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# Contract's Meaning and the Histories of Classical Contract Law

Anat Rosenberg

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Résumé de l'article

Cet article soutient que l'histoire des contrats du XIXe siècle fut impliquée dans la création d'un artefact historique discutable : le développement d'une seule et unique interprétation du contrat à une époque décisive pour le développement du droit contractuel moderne, un développement intimement liée à l'individualisme atomistique.

Cet article retrace la façon dont ce consensus se développa à l'écart de réels débats, en dépit d'importantes controverses opposant plusieurs écoles de pensée historiques du droit contractuel du XIXe siècle. Pour ce faire, l'article résume de manière critique plusieurs exemples du droit des contrats du XIXe siècle à nos jours. L'article débute avec une brève excursion littéraire afin de démontrer qu'il existe de bonnes raisons de douter que le consensus soit justifié. Une version individualiste mais relationnelle du contrat était dominante dans le réalisme littéraire de l'époque victorienne, l'un des principaux sites culturels de l'« Ère du contrat », rendant problématique la théorie d'une unique signification du contrat.

Le consensus créé par l'histoire des contrats influence la pensée actuelle puisqu'il concerne l'interprétation des contrats et explore les effets constitutifs du droit sur la conscience sociale. Cet article met à nu le consensus afin qu'il puisse être reconsidéré.

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McGill Law Journal — Revue de droit de McGill

# CONTRACT'S MEANING AND THE HISTORIES OF CLASSICAL CONTRACT LAW

*Anat Rosenberg**

This paper argues that histories of nineteenth-century contract have been implicated in the creation of a questionable historical artifact: the story of a single meaning of contract at the decisive era for modern contract law's development, a story intimately tied with atomistic individualism.

The paper traces how the consensus has been built and kept beyond debate despite significant controversies engaging rival historical schools of nineteenth-century contract law. It does so by critically synthesizing multiple accounts of contract law, produced from the nineteenth century to our own days. It opens, however, with a brief literary excursion in order to show that there is good reason to view the consensus as unwarranted. An individualist but relational version of contract was dominant in Victorian literary realism, one of the central cultural sites of the "Age of Contract", problematizing the story of a single meaning of contract.

The consensus created by contract histories bears implications for present thought as it negotiates visions of contract, and as it explores law's constitutive effects on social consciousness. This paper lays the consensus open so that we can let go of it.

Cet article soutient que l'histoire des contrats du XIXe siècle fut impliquée dans la création d'un artefact historique discutable : le développement d'une seule et unique interprétation du contrat à une époque décisive pour le développement du droit contractuel moderne, un développement intimement liée à l'individualisme atomistique.

Cet article retrace la façon dont ce consensus se développa à l'écart de réels débats, en dépit d'importantes controverses opposant plusieurs écoles de pensée historiques du droit contractuel du XIXe siècle. Pour ce faire, l'article résume de manière critique plusieurs exemples du droit des contrats du XIXe siècle à nos jours. L'article débute avec une brève excursion littéraire afin de démontrer qu'il existe de bonnes raisons de douter que le consensus soit justifié. Une version individualiste mais relationnelle du contrat était dominante dans le réalisme littéraire de l'époque victorienne, l'un des principaux sites culturels de l'« Ère du contrat », rendant problématique la théorie d'une unique signification du contrat.

Le consensus créé par l'histoire des contrats influence la pensée actuelle puisqu'il concerne l'interprétation des contrats et explore les effets constitutifs du droit sur la conscience sociale. Cet article met à nu le consensus afin qu'il puisse être reconsidéré.

* Radzyner School of Law, Interdisciplinary Center (IDC) Herzliya. For invaluable discussions I am grateful to Roy Kreitner. For financial support I am grateful to the Sacher Institute for Legislative Research and Comparative Law at the Hebrew University of Jerusalem.

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Introduction 167

**I. What Did Contract Mean in Victorian Culture? A Literary Excursion Away from Metanarratives** 168

**II. Classical Contract Law** 176

*A. Individualism in Contract Histories* 176

*B. Individualistic Bias in Contract* 177

1. General: The Classical Model of Contract 177
2. Conceptual Tendencies in Classical Contract Law 178
3. The Promising Individual 181

**III. Classical Contract's Others: Status and Collectivism** 184

*A. Status and Contract* 184

1. From Status to Contract 184
2. Status Still Here 185

*B. Collectivism and Contract* 188

1. Collectivism as Historical Trend 189
   - *a. General* 189
   - *b. Conceptual Tendencies in Contract Law* 189
   - *c. The Promising Individual* 191
2. Assessing the Limits of the Collectivist Impact 192
3. Collectivism as Conceptual Alternative: Internal Critique 195

**IV. Individualism as Culture** 196

*A. Individualism Around Contract* 197

1. Context 197
2. Challenges to the Historical Narrative 199
   - *a. Causality* 199
   - *b. Periodization* 200
   - *c. Contradiction/Complexity* 201

*B. Collectivism Around Contract* 202

Conclusion 205


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## Introduction

If you were inclined to search for ghosts in legal scholarship, classical contract law would be a promising start: a historical construct holding present legal thought firmly in its grip. This paper argues that contract histories themselves have been implicated in the continual, and unwarranted, grip of the classical construct.

Contract histories have secured the dominance of classical contract by effectively uniting on a questionable story made up of the following narrative strands: Classical contract law embodied a specific version of individualism; that version, in its idealist articulation, treated contract as an act of the will of an autonomous, economically rational individual. The "fall" of contract was not, for many decades, a *conceptual* fall. Why not? Because the available "social" alternatives—status and collectivism—functioned as Others, eroding contract in practice without substituting its meaning. And so contract retained its conceptual relation to individualism throughout the century. The individualism of contract law, furthermore, was of broad cultural resonance. Taken together, the narrative strands suggest that law's atomistic version of individualism in contract was the only one available in the nineteenth century. At the decisive era for modern contract law's development, these histories tell us, contract meant but one thing, and individualism in contract meant but one thing.

The historical debate is heated on virtually all other questions: the explanation for contract law's individualist bias; how old this individualism is (here positions range along a timeline of some six hundred years); and, closely related, what were the minimal features which made any particular constellation of contract rules, doctrines, or theoretical rationalizations distinctively individualistic. It is possibly the breadth of these debates that renders the picture of classical contract law so obvious and its individualism so dominant. Just below the heat of debates, the story of a single individualistic meaning of contract serves as common ground. A hotly contested field has managed to produce an uncontested historical consciousness.

This paper traces how the consensus has been built and kept beyond debate in contract histories, by critically synthesizing multiple accounts of nineteenth-century contract law, produced from the nineteenth century to our own days. While the narrative strands making up the consensus—those of individualism, status, collectivism, and the broader culture—are all too familiar, their effect in grounding a shared consciousness concerning contract's historical meaning has not been adequately grasped.

I open, however, with a brief literary excursion in order to show, at the outset, that there is good reason to view the consensus among historians as unwarranted. An individualist but relational version of contract was dominant in Victorian literary realism, one of the central cultural sites of

the "Age of Contract". The literary outlook clarifies that there was more than one version of contract, and more than one version of individualism going around. This basic insight should put readers in a critical position for the review of histories that follows.

* * *

Part I introduces the broad historical and conceptual pattern of status–individualism–collectivism that has engaged contract histories for over a century now. It argues, suggestively, that canonic novels often embraced a relational meaning of contract, one unheeded by the status–individualism–collectivism axis, and so offers good reason to doubt the current historical consciousness.

The following Parts then show how histories have grounded the unspoken consensus. Part II discusses classical contract law (individualism); Part III discusses status and collectivism. Parts II and III together recount contract's stable link with a specific version of individualism as it emerges from contract histories. Part IV reviews discussions of the wider cultural terrain of the nineteenth century; here histories reveal assumptions about the broad cultural resonance of contract law's individualism. In reviewing discussions of the cultural terrain *after* having reviewed legal developments, I reverse the standard story in which "context" or "background" come first, in an effort to flesh out the nontrivial connection made by historians between the individualism of contract law and broader cultural mores.

I conclude by discussing the normative implications of the consensus about a single historical meaning of contract and its individualism.

## I. What Did Contract Mean in Victorian Culture? A Literary Excursion Away from Metanarratives

Contract histories have for a long time conversed with two metanarratives of the nineteenth century. One metanarrative is the liberation of the individual from inhibiting social locations—from the categories of status. In this story, contract rose to prominence at the Victorian era as a conceptual alternative to status, a story memorably captured in Henry Maine's aphorism, "from status to contract."[1] Less celebratory versions view the development not as progress, or view the displacement of status as only partially, tenuously, or questionably achieved, but otherwise agree on the conceptual conflict at hand: status versus contract.

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1 Sir Henry James Sumner Maine, *Ancient Law* (London: JM Dent, 1917) at 100.

The "contract" of this narrative bears a specific and too-familiar idealist meaning, that of the classical legacy: an act of a socially disembedded[2] private individual will, a notion reliant upon a view of the contracting individual as an autonomous agent acting within a distinct sphere of economic rationality—the market.

A second metanarrative is the rise of the welfare state, or the move from individualism to collectivism. In this story, contract, as the preferred mode for determining social relations, rose with individualism and sank with collectivism. Here, too, there are alternative versions. One version doubts whether any effective socialization was achieved through these changes, at least from the narrow perspective of contract. Another version questions the linearity of change (first individualism, then collectivism) and suggests a messier story. But the conceptual opposition of individualism versus collectivism, in which contract is associated with the former, remains intact.

Combined, the entire move of the nineteenth century is sometimes described as *status–contract–status*:[3] communally based definitions of social relations are superseded by individually defined ones, and then revert back again. Whether the story is one of progress and decline, vice versa, or just an amalgam of normative visions competing for dominance, the conceptual picture emerging from histories is of status and collectivism as the two historical Others of the classical view of contract, each entrenched in a commanding narrative of the nineteenth century. The Otherness of status and collectivism arises from their conceptualization as alternatives *to*, not *of*, contract, a conceptualization which preserved contract's meaning even as it threatened its normative appeal and operative relevance.

The individualism of contract law, though emerging from histories as virtually hegemonic, was in fact just a version—one possible interpretation—of promissory relations, even among liberals.

This Part aims to cast doubt on the story of contract carrying but one culturally embraced individualist meaning, and so place readers in a critical position from which to observe the consensus among historians. This Part argues that a culturally dominant individualist version of contract, one significantly different from that identified by contract histories, and

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2 For more on the use of this term, see e.g. Zygmunt Bauman, "Foreword" in *Liquid Modernity* (Cambridge: Polity, 2000); see also *ibid* ch 1 at 16ff.

3 See e.g. Roscoe Pound, "The End of Law as Developed in Juristic Thought (Part 2)" (1917) 30:3 Harv L Rev 201 at 219–21 [Pound, "End of Law 2"]; Robert W Gordon, "*Britton v. Turner*: A Signpost on the Crooked Road to 'Freedom' in the Employment Contract" in Douglas G Baird, ed, *Contract Stories* (New York: Foundation, 2007) 186 (a critical account of the status–contract–status narrative).

disruptive of the status–individualism–collectivism conceptual axis, was available in at least one central site of Victorian social thought: canonic realist novels.

* * *

Realist novels shared with legal thought an ardent attempt to imagine and represent a new social order, one problematizing the older order of status; to make sense of a world which, as Raymond Williams put it, "had no new forms, no significant moments, until these were made and given by direct human actions."[4] Novels, like law, recognized their age as the age of contract, and are well known for their fascination with promissory relations. Promises were central to novels as stories, but no less importantly as plot hinges, as links, as figures for representing, imagining, exploring, and constructing their world; promises in novels were conspicuous, multiple, and diverse.

