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Contract Law, Equality and the State

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ABSTRACT

There is a rich and diverse literature on contract law and equality, discussing whether contract law should advance social equality and if so how should contract law achieve that. However, this literature has yet to address the State's role in combating social inequality through contract law. Filling this void this Article discusses three strategies the State can and should adopt in promoting social equality, by enforcing contracts, applying contract law doctrines, and regulating and legislating laws as background rules. After mapping these three state powers the Article further explores three test cases: enforcing nonmarital agreements, applying contract defenses in consumer contracts, and enacting the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act that voids mandatory arbitration agreements in sexual harassment and sexual assault cases. Based on this analysis, the Article concludes that contract law is not purely private, but rather has public aspects; that the State is an important facilitator in promoting equality; and that the State should use its different powers in concert to promote equality.

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CONTENTS

I. INTRODUCTION

It is conventional wisdom that contract law and anti-discrimination law are two different areas of law. The former governs private dealings between individuals, and the latter involves the State's commitment to equality in the public sphere. This truism has been challenged by scholars arguing that contract law (and private law generally) should promote distributive justice.[1] This Article furthers this challenge by examining how the State can and should utilize its different powers to advance social equality through contract law. Put differently, it analyzes the ways contract law can combat

[1] *See, e.g.*, Aditi Bagchi, *Distributive Justice and Contract*, *in* PHIL. FOUND. OF CONT. L. 193–95 (Gregory Klass, George Letsas & Prince Saprai eds., 2014) (arguing that principles of distributive justice can and should impose numerous constraints on contract law); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 499 (1980) (discussing taxation and contractual regulation as methods of redistribution).

discrimination from the perspective of the State's role to do so. This Article addresses the meeting point of contract law, equality,[2] and state power.[3]

This Article proceeds as follows: Part II gives a brief overview of the literature on contract law and equality. Though this scholarship is diverse, ranging from empirical to theoretical research, it nevertheless does not address the State's role in advancing equality using contract law. Filling this void, Part III reviews three strategies the State can and should adopt in combating discrimination, by enforcing contracts, applying contract law doctrines, and regulating and legislating laws as background rules. This Part maps these three state powers and demonstrates how they can and should be used to advance social equality in contracting. Part IV further develops the analysis found in Part III by using three test cases: (1) enforcing nonmarital agreements, (2) applying contract defenses in consumer contracts, and (3) enacting the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act that voids mandatory arbitration agreements in sexual harassment and sexual assault cases.[4] This Part also discusses the benefits and advantages, as well as the limitations and weaknesses, of each of these strategies. Part V examines the implications of the analysis suggested in this Article regarding contract law, equality, and state power. The mapping presented in this Article highlights the public aspects of contract law; that the quest for equality is not only a matter of social activism and public awareness, but also a matter of legal reform; and that the State should actively and jointly use its powers to enforce contracts, implement contract law, legislate, and regulate in concert.

II. CONTRACT LAW AND EQUITY

This Part generally surveys the rich and diverse literature on contract law and equality. This scholarship includes empirical and theoretical studies, recommendations of how contract law should promote equality, and examinations of what contract law does in practice. This Part gives a brief overview of the main literature as a general background and as a starting point for this Article's project opposed to be a comprehensive and full review of all the literature.

Empirical studies demonstrate discrimination in the market. For example, Ian Ayres documented discrimination in pricing used cars in Chicago based on gender and race.[5] Other studies documented price discrimination in additional markets.[6] Hila

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[2] There are many forms of equality: formal equality, substantive equality, equal opportunities, equal outcomes, and equal treatment, to name a few. I generally use the term equality, as the State may promote equality in any of these meanings. However, I am aware that different examples in the Article present different types of equality.

[3] By state power I mean either state or federal power.

[4] Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, H.R. 4445, 117th Cong. (2022).

[5] Ian Ayres, *Fair Driving: Gender & Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 818–20 (1991).

[6] Tamar Kricheli-Katz & Tali Regev, *How Many Cents on the Dollar? Women and Men in Product Markets*, 2 SCI. ADVANCES 1, 3, 7 (2016); Tamar Kricheli-Katz & Tali Regev, *Competence, Desert and Trust - Why Are Women Penalized in Online Product Market*

Keren also observed refusal to contract with minorities and women and different treatment in their transactions, terming it "market humiliation".[7] Keren proposed that private law should recognize and compensate for limiting market citizenship.[8] Furthermore, anecdotes show what it means to negotiate a contract or to be a party to a contract as an African American and/or a woman.[9] It is important to note that this literature documented different pricing, as well as different terms of contract and forms of contracting, based on gender and race.

Despite this scholarship, conventional wisdom holds that contract law has nothing to do with social equality. As Kevin Davis and Mariana Pargendler explained, "the orthodox view is that contract law generally is not and should not be concerned with the distribution of wealth in society."[10] According to this approach, contract law should advance autonomy, efficiency, and corrective justice.[11] Moreover, it maintains that pursuing distributive justice using contract law is both illegitimate and inefficient, and better left to other areas of the law, such as tax law.[12] Contract law is private law and has nothing to do with anti-discrimination law.

However, some scholars did take a heterodox view, arguing that contract law should advance distributive justice. Rejecting arguments against using contract law to advance equality, Anthony Kronman,[13] Duncan Kennedy,[14] Aditi Bagchi,[15] Hugh

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Interactions?, 18 THEORETICAL INQ. L. 83, 91–95 (2017); Renée B. Adams et al., *Gendered Prices*, 34 REV. FIN. STUD. 3789, 3806 (2021).

7 Hila Keren, *Market Humiliation*, 56 LOY. L.A. L. REV. 565, 568–70, 572 (2023); Hila Keren, *Beyond Discrimination: Market Humiliation and Private Law*, 95 U. CO. L. REV. 87, 96–97 (2023) [hereinafter *Beyond Discrimination*].

8 Keren, *supra* note 7, at 576–77, 582.

9 PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 104 (1991); Hila Keren, *"We Insist! Freedom Now": Does Contract Doctrine Have Anything Constitutional to Say?*, 11 MICH. J. RACE & L. 133, 152–53 (2005).

10 Kevin Davis & Mariana Pargendler, *Contract Law and Inequality*, 107 IOWA L. REV. 1485, 1492 (2022).

11 *Id.* at 1497.

12 *Id.* at 1487.

13 *See generally* Kronman, *supra* note 1.

14 Duncan Kennedy, *Distributive and Paternalist Motive in Contract and Tort Law, With Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 620–24 (1982).

15 Bagchi, *supra* note 1, at 195; Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105, 147 (2008).

Collins,[16] and Marco Jimenez[17] (to name a few) argued that contract law should promote distributive objectives. Hanoch Dagan and Avihay Dorfman "develop a distinctly liberal conception of private law, founded on the commitments to individual self-determination and substantive equality" and private law that secures "just relationships: relationships of reciprocal respect to people's self-determination and substantive equality."[18] That is, contract law that is based on relational justice, which inherently prohibits discrimination. Equality is not only part of public law, as private law sustains "relationships as interactions between free and equal individuals who respect each other for the persons they actually are and thereby vindicate our claims to relational justice from one another."[19] "[P]rivate law's normative DNA is premised on a profound commitment to reciprocal respect to self-determination and substantive equality."[20] Similarly, Gillian Demeyere argued that there is no conflict between prohibition against discrimination and freedom of contract as both are part of contract law.[21]

Putting theory into practice, Hila Keren claimed that contract law has something constitutional to say, suggesting that the duty of good faith can promote equality between contracting parties.[22] In the same vein, Emily M.S. Houh argued that the doctrine of good faith should be used to promote racial equality in both contract formation and performance.[23] Hanoch Dagan and Avihay Dorfman also discussed the doctrine of good faith as an example of contract law's commitment to equality.[24] John Enman-Beech also suggested that good faith sensitive to the parties' relationship,

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16 Hugh Collins, *Distributive Justice Through Contracts*, 45 CURRENT LEGAL PROBS. 49, 49 (1992).

17 Marco Jimenez, *Distributive Justice and Contract Law: A Hohfeldian Analysis*, 43 FLA. ST. U. L. REV. 1265, 1270–71 (2016).

18 Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1397 (2016).

19 *Id*. at 1398.

20 Hanoch Dagan & Avihay Dorfman, *Interpersonal Human Rights*, 51 CORNELL INT'L L.J. 361, 361 (2018); *see also* Hanoch Dagan & Avihay Dorfman, *Justice in Contracts*, 67 AM. J. JURIS. 1, 13 (2022); Hanoch Dagan & Avihay Dorfman, *Precontractual Justice*, 28 LEGAL THEORY 89, 102–03 (2022). *See generally* Hanoch Dagan & Avihay Dorfman, *Poverty and Private Law: Beyond Distributive Justice*, 68 AM. J. JURIS. 1 (2023).

21 Gillian Demeyere, *Discrimination, Freedom, and the Limits of Contract*, 10 INT'L J. DISCRIMINATION & L. 219, 221 (2009); *see also* Gillian Demeyere, *Human Rights as Contract Rights: Rethinking the Employer's Duty to Accommodate*, 36 QUEEN'S L.J. 299, 303 (2010).

22 Keren, *supra* note 9, at 179.

23 Emily M. S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1025 (2003).

24 Dagan & Dorfman, *supra* note 18.

including power differentials, can also advance women's and minorities' interests.[25] As these scholarships show, contract law has public aspects.[26]

Other scholars focused on empirical studies that examined whether contract law does in fact promote equality, as opposed to theoretical scholars that asked whether contract law should do so. They showed how some courts in different countries use contract law to reduce economic inequality and advance distributive justice.[27]

The studies briefly discussed here are diverse, but they do not address the State's role in advancing equality through contract law.[28] This Article fills this void by mapping different strategies the state can and should implement in using contract law to promote distributive justice.

III. CONTRACT LAW, EQUALITY AND THE STATE: A MAP

This Article adds to the contract law and equality scholarship discussed in the previous Part by examining this issue from the perspective of the State's role in using contract law to combat discrimination. In other words, it reviews the different strategies the State can and should adopt to promote distributive justice through contract law. Contract law is not neutral, and has distributive effects, and, likewise, the State's actions (or inactions) have an impact on social equality. Thus, this Article examines how the State can and should use its powers to make contract law more just, fair, and egalitarian. Scholarship on governance feminism addressed the ways feminist ideas entered into state power.[29] This Article focuses on the state's role in protecting gender equality.

Several comments on what is beyond the scope of this Article. First, parties can use contracts as social tools from their own initiative and commitment to social justice and equality, independent of the State. For example, inspired by the #MeToo movement, a merger contract might include a party's disclaimer that there are no

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[25] John Enman-Beech, *The Subjects of Bhasin: Good Faith and Relational Theory*, 13 J.L. & EQUAL. 1, 9 (2017).

[26] For the constitutionalisation of contract law, *see* François G DuBois, *The Impact of Human Rights on English Contract Law*, *in* THE CONSTITUTIONAL DIMENSION OF CONTRACT LAW: A COMPARATIVE PERSPECTIVE 1 (Luca Siliquini-Cinelli & Andrew Hutchison, eds. 2017).

[27] *See* Davis & Pargendler, *supra* note 10, at 1530–32 (South Africa, Brazil, and Columbia); L. Hawthorne, *The Principle of Equality in the Law of Contract*, 58 THRHR 157, 160 (1995) (South Africa); Thomas Wilhelmsson, *Contract and Equality*, 40 SCANDINAVIAN STUD. L. 145, 152–53 (2000) (Sweden).

[28] For exploring the impact of the public on private contracts in the context of contracts that pose a risk to public health, see David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 985–86, 991–92, 996–97, 1016 (2021) (exploring three mechanisms: ex ante definition of legally permissible subject matter for private bargains, regulation, and contract interpretation).

[29] *See generally* JANET HALLEY, PRABHA KOTISWARAN, RACHEL REBOUCHÉ & HILA SHAMIR, GOVERNANCE FEMINISM: AN INTRODUCTION (2018); JANET HALLEY, PRABHA KOTISWARAN, RACHEL REBOUCHÉ & HILA SHAMIR, GOVERNANCE FEMINISM: NOTES FROM THE FIELD (2019).

known sexual harassment claims.[30] In this case, the parties set their contract in the context of awareness to the harms of sexual harassment, and thus, their contract promotes women's equality out of their own economic and moral concerns. As Susan Chesler claimed, feminist contract drafting is an important vehicle for seeking and obtaining social change.[31] Notwithstanding these important initiatives, this Article focuses on the State's (rather than parties') actions and powers that encourage and facilitate egalitarian contracts.

Second, the market can advance equality. Although market actions to promote equality are important, they are nevertheless limited, and thus there is the need for state actions. Due to market failures, state actors (such as courts, legislators, and regulators) should work to correct market limitations and eradicate discrimination in society. Furthermore, state inaction means perpetuating current market distribution. Thus, the state's actions are necessary when there is a need to intervene in market allocations. Both state actions and inactions have distributive implications. For these reasons, this Article addresses the state's—rather than the market's—actions to promote equality.

Third, this Article focuses on contracts between two private entities (individuals, corporations, etc.), not on contracts with a state entity. Thus, even though this Article does not view contracts as purely private institutions, but as private institutions with public aspects, the discussion in this Article excludes cases in which the State is a party to a contract. Furthermore, the State can prefer to contract with minority-owned businesses, thus promoting equality. The State may also include a provision in the contract requiring the other party not to discriminate, thus advancing social equality. Notwithstanding the importance of such state initiatives, this Article discusses the interactions between private parties and the State on this issue. For this reason, this Article does not discuss the social contract and the social inequalities it maintains.[32] Likewise, contract parties and the State may be influenced by social movements (such as #MeToo), NGO lobbyists, and activists (for example, advocates for consumers and employee rights),[33] and this in turn will be reflected in their contracts and actions. No doubt, society both has an impact on contracts and at the same time is impacted by contracts. There is a dual effect between society and contract. However, this, too, is beyond the scope of this Article.

Fourth, this Article primarily focuses on discrimination based on gender. However, it is also applicable to discrimination based on other factors, including race, sexual

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30 *See generally* Grace Maral Burnett & Emily Rouleau, *A Fresh Look at #MeToo Reps & Warranties in M&A Deals*, AM. BAR ASS'N (June 27, 2022), https://www.americanbar.org/groups/business_law/resources/business-law-today/2022-july/a-fresh-look-at-metoo/.

31 Susan M. Chesler, *Using Private Law as a Vehicle for Social Change: A Feminist Approach*, 15 L.J. SOC. JUST. 138, 142–43 (2022).

32 CAROLE PATEMAN, THE SEXUAL CONTRACT 50–51 (1988); CAROLE PATEMAN & CHARLES MILLS, THE CONTRACT AND DOMINATION 81 (2007); Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803, 1819–20 (2022).

