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COMMERCIAL RIGHTS AND CONSTITUTIONAL WRONGS

PATRICIA J. WILLIAMS*

I. COMMERCE AND THE CONSTITUTION

I am sitting on a train writing a speech for a program sponsored by the University of Maryland School of Law. I am in the dining car of the Broadway Bomber, or some other Amtrak name like that, my pens and notebook spread out on the table before me. About all I have done is pick a title: Contract and Communion. This much I can do without much difficulty because contract and something like communion is pretty much what I always write about. Most of my work is concerned with the division between the commercial and the communitarian, the legal and the illegal, the righted and the outlawed, the legitimate and the illegitimate, the propertied and the dispossessed. The framework from which I have been considering this topic most recently is grounded in private law, in particular contract and property law. I am interested in concepts of ownership as both legal relationship and mental construct.

In this Article, I plan to make an analogy between social and private contract. I do so from a conviction that aspects of social contract are characterized by strategies of evasion and control that are embedded in the rhetoric and symbology of the private sector. I use the model of private contract to illustrate the problematics of social contract because it seems a manageable way to test my hypotheses. At issue is a structure of relation in which a cultural code has been inscribed; if I am inside the bell jar of this common culture, my dilemma becomes how I can situate myself in order to evaluate it. Thus, I attempt to reduce the all-encompassing social contract to a manageable, private contract context (or is it that I am using the all-encompassing private contract to examine in microcosm what our social contract has become?).

Private contract is based on will theory, in which individual will and private acts of interpretation are joined to fulfill the expectations of not the larger, but the smaller society of the parties to it. For example, if one looks at documents like the Declaration of Inde-

* Associate Professor of Law and Women's Studies, University of Wisconsin at Madison. B.A., Wellesley College, 1972; J.D., Harvard Law School, 1975. This Article originally was presented as the Simon E. Sobeloff Lecture at the University of Maryland School of Law in April 1989.

pendence and the Constitution, one can see how they marry aspects of consent and aspects of symbology—for example, the notion of freedom. On the one hand, there is the letter of the law, exalted in these documents, which describes a quite specific range of rights and precepts. On the other hand, there is the spirit of the law, the symbology of freedom, which is in some ways utterly meaningless and empty—although at the same time this very emptiness provides a vessel to be filled with a sense of possibility, with a plurality of autonomous yearnings.

I pause for a moment and gaze out the window of the train. It is lunchtime. The dining car is starting to fill up and an Amtrak attendant politely intrudes into the middle of my reveries. She brings me a menu, some silverware, and another traveller with whom I am to share my table. My new companion is a stockbroker from New York. He says he travels a lot too, and we talk about feeling uprooted, even homeless.

Then we talk about being homeless.

“I never give money when people beg from me,” he says. “I tell them I have nothing. But I always stop to chat.”

“Why?” I ask, meaning why does he not give money, but he misunderstands my question and proceeds to explain why he always stops to talk.

“Finding out a little bit about who they are,” he explains, “helps me remember that they’re not just animals.”

“Are you at risk of forgetting that?” I ask, wondering exactly whom it helps when he stops to reassure himself of a humanity unconnected to any concerted recognition of hunger and need.

“Yes,” he replies to my surprise. “Over time, my conversations have helped me not to resent their presence on the streets and in my neighborhood so much.” He seems very anxious to prove the benignity of his neglect. It is an awkward, even dangerous moment in our short acquaintance; we chew in silence for a while, each not wanting to offend the other further. I ponder the notion of speech as “proportizing”, and the silly irony, given the circumstance, of metaphors like eating one’s words.

A little while later, we part, not much more said, but cordially enough. I cannot help noticing that he does not tip our waitress at all.

II. CONTRACT AND COMMUNION

From a temporary office I have been given at a university in Southern California while there for a conference, I continue to pon-

der the equation of privacy with intimacy, and of publicity with dis-possession. I think about the problem of homelessness as a metaphor for, as well as the manifestation of, collective disownership. I take my wondering to class and place it before my students. There are, I tell them, by conservative estimates, 70,000 homeless people in New York City alone.¹ While a disproportionate number are black, homelessness has no necessary connection to race. I, however, do see it as interwoven with the legacy of slavery, in its psychology of denial, in the notions of worth and unworthiness that go into the laws that deal with the homeless, in the ranking of "legitimate" needy and "illegitimate" homeless—these are old, familiar, cruel, blind games that make bastards and beggars of those who are our family.

