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Book Review:

*Are Women Human? and Other International Dialogues*

by Catharine A. MacKinnon

Tracy E. Higgins†

*Are Women Human?* is a scary book. Mostly, this is by design. It contains pages and pages of descriptions of various incidents of violence against women, including beatings, torture, rape, sexual enslavement, murder, and genocide. It also contains many terrifying statistics. For example, in the United States, forty-four percent of all women are victims of rape or attempted rape, and between one-quarter and one-third of women are battered in their homes. In many places around the world, the rates for both rape and domestic violence are even higher. These accounts and statistics amply support MacKinnon’s point, raised most starkly in the final chapter, that violent death is a reality for a startling number of women every day and that states and the international bodies they comprise should wake up to this reality and respond to it. Failure to do so, MacKinnon persuasively argues, represents a profound hypocrisy on the part of the international community; indeed, it represents a failure to treat women as human at all.

As powerful, even devastating, as this argument is, it nevertheless leads to another reason that *Are Women Human?* is scary: MacKinnon focuses so steadfastly on her critique of private power (in particular, private power wielded by men against women) that, by the end, she seems to have lost sight of the dangers of “public” power, also wielded mostly by men, and against both men and women. Yet at this moment in history, though private groups

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2. *Id.* at 22.
3. *Id.* at 30.
4. *Id.*
5. *Id.* at 259.

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increasingly act with power and violence previously reserved to states, states quickly fashion legal justifications for even more violent responses. Critiques of liberalism notwithstanding, public power is still to be feared. If feminists aspire to harness public power—whether national or international—in the service of women’s equality, we need to consider very carefully the risks and ethical implications of the inevitable violence that will result. Despite the creative brilliance of much of her work, MacKinnon does too little of that here.

The question of the book’s title, Are Women Human?, is a reference to Richard Rorty’s characterization of MacKinnon’s work as suggesting “that ‘a woman’ is not yet . . . a way of being human.” More importantly, it is also a provocative challenge to the international community to rethink the category of human rights so as to define humanity in a way that includes women. Her basic point is this: When beating, torture, rape, and extra-judicial killing happen to men, international law takes the violations seriously (if perhaps not seriously enough to end them). When those same things happen to women, in settings largely reserved for the abuse of women and not men, international law regards the violations as private and domestic (in both senses—meaning within homes and within states), and therefore beyond its scope.

MacKinnon makes this same point forcefully in several different contexts by asking what it would mean to redefine central concepts of international human rights law or humanitarian law to include women. She does so primarily by challenging the divergent treatment under international law of public power, exercised by states, and private power, exercised by non-state actors such as corporations, religious institutions, terrorist groups, and individuals. As a general rule, the former and not the latter are the subject of regulation in public

6. See, e.g., Greg Myre, Turmoil in the Mideast: Haifa, Israel, N.Y.TIMES, July 17, 2001, at A8 (discussing Hezbollah’s initial attack on Haifa, Israel, and presaging Israel’s response by quoting an Israeli citizen who says, “We should wipe Hezbollah off the map without pity and without listening to the criticism from the rest of the world.”); A Nation Challenged: President Bush’s Address on Terrorism Before a Joint Meeting of Congress, N.Y.TIMES, Sept. 21, 2001, at B4 (reprinting President Bush’s discussion of the attacks of Sept. 11, 2001, noting that Al Qaeda was most likely responsible for bombing American Embassies in Tanzania and Kenya as well as the U.S.S. Cole, and outlining “Al Qaeda’s vision for the world”).


8. See infra notes 20-22 and accompanying text (discussing the feminist critique of liberalism’s preoccupation with public power).


10. See MACKINNON, ARE WOMEN HUMAN?, supra note 1, at 3 (noting that “[l]egally, one is less than human when one’s violations do not violate the human rights that are recognized”).

11. This argument is made in various places throughout the book, but for a general overview, see id. at 4-8. See also id. at 147 (“[W]hen men use their liberties socially to deprive women of theirs, it does not look like a human rights violation. When men are deprived of theirs by governments, it does.”).
Abuses of public power, in international law as in United States constitutional law, may violate individual rights and are regarded as implicating fundamental norms of political freedom, citizenship, and equality. In contrast, abuses of private power may (or may not) violate the criminal law or perhaps constitute a tort, but are not generally understood as sufficiently systematic and political so as to implicate rights guarantees. MacKinnon sets out to demonstrate the arbitrariness of this distinction and its implications for gender hierarchy.

This critique is not original to MacKinnon, though she applies it here in novel ways and with characteristic rhetorical power. Focusing on the relationship among the state, the individual, and civil society, feminists have argued that the putatively “unregulated” sphere of the family is profoundly regulated—even constituted—by the state through law and other economic, administrative, and political institutions of state power. This regulation is apparent through both direct state intervention and the refusal to intervene, state inaction. MacKinnon invokes this analysis in the context of domestic violence and rape, noting that “the state actually is typically deeply and actively complicit in the abuses . . . .” She argues that the state’s response to these crimes and the law’s (hence the state’s) definition of them together constitute the boundaries of private power in a way that is highly gendered. On this view, we should regard the creation and maintenance of this legal regime as an


14. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1524 (1983) (noting that “once the state undertakes to define the marriage relation, it is impossible for the state to refuse to engage in some enforcement of the individual will of the parties”); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 837 (1985) (arguing that “because the state is deeply implicated in the formation and functioning of families, it is nonsense to talk about whether the state does or does not intervene in the family”).

15. See Frances E. Olsen, *The Myth of State Intervention in the Family, supra* note 14, at 854 (citing the selective application of tort and criminal laws within a family as an example of the incoherence of the intervention/nonintervention paradigm).


17. See id. at 23-24, 27.
affirmative act by the state, just as we consider as such the torture of detainees by military police.¹⁸

Confronted with the failure of liberal rights to improve women’s unequal status, feminist legal theorists have also embraced the idea that private power is at least as significant a threat to women as state power.¹⁹ On the international level, feminists have argued that international human rights standards that forbid torture, but regard violence committed against women by intimate partners or family members as outside the scope of international concern, fail to address the central source of violent coercion in women’s lives.²⁰ The argument is not that the abusive husband acts under color of state law or to promote the interests of the state.²¹ Rather, the argument is simply that a meaningful right to freedom, bodily integrity, and security for women must include effective remedies against private violence.

MacKinnon invokes this critique of the public/private distinction most powerfully in her analysis of torture. She notes that we all have come to understand how it works and why it is used: “Victims are beaten, raped, shocked with electricity, nearly drowned, tied, hung, burned, deprived of sleep, food, and human contact.”²² It is done “to control, intimidate, or eliminate those who insult or challenge or are seen to undermine the powers that be . . . .”²³ She suggests that both the description and the rationale apply equally to many cases of domestic violence.²⁴ MacKinnon asks simply, why are these same acts taken much less seriously (if noticed at all) when they happen to take place “in homes in Nebraska . . . rather than prison cells in Chile”?²⁵

MacKinnon also reinterprets and extends the critique of the public/private line to expose the gendered dimensions of humanitarian law. For example, she notes that, ironically, the one context in which international law does directly protect women from the violence they suffer at the hands of men is when men are also fighting each other in the name of state power—in short, when they are

¹⁸. See id. at 148.
¹⁹. See, e.g., CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 161 (1989) (arguing that “men’s forms of dominance over women have been accomplished socially as well as economically, prior to the operation of law, without express state acts, often in intimate contexts, as in everyday life”); ROBIN L. WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 58 (1994) (using the marital rape exemption to argue that a state violates equal protection when it denies some of its citizens protection from private violence, aggression, and wrongdoing).
²¹. Insofar as the state creates and sustains institutions that support men’s power, men might be understood as acting under color of state law, broadly defined. MacKinnon also makes this argument here. MACKINNON, ARE WOMEN HUMAN?, supra note 1, at 23.
²². Id. at 17.
²³. Id. at 18.
²⁴. Id. at 19-21.
²⁵. Id. at 21.
at war. But why should this be? Why, she asks, is the often armed assault on women that takes place everywhere daily not regarded as armed conflict under international law? One reason: states are not waging the war, at least not in the conventional sense. Women are not generally armed; they are not in uniform. They do not count as soldiers, whose treatment is regulated by the Geneva Conventions. At the same time, they are not noncombatants either, at least so long as there is no war going on among men.

To the claim that violence perpetrated by men against women does not fit the international legal concept of war or armed conflict because it does not involve states as such, MacKinnon has a ready response: Al Qaeda. She accurately observes that “on September 11th, nonstate actors committed violence against mostly nonstate (nongovernmental and civilian) actors.” Yet, despite the fact that the attack did not fit well within conventional categories, the international community adapted legal norms to accommodate what it regarded as a necessary response to the perceived threat. Given that the absence of state power was not an obstacle to international action in the case of September 11th, MacKinnon asks why women’s suffering and violent death at the hands of the Taliban regime in Afghanistan triggered no response until men’s lives were also at stake.

Finally, MacKinnon also discusses a subtle and important argument about rape and genocide, or rape as genocide, in the context of her work in Bosnia-Herzegovina. Here, her objective is twofold. First, she wants the concept of genocide to be understood to comprehend its specifically gendered forms, including rape and forced maternity. This requires her to distinguish rapes according to their function, whether in genocide, war, or everyday life. Responding to claims that the Serbian rape of Bosnian women was an inevitable byproduct of war, or that the rapes of Bosnia and Croat women were “merely” an aggravated form of what men do to women all the time and everywhere, MacKinnon describes how the Serbian military deployed rape in a deliberate and strategic way, with the purpose of destroying a specific group of people. “It is not rape out of control. It is rape under control.” Proof of such
intent, she argues convincingly, brings some forms of rape within the scope of the accepted definition of genocide.\textsuperscript{34}

MacKinnon’s second, and more radical, objective—to challenge the limits of this definition of genocide—is in some tension with the first. Having carefully drawn legal distinctions among rape in genocide, rape in war, and rape in everyday life,\textsuperscript{35} she deliberately undercuts these distinctions by showing the commonalities in the way rape functions in these different contexts. For example, she argues that:

what rape does in genocide is what it does the rest of the time: ruins identity, marks who you are as less, as damaged, hence devastates community, the glue of the group. It destroys the willingness to identify with the group designation on the basis of which the rape took place, hence works to destroy the group as such.\textsuperscript{36}

Noting that “[w]omen not being considered a people, there is as yet no international law against destroying the group women,” she raises the question of whether targeting a group on the basis of sex ought to be included in the definition of genocide.\textsuperscript{37} The fact that it is not, MacKinnon insists, suggests how effectively sexual violence has already destroyed the notion that women are “a people,” confirming that woman is “not yet a way of being human.”\textsuperscript{38}

Surely any serious reader of this collection will come away with a changed perspective on the law of international human rights. Even if one is not fully convinced by MacKinnon’s arguments, she does brilliantly here what she has always done, that is, call into question the inevitability of the way things are. She forces us to consider how things might be different and better for women, not just incrementally within existing structures, but radically within a new paradigm of international law.

At the same time, the work collected here is characterized by some of the limitations apparent in MacKinnon’s work in other contexts. In my view, the most important of these include her almost exclusive focus on private violence as the paradigmatic form of gender subordination, her tendency to overestimate the potential of legal norms to promote women’s equality by targeting that violence, and, finally, her failure to think systematically about the costs of invoking state and international power (which often also entails violence) to improve the status of women. Even while acknowledging the transformative power of her work, many feminists have raised questions regarding MacKinnon’s analytical framework and reform agenda on the domestic level. In the remainder of this Review, I build on these critiques to suggest that

\textsuperscript{34} Id. at 226-27.
\textsuperscript{35} Id. at 221-22.
\textsuperscript{36} Id. at 230.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 48 (quoting Rorty, supra note 9, at 234).
applying her agenda internationally and cross-culturally presents different and perhaps more troubling issues.

MacKinnon's analysis of women's inequality focuses centrally on violence against women, particularly sexual violence. This emphasis is consistent with MacKinnon's work throughout her career, and, as I acknowledge above, translates in creative and powerful ways to the international sphere. And yet the analysis here is subject to the familiar critique of her work on domestic law, that MacKinnon's focus on sexual violation overstates its centrality to women's subordination.39 Thus, in a book about women's human rights—indeed women's humanity—MacKinnon says very little about such pressing determinants of gender inequality as economic and educational discrimination, the gendered structure of the family (including profoundly unequal rights of inheritance and property ownership), or starkly gendered assumptions about the care of children, to name a few.40 To be clear, MacKinnon does not claim that these issues are unimportant.41 Yet, of twenty-five chapters in this collection, seventeen deal almost exclusively with either sexual violence or pornography. And although several chapters deal with equality theory generally, only one gives sustained treatment to an issue of structural inequality other than sexual violence per se.

It is easy enough to criticize an author for not having written a different book, or one with a different emphasis. That is not my intention. MacKinnon is entitled to set her own priorities, and I readily concede that her steadfast focus on gender-based violence has helped to change the way such violence is understood in law, both domestically and internationally. At the same time, her insistence on characterizing violence as discrimination has the effect of framing


40. MACKINNON, ARE WOMEN HUMAN?, supra note 1, at 130-31. MacKinnon's description of the role of family structure in women's inequality is representative of her tendency to prioritize issues of violence. In a paragraph focusing on the family as a site of battery and murder, she adds, almost as an aside, "[t]he family is also a place where women are required to take responsibility for children and are often given few resources to care for them and little voice in decisions that affect their joint lives." Id.

41. She often includes them in a list of oppressive conditions under which women live. See, e.g., id. at 42 (sex segregation in the labor force), id. at 131 (describing women's subordination within the family). Moreover, in her introduction, MacKinnon explains, "[b]ecoming human... requires prohibiting or otherwise delegitimizing all acts by which human beings as such are violated, guaranteeing people what they need for a fully human existence, and then officially upholding those standards and delivering on those entitlements." Id. at 2-3 (footnote omitted).

