

# FEMINISTS & CONTRACT DOCTRINE

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## INTRODUCTION

In the past thirty years, feminism has had an undeniable impact upon law. The number of women law students, lawyers, and judges has increased dramatically.<sup>1</sup> New causes of action have been recognized,<sup>2</sup> and old remedies revised,<sup>3</sup> as a consequence of feminists' work. Feminist jurisprudence has influenced legal doctrine; for example, articles and books have been written on the impact of feminist theory on law school subjects, such as torts<sup>4</sup> and criminal law.<sup>5</sup>

Ten years ago, a prominent male contracts professor suggested that "the male bias of our society . . . has not had important consequences for contract law."<sup>6</sup> This Article is meant to respond to that suggestion by exploring the influence of feminism on this area of law.<sup>7</sup>

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1. See KATHARINE T. BARTLETT & ANGELA P. HARRIS, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 750-51 (2d ed. 1998).

2. See, e.g., CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979) (MacKinnon's work substantially contributed to the recognition of sexual harassment as a violation of Title VII).

3. For example, we have seen increased responsiveness to domestic violence. See BARTLETT & HARRIS, *supra* note 1, at 566-70.

4. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989); Carl Tobias, *Gender Issues and the Prosser, Wade, and Schwartz Torts Casebook*, 18 GOLDEN GATE U. L. REV. 495 (1988).

5. See Mary Irene Coombs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988); Nancy S. Erickson and Nadine Taub, *Final Report: "Sex Bias in the Teaching of Criminal Law,"* 42 RUTGERS L. REV. 309 (1990).

6. Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029, 1030 (1992) [hereinafter *Rescuing Impossibility Doctrine*] (quoting letter from W. David Slawson, Professor of Law, University of Southern California, to Mary Joe Frug 2 (June 24, 1988)). See also Patricia Tidwell & Peter Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue and Norms*, 28 HOUS. L. REV. 791, 800 n.48 (1991) (suggesting that the letter led to a "brouhaha of modest proportions").

7. The number of scholars exploring the topic of feminism's influence on contract doctrine is small but growing. Examples of writing on the subject include: Elizabeth S. Anderson, *Women and Contracts: No New Deal*, 88 MICH. L. REV. 1792 (1990) (reviewing CAROLE PATEMENT, *THE SEXUAL CONTRACT* (1988)); Jean Braucher, *Contract v. Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990); Clare Dalton, *An Essay in the*

Let us begin by focusing on the professor's comment in order to unearth the implicit assumptions buried within it. I read his claim that male bias has not had important consequences for contract law as having three components: the concept of "male bias," the concept of "contract law," and the judgment that the effect of male bias on contract law has not been "important." Three interpretations of the comment come to mind; each emphasizes a different component and reveals the hidden assumptions underlying each component.

The first possible interpretation is that the professor believed that, once upon a time, contract law suffered from male bias, but that the problem has been cured and is no longer worth discussing. Such an interpretation implicitly identifies "male bias" with legalized sex discrimination, or formal inequality. In this view, at one time "male bias" prevented women (at least married women) as a matter of law from contracting, but once that legal barrier was removed, there was no sexism left in contract law.

This interpretation is based upon a limited view of "male bias." For the most part, women did gain formal equality with respect to contract law in the last century, but that did not remove all of the consequences of their prior exclusion. The fundamental doctrines of contract law were developed during the time when most women were not participants in the market and certainly were not members of the bench and bar.

Another possible interpretation is that the professor believed contract law has a distinctive quality about it. He might believe that this distinctive quality, moreover, somehow immunizes contract law from the otherwise pervasive effects of patriarchy, or "male bias." One could claim such immunity for contract law if one conceived it as being neutral and objective.

It is precisely this conception of contract law, however, that is under attack by feminists.<sup>8</sup> Feminists have theorized that law, including contract law, is itself

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*Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985) [hereinafter *Re-Reading Contracts*]; Leo Flynn & Anna Lawson, *Gender, Sexuality & the Doctrine of Detrimental Reliance*, 3 FEMINIST LEGAL STUD. 105 (1995); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); *Rescuing Impossibility Doctrine*, *supra* note 6; Karen Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1506 (1990) (reviewing TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* (1989)); Betty Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753 (1981) (book review); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982) [hereinafter *Contractual Ordering of Marriage*]; Marjorie Maguire Shultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55 (1991) [hereinafter *Gendered Curriculum*]; Kellye Y. Testy, *An Unlikely Resurrection*, 90 NW. U. L. REV. 219 (1995); Tidwell & Linzer, *supra* note 6.

8. Feminists, of course, are not the only ones attacking this conception of contract law. Critical legal scholars have also called into question the apparent neutrality and objectivity of contract doctrine. See, e.g., Jay Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283 (1990); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

“gendered.”<sup>9</sup> When feminists make such an assertion what they mean is this: Law is a human artifact; it is constructed by individual judges, legislators, and lawyers acting within the social context of their time, race, gender, and class. American law has, until very recently, been constructed almost exclusively by the male gender. Therefore, it should not be surprising that “law” incorporates and reflects male gender traits.<sup>10</sup> Some of these traits are identified as the preference for rationality over other ways of knowing (e.g., intuition); for objectivity over subjectivity; for abstraction over contextualization; and for hierarchical decision-making over consensus or compromise.<sup>11</sup> Contract law, like law more generally, is said to be male-gendered because of the perceived presence of these traits.<sup>12</sup> In other words, contract law is not neutral; it is one of the many social structures that supports a male preference. Further, it is not objective; it has a perspective, but its point of view is masked.<sup>13</sup>

A final possible interpretation is that the professor was acknowledging that “male bias” has impacted contract law, but believes the consequences are unimportant. One could call this the “de minimis” argument. It is an argument with which feminists are familiar. For example, when feminists began to push for gender-inclusive language, they received a fair degree of ridicule, including variations on the theme: “How can using ‘she’ as well as ‘he’ change anything? Why are you making such a big deal over such a little thing?”<sup>14</sup> Yet today, gender-inclusive language is the norm, even in first year casebooks and traditional law reviews. I do not think this is just “political correctness” at work. I believe it reflects a shift in thinking; as a society, we no longer assume, as we

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9. See, e.g., Frances E. Olsen, *The Sex of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 453 (David Kairys ed., 2d ed. 1990); Symposium, *Is the Law Male?*, 69 CHI.-KENT L. REV. 293 (1993); Ramona L. Paetzold, *Feminism and Business Law: The Essential Interconnection*, 31 AM. BUS. L.J. 699, 702 & n.9 (1994).