The legal and novelistic attempts to construe a new world were part of their shared liberal commitments. Novels, no less than law, have been recognized and assessed by historians as part of the rise of individualism. The best-known reference is probably Ian Watt, who explained the rise of the realist novel against the economic, political, and ideological rise of individualism, in which, Watt noted, the idea of contract was central.[5] Analyses have confirmed and reconfirmed the relation from various directions in a series of claims about the Victorian novel as supporter of bourgeois ideology, as the middle class art par excellence, or, beyond class relations, generally as naturalizer of a capitalistic social order and promoter of individualistic values, at times lumping novels and law together in the discussion.[6]

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4 *The English Novel: From Dickens to Lawrence* (New York: Oxford University Press, 1970) at 11.

5 *The Rise of the Novel: Studies in Defoe, Richardson and Fielding* (Berkeley: University of California Press, 1957) at 63–64.

6 See e.g. Franco Moretti, *The Way of the World: The* Bildungsroman *in European Culture*, translated by Albert Sbragia (London: Verso, 2000) (discussing the English novel's tendency, together with law, to legitimate the established order); Daniel Cottom, *Social Figures: George Eliot, Social History, and Literary Representation* (Minneapolis: University of Minnesota Press, 1987) (arguing that the realist novel was one of the major forms of the rational representation of a universal order, which was in fact a projection of the newly dominant English middle class); Leo Bersani, *A Future for Astyanax: Character and Desire in Literature* (Boston: Little, Brown, 1976) ch 2 (arguing that the psychological readability of characters in novels served to guarantee the established social order); Deidre Shauna Lynch, *The Economy of Character: Novels, Market Culture, and the Business of Inner Meaning* (Chicago: University of Chicago Press, 1998) (arguing that nineteenth-century literature individuated citizens and at the same time purveyed assurances about human homogeneity, and was thus involved in the transition to

And yet, novelistic individualism was often not the same one found in law, and, unlike the alternatives usually recognized in contract histories (status and collectivism), that individualism served to differently conceive contract itself rather than to signal its displacement. Contract in novels carried a different, if individualistic, meaning.

In novelistic discourse, contract was often construed not as abstract individual willing, a means for individuals to assert themselves and overcome social controls, but as a concrete relationship within a web of relationships, a paradigm of interdependence, entailing limits as well as freedoms, and compromise as much as self-assertion. This outlook reversed many of the basic features associated with the classical system of meaning. Its deep structure, however, can be sufficiently explicated for the purposes of this paper by attending to its construction of the promising individual. For, just like the legal conceptualization of contract, the novelistic one was directly related to that human picture.

How did novels, famed for their celebration of individual character, psychological depth, and personal uniqueness, construe individuality? As the discussion below suggests, individuals in novels were, more often than not, *insistently relational beings*, a construction salient in promissory contexts. Unlike the socially disembedded, rational, contracting person of law, the novelistic contracting individual was incomprehensible and in-

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middle class hegemony); Irene Tucker, "What Maisie Promised: Realism, Liberalism and the Ends of Contract" (1998) 11:2 Yale Journal of Criticism 335 (arguing that the realist novel functions as a cultural instrument by which the rationalization of contingency takes place, thus enabling the agency of subjects with limited knowledge and control and sustaining the idea of autonomy, somewhat like contract); Patrick Brantlinger, *Fictions of State: Culture and Credit in Britain, 1694–1994* (Ithaca: Cornell University Press, 1996) at 146 (arguing that novels, even when critical of the social evils of capitalism, underwrite the naturalness and stability of the social realm); Linda M Shires, "The Aesthetics of the Victorian Novel: Form, Subjectivity, Ideology" in Deidre David, ed, *The Cambridge Companion to the Victorian Novel* (Cambridge: Cambridge University Press, 2001) 61 ("the [realist novel's] hero or heroine is molded to the bourgeois ideal of the rational man or woman of virtue" at 65); Joseph W Childers, "Industrial Culture and the Victorian Novel" in Deidre David, ed, *The Cambridge Companion to the Victorian Novel* (Cambridge: Cambridge University Press, 2001) 77 ("a neat separation of industrialism and the novel is nearly impossible. ... Each looked to the other for models of effecting and controlling as well as understanding change" at 77–78); WJ Harvey, *Character and the Novel* (Ithaca: Cornell University Press, 1965) at 24:

> One of the few Marxist generalizations about literature to hold up reasonably well when put to the test of detailed historical examination is the thesis that the development of the novel is intimately connected with the growth of the bourgeoisie in a modern capitalist system. From this social process derive the assumptions and values we may conveniently if crudely lump together as liberalism.

significant outside her[7] relationships. To be sure, that person was individualized: she could not be reduced to group identities, and was not entirely preceded by status-like determinations, or even by relative power positions. In other words, this person was not an instantiation of a status-based outlook or of a collectivist sensibility. And yet, the novelistic contracting individual was a social creature who could not be stripped off of her relationships; she became a self through and in them. This conception, though not exclusive in canonic novels, was dominant and distinct enough to cast significant doubt on the picture of a single meaning of contract, and of individualism, emerging from contract histories.

What follows is one example of a novelistic construction of a promising individual, from George Eliot's *Middlemarch* (1871–72),[8] often considered an epitome of Victorian individualism.[9]

* * *

Recall Tertius Lydgate, a young surgeon nurturing ambitions to develop a modern medical practice. He marries Middlemarch's local beauty, Rosamond Vincy, expecting nuptial bliss to conform to his professional aspirations. Idealism, however, soon meets reality. Lydgate is unable to repay the many loans taken for furnishing the newlyweds' home, and wants to cut expenditures. To his frustration, Rosamond reveals ideas of her own (or rather, of her home-make) and refuses to cooperate. As creditors begin to collect the couple's furniture, Lydgate is offered a loan by the town's banker, Bulstrode. Bulstrode offers the loan to secure Lydgate's loyalty: Lydgate tends a patient who threatens to expose devastating secrets from Bulstrode's past. Bulstrode then kills the patient.[10] The secrets are of course soon revealed, and Lydgate is implicated in suspicions of murder. Rosamond fails to support him. He is finally saved and sadly reconciled to a mediocre career and a cold marriage.

Lydgate is one of a number of *Middlemarch* protagonists encountering an unaccommodating social and interpersonal reality to which they painfully adjust. This plotline, centred on the meanings of individuality and

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7 The female pronoun might seem awkward for readers sensitive to the grave limitations on women's contractual capacities in the nineteenth century, and familiar with feminist critiques of classical contract law. My usage is both a way of re-evoking those critiques and a reminder of the role, complex yet inevitable, that women did play in contract, which feminist historians have recovered.

8 George Eliot, *Middlemarch*, ed by David Carroll (Oxford: Oxford University Press, 1996).

9 See e.g. Calvin Bedient, *Architects of the Self: George Eliot, D.H. Lawrence, and E.M. Forster* (Berkeley: University of California Press, 1972) ch 1, 3.

10 I am oversimplifying a complex plot in which the killing itself is a matter of changing medical practices.

the possibilities of agency, has been influential in *Middlemarch*'s evaluation as a liberal text.

The process of adjustment in Lydgate's story, as in other plots, is importantly grounded in contractual stories. These work symbolically as the axis along which Lydgate comes to terms with historical, social, and, foremost, relational contexts. The pressure of the contract serves the narrative in constructing identity through a set of collapsing idealizations, with self-reflexive modalities gradually replaced by a full recognition of otherness and its constitutive power for selfhood. Put otherwise, contracts' primary work in *Middlemarch* is a formal one, bringing individuals into contact with the world around them, thus breaking the isolation of processes experienced in wholly internal terms.[11] As contracts do so, they produce—in readers as much as within the plot—a consciousness of differences between persons, and, in consequence, an appreciation of the constant compromises which the very fact of relational, interdependent existence demands. Consider the main turns contributing to this outlook.

Three basic stages inform Lydgate's contract-based process of adjustment. At the point of contract formation (initial loans), complacent Lydgate adopts a vision of the ideal marriage in full compatibility with his professional aspirations: "[H]aving been accepted [by Rosamond], he was prepared to accept all the consequences which he believed himself to foresee with perfect clearness. ... [O]ther schemes would not be hindered: they would simply adjust themselves anew."[12] He is wrong: not only is Rosamond not the submissive, supportive figure he imagines, but his professional aspirations too are self-reflexive and overlook the suspicions of a small community accustomed to traditional medical practice.[13]

Moving along the axis, as the contract becomes a burden, Lydgate comes to recognize something of the reality of his non-ideal wife and non-indulgent community. Yet at this stage he strives to preserve the larger ideal vision of his life and so falls into alternative forms of idealization. He begins to see Rosamond as a different kind of creature so that he might

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11 Contracts' formal function is often supported by the content of promissory plots; in Lydgate's story, promissory interaction between himself and Rosamond is a case in point—they are stories of contest and explicit compromise. Content alone, however, does not capture the force of the relational conception in *Middlemarch*.

12 Eliot, *supra* note 8 at 326–27.

13 Note that Lydgate's initial disposition is not a representation of a socially disembedded, abstract individual mode, but an aspect of his social conditioning. Lydgate, of aristocratic background, "walked by hereditary habit" (*ibid* at 327)—his social context explains his disposition. If this initial conditioning is status-like and ties Lydgate with generic class traits, the process of adjustment is individualized and depends upon concrete relational settings.

still accept her: "[I]t was inevitable that in that excusing mood he should think of her as if she were an animal of *another and feebler species*."[14] He reframes his career as removed from the more petty business of everyday life: "[B]y the bedside of patients the direct external calls on his judgment and sympathies brought the added impulse needed to draw him *out of himself*."[15]

At the third and final stage, when the contractual obligation overwhelms Lydgate, he can no longer resist the reality of his wife, nor escape the disappointment in his career. At this stage, the plot ties Lydgate's professional performance with his domestic trouble, again through a contractual story—the loan from Bulstrode, which brings both his marriage and his professional standing to a near breaking point. The plot emerges in a sadly realistic adjustment on all fronts, with Lydgate appreciating his marriage, his career, and himself in different lights.

Lydgate's contract works in the plot as a figurative site of change, appearing at the height of a tension always and already existing between subjective conceptions and social and historical reality, and between self and other. The existence of individuals in *Middlemarch* is defined through these points of limit and adjustment, "the double change of self and beholder."[16] The contracting person in this novel is not stable and given at any moment; she is in a constant state of relational *becoming*. Rather than extensions of the individual—ways to improve and expand her scope of self-determination—promises are figures for her obstacles, anxieties, and limitations. Through the process of compromise, in which both difference and interdependence become clear, *Middlemarch* investigates different modes of relating to others, moving from ignorant (and egocentric) idealism, through partial acknowledgement, to full appreciation of the reality of others, which, in this novel, is both factually and morally inescapable. Marginally, observe that the contracting individual's economic rationality, a conceptual construction dependent upon her basic self-sufficiency, is entirely foreign to *Middlemarch*'s vision.[17] Contract, we might conclude, bears a meaning deeply at odds with the atomistic version.

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14 *Ibid* at 628 [emphasis added].

15 *Ibid* [emphasis added].

16 *Ibid* at 88.

17 The question of economic rationality is part of the construction of the ideal market. For a detailed examination of novelistic and legal views of the market, see Anat Rosenberg, "Separate Spheres Revisited: On the Frameworks of Interdisciplinarity and Constructions of the Market" (2012) 24:3 Law & Literature 393 [Rosenberg, "Separate Spheres"].

Why has this view of contract and the contracting individual escaped contract historians? One answer is disciplinary boundaries, but, while important, it is the easy one. The more complex problem lies in the individualizing mode involved in relational outlooks like that of *Middlemarch*. The main problem here, a legacy of Marxist criticism, is the distinction between class, or similarly broad (and relatively rigid) social locations, and concrete relationships underlying *Middlemarch*'s idea of contract. The latter are not truly "social" from the perspective of radical critique, but rather are the mark of individuality discovered or evolved through experience.[18] For critiques concerned with abstraction from class divisions, the distinction between relational modes and the fully isolated idea of the autonomous individual is all but misleading given the suppression of class conflict in both and, thus, suppression of the essence of political struggle.[19] This viewpoint likewise informs liberal histories in which the individual/social binary serves as a core analytic tool. But the distinction between constructions of individualism like that of *Middlemarch* and that identified by contract histories, while indeed within rather than outside liberalism, is important for a critical re-evaluation of those histories.[20]

* * *

Liberal sites of social thought did not accept a single meaning of contract; canonic novels' interpretation of individualism often parted ways with the story grounded by contract histories. The meanings of contract and individualism were subjected to divergent, if liberal, interpretations.

