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Sketches of a Redemptive Theory of Contract Law

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Sketches of a Redemptive Theory of Contract Law

EMILY M.S. HOUH*

This Article is about the game we call contract law and what it does and means to those who, at one time or another, have been categorically barred from play. How have “outsider” players—such as racial minorities, women, and sexual minorities—entered the game and, subsequently, how have its governing rules—that is, contract doctrines—applied or not applied to them? On the flipside, how have common law contract doctrines responded to the entry of new players in the game? And, to the extent contract law has so responded, why has it done so? In asking and responding to these questions, this Article begins to examine how contract law facilitates, internalizes, and resists changing social contexts and movements. More broadly, as other scholars have done, it offers an alternative to the “formalist-realist” narrative of contract law by demonstrating how contract law has functioned and continues to function as an “engine of social change” that simultaneously “transforms” and “preserves” a stratified socioeconomic order based on race, gender, and sex. This Article further argues that by so functioning, the regime of American contract law legitimates or “redeems” itself within the neoliberal project of the American legal system as it responds to periods of transformative social, cultural, political, and economic upheaval.

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INTRODUCTION

When is a deal, good or bad, something more than just a deal? What does the deal, by its own terms or the rules governing its formation and performance, tell us about social conditions, about who has access to economic power vis-à-vis a contract and who does not, and about how terms and rules might apply differently to those with power and those without? In responding to these questions, this Article examines, through a close reading of two little-known cases from the early twentieth century, how contract law facilitates, internalizes, and resists changing social mores and movements.

This process of doctrinal response and internalization describes a “redemptive” tendency in contract law, where such “redemption” refers to a discursive legal process and project that maintains social status regimes.¹ In contract law, this tendency usually manifests itself in a more robust application of equitable contract doctrines. During periods of such redemption, contract law transforms into a “kinder and gentler” version of itself, one that makes its benefits and protections available to those who formerly had been exploited by it, but only to a degree. Thus, as these social “outsiders” enter and engage in the game of contracts, they may simultaneously be empowered and marginalized by the very rules that gave them entrance in the first place. This redemptive theory of contract law explains how the system remains, in reality, “rigged,” even as the rules change to accommodate new players.

More broadly, this Article also begins to create an alternate narrative to the well-established formalist-realist account of contract law by demonstrating how contract law has functioned as an “engine of social change” that simultaneously “transforms” and “preserves” a stratified

1. The concept is borrowed from Sumi Cho, who originated a theory of racial redemption in *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 75 (1998) (defining “racial redemption” as a “psycho-social and ideological process through which whiteness maintains its fullest reputational value”).

socioeconomic order based on race, gender, sex, and, of course, class.² In doing so, American contract law contributes to the legitimization of the neoclassical (and, of late, increasingly neoliberal) American legal system in times of social, cultural, political, and economic upheaval.

This Article proceeds as follows. Part I briefly reviews the Anglo-American development of equitable contract doctrines and historically contextualizes those developments as part of the liberal response to late nineteenth-century Lochnerian contract orthodoxy. It also explores questions related to how contract orthodoxy of the period, as an institutional and systemic matter, supported the socioeconomic relations in which the orthodoxy itself was embedded. Part II presents two case studies of contract law “redeeming” itself in response to or as part of broader socioeconomic and sociocultural changes during the post-Reconstruction, Jim Crow era. Critical analyses of these cases demonstrate how contract law, perhaps in trying to keep up with the times, simultaneously preserves existing socioeconomic status regimes, thus serving as another example of “preservation through transformation.”

I. A BRIEF META-NARRATIVE OF EQUITY³

Contract law—or, as Morton Horwitz has termed it, “the legal paradigm of voluntary market relations”—undergirds our market economy.⁴ If one accepts the argument of twentieth-century institutional economists and their progeny that the market is a “social construct” as opposed to an “invisible hand,”⁵ contract law can function legitimately to distribute rights and obligations among and between private parties only if it does so justly. Equitable contract doctrines, in part, perform this legitimating work vis-à-vis their explicit attempts to provide those most

2. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2180 (1996) (describing her theory of “preservation-through-transformation” as a “modification of] the rules and reasons by which the legal system distributes social goods so as to produce a new regime, formally distinguishable from its predecessor, that will protect the privileges of heretofore dominant groups, although not necessarily to the same degree”).

3. This meta-narrative speaks to the oft characterized “swinging of the pendulum” between formalism and realism in contract law. See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 32–63 (1995). Also, before delving into what necessarily will be a very general history of the modern development of equitable doctrines in American contract law, I am obligated to set out all the usual caveats. Of course, what follows in the text is the most cursory of historical overviews of the development of equitable contract law. Moreover, this overview focuses exclusively on English and American contract law. It draws mostly from comprehensive works on the histories of the equitable and common law of contract, namely on the works of those such as Morton Horwitz, Larry DiMatteo, Alfred W.B. Simpson, and P.S. Atiyah.

4. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 194 (1992).

5. *Id.* at 195; see generally BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011) (tracing historical development of the Western “free market” and the rise of the punitive carceral state as philosophically and politically linked, and arguing that both are anything but part of a “natural order”).

in need with protections against economic exploitation by the more sophisticated and dominant among us.

