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TEACHING CONTRACT LAW: INTRODUCING STUDENTS TO A CRITICAL PERSPECTIVE THROUGH INDENTURED SERVITUDE AND SHARECROPPER CONTRACTS

Gregory Scott Crespi*

ABSTRACT

An introductory law school course in contract law should at the outset provide students with some general orientation to the rationale for and social consequences of that body of law. The instructor should first present a broad overview of the field that reflects the conventional characterization of contract law as a benign social institution that facilitates private ordering through encouraging general promisee reliance. However, this initial orientation should also expose the students to a contrasting and more critical perspective that calls attention to contract law's potential use as a means of social domination and oppression. The students will then be better equipped to broadly reflect upon the doctrines they will subsequently learn. Unfortunately, some instructors present the conventional characterization without the complementary critical perspective, thus doing their students a disservice.

A brief discussion of the history of indentured servitude and sharecropper contracts in the U.S. provides an excellent vehicle for imparting this critical perspective, which can be done in a succinct manner that does not crowd out much doctrinal coverage. This short article presents for consideration the text of a sample lecture presentation of this material that could be included early in a contract law course using only about thirty minutes of class time, even including student comments and instructor responses thereto.

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I. INTRODUCTION

I have taught introductory contract law to first-year law students at Southern Methodist University for over twenty years. Most contract law teachers, myself included, start off the first contracts class by explaining to students that contract law is primarily designed to facilitate an efficient private ordering of society by providing a legal enforcement mechanism to encourage general promisee reliance. This is the conventional characterization of contract law as a generally benign, facilitative social institution.¹ However, before an instructor delves into the details of the classical contract formation doctrines of offer, acceptance, mutual assent, and consideration, she should also provide the students with at least a brief exposure to a complementary and more critical perspective on contract law that calls to their attention some historical instances of its use as a means of social dominance and oppression.

My general impression is that not all contract law instructors do this, although I admit that I have not attempted to conduct a poll on this question. In my opinion, those instructors who do not take the time to acquaint their students at the outset with both laudatory and critical perspectives that the students can then bring to bear in their later studies are doing their students a disservice. The subject calls for a broad and balanced initial orientation that can easily be done without sacrificing a significant amount of doctrinal coverage.

As a means of introducing my students to a critical perspective on the subject, I have on occasion used the vivid historical examples of indentured servitude contracts and sharecropper contracts in the U.S. I present below, in a stylized lecture format, a typical class presentation using these examples that I might make at about the third class meeting of the semester. Such a presentation usually takes only about thirty minutes, even when I take and respond to several student comments, and therefore does not unduly infringe on the class time available during the semester for presenting more doctrinal material.

II. PRESENTATION OF A CRITICAL PERSPECTIVE
ON CONTRACT LAW

As I have briefly explained over the past two classes, contract law is the legal framework through which society coercively enforces promises.² This body of law has developed gradually over a number of centuries, and, as I have told you, the primary reason for having a body of contract law is to facilitate economic activity by encouraging and enabling people to enter into complex networks of promissory relationships and specialized activities. The public enforcement mechanism of contract law aug-

1. See Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1109 (1984).

2. E.g., CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 17 (1981).

ments the availability of informal reputational sanctions as another means to encourage widespread promisee reliance so that those complex promissory arrangements can be formed.³ It appears that contract law has worked reasonably well to achieve this end, with resulting benefits for almost everyone.

This characterization is what one might call the “happy face” story of contract law. But this optimistic, laudatory depiction of contract law as a benign, facilitative social institution is not the only story that can be told. There is definitely a darker side to the history of contract law. You need to realize that tools that are originally developed for a legitimate purpose are often later utilized for very different (and perhaps less benign) purposes, and that the contract law regime can be regarded as a kind of social “tool” that is no different from other tools in this regard.

Let me try to make this point in more concrete fashion. Consider this humble flat-head screwdriver I have in my hand. Why are there screwdrivers? What is their purpose? As far as the historians can determine, screwdrivers were originally developed sometime during the Middle Ages in Europe as a method to fasten two pieces of wood together.⁴ They proved to be quite popular and useful, and there probably are literally billions of screwdrivers now in use around the world! Almost everyone has one or more screwdrivers around somewhere in a drawer or garage.