With this basic insight as background, the following Parts ask how contract histories have managed to agree on contract's meaning in the nineteenth century, a consensus which has so far been too transparent, despite the familiarity of its building blocks.

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18 See e.g. Cottom, *supra* note 6 at 70.

19 For a more general articulation of this position with respect to the experience of public life in industrial society, see e.g. Richard Sennett, *The Fall of Public Man* (New York: Vintage, 1976); Herbert Marcuse, "The Affirmative Character of Culture" in *Negations: Essays in Critical Theory*, translated by Jeremy J Shapiro (Boston: Beacon Press, 1968) 88 at 98 (arguing that the concept of the person in bourgeois culture is an idealist disregard of social conflicts and conventions, and charging classical literature since Shakespeare with affirming the ideal, producing in its representations of individual interaction the counterimage of what occurs in social reality).

20 The point is easily grasped today, after decades of relational contract theory as well as relational individualism. It has remained, however, oddly irrelevant to nineteenth-century contract histories, a point I discuss in my conclusion.

## II. Classical Contract Law[21]

*Undisputed Point #1*: Classical contract law embodied a specific version of individualism. This Part first clarifies the meaning of "individualism" in historical accounts of contract law. I then review and refocus histories of contract law to elaborate on its content. While the consensus traced in the next two Parts may be less obvious to readers, the story of this Part has been told many times over; I thus recount only its core elements, while focusing on the underlying human picture: the promising individual in the market.

### *A. Individualism in Contract Histories*

Writers time and again relate classical contract thought of the nineteenth century to "individualism", and they do so in different ways. Some writers discuss basic ideals underlying individualism, such as contract's commitment to negative liberty (Steven Lukes' "autonomy"[22]); others refer to specific doctrines of individualism, like the economic individualism of the market;[23] still others refer to patterns of human behaviour and consciousness, like the calculating promisor.[24]

The point of convergence among the various writers—the underlying concern in the varied uses of "individualism"—is an ideational construct:

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[21] The discussion covers histories which have dealt with various aspects of nineteenth-century contract law, like case law, theory, and, more broadly, legal thought or consciousness. I thus refer interchangeably to "law", "legal discourse", or "legal thought".

I focus primarily on the law in England. However, these origins have been crucial for American contract law as well and are examined by its historians.

The term "classical" is prone to different uses. For example, Atiyah focuses on a theory he interchangeably calls "will theory" and "classical theory", which emerged by 1830 (PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) [Atiyah, *Rise and Fall*]). Kennedy and Kreitner refer to "classical theory" as a way to distinguish it from pre-classical thought, and argue that it rose in the last three or four decades of the century (Duncan Kennedy, *The Rise & Fall of Classical Legal Thought* (Washington, DC: Beard, 2006) [Kennedy, *Rise & Fall*]; Roy Kreitner, *Calculating Promises: The Emergence of Modern American Contract Doctrine* (Stanford: Stanford University Press, 2007)). The difference emanates from the extent to which the expulsion of relations from contract, rather than just increasing focus on the will, is perceived as crucial. Given my interest in the final result, on which these and other historians generally agree, I treat the move from the will theory to the classical formulation as a process of intensification, and use the terms interchangeably.

[22] *Individualism* (Oxford: Basil Blackwell, 1973) ch 7–11.

[23] For an elaboration of the doctrines, see *ibid* at 79–92, 140–41.

[24] For an account set in terms of the ethics of human interaction and patterns of behaviour, see Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89:8 Harv L Rev 1685 at 1717–18, 1738 [Kennedy, "Form and Substance"].

a picture of the social order at the centre of which lies a sphere of "free" competitive economic activity conducted by autonomous individuals who are rational maximizers of economic interest. This notion is surrounded by corresponding conceptions about the roles of politics (not necessarily laissez-faire, but tending to view government economic activity as "interventionist", and channeling it to encourage individual competition and self-reliance) and the judiciary (viewed as a protector of rights, the goal being to ensure mutual respect of rights among individuals and, thus, adequate spaces for self-realization). The diverse accounts of classical contract law all suggest, from different angles, that contract law assumed and reinforced this liberal world view, which for brevity's sake I call the atomistic view.

### *B. Individualistic Bias in Contract*

Classical contract law's structures and rationalizations were closely tied to the atomistic view, histories show.[25] The following account notes the salient features making up the tie. As it weaves different histories into a single account, it adopts the emphases of specific historians on specific points, which might not be conceded by others. In dealing with historical details this is unavoidable, yet should not obscure the main argument: the end result—namely, the picture of contract—enjoys a wide consensus even if not every detail of how and when law got there does.

#### 1. General: The Classical Model of Contract

> As every contract derives its effect from the intention of the parties, that intention, as expressed or inferred, must be the ground and principle of every decision respecting its operation and extent, and the grand object of consideration in every question with regard to its construction.[26]

Such was Pothier's classic formulation of the will theory of contract, the basis of the English formulation of the theory.[27]

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[25] Not necessarily in a causal relationship, as Part IV will clarify below.

[26] M Pothier, *A Treatise on the Law of Obligations, or Contracts*, translated by William David Evans, 3d ed (Philadephia: Robert H Small, 1853) vol 2, ch 5 at 30–31, cited in AWB Simpson, "Innovation in Nineteenth Century Contract Law" in *Legal Theory and Legal History: Essays on the Common Law* (London: Hambledon Press, 1987) 171 at 190 [Simpson, "Innovation"].

[27] See Simpson, "Innovation", *supra* note 26; Atiyah, *Rise and Fall*, *supra* note 21 at 399–400; DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999) at 222.

As classical contract doctrine gave meaning to this formulation, a specific picture of the contractual relation emerged: The relation represented a meeting point between two individuals with separate interests. Each of them was a person able to choose for herself, who rationally chose that which could best serve her own economic interest. The meeting point was achieved through the exercise of each person's will. That exercise, or the moment of formation, was the core of the analysis, which proceeded by assuming its exclusive meaningfulness. Importantly, the discourse of rights and duties—seeking to describe what one party need or need not do for the other, and to what that party is or is not entitled from the other—relied on the distinction and even opposition between the parties before, at, and after formation, focusing attention on each in isolation rather than on the fact of their relation. The same discourse relied on the isolation of both parties from a broader social environment. Their contract belonged to a separate economic sphere ideally composed of such persons and the relationships they in fact choose, and of nothing else. This picture, finally, was of general applicability, ideally representing any and every contract.

### 2. Conceptual Tendencies in Classical Contract Law

A number of points are widely viewed as central to contract law's individualism. Most generally, the will theory brought about a tendency to attribute all the consequences of a contract to the will of those who made it. Thus, for instance, restrictions of capacity existed because some persons lacked free will; "duress [was] the overbearing of the will, undue influence its subversion; ... mistake meant that the wills of the parties had miscarried; the measure of damages was defined by the will of the parties with respect to the extent of liability"; and so forth.[28] The source of liability was the promise, whatever else happened before or after it was made; and it was to be equally protected in all cases through the expectation measure.

Contract law thus became abstract. Its doctrines seemed "to describe phenomena in a manner one step removed from concrete particulars of the persons and subject matters appearing in the cases."[29] Abstraction is

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[28] Kennedy, "Form and Substance", *supra* note 24 at 1730 (the list appears there). See also Atiyah, *Rise and Fall*, *supra* note 21 at 405, 435; Ibbetson, *supra* note 27 at 221–42; Duncan Kennedy, "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form'" (2000) 100:1 Colum L Rev 94 at 115 [Kennedy, "From Will Theory"]; Roscoe Pound, "The Role of the Will in Law" (1954) 68:1 Harv L Rev 1 at 4–7 [Pound, "Role of the Will"]; Samuel Williston, "Freedom of Contract" (1921) 6:4 Cornell LQ 365 at 370–71; John P Dawson, "Economic Duress: An Essay in Perspective" (1947) 45:3 Mich L Rev 235.

[29] Christopher T Wonnell, "The Abstract Character of Contract Law" (1990) 22:3 Conn L Rev 437 at 438. See also Lawrence M Friedman, *Contract Law in America: A Social and Economic Case Study* (Madison: University of Wisconsin Press, 1965) at 20; Atiyah,

often contrasted with an older view of contract as a status-like relationship, which treated different types of contracts (landlord and tenant, master and servant, principal and agent, and so forth) on different terms. At the core of the nineteenth-century opposition between status and contract was a contrast between the mandatory terms of the status relation—prescribed by law or custom according to the parties' social roles—and the freely chosen content of the contractual relation. Abstract law was limited to specifying the general conditions under which individually willed content would be enforceable.[30]

Closely related was a tendency to reify contract—to treat it as a thing intentionally made by the parties.[31] The nineteenth century gave rise to the rules of offer and acceptance, determining how a contract was made.[32] Once reified, contract, and more specifically the moment of formation, could be an independent source of rights and duties, a definitive point of reference for the entire relationship. The effect was the bounding-off of the contractual relation from the more extensive and boundless relationships that surround it.[33]

The free choice of the parties was almost beyond challenge. Contractual rights were conceived as absolute, and thus a person was not accountable for the reasons for her contractual choices. The approach was also reflected in a severe attitude to changed circumstances between formation and the time of performance: very little scope was allowed for adjustment of the parties' rights and duties.[34]

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*Rise and Fall*, *supra* note 21 at 402; Donal Nolan, "The Classical Legacy and Modern English Contract Law", Book review of *Good Faith and Fault in Contract Law* by Jack Beatson & Daniel Friedmann, eds, (1996) 59:4 Mod L Rev 603 at 614–15.

30 See Atiyah, *Rise and Fall*, *supra* note 21 at 400; "Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort", Note, (1980) 93:7 Harv L Rev 1510 (probably written by John T Nockleby); Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974) at 6–8; Gordon, *supra* note 3 at 208.

31 The executory model of contract—the paradigm case of the will theory—was tied with the idea of a thing created by will. The introduction of rules of set-off between parties strengthened reification by pointing to the "net" sum representing the value of the contract-as-thing (Ibbetson, *supra* note 27 at 216–17).

32 See Atiyah, *Rise and Fall*, *supra* note 21 at 446.

33 On contract's "limitedness" or "bordered relationship", see Arthur Allen Leff, "Contract as Thing" (1970) 19:2 Am U L Rev 131 at 138; Nolan, *supra* note 29 at 604.

34 See Atiyah, *Rise and Fall*, *supra* note 21 at 405–54; Gilmore, *supra* note 30 at 14–15. For an account of the philosophical justification for dismissing subjective motives, see also Alan Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (Berkeley: University of California Press, 1995) at 128–29, 134–35.

The flipside of the absoluteness of contractual rights was the idea that no duty arises before a binding contract is entered into, which is again explained in terms of the intentional basis of contract.[35] The absence of pre-contractual duties and the absoluteness of contractual rights focused the contractual outlook on the moment of formation as the crucial point in contract, both contributing to and emanating from contract's reification.

In the classical era, a narrow formulation of excuses held sway. This narrow formulation suffers from a potential internal contradiction, for the ideal of the absolutely free will seems to justify a liberal interpretation of excuses if these represent cases of defective assent, or unfree will. The formulation of excuses, however, was in line with individualism.[36] Indeed, and more broadly, historians have repeatedly explained logical incoherencies in the classical model's commitment to the abstraction of free will by viewing them as victories of the individualist commitment to the ideal market over the subjectivist legacy embedded in the will theory.[37]

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[35] See Kennedy, *Rise & Fall*, *supra* note 21 at 227–28; Kennedy, "Form and Substance", *supra* note 24; Gilmore, *supra* note 30 at 14.

