

Breaking Down Barriers:
Unveiling Gender Biases in Contract Law

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Introduction

The Feminist Judgments Project represents a significant effort across various jurisdictions, aiming to critique real-life judicial decisions from a feminist perspective and provide alternative judgments that promote gender-sensitive judging.¹ These projects highlight the importance of incorporating women's experiences into decision-making and legal rule formulation, urging a rethinking of what gender justice truly demands. While these discussions have been widely explored in the context of criminal law, there has been limited discussion of this topic in the domain of contract law – the private commercial sphere characterized by arm's length dealings.²

To fill this gap, this essay explores the challenges working-class women face in contractual relationships and investigates the contextual factors perpetuating their disadvantaged position in the marketplace. Part I of this essay critically examines the impact of women's reality in modern societies in shaping their decisions concerning family, work, and contracts, resulting in their vulnerability within the marketplace. Part II then delves into the gender hierarchy entrenched within the certainty-oriented contract principles, which favor objectivity over contextual considerations, marginalizing women's perspectives and experiences. Part III assesses the limitations of the current state-level legislative and policy approach in addressing structural discrimination. Part IV advocates for a more comprehensive understanding of gender justice within contract law. By shedding light on these issues, this essay contributes to the broader conversation on promoting gender equality and fairness in women's contractual relationships.

Women's Reality

I. Societal Expectations

¹ The Feminist Judgments Project. (2010). UKSCBlog. <http://ukscblog.com/the-feminist-judgments-project/>

² Bonita, B. (2005). 'Different Space, Same Place? Feminist Perspectives on Contracts in Cyberspace'. In *Feminist Perspectives on Contract Law*, eds. Linda Mulcahy and Sally Wheeler. Glasshouse Press. at 116

Despite efforts to address gender biases and break down barriers,³ the enduring impact of societal expectations on women remains a pressing issue in modern society. These expectations, deeply rooted in long-standing legacies and social norms, continue to exert a pervasive influence on women's lives, implicitly limiting their freedom of choice and genuine consent in various aspects, including contractual relationships and professional endeavors.

While modern society widely embraces egalitarian beliefs,⁴ the gendered division of roles within families persists. Interestingly, research shows that even among couples sharing egalitarian ideas, achieving true equality proves challenging.⁵ The cruel reality is that women still shoulder a significantly larger share of household chores compared to their male partners,⁶ even when they act as the primary breadwinners for their families.⁷ This prevailing paradox perpetuates traditional gender roles where women are *expected* to be the main caregivers and embody warmth and care.⁸ Regrettably, this imposed caregiving role translates into a “high discount rate” for women in market dealings, as they tend to be more “anxious to cut the deal” and thereby tend to “take the short end of the stick” in their negotiations both in market and nonmarket.⁹

Gender stereotypes and societal expectations, sometimes internalized, have a profound influence on women's seemingly voluntary decisions. The illustration of stay-at-home mothers exemplifies how societal conceptions frame these gendered distribution of work as “free choices” made by women.¹⁰ Despite notable progress in women's empowerment, there has been a recent resurgence in the number of women opting to stay at home,¹¹ with

³ Meinck, S., & Brese, F. (2019, July 30). Trends in gender gaps: using 20 years of evidence from TIMSS. Large-scale Assessments in Education. <https://doi.org/10.1186/s40536-019-0076-3>

⁴ Priority gender equality. (2023). UNESCO. <https://www.unesco.org/en/gender-equality>

⁵ McMunn, A., Bird, L., Webb, E., & Sacker, A. (2019). Gender divisions of paid and unpaid work in contemporary UK couples. *Work, Employment & Society*, 34(2), 155–173. <https://doi.org/10.1177/0950017019862153>