33 Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000); Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 470 (2020).

orientation, and class, as well as to other cases of inequality between parties, as in the context of employment contracts and consumer contracts. Because addressing all forms of discrimination is too wide a scope, this Article is limited to one type of inequality: gender inequality. But by acknowledging the immorality and harmful impacts of all kinds of discrimination, the analysis in this Article is applicable beyond gender discrimination.

Fifth, this Article discusses the actions the State can and should take to promote social equality. Although it uses concrete examples, it is not an empirical study of what the State did in practice. In other words, this Article provides a map of steps the State should take to eradicate discrimination and does not study the actual actions of the State. As will be discussed in the next Part, sometimes court decisions and legislation advance equality; sometimes they perpetuate inequality; and oftentimes State's actions do both, moving in the right direction, but still far from perfect due to possible disadvantages. This Article does not address questions such as when and why the State advanced equality, nor in what context—nor for what reasons—the State maintained inequality. This Article provides a general map, and the study of its implementation by state actors will have to wait for future articles.

This Part is divided into three strategies the State can and should use in combating discrimination by using its powers as a (1) contract enforcer, (2) contract interpreter, and (3) anti-discrimination regulator. First, the State, which plays a key role in enforcement of contracts, may enforce contracts, such as inclusion riders, to promote equality; at the same time, the State may opt not to enforce other contracts, such as non-disclosure agreements shielding sexual harassment claims. Thus, the question of which contracts are enforceable is a question concerning social equality. Second, the State also plays a key role in interpreting contracts and implementing contract law doctrines (such as duress, undue influence, promissory estoppel, unconscionability, and public policy). Thus, the State should read contracts and apply contract law doctrines in a way that promotes equality. Finally, the State plays a key role in creating background rules in whose shadow the parties may contract. Thus, the State should enact and enforce anti-discrimination statutes that mitigate social inequalities, and in so doing diminish power imbalances between the parties. The State should also enact mandatory rules that combat discrimination.

These strategies sometimes overlap. For example, the State may enact a law declaring non-disclosure agreements unenforceable for shielding sexual harassment claims. Here, the State acts as both contract enforcer and regulator. Another example pertains to protecting surrogate mothers by using both legislation and contract law doctrines such as unconscionability. Here, the State promotes equality by the court implementing contract law doctrines and by legislation of laws. Mapping the different strategies sheds light on different ways to promote equality, however, it is important to keep in mind that the State's different roles intersect. As will be further discussed in the last Part, the State should combine all of its powers to eradicate discrimination.

A. Enforcing Contracts

The State can and should use its power as a contract enforcer to promote equality. Contract enforceability is not neutral, and the question of where to draw the line between enforceable and unenforceable contracts is a policy-oriented question. Enforcing or not enforcing contracts sends a public message. It is not only a matter of encouraging certain contracts and discouraging others, but also of pursuing public policy and advancing values. By giving effect to contracts that promote equality, and invalidating contracts that perpetuate discrimination, the courts can advance equality.

This, of course, is also applicable to enforcing certain contract terms, not only to enforcing the entire contract. The following are several examples of how state power in enforcing or invalidating contracts can be used to advance social equality.

The State can encourage contracts that promote equality, for example, by enforcing inclusion riders. These terms advance diversity and, thus, promote the inclusion of women and minorities. For example, because women and minorities are underrepresented in the movies industry,[34] an inclusion rider will boost their participation. Some scholars have called to expand inclusion riders to additional contexts beyond movies, such as music,[35] boards of private corporations,[36] and ADRs.[37] Similarly, the Rooney Rule aims to increase diversity in football coaching,[38] and the Model Contract Clause includes healthy corporate policies in supply chain contracts to prevent abuses.[39] As for inclusion riders, some scholars have questioned their legality. For example: are they allowed under affirmative action law?[40] Do they satisfy Title VII law?[41] Scholars have also questioned the effectiveness of inclusion riders and raised certain concerns.[42] For example, studios may prefer to cast an actor who did not commit to an inclusion rider rather than an actor who did. Inclusion riders

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34 *Inequality in 1,300 Popular Films: Examining Portrayals of Gender, Race/Ethnicity, LGBTQ & Disability from 2007 to 2019*, USC ANNENBERG (Sept. 2020), https://assets.uscannenberg.org/docs/aii-inequality_1300_popular_films_09-08-2020.pdf.

35 Laura Kozel, "*Can't Hold Us Down"1: How to Use Inclusion Riders to Increase Gender Diversity in the Music Industry,* 1019 L. SCH. STUDENT SCHOLARSHIP 1, 2 (2019).

36 Jennifer S. Fan, *Innovating Inclusion: The Impact of Women on Private Company Boards*, 36 FLA. ST. U.L. REV. 345, 398–99 (2019); *see also* Sue Reisinger, *The Inclusion Movement: A Look at the #InclusionRider Outside of Entertainment*, LAW.COM (Mar. 5, 2018), https://www.law.com/corpcounsel/2018/03/05/the-inclusion-movement-a-look-at-the-inclusionrider-outside-of-entertainment/.

37 *JAMS Introduces Inclusion Rider, Promotes Diversity Initiatives in ADR*, JAMS (May 29, 2018), https://www.jamsadr.com/news/2018/jams-introduces-inclusion-rider-promotes-diversity-initiatives-in-adr.

38 Brian W. Collins, *Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule*, 82 N.Y.U. L. REV. 870, 872 (2007).

39 David V. Snyder, Susan Maslow & Sarah Dadush, *Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0*, 77 BUS. LAW. 115, 167–68, 182 (2022).

40 Jonathan Cappiello, *The Inclusion Rider: Constitutional Analysis and Practical Application of Demanding Diversity Throughout Hollywood*, 37 HOFSTRA LAB. & EMP. L.J. 217, 237–239 (2019).

41 Emily Gold Waldman, *Inclusion Riders and Diversity Mandates*, 6 BELMONT L. REV. 229, 232–33 (2019); *see also* Monica Brierley-Hay & Liam Elphick, *Riding Towards Inclusion in the Film Industry: Quotas and Special Measures under Australian Discrimination Law*, 23 MEDIA & ARTS L. REV. 143, 173 (2019) (addressing anti-discrimination law in Australia).

42 Cappiello, *supra* note 40; *see also* Jonathan Christian, *Are Inclusion Riders Problematic?*, STUDY BREAKS MAG. (Apr. 25, 2018), https://studybreaks.com/tvfilm/inclusion-rider/.

may be drafted so as to require only reasonable efforts to cast or hire people from underrepresented groups. It is also unclear who will enforce the inclusion rider. Lastly, inclusion riders are limited to movie stars and the entertainment industry and have yet to be extended to other actors or areas.

Despite their limitations, inclusion riders can promote diversity and inclusion through contract law. Even if the number of inclusion riders is limited and are not a wider phenomenon, they are important and may impact the possibility of others following suit. As Jonathan C. Lipson suggested, this is an example of "contract social responsibility", the use of contract law to address social problems usually addressed by public law.[43]

Another example of the use of contracts to promote equality are prenuptial agreements that prevent *get*[44] abuse in Jewish divorces.[45] These prenuptial agreements are drafted in accordance with *halachic* law.[46] Thus, enforcing them in civil court may encourage the husband to give his wife a *get*. The prenuptial agreement is a contractual solution to the *agunah*[47] problem. It deals with the husband's control of the divorce heads on, by aiming to prevent the husband from prolonging the divorce proceedings, refusing to give his wife a get or extorting compensation for the *get*.[48] This prenuptial was criticized for not protecting women due to its shortcomings, including the lack of *halachic* support and civil court reactions.[49] As in the inclusion rider example, prenuptial agreements are not a perfect solution to the problem of *get* refusal. Nonetheless, despite their limitations and disadvantages, they have the potential to promote gender equality of Jewish orthodox women. In fact, it is reported that these agreements have been successful in protecting women from *get* refusal.[50]

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43 Jonathan C. Lipson, *Promising Justice: Contract (as) Social Responsibility*, 2019 WIS. L. REV. 1109, 1115 (2019).

44 Rabbi Mark Dratch, *Jewish Divorce: Get Abuse*, MY JEWISH LEARNING, https://www.myjewishlearning.com/article/jewish-divorce-get-abuse/ (last visited May 31, 2024).

45 *Why Should I Sign the Prenup?*, THE PRENUP, https://theprenup.org/explaining-the-prenup/why-should-i-sign-the-prenup/ (last visited Jun. 4, 2024).

46 Amihai Radzyner, *Jewish Law, State, and Social Reality: Prenuptial Agreements for the Prevention of Divorce Refusal in Israel and the United States*, 33 J.L. & RELIGION 61, 63–67 (2018); Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J.L. & SOC. PROBS. 359, 392–93 (1999).

47 *Abuse in the Jewish Community*, WOMENSLAW.ORG, https://www.womenslaw.org/laws/religious/jewish-get-law-divorce-law/basic-info-about-jewish-divorce-law/what-agunah (last updated Aug. 7, 2018).

48 Radzyner, *supra* note 46, at 61, 63–67.

49 Lara Traum, *Involved, Empowered and Inspired: How Mediating Halakhic Prenuptial Agreements Honors Jewish and American Law and Builds Happy Families*, 17 CARDOZO J. CONFLICT RESOL. 179, 180, 192–94 (2015).

50 Radzyner, *supra* note 46, at 64.

Moreover, they have an impact at both the time of divorce and during the marriage because the husband knows he has limited control over the *get*.

Generally, enforcing contracts between husband and wife also promotes equality for women. Under coverture, married women could not contract with their husbands,[51] but even after the law no longer legally prohibited contracts between husband and wife, the courts were reluctant to enforce such contracts. In the famous old case of *Balfour*,[52] the court refused to enforce the contract between the Balfours because a mutual promise between a husband and a wife goes to the very root of the relationship, so there is no consideration. The reluctance of the courts to enforce such contracts is also found in current cases. Courts deny enforcing promises a husband made to his wife for lack of consideration.[53] As such, women's right to contract is restricted by the court, and coverture still persists.[54] This has devastating economic consequences for women.[55] When their domestic labor does not qualify as consideration, and the promises made to them are not enforced - even though they kept their part of the bargain - this leaves them inferior to men in the eyes of the law.[56] Men reap the benefits of the bargain, but escape paying their share of the deal because the contract is unenforceable. Enforcing these contracts will advance economic equality between men and women by empowering women (whether married or not) and advancing distributive justice.[57]

In addition to women, contract enforcement can also benefit other minorities. For example, enforcing agreements between same-sex couples can promote equality for gays. As Martha Ertman suggested, contract is a middle way between criminalization of homosexuality and full equality and public rights.[58] Furthermore, where same-sex marriage is illegal, same-sex couples may cohabit and enter into non-marital agreements, and where same-sex couples cannot adopt, they may enter into joint parenting agreements, surrogacy agreements, or buy egg or sperm to become

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51 1 WILLIAM BLACKSTONE, COMMENTARIES *430–33; Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2152–54 (2019).

52 Balfour v. Balfour [1919] 2 KB 571; *see also* Miller v. Miller, 35 N.W. 464 (Iowa 1887).

53 Borelli v. Brusseau, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993).

54 Antognini, *supra* note 51, at 2158–59.

55 Hendrik Hartog, *Coverture and Dignity*, 41 L. & SOC. INQUIRY 833, 834–835 (2016).

56 Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 506–07 (2005); Orit Gan, *A Feminist Economic Perspective on Contract Law: Promissory Estoppel as an Example*, 28 MICH. J. GENDER & L. 1, 4–6, 21, 31 (2021).

57 *See* Martha M. Ertman, *Contract's Influence on Feminism and Vice Versa*, *in* HANDBOOK OF FEMINISM AND LAW IN THE U.S 532 (Debora Burke, Martha Chamallas & Verna Williams eds., 2022).

58 Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, But not Hell Either*, 73 DENV. U. L. REV. 1107, 1167–68 (1996).

parents.[59] In other words, while the laws support heterosexual families, but sometimes do not even recognize same-sex families, contracts may be a way around these laws.

Contracts enable same-sex couples to create a family. Enforcing such contracts will give these families some support and recognition. The preferred way may be legally recognizing these families and broadening family law to include same-sex families. However, contract enforcement provides important encouragement, albeit limited, to these families.

Alongside contract enforcement (as demonstrated above), the State may refuse to enforce contracts that perpetuate inequality. For example, not enforcing non-disclosure agreements ("NDAs") shielding sexual harassment cases will help reduce sexual harassment and promote gender equality. NDAs come in different forms[60]: as part of an employment agreement, a settlement agreement, or an arbitration agreement; in the employment setting or in another context. Furthermore, NDAs come about when sexual harassment allegations arise in internal proceedings in the workplace; or in federal or state agencies such as the Equal Employment Opportunity Commission ("EEOC"); or in federal or state courts.[61] Courts usually enforce NDAs, especially when they constitute a private agreement between parties and when no public agencies are involved.[62]

Scholars identify several advantages and disadvantages, benefits and detriments of NDAs.[63] NDAs facilitate settlement of sexual harassment cases (rather than a long, expensive, and public trial) while protecting the privacy of both parties.[64] Thus, NDAs benefit both parties: publicity would hurt the reputation of both the perpetrator and the claimant, and both parties also save on legal costs.[65] On the other hand, NDAs enable repeat offending and do not deter predators; they are sometimes written broadly;[66] and there is usually a power imbalance between the parties which might be misused,

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59 MARTHA M. ERTMAN, LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES 155 (2015).

60 D. Andrew Rondeau, *Opening Closed Doors: How the Current Law Surrounding Nondisclosure Agreements Serves the Interests of Victims of Sexual Harassment, and the Best Avenues for Its Reform*, 2019 U. CHI. LEGAL F. 583 (2019); Emily Otte, *Toxic Secrecy: Non-Disclosure Agreements and #MeToo*, 69 U. KAN. L. REV. 545, 546–47 (2021).

61 Minna J. Kotkin, *Reconsidering Confidential Settlements in the #MeToo Era*, 54 U.S.F. L. REV. 517, 524–25, 527–28 (2020).

62 *See e.g.*, Equal Emp. Opportunity Comm'n v. Astra U.S.A., Inc., 94 F.3d 738, 741–42 (1st Cir. 1996).

63 Taishi Duchicela, *Rethinking Nondisclosure Agreements in Sexual Misconduct Cases*, 20 LOY. J. PUB. INT. L. 54, 57–61 (2018); *see also* Otte, *supra* note 60, at 558–60.

64 Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 77 (2018).

65 Michael Heise & David S. Sherwyn, *Sexual Harassment: A Doctrinal Examination of the Law, An Empirical Examination of Employer Liability, and A Question About NDAs - Because Complex Problems Do Not Have Simple Solutions*, 96 IND. L.J. 969, 999–1001 (2021).