[36] Some accounts explain the tie in terms of the intertwining of freedom in contract with the ideal market (Thomas L Haskell, "Capitalism and the Origins of the Humanitarian Sensibility, Part 2" in Thomas Bender, ed, *The Antislavery Debate: Capitalism and Abolitionism as a Problem in Historical Interpretation* (Berkeley: University of California Press, 1992) 136 at 138; Dawson, *supra* note 28 at 266; Atiyah, *Rise and Fall*, *supra* note 21 at 402–03). Others refer to the basic individualistic position, which seeks to enlarge the sphere in which a person may act in a self-interested fashion. The contraction of the initial liability in contract (its limitation to intention) leaves greater areas for people to behave in a self-interested fashion, but liberal rules of excuse oblige the promisee to share the losses of the promisor who is unable to perform (Kennedy, "Form and Substance", *supra* note 17 at 1735). Narrow excuses were also part of the limited sphere for pre-contractual duties and reinforced the idea of absolute contractual rights, for excuses were a route into subjective motivations undermining the objective fact of an agreement. Finally, a narrow formulation of excuses was part of the reluctance to concretize.

[37] See Robert B Seidman, "Contract Law, the Free Market, and State Intervention: A Jurisprudential Perspective" (1973) 7:4 Journal of Economic Issues 553 at 555; Friedman, *supra* note 29 ("the law of contract was the legal reflection of that market and naturally took on its characteristics" at 22); Atiyah, *Rise and Fall*, *supra* note 21 at 435–37 (arguing that the model was based on the free market bargaining process); Melvin A Eisenberg, "Why There Is No Law of Relational Contracts" (2000) 94:3 Nw UL Rev 805 ("classical contract law rejected principles of unfairness, which typically ... have little application to contracts made between strangers on perfect markets" at 808).

One major tension in the model was between "freedom" and enforcement, explained in terms of the model's ultimate commitment to market security. For commentary, see e.g. Betty Mensch, "Freedom of Contract as Ideology", Book Review of *The Rise and Fall of Freedom of Contract* by PS Atiyah, (1981) 33:4 Stan L Rev 753; Mark Pettit Jr, "Freedom, Freedom of Contract, and the 'Rise and Fall'" (1999) 79:2 BUL Rev 263; RB Ferguson, "Commercial Expectations and the Guarantee of the Law: Sales Transactions in Mid-Nineteenth Century England" in GR Rubin & David Sugarman, eds, *Law,*

The picture of the market is at the heart of historians' assessments of the classical legacy. The same is true for the image of the human agent acting through contract in the market. I now turn to that person.

### 3. The Promising Individual

Classical contract thought, histories show, established a view of a choosing individual: an abstract, self-sufficient person, who, when contracting, is rationally self-interested. Lukes explains: the abstract individual is a self pictured abstractly as given, with given interests, wants, purposes, needs, and so forth. The crucial point is that the relevant features of individuals, which determine the ends that social arrangements are held to fulfill (whether these features are called instincts, faculties, needs, desires, or rights), are assumed as given, independent of social context.[38] Charles Taylor critiques givenness as a vision of self-sufficiency: in this vision, individuals can develop their human capacities independently of society; the development of rationality, or becoming a fully responsible and autonomous being, can somehow be achieved outside society.[39]

This individual was at the heart of law, histories show. Classical contract law took free choice, epitomized in the idea of promise, as the basis for its entire analytic structure, to the exclusion of other sources of obligations. The idea of individual choice as a necessary and sufficient principle assumed a promisor who did not require society in order to become a meaningfully choosing person. Being self-sufficient, the promisor knew her own interest best. Being self-sufficient, she did not, at least not by definition, owe any duties except those she first chose to owe to her promisee. She preceded society in terms of significance and conceptual structure.[40]

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*Economy and Society, 1750–1914: Essays in the History of English Law* (Abingdon, UK: Professional, 1984) 192.

Another tension was between the notion of "will" and objectivism adopted by courts, likewise explained in terms of law's promotion of market rationality. See e.g. Atiyah, *Rise and Fall*, *supra* note 21 at 459–60 (offering as explanation the avoidance of factual inquiries and mistakes), Morton J Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass: Harvard University Press, 1977) at 26 (suggesting promotion of uniformity and predictability); Gilmore, *supra* note 30 at 44–45 (suggesting imposition of absolute liability in contract and limiting the range of excuses); Kennedy, *Rise & Fall*, *supra* note 21 at 239–40 (explaining objectivism as the limitation of judicial policing of contract through this pseudo-scientific measure of protecting reliance).

[38] See Lukes, *supra* note 22 at 73–78.

[39] *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985) at 189–90.

[40] For one historicization of the epistemological shifts enabling this outlook, see Craig Muldrew, *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England* (Basingstoke, UK: Palgrave, 1998) at 328–32.

The notion of self-sufficiency bears a close relation to the opposition between self and society, in which the social is pictured as a threat to individual development. In this, the vision of individuality in classical contract mirrored the private/public (or state/civil society) distinction. The distinction was part of contract law's construction of separate-spheres ideology, a conceptual investment in the market as a free realm of economic pursuit.[41]

The model of contract, centred as it was on the primacy of the individual will, emerged in the nineteenth-century rearrangement of areas of law. Law which represented the involvement of communal will, like tort, status, and quasi-contract, was banished from the contractual zone; contract rules were rationalized through the notion of individual will; and remaining rules incommensurate with the vision of contract were conceptualized as exceptions, counterprinciples detached from the operative sources of contract.[42] As the central tool of market exchange, contract's basis in individual will bolstered the vision of the self-regulating market: that market began with the premise of a sphere in which the state was somehow uninvolved.[43]

The second building block of the individual, her economic rationality, mirrored a second aspect of separate-spheres thought: the family/market distinction. This distinction connotes separations *within* civil society, between market and non-market (yet "private") forms of association. The separation within civil society—variously formulated as market versus home, business versus family, exchange versus gift economy, and so forth—imports a basic contrast in both norms of conduct and structure: rational, calculating, self-interested action based on abstract freedom and formal equality within the market is contrasted with altruistic, fluid, compassionate action in an often more dependent and hierarchical context within the family.

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41 The private/public distinction ran through every level of doctrine: Kennedy, "From Will Theory", *supra* note 28 at 107. For the historical evolution of this idea, see Kennedy, *Rise & Fall*, *supra* note 21; Seidman, *supra* note 37 at 554–56.

42 For an elaborate study of the process, see Kennedy, *Rise & Fall*, *supra* note 21. See also Kreitner, *supra* note 21 (discussing consideration doctrine's role in the creation of separate spheres). For a detailed discussion, see Rosenberg, "Separate Spheres", *supra* note 17.

43 See Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1957) at 71. On the state/civil society separation, see Frances E Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96:7 Harv L Rev 1497 at 1501; GR Searle, *Morality and the Market in Victorian Britain* (Oxford: Clarendon Press, 1998) ch 11 (a distinct role for the state as a disinterested source of authority unaffected by commercial considerations functioned as a balance for the market); Joseph William Singer, "Legal Realism Now", Book Review of *Legal Realism at Yale, 1927–1960* by Laura Kalman, (1988) 76:2 Cal L Rev 465 at 477–82.

Historians find the distinction in classical law. Legal rules expressed, as Roberto Unger puts it, a "reluctance to allow contract law to intrude ... upon the world of family and friendship, ... [and] destroy their ... communal quality."[44] The distinction between market and family not only protected the communal quality of the latter, but injected content into the former: action in the market was not just private, but self-interested and rational.[45] Assessments thus expose a sophisticated ideological structure: while the separation between public and private spheres created the market as a free realm of private interaction, the one between market and non-market private relationships rendered it economically rational. Contract law marginalized relations that were not individually chosen and shaped, as well as relations that did not adhere to strict rationality and a rigid allocation of rights and duties, sustaining a view of a compartmentalized social life. When contracting, the individual is calculating and calculable, a person with a market consciousness, Kreitner summarizes.[46]

The historical picture emerges in an idealized contracting party characterized by extreme atomism. The parties need not discuss or agree on ends or values; they can achieve complex interdependence in production

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[44] Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, Mass: Harvard University Press, 1986) at 62–66.

[45] Consider the non-enforceability of promises to make gifts, for example, a rule within consideration doctrine reversing the enforceability of promises outside contexts of exchange. The rule expresses the inappropriateness of contract to contexts in which gifts are given. But why? One answer is that unreciprocated transfers raise the spectre of economically irrational social transactions, which the legal vision of the market denied (see Kreitner, *supra* note 21). Atiyah explains that liberality or beneficence (which are the grounds for a gift) were considered a good cause but not sufficient consideration. Atiyah, however, does not discuss the constructive effect on views of the market emerging from this distinction, but rather seems to think that consideration was gradually stripped of any important role in contract law (*Rise and Fall*, *supra* note 21 at 451–52). Note that leaving gifts outside contract did not entail only a conceptual separation between market and non-market relationships, but one which made family and friends inferior contestants in fact when they happened to compete with market creditors. See WR Cornish & G de N Clark, *Law and Society in England, 1750–1950* (London: Sweet & Maxwell, 1989) at 207–08. For further discussion see Rosenberg, "Separate Spheres", *supra* note 17.

[46] Kreitner, *supra* note 21 at 228–35. Note that Kreitner distinguishes theory from case law. For an argument distinguishing legal ideology from judicial discourse in the English context, see RB Ferguson, "The Horwitz Thesis and Common Law Discourse in England" (1983) 3:1 Oxford J Legal Stud 34. The possibility that case law complicated theory and so also the overall vision of classical law seems plausible; the main aspects of this theory are covered in the discussion below of status and collectivist influences on contract.

and consumption without acknowledging any interdependence as moral beings.[47]

## III. Classical Contract's Others: Status and Collectivism

Contract histories have long acknowledged that classical contract law was never a clean analytical structure, nor an exclusive ideological construct. This Part reviews histories of classical law's Others: status and collectivism, the two "social" alternatives to classical law's individualism.

Histories of contract's Others, while diverse in many ways, establish these points of agreement. *Undisputed Point #2*: The conceptual alternatives to classical contract in the nineteenth century were, predominantly, status and collectivism. *Undisputed Point #3*: In the nineteenth century these alternatives did not represent alternative meanings *of* contract, but alternatives *to* contract; hence they did not challenge contract's meaning.

The consensus I trace here may be less obvious to readers than that treated in the previous Part; it emerges from a complex field of historical inquiry usually conceived as revealing the fall or failure of classical law, rather than its solidification. To make things more complex still, historians have treated status and collectivism both as external and as internal critiques of contract.

The following discussion clarifies how the consensus emerges. If the two points above are conceded by historians (that is, if status and collectivism were the two conceptual alternatives to classical contract and did not challenge its meaning during the nineteenth century), histories speaking to these points effectively identify one kind of individualism in contract (the alternatives were something else than individualism) and allow that this one individualism was the only thing considered *contractual* in the nineteenth century, at least in its latter part—after the classical construct had been firmly established. Together, these points speak to the persistent conceptual link between contract and individualism traced in the previous Part; this link is an unappreciated contribution of histories interested in the force of status and collectivism.

### *A. Status and Contract*

#### 1. From Status to Contract

The classical model of contract, recall, established a distinction between status and contract. Contract represented a set of freely chosen,

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[47] See Kennedy, "Form and Substance", *supra* note 24 at 1767–71.

self-imposed obligations of abstract individuals, unlike status, which represented obligations imposed without an individual's consent, tied instead to a social position.[48] Kennedy explains the change in the operation of status categories in contract law: first, status came to exist as the opposite of rights in the abstract, rather than the medium for the organization of rights in the particular; second, the elements composing particular statuses were fragmented and dispersed, rather than treated as the elements of operative wholes.[49] Both of these developments, Kennedy argues, were influenced by, and appeared to confirm, Maine's generalization.

Indeed, the analytical distinction in legal thinking between status and contract often emerges from history as an echo of a wider socio-political implication: contract's meaning as "not status" was part of Victorians' search for an alternative system to traditional hierarchies,[50] the readiest mode, as Dicey put it, of "abolishing a whole body of antiquated institutions."[51] Maine's aphorism invoked contract as a proxy for the refined (and progressive) essence of the nineteenth-century social reality of industrialization and the market.[52] I will return to the relation of contract to a wider terrain in the next Part.

