THE NEW PRIVATE LAW THIRTY YEARS AFTER

MARTHA M. ERTMAN†

TABLE OF CONTENTS

INTRODUCTION

Reasons big and small draw the legal academy's attention to the *Denver Law Review*'s centennial. First, it honors the impact of one of the first student-edited law reviews, from one of the nation's oldest law schools, which has played a key role in the development of law and society scholarship. More parochially, my own participation in *Denver Law Review* symposia in the 1990s set the direction of my legal research and writing for the next three decades. This essay essentially says "thank you" for all that the *Denver Law Review* has brought to scholarly and doctrinal matters over the past 100 years with a few thoughts on how the law review article I published here, *Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either*,[1] relates to work since then on progressive uses of the private law of contract.

Back in 1994, I was a brand-new University of Denver (DU) faculty member, learning to teach and write about law's most interesting and challenging topics from immensely talented, insightful, and generous colleagues. That vibrant intellectual community organized a series of symposia, starting with *The New Private Law* in 1995. Faculty and law review editors met weekly over cookies to discuss law review articles and books we had read to identify and puzzle over issues that bedeviled legal theory and doctrine. Dean Dennis Lynch generously supported the Symposium, both financially and in his own comment to Katherine Van Wezel Stone's contribution on employment arbitration clauses.[2] By the time we incubated an idea to focus on and hosted leading faculty from law schools across the country for the live conference, we had forged intellectual and personal

† Carole & Hanan Sibel Research Professor, University of Maryland Carey Law School. Thanks to Karen Lash and the editors of the *Denver Law Review* for helpful comments.

1. Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996).

2. Dennis O. Lynch, *Conceptualizing Forum Selection as a "Public Good": A Response to Professor Stone*, 73 DENV. U. L. REV. 1071 (1996).

connections that epitomized the best that academic life has to offer, in all its richness and complexity.

The Symposium issue reflected a range of views among the planners. Julie Nice's introduction brought characteristic enthusiasm in dubbing *The New Private Law* as "an idea so fresh as to resist definition."[3] Alan Chen's contribution to *The New Private Law* Symposium—titled *Meet the New Boss . . .*[4]—wittily and thoroughly questioned whether the Symposium presented anything genuinely new to jurisprudence.[5] Nancy Ehrenreich's contribution asserted that despite critical legal theory's trenchant critique of the public/private distinction, that privatization may well serve progressive ends.[6] Fred Cheever—whose fake German accent when voicing Marxist views beautifully demonstrates how serious and funny those discussions were—described conservation easements as a private mechanism to pursue public environmentalist ends and presciently warned that changed conditions may allow descendants to "break" the easements.[7] Roberto Corrada inquired whether *The New Private Law* is even "law" in the context of private employment arbitration agreements and explored how the process could be structured to be more fair to employees.[8]

Three decades later, the *Denver Law Review*'s symposia continue to mine pressing issues of law and society, doubtless via spirited discussions. The 2023 symposium addresses *The Watergate State: 50 Years of Executive Power, Illicit Speech, and the Legal Profession*.[9] As with prior symposia issues, that focus brings together longstanding legal conundrums and contemporary disputes of great import. The separation between rule of law and bare-knuckled politics has weathered continual assault over the last decade, via the forty-fifth U.S. President's extraordinary claims to executive power, and also a zeitgeist of increasingly acrimonious suspicion of government in its various forms. As I write this essay, the rule of law has survived multiple assaults, the most striking of which involved private militias' violent attack on the U.S. Congress on January 6, 2021, in their vain attempt to prevent the peaceful transition of power to Joe Biden as the forty-sixth President.[10] Between election denialism, rampant misinformation and disinformation on social media, and lawyers' key roles on

3. Julie Nice, *The New Private Law: An Introduction*, 73 DENV. U. L. REV. 993, 993 (1996).
4. Alan K. Chen, *"Meet the New Boss . . ."*, 73 DENV. U. L. REV 1253 (1996).
5. *Id.* at 1268–69.
6. Nancy Ehrenreich, *The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235, 1238 (1996).
7. Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1093 (1996).
8. Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1060 (1996).
9. *Symposia*, DENVER LAW REVIEW, https://www.denverlawreview.org/symposia (last visited Mar. 9, 2023).
10. *See, e.g.*, *The Attack: The Jan. 6 Siege of the U.S. Capitol Was Neither a Spontaneous Act Nor an Isolated Event*, THE WASH. POST, https://www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol (last visited Feb. 5, 2023).

every side of these formerly unthinkable conflicts, law and society need discussions like the *Denver Law Review* symposium more than ever.