From my temporary office, I overlook a plaza called "The Marketplace." Pink-tiled and stuccoed, it seems too neat to be real. In it are the university bookstore, a couple of restaurants and juice bars, the accounting offices for the university, colorful boutiques that advertise for salespeople who are "bright, creative and love to smile," and a movie theater, now showing *Pet Sematary*,² *Friday the Thirteenth, Part II*,³ and *Honey, I Shrunk the Kids!*,⁴ which the university uses as a lecture hall by day. It is, I think, a literal marketplace of ideas. I sit and look and long for the messy complication of New York, where I have a home that I almost never see anymore.

The next week, I am in yet another city at yet another institution. I am there to give a two-week session on homelessness and the law.

There are many homeless people on my street in New York, I tell my class full of non-New Yorkers. From the window of my home, I watch the well-heeled walk by the homeless all day long. Some give money; most do not. From time to time, something very visible or controversial happens with reference to the homelessness issue, and then the well-heeled give more or less, depending upon which way sentiments are twisted. Former Mayor Edward Koch puts up signs in the subway telling travellers not to give to panhandlers—that it is bad for tourism. Someone writes an editorial and says the streets belong to the taxpayers, and that the homeless should pay rent for their use. A homeless child dies in her mother's arms.

1. Lurie & Wodiczko, *Homeless Vehicle Project*, 47 OCTOBER 54, 54 (1988).

2. Paramount Pictures 1989.

3. Paramount Pictures 1981.

4. Touchstone Pictures 1989.

While small disenfranchisements give birth to large disenfranchisements, sympathies come and go.

There was a particularly well-publicized story about a pregnant homeless woman who gave birth to her child in the subway.⁵ The state intervened and took the child away, saying that she was an unfit mother based on her economic circumstance. The American Civil Liberties Union represented the mother in her attempt to maintain custody of her child. While there is some provision in New York to protect a newborn child from her mother's destitute circumstance, there is no law in the United States to provide that mother with the housing, health care, or economic rights with which to provide for her child.

While many European constitutions and the European Convention on Human Rights guarantee everyone the right to an education, the right to health care and even the right to a job or welfare payments, our Constitution does not.

Our Bill of Rights guarantees the individual's right to be free of Governmental intrusions, not the individual's entitlements to Government support. The Supreme Court has uniformly rejected all claims to constitutional entitlements. . . .⁶

My students always fight with me about this point. They tell me that this is the land of opportunity and that anyone who works hard can get anything they want. (My students are all very hard workers.) But I am not arguing, I say to them, that there are not laws that provide her with the opportunity to seek out a job and to be successful at it. But if she does not find a job, or if she is not successful at it, then she will have very little recourse, for the government has little or no obligation to provide for her. For example, friends working in the Department of Social Welfare in New York have told me that food stamps, for those who are lucky enough to get them, who most frequently do not include the homeless, provided, as of 1988, only forty-eight cents a meal.

In effect, I tell my angry students, the homeless have no real right to conjugal benefits, to family of their own, to anything like happiness, or to the good health that is necessary to enjoy life, appreciate liberty, and pursue happiness. Furthermore, I tell them, our

5. See *A Homeless Woman Gives Birth in Subway*, N.Y. Times, Mar. 22, 1989, at B6, col. 6.

6. Cutler, *Pro-Life? Then Pay Up*, N.Y. Times, July 7, 1989, at A29, cols. 3-4.

national and collective failure to provide guaranteed rights to food, shelter, and medical care has significant costs that they will have to deal with in their lifetimes: both as a constitutional or a public matter, and in the overwhelming power of specialized economic interests, *i.e.*, the power of so-called private interests.

It is the last few minutes of class; the students are hungry and edgy. They growl with the restless urge to go shopping. I, who also love to shop, nevertheless run on and on. I am terribly concerned, I say, about the way in which hunger, lack of education, and homelessness are devastating our communities, and most particularly women, children and blacks. I am alarmed by the rationalization, even the denial, of this cruel withholding of the right to survival itself, in terms of untextualized constitutionalisms, governmental restraint, states' rights, to say nothing of indignity being characterized as just a matter of "choice."