42. Id. at 120-38.
that violence as a source, rather than a product, of gender hierarchy.\footnote{See id. at 107-08 ("The misogyny animating sexual violence is recognized as a mainspring of the inequality on the basis of sex that destroys our lives . . . "); id. at 111 (expressing the belief that "[w]hen all the forms of violence against women in society, and impunity for it in law, are recognized as sex inequality violations, law will be made new in women's hands").} Within that frame, the logical response is to target the violence directly, either through the criminal law or, more often here, a civil remedy against the abuser.\footnote{See id. at 32-33 (noting that "if battering is a social problem of sex inequality, its legal solution should lie through sex equality law" and advocating a civil remedy); id. at 111 (citing the example of her antipornography ordinance as a model for civil remedies for sexual violence).} Yet even if one accepts that ending violence must be a top priority, attending to other culturally-specific dimensions of gender subordination is critical to understanding why violence happens and to developing policies that will be effective in curtailing it.\footnote{For over two decades, feminist legal scholars have produced a great deal of excellent work on the causes and consequences of domestic violence. See, e.g., ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING (2000) (exploring some of the challenges of developing effective feminist responses to domestic violence and emphasizing the interrelatedness of women's rights claims to be free of violence with reproductive rights, employment, child care, and economic and social rights).}

For example, in recent work on customary law in South Africa,\footnote{In May 2006, Professor Paolo Galizzi, Professor Catherine Powell, Ziona Tanzer, and I, along with a group of eight students, completed a year-long research project on the status of women living under customary law and Muslim personal laws. The project culminated in two weeks of intensive fieldwork during which we interviewed more than a hundred men and women. The citations to interview notes that follow are drawn from this project. A complete report of the project will be published in the Fordham International Law Journal.} I interviewed dozens of women and men regarding issues of community control and leadership, property ownership and inheritance, care and control of children, and gender-based violence, domestic and otherwise. These interviews emphasized for me the complex reasons for women's marginalization and lack of power in their communities, especially the fact that women are not regarded as part of the lineage that determines leadership, power, and wealth.\footnote{In the Eastern Cape, this point was illustrated starkly by the arrangement of people within a round meeting hall where we conducted interviews. All of the men sat on one side (in chairs) and all of the women on the other (on wooden benches), except for one woman who sat with the men. We asked why she was sitting on the "men's" side, and she explained to us that she was an unmarried daughter of the chief. The married women sat on the opposite side because they were not of the lineage. The women who were part of the lineage (daughters of the chief, for example), left the community when they married. The arrangement was a production of segregation by blood ties, and in patrilocal communities, this was also, by default, segregation by gender. See also T.W. BENNETT, CUSTOMARY LAW IN SOUTH AFRICA 347 (2004) (describing women as "transient members of this lineage" and therefore not entitled to inherit from their husbands).} This family structure, in turn, has important implications for understanding why domestic violence happens and what kinds of legal structures might be most effective in curtailing it.

Customary law and social practices create complex pressures and incentives for women confronted with domestic violence. For example, in the patrilineal and patrilocal communities with whom we worked, the spouses reside in the husband's community and the children are regarded as part of their
father’s family line.\textsuperscript{48} This arrangement increases a woman’s vulnerability to violence in a number of ways. First, all married women in the community are outsiders in that they are not a part of the bloodline and are therefore marginalized to some degree.\textsuperscript{49} Yet, the first source from whom a woman is expected to seek help in the event of violence is her husband’s family.\textsuperscript{50} Second, although she may find some measure of security with them,\textsuperscript{51} if she chooses to leave her husband’s community, she must leave her children and her property.\textsuperscript{52} To complicate matters further, even if she is willing to leave under these terms, her own family may not welcome her back because they may be forced to return the \textit{lobolo}, or bridewealth, which they may be unwilling or unable to do.\textsuperscript{53}

In these communities, therefore, customary law operates to disempower women economically, socially, and politically in ways that are far-reaching, deeply-rooted, and complex. In cases of domestic violence, it creates tremendous pressure to resolve matters within the family or to endure the abuse.\textsuperscript{54} This social structure means that women will not necessarily be able or even willing to invoke available remedies for domestic violence. In interviews with NGO representatives working on domestic violence in South Africa and police charged with responding to such complaints, we learned that incidents

\begin{footnotesize}
\begin{enumerate}
\item See BENNETT, \textit{supra} note 47, at 180-81, 309 (describing the patrilineal family and the affiliation of children with the husband’s lineage).
\item See \textit{id.} at 180-81.
\item See \textit{id.} at 250.
\item One traditional leader, Chief Ngangomhlaba Mathanzima, the Head Chief of the House of Traditional Leaders in Bisho, Eastern Cape, explained that the extended family will consult and often recognize the problems. He suggested that the suspicion is often on the man, who is encouraged to move out and leave the woman to care for the home and children. Interview with Ngangomhlaba Mathanzima, Head Chief, House of Traditional Leaders, in Bisho, S. Afr. (May 24, 2006) (notes on file with author).
\item This is generally the case unless the children are very young. If so, she may leave with them, but must return them when they reach an appropriate age. For example, the Subheadman of the Xhosa village of Ngecengane in the Eastern Cape, M. Similo, explained to us that, if a woman leaves, she must leave the children with the man’s family. If they are very young, she may take them but must return them when they are older. Interview with M. Similo, Subheadman, in Ngecengange, S.Afr. (May 26, 2006) (notes on file with author). See also BENNETT, \textit{supra} note 47, at 285 (noting that “parental rights are determined by payment of lobolo [bridewealth]”).
\item For example, in Ngecengane, Subheadman M. Similo explained the process for the dissolution of marriage. He insisted that there was no divorce in his court. Rather, when the woman decides to leave the man, the family of the woman must retrieve her. She then stands naked outside the kraal of her family, where the cattle are kept, and must drive the cattle from the kraal to return the lobolo. Interview with M. Similo, \textit{supra} note 51.
\item One of the members of the House of Traditional Leaders in Bisho, Eastern Cape, explained to us that customary law is conciliatory. Even in the case of domestic violence, the family will be brought together to settle the dispute. Interview with Nkosini T. Magadla, Chief, House of Traditional Leaders, in Bisho, S. Afr. (May 24, 2006) (notes on file with author). Lungiswa Mamela, a woman working at the Women’s Centre in Khayelitsha, explained that women must simply endure the abuse. Indeed, women are taught to expect a certain level of abuse as a condition of marriage. Interview with Lungiswa Mamela, Women’s Centre, in Khayelitsha, Cape Town, S. Afr. (May 28, 2006) (notes on file with author).
\end{enumerate}
\end{footnotesize}
are formally reported only in the most severe cases.\textsuperscript{55} The state’s legal mechanism for responding to domestic violence is rarely invoked, even when an initial report is made.\textsuperscript{56}

This evidence suggests that fashioning appropriate policy responses to domestic violence requires an understanding of the complex structure of patriarchy in a given culture, including issues of educational inequality, economic dependence, gendered religious and cultural norms, and hierarchical family structures. In the communities with whom we worked, simply adding to existing remedies a civil cause of action against one’s abuser for damages or an injunction, as MacKinnon advocates, is not likely to improve significantly the situation of women. Rather, educational efforts aimed at local leaders and the creation of local support networks among women may be more effective. Law reform efforts might more profitably target the issue of lobolo, providing that in cases of spousal abuse, it need not be returned.\textsuperscript{57}

None of this contradicts MacKinnon’s theoretical claim that violence is important, even central, to women’s subordination. It simply suggests that doing what MacKinnon demands—taking seriously sexual violence and ending it—will require understanding and addressing a more complex dynamic of patriarchy that extends well beyond the problem of gender-based violence itself.

Another reason that MacKinnon’s relative inattention to issues of gender inequality other than sexual violence is unfortunate is that the one essay in the volume that does engage them, the chapter analyzing the issue of personal laws under the constitution of India, does so in characteristically interesting and productive ways.\textsuperscript{58} In that essay, MacKinnon extends her critique of the Aristotelian conception of equality—perhaps her most important contribution to legal thought\textsuperscript{59}—to the equality jurisprudence of the Supreme Court of India. She praises the Court for embracing a comparatively robust and substantive definition of equality but notes its failure to extend the principle to the context of Hindu personal laws.\textsuperscript{60} This discussion takes MacKinnon into the thorny area of patriarchal religious practices. In her thoughtful discussion, she acknowledges the problems, both practical and ethical, of imposing a legal

\textsuperscript{55} See Interview with N.P. Ngum, South African Police Service Captain, in Coffee Bay, Eastern Cape, S. Afr. (May 27, 2006) (notes on file with author) (explaining that most cases of domestic violence are not reported and, if they are reported, charges are not pursued by the accuser).

\textsuperscript{56} See id. (noting that occasionally an order of protection is sought, but the victim almost never pursues the case, and the man is almost never prosecuted).

\textsuperscript{57} See BENNETT, \textit{supra} note 47, at 277-78 (describing conditions under which lobolo need not be returned upon dissolution of marriage); Interview with Sibongile Ndashe, Women’s Legal Centre, in Cape Town, S. Afr. (May 28, 2006) (notes on file with author) (describing a case involving a king where domestic violence is being raised as a defense to the return of lobolo after the dissolution of marriage).

\textsuperscript{58} MACKINNON, ARE WOMEN HUMAN?, \textit{supra} note 1, at 120-38.

\textsuperscript{59} See MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, \textit{supra} note 19, at 215-34.

\textsuperscript{60} MACKINNON, ARE WOMEN HUMAN?, \textit{supra} note 1, at 128.
structure on a non-consenting community, particularly one that itself is subordinated within the broader culture.61

This analysis of personal laws, despite its elegance, illustrates a second limitation of the book as a whole: the centrality of legal regulation to MacKinnon’s analysis of and response to inequality. Simply put, despite her occasional insistence to the contrary, MacKinnon is quite optimistic about the liberatory potential of law.62 Thus, in the face of a patriarchal social structure buttressed by religious beliefs, MacKinnon’s solution is for women to be able to sue to opt out of such a regime.63 Yet the usefulness of new legal remedies varies dramatically depending on the power and resources of the individual woman. Although the framework she proposes would give women who are already capable of seeking legal remedies a choice that they do not currently have, it is not likely to do much in the short or even medium term to improve the status of more marginalized women living under personal laws.

Again, consider an example from South Africa. When confronted with a similar conflict between constitutional principles and customary law, the South African Constitutional Court reached a result very different from the Indian Supreme Court. In Bhe v Magistrate, Khayelitsha,64 the Court considered a constitutional challenge to the customary norm of male primogeniture. In that case, the widow and the deceased had lived together for twelve years. They had two children, both girls.65 The husband had been a carpenter, and the wife was a domestic worker.66 “They were poor and lived in a temporary informal shelter in Cape Town.”67 The deceased had obtained a state housing subsidy that had allowed him to purchase the property on which they lived and to buy materials with which to build a house.68 But “he died before the house could be built.”69 The estate consisted of the temporary shelter where Bhe continued to live with her youngest daughter, the land upon which it was built, the household chattel, and the building materials.70 The magistrate ruled for the deceased’s father, invoking the rule of male primogeniture under customary law.71 Because the two children were daughters, the magistrate named the deceased’s father as the

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61. Id. at 134.
62. For example, she warns, “[t]he law, as you know, as all women know, is not ours. It is treacherous. It is slow.” Id. at 103. But then she continues, “[i]t also should not be let off the hook. It promises you equality. Get it. It is too powerful to be ignored.” Id. at 111.
63. Id. at 135-36.
64. Bhe v Magistrate, Khayelitsha 2005 (1) BCLR 1 (CC) (S. Afr.).
65. Id. at 15.
66. Id.
67. Id.
68. Id.
69. Id. at 15-16.
70. Bhe v Magistrate, Khayelitsha 2005 (1) BCLR 1, 15-16 (S. Afr.).
71. Id.
heir and successor. The father, in turn, planned to sell the property to pay for funeral expenses.

To make a long and complex analysis rather short and simple, the Constitutional Court had relatively little problem concluding that the Black Administration Act, which dictated the application of customary law on the basis of race, was an unconstitutional, overtly racist legacy of apartheid. The Justices then confronted the question of whether customary law should nevertheless govern the disposition of the estate. Under the South African Constitution, courts must apply customary law when that law is applicable, subject to the Bill of Rights. The Court then considered whether the applicable customary law principle of male primogeniture violated women’s rights to equality and to dignity. The Court concluded that it did and, moreover, that the violation could not be justified under the limitations clause.

The Constitutional Court thus went further even than MacKinnon would, striking down the customary law norm altogether. The Court was admittedly

72. Id.
73. Id. at 17.
74. Id. at 91. The Black Administration Act of 1927 specified that the property of “a Black” [for which the Constitutional Court now substitutes “African”] who dies intestate shall devolve in terms of “Black law and custom.” Black Administration Act 38 of 1927 s. 23. All other estates were governed by the Intestate Succession Act, which codified and updated common law rules for intestate succession, providing for inheritance by the surviving spouse and, importantly for this case, providing equally for all children regardless of birth order or the marital status of the parents. See Intestate Succession Act 81 of 1987.
75. As Justice Langa explained:
Section 23 [of the Black Administration Act] cannot escape the context in which it was conceived. It is part of an Act which was specifically crafted to fit in with notions of separation and exclusion of Africans from the people of “European” descent. What the Act in fact achieved was to become a cornerstone of racial oppression, division and conflict within South Africa, the legacy of which will still take years to completely eradicate.
76. The Constitution of the Republic of South Africa provides:
Section 30: Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Section 31: (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to (a) enjoy their culture, practise their religion and use their language; and (b) . . . (2) This right may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Section 211(3): The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

77. Bhe, 2005 (1) BCLR at 33. Under the South African Constitution, once the Court concluded that the rule of male primogeniture was unfair discrimination on the basis of gender and therefore a violation of Section 9(3) of the Bill of Rights, it had to consider further whether that violation could be justified under the limitations clause, Section 36(1), in view of the customary successor’s duty of support. With respect to this analysis, Justice Langa concluded simply that “the connection between the rules of succession in customary law and the heir’s duty to support the dependents of the deceased is, at best, less than satisfactory . . . . The heir’s duty to support cannot, in the circumstances, constitute justification for the serious violation of rights.” Id.

