

DANCING AROUND GENDER: LESSONS FROM  
ARTHUR MURRAY ON GENDER  
AND CONTRACTS

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INTRODUCTION

Context in contracts always matters.<sup>1</sup> In a sense, contract law is profoundly contextual because it depends on the parties' particularized agreement rather than some more generalized terms found in a statute or regulation. Take any contract case and to some extent the court will have to look at context. Does an advertisement constitute an offer? It depends. Pepsi's television commercial appearing to offer a Harrier jet for a million Pepsi Points is not an offer<sup>2</sup> because of the tongue-in-cheek context, but a misleading car advertisement in a newspaper can be.<sup>3</sup> The more precise issue is which contexts should matter in contract law.

The call for attention to context is often a call to pay attention to unequal distribution of power.<sup>4</sup> From the perspective of an

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1. At least, context matters in modern contract law. See Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 192 (2009) (discussing the shift from formal rules of classical contract to "standards, like reliance, that required courts to derive facts and meaning from the surrounding circumstances"); Betty Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 769 (1981) (reviewing P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979)) (contrasting the abstract formalism of classical contract with "the close attention to commercial detail required by thorough-going realism").

2. *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 118–19, 132 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000).

3. See *Izadi v. Machado (Gus) Ford, Inc.*, 550 So. 2d 1135, 1138–39 (Fla. Dist. Ct. App. 1989).

4. See Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1632–33 (1990). "The attention to particularity . . . is not an

“outsider jurisprudence,” context matters because it can make visible the otherwise unremarked privileging of one position over another on the basis of social hierarchies.<sup>5</sup> Contextualization in this sense is about looking at the imbedded power structures in law, and gender is one of those imbedded power structures.<sup>6</sup>

Traditionally, scholars of contract law have claimed that context based on categories of subordination such as race or gender does not matter. They have seen contract law as untouched by social hierarchies. They believe that contract rules have nothing to do with the construction or maintenance of inequality.<sup>7</sup>

This belief is taught implicitly, if not explicitly, in law school. The contracts canon,<sup>8</sup> as currently structured, reinforces this notion of contract as untouched by gender or other social hierarchies. Contract law, as structured in casebooks, generally does not use race or gender as a lens for viewing contract doctrine.<sup>9</sup> Moreover, many of the cases in which gender is explicitly implicated involve atypical contracting situations, such as surrogacy contracts.<sup>10</sup> Ironically, relegating discussions of gender and contracting to such cases serves to reinforce the idea that the heart of contract, i.e., market transactions, is untouched by gender.

I confess that I have always been fundamentally distrustful of this conception of contract law as untouched by social hierarchies.<sup>11</sup>

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unthinking immersion in overwhelming detail, but instead a sustained inquiry into the structures of domination in our society.” *Id.* at 1633.

5. *See id.* at 1631–34.

6. Felice Batlan, *Engendering Legal History*, 30 LAW & SOC. INQUIRY 823, 848 (2005) (arguing that we need to understand gender as involving “evershifting constructions of power”).

7. *See, e.g.*, Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029, 1029–30 (1992) (quoting a male contracts scholar who denied that male bias had any important effect on contract law).

8. *See* J.M. Balkin & Sanford Levinson, *Legal Canons: An Introduction*, in LEGAL CANONS 3, 7 (J.M. Balkin & Sanford Levinson eds., 2000) (describing three types of legal “canons”: pedagogical, cultural literacy, and academic theory). I am using “contracts canon” to indicate the pedagogical canon in the area of contracts, meaning the key cases that should be taught in contracts classes.

9. *See generally, e.g.*, CONTRACTING LAW (Amy Kastely et al. eds., 2006). This casebook includes “gender” in its index; however, gender is not used as a frame for thinking about contract doctrine.

10. *See, e.g.*, *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988). This early case invalidating a surrogacy contract on public policy grounds is one such seminal case that is reprinted in many Contracts casebooks. *See, e.g.*, RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 22 (4th ed. 2008); CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 655 (6th ed. 2007).

11. For a similar concern, see Marjorie Maguire Shultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55, 64–66 (1991) (suggesting that contract law reinforces power imbalances by creating a hierarchy of contract enforcement and consideration based on a traditionally

We live gendered lives.<sup>12</sup> As far as I can see, there is nothing in contract law that should render it immune to distortions caused by social hierarchies. Moreover, although blatant sexism is legally prohibited and socially ostracized, the contract law we know today is largely an artifact of an earlier time, when gender power imbalances were considered “natural” and ordained by God.<sup>13</sup> So, it would seem likely that there are gender hierarchies underlying contract rules.<sup>14</sup>

I perceive lots of contracts cases that either explicitly or implicitly reveal the effect of social hierarchies.<sup>15</sup> How could it be otherwise? We can strive for neutrality, but bias and its flip side, unthinking preference, slip in with every breath we take.

No contracts casebook, however, has a section entitled “Impact of Social Hierarchies on Contract Rules.” Perhaps the thinking is that this is left up to the individual teacher to bring up as she sees fit. But this is unfair to precisely those teachers who are themselves marked by these social hierarchies: women and persons of color. If a white male brings up for discussion the impact of race or gender on contract rules, he can still speak from a position of (presumed) neutrality. There is no implication of advantage for him personally in questioning whether social hierarchies distort contract rules because he speaks from an already privileged position by virtue of his race and gender. But when a woman or person of color brings up these topics, it can be perceived as special pleading or bias.<sup>16</sup>

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masculine worldview). Gender, of course, is not the only factor that shapes experience and perhaps it is not even the primary one. There are other shapers of experience: race, class, age, sexual orientation, physical limitations, religion, birthplace, and language. All of these categories have been used as a justification for creating hierarchies.

12. See Batlan, *supra* note 6, at 837 (“After all, court cases are about men and women who live gendered lives.”).

13. See 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §§ 11.1–2 (4th ed. 2009); Michele Goodwin, *Assisted Reproductive Technology and the Double Bind: The Illusory Choice of Motherhood*, 9 J. GENDER RACE & JUST. 1, 9 n.38, 11 n.45 (2005).

14. However, it is a mistake to reduce “gender” to a unitary conception. See *infra* text accompanying note 155.

15. See, e.g., *Betancourt v. Logia Suprema de la Alianza Hispana-Americana*, 86 P.2d 1026, 1026, 1028 (Ariz. 1939) (denying life insurance benefits to the family of a woman who died in childbirth when the woman had denied being pregnant during the medical examination required by the insurance company, despite evidence that the woman spoke only Spanish and the doctor spoke only English); *Sapp v. Lifrand*, 36 P.2d 794, 795–96 (Ariz. 1934) (contesting transfer of a note from the deceased to a woman with whom he was living at the time of his death on the basis of lack of consideration); *Crawford v. Robert L. Kent, Inc.*, 167 N.E.2d 620, 621 (Mass. 1960) (finding in favor of a black man who sued a dance studio for refusing him lessons due to his race). The contexts of all of these cases implicate social hierarchies.

16. I discuss the case of *Kirksey v. Kirksey*, 8 Ala. 131 (1845) in my contracts classes, contrasting it with *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891). Both cases involve promises given by one family member to another, and in both cases the issue arises whether there is consideration for the promise. In

Another objection that could be raised to the idea of including a section in contract casebooks that addresses how gender, race, or other social hierarchies influence contract law and decisions is that such an approach strays too far from the core mission of contract law teaching, which is to impart the doctrine. But almost every casebook includes a section on economic efficiency as a way to think about contract cases.<sup>17</sup> Economic efficiency is not, however, a neutral premise; it is based on a worldview that has specific values. When Judge Posner invokes economic efficiency as a methodology for thinking about surrogacy<sup>18</sup> or prostitution,<sup>19</sup> or compares the relative costs to a motel versus its guest to take precautions to protect against rape,<sup>20</sup> there is a value-laden worldview at work. This worldview is no more integral to contract doctrine than is a gendered view; that should not be the measuring stick for including or not including a segment on that worldview.

The measuring stick should be whether exploring a particular worldview is helpful for understanding how contract law operates in the world. Economic efficiency is concededly helpful to understanding contracts, but so is gender, at least in some instances. Economic efficiency is probably applicable in a greater number of cases but, in contexts that implicate gender or other social hierarchies, those concepts are just as helpful in understanding contract law in action.

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*Hamer*, in which an uncle promises a nephew five thousand dollars if the nephew will refrain from using alcohol and tobacco, swearing, and gambling until he is twenty-one, the court finds the nephew's abstinence to be sufficient consideration. *Hamer*, 27 N.E. at 257. In *Kirksey*, in which a brother-in-law promises his widowed sister-in-law a home in which to raise her family and she gives up her home to move to his land, the court finds no consideration, only a gift. *Kirksey*, 8 Ala. at 131. There are, concededly, ways to distinguish the two cases without involving gender; nevertheless, I believe that gender is one basis for explaining why in an intrafamilial context one court is willing to find contracting behavior and another court is not. In other words, it could be that it is easier for a court to accept that an uncle would contract with his nephew—after all, they are both men and therefore both market actors—than it is for a court to accept that a brother-in-law would contract with his sister-in-law, as women were not seen at that time as market actors. I find it difficult to convey this to my students without running into resistance from at least some students, and I always wonder if it would be easier to persuade them if I were male. See also Douglas Baird, *Reconstructing Contracts: Hamer v. Sidway*, in *CONTRACTS STORIES* 160, 164–65 (Douglas Baird ed., 2007) (comparing the outcome in *Hamer* to the outcome in another case heard in the same court three years later in which the court ruled that a father's promise of money to his daughter was unenforceable despite his having already opened a bank account for her; Baird does not consider that gender may have influenced the inconsistency but rather blames doctrinal infighting on the bench).

