FIU Law Review

Volume 17 | Number 1 Article 7

2023

Gender Inequality in Contracts Casebooks: Representations of Women in the Contracts Curriculum

Deborah Zalesne
CUNY School of Law, zalesne@law.cuny.edu

Online ISSN: 2643-7759

Recommended Citation
Deborah Zalesne, *Gender Inequality in Contracts Casebooks: Representations of Women in the Contracts Curriculum*, 17 FIU L. Rev. 139 (2023).
DOI: https://dx.doi.org/10.25148/lawrev.17.1.7

GENDER INEQUALITY IN CONTRACTS CASEBOOKS: REPRESENTATIONS OF WOMEN IN THE CONTRACTS CURRICULUM

Deborah Zalesne*

I. INTRODUCTION

Gender has always explicitly or implicitly played a critical role in contracting and in contracts opinions—from the early nineteenth century, when married women lacked the legal capacity altogether to contract, through the next century, when women gained the right to contract but continued to lack bargaining power and to be disadvantaged in the bargaining process in many cases, to today, when women are present in greater numbers in business and commerce, but face continued, yet less overt, obstacles.

Typical casebooks provide ample offerings for discussions of the ways in which parties can be and have been disadvantaged because of their gender and gender identity. At the core, gender inequity often stems from long-held stereotypes about women in contracting, which are often on full display in the cases. The vast majority of cases in the typical Contracts casebook are drawn primarily from the commercial context; sales, franchise, employment, and transfer of property cases predominate most Contracts casebooks, with many fewer cases in the family context. In the commercial cases, women and other people who do not identify as men, rarely seen as the businessperson, seller, or landowner, are sorely underrepresented, and the "non-male"

*Professor of Law, City University of New York School of Law. B.A. Williams College; J.D. University of Denver College of Law; LL.M. Temple University School of Law. Some of the issues raised in this article were originally raised in DAVID NADVORNEY & DEBORAH ZALESNE, TEACHING TO EVERY STUDENT: EXPLICITLY INTEGRATING SKILLS AND THEORY INTO THE CONTRACTS CLASS, Section III (Carolina Press 2013). I would like to thank my fabulous research assistant Hannah Kohn for her invaluable research assistance.

perspective tends to be obscured. Casebook offerings involving non-male parties still tend to be clustered in certain areas—namely contract defenses, promissory estoppel, and family cases. The result is a Contracts curriculum that typically confines women to certain traditional roles and relegates women's issues to a secondary status, privileging rational, arms-length market promises at the expense of family-based promises. The overall gender allocation in cases may or may not be reflective of the actual presence of women in the universe of American contracts cases. But either way, it raises some issues regarding how the typical casebook presents women in the realm of contracts cases, and overall, the role of women in contracting.

There is, of course, a diversity of viewpoints and a multiplicity of voices among women and feminists, who are divided by age, race, religion, sexual orientation, gender identity, ethnicity, and class, among other things. There are divisions among feminists over the nature and source of gender injustice, as well as over solutions.[1] Feminists differ, for example, over the roles of men and women (such as biological differences and cultural frameworks that land women as the primary caretakers most of the time), and whether and how the law should account for those differences.[2] When it comes to contract law, some feminists embrace contracting as a means of empowerment,[3] while others express concern over whether most women have the bargaining power necessary to protect themselves in the bargaining process. [4]

The goal of the Article is not to set out in any detail the contours and fine points of feminist legal theory. Rather, the Article will simply highlight gender-based deficiencies in the ways in which women are portrayed in traditional contracts cases and casebooks, often as either victims, overly-aggressive commercial actors, or in other specific gendered roles such as bride, princess, nurturer, mother, spouse, or mistress. In doing so, the Article will highlight feminist themes and conflicts in contract law and the ways in which reliance on gender-based stereotypes can negatively affect legal analysis in Contracts cases.

---

1 *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 602 (1990).

2 *Id*. For example, liberal feminists generally think it would be paternalistic to presume weakness and intervene in a concluded deal, while cultural feminists generally think that intervention is necessary in some cases for the protection or welfare of parties with weaker bargaining power.

3 *See, e.g.*, Robin Kar, *Contract as Empowerment*, 83 U. CHI. L. REV. 759, 759 (2016).

4 *See, e.g.*, Stephanie Bornstein, *The Statutory Public Interest in Closing the Pay Gap*, 10 ALA. C.R. & C.L.L. REV. 1, 2 (2019); Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 188 (2005).

II. PORTRAYAL OF WOMEN IN CONTRACTS CASES

The choice of cases included in the typical Contracts casebook, together with the way women tend to be portrayed in popular cases, often work together to reinforce gendered stereotypes about personality traits, domestic behaviors, and physical appearances of women. These stereotypes continue to hold women to age-old expectations and roles as mother, wife, beauty queen, or sexualized object, while keeping women from fair competition in negotiations and fair resolution of contract disputes, as well as diminishing their full autonomy. Stereotyped portrayals in the cases can influence legal analysis, as women face double standards: they are penalized for deviating from gender expectations, while also being penalized for passivity or more modest "feminine" behavior. Stereotyped portrayals of women can be well-intended, justifying a decision to protect a party with weaker bargaining power, or can be a tool used intentionally to justify a conclusion that a party does not actually deserve protection. But either way, stereotyped appearances of women can suggest that women are not the appropriate or typical actors in marketplace transactions and can ultimately be a hurdle to full participation in the market.