78. MacKinnon suggests only creating a scheme under which the woman could opt out of the regime of personal laws. See MACKINNON, ARE WOMEN HUMAN?, supra note 1, at 135-36.
gentle on customary law, pointing out that the rigidity of the statutory scheme of apartheid and the racist ends served by the codification of customary law undermined its flexibility and capacity to evolve as social norms changed over time—thus implying, at least, that it is more patriarchal than it might have been.\footnote{Justice Langa explained: At a time when the patriarchal features of Roman-Dutch law were progressively being removed by legislation, customary law was robbed of its inherent capacity to evolve in keeping with the changing life of the people it served, particularly of women. Thus customary law as administered failed to respond creatively to new kinds of economic activity by women, different forms of property and household arrangements for women and men, and changing values concerning gender roles in society. The outcome has been formalisation and fossilisation of a system which by its nature should function in an active and dynamic manner.} In any case, the Court struck it down, and held that the (now) gender-neutral Intestate Succession Act, which governed the estates of whites, would apply pending a legislative response.

In one sense, this was an important legal victory for women's equality in the face of patriarchal custom. It is nevertheless worth asking whether it has made a real difference to women living under customary law. And we did ask. Our interviews with South African lawyers and representatives of nongovernmental organizations working on gender equality issues suggest that the case has had virtually no impact even on the adjudication of disputes concerning inheritance rights.\footnote{See, e.g., Interview with R.B. Mqeke, Professor, Rhodes University, in Grahamstown, S. Afr. (May 23, 2006) (stating that the government has failed "to explain the changes that have taken place. Nothing has been done. People live as if there were no Bhe. People don't know about it.") (notes on file with author).} Although legal services organizations have begun to conduct training sessions for lawyers and magistrates on a limited basis, most estates are still administered informally by family members or traditional leaders in rural and semi-urban communities, where knowledge of the Bhe decision is virtually nonexistent.\footnote{For example, Patrick Pringle, the Director of the Queenstown Rural Legal Centre, noted that, when the Centre undertook its training efforts, even the paralegals were unaware of the Bhe judgment. Where there was awareness, he added, there had been almost a paralytic effect. The magistrates did not know how to apply the judgment. The problem was not resistance but ignorance of the judgment. \textit{See Interview with Patrick Pringle, Director, Queenstown Rural Legal Centre, in Grahamstown, S. Afr. (May 23, 2006) (notes on file with author).} } As a practical matter, this means that a widow's access to her deceased husband's home and property depends on the inclinations of the male heir.\footnote{See BENNETT, \textit{supra} note 47, at 335 (stating that the "heirs must be male, partly because only men have the legal powers necessary \[to\] run a family's affairs, but also because the bloodline is traced through males").} If that heir is her son, she will likely remain in her home. If the heir is another male relative, she may well be evicted from the property, particularly if she has no children of her own.\footnote{Bennett observes that the widow's right to maintenance depends on her willingness to remain on the homestead and that the successor has no right to eject her. \textit{See id.} at 347-48. He concedes, however, that "[c]ompliance with support obligations depends, in the first instance, on harmonious relationships." \textit{Id.} at 349. The vulnerability of the widow was confirmed by our interviews. \textit{See, e.g., Interview with Mbolombo community members, in Eastern Cape, S. Afr. (May 25, 2006) (noting that a}}

\footnote{80. See, e.g., Interview with R.B. Mqeke, Professor, Rhodes University, in Grahamstown, S. Afr. (May 23, 2006) (stating that the government has failed "to explain the changes that have taken place. Nothing has been done. People live as if there were no Bhe. People don't know about it.") (notes on file with author).}

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beyond the opinion itself to consider the conditions on the ground suggests that very little power has been redistributed as a result of this legal victory.

I do not mean to suggest that the Constitutional Court’s decision does not matter; it does. Surely South African women living under customary law are better off than they would have been if the Court had taken the Indian Supreme Court’s approach and exempted such laws from the Constitution’s guarantee of gender equality. But they are not substantially and materially better off as a result. For that to happen, women must not only have a legal right to own and inherit property, but also a means of obtaining and controlling the property. For many women in the developing world, this means not having the primary (or often sole) responsibility for feeding their children every day. Women cannot expand their economic power if they cannot think beyond the next meal for their families. For women who have acquired such resources, the law can help them keep their resources and pass them on to their daughters. It cannot change their economic status in the first place.

In short, law matters, but perhaps not as much as MacKinnon suggests. Legal reform is a necessary but far from sufficient factor in the progress toward gender equality on a global level. For lawyers and law professors to assume otherwise (which too many of us do) is to exaggerate our own significance in the larger struggle.

MacKinnon’s faith in the liberatory potential of law and her resulting embrace of an ambitious law reform agenda is perhaps surprising given her longstanding critique of law as an instrument of state power and of the state as thoroughly masculine.84 In some of her earliest work, MacKinnon argues that the state is fully complicit in the construction of gender hierarchy: “The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender, through its legitimizing norms, relation to society, and substantive policies.”85 She goes on to show how the state accomplishes this, in part, through law, embracing a false norm of equality that reinforces and obscures male dominance. Thus, for MacKinnon, borrowing from Marx, the liberal state and its regulation through law is a ruse of power disguised as gender neutrality—most oppressive when it is most neutral.86

Are Women Human? extends this analysis to the international sphere, asking: “If the state has a gender (as well as usually a sex), so that the state through its distinctive instrument, law, sees and treats women the way men in society see and treat women, does international law challenge this, or does it

84. See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, supra note 19; Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 SIGNS 635 (1983) [hereinafter MacKinnon, SIGNS II].
85. MacKinnon, SIGNS II, supra note 84, at 644.
86. See MacKinnon, SIGNS II, supra note 84 (making this point more explicitly here than in later work).
reproduce it at a yet higher level?"87 Her answer, for the most part, is that the international legal order does reproduce gender hierarchy, largely through an embrace of states as the relevant units of power and obligation.88 As she explains:

[T]his statist structure of international human rights . . . means that no state has an incentive to break ranks with states as such by moving to set a human rights standard for women's status and treatment that no state yet meets within itself or (seems to) want to be held to internationally.89

With this diagnosis of the function of law in the liberal state and the state-centered international system, MacKinnon might be left with little to do, concluding that trying to combat inequality through law is misguided and doomed to failure. This has not been her response. Instead, shifting from critic to reformer, she has attempted to fashion a feminist law reform agenda that seeks to disrupt the masculinity of law (its supposed neutrality) and make it responsive to gender inequality, as Wendy Brown has observed, by "installing within the law the capacity to recognize stratifying social power.'90 In other words, MacKinnon does not simply reject the liberal promise of equality as obfuscating the material conditions of subordination. Instead, she argues that in order for that promise to be realized, the law must not only take into account the substantive conditions of women's subordination, but also help to alter those conditions.

The logic of the argument is seductive: Liberalism ignores women's subordination by emphasizing the danger of state power and protecting, in the name of freedom, the very site of women's subordination. MacKinnon's response is to invoke state power to disrupt and reallocate private power through law and, if necessary, through force. The problem, though, is that liberals are not wrong about what we should fear about state power: It is difficult to control, subject to abuse, and profoundly threatening to individual freedom. In short, if liberals err by ignoring the dangers of private power, MacKinnon errs by ignoring the dangers of public power.

MacKinnon herself is evidently a bit uncomfortable with invoking state power in this way, at one point characterizing the state as "increasingly irrelevant to women."91 Indeed, one of the virtues she perceives in international human rights law is that it seeks to hold states accountable to individuals, thus shifting power from the masculine state to individuals, some of whom are women.92 One way to do this is through the time-honored naming and shaming

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87. MACKINNON, ARE WOMEN HUMAN?, supra note 1, at 4.
88. See id. at 4-7.
89. Id. at 39.
91. See MACKINNON, ARE WOMEN HUMAN?, supra note 1, at 13.
92. See id. at 1-2.
techniques of NGOs. Women can work together across national boundaries in these non-state, woman-controlled entities to formulate policy and assert their rights. And, as MacKinnon rightly observes, women have made significant progress in pushing women’s rights higher (if not to the top) of the international human rights agenda, at least on the rhetorical level.

MacKinnon characterizes this process as “supplementing or even at times supplanting the state as international law’s historically nearly exclusive unit.” Yet, ultimately, the effectiveness of this strategy depends upon the willingness of states to insist upon compliance with international law, something that has not been forthcoming. This book provides ample evidence of both the embrace by states and international bodies of a norm of gender equality, and of the wholesale flouting of that norm. Given this reality, MacKinnon must accept that, no matter how good the legal definition of equality might be, no matter how fully the Aristotelian concept of equality is repudiated in favor of substantive equality, the unequal conditions under which women live will not change without the exercise of state power, something that women do not fully control.

Caught between needing and distrusting the state, MacKinnon attempts to hedge by advocating civil remedies rather than criminal ones. She argues, for example, that civil remedies for sexual violence could “put more power in the hands of women both to confront the state, where necessary, including through international and national forums, and to directly confront men in society who harm them.” But to regard such remedies as somehow non-state, “private,” or under women’s control, is to buy into the public/private distinction feminists have criticized for so long. Legal norms permitting a civil action and backed by judicial power are every bit as regulatory as criminal sanctions, and ultimately, equally dependent on the state for their enforcement.

So, what is at stake in this expansion of state power in the name of women’s equality? I have already expressed doubts about the efficacy of law in

93. See id. at 2 (“And since states too often do not represent women, whether by acts or failures to act within the sphere of their power and authority, women facing unresponsive official mechanisms, doctrines, and authorities have reached, often through their own NGOs, to hold the law in their own hands, seeking perpetrator accountability directly to them through civil legal means.”).
94. Id. at 12.
95. Id. at 2.
96. Id. at 10 (“Many, even most, countries recognize sex equality as a value in their legal systems, widely guaranteeing legal equality based on sex in constitutions and other foundational statements—this despite the fact that sex discriminatory laws continue in force around the world in settings of pervasive social inequality of the sexes in reality.”).
97. See, e.g., id. at 118 (discussing civil remedies for pornography).
98. Id. at 33.
99. Thus, for example, MacKinnon’s groundbreaking representation of female Croat and Muslim citizens of Bosnia-Herzegovina in federal court in the United States, which resulted in a $745 million verdict for the plaintiffs, is an important symbol, but utterly unenforceable without the exercise of state power. See Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); MACKINNON, ARE WOMEN HUMAN?, supra note 1, at 208 (reporting amount of the judgment).
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bringing about meaningful changes in the material conditions under which women live. Law has simply not proven itself a very effective tool for the redistribution of power and resources. At the same time, law inevitably serves as a tool for the exercise of power, sometimes in ways that are unintended and unpredictable. Thus, as women, indeed feminists, increasingly exercise power on the national and international levels, we must consider the conditions under which the power of law can be deployed legitimately. Who are the dissenters and how are their lives affected? How can specific legal reforms be structured so as to minimize the possibilities for abuse? How do the legal changes suggested here alter the risks of such abuse? Who becomes more vulnerable? Who less? In short, feminists should consider not simply whether law as an instrument of state power can be effective in empowering women, but also how that power can be wielded ethically.

MacKinnon devotes very little attention to these questions here. Often she simplifies the situation by downplaying the costs, especially those borne by women. Consider, for example, MacKinnon’s treatment of sex work. Much disagreement exists among women, including among feminists, as to whether sex work is inherently subordinating. Although many feminists support MacKinnon’s position, others have argued that sex work ought not to be differentiated from other types of work that may be equally dangerous and demeaning. On this view, to single out sex work simultaneously reinforces a conservative anti-sex morality and draws attention away from a wide range of workers in need of protection.

100. In her critique of what she calls “governance feminism,” Janet Halley observes that “punishing conduct as a crime does not ‘stop’ or ‘end’ it, as governance feminists sometimes seem to imagine. Rather it enables a wide range of specific institutional actors to do a wide range of things.” Janet Halley et al., From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism, 29 HARV. J. L. & GENDER 335, 337 (2006).

101. Compare Amber Cooke, Sex Trade Workers and Feminists: Myths and Illusions, in GOOD GIRLS/BAD GIRLS: FEMINISTS AND SEX TRADE WORKERS FACE TO FACE 202 (Laurie Bell ed., 1987) [hereinafter GOOD GIRLS/BAD GIRLS] (“Some [women] feel they are victims. Some are victims. And then there are others who have made that choice and celebrate that choice”); and Jody Freeman, The Feminist Debate over Prostitution Reform: Prostitutes’ Rights Groups, Radical Feminists, and the (Im)possibility of Consent, 5 BERKELEY WOMEN’S L.J. 75 (1989-90) (discussing conditions under which women might exert more control over the conditions of sex work), with Dorchen Leidholdt, Prostitution: A Violation of Women’s Human Rights, 1 CARDOZO WOMEN’S L.J. 133 (1993) (rejecting the idea that a woman’s choice to engage in sex work could be a free one); and Beverley Balos, The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation, 27 HARV. WOMEN’S L.J. 137 (2004) (questioning whether consent constitutes a meaningful boundary for legal regulation of sex work).


For her part, MacKinnon has very little patience for these objections and dismisses them here with characteristic sarcasm. Somewhat more subtly, she attempts to avoid them altogether by focusing on sexual experiences that are incontrovertibly violent while eliding more problematic distinctions, for example between trafficking and sex work. Thus, in her chapter "Pornography as Trafficking," she argues that:

[To distinguish trafficking from prostitution, as if trafficking by definition is forced and prostitution by definition is free, is to obscure that both use money to compel sexual use, that the whole point of sex trafficking is to deliver women and children into prostitution, and that not crossing a jurisdictional line does not make the unequal equal or the forced free.]

By noting that "[w]omen can be enslaved without ever leaving home," she means to indict the practice of prostitution, whether transnational or not.

