Doing Theory in First Year Contracts: The Iceberg Method

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There are various ways of introducing first year law students to legal theory. One is to offer a discrete legal theory course. This is a "bottom-up" approach in the sense that typically discussion of a given theory in the abstract precedes application of the theory to particular legal problems. An alternative is to teach theory as part and parcel of one or more of the standard first year courses. This is a "top-down" approach in the sense that identification of the legal problem precedes the introduction of potential theoretical solutions. The top-down approach can be visualized as an iceberg, with particular legal rules at the peak and the policy preferences which shape the rules submerged below. In this paper, we explore a variation of the top-down or iceberg approach in which the aim is to introduce students to a range of theoretical perspectives by comparing and contrasting the application of com-

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This paper had its genesis in a seminar hosted by the National Judicial Institute, Emerging Issues in Contract Law (Halifax, May 10–12, 2006). On behalf of the National Judicial Institute, Professor John McCamus invited us three to give a presentation to the judiciary illuminating the relevance of legal theory to contract law. As a result of that presentation, which as far as we can tell was quite well received by the assembled judges, we discussed the pedagogical benefits of the approach adopted. We concluded if the "output node" of the legal system, i.e. the judiciary, could derive some benefit from our approach, so too might the "input node", i.e. first year law students. Special thanks to Professor McCamus and the other organizers of the conference for providing us with this opportunity. Thanks also to Stephanie Lane and Kate Darling for their research and to anonymous reviewers and editors at CLEAR/REDAC for their constructive criticism.
peting legal theories to a particular legal problem. For the purposes of illustration, we have chosen the spousal guarantee cases in Contract Law as our reference point and critical legal studies, law and economics and feminist theory as our perspectives. There are numerous other cases, not just in Contracts, but in Torts, Property and Criminal Law as well, that might be amenable to similar treatment. Likewise, needless to say, there are other theories, apart from the ones we use here, that teachers might prefer; the teaching method we propose does not depend on the particular perspectives we happen to have chosen.

Parmi les différentes façons d’aborder les questions de théories juridiques en première année de droit, on peut choisir de dispenser un cours de théorie. Il s’agit de l’approche « du bas vers le haut », parce que habituellement on discute d’abord d’un principe dans l’abstrait avant de passer à l’application pratique. Une autre façon de faire est d’aborder les questions de théories juridiques dans le cadre d’un ou de plusieurs cours de première année. Dans ce cas, il s’agit de l’approche « du haut vers le bas », parce que l’identification du problème juridique précède la présentation de solutions théoriques. L’image de l’iceberg peut servir à visualiser cette approche. Les normes juridiques constituent la partie de l’iceberg hors de l’eau et les questions de politiques sociales qui sous-tendent ces normes sont sous l’eau. Dans le présent article, nous explorons une variation de l’approche de l’iceberg ou « du haut vers le bas » dont le but est d’initier les étudiants et les étudiantes à différentes perspectives théoriques en comparant et en analysant l’application de diverses théories juridiques à un problème donné. Pour les fins de l’exercice, nous avons choisi de commenter, à partir des perspectives des critical legal studies, du droit et de l’économie, et de la critique féministe, des décisions portant sur le cautionnement donné par une conjointe. D’autres décisions autant en droit de la responsabilité civile, en droit des biens, ou en droit criminel peuvent être analysées de la même façon. De plus, d’autres perspectives auraient aussi pu être adoptées. La méthode que nous proposons ne dépend pas des perspectives que nous avons privilégiées.

1. Introduction

Teachers of first year law students face a trilemma: whether, when and how to teach legal theory. We believe that theory is both pedagogically inevitable and professionally desirable and also that students should be introduced to legal theory as early as possible in the first year. In this essay we offer one approach, the “iceberg method,” that law teachers might consider adopting if they are interested in introducing their students to legal theory. Our focus is on contract law, but we believe that our suggestion can be extended to other first year courses.

The claim that theory is pedagogically inevitable can be developed as follows: all law professors either implicitly or explicitly premise their teaching on some conception/vision of the nature and purposes of law. The only real issue is how candid the professor is with the students as to what that conception/vision might be. For example, the decision whether to start a contracts course with the formation question (offer and acceptance) or the remedies question (reliance and/or expectation interests) reflects choices about the essential function of contract law. Similarly, familiar contract law cases, for example, Carill v. Carlock Smoke Ball, Hillas v. Arcos, Ron

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1 In this essay we adopt a relatively expansive conception of theory: it is a multi-dimensional interrogative process in the pursuit of a better understanding of the nature and functions of law, which itself is a complex and controversial phenomenon. More specifically, legal theorists ask the following types of questions: (1) What is the nature of law? (2) Why, or when, is a law valid? (3) Which principles or policies undergird this law? (4) What sort of roles or functions do law, legal institutions, legal rules and legal procedures fulfill in society? (5) How does law fulfill those functions? (6) How important is law in a society? (7) Which perspectives, overtly or covertly, inform legal institutions, rules or procedures? and (8) What is the relationship between law and social change? See more generally, Richard Devlin, “The Charter and Anglophone Legal Theory” (1997) 4 Rev. Can. Stud. 19 at 23.

2 “To be sure, there are lawyers, judges and even law professors who tell us that they have no legal philosophy. In law, as in other things, we shall find that the only difference between a person ‘without a philosophy’ and someone with a philosophy is that the latter knows what his [sic] philosophy is.” See Filmer Northrop, The Complexity of Legal and Ethical Experience: Studies in the Method of Normative Subjects (Westport, Conn.: Greenwood Press, 1978, at 6). See more generally, William Twining ed., Legal Theory and Common Law (Oxford: Basil Blackwell, 1986).


Engineering or Banque de Montréal v. Bail litée to be intelligible need to be structured in the context of underlying judicial understandings of the premises of a contracts regime. Carlill v. Carbolic Smoke Ball, for example, illustrates how traditional rules of offer and acceptance can be tweaked to respond to consumer protection concerns and even gender analysis. Hillas v. Arcos raises important questions about the role of the judiciary in the marketplace and the relevance of efficiency values for contract law. Ron Engineering highlights the importance of risk allocation analysis and the role of integrity in the contractual marketplace. Banque de Montréal v. Bail litée shows how, through courts’ decisions, the concept of good faith can develop by imposing an informational obligation on the party that possesses the information.

Not only is theory pedagogically unavoidable, it is also professionally desirable because it (a) enhances students’ substantive competence, (b) inculcates skills of critical thinking and (c) engenders self-reflexivity. First, if we believe that the vast majority of our students are likely to end up practicing law then we have an obligation to make sure that they have the basic skills of legal analysis and legal reasoning. Legal analysis, among other things, requires the capacity to ask the simple question of what is the underlying rationale or purpose of a particular legal rule. If a lawyer is not able to locate a legal rule in this broader context, he or she is not likely to be able to give a client good advice. Legal theory provides insight into the various goals that law might seek to pursue.