A. The Victimized Woman

When women are represented in the commercial context in a typical Contracts casebook, they usually appear as the unsophisticated, unwitting victim of the tough commercial marketplace—the vulnerable, weaker party being taken advantage of by the dominant male party. While the use of a contract defense can arguably have a redistributive effect in that the "victim" can use the defense as a tool to protect themself from an unfavorable contract, such empowerment from the defenses is often obscured by many courts' persistent infantilization of women with paternalistic narrative that portrays women as weak.[5]

Society has constructed a power hierarchy of genders where maleness is associated with power, and femaleness is associated with passivity and weakness. The result of this social construction of power is that what is seen as masculine (aggressive, ambitious, assertive, competitive, dominant, forceful, rational, or independent behavior) is more highly valued than what is seen as feminine (understanding, warm, gentle, collegial, emotional, or passive behavior). In the commercial world, rational, self-interested, "masculine" traits tend to be valued and privileged, and "feminine" traits and the complicating effects of the personal and emotional are all too often

5 *See, e.g.*, *infra* Section II(A).

overlooked. The enforcement of these gender-based stereotypes often results in women who exhibit stereotypically female traits being either penalized for being "weak" or protected from their "weakness" by paternalistic judges who reinforce the traditional stereotype.

When it comes to the judicial process, casting female contracting parties as victims in need of protection can be used to their benefit, as an excuse to undo an otherwise binding unfair contract. In the process, however, courts often portray the parties they are trying to protect as weak, inadequate, or inferior, and unable to truly, voluntarily consent to the transaction, when in reality the protection is needed because of intentional deceptive trading practices or unintentional structural inequalities.

For example, in the bargaining process, women who do not exhibit aggressive, masculine characteristics are often considered to be poor negotiators who are penalized by the resulting unfavorable contract terms.[6] These parties are seen as needing court protection from their own weakness. However, negotiations can be affected by race and gender dynamics. Race and gender privilege can yield confidence, and when women or members of disenfranchised groups do not effectively protect their interests in negotiations, it is more likely the result of a structural problem of race or gender subordination than of any deficiency in capacity of the bargaining party.

The notable unconscionability case, *Williams v. Walker-Thomas*, provides an apt example of a court using infantilizing language to justify protecting a party from unscrupulous behavior. In that case, a consumer, Ora Lee Williams, was portrayed as a victim of the Walker-Thomas Furniture Store in a landmark opinion that found a series of contracts for household items to be unconscionable.[7] In the case, after Williams bought a stereo and defaulted on one payment, an oppressive and confusing cross-collateralization clause in the contract allowed the Walker-Thomas Furniture Store to repossess all the items that Williams had ever bought from the store, including rugs, curtains, a typewriter, a bed, kitchen furniture, a washing machine and sheets, even though she had been making payments on those

---

6 Of course, it is well-documented that women and people of color also get less favorable terms in particular contracts than white men, because of a variety of factors not related to their ability to negotiate. One study of retail car negotiations sent testers of different races and genders into car dealerships to buy a new car using the same bargaining strategy. Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991). The study revealed that women paid consistently more men. *Id.* at 819, 829. The study also revealed several forms of non-price discrimination, such as: the steering of testers to salespersons of their own race or gender; testers being asked different types of questions (e.g., about occupation and financing); and salespersons disclosing different qualities of the car or employing different sales tactics. *Id.* at 833–36. For example, salespersons asked black female testers more often about their occupation than white male testers. *Id.* at 834.

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

items on time for many years, and her overall debt on all those items was down to only $164 before she bought the stereo.[8]

Consider the inherent judgments that come up about Williams, presumably because of her gender, race, class, and educational background, that allowed the court to implicitly label her as a victim in need of its protection. Though not explicitly stated in the opinion, it is suggested from a variety of facts that Williams was a black, single mother on welfare.[9] Though Williams most likely had direct or indirect experience with clauses such as the one at issue, the inference is that she lacked sophistication and was unaware of the harsh terms.[10] Though the cross-collateralization clause was indecipherable to most any lay person, the inference is that Williams' lack of education caused her to be unable to understand or learn the content of the contract.[11] Though she made timely payments on a long series of items for five years, the inference was that because she was on welfare, she was irresponsible for buying items that were not "necessities."[12] This specific combination of conditions and personal characteristics facilitated the assumption that she was incapable of giving meaningful assent.

Similarly, in *Vokes v. Arthur Murray*, a middle-aged widow with no family was portrayed as a victim to support a holding that a consumer contract was unenforceable.[13] In that case, Audrey Vokes enrolled in dancing classes with Arthur Murray's School of Dancing. Ms. Vokes had always wanted to be a dancer and, at the time she enrolled in dancing classes, hoped to find a "new interest in life."[14] At every turn, her instructors lavished praise on her and encouraged her to buy more and more lessons (even when she had a number of unused lessons), saying that she was particularly adept and could become a "gold level" dancer with more coaching. All told, Ms. Vokes

---

8 *Id.* at 448.

9 *See infra* notes 12–13.

10 For example, in setting forth the relevant rules for a finding of unconscionability, the D.C. Circuit Court focused on the fact that, "Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain." *Williams,* 350 F.2d at 449.

11 The lower court described Williams as "a person of limited education." Williams v. Walker-Thomas Furniture Co., 198 A.2d 914, 915 (D.C. 1964). The D.C. Circuit Court, in setting forth the relevant rules for a finding of unconscionability, posed this inquiry: "Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract." *Williams,* 350 F.2d at 449.

12 The court highlighted: "Significantly, at the time of this and the preceding purchases, appellee was aware of appellant's financial position. The reverse side of the stereo contract listed the name of appellant's social worker and her $218 monthly stipend from the government. Nevertheless, with full knowledge that appellant had to feed, clothe and support both herself and seven children on this amount, appellee sold her a $514 stereo set." *Williams,* 198 A.2d at 916.