Modern equitable contract law has its origins in early Roman and canon law of the twelfth century, which itself was centrally informed by the moral concepts of equality in exchange, just price, and just contract.⁶ For at least two centuries, the notion of “just exchange,” the value of which was based on the cost of producing a particular good or service, dominated the English law of contract, or exchange.⁷ During this time, the English Court of Chancery developed and applied a theory of equitable contract whose principles, for example, barred enforcement of “unconscionable” contracts.⁸ In its efforts to extend the law’s protection to the “poor and helpless” against the “powerful and lawless,”⁹ the Chancery Court continued to do equity even in the fourteenth century, when the English common law courts had begun their “retreat . . . into the formalistic, non-discretionary domain of the writ system.”¹⁰ There, the action of *assumpsit*—the precursor to the modern breach of contract action—took root.¹¹ In fact, by the end of the sixteenth century, actions of *assumpsit* made up the majority of contract cases in the English courts. By this time, the executory contract likewise had come to be viewed largely as the mutual exchange of promises, rather than as a set of just exchanges.¹²

By the eighteenth century, the merger of courts of equity and courts of law in the Anglo and American legal systems was well underway.¹³ Consequently, courts during this period attempted to develop a totalizing theory of contract that would unify equitable contract principles with more formalistic principles of *assumpsit*.¹⁴ By this time as well, certain residual doctrines based on earlier theories of just price had become firmly established in the English law of contract.¹⁵ Further, the equity courts had by then developed, in particular cases, a jurisprudence around

6. LARRY A. DiMATTEO, *EQUITABLE LAW OF CONTRACTS: STANDARDS AND PRINCIPLES* 4–28 (2001).

7. *Id.* at 29–41.

8. *Id.* at 28. DiMatteo enumerates three important principles of equity developed under the just price theory. First, contract rules should favor debtors over creditors (assuming inequitable conduct on the part of the latter). Second, in particular cases, contracts may be subject to reformation in order to achieve justice. Finally, unconscionable contracts should not be enforced. *Id.*

9. *Id.* at 27.

10. *Id.*

11. See ALFRED W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT 199–315* (1987) (tracing history of contract actions from the action of *assumpsit* to the action for *assumpsit* for breach of promise, and connecting them to older remedies preceding such development).

12. Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 918–19 (1974).

13. DiMATTEO, *supra* note 6, at 29–32.

14. *Id.* at 35. For example, Lord Mansfield attempted to develop a unifying theory of contract based on morality of promise.

15. For example, by the eighteenth century, common law courts had come to recognize the principle of “customary price.” *Id.* at 33.

principles of justice, conscience, and fairness, often through doctrines such as fraud and mistake.¹⁶ All of these doctrines found their way into a unified theory of contract law, although assumpsit dominated contract jurisprudence during this time.¹⁷

Turning specifically to the history of equitable contract law in the United States, legal historian Morton Horwitz¹⁸ argues that American contract law of the eighteenth century bore significant ties to property law. This was so because contractual disputes were being settled under title-based theories of exchange, since markets in goods had not yet developed to a point at which goods might be considered fungible.¹⁹ Countering the conventional narrative about the development of Anglo contract law, Horwitz further asserts that exchange during the eighteenth century was still largely thought of not in terms of monetary return, but of fairness of the exchange.²⁰ Elaborating on these ties to the law of property and the law of contractual equity, which fundamentally impacted the development of the doctrine of consideration, Horwitz concludes that eighteenth century contract law in the United States “was essentially antagonistic to the interests of the commercial classes.”²¹

16. *Id.* at 33–34.

17. See SIMPSON, *supra* note 11.

18. Horwitz’s project—in vastly oversimplified terms, to deconstruct the myth of law’s neutrality and expose its inherently political and ideological nature—spawned two now classic monographs, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977), and HORWITZ, *supra* note 4. While generally well received by nonlegal historians, Horwitz’s account of legal history stirred not only discomfort but also hostility among legal scholars and historians, who asserts generally (but passionately) that Horwitz does not provide adequate evidence to support his claims. Those critiques, as well as Horwitz’s own works, can themselves be read with varying degrees of skepticism, but the importance of *TRANSFORMATION I* (and *TRANSFORMATION II*, for that matter) as great works of intellectual history cannot be refuted. See Laura Kalman, *Transformations*, 37 *TULSA L. REV.* 849, 855 (2001) (“*Transformation* came out at a time when all of its readers had recently seen the power of law to do evil. It also appeared at a time when its liberal audience was losing hope that the Burger Court would follow in the Warren Court’s footsteps. . . . If it were right, perhaps readers who had gone to law school to learn to do good, even to become legal historians, had chosen the wrong careers. The reaction to *Transformation* was so intense among lawyers and legal historians, I believe, because it reinforced our darkest suspicions and fears.”); Wythe Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 *WM. & MARY L. REV.* 663, 722 (1982) (“Despite its shortcomings, which can be remedied by Marxist historiography, *Transformation* stands as a monumental achievement. Bourgeois historians and bourgeois historiography have been demonstrated to be what they are, biased and partial rather than neutral and timeless. The ‘consensus’ assumptions underpinning all schools of mainstream American legal history have been shown to be partisan, and partisan from the standpoint of the elite. The way has been cleared for legal historians to place the focus where it belongs, on socioeconomic evidence of class conflict . . .”).

19. Horwitz, *supra* note 12, at 920.

20. *Id.* at 920–24.

21. *Id.* at 927. Horwitz further explains that while eighteenth century contract law might have been “antagonistic” toward the commercial classes, businesspersons certainly were not without recourse. They employed informal and alternative modes of dispute settlement. They also developed other “legal forms of agreement” that enabled them to settle potential disputes without resorting to the courts, such as the “penal bond” (which more contemporary students of contract law probably know as the “sealed instrument”), which “precluded all inquiry into the adequacy of consideration for an exchange.” *Id.* at 927–28.

