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# Law at the Margins: The Displacement of Law as a Framework of Governance\*

Dr. Fergus W. Ryan\*\*

## I. Introduction

In his own idiosyncratic way, the late and lamented Master of the English Rolls, Lord Alfred Denning, was one of the legal profession's more unlikely feminists.<sup>2</sup> In his book, *The Due Process of Law*, Lord Denning discusses, *inter alia*, his experiences as a judge of the Family Division of the English and Welsh High Court from 1944 onwards. In the course of his reminiscences, he outlines what he terms "The Story of Emancipation,"<sup>3</sup> a treatise on the rise of gender equality. Having considered the historic disadvantages

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2. Though Lord Denning had rather fixed views about the respective roles of men and women, there is no doubting that he believed strongly in the fundamental human equality of men and women. See for instance his early legal efforts on behalf of the deserted wife in *H. v. H.*, [1947] 63 T.L.R. 645; and in the *National Provincial Bank v. Hastings Car Mart Ltd.*, [1964] Ch. 665. See also (on the equitable interests of spouses in the family home) his decision in *Rimmer v. Rimmer*, [1953] 1 Q.B. 63. In *Jeremiah v. Ministry of Defence* (Crt. of App., Oct. 19, 1979) he pronounced that "equality is the order of the day. In both directions. For both sexes. What is sauce for the goose is sauce for the gander."

3. Originally delivered as an address to the (British) National Marriage Guidance Council in 1950.

and disabilities that plagued the advance of women in the past, Lord Denning then proceeds to address more recent developments:

By a series of Acts of Parliament . . . starting in 1870, all the disabilities of wives in regard to property have been swept away. A married woman is now entitled to her own property and earnings, just as her husband is entitled to his . . . . No longer is she dependent on her husband. She can, and does, go out to work and earn her own living. *Her equality is complete.*<sup>4</sup>

Certainly there can be no doubting the advance of the cause of female emancipation in the past 150 years. Great strides have been made—in the legal, political, socio-economic and cultural spheres alike—in the promotion of gender equality.<sup>5</sup> It is fallacious, however, to suggest (as his Lordship seems to do), that legal steps designed to assert the formal legal equality of women have eliminated in fact *all* barriers to full gender equality.<sup>6</sup> The implicit suggestion in Lord Denning's comments is that the oppression of women is and was primarily a product of law. As such, that oppression could be swept away by simple legislative intervention. Here, Lord Denning seems to have committed the error, (noted by the Scottish philosopher, David Hume)<sup>7</sup> of confounding the prescriptive (how things *ought* to be) with the descriptive (how things in fact *are*). Lord Denning, in other words, assumes that because the law says that women ought to be treated as equals, that gender equality is, as he puts it, "complete." The reality, of course, is very different. Despite valiant legislative moves to assert formal

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4. LORD ALFRED DENNING, *THE DUE PROCESS OF LAW* 200 (Butterworth's 1980). See also the discussion in SMART, *FEMINISM AND THE POWER OF LAW* 11-14 (Routledge 1989).

5. Some random (if symbolic) Irish examples may suffice. Ireland now has a female President (the second woman in succession to hold the post), a female Deputy Prime Minister (*Tánaiste*), 2 female Supreme Court judges and 4 female High Court judges. Twenty-five years ago, by contrast, not one of these positions had *ever* been held by a woman.

6. Feminist commentators ably demonstrate that even despite moves to assert the formal equality of the sexes, men remain the privileged gender. For example, see SMART, *FEMINISM AND THE POWER OF LAW* (Routledge 1989); and SMART, *THE TIES THAT BIND* (Routledge 1984).

7. DAVID HUME, *A TREATISE OF HUMAN NATURE* § 3.1.1 (Oxford University Press 1978).

equality between the sexes,<sup>8</sup> men remain the (unfairly) privileged gender.<sup>9</sup>

At their heart, Lord Denning's comments are more than a (rather naïve) statement of gender equality. They are in effect an assertion of the primacy of law as a determinant of patterns of social behavior. While there can be no doubting Lord Denning's *bona fides* in this regard,<sup>10</sup> his rhetoric seems misguided. The purpose of this article is to discuss and hopefully demonstrate the fallacy of this stance, in particular by observing the impact of certain relational factors on the behavior of individuals in both the commercial and familial contexts alike. It is argued that these relational factors can reduce the extent to which parties are willing or indeed able to resort to the law where legal obligations and duties have been breached. Ultimately it is argued that the stance taken by Lord Denning tends to over-estimate the impact of the law in shaping social responses.

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8. In Ireland, see Arts. 9.1.3, 16.1, 40.1 and 45, Constitution of Ireland, 1937; Sex (Disqualification) Act, 1919; The Interpretation Acts, 1937-1991; The Anti-Discrimination (Pay) Act, 1974; The Employment Equality Acts, 1977-1998; The Equal Status Act, 2000; and Treaty Establishing the European Community, Mar. 25, 1957, arts. 13 and 141. *See also*, the court decisions in *de Búrca v. Attorney General*, [1976] I.R. 38; *T.O'G. v. An Bord Uchtála*, [1985] I.L.R.M. 61; *McKinley v. Minister for Defence*, [1992] 2 I.R. 333; *W. v. W.*, [1993] 2 I.R. 476. *But see*, *Somjee v. Minister for Justice*, [1981] I.L.R.M. 324; and *Dennehy v. Minister for Social Welfare*, unreported, High Court, July 26, 1984 (where discrimination based on gender was upheld as constitutional by the Irish Courts). *See generally* Scannell, *The Constitution and the Role of Women*, in DE VALERA'S CONSTITUTION AND OURS (Gill and Macmillan 1988).

9. For example, see CAROL SMART, *FEMINISM AND THE POWER OF LAW* (Routledge 1989); and CAROL SMART, *THE TIES THAT BIND* (Routledge 1984).

10. The late Master of the Rolls seems to have adopted something of a "separate but equal" philosophy concerning gender equality. (*Cf.* The dubious logic of the U.S. Supreme Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896) where the U.S. Supreme Court found that a state law requiring separate rail carriages for blacks and whites was not unconstitutional, provided that the carriages were of equal quality. *See also* *Pace v. Alabama*, 106 U.S. 583 (1883). This reasoning was overturned in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) where a differently constituted Supreme Court ruled that separate schooling facilities for children of different races necessarily implied racial inequality and thus offended the guarantee of equal treatment in the U.S. Constitution). Men and women, Lord Denning asserts, are different in many ways. In the *Due Process of the Law*, however, he refuses to accept that these supposed differences were "any reason for putting women under the subjection of men. A woman feels as keenly, thinks as clearly as a man . . . . She has as much right to her freedom—to develop her personality to the full—as a man. . . . Neither is above or under the other. They are equals." LORD ALFRED DENNING, *THE DUE PROCESS OF LAW* 194-95 (1980). *But see also* SMART, *supra* note 9, at 11-14.

## II. "Discrete" and "Relational" Models of Contracting

The road from the pronouncement of legal objectives to their realization in fact is one strewn with many barriers and contingencies. Becker,<sup>11</sup> for instance, argues how the success of an enacted law depends on the "moral enterprise" of various agents with sufficient popular and official support to implement effectively the relevant legislation. The presence of a law, in other words, does not guarantee that the mischief against which it is directed will automatically be eliminated.

For the purposes of this discussion, this article will focus partly on the success of the law in addressing instances of duress and undue influence that arise in the context of continuing contractual and familial relations. More often than not, economic actors contract in a context of ongoing social and economic relationships on which their ultimate wellbeing is contingent. The basic argument propounded is that the existence of these relations can to a greater or lesser extent reduce the likelihood of relief being sought by the victim of the coercive activity.

In many respects this is a rather simple argument. It is one, nonetheless, that traditionally seems to have been suppressed in legal discourses. These legal discourses have typically tended to ignore the dynamic of the ongoing relation as a factor worthy of regard in analyzing the impact of laws. Classical contract law doctrine, in particular, has overwhelmingly favored a "discrete analysis" of legal events, one that views contractual phenomena in isolation from the context in which they arise.<sup>12</sup> The modern contract is characteristically seen as a discrete and isolated event, giving rise to an arrangement of specific and delimited purpose.<sup>13</sup> Preceding and subsequent relations between the parties are ignored as irrelevant.

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11. HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE*, (Free Press, 2nd ed. 1973).

12. *But see*, Roscoe Pound, *The End of Law in Juristic Thought (II)*, 30 HARV. L. REV. 201 (1917), who maintains that traditionally at common law "the central idea [was always the] . . . relation." *Id.* at 212. Pound illustrates how the common law was founded upon (and indeed in some respects continued to look to) status or the "relation" as a determinant of legal rules. *Id.* at 213. In this sense, perhaps, modern contract doctrine is distinctively out of step with its common law origins.