10. In referring to “male gender traits” I wish to make it clear that there is nothing essentialist about such a term. Because gender is socially constructed and mutable, the content of male gender traits, as well as female gender traits, will change over time and place. In other words, the phrase “male gender traits” in the text sentence is a short-hand reference to those traits generally accepted as appropriate to the male gender at a specific time (primarily the Nineteenth Century) and place (the United States of America). Even this may be painting with too broad a brush. What is “generally accepted as appropriate to the male gender” may be specific to different regions, ethnicities, generations, and classes. Finally, there have always been men (and women) who have acted unconventionally, contrary to gender expectations.

11. See Olsen, *supra* note 9, at 453.

12. *Id.* at 454.

13. See, e.g., Paetzold, *supra* note 9, at 699-700 (arguing that personal values influence everyone’s perspectives, but that the more “mainstream” such perspectives are, the more likely they are to be perceived as neutral and objective).

14. See, e.g., David R. Dow, *Law School Feminist Chic and Respect for Persons: Comments on Contract Theory and Feminism*, in *The Flesh-Colored Band Aid*, 28 HOUS. L. REV. 819, 849-50 (1991) (referring to feminists’ objections to the use of “seminal” to mean “formative” and “man” to mean “person” as “excrescences of feminist theory”).

once did, that lawyers, judges, business people, and felons are men, and this shift is reflected in our language. Moreover, it is not easy to determine which came first, the change in language or the shift in thinking.<sup>15</sup> The point is that, from a feminist perspective, it is difficult to decide what consequences of sexism are unimportant. From one point of view, there are no unimportant consequences of male bias; they are all part of the whole.

This Article challenges the professor's comment, no matter how it is interpreted. The Article argues that contract law is as susceptible to "male bias" or sexism as any other area of the law, the effects of this sexism are not trivial, and they continue to this day.

The following two sections suggest two ways of looking at the gendered nature of contract law. I borrow a sports metaphor<sup>16</sup> to do this. First, we can look at the "game" itself, the domain of contract law and how it is defined. We can ask whether the definition of contract reflects a male perspective, and then consider whether feminism has impacted that definition. Second, we can look at the "rules of the game" and again ask the same question about male perspective and feminism's impact.

## I. THE GAME DEFINED

### A. *The Gendered Nature of the Game*

The gendered nature of contract law's domain can be discovered by examining how women and women's concerns historically were excluded from that domain. This exclusion occurred in two ways: First, contract pertained to market transactions which generally excluded intra-familial bargaining; and, second, women were barred by law and custom from engaging in market transactions.

1. *Excluding Family From the Game.*—The standard definition of a contract is the bargained for exchange of consideration.<sup>17</sup> Nothing in this definition

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15. See Margaret Jane Radin, *Market-inalienability*, 100 HARV. L. REV. 1849, 1877-87 (1987) (discussing how rhetoric, specifically the rhetoric of the market, affects our understanding of reality and thus how we behave).

16. Although I am not a sports fan, I found I had to learn sports talk when I entered practice as a commercial litigator. Perhaps it was mere coincidence that most of the predominantly male litigators in my firm used sports talk, but I think not. Even today in my contracts and commercial law courses, I find myself lapsing into sports talk. Thus, it seems appropriate to me to use sports talk in this article about gender and contracts. See Maureen Archer & Ronnie Cohen, *Sidelined on the (Judicial) Bench: Sports Metaphors in Judicial Opinions*, 35 AM. BUS. L.J. 225, 233 (1998) ("[O]ne of the primary purposes and effects of the use of much sports terminology in non-sports contexts is the exclusion of women."); Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225, 226-27 (1995).

17. "[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1979).

explicitly restricts a contract to a “market” transaction. However, contracts are typically thought of as market transactions because implicitly “bargaining” is thought of as market behavior. The “market” is where people act as self-interested, rational, autonomous individuals concerned with the exchange of economic value.<sup>18</sup>

To define something as a “market” transaction or “market” behavior, moreover, implies that there is a realm of activity that is “non-market.” Sometimes this contrasting behavior is labeled “social.” Thus, contract’s domain is thought of as excluding certain reciprocal transactions, even though they may be “bargained for” in the broadest sense of that term, because “we” understand that these transactions are not “market” transactions. For example, you ask me to help you move, promising to feed me in return, and I agree. If either of us fails to perform, contract law will not provide a remedy.

“Family” is also considered outside the market.<sup>19</sup> Family bargaining, therefore, is usually—although not always—outside the domain of contract law. *Miller v. Miller*<sup>20</sup> exemplifies the exclusion of intra-familial contracts from the domain of contract law. In that case, Mrs. Miller had grounds for seeking separation or divorce due to her husband’s alcoholism and failure to support her. Instead, she entered into a written agreement with her husband in which she would not leave him and would continue to provide him with a home if he agreed to give her \$200 a year for household expenses. When Mr. Miller failed to abide by this agreement, she took him to court, seeking not a divorce but enforcement of their contract. The court refused to enforce the contract; as her husband argued, Mrs. Miller “merely agreed to do what by law she was bound to do.”<sup>21</sup>

Not all bargains between family members are excluded from contract law, however. A pair of first year contract law cases illustrates the tensions between “family” and “market.” When an uncle promised his nephew \$5000 if the nephew would refrain from smoking, drinking and gambling until he turned twenty-one, the court concluded they were bargaining; thus, the nephew’s refraining constituted consideration and the parties had contracted.<sup>22</sup> When,

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The determination of what is valuable is another facet of contract law that begins with premises that exclude women. . . . Indeed, the determination of the kinds of work, products and promises that contract doctrine values seems to be very gender-biased. Those things which men have traditionally done or produced are valuable. The cleaning of houses, the raising of children, the giving of comfort, and the cooking of meals, however, are not peppercorns. Yet these activities are usually insufficient to support a contract.

Tidwell & Linzer, *supra* note 6, at 804-05.

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

20. 35 N.W. 464 (Iowa 1887).

21. *Id.* at 464. See also *Contractual Ordering of Marriage*, *supra* note 7, at 230 n.68, 231 nn.70 & 71.

