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ORIGINAL ARTICLE

What can contract law learn from #MeToo?

RENATA GROSSI

Faculty of Law, University of Technology Sydney, PO Box 123, Broadway, Sydney, NSW 2007, Australia

Correspondence
Renata Grossi, Faculty of Law, University of Technology Sydney, PO Box 123, Broadway, Sydney, NSW 2007, Australia
Email: renata.grossi@uts.edu.au

Abstract

In this article, I ask whether contract law can learn anything from the #MeToo discussions of consent. When we juxtapose consent in these two contexts, two issues emerge. The first is whether consent is a valuable ethical tool in helping us to determine whether an agreement is 'good'. This article argues that just as patriarchy makes a mockery of consent in negotiating sexual encounters, so too do free market economics make a mockery of consent and freedom to contract. The second issue is whether consent should be understood objectively or subjectively. While favouring the centralizing of a subjective approach as #MeToo did, this article also affirms the critical critique of objectivity and questions the objectivity/subjectivity dichotomy altogether. This article ends with a nod towards the theorization of contract as feminist and as relational.

1 | INTRODUCTION

Linda Martìn Alcoff has said that there is a rather 'wide gulf between contract-based concepts of consent and the phenomenological features of sexual encounters'. She has argued therefore that the application of the contract model to these areas of social life is 'more than a little bizarre'.[1] And yet the connection is often made. For a very obvious example, consider this. At the height

[1] L. M. Alcoff, *Rape and Resistance* (2018) 131.

of the #MeToo movement,[2] a Dutch legal start-up company produced *LegalFling*, an app that enabled prospective sexual partners to 'create a legally binding consent contract before sex'. The app claimed that a departure from the contract would constitute a 'breach', upon which 'cease and desist letters' enforcing 'penalty payments' would be generated. The app was quickly discontinued, but the idea has not gone away. As recently as March 2021, the New South Wales police commissioner floated the idea as a way to record consent before sex.[3]

While in substance a consent app is clearly very problematic,[4] as an idea it is actually in keeping with our contemporary social and cultural imagination. The contract is a continuing central idea in liberal political thought, a dominant governmental strategy, and part of a new cultural ideal of managerialism.[5] By the twentieth century, Henri Maine's 1861 prediction that human societies were transitioning from status to contract[6] had, for some, become fact. Max Weber described modern society as a contractual society,[7] and Emile Durkheim argued that contractual ties were at the heart of social ties.[8] Hugh Collins has said that the contract has become a dominant 'organising principle of human association' that 'defines the meaning of social life'.[9] Our intimate and sexual lives are also subject to the contract discourse. Modern love has been described by leading theorists as a 'blank form' whose content is a 'subjective and mutual invention',[10] and as a set of self-imposed ties.[11] Given this context, finding the language of contract law in the social and cultural discourse of #MeToo is unsurprising. However, it does raise a question: if #MeToo seeks answers from contract law, may it not also be the case that contract law has something to learn from #MeToo?

In this article, I begin by retelling the story contained in an article written for *babe* magazine by Katie Way with the title 'I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life'.[12] It tells of a date between Grace (an alias), a then 22-year-old photographer, and the then

[2] #MeToo was a hashtag first used in 2007 by African American youth activist Tarana Burke to aid sexual assault survivors. It was then used by actor Alyssa Milano in inviting women to disclose experiences of sexual abuse following the *New York Times* exposé of Harvey Weinstein's decades of abuse of women. The movement has sparked major activism, as well as academic, media, and cultural discussion around sexual consent and abuse of power. Catherine MacKinnon has described the movement as 'shifting cultures everywhere', 'setting off cataclysmic transformations', and 'shifting gender hierarchy's tectonic plates', and as a 'mass kaleidoscopic movement'. C. MacKinnon, 'Where #MeToo Came From, and Where It's Going' *The Atlantic*, 24 March 2019, at <https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/>. For general reading on the movement, see R. Farrow, *Catch and Kill: Lies, Spies and Conspiracy to Protect Predators* (2019); R. Solnit, *Whose Story Is This? Essays at the Intersection* (2019).

[3] The idea was met with almost universal opposition and some ridicule. M. McGowan, 'NSW Police Commissioner Admits His Sex Consent App Proposal "Could Be a Terrible Idea"' *Guardian*, 18 March 2021, at <https://www.theguardian.com/australia-news/2021/mar/18/critics-ridicule-nsw-police-commissioners-idea-for-sexual-consent-app>.

[4] The app, now discontinued, was described as 'unsexy', 'missing the point', and 'providing a get out of jail free card for rapists'. A. Simon, 'New Sexual Consent Contract App Is Weird and a Terrible Response to #MeToo' *Grazia*, 13 January 2018, at <https://graziadaily.co.uk/life/opinion/sexual-consent-contract-app-legalfling-terrible-response-to-me-too>.

[5] See G. Davies et al. (eds), *The New Contractualism?* (1997).

[6] H. S. Maine, *Ancient Law* (2002).

[7] M. Weber, *Economy and Society* (1978, eds G. Roth and C. Wittich).

[8] E. Durkheim, *The Division of Labour in Society* (1984, trans. W. D. Halls).

[9] H. Collins, *Regulating Contracts* (1999) 13.

[10] U. Beck and E. Beck-Gernsheim, *The Normal Chaos of Love* (1995) 193.

[11] A. Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (1992) 2.