⁶ *Id.*

⁷ Germano, M. (2019, March 27). Women Are Working More Than Ever, But They Still Take On Most Household Responsibilities. *Forbes*. <https://www.forbes.com/sites/maggiegermano/2019/03/27/women-are-working-more-than-ever-but-they-still-take-on-most-household-responsibilities/?sh=bf0c02152e9e>; and Angela, D. (2012). Working and caring: women's labour inside and outside the home. In *Modern motherhood*. Manchester University Press. <https://www.jstor.org/stable/j.ctt155j59g.10>

⁸ Eagly, A. H., Wood, W., & Diekmann, A. B. (2000). Social role theory of sex differences and similarities: A current appraisal. In T. Eckes & H. M. Trautner (Eds.), *The developmental social psychology of gender* (pp. 123–174). Lawrence Erlbaum.

⁹ Rose, C. M. (1992). Giving Some Back – A Reprise. 44 Fla. L. Rev. 365 at 371

¹⁰ Stephens, N. M., & Levine, C. S. (2011). Opting out or denying discrimination? How the framework of free choice in American society influences perceptions of gender inequality. *Psychological Science*, 22(10), 1231–1236.

¹¹ Cohn, D. (2020, May 30). Stay-at-Home mothers on the rise. Pew Research Center's Social & Demographic Trends Project. <https://www.pewresearch.org/social-trends/2014/04/08/after-decades-of-decline-a-rise-in-stay-at-home-mothers/>

approximately 85% citing the need to care for their families as the primary reason.¹² However, many women also express a strong desire to work and pursue their own ambitions, revealing the conflict between individual choice and family obligations.¹³ Unfortunately, women often find themselves conceding to these expectations, as they are burdened by greater guilt than men when their work interferes with family responsibilities.¹⁴ The persisting societal expectation that women should prioritize their role as wives and mothers, trapping them in traditional gender roles and burdening them with a heavier load of care for their children and husband.¹⁵ This deeply ingrained and internalized societal expectation, in turn, contributes to the weakened bargaining power and inferior position of women in the market, even in the context of advancements in women's empowerment today.

II. Imposed Inferiority

The enduring impact of inferior economic conditions, coupled with the legacy of gender bias, has been another significant force in undermining the bargaining power of women as market participants. This unfortunate reality creates a self-perpetuating cycle, reinforcing the inferior status of women within the private commercial sphere.

Despite sustained efforts to promote equal pay, the gender pay gap remains a persistent global issue. Recent governmental reports reveal that approximately 80 percent of UK employers still pay men more than women, on average.¹⁶ This disparity can largely be attributed to the entrenched male dominance in senior positions within organizations,¹⁷ disregarding the well-deserved suitability of women for these roles.¹⁸ Furthermore, women are disproportionately confined to low-paying sectors such as health and social

¹² Wilkinson, A. (2023, February 19). Actually, Jeremy Hunt, many stay-at-home mums want to work. This is why we can't. *The Guardian*. <https://www.theguardian.com/commentisfree/2023/feb/19/jeremy-hunt-stay-at-home-mums-work-parents-employment>

¹³ Davis, Angela, 'Working and caring: women's labour inside and outside the home', *Modern Motherhood: Women and Family in England, 1945-2000* (Manchester, 2012; online edn, Manchester Scholarship Online, 20 Sept. 2012), <https://doi.org/10.7228/manchester/9780719084553.003.0006>

¹⁴ Aarntzen, L., Derks, B., Van Steenberghe, E. F., & Van Der Lippe, T. (2022). When work–family guilt becomes a women's issue: Internalized gender stereotypes predict high guilt in working mothers but low guilt in working fathers. *British Journal of Social Psychology*, 62(1), 12–29. <https://doi.org/10.1111/bjso.12575>

¹⁵ Keren, H. (2018). Feminism and Contract Law. *Research Handbook on Feminist Jurisprudence* (Elgar, Robin West & Cynthia Bowman Eds.), Available at SSRN: <https://ssrn.com/abstract=3258616> (at 422)

¹⁶ Nearly 80% of UK employers pay men more than women. (2023). *Financial Times*. <https://www.ft.com/content/062e80a3-af13-4aef-9e11-942abc40f8dc>