22. *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891).

however, a brother-in-law promised to give his widowed sister-in-law a place to raise her family if she would give up homesteading and move closer to him, the court did not perceive them as bargaining; moving was not consideration and the parties had not contracted.<sup>23</sup> One explanation for these divergent outcomes is that in the first case the intra-familial agreement occurs between two males, while in the latter it occurs between a male and female relation.<sup>24</sup> Bargaining, like beauty, is in the eye of the beholder and judges may be less likely to perceive contract bargaining between the sexes in a family context.

This same reluctance to see market behavior between the sexes in a family context occurs in the area of detrimental reliance. Detrimental reliance, also known as promissory estoppel, is an alternative basis for finding a contract.<sup>25</sup> In cases alleging the existence of a contract based upon detrimental reliance between cohabitating heterosexual couples, courts are more likely to find detrimental reliance where the woman performs non-domestic acts.<sup>26</sup> For example, non-domestic acts, such as making mortgage payments, paying for improvements, and performing heavy remodeling, are not what one expects a woman to do for a man; therefore, these acts can provide a basis for detrimental reliance. However, having babies, refraining from paid employment, and decorating the home are traditionally “women’s work” (meaning nonmarket) and thus cannot provide such a basis.<sup>27</sup> The existence of family relations between parties of different sexes affects whether their bargaining is seen as market activity.

2. *Excluding Women From the Game.*—The game of “Contracts,” then, can roughly be defined as including market transactions and excluding social and family transactions. Such a definition today may not look as if it is reflecting any particular gender perspective, but the definition of contract that we use today has its roots in the Nineteenth Century. At the time when the domain of contract law was being established, women were participants in social and family transactions, but by and large they were excluded from market transactions.<sup>28</sup> Thus, because

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23. *Kirksey v. Kirksey*, 8 Ala. 131 (Ala. 1845).

24. There are, of course, alternative explanations. It can be pointed out that in the nephew’s case, it was not a necessary prerequisite for him to give up smoking, etc., in order for the uncle to give him \$5000, while it was necessary for the widow to give up her current home and move to the home of her brother-in-law in order for him to give her a place to live. Thus, the widow’s moving could be seen as a condition to the brother-in-law’s gift. Another possibility is the fact that the uncle never renounced his promise; the lawsuit was between the nephew and the administrator of the uncle’s estate. The brother-in-law, however, after allowing the widow to live on his property for several years, did renounce any further obligation.

25. “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

26. Flynn & Lawson, *supra* note 7, at 117-18.

27. *See id.*

28. This exclusion, of course, was never complete. One of the projects of feminism has been

contract law primarily pertained to market transactions, women were by and large excluded from contract law's domain.

For most of the last century married women were not legally competent to make contracts in their own name. The reason for refusing to admit Myra Bradwell to the Illinois state bar in 1869 was that, as a married woman, she could not make or enforce contracts.<sup>29</sup> Up to the early 1800s, the common law doctrine of coverture<sup>30</sup> provided that "married women could not enter into agreements with their husbands, contract with parties outside their marriages, or sue or be sued in their own names on any matters."<sup>31</sup> Man and woman merged in marriage into one entity, the man; thus, there was no one, other than the man, to contract with third parties and there was no room within the marriage for contractual relations. "When a single-entity view of marriage prevailed, it was logical that only the unit could . . . create contracts . . . . More important, any notion of bargaining, exchange, or negotiation within a marriage-as-unit would be anomalous and perhaps even offensive as a matter of policy."<sup>32</sup>

The view of marriage as a merging of the woman into the man led to courts' reluctance to enforce "contracts" within marriage. In the last century, generally,

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to recover women's "lost" history. Karen Gross and her collaborators unearthed bankruptcy filings by women debtors under the Bankruptcy Acts of 1800 and 1841. Karen Gross et al., *Ladies in Red: Learning From America's First Female Bankrupts*, 40 AM. J. LEGAL HIST. 1 (1996). They write: "People not familiar with revisionist history assume, for example, that women in [Eighteenth] and [Nineteenth C]entury America did not work, own property, or obtain credit. In this sense, our research is galvanizing because our findings upset preconceived notions of what women in early America were like." *Id.* at 31. See generally Karin Mika, *Self-Reflection Within the Academy: The Absence of Women in Constitutional Jurisprudence*, 9 HASTINGS WOMEN'S L.J. 273 (1998).

29. *Bradwell v. The State*, 83 U.S. (16 Wall.) 130, 131 (1872). See also Mika, *supra* note 28, at 292; KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA: 1638 TO THE PRESENT* 16-20 (1986).

30. See 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 355-66 (1857). Of course, coverture can be seen as an improvement over earlier times. Before coverture with its concept of marriage-as-unit, marriage was seen as a contract between two men, the father and the groom, or between two families or clans; thus, marriage was seen as an economic exchange. "At least semantically, marriage and contract share common ground. Contract terminology appears often in conjunction with marriage . . . . To some extent this contract terminology may be a carryover from the era when marriage was a major occasion for bargain and exchange between the families of the bride and groom." *Contractual Ordering of Marriage*, *supra* note 7, at 224. See generally Dianne Post, *Why Marriage Should Be Abolished*, 18 WOMEN'S RTS. L. REP. 283, 283-86 (1997) (discussing derivation of marriage customs). So perhaps we should at least recognize that the woman's role of merger with the husband can be thought of as an improvement over the woman's earlier role, as the subject of exchange.

31. Richard H. Chused, *Married Women's Property and Inheritance by Widows in Massachusetts: A Study of Wills Probated Between 1800 and 1850*, 2 BERKELEY WOMEN'S L.J. 42, 48 (1986) [hereinafter *Married Women's Property and Inheritance*]. See also *Contractual Ordering of Marriage*, *supra* note 7, at 274-75.