Of course, that women can be enslaved does not mean that they are enslaved or regard themselves as such. For many feminists, though perhaps not for MacKinnon, this distinction matters. Some feminists working on behalf of sex workers, and some sex workers themselves, view the restriction of women's voluntary participation in this work as limiting women's freedom. MacKinnon dismisses this either as impossible (what woman with choices would voluntarily engage in sex work?), or perhaps affecting so few women as to be worth the cost. Whether MacKinnon thinks that women who defend sex work as a viable economic choice are deluded (suffering from false consciousness, perhaps) or simply have so few choices that this one need not be respected is unclear. If the former, MacKinnon does not explain how she identifies the falsely conscious (or worse, collaborating) woman. If the latter,

104. See MacKinnon, Are Women Human?, supra note 1, at 249 ("[t]hrowing money at victims of sexual abuse does not make it a job").
105. Id. at 250.
106. Id.
108. See MacKinnon, Are Women Human?, supra note 1, at 115 ("Most women in pornography, if they are not directly abducted, are poor, desperate, addicted to drugs, sexually abused as children, or are children. If spreading your legs for a camera is a woman's autonomous choice, as the myth goes, wouldn't you think that the women with the most choices rather than the fewest, with the most preconditions for autonomy rather than the least, would be the women doing it?"). She also expressly rejects any distinction between children and adult women: "To purport to address child sexual exploitation while doing nothing effective for adult women is to suppose that an age line is enforceable on, or respected by, an industry that is organized to exploit the powerless, and to accept the false notion that women become equal at age eighteen." Id. at 250.
109. One reason that this distinction is unclear is that MacKinnon does not directly associate this pro-sex work position with women. She attacks it as an abstract argument, but not as the personal experience of individual women. She therefore never has to say directly that any particular woman is wrong about her account of her own experiences. In contrast, she does quote extensively from women
it is not obvious why it is better for women with few choices to have their preferred choice eliminated in favor of even more dangerous, difficult, and poorly-paid work. What is clear is that, for MacKinnon, no form of work could be more degrading or exploitative than sex work. Yet, if another woman makes a different, albeit constrained, choice, what is the justification for overriding it?

I do not mean to suggest that the law must invariably accept an individual’s own assessment of what might be best for her. But given our long history of protective labor legislation reinforcing the economic marginalization of women, it is worth asking when women’s choices are sufficiently free that they should be respected by the law. If for MacKinnon the answer in the case of sex work is “never,” she must justify (or at least acknowledge) the coercive power that judgment brings to bear on those women who choose differently. Maybe the benefits to all women are worth the costs, but MacKinnon seems to count costs only on one side.

MacKinnon encounters the problem of conflicts among women again in her chapter on personal laws. Here, she addresses the question more directly. Indeed, she comes close to acknowledging that some women might prefer to conform their lives to their own understandings of religious obligation, even if inegalitarian, and that those preferences might have to be respected. Embracing the liberal proxy for freedom, individual choice, MacKinnon’s solution is to provide women with the opportunity to elect either the

who have been abused in the course of sex work, including in the production of pornography. See, e.g., id. at 18-19 (quoting Linda Marchiano’s account of her abuse during the filming of Deep Throat).

10. See, e.g., Catharine A. MacKinnon, Prostitution and Civil Rights, 1 MICH. J. GENDER & L. 13, 13 (1993) (arguing that “[w]omen in prostitution are denied every imaginable civil right... such that it makes sense to understand prostitution as consisting in the denial of women’s humanity, no matter how humanity is defined”).

11. To dismiss the positive accounts of sex work is simply to ignore women’s experiences to the extent that they conflict with one’s political ends. This seems especially problematic for MacKinnon given that her methodological approach is premised on the development of legal norms and policy based on women’s experiences. See MacKinnon, Are Women Human?, supra note 1, at 46. As members of one Canadian organization of sex workers explained:

[W]hen you have a prostitute that says, “Well, I don’t agree with the way you’re interpreting my life, I don’t feel oppressed or I don’t feel exploited in the way that you’re saying,” they say things like, “She’s too blinded by her own oppression to see her experience for what it really is...”. [T]hey wouldn’t dare be so condescending or patronizing with any other group of women.

Realistic Feminists: An Interview with Valerie Scott, Peggy Miller, and Ryan Hatchkiss of the Canadian Organization for the Rights of Prostitutes, in GOOD GIRLS/BAD GIRLS, supra note 101, at 213.


13. MacKinnon does not seem to think that those choices are entitled to respect as an ethical matter. Rather, she characterizes the outright invalidation of all sex-discriminatory aspects of personal laws as “preferable on principle but apparently politically inexpedient,” suggesting that giving women the choice of applicable law is an unfortunate but necessary political compromise, rather than a balancing of competing values. MacKinnon, Are Women Human?, supra note 1, at 135.
community norm embodied in the personal laws or a legal standard reflecting substantive gender equality.\textsuperscript{114}

MacKinnon also acknowledges here that women’s choices will be constrained by social circumstances and that determining when those choices are sufficiently free to be respected legally poses a difficult problem.\textsuperscript{115} Although elsewhere in this volume she is quite critical of feminist attempts to theorize the concept of agency,\textsuperscript{116} MacKinnon is confronted here with precisely that issue—the exercise of choice under conditions of inequality.\textsuperscript{117} Yet, instead of grappling directly with the difficult problem of whether the law should respect or override women’s choices, MacKinnon simply avoids it by treating as remote the possibility that a woman would elect to be constrained by personal laws rather than be governed by the uniform code she proposes.\textsuperscript{118}

By focusing on her treatment of dissenting women, these examples illustrate MacKinnon’s tendency to disregard or minimize the coercive consequences of her law reform agenda. This tendency becomes even more problematic when she invokes the deployment of state power through military force, as opposed to the force of law, a point illustrated most dramatically by the final chapter of the book, “Women’s September 11th.” On one level, this chapter can be read simply as an effort to point out once again the hypocrisy of the international community in responding forcefully and creatively to the September 11th attacks when comparable numbers of women are victims of systematic violence every day. “The fact that Al Qaeda is not organized into a nation with armies and territory did not stop this international response before it started,” MacKinnon notes.\textsuperscript{119} Why is the international community incapable of responding to the assault on women in a similarly creative way?

Nevertheless, despite her acknowledgement that the “war on terror” is perhaps “not a model for emulation,”\textsuperscript{120} MacKinnon does seem to call for a more directly parallel response. For example, she quotes President Bush’s linking of Al Qaeda to particular states: “We will make no distinction between the terrorists who committed these acts, and those who harbor them.”\textsuperscript{121} She then notes that:

\textsuperscript{114}  Id.
\textsuperscript{115}  Id. at 137.
\textsuperscript{116}  See id. at 55 (dismissing this analysis).
\textsuperscript{117}  Professor Kathryn Abrams has done the most sustained and important work on women’s exercise of self-direction or agency under conditions of constraint. See, e.g., Kathryn Abrams, From Autonomy to Agency: Feminist Perspectives on Self-Direction, 40 WM. & MARY L. REV. 805 (1999); Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, 95 COLUM. L. REV. 304, 309 (1995) (noting that dominance feminists characterize “women’s sexuality primarily as a construct of oppressive forces”).
\textsuperscript{118}  See MACKINNON, ARE WOMEN HUMAN?, supra note 1, at 137.
\textsuperscript{119}  Id. at 268.
\textsuperscript{120}  Id. at 260.
\textsuperscript{121}  Id. at 268.
whether violent men whose targets are women, who operate with essential impunity worldwide, will be seen as “harbored” by the states that effectively permit, hence condone and support, their acts, or whether male violence against women will ever be regarded as urgent enough to ignore—or preferably restructure—international law to address it, remains to be seen.\textsuperscript{122}

Violence against women, she observes “has yet to create what is perceived as a humanitarian emergency or to justify military intervention.”\textsuperscript{123} And more ominously, “It is \textit{so far} never suggested that brutal systematic violence against women, even with official impunity or participation, could legally justify resort to force unless it occurs as part of a conflagration in which men are also attacking other men.”\textsuperscript{124}

MacKinnon does make that suggestion here. Although she carefully notes that “[t]his is not to argue that the war on terror is the right model for opposing violence against women,”\textsuperscript{125} she does suggest the possibility of an international convention on violence against women that, “when breached, could ultimately trigger corrective intervention by transnational forces.”\textsuperscript{126} She acknowledges that “real difficulties will have to be faced,” but does not elaborate here as to what those difficulties might be or how we should go about facing them.\textsuperscript{127}

And yet as I write this, devastation in Iraq, ongoing conflict in Afghanistan, and the controversial aggrandizement of presidential power under this “war President” appear to be the principal legacies of the war on terror. The hoped-for increase in national security seems not to have materialized. Indeed, in the view of many, the threat of terror has increased. Under these circumstances, I cannot help thinking that the expansion of legal grounds for armed intervention may not be the right direction for feminism’s international human rights agenda. Even from the standpoint of women alone, the use of military force almost always makes things worse, at least in the short term. I do not deny that it is also sometimes necessary. But, for feminists, the appropriate lesson of the “war on terror” is not the one MacKinnon would draw, that is, that if the international community can justify force in Iraq and Afghanistan, so should it in the analogous circumstances for women. Rather, the lesson may be that the use of force even in the name of ending terror against civilians can—indeed will—be abused. Knowing this, perhaps as women, as feminists, our approach can be different.

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\begin{itemize}
\item \textsuperscript{122} Id. at 269.
\item \textsuperscript{123} Id. at 271.
\item \textsuperscript{124} Id. at 273 (emphasis added).
\item \textsuperscript{125} Id. at 275.
\item \textsuperscript{126} Id. at 276.
\item \textsuperscript{127} Id. at 276-77.
\end{itemize}
In the end, the question of women’s humanity is not just about whether we have power, but how we use it. How might women seize power directly or use law to force states to deploy power on our behalf? What does it mean for women to do this? One of the insights that feminist legal theorists borrowed from postmodernism (about which MacKinnon is so scathing here) is that there is no innocent exercise of power, and legal norms cannot make it so. The point is not that ethical judgments are impossible or meaningless, but that, once those judgments are made and enforced through law or military intervention against non-consenting people, the powerful must take responsibility for the resulting violence. If the powerful includes women, feminists must think carefully about this responsibility before heeding MacKinnon’s provocative call. After all, the taking of responsibility by the powerful is ideally what international human rights law, and perhaps even feminism, is about.

128. See id. at 44-63. I should acknowledge that I am one of many feminists friendly to postmodernism that MacKinnon criticizes in the chapter cited. I have not pursued that conversation here, however, as I believe that it is related only tangentially to the central argument of her book and of this Review.

129. Wendy Brown makes the point this way:
Surrendering epistemological foundations means giving up the ground of specifically moral claims against domination—especially the avenging of strength through moral critique of it—and moving instead into the domain of the sheerly political: “wars of position” and amoral contests about the just and the good in which truth is always grasped as coterminous with power, as always already power, as the voice of power.

BROWN, supra note 90, at 45. See also Jane Flax, The End of Innocence, in FEMINISTS THEORIZE THE POLITICAL 458 (Judith Butler & Joan W. Scott eds. 1992) (urging feminists to “take responsibility for our desire in such cases: what we really want is power in the world, not an innocent truth”).
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Legal Tenderness:
*Feminist Perspectives on Contract Law*

Martha M. Ertman†

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I. INTRODUCTION

At first blush, feminism and contract law seem to occupy different realms. Feminism seeks to distinguish women from doormats, while contract law provides theory and doctrine for state enforcement of certain kinds of promises. But the two realms overlap more than many people realize. In particular, both are fundamentally concerned with consent and agency. Having the capacity to contract—to freely order one’s affairs—has been a benchmark for distinguishing full citizens from everyone else. Since much of feminism is about women becoming citizens through contract and other means, some feminists embrace contractarianism as a mechanism and reflection of empowerment. Other feminists are skeptical about whether most women

1. Describing the traditional goals of feminism in a single sentence, let alone a clause, is difficult. Feminists disagree on many issues, including whether gender is innate or socially constructed and whether law and society should treat men and women the same or account for women’s particular life experiences, such as primary responsibility for child care. A century ago Rebecca West coined the doormat comparison to provide an overarching, if arch, description of feminism: “I myself have never been able to find out precisely what Feminism is: I only know that people call me a Feminist whenever I express sentiments that differentiate me from a doormat or a prostitute.” Rebecca West, Mr. Chesterton in Hysteric: A Study in Prejudice, THE CLARION, NOV. 14, 1913, reprinted in YOUNG REBECCA: WRITINGS OF REBECCA WEST 5 (Jane Marcus ed., 1989).


possess the bargaining power essential to making a deal work for all concerned. Linda Mulcahy and Sally Wheeler’s book *Feminist Perspectives on Contract Law* enters this discussion by tracking some ways that contract law has played a role in women’s struggle for citizenship, and offers a point of departure to discuss cases commonly studied in law school contracts classes.

*Feminist Perspectives on Contract Law* makes its contribution to this endeavor with a largely British set of essays. The essays range widely, including grand theory, case crunching, and legal archaeology. Of particular interest are the British spousal-guarantee cases, which shed light on American cases such as *Vokes v. Arthur Murray, Inc.*, *In re Baby M*, and *Williams v. Walker-Thomas Furniture Co.* Also of interest are chapters demonstrating that gender lurks where it is least expected. Peter Goodrich’s chapter explains how the postal rule established in *Adams v. Lindsell*, a seemingly gender-neutral rule dictating that acceptance is effective on the offeree’s dispatch, has gendered roots in that it extends the rule of marital contracting to commercial contracts. In this light, marital contracts become the template instead of the exception in contract law, a considerable departure from conventional wisdom. Other chapters similarly reveal gender cross-currents running

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5. *FEMINIST PERSPECTIVES ON CONTRACT LAW* (Linda Mulcahy & Sally Wheeler eds., 2005) [hereinafter FEMINIST PERSPECTIVES].


7. 212 So. 2d 906, 907 (Fla. Dist. Ct. App. 1968) (holding that a “widow of 51 years...[who] was incessantly subjected to over-reaching blandishment and cajolery” was “induced” to pay in excess of $31,000 for dance lessons could bring a claim for rescission of the contracts).