13. *See* Victor Goldberg, *Towards an Expanded Economic Theory of Contract*, 10 J. OF ECON. ISSUES 45, 49 (1976) ("The Paradigmatic contract of neo-classical economics . . . is a discrete transaction in which no duties exist between the parties prior to the contract formation and in which the duties of the parties are determined at the formation stage.").

This “discrete” contract, as it is known, came to be the paradigm of classical and neo-classical contractual discourses and has, as such, played a predominant part in the shaping of modern contract law.<sup>14</sup> This paradigm takes as its subject the individual almost entirely abstracted from context. It is no small coincidence, then, that it first gained currency as a model of social interaction at a time when economic liberalism and the principles of *laissez-faire* were to the forefront of economic thought.<sup>15</sup> Both are predicated on the construction of the individual as an atomized unit acting independently of greater authority, and free from all but the most inevitable of fetters and restrictions. Both treat the parties to a contract as persons free from all contingencies, duties and expectations save those created by the contract itself. This abstraction, Friedman notes “is a deliberate renunciation of the particular, a deliberate relinquishment of the temptation to restrict

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14. Rules requiring the specificity of contracts provide a good example of its influence. A contract should not be vague or uncertain and will often be struck down on the ground that its terms cannot be readily ascertained. See *Loftus v. Roberts*, [1902] 18 T.L.R. 532 (C.A.), the *dictum* of Viscount Dunedin in *May & Butcher v. R.*, [1934] 2 K.B. 17 (note) at 21; and *Scammell v. Ouston*, [1941] 1 All E.R. 14. On uncertainty of terms see the Irish case of *Mackey v. Wilde*, [1998] 2 I.L.R.M. 449. The concept of privity of contract provides another good example. Privity “ring-fences” the contract, denying all but the parties to the contract of any right to sue on foot of such contract. The doctrine is most notably illustrated by the decision in *Tweddle v. Atkinson*, [1861] 1 B. & S. 393. A and B agreed to pay C, B’s son, an amount of money on C’s marriage to A’s daughter. C later sued A’s estate for the promised sum. The Court refused to order payment, partly on the ground that consideration did not flow from C, but additionally because C was not a party to the contract and could not, therefore, assert its terms. See Arthur L. Corbin, *Contracts for the Benefit of Third Parties*, 46 L.Q.R. 12 (1930). On privity generally see ROBERT CLARK, *CONTRACT LAW IN IRELAND* Ch. 17 (Round Hall, 4th ed. 1998); and RAYMOND FRIEL, *THE LAW OF CONTRACT* Ch. 9 (Round Hall, 2nd ed. 2000). See also *Murphy v. Bower*, [1866] I.R. 2 C.L. 506; *Clitheroe v. Simpson*, [1879] 4 L.R. Ir. 59; *Mackey v. Jones*, [1959] 93 I.L.T.R. 177; *Dunlop v. Selfridge*, [1915] A.C. 847; *Vandepitte v. Preferred Accident Assurance Co. of New York*, [1933] A.C. 70; and the commentary of Peter Karsten, *The “Discovery” of Law by English and American Jurists in the Seventeenth, Eighteenth and Nineteenth centuries: Third-party Beneficiary Contracts as a Test Case*, 9 LAW & HIST. REV. 327 (1991). The rule has been diluted considerably in some parts of the U.S., for instance in New York (*Lawrence v. Fox*, 20 N.Y. 268 (1859)) and in Massachusetts (*Choate v. S.C.A. Services, Inc.*, (1979) N.E.2d 1045) as well as in Australia (See the decision of the majority in the Australian High Court in *Trident General Insurance v. McNiece Bros. Pty. Ltd.*, (1988) C.L.R. 107. Pressure for change (see for instance Lords Scarman and Keith in *Woodar Investment Ltd. v. Wimpey Ltd.*, [1980] 1 W.L.R. 277; and Lord Diplock in *Swain v. Law Society* [1983] 1 A.C. 598, 611). This trend has ultimately led, in Britain, to the dilution of the doctrine of privity by the Contracts (Rights of Third Parties) Act, 1999.

15. See generally PATRICK S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (Oxford University Press 1979).

untrammelled individual autonomy or the completely free market in the name of autonomy.”<sup>16</sup>

There is obviously a certain attraction in this image for those who wish to ignore the infinite complexities of social relations in favor of a tidy, predictable model of contracting practice. The discrete paradigm may certainly possess what Goldberg<sup>17</sup> termed an “elegance” of sorts, though this is arguably at the expense of a comprehensive model rooted in the reality of modern contracting. Nevertheless, beginning in the late 1960s and early 70s,<sup>18</sup> a number of commentators began to dispute the appropriateness or relevance of the discrete contractual paradigm as a model for the study of contractual phenomena. As a paradigm of contract law, it was contended, the discrete contract is neither particularly descriptive nor helpful. In particular, it is argued that the unwitting preoccupation with the neo-classical fairy-tale of discrete-contracting has blunted the law’s effectiveness in regulating and ordering modern contractual relations.

Starting in the 1960s, two American academics, Ian Macneil<sup>19</sup> and Stewart Macauley,<sup>20</sup> spearheaded an influential challenge to the stranglehold that the discrete contractual paradigm had over

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16. LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA* (University of Wisconsin 1965).

17. See Goldberg, *supra* note 13, at 49.

18. Although see the earlier comments of Roscoe Pound, in *The End of Law in Juristic Thought (II)*, in which he identifies the relation (or the status-contract) as the dominant socio-legal model used in the common law. Pound, *supra* note 12, at 201.

19. See IAN R. MACNEIL, *CONTRACT, EXCHANGE TRANSACTIONS AND RELATIONS* (Foundation Press, 2d ed. 1978); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974); Ian R. Macneil, *Contracts: Adjustment of Long-term Economic Relations under Classical, Neo-classical and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978); IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* (1979); Ian R. Macneil, *Economic Analysis of Contractual Relations*, in *THE ECONOMIC APPROACH TO LAW* 61-92 (Butterworth’s 1981); Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the need for a “Rich Classificatory Apparatus,”* 75 NW. U.L. REV. 1018 (1981). On relationalism, see generally Charles Goetz & Robert Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Melvin A. Eisenberg, *Relational Contracts*; and Ewan McKendrick, *The Regulation of Long-Term Contracts in English Law*, in *GOOD FAITH AND FAULT IN CONTRACT LAW* (Clarendon Press 1995); and Oliver Williamson, *Transaction Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1981). See also Roscoe Pound, *The End of Law in Juristic Thought (II)*, 30 HARV. L. REV. 201, 212 (1917), who maintains that the relation was and remained in 1917 a central concept in the common law.

20. Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963); Stewart Macauley, *The Use and Non-use of Contracts*, 9 PRAC. LAW. 13 (1963); and Stewart Macauley, *An Empirical View of Contract* [1985] WISC. L. REV. 465.

modern contract doctrine. They argued (albeit with differing emphases) that as a model it was neither realistic nor useful in describing and analyzing modern contractual relations. At the center of their thesis is the proposition that the discrete model thrives on the false premise that the vast bulk of contracting practices could realistically be critiqued as discrete events divorced from context. In fact, as both commentators stress,<sup>21</sup> the discrete transaction is in fact a rarity, a marginal phenomenon. Instead, most contracts, much like marriage,<sup>22</sup> are struck and operate within the context of, or at the very least as a prelude to, an ongoing relationship, commercial or otherwise, between the parties. Classical and Neo-classical contract doctrine alike have ignored these "relational aspects" of contracting in favor of a tidy, abstract conception of social intercourse ill-befitting a complex post-industrial society.<sup>23</sup> In ring-fencing the contractual event, the discrete perspective displaces explanations and analyses of contracting that view the event in its wider context and seek to explain it in terms that acknowledge the relations which gave rise to and shaped the event's progress. This would have been objectionable, Eisenberg<sup>24</sup> argues, "even if most contracts were discrete." Even more disturbing was the fact that the "tacit empirical premise" underlying classical contract law "was entirely incorrect. Discrete contracts are unusual not relational contracts."<sup>25</sup>

No contract, of course, can ever be entirely devoid of relational aspects. Contract is quintessentially relational. It necessarily presupposes the existence of social relations. Few contracts could ever be made, after all, without a language common to both parties, absent a shared understanding of the words and gestures used and a minimal consensus as to their meaning. "[T]he process of communication of the content of that exchange," Elliot notes, "cannot be discrete to it but must be expressed in terms (language) derived from social formations exogenous to it."<sup>26</sup>

Relational Contract Theory, however, goes further. It looks at contractual phenomena not in terms of discrete events but as part

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21. Macauley using empirical research to underline his point. See Stewart Macauley, *An Empirical View of Contract* [1985] WISC. L. REV. 465.

22. See further the comments in the text below at note 28.

23. See Goldberg, *supra* note 13, at 49 ("[t]he elegance... of analytical models based on choice has led economists to suppress the relational aspects of contracts").