[12] K. Way, 'I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life' *babe*, 13 January 2018, at <https://babe.net/2018/01/13/aziz-ansari-28355>. See also S. Harmon, 'Aziz Ansari Responds to Sexual Assault

34-year-old comedian, writer, and actor Aziz Ansari.[13] Given Ansari's profile in popular culture, it was not surprising that it became a flashpoint story of the movement, but importantly for the purposes of this article it illustrates the complexities around the idea of consent, and in particular its limitations in determining an act's intrinsic significance and in measuring individual autonomy.[14] Applying this insight to contract law reveals a similar conclusion. Consent hiding behind the resilient 'freedom to contract theory' is an enabler of many exploitative agreements that make a mockery of autonomy. This conversation leads to another important question. Consent in contract law has been theorized as a promise that embodies a party's intention to be legally bound and as something that should be objectively measured. This article questions whether this is at all complicated by the #MeToo conversation, which absolutely asserts the centrality of a subjective interpretation of consent. In doing so, I question the objectivity/subjectivity divide entirely. Both of these conversations – about the limits of consent and the challenges of applying an objective measure to it – lead to bigger questions about how we can theorize contract law. The article ends tentatively with a nod towards existing approaches that re-theorize contract law, which incorporates relational contract theory and feminism.

2 | THE GRACE AND ANSARI STORY: #METOO AND CONSENT

After a dinner out, Grace and Ansari returned to his apartment. Various sexual encounters quickly followed (kissing, touching, and oral sex). Grace gave many non-verbal cues and a number of explicit verbal statements about not wanting to engage in penetration. Three or four times, he appeared to accept her decision only to quickly initiate more sexual contact that led back to the same requests. Eventually, Grace left. The next day, they exchanged texts. He texted: 'It was fun meeting you last night.'[15] She replied: 'Last night might've been fun for you, but it wasn't for me. You ignored clear non-verbal cues; you kept going with advances.'[16] Ansari texted back: 'Clearly, I misread things in the moment and I'm truly sorry.'[17] The *babe* article reported that Grace felt

Allegations' *Guardian*, 15 January 2018, at <https://www.theguardian.com/culture/2018/jan/15/aziz-ansari-responds-to-sexual-assault-allegation>; C. Cooper, 'Speaking the Unspeakable? Nicola Lacey's Unspeakable Subjects and Consent in the Age of #MeToo' (2018) 8 *Feminists@law*. In this article, I am comparing the social and cultural conversation around consent that occurred with #MeToo to the doctrine of contract consent. For this reason, I am using a story that unfolded in the media rather than a case before the courts. I justify this approach because I argue that the language of contract is part of our social and cultural imaginations and I am interested in how that discourse informs or is informed by the doctrines of the law.

[13] Aziz Ansari is known for his roles in the hit shows *Parks and Recreation* and *Master of None*. He has won two Emmys and one Golden Globe. In 2015, Ansari co-wrote a book with Eric Klinenberg entitled *Modern Romance: An Investigation* (2016).

[14] Despite often being used synonymously, in philosophy there are distinctions between autonomy and agency. Autonomy refers 'to the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own and not the product of manipulative or distorting external forces'. J. Christman, 'Autonomy in Moral and Political Philosophy' *Stanford Encyclopedia of Philosophy*, 29 June 2020, at <https://plato.stanford.edu/entries/autonomy-moral/>. Agency refers to the capacity to act. M. Schlosser, 'Agency' *Stanford Encyclopedia of Philosophy*, 28 October 2019, at <https://plato.stanford.edu/entries/agency/>. Notwithstanding the complex meaning of freedom, it is often connected to both. I use 'autonomy' throughout this article while acknowledging the inclusion of 'agency' and 'freedom' in the popular discourse.

[15] Way, op. cit., n. 12.

[16] Id.

[17] Id.

violated and, after processing the events, saw it as sexual assault. She described it to friends as 'weird', 'awful', and 'upsetting'.[18] She felt that she 'had to say no a lot' and 'was taken advantage of'.[19] Ansari released an official statement that said in part:

> [W]e ended up engaging in sexual activity, which by all indications was completely consensual. The next day, I got a text from her saying that although 'it may have seemed okay', upon further reflection, she felt uncomfortable. It was true that everything did seem okay to me.[20]

In his response, it was unsurprising that Ansari evoked consent. Albeit in a limited form and unevenly applied, the concept has been used to distinguish between legitimate and illegitimate sexual behaviour from as far back as the seventeenth century,[21] but even more than that, it has been a lynchpin of liberal philosophy.[22] Consent has been described as the foundational story and the source of legitimate authority in twentieth-century law,[23] and as 'morally, institutionally and legally transformative'.[24] It generates rights and obligations for ourselves and for others and thus defines the bounds of permissible actions, and because of this Heidi Hurd describes consent as magical, and at the centre of what it means to be autonomous.[25] Thus, it is often connected to our exercise of individual agency and to our sense of freedom.[26] However, the Grace and Ansari story confronts us with difficult questions about consent. Is it as 'good' as we think it is? And even if it is, is it all we want? Has consent, long considered capable of lending moral and ethical legitimacy to our actions, now set the bar too low?