12. My students generally find heart balm actions ridiculous, heartily agreeing with states’ repeal of actions such as breach of promise to marry in the early twentieth century.
through contexts that seem gender-neutral, such as Bela Chatterjee’s contribution, which argues that cyber-contracting provides opportunities for rethinking contract doctrine, and Linda Mulcahy’s chapter championing alternative dispute resolution as a means for importing feminist methodologies to dispute resolution.

The British spousal-guarantee cases appear again and again in Feminist Perspectives, notably Barclays Bank plc v. O’Brien, a recent statement of the “special tenderness” doctrine toward married women and other cohabitants in noncommercial guarantee cases, and Royal Bank of Scotland v. Etridge (No. 2), which specifies methods for banks to rebut the presumption of undue influence in these cases. New to many American readers, these cases involve wives asserting undue influence, mistake, or misrepresentation to avoid their guarantees of their husbands’ business debts with the goal of preventing the bank from foreclosing on the family home. This braiding of family and commerce provides a new context for common contracts class discussions such as the surrogacy cases and the classic case defining consideration, Hamer v. Sidway.

The spousal-guarantee cases are particularly suited for classroom discussion because classical contract theory cannot quite resolve the issues they raise. If parties are autonomous individuals engaged in discrete transactions, why not enforce a surrogacy contract against Mary Beth Whitehead? Why not hold an uncle to his promise to give his ne’er-do-well nephew $5000 for refraining from the vices of smoke, drink, and gambling? The holdings in these cases turn on the fact that they arise out of complex social relations of love, duty, and trust. They thus raise questions about the boundaries between autonomy and altruism, and consequently, between markets and families.

13. Bela Bonita Chatterjee, Different Space, Same Place? Feminist Perspectives on Contracts in Cyberspace, in FEMINIST PERSPECTIVES, supra note 5, at 109. Chatterjee contends that cyberspace, in addition to being economic, is a political space in which power relations are renegotiated, and further contends that a postmodern perspective on the fluidity offered by cyberspace enables the refiguring of gender and other power relationships. Id. at 110-11. She concludes that in this context "law could move from being a mere framework for commerce to a facilitator of justice." Id. at 112.


18. 27 N.E. 256 (N.Y. 1891).

19. See Baby M, 525 A.2d 1128.


Enter relational contract theory. Relational contract theory critiques classical contract law for its failure to account for the lack of real agreement in contracts where terms appear in pre-printed forms and bargaining power is sufficiently unbalanced so that only one party has the power to determine those terms. In place of the assumptions of autonomy and choice that inform classical contract theory, relational contract theory offers norms of cooperation and reciprocity to guide contract theory and practice.

As an ongoing venture, spousal contracts are as relational as they get, which may explain the prominence of both relational contract theory and spousal-guarantee cases in *Feminist Perspectives*. In Mulcahy's introduction she suggests that relational contract theory can import an "ethic of care" they deem "feminine" to contract law through norms of role integrity, flexibility, and reciprocity. The close relationship of the cultural feminist goals of cooperation, trust, and altruism in relational contract theory is widely recognized. However, the introductory chapter's insistent contrast of "feminine values" with "masculine abstracted relations," even with caveats about social construction, seems a bit two-dimensional in light of anti-essentialist feminist scholarship of recent years.

This talk of gender may sound foreign to most American contracts scholars and students, since contract doctrine tends to employ gender-neutral analysis, rarely acknowledging that women might have special interests in contract law. Judicial recognition of women's special interests might relegate women to second class citizenship, which would be inconsistent with courts' liberal commitment to parties' individuality. This respect for individuality and choice, which contracts theorists call the will theory of contract, forms the foundation

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25. Mulcahy, supra note 23, at 1, 3.


27. Conventional wisdom justifies the legal enforcement of certain promises in contract law on the grounds that parties voluntarily consented to the terms of the agreement. E. ALLAN FARNsworth, *Contracts* 20-21 (2d ed. 1990). A classic example of this approach is CHARLES FRIED, *Contract as Promise* (1981). Alternative justifications for legal enforcement of some agreements include economic
of contract law. It defines courts’ job as interpreting and enforcing contracts, but not revising parties’ agreements.\textsuperscript{28} In contrast, English law expresses a “special tenderness” toward married women in a line of cases that Gillian Hadfield has dubbed “spousal guarantee cases.” These cases, discussed in several chapters of \textit{Feminist Perspectives on Contract Law,}\textsuperscript{29} involve wives securing their husbands’ business debts with the family home, often without knowing the amount of the debt, that the loan jeopardizes the family home, or even that they are signing loan documents.\textsuperscript{30} English courts, expressing a “special tenderness”\textsuperscript{31} to married women as well as those “in a like position,”\textsuperscript{32} presume undue influence in cases where non-commercial sureties guarantee debts, and allow lenders to rebut this presumption by showing that the wives/sureties fully understood and freely consented to guaranteeing their husbands’ business debts.\textsuperscript{33}

Despite American law’s formal commitment to neutrality, many American contracts teachers are familiar with the way that gender sometimes makes a difference in contracts cases, albeit less explicitly than in the English spousal-guarantee cases. American courts and students do not entirely ignore the fact that Mrs. Vokes was a lonely widow, that Mary Beth Whitehead’s surrogacy contract concerned a service only women can provide, and that Ora Lee Williams was a poor, African-American mother supporting seven children on
$218 a month. Thus the question arises: To what extent do and should wives, women, and feminine persons generally receive "tender" treatment by contract law?

This Review tackles this question by using the English spousal-guarantee cases' assertion of legal "tenderness" to women as a point of departure, exploring how three possible meanings of "tender" might influence feminist understandings of contract law:

(1) legal tender, i.e., women's access to cash, or lack thereof;

(2) solicitude toward a particularly vulnerable person, such as a child (as in the tender years doctrine); and

(3) splitting the word in two to voice an imperative "tend her," which raises questions of individual responsibility and liability, asking whether, and when, legal doctrine should and does treat women as autonomous individuals. Some feminists might blanch at the prospect of legal "tenderness" specially directed at women. Against this grain, I contend here that a feminist view of contract law and theory would do well to attend to these three enumerated senses of "tender."

First, a feminist view should maximize women's access to capital, and thus to choices in their lives. Second, it should recognize the systemic vulnerabilities of certain classes of people, in particular dependents and those who care for them. Third, it should strive to recognize the integrity of individual women, resisting the powerful cultural tendency to subsume women into relationships (daughter, mother, wife) and deprive them of that crucial element of citizenship, individual choice. Taken together, these three concerns account for cultural feminists' attention to the relational roles played by women, liberal feminists' concerns with autonomy, and material feminists' concerns about control over the means of production. The fact that the spousal-guarantee cases raise all three of these issues may explain why they get more attention than other topics in Feminist Perspectives on Contract Law.


35. A fourth meaning of "tender" may spring to contracts scholars' minds. "Tender" also describes one party to a contract offering or undertaking to perform. Sellers tender goods to buyers, and buyers tender payment for those goods. This sense of "tender" as "offer" coheres with the spirit of both this essay and Feminist Perspectives on Contract Law in the sense of making feminism available to contract theory and doctrine and vice versa.


38. This combination of material concerns, protection of vulnerability, and assertion of individuality is at least as canonical as Adams v. Lindsell, (1818) 106 Eng. Rep. 250 (K.B.). Virginia Woolf, herself a British feminist, famously asserted that for a woman to write, she needed money and a room of her own. VIRGINIA WOOLF, A ROOM OF ONE'S OWN 2 (Harcourt Brace & Co. 1991) (1929).
II. A BRIEF SURVEY OF THE CHECKERED PAST OF GENDER AND RACE IN CONTRACT LAW

Historically, the legal doctrine of coverture limited married women’s ability to enter or enforce most contracts. Similarly, by not allowing them to marry, contract doctrine deprived both male and female slaves of the capacity to contract, placing them in a category with what were then called idiots, lunatics, and infants. (While terminology has changed, mental disease or defect and youth still deprive people of contractual capacity, for the most part.)  

Legislation such as the married women’s property acts and the Civil Rights Act of 1866 extended a measure of citizenship to white women as well as people of color.  

The latter legislation explicitly linked contract and the freedmen’s citizenship by providing that “all persons . . . shall have the same right . . . to make and enforce contracts . . . as enjoyed by white citizens . . . .”  

These doctrinal changes resonated with larger changes in nineteenth-century law, culture, and politics.

The seismic changes that defined the nineteenth century affected contract doctrine and contractual aspects of political theory in ways that continue to this day. Slavery was contested and abolished, marriage was redefined from a practical institution based on economics and community to a romantic institution focused on love and companionship, industrialization changed the ways Americans lived, and the modern welfare state emerged. Contract played a key role in each of these changes: abolition replaced slavery with wage labor, contract provided a metaphor signaling individuality and choice in marriage, contract and commercial law evolved to facilitate industry, and social contract theory provided a rationale for the expansive growth of the


41. 42 U.S.C. § 1981 (2000) was passed initially as the Civil Rights Act of 1866, then re-enacted on firmer constitutional footing after the passage of the Fourteenth Amendment as the Civil Rights Act of 1870. For a fuller discussion of the history of § 1981 and citizenship for the freedmen, see Danielle Tarantolo, Note, From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor, 116 YALE L.J. 170, 185-87 (2006). Discrimination resting in contract continues. To remedy it, Congress passed measures such as the 1974 Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691(f) (2000), which prohibits discrimination in credit transactions on the basis of race, color, religion, national origin, sex or marital status, or age, provided the applicant has the capacity to contract. Moreover, employment discrimination claims are often grounded in contract, making § 1981 relevant in those cases. Tarantolo, supra.


In 1864, Sir Henry Maine captured the importance of contract for these changes, both doctrinally and in terms of political theory, in his now-famous dictum: "[T]he movement of the progressive societies has hitherto been a movement from Status to Contract."

One strand of political theory has questioned the extent to which women and other marginalized people have truly been parties to this transition from Status to Contract. Some feminists, for example, contend that women and Blacks were left out of the social contract that forms the basis of liberal political philosophy. More concretely, empirical research has demonstrated that women and people of color get less favorable terms in particular contracts, such as car sales, than white men. If parties do not have equal bargaining power, contractual consent may not be genuine or complete. Thus, contract doctrine and theory must account for differences in bargaining power. Although legal doctrine no longer deprives married women and African Americans of contractual capacity, legal doctrine drags its disinherited self behind it by incorporating elements of the old rules in canonical cases. Recognizing this continued relevance of gender and race in contract doctrine, albeit in altered form, provides new perspectives on classic contracts cases.

Turning to the present day, it is important to note that contract law already incorporates much of what editors Mulcahy and Wheeler champion as feminist approaches. Black-letter doctrine, a mix of law and equity, imports concerns of justice to complement aims of certainty in basic rules such as the statute of frauds, the parol evidence rule, and contract modification provisions. The Uniform Commercial Code (U.C.C.) allows considerable flexibility in defining what constitutes an agreement—the bargain-in-fact between the parties, as indicated by their words and conduct, course of performance, course of dealing, and usage of trade. Moreover, the U.C.C.'s version of the statute of frauds provides safe harbors to prevent a party who actually entered into an agreement from evading its legal enforceability on the grounds that she did not sign a

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47. See, e.g., Carol Pateman, The Sexual Contract (1988); Williams, supra note 2, at 15-16.

48. See, e.g., Ian Ayres, Pervasive Prejudice?: Unconventional Evidence of Race and Gender Discrimination (2001); Williams, supra note 2, at 44-51.


50. U.C.C. §§ 1-201(3), 1-205, 2-208 (2003). Course of dealing is conduct between the contracting parties prior to entering the contract in question, while course of performance is repeated conduct between parties under contract. Trade usage, in contrast, is practice in the trade or place that parties justifiably expect will be observed. Id. §§ 1-205, 2-208 (2003). Defining a contract to include relationship-based evidence of what the parties have done, as opposed to limiting the terms to what they said they would do in a writing, recognizes the importance of relationships, cooperation, and changed conditions in contract law.
Similarly, the U.C.C. Article 2 parol evidence rule allows even writings that the parties intend to express their final agreement to be “explained or supplemented” by course of dealing, course of performance, and usage of trade, and also by consistent additional terms unless the parties also intended the writing to be the “complete and exclusive” expression of their agreement. Finally, Article 2’s damage provisions create incentives to cooperate by granting sellers a right to cure nonconforming tender in many circumstances, and by limiting consequential damages to those that cannot be mitigated by cover or otherwise. In short, contract law already endorses a number of principles that Mulcahy and Wheeler term feminist.

While these provisions demonstrate that a number of contract doctrines already recognize interests Mulcahy and Wheeler dub feminist, that insight leaves a larger question unanswered. We need an understanding of where hard line contractarian analysis of traditional legal economics becomes subject to the law of diminishing returns. Claims to individuality and cost-benefit analysis are helpful, as two generations of legal economic scholarship and case law have demonstrated. But having a hammer in your hand does not mean that everything in the world is a nail. Identifying the limits of the classical contract theory assumptions that form the foundation of legal economic analysis serves everyone, not just women, and not just feminists. Thinking about “tenderness” in the three senses of money, solicitude, and independence can help students of both feminism and contracts rethink their position on contracts, and thus on legal economic liberal commitments to autonomy, choice, and wealth maximization.

III. THE THREE SENSES OF “TENDER”

Having made the case for linking contract, citizenship, and feminism, we can chart how Feminist Perspectives on Contract Law engages the three understandings of “tenderness”: money, solicitude, and individuality. The following discussion explores ways in which the three senses of tenderness arise in relation to the spousal-guarantee cases and also notes instances where tenderness comes up in other contexts in the book, such as chapters about the postal rule of Adams v. Lindsell, premarital agreements, and alternative dispute resolution.