¹⁷ Mayne, M. (2022, March 8). Women hold less than two in five senior management positions, research finds. *People Management*. <https://www.peoplemanagement.co.uk/article/1751755/women-hold-less-than-two-five-senior-management-positions-research-finds>

¹⁸ Haslam, S. A., & Ryan, M. K. (2008). The road to the glass cliff: Differences in the perceived suitability of men and women for leadership positions in succeeding and failing organizations. *Leadership Quarterly*, 19(5), 530–546. <https://doi.org/10.1016/j.leaqua.2008.07.011>

work, as well as wholesale and retail trade.¹⁹ These patterns perpetuate the fixed stereotype that women are more suited for lower-level positions, reinforcing the societal trap that hinders their upward mobility in the labor market.

The inferior economic position of women has been further exacerbated by the gendered perception of family roles and reproductive needs. As women are expected to conform to traditional gender roles within the family, they tend to prioritize their family needs over career progression, often remaining “economically inactive” or engaging in low-paying, part-time or flexible work arrangements to accommodate caregiving duties.²⁰ Moreover, remaining “economically inactive” can result in limited financial independence, making women more vulnerable to becoming the ones whose careers can be sacrificed easily when family needs arise. This vicious circle not only undermines women’s bargaining power in the workplace but also weakens their position in the marketplace, further marginalizing them from the private commercial sphere.

The financial inferiority experienced by women directly contributes to their disadvantaged position when negotiating contractual agreements. Women often exhibit lower confidence and expectations in contract negotiations due to their unfavorable economic circumstances.²¹ As a result, they are more likely to accept unfair contract terms and enter into agreements that are less favorable than those secured by their male counterparts. In this way, women’s equal footing as market participants is hindered. These existing gender disparities in the economic spheres and the realities faced by women are inseparable parts of the contracting context for women. However, these factors are far from being recognized by the legal system.

Unmasking the Certainty Trap

In common law, the certainty-oriented contract principle governs the construction and interpretation of contracts, primarily emphasizing objectivity.²² This overarching approach endeavors to establish a framework of clear and generalized guiding principles

¹⁹ Statista. (2022). Average annual earnings for full-time employees in the UK 2022, by sector. <https://www.statista.com/statistics/416122/full-time-annual-salary-in-the-uk-by-sector/>

²⁰ Pew Research Center. (2020, August 14). Women more than men adjust their careers for family life | Pew Research Center. <https://www.pewresearch.org/short-reads/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/>

²¹ Amy J. Schmitz. (2013). Sex Matters: Considering Gender in Consumer Contracts, 19 *Cardozo J. of Law & Gender* 437-509 at 450

²² Peter, G. (1996). *Gender and Contracts*. In *Feminist perspectives on the foundational subjects of law*. Cavendish Publishing.

to ensure predictability and stability in contractual relationships. It categorizes alternative perspectives and individualized contexts as secondary, accommodating them only in exceptional circumstances.²³ However, this rigid and inflexible generalization in contractual matters tends to neglect the vital real-life contextual factors, marginalizing alternative visions and considerations of the female contracting parties.

This tendency becomes evident in the application of the signature rule in contract law. In *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, a woman purchased an automatic cigarette vending machine which malfunctioned shortly after. Despite her inability to comprehend an unreadable exemption clause in small print, she was legally bound by her signature on the order form, which left her without any recourse. Similarly, in *Thompson v London, Midland and Scottish Railway Co.* [1930] 1 KB 41, another lady slipped due to the railway company's negligence. However, her illiteracy situation was completely disregarded in examining the enforceability of an exemption clause, and the court held without difficulty that "the fact that the plaintiff could not read did not alter the legal position".²⁴ These swift and rigid judgments exemplify how the certainty-oriented approach relies on universal guiding principles, even at the expense of contextual and humane considerations.