66 Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change.

especially in cases of low-wage workers.[67] Thus, some victims are not amply compensated. One scholar argued that NDAs are analogous to blackmail and are thus immoral.[68] Other scholars have maintained that NDAs silence victims of sexual harassment, oppress them, and generally hurt the efforts to eradicate sexual harassment.[69] NDAs also complicate the psychological damage caused to the victims by sexual harassment.[70] NDAs may also affect third parties, such as future victims.[71] Thus, these externalities should also be considered when evaluating NDAs, and not merely the interests of the parties. In addition, an empirical study showed that people prefer public disclosure of uncomfortable information.[72]

Some scholars propose a balanced approach: rather than either an enforceable or unenforceable agreement, they suggest an intermediate solution.[73] Some states (such as New York, New Jersey, and California) have enacted statutes concerning NDAs.[74]

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[67] Marissa Ditkowsky, *#UsToo: The Disparate Impact of and Ineffective Response of Sexual Harassment of Low-Wage Workers*, 26 UCLA WOMEN'S L.J. 69, 69, 118–19 (2019).

[68] Scott Altman, *Selling Silence: The Morality of Sexual Harassment NDAs*, 39 J. APP. PHIL. 698, 716 (2022).

[69] Kate M. Fox, *It's the Circle of Strife: Combatting Backlash and Workplace Animus Towards Women after the #MeToo Movement*, 82 U. PITT. L. REV. 207, 220 (2020); *see* Sarah David Heydemann & Sharyn Tejani, *Legal Changes Needed to Strengthen the #MeToo Movement*, 22 RICH. PUB. INT. L. REV. 237, 243 (2019).

[70] Benton Hughes, *Revisiting the 1995 Congressional Accountability Act: How Congress Granted Itself Practical Immunity from Sexual Misconduct and Learned to Stop Worrying about Allegations*, 44 LAW & PSYCHOL. REV. 245, 253 (2020).

[71] Julie Macfarlane, *How a Good Idea Became a Bad Idea: Universities and the Use of Non-Disclosure Agreements in Terminations for Sexual Misconduct*, 21 CARDOZO J. CONFLICT RESOL. 361, 367 (2020).

[72] Gilat Juli Bachar, *The Psychology of Secret Settlements*, 73 HASTINGS L.J. 1, 7 (2022).

[73] *See* Rosemary Kim, *Trying Something Old?: Incorporating the Dodd-Frank Act into Modern Efforts to Eliminate Workplace Sexual Harassment*, 43 SEATTLE U. L. REV. 351 (2019); Ayres, *supra* note 64; Joan C. Williams et al., *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139 (2019); Rachel S. Spooner, *The Goldilocks Approach: Finding the "Just Right" Legal Limit on Nondisclosure Agreements in Sexual Harassment Cases*, 37 HOFSTRA LAB. & EMP. L.J. 331 (2019).

[74] Jonathan Ence, "*I Like You When You are Silent": The Future of NDAS and Mandatory Arbitration in the Era of #MeToo*, 2019 J. DISP. RESOL. 165, 174–76 (2019); Mushu Huang, *Legislative Responses to the Use of Non-Disclosure Agreement Regarding Workplace Sexual Misconduct Claims: From Information Transparency to Systematic Protection*, 1 Seton Hall L. SCH. STUDENT SCHOLARSHIP 1023 (2019); Taylor Percival & Lane Gibbons, *Beyond #MeToo: Addressing Workplace Sexual Misconduct Cases and the Targeted Use of Non-disclosure Agreements*, 35 BYU PRELAW REV. 89, 95 (2021); Rachel L. Wagner, *Women's Autonomy in Nondisclosure Agreements for Sexual Misconduct Cases*, 82 MONT. L. REV. 409, 416, 418 (2021).

There is also pending federal legislation limiting the use of NDAs.[75] The Speak Out Act makes pre-dispute NDAs unenforceable in sexual harassment and sexual assault cases.[76]

Another example is prenuptial agreements. Enforcing prenuptial agreements—entered into under a severe power imbalance—may sometimes harm women.[77] Enforcing a one-sided prenuptial agreement that includes a waiver of the woman's property and other economic rights under marriage law may result in severe economic conditions for women.[78] Such enforcement perpetuates the inequality between spouses.[79] Thus, refusing to enforce prenuptial agreements under these circumstances will advance distributive justice and equality.

In the same manner, some surrogacy agreements are one-sided and harmful for the surrogate. Due to the power imbalance between the privileged couple and the underprivileged surrogate, the contract may include restrictions on the surrogate's behavior and under-compensation for her services.[80] As in the previous example of prenuptial agreements, some surrogacy agreements should not be enforced.[81]

Some contracts are not enforced for anti-commodification reasons, or at least only partially enforced for incomplete commodification reasons.[82] *Get* abuse and surrogacy are such examples.

As these examples show, not enforcing unfair one-sided NDAs, prenuptial agreements, and surrogacy agreements can benefit women. However, this is not a general conclusion applicable to all contracts. Rather, a close reading of each contract, and considering the circumstances surrounding the contract formation and the relations between the parties, is necessary. As noted before, to enforce or not to enforce is a gendered question, and there is no easy answer.

Though this Article has thus far focused on gender equality, the above is relevant in other contexts as well. For example, not enforcing an employment contract

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[75] Me Too Congress Act, H.R. 4396, 115th Cong. (2017); EMPOWER Act, H.R. 5842, 117th Cong. (2021); BE HEARD in the Workplace Act, H.R. 2148, 116th Cong. (2019).

[76] Speak Out Act, S. 4524, 117th Cong. (2022).

[77] *See* Biliouris v. Biliouris, 852 N.E.2d 687 (Mass. App. Ct. 2006).

[78] Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 280 (1994).

[79] *Id*. at 247. *See also*, Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 193 (2013); Annie L. Zagha, *As Long as You Love Me: The Effects of Enforcing Prenuptial Agreements on Intimate Partner Violence*, 22 CARDOZO J. CONFLICT RESOL. 293, 294–95 (2021); SHARON THOMPSON, PRENUPTIAL AGREEMENTS AND THE PRESUMPTION OF FREE CHOICE: ISSUES OF POWER IN THEORY AND PRACTICE 5 (2015).

[80] Alexandra Holmstrom-Smith, *Free Market Feminism: Re-Reconsidering Surrogacy*, 24 U. PA. J.L. & SOC. CHANGE 443, 446 (2021).

[81] *Id.* at 455.

[82] MARGARET JANE RADIN, CONTESTED COMMODITIES 509 (1996).

mandating individual arbitration protects employee rights.[83] It enables employees to bring class actions against employers and diminishes the power imbalance between the parties. Another example is training repayment agreements, according to which the employee will pay the employer for on-the-job training if she leaves the job or is fired within a set period of time.[84]

As the above discussion shows, the State should better protect equality by enforcing some contracts while refusing to enforce others. This will depend on the contracts, as in some cases enforcing a contract will advance equality, and in other cases denying enforcement will promote equality. The question of whether to enforce a contract requires a context-specific answer. None of the examples are perfect, and each has its limitations. Thus, advancing equality using contract law deserves a nuanced and complex answer.[85] The impact on social equality should be a factor in contract enforcement. The question whether to enforce a contract is gendered, and the answer should be given with gender in mind.

B. Applying Contract Law

The State can and should use its judicial power to implement contract law to promote equality. Contract law doctrines are gendered.[86] As scholars have shown, whether deciding if a contract was formed, interpreting contracts, awarding remedies for breach, or applying contract law defenses to invalidate a contract, the court's application of contract law is not gender neutral.[87] The courts can use contract law to empower women and minorities, or to perpetuate social inequalities; to advance equality, or to maintain social hierarchies. The following are several examples of how the State can use its judicial power in applying contract law to promote a more egalitarian society.

Contract formation is gendered. For example, housework or care work do not qualify as consideration.[88] Thus, the courts may conclude that no contract was formed between a husband and his wife for lack of consideration. Likewise, the court will not enforce an agreement between a man and a woman, whether married or not, if it contains sex.[89] Thus, the ability of women to contract with their significant others is

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83 *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

84 Jonathan Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723, 748 (2021).

85 *See* Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235 (1998).

86 Debora L. Threedy, *Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts*, 45 WAKE FOREST L. REV. 749, 762 (2010).

87 Albertina Antognini, *Nonmarital Contracts,* 73 STAN. L. REV. 67, 92 (2021).

88 Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 19 (Cal. Ct. App. 1993); *see also* Hasday, *supra* note 56; Gan, *supra* note 56.

89 Susan F. Appleton & Albertina Antognini, *Sexual Agreements*, 99 WASH. U. L. REV. 1807, 1819 (2022).

curtailed whether in or outside of marriage.[90] This limits women's freedom of contract and denies the property distribution the parties agreed upon.[91] It denies the value of women's care work and housework.

Applying a broader definition of consideration or the doctrine of promissory estoppel will result in a more egalitarian distribution of property.[92] Enforcement of these marital agreements will empower women and enable them to use contract law to be better off economically. It will also relax the market/home binary and stretch contract law beyond the market to include agreements between intimates. Thus, formation of contract may work to exclude women or empower them, to disregard the promise made to them and the parties' distribution, or to award women contractual gains.

Furthermore, in the precontractual stage, the duty of good faith can be applied to refusal-to-contract cases for animus reasons.[93] As Hila Keren showed, people are denied participation in the market when they are denied services or products or when they are treated in a hostile, derogatory, and discriminatory manner.[94] Studies have shown, for example, that prices differ according to gender and race.[95] As negotiations are gendered, contract law's disregard of social gender roles, stereotypes, and dynamics puts women at a disadvantage.[96] Danielle Kie Hart showed this disadvantage by demonstrating that imbalance of power during negotiations is crucial.[97] To counter such disadvantages, the duty of good faith can be used as a contractual tool to infuse non-discriminatory ideas into contract law.[98] This doctrine allows women to further their economic participation in the market and to use contracts to improve their economic condition.

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90 *See* Antognini, *supra* note 87.

91 Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 30 (2017).

92 Gan, *supra* note 56, at 30; Hadfield, *supra* note 85, at 1249–50; Orit Gan, *Promissory Estoppel: A Call for a More Inclusive Contract Law*, 16 J. GENDER RACE & JUST. 47 (2013).

93 Keren, *supra* note 7, at 630; Keren, *supra* note 9, at 179.

94 Keren, *supra* note 7.

95 Ayres, *supra* note 5, at 819; *see also* Mikayla R. Berliner, *Tackling the Pink Tax: A Call to Congress to End Gender-Based Price Discrimination*, 42 WOMEN'S RTS. L. REP. 67, 72–73 (2020).

96 Carol M. Rose, *Bargaining and Gender*, 18 HARV. J.L. & PUB. POL'Y 547, 557 (1995).

97 Danielle K. Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 179 (2009) (demonstrating that unconscionability, economic duress, and misrepresentation have the potential to induce coercive conduct by exploiting imbalances in bargaining power which compromises the fairness and voluntariness of contractual agreements).

98 For the notion that duty of good faith promotes just relations, *see* Dagan & Dorfman, *supra* note 18, at 1440; Houh, *supra* note 23.

Like contract formation, contract defenses are also gendered. Duress law leaves out of its reach many threats and coercions women face.[99] Pressures typical to women's lived experience in a patriarchal society are excluded from duress, leaving these women unprotected. Women's subordination in a patriarchal society may leave women at a disadvantage when negotiating a prenuptial agreement,[100] divorce agreement,[101] or surrogacy agreement. As in duress, undue influence may disregard women's vulnerability and men's misuse of their own advantages.[102]

Unconscionability is also gendered. *Williams v. Walker Thomas*,[103] the famous unconscionability case, is an example. Ora Williams, an African-American single parent of seven children living on welfare, was relieved from her one-sided contract with Walker Thomas because the agreement was unfair and exploitive.[104] NDAs—

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99 Gan, *supra* note 79, at 194.

100 Brod, *supra* note 78, at 239.

101 Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1191–92 (1999).

102 Orit Gan, *Spousal Agreements and Patriarchal Bargains: A Wife's Guarantee of Her Husband's Business Debts*, 18 EUR. REV. CONT. L. 175, 188 (2022); Rosemary Auchmuty, *Men Behaving Badly: An Analysis of English Undue Influence Cases*, 11 SOC. & LEGAL STUD. 257, 259 (2002); BLINDA FEHLBERG, SEXUALLY TRANSMITTED DEBT: SURETY EXPERIENCE AND ENGLISH LAW 86 (1997).

103 Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

104 Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 38–39 (1995); Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 305–10 (1994); Blake D. Morant*, Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & L. 1, 5–6 (1989); Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 108–09 (1998); Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 925–28 (1997); Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L. REV. 89, 98–99 (1994); Barbara C. Bedont, *Gender Differences in Negotiations and the Doctrine of Unconscionability in Domestic Contracts*, 12 CAN. FAM. L.Q. 21, 36 (1994); Renata Grossi, *Love as a Disadvantage in Law*, 45 J.L. & SOC'Y 205, 211 (2018); *see* Hila Keren, *Law and Economic Exploitation in an Anti-Classification Age*, 42 FLA. ST. U. L. REV. 313, 367 (2015).

discussed earlier—could be unenforceable under the doctrines of unconscionability, duress or public policy,[105] as can be get settlements discussed earlier.[106]

Defenses protect vulnerable women, but this comes at the price of stereotypes. While helping the specific woman out of her exploitive contract, it generally leaves women as victims needing special protection—not really as an autonomous party that enjoys freedom of contract.

Interpretation of contracts is also gendered. As Hila Keren suggested, the parol evidence rule maintains hierarchies that value masculinity over femininity.[107] Textual interpretation, with no consideration of the social context (including gender, race, class, ethnicity), veils the social meaning of the contract.[108] Words are socially constructed, so a limited interpretation may miss the intention of the parties and the purpose of the contract.

Breach of contract and remedies are also gendered. Lea VanderVelde explored the historical gendered background of a contract enforcement rule and analyzed the origin of the distinction between enforcing performance of a contract and preventing the breaching party from entering into another contract.[109] Furthermore, damages are also gendered.[110] The breach of promise to marry is another example of how remedies for breach are gendered. This claim was abolished in many states but is still available in some states.[111] Scholars discussed the advantages and disadvantages of this claim. On the one hand, it empowered women, giving them a cause of action against their

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105 Vasundhara Prasad, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence around Abuse through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2524–25 (2018); Catharine MacMillan, *Contracts and Equality: The Dangers of Non-disclosure Agreements in English Law*, 18 EUR. REV. CONT. L. 127, 148 (2022); *see also* Otte, *supra* note 60, at 571. For public policy, *see* David A. Hoffman & Eric Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 198 (2019); Jingxi Zhai, *Breaking the Silent Treatment: The Contractual Enforceability of Non-Disclosure Agreements for Workplace Sexual Harassment Settlements*, 2020 COLUM. BUS. L. REV. 396, 421–22 (2020); Jeffrey Steven Gordon, *Silence for Sale*, 71 ALA. L. REV. 1109, 1160 (2020).