According to Horwitz, contract law in the United States began to break from its equitable roots in the late eighteenth century as a result of the rise of the American market economy. Because of industrialization and the development of extensive and myriad markets in fungible goods, executory contracts increasingly came to signify not a fairness of exchange between parties, represented by the customary setting of prices independent of agreed upon terms; rather, they came to signify the parties' expectation of return.²² This fundamental change in how exchange was being understood in American jurisprudence led to the development and subsequent normalization of awarding expectation damages as the paradigmatic remedy for breach of contract.²³

This, in turn, paved the way for the "radical" turn in American contract law away from equitable concepts toward a "will theory" concept of exchange, or what we now refer to as "classical" contract law. By the early nineteenth century, clear expressions and applications of a market-oriented will theory of contract reflected the idea that money, rather than custom, justice, or policy, should be the sole standard of making contracts and resolving contractual disputes (because the market value of goods constantly fluctuated, there could be no objectively "fair" price).²⁴

Observers at this time saw the writing on the wall. Those who opposed the turn to a market-driven theory of contract worried about confining fairness concerns to narrowly and infrequently applied doctrines such as fraud and, more generally, about the effects of such systemic and institutional change, which they feared would consolidate growing social and economic inequalities.²⁵ Their fears were not unfounded. During the classical era, for example, American contract law, once primarily concerned with labor and preventing economic exploitation, had come to favor the interests of industry and commercialism.²⁶ American contract law, once embedded with public law norms of equity, was going private; fairness of exchange was giving way to freedom of contract.²⁷ This shift in contract law's priorities—from public to private, from principles of equity to principles of free will—demonstrates how contract law functions both to maintain and alter the socioeconomic order.

22. *Id.* at 937.

23. *Id.* Consistent with the development of American commodities markets, expectation damages were first recognized by the courts in cases involving stock speculation. Prior to the late eighteenth century, specific performance was deemed the appropriate remedy for "failure to deliver stock on a rising market." *Id.* But because of the developing futures market for the speculation of state securities in the United States, American courts began awarding expectation damages on contracts of stock speculation in states like South Carolina, Pennsylvania, and Virginia. *Id.* at 937–41.

24. *Id.* at 946–57.

25. *Id.* at 949.

26. *See supra* notes 20–24 and accompanying text.

27. *See DiMATTEO, supra* note 6, at 44–45.

Of course, this jurisprudential shift in contract law would not have been possible without the support of the courts, which embraced and readily applied the concept of expectation damages, while also limiting the circumstances in which they would award restitutionary or quantum meruit damages. Horwitz claims (somewhat controversially²⁸) that these juridical trends reflected changing class sympathies, as well: Where once the courts had seen themselves as protectors of farmers, employees, and small traders, they began to see themselves, at the turn of the century, as an important part of the engine of American economic modernization.²⁹ Thus, their sympathies shifted toward employers and commercial and industrial interests.³⁰

The will theory of contract reached its high point in 1905 when the Supreme Court decided *Lochner v. New York*, which struck down the state of New York's maximum-hour laws in the baking industry as unconstitutionally interfering with freedom of contract.³¹ According to Horwitz, the *Lochner* decision "brought Progressive Legal Thought into being . . . [It] galvanized Progressive opinion and eventually led to a fundamental assault on the legal thought of the old order."³² The Progressives, who laid the intellectual foundation for the Realists, effected this assault by critiquing basic assumptions underlying the private law of contract. For example, they argued that objectivism, long thought to be fundamental to will theory, was actually incompatible with it.³³ Though objectivism had first been employed to achieve more predictable contracts, which resulted in the establishment of more formalistic legal rules in contract, the Progressives demonstrated how its application could result in contractual outcomes that were completely divergent from the actual

28. See *supra* note 18.

29. Horwitz, *supra* note 12, at 953–55.

30. *Id.* Horwitz supports this claim by comparing the ways in which courts were then awarding damages in different categories of cases. For example, he points out that in disputes involving service contracts, courts tended to award expectation damages against laborers/employees who "voluntarily" broke contracts and deny their quantum meruit claims for service rendered. *Id.* at 955. In building and construction contracts, on the other hand, courts more often awarded quantum meruit damages for the breaching builders' reasonable value of performance. *Id.* at 954. Horwitz attributes this inconsistency to the courts' shifting biases toward the interests of development and commercialization. He writes that penalizing builders in contractual disputes

could have deterred economic growth by limiting investment in high risk enterprise. Just as the building trade was beginning to require major capital investment during the second quarter of the nineteenth century, courts were prepared to bestow upon it that special solicitude which American courts have reserved for infant industry.

Id. at 955. On penal provisions in service contracts, Horwitz explains that they had "only redistributive consequences, since they [could] hardly be expected to deter laboring classes from selling their services in a subsistence economy." *Id.*

31. 198 U.S. 45 (1905).