24. Eisenberg, *supra* note 19, at 297.

25. *Id.*

26. Elliott, *The Frontiersmen*, 44 MOD. L. REV. 345, 346 (1981) (reviewing *The New Social Contract*).

of the wider, ongoing relationships in which they arise or to which they give rise. The relational perspective thus poses a counter to the hegemony of the discrete transaction, allowing the scrutiny of contracting along a discrete-relational spectrum.<sup>27</sup> Perhaps the best example of a relational contract is one derived from outside the commercial field—marriage. Marriage is after all the quintessential relation “contract” (if the latter term is even appropriate).<sup>28</sup> The parties commit potentially for life<sup>29</sup> to an arrangement that is vague in detail and that presupposes great flexibility, mutual trust and intertwined interests. Indeed, the parallels between marriage and relational theory are not always lost on contractual commentators, as underlined by a rather colorful quotation from Gordon.<sup>30</sup> “In the ‘relational’ view of Macauley and Macneil,” he comments “parties treat their contracts more like marriages than like one-night stands.”<sup>31</sup>

Like marriage the long-term contractual relationship acts more as a framework for engagement than as a strict agenda of terms and conditions. As a result, the relational perspective displaces the possibility of what economists term “contingency-claims” contracting, where all relevant and possible future events are encompassed by the terms of the agreement itself. Contingency-claims contract-

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27. In a colorful feminist analysis of contracting, Peter Goodrich suggests that these alternate poles represent, respectively the paradigms of masculine-type and feminine-type contracting. Peter Goodrich, *Gender and Contracts*, in FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW 17-46 (Cavendish 1996). While commending this article highly, it is submitted that this analysis ignores other feminist and queer theoretical perspectives. These propound the dangers inherent in assuming that certain characteristics or personality traits can be assumed to be the sole preserve of one gender rather than the other. Goodrich arguably does his own gender a disservice in typecasting it as the equivalent of a decontextualized, rather brutish paradigm of contracting.

28. The term “contract” is one that can at best be uneasily applied to marriage. Marriage, after all, does not typically fit the profile of a stereotypical contract. Statute and common law lay down many of the “terms” of marriage. Few of these terms are, or can be, negotiated between the parties. Unlike most contracts, furthermore, the law will only allow a person to be a party to one marriage at a time and strictly limits the range of persons with whom one may contract. Imagine, by contrast, if the law required that one may only contract to sell one’s car to a person of the opposite sex not being a close relation or a person who already owned a car!

29. *But see* Art. 41.3.2, Constitution of Ireland, 1937, and the Family Law (Divorce) Act, 1996 which now permit the possibility of a dissolution of marriage in Ireland.

30. Robert W. Gordon, *Macauley, Macneil and the Discovery of Solidarity and Power in Contract Law*, [1985] WISC. L. REV. 565. (Quoted in S. WHEELER & J. SHAW, CONTRACT LAW, CASES AND MATERIALS 83 (Clarendon Press 1994)).

31. *Id.*

ing assumes full “presentation,”<sup>32</sup> that is, all possible opportunities and avenues, risks and pitfalls which the future may throw up are “made present” in the contract and provided for as the parties desire. The contract is taken to provide comprehensively for all future contingencies. Absent the allocation of a particular risk, it is assumed that the parties intend the risk, if realized, to lie where it falls.

Even if such “full presentation” were possible in a discrete context,<sup>33</sup> it is certainly neither feasible nor helpful as a means of governance in long-term relationships. Instead, such arrangements tend (regardless of the actual terms of the initial contract upon which the relation is based) to be open-ended in nature. “The participants,” Macneil observes,

never intend or expect to see the whole future of the relation as presentiated at any single time, but view the relation as an ongoing integration of behavior to grow and vary with events in a largely unforeseeable future (e.g., a marriage, a family business).<sup>34</sup>

The relational contract, hence, far from strictly delineating the content of the contractual relationship, acts as a broad framework within which the parties act to their mutual benefit. The norms and understandings governing the relation tend to be dynamic rather than static, developing in tandem with and by reference to the relation itself, adjusting to new situations and opportunities as they arise. Disputes are typically resolved by compromise rather than conflict. Indeed, dogged reliance on one’s strict legal rights is seen as potentially inimical to the survival of the relation in the long

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32. Made present in time, anticipated, providing for all possible future contingencies and risks in one contractual event. See Goldberg, *supra* note 13, at 51; and Ian R. Macneil, *Economic Analysis of Contractual Relations*, in *THE ECONOMIC APPROACH TO LAW* 64-67 (Butterworth’s 1981).

33. The high transaction costs of providing for each possible contingency probably render such foresight disproportionate not to mention prohibitively expensive in most cases.

34. IAN R. MACNEIL, *CONTRACT, EXCHANGE TRANSACTIONS & RELATIONS* 13 (Foundation Press 2d ed. 1978). The same author, in another publication, observes that:

two common characteristics of long-term contracts are the existence of gaps in their planning and the presence of a range of processes and techniques used by contract planners to create flexibility in lieu of either leaving gaps or trying to plan rigidly.

Ian R. Macneil, *Contracts: Adjustment of Long-term Economic Relations under Classical, Neo-classical and Relational Contract Law*, 72 *Nw. U. L. R.* 854, 865 (1978).

run.<sup>35</sup> Instead, the parties act to their mutual benefit with a view to sustaining good relations with their co-contractors.<sup>36</sup> Indeed, the prospect of the long-term benefits of maintaining the relationship often influence parties to forego short-term gain in discrete transactions or to make ostensibly altruistic yet calculated concessions with a view to long term gain.<sup>37</sup> In Macauley's words, "the value of these relations means that all must work to satisfy each other."<sup>38</sup> Thus, "[p]otential disputes are suppressed, ignored or compromised in the services of keeping the relationship alive."<sup>39</sup>

Mutual trust is the cornerstone of relational contracting. Like marriage, no long-term contract can survive healthily in an environment of mistrust and suspicion. Equity recognizes this fact in refusing as a general principle to order specific performance of contracts<sup>40</sup> involving the rendering of a service or the re-instatement of an employee.<sup>41</sup> In *Page One Records v. Britton*,<sup>42</sup> for instance,

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35. See Steve Hedley, *Contracts as Promises*, 44 N. IRELAND L.Q. 12, 13 (1993), who notes that a party who insists on asserting the strict letter of his legal rights against another may generally expect never to do business with the latter again.

36. This idea of mutual self-interest seems to be embedded in the "best practice" models of those who teach business negotiation skills. An advertisement for Dr. Chester Karrass's business negotiation workshops advises that "[c]ontrary to common perception, great negotiators do not dominate their adversaries. In fact, they do not see them as adversaries. We teach you to build solid, long-term relationships that satisfy both parties . . . . By asking the right kind of questions and delving into the other person's true needs, deals can be made that leave both parties feeling that they got a bargain." Advertisement in AM. WAY, Aug. 15, 2001, 85-88.

37. Cf. the concept of "enlightened self-interest" propounded by the Scottish philosopher David Hume (DAVID HUME, A TREATISE OF HUMAN NATURE (1739-40)). See also the discussion in PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 52-57 (Clarendon 1979). See also ADAM SMITH, THE WEALTH OF NATIONS 14, 421-23 (1937 ed.). Both Hume and Smith argued that a trader best promoted his own interests by attending to those of his customers. Being honorable, reliable and dependable in the service of customers would ultimately result in the promotion of the trader's own longer-term self interest.

38. Stewart Macauley, *An Empirical View of Contract*, [1985] WISC. L. REV. 465. (Quoted in S. WHEELER & J. SHAW, CONTRACT LAW, CASES AND MATERIALS 77 (Clarendon Press 1994)).

39. *Id.*

40. Or indirectly achieving the same result by means of the enforcement of a negative covenant.

41. *Ryan v. Mutual Tontine Association*, [1893] 1 Ch. 116; *Page One Records v. Britton*, [1968] 1 W.L.R. 157; and *Posner v. Scott-Lewis* [1987] Ch. 25. See also Jones, *Specific Performance of a Contract for Services*, [1987] 47 C.L.J. 21. See also, *De Francesco v. Barnum*, per Fry L.J. ("Courts are bound to be jealous lest they should turn contracts of service into contracts of slavery."); but see *Lumley v. Wagner*, [1852] 1 De G.M. & G. 604; and *Warner v. Nelson*, [1937] 1 K.B. 209 where negative covenants were enforced precluding entertainers from working other than for a specific employer. The courts argued, not convincingly in the

Justice Stamp outlined the detrimental effects of “put[ting] pressure upon” the members of a then famous rock-band, “to continue to employ as a manager and agent in a fiduciary capacity one . . . who has duties of a personal and fiduciary nature to perform and in whom [they] . . . have lost confidence.”<sup>43</sup> Co-operation, good faith, trust and discretion are, likewise, essential to the success of the contractual relation. Relations are expected to engender what Gordon, amongst others, termed “organic solidarity.”<sup>44</sup> Thus, it is expected that “the benefits and burdens of the relation are to be shared rather than entirely divided and allocated. . . .”<sup>45</sup> Each party is expected to take the rough with the smooth, to accept in particular that it may be required, as a prerequisite to the maintenance of the relation, to forego its own advantage with a view to supporting a co-contractor in difficulty. One is reminded, in particular, of Macauley’s observation that “[p]eople often renegotiate deals that have turned out badly for one or both sides. They recognize a range of excuses much broader than those accepted in most legal systems.”<sup>46</sup>

Recognition of these characteristic features, Macneil argues, is a necessary prerequisite to the establishment of “intellectually coherent principles”<sup>47</sup> of contract law, tailored to the effective critique of modern contractual relations. If relational contracting makes up the bulk of modern contracting (and, let us not forget, familial) practices, then, it follows that legal discourses should be sufficiently open-textured to cater to relational perspectives.<sup>48</sup>

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latter case, that such enforcement was not equivalent in effect to specific performance of an agreement to provide personal services. *See also* *Irani v. Southampton & S.W. Hampshire Area Health Authority*, [1985] I.C.R. 590 where an injunction was imposed, there being no breach of trust between the parties to the employment in question. *See also* Madden, *Specific Performance of Contracts of Employment*, (1985) IRISH L. TIMES 135.