17. See, e.g., BARNETT, *supra* note 10, at 592–94; KNAPP ET AL., *supra* note 10, at 12–14.

18. RICHARD A. POSNER, *SEX AND REASON* 420–29 (1992).

19. *Id.* at 440.

20. *Wassell v. Adams*, 865 F.2d 849, 855–56 (7th Cir. 1989).

One of the most basic ways in which contract is in fact “gendered”—that is, marked by gender hierarchies—is in its scope. The domain of contract law tends to exclude areas that are of importance to women.<sup>21</sup> For instance, it excluded agreements between a man and his wife because under coverture, these were not two separate individuals and thus could not “contract” with one another.<sup>22</sup> I still think that limitation of scope is the most important way in which contract law is gendered.

For this Symposium, I was asked to think about the ways in which contract rules have been shaped by gender. Accordingly, I have organized this Article around two questions: (1) *Does* gender affect contract law, and if so, how? (2) *Should* gender affect contract law, and if so, how? The first question is empirical in nature; the second is a normative question.

To explore these questions, I am going to look at a group of cases that I will call the “Arthur Murray cases.”<sup>23</sup> In these cases,

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21. See Shultz, *supra* note 11, at 56–58; Debora L. Threedy, *Feminists and Contract Doctrine*, 32 IND. L. REV. 1247, 1250–54 (1999).

22. See *Miller v. Miller*, 35 N.W. 464, 464 (Iowa 1887), *aff'd on reh'g*, 42 N.W. 641, 642–43 (Iowa 1889); Goodwin, *supra* note 13, at 11 n.45 (giving an overview of the law of coverture); see also Shultz, *supra* note 11, at 59 (discussing the *Miller* court’s holding that a wife could not contract with her husband regarding performance of domestic duties). For a discussion of how the echoes of coverture live on in our times, see Vivian Bodey, Comment, *Enforcement of Interspousal Contracts: Out with the “Old Ball & Chain” and in with Marital Gender Equality and Freedom*, 37 SW. U. L. REV. 239 (2008). The comment discusses *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 17–18, 20 (Ct. App. 1993), which held that a contract between a husband and a wife, bargaining for the husband’s nursing care in exchange for a promise that the wife would inherit certain items, was unenforceable for lack of consideration because of the wife’s duty to tend to her husband. Bodey, *supra*, at 242–47.

23. *E.g.*, *Arthur Murray Studio of Wash., Inc. v. FTC*, 458 F.2d 622 (5th Cir. 1972); *Lawless v. Ennis*, 415 P.2d 465 (Ariz. Ct. App. 1966); *Holland v. Nelson*, 85 Cal. Rptr. 117 (Ct. App. 1970); *Staples v. Arthur Murray, Inc.*, 61 Cal. Rptr. 103 (Ct. App. 1967); *Porter v. Arthur Murray, Inc.*, 57 Cal. Rptr. 554 (Ct. App. 1967); *Nichols v. Arthur Murray, Inc.*, 56 Cal. Rptr. 728 (Ct. App. 1967); *Beck v. Arthur Murray, Inc.*, 54 Cal. Rptr. 328 (Dist. Ct. App. 1966); *People v. Arthur Murray, Inc.*, 47 Cal. Rptr. 700 (Dist. Ct. App. 1965); *Adjustment Bureau, Inc. v. Rogers*, 354 P.2d 605 (Colo. 1960); *Santos v. Bogh*, 298 So. 2d 460 (Fla. Dist. Ct. App. 1974); *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. Dist. Ct. App. 1968); *Parker v. Arthur Murray, Inc.*, 295 N.E.2d 487 (Ill. App. Ct. 1973); *Davies v. Arthur Murray, Inc.*, 260 N.E.2d 240 (Ill. App. Ct. 1970); *Van Kleck v. Vente*, 91 N.E.2d 908 (Ill. App. Ct. 1950); *Syester v. Banta*, 133 N.W.2d 666 (Iowa 1965); *Acosta v. Cole*, 178 So. 2d 456 (La. Ct. App. 1965); *Vowels v. Arthur Murray Studios of Mich., Inc.*, 163 N.W.2d 35 (Mich. Ct. App. 1968); *Kraus v. Arthur Murray Studios of Mich., Inc.*, 138 N.W.2d 512 (Mich. Ct. App. 1965); *Weil v. Arthur Murray, Inc.*, 324 N.Y.S.2d 381 (Civ. Ct. 1971); *Best v. Arthur Murray Town & Country Dance Club*, 303 N.Y.S.2d 546 (Civ. Ct. 1969); *Pescatori v. Nassau Dance Studio, Inc.*, 305 N.Y.S.2d 393 (Dist. Ct. 1969). Note that most of these cases date from the late 1960s to the early 1970s. I suspect there are two reasons for this. First, this was a period of enhanced attention to consumer protection. See, e.g., *Consumer Credit*

Arthur Murray customers, dance students, are attempting to rescind or avoid enforcement of long-term contracts for dance lessons.<sup>24</sup>

I have chosen the Arthur Murray cases for investigation for three reasons. First, an example of this kind of case is already present in the contracts canon. Several first-year contracts casebooks include one of these cases,<sup>25</sup> and consequently, many lawyers are familiar with the basic narrative underlying these cases. Second, and more importantly, gender is inextricably connected to the subject matter of these cases.<sup>26</sup> And finally, despite the fact that gender plays an important role in these cases, they fall within the archetype of a market transaction: money in exchange for services.

The contract doctrines involved in these cases are varied, but they are all within the general category of contract defenses.<sup>27</sup> Looking at these cases through the lens of contract defenses highlights a problem. In order to prevail under the contract defenses, a plaintiff must assume the position of pleading special protection. The contract defenses are all based, to a greater or lesser extent, on paternalism: the plaintiff pleading a contract defense should be granted an exception from contract liability due to an impaired ability to protect herself in the marketplace.<sup>28</sup>

For subordinated social groups, such as women or minorities, such special pleading presents a dilemma.<sup>29</sup> One horn of the dilemma runs as follows: In order to qualify for protection, the

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Protection Act of 1968, Pub. L. No. 90-321, 82 Stat. 146 (codified as amended in scattered sections of 15 & 18 U.S.C.); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183 (codified as amended at 15 U.S.C. §§ 2301–2312). In addition, after this period, the need for litigation was mooted as legislatures enacted statutes prohibiting such long-term contracts. *See, e.g.*, Contracts for Dance Studio Lessons and Other Services, CAL. CIV. CODE §§ 1812.50–69 (Deering 2010) (signed into law in 1969); Dance Studio Act, FLA. STAT. § 501.143 (2010) (not passed until 1992); Dance Studio Act, 815 ILL. COMP. STAT. 610/1–12 (2008) (in effect since 1982); N.Y. GEN. BUS. LAW § 394-b (McKinney 1996) (passed in 1964). In addition, the Federal Trade Commission (“FTC”) issued cease-and-desist orders in some instances. *See, e.g.*, *Davies*, 260 N.E.2d at 245 (holding, however, that there was no private cause of action for violation of an FTC order).

24. These cases are actually a subset of cases involving Arthur Murray. See *infra* notes 51–53 and accompanying text, discussing additional Arthur Murray cases.

25. *E.g.*, BARNETT, *supra* note 10, at 991 (using *Vokes*, 212 So. 2d 906); KNAPP ET AL, *supra* note 10, at 557 (using *Syester*, 133 N.W.2d 666). *See also infra* text accompanying notes 69–70.

26. *See infra* text accompanying notes 89–103.

27. *See infra* text accompanying notes 57–65.

28. *See, e.g.*, Darren Bush, *Caught Between Scylla and Charybdis: Law & Economics as a Useful Tool for Feminist Legal Theorists*, 7 AM. U. J. GENDER SOC. POL’Y & L. 395, 407–08 (1998).

29. *See id.*

plaintiff must prove that she is less able to protect herself than the ordinary contract bargainer. If successful, she has established that she is less qualified to participate in contract activity. In other words, she has established herself as being on the margins of contract, as in some sense “less.” That, in turn, can serve to reinforce the subordination of her social category, which may have contributed to her need for protection in the first place. In other words, such special pleading, if based on gender, tends to reinforce the very subordination that feminists seek to overcome.<sup>30</sup> That is the first horn of the dilemma.

The other horn is that, because gender subordination has real consequences (including lower pay, impaired access to social goods such as education due to child care responsibilities, etc.), to ignore gender, to be gender-blind, to say that gender merits no special concern or treatment, leaves untouched the existing gender subordination.

Damned if you do; damned if you don't.

How to resolve the dilemma? Some feminist contract scholars suggest we look at the problem from a different perspective.<sup>31</sup> Rather than looking to somehow inscribe gender into the contract defenses, what if we were to reexamine and reconceptualize the root concept of choice? What if, rather than looking for an exception to contract liability, we look to the formation stage? What if “mutual assent” in the classical, positivist sense—a concept firmly embedded in the patriarchal nineteenth century—did not always result in binding contractual obligation?