I give examples of the deep-rooted commonplaceness of our economically patterned notions of humanity. I tell stories of life in the subways of New York. Once, while getting off the F train at 14th Street, I saw an old beggar woman huddled against a pillar. Behind me, a pretty little girl of about six exclaimed: "Oh, daddy, there's someone who needs our help." The little girl then was led off by the hand, by her three-piece-suited father, who patiently explained that just giving money to her directly was "not the way we do things." Then he launched into a lecture on the United Way as succor for the huddled masses. It was a first lesson in distributive justice, conditioned passivity, indirection, and distance—statistical need positioned against actual need. I walked behind them for a little way, listening to him teach: responsiveness to immediate need actually was devalued as wrong.

A few moments later, just a little further along the concourse and still in the 14th Street subway, I saw another homeless person; he lying on a bench. He lay extended along its length, one leg dropped on the ground, the other stretched out on the bench; one arm flung across his chest, the other crooked under his head. He was dressed poorly, but not as badly as some street people. He had a little beard and a complacent face. His mouth hung open, and his eyes half closed, yet open. His eyes were a startlingly vacant blue, heavy-lidded yet staring at the subway station ceiling, intense, yet with no particular focus. These were the eyes, I thought, of a dead man. Then, I rationalized, no, he could not be. He is just sleeping like my mother used to, with the whites of her eyes showing, when she was sitting in her chair and did not really want to fall asleep.

Then I looked at the face of another man who had seen what I saw, both of us still walking past, yet never stopping for a second. I tried to flash worry at him. He, however, was seeking reassurance, which he took from my face despite myself. I could see him rationalize his concern away in the flicker of an eye. We walked behind each other up the stairs, and three blocks down Broadway before I lost him and the conspiracy of our solidarity. Thus, the man on the subway bench died twice: in body and in the spirit I murdered.

(Deep inside, I am made insecure by the wandering gazes of my students. I wonder, as they obviously do, is all this really related to law?) I think that all of this is related, I say aloud, to our ability to interpret our laws. What we had engaged in was not merely a rationalization, but the imposition of an order. The ironclad imposition of a world view requiring adherence to fictional visions cloaked in the comfort of familiar truth-denying truisms: "I know a black family and they're making it;" "My grandfather came to this country with nothing and . . .;" "He'll just use it for booze or drugs"—even though "he" looks hungry and asks for money for food. We, the passersby of the dispossessed, were a society of sorts. We made, by our actions, a firm social compact by which we were made comfortable and whose bounds we did not transgress. We also made a bargain of the man who lay dead. We looked at each other for confirmation that he was not dead; we, the grim living, determined to make profit of the dead.

After class, my students rush to the dean to complain. They are not learning real law, they say, and they want someone else to give them remedial classes. How will they ever pass the bar with subway stories? I am called in by the dean, who even in his distress, does not forget to offer me sherry. I explain: the discussion of economic rights and civil liberties usually starts from a point that assumes that equal protection guarantees equality of opportunity "blindly" for the benefit of those market actors who have exercised rational choices in wealth-maximizing kinds of ways. The corollary to this is that those who make irrational non-profit-motivated choices have chosen to be poor. I, however, take as given two counter-facts: (1) that in this country we do subsidize the wealthy in all kinds of ways, and we do so in a way that directly injures the poor; and (2) that the states of neither indigency nor wealth are necessarily nor even frequently the result of freely exercised choice. I think that this wide divergence of professed ideals and day-to-day reality has created in us some costly degree of social schizophrenia; I think that over time, our relation to both the marketplace and our sense of liberty—our

view of ourselves as both free and free agents—has become tremendously complicated.

The dean offers me biscuits and a soft white cheese. This past summer, I tell him, I drove across the country with a friend who had never visited the United States before. His conclusion was that “Free” is a magic word in America. Give me an example of what you see, I urged. At that moment, we were on the highway just outside Las Vegas. He merely pointed to a sign on a roadside diner—it said: “Free! All you can eat, only \$7.99.”

Yet this sign was more than a joke. It symbolized the degree to which much of what we call “freedom” is either oxymoronic or meaningless. For example, when the United States Supreme Court, in *Buckley v. Valeo*,⁷ held not just that it is undesirable to constrain the expenditure of money in political elections, but that such an expenditure is *speech*⁸—what does this really mean? The *Buckley* Court seems to have gone one step beyond merely holding that money is related to access to expensive media. Rather, the Court seems to imply that if one could speak freely (without pecuniary cost, that is) but could not spend money, then one still would be “censored.” But if expression is commodified in this fashion, then can it not be bought and sold? Is money itself communicative, and of what? Is the introduction of money as a concept of expression a little like introducing usury into our love lives? Can speech be usurious? Is money a form of language, in the way we think of speech as language? What does this imply for oaths, rituals, and the swearing of attachments? Can we now say “political money” and “artistic money” and mean the same thing as when we say “political speech” and “artistic expression”? What does free speech or freedom itself mean, if it really has a price?