51. Id. § 2-201 (2003) (providing for enforceability of agreements even without a writing signed by the person against whom enforcement is sought where a merchant sends a confirming memorandum, goods are specially manufactured, the party resisting enforcement admits to contract formation, or the parties have delivered and/or accepted the goods or payment).
52. Id. § 2-202.
53. Id. § 2-508.
54. Id. § 2-715. A buyer covers, in Article 2, when she obtains substitute goods in the wake of the seller’s breach. Id. § 2-712.
55. See, e.g., POSNER, supra note 27.
resolution. I focus on spousal-guarantee cases since nearly a third (two of seven) of the substantive chapters of the book focus on them.56

A. Legal Tender

It makes sense to start with money, since contracts are usually about money. Courts are better able to award money damages than things like cheerful participation in a family dinner, and the doctrine of consideration distinguishes enforceable (legal) agreements from non-enforceable (extralegal) ones.57 Conventional wisdom accepts the bargain theory of consideration, which justifies legal enforcement on the fact that parties give and get something of value to induce promises or performance.58 In addition to affecting doctrine, money matters on a practical level. Money might not buy happiness, but it can buy things that facilitate happiness, such as therapy, an apartment, three square meals a day, mammograms, chemotherapy, flattering blue jeans, dinner out with a date, CDs, music lessons, and beach vacations.59

Some scholars flag the importance of money to full participation in the polity with the term “economic citizenship,” as distinguished from “political citizenship.” First-wave feminism sought political citizenship for women through reforms such as female suffrage,60 and second-wave feminists similarly fought to reform rape law and secure reproductive freedoms. But feminists in both eras also pursued economic citizenship for women.61 Women’s liberty to pursue a profession, to be free from sex discrimination in compensation and

56. See Auchmuty, supra note 29; Adam Gearey, Women Lie Back Everywhere, supra note 5, at 91. In addition, Belinda Fehlberg and Bruce Smyth mention the spousal-guarantee case Royal Bank of Scotland v. Etridge (No.2) in passing. Belinda Fehlberg & Bruce Smyth, Binding Prenuptial Agreements in Australia: The First Year, in FEMINIST PERSPECTIVES, supra note 5, at 125, 130.

57. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981) (requiring mutual assent and consideration for an agreement to be legally enforceable).

58. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (“To constitute consideration, a performance or a return promise must be bargained for . . . . A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”). Some contracts scholars disagree on precisely what makes certain agreements legally binding, such as the intent to be legally bound, or reliance. See, e.g., GRANT GILMORE, THE DEATH OF CONTRACT 72 (12th prtg. 1982) (1974); Randy Barnett, A Consent Theory of Contract, 86 COLUM. L. REV. 269 (1986).

59. Money of course also buys things that bring misery, such as illegal and addictive drugs, or an expensive education culminating in a lifetime of soul-deadening employment.

60. Other nineteenth-century feminist reforms included raising the age of consent. Jane E. Larson, “Even a Worm Will Turn at Last”: Rape Reform in Late Nineteenth-Century America, 9 YALE J.L. & HUMAN. 1 (1997).

61. In the eighteenth century, only male property holders were entitled to exercise the citizenship right of voting, and married women could not hold property in their own names. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 146 (3d ed. 2005). Although married women’s property acts entitled married women to own property, among other things, American women did not obtain the right to vote until 1920. U.S. CONST. amend. IX. Even now, property ownership continues to convey citizenship rights. Homeowners enjoy more security physically and financially than do renters, and both of these more than residents of single-room-occupancy hotels and homeless people. Michelle Adams, Knowing Your Place: Theorizing Sexual Harassment at Home, 40 ARIZ. L. REV. 17 (1998).
work conditions, and to take out loans are all related to economic citizenship.\textsuperscript{62} Indeed, the feminization of poverty has been a major strand of feminist theory and activism in the last generation.\textsuperscript{63} The fact that financial wherewithal facilitates protection of both intimate and public freedoms that constitute citizenship reveals an overlap between political and economic citizenship.\textsuperscript{64} The right to decide whether to terminate a pregnancy is constrained by restrictions on the use of federal funds to perform abortions.\textsuperscript{65} Moreover, given women’s continued responsibility for most care-giving labor, one can say that the cases protecting women’s power to control when and whether one has children\textsuperscript{66} helped facilitate women’s entrance into the professions in significant numbers starting in the 1970s.\textsuperscript{67}

Like most contracts and many feminist issues, spousal-guarantee cases deal with money. For example, if a bank wants to collect a loan that it extended to cover a husband’s business debts, the bank can foreclose on the family home if the wife signed as surety. The facts of the eight separate cases heard together in \textit{Etridge (No. 2)} illustrate some ways these obligations may arise:

- Mrs. Moore signed a blank mortgage application form at her husband’s urging after he misinformed her of the amount of the loan, and without receiving any legal advice.\textsuperscript{68}
- Mrs. Harris signed documents upon her husband’s request without knowing what she signed “because she trusted him.”\textsuperscript{69}
- Mrs. Coleman, a Hasidic Jew, had been raised “to expect and to accept a position of subservience and obedience to her husband,” so that she was “not merely disinclined to second-guess her husband on matters of business, but appears to have regarded herself as obliged not to do so.”\textsuperscript{70}
- Mrs. Gill signed the document under pressure to act quickly, despite a “heated altercation” with her husband after he asked her to mortgage the family home, believing (along with the solicitor

\begin{enumerate}
\item KATHRYN EDIN & LAURA LEIN, \textit{MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK} (1997); LINDA GORDON, \textit{PITIED BUT NOT ENTITLED} (1994).
\item 42 U.S.C. §§ 1396(a)(5), (a)(17), (a)(21), (b)(1), (b)(7) (1994). These patterns are not new. Long ago, Jacobus ten Broek observed that there are two branches of family law, one for the rich, and another for the poor. See \textit{JACOBUS TEN BROEK, FAMILY LAW AND THE POOR: ESSAYS} (Joel Handler ed., 1971).
\item See, \textit{e.g.}, Eisenstadt v. Baird, 405 U.S. 438 (1976); Roe v. Wade, 410 U.S. 113 (1973).
\item Auchmuty, supra note 29, at 66.
\item \textit{Id.} at 67 (citing Royal Bank of Scotland v. Etridge (No. 2), (2001) 4 All E.R. 524 (H.L.)).
\end{enumerate}
who advised her) that the loan was for £36,000 rather than the actual amount of £100,000, and feeling that she “had no alternative but to sign.”

Because these facts raise serious questions about the genuineness of wives’ consent to the guarantees, English courts presume undue influence or misrepresentation in cases where the surety and debtor are spouses or cohabitants. However, banks are allowed to rebut this presumption by establishing that the surety fully understood the nature and consequences of the transaction—that she could lose her home.72 This rule causes banks to give special notice to each wife/surety of the amount of her potential liability and of the risks involved, and to advise her to get independent legal advice.

Contracts scholar Gillian Hadfield has introduced this line of cases to American students of contracts.73 She recognizes that the notice required under English law does little to remedy the tangle of sexual and emotional factors producing marital agreements. Instead of notice, she proposes that the will theory of contract be supplemented with a reliance-based theory of contract in certain special cases, such as spousal-guarantees, surrogacy, and marital separation agreements. In these cases, Hadfield contends, reliance should supplement the will theory because the parties’ consent might not represent a true balancing of future costs and benefits as it would in commercial transactions.74

Rosemary Auchmuty’s chapter in Feminist Perspectives, “The Rhetoric of Equality and the Problem of Heterosexuality” takes Hadfield’s discussion further. Auchmuty proposes a ban on using the family home as collateral in place of the undue influence doctrine’s bar to enforcement of some guaranties. Auchmuty explains in her chapter that the House of Lords extended the “tenderness” English courts ordinarily show to married women in mortgage cases as a matter of equity to “a wife (or anyone in a like position)” and “a husband (or anyone in a like position).”75 Auchmuty takes issue with this extension.

Auchmuty begins with Cicily Hamilton’s 1909 assertion that “marriage for woman has always been not only a trade, but a trade that is practically compulsory,” which she then links to Adrienne Rich’s contention seventy years later that heterosexuality is compulsory.76 What bothers Auchmuty is how the

71. Id. at 68.
72. Id. at 52-53.
73. Hadfield, supra note 36, at 1245. Hadfield also suggests that giving notice to wives but not husbands might give rise to sex discrimination claims on the ground that women, but not men, are required to incur the expense of independent legal advice. Id. at 1247.
74. Id. at 1282-84.
75. Auchmuty, supra note 29, at 51, 52.
76. Id. at 57-58 (citing Cicily Hamilton, Marriage as a Trade 28 (1909) and Adrienne Rich, Blood, Bread and Poetry 23 (1980)). I made the same link between Hamilton and Rich in Martha M. Ertman, Marriage as a Trade, Bridging the Private/Private Distinction, 36 HARV. CIV. R & CIV. LIB. REV. 79, 95-96 (2001).
new doctrine obscures the abuses inherent in heterosexuality by extending the undue influence doctrine beyond marriage to same-sex couples. She contends that she is not "advocating the introduction of a special rule for women but, rather, an acknowledgment that the 'normal' expectations of gendered roles and conduct within heterosexual relationships are neither inevitable nor natural but socially constructed, structurally inequitable, and potentially oppressive to women." Specifically, Auchmuty critiques the extension of the undue influence rule to gay people, because, she argues, they are less likely to need it since they are "more egalitarian" and "free of gendered power differential." Therefore, Auchmuty contends, women suffer injury through heterosexuality itself rather than through discrete injuries resulting from a particularly bad deal. Her solution to this injury is not the band-aid of presumptions of undue influence, but rather a tourniquet—cutting off the entire class of transactions.

Auchmuty proposes "a ban or limitation . . . on the availability of the family home as security for business debts" and presents this solution as reflecting a "prioritization of what is important to most women—their home and family—over the masculine concern of business profits." Auchmuty herself, however, is pessimistic about courts adopting her proposal. While Auchmuty’s proposal is not inconsistent with American limitations on particular kinds of collateral, such as wages, bank accounts, and consumer goods, American law does not prevent debtors (directly or as sureties) from mortgaging their homes to secure business debts.

American law formerly evidenced some concern for wives in spousal guarantee cases, but that concern seems to have gone out of fashion with the corset. "Voluntary" sureties, who guarantee loans without compensation, are generally family members or other intimates. Recognizing this special context, legal doctrine has long treated voluntary sureties as "favorites of the law," strictly construing the agreement in the surety’s favor. In 1923, the Maine

77. Auchmuty, supra note 29, at 51 (“I argue that the case law reveals that undue influence is the consequence not of the dangers of intimacy per se, but of the dangers of heterosexual intimacy, or simply of heterosexuality itself.”).
78. Id. at 71.
79. Id. While data does suggest that gay men and lesbians are more egalitarian than heterosexual couples in dividing housework, gendered differences do exist within same-sex relationships, in which one man may take on more masculine work, for example, than the other. CHRISTOPHER CARRINGTON, NO PLACE LIKE HOME: RELATIONSHIPS AND FAMILY LIFE AMONG LESBIANS AND GAY MEN (2002).
80. Auchmuty, supra note 29, at 71.
81. Id.
82. Article 9 of the U.C.C. does not govern transactions in which the debtor's wages are collateral, federal law and state statutes closely regulate wage assignments. U.C.C. § 9-109(d)(3) cmt. 11 (2003). Similarly, Article 9 does not cover transactions in which bank accounts are collateral in consumer transactions. Id. § 9-109(d)(13). Moreover, section 9-204 prevents creditors from taking security interests in consumer goods acquired by debtors more than ten days after the secured party gives value, id. § 9-204, and a Federal Trade Commission regulation limits creditors' rights to obtain security interests in "household goods." 16 C.F.R. § 444.1 et seq. (1999). A home is usually the most valuable thing people own, making it considerably more attractive to creditors than wages, deposit accounts, and consumer goods.
Supreme Judicial Court recognized that sureties who guarantee debts for family members faced relaxed proof requirements in establishing duress:

Ordinarily the claim of duress . . . must be sustained by threats which create a reasonable fear of loss of life or of great bodily harm or of imprisonment . . . . But there are exceptions to this rule, based on the nearness and tenderness of family relations and the obviously constraining force of close family ties.  

In 1926, the Supreme Court of Kansas described the protection of voluntary sureties as an “old rule.” By 1961, the Supreme Court of Minnesota enforced Miss Dorothy Lewis’s guarantee to pay the rent of a gift shop called The Purple Door for Richard Pohl, despite the fact that she received no consideration, specifically rejecting “judicial tenderness in dealing with the rights and liabilities of sureties.” Today, wives who guarantee their husbands’ business debts can avoid losing their homes only if they show that the lending institution knew of or participated in the husband’s duress, misrepresentation, undue influence, or fraud. Thus, in one case, a wife was not bound where she signed an incomplete promissory note with her husband, and the husband then forged her signature on the check that was jointly issued to both of them and used the funds to buy stock in his name alone. However, these facts are extreme. In another, more typical case, a court enforced a promissory note which a wife signed only “because I trusted my husband and his judgment on business affairs. I understood from my husband that if the document was not signed my husband’s business relationship with his attorney would be harmed.” In this case, the court reasoned that a husband’s mere persuasion did not overcome his wife’s free will. In short, American contract law worries less than English law about the validity of married women’s agreements to guarantee their husbands’ debts, a difference that also plays out in Australian and American doctrine governing marital contracting.