Professor Gillian Hadfield has proposed a concept of “expressive choice” as an alternative to the “rational choice” model espoused by both classical contract doctrine and law-and-economics theory.<sup>32</sup> If we take that reconceptualization of choice and applied it to the Arthur Murray cases, what result?

This Article is organized in this fashion. Part I provides some background on the Arthur Murray dance studios and the contract defenses implicated in the cases. Part II explores the importance of the contracts canon in shaping views about the role of context in contract doctrine. Part III, using the Arthur Murray cases, explores the feminist dilemma in deploying contract defenses and the consequences of using the “expressive choice” model as an alternative way to think about gender and contracts.

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30. See, e.g., Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1239 (1998) (discussing the dilemma of choosing between promoting a woman's autonomy by enforcing her contract or promoting her well-being when enforcing the contract serves to reinforce inequality).

31. E.g., *id.* at 1261–62.

32. *Id.*

## I. ARTHUR MURRAY AND THE DANCE STUDIOS

A. *Background on Arthur Murray, the Man*

Arthur Murray, the man, was born Moses Teichmann in 1895 in New York City.<sup>33</sup> He grew up the son of Austrian immigrant parents on Manhattan's Lower East Side.<sup>34</sup> He changed his name in response to anti-German sentiment at the beginning of World War I.<sup>35</sup>

As a shy teenager, he learned to dance to impress girls.<sup>36</sup> He studied at Castle House, the dance school founded by Irene and Vernon Castle.<sup>37</sup> Later, he attended Georgia Tech, studying business administration.<sup>38</sup> He then started a business of selling mail-order dance lessons.<sup>39</sup> He had the idea to sell lessons using footprint diagrams and this was very successful; by 1925, he had sold some five million courses by mail.<sup>40</sup> He started franchising his name and instructional materials in 1938.<sup>41</sup> (Supposedly this was only the second national franchise in the United States, after A & W Restaurants, which was first franchised in the mid-1920s.<sup>42</sup>) In 1946, he formally incorporated the franchise business.<sup>43</sup>

In the 1950s, he had a television show called *The Arthur Murray Party*, a variety show that featured popular musicians and included dance instruction.<sup>44</sup> Arthur Murray formally retired from his dance studio business in the mid-1960s and had a second career as a business investment adviser.<sup>45</sup> He died in 1991.<sup>46</sup>

Arthur Murray has been referred to as "America's number one social dance teacher."<sup>47</sup> At the height of the franchise's success there

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33. Tina Gianoulis, *Arthur Murray*, in 3 ST. JAMES ENCYCLOPEDIA OF POPULAR CULTURE 448, 448 (Tom Pendergast & Sara Pendergast eds., 2000).

34. *Id.* at 448.

35. *Id.* at 449.

36. See KATHRYN MURRAY, *MY HUSBAND, ARTHUR MURRAY* 36, 38 (1960).

37. Maureen Needham, *Arthur Murray*, in AM. COUNCIL OF LEARNED SOC'YS, 16 AMERICAN NATIONAL BIOGRAPHY 148, 148 (John A. Garraty & Mark C. Carnes eds., 1999).

38. *Id.* at 149.

39. Gianoulis, *supra* note 33, at 449.

40. *Id.*; see also JULIET MCMAINS, *GLAMOUR ADDICTION: INSIDE THE AMERICAN BALLROOM DANCE INDUSTRY* 74 (2006).

41. Kimbally A. Medeiros, *Arthur Murray International, Inc.*, in 32 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 60, 61 (Jay P. Pederson ed., 2000).

42. Thomas Derdak, *A & W Brands, Inc.*, in 25 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 61 (Laura E. Whitely ed., 2000).

43. Medeiros, *supra* note 41, at 60, 61.

44. THE COMPLETE DIRECTORY TO PRIME TIME NETWORK AND CABLE TV SHOWS, 1946–PRESENT, at 82 (Tim Brook & Earl Marsh eds., 9th ed. 2007).

45. Needham, *supra* note 37, at 149.

46. *Id.* at 148.

47. DORIS EATON TRAVIS ET AL., *THE DAYS WE DANCED: THE STORY OF MY THEATRICAL FAMILY FROM FLORENZ ZIEGFELD TO ARTHUR MURRAY AND BEYOND*



were more than 350 Arthur Murray studios worldwide, grossing over \$25 million.<sup>48</sup> Today there are still about 250 Arthur Murray studios.<sup>49</sup> There are numerous references to his method of dance instruction in popular culture.<sup>50</sup>

*B. Arthur Murray, Inc. in the Courts*

You could almost structure a law school curriculum around Arthur Murray Dance Studios. Certainly, you could teach large parts of several courses using only Arthur Murray cases, if you were so inclined. Over the last ninety years, the franchised studios have generated much litigation. From a corporate law perspective, cases hashed out the legal consequences of a franchise: did it create an agency relationship or merely a license?<sup>51</sup> From a civil procedure perspective, because the legal nature of a franchise was novel, many of the early cases deal with questions of jurisdiction, such as: did the presence of the franchisee in the jurisdiction give the court power over the nonresident franchisor?<sup>52</sup> Unexpectedly, there are employment cases because the Arthur Murray studios often included a noncompete clause in the dance instructors' employment contracts, and former employees challenged those clauses.<sup>53</sup>

From a contracts perspective, one theme that runs through a number of cases is under what circumstances a student who has purchased many hours of future instruction may rescind the contract or contracts. The factual similarities of the conduct of the dance studios suggest that Arthur Murray, Inc., in addition to franchising the Arthur Murray name, gave standardized rules, or at least suggestions, for marketing the dance lessons. For example, the *Syester v. Banta* opinion recounts testimony about the talking points that dance instructors were supposed to use to flatter a prospect.<sup>54</sup>

The allegations in the cases suggest that the "Arthur Murray

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148 (2003).

48. Gianoulis, *supra* note 33, at 449.

49. Arthur Murray International, History, <http://arthurmurray.com/history.asp> (last visited Sept. 14, 2010).

50. See, e.g., *DIRTY DANCING* (Lionsgate 1987); *THE AMERICAN PRESIDENT* (Universal Pictures 1995); *THE APARTMENT* (MGM 1960). In all of these movies, the male lead claims to have taken dance lessons from Arthur Murray.

51. See, e.g., *Nichols v. Arthur Murray, Inc.*, 56 Cal. Rptr. 728, 730 (Ct. App. 1967); *Beck v. Arthur Murray, Inc.*, 54 Cal. Rptr. 328, 330–32 (Dist. Ct. App. 1966); *Vowels v. Arthur Murray Studios of Mich., Inc.*, 163 N.W.2d 35, 37 (Mich. Ct. App. 1968).

52. See, e.g., *Arthur Murray, Inc. v. Smith*, 183 S.E.2d 66, 67–68 (Ga. Ct. App. 1971); *Odam v. Arthur Murray, Inc.*, 621 P.2d 453, 456–57 (Kan. Ct. App. 1980); *White v. Arthur Murray, Inc.*, 549 P.2d 439, 440–41 (Utah 1976).

53. See, e.g., *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 105 N.E.2d 685, 687 (Ohio Ct. Com. Pl. 1952); *Worrie v. Boze*, 62 S.E.2d 876, 877–79 (Va. 1951).

54. *Syester v. Banta*, 133 N.W.2d 666, 670 (Iowa 1965).

marketing plan” included many of the classic hallmarks of “overpersuasion,”<sup>55</sup> such as telling the plaintiffs they had to decide immediately, involving two or more employees in the sales pitch, and bringing in so-called outside experts to evaluate the student’s potential and offer advice as to the classes the student should take.<sup>56</sup>

Different cases raise different contract defenses. For example, there are cases in which the plaintiff, after having bought a long-term contract for dance instruction, claims to have become injured or ill; these plaintiffs raise the defense of frustration of purpose or impossibility.<sup>57</sup> In cases in which the plaintiffs are alleging sharp dealing on the part of the dance studio, the defenses raised include misrepresentation and fraud,<sup>58</sup> undue influence,<sup>59</sup> unconscionability,<sup>60</sup> violation of public policy,<sup>61</sup> mutual mistake,<sup>62</sup> unjust enrichment,<sup>63</sup> and duress.<sup>64</sup> The confusing welter of defenses

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55. “Overpersuasion” involves tactics such as discussing the transaction at an inappropriate time or place, insisting on an immediate decision, emphasizing the negative consequences of delay, and discouraging the use of third-party advisers. *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533, 541 (Dist. Ct. App. 1966).

56. All of these tactics were used to convince Audrey Vokes to sign up for more than two thousand hours of dance lessons. *See* Fourth Amended Complaint at 5, *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. Dist. Ct. App. 1968) (No. 69,617) (recounting how defendant dance studio owner took plaintiff to St. Petersburg for a “dance aptitude test” before an “outside expert,” Toni Fudge, who advised plaintiff she needed 545 hours to achieve the Bronze Standard); *id.* at 10 (describing the presence of multiple instructors who advised plaintiff to sign up for more lessons); *id.* at 17 (recalling the studio’s promise that immediate purchase of additional hours would result in financial savings).

57. *See, e.g.*, *Parker v. Arthur Murray, Inc.*, 295 N.E.2d 487, 489 (Ill. App. Ct. 1973); *Davies v. Arthur Murray*, 260 N.E.2d 240, 242 (Ill. App. Ct. 1970); *Acosta v. Cole*, 178 So. 2d 456, 456–58 (La. Ct. App. 1965). Technically, the proper defense in these cases is frustration of purpose, as the plaintiff is alleging that his or her injury has negated the plaintiff’s purpose in entering into the contract, i.e., to learn to dance. The plaintiff’s ability to perform his or her obligations under the contract, i.e., to pay money, is not affected and therefore impossibility does not apply.