106 Alan C. Lazerow, *Give and "Get"? Applying the Restatement of Contracts to Determine the Enforceability of "Get Settlement" Contracts*, 39 U. BALT. L. REV. 103, 134 (2009).

107 *See* Hila Keren, *Textual Harassment: A New Historicist of the Parol of Evidence Rule on its Four Hundredth Anniversary*, 13 AM. U. J. GENDER SOC. POL'Y & L. 251 (2005).

108 *See* Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1, 45 (2008).

109 Lea S. VanderVelde, *The Gendered Origin of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775, 819 (1992).

110 *See* Sullivan v. O'Connor, 296 N.E.2d 183, 189–90 (Mass. 1973); Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737, 742 (1970).

111 Kelsey M. May, *Bachelors Beware: The Current Validity and Future Feasibility of a Cause of Action for Breach of Promise to Marry*, 45 TULSA L. REV. 331, 332 (2013).

fiancés[112] and acknowledged women's harms, especially emotional harms.[113] On the other hand, it is old fashioned and riddled with stereotypes and old notions of femininity, masculinity, and marriage. It also raises questions about privacy and autonomy. Finally, contract law is suited for commercial bargains and is ill-fitted to address emotional intimate relations. Money cannot mend a broken heart, and therefore damages for breach of contract are not the remedy for loss of affection. As in the previous examples, contract law doctrines provide some gains and advantages, but also have some costs and detriments.

Contract law is based on consent and freedom of contract, both gendered concepts. Consent is limited and does not consider social background that influences the parties' consent.[114] In our society, the parties' class, gender, race, and disability may affect their choices: some have more and better choices than others. However, treating the choices parties make as agreed while disregarding this social reality under a lean concept of consent perpetuates social inequalities. As Jeffrey L. Harrison observed,

> [T]he source of the continual societal imbalances that flow from "freedom of contract" are largely the results of the damage that class stratification has already inflicted… "freedom" of contract is an illusion, in that we are taught from birth, by the fortuity of our class, that to which we should feel entitled. Furthermore, the conclusion that contract law principles are carefully designed to permit and facilitate inequality in exchanges seems accurate.[115]

Similarly, freedom of contract is based on the assumption of autonomous individuals operating in the market without constraints and restrictions.[116] This does not reflect the lived experience of many women and men. As this concept calls for restricted intervention of the state in the market, underprivileged parties need the state's protection. Facing unequal bargaining power and predatory terms and conditions in their contracts they need the state to police these contracts and to intervene in the case of market inefficiencies and failures. Furthermore, contract law is structured around binaries and hierarchies. A contract is either enforced or

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112 *See* Mary Coombs, *Agency and Partnership: A Study of Breach of Promise Plaintiffs*, 2 YALE J.L. & FEMINISM 1, 18 (1989); Neil G. Williams, *What to Do When There's No "I Do": A Model for Awarding Damages Under Promissory Estoppel*, 70 WASH. L. REV. 1019, 1036 (1995).

113 *See* Alecia Simmonds*, 'She Felt Strongly the Injury to Her Affections': Breach of Promise of Marriage and the Medicalization of Heartbreak in Early Twentieth-Century Australia*, 38 J. LEGAL HIST. 179, 189 (2017); Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 472 (1993).

114 Hadfield, *supra* note 85, at 1280; Orit Gan, *The Many Faces of Contractual Consent*, 65 DRAKE L. REV. 615, 617 (2017).

115 Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 447–49 (1994).

116 Orit Gan, *Anti-Stereotyping Theory and Contract Law*, 42 HARV. J.L. & GENDER 84 (2019).

invalidated, consent is either valid or invalid, a contract is either formed or no contract was made. Moreover, contract law is private, not public, objective, not subjective, and contract rule is either procedural or substantive. This dichotomous structure is gendered.[117] This gendered basis of contract law impacts the doctrines of contract law. As demonstrated above, contract law is not gender neutral.

Although I focused on gender, contract law should be sensitive to minorities and other underprivileged parties as well. For example, duress law should be sensitive to gays[118] and Jews[119] and unconscionability should be sensitive to class and race.[120]

As the above discussion showed, contract law is not gender neutral. Thus, applying contract law doctrine with gender in mind will empower women, but ignoring it will lead to unjust results. Contract law rules sensitive to women's lived experience will advance equality, while disregarding gender will result in the opposite. Contract law is not neutral, and challenging its claim of universality is the beginning of a critical project. As the above examples showed, reshaping contract law doctrines with gender in mind continues this project.

C. Legislating Background Rules

The State can and should use its power as a regulator and legislator to promote equality. Specific statutes and regulations can address problems that underprivileged parties, such as surrogate mothers, face in their negotiations. These mandatory rules restrict the parties' freedom of contract and police the terms of their contracts. More generally, anti-discrimination laws and regulations may work in the background of the contract to empower underprivileged parties. This will result in more egalitarian contracts.[121] As power imbalance between negotiating parties impacts the terms of their contract, it is important to restrain the power of the powerful party by legislation or regulation. The following are several examples of how the State can use its regulative and legislative power to act in the shadows of the law as contracts are negotiated and entered into in the context of anti-discrimination laws.

The State can enact specific, tailored, mandatory rules that protect women.[122] For example, some states regulate surrogacy to protect surrogate mothers. An eligible

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117 Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

118 Odorizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr. 533, 537, 543 (1966).

119 *See* Golding v. Golding, 581 N.Y.S.2d 4, 5–6 (N.Y. App. Div. 1992); Perl v. Perl, 512 N.Y.S.2d 372, 373 (N.Y. App. Div. 1987); Segal v. Segal, 278 N.J. Super. 218, 650 A.2d 996 (App. Div. 1994). For public policy, *see* Re Drummond Wren 26 [1945] O.R. 778, [1945] 4 D.L.R. 674 (Ont. H.C.).

120 *See* sources, *supra* note 104.

121 Jenny R. Yang and Jane Liu, *Strengthening Accountability for Discrimination*, ECON. POL'Y INST. (Jan. 19, 2021), https://www.epi.org/unequalpower/publications/strengthening-accountability-for-discrimination-confronting-fundamental-power-imbalances-in-the-employment-relationship/.

122 For personalized mandatory rules, *see* Omri Ben-Shahar & Ariel Porat, *Personalizing Mandatory Rules in Contract Law*, 86 U. CHI. L. REV. 255, 257 (2019).

surrogate or intended parent must meet certain requirements such as age, health, and medical requirements.[123] Surrogacy agreements must also meet several requirements to be enforceable, among them independent counsel and a writing.[124]Although these protections are not perfect, they still benefit surrogate mothers. Policing the agreement and somewhat limiting the power imbalance between surrogate mothers and intended parents advances women's equality and distributive justice.

Laws protecting prostitutes is another example. Some states adopted the notion of prostitution as sex work. As such, prostitution is not criminalized, but rather regulated, to protect prostitutes.[125] In other words, although prostitutes are viewed as autonomous, independent individuals who work and negotiate the terms of their labor, there are interventions to their freedom of contract.[126] These are legal safeguards (albeit imperfect) from the harms of prostitution.

Another example is New York's law that deals with *get* refusal. This law protects Jewish women and diminishes the power imbalance between them and their husbands in negotiating divorce agreements. According to the New York law, to get a divorce, one must take "all steps solely within his or her power to remove [all] barrier[s] to the defendant's remarriage following the . . . divorce."[127] In addition, in determining distribution of marital assets and maintenance, the court shall consider "the effect of a barrier to remarriage".[128] Other countries also have similar statutes.[129] Scholars have criticized New York's statute, arguing that it is too limited.[130] Furthermore, there

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123 *Surrogacy Requirements & Qualifications*, IARC SURROGACY, https://iarcsurrogacy.com/surrogacy/surrogate-requirements/ (last visited Jun. 4, 2024).

124 For surrogacy laws in each state, *see Surrogacy Laws*, THE SURROGACY EXPERIENCE, INC., https://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html (last visited Jun. 4, 2024); *Guide to State Surrogacy Laws*, CAP 20, https://www.americanprogress.org/article/guide-to-state-surrogacy-laws/ (last visited Jun. 4, 2024).

125 Katheryn E. Marcum, *Learning From Mistakes: Decriminalizing Prostitution in the United States*, 3 MOUNTAINEER UNDERGRADUATE RSCH. REV. 130, 135–36 (2011).

126 Che Post, Jan G. Brouwer & Michel Vols, *Regulation of Prostitution in the Netherlands: Liberal Dream or Growing Repression?*, 25 EUR. J. CRIM. POLICY RES. 99, 107 (2019); Coty R. Miller & Nuria Haltiwabger, *Crime and Punishment Law Chapter: Prostitution and The Legalization/Decriminalization Debate*, 5 GEO. J. GENDER & L. 207, 241–42 (2004); Hila Shamir, *Feminist Approaches to the Regulation of Sex Work: Patterns in Transnational Governance Feminist Law Making*, 52 CORNELL INT'L L.J. 177, 207 (2019).

127 N.Y. Dom. Rel. Law § 253 (McKinney 1986); *see* Jack B. Harrison, *On Marriage and Polygamy*, 42 OHIO N.U. L. REV. 89, 104 (2015) (arguing that the First Amendment's Free Exercise Clause bars the government from regulating religious beliefs but allows regulation of actions conflicting with social duties or public order).

128 N.Y. Dom. Rel. Law § 236(B) (McKinney 1986).

129 Lawrence Goodman, *A Feminist Guide to Jewish Divorce,* BRANDEISNOW (Dec. 5, 2018), https://www.brandeis.edu/now/2018/december/divorce-judaism-fishbayn%20.html.

130 Jeremy Glicksman, *Almost, But not Quite: The Failure of New York's Get Statute*, 44 FAM. Q. REV. 300, 305 (2006).

is a debate whether the statute is constitutional[131] or not.[132] Scholars have also pointed out that the statute raises *halachic* problems.[133] While some scholars view the statute as effective and successful[134] and advocate enacting similar statutes in other states,[135] other scholars consider it a bad law.[136] Notwithstanding the above criticism, these *get* laws protect Jewish women from *get* refusal and put them in a better position when negotiating a divorce contract with their husbands. They also forbid men from leveraging their power to withhold get under *halachic* law. By denying them this power, the State ensures that they are unable to extort economic advantages from their wives in their divorce negotiations. Even though these laws are not perfect, and despite their disadvantages, they are important for advancing equality between Jewish women and their husbands. Indeed, these laws do not provide perfect protection for Jewish women, nor do they completely resolve the *agunah* problem. Nonetheless, they impact not only the divorce agreement, but also the behavior of men during both the marriage and the divorce. As discussed in the previous Part, the Speak Out Act and other states' statutes declaring NDAs that hush sexual harassment cases are unenforceable, provide similar examples. This legislation empowers women to better their position in contract negotiations, and by using these mandatory rules, the State polices misuse of power and fairness of contracts.

Mandatory rules protect vulnerable parties in general, not only women, for example: consumers and employees.[137] Minimum wage for employees and return

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131 Tanina Rostain, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 YALE L.J. 1147, 1149 (1987); Jill Wexler, *Gotta Get A Get: Maryland and Florida Should Adopt Get Statutes*, 17 J.L. & POL'Y 735, 769 (2009); Adetokunbo Arowojolu, *How Jewish Get Law Can Be Used as a Tool of "Spiritual Abuse" in the Orthodox Jewish Community*, 16 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 66, 86 (2016); Michelle Kariyeva, *Chained Against Her Will: What a Get Means for Women Under Jewish Law*, 34 TOURO L. REV. 757, 785 (2018).

132 Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law?*, 15 PACE L. REV. 703, 706 (1995); Lawrence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From Avitzur to the Get Statute*, 50 BROOK. L. REV. 229, 251 (1984); Ilene H. Barshay, *The Implications of the Constitution's Religion Clauses on New York Family Law*, 40 HOW. L.J. 205, 233–35 (1996); Patti A. Scott, *New York Divorce Law and the Religion Clauses: An Unconstitutional Exorcism of the Jewish Get Laws*, 6 SETON HALL CONST. L.J. 1117, 1160, 1180, 1189 (1996); Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312, 381 (1992); Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 833–34 (1998).

133 Zornberg, *supra* note 132, at 722; Breitowitz, *supra* note 132, at 396.

134 Wexler, *supra* note 131, at 736.

135 Arowojolu, *supra* note 131, at 79; Wexler, *supra* note 131, at 737.

136 Glicksman, *supra* note 130, at 300; Zornberg, *supra* note 132, at 707.

137 Eyal Zamir & Ian Ayres, *A Theory of Mandatory Rules: Typology, Policy, and Design*, 99 TEX. L. REV. 283, 300 (2020).

policies for consumers are such examples.[138] Regulation of prices in different sectors such as housing, consumers, and banking is another example.[139]

Alongside mandatory rules, the State should enact anti-discrimination laws. These laws empower women in their negotiations with men and promote equality. They also serve as a socio-legal background to the contract. Women bargain in the shadow of the law, and as such, the law sets the framework for negotiations.[140] For example, a law that prohibits polygamy[141] would strengthen women's position vis-à-vis their husbands when negotiating marital agreements. Criminal prohibition of polygamy is not unrelated to marital contracts and can empower women who enter such contracts. Though some scholars questioned whether these criminal laws are constitutional and warranted,[142] the mere prohibition of polygamy betters women's place vis-à-vis men in negotiating marriage.

At a higher level of abstraction, anti-discrimination laws generally empower women, which can lead to women negotiating better contracts for themselves. For example, Title VII prohibits employment discrimination because of sex. Anti-discrimination laws in the employment setting put women in a better position when negotiating their employment contract.[143] Although not directly targeting the employment contract, anti-discrimination laws in the employment setting have a secondary effect on women's employment negotiations and contract terms. Protecting equal pay, prohibiting sexual harassment in the workplace, and practicing affirmative action in employment advance women's position in the workplace[144] as might be reflected in their employment contracts. As Danielle Kie Hart concluded, "Imbalances of power, not freedom and consent, form the cornerstones of the modern system of

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138 *Id.* at 313.

139 *Id.*

140 Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

141 Nicholas Bala, *Why Canada's Prohibition of Polygamy is Constitutionally Valid and Sound Social Policy*, 25 CAN. J. FAM. L. 165, 166 (2009); Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 359 (2003); Thomas Buck Jr., *From Big Love to the Big House: Justifying Anti-Polygamy Laws in an Age of Expanding Rights* , 26 EMORY INT'L L. REV. 939, 946 (2012); John Witte Jr., *Why Two in One Flesh - The Western Case for Monogamy over Polygamy*, 64 EMORY L.J. 1675, 1687–88 (2015).