32. HORWITZ, *supra* note 4, at 33.

33. *Id.* at 35–39.

will of the parties.³⁴ They also attacked, to varying degrees, the related incorporation of agency principles into contract law, and the notion of objective causation in contract law.³⁵

In exposing the objective theory of contract as ideological rather than scientific in nature, the Progressives also aggressively critiqued Christopher Columbus Langdell's implementation, in the late nineteenth century at Harvard Law School, of a new, more "scientific" legal pedagogy—namely, the case method approach to the study of law.³⁶ Generations of legal scholars and students have since internalized the "realist" critique of Langdell's now fully entrenched method. Yet, we must not lose sight of the fact that this turn toward a hard "formalist" study of law, and particularly contract law, may have occurred not wholly as a result of an attempt to ideologically hijack the law from the "other side," but as a result of Langdell's attempt, which could be understood as a sort of political and protectionist intervention in its own right, to ensure a continued place for legal education within the American university system, which by that time had begun to actively embrace and prioritize scientific research and research methodologies, particularly in the social sciences.³⁷

In any event, the Progressives' multipronged assault on Lochnerian thinking eventually morphed into what we now call the Legal Realist movement of the early and mid-twentieth century. It is the Realists who are most often credited with the important jurisprudential insight that law is, fundamentally, political, and that orthodox formalism masks the political, ideological and, indeed, hegemonic nature of legal institutions.³⁸ This insight, of course, was subsequently mined to an extreme by critical legalists of the late twentieth century and, to a different degree, by later critical race theorists.³⁹ But as both Morris Cohen and Larry DiMatteo state,

34. *Id.* at 35–56.

35. *Id.* at 39–63.

36. See, e.g., JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938) (advocating reliance on administrative agencies and regulation, rather than on the judiciary and the common law, to address the nuances and particularities of different fields of law and industry); Roscoe Pound, *Mechanical Jurisprudence*, 8 *COLUM. L. REV.* 605 (1908) (criticizing the rule-bound formalism of turn-of-the-century American judicial decisionmaking and jurisprudence).

37. See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 13–16 (1997) (discussing Dean Christopher Columbus Langdell's development, in the late nineteenth century, of the "science" of the study of law as part of a scientific revolution in American higher education).

38. AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993); BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM IN LEGAL PHILOSOPHY* (2007); BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010); Gregory Scott Parks, *Toward a Critical Race Realism*, 17 *CORNELL J.L. & PUB. POL'Y* 683 (2008); Mae C. Quinn, *Feminist Legal Realism*, 35 *HARV. J.L. & GENDER I* (2012).

39. See, e.g., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1983).

in different terms and different eras, law is dialectical in nature.⁴⁰ The law of contract, for example, should not be viewed in absolute terms, as only formalistic or only equitable; in fact, contemporary commentators argue that, as a matter of descriptive accuracy, it never has been.⁴¹ It should provide both a degree of certainness and predictability, as well as a degree of fairness and justice. There is room in contract law for objectivism, subjectivism, economic efficiency, and community standards of fair and just practices.

This view, not merely academic, is reflected in twentieth century doctrinal developments⁴² and statutory interventions into contract law, best exemplified by the Uniform Commercial Code (“U.C.C.”), itself one of the most successful legacies of the Realist movement. On the one hand, the U.C.C. has been characterized as a “highly specific codification of contract law [that] removes discretion from the judicial branch and limits their ability to fashion equitable solutions to contract disputes.”⁴³ At the same time, Patrick Atiyah aptly notes that statutes like the U.C.C. were “designed to ensure substantive fairness in exchange.”⁴⁴ Anyone who has studied, even briefly, Article 2 of the U.C.C., understands that both Guido Calabresi and Atiyah are correct in their assessments of the dialectical nature of modern statutory interventions in contract law: certainty and fairness live side by side—sometimes successfully and sometimes not—in the U.C.C. The same can be said of the modern common law of contract.

This Article builds upon this narrative of American contract law by reframing the contractual dialectic not just as one of formalism and realism, of certainty and fairness; but also as one of economic and cultural injustice,⁴⁵ of material and discursive effect. In this way, it works to uncover the discursive connections between contract law and legal status regimes more generally. The next Part examines two cases, in historical and socioeconomic context, that perform this work.

40. MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY* (Transaction Books Inc. 1982) (1933); DiMATTEO, *supra* note 6, at 65–68.

41. See, e.g., Jay M. Feinman, *Relational Contract Theory in Context*, 94 *Nw. U. L. Rev.* 737 (2000); Danielle Kie Hart, *Cross Purposes & Unintended Consequences: Karl Llewellyn, Article 2, and the Limits of Social Transformation*, 12 *NEV. L.J.* 54 (2011); Charles L. Knapp, *An Offer You Can't Revoke*, 2004 *Wis. L. Rev.* 309; Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 *HASTINGS L.J.* 1191 (1998).

42. See *supra* notes 6–24 and accompanying text.

43. DiMATTEO, *supra* note 6, at 101; see also GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

44. P.S. Atiyah, *Contract and Fair Exchange*, 35 *U. TORONTO L.J.* 1, 3 (1985).

45. See Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age*, 212 *NEW LEFT REV.* 68, 69 (1995).

II. CONTRACTUAL REDEMPTION: MAKING A CASE

This Part discusses, in historical context, two cases in which “outsider” contract parties—that is, persons who had been historically, if not legally, restricted from participating to varying degrees in or within the burgeoning market economy because of their marginalized positions on the spectra of socially constructed status regimes⁴⁶—attempted to access, with state sanction, economic power via the “legal paradigm of voluntary market relations” and, more specifically, vis-à-vis equitable contract doctrines. Both cases were brought by black plaintiffs unhappy with their contractual arrangements and both were decided by southern appellate courts during the rise of Jim Crow. In both cases, the black plaintiffs won. Despite these ostensibly positive outcomes, more critical examination reveals how contract law, at a doctrinal level, can be used in service of both progressive *and* regressive social change, often simultaneously.