58. *See, e.g.*, *Syester*, 133 N.W.2d at 673.

59. *See, e.g.*, *Vokes*, 212 So. 2d at 907.

60. *Cf. Best v. Arthur Murray Town & Country Dance Club*, 303 N.Y.S.2d 546, 548 (Civ. Ct. 1969) (ruling against Arthur Murray on statutory grounds, as the State had recently passed a law protecting consumers against unconscionable practices by dance studios).

61. *See, e.g.*, *Weil v. Arthur Murray, Inc.*, 324 N.Y.S.2d 381, 384–85 (Civ. Ct. 1971) (finding for the plaintiff on statutory grounds and decrying the dance contract as not only “adverse to the public policy as intended by the Legislature” but also exploitative to the extent that it “violat[e] basic concepts of permissible conduct”).

62. *See, e.g.*, *Lawless v. Ennis*, 415 P.2d 465, 466 (Ariz. Ct. App. 1966).

63. *See, e.g.*, *id.*

64. *See, e.g.*, *Adjustment Bureau, Inc. v. Rogers*, 354 P.2d 605, 607 (Colo. 1960).

raised in these very similar situations suggests that lawyers and courts were having a difficult time conceptualizing how to fit these cases into established contract doctrines.<sup>65</sup>

Before examining these cases in more detail, I want to pause and consider what is called “deep canonicity”<sup>66</sup> and how the judicial rhetoric in the Arthur Murray cases both is shaped by and, in turn, shapes norms established through the contracts canon.

## II. DEEP CANONICITY AND GENDER

Legal education proceeds “by reading a series of central texts.”<sup>67</sup> These central texts are the cases collected in the various casebooks. The cases, particularly those that appear in a number of the casebooks, comprise the “canon.”

The choice of cases included in the contracts casebooks can be (and has been) examined for what those choices say about gender. At a somewhat superficial level, Professor Mary Jo Frug wrote about the paucity of women as litigants in a typical contracts casebook and what messages that sent to law students about gender.<sup>68</sup>

The Arthur Murray dance studio cases do make an appearance in the first year contracts canon. The Knapp, Crystal, and Prince text includes the *Syester* case, in which a lonely widow signs up for more than 4000 hours of lessons costing some \$33,000.<sup>69</sup> And the Barnett text contains the *Vokes* case, also involving a lonely widow signing up for 2300 hours of lessons costing some \$31,000.<sup>70</sup> Both of these cases are interesting in the way that makes for good teaching cases: memorable facts, focused on a digestible legal issue.<sup>71</sup>

Not all of the plaintiffs in the Arthur Murray cases are women,

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65. Perhaps there is a need for a “unified theory” of contract defenses, at least in the context of sharp dealing.

66. See Balkin & Levinson, *supra* note 8, at 15–24 (defining “deep canonicity” as “certain ways of thinking, talking, and arguing that are characteristic of a culture”).

67. JAMES BOYD WHITE, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life, in HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 107, 109 (1985).

68. Mary Jo Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1074–1112 (1985).

69. KNAPP ET AL., *supra* note 10, at 557 (citing *Syester v. Banta*, 133 N.W.2d 666, 669 (Iowa 1965)).

70. BARNETT, *supra* note 10, at 991 (citing *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906, 907 (Fla. Ct. App. 1968)).

71. Digestibility is a relevant attribute for legal study:

I suppose one reason why the . . . opinions were studied as they were is that they were small enough to be grasped all at once, to be held in the mind as wholes. . . . [W]e gave our attention for the most part to the particular texts, the particular expressions, and did not wonder much—did it matter?—how the particular texts were chosen or in what sense the “series” they made corresponded to anything outside itself.

WHITE, *supra* note 67, at 109–10.

however. Some of the plaintiffs are men.<sup>72</sup> Because the cases do involve both men and women, it is possible to compare the cases on the basis of gender. I am not of a quantitative bent, so I will not be examining these cases to see if there are statistically significant differences in the outcomes or rationales for men and women. However, even for those of us who are quantitatively challenged, it is clear that there are many more cases involving women than men. This is not surprising, as women tend to live longer than men, and thus as a woman ages there are fewer available men in her age cohort. The gender imbalance in the plaintiffs' genders could, therefore, simply reflect the demographics of the class of Arthur Murray students.<sup>73</sup>

Alternatively, it could be that even if the Arthur Murray students overall were comprised of roughly the same number of men and women, more women could be bringing suit. This could be because more women than men were susceptible to signing long-term dance school contracts, for whatever reason, or because women were more likely to be dissatisfied with the long-term contracts than were men. It could also be that the legal profession perceived that women had a better chance of succeeding in these cases and thus were more willing to encourage and participate in a lawsuit brought by a woman.

Whatever the explanation for the gender imbalance in the overall class of plaintiffs, should we read anything into the fact that compilers of casebooks have chosen to use cases involving women rather than men? There has been surprisingly little examination of the process by which cases are selected; in other words, the factors that go into choosing what texts will comprise the "canon" have not been studied in any depth.<sup>74</sup>

Choice of cases to include in a casebook, and thus in the canon, is not the only way to think about canonicity, however. We can also think about what is called "deep canonicity" and what that can tell us about gender and contract doctrine:

[S]ome of the most important forms of canonicity have less to do with the choice of materials than with the tools of understanding that people use to think about the law—the

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72. See, e.g., *Porter v. Arthur Murray, Inc.*, 57 Cal. Rptr. 554, 555 (Ct. App. 1967); *Adjustment Bureau, Inc. v. Rogers*, 354 P.2d 605, 606 (Colo. 1960); *Parker v. Arthur Murray, Inc.*, 295 N.E.2d 487, 489 (Ill. App. Ct. 1973); *Pescatori v. Nassau Dance Studio, Inc.*, 305 N.Y.S.2d 393, 394 (Dist. Ct. 1969).

73. The actual demographic makeup of the class of Arthur Murray students is an interesting question, but beyond the scope of this Article and the competence of its author.

74. But see Angela Fernandez, *An Object Lesson in Speculation: Multiple Views of the Cathedral in Leaf v. International Galleries*, 58 U. TORONTO L.J. 481, 503–14 (2008) (discussing how and why a case becomes canonized in a casebook).

background structures of “law-talk” that shape conversations within and concerning the law. These elements of “deep canonicity” include characteristic forms of legal argument, characteristic approaches to problems, underlying narrative structures, unconscious forms of categorization, and the use of canonical examples.<sup>75</sup>

I propose to use the idea of canonical narratives as a lens through which to examine the Arthur Murray cases.

A. *Canonical Narratives*

One aspect of “deep canonicity” is the use of “canonical narratives.”<sup>76</sup>

Every society has a set of stock stories about itself, which are constantly retold and eventually take on a mythic status. These stories explain to the members of that society who they are and what values they hold most dear. These stock stories are both descriptive and prescriptive: they not only frame our sense of what has happened and how events will unfold in the future, but also explain how those events should unfold.<sup>77</sup>

What is the message of the Arthur Murray cases included in the first-year canon at the level of “deep canonicity”? I suspect these cases were selected at least in part because they conform to one of the “stock stories” we as a society tell ourselves. The descriptive part of the stock story goes something like this:

Lonely, vulnerable, typically elderly widow/spinster attends a dance class or demonstration at an Arthur Murray Studio. There, an attentive, presumably attractive, young male dance instructor “sweeps her off her feet” and in no time at all, she has signed up for hundreds, if not thousands, of hours of dance instruction, costing her thousands, if not tens of thousands, of dollars. At some point, she comes to her senses and demands a refund, seeking to rescind her contracts on the basis of one of a suite of contract defenses.<sup>78</sup>

The prescriptive part of this story requires us, through the law, to take extraordinary measures to protect this woman, exempting her from the “normal” rules that would apply to the rest of us. In other words, these cases are the legal equivalent of helping a little old lady across the street. This is an example of the first horn of the dilemma: by playing the “gender card,” the plaintiff establishes

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75. Balkin & Levinson, *supra* note 8, at 5.

76. *Id.* at 16.

77. *Id.* at 16–17.

78. *See, e.g.*, Vokes v. Arthur Murray, Inc., 212 So. 2d 906, 907–08 (Fla. Dist. Ct. App. 1968); Syester v. Banta, 133 N.W.2d 666, 669–70 (Iowa 1965).

herself as less capable.<sup>79</sup>

In talking about the plaintiffs in the Arthur Murray dance cases, a court could focus on their ages, as the plaintiffs tend to be middle-aged or older. Focusing on the plaintiffs' ages would be using a gender-neutral lens; but instead, courts focus on their genders.<sup>80</sup> It may be that our "stock stories" about age are not as firmly established as our narratives about gender, but in a sense that simply begs the question: why would we have a clearer notion of how gender triggers paternalism than we do about how age does?