7 Dworkin, for example, argues that law is “drenched” in theory. Ronald Dworkin, “In Praise of Theory” (1977) 29 Ariz. St. L.J. 353 at 360.
8 Arts. 6, 7, and 1375 C.C.Q.
9 Michael Robertson argues that “quality” legal pedagogy requires planning for three discrete objectives: rules, skills and judgment. Michael Robertson, “Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective” (2005) 8 Legal Ethics 222 at 226–229. There is, of course, a fourth argument: in a university it is appropriate to teach theory for theory’s sake. While we agree with this argument, we do not propose to defend it in the context of this article.
10 See e.g. Bryant Garth & Joanne Martin who argue that despite the tensions between the academy and the profession as to what law schools should be teaching, there is relative consensus that legal reasoning is a core competency. Bryant Garth and Joanne Martin, “Law Schools and the Construction of Competence” (1993) 43 J. Legal Educ. 469. See also David ButleRichie, “Situating ‘Thinking like a Lawyer’ Within Legal Pedagogy” (2002–2003) 50 Clev. St. L. Rev. 29.
15 Arthur Leff, “Economic Analysis of Law: Some Realism about Nominalism” (1974) 60 Va. L. Rev. 451 at 454. A similar sentiment underlies Oliver Wendell Holmes’ celebrated claim that, “the life of the law has not been logic: it has been experience”. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellows, have had a great deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development.
engage in law talk is a capacity to engage in an act of power. This can lead to beneficial or dangerous consequences. Consequently it is important that those who are legally trained have a sense not only of the values that are “out there” underpinning law, but also the values that are “in there”, generating their individual preferences and choices. Legal theory, we suggest, can help identify those preferences and inform those choices and a responsible educational system should, as best it can, seek to nurture such reflective citizenship.

Thus for us the “whether” dilemma is in fact a non-issue: first because theory is irrepressible, even if implicit; and second because the articulation of theory is professionally responsible pedagogy. The real issues are therefore “when” and “how” to do theory. A significant problem, however, is that the leading Canadian textbooks and teaching materials on contracts are somewhat thin when it comes to the theoretical dimensions of contract law. While there are some overtures to theory in all of these materials, the overwhelming emphasis is on relatively traditional doctrinal discussion and analysis.

One solution might be for teachers to adopt an explicitly theoretical contract law book, such as Stephen Smith’s Contract Theory, Peter Benson’s The

through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been and what it tends to become. We must alternately consult history and existing theories of legislation. Oliver Wendell Holmes, The Common Law (Boston: Little, 1881) at 1.

15 “To live in history means among other things to be an active and conscious participant in the conflict over the terms of collective life, with the knowledge that this conflict continues in the midst of the technical and everyday.” Roberto Mangabeira Unger, “The Critical Legal Studies Movement” (1983) 96 Harv. L. Rev. 561 at 669–70. See also Susan Williams, “Legal Education, Feminist Epistemology and the Socratic Method” (1993) 45 Stan. L. Rev. 1571 discussing the importance of emotions at 1575.


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Theory of Contract Law or Maurice Tancelin’s Sources des obligations: L’acte juridique légitime. Despite the many virtues of these books, in our opinion, none is suitable because they are pitched at relatively high levels of abstraction and are thus inaccessible to the vast majority of first year law students. There is a further consideration. Theoretical texts may be appropriate for courses which take a “bottom-up” approach to the teaching of legal theory, but they may not work so well for a “top-down” approach. The bottom-up approach starts with the presentation of a particular theory in the abstract followed by application of the theory to selected legal problems. The bottom-up approach presents a challenge for instructors because students in first year are typically enthusiastic about engaging directly with legal issues. The bottom-up approach postpones this engagement and it requires students to curb their enthusiasm. The dangers are that students will become impatient with the theoretical excursus and skeptical about its relevance to the law they want to learn. A related concern is that it takes particular skills to teach theory in the abstract and to win over a skeptical audience. Some instructors are better at this kind of teaching than others. For example, many of us have had the experience of hearing good economists explaining economic theory badly to a legal audience: the presentation focuses on “Pareto optimality”, “Kaldor-Hicks efficiency” and the like, and the audience goes away not seeing the forest for the trees.

For these reasons, we favours a “top-down” or what we prefer to call “iceberg” approach to teaching legal theory in first year. As is probably obvious, by this we mean that rather than focusing on the conceptual framework of a particular theoretical tradition in the abstract, it might be better to start with a precise legal issue and actual legal text (a common law case or a provision of the Civil Code and accompanying case law) and then unpack the text to explore its theoretical implications. The process might be illustrated as follows:

21 Maurice Tancelin, Sources des obligations: L’acte juridique légitime (Montréal: Wilson et Lafleur, 1993).
Our suggestion is that the iceberg method could proceed as follows:

1. Teachers should ask their students to read a case or two (for example, the cases we work with in this essay) and to prepare a one paragraph memo which (a) provides a statement of the ratio of the cases, (b) indicates whether the student agrees or disagrees with the ratio and (c) includes reasons as to why the student agrees or disagrees.
2. Teachers should spend ten to fifteen minutes in an open class discussion encouraging students to address each of the foregoing three points.
3. Teachers should then present students with a selection of theoretical perspectives on the case (as we do in this essay). This could be done through short additional readings or by bringing in one or more guest presenters to supplement the teacher’s own expertise.
4. Teachers should then re-open the class discussion focusing on whether the theoretical perspectives (a) reinforce students’ initial assessments of the cases or (b) challenge their initial assessments, and if so, why?
5. Finally, teachers might encourage students to identify the various “rules,” “principles,” “policies” and “politics” which are at stake in the chosen cases, and ask the students to consider if a similar iceberg analysis could be applied to other cases they have studied.

2. The Issue and the Cases

Banks commonly ask for a guarantee to support a loan repayment obligation. In many cases, the guarantor and the debtor will be members of the same household, for example, parent and son or daughter or wife and husband. A commonly occurring situation is where one spouse, almost invariably the husband, or, alternatively, a company the husband controls, borrows money from the bank to finance a new project and the husband offers the family home as security for the loan. The property is jointly owned by the husband and the wife and they both sign the security documents. The project fails and the bank attempts to enforce the security. Australian feminist scholars have coined the expression “sexually transmitted debt” to describe this scenario: the husband or the husband’s company contracts the debt, but the wife ends up carrying a substantial part of the risk. In sexually transmitted

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22 As we shall see, even this way of characterizing the issue is open to theoretical challenge.
25 In developing these three theoretical interrogations of spousal surety contracts we are not claiming to be advancing “original” analyses of this particular issue. At the same time, however, our aspiration is to go beyond “legal theory for dummies” to introduce students to what has been helpfully described as “working theory.” See William Twining, “Some Jobs for Jurisprudence” (1976) 1 Brit. J.L. & S. 149 at 159.
26 This obviously raises the key issue of resources. As a partial solution to this problem we have created a video cast in which each of us presents one of the arguments of CLS, Law and Economics and Feminism on the topic of spousal sureties. This video cast can be found at <http://mediacast.ics.utoronto.ca/2007/CLEAR-DDL/index.htm>.
27 See e.g. Belinda Fehberg, Sexually Transmitted Debt: Surety Experience and English Law (Oxford: Clarendon Press, 1997).
debt cases, there is a strong probability that the husband will have obtained the wife’s signature by misrepresentation or undue influence.