This essay first describes my article, *Contractual Purgatory*, then situates it as the foundation of my subsequent research and writing on the progressive role of contract theory and doctrine, and finally, more importantly, within the symposium's fine tradition of incubating legal theory that can evolve into doctrine over time.

I. CONTRACT AS A PRIVATE WAY STATION

Looking back, I see now that *Contractual Purgatory*—and the symposium planning discussions—played a key role in determining work I have done since. That first article focused on LGBT relationship recognition and served as a foundation for subsequent work in commodification theory and concrete doctrinal proposals to decriminalize polygamy, recognize that families can include more than two legal parents, and value the ways that care work contributes to life at home as well as in offices.[11] Most recently, I have begun to explore how social contract theory, as it has been updated by philosopher Charles Mills's book *The Racial Contract*,[12] can justify doctrinal innovations in debt collection that could constitute one form of America's long overdue reparations to African Americans for systemic injustices dating back to slavery and Jim Crow, and continuing in debt contracting practices of the past few decades.[13] All of these injustices have greatly contributed to the racial wealth gap between white and Black Americans.

II. *CONTRACTUAL PURGATORY* AND BEYOND

For personal and political reasons, my early scholarship focused on LGBT and feminist concerns, and I have begun to apply those analytical tools sharpened in the family law context to problems of racial justice. Overall, this work has focused on recognition as well as recompense, generally through the lens of commodification theory. Since that first article, I have examined the often-surprising potential of contract theory and doctrines to provide mechanisms for subordinated people to circumvent rules of public law that would otherwise ignore or punish them. Outstanding mentorship from my DU colleagues helped me shape an incremental approach to explain and propose remedies in legal regulation of increasingly broad contexts.

I started where I stood, as a thirty-something lesbian whose law school years in the late 1980s were shadowed by the AIDS epidemic and the U.S. Supreme Court's stamp of approval on states criminalizing gay

11. Ertman, *supra* note 1.

12. *See generally* CHARLES MILLS, THE RACIAL CONTRACT (1997); *see also* CHARLES MILLS & CAROLE PATEMAN, CONTRACT AND DOMINATION (2013); JOHN RAWLS, A THEORY OF JUSTICE (1971).

13. *See generally* sources cited *supra* note 12.

people.[14] Though federal law also banned gays from military service, and state-based family law ignored or punished people and relationships deemed "unnatural," contracts such as living-together agreements, employment nondiscrimination agreements, and contracts for adoption and reproductive technology provided vehicles for private law—and thus society—to recognize and protect more people and relationships.[15] That need was particularly pressing for those of us living in Colorado, which was then subject to a national boycott as "the hate state" for amending its state constitution in 1992 to ban government entities from extending any protections to gay or bisexual people.[16]

But the times were changing. By 1996, the U.S. Supreme Court invalidated that Colorado constitutional provision as unconstitutional based on its anti-gay "animus" as reflected in its "bare desire to harm a politically unpopular group."[17] Yet progress was choppy; around the same time Congress and more than half of the states ramped up their anti-gay agenda by enacting so-called Defense of Marriage Acts to prevent the extension of marriage equality to same-sex relationships.[18]

Contractual Purgatory aimed to help critical theorists see the progressive potential of contract law and situate the historical regulation of homosexuality within a larger model that charted how sexual regulations such as sodomy, abortion, miscegenation, and marital rape have moved historically between the extremes of public condemnation (e.g., criminalization through sodomy laws) and public recognition (e.g., extension of marriage equality to same-sex couples), sometimes stopping along the way at a private law contractual waypoint. The article aimed to show how contractual options such as living-together agreements and employment nondiscrimination policies extend concrete benefits to LGBT people by "offering a purgatory between the hell of public condemnation and the heaven of public rights."[19] In this view, contracts could serve a "crucial function" of helping marginalized people such as gay folks move toward full legal personhood via contract to upgrade them to "full members of society."[20]

Innumerable conversations among the Symposium planning committee—faculty Fred Cheever, Alan Chen, Roberto Corrada, Nancy Ehrenreich, and Julie Nice, as well as law students and law review editors such

---

14. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

15. *See generally* A. Belkin, *The Pentagon's Gay Ban Is Not Based on Military Necessity*, 41 J. HOMOSEXUALITY 103 (2001) (evidencing banning gays from military service); Richard Weinmeyer, *The Decriminalization of Sodomy in the United States*, AMA J. ETHICS 916, 916–17 (2014) (evidencing the United States' history of criminalizing sodomy).