Among other things, #MeToo brought to the fore two important arguments about consent long made by feminists. One is that it disguises the lack of autonomy that is often a feature of our actions, and the other is that consent is not capable of telling us whether an act is 'good' by any measure. In relation to autonomy, Carole Pateman argued in her landmark book *The Sexual Contract* that even when we can identify women's consent (and this is not always easy to do given the patriarchal structural inequalities that exist), we cannot necessarily consider it as a manifestation of autonomy.[27] Social, economic, and gender inequalities mean that consent is not always an expression of autonomy. Nowhere is this more evident than in the case of sexual consent. Take these examples from the story:

> He sat back and pointed to his penis and motioned for me to go down on him. And I did. I think I just felt really pressured.[28]

[18] Id.

[19] Id.

[20] Id.

[21] C. J. Smith, 'History of Rape and Rape Laws' (1970) 60 *Women Lawyers' J*. 188.

[22] L. Alexander, 'Introduction to Issues 2 & 3: Symposium on Consent in Sexual Relations' (1996) 2 *Legal Theory* 87.

[23] R. West, 'Consent, Legitimation and Dysphoria' (2020) 83 *Modern Law Rev*. 1, at 5.

[24] A. Wertheimer, 'What Is Consent and Why Is It Important?' (2000) 3 *Buffalo Criminal Law Rev*. 557, at 559.

[25] H. Hurd, 'The Moral Magic of Consent' (1996) 2 *Legal Theory* 121, at 124.

[26] For a distinction between autonomy and agency and their connection to freedom, see n. 14.

[27] C. Pateman, *The Sexual Contract* (1988).

[28] Way, op. cit., n. 12.

> She said she remembers him asking again and again, 'Where do you want me to fuck you?' … She says she found the question tough to answer because she says she didn't want to fuck him at all.[29]

A subsequent opinion piece in the *New York Times* mocked Grace's inability to say no at various points of the night and suggested that she needed to be more assertive.[30] However, this kind of commentary either is tone deaf to, or outright rejects, the reality of the sexual context and the contributions that feminists have made to the argument. That Grace felt pressured speaks to an unfortunate reality: that women often consent to unwanted sex. Catherine MacKinnon has long argued that sexual encounters take place in environments of domination and power, of inequality and subordination, where women give in to men's sexual desires. Sex and sexual assault, she has argued, must be seen as a practice of sexism and of sexual inequality, and that when we do this, the difference between many sexual encounters and rape is blurred.[31]

At times, the pressure can come from more subtle and indirect sources, stemming from general expectations, but be just as real. In her book *Rape and Resistance*, Alcoff tells a story about being met with abuse when politely refusing an offer of a drink while in a bar catching up with a group of friends. The man whom she refused waited outside the bar and, as she left, called out abuse at her. The story, she argues, illustrates that in normative heterosexual sex, women are portrayed as subordinate and passive. Men 'ask' and women 'give'. Women who do not 'give' are 'frigid', a 'tease', or, as in her experience, a 'BitchCuntDyke!'[32] This dynamic can lead to sex taking place under a weight of expectations about male entitlement and female passivity,[33] and this is harmful.

Robin West has argued that unwanted but consensual sex is alienating, physically invasive, and emotionally abusive. She has labelled it 'hedonistic dysphoria'.[34] She says that sex that we do not desire 'can alienate us from our bodies, from our subjective pains and pleasures, from our needs, our interests, our true preferences, our histories and our futures'.[35] As we saw above, Grace went home feeling 'awful', 'upset', 'violated', and 'assaulted', but Ansari was not tuned in to thinking about their encounter in ways that would make him aware of these feelings. He was not thinking about whether the sex in which they were engaging was, to use West's words, 'good for either party, or good for both of them, or good for the world'.[36]

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[29] Id.

[30] B. Weiss, 'Aziz Ansari Is Guilty. Of Not Being a Mind Reader' *New York Times*, 15 January 2018, at <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html>.

[31] C. A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987) 81.

[32] Alcoff, op. cit., n. 1, p. 108.

[33] A University of California study conducted by Amy K. Kiefler and Diana T. Sancher concluded that 'traditional gender-based sexual roles dictate sexual passivity for women but sexual agency for men'. A. K. Kiefler and D. T. Sancher, 'Scripting Sexual Passivity: A Gender Role Perspective' (2007) 14 *Personal Relationships* 269.

[34] West, op. cit., n. 23. A cross-cultural study found that about half of the women in three different countries had engaged in unwanted consensual sex. S. Sprecher et al., 'Token Resistance to Sexual Intercourse and Consent to Unwanted Sexual Intercourse: College Students' Dating Experiences in Three Countries' (1994) 31 *J. of Sex Research* 125.

[35] West's argument is that to conflate rape with consensual unwanted sex obscures the harms of both. R. West, 'Sex, Law and Consent' (2008) Georgetown Law Faculty Working Papers 71, at <https://scholarship.law.georgetown.edu/fwps_papers/71>.

[36] West, op. cit. n. 23, p. 20. It is important to note here that West has been criticized for taking a 'normal' heterosexual lens to 'unwanted sex' and thus ignoring the complicated nature of desire and pleasure. See H. Matthews, 'How Do

This brief reading of the Grace and Ansari story is illustrative of consent's weak relationship with autonomy and its irrelevance for moral and ethical judgement, as well as for any assessment of harm, pleasure, and desire. Seeing sexual relations through the lens of consent and non-consent ultimately does not offer any solutions to these problems. As Alisa Kessel puts it, 'it requires no commitment to non-domination. It requires no promise to refuse to coerce others.'[37]

In these arguments, feminist thinkers have emphasized the message that consent sets a very low bar for evaluating autonomy and the value of our actions. Let me now turn to the commercial world of contract and whether this conversation has anything to teach contract law. The discussion below illustrates that juxtaposing these two seemingly different contexts does indeed create some interesting challenges for thinking about contract law.