Two caveats must be given before analyzing the cases. First, these two cases, *Caldwell v. Insurance Co. of Virginia*⁴⁷ and *Bussell v. Bishop*,⁴⁸ were chosen from the early Jim Crow era—a period marked by social, economic, and political resistance to the abolition of slavery, passage of the Reconstruction amendments, and enactment of the Civil Rights Act of 1866 (“Act”)—in order to closely examine how members of subordinated groups could use existing common law doctrines during such times. Section 1981 of the Act had only recently enabled the plaintiffs in *Caldwell* and *Bussell* to enter into their respective contracts in the first place.⁴⁹ Notably, the plaintiffs in both cases turned to contract law to enforce the economic and civil rights guaranteed them under the Act. As such, the cases demonstrate how contract law played a part in filling the interstices of a civil rights jurisprudence that was then only in its infancy.

Second, this Article focuses on the *Caldwell* and *Bussell* cases because, while individual assertions of legal rights, regardless of whether backed by larger movement strategists, may elicit critiques about false consciousness and legal hegemony,⁵⁰ there is something extraordinary and inspiring about the plaintiffs’ attempts to assert and transform what the law

46. For example, blacks, women, and Asians, among others.

47. 52 S.E. 252 (N.C. 1905).

48. 110 S.E. 174 (Ga. 1921).

49. Section 1 of the Civil Rights Act of 1866 states:

[C]itizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory of the United States, to make and enforce contracts, to sue, be parties, and give evidence, . . . and to full and equal benefit of the laws and proceedings for the security of persons and property, as is enjoyed by white citizens.

Civil Rights Act, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–1982 (2015)).

50. See, e.g., William E. Forbath et al., *Introduction: Legal Histories From Below*, 1985 Wis. L. REV. 759, 765.

meant as a matter of civil and economic life. Their attempts demonstrate that “law is an important and appropriate terrain of social conflict.”⁵¹

Caldwell and *Bussell* both involve known black plaintiffs who proactively brought suit seeking equitable relief based in contract. It is doubtful that these cases have any authoritative value; *Caldwell*, decided in 1905, has not been cited by a court since 1925, and *Bussell*, decided in 1921, not since 1940. Additionally, these cases have never been discussed in a scholarly publication. Given the era during which they were decided, however, these decisions and their consequences as legal texts are extraordinary. To fully understand why this is so, a brief and very oversimplified overview of the Jim Crow era follows.

A. BRIEF NOTES ON RECONSTRUCTION AND THE RISE OF JIM CROW

Legal historian and leading reparations scholar Alfred Brophy describes the Jim Crow era as “the period between the end of Reconstruction and the beginning of the modern civil rights movement, when African Americans were subject to state-sponsored discrimination in education, housing, employment, and public accommodations.”⁵² Following the passage of the Reconstruction amendments, southern states in the 1970s enacted Black Codes and Jim Crow laws to establish strict segregation between whites and blacks in almost every facet of life. Many leading historians of slavery, Reconstruction, and Jim Crow, however, including C. Vann Woodward and Leon F. Litwack, point out that although Jim Crow laws were enacted and enforced to an extreme in the post-Reconstruction South, such laws had their origins in the pre-Civil War North, where “the Northern Negro was made painfully aware that he lived in a society dedicated to the doctrine of white supremacy and Negro inferiority.”⁵³

Sectional reconciliation and northern acquiescence to southern redemption and “home rule” during the post-Reconstruction era further contributed to a national retreat on the issue of racial equality.⁵⁴ This was

51. *Id.*

52. Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 86 (2004).

53. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW: A COMMEMORATIVE EDITION* 18, 17–21 (Oxford University Press 2002) (1955); see LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES 1790–1860* (1961).

54. Constitutional scholar and legal historian Michael J. Klarman has written that several factors, including “sectional reconciliation,” explain Northern capitulation to Jim Crow during the late nineteenth century. Those factors include: increasing black migration to the North, which “heightened the racial anxieties of northern whites”; the rise of northern racial nativism in response to the massive wave of Southern and Eastern European immigration to the Northeast; American imperialism and its accompanying ideology of Manifest Destiny in countries inhabited by brown-skinned peoples, such as Hawaii, Puerto Rico, and the Philippines; post-Reconstruction sectional reconciliation, in part facilitated by the Spanish-American War; and, last but not least, the Republican party’s turn against the protection of black civil rights. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 14–15 (2004).

reflected in Supreme Court decisions of the time, which limited the reach of the Reconstruction Amendments⁵⁵ and culminated in the (in)famous 1896 Supreme Court decision sanctioning separate-but-equal railway segregation, *Plessy v. Ferguson*.⁵⁶ Thus, and to borrow Woodward's famous phrase, "the strange career of Jim Crow" was well underway.⁵⁷

As Woodward and others have pointed out, however, Jim Crow did not immediately emerge as the way forward in the post-Reconstruction South. There existed alternative approaches to race relations, the most popular of which was the "conservative" approach.⁵⁸ Southern conservatives positioned themselves somewhere between the radical white "Negrophiles" of the left and the equally radical white "Negrophobes" of the right. They rejected the former as being "false friends" to newly freed blacks, and the latter as being common, undesirable, and "lower-class."⁵⁹ They opposed Jim Crow, but only because of their faith in white supremacy. Southern conservatives simply believed, as Woodward observed, that "Negro degradation was not a necessary corollary of white supremacy."⁶⁰

Though the conservatives, for a time, mounted a strong campaign to hold the left and right extremists at bay, they lacked the political will to maintain their resistance. The left-leaning radicals and liberals likewise retreated from their commitments to black equality. Thus, Jim Crow came to dominate the South, regulating almost every facet of black life. We all know, of course, that at least until the middle of the twentieth century, this brutal form of white supremacy found legitimation through the courts. But even as the courts sanctioned this "extreme" form of white supremacy through decisions like *Plessy*, alternate discourses of racism found their way into judicial opinions.