The leading United Kingdom cases in point are the two House of Lords decisions in Barclays Bank plc v. O’Brien28 and Royal Bank of Scotland v. Etridge.29 Canadian common law appears to be developing along the same lines: O’Brien and Etridge have been followed in a number of provincial court decisions30 and, while the Supreme Court of Canada has yet to hear a spousal guarantee case, in Gold v. Rosenberg31 both the majority and minority judgments discussed the possible application of O’Brien’s case in other factual settings and, in doing so, appear to endorse the decision. There have been parallel developments in Quebec.32 A leading case is Fiducie canadienne italienne v. Rudolpho Polini33 and teachers in Quebec could use this case as the focus for discussion.

O’Brien and Etridge can be summarized in point form, as follows:

(1) There is no special equity favouring wives and spousal guarantee cases are subject to the same general principles governing undue influence as apply in other cases.
(2) Nevertheless, the general principles governing undue influence should be applied generously in favour of the wife in recognition of the facts that, (a) the transaction is on its face not to her financial advantage, and (b) there is a substantial risk of undue influence on the husband’s part.
(3) If the wife establishes undue influence or misrepresentation against her husband, the bank will be fixed with constructive notice, and will be unable to enforce the guarantee, if the evidence shows that it knew about the relationship.
(4) The bank can avoid being fixed with constructive notice by taking reasonable steps to satisfy itself that the wife entered into the transaction freely and with knowledge of the true facts.

28 Barclays Bank plc, supra note 23.
29 Royal Bank of Scotland, supra note 24.

3. Critical Legal Studies

(a) Introduction

The central claim of Critical Legal Studies (CLS) is that all law, including contract law, is an unavoidably political and normative enterprise.34 That is to say, law is a human artifact, constructed by mortals who inevitably bring
to bear their values and thereby shape law in their own image. In other words, law is not independent of larger political moralities and ideologies, but rather a manifestation of particular political moralities and ideologies. Contract law is therefore best understood not as a system of abstract rules and principles with their own inner coherence but as a regulatory regime that constructs, channels, polices and legitimizes particular economic and social relationships. More specifically, contract is not just about the resolution of disputes between two private parties, it is also about the values and ideals that we embrace as a society. The Common Law, just like public law, tells us something about who and what we are as a community, and judges—who are the "guardians of the Common Law"—are key political actors in so far as they are the ones who determine what those values are.

The second claim advanced by CLS is that, historically, the values articulated in law, including contract law, have tended to reflect the perspectives and experiences of those who have been socially dominant. CLS argues that the conventional approach to contract analysis, also known as the classical model of contracts, invokes two key ideas:

- A preference for a formalistic judicial methodology: The dominant view argues that the primary function of contract law is to establish a stable, coherent, scientific and rational system of rules and subrules in order to provide certainty in the marketplace. The role of the judge is passive and formalistic: he or she is simply to discover the appropriate rules and apply them to the facts of the case. Hence the essence of contract law is often reduced to the formula O + A + C + I = K (offer + acceptance + consideration + intention = contract).

- An ideological disposition: CLS also argues that underlying the quest for stable rules and judicial passivity there is a certain vision of the world, one that reflects the political morality of capitalism. Thus the formula of O + A + C + I neatly captures the ideas and ideals of freedom of contract (people can contract with whoever they like, for whatever they like); sanctity of contract (once a contract is formed it is binding); and privity of contract (the contract, unlike torts, is binding only on those parties who agree to it; other collateral relationships are irrelevant). The high water mark of this ideological predisposition is to be found in the following proposition by Sir George:

If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.37

(b) Application

This freedom of contract ideology was essentially the position adopted by Barclays Bank and accepted by the trial judge in the O'Brien case. First, the bank argued it had done nothing wrong; the wife freely entered into the surety contract with the bank and any issues of inappropriate conduct were between her and the husband. Second, it is vital that such contracts be held sacrosanct not only because people are bound by their word but also because to allow them to exit the contract would cause instability in the marketplace. Third, while there may be collateral damage to third parties (e.g. other family members), that is not the concern of contract law.38

However, the House of Lords did not accept these arguments. Why not? The answer is that the House of Lords is no longer in the thrall of a classical model of contract. Rather it is embracing a somewhat different set of values and a more activist methodology. This change has come about because the House of Lords has recognized that contract law is caught between various values that are in tension with each other: individualism vs. communitarianism, liberty vs. equality, public vs. private and consent vs. constraint.

(i) Individualism v. Communitarianism.

CLS argues that all societies, and thereby all legal systems, including contract law, have to locate themselves somewhere on the spectrum between individualistic values and communitarian values. The classical model of contracts, because of its commitment to freedom of contract, gravitates toward the individualistic end of the spectrum. However, in the twentieth century there was "a renaissance of equity" in which greater solicitude has been shown for the protection of vulnerable parties to a contract. Of equal importance, throughout the latter half of the twentieth century, there have been significant legislative interventions designed to enhance consumer protectionism. Both of these developments reflect the more communitarian values of the era. The equitable predisposition of some courts is perhaps best understood as simply the legalistic encoding of communitarian ideals. CLS identifies the potential of communitarian values, not just as exceptions

37 Printing and Numerical Registering Co. v. Sampson (1875), L.R. 19 Eq. 462 at 465, 1874 WL 16322 (Eng. Rolls Ct.).
38 O'Brien, supra note 23 at 197.
or deviations from the classical individualistic model, but as an alternative normative vision, a set of counter-principles to regulate social and economic relations. These are principles of good faith and fair dealing in which courts are sensitive to relationships of interdependence and trust. Undue influence is just one example of several doctrines which encode this normative ideal. Others include economic duress, unconscionability, fundamental breach, promissory estoppel, and interpretive doctrines such as contra proferentem and reasonable expectations, and implied terms.

Mrs. O'Brien's lawyers picked up on these equitable norms and argued that because of the Bank's economic power in the marketplace it is a pressure point in the circulatory system of social and economic relations. Consequently, it had a duty to act not only in its own interests, but also to inform Mrs. O'Brien of the risks of the surety because it knows, or should know, that she is likely to be in a position of vulnerability. The Bank cannot parasitically take advantage of her vulnerability to her husband. The House of Lords, as we have seen, reacts quite positively to this claim by endorsing the equitable doctrine of constructive notice: the Bank has a duty to ensure that Mrs. O'Brien is warned of the risks of the surety. Why? The Court does not explicitly refer to communitarian values; instead it invokes another framework of analysis: equality.


The previously cited quotation from Sir George Jessel is often characterized as the Liberty Principle. The classical model of contracts tended to assume that if liberty was maximized, equality would inevitably follow. The primary role of the courts was to ensure that contracts were enforced because this would maximize autonomy. CLS argues that this idea might have made sense in an era when the primary users of the courts were mostly reasonably well positioned commercial players. Hence it was logical for the law to reflect their needs, interests and aspirations.