3 | CONTRACT LAW: THE CONSENT THEORY

In contract law theory, the most explicit discussion of consent can be found in the works of Randy E. Barnett.[38] Barnett argues that consent is the 'heart of contract law'[39] and the 'moral prerequisite to contractual obligation'.[40] He says that in contract law, legal enforcement is justified because 'the promisor has voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights'.[41] He distinguishes consent from promise. Consent enables us to focus not only on the promise that the parties have made, but also on whether the parties have shown an intention to be legally bound; by contrast, a promise may be morally enforceable, but it is not legally enforceable without being accompanied by such an intention. In *Contract as Promise*, Charles Fried argues that when we contract, we decide to place our confidence in another to do what is right. A promise transforms a choice into a moral obligation.[42] An individual has a moral obligation to keep a promise because she has created an expectation in another. To break a promise is to defeat that expectation and thus to break the bonds of trust.[43] However, Barnett argues that in contract law, legal enforcement is justified because an intention to be legally bound exists. While the promise is not irrelevant, it should not be the focal point. Consent rather than promise enables us to focus on what really matters, which is whether the party has shown an intention to be legally bound. As Barnett puts it,

> [t]o promise is to commit to do or refrain from doing something. To consent to contract is to commit to be legally responsible for non-performance of a promise. So

We Understand Sexual Pleasure in this Age of "Consent"?' *Aeon*, 6 March 2018, at <https://aeon.co/ideas/how-do-we-understand-sexual-pleasure-in-this-age-of-consent>; J. J. Fischel, 'What Do We Consent To When We Consent To Sex?' *Aeon*, 23 October 2018, at <https://aeon.co/ideas/what-do-we-consent-to-when-we-consent-to-sex>.

[37] A. Kessel, 'The Cruel Optimism of Sexual Consent' (2019) 19 *Contemporary Political Theory* 359, at 376.

[38] R. E. Barnett, 'A Consent Theory of Contract' (1986) 86 *Colombia Law Rev*. 269. Consent is a big part of critical jurisprudence, mostly as a critique of its central place in classical (and liberal) theory. I locate this article as part of that critique.

[39] Id., p. 299.

[40] Id., p. 297.

[41] Id., p. 300.

[42] C. Fried, *Contract as Promise*: *A Theory of Contractual Obligation* (2015, 2nd edn) 8. Also see C. Fried, 'The Ambitions of Contract as Promise' in *Philosophical Foundations of Contract Law*, eds G. Klass et al. (2014) 17.

[43] Id. (2015), p. 16.

> consent is a commitment in addition to whatever moral commitment inheres in a promise.[44]

Barnett's consent theory, like Fried's promise/will theory, forms part of the freedom to contract theory.[45] This theory has been much critiqued and I do not want to rehash that critique here, but it is worth just noting briefly a couple of points from it that resonate with the general discussion in this article.[46]

First, freedom to contract theory accepts as axiomatic that 'free dealing is fair dealing',[47] and therefore the approach by the courts has been to focus on technical rules to do with the formation and consequences of an agreement, rather than to engage with any analysis of the content itself.[48] Second, it adopts a limited understanding of freedom. It is blind to the structural nature of freedom. As Hila Keren puts it, '[w]hen the owner of a property refuses to lease apartments to people who are for example, disabled, elderly, or single mothers, the rejected tenants have no "freedom to contract"'.[49] Furthermore, freedom to contract does not, as it should, mean freedom in the context of the market. Patrick Atiyah describes contract law as having two principles. The first is as part of the economic model of the free market, and the second is as an instrument of market planning.[50] For this reason, a critique of freedom to contract needs to include a critique of the market: that inequalities are created and replicated by the market. While the rich and powerful contract on their own terms, others are 'weakened and enslaved by the idea'.[51]

Any theory that centralizes consent needs to consider the limitations of consent that the #MeToo conversation has brought to light. This exercise reveals that some of the same limitations from that discourse are evident in contract law. Contract law does not consider questions of choice that are based on 'prior assignment of entitlements'.[52] It does not ask who has choice

[44] R. E. Barnett, 'Contract Is Not Promise; Contract Is Consent' in Klass et al. (eds), op. cit., n. 42, p. 48.

[45] I am using 'freedom to contract theory' to denote both classical and neoclassical theory. While neoclassical theory balances individual freedom to contract with collective social standards embedded in our legislation and in some of our common-law and equitable doctrine and therefore constitutes an attempt to temper the freedom of contract principles, it nevertheless centralizes freedom to contract. For a discussion on the differences between them, see J. M. Feinman, 'The Significance of Contract Theory' (1990) 58 *University of Cincinnati Law Rev*. 1283.

[46] Earlier, I described freedom to contract theory as resilient. Despite its many critiques, it retains currency. One strand to its critique is that it does not represent reality. Modern contract law – with its reliance on standard forms, legislative control, and equitable principles – means that parties have very little freedom. However, many have argued that these features do not change the fact that contract law is 'quintessentially voluntary'. A. Bagchi, 'Voluntary Obligation and Contract' (2019) 20 *Theoretical Enquiries in Law* 433, at 434–435. See also R. E. Barnett, 'The Sound of Silence: Default Rules and Contractual Consent' (1992) 78 *Virginia Law Rev*. 821, at 860; B. Bix, 'Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried' (2012) 45 *Suffolk University Law J*. 719, at 732.