Under this efficiency and certainty-favored legal framework, women's struggles under male supremacy and gendered societal expectations are not recognized and compensated.²⁵ Instead, the contract law rationalizes and legitimizes gender-based disadvantages of women due to long-standing social norms. Women often find themselves penalized for fulfilling their gendered roles as caregivers for their children, husbands, and families.²⁶ Their imposed caregiving duty under societal expectations, and the sacrifices they made for the family, are ignored under the contract law framework, becoming bargaining leverage exploited by third parties.²⁷ By disregarding these critical contextual factors in judicial interpretation, women end up "losing ground" and being deprived of the protection they deserve in the competitive marketplace.²⁸

²³ Mulcahy, L. (2005). The Limitations of Love and Altruism. In *Feminist Perspectives on Contract Law* (pp. 13–32). Glasshouse Press. <https://doi.org/10.4324/9781843146094-3> at 2

²⁴ *Thompson v London, Midland and Scottish Railway Co.* [1930] 1 KB 41 at 42

²⁵ Hunter, R. (2013). Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legal Theory. In *The Ashgate Research Companion to Feminist Legal Theory*. Routledge.

²⁶ Rose, C. M. (1992). Giving Some Back – A Reprise. 44 Fla. L. Rev. 365 at 370

²⁷ Rose, C. M. (1992). Women and Property: Gaining and Losing Ground. *Virginia Law Review*, 78(2), 421–459. <https://doi.org/10.2307/1073366> at 446

²⁸ *Id.*

The Reinforcement of Gender Hierarchy in Contract Law

Objectivity, the ostensibly neutral standard adopted by contract law to maintain certainty, embeds a troubling bias and a model that preserves dominance.²⁹ Many feminists hold suspicious views about objectivity and view it as something defined by the rule makers, where what is deemed objective actually reflects the subjectivity of those privileged.³⁰ In a patriarchal society, where male values often take precedence over female ones, male-defined objectivity falsely presented as something neutral.³¹ Rather, the contract law itself serves as the institutions of male power, further perpetuating a hierarchical system that marks the relational values, and the women associated with them, as inferior.³²

The impersonal interpretative rule of contract doctrine had historically demonstrated blatant gender bias.³³ The hostility towards the context-based interpretation in contract law can be traced back to the invention of the parol evidence rule.³⁴ Originating during the Elizabethan era when illiteracy was still widespread among women,³⁵ the parol evidence rule dictates that a written contract should be interpreted solely based on its texts. This rule effectively constitutes “a silencing mechanism of more womanly voices,”³⁶ suppressing the forms of communication that women are more likely to rely on, such as verbal communication. In this way, the hierarchy between written text and oral understandings has been reinforced, further excluding women from this “men-only” economic game.³⁷

This enduring hierarchy between men’s economic values and women’s contextual reality can be further manifested in various case laws. One such manifestation can be observed in the case of *Balfour v Balfour* [1919] 2 KB 571, where the court refused to enforce an agreement between a couple due to the lack of sufficient consideration. The reasoning

²⁹ Keren, H. (2018). Feminism and Contract Law. Research Handbook on Feminist Jurisprudence (Elgar, Robin West & Cynthia Bowman Eds.), Available at SSRN: <https://ssrn.com/abstract=3258616> (at 421)

³⁰ *Id.*

³¹ Bonita, B. (2005). Different Space, Same Place? Feminist Perspectives on Contracts in Cyberspace. In Feminist Perspectives on Contract Law. Glasshouse Press.

³² Hunter, R. (2013). Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legal Theory. In The Ashgate Research Companion to Feminist Legal Theory. Routledge.

³³ Peter, G. (1996). Gender and Contracts. In Feminist perspectives on the foundational subjects of law. Cavendish Publishing.