13 Vokes v. Arthur Murray, Inc., 212 So. 2d 906, 907 (Fla. Dist. Ct. App. 1968).

14 *Id.* at 907.

purchased over 2,302 hours of dance lessons; the total cost of her lessons, which she purchased in less than sixteen months, was $31,090.45.[15]

The court found in favor of Vokes and lambasted the dance studio for its "barrage of flattery, false praise, excessive compliments, and panegyric encomiums."[16] In its opinion, the court leveraged the fact that Ms. Vokes was a retiree and a widow. The court's language evoked the image of a lonely old woman with no other source of joy, portraying her relationship with the dance studio as closer and more personal than the typical arms-length market transaction.[17] The opinion even suggests an "intimate" relationship of sorts—which likely led Ms. Vokes to assume Arthur Murray would act in her interest, and perhaps making her more susceptible to manipulation by unscrupulous salespeople.

The court highlighted the fact that she did not realize the true nature of the contracts. In so finding, the court must have assumed that Ms. Vokes was unaware that she was not a good dancer and that she did not need additional dancing lessons. It must have assumed further that she was unable to protect herself by making a rational decision to use the lessons she had already bought before purchasing new lessons, especially given her lack of talent as a dancer. There is a concomitant assumption that the vulnerable widow cannot afford the dance lessons—or at a minimum that she was acting irresponsibly and against her self-interest by purchasing so many lessons. These assumptions might have been made because Vokes was assumed to be emotionally vulnerable as an elderly widow without family and support. The court alludes to the psychological effects of aging and isolation, suggesting that certain classes of people are particularly vulnerable to merchants like Arthur Murray.[18] Indeed, the vulnerability of the elderly because of lack of cognitive acuity and loneliness is well-documented. However, Vokes was not that old at age fifty-one.

The *Vokes* holding paternalistically reaffirms the image of an emotionally vulnerable woman in need of protection. While the opinion benefits the plaintiff, it does so by unnecessarily characterizing her as helpless and fragile, and unable to protect herself.

---

15 *Id.*

16 *Id.*

17 For example, the court referred to "pleasant hours" spent in a "private room," and the contract itself said, "No one will be informed that you are taking dancing lessons. Your relations with us are held in strict confidence." *Id.* The court even noted that Davenport "intruded well into the forbidden area of undue influence." *Id.*

18 Martha M. Ertman, *Book Review*, *Legal Tenderness: Feminist Perspectives on Contract Law*, 18 YALE J.L. & FEMINISM 545, 551 (2006).

B. The Aggressive Woman

The binary portrayal of women in the commercial cases in the Contracts curriculum is unmistakable. When women are not portrayed as weak or vulnerable, the opposite conclusion is often drawn—that they are bold, brash, or inappropriately aggressive. Women who possess stereotypically "masculine" traits, such as assertiveness and independence, are often penalized for deviating from the gender norms expected of them.[19] As Professor Frug has said:

> [B]ecause of men's traditional dominance over women, the traits which were positive when they were linked with men may seem negative when they are attributed to women. Thus, women may be described as scheming, cold, selfish, and manipulative, when they appear intellectual, detached, autonomous, and in control, while men may be described as uninhibited, loyal, considerate, and easy-going, when they seem emotional, attached, compassionate, and spontaneous.[20]

The trend is evidenced in several popular Contracts cases in which female plaintiffs who exhibit business acumen and ambition were faced with subtle hostility by the courts. For example, in *Lucy, Lady Duff Gordon*, Lady Duff Gordon was portrayed as greedy and heartless, diminishing the magnitude of her entrepreneurial success. Lucy, Lady Duff Gordon was a fashion designer and entrepreneur. She entered a contract with Otis Wood, her publicist, under which he would market her designs and place her endorsement on other designs and in exchange they agreed to split the profits. He claimed she breached the contract by placing her endorsement on designs behind his back.[21] Her defense was that the contract was not enforceable due to a lack of consideration. She alleged that although he had the exclusive right to place her endorsement on the design of others and if he made a profit he was required to give her half, in fact he was not actually required to place her

---

19 Feminist thinkers offering phenomenological and existential analyses have developed an enduring theme of feminist scholarship: the marginalization of women as "other" in a male created culture. The "other" is an objectified being who is assigned traits that represent the opposite of the agentic subject, men. The classic formulation of this theme is exemplified in Simone de Beauvoir's seminal text, *The Second Sex*. In *The Second Sex* de Beauvoir introduces themes that will become the bedrock of much of second wave feminism: women's difference from men is both a result of a cultural construct that excludes women and a result of the internalization of "otherness." *See* SIMONE DE BEAUVOIR, THE SECOND SEX (1949).

20 Mary Joe Frug, *Re-Reading Contracts: Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1105 (1985).

21 Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214 (N.Y. 1917).

endorsement on any designs, and therefore his promise was illusory.[22] The court disagreed, holding that he implicitly promised to use reasonable efforts to bring profits and revenues into existence.[23]

It has been observed that in the *Lucy, Lady Duff-Gordon* case "readers . . . know who will ultimately win by the time they read the third word in the case."[24] And if they do not know by then, they will certainly figure it out by the time Judge Cardozo finishes setting forth the background facts. In a lecture delivered by Professor Karl Llewellyn in 1962, he discussed how Judge Cardozo uses, or even manipulates, the facts to paint a sympathetic plaintiff. At the same time, he craftily downplays Lady Duff Gordon's business acumen and mocks her desire to turn fabric design into cash. The case begins:

> The defendant styles herself a creator of fashions. Her favor helps a sale. Manufacturers of dresses, millinery, and like articles are glad to pay for a certificate of her approval. The things which she designs, fabrics, parasols, and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her turn this vogue into money.[25]

This is not simply a neutral statement about her job, but a deeper implicit statement about her greedy character, emphasizing her desire to make money out of what sounds like a mundane pursuit relating to fashion. Llewellyn points out that Judge Cardozo "subtly" paints a picture of a "nasty person,"[26] gradually building up sympathy for Wood and setting up Lady Duff-Gordon's certain failure in this action. Unsympathetic characterizations such as the ones made in that case can ultimately work against women in the judicial process.