42. [1968] 1 W.L.R. 157.

43. *Id.* at 167.

44. Gordon, *supra*, note 30, at 569.

45. IAN R. MACNEIL, *CONTRACT, EXCHANGE TRANSACTIONS AND RELATIONS* (N.Y. Foundation Press 2d ed. 1978). *See also* Ian R. Macneil, *Economic Analysis of Contractual Relations*, in *THE ECONOMIC APPROACH TO LAW* 69-70 (Butterworth’s, 1981).

46. Macauley, *supra* note 38, at 467-68.

47. Macneil, as quoted in Feinman, *The Significance of Contract Theory*, (1990) U. CIN. L. REV. 1299-1302. (Reproduced in S. WHEELER & J. SHAW, *CONTRACT LAW, CASES AND MATERIALS* 73, (Clarendon Press 1994)).

48. Eisenberg proceeds an explicit step further. He rejects the assertion that the relational contract should be the subject of special rules, arguing instead that principles of contract modeled on the relational perspective would and should be sufficiently broad-textured to cater *even* to discrete contracts. The latter being, he maintains, the exception rather than the rule, it is the relational contract that

Recognition of these factors should, furthermore, transform perceptions about the dynamic of power relations (and correspondingly one's analysis of incidents of duress and undue influence). Acknowledgement of the relational aspects of contracting opens up the possibility of examining coercive forces that exist *as a result of situations of dependence engendered by the relation itself*. Scrutiny of the most appropriate legal responses to coercion should be tailored accordingly.

### III. The Relation as a Barrier to Legal Action

There is, that said, a certain irony, even pointlessness, in arguing that legal doctrine should be so altered. The very dynamic to which the relation gives rise, after all, to a large extent negates and displaces the influence of legal norms and rules. In eschewing strict legal rights and entitlements in favor of compromise and commitment, the contractual relation gradually develops its own framework of governance, a by-product of the dynamic internal to the relation. In a similar vein, Macauley, drawing on his empirical studies of "real life" contracting, observes that "contract planning and contract law, at best, stand at the margin of important long-term continuing business relations."<sup>49</sup> In their stead, one finds private governance frameworks shaped by the particular needs of the parties, their circumstances and ultimate business objectives.

The key point made herein is that when approaching the phenomenon of coercion, (in legal language, duress and undue influence), the impact of ongoing relations cannot be ignored. When oppressive behavior arises in such a relation—be it a business relationship or a familial one—the existence of the relation itself jeopardizes the possibility of obtaining legal relief. Standard contract doctrine tends to ignore this issue. It stipulates, for instance, that where a person alleges that she has been subjected to common law duress, she should complain or protest (if necessary by commencing legal proceedings) at the earliest possible opportunity.<sup>50</sup>

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should provide the model around which modern contract rules are framed. Eisenberg, *supra* note 19, at 291-304.

49. Macauley, *supra* note 38, at 465 (Quoted in S. WHEELER & J. SHAW, *CONTRACT LAW, CASES AND MATERIALS* 76 (Clarendon Press 1994)).

50. See Judgment of the Judicial Committee of the Privy Council, in *Pao On v. Lau Yiu Long*, [1980] A.C. 614, 635 stating that "[i]t is material to inquire whether the person alleged to have been coerced did or did not protest." See also Justice Millett, in *Alec Lobb (Garages) Ltd. v. Total Oil*, [1983] 1 W.L.R. 87. In *The Atlantic Baron*, [1979] Q.B. 705, for example, the presence of protest contributed, it seems, to the initial conclusion that pressure had in fact been exerted in that case. However, the plaintiffs had subsequently failed to complain either at the time

This evidential requirement possibly arises from the common law's sensible concern that the courts should not endeavor to seek out the unspoken thoughts of a litigant. The Court proceeds not by reference to "secret mental reservations"<sup>51</sup> unknown and unknowable, but to the conduct of a person and the state of mind that the latter would suggest to an ordinary reasonable person.<sup>52</sup> The assertion of the relevance of subsequent protest, however, in itself assumes that the incidence of coercion will be discrete and transient rather than an endemic constant of certain relationships. The very coercive practices of which the victim may wish to complain may thus, in many instances, prevent that victim from protesting in a manner desired or expected by the Courts of law.

In an ongoing relation such as marriage, coercive forces often arise as a product of the relation itself. Parties may be forced to act against their will in favor of maintaining the relation intact. Take for instance the defendant in *C.I.B.C. Mortgages v. Pitt*.<sup>53</sup> In that case, the defendant had alleged that in agreeing to stand surety for her husband, she had been acting under the undue influence of her spouse. Her husband had borrowed money from the plaintiff, claiming that it was to be used for the mutual benefit of both him and his wife. In fact, it was his intention (as she well knew) to use the funds for his personal business interests. If so, why did Mrs. Pitt not protest at the time the surety agreement was made? Her response (noted by Fehlberg<sup>54</sup>) is highly instructive. At the heart of her reasoning is a concern to maintain the stability of her relation-

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of or prior to the payment of the final installments and the delivery of the ship. "No protest of any kind was made" for some 2 years after the new arrangement, the alleged product of coercion, had been entered into. *Id.* at 720. Though "free from the duress" the plaintiffs "took no action by way of protest or otherwise" until the formal claim for the return of the excess was made. *Id.* This, according to the Court, was evidence of acquiescence in the result of the renegotiated contract. Protest, however, is never relevant where a threat is legitimately imposed. It is not relevant, for instance, where the protest is made in the face of a court order for payment. See *Bank of Montréal v. Canada*, [1993] F.C. 279 (cited at [1996] *RESTIT. L. REV.* 149).

51. *Deacon v. Transport Regulation Board*, [1958] V.R. 458, 460.

52. On the principle of manifest intention (or objectivity) in contract law see Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 *HARV. L. REV.* 417 (1889); and Clare Dalton, *An Essay on the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997, 1042 (1985).

53. [1994] A.C. 200.

54. Belinda Fehlberg, *The Husband, the Bank, the Wife, her Signature*, 57 *MOD. L. REV.* 467 (1994). See also Belinda Fehlberg, *The Husband, the Bank, the Wife, her Signature: the Sequel*, 59 *MOD. L. REV.* 675 (1996); and Belinda Fehlberg, *Money and Marriage: Sexually Transmitted Debt in England*, 11 *INT'L J. OF L. POL'Y & THE FAM.* 320 (1997).

ship with her husband. In the words of the judge at first instance in that case,

[i]f she had refused to co-operate her life would have become a nightmare . . . . As she said, "I'd rather have a peaceful life than lots of money."<sup>55</sup>

In many cases then, protest in the face of coercion is only possible (and herein lies the irony) if and when the alleged victim has freed herself from the pressure alleged and the context that facilitated its imposition. Mrs. Pitt, for instance, might well have complained to her heart's delight. She might even have proceeded to court to sue her husband; only that her marriage is unlikely to have survived the strain. Lack of protest then may be highly equivocal as an evidential factor in this field. It may certainly and quite feasibly indicate contentment with arrangements made. It may be equally consistent, however, with the fact that the silent party not only entered into the impugned arrangements under compulsion but *remains in that state of compulsion* arising from the circumstances in which she finds herself. The irony, then, is that to plead duress or undue influence almost necessarily requires that the party first have independently sundered the relationship that fostered the compulsion or abuse.