### 2. Status Still Here

The story of the classical model's triumph has been challenged by histories which identify status categories as operative sources for contractual practice and for common law at the high Victorian era. While never acknowledged conceptually, status remained, according to these histories, a challenge to the nineteenth-century idea of contract.

Thus, histories of credit contracts, a type of contract central to the socioeconomic developments of the era, show their entanglement in social relations. Margot Finn describes the experience of personal credit contracts in England from the onset of the industrial and consumer revolution to the outbreak of World War I, and claims that the autonomous in-

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48 The notion is broader than the place into which one is born; it includes the generation of rights and duties based on social role or group belonging.

49 See Kennedy, *Rise & Fall*, *supra* note 21 at 186–94. See also Singer, *supra* note 43 at 477–82 (discussing classical thought's emergence in opposition to status, which became an abnormality).

50 See Pound, "End of Law 2", *supra* note 3 at 209–10.

51 AV Dicey, *Lectures on the Relation Between Law & Public Opinion in England During the Nineteenth Century*, 2d ed (London: Macmillan, 1962) at 151. See also Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (Cambridge: Cambridge University Press, 1998) at 1 (discussing William Graham Sumner's similar understanding in the American context).

52 *Supra* note 1 at 100.

dividual model of political economics did not gain prominence and coexisted with the model of the social individual, who gained rights and responsibilities by virtue of her status and connections. Finn shows, for instance, how both tradesmen and courts confirmed differences in the social-hierarchical position of debtors in the way they handled and responded to credit contracts, and how gender identities played a role in contractual exchange. Finn's review of county court litigation reveals that judges urged the continual need to moderate legal obligations by equitable considerations, most notably those of gender and class, rather than promoting a transition from status to contract.[53] Erika Rappaport similarly depicts consumer credit's cultural role and its entanglement with social positions, both class and gender, defying the supposed rationality of the market.[54]

Employment contracts are another site in which status-like regulation never lost its grip. Thus, while, as John Orth argues, the reconceptualization of labour in terms of contract—completed by the mid–nineteenth century—was a major factor in the reorientation of the common law as a whole in the direction of contract, it was no sooner established than it began to be undermined.[55] Historians suggest that the new priority accorded to property and contract in Victorian England was qualified, as far as labour contracts were concerned, by a continuing role for status-based forms of regulation.[56]

The legal treatment of promises of marriage has also been challenged as a site of abstract contract principles answering to the classical formulation. Ginger Frost, for instance, disputes the understanding of breach-of-promise-of-marriage cases as extreme sites of the triumph of individualism and abstraction in contract. Instead, she argues, these actions demonstrated that judges, despite formalistic contractual language,

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[53] Margot C Finn, *The Character of Credit: Personal Debt in English Culture, 1740–1914* (Cambridge: Cambridge University Press, 2003).

[54] Erika Rappaport, "'A Husband and His Wife's Dresses': Consumer Credit and the Debtor Family in England, 1864–1914" in Victoria de Grazia & Ellen Furlough, eds, *The Sex of Things: Gender and Consumption in Historical Perspective* (Berkeley: University of California Press, 1996) 163.

[55] John V Orth, "Contract and the Common Law" in Harry N Scheiber, ed, *The State and Freedom of Contract* (Stanford: Stanford University Press, 1998) 44 at 62–65.

[56] *Ibid*. See also Gordon, *supra* note 3; Simon Deakin, "Legal Origin, Juridical Form and Industrialization in Historical Perspective: The Case of the Employment Contract and the Joint-Stock Company" (2009) 7:1 Socio-Economic Review 35.

brought social, gender-, and class-aware values to bear on contractual issues.[57]

Such histories, which point to social locations and social roles as relevant and operative sources for contract practice and law, expose that status had never disappeared and had remained a social alternative to the individualistic construction found in the classical model. What is the implication? From the perspective of evaluating the rise of individualism, some may be inclined to argue that individualism was slow; establishing the classical system was no easy project. Others suspect that individualism was never about the elimination of statuses, but rather a form of their covert embrace.[58]

What of contract's meaning? Observe three points. First, no alternative individualist meaning of contract can be glimpsed here—only a "return" to status.[59] Second, histories often intimate that despite status's persistence, the meaning of contract as *not*-status was triumphant; the classical construction of contract proved conceptually resilient to status-based definitions. For the most part, status was not discursively, analytically, or theoretically acknowledged as part of what contract was, even though it influenced contractual relations and informed legal responses. As my discussion of collectivism below clarifies, the issue often goes beyond a distance between books and action, or between ideology and reality. It reaches deeper, for all of these levels could and did accommodate status—only not as part of *contract*. My concern is with what could and what could not, according to available histories, be considered *contractual*. Once the classical idea of contract took hold in law, its alternatives became and remained, according to historical accounts, external to its meaning; as such, they strengthened that meaning even as they critiqued its normative appeal and eroded its practical significance. Finally, accounts often reinforce the classical meaning in their tendency to describe status in terms of an "obstacle" to contractual enforcement.[60]

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57 Ginger S Frost, *Promises Broken: Courtship, Class, and Gender in Victorian England* (Charlottesville: University of Virginia Press, 1995).

58 For a discussion of the various positions concerning the relations between liberal ideals and statuses, see Anat Rosenberg, "Entanglements: A Study of Liberal Thought in the Promise of Marriage" (2013), online: <portal.idc.ac.il/en/faculty/arosenberg/Pages/Publications.aspx> [unpublished; Rosenberg, "Entanglements"].

59 In Finn (*supra* note 53) there are findings which, if she had gone further in conceptualizing them, would make up a relational, non-atomistic liberal view of contract. Finn, however, tends to emphasize the continuing force of statuses.

60 For a critique of historical treatments that too readily accept the conceptual opposition of contract and status, see Rosenberg, "Entanglements", *supra* note 58.

### *B. Collectivism and Contract*

Collectivism, unlike status, is considered part of the "Age of Contract"; part of the story of modern contract law's evolution, rather than its rejected past. Indeed, individualism and collectivism are customarily identified as the two ideological currents that influenced contract, and modern law is repeatedly portrayed in terms of their contest.

The general tension between individualism and collectivism is a persistent point in analyses of contract on two levels. As a matter of historical account, the story of the rise and fall[61] is a dominant narrative of the nineteenth century, and legal accounts of contract converse with it. When collectivism is analyzed as a historical trend, it generally denotes historical attempts, dating from mid-century onward, to mitigate the unwanted effects of the unrestrained pursuit of self-interest, whether as part of a radical or a liberal outlook. (Given its often liberal turn, the term "collectivism" is somewhat confusing. In using it I merely trace a common practice in contract histories.) Either way, in the pursuit of its goals in contract, collectivism, according to contract histories, reacted to individualism and functioned as a palliative rather than a full-fledged alternative. References to "collectivism" in histories thus do not generally point to a consistent program, despite the positive ideals of egalitarianism and the advancement of positive freedom they identify with it.

But references to collectivism do not denote only a historical development; they also denote a conceptual possibility and ideological tendency, a possible route of action existing from the start within classical contract doctrine.[62]

Subsection 1, below, synthesizes accounts of collectivism as a historical trend to consider its assessed impact on classical contract. I briefly revisit the tenets of classical law reviewed in Part I to clarify how they changed under the collectivist impact. Subsection 2 then discusses the limited influence of collectivism on the legal conceptualization of contract, to which histories speak. Subsection 3 discusses collectivism as a conceptual possibility developed by internal critique of classical contract. The overall aim is to show how histories of collectivism in fact confirm the relation of contract and individualism in the nineteenth century.

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61 Individualism–collectivism, laissez-faire–protectionism, industrial revolution–consumer revolution, individual-based–corporate-based economy, and so forth.

62 Examples below. To get a sense of the dominance of this argument, see Brudner, *supra* note 34.

#### 1. Collectivism as Historical Trend

Unlike invocations of "individualism" in contract, which can be more or less related to identifiable commitments, "collectivism" of the late nineteenth century is treated more diversely; its uses in history invoke radical and liberal programs, as well as isolated and conceptually hazy trends. This is part of the reason for assessments of collectivism's limited impact on the meaning of contract, discussed in the next section. This section concentrates on changes in law associated with collectivism, whatever their assumed conceptual underpinnings.

Accounts treating collectivism as a historical trend generally rely on the story of change in which individualism first rose to prominence, and then (even if almost immediately) was eroded by collectivism—that is, by changes that together added up a more "interventionist", welfarist legal regime. Such, for example, was Dicey's account, later confirmed by Atiyah. Consider the impact of collectivism on contract law as it emerges from histories.

##### *a. General*

No alternative theory of contract was formulated in the nineteenth century. The impact of collectivism in contract was to be found in case law and in legislative activity.[63] But contract law's commitment to individualism was more than a lack of textbook theory. The collectivist outlook, histories show, worked against a backdrop conception of contract's meaning, the plausibility of which it little disputed.

##### *b. Conceptual Tendencies in Contract Law*

The core of contract in law remained a highly abstract description of promissory relations. However, legislative activity began to apply special rules to types of ordinary contracts (labour, corporate, consumer, etc.) on an ever-increasing scale. These were becoming, for legal thinkers, specialized bodies of law, areas in which the parties' rights and duties were understood as determined by state law, not by contract.[64]

Contract thus remained reified in legal thought as a "thing" created by the parties, capable of being analyzed in isolation. The important difference within contract was an increasing willingness to forgo the assumption of equality (or acquiescence in inequality), or, in another formulation, to forgo the assumption that parties were under all circumstances the

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[63] See Atiyah, *Rise and Fall*, *supra* note 21 at 764, 773; Subsection III.B.2, below.

[64] See Atiyah, *Rise and Fall*, *supra* note 21, ch 21.

best arbiters of their own interest, which, in classical thought, was uncontested.[65] Instead, there was an increasing willingness to protect the weaker party in the relationship from her own creation and to prevent injustice between parties. The relative power position of the parties to the promise vis-à-vis one another gradually became part of the relevant social context of contract. In addition, judicial inquiry began to consider post-formation circumstances to prevent abuses that emanate from strict adherence to literal contractual content.[66] The effect of concern about interparty justice and equality was a relaxation in the absoluteness of contractual rights: terms of contracts became more susceptible to judicial adjustment.[67] As Ibbetson notes, however, "These circumstances were never linked together as a general principle."[68]

Protection of pre-contractual reliance also became more acceptable, mitigating the individualist view that little acknowledged pre-contractual duties. Cases, however, were confused and, as Atiyah puts it, "bogged down in a mass of technicalities ... and anyhow did not adequately reflect the essential point that justifiable reliance depended on a much wider set of factors."[69] What seemed clearer was an increase in reliance-based liabilities under tort law—under something perceived as other than contract.[70]

A similar trend toward inter-party justice and equality was found in a liberalization of excuses.[71]

Attending to a party's weakness was a potential acknowledgment of individuals' interdependent existence. The collectivist outlook on contract, however, was little able to accommodate contract to its own insights; histories suggest that the parties' mutual dependence was acknowledged only to the extent that one had a power to overbear the other, whether prior to the contract's formation, using her pre-existing advantages, or after formation, relying on her contractual ones.

Similarly, parties' dependence on a larger social context was relevant only in terms of their power contest within the antagonistic contractual relation. The changes in the approach to contract were, in other words, inward-looking: they represented an effort to make contract fairer as be-

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65 See Pound, "Role of the Will", *supra* note 28 at 11–12.