*B. Judicial Rhetoric in the Arthur Murray Cases*

I am interested in how courts qualitatively treat gender in these cases. Here are three examples. In the first case, the plaintiff is a woman and this is how the court portrays her:

Plaintiff Mrs. Audrey E. Vokes, a widow of 51 years and without family, had a yen to be "an accomplished dancer" with the hopes of finding "new interest in life". So, on February 10, 1961, a dubious fate, with the assist of a motivated acquaintance, procured her to attend a "dance party" at Davenport's "School of Dancing" where she whiled away the pleasant hours, sometimes in a private room, absorbing [the male instructor's] accomplished sales technique, during which her grace and poise were elaborated upon and her rosy future as "an excellent dancer" was painted for her in vivid and glowing colors. As an incident to this interlude, he sold her eight 1/2-hour dance lessons to be utilized within one calendar month therefrom, for the sum of \$14.50 cash in hand paid, obviously a baited "comeon".

Thus she embarked upon an almost endless pursuit of the terpsichorean art during which, over a period of less than sixteen months, she was sold fourteen "dance courses" totalling [sic] in the aggregate 2302 hours of dancing lessons for a total cash outlay of \$31,090.45, all at Davenport's dance emporium.

....

.... From the time of her first contact with the dancing school in February, 1961, she was influenced unwittingly by a constant and continuous barrage of flattery, false praise, excessive compliments, and panegyric encomiums, to such extent that it would be not only inequitable, but unconscionable, for a Court exercising inherent chancery power to allow such contracts to stand.

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79. See Hadfield, *supra* note 30, at 1239.

80. See, e.g., *Lawless v. Ennis*, 415 P.2d 465, 467-68 (Ariz. Ct. App. 1966) (describing plaintiff as a "lonely, unhappy widow"); *Vokes*, 212 So. 2d at 907 (referring to the plaintiff as a "widow").

She was incessantly subjected to overreaching blandishment and cajolery. She was assured she had “grace and poise”; that she was “rapidly improving and developing in her dancing skill”; that the additional lessons would “make her a beautiful dancer, capable of dancing with the most accomplished dancers”; that she was “rapidly progressing in the development of her dancing skill and gracefulness”, etc., etc. . . .

. . . .

All the foregoing sales promotions, illustrative of the entire fourteen separate contracts, were procured by defendant Davenport and Arthur Murray, Inc., by false representations to her that she was improving in her dancing ability, that she had excellent potential, that she was responding to instructions in dancing grace, and that they were developing her into a beautiful dancer, whereas in truth and in fact she did not develop in her dancing ability, she had no “dance aptitude”, and in fact had difficulty in “hearing the musical beat”. The complaint alleged that such representations to her “were in fact false and known by the defendant to be false and contrary to the plaintiff’s true ability, the truth of plaintiff’s ability being fully known to the defendants, but withheld from the plaintiff for the sole and specific intent to deceive and defraud the plaintiff and to induce her in the purchasing of additional hours of dance lessons”. It was averred that the lessons were sold to her “in total disregard to the true physical, rhythm, and mental ability of the plaintiff”. In other words, while she first exulted that she was entering the “spring of her life”, she finally was awakened to the fact there was “spring” neither in her life nor in her feet.<sup>81</sup>

Note the rhetorical moves in this excerpt. The female plaintiff is spoken of in the passive voice: she was sold, she was influenced, she was subjected to, even, in the end, “she finally was awakened to” the folly of her actions. She is not even given the agency or self-awareness to come to this conclusion as a result of her own initiative; rather, some unnamed, outside influence acts like an alarm clock and awakens her.

In the second case, the plaintiff is also a woman. Here is the picture of her, painted, it should be noted, by her own attorneys,<sup>82</sup>

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81. *Vokes*, 212 So. 2d at 907–08.

82. *Lawless*, 415 P.2d at 467. Reflecting upon that fact opens further questions: Were her attorneys in fact that patronizing to her? Or did they believe that they had to paint her in such a light in order to invoke the contract defense? Did they discuss that strategy with her? Did she consent to such an unflattering portrayal?

and quoted by the court:

Maude Ennis, a 69 year old lonely, unhappy widow, whose life was one boring bridge game after another, received a telephone call one day while she was at home, pondering what to do about her vacuous existence.

It was the Arthur Murray Studio calling. Would Mrs. Ennis like to come to the studio for a free trial lesson?

She said, 'No.'

A few days later Arthur Murray called again, making the same offer. Finally, Mrs. Ennis bored and lonely with time hanging heavily upon her hands, with the clock of life ticking on, went to Arthur Murray's.

The studio was nice. Many people were there, enjoying themselves at what appeared to be a party. The instructors were gentlemen; they were very polite, very solicitous, and intent upon showing Mrs. Ennis a good time. And of getting her to sign a contract.

Shortly thereafter, she signed the first of three contracts, the last of which was for \$13,120 and entitled her to a lifetime membership.

....

Now that she had become a lifetime student and had parted with \$13,120, Mrs. Ennis no longer received any further deferential attention from the instructors. She didn't learn to dance a step.

Her back bothered her. She had a few black-outs and severe headaches.

After she left Phoenix for the summer for the solitude and tranquillity [sic] of her small cabin in the Rockies, while she was away from the pressure of life in the city, in the mountains she enjoyed so much, it occurred to her that she had been a fool to sign the life contract, to succumb to the blandishments and flattery of the people at Arthur Murray's. She realized she never was able to enjoy herself dancing because of her health, she learned she had arthritis, and because, as she has stated, she had 'Methodist feet.'<sup>83</sup>

At least Maude Ennis is granted some agency: she herself comes to the realization that she had been a "fool." Both women

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83. *Id.* at 468.



nevertheless are portrayed as frivolous, vain people leading empty and “vacuous” existences.<sup>84</sup> Compare that with the following characterization of a male plaintiff:

Frank W. Porter (Porter), born in 1901, was a post office employee from 1925 until his retirement in 1957. His second wife died on November 15, 1961.

In 1961 a new and exciting life opened up for Porter: He discovered the Arthur Murray School of Dancing (School), or it discovered Porter.

....

Porter signed 11 different contracts with School, the first on September 23, 1961, the last on July 11, 1962.

The first, called “Enrollment Agreement,” dated September 23, 1961, was for “25 hours of dancing lessons” which was to expire on September [blank] 1962. . . .

On September 28, an “Extension Agreement” was signed. Porter agreed to extend his course of 25 hours to 309 hours for a total of \$3,400 including the \$365 previously paid. He made full payment of the balance the same day. The course was to expire “on Dec. 31, 1965.” Again, School agreed to give the lessons.

On October 13, another “Enrollment Agreement” was signed for “850 hours . . . during the next [blank] months” for a mere \$8,500. On it Porter was described as a “full Lifetime Member.” It contained no promise by School.

Perhaps disturbed by the possibility that if he did not corner enough of the desirable dancing lessons they would be gobbled up by others, Porter on October 13 increased his earlier option of the same date to cover 900 hours “during [blank] months” and, of course, his life membership, for a total of only \$9,750.

By December 8, the possible threat of a shortage of dancing lessons in a seller’s market persuaded Porter that

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84. Note also how the women’s desires are portrayed: Audrey Vokes has a “yen,” and Maude Ennis is bored, “pondering what to do about her vacuous existence.” It is almost as if women who seek adventure are somehow asking to be taken advantage of. My thanks to Darren Bush for pointing this out. As he comments: “Apparently, only men are allowed the hero’s journey.” E-mail from Professor Darren Bush to author (Sept. 7, 2010, 10:17 CST) (on file with author).

1,200 to 2,232 hours additional for a minimal \$11,500 was a judicious investment. . . .

So great a plunge in dancing lesson futures might be expected to require outside financing. Under the same date, a "Retail Installment Contract" was signed covering 1,032 lessons. Although the "Enrollment Agreement" recited a deposit of \$1,500, the "Retail Installment Contract" showed that the down-payment was \$5,500, the balance of \$6,000 to be paid \$500 monthly, commencing January 8, 1962.<sup>85</sup>

While all three opinions are condescending in tone toward the plaintiffs,<sup>86</sup> I am struck by how the court's ridicule of the male plaintiff at least grants him agency—he is portrayed as an investor making decisions to further his self-interest, not as the pawn of unscrupulous dance studio owners, as in the case of the female plaintiffs. This is even more striking given that, in the caption of the case, the plaintiff is identified as being incompetent.<sup>87</sup> In the opinion, however, the only direct reference to the plaintiff's possible lack of competence at the time he was contracting appears in the very final sentence: "It is apparent from the face of this record that Porter from some cause or another was likely to be deceived and

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85. *Porter v. Arthur Murray, Inc.*, 57 Cal. Rptr. 554, 555–56 (Ct. App. 1967). The opinion continues:

On January 13, 1962, a further "Enrollment Agreement" was signed covering 100 hours for \$1,000, "due Feb. 1962," which was paid on February 7, 1962. That course of 100 hours of dancing lessons was to expire on blank date.

Having obtained the January 13, 1962 contract for \$1,000, School magnanimously undertook on the same day to give a further 168 hours of dancing lessons to expire on blank date as "Payment in full for two oil paintings now in possession of the Studio." That document contained also the notation "Full Charter Membership."

Greater triumphs, however, were in store for Porter. He was given the opportunity to become a "1st Patron Charter Club Member." So rare a prize was not to be refused. On February 23, 1962, he paid a token \$2,000 for that privilege. Since club membership alone might be a hollow thing, the same contract provided for 200 hours of dancing lessons for an additional \$2,000, which was paid. Those lessons were to expire only when used. Porter achieved an additional coup by a provision that 50 hours should be added "for each portrait of patron charter."

