

## CRITICAL PERSPECTIVES ON CONTRACT LAW

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### I. The Ordinariness of Contract Law

The cases that catch my attention are those that record the ordinariness of contract law, the extent to which this idea, the idea of contract, has become central to a shared conception of social order. Cases about contract disputes between consumers-- middle class or working class or poor-- and retailers, between employers and at will employees or collective bargaining units, between students or their parents and schools, elementary and graduate, between husbands and wives at the time of marriage or divorce, between lovers who are not married, lovers who are gay and straight, between parents and children or any other combination of family members, between health care providers and their patients, between debtors and creditors, large and small, urban and rural, between contractors and owners, contractors and subcontractors, between government and suppliers, landlords and tenants, insurers and insured, those who possess human capital, of whatever kind, including intellectual property – whether it is a design for a new fighter plane, a voice that people will pay to hear, or a talent for sports -- and those who have the money to develop and exploit it. , buyers and sellers of all manner of goods and services, small and large. It is all mundane, and it is fascinating, because the patterns that are revealed tell the observer, the close reader, so much about the structure of American society and gap that has developed between the ideals and beliefs about human relationships and the reality of those relationships.

### II. The Ideal & the Real; Power & Position

#### A. Moon pies and mores: Posner's social norms

If you read Eric Posner's book, *Law and Social Norms*, it is best to start at the back rather than the front of his introduction. It is at the end, not the beginning, where he states that social norms have no explanatory power. Norms are simply "behavioral regularities" that emerge when individuals are driven by self interest to cooperate. Conformity to norms signals a desire to cooperate and so, in Eric Posner's world, *guanxi*, a relatively complex cultural practice in China, is reduced to the ritual exchange of moon pies. When the law seeks to "harness the regulatory power of social norms" Posner tells us, it must fail because social norms are "complex, poorly understood, sensitive to factors that are difficult to control."

#### B. Bargaining and (In)equality, status and will

Repetition does not make something true so no matter how many times we repeat the quote from Sir Henry Maine, the movement in modern society has not been from status to contract. Status continues to play an important role in creating and limiting contractual possibilities. When we look at contract law, it is important to identify the socially and juridically significant categories at work . Consumer is a socially significant

category even though everyone is a consumer because it is the site of political struggle. Employee is a socially significant category because it is a site of intense and persistent political struggle. Employee is not a person but a group, and the people in that group exist in a dyadic relationship with people in another group – employers. They have other relationships as well, but this relationship has great potential for conflict. Husband and wife and man and woman are significant social categories because husbands and wives, men and women struggle continually over the allocation of resources, including dignity and power, and the division of property, Black and white, gay and straight, entrepreneurs and multinational corporations are socially significant categories in our society. Contract law recognizes the status of the parties to a contract in a variety of different ways: in presumptions that are applied – employment at will, gift rather than exchange within a family, the rule that judges construe the contract against the drafter, are all about status. Status also shows up unannounced in assumptions about intent and meaning and in legal rules and theories that imagine the hypothetical bargains parties to a contract would be likely to make.

### C. Agency, norm entrepreneurs and jural dramas

In law, and contract law is no exception, the meaning of social distance is made plain. Patricia Ewick and Susan Sibley's in their book, *The Common Place of Law*, have documented examples of injustice born of misunderstanding and miscommunication, what Roland Barthes calls the myth of the transparency and universality of language, the tendency of the law to “depict you as you should be, not as you are.” Critical contract theory challenges a particular world view in an attempt to thwart self-denial and purposeful ignorance. It is epistemically confrontational because it acknowledges and documents the existence of cultural dissent, attempts to redefine roles and establish rights. Unlike law and society, often documents the extra-legal strategies of resistance and contestation, critical contract law advocates for legal rules that redistribute power; to carve out for those who have been or who are subordinated a “discursive space” in contract law and the recognition of their agency.

## III. NO TRUST – Law in a Land of Hustlers

Perhaps as Walter McDougall argues, we are a nation of hustlers. There are those, like the protean confidence man from the Melville novel he uses to make his point, whose behavior might lead us to conclude, as the barber in the tale does, that trust is impractical and imprudent. McDougall suggests we tolerate hustlers because they “clear the path for emerging industries and business models.” Or perhaps, like the narrator in the Cheever's *Deptford Chronicles*, we believe that somehow we all deserve to be cheated. The problem I have with law and economics and with the decisions of Easterbrook and Posner is that they give much too much latitude to the hustlers. We are at risk, I think, of losing erasing the law of contract. As Lon Fuller once argued, law without moral content is not law at all.