However, as the twentieth century unfolded, a more diverse clientele began to turn to the courts in order to access justice. Of particular significance here was the emergence on the part of the judiciary of a "consumer consciousness." This consciousness identified two major concerns: significant inequality of bargaining power between sellers and buyers of goods and services and, secondly, the widespread use of standard form contracts, that is, contracts of adhesion. As a result of these concerns, society in general and judges in particular, began to realize that embracing the liberty principle did not necessarily engender equality. In fact, in some situations, the maximization of liberty would guarantee the enforcement of inequality. Contracts would be an instrument of subordination rather than autonomy. Thus in the twentieth century judges began to emphasize the importance of equality principles, peaking with Lord Denning's "inequality of bargaining power" principle in Lloyd's Bank v. Bundy41 or Lambert J.A.'s decision in Harry v. Kreutziger embracing "community standards of commercial morality."42 The mantra of "freedom of contract" was forced to compete with the mantra of "freedom from contract."43

O'Brien brings this tension between liberty and equality into especially sharp relief. If one is predisposed towards the liberty principle, one will tend to favour the bank's argument that Mrs O'Brien acted voluntarily; if one is predisposed towards the equality principle, one will be responsive to Mrs. O'Brien's argument that she is a vulnerable consumer, burdened by an oppressive contract of adhesion. The House of Lords, CLS would suggest, appears to be gravitating towards the latter. While the Court rejects a "special equity"44 for wives, it endorses "a tenderness"45 in the law of undue influence given the substantial risk of inappropriate conduct on the husband's part. Moreover, it is important to emphasize that the House of Lords was not compelled by precedent to adopt this solution. Indeed, as several commentators have noted, the approach it adopted, the doctrine that the bank is put on constructive notice, was an innovative if not unorthodox deployment of this doctrine.46 CLS argues that this illustrates the indeterminacy thesis: rules of law are rarely absolute and fixed, rather rules are always in flux, sometimes expanding, sometimes contracting. The rules of contract are malleable and flexible, their plasticity rendering them deployable in a variety of contexts, depending upon the underlying value choices of the judges. In short, result determinism is the name of the game.

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44 O'Brien, supra note 23 at 195.
45 Ibid. at 196.
46 See e.g. John Mee, "Undue Influence, Misrepresentation and the Doctrine of Notice" (1993) 54 CLJ 536.
(iii) Public/Private Dichotomy.

In O'Brien the House of Lords is very sensitive to the fact that the sureties of wives is a complex and controversial issue that gives rise to "a difference of judicial view."

The old split between the public world of business and the private world of family is no longer a social or economic reality. Historically, the courts have been unwilling to enter into the sphere of contracts involving family relations. As Lord Atkin said in 1919, "the principles of the common law ... are such as to find no place in the domestic code ... each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted ..." But now, as the House of Lords recognizes, the public world of finance is often dependent upon the private world of family finances:

It is easy to allow sympathy for a wife who is threatened with loss of her home at the suit of a rich bank to obscure an important public interest, viz., the need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile. If the rights secured to wives by the law render vulnerable loans granted on the security of matrimonial homes, institutions will be unwilling to accept such security, thereby reducing the flow of loan capital to business enterprises.

Having intervened in the private realm of the family, a critical question becomes where to stop the "tenderness" of the law? In O'Brien the House of Lords admitted it would be inappropriate to identify "wives" as the only potentially vulnerable sureties, so it also included others who engage in "unmarried cohabitation, whether heterosexual or homosexual ..." However, in Etridge the Court realized that even this was too narrow, and it invoked the language of "non-commercial relationships," "relationships of trust and confidence" and "emotional pressure." What started as a very particular exception to the freedom of contract rule has the potential to encompass a very large number of relationships that may go beyond the quintessentially private. Freedom of contract appears to be losing ground to freedom from contract. Once the communitarian cat is out of bag, it is very difficult to get it back in again.

(iv) Consent vs. Constraint.

For some the "tenderness" of O'Brien may be seen not just as a radical departure from the classical law of contracts, but a fundamental undermining of its core values. Traditionally, the key idea of contracts is intent: the function of the courts is to give effect to the will of the parties. A fundamental rule of contract is the principle of L'Estrange v. Graucob: "if you sign, you are bound." Consent is the keystone of the edifice of contracts.

The surety cases raise some very tricky questions involving complex issues of gender and power consent and constraint. For years, in the criminal law context, judges have been confronted with the debate on whether "no really means no" in relation to sexual assault. Now in contract law there is the inverse problem of whether "yes really means yes." From the critical perspective this creates some very messy problems, indeed judgment calls, for judges. On the one hand, if a court finds "yes means yes" it can be accused of undervaluing the experiences of vulnerable women; if it says "yes does not necessarily mean yes" then it can be accused of paternalism, if not infantilization.

What of the House of Lord's solution in O'Brien and Etridge? It held that banks have two options if they want to avoid the doctrine of constructive notice: a) they have a pre-contractual duty to warn the wife in a private meeting absent the husband of the potential liabilities and risks of the contract and encourage her to obtain independent advice, or b) they can insist that the wife obtain independent advice relating to the legal aspects and risks of the transaction. The critical concern is that while at first blush this might seem to be a progressive, balanced and sensitive resolution, in fact it is a procedural solution to a substantive problem. The inequality of many wives is a reality, both materially and emotionally. So, realistically, how effective are such warnings and/or lawyerly advice likely to be? A procedural response to substantive inequality may create the appearance of a solution, thereby further obscuring the reality. In fact, the reality seems to be that banks are now choosing the second option: they insist that the vulnerable surety receive independent legal advice, and then they receive a certificate from the lawyer confirming that the surety appears to understand the agreement.

53 See e.g. O'Brien, supra note 23 at 188 and 191.
54 See also Belinda Felthberg, "The Husband, the Bank, the Wife and her Signature" (1994) 57 Mod. L. Rev. 467 at 472-473; Belinda Felthberg, "The Husband, the Bank, the Wife and her Signature—the Sequel" (1996) 59 Mod. L. Rev. 675.
Consequently, despite all the doctrinal innovation, it seems that when the rubber hits the road, banks have very little responsibility, and the real risk is transferred to lawyers. This means, then, sureties will have to sue the lawyers for negligent advice... which is a highly formidable, not to mention expensive, challenge! Moreover, CLS worries that the requirement that the wife bears the burden of proof of showing undue influence or misrepresentation by the husband (rather than simple lack of understanding on her part) before being able to trigger the bank’s duty to warn or the lawyer’s duty to advise may, in reality, make this an illusory remedy for a very large number of women. This double whammy indicates that what the House of Lords appears to be giving with one hand, it may be taking away with the other.