Effectively, the more important the relation to the parties in question, the greater the stake each of the parties will have in its maintenance. The greater this stake, the less likely it will be that either party will wish to engage in transaction-rupturing litigation.<sup>56</sup> "Interdependence," Macneil says, "often generates forces tending to keep [the relation] going and to make it a reliable basis for conducting economic activities."<sup>57</sup> This tallies with Howard Becker's suggestion<sup>58</sup> that social behavior largely can be determined by a variety of contingencies to which one is subject. The greater the stake one has in conforming to the norms of a group, he argued, the less likely it is that the person will rebel against those norms.<sup>59</sup>

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55. Belinda Fehlberg, *The Husband, the Bank, the Wife, her Signature*, 57 MOD. L. REV. 467, 473 (1994).

56. BECKER, *supra* note 11.

57. Ian R. Macneil, *Economic Analysis of Contractual Relations*, in BURROWS & VELJANOVSKI., *THE ECONOMIC APPROACH TO LAW* 71 (Butterworth's, 1981).

58. BECKER, *supra* note 11.

59. Cf. Stanley Cohen, *DEVIANCE AND CONTROL* 86-88 (Prentice Hall 1966). Cohen uses the example of gay community in the U.S. in the 1960s to illustrate that "[n]ot all homosexuals are equally immersed in this homosexual community; much depends on the degree to which they still have emotional and material stakes in their relationships with the conventional world." The greater these stakes, he

A married man with children and a high-powered job is less likely to offend against convention than a single man with no children and no prospects, simply because the former's stake in conformity (in conventional society, that is) is greater. He has, in short, more to lose.

Litigation claiming coercion, then, in most cases presupposes that the relation from which it arose has been sundered.<sup>60</sup> The irony in cases involving coercion, thus, is that for the party to assert that she was a victim of duress or undue influence, she must first break free of the relation that gave rise to the coercive factors. A lack of protest, far from negating the presence of undue pressure, may in some circumstances provide firm evidence of its existence. This is especially relevant in cases where the pressure arises from an ongoing relation of some importance to the victim of the pressure. The closer and more significant the relationship between the parties, the less likely it is that coercion will lead to protest.<sup>61</sup> If the victim is free to take proceedings against the alleged perpetrator, this presupposes that the victim has broken free of the coercive forces of which she wishes to complain. Ironically, then, the prospect of asserting one's freedom from coercive forces by legal methods depends on the extent to which the alleged victim has already freed herself from those coercive forces (presumably otherwise than in reliance upon the law).

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continues, the more tenuous and/or secretive will be their links with and association with the gay community. *Id.*

60. A useful analogy may be drawn from Claire Archbold's commentary on divorce in Northern Ireland. Claire Archbold, *Divorce—the View from the North, in THE DIVORCE ACT IN PRACTICE* (Round Hall, 1999). She maintains that divorce is not the beginning but rather the end of a long process that leads to the dissolution of a marriage. She rejects the assumption that parties wishing to end their relationship typically begin by proceeding for divorce. Divorce, rather, usually marks the conclusion of such a process.

[F]amily breakdown does not occur all of a piece. Rather it is an incremental process; a massive emotional, mental, social and legal transition. Few in Northern Ireland take the decision to divorce immediately. Divorce is the *final, rather than the central act in the legal drama.*

*Id.* at 54. (Emphasis added by present author).

61. It is worth observing that some of the most prominent British court cases on legal duress in the past thirty years—*North Ocean Shipping v. Hyundai* (“The Atlantic Baron”), [1978] 3 All E.R. 1170; and *Pao On v. Lau Yiu Long*, [1980] A.C. 614; *Universe Tankships of Monrovia v. I.T.W.F.* (“The Universe Sentinel”), [1982] 2 All E.R. 67; *Dimskal Shipping v. I.T.W.F.* (“The Evia Luck”), [1999] 3 W.L.R. 875—share one feature in common. This feature is the virtual certainty, from the start in some cases, that the parties would never do business with each other again, either because the transaction was intended as a “once-off” event or because relations between the parties had deteriorated to the point of no return.

#### IV. The Development of Idiosyncratic Governance Frameworks in Ongoing Relations

Parties to a relation, then, tend not to have recourse to the law in dealing with conflict internal to the relation, unless the party involved anticipates the ending of that relation. The threat to ongoing arrangements within the relation will normally dissuade actors from relying on their strict legal rights. As Hedley astutely notes in the context of commercial relations:

[o]f course there are *some* markets where the participants are happy to do business with another firm on Monday, sue them on Tuesday and do business with them again on Wednesday; though it would be surprising if they outweighed those where “you don’t read legalistic contract clauses if you ever want to do business again.”<sup>62</sup>

In business practice, thus, private third-party or even internal arbitration methods will often be preferable to “transaction-rupturing” litigation, particularly where the relation is ongoing and where both sides have made transaction-specific investments.<sup>63</sup>

Here it is worth outlining some of the commentary based on what is called “transaction cost economics.”<sup>64</sup> A pivotal theme of

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62. Hedley, *Contracts as Promises*, 44 N. IRELAND L.Q. 12, 13 (1993).

63. The Courts in Ireland at least, seem to respect this practice. In *Doyle v. Kildare Co. and Shackleton*, [1996] 1 I.L.R.M. 252, the Supreme Court stated that judges ought be slow to interfere with the decision of an adjudicator as, in the words of Chief Justice Hamilton, “one of the cardinal principles of the law of adjudication is that the parties are taken to have abandoned their right to litigate the question in issue.” *Id.* at 265. For evidence of similar sentiments, see the judgment of Justice McCarthy in *Keenan v. Shield Insurance Co. Ltd.*, [1988] I.R. 89, 96; and that of Chief Justice Finlay in *McStay v. Assicurazoni Generali S.P.*, [1991] I.L.R.M. 237, 242. The latter stressed the finality of arbitration decisions, noting the “reluctance of the courts to interfere with the finality of an arbitrator’s award.”

64. See generally Oliver E. Williamson, *Contract Analysis: The Transaction-Cost Approach*, in *THE ECONOMIC APPROACH TO LAW* (Butterworth’s, 1981). “Transaction Costs” are in the words of Arrow, *The Organization of Economic Activity: The Analysis and Evaluation of Public Expenditure: The PBB System*, 47-64, 48 (J. Econ. Comm., 91st Congress, 1st Sess., 1969), “the costs of running an economic system. . . .” They can usefully be contrasted with “production costs.” See also BURROWS & VELJANOVSKI, *Introduction*, in *THE ECONOMIC APPROACH TO LAW* 22 (Butterworth’s, 1981), where the authors typify transaction-cost (or what they call neo-institutional) economics as a model that rejects “the fiction of frictionless markets.” By contrast with market-based economic theories, which assume perfectly static market conditions, transaction-cost economics favor an analysis of market behavior in circumstances where friction, change and uncertainty—and disequilibria in general—are acknowledged. It attempts to pinpoint the adaptive techniques most appropriate for the minimization of transaction costs in any given set of circumstances. Transaction-cost economics,

neo-institutional economics is that transactional governance structures—the framework under which transactions are organized and conflicts resolved—will vary in form and substance depending upon the transaction costs involved in administering each. These in turn will vary depending on the dimensions of the contractual relationship, identified by Williamson<sup>65</sup> as:

- (1) the level of market *uncertainty*,
- (2) the *frequency* of exchange,
- (3) transaction-specificity or the *idiosyncrasy* of the goods being exchanged/services being supplied.

Williamson's central thesis is that the greater these dimensions of uncertainty, frequency and idiosyncrasy, the more likely it is that the contractual relation will be governed by norms internal to the relation.<sup>66</sup> Correspondingly, the greater the degree of each of the three dimensions mentioned, the less significant become standard legal governance structures in the administration of the contractual relationships involved. In other words, the greater the level of market uncertainty, the higher the frequency of transactions between the parties and the more idiosyncratic or specialized their relation (i.e., the less "fungible" the goods), the more likely it is that the parties will resort to private, idiosyncratic means of dispute resolution. These means may be tri-lateral, (involving an impartial third party, not being the State) or even bi-lateral (where no outside involvement is anticipated).<sup>67</sup> Those familiar with contractual agreements of a long-term nature will of course attest to the prevalence of the arbitration clause in many such contracts, a clause that requires the parties to refer disputes to an impartial private arbitrator.

Where the relation is particularly profound, mutual trust, understanding and facilitation become essential to its survival. The interests of each party become heavily bound up in those of the

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while acknowledging the importance of contract law in promoting efficiency and reducing transaction costs, eschews the market-based economic assumption that commercial affairs are solely or mainly regulated by the market itself, or where considerations of efficiency or market failure so dictate, legal rules and forms.

65. Williamson, *supra* note 60, at 39. See also Williamson, *supra* note 19, at 233.

66. Oliver E. Williamson, *Contract Analysis: The Transaction-Cost Approach*, in *THE ECONOMIC APPROACH TO LAW* (Butterworth's, 1981).