Another casebook favorite involving a strong, successful woman was *Parker v. Twentieth Century-Fox Film Corp*.[27] In that case, Shirley MacLaine Parker, a well-known actress, was not penalized for her professional success and business acumen, but only because she was pushed into a more stereotypically "female" box. Although MacLaine Parker was a powerful Hollywood actress and her work was valued as such, the court nonetheless reduced the value of her work to her skill as a dancer and comic.

---

22 *Id.*

23 *Id.*

24 Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. MIA. L. REV. 409, 437 (1986).

25 *Wood*, 118 N.E. at 214.

26 Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 637 (1962).

27 Parker v. Twentieth Century-Fox Film Corp., 474 P.2d 689 (Cal. 1970).

In *Parker*, the Supreme Court of California considered whether Shirley MacLaine Parker had failed to meet her duty to mitigate by refusing to accept a role in the western movie, "Big Country, Big Man." Twentieth Century-Fox offered MacLaine Parker the role in "Big Country" after it canceled production of the musical comedy "Bloomer Girl," in which she was to play the lead as Amelia Bloomer.[28] The Court held in favor of MacLaine Parker finding that she had not failed to meet her duty to mitigate by refusing to accept Twentieth Century-Fox's offer of a role in "Big Country."[29] According to the Court, the role in "Big Country" was "both different and inferior" to the role offered in "Bloomer Girl," and "Big Country" failed to offer an opportunity for MacLaine Parker to use her "talents as a dancer as well as an actress."[30] In concluding that the two roles were not comparable, the Court said, "The female lead as a dramatic actress in a western style motion picture can by no stretch of imagination be considered the equivalent of or substantially similar to the lead in a song-and-dance production."[31]

The court's characterization of "Bloomer Girl" as a "song-and-dance production" and "Big Country" as a "straight dramatic role" betrays its simplistic belief about what would constitute a successful and important female lead role. The holding rests primarily on the belief that a role in a light-hearted musical ("Bloomer Girl") would do more to advance MacLaine Parker's career than a heavy role in a serious movie ("Big Country"). The Court made no mention of the political and suffragist overtones of the story (the script of "Bloomer Girl" was adapted from a play by the same name about the political activities of Amelia Bloomer, a nineteenth century feminist and suffragist).[32] It selectively characterized "Bloomer Girl" as a musical comedy where the main attraction would have been MacLaine Parker's dancing and acting, omitting any discussion of MacLaine Parker's possible desire to play a radical feminist whose political causes she identified with.[33]

Parker is a particularly interesting case study of contradictions, as MacLaine's victory was dependent on essentialized notions of gender. In the end, readers may be inclined to read *Parker* as an example of how an enterprising female plaintiff manipulated the legal system by playing upon

---

28 Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AMER. UNIV. L. REV. 1065, 1114 (1985).

29 *Parker*, 474 P.2d at 690.

30 *Id.* at 693–94.

31 *Id.* at 694.

32 Victor P. Goldberg, *Bloomer Girl Revisited or How to Frame an Unmade Picture*, 1998 WIS. L. REV. 1051, 1053 (1998).

33 Frug, *supra* note 20.

notions of traditional gender roles in movies.[34] And even though she won the case, there will always be those who see her as greedy for even trying.

C. The Emotional Woman

Representations of women in contract law often reflect the stereotype that women are over-emotional. This stereotype emerges from the construction of gender as a series of dichotomous categories, in which men and women are conceptualized in terms of their opposites, with the concepts associated with women are systematically devalued.[35] For example, men are seen as competitive, and women as passive; men are seen as strong, and women as weak;[36] rationality is valued, while emotion is denigrated. In fact, women's emotions have been so belittled as to have been labeled as a mental illness since at least 1900 B.C., when ancient Egyptians described women as being over-emotional due to movements of their uteruses.[37] Influential thinkers continued to label women's emotions as an illness until at least 1980, when "hysteria" was removed from the Diagnostic and Statistical Manual of Mental Disorders (DSM).[38]

One common portrayal of women as the "hysterical bride" reflects this stereotype. The so-called "bridezilla," [39] a portmanteau combining "bride" with the city-crushing monster Godzilla,[40] now features in reality television shows,[41] salacious magazine articles,[42] and even self-help books for brides recoiling from the bridezilla label.[43] Some have argued that the "bridezilla" trope is sexist, and wrongly allocates blame for the wedding industry's

---

34 Frug, *supra* note 20, at 1125.

35 PATRICIA HILL COLLINS, TOWARD A NEW VISION: RACE, CLASS, AND GENDER AS CATEGORIES OF ANALYSIS AND CONNECTION (1993) (arguing that this dichotomous "and/or" thinking does not leave room for a full understanding of overlapping privileges and oppressions on individual, institutional, and symbolic levels).

36 *Id.* at 646 (noting that these commonly listed categories of "and/or," "male/female" traits tend to reflect understandings of white, middle-class men and women).

37 Cecilia Tasca et al., *Women and Hysteria in the History of Mental Health,* 8 CLINICAL PRAC. & EPIDEMIOLOGY IN MENTAL HEALTH 110, 110 (2012).

38 *Id.* at 116.

39 In 1995, the Boston Globe warned readers of the so-called "bridezilla." Diane White, *Tacky Trips Down the Aisle*, BOS. GLOBE (June 29, 1995).

40 *Bridezilla*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/bridezilla (last visited June 25, 2022).