32. *Contractual Ordering of Marriage*, *supra* note 7, at 276-77.

women did not participate in the market, and when women tried to bring the market home, they found that contract law did not apply between family members.<sup>33</sup>

The reversal of this common law prohibition against women's contracting, as any social change, occurred over a period of time, by fits and starts.<sup>34</sup> Antenuptial agreements establishing a "separate estate" for the wife began to come into use and were over time given judicial enforcement.<sup>35</sup> By the second half of the Nineteenth Century, the ability of married women to control their own property had achieved some degree of standardization through the widespread adoption of Married Women's Property Acts, giving women the legal right to contract and to sue and be sued.<sup>36</sup> However, the last vestiges of the doctrine of coverture did not disappear until 1981 when the U.S. Supreme Court ruled that state laws allowing a husband to sell or encumber marital property without the wife's consent were unconstitutional.<sup>37</sup>

### B. Redefining the Game

If the market-based domain of contracts is a consequence of gender, how might feminism go about challenging, or redefining that domain? First of all, feminists can question the market/nonmarket dichotomy, challenging and unsettling what we think of as market transactions. Feminists do this in two ways: by bringing traditionally nonmarket "women's labor" to the market, and by bringing the market home.

The most visible example of bringing women's labor to market is in the area of reproduction (pun intended). With the development of new reproductive technologies, we find ourselves confronting all the issues of contractual surrogacy, from intentional parenthood to "wombs for hire." Sometimes I think that the single greatest contribution of feminism to contract doctrine in the last

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33. See *supra* notes 20-21 and accompanying text. As Marjorie Shultz so cogently puts it: "[L]egal rules change at the boundary of marriage. It is as if the family were surrounded by a fence. Ordinary rules run up against that fence and bounce off or are at least deflected." *Gendered Curriculum*, *supra* note 7, at 58.

34. See *Married Women's Property and Inheritance*, *supra* note 31, at 47.

35. See *id.* at 44, 50-51; see also Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1372-81 (1983) [hereinafter *Married Women's Property Law*].

36. *Married Women's Property and Inheritance*, *supra* note 31, at 52; *Married Women's Property Law*, *supra* note 35, at 1400-04. For a contemporaneous view of the Married Women's Property Acts, read James Fenimore Cooper's novel, *The Ways of the Hour*. JAMES FENIMORE COOPER, *THE WAYS OF THE HOUR* (1850). Cooper, a lawyer, has several of the novel's characters rail against the "unnatural" acts. *Id.* at 17, 180-82.

37. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981). In that case, the Court held unconstitutional under the Fourteenth Amendment a Louisiana statute that provided in pertinent part: "The husband is the head and master . . . and may alienate [the community property] by an onerous title, without the consent and permission of his wife." *Id.* at 457 n.1.

decade is the inclusion of *In re Baby M*<sup>38</sup> in standard first year contracts textbooks.

In the *Baby M* case, the New Jersey Supreme Court held that the surrogacy contract between the Sterns and Mary Beth Whitehead was unenforceable, in part because it was contrary to public policy.<sup>39</sup> Shortly after the decision came out, feminist contracts professors began handing out photocopies of the decision. Today, the case has been “mainstreamed;” it appears in first year contracts casebooks.<sup>40</sup> While the case did hold the particular surrogacy contract at issue void, it opened the door for such contracts, and the case itself has become a tool for initiating class discussions about whether such contracts should be enforceable.

The market/nonmarket boundary is also being challenged in the other direction: Market concepts are being imported into the realm of family. Some feminist theorists have argued for the application of contract principles to marriage.<sup>41</sup> Legislative proposals are being considered to allow contract-based marriages.<sup>42</sup>

Not all feminists agree, however, that breaching the boundary between family and market is a good thing.<sup>43</sup> Taking surrogacy as an example,<sup>44</sup> feminists who support contractual surrogacy do so because they believe that on balance it

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38. 537 A.2d 1227 (N.J. 1988). *Cf.* A CONTRACTS ANTHOLOGY 174 (Peter Linzer ed., 2d ed. 1995) (suggesting that the inclusion of reproductive issues in contracts casebooks may be a response to *Re-Reading Contracts*, *supra* note 7).

39. *In re Baby M*, 537 A.2d at 1246-50.

40. *E.g.*, ROBERT E. SCOTT & DOUGLAS L. LESLIE, CONTRACT LAW AND THEORY 412 (2d ed. 1993).

41. *See Contractual Ordering of Marriage*, *supra* note 7, at 301-03; Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 348 n.153 [hereinafter *Reproductive Technology*]. *See also* Mary Becker, Presentation at 1989 AALS (arguing that definite contract rules would treat women better than indefinite rules of family law that give lots of discretion to (primarily male) judges). *But see infra* note 42 and accompanying text.

42. *E.g.*, Illinois Marriage Contract Act, H.B. 2095, 89th Gen. Assembly (Ill.); An Act Relating to Written Marriage Contracts, H.B. 1711, 54th Leg., 1995 Reg. Sess. (Wash.). Both of these proposed statutes seek to limit the granting of a divorce to contractually agreed upon grounds.

43. *See, e.g.*, Martha Albertson Fineman, *A Legal (and Otherwise) Realist Response to “Sex as Contract,”* 4 COLUM. J. GENDER & L. 128 (1994); Mary Lyndon Shanley, “*Surrogate Mothering*” and *Women’s Freedom: A Critique of Contracts for Human Reproduction*, 18 SIGNS 618, 634-36 (1993). *See also* Radin, *supra* note 15, at 1917 n.244 (discussing “double bind” for women with less social wealth and power than their spouse, whether marriage is conceived of as contract or status).

44. One could also use prostitution as an example. Feminists who support the legalization of prostitution do so because they believe that on balance it will improve the situation of women. Legalization will improve the lives of women in prostitution by removing harassment from police, violence from pimps and fear of loss of custody of their children if their occupation were known. Women as a class will benefit because of the availability of a means of earning a significant income.

will improve the situation of women.<sup>45</sup> Legalizing contractual surrogacy will improve the lives of surrogates by “mainstreaming” their work, giving them the same protections as any other employee. Women as a class will benefit economically because of the increased availability of a means of earning income.

Conversely, the commodification of reproduction through surrogacy for hire gives some feminists pause.<sup>46</sup> They point out that the market is no friend of women: Women still earn less than men even when all factors such as education and seniority are taken into account.<sup>47</sup> Labeling this “market failure” does not reassure them. Legalization of surrogacy for hire may in fact result in the victimization of women who may be economically compelled to bear children for money.<sup>48</sup>

These feminists see contract not as a means of creating connections, but as a cause of alienation.<sup>49</sup> They would argue that contract implies commodification, and “commodification simultaneously expresses and creates alienation.”<sup>50</sup> This view sees “a necessary connection between this market alienability and human alienation.”<sup>51</sup>

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45. Believers in the market (law and economics types, for example) support contractual surrogacy (and legalized prostitution) as well. See RICHARD A. POSNER, *SEX AND REASON* 421-29 (1992) (arguing for contractual surrogacy). It is a mistake, however, to assume that two radically different normative views come to the “same” conclusion. See Radin, *supra* note 15, at 1936-37. Market believers support the commodification of sexual and reproductive services, but are agnostics as to whether that will improve the situation of the women providing such services.