(c) Conclusion

So the critical spin on contract law, undue influence and vulnerable sureties highlights four points. First, CLS emphasizes that while doctrine and precedent are absolutely vital, they are not determinative. Judicial decision making (often covertly) always goes beyond the simplistic formalistic quest for the right rule, because there is no right rule. There is no holy grail of doctrinal purity with oracular solutions because indeterminacy and change are the very essence of the common law.

Second, and corollarily, CLS encourages us to identify the various principles and social policies that might be at stake in every case and the political moralities and ideologies that underlie such principles and policies. Often these political moralities, principles and policies will be in direct competition with each other (individualism vs. communitarianism, liberty vs. equality, private vs. public, consent vs. constraint) and difficult choices will have to be made by the judges.

Third, in choosing which principles, policies and moralities to embrace judges will necessarily be driven by larger social values. These are the macro forces. At the same time, CLS emphasizes the importance of microforces, especially the particular facts of each case. It is often said that hard cases make bad law; but CLS argues hard cases reveal the true nature of law as a profoundly normative enterprise.

Fourth, and finally, despite the doctrinal and ideological developments in *O’Brien* and *Etridge*, it is not clear if much has really changed for vulnerable sureties or for banks. While banks have to jump over a few more hurdles,
business experience and the wife is willing to follow his advice without
bringing a truly independent mind and will to bear on financial transactions.
The number of recent cases in this field shows that in practice many wives
are still subjected to, and yield to, undue influence by their husbands. ...)

He goes on to identify, as a competing goal, “the need to make sure that the
wealth tied up in the matrimonial home does not become economically sterile”. ...

In other words:

(1) the benefit of a rule protecting the wife is that future contracts are more
likely to reflect the wife’s real preferences;
(2) The cost of a rule protecting the wife is the potentially chilling effect
on banks’ willingness to lend; and
(3) Excessive protection may be counter-productive if it cuts of finance
for business ventures that could make the family wealthier.

Trebilcock and Elliott expand on the economic policy considerations in
spousal guarantee cases as follows: ...

The difficulties of intra-familial contract regulation arise out of the fact that
no family is a perfect unity. The communality of family life is never abso-
lute—even in the most harmonious households, family members have several
as well as mutual ends. These differences of interest are accentuated by the
possibility of family breakdown. The high incidence of divorce in most
western societies and the prevalence of elder abandonment mean that the
prospect of breakdown should usually weigh in the making of intra-familial
financial arrangements. Prudent family members will want to protect their
personal position in light of this contingency. The trust and informality that
result from family communality can easily be abused by a member seeking
to favour their own severable interests at the expense of their family. The
purpose of regulating intra-familial arrangements is to put safeguards in place
to prevent this from happening.

They go on to point out that statistics show the average standard of living
for women following divorce declines, whereas for men it rises. The reason
is partly women’s lack of earning power due to the time they have to spend
at home and out of the work force. The risk of divorce therefore makes the
conservation of family assets a relatively more important issue for women

57 O’Brien, supra note 23 at 188.
58 See text accompanying note 49.
59 Michael J. Trebilcock & Steven B. Elliott, “The Scope and Limits of Legal Paternalism:
Altruism and Coercion in Family Financial Arrangements” in Peter Benson ed., The

than it is for men. In many cases, the probability is that the wife will take
insufficient account of this consideration in agreeing to mortgage the family
home as security for the husband’s debts. ... In other cases, the husband may
use the threat of divorce as a weapon to secure the wife’s agreement.

The justification for invalidating the bank’s security in spousal guarantee
cases is not that the bank itself is guilty of exploiting the wife’s dependency.
Rather, it has to do with what Trebilcock and Elliott describe as a “gate-
keeper function”. ... The bank is in a position to prevent the husband from
exploiting the wife by refusing the husband co-operation or support. As
between the wife and the bank, the bank is the party best placed to avoid
the wife’s loss. If the husband has coerced or misled the wife, her capacity
for self-help will be limited. She may not even be aware of the need for
cautions. On the other hand the bank is relatively well placed, by virtue of
its relationship with both the husband and the wife, to check for signs of
the husband’s wrongdoing and take appropriate steps. By invalidating the
bank’s security in the event of the husband’s wrongdoing, the courts give
lending institutions the incentive to take such steps in the future.

The challenge for the courts is to set the bank’s gatekeeping obligations at
a level that minimizes the sum of compliance costs and the costs of the
husband’s wrongdoing. Excessively stringent gatekeeping obligations may
deliver a high level of protection to the wife, but at the cost of discouraging
legitimate lending activity. Conversely, excessively lenient obligations may
lower the bank’s lending costs, but deliver a less than optimal level of
protection to the wife. Efforts to strike the right balance can be seen in
Points (3), (5), (6), (7) and (8) of the summary in Part 2, above. We address
these points further in the next section.

(b) Striking the right balance

(i) Requirement for proof of undue influence or
misrepresentation.

To succeed against the bank, the wife must show the husband was guilty of
undue influence or misrepresentation (Point (3) of the summary in Part 2,
above). It is not enough for her to show that she failed to understand the
transaction. The plaintiff in Etridge failed for this reason. The law is different

60 Ibid. at 60–61.
61 Ibid. at 67 and following.
in Australia. According to the second limb of the rule in *Yerkey v. Jones*, if the wife fails to understand the effect of the document and the significance of giving a guarantee, she can have the transaction set aside unless the bank took steps to inform her about the transaction and reasonably supposed that she understood.

Other things being equal, there is no reason in principle for limiting the wife’s protection to cases of misrepresentation or undue influence by the husband. The key question is whether the transaction reflects her true preferences. It is likely not to do so if the husband misleads or coerces her into signing. But it is just as likely not to do so if she lacks understanding of the transaction’s implications. To quote Trebilcock and Elliott again:

Grounds for judicial contract regulation may exist where an actor has a stable and coherent preference structure but the choices they make in particular circumstances are inconsistent with that structure. This inconsistency may be due to either coercion or information failure. Information failure consists in problems of either availability or processing ability.

On the other hand, extending the wife’s protection to cases of “information failure” increases the risk to the bank of losing its security. Therefore, limiting judicial intervention to cases of misrepresentation or coercion may make sense in terms of the trade-off referred to above: it delivers less protection for the wife, but it also lowers lending costs. It may be worth noting that, while the Australian rule gives more protection, the scope of the rule is narrower than it is in England: as presently stated, the rule only applies where the debtor and guarantor are husband and wife whereas in England, the rule extends to all cases where the relationship is a non-commercial one. The narrower scope of the Australian rule may offset the costs of the additional protection it offers.

(ii) *Alternative precautions open to the bank.*

The bank can avoid liability by taking one or other of two measures. It may warn the wife, at a meeting not attended by the husband, of the amount of her potential liability and the risks involved and encourage her to obtain independent advice (Point (5) of the summary in Part 2, above). Alternatively, it may insist that she obtain independent advice (Point (6)).

Again, the law in Australia is different. As a practical matter, the rule in *Yerkey v. Jones* requires proof of independent advice: it is not sufficient for the bank to give the advice itself.