[47] R. Brownsword, *Contract Law: Themes for the Twenty-First Century* (2006, 2nd edn) 50.

[48] Take, for example, the consideration principle that courts will not look into the adequacy (the value) of a bargain. This principle is consistent in all common-law countries. In Australia, the principle was justified in *Woolworths* v. *Kelly* by Justice Kirby, in part as a means of preserving economic freedom to contract. *Woolworths* v. *Kelly* [1991] 22 NSWLR 189, at 193. See also P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

[49] H. Keren, 'Undermining Justice: The Two Rises of Freedom to Contract and the Fall of Equity' (2016) 2 *Cdn J. of Comparative and Contemporary Law* 339, at 384.

[50] Atiyah, op. cit., n. 48, p. 681. Nathan B. Oman argues that the role of contract law is to facilitate the market. N. B. Oman, 'Markets as a Moral Foundation for Contract Law' (2012) 98 *IOWA Law Rev*. 183.

[51] Keren, op. cit., n. 49, p. 386.

[52] L. Brilmayer, 'Consent, Contract and Territory' (1989–1990) 74 *Minnesota Law Rev*. 1 at, 21.

and why. When choice is exercised, contract law does not consider the economic, political,[53] and gendered[54] nature of choice and its effects. A contract is about assuming an obligation to gain an advantage. The first assumption of consent is that everyone has something to exchange. However, this is determined by a range of factors outside of an individual's control. Whether we have anything to exchange 'antedates consensual transactions'.[55] Who has choice and why? Without this enquiry, Lea Brilmayer argues, we are not consenting – let alone consenting freely.[56] Consenting to a contract is not the same as wanting that contract. Consenting to a contract does not make the contract right or just. Freedom to contract needs to be judged in the light of the structural inequalities that exist in society and the injustices of a predatory capitalist market that replicates them.[57] Consider the working conditions of the employees in Amazon's fulfillment centres,[58] and tenants signing residency agreements that prohibit them from having overnight guests.[59] However, there are also many more subtle ways in which the market reduces our autonomy to contract. Chunlin Leonhard's study of court decisions around the global financial crisis illustrates that choice is not free or equal for all. Consent can be, and is, manipulated by stronger parties and even if it is not, it needs to be understood politically and economically, and as 'an act of meaning' that varies according to our identity.[60]

4 | CONSENT: OBJECTIVITY/SUBJECTIVITY

Thinking about consent also leads us to ask how we understand it. For Barnett, consent should be determined objectively rather than subjectively. He has three main reasons for this assertion. First, he claims that it more realistically reflects the way in which contract law actually operates.[61] In practice, agreements between parties are seldom spelled out in their entirety. Terms are readily

[53] See C. Leonhard, 'The Unbearable Lightness of Consent in Contract Law' (2012) 63 *Case Western Reserve Law Rev*. 57, at 61.

[54] See L. Mulcahy and S. Wheeler (eds), *Feminist Perspectives on Contract Law* (2005); D. I. O'Neill et al., *The Illusion of Consent* (2008).

[55] Brilmayer, op. cit., n. 52, p. 18.

[56] Id., p. 21.

[57] See for example J. Whyte, *The Morals of the Market* (2019).

[58] M. Sainato, '"I'm Not a Robot": Amazon Workers Condemn Unsafe, Grueling Conditions at Warehouse' *Guardian*, 5 February 2020, at <https://www.theguardian.com/technology/2020/feb/05/amazon-workers-protest-unsafe-grueling-conditions-warehouse>.

[59] N. Burnside, 'Call for Stricter Control for ACT Landlords as Canberra Renters Asked to Care for Chickens, Limit Heater Use' *ABC*, 21 June 2021, at <https://www.abc.net.au/news/2021-06-16/act-call-for-stricter-controls-for-act-landlords-lease-disputes/100217382>.

[60] Leonhard, op. cit., n. 53, p. 78.

[61] In Australian case law, in the settling of disputes, courts will default to the application of objective standards. In *Taylor* v. *Johnson*, Mason ACJ, Murphy, and Deane JJ said that the objective approach had 'command of the field'. *Taylor* v. *Johnson* [1983] HCA 5, (1983) 151 CLR 422, at 428–429. In *Byrnes* v. *Kendle*, Gummow and Hayne JJ said that the 'objective theory' of contract formation is not concerned with 'the real intentions of the parties, but with the outward manifestations of those intentions'. *Byrnes* v. *Kendle* [2011] HCA 26, (2011) 243 CLR 253, at 275. See also *Equuscorp Pty Ltd* v. *Glengallan Investments Pty Ltd* [2004] HCA 55, (2004) 218 CLR 471. This is also true in other common-law jurisdictions. According to Perillo, apart from a short period in the nineteenth century, consent has always been objectively measured. See J. M. Perillo, 'The Origins of the Objective Theory of Contract Formation and Interpretation' (2000) 69 *Fordham Law Rev*. 427.

implied to complete agreements and to ensure that they conform with other legal obligations.[62] Second, an objective measure of consent better allocates rights and obligations because it also protects parties that have relied upon promises.[63] Third, an objective measure of consent fulfils the normative role of contract law.