Once screwdrivers were invented, however, people quickly figured out that they also served pretty well as pry bars. For example, you can use them to pry open cans of paint that are stuck shut. That is another benign use of this tool. Or, if you are so inclined, you can use a screwdriver to break into a locked house to rob it, without making a lot of noise, by prying open a window. Or, as another use, you can turn a common flat-head screwdriver into a pretty deadly weapon by sharpening the blade to a fine edge to create a dagger, and then using it to stab and kill somebody, which is, unfortunately, a fairly common practice in American prisons.⁵

Now these latter uses of screwdrivers are not the originally contemplated uses, to be sure, but they are ones for which a screwdriver is well suited. Not only every painter but also every burglar has a screwdriver in his tool bag, and many prisoners keep hidden somewhere in their cell a homemade dagger fashioned from a screwdriver.⁶ Therefore, if you want to make some sort of overall judgment about the impact of screwdrivers on human welfare, you need to consider the houses broken into and the

3. See, e.g., Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61 (1963) (describing societal pressures affecting enforcement).

4. See, e.g., WITOLD RYBCZYNSKI, *ONE GOOD TURN: A NATURAL HISTORY OF THE SCREWDRIVER AND THE SCREW* 93 (2000).

5. See, e.g., *State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 75, 79 (Mo. 2011) (en banc) (vacating an inmate’s murder conviction because another inmate was found near murder scene with a sharpened screwdriver).

6. See, e.g., *Williams v. Edwards*, 547 F.2d 1206, 1211 (5th Cir. 1977) (discussing widespread possession of weapons by inmates due to easy access to machinery).

prisoners stabbed with screwdrivers, as well as the screws fastened and the paint cans opened with screwdrivers.

Now an organized framework of legal rules is also a human creation and also a kind of tool. Just as a screwdriver can serve as a burglar tool or a dagger, a set of legal rules that was originally created to achieve a certain benign objective can later be utilized by other people for a variety of other purposes, some of which may be somewhat dubious. Contract law is no exception to this. One can, for example, identify certain historical situations where the state's enforcement of promissory relationships, through the mechanisms of contract law, has served at least as much as a means of domination and oppression of one group of persons by another as it has as a means for facilitating promisee reliance and complex productive activity.

Let me briefly give you a couple American historical examples where contract law has been utilized in what most observers would regard as an oppressive fashion. First, consider the sharecropping system of land tenure relationships that developed in the southern United States after the Civil War and persisted until about World War II.⁷ In the late-1870s at the end of the Reconstruction Era, the Union Civil War troops ended their occupation of the South and returned to the North. Thereafter, the white southern landowners then attempted to reassert their traditional domination and control of the local black populations that were now no longer their slaves.⁸ They were largely successful in this effort. One important element of reimposition of social domination was the establishment of contractual land tenure arrangements, also known as sharecropping, under which landless black families with no other means of subsistence would contract with white landowners to farm a portion of the whites' land and then pay over to them each year a significant share of the resulting crop as rent.⁹

Now the terms of these contractual arrangements were generally very one-sided in favor of the landowners, as expected, since the former slaves were destitute, largely illiterate, and without alternatives, and thus they had a very weak bargaining position.¹⁰ The contracts made little if any provision for suspending or reducing rental payments in situations like

7. For a comprehensive discussion of the use of sharecropping contracts in the U.S., see generally J. WAYNE FLYNT, *DIXIE'S FORGOTTEN PEOPLE: THE SOUTH'S POOR WHITES* (Warren F. Kimball & David Edwin Harrell, Jr. eds., 1979). See also ROGER L. RANSOM & RICHARD SUTCH, *ONE KIND OF FREEDOM: THE ECONOMIC CONSEQUENCES OF EMANCIPATION* (1977) (providing good statistical data); GAVIN WRIGHT, *THE POLITICAL ECONOMY OF THE COTTON SOUTH: HOUSEHOLDS, MARKETS, AND WEALTH IN THE NINETEENTH CENTURY* (1978) (containing an excellent bibliography); ANTHONY M. TANG, *ECONOMIC DEVELOPMENT IN THE SOUTHERN PIEDMONT, 1860-1950: ITS IMPACT ON AGRICULTURE* (1958); PAUL GOOD, *THE AMERICAN SERFS* (1968); PETE DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969* (1972).