142 THE POLYGAMY QUESTION 18 (Janet Bennion & Lisa Fishbayn Joffe eds., 2016); Casey E. Faucon, *Decriminalizing Polygamy*, 2016 UTAH L. REV. 709, 709 (2016).

143 Carmen Sanchez Cumming, *The Importance of Anti-Discrimination Enforcement for a Fair and Equitable U.S. Labor Market and Broadly Shared Economic Growth,* WASH. CTR. FOR EQUITABLE GROWTH (Dec. 2021), https://equitablegrowth.org/the-importance-of-anti-discrimination-enforcement-for-a-fair-and-equitable-u-s-labor-market-and-broadly-shared-economic-growth/.

144 *Id.*

contract law."[145] Focusing on formation of contract, inequality of power between negotiating parties leads to unfair contracts that favor the more powerful party. Thus, contract law maintains, rather than mitigates, this unfairness.[146] Accordingly, anti-discrimination laws (external to contract law) at the background of negotiations are important. As contract law lacks a robust imbalance of power doctrine,[147] these laws somewhat mitigate the disadvantage women face in negotiations.

As in employment law, tax law can also empower women in their negotiations. Tax is a factor in many transactions, therefore progressive tax, tax incentives for women and minorities, and generally, a gendered policy in taxation, will benefit women when they contract.[148] Similar to criminal law, tax law can impact the terms of the contract, albeit indirectly. For example, tampon tax makes menstrual hygiene products more expensive than other tax-free products, and thus unavailable for poor women. Because only women use these products, this is a gendered tax[149] law, which impacts the price of sale contract.

Although I focused on gender equality, the above is relevant in other contexts as well. For example, laws that prohibit discrimination of LGBTQ people may empower them when they negotiate as employees, consumers, or renters.[150] Laws that prohibit discrimination of disabled people have a similarly empowering effect.[151] Anti-discrimination laws affect the precontractual stage by providing rules of conduct and prohibiting discrimination in negotiations.[152] Even though the Supreme Court limited the protection of anti-discrimination laws, these laws still apply to the pre-contractual stage, and negotiations are conducted in their shadow.

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145 Danielle Kie Hart, *Contract Law Now - Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 5 (2011).

146 *Id.* at 4.

147 Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 140, 144 (2005); Hugh Beale*, Inequality of Bargaining Power*, 6 OXFORD J. LEGAL STUD. 123, 124 (1986); Spencer Nathan Thal, *The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness*, 8 OXFORD J. LEGAL STUD. 17, 19 (1988).

148 Anthony C. Infanti & Bridget J. Crawford, *A Taxing Feminism*, *in* THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES 630–47 (Deborah L. Brake, Martha Chamallas, and Verna L. Williams eds., 2020); FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS 25–26 (Bridget J. Crawford & Anthony C. Infanti eds., 2017).

149 Bridget J. Crawford & Emily G. Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 439 (2022); Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 WIS. L. REV. 491, 491 (2017); Jorene Ooi, *Bleeding Women Dry: Tampon Taxes and Menstrual Inequity*, 113 NW. U. L. REV. 109, 109 (2018–2019).

150 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2022); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018); Fulton v. City of Phila., 141 S. Ct. 1868 (2021).

151 Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1568–69 (2022).

152 Keren, *Market Humiliation*, *supra* note 7, at 628–29; *Beyond Discrimination*, *supra* note 7, at 156.

Contracts are not signed in a vacuum, but rather embedded in social context, and indeed, women bargain in the shadow of a patriarchal society.[153] Anti-discrimination laws stand in the background of contracts while parties negotiate in their shadow. In this way, they can shape the terms of contracts: put plainly, anti-discrimination laws can advance more egalitarian contracts. Some laws directly target contracts, while other laws more generally empower women and minorities, indirectly influencing the contracts.[154] Some laws set specific mandatory rules and others promote social equality and create an egalitarian background for the parties' negotiations. Whether directly or indirectly, contract negotiations are conducted under a social power structure.[155] Thus, the legislation background makes the terms of contracts with underprivileged parties more egalitarian. Indeed, the Supreme Court applies these laws to a limited degree, but these laws provide an important environment for negotiations.[156] Although not a perfect guarantee of fair contracts, these laws directly and indirectly better women's position in negotiations.

As the discussion above showed, when enacting anti-discrimination laws, the State should consider their impact on contracts, and regulation should be context specific and nuanced. For example, the State should consider the constitutional or *halachic* aspects of the legislation. Contracts evolve[157] and react to their socio-legal environment. Contracts are not static, but rather engage in a dialogue with their environment, change over time, reflect social norms, and respond to new social realities.[158] This makes regulation very important in triggering contract changes so that they are more egalitarian. Carol Rose argued that since women tend to cooperate, or are perceived as cooperators in negotiations, men will always have the upper hand in negotiations.[159] Notwithstanding this pessimistic conclusion, anti-discrimination laws will narrow the imbalance of power between the parties, limit the inferior position of women, and police abuse of power by men.

IV. CONTRACT LAW, EQUALITY AND THE STATE: THREE TEST CASES

This Part further develops the mapping in the previous part. It thoroughly analyzes three test cases of the State's three different strategies in furthering equality by using contract law in each different context. The first test case pertains to enforcing nonmarital agreements, thereby empowering women in the familial sphere. The second test case applies to contract defenses in commercial law. As the *Arthur Murray* cases show, women can be relieved of predatory consumer agreements. The third test case involves the enactment of the Ending Forced Arbitration of Sexual Assault and

153 Gan, *supra* note 102.

154 *Id.*.

155 Hart, *supra* note 145, at 2.

156 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2314–15 (2022).

157 Matthew Jennejohn et al., *Contractual Evolution*, 89 U. CHI. L. REV. 901, 901 (2022).

158 *Id.* at 908.

159 Rose, *supra* note 96, at 551.

Sexual Harassment Act. This legislation provides an important contractual tool in the battle against sexual assault and sexual harassment.

A. Nonmarital Agreements

The law applied to cohabitation is mainly judge-made, so nonmarital agreements are an apt example of the role of the State as contract enforcer in advancing equality.[160] In the canonic *Marvin* case, Justice Tobriner held

> [A]dults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason. But they may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property; conversely they may agree that each partner's earnings and the property acquired from those earnings remains the separate property of the earning partner. So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.[161]

Marvin opened the door to the enforcement of nonmarital agreements. The ability to contract with their nonmarital partner empowers women, like Michelle Marvin, because they can sue their nonmarital partners for breach of contract. It enables women to contract for the distribution of the couples' property, thereby advancing equality and distributive justice. For example, preventing Lee Marvin from reaping the benefits of the relationship and denying his duties to Michelle Marvin appears like the just result.[162] This is important during a time when more and more couples choose not to marry.[163]

Some scholars pointed to the benefits of a contractual regime over status, maintaining that it allows women to override marital law and tailor their contract to their special relationship.[164] Kaiponanea T. Matsumura argued for the right not to

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160 Barbara Atwood & Naomi Cahn, *Nonmarital Cohabitants: The US Approach*, 44 HOUS. J. INT'L L. 191, 193–94 (2022).

161 Marvin v. Marvin, 18 Cal. 3d 660, 674 (1976).

162 For restitution claims by cohabitants, *see* Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 712 (2006).

163 Atwood & Cahn, *supra* note 160, at 192; *see also* Marsha Garrison, *Nonmartial Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 309 (2008).

164 Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 244 (1982); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 109–11 (2001); *see also* Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225, 250–53 (2011).

marry,[165] and in this case, nonmarital agreements, are important to couples who reject marriage. Considering that wives could not enter into a contract at all under coverture,[166] this is an important accomplishment that both benefits women economically and recognizes their autonomy. Married couples can tailor their relationships to their needs or move altogether from status to contract and substitute the marriage with a contract.[167] When marriage moves from status to contract, it only follows to allow nonmarital agreements.[168] *Marvin* also gives women options other than traditional marriage, such as "quantum meruit" or an "effort to obtain a tacit understanding."[169] Deborah Zalesne suggested that modern families (such as cohabitants and same-sex couples) use contract law to achieve the legal protections marriage awards traditional families.[170] Contract law, she claimed, is not at odds with family law, but rather, furthers the goal of family law of protecting family members. Until recently, same-sex couples could not marry, and in some countries they still cannot marry.[171] Thus, for same-sex couples, Marvin agreements are very important.

Nonmarital relationships vary: some are short-term, anticipating marriage, and some are long-term; some involve equal partners, and some unequal relationships with one dependent on the other; some are more committed than others; some are nontraditional, and some are traditional with conservative gender roles.[172] *Marvin* allows nonmarital couples to tailor the relationship as they see fit and in accordance with their interests and preferences. Furthermore, considering that cohabitation was once criminalized, today's acceptance is a positive change.[173]

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165 Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1509 (2016).

166 BLACKSTONE, *supra* note 51, at 79; Antognini, *supra* note 51, at 2143.

167 MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 228–30 (1995); *see also* June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 55 (2016) (offering nonmarriage law different from marriage law); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 815 (2005) (arguing against a constructive approach to cohabitation).

168 Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1229, 1327 (1998).

169 Herma H. Kay & Carol Amyx, *Marvin v. Marvin: Preserving the Option*, 65 CAL. L. REV. 937, 956, 961 (1977).

170 Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027, 1027 (2015); *see also* Ertman, *supra* note 57; Ertman, *supra* note 58, at 1137–39, 1167–68.

171 Obergefell v. Hodges, 576 U.S. 644, 681 (2015); *Same-sex Marriage,* EQUALDEX, https://www.equaldex.com/issue/marriage (last visited Jun. 4, 2024).

172 Raymond C. O'Brien, *Marital Versus Nonmarital Entitlements*, 45 AM. COLL. TR. EST. COUNS. L.J. 79, 79 (2020).

173 Martha L. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 276 (1981).

Contrary to the positive opinion of contract over status, Ira M. Ellman argued that contract is ill-fitted to resolve nonmarriage cases because "couples do not think of their relationship in contractual terms."[174] It follows that the court should look at the duties that emerge from the relationship and not at the contract between the parties.[175] Another criticism was raised by Albertina Antognini, who argued:

> [T]he work done by the status-based rules of marriage is now done through contract law outside of marriage-through courts' decisions about whether to enforce agreements entered into by individuals in nonmarital relationships. The right to contract is limited by an intimate relationship not only within marriage but also, significantly, outside of it. By declining to recognize certain exchanges, namely those that involve services rendered, contract law extends the impediments created by status to relations that lack any such formal marker. In this way, contract works more expansively than status—the restrictions on the right to contract have moved beyond marriage to also impact "single" individuals in nonmarital relationships. Despite courts' various attempts to keep marriage and nonmarriage distinct, the way they interpret agreements outside of marriage has the effect of blurring the boundary between the two.[176]

Antognini showed that the courts selectively enforce marital agreements[177] and nonmarital agreements. While enforcing the economic aspects of the agreements, the courts will not enforce other nonmarital agreements because neither sex nor housework qualifies as consideration and because they view women's services as gratuitous, rather than as part of an exchange, or because the promises are too vague or against public policy to form an enforceable contract.[178] Likewise, courts refuse to enforce intimate agreements for public policy reasons in an unjust manner, burdens minority women, perpetuates gender roles, and maintains the market-domestic sphere dichotomy.[179] In fact, despite the conventional wisdom that nonmarriage is a better contractual option for women than the status of marriage, in practice, courts treat

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174 Ira M. Ellman, *"Contract Thinking" was Marvin's Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1367 (2001).

175 *Id.* at 1369. *But see*, Gregg Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J.L. & PUB. POL'Y 121, 122, 137 (1985) (supporting intimate relationship contracts).

176 Antognini, *supra* note 87, at 74.

177 *Id*. at 74; Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw. U. L. Rev. 65, 135 (1998).

178 *Id.* at 78.

179 Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 159 (2013); *see also* Clare Huntington, *Family Law and Nonmartial Families*, 53 FAM. CT. REV. 233, 233–34 (2015).

nonmarital agreements like marital agreements and nonmarriage like marriage.[180] Thus, women do not enjoy full freedom of contract and their ability to enter into a contract with their loved one is curtailed. As an alternative to both status regime and contract regime, Kaiponanea T. Matsumura proposed a consent-based regulation of informal intimate relationships.[181] Indeed, Erez Aloni noted that State recognition of domestic relationships may have a financial cost for some unmarried couples.[182] Instead, he offered a registration-based marriage alternative based on contract.[183] He also showed that enforcing cohabitation agreements favors the wealthier party.[184]

Nonmarital agreements are contracts in the family setting, opposite of the commercial setting. This leaves women in their domestic roles and chores, perpetuates women's stereotypes as homemakers, and reinforces gender roles whether in marriage or in nonmarriage. Enforcing nonmarital agreements could potentially give housework economic value. It theoretically recognizes women's labor as something with monetary worth as women receive money or property in return. However, as Albertina Antognini argued, in practice courts selectively enforce nonmarital agreements: while economic exchange may be enforced, housework does not satisfy consideration.[185] The court's approach to nonmarital agreements perpetuates the market/family binary. As Jill Hasday argued, the question is not whether the law should regulate economic exchange between intimates, because this is regulated by law.[186] Rather, the question is how the law should regulate economic exchange between intimates in a just and egalitarian manner.[187] Notwithstanding the issue of commodification of housework, the question is not to commodify or not to commodify, but rather a nuanced approach to benefit from commodification while avoiding its risks.[188] While Antognini observed that the courts often blur the distinction between marriage and nonmarriage,

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180 For imposing gendered marital norms to marital and nonmarital relationships, *see* Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C.D. L. REV. 1891, 1964 (2018); Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1655–56 (2003).

181 Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1013–14 (2018).

182 Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1299–1309, 1280–81 (2014).

183 Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 573 (2013); *see also* Courtney G. Joslin, *Nonmarriage: The Double Bind*, 90 GEO. WASH. L. REV. 571, 571 (2022) (nonmarriage law is neither status-based nor contract-based).

184 Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. WOMEN'S L.J. 317, 317 (2016).

185 Antognini, *supra* note87.

186 Hasday, *supra* note 56, at 492.

187 *Id.*

188 Viviana A. Zelizer, *To Commodify or Not to Commodify, that is not the Question*, *in* RETHINKING COMMODIFICATION 362 (Martha M. Ertman & Joan C. Williams eds., 2005).