It must have been obvious to Porter that for membership in an exclusive club to be meaningful, there must be an initiation. So on February 24 he signed an agreement for payment of, and paid, the "initiation fee" of \$900. This should not seem a stiff fee to ride the goat when the rider has the unique experience of being also the ridden.

*Id.* at 556–57.

86. Seeing humor used against the litigants in such a fashion is upsetting to me, as it implies an unthinking and unconscious judicial arrogance.

87. *Porter*, 57 Cal. Rptr. at 554.

imposed upon by artful and designing persons.”<sup>88</sup>

The narratives deployed in these cases reveal an unflattering gender stereotype. Women are lumped with incompetents as deserving and needing protection. Like layers of an onion, these narratives have deeper layers of meaning. What follows is an attempt to look beyond the stock story.

C. *A Psychological Reading of the Arthur Murray Narratives*

The offering of dance instruction in a club-like setting invokes many aspects of heterosexual courtship rituals. Arthur Murray studios specialized in teaching “touch dancing,” in which a man and a woman danced in each other’s arms.<sup>89</sup> These heterosexual pairings, the touching, and the rhythmic movements all invoke—let’s be frank here—a sexualized experience, albeit one that is highly stylized and by modern mores exceedingly tame. Nevertheless, let’s not forget the outrage sparked by the waltz.<sup>90</sup>

I think it is highly likely that this whiff of sexuality permeates the rhetoric and narratives in these cases.<sup>91</sup> If I am right about there being an almost subconscious relation to sex in these dance studio cases, is it not likely that generalized background anxieties about gender and race would infect these cases and how we think about these cases?<sup>92</sup> Consider, for example, the *Crawford* case, in which a dance studio refused to allow a black man to take lessons.<sup>93</sup> The color of his money was the same as anyone else’s, but can you imagine the discomfort caused in 1960 by the sight of a black man holding a young, attractive white woman (his dance instructor) in his arms? To many white observers, it would have made sitting next to a black person at a lunch counter seem tame in comparison.

When thinking of these cases as involving scams against elderly, vulnerable widows, one might possibly overlook the fact that, in many of the cases, it appears that the plaintiff was a woman of more than average means. That possibility complicates the stock story of the lonely old woman cheated out of her life savings by an unscrupulous salesman. It may also trigger a background, gender-specific anxiety.

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88. *Id.* at 564.

89. See Medeiros, *supra* note 41, at 61.

90. See ANATOLE CHUJOY, *The Waltz*, in THE DANCE ENCYCLOPEDIA 501–03 (1949).

91. When I described the *Porter* case to my contracts class, their response was: oh, he just wants the chance to hold a young attractive woman in his arms. That produced an “Aha!” moment. The gender stereotypes in these cases reflect cultural anxieties about money and sex.

92. Cf. McMains, *supra* note 40, at 73 (describing how societal anxieties about implied sexual desires and the influence of black culture on white America generated antidance criticism).

93. *Crawford v. Robert L. Kent, Inc.*, 167 N.E.2d 620, 621 (Mass. 1960).

For example, Mrs. Syester spent \$33,000 on dance lessons,<sup>94</sup> the equivalent of some \$200,000 in today's dollars.<sup>95</sup> In *Vokes*, the plaintiff is portrayed as playing golf, a sport that until recently required membership in a private club.<sup>96</sup> The plaintiff in *Lawless* had two residences, a home in Arizona and a summer cabin in the mountains of Colorado.<sup>97</sup> If we think of these women not as "poor" little widows, but as women of substance, does that change how we think about the cases?

I suspect that an anxiety over the notion of women with enough discretionary income to spend \$30,000 (in mid-60s dollars) on dance lessons operates as a subtext in these cases. There is a well-established history of men paying money for female companionship. Consider "taxi-dancers," for instance.<sup>98</sup> But women's ability to do the same is of a more recent vintage, and at the time, it may very well have been tainted with a faint unsavoriness.

It goes unquestioned in all of these cases involving men that they are seeking—and paying for—female companionship. And there is nothing "wrong" with that, either in the seeking or in the paying.

Moreover, given the background gendered power imbalance, men as a class have greater access to economic resources and thus can more easily be the consumer of companionship or sex. Women as a class have less access to economic resources and thus often sell companionship or sex. There is no overreaching in this, just typical bargaining behavior. That bargaining relationship plays out against a background of social inequality, but defenders of the impartiality of contract doctrine would argue that contract law did not create that inequality and is not furthering it.

Now flip the roles: in most of the Arthur Murray cases, we see

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94. *Syester v. Banta*, 133 N.W.2d 666, 669 (Iowa 1965). There is a puzzling fact in the opinion that points in a different direction: after her husband's death, Mrs. Syester worked as a "coffee girl at Bishop's." *Id.* I am not sure what being a "coffee girl" entails or what kind of establishment Bishop's was, but my guess would be that it was some kind of service position like waitressing. That does tend to indicate a lower socioeconomic class than I'm suggesting. Nevertheless, she certainly was not destitute (at least not before she signed up for dance lessons) as she was able to come up with a sizable amount of cash.

95. M. Cathleen Kaveny, *Between Example and Doctrine: Contract Law and Common Morality*, 33 J. RELIGIOUS ETHICS 669, 687–88 (2005).

96. Complaint at 2, *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. Dist. Ct. App. 1968) (No. 69,617).

97. *Lawless v. Ennis*, 415 P.2d 465, 468 (Ariz. Ct. App. 1966).

98. A taxi-dancer is someone, usually a woman, who is paid on a per-dance basis to spend time with a man. THE CONCISE NEW PARTRIDGE DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH 641 (Tom Dalzell & Terry Victor eds, 8th ed. 2008). The main character in the Broadway musical "Sweet Charity" is a taxi-dancer. See NEIL SIMON, SWEET CHARITY (1966).

women purchasing companionship.<sup>99</sup>

So here is my theory: Despite being painted as “elderly widows,” which triggers a vision of a lonely widow scraping along on a pension, maybe that is not the case; maybe the “merry widow” is a more fitting stereotype. The women plaintiffs in at least some of these cases appear to be women with disposable income. But, maybe the judges and juries in these cases would prefer the stereotype of an elderly widow—a sad, lonely, vulnerable figure—to that of a woman “acting just like a man”—that is, purchasing the favors and attention of an attractive young partner.<sup>100</sup>

Push this further: if the law-and-economics folks are correct, one way to undercut the market power of a group is paradoxically to give them the ability to opt out of contracts.<sup>101</sup>

So, if my theory is correct, and if the idea of a woman acting like a man and rationally entering the market for companionship as a market player with real bargaining power makes judges and juries uneasy, one way to resolve that uneasiness is to recast their role: rather than describing them as rational market actors pursuing their self-interest by purchasing access to attractive young men, paint them as vulnerable and provide them with a contract defense—paternalism, on more than one level.

The foregoing psychological reading of the gender narratives embedded in these cases is not incompatible with acknowledging that the lived experiences of these women dance students may be accurately portrayed as “vulnerable.” Women have no social history of being market players and it would not be surprising that they would not be good market players, especially in the time frame of these cases.<sup>102</sup> The point I am making is that women’s vulnerability has not counted for much in the law, unless recognizing it also serves to reinforce male privilege.<sup>103</sup>

Furthermore, to argue that these cases are wrongly decided and

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99. There is a film clip from a George Raft movie that perfectly illustrates this. See *BOLERO* (Paramount Pictures 1934) (depicting two older women in a ballroom paying a young male taxi-dancer to dance with them).

100. A recent slang term, “cougar,” refers to an older woman seeking a romantic or sexual relationship with a younger man, but the concept is much older. See Joe Saltzman, *Sex and the Older Adult*, USA TODAY, May, 2010 (Magazine), at 29 (defining “cougar”).

101. See Bush, *supra* note 28, at 423–25; Hadfield, *supra* note 30, at 1248.

102. See, e.g., Batlan, *supra* note 6, at 829–34. The majority of the Arthur Murray cases arise between the mid-1960s and the mid-1970s.

103. For example, in the novel *To Kill A Mockingbird*, Mayella Ewell is “poor white trash” and does not count for much, until she claims to have been raped by a black man. HARPER LEE, *TO KILL A MOCKINGBIRD* 203–15 (HarperCollins 2002) (1960). Then she can be recast as a violated Southern white woman, which serves to reinforce both gender and racial hierarchies. See Iris Halpern, *Rape, Incest, and Harper Lee’s To Kill a Mockingbird: On Alabama’s Legal Construction of Gender and Sexuality in the Context of Racial Subordination*, 18 COLUM. J. GENDER & L. 743, 765–70 (2009).

that contract law should not paternalistically protect these women leaves untouched the overreaching and undoubted sleaziness of the dance studios.