For Barnett, a theory of contract must specify the social 'boundaries' of an individual's freedom to contract. This is better achieved by a focus on what was 'manifested consent'. He says: 'Only a general reliance on objectively ascertainable assertive conduct will enable a system of entitlements to perform its allotted boundary-defining function.'[64] Contract law needs to create standards to govern the 'basis for cooperative interpersonal activity'.[65] In doing so, it creates a number of specific norms for the market, such as stability, predictability, and reliance, and even more generally, it creates a general standard of public morality: to keep one's contractual commitment.[66]

However, what do we lose when we adopt an objective approach to consent? Hurd claims that because consent is so significant, it cannot be conceptualized in any way other than subjectively. She says:

> If autonomy resides in the ability to will the alteration of moral rights and duties, and if consent is normatively significant precisely because it constitutes an expression of autonomy, then it must be the case that to consent is to exercise free will. That is, it must be the case that consent constitutes a subjective mental state.[67]

To view it otherwise is dangerous because, Hurd argues, to equate consent only to observable acts leads to morally unacceptable results.[68] Take, for example, a person who acquiesces to an act under a threat. If we do not consider their state of mind and only observe the act, there will be no difference between a free act and a forced act.

The question at issue between objectivity and subjectivity is not easily resolved. Can we hold a person legally accountable without an observable act of consent?[69] How can we understand autonomy without an observable performance of it?[70] Circling back to sexual assault highlights the difficulty in the objectivity/subjectivity dichotomy. The Grace and Ansari story shows us first that each of the parties had a different subjective interpretation of consent. Grace felt that she was saying no a lot and was forced; Ansari felt that everything was 'okay'. Commentary on the case also showed different ways of reading the actions in the story.[71] #MeToo centralized subjectivity and strongly asserted that in the context of sexual relationships, it is inconceivable that we would

[62] Consider also the widespread use of standard form contracts.

[63] Barnett, op. cit., n. 38, p. 306.

[64] Id., p. 303.

[65] Id., p. 301.

[66] Barnett, op. cit., n. 44, p. 57.

[67] Hurd, op. cit., n. 25, p. 125.

[68] Id., p. 136.

[69] Wertheimer, op. cit., n. 24, p. 568.

[70] H. Schnüriger, 'What Is Consent?' in *Routledge Handbook of the Ethics of Consent*, eds A. Müller and P. Schaber (2018) 27.

[71] For a defence of Ansari, see C. Flanagan, 'The Humiliation of Aziz Ansari' *The Atlantic*, 15 January 2018, at <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/>; Weiss, op. cit., n. 30.

forego subjectivity,[72] but is this too high a standard for contracts? Is Barnett right that the world of contract in the marketplace needs objectivity above subjectivity?

These questions may be somewhat addressed by considering the critical critique of objectivity – and in particular by acknowledging, first, that objectivity is a mask for power and that aspects of our identity and social context influence our legal decision making and impact upon the ways in which we interpret legal facts and principles,[73] and second, that the dichotomy between objectivity and subjectivity in interpretation is not an either/or proposition. Any interpretation requires some level of subjectivity,[74] and subjectivity does not mean an abandonment of standards and values. As Lorraine Code establishes, 'knowers are always somewhere – and at once limited and enabled by the specificities of their location'.[75] Knowledge, then, is 'a construct produced by cognitive agents within social practices by various agents across various social groups'.[76] Donna Haraway puts it even more strongly, saying that objectivity can be achieved when we think about it as what is translatable across particular subjective positions. Developing the idea of 'situated knowledges' –the construction of knowledge through the position from which you are coming – she argues that only partial perspective is rational and objective, and only situated and embodied knowledge is reliable. In contrast, unlocated knowledge is unaccountable and irresponsible.[77]

In reality, Barnett acknowledges the importance of subjectivity and its relationship with objectivity. He says that determining consent objectively inevitably constitutes an examination of what was subjectively done and said. Barnett claims that, in practice, the only subjective intention that is disregarded by a focus on objectivity is that which was not manifested or which was extrinsic to the transaction.[78] He also acknowledges that the relationship between objectivity and subjectivity is not dichotomous but complex, one that relies upon an interaction between individuals, culture, and society. For example, he says: 'Contracts based on manifested consent … operate … by converting the personal knowledge of each party into a form of local knowledge that is accessible to both parties.'[79]

[72] Following #MeToo, there have been significant changes to move our understanding towards affirmative consent which can be seen as a broadening of the subjective standards of consent. West argues that for sex not to be alienating, it needs to be connected to our subjective selves (bodies, pleasures, pains, needs, interests, preferences, histories, and futures). West, op. cit., n. 23. Alcoff has also discussed this and has said that '[i]f my body is having sex, then I am having sex'. Alcoff, op. cit., n. 1, p. 131.

[73] Feminists have been particularly important in the argument against objectivity in law. MacKinnon has argued strongly that the male perspective has been the 'standard' and the 'universal' point of view. C. MacKinnon, *Towards a Feminist Theory of the State* (1989). This argument has been further developed by race theorists. As Kimberlé Crenshaw says, 'the authoritative universal voice is too often white male subjectivity masquerading as non-racial, non-gendered objectivity'. K. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 *University of Chicago Legal Forum* 139.