66 Scrutiny of motivations also became more acceptable, but this development belongs largely to the twentieth century.

67 See Atiyah, *Rise and Fall*, *supra* note 21 at 736–37.

68 Ibbetson, *supra* note 27 at 258.

69 Atiyah, *Rise and Fall*, *supra* note 21 at 772.

70 See *ibid* at 772–74.

71 See Gilmore, *supra* note 30 at 80–81; Ibbetson, *supra* note 27 at 252.

tween the contracting parties, an effort beginning with their chosen content. A corollary point is that these changes did not undermine contract's reification. The core remained the individual choices that created the contract. The liberalization that resulted in parties—empowered or weakened by the state—achieving something less or more than they had ostensibly intended was rationalized against that core; both the consensual idea and the attendant independence of parties were maintained as cornerstones. In fact, the whole process can be seen as an attempt to restore to weaker parties the independence they appeared to have risked, to reinstate classical thought's ideal image of competitive equality, and to deliver on contract's promise of enabling each individual to assert herself.[72] The result was a limited conceptual change in contract's meaning, conceded by historians virtually without exception. I return to this point in a moment.

### c. *The Promising Individual*

The historical story of the rise of collectivism is linked with the suggestion that atomism was no longer a plausible account of the social structure. Following the establishment of the bureaucratic state and the rise of corporations, atomism lost its hold.

This development, however, could not be seen from within contract law—it did not so much affect the meaning of contract in law, or the way individuals came to owe duties under it, as it diminished contract's appeal and practical importance. The web made up of individually chosen relationships was displaced in legal thought by a structure of organizations, with individual duties assigned on an increasing scale through legislation applicable to individuals' relations with organizations.[73] Where contract was thought to exist, the idea of control through choice held sway (with greater support at the fringes); where choice was out of control—when third parties and public interest were offended by it—contract was thought to be displaced altogether.

A limited appreciation of individuals' social embeddedness within contract law was observable, as noted, in courts' increasing willingness to consider a party's weakness relative to her partner. However, by and large, when contracting, a person was assumed to be manifesting a (more or less successful) attempt at independent generation of economic plans, according to her own (more or less well-founded) perception of self-

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[72] See Harry N Scheiber, "Economic Liberty and the Modern State" in Scheiber, *supra* note 55, 122 at 123–24 (interventions were justified as necessary for bringing social realities into line with the theoretical premises of freedom of contract). See further discussion in Subsection III.B.2, below.

[73] See Atiyah, *Rise and Fall*, *supra* note 21 at 724.

interest. All that could be done was to add patches that would help the individual achieve that goal.

The ideal market in which individuals contracted thus remained a conceptually distinct sphere, but one acknowledged as less than perfect. Outside support for market failures and uninformed and weak parties became an acknowledged need. The outside was the state; in other words, the conceptual separation on the level of state and civil society remained intact, a significant point for historians' evaluation of the collectivist outlook on contract, to which I now turn.

### 2. Assessing the Limits of the Collectivist Impact

Histories that view collectivism as a historical trend imply that it bore limited importance for the meaning of contract in the nineteenth century. Nineteenth-century collectivism represents a specific stage in the historical attack on classical contract law. The important point about this stage is its second-degree or reactive quality, widely agreed upon by historians. The content of the collectivist attack was the *inappropriateness* of the regime governed by the ideal of freedom of contract. The drama of the "fall of contract" was not a dispute about the *meaning* of contract in its classical formulation, but rather a dispute about contract's desirability or workability. Collectivism acquiesced in the classical view of contract, and moved to narrow its scope; or, on another reading, moved to remedy its failures in fact. The nineteenth-century critique largely left aside the possibility that the legal regime in force did not, or did not necessarily, correspond to that required by the abstraction of free contract, and instead emphasized that freedom of contract was pernicious.[74]

The story of collectivism's limited impact on the legal conceptualization of contract appears in multiple histories. Lawrence Friedman, for example, explains the external quality of the collectivist impact as a characteristic of contract law, directly related to its coextension with the free market. Contract law, argues Friedman, sought to provide legal support for the residue of economic behaviour left unregulated—that is, for the free market. Accordingly, it was busy defining its own boundaries—what kind of transactions were and were not contractual. Contract law, as a residual category, was expanded and narrowed primarily through a process of inclusion and exclusion. By definition, therefore, no revolution could take place within it. The most dramatic changes impacting the significance of contract law in modern life, claims Friedman, came about not

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[74] See Duncan Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) 41:4 Md L Rev 563 [Kennedy, "Distributive Motives"].

through internal developments in contract law, but through developments in public policy which robbed contract of its subject matter.[75] This analysis has been confirmed over and over.[76] The process, in essence, was one in which the classical paradigm was left intact, compelling, as Unger has argued, "all other modes of thought to define themselves negatively, by contrast to it."[77]

Collectivism, historians suggest, largely failed to replace the classical view of contract; the dominant outlook influencing reform approached contract from the outside, addressing a variety of its unwanted effects. Whether collectivism's normative content was liberal or radical, its approach was external to contract.

Another lens through which this point can be viewed is the opposition between state and civil society. Contract, according to the classical view, was something belonging to civil society, or to a private sphere of action. The welfare state (or steps towards it)—the achievement of collectivism—did not challenge the opposition between state and civil society.[78] Rather, collectivism redefined state roles: the state now had, in addition to its role of legalizing private interaction, a redistributive function and a responsibility to protect individuals against severe adversity. And because the opposition between state and civil society with regard to the source of obligations remained intact—no "private/public flip"[79] had been performed as yet in legal thought—the controversy between individualism and collectivism within contract could be framed in terms of "non-intervention" and "intervention". The subject of (non-)intervention remained the same idea of contract, the debate turning on the role of the state with regard to it, most significantly with regard to inequalities in fact in contractual relations.[80]

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[75] *Supra* note 29 at 21–24.

[76] See e.g. Atiyah, *Rise and Fall*, *supra* note 21 at 714; E Allan Farnsworth, "The Past of Promise: An Historical Introduction to Contract" (1969) 69:4 Colum L Rev 576 at 604; James Gordley, "Contract, Property, and the Will: The Civil Law and Common Law Tradition" in Scheiber, *supra* note 55, 66 at 85–86.

[77] Unger, *supra* note 44 at 58. For additional accounts of the continued dominance of the classical formulation of contract, see Brudner, *supra* note 34 at 90; Nolan, *supra* note 29; Kennedy, "From Will Theory", *supra* note 28 at 162–63; Scheiber, *supra* note 72 at 124; Pettit, *supra* note 37; Ibbetson, *supra* note 27 at 245; Atiyah, *Rise and Fall*, *supra* note 21 at 686.

[78] See Olsen, *supra* note 43 at 1516.

[79] Kennedy, "From Will Theory", *supra* note 28 (coining the term).

[80] The discourse of interventionism versus non-interventionism itself functioned rhetorically to preserve the centrality of private ordering as the contractual paradigm. See Kreitner, *supra* note 21 at 164.

Collectivism, historians show, brought about changes in doctrine and in the scope of the applicability of general contract law. While little prevented collectivists from achieving the same results from “within” contract[81] and replacing the classical meaning of contract, the nineteenth-century collectivist conceptual apparatus continued to work against the essence of contract; its moves were perceived as interference with contract. The frame of mind, with respect to contract, remained intact. Changes were superimposed by a source largely understood as foreign, as *other* than contract, and otherwise worked only at its periphery, neutralized within the terminology of the will theory.

This point emerges repeatedly from historical accounts of contract, but it is too often submerged under the governing theme of the “fall of contract”. Viewed from the perspective of contract’s *meaning*, however, histories of nineteenth-century collectivism are better seen as accounts of contract’s victory, not of its fall. But this would require a different normative focus.

The rise-and-fall narrative implicitly suggests that the meaning of contract is not in itself very significant; what is significant is its fate in the world. This normative position seems to be the legacy of Eugen Ehrlich, who criticized the juristic focus on unchanging legal propositions as inhibiting appreciation of actual changes in law properly understood.[82] While contract maintained a stable meaning into the twentieth century, the legal world around it changed, arising in a different “social law”, in Ehrlich’s terms. This changing perception is the main thrust of the histories of nineteenth-century collectivism and contract law.

It would be mistaken, however, to overlook the manner of change depicted by histories as a process external to contract—to disregard the significant stability of the meaning of contract and its individualism as those emerge from contract histories. The image of contract is important both as a matter of its own history and in terms of its continued influence. It is through meaning that the ubiquitous human practice of contracting is understood, experienced, lived, and transformed.[83] And so, I ponder on the stability of contract’s meaning a little longer.

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[81] See discussion in Subsection III.B.3.

[82] *Fundamental Principles of the Sociology of Law* (Cambridge, Mass: Harvard University Press, 1936) at 397.

[83] For a similar insight from a different perspective, see Jeffrey M Lipshaw, “Contract as Meaning: An Introduction to ‘*Contract as Promise* at 30’” (2012) 45:3 Suffolk UL Rev 601.

### 3. Collectivism as Conceptual Alternative: Internal Critique

Collectivism is discussed in contract histories not just as a historical trend, but as a conceptual alternative that internal critiques of the classical model found *within* the model itself. Identifying collectivism as a conceptual possibility available within classical contract doctrine represents a second stage in the historical attack on classical contract.[84] This twentieth-century development arguably rendered obsolete the earlier debate, since the social or collective principle that nineteenth-century opponents put forward as an alternative *to* contract turns out to have been established *within* contract from the start.

Internal critique is primarily the work of legal realism and critical legal studies, which have foreclosed on the deductive aspirations and logical coherence of the classical model. Internal critique is woven into this paper: it is internal critique, for example, that points out the contradiction between will and coercion in classical contract law; it is likewise internal critique which links contract law with a specific vision of the market, rather than with any abstract concept of freedom.

The link between contract and individualism, internal critique showed, did not lie in the basic ideals which contract supposedly protected—individual will, freedom, or choice—but more concretely in choices within doctrine that could, conceptually, go the other way (collectivism) just as well. The critique thus left any account of the relation of these ideals to individualism a matter of ideological bias only; that relation was not inherent in them but rather depended on the specific way in which they were put to use in law. The private/public distinction turned out to be groundless, as contract law was shown to be a principle of social order. Contract never represented a presocial order, and, as a social order, did not have to represent an individualistic one.[85]

But all of this was not available for nineteenth-century jurists. Internal critique is an intellectual move that history finds only in the twentieth century. Contract's ability to encompass collectivist concerns within its paradigmatic core, historians argue, was not entertained by thinkers of the nineteenth century.[86]

When internal critique arrived, it confirmed the basic association of classical contract and individualism. Paradoxically, it may have strengthened it, for in showing the association to be contingent and unnecessary,

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84 See Kennedy, "Distributive Motives", *supra* note 74.

85 See Kennedy, "From Will Theory", *supra* note 28; Brudner, *supra* note 34.

86 Kennedy's histories of legal thought speak to this point: see e.g. Kennedy, "From Will Theory", *supra* note 28.

internal critique found contract to contain not just grey areas and intermediate hues, but an antagonistic ideological possibility, one perhaps too oppositional to be openly endorsed.

## IV. Individualism as Culture

I have so far focused on three points that tie together into a single assumption: contract's close and persistent tie to the atomistic view as a specific version of individualism, confirmed even as the significance of status and collectivism has occupied historians' attention. This Part turns to the fourth undisputed point. *Undisputed Point #4*: The individualism of contract law was of broad cultural resonance, falling in line with economic, political, and ideological currents of the era.

I use the term "culture" loosely to refer to these currents; any more precise a use would fail to capture the diversity of references in contract histories. My use aims to capture a simple commonality: references all invoke social sites, systems, and processes of meaning-making considered in some recognizable sense *non*-legal. The relations of all of these to law is a matter of debate: law may be reflective of, a product of, constitutive of, or part of those other sites, systems, and processes, with more or less emphasis on the unique mechanisms through which law establishes and transforms meaning in relation to non-legal sites. Historical accounts of classical law embody diverse theoretical approaches to these issues, involving differing attention to the broader cultural terrain. The important point for the purposes of this Part is the emergent sense that contract's individualism was of broad cultural resonance.[87] Histories portray, often with few words, a continuous and smooth cultural landscape, at least for nineteenth-century liberals.