41 Bridezillas (WE tv television broadcast June 1, 2004).

42 Jess Edwards, *Bridezilla Asks Bridesmaids to Pay for Her Wedding Dress*, COSMOPOLITAN (June 28, 2016), https://www.cosmopolitan.com/uk/fashion/style/news/a44281/bridezilla-bridesmaids-pay-designer-wedding-dress/.

43 MADISON BOUND, THE ANTI-BRIDEZEILLA BOOK: HOW TO CALM THE F**K DOWN AND STILL MANIFEST THE WEDDING OF YOUR DREAMS (2019).

construction of impossibly high expectations of brides.[44] Nevertheless, in contract law, bridezillas feature regularly in court, and legal opinions tend to represent these women as "hysterical" figures.

Contract law cases on brides reflect the social categorization of women as "emotional," and the problematization of that emotion. For example, in *Dietsch v. Music Co.,* a bride and groom hired a band to play at their wedding reception.[45] However, the band never turned up to the wedding.[46] The Judge wrote that, "after much wailing and gnashing of teeth," the plaintiffs secured stereo equipment to provide music.[47] Thereafter, the married couple sued the band for the entire cost of their wedding reception.[48] The Judge scoffed at the plaintiffs' requests, though he did award damages for the couple's diminution of value of their reception, distress, and inconvenience.[49] While the plaintiffs in this case were both a bride and a groom, the facts indicate that it was just the bride who communicated with the band and confirmed their attendance.[50] Readers are left with the distinct impression that bride and groom were not equally gnashing teeth.

Dietsch is one of many contract law cases that casts brides as over-emotional and irrational actors, obsessed with curating a picture-perfect wedding rather than embarking on a successful marriage. Other "bridezillas" in contract law cases include a bride who became "hysterical" and "feverish" when her wedding venue was double-booked at the last minute;[51] a betrothed woman who turned to tranquilizers and her priest after suffering "mental anguish, emotional stress and physical pain which resulted in sleepless nights, crying, headaches and nervousness," due to her wedding florist's breach of contract;[52] a bride whose venue and caterer moved her reception from a ballroom into a lobby, causing her to "'cry[] uncontrollably' and have 'nightmares;'"[53] and a bride who sued a dressmaker for the cost of her bridesmaids dresses, her limousine, her photographer, and her videographer when the dresses were delivered late.[54]

---

44 Erika Engstrom, *Unraveling The Knot: Political Economy and Cultural Hegemony in Wedding Media*, 32 J. COMMC'N INQUIRY 60, 65 (2008); Kelsey Mckinney, Opinion, *A Feminist Defense of Bridezillas*, N.Y. TIMES (Aug. 5, 2017).

45 Deitsch v. Music Co., 453 N.E.2d 1302, 1303 (Ohio Mun. Ct. 1983).

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.* at 1304.

50 *Id.* at 1303.

51 Murphy v. Lord Thompson Manor, Inc., 938 A.2d 1269, 1272 (Conn. App. Ct. 2008).

52 Matlin v. Svihlik, No. 49701, 1985 WL 8517, at *2 (Ohio Ct. App. 1985).

53 Deauville Hotel Mgmt., LLC v. Ward., 219 So. 3d 949, 951 (Fla. Dist. Ct. App. 2017).

54 Sagnia-Blythe v. Gamblin, 611 N.Y.S.2d 1002, 1005 (N.Y. Civ. Ct. 1994).

These cases represent women as caring more about the consumerism surrounding weddings than their marriages. The focus of contract law opinions on the reaction of the brides, rather than on the behavior of the breaching vendors, is rooted in, and perpetuates, the stereotype of women as problematically emotional. Even in a claim for damages based on emotional distress, there is no need to portray women as hysterical monster brides, in order to justify the damages.

D. The Domestic Woman

While women's appearances in traditional commercial cases is infrequent, they appear in disproportionate numbers in non-commercial family cases in ways that reinforce the traditional role of women as mothers and nurturers. These cases are often addressed through the "softer" promissory estoppel doctrine, which can be seen as a subordinate alternative to the "harder" rules of the bargain principle, which applies to most market transactions.[55] Indeed, *Ricketts v. Scothorn*, the classic 1898 promissory estoppel case that is often taught to show the development of the law of promissory estoppel, involved a grandfather's promise to give his granddaughter $2,000, so that she wouldn't have to work.[56]

The popular family cases taught in the Contracts class tend to cast female plaintiffs in a domesticated role traditionally assigned to women. The housewife status generally reduces or eliminates a right to compensation for breach of contract. Women continue to be "subsume[d] . . . into relationships (daughter, mother, wife) and deprive[d] . . . of that crucial element of citizenship, individual choice."[57] In a handful of cases, the domestic characterization is further tarnished by images of cheating wives (where women are reproached for having affairs with married men and then seeking compensation from them),[58] and bad mothers (where women are admonished first for giving up their babies and then again for changing their minds and asking for them back).[59]

For example, in *Brooks v. Steffes*,[60] a case used to teach the objective test, a married woman entered the household of a married man to serve as his housekeeper, cook, and nurse, among other things. The analysis of whether there was an implied contract to compensate Ms. Brooks for her very

---

55 Frug, *supra* note 20, at 1093.

56 Ricketts v. Scothorn, 77 N.W. 365, 366 (Neb. 1898).

57 Martha M. Ertman, *Book Review: Legal Tenderness: Feminist Perspectives on Contract Law*, 18 YALE J.L. & FEMINISM 545, 551 (2006).

58 *See, e.g.*, *infra* notes 60–67 and accompanying text.

59 *See, e.g.*, *infra* notes 68–93 and accompanying text.