8. See, e.g., Martin Ruef & Ben Fletcher, *Legacies of American Slavery: Status Attainment Among Southern Blacks After Emancipation*, 82 SOC. FORCES 445, 447-48 (2003).

9. See, e.g., Louis Ferleger, *Sharecropping Contracts in the Late-Nineteenth-Century South*, 67 AGRIC. HIST. 31, 33 (1993), Ruef & Fletcher, *supra* note 8.

10. E.g., Ruef & Fletcher, *supra* note 8, at 447, 453-54.

droughts, hail storms, crop failures, or other calamities.¹¹ The net result, generally, was that over the years the sharecroppers would gradually get deeper and deeper in debt to the white landowners.¹² If a sharecropper family in debt considered leaving the land and moving to a northern city—like Chicago or Detroit—by a “midnight train” to seek better economic opportunities, fear discouraged them from doing this because if their plans became known, the local sheriff would immediately seize their few assets to pay their contractual debts. As a result, they would have to leave with absolutely nothing, even if they could afford a train ticket.

What you had, in effect, was contract law being used as a legal mechanism to justify and facilitate the white landowners once again exercising broad, coercive control through the local courts and police forces to exact rural farm labor from the local black population on oppressive terms. It proved a very useful tool for this purpose and when exercised in conjunction with Jim Crow-type segregation laws, some extra-legal Ku Klux Klan terrorism, and the occasional lynching of anyone who got too uppity, essentially allowed the local white landowners to maintain for another several generations the substance of the oppressive social relationships of the pre-Civil War slavery era.¹³

Eventually, the creation of large numbers of factory job openings in northern cities like Chicago and Detroit in connection with the WWI and, especially, WWII defense mobilizations provided the southern blacks with a viable means of escape from these oppressive sharecropper social arrangements. The general twentieth-century trend of increasing mechanization of agriculture also rendered many rural black laborers economically superfluous so that their emigration was therefore no longer strongly resisted by local white elites.¹⁴ The sharecropper system gradually broke down as a result of these changes.¹⁵

As another American historical instance where contract law was applied in an exploitative fashion, one about which you may not know as much as you probably do about the sharecropper era, consider the experience of the American colonies between roughly about 1630 and 1750 when there was extensive use of indentured servitude contracts.¹⁶

11. See Ferleger, *supra* note 9, at 33 (describing rent as “fixed” for “cash renter” tenants).

12. E.g., John David Smith, *More Than Slaves, Less Than Freedmen: The “Share Wages” Labor System During Reconstruction*, 26 CIV. WAR HIST. 256, 262 (1980).

13. See, e.g., Ruef & Fletcher, *supra* note 8, at 448.

14. E.g., Joe William Trotter, Jr., *The Great Migration*, 17 OAH MAG. HIST. 31, 31, 33 (2002).

15. See Warren C. Whatley, *Southern Agrarian Labor Contracts as Impediments to Cotton Mechanization*, 47 J. ECON. HIST. 45, 61–62 (1987) (discussing the impact of mechanization on annual labor contracts).

16. For a comprehensive discussion of the use of indentured servitude contracts in the U.S., see generally MICHAEL A. HOFFMAN II, *THEY WERE WHITE AND THEY WERE SLAVES* (4th ed. 1992). See also David W. Galenson, *The Rise and Fall of Indentured Servitude in the Americas: An Economic Analysis*, 44 J. ECON. HIST. 1 (1984) [hereinafter Galenson, *Rise and Fall*]; DAVID W. GALENSON, *WHITE SERVITUDE IN COLONIAL AMERICA: AN ECONOMIC ANALYSIS* (1981) [hereinafter GALENSON, *WHITE SERVITUDE*];