7. 424 U.S. 1 (1976).

8. *Id.* at 39. The Supreme Court stated:

While the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.

It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment

Id. at 47-49 (footnote omitted).

Here is what troubles me: we use money to express our valuation of things. We express equivalencies through money, and in that process of laying claim through the application of equivalencies, we not only make egalitarian, we introduce a powerful levelling device. Through reducing to commodified equivalencies, we can bargain away what is undesirable; we can purchase and create a market for what is desirable. But given the way we use money, we also dispense with the necessity of valuing or considering (for is that not the definition of "consideration"⁹ in our economically-derived conception of contract?) that which is outside the market.

The sherry is beginning to go to my head. If, I demand somewhat sharply of the dean, political discourse is a market phenomenon, what happens to those members, that part, of the polis that is outside the market—that cannot or will not be bought and sold? And what, indeed, is the impact of buying and selling on the polis that is within the market place of ideas?

I think, I say jabbing the air with my finger, that the answer to all of this is increasingly, if not immediately, apparent in the construction of American political discourse, not just in things like political action committees (PACs) lobbying for legislation, but in the pernicious degree to which advertising agencies and wheel-of-fortune style popularity polls determine the course of world events—elections, health care, invasions, and whole wars. The focus of politics is shifted, in other words, from concepts such as service to duty, to purchasers and the buying public. It is representative politics alright, but wealth-representative politics that is the exact equivalent of what Robert Ellickson so appallingly endorsed in his article, *Cities and Homeowners Associations*.¹⁰ The focus of

9. RESTATEMENT (SECOND) OF CONTRACTS § 71(a) (1981) provides that "[t]o constitute consideration, a performance or a return promise must be bargained for." Section 79 further provides that: "[i]f the requirement of consideration is met, there is no additional requirement of (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or (b) equivalence in the values exchanged; or (c) 'mutuality of obligation.'" *Id.* § 79.

10. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982). In encouraging consideration of a system of local elections in which voting power would be based on "economic stake" in a community, Ellickson writes:

[S]uppose that voting power in a suburb were to be reallocated from one-vote-per-resident to one-vote-per-acre. That reallocation would strengthen prodevelopment forces relative to antidevelopment forces because owners of undeveloped land would gain in political power. Assume more housing would be built. If exclusionary practices had previously pushed housing prices above competitive levels, housing prices would fall. It is possible that the gains low-income families would obtain from the drop in housing prices would outweigh

politics is shifted from amassing the greatest amount of intellectual, social, or erotic capital to the simple amassing of capital.

It enables the wealthiest presidential candidates to purchase the soft fuzzy image of "I am a real American," and to hoard it like commodity wealth. It allows the spurning of those who do not express themselves through expenditure as "undeserving." It allows speechwriters to become the property of presidents. And the harm I see from this is that it puts reality up for sale, makes meaning fungible, and makes meaning dishonest, empty, irresponsible.

An image that comes to mind is that of Jessica Lange testifying to Congress about the condition of farms in America because she had played a farmer's wife.¹¹ What on earth does "testimony" mean in that context? Similarly, the movie *Mississippi Burning*,¹² by making history subservient to the selling of a product, purchased a new rendering of reality, of history, of experience; it provided a profound illustration of this commodity-quantification, as mercenarily-motivated political *re*-presentation. Public discourse becomes privatized, speech becomes moneyed, and money becomes the measure of our lives.

I pause for breath. The dean says quietly, "But money is real," and refills my glass.

I fail to heed the warning in his voice and continue rashly: Jean Baudrillard has said that "[t]he secret of gambling is that money does not exist as a value."¹³ It seems to me that the secret of the Madison Avenue stakes for which our legal and political futures are played is that words do not exist as a value in the constitution of political currency.

In our legal and political system, words like "freedom" and "choice" are forms of currency. They function as the mediators by which we make all things equal, interchangeable, fungible. It is, therefore, not just what "freedom" means; it is the relation it signals between each individual and the world. It is a word that levels difference.