46. See, e.g., Mary Becker, *Four Feminist Theoretical Approaches and the Double Bind of Surrogacy*, 69 CHI.-KENT L. REV. 303 (1993); Radin, *supra* note 15, at 1903-36; Shanley, *supra* note 43, at 624-33.

47. See, e.g., BARTLETT & HARRIS, *supra* note 1, at 161 (discussing gender wage gap of attorneys).

48. Similarly, some feminists fear that legalization of sexual services will reduce the earnings and autonomy of sex workers. In Nevada, for example, women sex workers are highly regulated as to hours, places of employment, medical testing, etc. Some of these regulations are arguably unconstitutional, such as ones prohibiting former sex workers from remaining in the town where they worked. See Aimee Nagles & Heather Brereton, *Sex for Sale: A Proposal for Prostitution Reform* 58-59 (1998) (unpublished manuscript, on file with author). They also are concerned about the ramifications of legalized prostitution for all women. One fear is that, if prostitution is legally sanctioned, only the well-off could afford not to be prostitutes. Cf. *AN INDECENT PROPOSAL* (Paramount 1993) (starring Robert Redford and Demi Moore, a movie in which a naive young wife agrees to sleep with a millionaire to fund her husband’s dream).

49. See generally Robert Batey, *Alienation by Contract in Paris Trout*, 35 S. TEX. L. REV. 289, 290 (1994) (exploring the critique that contract law has “a high potential for alienation”). But cf. PATRICIA WILLIAMS, *The Pain of Word Bondage*, in *THE ALCHEMY OF RACE AND RIGHTS* 146, 146-48 (1991) (discussing how for a white male colleague contract implied alienation while for her contract implied wholeness: “For me, stranger-stranger relations are better than stranger-chattel.”).

50. Radin, *supra* note 15, at 1871.

51. *Id.* The critique in Radin’s piece is actually attributed to Marx rather than feminists opposed to bringing contract into the realm of the family, but in the context of marriage, sexual

Breaching the market/family divide thus presents feminists with a “double bind.”<sup>52</sup>

If the social regime permits buying and selling of sexual and reproductive activities . . . there is a threat to the personhood of women, who are the “owners” of these “commodities” . . . because essential attributes are treated as severable fungible objects, and this denies the integrity and uniqueness of the self. But if the social regime prohibits this kind of commodification, it denies women the choice to market their sexual or reproductive services, and given the current feminization of poverty and lack of avenues for free choice for women, this also poses a threat to the personhood of women.<sup>53</sup>

A way out of this double bind may exist, however. The long-term consequences of the unsettling of contract’s domain are difficult to predict but one possibility is a fundamental reconception of the paradigm of a contract. Such a reconceptualization might alleviate the concerns about alienation and victimization.

The market-based paradigm is that of arm’s length, autonomous transactors engaged in a discrete exchange. Relational contract theorists<sup>54</sup> have challenged this paradigm on both empirical and normative grounds. There has already been some “cross-fertilization” between relational contract theorists and feminists and more can be expected.<sup>55</sup>

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services and surrogacy, I believe it is an accurate description of the latter’s views.

52. “The double bind is a series of two-pronged dilemmas in which both prongs are, or can be, losers for the oppressed.” Margaret Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1704 (1990).

53. *Id.* at 1699-1700. *See also id.* at 1703-04 (discussing double bind in the context of the conceptualization of marriage as a contract).

54. The school of relational contract theory is largely the brainchild of Ian Macneil. *See, e.g.*, IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980). Other proponents of relational contract theory are Stewart Macauley and Peter Linzer. “With Macneil we move out of the world of the autonomous rights-bearing individual and into a world where every person is inextricably bound to others by a complex web of interdependence and relations.” James Cassels, Book Reviews, 27 MCGILL L.J. 591, 602 (1982) (reviewing CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981); IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980)).

55. *E.g.*, Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 515 n.136, 523, 523 & nn.181-82. *See also* Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139, 162 (“Although the feminist writers have not focused much on contracts, their thesis is most relevant [to relational contract theory].”) (citation omitted). According to Linzer, the feminist “thesis” is ““that women tend to have a more intersubjective sense of self than men and that the feminine perspective is therefore more other-directed.”” *Id.* at 162 (quoting Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 584-85 (1986)). This conception of the

Relational contract theorists argue that discrete contract transactions are rare and relatively unimportant in today's world. Instead, they suggest that the contract paradigm should be that of an on-going, complex, multi-faceted, constantly renegotiated relationship.<sup>56</sup> As a result of this conception of a contract as a relationship, these theorists identify certain values as being important to contract, values such as mutuality (meaning equality of bargaining power) and solidarity (meaning trust and cooperation).<sup>57</sup> Because they view contract law as being the law of relationships, they can envision marriage as within the realm of contract.<sup>58</sup>

Relational contract theorists share a normative vision with the branch of feminism called relational or cultural feminism.<sup>59</sup> Relational feminism also

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feminist thesis is accurate only for that branch of feminism called cultural or relational feminism. See *infra* notes 59-61 and accompanying text.

Some feminist theorists have in turn borrowed from Macneil's work. See *Contractual Ordering of Marriage*, *supra* note 7, at 301-03; *Reproductive Technology*, *supra* note 41, at 348 n.153. Shultz has taken the position that contract doctrine should apply to marriage and surrogacy. In discussing the application of contract principles to marriage, she states:

The overriding importance of continuing relationships; the whole-person nature of the exchange; the presence of quantifiable and nonquantifiable elements; the expected range of interaction, from altruism to self-interest to conflict; the need for planning as a continuing process that focuses on flexibility of structure and procedure rather than on any single transaction; the emphasis on remedies that repair and restructure relationships rather than replace a specific failed performance—each of these characteristics of Macneil's relational contract type is an important characteristic of marriage.