Echoes of pre-Jim Crow southern conservatism, for example, can be heard in Justice Harlan's famous dissent in *Plessy*, where he wrote:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.⁶¹

55. See, e.g., *Civil Rights Cases*, 109 U.S. 3, 23-25 (1883) (invalidating public accommodations provision of the Civil Rights Act of 1875, and holding that Fourteenth Amendment applies only to states, not individuals).

56. 163 U.S. 537, 547-549 (1896).

57. WOODWARD, *supra* note 53.

58. The radical/Populist approach, as well as the liberal approach, to race relations also had many supporters. WOODWARD, *supra* note 53, at 44-51.

59. *Id.* at 44-51.

60. *Id.* at 48.

61. *Plessy*, 163 U.S. at 559. Notably, in further support of his position on the wrongheadedness of the *Plessy* majority, Justice Harlan also wrote in his dissent:

Echoes of this particular conservative sentiment could likewise be found in southern state court cases decided during the rise of Jim Crow.

B. HISTORICAL BACKGROUND OF THE CASES

Caldwell v. Insurance Co. of Virginia was decided in 1905 by the Supreme Court of North Carolina. There, Dinah Caldwell alleged that one of the insurance agents of the Life Insurance Company of Virginia induced her to take out life insurance policies for herself and her children.⁶² The opinion's language describing Ms. Caldwell and her circumstances is worth reading, so I quote the court at length. It stated that Caldwell

is an illiterate colored woman, having ten (10) children. That sometime during the year 1895, while she was engaged as a cook at the Buford Hotel in Charlotte, the superintendent of the [insurance company] sent for her to come to his office; that upon going to the office he asked her if she had any objection to being "written up," to which she replied that she knew nothing about it—did not know what insurance meant. He said that he would tell her, to which she replied that if he did, she would know nothing about it then, to which he replied, "You will have a nice hearse, nice carriage and a nice funeral." She said, "I can't feel the ride in the hearse and I can't see the funeral procession." He said, "You will have a heap of money," to which she said, "I don't want the money if I'm dead. I have got to go to work at 3 o'clock in the morning and am not going to take my money to pay insurance." He said, "I will tell you what you can do. You can come in for 10 years and after 10 years you can go out." She said, "I don't know anything about this. I have been living with white people ever since I was born. I don't know anything about it and, I don't want to fool with it." He said: "Aunty, you can go in for 10 years" [T]hat after 10 years I could draw out the claim and if anything happened to me the claim would be paid.⁶³

Caldwell finally capitulated and for several years paid weekly premiums on these life insurance policies.

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana . . . who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.

Id. at 561. For a fascinating study of how law, beginning with Asian exclusion (referenced in the above excerpt), impacts Asian American racial formation, see JOSHUA TAKANO CHAMBERS-LETSON: A RACE SO DIFFERENT: PERFORMANCE AND LAW IN ASIAN AMERICA (2013). This Article makes no claims as to Harlan's specific political proclivities.

62. *Caldwell v. Life Ins. Co. of Va.*, 52 S.E. 252, 253 (N.C. 1905).

63. *Id.* According to an entry describing a postcard at the turn of the century, archived at the University of North Carolina at Charlotte, the Buford Hotel stood at the corner of 4th and Tryon Streets in Charlotte and operated from 1885 to 1915. Built in 1870 and intended originally for offices, the building later housed The Commercial National Bank and the Union National Bank. *Buford Hotel*, J. MURREY ADKINS LIBR. SPECIAL COLLECTIONS, U.N.C. CHARLOTTE, <http://digitalcollections.uncc.edu/cdm/singleitem/collection/p15483coll1/id/1398/rec/4> (last visited May 10, 2015).

One of her co-workers, however, later read the policies and told Caldwell that they were not as the agent had represented.⁶⁴ Caldwell thus went to see a Charlotte lawyer, one Col. Jones, who confirmed this state of affairs.⁶⁵ Caldwell went directly to Life's agents to complain that the policies were not as represented, and "after much going and coming, [Ms. Caldwell] refused to pay any further premiums."⁶⁶ She then sued Life to rescind the contract and recover her premium payments.⁶⁷

Caldwell's case was tried before a jury, which returned a verdict for her on an equitable contractual theory of fraudulent inducement. On appeal, the court affirmed the jury's verdict. In so doing, it felt compelled to make a strong case for Ms. Caldwell's good character:

She narrates her trials in her own simple and natural way, showing that she was bewildered in the intricate mazes and confusing obscurities of life insurance policies. In this respect, she is not singular. In the only way open to her she was constantly protesting that something was wrong about her insurance She proved an excellent character; her testimony both in manner and in matter was well calculated to carry conviction to the minds of jurors. The plaintiff is evidently one of the few remnants of a type of her race illustrating its highest virtues. In the simple duties of life incident to her station, she exhibits a store of saving common sense She could not read the policies and it is no serious reflection upon her intelligence to surmise that if she could have done so, she would not have been very much the wiser. She did resist the blandishment to which those of her race usually succumb—"a nice funeral"—nor did she surrender to the persuasive assurance for which many accredited with more wisdom, spend a live of slavery, "a heap of money." There is a vast deal of sound philosophy and sense in the answers made by her to the agent.⁶⁸