60 Matter of Steffes' Est., 290 N.W.2d 697, 699 (Wis. 1980).

laborious work turned on the nature of the intimate relationship that she had established with Mr. Steffes.[61]

When they met, Mary Lou Brooks and Virgil Steffes were each married to other people.[62] The two became lovers; Brooks moved in and remained with Steffes until he died six years later. Brooks worked hard on the property during that time completing jobs normally done by paid professionals, including nursing care, housekeeping, cooking, cleaning, bookkeeping, carpentry, masonry. When Steffes died, Brooks sought payment for the labor she had performed, but the estate refused to pay, arguing that these were jobs that were done gratuitously as a member of the household.[63]

In the first sentence of the opinion, the court introduced Brooks by referring to her relationship status with an unconcerned man, her husband: "The question on appeal is whether the plaintiff, who engaged in an adulterous relationship with the deceased, may recover . . . ."[64] The court touched on Brooks' ability to cook good meals for the men involved, and how well the house was kept while she resided on the property.[65] Steffes' son, the defendant in the case, argued that the work Brooks rendered would be expected of her if she were a member of the family.[66] After deliberation, the court determined that a woman can simultaneously live in the same house as others, have intimate feelings towards those others and nonetheless expect payment for work she performs.[67]

Although Ms. Brooks ultimately prevailed in the case, the court's holding that there was an implied promise to compensate Brooks for the rigorous work performed in the house depended on the court ignoring her intimate relationship with Mr. Steffes. The court highlighted the presumption that where one provides services for another person, they normally expect payment for those services, but when the services are provided for a family member, the presumption is that the services were provided gratuitously. This presumption reinforces the gendered nature of home labor and the traditional role of women in the household.[68] Although the court found for Brooks, in

---

61 *Id.* at 698 (noting that "the question on appeal is whether the plaintiff . . . may recover from the estate for unpaid salary, wages, or other compensation for personal services rendered to the deceased within the two-year period preceding his death").

62 *Id.* at 699.

63 *Id.* at 704.

64 *Id.* at 698.

65 *Id.* (noting that "Steffes' son had been a guest in his father's home before his father's death, and he testified that he had eaten meals cooked by the plaintiff, that his father's home was kept in good condition, and that the plaintiff took good care of his ill father").

66 *Id.* at 699.

67 *Id.* at 702.

68 Women's inability to get adequate, or any, monetary compensation for the tasks and roles they solely or primarily perform in the household, is a central factor in the exploitation of women. *See* Gus

order to do so, it had to ignore her personal relationship with Mr. Steffes and treat them as if they were bargaining at arms-length. Arguably, Brooks received compensation for her hard work because of the very fact that she had never married Steffes.

When the dissent, on the other hand, acknowledged the personal relationship, it determined that Ms. Brooks should not be compensated, focusing on the illicit relationship that "offends the standards of decency." The dissent is startling in its misogyny and rebuke of Ms. Brooks, who is characterized as an adulteress who abandoned her lawful husband and children for Mr. Steffes. Though they had different perspectives on traditional values surrounding family, both the majority and the dissent presented the relationship between the parties as the central and deciding factor in determining whether Ms. Brooks was entitled to compensation, perpetuating the notion that women should be defined according to their relationship to men, that women have a pre-existing duty to perform domestic work as marital obligations in the household, and that such domestic work should be uncompensated.

Women are also subtly but frequently shamed for unwanted pregnancies, especially when they make the decision to give up their babies. In such cases, courts sometimes make generalizations about the instability of "natural mothers" who surrender their children for adoption. *Acedo v. State of Arizona, Dept of Public Welfare*[69] is one such case. *Acedo* is sometimes used to teach the doctrine of misunderstanding and the methodology used to determine whether two parties to a contract said and meant the same thing in bargaining. Herlinda Acedo, an unmarried eighteen-year-old woman, agreed to give up her six-month-old baby for adoption.[70] She voluntarily signed a contract authorizing the adoption agency to place her child in a home and giving the agency "unrestricted" power to consent on her behalf to the termination of her parental rights if an adoption should occur.[71] About two weeks after signing the contract, and three days after the baby had been placed with a family, the young mother and her family sought the assistance of an attorney in an attempt to revoke her consent.[72] Ms. Acedo claimed that she read the contract to mean she had six months to change her mind.[73] She alleged that because she did not understand the contract she signed in the

---

Wezerek & Kristin Ghodsee, *Women's Unpaid labor is Worth $10,900,000,000,000,* N.Y. TIMES (Mar. 5, 2020), https://www.nytimes.com/interactive/2020/03/04/opinion/women-unpaid-labor.html.

69 Acedo v. State Dep't of Pub. Welfare, 513 P.2d 1350, 1350–51 (Ariz. Ct. App. 1973).

70 *Id.* at 1351.

71 *Id.*

72 *See id.*

73 *Id.*

same way that the agency did, there was no manifestation of mutual assent and no enforceable contract.[74]

The court held that there were, indeed, two materially different understandings about the meaning of the contract, but both interpretations were not equally reasonable.[75] According to the court, the contract language was clear and unambiguous, and the only reasonable, objectively correct interpretation was that Ms. Acedo unconditionally relinquished her right to the baby.[76] The court held that a reasonable person observing Ms. Acedo's words and conduct would have believed Ms. Acedo manifested her assent to such relinquishment by reading and signing the unambiguous contract.[77]

The court portrayed Ms. Acedo as poor, uneducated, irrational, and irresponsible. The court refers to her as "an unmarried woman, who at the time was eighteen years of age and a high school graduate."[78] The court emphasized that she left home with only twenty dollars and had no way to support herself or her child.[79] Ms. Acedo had contact with and was litigating a case against the department of welfare. All in all, Ms. Acedo was presented by the court as someone too poor to take care of her child.[80] Still, despite the assertion that Acedo was acting in an irrational manner, the court simultaneously reasoned that she was not a minor but a high school graduate of normal intelligence who voluntarily signed the contract after having full opportunity to read it.[81] This perspective might seem to honor the stability of contracts, but what it really does is provide assurances to adoptive parents who would otherwise be subject to "unstable whims and fancies of natural mothers."[82]

Ms. Acedo's decision is put further in question by unspoken inferences and unspoken stereotypical assumptions based on her perceived race. It is reasonable to assume that the judges in the case had as a reference point the interpretive strategy of white middle class males.[83] Yet, given the geographic location of the case and the name Herlinda Acedo, it would also be reasonable

---

74 *See id.*

75 *See id.* at 1353.

