⁴ These observations resonate
 296
 297

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

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

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

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

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

305 ⁵⁸ Johns (n. 30) p. 117.

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

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

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

311 ⁶² Riles (n. 18) p. 58.

312 ⁶³ Anna Gelpern and Mitu Gulati, ‘Feel-good formalism’ (2009) 35 *Queen’s Law Journal* 97.

313 ⁶⁴ Anna Gelpern and Mitu Gulati, ‘Public symbol in private contract: A case study’ (2006) 84
Washington University Law Review 1627.



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

316 to induce through an improvised relation with a semi-stranger an attachment
317 that might become a solidarity that could produce more and better traction in
318 the world.⁶⁵
319

320 On Berlant's reading, none of us, in contracting, occupies the powerful
321 'self-authoring' position assumed by law. We may care deeply about a particu-
322 lar contract, but we must acknowledge that it is fragile: improvised, impulsive,
323 indirect, speculative, and ultimately dependent on others' responses.
324

325 Debate 2

326 Can relational contract theory save freedom of contract?

327 Some theorists turn to relational contract theory in order to reimagine freedom
328 of contract. Contract's autonomous, rational subjects are disembedded from
329 wider relationships. Early capitalism presented traditional communal standards
330 of contractual fairness⁶⁶ as incompatible with new forms of exchange between
331 individuals who were not connected by ties of kinship, neighbourliness or even
332 nation.⁶⁷ As part of colonialism's civilising mission,⁶⁸ it was similarly neces-
333 sary to overcome cultural market ethics, and impose contractual discipline.
334 Classical contract recoded social and religious obligations in line with modern
335 economic logic.⁶⁹ By stripping away relational particularity, contract made
336 everything interchangeable with money.⁷⁰ Contract imagines us as separated
337 not only from community but from one another. We are atomistic, unattached,
338 bargaining at arms' length, each pursuing our own projects in a series of dis-
339 crete, bipolar transactions. Parties ideally do not owe one another duties unless
340 they consented to them; they are sovereign within the contract. This is one
341 reason for the doctrine of privity.⁷¹ It also explains why the traditional rules on
342 contract formation – such as those on 'the battle of the forms' – still empha-
343 sise the need to find a precise moment of agreement.⁷² This approach obscures
344
345

346
347 ⁶⁵ Berlant (n. 3) p. 161.

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

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

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

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

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

358 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 services⁷⁹ 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,

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.



404 rational, efficient, short-term, calculable, incontestable⁸⁴ bargains are formed.
 405 Instead, they argued, market actors' projects are often dependent on and inseparable
 406 from one another. Relational contract theory similarly understands contractual
 407 rights as 'entangled, not delineated'.⁸⁵ It casts each contract as a node
 408 in a network of cross-cutting relationships. Contract always implies contact; a
 409 drawing together of subjects and projects.⁸⁶ Contact is rarely a discrete 'alienated
 410 moment of mutual exploitation'.⁸⁷ As Macneil shows, contracts dwell amid
 411 ongoing long-term business relationships.⁸⁸ Parties value and seek to preserve
 412 these relationships. Macaulay found that businessmen often deliberately depart
 413 from contract law's expectations. They fail to plan contracts in detail at the point
 414 of formation, instead renegotiating necessary terms as the need arises.⁸⁹ Yet deals
 415 do not collapse for want of compliance with traditional models of contracting.
 416 Rather, undergirding relationships stabilise contracts: contractual norms evolve
 417 in tune with parties' friendships.⁹⁰ In cases of conflict, parties are more likely to
 418 seek to repair a failing contract than to have resort to the courts.⁹¹ In this sense,
 419 relational contract theory also teaches that commercial contracting shares much
 420 with domestic exchange.⁹² Solidarity, reciprocity, trust and even dependency are
 421 characteristics of ordinary market behaviour.⁹³ These ameliorate otherwise irrational
 422 behaviour, and may drive towards deeper bargaining fairness; for example,
 423 one party may forego their more selfish interests, for the long-term benefit of
 424 the relationship.⁹⁴ For Williams, contract law is about the 'making strange,
 425 putting at a distance' which makes alienation and sale possible.⁹⁵ Relational contract
 426 theory recovers proximity and familiarity in contracting.⁹⁶

427 Whatever we can say about how business works in practice, as a general
 428 matter contract law is inhospitable to relational expectations. There is no broad
 429

430 ⁸⁴ J.K. Gibson-Graham, *A Postcapitalist Politics* (University of Minnesota Press, 2006) p. 83.

431 J.K. Gibson-Graham is a joint pseudonym adopted by two women, Julie Graham and
 432 Katherine Gibson, who wrote together.

433 ⁸⁵ Riles (n. 18) p. 165.

434 ⁸⁶ Mitropoulos (n. 22) p. 14.

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

437 ⁸⁸ Macneil (n. 70).

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

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

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

443 ⁹² Mulcahy and Wheeler (n. 45) p. 12. Lisa Bernstein, 'Beyond relational contracts: Social
 444 capital and network governance in procurement contracts' (2015) *Journal of Legal Analysis*
 445 561.

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

448 ⁹⁴ Stychin (n. 90) 83.

449 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,
 450 accessed 19 March 2017.

451 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.



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

503 504 CONCLUSION

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

523 524 FURTHER READING

- 526 John N. Adams and Roger Brownsword, 'The ideologies of contract' (1987) 7 *Legal*
 527 *Studies* 205.
 528 Duncan Kennedy, 'Form and substance in private law adjudication' (1976) 89 *Harvard*
 529 *Law Review* 1685.
 530 Linda Mulcahy and Cathy Andrews, 'Baird textile holdings v Marks and Spencer plc'
 531 in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments:*
 532 *From Theory to Practice* (Hart Publishing Ltd), 2010 pp. 189–204.
 533 Linda Mulcahy and Sally Wheeler, *Feminist Perspectives on Contract Law* (Routledge,
 534 2005).
 535 Carey Young, *Subject to Contract* (JP Ringier, 2013).

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