The consensus here is possibly the least obvious one; this third and final Part aims to clarify it, and so to complete the argument about histories' solidification of the notion of a single historical meaning of contract. It is least obvious for, while some well-known histories have centralized the cultural context in their accounts of the individualism of classical law, many others have resisted these assessments. This Part shows, however, that these resistances have not, in fact, challenged the sense of continuity between legal and non-legal culture, from which law emerges as a phenomenon entirely consonant with a broader cultural history. Explorations of collectivism in broader culture, in the meantime, add a layer of explanation to collectivism's perceived failure to reconceptualize contract; they

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[87] I return to this question in my conclusion from a different perspective, to suggest that one effect of the current consensus among historians is to delimit understandings of law's constitutive effects on social consciousness.

thus support the same sense of continuity between the legal meaning of contract and Victorian culture in general. Having laid bare all elements of consensus, the troubling implications for legal history and theory will be explored in my conclusion.

### *A. Individualism Around Contract*

At the background of historical analyses of contract's individualism lies a picture of broadly economic, political, and ideological shifts in the nineteenth century. The broader context has been mostly elaborated by historians who consider it part of the explanation of classical contract law; but the picture is not only their work. While, as an explanation for legal developments, nineteenth-century individualism is contested, as a general backdrop it is not. I pause on controversies among historians concerning the relation between the broader context and contract law; controversies deal with questions of causality, periodization, and internal contradiction in law. These are of interest not just in themselves but because they reveal the points of consensus; even historians who attribute the legal development largely to other grounds, or are otherwise reluctant to move too quickly between law and non-legal culture, view individualism as classical contract law's receptive cultural soil.

#### 1. Context

At least since Dicey's Harvard lectures, the story of contract law's continuity with cultural mores has been common wisdom. "Nowhere," proclaimed Dicey, "have changes in popular convictions or wishes found anything like such rapid and immediate expression in alterations of the law as they have in Great Britain during the nineteenth century, and more especially during the last half thereof."[88] Dicey identified three main currents of public opinion: the first third of the nineteenth century Dicey named the period of Old Toryism or legislative quiescence; the second third of the century, the period of individualism in public opinion; the last third, the period of collectivism.

The period of individualism, argued Dicey, was in fact "Benthamism of common sense"[89] rather than strict dogma, which under the name of liberalism became the main factor in the development of English law. Dicey articulated the terms of this position. Though presumably only an idealist articulation which neither he nor anyone else thought was exclusively nor coherently at work in English culture, it was this version he took care to

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[88] *Supra* note 51 at 7.

[89] *Ibid* at 170.

expound: Benthamite liberals looked upon humanity as separate persons, each of whom must by her own efforts work out her happiness and well-being. They held that the prosperity of a community means nothing more that the prosperity or welfare of the whole, or of the majority of its members. From 1832 onward, claimed Dicey, the supremacy of individualism was for many years incontestable and patent; conservatives were as much imbued with individualism as were Whigs or liberals. From Benthamite principles, English individualists had in practice deduced a corollary—that the law ought to extend the sphere and enforce the obligation of contract; such extension was conceived as an extension of individual liberty, for contract itself was understood as an expression of individual wishes.

An affirmation of the tie between developments in contract law and the expansion of contractual freedom, on the one hand, and individualism in culture, on the other, is famously found in Atiyah's *The Rise and Fall of Freedom of Contract*.[90] Atiyah refers to individualism rooted in or given impetus primarily by utilitarianism and classical political economy, and emphasizes the relation of legal ideas to economic thought, though he does argue that individualism was asserted as a moral value throughout the nineteenth century. The new individualistic ideas of the utilitarians and political economists came to have a pronounced effect on the law from 1830, with the idea of freedom of contract seizing hold of legal thought.[91] The basic premise, again, was that individuals knew their own interests best, and were concerned with maximizing their wealth or happiness. In the economic sphere, the emphasis was on the role of the choosing individual at the centre of the free market. Other historians have likewise identified individualistic doctrines and mores echoed in contract law.[92]

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[90] *Supra* note 21; see also PS Atiyah, *An Introduction to The Law of Contract*, 5th ed (Oxford: Clarendon Press, 1995) ch 1. Atiyah also criticizes Dicey's historical account (*Rise and Fall*, *supra* note 21 at 231–37, 326, 479). The controversy, however, centres on the role of government, while Dicey and Atiyah share much in common concerning the legal view of contract. Somewhat similarly to Atiyah, Morton Horwitz's classic thesis links the change in contract thought in the nineteenth century to the rise of the market economy and to the service of commercial interests. Horwitz concentrates on American law, but attributes the change to England as well (*supra* note 37, ch 5).

[91] Atiyah, *Rise and Fall*, *supra* note 21 at 368–69. For the problematics of periodization, see *supra* note 21.

[92] See e.g. Gilmore, *supra* note 30 at 96 (viewing the rise and fall of the general theory of contract and of laissez-faire economics as "remote reflections of the transition from nineteenth century individualism to the welfare state and beyond," while also offering "specifically legal ... factors," like the distrust of the civil jury); Williston, *supra* note 28 at 366 (connecting, on the one hand, freedom of contract and various doctrines of individual freedom, and, on the other hand, the social philosophy that called for the greatest individual freedom and development). Peter Gabel and Jay Feinman also argue that classical law in the United States was an ideological apparatus that must be grasped in

A somewhat different account of individualism and classical contract began interestingly with individualism outside contract but not outside the law: it began with the individualist conception of justice at common law. Roscoe Pound described the evolution from antiquity of the idea of the end, or purpose, of law, pronouncing the culmination of the process in the nineteenth-century "thoroughly individualist" theory of law.[93] This theory rested on the conception of justice as the securing of maximum individual self-assertion, with law having the purely negative function of removing obstacles to self-assertion. Utilitarianism arrived, according to Pound, when individualist ideas were already firmly fixed, and in fact took its (unnecessary) individualist turn from the earlier individualist tradition, reinforced by classical economics and post–French Revolution politics. This individualist conception of justice, suggested Pound, led to an exaggerated importance of property and contract, a preference for private over public right, and an antagonism toward legislation.[94] Individualism at the common law, on this account, influenced both ideology outside the law and the area of contract law.

### 2. Challenges to the Historical Narrative

The story of the period of individualism in culture and its relation to classical law has been challenged. The troubling point is that the challenges end up reinforcing, or at least leaving undisputed, the sense of a cultural background of individualism of the kind found in contract law.

#### a. *Causality*

One important challenge has been directed at the causal explanation behind the cultural story. James Gordley argues that the will theories of contract arose as a response to an intellectual crisis within the legal discipline, namely the fall of the Aristotelian philosophical tradition. However, Gordley concedes that the will theory corresponded with, and even gave

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the socio-economic context that it legitimated. Gabel and Feinman make explicit the idea of a legal "translation" of broader cultural dynamics when they argue that lawyers "associated themselves emotionally and intellectually with the new socioeconomic order and expressed in their professional activities the individualistic nature of the new system of human relationships" ("Contract Law as Ideology" in David Kairys, ed, *The Politics of Law: A Progressive Critique*, 3d ed (New York: Basic, 1998) 497 at 501).

93 "End of Law 2", *supra* note 3 at 204.

94 See Roscoe Pound, "The End of Law as Developed in Juristic Thought (Part 1)" (1914) 27:3 Harv L Rev 195; Pound, "End of Law 2", *supra* note 3; Roscoe Pound, "Liberty of Contract" (1909) 18:7 Yale LJ 454.

credibility to, prevalent individualistic notions.[95] Philip Hamburger also argues that economic liberalism played a very limited role in shaping contract theory. Consensus theory specifically, he suggests, was selectively adopted by common lawyers from natural law and civilian ideas, and was gradually assimilated into common law. Hamburger agrees, however, that economic liberalism was compatible with the English version of contract theory, and may have encouraged it and rendered it appealing.[96]

To the extent that the story of individualism as culture is a liberal functionalist history, critical history has challenged it by allowing a measure of autonomy to legal thought itself, thus complicating causal explanations and making room for law's indeterminacy. Duncan Kennedy's history of classical legal thought focuses on the internal structures of legal consciousness, viewed as a device mediating the contradictions of experience. What contradictions? Most broadly, the conflicting pull, and relevance, of individualism and altruism, autonomy and community, or, as Gordon has put it elsewhere, "the fundamental contradiction between the needs for fusion and for individuality."[97] While Kennedy veers away from the "background" story,[98] his focus on the conceptual forms of legal consciousness offers highly elaborate accounts of historical human experience as played out in legal thought, accounts both of the individualism established at the core of contract law, and of its conceptual (altruist) alternative. The individualism of classical contract, it turns out, represented a contingent arrangement of the pieces of a contradictory existence. The point to note, from my perspective, is that the account remains silent about the possibility of other arrangements of experience actually available to historical agents. And so, one is left primarily with a sense of the conceptual pieces which were available for arrangement in historical consciousness, among them one ideal version of individualism.

### *b. Periodization*

Objections centred on periodization suggest that it is a misunderstanding to represent the changes in nineteenth-century contract law—particularly the executory contract model at its base—as a new phenomenon. Thus Simpson explained the change in the nineteenth century pri-

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95 *Supra* note 76 at 83. See also James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991).

96 Philip A Hamburger, "The Development of the Nineteenth-Century Consensus Theory of Contract" (1989) 7:2 LHR 241.

97 Robert W Gordon, "Critical Legal Histories" (1984) 36:1 Stan L Rev 57 at 114.

98 He only commits incidentally to not denying the importance of "ideologies like laissez-faire, nor of concrete economic interests" (*Rise and Fall*, *supra* note 21 at 2).

marily in the production of systematic treatises relying on Continental writers who assimilated Roman sources. Baker too finds the executory model in earlier periods; Hamburger points to the early roots of consensus theory; and Ibbetson proclaims the idea of contractual liability rooted in voluntary intentional acts as having been familiar to common lawyers for at least "half a millennium."[99] None of these histories, however, contest the suggestion that the formulation of contract law and its rising importance as the centre of private law in the nineteenth century bore the marks of individualistic cultural mores, and some expressly concede it.[100]

#### c. *Contradiction/Complexity*

Cornish and Clark offer a critique of a different kind, one returning to internal contradictions in law. They emphasize the underplayed principles of nineteenth-century equity rules, which offered a competing ideology to the common law's individualism. Chancery evolved a view of contract which emphasized dependence and took a broader view of the contractual relationship, seeking to encourage trust and fairness in bargains and to protect the weak and unfortunate. This outlook was associated with the older world of status—with landed property and familial alliance. The authors admit, however, that equity's outlook did not pose a threat to the hegemony of common law individualism, which, again, was everywhere apparent: it was only toward the end of the century that any serious challenge was made to the "ideals on which the greatest nation of the

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[99] JH Baker, Book Review of *The Rise and Fall of Freedom of Contract* by PS Atiyah, (1980) 43:4 Mod L Rev 467; Hamburger, *supra* note 96; Ibbetson, *supra* note 27 at 232 (agreeing that the greater depth and weight given to the idea of the will was a nineteenth-century novelty).

[100] The rejection of executory contract and will theories as a nineteenth- or late eighteenth-century transformation was elaborated by Simpson in his critique of the Horwitz thesis. Simpson did not, however, touch upon the relation of culture to the reception of, perhaps, older ideas in this period, and their formulation under the will theory of contract (AWB Simpson, "The Horwitz Thesis and the History of Contracts" (1979) 46:3 U Chicago L Rev 533; Simpson, "Innovation", *supra* note 26). From Simpson's review of Atiyah's *Rise and Fall*, it appears he would not deny the relation of a culture of individualism to contract legal thought, at least in terms of emphasis, and he agrees that "philanthropy" or paternalism eroded the significance of private contract (AWB Simpson, "Contract: The Twitching Corpse" in *Legal Theory and Legal History: Essays on the Common Law* (London: Hambledon Press, 1987) 321 at 332). Maitland and Montague confirm the general argument of "nothing new" in claiming that in nineteenth-century contract law, "more [had] been done to codify existing law than to introduce new principles." They suggest, however, that contract law gained in importance by a vast expansion of business (Frederic W Maitland & Francis C Montague, *A Sketch of English Legal History*, ed by James F Colby (New York: GP Putnam's Sons, 1915) ch 8 at 182).

nineteenth century had been built." It was only then that equity had to be sharply curtailed.[101]

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The golden age of contract in law, histories suggest, was in line with, if not a result of, nineteenth-century individualism. Whether a historical continuity, coincidence, or innovation, the individualism of classical contract law emerges from dominant contract histories as one in tune with nineteenth-century culture in general.