Cahn and Carbone suggested that nonmarital relations are varied.[189] Thus, the State should not have a so-called "one rule fits all," but should rather allow couples to arrange their relations using a contract or registration.[190] A contract regime enables couples to tailor their relationship rather than imposing marital law on couples who chose not to marry. Indeed, it is a general question of the separation of market and family (marriage, nonmarriage, and parenthood). The general criticism of this blurring of the line is relevant to nonmarital agreements. Sharon Thompson proposed a way to ease the tension between economic and commercial contract law and the family. She developed a feminist relational theory of contract that makes contract law suitable for intimate, emotional, and noneconomic relations.[191] It considers gender roles and stereotypes, as well as the power dynamics and inequality between men and women.[192] Thus, it can mold the cold and formalistic contract law to fit the intimate relationship context.[193]

Despite the advantages of cohabitation agreements, many cohabiting couples do not enter into a formal agreement.[194] There may be several reasons for the small share of nonmarital agreements: couples may be optimistic about their relations, may not know the laws applicable to nonmarriage, or may move in together too fast to plan a formal contract.[195] Although further research regarding the reasons is needed, it has been suggested that the State could better use protective regulation and default rules legislation to protect these couples, their expectations, and their preferences.[196] Such legislation and regulations are found in Slovenia,[197] Australia,[198] Sweden,[199] and

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189 Naomi Cahn & June Carbone, *Blackstonian Marriage, Gender, and Cohabitation*, 51 ARIZ. ST. L.J. 1247, 1248–49 (2019).

190 *Id.* at 1253–54; *see also* Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 47, 70–73 (2014); Kaiponanea T. Matsumura, *Breaking Down Status*, 98 WASH. U. L. REV. 671, 702–03 (2021); Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1592, 1634 (2009).

191 Sharon Thompson, *Feminist Relational Contract Theory: A New Model for Family Property Agreements,* 45 J.L. & SOC'Y 617, 617 (2018).

192 *Id.* at 633.

193 *Id.* at 635; *see also* Sharon Thompson*, Using Feminist Relational Contract Theory to Build upon Consentability: A Case Study of Prenups,* 66 LOY. L. REV. 55 (2020).

194 Margaret Ryznar, *Unwanted Cohabitation Agreements*, 61 FAM. CT. REV. 73, 76 (2023).

195 *Id*. at 77.

196 *Id*. at 77–78; *see also* Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1159–80 (1981).

197 Ryznar, *supra* note 194, at 78.

198 *Family Law Act 1975* (Cth) pt. 1 s 4AA (Austl.).

199 Cohabitees Act (SFS 2003:376) (Swed.).

France.[200] In 2021, the Uniform Law Commission gave final approval to the Uniform Cohabitants' Economic Remedies Act.[201] Thus, even if nonmarital contracts provide a good solution for unmarried couples, this solution is not relevant for them because many choose not to contract. Other than State regulation and legislation, additional options include court enforcement of implied contracts or educating couples about the contract option and encouraging its use.

Courts assume equality between men and women and disregard imbalance of power in relationships.[202] General contract law defenses and fairness doctrines do not adequately protect women in marriage.[203] As Judith T. Younger concluded:

> [C]ohabitation agreements, attractive in theory as giving power to parties to craft their own bargains, are becoming instruments of oppression in practice. By enforcing them, the courts are enabling the dominant party to acquire financial advantages and to shift the risk of a failed relationship from him, even though he can afford to bear it, to her, the weaker party who cannot easily bear such a burden. These judicial decisions work not only to her detriment but to the public's detriment as well.[204]

As the above analysis shows, nonmarital agreements have both advantages and disadvantages for women: they empower women and oppress them, they protect them, and they harm them. Thus, there is no clear conclusion as to whether nonmarital agreements are good for women. They potentially advance women's equality, but in some cases may work to women's economic detriment. Thus, enforceability of nonmarital contracts is gendered. Rather than a yes-or-no answer, the answer should be nuanced and context specific. Enforceability depends on the parties, their relationship, the terms of the contract and other relevant factors.

B. Contract Law Defenses

The *Arthur Murray* cases[205] demonstrate how women use contract law doctrines to obtain relief from unfair consumer contracts. In other words, contract law can be used to police predatory commercial practices.

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[200] Code Civil [C. civ.] [Civil Code] art. 515-1 (Fr.).

[201] Barbara Ann Atwood & Naomi R. Cahn., *The Uniform Cohabitants' Economic Remedies Act: Codifying and Strengthening Contract and Equity for Nonmarital Partners*, 57 FAM. L.Q. 1, 1 (2024).

[202] Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990).

[203] Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1400, 1430–31 (1984).

[204] Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 427 (2007).

[205] *See, e.g.*, Vokes v. Arthur Murray, Inc., 212 So. 2d 906 (Fla. Dist. Ct. App. 1968).

In the *Arthur Murray* cases, women used contract law defenses to rescind their long-term contracts for dance lessons.[206] The courts viewed these women as vulnerable consumers who were taken advantage of and subsequently trapped in a predatory contract.[207]

Allowing these women to rescind the contracts empowered them. As the vulnerable party, it helped them against the dance studio. It sends a message that such predatory practices are illegitimate and that the studio cannot get away with its instructors' behavior by limiting the misuse of powers allowed against consumers and promoting equality and distributive justice. As there were more women plaintiffs than men, and as the cases involving women yielded different outcomes and rationales than the cases which involved men, they are a good example of gendered defenses.[208] However, as Debora Threedy argued, they were wealthy women paying for a male instructor's company.[209] Based on her analysis, rescission of the contracts with the dance studio did not stem from protection of the vulnerable, but from fear of the happy widow buying the attention of a younger man.[210] These are negative stereotypes limiting what is appropriate for women to buy thereby limiting their market participation, since some transactions are acceptable when men are the buyers but frowned upon when women are the purchasers.

Furthermore, even under the courts' narrative for protection of vulnerable women from unscrupulous and shrewd tactics of the dance studio, the legal protection comes with a price. These cases perpetuate the stereotypes of women as vulnerable and in need of protection.[211] To succeed in their claim, they must portray themselves as victims in need of the law's protection. Gillian Hadfield alluded to women's double bind: "the conflict between promoting women's autonomy and freedom of choice on the one hand, and protecting women from the harmful consequences of choices made under conditions of inequality on the other."[212] On the one hand, there is the need to respect women's freedom of contract and participation in the market. On the other hand, women enter oppressive contracts under conditions of social inequality which these contracts maintain.

On a more general note, by using contract law defenses, women are relegated to the margins of contract law. Using contract law defenses sends the message that they are not a "real" party to a contract. Rather than contract rule of autonomy, freedom of

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206 *Id.* at 908.

207 Threedy, *supra* note 86, at 761.

208 *Id*. at 760.

209 *Id*. at 769.

210 *Id.*

211 *Id*.; *see also* Andrea McArdle, *The Postwar Consumer as Feminized Legal Subject*, 27 LEGAL STUD. F. 221, 227–28 (2003).

212 Hadfield, *supra* note 85, at 1238; *see also* Gillian K. Hadfield, *The Dilemma of Choice: A Feminist Perspective on the Limits of Freedom of Contract*, 33 OSGOODE HALL L.J. 337, 338 (1995); Jennifer Nadler, *Unconscionability, Freedom, and the Portrait of a Lady*, 27 YALE J.L. & HUMAN. 213, 215 (2015).

contract, and consent, contract defenses are the exception to the contract rule of paternalistic protection of weak parties. As I explained elsewhere:

> Women are not "true" contractual parties but rather are relegated to the margins of contract law. Women are awarded paternalistic protection and receive special treatment. Women are viewed as weak victims, subject to pressures and threats, while men are seen as strong and resilient. True contract parties—men—are autonomous and free agents, capable of resisting intimidation and threats. The lived experiences of women in a patriarchal society are filled with constraints to their autonomy. Women's freedom of action is curtailed, and their consent is often given under conditions of inequality and subordination.[213]

The *Arthur Murray* cases involved the defense of duress.[214] Therefore, a critical look at defenses should generally be followed by a critical look at duress law. Duress law does not resolve the power imbalance between the parties. It is narrow and limited, ignoring how social inequality impacts consent.[215] Courts use the formalistic and underdeveloped notion of consent. Under this limited view courts see coercion as consent, and no choice as agreement. Courts view consumer agreements as an interaction between two equals bargaining at arm's length, isolated from society.[216] Their view of consent is acontextual, disregarding the social context and background.[217] As I explained elsewhere:

> The narrow nature of current duress doctrine is insensitive to inequality between the parties and has devastating distributive ramifications for aggrieved parties. The limited scope of duress doctrine allows many coercive practices to be employed during negotiations. Further, by enforcing these contracts, courts legitimize these practices and maintain power imbalances.[218]

As Robin West argued, women consent to unfair contracts out of submission, and therefore consent does not legitimize contracts.[219] As such, consent alone cannot serve

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213 Gan, *Anti-Stereotyping Theory and Contract Law, supra* note 116, at 106.

214 Vokes v. Arthur Murray, Inc., 212 So. 2d 906 (Fla. Dist. Ct. App. 1968).

215 Gan, *supra* note 79, at 171.

216 *See* Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine,* 108 W. VA. L. REV. 443, 449–50 (2005).

217 Gan, *supra* note 79, at 203–04.

218 *Id.* at 221–22.

219 Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 427–28 (1985).

as the basis for moral justification of contracts.[220] A more complex and robust notion of consent is needed. Indeed:

> Consent is gradual, contextual, and socially constructed. It is a rich and complex concept, not limited to its informed and voluntary aspects. It is not only correlated to the will, intentions, choices, and preferences of parties, but also contains public and cultural aspects. Consent is a layered concept: it comes in different forms, may exist to varying degrees, and is shaped by the relations between the parties, as well as by social and cultural context.[221]

Such a complex notion of consent and duress will be sensitive to social context, and will consider factors such as race and gender when analyzing the negotiations.

As Clare Dalton showed, contract law is built around binaries.[222] There is either consent or duress, the contract is either enforced or avoided, either the freedom of contract rule applies, or the exception to the rule of defense applies. And where there is a dichotomy, there is also hierarchy: the first option in each set is preferred over the second. Thus, it is not neutral but rather supports the powerful privileged party.[223] Duress is a narrow exception to the freedom of contract rule. This dichotomy veils nuances and intermediate situations, in-between coercion and freedom.

Unconscionability and undue influence, also raised in the *Arthur Murray* cases, create similar dilemmas and tensions.[224] They preserve stereotypes of weak, vulnerable, and less autonomous persons in need of special protection. They are narrow and limited, only intervening in extreme cases. This leaves many unfair contracts enforceable and preserves the rule of freedom of contract.[225]

This is an example of women participating in the market. Women are consumers rather than homemakers. As Amy J. Schmitz showed, consumer contracts are gendered. Despite conventional wisdom regarding the neutrality of consumer law, she showed that women "have different interests, understandings, [behaviors,] and styles with respect to [consumer transactions] . . . and . . . other contract decisions."[226] Consumer law is riddled with gender stereotypes and biases, and thus fails to protect from market discrimination.[227] One example is prices, which are gendered. "Women

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220 *Id.*

221 Gan, *The Many Faces of Contractual Consent, supra* note 114, at 660.

222 Dalton, *supra* note 117.

223 *Id*.

224 Vokes v. Arthur Murray, Inc., 212 So. 2d 906 (Fla. Dist. Ct. App. 1968).

225 For undue influence, *see* sources cited *supra* note 102; for unconscionability, *see* sources cited *supra* note 104.

226 Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracting*, 19 CARDOZO J.L. & GENDER 437, 442 (2013).

227 *Id.*; *see also* Jim Hawkins, *Female Perspectives in Commercial and Consumer Law*, 34 COLUM. J. GENDER & L. 1, 3 (2016); Emma Caterine, *A Fresh Start for a Women's Economy: Beyond Punitive Consumer Bankruptcy*, 33 BERKELEY J. GENDER L. & JUST. 1, 2, 16–17 (2018).

pay more than men."[228] Thus, consumer law should address this gendered context and protect women.

Hila Keren coined the term "market humiliation" to describe how minorities systematically suffer refusals, exclusions, rejections, and insults while engaging in everyday market activities such as shopping, working, or traveling.[229] They suffer emotional harms and pain of humiliations, as well as economic harms.[230] Their participation in ordinary market activities is denied or constrained, and they endure emotional suffering.[231] As anti-discrimination laws do not provide remedy for market humiliation, Keren argued that private law should respond. As for contract law, developing the duty of good faith and expanding statutory protection would address market humiliation.[232] She further advocated a freedom to contract, imposing a duty to negotiate in good faith.[233] This covers precontractual negotiations and refusals to contract.

As the above analysis shows, applying duress law and other defenses helps women avoid enforcement of the contract. However, in the long run, it involves costs and disadvantages. On the one hand it protects women, but on the other it perpetuates stereotypes; on the one hand it acknowledges women's vulnerability in patriarchic society, but on the other hand it limits women's participation in the market. A contextual and balanced approach to contract defenses is necessary.

C. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("Statute" or "Act") is a recent legislation improving women's protection from sexual abuse.[234] Because the issue of sexuality is paramount to women's equality, this bipartisan legislation is an important tool to combat sexual exploitation.

In March 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.[235] This Statute provided that "no predispute arbitration agreement . . . shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the

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228 *See supra* notes 5-6.

229 *See* Keren, *supra* note 7; *see also* Hila Keren, *Separating Church and Market: The Duty to Secure Market Citizenship for All*, 12 U.C. Irvine L. Rev. 909, 950–54 (2022) [hereinafter *Separating Church and Market*].

230 Keren, *supra* note 7.

231 *Id.*

232 *Id*..

233 *Id.*

234 Matthew DeLange, *Arbitration or Abrogation: Title VII Sexual Harassment Claims Should Not Be Subjected to Arbitration Proceedings*, 23 J. GENDER RACE & JUST. 227, 274 (2020); *see also* Scott R. Thomas, *Pre-Dispute Mandatory Arbitration of Sexual Harassment Complaints: Bad for Business Too*, 16 BERKELEY BUS. L.J. 102 (2019).