The greater leeway the bank has under English law reduces the level of protection for the wife but, by the same token, it may also reduce the bank’s compliance costs. The trade-off reflects the tension between the policy concerns underpinning the rule.

(iii) *The content of the advice.*

The advisor is limited to informing the wife about the legal aspects and risks of the transaction (Point (6) of the summary in Part 2, above). In *Etridge*, Lord Nicholls described the solicitor’s duty in some detail. In summary, the solicitor must explain the documents and their legal consequences, make it clear to the wife that she has a choice whether to sign and confirm that she wishes to proceed.

In many cases, the husband wants the loan to finance a business venture. The solicitor’s obligations do not extend to advising the wife about the commercial viability of the business venture. In terms of the need for protecting the wife from contract failure, this limitation seems an arbitrary one. The wife’s decision whether to sign is likely to be affected as much by her understanding of the business venture as it is by what she knows of the legal documentation. On the other hand, solicitors may not be qualified to

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63 Trebilcock & Elliott, supra note 59 at 59-64.
64 Ibid. at 59.
65 The bank could cover itself by insisting that the wife obtain independent advice. It will probably want to take this precaution anyway to guard against the risk of the husband’s undue influence or misrepresentation. What, then, is the additional cost to the bank? The answer is that, even in cases where the bank complies with the independent advice requirement, there is a residual risk of a court later saying that the advice was inadequate or not sufficiently independent. Extending the wife’s protection to cases of information failure increases this residual risk.
66 The High Court has flagged the possibility that the rule may be extended in future to all “long term and public declared relationships short of marriage between members of the same or opposite sex”: *Garcia v. National Australia Bank Ltd* (1998) 194 CLR 395 at 404, 72 ALJR 1243, 2000 WL 1245588.
67 The first limb of the rule in *Jones*, supra note 62, says that the wife can set aside the transaction if the husband was guilty of undue influence or misrepresentation unless she received independent advice. The second limb of the rule says that the wife can set aside the transaction for want of understanding unless the bank explained it to her and reasonably supposed she understood. Given the first limb of the rule, the bank should insist in all cases that the wife obtains independent advice. Otherwise it will be at risk if she is later able to establish misrepresentation or undue influence by the husband.
68 *Etridge*, supra note 24 at para. 65.
give financial advice and if the bank had to insist on independent advice from an accountant or the like as well, compliance costs would rise substantially.70

(iv) The impact of the advice.

As a general rule, the solicitor's duty is to make sure the wife understands the transaction. The solicitor does not have to make sure that she is free from her husband's influence (Point (7) of the summary in Part 2, above). This is a significant limitation on the protection the rule offers: telling the wife about her choices is likely to be pointless if she is not free to exercise them. On the other hand, a requirement that the advice be both taken and followed would interfere with the wife's autonomy: "it effectively imposes a lawyer's view" of what is in the wife's best interests.71 To minimize this effect, the rule would have to be limited to cases where undue influence was likely. However, if the transaction goes ahead, it would then be harder for the bank to know in advance whether it will withstand a subsequent court challenge. The increased uncertainty would be reflected in higher lending costs. In Etridge, Lord Nicholls acknowledged the problem when he said that in exceptional cases, where it is "glaringly obvious" that the wife is being "grievously wronged", the solicitor should decline to act further.72 However, as the adverts attest, this stops well short of a wholesale solution and so it represents yet another example of the trade-offs this area of the law involves.

(v) Reliance on certificate.

The bank is entitled to rely on the solicitor's confirmation of advice and it does not have to inquire into the quality of the advice (Point (8) of the summary in Part 2, above). This compromises the wife's protection because it means she will be held to the transaction even if the advice the solicitor gives her is inadequate. The countervailing benefit of the limitation is that it reduces the bank's compliance costs.

If the advice is inadequate, the wife may have an action against the solicitor for negligence. There are trade-offs at work here too. The heavier the solicitor's responsibilities, the greater the potential chilling effect on their willingness to provide advice to spousal guarantors at an affordable price. For example, if solicitors were required to provide financial advice in ad-

dition to advice about the legal aspects of the transaction it can be anticipated that many would react by simply refusing to undertake the task.73 Limiting the solicitor's responsibilities means lower quality protection but, by the same token, it also means better access to legal services.

(c) Conclusion

It is sometimes said that equity has a role to play in improving business morality. This is because, unlike the common law which promotes self-interested behaviour by firms, equity promotes concern for the welfare of others.74 The spousal guarantee cases suggest that, while this may be true, it is true only in a limited sense. O'Brien and Etridge promote "other-regarding behaviour" on the bank's part. However, they do this by appealing to the bank's self-interest, not its better nature. By transferring the risk of the husband's wrongdoing to the wife to the bank, the cases give the bank the incentive to take cost-justified precautions. The cases limit the bank's exposure, in the various ways discussed above, with a view to ensuring that "the wealth currently tied up in the matrimonial home does not become economically sterile", to use Lord Brown-Wilkinson's words in O'Brien. The protection the cases give to guarantors increases the bank's transactions costs and so it might be tempting to conclude that they are an impediment to business. However, the correct focus of inquiry is not on the bank's costs alone, but on the bank's and the guarantor's combined transactions costs. Seen in this light, the cases make economic sense.

5. Feminism

(a) Introduction

In her now famous speech entitled "Will Women Judges Really Make a Difference?",75 Justice Wilson said that certain areas of law, such as contract law, would not benefit from being reconstructed according to a particularly "feminine perspective". The following discussion questions this affirmation.

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70 See Trebilcock & Elliott, supra note 59 at 77 and 79.
71 Ibid. at 78.
72 Etridge, supra note 24 at para. 62.
73 See e.g. Micarone, supra note 69 at 146: "if the duty imposed on solicitors is too onerous, they will refuse to advise, with the consequence that many who need advice will not receive it".
17 years later, and proposes a feminist re-reading of guarantees, and more particularly the issue of the quality of the lay guarantor’s consent.76

A feminist approach to the law of contracts aims to analyze those rules while taking into account gender, that is to say, while taking into account the subordinate position of women in society.77 One must consider in what way women’s experiences were excluded or included in the development of contractual rules. It is possible to analyze these rules from an external perspective. For instance, do women have access to the contractual mechanism? What kind of contracts do they conclude? Are some situations seen as outside the contractual relationship, which denies them legal protection? Are contracts between common law spouses enforceable just as marriage contracts are? Are surrogate motherhood contracts enforceable? Are women the victims of discrimination in the supply of public goods? Consider, for example, business women who have problems obtaining credit or single mothers who have problems finding decent housing. Contractual principles may also be analyzed from an internal perspective, once women have access to contracts. What are the effects of formation rules or of contractual remedies on women? A feminist perspective helps to determine if contracts constitute a tool of subordination, protection or empowerment for women. The ultimate goal of all feminist critiques is to reach true equality for women. Even if law has been used historically to keep women in a subordinate position, it might also be seen as a tool for social change for women.