[74] See N. MacCormick, 'Reasonableness and Objectivity' (1999) 74 *Notre Dame Law Rev*. 1575; D. Patterson, 'Normativity and Objectivity in Law' (2001) 43 *William and Mary Law Rev*. 325.

[75] L. Code, *Rhetorical Spaces: Essays on Gendered Locations* (1995) 39.

[76] Id., p. 15.

[77] D. Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14 *Feminist Studies* 583. See also R. Grossi, 'Law, Emotion and the Objectivity Debate' (2019) 1 *Griffith Law Rev*. 23.

[78] Barnett says: 'A consent analysis is genuinely interested in the actual intentions of the parties, but we never have direct access to another individual's subjective mental state. We thus must always learn the meaning of terms by comparing (1) the conduct of persons with their words, or (2) their conduct and words in one context with those of another, or (3) one person's conduct and words with another person's conduct and words.' Barnett, op. cit., n. 38, p. 305.

[79] Barnett, op. cit., n. 46, p. 858.

Given these arguments, we need to retheorize objectivity in contract law. Stating that we should arrive at consent objectively obscures questions such as whose standard is the objective standard, and how do we arrive at it? If one of the goals of contract law is about setting standards, is objectivity the only way or even the best way to achieve this goal? Accepting that objectivity and subjectivity are entwined might mean that we have nothing to fear from a subjective standard in contract law.[80]

5 | IF NOT CONSENT, THEN WHAT?

If we decentre consent, and therefore freedom to contract, how do we then understand contract law? Some existing scholarship suggests taking a more substantive approach to the examination of contracts. What I mean by this is moving away from how the agreement was reached towards what the agreement is. Leonhard suggests that doctrinally we should take up a totality of circumstances approach.[81] This would enable courts to engage in a fuller understanding of the context of the contract to determine whether it should be enforced. She suggests that this approach would enable courts to answer questions such as what are the terms of the contract, and are they reasonable? Did the party understand the terms? How was the contract negotiated? What resources did each party have at their disposal? And finally, what are the practical considerations of the enforcement or non-enforcement of the agreement?[82] No doubt there could be many more factors, of which consent may very well remain an important one.

Mindy Chen-Wishart has also argued for a more substantive approach and towards the application of relational contract theory. In cases of vitiating factors, she argues that courts should consider factors such as the behaviour and responsibility of the contracting parties at the time of formation, and the overall need to protect them against harsh and unfair outcomes.[83] To achieve this, courts need to move away from consent and towards a multidimensional examination with specific regard to the nature of the relationship itself. Undue influence, therefore, is a question of evidence around the conduct and motivation of both parties and the outcome of the transaction.[84]

Taking a relational approach to contract[85] challenges the idea that a contract needs to be understood as the moment of either promise or consent (offer and acceptance). If we understand agreement as an ongoing and evolving concept, then it is not only the relationship that is important

[80] See also N. S. Kim, 'Relative Consent and Contract Law' (2017) 18 *Nevada Law J*. 165; P. Saprai, 'In Defence of Consent in Contract Law' (2007) 18 *King's Law J*. 361.

[81] Leonhard, op. cit., n. 53.

[82] Id., pp. 85–89.

[83] M. Chen-Wishart, 'The Nature of Vitiating Factors in Contract Law' in Klass et al. (eds), op. cit., n. 42, p. 294.

[84] M. Chen-Wishart, 'Undue Influence: Beyond Impaired Consent and Wrongdoing towards a Relational Analysis' in *Mapping the Law: Essays in Memory of Peter Birks*, eds A. Burrows and A. Rodger (2006) 201, at 204.

[85] Broadly speaking, relational contract law theory states that contracts are complex social interactions that take place within broader social systems. For two of the main sources of relational contract theory, see S. Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *Am. Sociological Rev*. 55; S. Macaulay, 'An Empirical View of Contract' (1985) *Wisconsin Law Rev*. 465. See also I. Macneil, *The New Social Contract: An Enquiry into Modern Contractual Relations* (1980). Macneil argues that contracting behaviour embodies our social and political bonds, and a number of internal and external norms. See I. Macneil, 'Values in Contract: Internal and External' (1983) 78 *Northwestern University Law Rev*. 340.

but also the context, expectations, and impacts of the agreement.[86] Such an analysis of contract goes a long way towards addressing some of the limitations of the freedom to contract approach. However, seeing agreement in the context of relationships and social structures raises some alarm bells too. Freedom to contract and the way in which it centralizes choice and autonomy speaks to contract law's emancipatory ideal. As I quoted at the beginning of this article, contract has been seen as a means of liberating society by moving away from socially imposed obligations (status) towards self-created ones. Does a relational contract approach conflict with the ideals of freedom, choice, and autonomy embodied in contract law? If feminism via the #MeToo discourse has highlighted the problem, interestingly it has also steered us towards a possible solution.

Sharon Thompson addresses this by articulating a feminist version of relational contract theory.[87] She argues that a feminist relational theory shifts analysis towards the many layers of agreement and the complex exercise of choice. Understanding autonomy as relational means that we accept that people are 'socially embedded', that their identities are shaped by those same relations,[88] and that their decision making reflects that 'constellation of relationships'.[89] Importantly, feminist analysis of these relationships exposes their underlying norms, their power dynamics, and therefore the structures that disadvantage women and limit their choices and freedoms.[90] A feminist relational theoretical analysis therefore means that the law confronts structured power and gender relations: 'feminist perspectives can facilitate recognition of power imbalance, challenge binary notions of consent/non-consent, and appreciate the context and (gendered) material realities of parties to agreements'.[91] As such, a feminist relational theory makes relevant why an agreement was made and the impact that this has on the parties to determine enforceability. This shift does not move us away from autonomy and choice, but it does move us away from the old liberal understanding of them towards a more relational one that may be more suitable for progressive projects.