### III. SHOULD GENDER MATTER?

Thinking about contract rules as a whole, I see those rules as reflecting a tension between two opposing ends of a spectrum. This tension is intrinsic to contract law. One end of the spectrum we can classify as “laissez-faire.”<sup>104</sup> The focus here is on the agreement that the parties have shaped for themselves. The goal of the law is to best effectuate the parties’ collective will.<sup>105</sup> The other end of the spectrum we can classify as “protectionistic.”<sup>106</sup> These are the contract rules that aim to protect a contracting party from overreaching by the other side.<sup>107</sup> When a court is furthering this end of the contract law spectrum, the parties’ agreement is no longer the lodestar; instead, the first principle is some notion of fairness. These two values, autonomy and fairness, are always in tension in contract law.<sup>108</sup>

The following may seem an aside, but I promise to tie it in. The traditional Navajo worldview sees everything as having a gender: everything is either male or female, or more precisely, everything has a male and a female aspect.<sup>109</sup> For example, every weaving has a male and female side.<sup>110</sup> Even in a Latin heritage, we can see a similar duality: every noun is either masculine or feminine.<sup>111</sup> Now—and this is where I proceed with trepidation—if we were inclined to look at this tension in contract law between laissez-faire and protectionism and to assign genders to this duality, we would call the laissez-faire side male or masculine and the protectionist side female or feminine<sup>112</sup> (notwithstanding the fact that what this side is often called is “paternalistic”—“maternalistic” might be better).

Why do I say “with trepidation”? First, I am not sure it is an accurate way to look at things. It runs the risk of oversimplifying

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104. See 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.1 (3d ed. 2004).

105. See *id.*

106. See *id.*

107. See *id.*

108. Gillian K. Hadfield, *The Dilemma of Choice: A Feminist Perspective on The Limits of Freedom of Contract*, 33 OSGOODE HALL L.J. 337, 339 (1995) (Can.) (book review).

109. LAWRENCE M. HINMAN, ETHICS: A PLURALISTIC APPROACH TO MORAL THEORY 85 (1994).

110. ROSEANN SANDOVAL WILLINK & PAUL G. ZOLBROD, WEAVING A WORLD: TEXTILES AND THE NAVAJO WAY OF SEEING 30 (1996).

111. DAVID CRYSTAL, A DICTIONARY OF LINGUISTICS & PHONETICS 197 (5th ed. 2003).

112. See Frug, *supra* note 7, at 1035–37.

our views of both contract law and gender. More importantly, I fear it risks reinscribing the very gender hierarchies that have marked our history. It opens the door for looking at the protectionist side, the feminine side of contract law, as less “real” contract law, the exceptions at the margins of contract law. That would leave the laissez faire side of things, the masculine side of contract law, the classical contract rules of consideration and mutual assent, as the “real” heart of contract law.<sup>113</sup> Indeed, this is why some argue that it is no use fiddling with the contract defenses, because it will always leave you marginalized.<sup>114</sup>

In fact, referencing again the Navajo worldview, the two sides depend on one another. Neither is complete in itself, and neither by itself constitutes a well-functioning system.<sup>115</sup> Mutual assent, without the mediating influence of defenses like undue influence or misrepresentation, will lead inexorably to injustice. The tension between the two poles of the spectrum will always be there. But rather than conceptualizing this as a tension between the core and the margins, we could think of this as the tension between the two arms of the scales of justice.

In the following Subparts, I explore these alternative approaches.

#### A. *Reconceptualizing the Core of Contracts*

Some feminists oppose thinking about gender only in terms of contract defenses. They find this unsatisfactory because it is too easy to reinscribe gender stereotypes.<sup>116</sup> They view the doctrine of mutual assent as the heart of contract law, where power resides,<sup>117</sup> and propose an alternate view of what constitutes “assent.”<sup>118</sup>

Hadfield, for example, suggests that part of the problem resides in having a unitary concept of “choice” or assent.<sup>119</sup> That unitary concept is rooted in the economic vision of “rational choice,” which is

113. See, e.g., Hart, *supra* note 1, at 199. “Formation is the core, because this is where power is centered.” *Id.* at 198.

114. See Hadfield, *supra* note 30, at 1266–69 (arguing that conventional contract logic must find “exceptional” circumstances in order to invoke a defense and render a contract unenforceable, whereas the theory of expressive choice accepts as ordinary the idea that future circumstances might cause a promisor to revise an earlier choice, and so the theory requires a reason, such as reliance, to justify enforcement of a contract promise); Hart, *supra* note 1, at 212–18 (arguing that the policing doctrines, i.e., the contract defenses, are ineffective because they are peripheral to the core of contract).

115. See HINMAN, *supra* note 109, at 85.

116. See Hadfield, *supra* note 30, at 1248 (“For if women were the beneficiaries of special doctrines of mistake or coercion, they would thereby be identified, in the logic of contract, as less competent . . .”).

117. See Hart, *supra* note 1, at 204–10.

118. See, e.g., Hadfield, *supra* note 30, at 1258–59.

119. See *id.* at 1254–57.

defined as the decision that maximizes one's own preferences.<sup>120</sup> Hadfield and others suggest there is another conception of choice that should be given effect in contract law—the concept of “expressive choice.”<sup>121</sup>

I find it easiest to grasp this concept when it is held up against “rational choice.” “Rational choice” is what you find in ordinary commercial transactions, in which parties allocate resources in such a way as to maximize self-interest.<sup>122</sup> An example of this would be the typical insurance contract, where the insured chooses to pay a small amount now to avoid the risk of paying a larger amount later. In situations involving “expressive choice,” however, values other than self-interest may be at play.<sup>123</sup> Examples of contracts involving “expressive choice” include surrogacy contracts, spousal guarantees, and separation agreements.

Hadfield proposes that in cases of “rational choice” the focus should be on the voluntariness of the assent, but in “expressive choice” situations the criterion for enforceability should be multivalenced, with less focus on assent and more focus on other factors such as reliance.<sup>124</sup> So, for example, in a case in which a wife agrees to act as a guarantor of her husband's business debts, a court could look to the reliance of the bank to justify enforcement of the wife's promise.<sup>125</sup>

The Arthur Murray cases provide an opportunity to test this theory against a more problematic category of cases than those mentioned above. Surrogacy cases, spousal guarantees, and divorce settlement agreements perhaps could be seen as involving a mix of both contract law and family law; we could think of them as family law/contract law hybrids. This hybridization, in turn, would justify the application of special rules, such as the proposed notion of “expressive choice.”

The Arthur Murray cases, however, are squarely within the domain of contract: money for services, which along with money for property (goods or real estate), is one of the “core” contract situations.<sup>126</sup> From a classical contracts perspective, in these cases mutual assent has been manifested in the most basic of ways: a signature to a written contract.<sup>127</sup> From this perspective, unless one of the contract defenses applies, justifying a court in voiding a party's assent, that is the end of the inquiry. If there is agreement, enforcement follows.<sup>128</sup>

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120. *Id.* at 1254.

121. *Id.* at 1257–61.

122. *Id.* at 1254.

123. *Id.* at 1257–61.

124. *Id.* at 1268.

125. *Id.*

126. *See* 1 FARNSWORTH, *supra* note 104, §§ 1.2–.3.

127. *See id.* § 3.3.

128. *See* 17A AM. JUR. 2D *Contracts* § 699 (2004).



In the category of cases she identifies as involving “expressive choice,” Hadfield argues that promissory estoppel should be the standard for enforcement, not classical contract doctrine.<sup>129</sup> Promissory estoppel, of course, involves several factors: a promise, which the promisor should reasonably anticipate creating reliance; actual detrimental reliance, which was reasonable under the circumstances; and a situation in which lack of enforcement would create an injustice.<sup>130</sup> In these cases, the objective manifestation of mutual assent, such as the signature on a written contract, satisfies only the first factor.<sup>131</sup> In other words, it is not the determinative issue. It is a necessary, but not sufficient, factor. Moreover, the doctrine explicitly embraces a “justice” component, which entitles the court to invoke principles beyond effectuating the parties’ agreement or will.<sup>132</sup>

To apply this theory to the Arthur Murray cases, we would first need to determine whether these cases involve “expressive choice.” Again, to contrast this concept with “rational choice,” a court would examine the purpose behind the contracting parties’ manifestations of assent: Were the parties attempting to allocate a risk? Were they focused on “achieving consequential goals, such as income?”<sup>133</sup> That is the quintessential hallmark of “rational choice.” Conversely, in situations involving “expressive choice,” the contracting parties’ focus is on what entering the contract means in the present:

[A]n expressive choice to enter into a contract may spring not from an assessment of the value of future consequences, but rather from a person’s judgment that, in the present moment, signing a given contract adequately expresses her valuation of a situation, another person, or herself. . . . Thus, her choice may have been *fundamentally* an expression of her valuation of the present circumstances and not an expression of her consequential assessment of future options. She may have chosen to make a promise as an end in itself rather than as an instrument to bring about some future state of affairs.<sup>134</sup>

The Arthur Murray cases, although not involving any connection to family law, fit comfortably within the concept of “expressive choice.” The *Syester* case is a good example. Mrs. Syester views entering into the various contracts as a way of creating a relationship between her and her dance instructor; this is evidenced by the fact that once he leaves the studio, she loses interest in her dance lessons.<sup>135</sup> Other plaintiffs spoke of their

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129. Hadfield, *supra* note 30, at 1249–50.

130. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

131. 1 FARNSWORTH, *supra* note 104, § 2.19.

132. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

133. Hadfield, *supra* note 30, at 1260.

134. *Id.* at 1262.