³⁴ Keren, H. Feminism and Contract Law (2018). Research Handbook on Feminist Jurisprudence (Elgar, Robin West & Cynthia Bowman Eds.), Available at SSRN: <https://ssrn.com/abstract=3258616> (at 416)

³⁵ Cressy, D. (1977). Literacy in Seventeenth-Century England: More evidence. Journal of Interdisciplinary History, 8(1), 141. <https://doi.org/10.2307/202599> (at 146)

³⁶ Keren, H. (2005). Textual Harassment: A New Historicist Reappraisal of the Parol Evidence Rule with Gender in Mind. In Journal of Gender, Social Policy & the Law.

³⁷ Thredy, L. (1999). Feminists and Contract Doctrine. (at 1250)

behind the court's decision exemplifies how contract law tends to downplay or disregard the economic value of women's domestic work. By labeling women's domestic work as either less valuable or entirely gratuitous, the contract law diminishes its importance compared to men's economic work.³⁸ Consequently, women's contributions in the domestic sphere and sacrifices made for the family are undervalued, leading to the reinforcement of gender bias and structural discrimination in the legal framework.

The similar tendency can also be observed in a more recent duress case *Holyoake v Candy* [2017] EWHC 3397. In determining the lawfulness of a loan agreement, the court refused to reckon an emotional duress made by the defendant who threatened that "you need to think about your pregnant wife" and that he would "feel terrible if anything were to go wrong during the pregnancy for her or the baby".³⁹ By categorizing this statement as a mere "reference, however ill-judged and insensitive,"⁴⁰ the court failed to consider the contextual situation in which the defendant made the statement. The emotional burden that the claimant, as a family-caring husband, felt was overlooked. This case once again highlights the persistence of an economic-emotional hierarchy within the legal system.

With the embedded hierarchy in contract law, women often find themselves in a helpless position and may even perceive a sense of cold-blooded hostility from the legal system. This becomes evident in some cases when conflicting reasoning is applied by the courts to justify results that are unfavorable to the women parties.

An illustrative case, *Saunders v Anglia Building Society* [1971] AC 1004, exemplifies this biased treatment. In this case, a 78-year-old widow was deceived by a fraudster into signing away her leasehold interest in her house, as the fraudster said it was a deed of gift for her nephew. When the court examined whether this contract is of a nature entirely different from what the signor meant to execute, its focus seemed solely on the equivalence of the economic outcome. However, in doing so, the court seemingly brushed aside the relational concern and genuine purpose of the widow behind the agreement, which was intended as a heartfelt gift for her nephew.

³⁸ Keren, Hila, *Feminism and Contract Law* (2018). *Research Handbook on Feminist Jurisprudence* (Elgar, Robin West & Cynthia Bowman Eds.), Available at SSRN: <https://ssrn.com/abstract=3258616> (at 410)

³⁹ *Holyoake v Candy* [2017] EWHC 3397 at [225]

⁴⁰ *Id.* at [233]

More intriguingly, right from the outset, the court denied the widow's capacity to exercise her judicial judgment by making a comment, while without any solid evidence proof, suggesting that she "at the nephew's instigation, began an action".⁴¹ However, despite this initial doubt about her ability to act independently, the court paradoxically went on to impose a high and stringent standard of care on the widow to understand and sign the document. In doing so, the court refused to consider the possibility of uninformed consent given by the widow due to her *perceived* incapacity to make independent judgments. These contradictory and biased reasonings shed further light on the gender bias ingrained within contract law, perpetuating the unfavorable position of women within the existing legal framework.

Persistent Challenges: Subtle Biases in Modern Contract Law

The case laws in earlier times demonstrated how the contract law exhibited overt and direct discrimination against women. While in modern times, the differentiation between men and women is rather subtle and sophisticated.⁴² Nevertheless, women still do not enjoy equal protection under contract compared to men, and initiating a defense to protect their rights proves to be a more challenging endeavor.