Likely, no historian would resist the suggestion of cultural complexity, of contradictory or alternative interpretations of contract and of individualism in contract, certainly not after the cultural turn of the last few decades. Contract histories, however, have not only left this issue little explored and little conceptualized; they have somewhat inadvertently secured the opposite notion of cultural homogeneity. Having been preoccupied with a host of other questions involved in classical contract history—contrasting it with its status and collectivist Others, determining causality and periodization, and making sense of internal legal complexity—histories have left one thing undisputed: the notion of a virtually hegemonic idea of contract, and individualism in contract, in Victorian culture, in law, and beyond it.

### *B. Collectivism Around Contract*

Historians who view collectivism as a historical trend relate it to broader changes in the political, economic, and ideological scene. This Subsection reviews some accounts. I then consider how accounts of collectivism contain within them explanations for the collectivist failure to reconceive contract, despite the transformative effects collectivism had on nineteenth-century law as a whole. My purpose is neither to provide a comprehensive account of available explanations, nor to evaluate them; rather, my aim is to offer a sense that the collectivist failure to reconceive contract is a phenomenon which, like individualism, emerges from histories as something rooted in the deep currents of the nineteenth century, reinforcing the story of contract law's continuity with broader mores.

Dicey identified roughly the last third of the nineteenth century as the period of collectivism in public opinion. The period was characterized, according to Dicey, by intellectual attacks on individualism, a waning belief in general maxims, and underlying conditions that stressed collective action and diminished the importance of individual effort. The practical corollary of the rise of collectivism was a demand for restrictions on freedom

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[101] See Cornish & Clark, *supra* note 45 at 226.

of contract. Unequal bargaining power and problems of monopoly and externalities called for paternalistic intervention in contractual freedom.[102]

Atiyah similarly locates the beginnings of the collectivist trend in contract law in the last third of the nineteenth century, and elaborates on many of Dicey's underlying factors. The trend, according to Atiyah, was largely attributable to the rise of a consumer society with a prospering working class, the growth of the corporate society, the expansion of democracy, and the establishment of a vast governmental bureaucracy. All of these were correlated with conceptual changes. Conceptions of positive freedom, a more benevolent meaning of the state following the Reform Act of 1867, shifting notions of responsibility (from individuals to their social environment), and the egalitarian ideal—all made the classical model seem less and less adequate. Attempts were accordingly made to restore concrete equality or to provide a substitute at the expense of abstract freedom of contract.[103]

But historians all concede that the processes were external to contract. Why were they so? Why did contract retain its link to individualism? Prominent in analyses of the effects of collectivism on contract law is an argument that "real" collectivism in contract appeared only in the twentieth century.[104] Until then, collectivist influences did not offer an alternative reading of social relations; individualism reigned supreme. Collectivism's proponents did make efforts, according to some historians, to articulate philosophical and economic underpinnings.[105] But, by and large, those who took an interest in social issues, historians observe, had been in search of ways of adapting and conditioning the known world of private

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[102] Dicey, *supra* note 51.

[103] See Atiyah, *Rise and Fall*, *supra* note 21 at 582–86, 627–33. See also Pound, "Role of the Will", *supra* note 28 at 14–15.

[104] See Ibbetson, *supra* note 27, ch 13 (arguing that "real" collectivism arrived only toward the end of the twentieth century, and only then an argument emerged that perhaps principles of substantive fairness underlay contractual liability); Cornish & Clark, *supra* note 45 at 112–13 (arguing for the liberal turn and individual-based commitments of collectivism, with Marxian influences awaiting another twenty to thirty years); Scheiber, *supra* note 72 at 125 (noting the involvement of English liberals in important "interventionist" legislation); Richard A Epstein, "Contracts Small and Contract Large: Contract Law Through the Lens of Laissez-Faire" in FH Buckley, ed, *The Fall and Rise of Freedom of Contract* (Durham: Duke University Press, 1999) 25 (claiming that nineteenth-century collectivist changes were not inconsistent with laissez-faire); Eric A Posner, "The Decline of Formality in Contract Law" in *ibid* at 61 (supporting Epstein's analysis).

[105] See e.g. Cornish & Clark, *supra* note 45. These authors reject the view of collectivism as an un-theorized sentiment, as expressed by Dicey. Polanyi, too, famously viewed collectivism as a spontaneous and varied response to the rise of the market: see *infra* note 108 and accompanying text.

property and free contract, and were at least suspicious of any dramatic breach with that present. Collectivism is sometimes even reduced to a form of apologetics. Searle, for one, reads nineteenth-century paternalism as in fact the other side of the same coin—namely, the preservation of the market and liberalism as the sole source of meaning.[106]

Furthermore, Cornish and Clark read the Judicature Acts of 1873–1875, merging the common law courts with the court of Chancery, as the triumph of individualistic common law principles over the competing values of equity, and the next seventy-five years or so as the unequivocal ideological control of common law ideas in contract adjudication. They suggest that case law was consolidating its individualist ideology precisely because of the sensed threat of a collectivist government expressing itself through legislation. Collectivist legislation, in this account, was not part of the general rules governing contract, at least not until the mid–twentieth century.[107] It thus failed to transform contract, and even prompted its consolidation.

An encompassing explanation lies in the broader context of the conflict. The critique of individualism in contract law was closely associated with the critique of the market; the broader struggle was not about contract law, but about market society. Collectivism was a reaction to the market, and contract in this larger picture was but one aspect. Rather than redefine it, collectivism placed limits on contract which were part of the greater protective effort. Within this process, the almost automatic assumption that contract "belonged" to market individualism remained intact.[108]

The stability of contract's conceptualization in dominant legal discourse, these various accounts suggest, emanated from the *what* and *why* of nineteenth-century collectivism itself. Taken together with the broad consensus about individualism in culture, contract law appears to have been, quite simply, part of its own epoch—one of the many sites of social thought which added up to a sweeping cultural wave.

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[106] *Supra* note 43, ch 11.

[107] See Cornish & Clark, *supra* note 45 at 200–26.

[108] Polanyi argues that "[t]he great variety of forms in which the 'collectivist' counter-movement appeared was not due to any preference for socialism or nationalism on the part of concerted interests, but exclusively to the broader range of the vital social interests affected by the expanding market mechanism" (*supra* note 43 at 145). The idea of a broader conflict in which contract is but a proxy for the larger question of a social order also seems to fit with Dicey's and Atiyah's accounts.

## Conclusion

Histories show that classical contract was individualistic (*Undisputed Point #1*), that the social alternatives were status and collectivism (*Undisputed Point #2*), which remained external possibilities, and ideological antagonists, until well into the twentieth century if not ever since (*Undisputed Point #3*), and suggest, or do not dispute, that law's version of individualism was in tandem with the individualism of its age (*Undisputed Point #4*). And the concord of opinion here, or at least lack of disagreement, is so overwhelming in a field of heated discussion that it must be either a certainty or a triviality—but it is neither.

In conclusion, note at least two nontrivial effects of this broad agreement. First, the effect of agreement is a historical picture in which individualism in contract could mean but one thing: social relations based on a socially disembedded individuality in a rational economic sphere, at least as an approximate ideal. This picture closes off the possibility that other versions of contract—and, in particular, other versions of individualism in contract—were around. The question is one which is never asked.

As suggested in the first Part of this paper, an elaborate alternative, centred on a relational view of contract and the promising individual, was vying for dominance in canonic literature of the era. This alternative should be familiar these days; the twentieth century, and the turn to the twenty-first, have seen discussions of relational contract and relational individualism, understood as critical responses to the atomistic individualism of the classical liberal tradition. Relational ways of thinking, however, were available for liberals in the high Victorian era, in contract no less than in other sites of social significance.

But even assuming that we do not know whether there was an alternative or not, the fact that this question is not on the table, that it is not an *uncertainty* informing the historical understanding of contract and its meaning, is in itself extremely influential in guiding past and future thought.

The historical picture, too readily conceded, partly explains how the classical model remains a dominant principle, a starting point for any liberal framing of contract law. It is still the case that "[t]he challenge facing contract lawyers ... is ... to identify which features of the classical law should be discarded and which retained."[109] What is more, claims relying on the classicist system of meaning—for instance, a claim that contractualism is expanding because private arrangements are expanding at the

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[109] Nolan, *supra* note 29 at 603.

expense of public ones—continue to make perfect sense.[110] The individualism–collectivism tension assumes that there is but one individualism and so identifies a single individualistic possibility for contract, making anything else seem like encroachments on an ideal (good or bad). This tension remains the one to inform contractual thinking; it is the reigning framework for virtually every theory, from conservative to radical and any hues in between. And of course, the conceptual possibilities of the status–individualism–collectivism axis remain influential as ways to understand the alternatives faced by Victorians themselves, and to make sense of developments that followed.[111]

Perhaps this ghost of contract would not have been so powerful had it been acknowledged—or at least entertained as a possibility—that it was not quite as culturally dominant and conceptually exclusive as has been assumed, not even for nineteenth-century liberals.

A second effect of the historical agreement is that despite an outpouring of scholarship on the constitutive effect of law, the individualism of classical contract law emerges from history as reflective of what individualism could possibly mean in the nineteenth century. Classical thought might have been revolutionary within the internal history of legal thinking on contract, as some historians claim, but its individualism appears nonetheless to have been virtually obvious, the only available construction for nineteenth-century liberals when they turned their gaze to contract. Historians have effectively closed off the possibility that there was a variety of individualisms which could, and did, respond to concerns about what might replace the older world of status, and about how the melting of old solids was to be confronted.

And so, the idea that law is constitutive of social consciousness remains limited to the suggestion that law is involved in diachronic transitions among social orders—from one dominant system to another (say, from feudalism to capitalism)—along with all other domains of social thought, all of which either cooperate or try to resist. There remains no room for a more culturally activist version of constitutivism, in which law takes part in *synchronic* cultural negotiations among alternative ways of framing any emergent social order (say, English capitalism). In this version of constitutivism, law is constitutive not because it is hegemonic, but because it enforces, with the backing of hegemonic state power, non-

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110 See *ibid* at 604 (making such a claim).

111 See Kennedy, "Distributive Motives", *supra* note 74 at 576. Feinman also suggests that, at least in the American context, the classical framework is being re-established (Jay M Feinman, "Un-Making Law: The Classical Revival in the Common Law" (2004) 28:1 Seattle UL Rev 1).

hegemonic worldviews within cultures containing divergent and multiple views. The important point here is not that law is involved in justifying or negotiating the dominant social order for us. The important point, rather, is that other justifications and negotiations might have been available, and law is involved in making choices here; that in complex cultures, law offers a specific and non-obvious way of understanding and experiencing the social order; that a social order is not an essential reality, but a reality dependent upon interpretations. And those interpretations are nuanced, multiple, and not necessarily ideologically antagonistic.

In the case of classical contract law, the possibility which contract histories do not invite their audience to entertain is that historical legal thought cemented an *interpretation* of individualism in contract which was less than obvious for historical agents. The classicist ideological bias toward individualism has preoccupied histories to such an extent that the content of the bias has only been examined vis-à-vis ideological antagonists (status/collectivism), keeping intact the sense of a single hegemonic idea of individualism and a single meaning of contract entangled with it.

After all seems to have been said and done in contract histories; after they have been written and rewritten for over a hundred years; after they have undergone conservative, liberal, radical, feminist, and perhaps some other revisions; after they have expanded from theory to consciousness, from high-court precedent to small-claims litigation, from books to practice, and have extended their idea of context in multiple directions, there remain untouched residues of agreement which merit more attention, and which create, by virtue of being unattended, a powerful sense of history informing understandings of the *what* and *how* of market society to present days. History is often normative in ways it does not acknowledge.

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