235 9 U.S.C. § 402.

sexual harassment dispute." In several cases, the motion to compel arbitration was denied based on this law.[236] Though sexual harassment is judge-made law, this Statute addresses the problem of shielding sexual harassment using arbitration.[237]

This Statute was a response to many cases of sexual harassment and assault that were silenced using arbitration. Gretchen Carlson aptly described it, noting that "[f]orced arbitration is a sexual harasser's best friend: It keeps proceedings secret, findings sealed, and victims silent."[238] Moreover, as Meagan Glynn concluded, "the current state of mandatory arbitration is ill-suited for resolving sexual harassment claims in an equitable manner and ultimately perpetuates the continuation of toxic work environments."[239] Furthermore, as Jean R. Sterlight warned:

> [T]o the extent that employers are using mandatory arbitration to keep employment disputes out of court, even as powerful a social force as the #MeToo movement may not produce the progressive legal changes one might otherwise have expected . . . . To the extent companies are permitted to use arbitration to eliminate access to courts, they prevent our law from evolving to become more just.[240]

As these quotes observed, arbitration of sexual harassment cases is not a secondary aspect of the battle against sexual assault, but a paramount part of this battle. As the

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236 Johnson v. Everyrealm, Inc., 2023 U.S. Dist. LEXIS 31242 (2023); Olivieri v. Stifel, 2023 U.S. Dist. LEXIS 57001 (2023); Rosas v. Beachbody LLC, 2023 Cal. Super. LEXIS 19317 (2023); Tiger v. Bridges Club at Rancho Santa Fe, 2023 Cal. Super. LEXIS 17843 (2023).

237 A few states also passed similar legislation banning mandatory arbitration in sexual harassment cases. Jonathan Cisneros, *Indiana in the Midst of #MeToo: The Argument for Enforcing Arbitration in Sexual Harassment Claims*, 22 PEPP. DISP. RESOL. L.J. 175, 175–76 (2022); Kaci Dupree, *#MeToo, Due Process, and Mandatory Arbitration: The Perfect Storm for Functional State Level Arbitration Reform*, 11 ARB. L. REV. 188, 188–89 (2019).

238 Gretchen Carlson, *The Supreme Court Tried to End # MeToo. Here's How We're Fighting Back*, FORTUNE (May 31, 2018), http://fortune.com/2018/05/31/gretchen-carlson-supreme-court-ruling-arbitration-metoo [https://perma.cc/HV53-WP8H]; *see also* Kate Webber Nunez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN ST. L. REV. 463, 507–12 (2018).

239 Meagan Glynn, Note, *#TimesUp for Confidential Employment Arbitration of Sexual Harassment Claims*, 88 GEO. WASH. L. REV. 1042, 1047 (2020); *see also* Marsha Levinson, *Mandatory Arbitration: How the Current Systems Perpetuates Sexual Harassment Cultures in the Workplace*, 59 SANTA CLARA L. REV. 485, 523 (2019).

240 Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 160 (2019); *see also* Kathleen McCullough, Note, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo and Time's Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653, 2658–59 (2019); Ramit Mizrahi, *Sexual Harassment Law After #Metoo: Looking to California as a Model*, 128 YALE L.J. F. 121, 134–35 (2018).

#MeToo movement shined the spotlight on sexual harassment as a general social concern,[241] it also influenced arbitration of sexual harassment claims.

Mandatory arbitration agreements reduce employee opportunities to win against their employers, as well as the awards they can receive from their arbitrators, public awareness of corporate abuse, and the likelihood that an employee will bring a claim at all. They also prevent the creation of precedent because the entire process occurs outside the judicial system.[242] Although this affects all employees, marginalized and low-wage employees are affected the most.[243] As Heidi M. S. Sandomir noted, "[f]orced or mandatory arbitration consistently denies survivors of sexual violence the justice they are owed."[244] And as Eliza Jones observed, "mandatory arbitration clauses perpetuate a cycle of sexual violence in the workplace and have detrimental psychological impacts on employees."[245] As arbitration prevents the development of judge-made sexual harassment law, it is important not to let perpetrators avoid litigation, for example, by using their superior position in negotiation to include an arbitration clause in employment agreements. Furthermore, as arbitration agreements usually also include non-disclosure clauses,[246] they also prevent publicity and public awareness on this topic. Moreover, class arbitration waivers will also reduce the chances of employees suing alone.[247] Collective arbitration, where several victims

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241 Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 231–34 (2018); Deborah L. Rhode, *#MeToo: Why Now? What Next*?, 69 DUKE L.J. 377, 378–80 (2019); L. Camille Hebert, *Is "MeToo" Only a Social Movement or a Legal Movement Too*?, 22 EMP. RTS. & EMP. POL'Y J. 321 (2018); Rebecca White, *Title VII and the #MeToo Movement*, 68 EMORY L.J. ONLINE 1014, 1014 (2018); Sarah D. Heydemann & Sharyn Tejani, *Legal Changes Needed to Strengthen the #MeToo Movement*, 22 RICH. PUB. INT. L. REV. 237, 238 (2019); *see also* Kate Webber Nunez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN ST. L. REV. 463, 463 (2018); Savannah W. Pelfrey, *How the #MeToo Movement has Rocked the Workplace*, 43 AM. J. TRIAL ADVOC. 259, 259 (2019).

242 *See* Tamra J. Wallace, *Nine Justices and #MeToo: How the Supreme Court Shaped the Future of Mandatory Arbitration and Sexual Harassment Claims*, 72 ME. L. REV. 417, 446–47 (2020); *see also* Alyssa Schaefer, *Sexual Harassment in the Shadow of Mandatory Arbitration*, 34 WIS. J.L. GENDER & SOC'Y 237, 256–57 (2019).

243 Rachel M. Schiff, Note, *Not So Arbitrary: Putting an End to the Calculated Use of Forced Arbitration in Sexual Harassment Cases*, 53 U.C. DAVIS L. REV. 2693, 2694, 2712 (2020).

244 Heidi M. S. Sandomir, *The End of Forced Arbitration of Sexual Violence and the Uncertain Future*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 111, 114 (2022).

245 Eliza Jones, *Nail in the Coffin: The Mandatory Arbitration Epidemic on Employee Sexual Harassment Claims*, 50 U. MEM. L. Rev. 799, 804 (2020).

246 Maureen A. Weston, *Buying Secrecy: Non-disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era,* 2021 U. ILL. L. REV. 507, 522 (2021); *see also* Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017) https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html.

247 Caitlyn Grey Fiebrich, *From #MeToo to #OnlyYou: Epic Systems, Collective Arbitration, and Sexual Harassment in the Workplace*, 57 HOUS. L. REV. 26, 36–37 (2019).

join forces to sue, will better protect employees and further anti-sexual harassment laws. Arbitration agreements, as a precondition for employment, are becoming increasingly more common, and therefore the legislation is important.

The Statute came to the aid of sexual harassment victims and was a response to the #MeToo and Time's Up movements. David Horton stated that, "the legislation—-which earned bipartisan support—was a stunning victory for the #MeToo movement and critics of forced arbitration."[248] Imre S. Szalai similarly declared that "[t]his landmark Amendment is also the most important federal legislation to arise thus far from the #MeToo movement."[249] Thus, the #MeToo movement is also important in the war against sexual harassment.[250] The Act is a mandatory rule that empowers women. Sexual harassment laws are not enough if arbitration denies women legal recourse. Through legislation, the State can police contracts and their misuse to silence victims of sexual assault. Interestingly, women innovators in the tech industry collectively organized and demanded removing the mandatory arbitration clauses in their adhesion employment contracts.[251] Notwithstanding their achievements, this alone is not enough and is limited to the tech industry. Therefore, the Statute has a broader effect on more women and more employment settings.

Notwithstanding the Act's importance, David Horton stressed the law's limitations due to the fact that it was not incorporated into the Federal Arbitration Act rather than enacted as a stand-alone statute.[252] Imre S. Szalai also claimed that the Statute is too limited and should also address confidentiality of sexual harassment and sexual assault settlements and other forms of gender and racial discrimination.[253] Likewise, it is unclear whether it applies in the context of labor collective bargaining agreements.[254] The Statute also raises interpretation problems, lacks implementation guidelines, and has an uncertain scope.[255] What's more, it may also be unconstitutional as applied in

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248 David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 131 YALE L.J. F. 1, 1 (2022).

249 Imre S. Szalai, *#MeToo's Landmark, Yet Flawed, Impact on Dispute Resolution: The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, 18 NW. J.L. & SOC. POL'Y 1, 2 (2023).

250 *See generally Law in the Era of #MeToo*, 2019 U. CHI. LEGAL F. 1 (2019); *#MeToo*, 71 STAN. L. REV. ONLINE 1 (2018); *#MeToo and the Future of Sexual Harassment Law*, 128 YALE L.J. F. 1 (2018).

251 Xuan-Thao Nguyen, *Disrupting Adhesion Contracts with #MeToo Innovators*, 26 VA. J. SOC. POL'Y & L. 165, 167 (2019).

252 Horton, *supra* note 248, at 2.

253 Szalai, *supra* note 249, at 3; *see also* Krista Gay*, Ineffective Congressional Response to the #MeToo Movement: Why Legislation Proscribing Mandatory Arbitration Agreements is Improper and Fails to Protect Workers*, 41 WOMEN'S RTS. L. REP. 176, 177 (2020).

254 Szalai, *supra* note 249, at 1, 3.

255 *Id*. at 3; *see also* Hirsh M. Joshi, *You Have Got to Be Keating Me: Why the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act Is a Good Start*, 2023 J. DISP. RESOL. 113, 114–15 (2023).

certain settings.[256] Another problem is that the Statute does not apply retroactively, such that arbitration agreements already signed before the law's enactment remain enforceable. This limits the law to future arbitration agreements and leaves many arbitration agreements beyond the law's reach. As Larry Pittman argued, the Statute is a first step toward reforming the Federal Arbitration Act, and Congress should continue this reform.[257]

M. Isabelle Chaudry suggested three principles for legislation regarding arbitration of sexual harassment cases: "1) whether it appropriately permits disclosure of the identity of the harasser, 2) whether legislation allows non-disclosure agreements in settlements, and 3) whether legislation gives victims of sexual harassment the freedom of choice."[258] The Statute as enacted does not meet these criteria and does not address the question of confidentiality.

As the above analysis showed, although a step in the right direction, the statute is too narrow and limited. And although an important addition to sexual harassment laws, it provides limited protection to victims of sexual assault. It leaves out of its scope issues of confidentiality and other forms of discrimination. Thus, although an important improvement, it did not go far enough.

V. CONTRACT LAW, EQUALITY AND THE STATE: CONCLUSIONS

This Part addresses the implications of the above analysis. The mapping of the different state powers yields several conclusions on how the State can actively promote equality using contract law. As this Article discusses the meeting point of contract law, equality, and state power, this Part explores the implications for each. First, it adds to the claim that contract law is not entirely private but also has some public aspects; second, it adds to the argument that the State can and should pursue equality; and lastly, it concludes that the State should combine its powers to advance equality.

A. Contract Law: Private and Public

The above discussion demonstrated how contract law is not purely private.[259] The claim that contract law has public aspects and implications, and that the State is highly involved in contracts is not new.[260] The critique of the private/public binary is not

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256 Szalai, *supra* note 249, at 36.

257 Larry J. Pittman, *Arbitration and Federal Reform: Recalibrating the Separation of Powers Between Congress and the Court*, 80 WASH. & LEE L. REV. 893, 893, 895 (2023).

258 M. Isabelle Chaudry, *An Analysis of Legislative Attempts to Amend the Federal Arbitration Act: What Policy Changes Need to Be Implemented for #MeToo Victims*, 43 SETON HALL LEGIS. J. 215, 219 (2019).

259 *See, e.g.*, *supra* Part III for discussion on the State's role in contract law.

260 Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 585–86 (1933).

new either.[261] The relational theory of contract law,[262] communitarian theories of contract,[263] critical legal studies,[264] feminist theory,[265] and critical race theory[266] all point to how contract law is not isolated from society at large. Dagan and Dorfman suggested that contract law's DNA includes a commitment to substantive equality, not as a public aspect of private law.[267] The scholarship above stressed that contract is a social institution that is socially constructed, however, it did not address the role of courts and legislators as state agencies. The mapping reveals how the State is a powerful actor in both contracts between parties and in promoting social equality. It shows how private and public are intertwined in contract law and how state powers and the freedom and autonomy of contract parties intersect. The mapping also demonstrates the different ways the State is involved in contracts, thus precluding them from being entirely private.

Contract enforcement is the first example. Even though the parties themselves enter into a private agreement, the State backs their agreement by enforcing contracts. This distinguishes contracts from informal deals or understandings that are not enforceable. The parties rely on the enforcement of their contracts when contracting. The State is the gatekeeper of who can enter contracts and which contracts are enforceable. Thus, the State has a crucial role in deciding who may use contract law and what promises are enforced. As women could not contract under coverture, and as nonmarital agreements were (and still are to some extent) unenforceable, this is not only a matter of contract law, but also a social-political gender issue.

The second example of contract law application takes the courts' roles and involvement in contracts a step further. The courts interpret contracts, invalidate contracts, and award damages for breach of contract. This goes beyond mere enforcement of the contracts—this is substantive policing of contracts. This is intervening in the parties' contracts and limiting the parties' freedom of contract. In other words, the State determines the domain of contract law (the game) and the

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261 Dalton, *supra* note 117; Dagan & Dorfman, *supra* note 18 at 1399.

262 *See generally* Ian R. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations,* 79 MICH. L. REV. 827 (1981); IAN R. MACNEIL, THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL (David Campbell ed., 2001).

263 Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1419 (2004).

264 Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); Girardeau A. Spann, *A Critical Legal Studies Perspective on Contract Law and Practice*, 1988 ANN. SURV. AM. L. 223 (1989).

265 Hila Keren, *Feminism and Contract Law, in* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 406 (Robin West & Cynthia Grant Bowman eds., 2019); Ertman, *supra* note 57.

266 Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUM. J. RACE & L. 23 (2013); Chaumtoli Huq, *Integrating a Racial Capitalism Framework Into First-Year Contracts: A Pathway to Anti-capitalist Lawyering*, 35 J. CIV. RTS. & ECON. DEV. 181 (2022).

267 Dagan & Dorfman, *supra* note 18.

contract law doctrines (the rules of the game).[268] Moreover, contract law is gendered. Thus, applying doctrines is not neutral and can either perpetuate social inequalities or advance equality. Contract law can benefit the powerful parties or pursue distributive justice. In both these options, contract law has a social role.

In the last and not least example, the State limits the parties' freedom of contract by enacting background laws and mandatory rules. It further intervenes in the parties' contracts and polices the contracts' terms. The State promotes values in tension with freedom of contract, and sometimes the former trumps the latter.[269] Freedom of contract is not absolute, and the legislator defines its limits.[270] Parties negotiate in the shadows of the law, and thus the State plays a crucial role in determining the terms of contracts and the negotiations. Anti-discrimination laws protect and empower women in their negotiations and their contracts. As these laws are in the shadow of the contract, they are an important supplement to contract law. Mandatory rules and regulations together form the law governing the parties' relations. Thus, laws promoting equality are an important supplement to contract law.

Because contract law has social impacts and is not completely private, it is appropriate to advance distributive justice using contract law. The State can promote equality, not only through anti-discrimination laws and tax laws, but also by using its power in contract law. State involvement in contract can either maintain social inequalities or advance equality. The State is not neutral, and every action has allocative implications. The State should not reinforce stereotypical sex-based roles, not only under anti-discrimination laws, but also under contract law.[271] The State should avoid stereotypical thinking in contract law as in other areas of law.