67. Williamson, *supra* note 60, at 51.

other. The parties indeed move closer to a single utility-maximizing unit. Techniques for the resolution of misunderstandings are thus more likely to be *internally* dictated. The parties ring-fence their relationship and depend largely on mutual give-and-take, foregoing rather than contesting points of disagreement for the sake of the relation as a whole. Strict legal rights increasingly fade into the background. Where relations are particularly deep, then, the parties often prefer to resolve conflicts using “bi-lateral” dispute resolution mechanisms that require *no outside involvement* at all. Frequency of dealing, coupled with the long-term duration of the contract, increase the need for flexible, easily accessible governance structures that facilitate easy solutions in cases of conflict. The general legal system meets none of these criteria.

#### V. The Role of the Legal Process in Discouraging Litigation

Indeed, the legal process itself often discourages litigation in favor of private resolution. Macauley comments on how “[e]ven when contract law might offer a remedy, the legal system in operation promotes giving up or settling rights rather than adjudicating to vindicate rights.”<sup>68</sup> The prospect of protracted litigation and the attendant legal costs that it spawns, often deter potential litigants from proceeding to trial. For many the gamble may not be worth the fight.<sup>69</sup> For Macauley this underlines the marginality of standard contract doctrine; it “operates,” the former opines, “at the margins of the major systems of private government through institutionalized social structures and less formal social fields.”<sup>70</sup>

In the context of marriage, one sees such trends manifesting themselves for example, in the guise of measures designed to promote problem-solving outside the context of the courtroom, in particular by means of mediation and other alternative dispute resolution methods [ADR].<sup>71</sup> In Ireland, both the Judicial Separation

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68. Stewart Macauley, *An Empirical View of Contract* [1985] WISC. L. REV. 465. (As reproduced in S. WHEELER & J. SHAW, *CONTRACT LAW, CASES AND MATERIALS* 78 (Clarendon Press 1994)).

69. *Id.* Macauley refers to Galanter’s observations on the dynamics of litigation. The latter notes how larger litigants weed out challenge by “drawing out” the legal process. Weaker parties unable to last the pace eventually falter and settle.

70. *Id.* S. WHEELER & J. SHAW, *CONTRACT LAW, CASES AND MATERIALS* 79 (Clarendon Press 1994)).

71. Usefully defined by a British National Consumer Council Report from February 1993, as “any means of promoting a resolution of a dispute between two or more parties which does not involve traditional adversarial procedures.” See Wilkins, *Is there Another Way*, 57 CONV. 321-26, 321 (1993).

tion and Family Law Reform Act, 1989 and the Family Law (Divorce) Act, 1996, contain provisions tacitly encouraging parties who are seeking a legal separation or divorce to explore avenues other than those of a judicial nature.<sup>72</sup> The Family Law Act 1996<sup>73</sup> of England and Wales proceeds in a similar vein. As a condition precedent to the granting of a divorce or legal separation, it requires that the petitioning party issue “a statement of marital breakdown.”<sup>74</sup> Following this statement’s publication, however, the Act requires that the parties enter upon a “period of reflection and consideration,”<sup>75</sup> lasting a minimum of nine months.<sup>76</sup> During such time the party or parties seeking a remedy are obliged to attend an informational meeting<sup>77</sup> at which they must be told (*inter alia*) about the availability of “marriage counseling and other marriage support services.”<sup>78</sup> Westminster, furthermore, took the rare step of “putting its money where its mouth is” in making provision for the funding of marriage support services<sup>79</sup> and the extension of the civil legal aid scheme for family matters to mediation.<sup>80</sup>

The moral agenda of the Act is barely concealed. Freeman observes that “[t]his is a divorce Act which is pro-marriage: it encourages counseling, mediation, reconciliation, [and] the promotion of good relationships.”<sup>81</sup> That said, it cannot be denied that the intended result, however interventionist the motive, is the dethroning of the court process in favor of private solutions. It is arguable, of course, that the purpose of promoting reconciliation will not, in most cases, be realized. The initiation of divorce

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72. See Judicial Separation and Family Law Reform Act, §§ 5-8, 1989 and Family Law (Divorce) Act, §§ 6-8, 1996.

73. See MICHAEL FREEMAN, *THE FAMILY LAW ACT 1996* (Sweet & Maxwell 1996).

74. Family Law Act (England and Wales), § 6, 1996. See generally FREEMAN, *supra* note 66. See also Dyer, *Divorce Bill Set to Include Talks and Waiting Times*, *THE GUARDIAN*, Sept. 7, 1998, at 5. The legislation generally proved controversial, and generated some considerable debate especially amongst social conservatives who saw initial proposals as an attempt to undermine the sanctity of marriage. See Womack, *Major Upset as MPs Force Retreat on Family Reform*, *IRISH TIMES*, Oct. 28, 1995; and Millar, *Reform of Divorce Law Hangs in the Balance*, London Letter, *IRISH TIMES*, Nov. 2, 1995.

75. Family Law Act (England and Wales), § 7, 1996.

76. This period may be further extended in certain circumstances. *Id.* at §§ 7(4), 7(13).

77. *Id.* at § 8.

78. *Id.* at § 8(9); see also §§ 13-14.

79. *Id.* at §§ 22-23.

80. Family Law Act (England and Wales), Part III, §§ 26-29.

81. FREEMAN, *supra* note 73, at 27.

proceedings invariably marks the formal end of a relationship.<sup>82</sup> This is underlined by the experience of those partaking of compulsory reconciliation procedures. As Bainham<sup>83</sup> asks

How seriously . . . will those administering the new Divorce Law really take the injunction to push reconciliation when their experience will already have taught them the simple truth that reconciliation is, for the vast majority, a "dead duck" once a public step towards divorce has been taken.<sup>84</sup>

ADR, however, is not the sole preserve of marital jurisprudence. It has also become the staple of many commercial contracts, where parties agree to put disputes as regards the meaning of contractual clauses to arbitration and in many cases to accept the decision of the arbitrator as final. The Irish judiciary has proved particularly supportive of these moves to dissuade parties from court-based litigation. It has been correspondingly reluctant to usurp the adjudicator's ascribed role by overturning decisions made by virtue of such clauses. "Arbitration," according to Justice McCarthy in *Keenan v. Shield Insurance Co. Ltd.*,<sup>85</sup> "is a significant feature of modern commercial life. . . . It ill becomes the courts to show any readiness to interfere in such a process."<sup>86</sup> The latter's comments are cited with approval by Chief Justice Hamilton in *Doyle v. Kildare County Council and Shackleton*,<sup>87</sup> who adds that the jurisdiction to quash the decision of an adjudicator, "should only be exercised sparingly."<sup>88</sup> The Courts have also exhibited a greater willingness to imply arbitration clauses into contracts, for instance in *Lynch Roofing Systems (Ballaghaderreen) Ltd. v. Bennett and Son*<sup>89</sup> where the practice in the trade of including such clauses was invoked in favor of reading an implied arbitration clause into the parties' contract.

## VI. The Symbolic Power of Law

In the light of this displacement of law, legal commentators will face some difficulty in reasserting the relevance of law to the study

82. Cf. the comments of Archbold, *supra* note 60.

83. Bainham, 10 C. & FAM. L.Q. 1, 14 (1998).

84. Cf. the comments of Archbold, *supra* note 60. Her observation that divorce usually comes at the end of a long process of marital breakdown would seem to militate against such eleventh hour attempts at reconciliation.

85. [1988] I.R. 89.

86. *Id.* at 96.

87. [1996] 1 I.L.R.M. 252.

88. *Id.* at 265.

89. Unreported, High Court, Morris P., June 26, 1998.

of contracts and other agreements. This problem is particularly acute in the case of relational contracts. During the currency of the relation, the governance frameworks springing from the relation itself serve as the primary means of ordering the behavior of the parties. The formal invocation of legal norms usually heralds the *denouement* of the relation; in other words, the law asserts its influence, if at all, at the point at which the relation is no longer worth saving or indeed no longer susceptible to effective rescue. Indeed, in the case of coercive practices, invocation of legal relief (as demonstrated above) necessarily presupposes that the situation of dependence that led to the coercion in the first place, has been surmounted.

Asserting the impact of law in such complex relations thus becomes an unenviable task. This perhaps is where the potential symbolic and hortatory impact of laws may play a useful role. Legal rules, as Dewar suggests,<sup>90</sup> can be viewed as “bright-lines” designed not so much to be rigidly enforced but to induce certain desirable behavior. Publicly visible enforcement can play an ancillary role in propagating this message, but this is not to suggest that a law that is rarely invoked or enforced is in fact unsuccessful. Despite the marginalization spoken of above, the law of contracts continues to exert an influence upon lawyers far exceeding its relevance in practice. Its position as a core subject of legal education grants it a privileged place in legal discourses: “Like the reality constructed in our primary socialization as children,” Thompson observes, “the reality of law which the law of contract first constructs tends to retain forever its massive power over us.”<sup>91</sup>

Thus, despite the declining reign of liberal-individualist thought in the law of contracts, it nonetheless continues to retain a significant foothold in modern contracting theory.<sup>92</sup> It serves even now to promote a conception of the market as a natural institution, devoid of political, social, cultural or economic color.<sup>93</sup> Most notably for the purpose of this discussion it serves to uphold the *status quo* by concealing the inequalities and power differentials that both shape and are shaped by the dynamics of social relations.