*Contractual Ordering of Marriage*, *supra* note 7, at 302 (citation omitted). See also Braucher, *supra* note 7, at 710-12; Testy, *supra* note 7, at 229. Additionally, Patricia A. Tidwell and Peter Linzer have written a piece that explicitly explores the common ground between the two. See Tidwell & Linzer, *supra* note 6.

56. Macneil's definition of contract reflects this emphasis on the relationship between the parties (rather than on the things exchanged which is the focus of the classical definition of consideration): "[T]he realm of contract encompasses all relations among people in the course of exchanging and projecting exchange into the future." Macneil, *supra* note 55, at 523.

57. Conversely, traditional contract theory enshrines autonomy and consent ("freedom of contract") as the central values of contract law, while the more recent economic model of contracts focuses on wealth and efficiency maximization. See Braucher, *supra* note 7, at 702-09.

58. See *Contractual Ordering of Marriage*, *supra* note 7, at 302 (pointing out that Macneil identifies marriage as a type of relational contract).

59. There is not, of course, a single feminist viewpoint: "Feminism is correctly characterized by a multiplicity of approaches." Jennifer Nedelsky, *The Practical Possibilities of Feminist Theory*, 87 NW. U. L. REV. 1286, 1289 n.4 (1993). As a result, on controversial issues such as surrogacy and prostitution, there is not a single, unified "feminist" position; rather, different feminists embrace opposing positions. To confuse matters further, individual feminists may identify with more than one feminist approach. It is more useful to identify the issues around which different theories have clustered, rather than to attempt to label particular feminists as belonging to one or another feminist school.

focuses on the web of connection between people.<sup>60</sup> Human interconnections rather than hierarchical rights lie at the heart of much of relational feminism. These feminists advocate an “ethic of care” to supplement, if not replace, the traditional rights-based ethic that underlies much of law.<sup>61</sup>

There are definite parallels between relational contract theory and relational feminism. Taking these two viewpoints together, we can envision a world of contracts where the relationship is the central goal. Such a paradigm shift would inevitably have consequences for the rules of contract law. The next section examines the gendered history of fundamental contract doctrines and suggests ways that a reconceptualization of contract might change these doctrines.

## II. THE RULES OF THE GAME

### A. *The Gendered Nature of the Rules*

Apart from the domain of contracts, there is also an argument that the “rules

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Although others have categorized the “feminisms” differently, in my opinion, four clusters of issues define the different feminist approaches. Achieving equality, both in the sense of formal equality and in the sense of equality of opportunity, has been the focus of liberal feminism. As discussed in the text, relational or cultural feminism seeks to have the “feminine” accorded as much respect as the masculine historically has enjoyed; it advocates an “ethic of care” to supplement the traditional rights-based ethic that underlies much of law. Radical or dominance feminism has focused on how sexual hierarchies are reflected in law; this work has focused on issues like rape and sexual harassment. Critical or postmodern feminism has focused on issues of identity and epistemology, particularly by challenging dualistic thinking and categories.

60. Relational or cultural feminism in law owes much of its inspiration to Carol Gilligan’s work. CAROL GILLIGAN, IN *A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982). In particular, as part of her discussion of moral development, Gilligan contrasts the responses of “Jake” and “Amy” (Gilligan identifies these as two prototypical respondents to her survey) to the classic problem of Heinz’s dilemma. In Heinz’s dilemma, Heinz’s wife is deathly ill, and he cannot afford the medicine that will save her life. The question is posed: Should Heinz steal the drug? *See id.* at 25-26. Jake concludes that Heinz should steal the drug, because “life” ranks above “property” in his hierarchical, rights-based analysis. *See id.* at 26. Amy, however, fights the hypothetical and suggests that if Heinz explained the situation to the pharmacist, he could probably get the drug donated. *See id.* at 28-29. Gilligan labels Jake’s response “the logic of justice” and Amy’s response the “ethic of care.” *Id.* at 30.

61. I am unable to resist pointing out that not all feminists identify with relational or cultural feminism. *See, e.g.,* Margaret Jane Radin, *Reply: Please Be Careful with Cultural Feminism*, 45 STAN. L. REV. 1567 (1993). The closeness of the “ethic of care” to traditional conceptions of femininity gives rise to the critique that relational feminism replicates, in modern dress, the Nineteenth Century “separate spheres” ideology that enshrines the feminine as the guardian of morality, home and the family. *See* BARTLETT & HARRIS, *supra* note 1, at 2 (the “separate spheres” ideology defines a male sphere that is “public”—one concerned with the world of government, trade, business, and law—and a female sphere that is “private”—encompassing the realm of home, family and childrearing).

of the game” are gendered, as well. Work has already been done on the gendering of legal rules in general, and the points made are equally applicable to contract rules.<sup>62</sup> The gendered nature of contract rules can be seen in the fundamental notion of freedom of contract and the resulting tension between freedom of contract and paternalism.

“Freedom of contract” is a fundamental underpinning of modern contract doctrine. In essence, “freedom of contract” includes two interrelated propositions: The first is that competent, autonomous individuals are entitled to enter into freely chosen<sup>63</sup> obligations with minimal interference from the state; and the second, which follows from the first, is that an individual should not have obligations imposed on him (or her) by the state. While ostensibly gender-neutral in its formulation, “freedom of contract” began as a sex-based concept.<sup>64</sup>

The freedom of contract doctrine is commonly held to have begun with the dissenting opinions in the 1873 *Slaughter-House Cases*<sup>65</sup> “and these opinions are to be found in every modern constitutional law casebook.”<sup>66</sup> In the *Slaughter-House Cases*, the four dissenters viewed the right to enter into employment contracts as protected under the Fourteenth Amendment.<sup>67</sup>

Within one day of the decision in the *Slaughter-House Cases*, the Supreme Court decided the case of *Bradwell v. Illinois*.<sup>68</sup> *Bradwell* is, in essence, the female counterpart of the *Slaughter-House Cases*, although it is not part of the law school canon and is barely mentioned in casebooks.<sup>69</sup> In *Bradwell*, the majority held that the right to engage in a profession was not protected by the

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62. See Symposium, *supra* note 9.