6 | CONCLUSION

In this article, I have argued that while on the face of it entering into a contract and negotiating a sexual relationship are worlds apart, in fact they are not, and contract law has much to learn from the discussions of consent that have occurred during the #MeToo era. These discussions have

[86] The argument to see beyond contract formation has also been made by Gillian Hadfield. G. Hadfield, 'An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law' (1998) 146 *University of Pennsylvania Law Rev*. 1235.

[87] S. Thompson, 'Feminist Relational Contract Theory: A New Model for Family Property Agreements' (2018) 45 *J. of Law and Society* 617.

[88] C. Mackenzie and N. Stoljar, 'Autonomy Refigured' in *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self*, eds C. Mackenzie and N. Stoljar (2000) 4. Jennifer Nedelski argues that we can only develop and understand our autonomy in the context of relationships. If we do this, autonomy is then understood not as the exercise of self-interest but rather as 'capacity', 'realization', something 'fluid' and 'contingent', that includes 'intimate, cultural, institutional, national, global, and ecological forms of relationship – all of which interact'. J. Nedelski, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2012) 119. Similarly, in relation to choice, Elizabeth Anderson has argued that choices are always a reflection of our values, and that our values are pluralistic and public. E. Anderson, *Value in Ethics and Economics* (1993).

[89] Thompson, op. cit., n. 87, p. 626.

[90] Id., pp. 630–632.

[91] Id., p. 632.

shown us that consent on its own is an inadequate device for helping us to establish whether a sexual encounter was mutually enjoyable and satisfying, free of coercion and exploitation. This is also true of consent in contract. Consent as a concept is not capable of giving us the assurance that some of us want from contracts: that the agreements reached are ethical, fair, and just. Consent is central to the liberal imagination, but as a standalone concept it cannot answer a number of important questions, such as who can consent, under what circumstances, and why. Every day, people freely enter into contracts to pay rents that are too high, do work for wages that are too low, pay for services that they do not need, and submit to the powerful interests of others. If we only ask whether there was consent, without asking further questions, we are never able to really make a judgement about the meaning of an action.

Consent needs to be understood contextually. Just as in a sexual context it needs to be understood in the context of patriarchy (among other things), so too in contract it needs to be understood in the context of an unequal and exploitative economic system (among other things). The law enforces certain promises that serve specific political and economic interests. Just as patriarchy makes a mockery of consent in negotiating sexual encounters, so too do free market economics, liberalism, and neoliberalism make a mockery of consent and freedom to contract in economic relationships. Consent needs to be understood as one among many factors that impact upon agreement making; what is clear is that consent is not, and should not be, the only factor that the law homes in on to determine questions of validity and enforceability, let alone justice.

We should also challenge the idea that consent must be objectively determined. While Barnett makes a convincing argument for the need to maintain an objective standard of consent in contract law (referring to the rights of the relying party, certainty and predictability in the economy, and the standard-setting and boundary-defining function of contract). The idea of objectivity obscures the exercise of power. Being tuned in to subjectivities can help to unmask this power. #MeToo has shown us that when it comes to sexual consent, we need to set the subjectivity bar as high as possible, and I suggest the same for contract law. However, I am not arguing for an application of the old dichotomy between objectivity and subjectivity. I am arguing that we should adopt a more sophisticated view of the interplay between the two that neutralizes the argument and delivers the benefits of both perspectives. I am arguing for an understanding of objectivity as 'located and situated', to use Haraway's terms.[92]

Above, I have suggested that the inadequacies of consent that have been exposed during the #MeToo conversation have reverberated more generally and can help us to understand consent in the world of contract. I have argued that centralizing consent and freedom to contract in the way in which we theorize contract is problematic because consenting to a contract does not make the contract right or just. Freedom to contract needs to be judged in the context of the serious problems that exist in capitalist markets. While it is not the intention of this article to articulate an alternative to the centrality of consent theory, it is important to signal that there are alternatives to understanding agreement that go some way to addressing the problems discussed here. There is some scholarship that suggests that a relational theory of contract may offer some solutions. To this end, I have highlighted the work of Chen-Wishart in the context of undue influence and Thompson in the development of a feminist relational theory that opens up contract law to an understanding of freedom, choice, and autonomy as existing in our relationships with others and our world – not as absolute exercises of self-interest but rather as part of the context that we inhabit, which includes our motives, our reasons, and our emotions, and the impact that they have on others.

[92] Haraway, op. cit., n. 77.

#MeToo and the feminist discourse more broadly have sparked a general conversation about how we understand consent. MacKinnon has described #MeToo as 'shifting cultures everywhere'.[93] The world of contract is not immune to these shifts. #MeToo has helped us to acknowledge that our contracts should be made accountable to more than just consent, that they should not be perceived as unaffected by our subjectivity, and that freedom and choice cannot be theorized outside the context of our social structures and our identities.

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[93] MacKinnon, op. cit., n. 2.