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90. Dewar, *The Normal Chaos of Family Law*, 16 O.J.L.S. 725 (1996).

91. Thompson, *The Law of Contract*, in *THE CRITICAL LAWYERS' HANDBOOK* 69 (Pluto Press 1992).

92. Indeed Friedman, in *Contract as Promise*, staged something of a mini-revival for liberal-individualism. See Comments of EWAN MCKENDRICK, *CONTRACT LAW* 3 (Macmillan 2d ed. 1994).

93. See Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 497 (1983).

It does this, it is suggested, by means of the paradigm of discrete contracting. In accounts of the contractual process in judicial narrative, the discrete paradigm serves to divorce the contractual event from the wider context in which that event takes place. In doing so, the various constraints, pressures and inequalities shaping the parties' conduct are concealed from view. Contract, thus, serves to "provide a cloak of legitimacy to the underlying inequalities of power in society such as those of class, gender and race."<sup>94</sup>

It is not of course to be assumed that law reform will provide a universal panacea to these or any other ills or indeed that it is possible to eliminate inequality by means of law alone. There is no automatic guarantee, for a start, that the replacement of the State's will for that of the parties is necessarily the more conducive to social wellbeing. Human nature, moreover, is surprisingly resilient and resourceful in the face of legal proscription. Individuals often adapt rather than obey directory or prohibitory laws, and not necessarily in a manner that is illegal.

It may well be said that in as much as growing confidence in humanity and the rationalist conviction that, left unfettered, humankind's progress was inevitable aided the demise of paternalist thinking in the eighteenth and nineteenth centuries, renewed doubts about the inherently "good" nature of human individuals led to its revival in the twentieth century. And yet in a very pronounced manner, the twentieth and twenty-first centuries' trend towards increased regulation and central administrative planning exhibits a faith in science and reason; an optimism unsuited to these cynical times. A strong faith in the ultimate efficacy of legal regulation underscores a regulative framework that has often failed to make any impact in real terms and in fact has frequently yielded precisely *the opposite* results to those intended. The assumption of straightforward obedience in the face of legal regulation is arguably misplaced. This is not to say that disobedience is rife but rather that legislative endeavors often fail adequately to account for the extent to which commercial agents *adapt* to legal forces, re-deploying commercial resources in a manner most conducive to profit *within* the confines of a particular legal system.

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94. MCCOUBREY & WHITE, INTRODUCTION TO JURISPRUDENCE 226 (Blackstone 2nd ed. 1993) (quoting Thompson, *The Law of Contract*, in THE CRITICAL LAWYERS' HANDBOOK 69).

Legislators should not, for instance, lose sight of the latent and undesired consequences of legislative reform. Peltzman,<sup>95</sup> for instance, notes the possibly counterproductive effects of compulsory seat-belt ordinances which he found had, at least on their initial introduction, the unintended effect of lulling some drivers into a false sense of security. This in turn inflated the potential for speeding, culminating in additional road accidents. Similarly, Trebilcock<sup>96</sup> notes some of the “displacement effects” of rent control legislation, for example in the inception of various hidden charges, a reduction in the quality of available accommodation or an outright decrease in availability of lodgings as buildings are (as personal utility maximization dictates) turned over to more profitable uses. The automatic right to a new fixed tenancy for life after a stipulated period of occupation by a tenant, (under § 13 of the (Irish) Landlord and Tenant Act, 1980, for instance) can precipitate the strategic termination of tenancies by landlords, concerned to avoid being stuck with an immovable “super-tenant.” As Trebilcock and Dewees comment, “feasible corrective policies . . . .” may prove “even more costly than the original problem. One must not blindly assume that the cure is preferable to the disease.”<sup>97</sup>

By the same token, it must not readily be assumed that where persons observe the law their motivation is solely one of adherence to legal requirements. To posit, for instance, that individuals fulfill their contractual promises simply because legal sanctions will otherwise ensue fails fully to reflect the reality of market and other transactions. When people make promises or formulate contracts, more often than not they “contemplate performance, not breach.”<sup>98</sup> Parties with roughly equal bargaining status negotiating at arm’s length rarely enter into contracts which they believe at that time not to be to their, either immediate or ultimate, benefit. The chances are, surrounding circumstances remaining constant, that that view of utility will not change between the date of execution and that of performance.

Of course, in a dynamic market, surrounding circumstances may not necessarily remain static. A new offer may be made, situations may change or a different view of existing contractual

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95. Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. OF L. & ECON 677-725 (1975).

96. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 4-5 (Harvard University Press 1993).

97. Trebilcock & Dewees, *Judicial Control of Standard Form Contracts*, in *THE ECONOMIC APPROACH TO LAW* 118 (Butterworth’s 1981).

98. Hedley, *supra* note 35, at 13.

arrangements taken such that the perceived utility in performing such a promise may wane to the point of non-existence. Indeed, on one view, contract doctrine itself seems to allow for the possibility of “efficient breach” — where a contractor may break a promise to a co-contractor in order to accept a more favorable offer from a third party.<sup>99</sup> Where a party has ordered his affairs in reliance upon a promise now not to be fulfilled, that party will most likely suffer some detriment owing to his misplaced trust and reliance.<sup>100</sup> The possibility of extra-legal normative sanctions—such as general disapproval, representations of untrustworthiness to other potential clients and the consequential damage to reputation, rupture in a continuous relationship of dealing and failure to deal in the future — may be sufficient to deter breach of promise in most cases.<sup>101</sup> Adverse publicity and its effect upon promise-makers often provide an extra-legal counter to breach of contract. Macauley observes that

[w]hile we often read that increasing bureaucratic organization has made the world impersonal, this is not always the case. Social fields cutting across formal lines exist within bureaucracies, creating rich sanction systems . . . . Social networks serve as communication systems. People gossip and this creates reputational sanctions.<sup>102</sup>

That said, legal measures, particularly when the policy underlying it is based on the concept of equality, should not be assessed solely in terms of changes in the conduct of persons or by reference to the observance of rules alone. Stoddard,<sup>103</sup> for instance, identifies no

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99. See the discussion in TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 172, 186 (Harvard University Press 1993); and Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 *VIRG. L. REV.* 947 (1982).

100. Although the party so aggrieved is obliged to mitigate, to as great an extent as possible, the damage caused to his business by the other party's breach.

101. See BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (Free Press 1974); and in COHEN, *DEVIANCE AND CONTROL* Chs. 8, 9 (Prentice Hall 1965). Both contend that individuals may be prompted to obey social norms by the prospect of extra-legal sanctions. The extent to which a person will do so depends on the “stake in conformity” that he possesses in respect of the group that judges him. This in turn is shaped by various contingencies, but most particularly by the extent to which his well-being, financial, social and emotional, depends on continued membership of the group.

102. Macauley, *An Empirical View of Contract*, [1985] *WISC. L. REV.* 465.

103. T. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 *N.Y.U. L. REV.* 967 (1997). See also *id.* (for the responses thereto, especially that of Feldblum, *The Moral Rhetoric of Legislation*, 72 *N.Y.U. L. REV.* 992). See also Whyte, *Public Interest Litigation in Ireland—The Emergence of the Affirmative Decree?*, 20 *DUBLIN U. L. J.* 198 (1998).

less than five general goals of law reform.<sup>104</sup> The first three are well known: “(1) to create new rights and remedies for victims, (2) to alter the conduct of government [and] (3) to alter the conduct of citizens and private entities.”<sup>105</sup> Stoddard, however, goes further to assert that law reform may, through “the expression of new moral ideals and standards,” serve not merely to change the rules by which society is governed but to hold out the prospect of changing “cultural attitudes and patterns” too.<sup>106</sup> This he terms the “culture-shifting” role of law.<sup>107</sup> While acknowledging the difficulty involved in testing the impact of this “symbolic” function of law,<sup>108</sup> Stoddard holds that where there is general public awareness of legal reform, a general sense of its legitimacy and a consistent enforcement thereof the process of social change can be buttressed by legal reforms.<sup>109</sup>

Arguably, there are too many contingencies in this formulation, too many factors on which the success of legal measures depend. Nevertheless, it is perhaps in these symbolic or hortatory elements that many laws harbor their strongest prospects of impacting on social behavior. One Irish example is that given by Norris in an article<sup>110</sup> preceding the decriminalization of male homosexual sexual activity in Ireland.<sup>111</sup> He argues that although the relevant statutes<sup>112</sup> criminalizing such behavior were almost never invoked against individual gay men,<sup>113</sup> they provided a

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104. Stoddard, *supra* note 103, at 972.

105. *Id.*

106. *Id.*

107. *Id.* at 977-78.

108. *Id.* at 974.