63. “Freedom of contract” depends upon freely given consent: “[C]onsent is the overriding principle of freedom of contract.” C.M.A. McCauliff, *Freedom of Contract Revisited*: Johnson Controls, 9 J. CONT. L. 226, 231 (1996). But consent is itself a problematic concept. Feminists, borrowing from earlier work regarding the idea of consent in rape law, argue that “consent” is more nuanced and debatable than many contemporary contract theorists imply. See Braucher, *supra* note 7, at 703-06 (arguing that consent is socially constructed in both rape law and contract doctrine: Rape law asks whether the man is justified in believing the woman consented, not whether the woman in fact consented; contract doctrine asks whether the party seeking enforcement of a deal is justified in believing the other party consented, not whether the other party in fact consented); Dalton, *supra* note 7, at 1005-06, 1028 & n.102 (arguing that, just as rape law, by drawing a line between acceptable and unacceptable force in sex, implicitly acknowledges that sex involves force, the duress doctrine, by drawing a line between acceptable and unacceptable coercion in contract negotiation, implicitly acknowledges that contracting involves coercion).

64. See Nancy S. Erickson, *Muller v. Oregon Reconsidered: The Origins of a Sex-Based Doctrine of Liberty of Contract*, 30 LAB. HIST. 228, 232 (1989); McCauliff, *supra* note 63, at 227-28.

65. 83 U.S. (16 Wall.) 36 (1872).

66. Erickson, *supra* note 64, at 230.

67. *Id.* at 232. See also *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 83-130 (Field, Swayne, Bradley, JJ., Chase, C.J., dissenting).

68. 83 U.S. (16 Wall.) 130 (1873). See Mika, *supra* note 28, at 308.

69. See Erickson, *supra* note 64, at 230; Mika, *supra* note 28, at 306-08.

Fourteenth Amendment and thus upheld the denial of Myra Bradwell's application for admission to the Illinois state bar.<sup>70</sup> This, of course, is consistent with the majority's opinion in the *Slaughter-House Cases*, which held that there was no constitutional protection for male workers to engage in lawful employment.<sup>71</sup>

It would have been consistent for the *Slaughter-House* dissenters to dissent in *Bradwell*, as well.<sup>72</sup> However, three of the four *Slaughter-House* dissenters concurred with the majority in *Bradwell*.<sup>73</sup> Although they thought the right of *men* to engage in a chosen profession was protected by the Fourteenth Amendment, "the peculiar characteristics, destiny and mission of woman"<sup>74</sup> justified a state legislature in denying women access to a specific profession, such as law. "Freedom of contract" was something that men were entitled to, but not women.

The *Slaughter-House* dissents evolved into the majority in the 1905 decision *Lochner v. New York*<sup>75</sup> in which the Court struck down a state statute limiting (male) bakers to a ten-hour workday.<sup>76</sup> Three years later, the Court upheld a similar restriction on the workday of women laundry and factory workers in *Muller v. Oregon*.<sup>77</sup> Given the views of the *Slaughter-House* dissenters in *Bradwell*, that freedom of contract applied to men and not women, this result is not surprising. These two cases, however, point to a tension that continues to exist in contract doctrine today—the tension between autonomy and protectionism, between "freedom of contract" and "paternalism."<sup>78</sup> The two cases also suggest that these two contrasting notions can be thought of in gendered terms: "freedom of contract" being associated with the male gender and "paternalism" with the female gender.<sup>79</sup>

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70. *Bradwell*, 83 U.S. (16 Wall.) at 139.

71. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 67-83.

72. See Erickson, *supra* note 64, at 232.

73. *Bradwell*, 83 U.S. (16 Wall.) at 139, 142 (Bradley, Swayne, Field, JJ., concurring).

74. *Id.* at 142 (Bradley, J., concurring).

75. 198 U.S. 45 (1905).

76. *Id.* at 64-65.

77. 208 U.S. 412 (1908).

78. See Gillian K. Hadfield, *The Dilemma of Choice: A Feminist Perspective on The Limits of Freedom of Contract*, 33 OSGOODE HALL L.J. 337 (1995); Kennedy, *supra* note 8, at 1725-37 (discussing how the indeterminacy of contract doctrine reflects the tension between the contradictory norms of self-centered individualism and paternalistic altruism); Mensch, *supra* note 7, at 759 ("Every doctrinal dispute within the classical model is reducible to conflicting claims of security and freedom."); Testy, *supra* note 7, at 228.

79. See *Rescuing Impossibility Doctrine*, *supra* note 6 (making a similar point in the context of impossibility). I admit to some disquiet with gendering "freedom of contract" and "paternalism" in this way, primarily because I am not convinced that it is helpful. I also acknowledge the irony of labeling "paternalism" as female gendered.

*B. Reformulating the Rules*

Pure and unadulterated “freedom of contract,” unconstrained in any way by the state, does not exist, and probably never existed. The Constitution, for example, imposes a limit on freedom of contract: The Thirteenth Amendment prohibits even rational, autonomous rights-bearing individuals from contracting themselves into indentured servitude.<sup>80</sup> Certain types of contracts are or have been illegal in certain jurisdictions, such as gambling contracts or prostitution. Many contract doctrines are paternalistic in the sense of protecting the “weaker” or disadvantaged party: concealment, misrepresentation, unilateral mistake, undue influence, duress, unconscionability, minority, and lack of capacity all could be said to have a protectionist cast. Furthermore, the excuse doctrines (mutual mistake, impossibility, impracticability, and frustration of purpose) all could be described as paternalistic, with the court imposing its judgment about allocation of risks on the parties.

Feminists have just begun to question whether paternalistic doctrines like unconscionability help or harm women.<sup>81</sup> At the same time, feminists are searching for ways in which contract doctrine could acknowledge that women historically have had less economic power than men.<sup>82</sup>

The unconscionability doctrine, for example, traces its roots to *Williams v. Walker-Thomas Furniture Co.*<sup>83</sup> In that case, the court struck down a cross-collateralization clause that enabled the Walker-Thomas Furniture Company to repossess, in the case of a default, any and all items ever purchased on credit, even though the specific items repossessed had been paid for in full.<sup>84</sup> The plaintiff in the case is identified as a woman on welfare.<sup>85</sup>

To the extent one accepts that the unconscionability doctrine is a paternalistic

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80. “Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1.

81. See, e.g., Darren Bush, *Is Law & Economics a Useful Tool for Feminist Legal Theorists?: Law, Economics and Unconscionability* (1998) (unpublished manuscript, on file with author).