76 *See id.* at 1354.

77 *See id.*

78 *See id.* at 1350.

79 *Id.* at 1351.

80 The court highlights that Acedo was "unmarried," "18 years of age," and "unemployed and in possession of only $20" after having moved out of her parents' home. The court mockingly concludes that "petitioner, her $20 expended, returned to her parents' home." *Id.*

81 *Id.* at 1354.

82 *Id.* (quoting Welfare Div. of Dep't of Health & Welfare v. Maynard, 445 P.2d 153, 155 (Nev. 1968)).

83 The "reasonable person" in the objective test is often based on white, heteronormative, middle-class men, aided here by the fact that the judge was indeed white.

to assume that the plaintiff and her family were Mexican American. Statistics show that Hispanic girls become pregnant at a rate more than twice that of white girls between the ages of fifteen and nineteen. And given the common hyper-sexualization of Latina women in mainstream media, when the court refers to her "unstable whims," there is an implicit connection that could be made to her race based on these stereotypes.[84]

In *Acedo,* a judgment was made about the wisdom of returning a child to the birth mother because birth mothers have "whims" that can destroy the lives of adoptive parents. In turn, adoptive parents are presumed to be better equipped to take care of a child placed for adoption.[85] Whether judges admit it or not, they often deny that the relative economic position of the parties in a custody or adoption proceeding matters a great deal.

Likewise, in *In re Baby M,* Mary Beth Whitehead was also portrayed as a "bad mother" for first entering a surrogacy contract under which she agreed to carry a child to term and relinquish the child to Mr. Stern and his wife, and then later changing her mind after giving birth and violating her agreement.[86] Judge Sorkow, in the lower court opinion, upholds the surrogacy contract. He portrays Ms. Whitehead as uneducated, irresponsible, unstable, and dishonest, almost suggesting that she is an unworthy mother. Judge Wilentz, in the Supreme Court opinion, finds the contract to be against public policy, though ultimately decides that it would be in the best interest of the child to give custody to the Sterns nonetheless.[87] He shows much sympathy for Ms. Whitehead, noting that her original choice to enter the contract stemmed from heartfelt "sympathy for family members and others who could have no children" and her desire to give another couple the "gift of life." He then paints Ms. Whitehead as a homemaker and a good mother who wants to fight for her natural daughter. In different ways, both decisions hold women to a problematic standard surrounding motherhood.

In holding the contract violates public policy, the New Jersey Supreme Court relied heavily on notions about surrogacy amounting to a form of baby bartering, where a child is produced in exchange for money.[88] A dominant

---

84 The average pregnancy rate per thousand non-Hispanic white girls between fifteen and nineteen years of age is 61.6, whereas Hispanic girls between the ages of fifteen and nineteen become pregnant at the rate of 145.9 per thousand. These figures represent an averaging of the pregnancy rates of each demographic during the years 1990–2006 as reported by the Guttmacher Institute. *See* KATHRYN KOST & STANLEY HENSHAW, U.S. TEENAGE PREGNANCIES, BIRTHS AND ABORTIONS: NATIONAL AND STATE TRENDS AND TRENDS BY RACE AND ETHNICITY 6 (Guttmacher Inst. ed. 2010), http://www.guttmacher.org/pubs/USTPtrends.pdf.

85 *See Acedo*, 513 P.2d at 1354.

86 *See* In re Baby M, 537 A.2d 1227, 1235–37 (N.J. 1988).

87 *See id.* at 1234.

88 *Id.* at 1248 (stating "this is the sale of a child, or, at the very least, the sale of a mother's right to her child"). Paradoxically, the court did not support a blanket prohibition on surrogacy, but rather

fear associated with alternative reproductive technology is related to the dignity of personhood—this fear is rooted in notions about the commodification of babies and the conflation of economic exchange and intimacy.[89] Some critics fear that the market and the commercialization of reproductive tissues could undermine personhood, turning "unique individuals into fungible entities with monetary values."[90] This "anti-commodification" position is another way some courts seek to protect intimate relations from the market, which, some believe, could undermine the dignity of marriage, "denigrate[] the emotional significance of home labor,"[91] and "violate the norms of love that are supposed to govern marital relations" and motherhood.[92]

The commodification concern with surrogacy and gamete donation stems, at least in part, from the fear that technology will diminish the sacredness of pregnancy, childbirth, and motherhood. While historically, marital love making and baby making have gone hand in hand, surrogacy and gamete donation involve a medical intervention that necessarily separates procreation from love and sexual intercourse, which can take on a meaningful significance to some people. As a result, surrogate mothers do not fit into the paradigm of women being the "good mother." Rather, surrogate women are sometimes seen as deviant mothers, making the decision to give up a child before getting pregnant and violating the sacred bond between mother and child in the process. A mother, either through biology or through carrying the baby, who gives up her child is often thought to break that indelible bond and violate a sacred relationship.

---

expressed its strong moral distaste for "baby selling," or surrogacy in exchange for monetary compensation. The court's opinion, though ultimately sympathetic to Ms. Whitehead, thus perpetuates a dangerous stereotype about the role of women as caregivers. The idea that women can be surrogates, but only if done as a gift without any compensation, reifies gendered notions of women as caregivers and providers whose services should not require compensation. The end result is a paradoxical situation where a woman can "donate" eggs, but other actors down the line in the transaction unquestionably profit from the sale of the "donation."