Enforcing contracts, applying contract law, and legislating background rules can be seen as three concentric circles of State intervention in contracts. The State can use each of these three powers to advance social equality. Each circle is a layer that provides another protection of equality. Each layer presents a different strategy that the State can use to promote equality in contracts. Together, they provide multi-layered protection.

B. Equality: Pursued by the State

The above analysis demonstrated the ambivalence of feminists regarding the State's role in pursuing equality for women. Some feminists are pessimistic, claiming the State is patriarchal and therefore unwilling to pursue equality. Catharine MacKinnon argued that laws protect men's interests and subordinate women.[272] Carol Pateman also maintained that the social contract subordinates women to men.[273] These two examples show that the patriarchal state maintains a hierarchal power

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268 *See* Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247 (1999).

269 David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition,* 16 YALE HUM. RTS. & DEV. L.J. 51, 53–54 (2013).

270 *Id.* at 68.

271 Gan, *supra* note 116, at 84.

272 CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 237–39 (1989).

273 PATEMAN, *supra* note 32, at 8.

structure of men's domination of women. As Audre Lorde aptly noted, "the master's tools will never dismantle the master's house."[274]

Despite this pessimism, feminists worked tirelessly to advance equality. The enactment of anti-discrimination laws entirely changed women's position. Legislation, regulation, and court decisions immensely helped secure women's rights, autonomy, and parity with men. We live in a world where feminists entered state power in recent years.[275]

The discussion on how the State can advance equality by using contract law demonstrates the ambivalence. Nonmarital agreements potentially advance women's interests and empower women by giving their work economic value. However, as Albertina Antognini showed, courts maintain coverture and limit women's ability to contract with their partners—whether married or not.[276] Still, women do not enjoy full freedom of contract when entering marital or nonmarital contracts. They are consumers but face discriminatory contracts and predatory businesses. As Hila Keren showed, women suffer market humiliation and are denied full market citizenship.[277] The consumer market is still gendered, and women face price discrimination. The #MeToo movement advanced the State's treatment of sexual harassment. However, NDAs silence victims of sexual harassment, and arbitration agreements entered into before March 2022, when the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act was signed by President Biden, remain enforceable.[278]

Social movements engage in activism and in raising social awareness. However, when they turn to the State, they can work with state actors to advance their social agenda. Lobbying for legislation, petitioning the court and advocating for regulation are all actions that can pressure the State to engage in social change. For example, the impact of the #MeToo movement was not limited to social media and public discourse, but also pushed for legal change.[279] Legislation and court decisions are shaped by social awareness of the harms and breadth of sexual harassment. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act discussed above is but one such example. Activists for consumer rights and employee rights also engage in driving legal change to protect consumers and employees.[280] Similarly, activists for

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274 Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER: ESSAYS AND SPEECHES 110, 112 (2007).

275 HALLEY, ET AL., *supra* note 29.

276 Antognini, *supra* note 87, at 71–72.

277 Keren, *supra* note 7, at 573, 578, 609–10.

278 Lisa Desjardins, *Congress Passes Law Banning Non-Disclosure Agreements in Sexual Harassment Cases*, PBS NEWS HOUR (Nov. 23, 2022, 6:40 PM), https://www.pbs.org/newshour/show/congress-passes-law-banning-non-disclosure-agreements-in-sexual-harassment-cases.

279 *The Legislative Impacts of #MeToo Five Years Later*, BURNETTE SHUTT MCDANIEL (Jan. 27, 2023), https://burnetteshutt.law/metoo-five-years-later/.

280 Freeman, *supra* note 33.

marriage equality for same-sex couples turned to the Supreme Court[281] and to Congress.[282] These legal triumphs are important, albeit limited. They are far from perfect, and our society is still far from equality. Nonetheless, these are major improvements that push our society towards equality. While the picture is complex, it is still optimistic. The legal battle is an integral part of the quest for social equality.

The above analysis portrays a complex picture: the State advances equality but also maintains hierarchies; the State prohibits discrimination but at the same time perpetuates inequalities; and the State improves the position of women yet still sustains the power dynamics between men and women. Contract law, as State-made law, demonstrates this complex picture. In what circumstances the State would promote equality or maintain inequality and why is beyond the scope of this Article. In other words, this Article provides a general map of the State's ambivalence toward equality, and further research is needed to explore the reasons and conditions for either advancing or curtailing the State's pursuit of equality.

The above discussion of contract law is an example of how the State engages in "preservation through transformation," as Reva Siegel called it.[283] Contract law enables women to move from coverture and participate in the market economy. However, contract law is also gendered and perpetuates stereotypes. As I concluded elsewhere, "contract law can either be exclusive or empowering, discriminatory or egalitarian, depending on how it is wielded and framed."[284] Therefore, I concluded optimistically that "[j]ust as the State can use contract law to maintain hierarchy, so too can it use contract law to promote equality."[285]

C. State Powers: Acting in Concert

The above analysis demonstrated that the State should combine its powers to fight discrimination. The literature usually discusses each state power separately, however, describing them together gives a fuller picture. As shown, the three state powers intersect and overlap, and, in reality, it is hard to clearly differentiate between contract enforcement, contract law implementation, and legislation of background rules. The State should act in concert and use its different powers together to promote equality. Each power alone is limited, but together they complement each other by intersecting and supplementing one another. Each example in the previous part showed how contract enforcement, contract legislation, and regulation can overlap. These strategies are applied by courts and legislators, that is by different state agencies. Thus, it is not a matter of which strategy will best advance equality, it is a matter of state agencies joining forces and acting together to achieve the same goal: that is advancing social

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281 *See* Obergefell v. Hodges, 576 U.S. 644 (2015); United States v. Windsor, 570 U.S. 744 (2013).

282 Respect for Marriage Act, 28 U.S.C. § 1738(c) (2022) (repealing the Defense of Marriage Act).

283 Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2119 (1996).

284 Gan, *supra* note 116, at 122.

285 *Id*. at 115.

equality. The State should use its multiple powers to advance distributive justice and create holistic, harmonious contract law that is sensitive to promoting equality.

As shown in the previous discussion of nonmarital agreements, enforcing these contracts is not enough.[286] Even though nonmarital agreements secure and protect the rights of cohabitants, they do not provide full protection. The story of Ms. Marvin is illustrative: although the court declared that nonmarital couples, like the Marvins, can enter into enforceable agreements, it also decided that the Marvins did not have such an agreement.[287] Michelle Marvin left the relationship with a small sum of money without enforcement of Lee Marvin's promise to provide for her for life, even though she did her share and quit her career.[288] These agreements are hard to prove and are only selectively enforced. Also, as discussed above, some couples do not enter into formal agreements for various reasons. Moreover, some agreements are unfair and leave the dependent party in a dire situation. In addition to enforcing nonmarital agreements, contract law needs to better address nonmarital relationships.

Rather than general contract law, the court should develop "nonmarital contract law": a law specifically tailored to the nonmarital relationship. Contract law is flexible and can be adapted to this special relationship.[289] Developing nonmarital contract law is beyond the scope of this Article, but several examples will demonstrate this unique contract law. Consideration should be broadened to include noneconomic benefits such as love and housework, as this will acknowledge the parties' interests and wishes. It will also be tailored to fit different nonmarital relationships, committed and noncommitted, long-term and short-term, same-sex and different sex, and conservative and nontraditional. Contextual contract law can have different sets of rules for these varied relationships. One-sided, unfair contracts should be set aside using unconscionability, public policy, and duress. These doctrines should be applied contextually, addressing the specificities of nonmarital relations. Alongside contract law, regulation and legislation protecting women at separation are also needed.[290] These laws will serve as background rules against which the parties negotiate. For example, mandatory rules will protect women when the couple breaks up, because the powerful party cannot contract around it.

Thus, supplementing contract law with protective legislation is warranted. Apart from a contractual root there needs to be regulation of cohabitation.[291] Some states

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286 *See infra* Part IV.

287 Marvin v. Marvin, 18 Cal. 3d 660, 683–85 (1976).

288 *Id.* at 666.

289 Jade Yeban, *Is Your Cohabitation Agreement Valid?*, FINDLAW (Jun. 2, 2023), https://www.findlaw.com/family/living-together/validity-of-living-together-contracts.html.

290 Carol S. Bruch, *Nonmarital Cohabitation in the Common Law Countries: A Study in Judicial-Legislative Interaction*, 29 AM. J. COMP. L. 217, 244–45 (1981).

291 Sharmila Roy Grossman, *The Illusory Rights of Marvin v. Marvin for the Same-Sex Couple versus the Preferable Canadian Alternative - M. v. H.*, 38 CAL. W. L. REV. 547, 568 (2002) (arguing that *Marvin* agreements should be followed by state regulation guaranteeing same-sex couples equal rights); *see also* Kaiponanea T. Matsumura, *Unifying Status and*

and countries already have legislation regulating the rights of nonmarital partners at the time the relationship ends. This is a vulnerable time, and there needs to be regulatory protection alongside contractual protection. The State should enforce nonmarital arrangements, but at the same time, protect vulnerable parties at the end of the relationship through legislation and contract law doctrines.

As shown in the previous discussion of the *Arthur Murray* cases, using contract defenses to protect vulnerable consumers is insufficient.[292] Duress and other defenses should be reformed to address women's vulnerability and autonomy. Duress should be contextual and nonbinary. It should acknowledge not only severe pressures but also more mundane pressures typical to women's lives, including, not only economic coercion, but also coercion resulting from social oppression and subordination. Moreover, duress should be developed from women's perspectives; not only preserving freedom of contract, but also protecting the underprivileged parties. A broad duress law sensitive to social power dynamics will better protect women consumers. Alongside duress law, consumer regulation and legislation should protect consumers and police predatory behavior of businesses. Alongside relieving one party from her contract, general regulation of the market, policing market abuses, and addressing market failures are all also needed. This combination of a specific contract solution with a general macro solution will benefit women.

The legislature reacted to the *Arthur Murray* cases.[293] Consumer legislation, sensitive to the gender context of these transactions, is needed to protect women and address their inequality in the marketplace. Relieving women consumers from their oppressive and unfair contracts through contract law defenses is not enough. This needs to be supplemented by regulating the consumer market and industry.[294] The plaintiffs in the *Arthur Murray* cases may have won and gotten their money back, but predatory business practices, such as those of the dance studio, should be addressed by regulations. There is a need to battle exploitative business practices using contract law and regulations.

As shown in the discussion of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, this legislation is not enough. Its scope is limited, and it does not address other forms of discrimination and arbitration agreements entered into before its enactment. Thus, while a step in the right direction, it provides women employees only partial protection.

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act is another example of the legislature's reaction to the court's ruling. The Supreme

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Contract, 56 UC DAVIS L. REV. 1571, 1604, 1608 (2023) (rejecting the contract/status binary by arguing that, besides contract law, courts apply a special set of rules for cohabitation similar to status).

292 *See infra* Part IV.

293 Daniel M. Warner, *Dancing around Contracts and Business Ethics: Lessons from Arthur Murray*, 23 JEFFREY S. MORAD SPORTS L.J. 109, 121–22 (2016).

294 *See generally* Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *The American Law Institute's Restatement of Consumer Contracts: Reporters' Introduction*, 15 EUR. REV. CONT. L. 91, 92, 97–98 (2019).

Court's pro-arbitration approach in the employment setting drew loud criticism.[295] Mandatory arbitration clauses in employment agreements left employees vulnerable and limited the application of employee rights laws. Thus, this Statute was meant to restrict the misuse of arbitration by employers and to preserve employees' legal recourse. Although arbitration may harm protective legislation generally, the Statute is only limited to sexual harassment and sexual assault, leaving discrimination based on gender, race, disability, and other factors outside the reach of the Statute. The Statute reacted to the court's enforcement of mandatory arbitration agreements, albeit in a limited manner, leaving vulnerable employees unprotected. Now the ball is back in the hands of the courts in applying the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. Furthermore, based on the court's pro-arbitration approach, Congress should pass pending legislation further protecting employees and consumers from mandatory arbitration agreements.[296]

Courts should interpret the Federal Arbitration Act and the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act in a way that will limit arbitration and support the rights of sexual assault victims. Some dissenting opinions showed how the Federal Arbitration Act can be balanced against other laws while preserving employee rights.[297] In addition, state and federal legislators should expand the realm of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.[298]

As these three test cases showed, there is a dialogue between the courts and the legislator. The courts need to interpret statutes in a way that will expand equality and apply them in a way that will promote anti-discrimination. At the same time, legislators need to pass anti-discrimination laws. These go hand in hand. Only by acting in concert will the pursuit of equality be more effective. Legislation and adjudication are related and support one another. Contract enforcement, contract law rulings, legislation, and regulation are not enough. Each separately advances equality, but only in a limited manner. Each has its disadvantages and costs. However, combining these state powers will balance these shortcomings.

VI. CONCLUSION

Scholars have discussed whether contract law does, or should, promote equality, and, if so: how. However, the State's role in promoting equality using contract law has not been addressed. The Article fills this void and explores the meeting point of

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295 *See, e.g.*, Judith Resnik, *Feature: Arbitration, Transparency, and Privatization: Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2809, 2865, 2868–70 (2015).

296 *See Rep. Johnson & Sen. Blumenthal Re-Introduce Legislation to End Forced Arbitration & Restore Accountability for Consumers, Workers*, Congressman Hank Johnson 4th Dist. of Ga. (Apr. 28, 2023), https://hankjohnson.house.gov/media-center/press-releases/rep-johnson-sen-blumenthal-re-introduce-legislation-end-forced.

297 Epic Sys. Corp. v. Lewis, 584 U.S. 497, 542–49 (2018) (Ginsburg, J., dissenting); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 243–45 (2013) (Kagan, J., dissenting).

298 Samuel D. Lack, *Forced into Employment Arbitration? Sexual Harassment Victims Are Saying #MeToo and Beginning to Fight Back - But They Need Congressional Help*, 2020 HARV. NEGOT. L. REV. ONLINE 1, 57–58 (2020).

contract law, equality, and State power. It maps the different strategies the State can implement to advance equality by enforcing contracts, applying contract law, and legislating and regulating background rules and mandatory rules. Exploring three test cases, the Article discusses the advantages and disadvantages of enforcing nonmarital agreements, rescinding consumer contracts for vitiating factors, and invalidating arbitration agreements in accordance with the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. Based on this analysis, the Article demonstrates that contract law is not purely private, but rather has public aspects. It concludes that the State is an important facilitator in promoting equality and argues that the State should use its different powers in concert to promote equality.

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