Settling the new North American continent at that time was obviously very hard, dangerous, and unhealthy work! You had to chop down thick, brushy forests and drain swamps largely by hand, there were few creature comforts, and there were plenty of deadly epidemic diseases and Native American attacks to worry about.¹⁷ Moreover, growing cotton and tobacco was very physically demanding work.¹⁸ Plenty of people were willing to be plantation owners in the New World and were content to sip mint juleps or other cool drinks on their porches while the workers were out laboring in the cotton fields, but very few people were willing to be field hands working fourteen hours a day in the swamps and the hot sun.¹⁹ After about 1750, as you know, the country relied primarily upon the large-scale enslavement of blacks from Africa to work the tobacco and cotton fields, but in the century before 1750 there was heavy reliance upon white indentured servants to do the heavy field work.²⁰

The way the system operated was that recruiters would go through the slums of London, Liverpool, and other major British cities—which were in those days filled with starving, homeless people who had been displaced from their English villages by the enclosure of village grazing commons in connection with the industrial revolution (remember your Charles Dickens novels!)²¹—and would get them to sign contracts where they agreed to work for an employer in the New World for seven years in exchange for ship passage and room and board during the seven-year work period, after which time they would be free to seek their fortunes amidst the many proclaimed opportunities of the New World.²² However, the contracts were full of nasty fine print, as you might imagine, allowing the employers to impose harsh corporal punishment such as floggings and the like should the workers not do their assigned work or attempt to quit before the seven years were up.²³ But starving people just looking for a chance to survive and get a new start in life were willing to sign up; and, of course, most of them were illiterate and could not have read the con-

SHARON V. SALINGER, "TO SERVE WELL AND FAITHFULLY": LABOR AND INDENTURED SERVANTS IN PENNSYLVANIA, 1682–1800 (1987); WARREN B. SMITH, WHITE SERVITUDE IN COLONIAL SOUTH CAROLINA (1961) [hereinafter SMITH, WHITE SERVITUDE]; ABBOT EMERSON SMITH, COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA, 1607–1776 (1947) [hereinafter SMITH, COLONISTS IN BONDAGE]; LAWRENCE WILLIAM TOWNER, A GOOD MASTER WELL SERVED: MASTERS AND SERVANTS IN COLONIAL MASSACHUSETTS, 1620–1750 (1998); JOHN VAN DER ZEE, BOUND OVER: INDENTURED SERVITUDE AND AMERICAN CONSCIENCE (1985).

17. See, e.g., SMITH, WHITE SERVITUDE, *supra* note 16, at 254.

18. See, e.g., Lois Green Carr & Russell R. Menard, *Land, Labor, and Economies of Scale in Early Maryland: Some Limits to Growth in the Chesapeake System of Husbandry*, 49 J. ECON. HIST. 407, 409 (1989); James H. Street, *Mechanizing the Cotton Harvest*, 31 AGRIC. HIST. 12, 12 (1957).

19. See, e.g., Galenson, *Rise and Fall*, *supra* note 16, at 2.

20. See, e.g., *id.* at 12.

21. SMITH, WHITE SERVITUDE, *supra* note 16, at 38, 41; Galenson, *Rise and Fall*, *supra* note 16, at 10.

22. See Galenson, *Rise and Fall*, *supra* note 16, at 4.

23. *Id.* at 8.

tractual fine print even if they had tried to do so.²⁴

Now the term ‘indentured servant’ may lead you to think of maids, nannies, butlers, and the like—domestic servants in livery—but that is not what these people were forced to do. They were sent to live in shacks out in the fields and work fourteen-hour days pulling stumps and clearing stones in the Virginia and South Carolina swamps!²⁵ If they changed their minds about their commitment after a while and attempted to escape, they were arrested for willful breach of contract, were whipped by their employers, and often had their periods of servitude extended by the courts to compensate their employers for the costs of recapture.²⁶ Many if not most of the indentured servants died of disease or overwork before their term of indenture was complete.²⁷ In other words, they lived exactly like the slaves that gradually displaced them in this kind of work over the next century, compliments of contract law!