135. *Syester v. Banta*, 133 N.W.2d 666, 671 (Iowa 1965). The importance of

desire to give purpose to their lives or to do something new.<sup>136</sup>

Labeling the long-term dance contracts as examples of “expressive choice” does not answer the question of whether the contracts should be enforced. To answer that question, we have to look to promissory estoppel. Whether a contract involving an “expressive choice” should be enforced would depend on a multivalenced assessment of the circumstances, including the reasonableness of all the parties and whether the other party was acting in good faith.<sup>137</sup>

Two problems arise in trying to apply the theory of “expressive choice” to the Arthur Murray cases. Promissory estoppel is typically invoked to decide the question of whether to enforce an executory promise—that is, a promise that has not yet been performed.<sup>138</sup> In most of the Arthur Murray cases, the plaintiff has already performed her promise; she has already paid the money to the studio.<sup>139</sup> What these plaintiffs are seeking is rescission of the contracts.<sup>140</sup> The argument would have to be that the student’s promise should be rescinded because of the studio’s lack of reasonable reliance. But invoking the lack of reliance as a basis for retroactively holding a promise unenforceable is not the way the doctrine of promissory estoppel historically has functioned.

The second problem arises because the cases were not developed factually with this paradigm in mind. Therefore, the opinions lack a factual record sufficient to answer confidently the question of whether these contracts should be enforced.

Using promissory estoppel does have the advantage of switching the focus from the plaintiff’s vulnerability to the reasonableness and good faith of the promisee.<sup>141</sup> In most of the cases, the plaintiffs have paid the money and presumably that money has been spent; that change of position would seem to satisfy the detrimental reliance requirement. But even if there was actual reliance, was it reasonable for the dance studio to expect that a sixty-eight-year-old woman would actually use over two thousand hours of instruction? At three hours of lessons per week, it would take 766 weeks, or

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the relationship between the student and her instructor could also explain one of the purposes behind the noncompete clause: to prevent the student from following the instructor to a competing dance studio.

136. *See, e.g.*, *Lawless v. Ennis*, 415 P.2d 465, 467–68 (Ariz. Ct. App. 1966); *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906, 907 (Fla. Dist. Ct. App. 1968).

137. *See* Hadfield, *supra* note 30, at 1282.

138. *See* 1 FARNSWORTH, *supra* note 104, § 2.19.

139. A minority of the cases, typically the earlier cases, involve the dance studio’s attempt to enforce notes given by the plaintiff. *See, e.g.*, *Adjustment Bureau, Inc. v. Rogers*, 354 P.2d 605, 606 (Colo. 1960); *Van Kleeck v. Vente*, 91 N.E.2d 908, 908 (Ill. App. Ct. 1950).

140. *E.g.*, *Lawless*, 415 P.2d at 467.

141. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981); *id.* § 90 cmt. b; 1 FARNSWORTH, *supra* note 104, § 2.19.

fourteen and a half years, to use all those lessons. Promissory estoppel would give relevance to that question in a court of law and allow the court to factor in the studio's good faith, or lack thereof.

The use of "expressive choice" theory does hold some promise as a more coherent way of approaching the Arthur Murray cases, as opposed to the current smorgasbord of contract defenses. I have reservations, however. One is purely pragmatic: what is the likelihood of a court adopting such an approach? Granted, the theory is not a wholesale reinvention of contract law: promissory estoppel has been around for awhile, and it has been used in commercial settings.<sup>142</sup> But it would require convincing a court that while the case appears to have all the hallmarks of classical contract—consideration in the money for services and mutual assent in the signed document—the court should nevertheless ignore classical contract and treat the case as arising under reliance. It would also require that the court be convinced that promissory estoppel can be used to rescind a promise that has already been performed. It was once prophesized that reliance would "swallow" classical contract, but that has not been the case.<sup>143</sup>

My second reservation is that even if the theory were adopted, I am not convinced that it would "resolve" the underlying tension between full market players and marginalized protected classes. "Expressive choice" theory proposes to move from the margins of contract law, namely cases governed by contract defenses, to the "seat of power"—the "heart" of contract law—namely, mutual assent and choice. But "expressive choice" situations would no doubt be the exception rather than the rule—which once again pushes the use of that theory to the margins.

#### B. *Gender-Sensitive Application of Contract Defenses*

Perhaps it would be better to frankly acknowledge that the tension between freedom of contract and paternalism is unavoidable. There are always going to be parties who push the envelope regarding what constitutes bad faith in contracting behavior, and there are always going to be parties who, for reasons of economics, social subordination, or even psychology, are going to be vulnerable to that questionable behavior. Perhaps the best we can hope for is that the existing contract defenses can be employed with sensitivity toward gender stereotyping.

The narratives in the Arthur Murray cases discussed above would, at first blush, appear to fit easily within the concept of undue influence. Undue influence is generally thought of as having two

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142. 1 FARNSWORTH, *supra* note 104, § 2.19.

143. See, e.g., Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 590 (1998) (concluding that fewer than ten percent of promissory estoppel claims decided on the merits are successful).

components. On the one hand, there is a party who is susceptible to having her will overborne, and on the other hand, there is a party who engages in “overpersuasion.”<sup>144</sup> That tracks well with the judicial rhetoric that paints a picture of a gullible widow and a predatory dance studio. A minority of the cases do in fact raise the defense of undue influence.<sup>145</sup>

But, as described above, that narrative leaves unresolved the dilemma of special treatment versus formal equality. Is it possible to use a rule that offers relief from overreaching without the need to reinscribe gender subordination?

It has been suggested that the contract defense of misrepresentation offers the best doctrinal option for focusing on the studio’s “bad act” rather than the plaintiff’s vulnerability.<sup>146</sup> Indeed, that is a common defense raised in the cases.<sup>147</sup> The courts invoke the prong of the doctrine that labels as a misrepresentation an opinion given in circumstances in which the speaker knows or should know the opinion is false.<sup>148</sup> At first blush, this option does appear promising, as it focuses the attention on the overreaching by the dance studios who opine that sixty-eight-year-old women have the potential to become professional dancers.

There is, however, one potential problem. In the cases using misrepresentation, the courts do examine the overreaching by the dance studios but they also portray the plaintiffs as gullible.<sup>149</sup> Gullibility is not required under the rule, so why do they do that? Is it simply a case of unthinking gender stereotypes? If that were the case, then sensitivity to those gender stereotypes could solve the dilemma, and offer relief without reinscribing those stereotypes.

Unthinking gender stereotypes may not be the explanation for why the courts invoking misrepresentation nevertheless focus on the gullibility of the plaintiffs. To prevail under the theory of misrepresentation, a plaintiff has to act justifiably.<sup>150</sup> Thus, the inquiry under misrepresentation is not one sided; the actions of the plaintiff seeking rescission must also be examined. It is in explaining why it was justifiable for the plaintiff to believe that,

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144. *See, e.g.*, *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533, 539–41 (Dist. Ct. App. 1966).

145. *E.g.*, *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906, 907 (Fla. Dist. Ct. App. 1968).

146. Arguably, duress also does not require vulnerability of character, only a lack of a reasonable alternative. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981). However, the dance studios do not appear to have employed wrongful threats to get the plaintiffs to purchase the long-term contracts.

147. *E.g.*, *Syester v. Banta*, 133 N.W.2d 666, 673 (Iowa 1965).

148. *E.g.*, *Vokes*, 212 So. 2d at 908–09.

149. *E.g.*, *Syester*, 133 N.W.2d at 668, 673.

150. *See* RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981) (“If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.” (emphasis added)).

even though she is a sixty-eight-year-old woman who has never danced before, she has the potential to become a professional dancer that the court perceives the need to paint the plaintiff as vulnerable to such blandishments.<sup>151</sup> That is how the court perceives the requirement of justifiable reliance to be satisfied.

What of unconscionability? That, too, is a defense that appears regularly in the cases.<sup>152</sup> However, like undue influence and misrepresentation, unconscionability requires a court to examine the actions of both parties.<sup>153</sup> Mere overreaching by one party is insufficient; there also has to be a lack of “meaningful” choice on the part of the other party.<sup>154</sup> And how would a court explain why the plaintiffs in the Arthur Murray cases lacked meaningful choice? No doubt they would once again characterize the plaintiffs as vulnerable and gullible.

#### CONCLUSION

Going back to a point made earlier, gender is not a unitary concept. My gender matters, but not necessarily in the same way that another woman’s gender matters to her. Sarah Palin and I share a gender, and our genders have shaped our lives, particularly our public lives, but I dare say that gender does not mean the same thing to both of us, and it has not shaped our lives in the same way.<sup>155</sup>

Not all women need “protection” in the market, even if some do. Not all widows, or middle-aged or elderly women, need protection, even if some do. If gender is not a unitary concept, then gender cannot, in and of itself, trigger the application of any contract rule.

What we need is a contract defense that is triggered by overreaching, without also requiring an inquiry into whether the other party is somehow “deserving of” or “entitled to” protection.<sup>156</sup> That would obviate the need for canonical narratives of vulnerability that replicate the very subordination that led to the need for the defense in the first place.

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151. *Syester*, 133 N.W.2d at 668–70.

152. *E.g.*, *Odam v. Arthur Murray, Inc.*, 621 P.2d 453, 455 (Kan. Ct. App. 1980); *Best v. Arthur Murray Town & Country Dance Club*, 303 N.Y.S.2d 546, 548 (Civ. Ct. 1969).

153. *See* 1 FARNSWORTH, *supra* note 104, § 4.28.

154. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

155. Sarah Palin was the governor of Alaska from 2006 to 2009 and a candidate for Vice President on the GOP presidential ticket in 2008. 1 CQ PRESS, GUIDE TO U.S. ELECTIONS 902 (6th ed. 2010).

156. To avoid such a defense from becoming overbroad, we would have to recognize that some conduct on the part of the complaining party might preclude the defense.