89 *Cf.* Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 218 (2012) (explaining that commodification "injures personhood and can cause a disassociation or alienation from oneself").

90 *Id.*

91 Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 95 (1997).

92 Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 500 (2005). However, this argument favoring the regulation of economic exchanges in the household reinforces the gendered nature of home labor and disproportionately harms poorer people, usually poor women. Failure to enforce interspousal contracts undervalues the labor associated with the marital relationship. *See id.* at 517.

It is also historically thought that women have an instinctual desire to be mothers.[93] Young girls are taught childbearing is something that is supposed to, and will, happen in their own lives. Conversely, one rarely hears about men having the same urge. The idea perpetuates the view that "'normal' women experience an instinctual longing from within to have a child, and if they do not there is something wrong with them."[94] The deep feeling that some women may have of wanting to have children, however, most likely stems from social and cultural influences, not biological ones.[95] Nonetheless, when a woman agrees to carry a child for another woman and agrees to give up that baby after presumably forming the "inevitable bond" with it, she is often viewed as violating these sacred beliefs about womanhood and motherhood.[96]

This sacredness not only acts to remove reproductive labor like surrogacy from the marketplace, but it also bears down on the market value of all gendered labor, doing a disservice to the work of all women who seek a fair wage. The paradigm of exalting sacred institutions of womanhood and motherhood, as above the market, historically serves to undermine the market value of gendered work, such as home healthcare or domestic work. Consequently, the value of "women's work" becomes illegible and deeply undervalued in the market economy.

Overall, on moral grounds, the social expectation that women serve as faithful wives and mothers and commit to getting married and raising children as their ultimate life project, that they cherish marriage and motherhood over all other competing values, and that they perform household labor and the labor of motherhood out of pure altruism and love of their particular biological children, is a traditional social prejudice that ultimately limits their freedom of choice in contracting. These expectations ultimately work in the law to devalue women's work outside the home and to diminish women's autonomy.

---

93 Laura Carroll, *The "Biological Urge": What's the Truth?*, HUFFINGTON POST (Oct. 10, 2012), https://www.huffpost.com/entry/childfree_b_1752906.

94 *Id.*

95 Gary L. Brase & Sandra L. Brase, *Emotional Regulation of Fertility Decision Making: What Is the Nature and Structure of "Baby Fever"?*, 12 EMOTION 1141, 1151–52 (2012).

96 *See, e.g.,* Arland K. Nichols, *Why Surrogacy Violates Human Dignity*, CRISIS MAG. (Apr. 7, 2015), http://www.crisismagazine.com/2015/surrogacy (stating that "[s]urrogate motherhood represents an objective failure to meet the obligations of maternal love, of conjugal fidelity and of responsible motherhood . . . .").

E. Women in Other Feminized Roles

Women who appear in commercial contracts cases often appear in a variety of other feminized roles in ways that draw heavily on traditional stereotypes that sexualize women. Women are often portrayed as embodying a "princess" or "beauty queen" mentality. Of the most prominent female parties in commercial cases, for example, there's Lucy, Lady Duff Gordon, a successful business entrepreneur, but in an industry that involves "commercializing the personal appearance of women;"[97] Alice Sullivan, a "professional entertainer" who sought plastic surgery on her nose; and Shirley MacLaine, portrayed as "an indulgent starlet."

Take Alice Sullivan, from the popular casebook classic *Sullivan v. O'Connor*, who sought plastic surgery on her nose "to 'enhance' her beauty and improve her appearance."[98] According to Professor Frug, this will "surely remind many readers of the stereotypical image of woman as princess (or beauty queen)—vain, self-absorbed, and decidedly inferior, not only to men but to worthier women as well."[99] In a different way, Shirley MacLaine of *Parker v. Twentieth Century Fox* fame, is also portrayed almost like a princess, lying around eating chocolates, while "the defendants, hard-working studio types, struggle to manage their business efficiently despite her arbitrary whims."[100] It has been observed that she "cleverly manipulated the legal system"[101] so as to get her full salary for doing nothing.[102] Finally, revisiting *Wood v. Lucy, Lady Duff Gordon*, note how Cardozo manages to portray Lady Duff Gordon's multi-million-dollar business as something more closely resembling a hobby (describing her as someone who "*styles herself* a creator of fashions" and "referring to the 'vogue' of making 'parasols, and what not'").[103] The less-than-flattering portrayals in these cases subtly reinforce restrictive and harmful stereotypes about women and beauty. These stereotypes can be harmful outside of contracting, by contributing to anxiety, depression, and low self-esteem, as well as in contracting.

---

97 Frug, *supra* note 20, at 1084.

98 *Id.* at 1100.

99 *Id.*

100 *Id.* at 1124.

101 *Id.*

102 *Id.*

103 *Id.* at 1084 n.66 (emphasis added).

III. CONCLUSION

Gender dynamics between contracting parties can affect the behavior of the parties and can have an impact on the resulting bargain, and negative portrayals of women and assumptions about women can affect the legal analysis in court opinions. But since gender is generally not considered in the legal analysis—largely due to the application of the neutral objective test—these effects are not always apparent. The casebook author's editorial choices can have a powerful effect on readers, informing how they think about the law, lawyering, clients, and even legal reasoning, and in some cases that effect can be harmful if not addressed head on.[104] If casebooks and teachers do not highlight these dynamics and disparities, they may inadvertently play a part in perpetuating such stereotypes and perceptions about the role of women and people who do not identify as men in the marketplace.

104 *Id.* at 1069.