Incidentally, the major reason that the indentured servitude system gradually went out of existence after about 1750 was that as New York, Philadelphia, and Boston became fair sized cities and the Appalachian mountain lands were gradually cleared of Indians and became more attractive for settlement, it made it too easy for these “servants” to escape permanently and either work anonymously in the bustling new cities or settle on their own small farms in the mountains.²⁸ The historical origins of many of today’s Appalachian mountain communities are rooted in escaped indentured servants.²⁹ In contrast, it was much more difficult for black slaves to escape and successfully hide out in the cities or the wilderness because they stood out from other persons because of their skin color, and, unlike the English indentured servants, they usually had no countrymen from their villages who spoke their language that were able to provide them with aid and shelter.³⁰

The growing difference in recapture rates between escaped white servants and escaped black slaves tended to make white indentured servants increasingly more expensive than black slaves for the planters,³¹ and that economic factor gradually led to formal master–slave relationships displacing contractual indentured-servant relationships in the American

24. See David W. Galenson, *The Market Evaluation of Human Capital: The Case of Indentured Servitude*, 89 J. POL. ECON. 446, 460 (1981) (explaining that earlier servants were mostly illiterate.)

25. SMITH, COLONISTS IN BONDAGE, *supra* note 16, at 256.

26. TOWNER, *supra* note 16, at 199.

27. SALINGER, *supra* note 16, at 91–92.

28. See, e.g., Christopher Tomlins, *Reconsidering Indentured Servitude: European Migration and the Early American Labor Force, 1600–1775*, 42 LAB. HIST. 5, 30 (2001).

29. See, e.g., Travis Loller, *DNA Study Seeks Origin of Appalachia’s Melungeons*, NBC NEWS.COM (May 25, 2012, 2:13 PM), www.nbcnews.com/id/47565074/ns/health-health_care/ (theorizing that Melungeon lines descended from white indentured servants).

30. TOWNER, *supra* note 16, at 206; Robert O. Heavner, *Indentured Servitude: The Philadelphia Market, 1771–1773*, 38 J. ECON. HIST. 701, 708–09 (1978).

31. See Heavner, *supra* note 30, at 708–09 (implying higher prices for servants who could not escape as easily as English-speaking servants).

South.³² Now my supposition is that the sixteenth- and seventeenth-century English judges who collectively developed the basic contract law doctrines that we use today did not anticipate—and certainly did not intend—that those legal principles would provide legal support to uphold oppressive indentured-servitude or sharecropping relationships centuries later in America, but they were.

I am trying to make two main points here that you should try to keep in mind throughout the course. First, I want to emphasize the specific point that contract law—generally regarded as a benign, facilitative institution—has been used at times to ideologically justify and coercively enforce oppressive social relationships that are based on highly unequal bargaining power in the negotiation of those contracts. It has not always operated to benefit everyone. Contract law, as do many other bodies of law, has the potential for misuse.

The broader and more general point that I am also trying to make is that a framework of legal rules, developed under one set of circumstances to achieve a particular worthy social objective, may later apply under very different circumstances by people with different objectives in mind than the judges or legislators who originally developed those rules, sometimes with far less desirable results. Laws not only have their direct and intended effects, but also, often over the longer term, have other unintended and unforeseen effects, sometimes benign but sometimes not. If you want to fully understand the consequences of a set of legal rules, or properly evaluate proposals for legal change, you need to keep this fact firmly in mind.

III. CONCLUSION

I strongly believe that at the outset of a contract law course or, for that matter, at the outset of any law course, students should be exposed to both laudatory and critical perspectives regarding the social consequences of the body of law being studied, so that they can bring each of those perspectives to bear upon their later doctrinal inquiries. The above sample stylized lecture is one way to introduce a critical perspective on contract law.

I recognize that the presentation of broad, contextual background material and contrasting perspectives on the subject at the outset of a course inevitably involves an opportunity cost. There will then be just that much less time available later in the semester for detailed doctrinal coverage of the subject. In my opinion, however, the advantages for students of being assisted at the outset of the contract law course in developing their ability to take a step back from its many doctrinal details and to reflect in an informed manner upon those doctrines' broader social context and consequences are sufficiently great to warrant some modest sacrifice in the coverage of doctrinal topics. This is particularly the case, in my opinion,

32. Galenson, *Rise and Fall*, *supra* note 16, at 11.

when the contextual material helps students develop a critical perspective regarding the social consequences of various bodies of law, an aspect of legal education that is too often neglected, particularly in the contract law area. And in addition, as I have attempted to demonstrate above with the sample stylized lecture, an effective introduction to a critical perspective on contract law can be presented in a succinct manner that does not unduly infringe upon the time available for doctrinal study.