82. See, e.g., Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229 (1994). Brod argues that prenuptial agreements tend to have a disparate negative impact on women, stating that “most agreements will be to the advantage of the economically superior spouse (usually a man) at the expense of the economically weaker spouse (usually a woman),” *id.* at 239, and thus should be enforced only if the agreement attains economic justice or if the bargaining process was demonstrably fair. *Id.* at 294-95. See also Debora L. Threedy, “Breach of the Peace” in *Self-Help Repossession: Adopting a Gendered Perspective*, 7 COM. DAMAGES REP. 245 (1992) (borrowing the concept of “reasonable woman” from sexual harassment law and arguing that “breach of the peace,” defined as force or the threat of force, has a gender element, as a reasonable woman could perceive the threat of violence in situations where a reasonable man might not feel threatened).

83. 350 F.2d 445 (D.C. Cir. 1965).

84. *Id.* at 450.

85. *Id.* at 448.

rule developed to protect poor women, the question arises whether such special rules help or hinder; or more accurately, do they help in the short run and hinder in the long run? For example, such special rules might lead to contracts with the protected groups being more expensive, due to the increased risk of being unenforceable. Thus, a possible consequence of such a doctrine could be to make credit purchases unavailable to women such as Mrs. Williams.

Analyzing the case using the paradigm of contract as a relationship, however, might lead to a conclusion that holds Walker-Thomas accountable, not because Mrs. Williams needs protection, but because the store violated the implicit terms of its relationship with her. To analyze the contract “relationally,” it is necessary to understand how Walker-Thomas operated.

Walker-Thomas’ market niche was selling furniture and household appliances to the economically underprivileged; most of their customers were on welfare.<sup>86</sup> Walker-Thomas’ selling strategy was based primarily on door-to-door sales: Salesmen called upon potential customers in their homes and encouraged these potential customers to see them as “friends.” The salesmen regularly cashed their customers’ welfare checks, saving the welfare recipient from having to pay a fee to the currency exchange (where welfare checks are often cashed) as well as from the potentially risky trip back from the currency exchange with a month’s living expenses in their pockets.<sup>87</sup> On occasion, the salesmen would even give small, inexpensive gifts to regular customers.<sup>88</sup> They knew their customers, and their children, by name.

The contractual relationship between Walker-Thomas and its customers suggests that *Williams* could be thought of as a case involving a breach of good faith and solidarity (to use Macneil’s term for trust and cooperation). Having created a relationship that incorporated elements of a social (nonmarket) relationship, Walker-Thomas could not then revert to a cold and calculating, purely market relationship.<sup>89</sup>

Another consequence of the new paradigm might be that inequality of bargaining power (what Macneil calls mutuality) becomes a factor in contract doctrine. Contract law, by and large, takes no account of inequality of bargaining power between contracting parties. The justification is that to do otherwise, to allow the party with inferior bargaining power to challenge the contract after the fact, would in the long run make it more difficult for such parties to contract. Parties with superior bargaining power would be disinclined to contract with weaker parties, because the weaker party could later use their inferior position

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86. See David I. Greenberg, *Easy Terms, Hard Times: Complaint Handling in the Ghetto*, in NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM 380-91 (Laura Nader, ed. 1980); see also Stewart Macaulay, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching v. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 Hous. L. Rev. 575, 578-82 (1989).

87. See Greenberg, *supra* note 86, at 382.

88. See *id.* at 383.

89. See Macaulay, *supra* note 86, at 581 n.30 (suggesting Walker-Thomas created a “fictive friendship”).

as an excuse to avoid the contract or its terms.

Inequality of bargaining power, however, does affect contract doctrine in all sorts of indirect ways. Power imbalances can trigger the doctrines of duress and unconscionability, although both require “something more” than the mere fact of such imbalances. Moreover, the doctrines of undue influence, infancy, and lack of capacity all could be said to have a component based upon inequality of bargaining power.

A relational contract doctrine could more explicitly recognize the ways in which an inequality of bargaining power can subvert the bargaining process.<sup>90</sup> For example, contract clauses could be subject to a two-tiered scrutiny by a reviewing court.<sup>91</sup> One level of scrutiny, extremely deferential to the parties’ bargain, would apply when the parties were determined to be of relatively equal bargaining power. Another, stricter level of scrutiny would apply in situations where equality was lacking, as in contracts of adhesion.

A relational contract paradigm also could lead to new ways of allocating risk in contract. Excuse doctrines—mutual mistake, impossibility, impracticability, frustration of purpose—deal with the allocation of risks unknown at the time of contracting. These doctrines, however, tend to operate as an all-or-nothing principle: If the buyer, for example, is allocated the risk, all losses flowing from the occurrence of the risk will fall on the buyer. A relational contract approach, however, could recognize that, in many ventures, the parties implicitly share risks and could formulate rules (perhaps analogous to comparative negligence rules in tort) for sharing the losses.<sup>92</sup>

If the foundation of contract law shifts from a focus on the things contracted for to the relationship between the contracting parties, we could see contract doctrine becoming more responsive to different kinds of contracts and to the differences between contracting parties.

#### CONCLUSION

We are on the brink of a new millennium: A good time to be looking back and taking stock. The last hundred years have seen revolutionary changes in the lives of women. We’ve come a long way, but full and equal participation in public, economic and political life still eludes us. That should not surprise or depress us, however; a hundred years is not enough time to change thousands of years of gender-based inequality.

The legacy of those thousands of years of inequality is imbedded deep within

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90. See, e.g., McCauliff, *supra* note 63, at 233 (discussing how relational contract theory might affect who should bear the cost of providing workers with a safe workplace).

91. See, e.g., Debora L. Threedy, *Liquidated and Limited Damages and the Revision of Article 2: An Opportunity to Rethink the U.C.C.’s Treatment of Agreed Remedies*, 27 IDAHO L. REV. 427, 460 (1990-91) (arguing that contractual remedies provisions should be subjected to a two-tiered judicial review).

92. My thinking on this, while tentative at this time, was inspired by a discussion about allocation of risk with my colleague, Terry Kogan.

the structures of our civilization. It is embedded in law; it is embedded in contract law. The deeply embedded legacy of inequality must be recognized before it can be changed.

Recognition opens the door to change. A large part of the work of feminists so far has been aimed at bringing about that recognition. Whether fundamental change occurs in the deeply embedded structures of inequality, and what that change may be, is the work of the next millennium.