Upon examination of Justice Wilson’s affirmation, according to which a feminist approach to contracts would not be possible or necessary, it is not surprising to find that the area of contracts can benefit from a feminist re-reading. In fact, like all legal institutions, contracts constitute a masculine institution constructed and based on men’s needs. Moreover, contract theory, which solidified in the nineteenth century, was developed for the business world, which was closed to women for a long time. We must not be taken in by the abstract and neutral character of legal rules, which has been denounced by many feminist writings.78 Other areas of law, which at first

76 The following is based on Louise Langevin, supra note 32.

submitted debts, it is necessary to specify the nature of the guarantee. It is a unilateral contract, in which only the guarantor assumes obligations and obtains no consideration, contrary to businesses that specialize in construction guarantees. In addition, the guarantee in the context of sexually transmitted debt possesses all the characteristics of the adhesion contract. It is presented as a standard form contract. Therefore, the bank imposes its conditions and negotiations are rarely possible. The provisions of this type of contract are often incomprehensible to the lay guarantor, who does not feel at ease to ask questions, either because the climate does not lend itself to those kinds of questions or because she does not wish to appear ignorant.

The signing of this contract carries a high number of risks for the guarantor: the risk of the principal's [husband's] future insolvency is part of the nature of the guarantee, although it may be presented or perceived as a commitment with no consequences, or like a moral obligation. Thus, the guarantor cannot request that her commitment be nullified due to an error, on the grounds that she did not know that the principal [husband] would become insolvent. In addition, the creditor may pursue the guarantor several years after she has made the commitment. It may be that the guarantor no longer has a special relationship with the principal, for example following the break-up of the spousal union. Additionally, the guarantor exercises no power over the business of the principal in order to protect her interests. Thus, she does not control the amount of the debt, as interest, penalties and expenses may be added to it.

(iii) A feminist re-reading of O'Brien and Etridge.

A feminist re-reading of the O'Brien and Etridge cases asks questions such as: in what ways do these cases take into consideration women's various experiences? Do the cases examine the social context? What are the positive and negative effects of these decisions on women? Do these decisions make the guarantee contract an instrument of subordination or of empowerment for women? Let us address three aspects of the O'Brien and Etridge cases. First, these guarantees, which might lead to sexually transmitted debts, are characterized by the existence of a privileged relationship between the surety wife and her spouse. How does the House of Lords deal with that fact?


Secondly, these contracts bring to the forefront the public-private sphere dichotomy and illustrate that the "personal is political". Thirdly, in searching for the adequate solution, the equality dilemma shows up. In the end, the issue of sexually transmitted debts raises the capacity of law to protect surety wives adequately.

(iv) A privileged relationship.

These guarantees, which might lead to sexually transmitted debts, are characterized by the existence of a privileged relationship between the "well-meaning" guarantor and the principal, who is a family member. In fact, the guarantor agrees to be bound due to the particular relationship of trust or friendship that she has with the principal. That affective relationship may beguile the signatory who can no longer appreciate the risks involved in the transaction or, although she is conscious of the risks involved, does not have the choice to refuse. In addition, the guarantor or co-borrower — be it a spouse, a father or a mother — gains no direct benefit from the transaction, which is to say that she does not touch the money or directly participate in the financial venture. In fact, the transaction is very disadvantageous for her. Her interest is instead indirect. She agrees to be bound for various reasons: she does not wish to harm her spousal relationship; she wants to help her spouse obtain the loan; she desires to ensure the well-being of her family; or she hopes to maintain a friendship.

In O'Brien, Lord Browne-Wilkinson well understood the nature of these contracts based on matrimonial solidarity and the doubt they cast on the quality of the consent of the vulnerable party, the female spouse. How can courts detect undue pressures exerted by the husband on the wife? How can courts adequately protect her? The House of Lords does not ask the lender to check the free and informed nature of surety wife's consent. Rather the bank escapes quite easily from the situation: as long as the lender gets a certificate from a solicitor confirming that the guarantor has obtained independent legal advice, it will bear no responsibility. This solution might not be the best. It might become a pure formality. Independent legal advice does not settle the power imbalance in couples or families. Isn't the bank benefiting from this "love money"? Do banks need all the guarantees they ask for? Should banks refrain from demanding security from wives? In fact, until 1969, the Civil Code of Lower Canada prohibited a married wife from

82 See the empirical study with surety wives in Great Britain led by Belinda Fehlberg, supra note 27, and in Australia, Jenni Milbank and Jenny Lovric, "Darling, Please sign this Form: Relationship Debt and Guarantees" (2003) 28 Alt. L.J. 282.
83 See text accompanying note 57.
acting as a guarantor for her husband. Should the guarantor be transformed into a co-borrower, thus making her legal obligations clearer? Shouldn’t there be an obligation imposed on the bank to inform the guarantor? Are legal solutions the only ones? Can’t we think of an information campaign on the legal consequences of a guarantee?

(v) The public-private sphere dichotomy.

Apart from the question of the female spouse being under pressure to sign, Lord Browne-Wilkinson’s statement also raises the issue of the private nature of the contract. Courts have usually been reluctant to interfere with private matters. Feminist scholars writing about the public-private sphere dichotomy argue that it is a false dichotomy that confines women to the private sphere and keeps them in a subordinate position. Feminist academics have shown the ways in which the legal system maintains and reproduces this dichotomy. In the case of white middle class women, this division has prevented them from having access to paid labour, which has kept them economically dependent. In the past, the State has also refused to intervene in domestic violence cases because they were considered family matters.

Guarantee contracts are examples of what might be described as the “private in the private.” First, according to the public-private sphere dichotomy, the contract may be seen as opposed to the family. A contract represents the “free market”, which distinguishes itself from the “truly” private sphere, where contractual relationships are perceived as foreign. The family setting does not need legal mechanisms to settle matters. Solidarity, trust and love are enough. Do couples think of the legal consequences of marriage when they marry? Secondly, but also as a consequence of the public-private dichotomy, the contract is often characterized as part of the private sphere because it represents the consent of two people to be bound by their mutual obligations. In this sense, the contract is part of the private sphere, and should be free of interference from the state, the public sphere.

Finally, in the family setting, a contract, which is part of the private realm, regulates private relationships. A contract made in the family sphere would therefore be the quintessence of the private. Thus one would expect the state to refuse to interfere for that reason. On the other hand, contractual rules, which are developed in the public domain, are then applied to the private sphere and effectively take the contract out of that private realm to place it in the public sphere.

The guarantee contract maintains the borders between the two spheres, but also breaks through them. It maintains the two spheres because it is a contract signed in the family context, far from the business world. But it also engages the public sphere because contractual rules apply to it and because assets benefiting the family, such as the family home, are used to finance a business, which is in the public sphere. The House of Lords in O’Brien and Etridge also breaches the public-private sphere dichotomy. By addressing the issue of the quality of surety wives’ consent, the court places this question in the public sphere. The solidarity relationship and the power imbalance in the couple or in the family become public matters. The court has to deal with emotions, family pressures, informed consent, freedom to contract, personal decisions between spouses, family budgets, the ways banks deal with this issue, and the role of the lender in giving information. This situation illustrates that “the personal is political”, as feminists have argued.