State-level efforts have been made to enhance the protection of contracting parties and address discrimination in contractual relationships through a series of legislation.⁴³ However, it is essential to note that among these legislations, only the Equality Act 2010 directly targets sex equality, albeit with a limited scope focused on gender discrimination in the workplace.⁴⁴ Further, even if the state-level legislation might manage to exclude express gender discrimination provisions in the contracts,⁴⁵ it is evident that the state-level legislation alone is not sufficient to address the broader structural gender bias that influences contractual relationships and economic opportunities for women. A clear indication of this inadequacy would be the enduring gender pay gap, which serves as compelling evidence of the ineffectiveness of existing legislation for structural discrimination in practical application.⁴⁶

⁴¹ *Saunders v Anglia Building Society* [1971] AC 1004 at 1005

⁴² *Id.*

⁴³ Examples include the Unfair Contract Terms Act 1977, Equality Act 2010, and the Consumer Rights Act 2015.

⁴⁴ Chapter 3 of Equality Act 2010

⁴⁵ s70 of Equality Act 2010

⁴⁶ New Economics Foundation. (2020, March 3). Why gender pay inequality is a structural issue.

<https://neweconomics.org/2019/04/why-gender-pay-inequality-is-a-structural-issue>

Further, women find it even more challenging to access legal protection when gender bias presents in a subtle way. The primary legal ground for women seeking protection is sex discrimination within contracts. However, businesses and retailers now get used to employing tricky tactics to rationalize their implicit gender discrimination by using other commercial justifications. A prime example of this is the practice of gender pricing, where retailers charge women more than men for similar products. Instead of directly attributing higher prices to gender factor, the popular justification used by the retailers is to claim higher production costs, which allows them to avoid being categorized as gender discrimination.⁴⁷ This tactic often deters women consumers from seeking legal redress due to the heavy burden of proof involved, and therefore most cases of gender-based discriminatory practices go unchallenged, perpetuating inequalities in the market.

From a pessimistic perspective, the prevailing hostility within the legal framework towards contextual considerations is unlikely to undergo significant change in the foreseeable future. In simpler terms, there is still a long road ahead before women's reality can be acknowledged and recognized by contract law. Adding to the challenges, the prevalent use of standard-form contracts further disadvantages women. These one-sided standardized agreements offer limited room for negotiation,⁴⁸ leading women to often find themselves unintentionally accepting the differential treatment by silence. The gender-biased rules and the inertia of gender norms, without correction from reversing authorities in case law, will continue to be perpetuated under the doctrine of precedent in the common law.⁴⁹ This "repeated performance" can only be altered through the exceptional efforts of judges, which are rather unlikely given their recent reluctance to intervene in women's private contractual dealings for public policy reasons.⁵⁰

Conclusion

In conclusion, this essay sheds light on the struggles and challenges women encounter in contractual relationships, which are perpetuated by enduring societal expectations and the associated economic disadvantages faced by women. Despite the significance of these issues, the predominant focus of contract law on certainty and objectivity often disregards

⁴⁷ BBC News. (2016). The battle over the gender price gap. BBC News. <https://www.bbc.com/news/magazine-35486308>

⁴⁸ Larry A. DiMatteo & Blake D. Morant. (2010). Contracts in Context and Contracts as Context, 45 Wake Forest L. Rev. 549 at 556

⁴⁹ Mulcahy, L. (2005). The Limitations of Love and Altruism. In *Feminist Perspectives on Contract Law* (pp. 13–32). Glasshouse Press. <https://doi.org/10.4324/9781843146094-3> at 2

⁵⁰ *ARB v IVF Hammersmith and R* [2018] EWCA Civ 2803

these gender-based contextual factors, leading to the marginalization of women's perspectives and experiences. Consequently, the legal system reinforces a gender hierarchy, perpetuating male-dominated standards and sustaining inequalities.

To achieve genuine gender equality in the legal system, it is crucial to acknowledge and recognize the unique realities and struggles faced by women under structural biases and gendered norms. Therefore, this essay strongly advocates for greater attention to be given to the subtle gender biases and disparities that can arise in contemporary contracting practices. Without addressing these issues, true equality for women within the legal framework will remain elusive.

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