16. *See* Dirk Johnson, *Colorado Faces Boycott Over Its Gay-Bias Vote*, N.Y. TIMES (Dec. 3, 1992), https://www.nytimes.com/1992/12/03/us/colorado-faces-boycott-over-its-gay-bias-vote.html.

17. Romer v. Evans, 517 U.S. 620, 634 (1996).

18. *See, e.g.*, 28 U.S.C. § 1738 (1996); ALA. CONST. art. I, § 36.03 (2022); COLO. REV. STAT. § 14-2-104 (2022).

19. Ertman, *supra* note 1, at 1109.

20. *Id.* at 1110.

as Sue Chrisman, Tracey Craige, and Lisa Banks—stay with me still. Those extraordinary colleagues read drafts, sharpened my analysis, and provided theoretical grounding, all with a good humor that made work seem like anything but. That iterative process in turn shapes my legal analysis today. I no longer write much about recognition and protection of LGBT relationships—perhaps because federal law has since evolved to recognize those relationships. Indeed, even as the U.S. Supreme Court signaled that it might resurrect the old bar to same-sex marriage equality in its decision overruling *Roe v. Wade*[21] in 2022, within a year the U.S. Congress preemptively protected the full-faith-and-credit and federal-recognition aspects of marriage equality via the Respect for Marriage Act.[22]

My research evolved to focus on other aspects of undervaluation, such as the need for improved treatment of caregiving work. Later—around the time that I left DU to teach at the University of Utah law school—that family recognition project extended to parenthood via alternative means and to bans on polygamy, and the caregiving focus extended to "office housework,"[23] meaning tasks such as food management (i.e., at-work lunch orders), event planning and supervision (i.e., holiday parties), and managing technology (i.e., Wi-Fi access, cell phone plans, and printer glitches). These non-billable workplace tasks known as "glue work" build and sustain trust and community, cultivate talent, and decrease attrition. Yet law and society systemically—and improperly—under-commodify that work under the same logic used to undervalue care work in family contexts.

The ambitious braiding of high theory and real-world concerns in our symposium process also set the table for my later effort to reach beyond the academy walls. While editing the seemingly endless drafts of my book, *Love's Promises*, lessons learned in the long process of planning and executing the symposia helped me distill the academic insights of pieces starting with *Contractual Purgatory* into a format aimed to reach treadmill and beach readers. The book mainly argued that relationship contracts are friendlier than most people think and that both formal and informal agreements can help people in the families I called "Plan B" ensure that the law

21. Roe v. Wade, 410 U.S. 113, (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

22. Respect for Marriage Act, Pub. L. No. 117–228, 136 Stat. 2305 (2022).

23. *See* Martha Ertman, *Reclassifying Office "Housework"*, HARV. BUS. REV. (Aug. 17, 2015), https://hbr.org/2015/08/reclassifying-office-housework; *see generally* Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1 (2003); Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998); Martha Ertman & Shula Malkin Darviche, *Do You Know Who Holds Your Office Together?*, HARV. BUS. REV. (Sept. 23, 2015), https://hbr.org/2015/09/3-steps-to-giving-office-housework-its-proper-due; Martha M. Ertman, *The Cost of Non-Billable Work*, 98 TEX. L. REV. ONLINE 184 (2020).

recognizes and protects their families as well as care work within those families.[24]

III. REPARATIONS FOR RACIAL INJUSTICE

My current project continues the trajectory from thirty years ago to explore another way that contract theory and doctrine can counter systemic subordination. The core contention aims to sketch new ways for law to begin the long-term process of awarding reparations for past racial injustice. It builds on commodification theory's cross-disciplinary inquiry into the reach of markets about how law and society treat contested commodities in such disparate categories as babies, body parts, and cultural identity. It leverages some of the same contractual tools that caused outrageous racial wealth gaps to remedy some of that injustice through market-based mechanisms.[25] While only public law can comprehensively address the losses caused by centuries of systemic harms caused by slavery, Jim Crow, and other mass racial harms, these private remedies might provide a way station for larger scale public reforms. As such, it essentially extends the logic of my DU article *Contractual Purgatory* that private contracts, such as living-together agreements, powers of attorney, and co-parenting agreements, pave the way for public law to extend marriage equality and the rights and duties of legal parenthood to families with same-sex and trans parents.[26]