(vi) The equality dilemma.

Lord Browne-Wilkinson’s statement also underlines the equality dilemma. Women have achieved equality, are able to take enlightened decisions and do not need “special tenderness” from the law. However, the reality can often be different. Some wives still rely on their spouses for all financial matters and need some protection from the law. Lord Browne-Wilkinson’s judgment reflects this tension. On the one hand, he says that the wife-husband relationship does not automatically give rise to a presumption of undue influence (it is not a “category 2A” relationship), but on the other hand, he concedes that wives need protection.

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84 Article 1301 of the Civil Code of Lower Canada was repealed in 1969 by article 41, Loi concernant les régimes matrimoniaux; L.Q. 1969, c. 77.
87 Speaking for the majority, Justice Bastarache thinks that couples who decide to marry and want the legal consequences of marriage, compared to common law spouses who decide not to marry to avoid the legal consequences. In her dissent, L’Heureux-Dubé believes that people who marry do not think about the legal consequences of their decision. See Walsh v. Bona, 2002 SCC 83, [2002] 4 S.C.R. 325, 2002 CarswellINS 511, 2002 CarswellINS 512 (S.C.C.).
89 Kate Millet, Sexual Politics (N.Y.: Avon Books), 1970.
This raises the issue of how much protection surety wives need. What would be a feminist solution? Feminism is not monolithic. Various solutions that can be called feminist, and which are designed to meet women’s needs, may seem contradictory. On the one hand, some feminist reform proposals claim that the courts should become more interventionist in order to ensure real protection for women who assume the role of guarantor. These feminists suppose, then, that women cannot give free and informed consent due to family pressures and that they have an increased need for protection. Obviously, some may criticize that approach for being too protectionist or paternalistic, treating women like minors, stripping them of responsibilities, supposing that they cannot give free and informed consent due to their matrimonial status, reducing them to their matrimonial status, and damaging their credit history. Not all female spouse-guarantors are victims of undue pressure from their spouse or the bank. They may have deliberately assumed the risk of helping their spouse. We must not fall into the trap of essentialism and impose a single model for women.

On the other hand, an equally feminist analysis may be less interventionist. Based on the beliefs that women are equal to men (from a formal point of view), that they have made a lot of progress, that they are no longer limited to the private sphere and that they are more knowledgeable about business, this other position does not claim any special protection for female spouse-guarantors beyond those that apply to all guarantors. This more liberal solution is also imperfect. It maintains the status quo, adopts a formal approach to equality and assumes that current legal measures are sufficient to ensure the protection of guarantors.

This dilemma of identical treatment vs. differential treatment which has, for a long time, divided feminists, is false because in both cases the male remains the standard and ideal to be attained. Therefore, we should reject the abstract model of the individual who is detached from her social context, and who is able to read and understand all of the documents that she signs, who makes the best decisions, and who is able to negotiate. One must think about this problem in a different way. If we want substantive equality to trump formal equality, the courts must take into account the nature of the guarantee and the position of the disinterested guarantors (whether they be spouses, parents or friends), and give particular attention to sexually transmitted debts. And this is what the House of Lords does in granting protection to surety wives in the O’Brien/Etridge cases.

90 See Paula Baron, supra note 81.
92 Wanda A. Weigars, supra note 80.

But we must pinpoint the reason why the law should demonstrate “special tenderness” with respect to these women. It is not a question of doubting the validity of their consent on the grounds that they would be incapable of understanding financial concepts or the wide-reaching effects of their acts. Those grounds, which reinforce the image of the servile wife, would indeed be degrading for women. Their freedom to consent must instead be closely examined due to the pressure created in the marital relationship by emotional and sexual bonds. Despite their experiences in the working world or the business world, which under other circumstances would make them more wary, female spouses trust their male partners. They do not think that their spouses wish to drag them into a risky financial venture. They sign, among other reasons, in order to preserve a healthy relationship, or a relationship that they know to be threatened, or even simply to indicate their support for their spouses.

(c) Conclusion

Are O’Brien and Etridge positive decisions for women from a feminist point of view? Yes and no. First, it is a good thing that the issue of sexually transmitted debt was raised in the House of Lords twice in a short period of time. Key elements of the private realm—the effect of emotions on the quality of the consent, matrimonial solidarity that at the end of the day benefits the lender, pressures coming from the spouse looking for money, the relations between banks and women—have become public issues. Secondly, the fact that the two decisions take account of the real social context is positive: women’s condition has improved, but not for all. Some need protection. Thirdly, O’Brien and Etridge also offer a larger vision of the family beyond the traditional heterosexual family. The rules elaborated in the two cases apply to any relationship which is a non-commercial one.

However, the proposed solution—-independent legal advice—does not solve all the problems. Although surety wives may understand the legal implications of their transactions, they may have no other choice but to agree to them. What about women who are not victims of undue influence, but of family pressures? “They say that love is blind.” Independent legal advice does not seek to give a full picture of the financial situation of the spouse.

or his business. Other solutions may be necessary. The fact that the House of Lords has granted a "special protection" to surety wives as well as other persons involved in identical situations is also problematic. Is it really a special protection any more? Have we simply changed the general rule in the case of non-commercial third party guarantees?

6. Conclusion

Before we conclude, it is important to acknowledge the limitations of this proposed iceberg exercise. First, various learning theories and the principles of instructional design make it clear that different people learn in different ways. Our suggested three part deconstruction of the cases may not work for every student, but we believe that it can work for a significant number of students. The simple fact of the diversity of interpretative positions should go some way towards helping most students understand how perspectives and assumptions can inform, if not determine, legal reasoning. Moreover, our metaphorical iceberg, with one part (rules) above the surface, and three parts (principles/policies/politics) below introduces students to the different types of argumentation and analysis available to lawyers, thus potentially enhancing their competency.

Second, we are not claiming that this exercise encompasses all the dimensions of a thorough legal education. For example, the exercise does not attempt to engage in any serious form of experiential learning as might emerge from clinical legal education. In our opinion, experiential learning opportunities must be provided and promoted by all law schools, but given the current priorities of most law schools they are not likely to be realistic options for first year students, beyond perhaps some pro bono possibilities. However, we would also suggest that to the extent the iceberg exercise encourages students to identify and consider their own principles, policy preferences and political visions, and emphasizes the inevitability of perspective, it can serve as a bridge to other more intensive forms of experiential learning.

Despite these caveats, we suggest that our analysis of the spousal guarantee cases is valuable material for teachers of a first year contracts course because

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95 For an excellent introduction to various learning theories (e.g. Behaviourism, Cognitivism and Constructivism) and the principles of instructional design in the context of the common law of contracts see Michael Schwartz, "Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching" (2001) 38 San Diego L. Rev. 347. See also Steven Friedland, "How We Teach: A Survey of Teaching Techniques in American Law Schools" (1996-1997) 20 Seattle U.L. Rev. 1 at 4.

97 Supra note 42.