Before transitioning from legal tender to tenderness, it is worth pausing to note the counterintuitive conclusion of Belinda Fehlberg and Bruce Smyth’s chapter in Feminist Perspectives, which reports the results of their empirical

84. Flynt v. J. Waterman Co., 122 A. 862, 863 (Me. 1923). The court goes on to cite cases involving fiancées, spouses and children, aunts and nephews, and siblings. Id.
85. Headley v. Post, 243 P. 1042, 1044 (Kan. 1926) (“[T]he old rule that a surety is a favorite of the law arose from judicial tenderness toward voluntary and accommodation sureties.”).
86. Southdale Ctr. v. Lewis, 110 N.W.2d 857, 862 (Minn. 1961).
87. CORBIN ON CONTRACTS § 28.10 (2006). Corbin lists the four elements of a prima facie case of undue influence: (1) susceptibility of the party influenced (such as mental or physical weakness); (2) the opportunity to exercise undue influence (such as through a confidential relationship, including spouses or cohabitants); (3) a disposition to exercise undue influence (i.e., whether the influencer took the initiative in the transaction and whether the person influenced had independent advice); and (4) the unnatural nature of the transaction (as when a testator leaves significant property outside the family). For two cases in which wives did not satisfy the burden of proof, see Sims v. First Nat’l Bank, 590 S.W.2d 270 (Ark. 1979); and Lesser v. Strabbe, 171 A.2d 114, 119 (N.J. Super. Ct. App. Div. 1961), aff’d 1887 A.2d 705 (N.J. 1963).
study of changing doctrines governing Australian prenuptial agreements. They begin with the familiar observation that men tend to benefit more than women from prenuptial contracts. Since men are more likely to have economic and social power, they are often able to induce their wives to contract around the default rules of property and support. Thus, one would expect that feminists—and women generally—would oppose Australia's adoption of the American and Canadian rules enforcing prenuptial agreements. While Fehlberg and Smyth found that people were likely to use prenuptial contracts when one spouse had more assets than the other, they also found that prenuptial agreements tend to appear when one or both parties are marrying for a second time, have had previous family court involvement, or want to quarantine a family asset or business. Contrary to their expectations—and to American conventional wisdom—Fehlberg and Smyth found that women were just as likely as men to seek premarital agreements. They point out that this data is not necessarily surprising, since older women entering second marriages may want to protect property and finances. Viewing their chapter in the context of the rest of the book, one can say that the tenderness that law expresses to women in facilitating the protection of their assets cuts various ways. Some women benefit from contract (as when they quarantine individually held assets from the claims of a second husband), and others do not (as when a richer partner quarantines his own assets from her).

B. Tenderness

Legal protections for women based on their vulnerability as dependents and as caregivers for dependents similarly cut both ways. On the one hand, it makes sense to protect vulnerable parties. Commercial and corporate law do that through a variety of rules protecting, for example, debtors and minority shareholders in close corporations. But the history of women and African-Americans' second-class citizenship, and the way contract law reflected and perpetuated that hierarchy, signal a downside to such an approach. I have already discussed the way that tenderness (in particular protecting women's access to legal tender) plays out in the spousal-guarantee context. The

90. Fehlberg & Smyth, supra note 56, at 125.
91. Id. at 127.
92. Id. at 133.
93. Id. at 134. The authors do not say that these women might want to protect property for children from their first marriages. However, this would trigger the second sense of "tender": kindness toward vulnerable parties.
94. For protections of debtors in secured transitions, see generally U.C.C. § 9-601 et seq. (2003). For discussions of protections for minority shareholders being frozen out of closely held corporations, see F. Hodge O'Neal & Robert B. Thompson, Oppression of Minority Shareholders and LLC Members § 9.26 (3d ed. 1998). Those protections undercut claims that other vulnerable or minority groups should not enjoy protections through affirmative action and family law. See Aunpam Chander, Minorities, Shareholder and Otherwise, 113 Yale L.J. 119 (2003); Ertman, supra note 76, at 115, 119-120, 129, 131.
following discussion addresses solicitude for women in three other doctrinal areas in *Feminist Perspectives*: the postal rule in *Adams v. Lindsell*; prenuptial agreements; and alternative dispute resolution.

### 1. Tenderness and the Postal Rule

Peter Goodrich's intriguing chapter in *Feminist Perspectives on Contract Law* sets out a genealogy of the postal rule, linking it with the formation of contracts to marry. Goodrich traces the history of the rule's evolution, explaining that the rule was not widely accepted for nearly a century. The most interesting point for our purposes is his assertion that "every contract is like a marriage." He argues that the ecclesiastical rules governing marriage migrated into assumpsit cases through breach of promise to marry cases, and that this migration included the postal rule. The postal rule gives preference to the offeree's interests by making an acceptance legally valid at the moment it leaves the offeree's hands, protecting her from an offeror's fickleness by depriving him of the right to revoke after dispatch but before receipt. This deference, one might say tenderness, to the offeree is directly related to the breach of promise to marry cases that proliferated in the nineteenth century. Since men proposed marriage and women accepted, the postal rule expressed tenderness toward the woman's honor. As Goodrich explains, "[r]ecognition of the social standing and the cultural expectations of the feminine offeree, and attention to her position and predicament, meant that equity clearly favoured protecting her reliance interest in the offer and preventing the offeror from speculating." While Goodrich is careful not to overstate his case for the link between marriage and commercial contracts, he unequivocally asserts that the "doctrinal root of that desire to protect the offeree can be traced directly to cases of breach of promise to marry." Beyond the particulars of the postal rule, this observation reminds students of contracts that tenderness for systemically vulnerable parties (debtors and tenants as well as women on occasion) is an integral part of contract doctrine. It is, moreover, not always a bad thing.

### 2. Tenderness and Premarital Agreements

Like the spousal-guarantee cases, the premarital agreement doctrine discussed above in the Fehlberg and Smyth's study seeks special protections for women in contracts associated with marriage. As Australian law changed to allow enforcement of premarital contracts as well as contracts entered during

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96. *Id.* at 81-86.  
97. *Id.* at 85.  
98. *Id.* at 81.  
99. *Id.* at 83.
marriage, it built in protections for women. Yet some of these protections inhibited the effectiveness of the new statute. Most notably, insurers refused to provide malpractice insurance to cover the attorney certification that the new law made a prerequisite to legal enforceability. The statute required attorneys to certify whether the agreement was to the signer’s advantage, was fair, and was prudent. Legal malpractice insurers refused to extend coverage for the required certifications, contending that an attorney’s views on these matters amounted to financial rather than legal advice. Moreover, even if an attorney did state in the certificate of independent legal advice that the client was signing “under a continuing economic disadvantage—for example emotional pressure,” the statement might not prevent enforcement of the agreement since suretyship case law provides that independent legal counsel may be enough to bind the client despite such a statement. But the rarity of marital contracting—Fehlberg and Smyth found that only 13 couples out of 650 surveyed entered into such agreements—makes the discussion as much or more about the expressive function of the law as about a pressing legal issue. Perhaps spousal-guarantees get more attention in the book because they have generated considerable case law, which may occur because the banks involved can absorb the transaction costs of litigation better than individuals.

3. Tenderness and Alternative Dispute Resolution

But there can be downsides to special treatment, and indeed to theoretical approaches that make general claims about contract law and gender. Linda Mulcahy’s chapter, “Bargaining in the Shadow of the Flaws? The Feminisation of Dispute Resolution,” both flags and falls into this trap. Mulcahy begins with the premise that mediation benefits women in three ways: (1) by rejecting “masculine values of the courtroom”; (2) by “privileging values associated with feminism, which reflect an ethic of care and the importance of context and relationship”; and (3) by “facilitating political goals by raising awareness of masculine paradigms.” But her contention that classical contract doctrine, more than other legal doctrines, articulates “hostile egoism and possessive

100. The Australian statute in place at the time of the study dictated that premarital and postmarital agreements bind if they are in writing, signed by both parties, each party has received independent legal advice, and the agreement has not been terminated by the parties. Fehlberg & Smyth, supra note 56, at 129. The requirement of independent legal advice is satisfied if an attorney appends a statement that she provided independent legal advice as to the effect of the agreement on her client’s rights, whether it was to the advantage, financially or otherwise, of the client, whether it was prudent for that party to make the agreement, and whether the agreement’s provisions were fair and reasonable. Id. The authors note that these rules soon faced legislative amendment to relax the attorney certification provisions. Id. at 125 n.1.
101. Id. at 135.
102. Id. at 136-37.
103. Id. at 128.
105. Mulcahy, supra note 14, at 145.
individualism" by taking people away from the "preexisting web of community"\textsuperscript{106} overlooks the facts that individualism and possession of property, as discussed above, can be a good thing for many women, and also that communities can enforce gender norms at the expense of individual interests. Moreover, describing Richard Posner's approach as "high octane masculine values" and condemning privatization\textsuperscript{107} overlooks the fact that some feminists have relied on his work and contractual norms of "performance, control, security of transaction and standardization"\textsuperscript{108} to justify feminist reforms and believe that privatization can both help and hurt women.\textsuperscript{109} These insights bring us to the third sense of "tender," relative to contract law and women's independence.

C. Tend Her

The phrase "tend her," a play on the "tenderness" theme of this Review, is admittedly an oblique way to raise issues of individuality within the "tender" rubric. But it does question the advisability of legal doctrine protecting women, as opposed to leaving them to tend to themselves. I raise it here to pull out the strand associated with tending oneself, and in doing so to engage any systemic conflicts between classical views of the will-based theory of contract on the one hand and feminist impulses to occasionally protect women from bad deals on the other. As discussed above, some chapters in Feminist Perspectives propose that contract law adjust to protect women from bad choices in some contexts, such as with the spousal-guarantee cases.

David Campbell's afterword makes it clear that he thinks this is a bad idea. He directly engages the question of contracts protecting the individual's interests by contesting Auchmuty's proposed ban on wives guaranteeing their husbands' business debts with the family home. Campbell suggests that Auchmuty seeks a special rule to protect women and argues that her rule harms the very people she seeks to protect by infantilizing them.\textsuperscript{110} He contends that feminist theory works better in alternative dispute resolution than contract formation, lauding Linda Mulcahy's chapter championing alternative dispute resolution as "the most accomplished chapter" in the book.\textsuperscript{111}

\begin{itemize}
\item \textsuperscript{106} Id. at 147.
\item \textsuperscript{107} Id. at 147, 153.
\item \textsuperscript{108} Id. at 147.
\item \textsuperscript{109} See, e.g., HIRSHMAN & LARSON, supra note 3, at 284-86; Martha M. Ertman, Commercializing Marriage, 77 Tex. L. Rev. 17, 97-110 (1998); Silbaugh, supra note 3.
\item \textsuperscript{110} David Campbell, Afterword: Feminism, Liberalism and Utopianism in the Analysis of Contracting, in FEMINIST PERSPECTIVES, supra note 5, at 165.
\item \textsuperscript{111} Id. at 162. He does not mention that a line of American feminist scholarship has questioned whether the soft and fuzzy norms of ADR might disserve some women in divorce proceedings, nor that ADR can be more rigid than litigation in its norms and substantive rules. See, e.g., Lisa Bernstein, Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms, 144 U. PA. L. Rev. 1765, 1766-71 (1996); Fenelope Eileen Bryan, The Coercion of Women in Divorce Settlement Negotiations, 74 Denv. U. L. Rev. 931 (1997).
\end{itemize}
Many feminists would share his view that special rules protecting married women in contracting situations with their husbands smack of the kind of "repugnant paternalism" that created the need for feminism in the first place. Rejecting Hadfield's proposed importation of Elizabeth Anderson's expressive values in contract to supplement the will theory of enforcement, Campbell asserts that contract law based on any value other than party autonomy is not contract law:

The chapters in this volume show that feminism certainly can make a considerable contribution to the critique of the classical law of contract, and they link to an economic and philosophical literature in which feminism is putting forward a powerful general critique of bourgeois individualism. However, if they do not place a pre-eminent value on autonomy, feminists cannot really respect the law of contract, for a law of contract that does not turn on autonomy and choice becomes something like a law of planned, paternalistic exchanges, that is, not contract at all. If Campbell is right, then the entire book is a contradiction in terms, except to the extent that "feminist" views of contract are limited to liberal critiques of contract rules that exclude women from the rights that men enjoy. But feminism is much broader than that, incorporating cultural feminist focus on relationships (and legal protections of the vulnerabilities that arise from those relationships), as well as radical feminist efforts to upend cultural categories of sex and gender.

Indeed, I would argue that Hadfield's expressive theory of contract finds considerable ground in existing contract doctrine. Hadfield chooses three puzzles of contract law—surrogacy, spousal-guarantees, and marital separation contracts—and proposes that legal doctrine could "transcend the dilemma of choice":

The structure of a contract law based on an appreciation of expressive choice would begin with an assessment of whether a given category of contract normally is entered into in a risk-allocation frame. Absent the risk-allocation frame, there is a need to assess the reasons there might be for enforcement. She suggests that where parties do not enter contracts conscious of risk-allocation, courts look to two things: (1) reliance interests at stake; and (2) instrumental justifications for enforcement in light of the value of the contract and the risk non-enforcement poses for contract law generally. The spousal-guarantee cases are particularly good examples of agreements entered into with a richer relational aspect than most, and a thinner risk-allocation aspect than most. Here, Hadfield persuasively argues that relational principles come to the

112. Campbell, supra note 110, at 172.
113. Id.
114. Hadfield, supra note 36, at 1282.
115. Id.
fore, including cooperation over time, reliance through coordination, communication, and commitment. In her words, “they are woven from and into a fabric of societal and relationship-specific norms.”

As we evaluate the extent to which contract doctrine that accounts for hierarchy at the expense of autonomy is still contract doctrine, it is important to keep in mind that contract has never been one thing in relation to have-nots. Freedmen were held to coercive labor contracts that replicated slavery in many respects, and labor conditions entered into under purported freedom of contract were often brutal for both men and women. Reva Siegel has coined the term “preservation through transformation” to describe the process by which purported improvements to the legal status of blacks and women have also perpetuated hierarchies.

Sally Wheeler’s chapter in Feminist Perspectives on Contract Law illustrates one strand of nineteenth century views of married women and contract. She describes how doctrines relating to coverture (including the doctrine of necessaries and the state-supplied marriage contract itself) constrained Victorian women’s contractual powers to buy clothing. Married women’s property acts changed much of that baseline by granting married women rights to contract as well as to hold and dispose of property, but courts interpreted them narrowly to keep most property, and thus independence, away from women. Interestingly, these rights of economic citizenship predated women’s political citizenship. Married women exercised their (albeit limited) rights under the married women’s property acts for half a century before they got the vote, and for nearly a century before they served on juries with any regularity.

116. Id. at 1283-84.


118. STANLEY, supra note 42, at 76-84. The high-water mark for classical liberalism in labor law is Lochner v. New York, 198 U.S. 45 (1905). Given the importance for women of defining the limits and beneficial applications of contract, it is hardly surprising that the demise of liberalism is conventionally linked to judicial acceptance of fair-labor laws protecting women. See W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).