The *Caldwell* case is remarkable on its face as an historical artifact. The Supreme Court of North Carolina affirmed the jury verdict awarding Ms. Caldwell her money back, along with interest.⁶⁹

Bussell v. Bishop, a Georgia Supreme Court case published in 1921, demonstrates how both equitable doctrines in contract *and* property law can be wielded to remedy acts of racial terrorism. The plaintiff in *Bussell*, Mr. Bishop, was a black sharecropper. He had entered into a typical sharecropping agreement—an early form of an employer/employee contract that replicated certain aspects of plantation life—with the defendant Lee Bussell, whereby Bussell was to furnish land and fertilizer and other agricultural necessities and Bishop to furnish tools, stock, and labor necessary to cultivate and gather crops on their land.⁷⁰ Soon after

64. *Caldwell*, 52 S.E. at 253.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 254.

69. *Id.* See Part II.C for a discussion of how *Caldwell* performs the redemptive work of contract law.

70. *Bussell v. Bishop*, 110 S.E. 174, 174–75 (Ga. 1921).

Bishop had planted the crops, Bussell organized a group of men, conspiring to either kill Bishop or drive him from his home on the farm. On the night of July 29, 1920, Bussell disguised himself behind “a white cloth or handkerchief,” and, with four others, drove to within 400 yards of Bishop’s home.⁷¹ One of Bussell’s confederates, J.B. Gaskins, was sent to lure Bishop out of his home with a story of his wife and children being stuck in their car in a ditch not far away.⁷² When Bishop followed Gaskins to his car, Bussell and the others, who had been hiding in the bushes, jumped out and assaulted him. A masked Bussell,

pointing a shotgun at the plaintiff, ordered [Bishop] to throw up his hands, and proceeded to place a sheet over his head and to beat him upon the head with some kind of instrument. Plaintiff was informed that he was going to be killed, and, having but a moment to live, he begged to be allowed to pray, and while down upon his knees the defendant beat him over the head with all his might and power. Plaintiff was also shot twice in the head by some one in the crowd, and a third shot missed him as he broke away and ran.⁷³

Miraculously, Bishop survived. He refused to leave his home and land.⁷⁴

Bussell denied participating in the July 20 attack, but threatened that if Bishop did not abandon and relinquish his rights in the land, he would surely be killed in a subsequent attack.⁷⁵ Bishop, fearing for his safety and effectively unable to continue working the land, filed suit, requesting in essence specific performance of the contract contingent on the appointment of a specifically *white* receiver to take charge of the property at issue and handle the crops and accounts between him and Bussell. The court granted the remedy, despite the applicable legal rule, which stated that in typical cases, a landlord such as Bussell could not be enjoined from taking charge of crops in the absence of an allegation of insolvency.⁷⁶

In refusing to apply this standard rule, the court noted:

[T]he landlord did not elect to breach his contract with his cropper and suffer the legal consequences thereof, but he sought to frighten the cropper and to compel him through fright to abandon his contract. The landlord resorted to violence, in short, to mob violence, to effectuate his intent and purpose⁷⁷

The court also took care elsewhere in the opinion to indicate that Bishop was a “negro” and Bussell a “white man,” and that in addition to being a “negro,” Bishop was “old, one-armed, and suffering under the serious

71. *Id.* (syllabus).

72. *Id.* at 175.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* (citing *Nicholson v. Cook*, 76 Ga. 24 (1885)). Absent such insolvency, the sharecropper would have an adequate remedy at law.

77. *Id.*

disability of the wounds caused by the shots and licks inflicted upon him by [Bussell] and his confederates.”⁷⁸

C. THE REDEMPTIVE WORK OF *CALDWELL* AND *BUSSELL*

From both a contracts and a racial/identity formation perspective, the *Caldwell* and *Bussell* cases are extraordinary, particularly in light of the historical circumstances discussed Part II.A. In terms of their broader narrative, they are meaningful not only in terms of how they define and develop the equitable doctrines of fraudulent inducement/misrepresentation and equitable receivership as remedy for breach of contract, but also because the black plaintiffs, in asserting their contractual remedies, were asserting their rights to the protection of private contract law as equal citizens under the law during the rise of Jim Crow, rather than through still-developing civil rights law. These cases were not brought, after all, as claims under section 1981 of the Civil Rights Act of 1866.⁷⁹ These texts, as historical accounts of law intersecting with racial reality, say something important about the expansion of the “legal paradigm of voluntary market relations”⁸⁰ to encompass black citizens during the rise of Jim Crow. That is, the plaintiffs used contract law to get material justice: Caldwell’s right to get one’s money back and undo an exploitative deal or Bussell’s right to be free from terrorizing harassment and earn one’s living.

The courts, in awarding the plaintiffs such “justice” through contractual equity, recognized the inevitable tendency, in the world of contracting—where market actors are often, because of embedded and systemic socioeconomic subordination, on unequal footing—toward exploitation, abuse, and injustice. Accordingly, the courts invoked the law’s power vis-à-vis equitable doctrine to impose a systemically legitimate contractual fix. Although the results in these cases are remarkable, given when they were decided, the courts (and the law) certainly should not be given more credit than is due. As discussed above, the southern conservative sentiment, which was rooted in the ideology of white supremacy, is expressed clearly in both cases. In *Caldwell*, for example, the description of Ms. Caldwell as an uncommon “remnant . . . of a type of her race illustrating its highest virtues” is clearly discursive in that it represents Caldwell, in the court’s view, as an exceptional black person, as one of the “good ones” whose trustworthiness, pathos, and acceptability are embodied in her gender, old age, work ethic, good sense and wisdom, in spite of—or perhaps because of—her formal illiteracy, and, significantly, her deferential respect for racial hierarchy.