109. Stoddard, *supra* note 103, at 978. The present writer makes a similar point, albeit in the rather different context of criminal law, in Ryan, “*Queering*” the Criminal Law: *Some Thoughts on the Aftermath of Homosexual Decriminalisation*, 7 IRISH CRIM. L.J. 38-47 (1997). There the point is made that while legal reform on its own cannot eliminate social prejudices, it can strip away certain justificatory backdrops in reference to which prejudicial beliefs or conduct were formerly legitimated. *See id.* at 45-47.

110. Norris, *Homosexual Law Reform in Ireland: A Progress Report*, 1 DUBLIN U. L.J. 27 (1977).

111. Most male homosexual sexual activity was banned in the Republic of Ireland until 1993, when the Criminal Law (Sexual Offences) Act, 1993 created an equal age of consent for homosexual and heterosexual sex. *See* Ryan, *supra* note 109.

112. Offences Against the Person Act, §§ 61-62, 1861; Criminal Law (Amendment) Act, § 11, 1881.

113. The present author’s own research confirms this point. “The simple fact, as a survey of the Garda Síochána [police] Reports from 1971 shows, is that for some two decades prior to decriminalisation, the incidence of prosecution for so-called ‘unnatural offences’ was comparatively low, less than 70 cases *per annum*.” Ryan, *supra* note 109, at 46.

“justificatory backdrop” to prejudicial behavior directed at the gay community in general. The State regularly cited the former ban on male homosexual sexual acts, to justify, for example, the censorship of media reports and textual materials dealing with the issue of homosexuality, the refusal to fund gay-specific HIV education schemes and the failure to distribute condoms to stem the tide of HIV/AIDS.<sup>114</sup> The subsequent reform of these laws (and introduction of a roughly equal age of consent between heterosexual and homosexual sexual activity)<sup>115</sup> may not, of themselves have changed social attitudes.<sup>116</sup> What cannot be denied however, is that an important means of justifying prejudicial treatment had been stripped away and denied as a strategic tool to those who opposed equal treatment in this area.

## VII. Rhetoric vs. Reality

Lord Denning’s stance then may not have been quite so naïve as asserted at the beginning of this paper. Nonetheless, those approaching the study of law and its impacts cannot simply assume that there will always be a necessary correlation between legal decree and social behavior. Law is but one of many factors that control and influence behavior. It is arguable that in some contexts—in particular in regard to the long-term contractual or familial relation—it is not even the dominant factor in this field. The assumption, thus, that the law can, single-handedly and effectively combat inequality and oppression is misplaced. Indeed there is even some danger in this assumption. Too many jurists and judges err in assuming that formal legal equality and true equal treatment are one and the same phenomenon. Take, for instance, the assumption that husband and wife are equal at law.<sup>117</sup> As a

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114. See e.g., PHILPOTT, DEEP END 190 (Poolbeg Press 1995); and Philpott in the IRISH TIMES, Nov. 30, 1992.

115. See generally, Criminal Law (Sexual Offences) Act, 1993.

116. Cf. Hart, *The Enforcement of Morality*, in THE MORALITY OF THE CRIMINAL LAW 44 (Magnes Press and Oxford University Press 1965); and Walker, *Morality and Criminal Law*, HOW. J. OF CRIM. (1946). Both point out that five years after the decriminalization of suicide in the United Kingdom, a majority of survey respondents in the UK who were aware of the aforementioned change in the law still considered suicide to be “morally wrong.”

117. On marital and gender equality in Ireland, see *Tilson v. A.G.*, [1951] I.R. 1 (establishing the equal custodial rights of mother and father); *DeBurca v. A.G.*, [1976] I.R. 38 (abolishing the rule that obliged only men to serve on juries); *T. O’G. v An Bord Uchtála*, [1986] I.L.R.M. 61 (establishing the equal status of widowers and widows in relation to adoption); *C.M. v. T.M.*, [1988] I.L.R.M. 456; [1991] I.L.R.M. 268; and *W. v. W.*, [1993] I.L.R.M. 294 (abolishing the dependent domicile rule in its application to married women); *McKinley v. Minister for*

corollary to this assumption, the law of contract long ago rejected the proposition that a wife was to be presumed to have acted under the influence of her husband when entering into contracts that were to her manifest disadvantage.<sup>118</sup> The courts of both the United Kingdom<sup>119</sup> and Ireland<sup>120</sup> have thus roundly rejected the proposition that wives are deserving of any "special equity" in undue influence cases, asserting that such treatment would offend the principle of equality between husbands and wives.

Certainly the modern marital relation operates in an environment of some considerable spousal equality. Of its counterpart of some decades ago, by contrast, Edwards felt able to say that there still remains a considerable proportion of married women who regard their husbands as their lord and master to disobey whose commands would be unthinkable."<sup>121</sup> Intimations of a dramatic reform of marital relations however, face the accusation that a significant number, perhaps even the majority of modern cases where undue influence is alleged in Ireland and Great Britain involve husbands and wives<sup>122</sup> or those in an intimate relationship.<sup>123</sup> Those allegedly subjected to the influence tend, moreover, overwhelmingly to be female; those said to have exerted such influence are almost always male. The rhetoric of law, however, appears to

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Defence, [1992] 2 I.R. 333, (extending the right to sue for loss of consortium, once reserved to husbands, to wives). See also the discussion of Scannell, *The Constitution and the Role of Women*, in DEVALERA'S CONSTITUTION AND OURS (Gill and Macmillan/RTÉ 1988).

118. See *Howes v. Bishop*, [1909] 2 K.B. 390; and the *Bank of Montréal v. Stuart*, [1911] A.C. 120 (where it was held that the existence of a relationship of trust and confidence giving rise to the danger of undue influence must be expressly proven to exist in each respective case of a husband and wife). There seems to have been some considerable earlier authority for this proposition: See *Nedby v. Nedby*, 5 De G. & Sm. 377, 64 E.R. 1161; *Grigby v. Cox*, 1 Ves. Sen. 517; *Barron v. Willis*, [1899] 2 Ch.D. 578; [1902] A.C. 271. For additional modern authority see the decision of the Privy Council in *Mackenzie v. Royal Bank of Canada*, [1934] A.C. 468 (Appeal from S.C. of Ont.) (*per* Lord Atkin at 475). *But see*, the U.S. decision of *Eubanks v. Eubanks*, 159 S.E.2d. 562, where Justice Sharp remarks that "[t]he relationship between husband and wife is the most confidential of all relationships, and transactions between them, to be valid, must be fair and reasonable." *Cf. State (D.P.P.) v. Walsh*, [1981] I.R. 412.

119. *Barclay's Bank v. O'Brien*, [1994] 1 A.C. 180.

120. See Justice Keane in *Bank of Nova Scotia v. Hogan*, unreported, High Court, Keane J., December 21, 1992, at 13; and Justice Murphy in the Supreme Court in the same case at [1996] 3 I.R. 239, 247-49.

121. Edwards, *Compulsion, Coercion and Criminal Responsibility*, 14 MOD. L. REV. 297, 312-13 (1951).

122. See *e.g.*, *BCCI v. Aboody*, [1990] 1 Q.B. 923; *CIBC Mortgages v. Pitt*, [1994] 1 A.C. 200.

123. See *e.g.*, *Massey v. Midland Bank plc.*, [1995] 1 All E.R. 929; [1994] 2 F.L.R. 342 (where the parties were unmarried).

have de-gendered this process.<sup>124</sup> By adhering to the legal ideal of gender equality, the courts may ironically have done a considerable disservice to that goal.

### VIII. Conclusion

Legal commentators must, therefore, remain mindful of the danger of the rhetoric of law clouding the real inequalities that exist in society. The path from the creation of a law to its effective enforcement is nothing if not fraught with barriers. For those studying law and its impact on social behavior, then, the challenge is to devise and discover the best means of maximizing the impact of law and legal discourses. The first step on this road, it is suggested, is to acknowledge the existence of and impact of complex, long-term contractual and familial relations. The “discrete,” context-free approach favored by traditional contract theorists can only hamper the task of devising effective rules to combat unequal treatment and oppression. However tidy and convenient the discrete approach may be, an effective, realistic analysis of the impact of laws requires a wider, more context-sensitive approach to human inter-relationships.

Certainly, this may involve an acceptance of the marginality of law in social and business spheres alike. A more “law-skeptical” approach may, indeed, be an inevitable by-product of such a process. The success of legal reform, however, depends heavily on one’s appreciation of the limitations of law and legal discourses in altering behavior patterns. Before these limitations can be overcome, they must be more fully appreciated. Ironically then, without a dramatic change in perspective, the marginalization of the law may be guaranteed.

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124. In fact in *Barclay’s Bank v. O’Brien*, [1994] 1 A.C. 180, Lord Browne-Wilkinson makes reference to homosexual as well as heterosexual cohabitantes. Though his equation of same-sex and opposite-sex couples is welcome, the implication that undue influence is ‘gender-free’ is not. His Lordship’s comments seem to imply that the gender of the parties is irrelevant in these cases.