120. Sally Wheeler, Going Shopping, in FEMINIST PERSPECTIVES, supra note 5, at 21. The doctrine of necessaries held a husband liable for debts incurred by his wife for small items, a rule which turned on married women’s incapacity to contract under coverture. A number of courts have held the doctrine of necessaries unconstitutional as applied to women, but it continues to apply when minors enter contractual relationships or where gender neutral. See, e.g., A. Mechele Dickerson, Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status, 67 FORDHAM L. REV. 69, 75 n.30 (1998).


122. LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 136-220 (1998). Indeed, military service, one of the hallmarks of citizenship, is still not open to women on the same basis as men. For a review of the history of American women and military service, see id. at 221-302.
The fact that women’s rights to contract laid the foundation for women’s political rights makes Charles Fried’s condemnation of the infantilizing effect of departures from assumptions of autonomy particularly persuasive. He explains:

If we decline to take seriously the assumption of an obligation because we do not take seriously the promisor’s prior conception of the good that led him to assume it, to that extent we do not take him seriously as a person. We infantilise him [as we do quite properly when we release the very young from the consequences of their choices].

Adult autonomy is all the more important when we consider the unique role of contract in skirting majoritarian rules. For example, testators can “contract” around default rules provided by intestacy law to bequeath their property to an intimate, such as a same-sex partner, whom the state refuses to recognize through intestacy laws. Similarly, adoptive parents can “contract” with birth parents for visitation to facilitate connection between adoptive children and the birth parents despite the state’s failure or refusal to recognize that relationship.

There is a lot to be said for contract’s ability to skirt hostile background rules. In the Islamic Republic of Iran, the 1978 revolution changed the law to value women half as much as men (setting them back 1400 years). Nobel laureate Shirin Ebadi managed to contract around the new rules that gave her husband the power to divorce her at will, take custody of their children, and acquire three wives, which would have allowed her husband to stay a person while she became chattel. Outraged by these rules (despite the fact that her husband had no intention of exercising the powers they gave him), she took him to a notary’s office, where he waived his newly acquired rights under the Islamic Republic’s law.

Contract reasoning and doctrine also remedy more mundane problems. At the doctrinal level, primary homemakers’ contributions to family wealth could be recognized in contractual terms. On a theoretical level, I have contended that the law can and should recognize a range of intimate relationships just as it

123. Campbell, supra note 110, at 166 (quoting FRIED, supra note 27, at 20-21).

124. Even if some contracts, such as contracts to buy sperm from anonymous donors, have the downside of depriving children of contact with one genetic parent, perhaps the remedy for this kind of “bad” contract is more contracting. The demand for familial connection among sperm bank babies has created a market for that connection, satisfied through membership in an online registry of children who are genetically related but would not otherwise know each other. Membership in the registry is $40 a year. Jennifer Egan, Wanted: A Few Good Sperm, N.Y. TIMES MAG., Mar. 19 2006, at 44, 81. See also Donor Sibling Registry, http://www.donorsiblingregistry.com (last visited Nov. 20, 2006).


126. Cynthia Starnes, Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault, 60 U. CHI. L. REV. 67 (1993). An alternative model is based on Article 9 of the U.C.C. and contends that primary wage earners are indebted to their primary homemaking spouses, giving homemakers an entitlement to part of the wage-earners’ post-divorce income as repayment of the debt. Ertman, supra note 109.
recognizes a range of business forms, analogizing marriage to a close corporation, cohabitation to a general partnership, and polyamory to a limited liability company.\textsuperscript{127} Jane Larson and Linda Hirshman have suggested that game theory can level the playing field of men and women in sexual matters,\textsuperscript{128} Adrienne Davis has documented the ways that some white men’s wills bequeathing property to their black paramours in the nineteenth century recognized relationships that intestacy law would not,\textsuperscript{129} and Elizabeth Emens has recently suggested that contractual analysis of marital name changes might dislodge the practice of women taking men’s names upon marriage.\textsuperscript{130}

The fruitfulness of applying feminist views to contract, and contractual views to feminist questions, is illustrated by an American case, \textit{Borelli v. Brusseau}.\textsuperscript{131} While \textit{Borelli} does not appear in \textit{Feminist Perspectives} (which is hardly surprising since nearly all the cases discussed are English), it does appear in some casebooks. Discussing \textit{Borelli} in contracts class makes sense because the case shows both the benefits and limits of contractual analysis, and also how courts selectively recognize contract doctrine in situations of contested marketization, such as contracts within families and for organ sales.\textsuperscript{132} Most startling is how the case demonstrates how the old rules regarding gender still bleed through to contemporary cases.

In \textit{Borelli}, the California Court of Appeals refused to enforce a husband’s promise to convey property to his wife in exchange for her promise to care for him at home after he suffered a stroke. (The alternative was a nursing home.) Three contracts were at issue: (1) a premarital agreement in which Hildegard Borelli waived her rights to Michael Borelli’s property; (2) his oral promise to alter that prenuptial agreement to substitute her care for nursing home care; and (3) the state-imposed marital contract. The feminist reader with a chip on her shoulder will note that all three contracts were construed against Hildegard, and that she would have been better off in a regime that either refused to enforce the prenuptial agreement or was willing to enforce the postnuptial agreement.

Mrs. Borelli signed the premarital agreement waiving her rights to substantial property the day before their wedding.\textsuperscript{133} While in a rehabilitation center after Mr. Borelli suffered a stroke, they orally agreed that Mrs. Borelli would provide nursing-home type care in their home in exchange for his promise to leave her property beyond what she would receive under the

\begin{thebibliography}{133}
\bibitem{127} Ertman, \textit{supra} note 76.
\bibitem{128} \textit{See, e.g., Hirshman & Larson, supra} note 3, at 283-86.
\bibitem{129} Davis, \textit{supra} note 3.
\bibitem{132} For a discussion of marketization of human organs, see Michele Goodwin, \textit{Black Markets: The Supply and Demand for Body Parts} (2006).
\bibitem{133} \textit{Borelli}, 16 Cal. Rptr. 2d at 17.
\end{thebibliography}
prenuptial agreement. When he died his estate refused to honor the oral agreement. The California Court of Appeal held that the oral agreement lacked consideration since she had a non-delegable obligation to care for her husband under the state-defined marriage contract. It relied on World War II-era case law to reach this result:

[A] wife is obligated by the marriage contract to provide nursing-type care to an ill husband. Therefore, contracts whereby the wife is to receive compensation for providing such services are void as against public policy and there is no consideration for the husband’s promise.

At the time these cases were decided, spouses could not contract away obligations of support or property settlement. However, by the time the Borellis entered their marriage the law had changed, so that Michael Borelli could have his cake and eat it, too, by altering the part of the state-provided marriage contract that mandated property-sharing with his wife, and keeping the part that compelled her to personally nurse him through illness.

Surprisingly, Mr. Borelli’s alteration of his support obligations the day before the wedding did not figure into the majority opinion (and was only tangentially mentioned in the dissent). The court explained:

[T]he duty of support can no more be “delegated” to a third party than the statutory duties of fidelity and mutual respect. Marital duties are owed by the spouses personally. This is implicit in the definition of marriage as “a personal relation arising out of a civil contract between a man and a woman.”

In essence, the court allowed Mr. Borelli to alter the “civil contract” regarding property distribution in marriage, but refused to allow Mrs. Borelli to alter her care-taking responsibilities:

We therefore adhere to the longstanding rule that a spouse is not entitled to compensation for support, apart from rights to community property and the like that arise from the marital relation itself. Personal performance of a personal duty created by the contract of marriage does not constitute new consideration.

The clause “apart from rights to community property and the like” does a lot of work. Mrs. Borelli did not get her share of community property because of the prenuptial contract, but she was still stuck personally providing round-the-clock care.

Maybe this outcome is okay. Perhaps money and love are analytically separate. Maybe Mr. Borelli can contract away his obligations to share

134. *Id.* at 17-18.
137. *Borelli*, 16 Cal. Rptr. 2d at 20 (citing CAL. CIV. CODE § 4100 (1992)).
138. *Id.* at 20 (emphasis added).
139. ZELIZER, supra note 3, at 28-29.
property with her but retain her obligation to care for him during an illness. The
majority opinion implies as much in defending itself against the dissent’s
criticism of the old case law’s gendered foundations, stating that “[i]f the rule
denying compensation for support originated from considerations peculiar to
women, this has no bearing on the rule’s gender-neutral application today.” 140
But marriage remains highly gendered, as reflected by the fact that wives still
do seventy percent of homemaking labor (a specialization that must affect how
husbands and wives care for one another during illness) and husbands still have
higher incomes on average and control more property than women. 141 Indeed,
in the United States, men are more likely to seek to protect their separate
property through premarital agreements, and women are more likely to contest
them. 142

Judge Poche’s dissent argues for the benefits of contract over status by
accusing the majority of resuscitating coverture and by defending contractual
understandings of marriage:

Insofar as marital duties and property rights are not governed by
positive law, they may be the result of informal accommodation or
formal agreement . . . . No longer can the marital relationship be
regarded as “uniform and unchangeable.” 143

Moreover, he continues, California has long granted husbands and wives “the
utmost freedom of contract” in both statute and case law. 144

But a close read of California’s statutory creation of contractual freedom
between husbands and wives may support the majority’s view that Mr. Borelli
may sell Mrs. Borelli down the river financially and still compel her to provide
round-the-clock care. The statute provided that “either husband or wife may
enter into any transaction with the other, or with any other person, respecting
property, which either might if unmarried.” 145 Thus it seems that, at least in this
context, men are more likely to benefit from the increased contractualization of
marital rights and obligations. Indeed, for over three decades courts have
enforced premarital agreements, and these agreements are likely to benefit the
richer spouse, who is more likely to be the husband than the wife. Under
Borelli, caregiver spouses, who are more likely to be wives than husbands,
cannot limit the obligations they are most likely to bear, i.e. care-giving. In
short, what is good for the gander can stink for the goose.

140. Borelli, 16 Cal. Rptr. 2d at 20.
142. Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital
143. Borelli, 16 Cal. Rptr. 2d at 22 (Poche, J., dissenting).
144. Id. at 23 (quoting Perkins v. Sunset Tel. & Tel. Co., 103 P. 190 (Cal. 1909); CAL. CIV. CODE
§5103(a) (Deering 1992) (repealed 1994) (providing that “either husband or wife may enter into any
transaction with the other, or with any other person, respecting property, which either might if
unmarried”)). The rule is stated now in CAL. FAM. CODE §721 (2003).
IV. CONCLUSION

Feminism and contract have more in common than many people think, in particular because both address problems of individual agency and accountability that are important elements of full citizenship. In discussing Feminist Perspectives, this Review has extracted themes that may enrich contracts classes and feminist theory discussions. On the doctrinal level, Borelli v. Brusseau tells us that perhaps courts should not enforce property agreements between spouses since they would have a hard time enforcing the non-delegable duties of sympathy, comfort, love, companionship, and affection in the state-provided marriage contract. Or perhaps the dissent in Borelli is right, and Mrs. Borelli should at least be able to try to prove the oral modification of the prenuptial contract with Mr. Borelli. Like other cases, this contract dispute between spouses also tells us about the promise and danger of contract analysis, much of which is represented in Feminist Perspectives on Contract Law, and much of which might find its way into a contracts class:

- **In re Baby M and Johnson v. Calvert**, two surrogacy cases, may provide a springboard to discuss a number of issues. Carol Sanger spends two full class sessions using Baby M to preview the course’s basic themes, including how to read a case, choice of law, damages, and legal theory. Within this discussion, a tension generally emerges between enforceability and contractual capacity. The impasse between capacity to contract and the dehumanizing effects of surrogacy reflects an irresolvable conflict between two equally good and important things: (1) freedom of contract; and (2) protection of dignity, solidarity, and equality. Another route into the question of enforceability may explore who benefits from contractualization, and in particular how contract doctrine and theory are improved or harmed by using contract to regulate contested contexts such as reproduction.

- It is difficult to ignore the fact that people resisting contract enforcement in many canonical undue influence cases are female. In Vokes v. Arthur Murray Dance Studios, the plaintiff was a lonely widow tricked into buying $31,000 of dance lessons by

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149. For a fuller discussion of the antinomous qualities of freedom of contract versus equality, dignity, and solidarity in commodification discussions, see Ertman & Williams, *supra* note 3.
high praise for her nonexistent dancing abilities from Arthur Murray Dance Studios. Does it matter that this doctrine tends to protect women? In particular, does it undercut autonomy-based definitions of contract? Is it significant that American law protects these parties without explicitly referring to their gender, while English law explicitly extends “special tenderness” to wives in guarantee cases?

- In *Williams v. Walker-Thomas Furniture Co.*,\(^{151}\) the canonical unconscionability case, Mrs. Williams is female, poor, and African-American. This combination of characteristics often leads to rich classroom discussions about whether the doctrines of undue influence and unconscionability are employed to remedy both the historic and contemporary fragility of women, people of color and poor people, and should be.

- If we recognize the marital roots of *Adams v. Lindsell*,\(^{152}\) the case establishing that acceptance occurs at the time of dispatch by the offeree, then at least in this context, the marriage contract rules provide the basis for commercial contract doctrine. Under this analysis, puzzles regarding marital contracts (similarly to or differently from commercial contracts) might look quite different. If marriage is the original and not the special case, the question may be whether marital rules should apply to commercial contracts, rather than vice versa. Moreover, the tremendous changes of the marriage contract over time, which are akin to the changes in employment contracts over the last century, illustrate the legal realist idea that law keeps changing as society keeps changing.

This Review has focused on English spousal-guarantee cases to provide a particularly strong foundation for discussing ways that the contract law can resolve monetary disputes, protect vulnerable parties whose consent might be less than freely given, and recognize that parties’ individuality is central to their claims as adult members of the polity. Future work may explore whether these three concerns relating to legal tenderness apply in other doctrinal areas, and in doing so demonstrate the things feminism and contract law have to offer one another.

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151. 350 F.2d 445 (D.C. Cir. 1965).