78. *Id.*

79. See *supra* note 48 and accompanying text. For an excellent overview of the history of section 1981 of the Civil Rights Act of 1866, see Darrell A.H. Miller, *White Cartels, The Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayor Co.*, 77 *FORDHAM L. REV* 999, 1032–36 (2008).

80. HORWITZ, *supra* note 4, at 194.

In this legal narrative, equity-based protection is extended to Ms. Caldwell precisely because she did not “succumb” to things like “nice funerals” and “heaps of money”—as those of her race apparently were wont to do. Significant representational work is being done here, for the opinion makes clear that the court would not have affirmed the jury’s verdict to rescind the contract and award Ms. Caldwell the premiums she had paid if she had been a more typical, or rather stereotypical, exemplar of her race and gender. Caldwell’s embodiment of the “good” black, elderly female enabled her to get her money back. The discursive effect? Stereotypically “good blacks” may get justice under contract law, but “bad blacks” (that is, those who would fit into the commonly held and racially specific stereotypes of lazy and greedy) may not.

Similar work is being performed in *Bussell*, though more covertly. The appointment of a receiver to oversee what was essentially an employer/employee contract in that case, understood in historical context, was a triumph. But closer examination of the narrative in the opinion about Bishop reveals, again, some troubling representational aspects of the case. It is interesting to note at the outset, as mentioned above, that Bishop is never referred to by name in the text of the opinion; we know only that he was “Colonel Bishop” per the additional syllabus later provided by the editorial staff of the Southeast Reporter. In the opinion itself, Bishop is described as hardworking, elderly, respectful, honest, and one armed.

Thus scripted as the historically discursive “good” black male, who, not incidentally, is also physically imperfect and weakened, the awarding of this equitable legal remedy to Colonel Bishop, despite and perhaps because of the criminal and then likely un-prosecutable conduct of the white landowner and his “confederates,” seems eminently justified. But what if Bishop had been young, with two strong arms, not physically imperfect, and not as respectful of the white landowner? Would he have brought suit? And if he had, would he have been given any justice? These questions are unanswerable, of course, but given the language in the opinion and the historical context, they are worth considering.

In light of the preceding discussion, one wonders whether *Caldwell* and *Bussell* are good or bad cases. The answer, of course, depends on what one means by “good” and “bad.” Are the cases exemplars of judicial resistance in an era of legally sanctioned racial subordination vis-à-vis Jim Crow, or do they merely reflect and reify a more genteel form of white racism? What goals were being served by the law in these cases: racial equality in an economic sense, or white supremacy in a cultural sense? How is the law being used in the cases, not only by the courts (or judges) themselves, but also by the black plaintiffs who brought these actions?

In the long trajectory of race relations in the United States, these cases—like many cases that attempt to do some form of justice—simultaneously perform both emancipatory and subordinating work, in terms of socioeconomic equality and representational inequality, respectively, and arguably represent two countervailing interpretations of racial reality in the Jim Crow South. They demonstrate the way in which law, as a state institution, can work in the same moment at cross-purposes in the emancipatory racial project, by providing a measure of material justice while at the same time reinforcing a form of cultural injustice. Moreover, that these cases were brought at all reflects an optimistic faith in a legal system that was, at the same time, working hard to ensure that the Ms. Caldwells and Colonel Bishops of the world, no matter how racially exemplary, remained firmly in their place in the racial social order: below whites.

That *Caldwell* and *Bussell* were brought as straight contract actions and not as statutory civil rights cases, signals a recognition and appreciation of economic rights as civil rights, and an understanding of the interconnectedness of racial and economic subordination. Ms. Caldwell and Colonel Bishop asserted those rights, supposedly secured by the Reconstruction Amendments and enactment of the Civil Rights Act of 1866, in the face of tremendous legal, institutional, and social resistance to black equality. The North Carolina and Georgia courts, perhaps also acting to a degree out of type of defiance to that resistance, used contract law to undo an economically exploitative form of white supremacy. In doing so, however, those courts reified an insidious cultural form of white supremacy. The *Caldwell* and *Bussell* opinions may be read, in this respect, as expressions of southern whites of a “better class,” whose belief in equal contract rights must be considered against a more abiding belief in white supremacy, consistent with the post-Reconstruction “conservative” approach to the “Negro problem.”⁸¹

CONCLUSION

Through critical readings of the *Caldwell* and *Bussell* cases, we can see how legal actors—the parties, their lawyers, the judges, and the jurors—work to redeem and rehabilitate the rules of contract so as to enable desirous outsiders to get into the game. As this Article hopes to have demonstrated, however, the cost of entry can be high. The successful, and in these cases certainly brave, assertions of economic power by Ms. Caldwell and Col. Bishop, particularly in times of such tremendous economic, social, and political change, might very well have depended on unintentional capitulation to persisting race and gender ideologies. But is contract law bound to “preserve” as it “transforms”—as it did in the

81. See *supra* notes 51–60 and accompanying text.

Caldwell and *Bussell* cases—or can it transcend this entrenched paradigm? It is my hope that this Article, as a first step in the development of a “redemptive” narrative and theory of contract law, begins to answer that question in a way that appropriately pays tribute to the Dinah Caldwell and Colonel Bishops of the contracting world.