The COVID-19 pandemic and racial uprisings after George Floyd's 2020 murder by the Minneapolis police combined to make me write about the harms of under-commodification in the context of racial injustice. The pandemic exposed and exacerbated chronic racial wealth disparities between white and Black Americans, leading to a resurgence of work offering new theories to understand racial harms and new mechanisms to provide redress for those harms.[27] My contribution to this literature mirrors the four-step approach to reparations taken in the United States, Canada, South Africa and elsewhere: (1) research to identify past harms; (2) apologies from institutions and people who caused or were unjustly enriched by those harms; (3) compensation for victims who suffered those losses; and (4) educational programs to facilitate cultural acknowledgement of the harms. Ultimately, these steps can lead to reconciliation between victims

24. *See* Ertman, *supra* note 1; MARTHA M. ERTMAN, LOVE'S PROMISES: HOW FORMAL & INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES 111 (2015) [hereinafter LOVE'S PROMISES].

25. *Id.* Much commodification theory, in contrast, warns of coercion and corruption that attends allowing markets in things and relationships such as parenthood and kidneys. *See, e.g.*, MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS (2012).

26. *See generally* LOVE'S PROMISES, *supra* note 24.

27. *See, e.g.*, Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1083 (2022); A. Mechele Dickerson, *Designing Slavery Reparations: Lessons from Complex Litigation*, 98 TEX. L. REV. 1255 (2020); Jordan Brewington, *Dismantling the Master's House: Reparations on the American Plantation*, 130 YALE L. J. 2160 (2021).

and the institutions and people who caused or benefitted from those harms.[28]

Litigation and a good number of proposals for legislative reparations have relied on a tort model.[29] I seek to mine a new theory of recovery in the form of contract law. Lending, housing, and other contracts played a key role in causing racial wealth disparities to accumulate over time via government and private actions that systemically benefitted white Americans and institutions at the expense of African Americans. Contract law and theory provides new remedies for those harms, as well as a justification for the remedies. A short article I wrote for *Law & Contemporary Problems* focuses on racial discrimination in past loan contracts as one important contributor to today's systemic racial wealth disparities, labels redlining and other discrimination in lending contracts and government regulation as breaches of the social contract, and proposes a restitution-based form of reparations as a remedy for that breach.[30]

This analysis links racial misallocation of resources to breaches of the social contract that political theory tells us provides the very foundation of law. Social contract theory says that law came into being via a mythical contract in which everyone agreed to be bound by law in exchange for the law's benefits (e.g., private property, police, education, and common roads).[31] John Rawls theorized an equally mythical pre-political "original position" in which people behind a "veil of ignorance" do not know their race, sex, level of wealth, or other social and physical characteristics.[32] In theory, that blindness should allow us to imagine and create an ideal society in which legal and social rules would not give priority to any one group at the others' expense. But that forward-looking approach ignores past harms. Philosopher Charles Mills points out that Rawlsian theory conveniently ignores past distributions of wealth and power to white men and away from white women and people of color.[33] Law and society must reform what Mills calls "the Racial Contract" to make it live up to its liberal promise.[34]

I seek to translate Mills's philosophical call for reparation into legal doctrine that can deliver concrete remedies. The *Law & Contemporary Problems* article explores one specific remedy: extending Uniform Commercial Code Article 9's "rebuttable presumption" rule that protects debtors from creditor overreach when they repossess and sell debtor property to likewise protect African American debtors from creditors who

28. WILLIAM A. DARITY, JR. & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY 2–4 (2020).

29. Patrick Oh, *Roy L. Brooks' Atonement and Forgiveness and the Hibernation (or Gestation?) of the Black Redress Movement*, 19 NAT'L BLACK L.J. 108, 109 (2005).

30. *See* Martha M. Ertman, *Reparations for Racial Wealth Disparities as Remedy for Social Contract Breach*, 85 LAW & CONTEMP. PROBS. 231, 231 (2022).

31. *Id.* at 232.

32. *Id.*

33. *Id.*

34. *See id.* at 239.

administer loans in racially unjust ways.[35] The next stage of scholarship, as applied to this longstanding wrong, aims to deepen this analysis to other contexts, such as loans for housing, education, or a business, all to identify interventions that could help the United States finally address past and current racial economic injustices.

CONCLUSION

This evolving project owes a debt of gratitude to the *Denver Law Review* and the amazing faculty, administrators, and students who have produced volume after volume over a century of vastly changing circumstances in law, law schools, and society. All that intelligence and effort has given us an archive through which to see and better understand ourselves as well as law and society. May the next century bear comparable fruit.

35. *See id.* at 247; U.C.C. § 9-626 (AM. L. INST. & UNIF. L. COMM'N 1977).