Similarly, money itself signals a certain type of relationship. So

other losses they would sustain from residing in a suburb that conferred voting power according to a formula that was facially disadvantageous to them. In other words, an apparently regressive voting system may have progressive distributional consequences.

Id. at 1562 (footnote omitted).

11. See 131 CONG. REC. S5727 (daily ed. May 9, 1985) (statement of Jessica Lange).

12. Orion Pictures 1988.

13. J. BAUDRILLARD, *Forget Baudrillard*, in FORGET FOUCAULT 86 (1987).

perhaps it is not just money that is the problem, but the relationship it signals—the tit for tat; the purchasing of our liberties; the peonage of our citizenship. As one analyst has described it:

In bourgeois ideology, history is negated by the process of exchange; in the equalization brought about by the need to determine that one ware is worth another ware, and everything has its price, that this equals that, history is replaced by an eternal stasis where values remain constant in an ideological tit for tat where the equal sign ensures a never-ending binary equilibrium in which a change on one side of the equation is always balanced by the algebraically obligatory change on the other. Everything becomes a perfect metaphor for everything else, for in the end all equations say the same thing and all equations say nothing. The emptiness behind the binary opposition is the emptiness behind the equation $0=0$. One thing is opposed to another thing in a two-fold opposition incapable of accommodating marginalities, third forces, or synthesis.¹⁴

The next day, I receive a note from the dean. It says that he has received a variety of complaints about the “polemical” nature of my teaching and that he indeed feels that my “style” is inappropriate in “the” law school classroom. That night, I go home, pour my own sherry, and write up my lecture notes for the next day’s class, which on the next day, I go in and give, out of neither defiance nor defeat, but because I do not have anything else to say:

In Brazil, women are being asked to provide proof of sterilization before they will be hired. This comes in the wake of new legislation granting pregnant women four months of maternity leave.¹⁵ This law mostly affects poor women, rather than middle-class women who

are able to return to work almost as quickly as they want because they can draw on a vast pool of poorly paid domestic servants, few of whom have social benefits. . . . Such servants . . . also earned the right to maternity leave under the new laws. The Association for Domestic Workers in Rio De Janeiro believes this city alone has at least 300,000 nannies and maids and the group has said it will now watch out for these women’s interests.¹⁶

14. Brockman, *Bitburg Deconstruction*, 7 PHIL. F. 160 (1986).

15. Simons, *Brazil Women Find Fertility May Cost Jobs*, N.Y. Times, Dec. 7, 1988, at A11, col. 1.

16. *Id.*

In the United States, however, we disguise the brutal directness of such bargains. In the private sector, we have employers who, based on arguments of fetal rights and protection, refuse to hire any woman "capable" of bearing a child.¹⁷

And more troubling still, in the public sector, we have the increasing phenomenon of sentencing hearings in which defendants in certain types of cases like child abuse or rape are offered a "choice" between time in jail and sterilization.¹⁸ The defendant, in privatized terms, is positioned as a purchaser, as "buying" her freedom by paying the price of her womb. And because that womb is in the position of money in this equivalency, it seems to many to be a form of expression, a voluntary and willing expenditure in the commerce of free choice.

One of the more peculiar examples of this is the case of Roscoe Brown, a black South Carolinian convicted of rape.¹⁹ In an arrangement styled to resemble a contract, Brown was offered a commutation of his thirty-year prison sentence if he would agree to be castrated.²⁰ After spending some time in prison, Brown asked to be castrated. Civil libertarians intervened and the case was appealed to the Supreme Court of South Carolina. Fortunately, that court ruled that the castration "option" would amount to cruel and unusual punishment.²¹ The question that this case raised for me was the interpretation of the words "contract," "freedom of choice," and "autonomy." "In 1985," wrote the *New York Times*, "three convicted rapists in South Carolina were resentenced after the state Supreme Court said a judge's decision to *let them choose* castration over prison violated their rights to be free from cruel and unusual punishment."²² The vocabulary of allowance and option seems meaningless in this context of an imprisoned defendant dealing with a judge whose power is, in effect, absolute as to his fate. Yet in January 1989, I saw Roscoe Brown's white lawyer on television vehemently arguing that Brown should be *allowed* to be castrated, that

17. *See* U.A.W. v. Johnson Controls, Inc., 886 F.2d 871, 898-99 (7th Cir. 1989), *cert. granted*, 110 S.Ct. 1521 (1990).

18. *See, e.g.*, Smith v. Superior Court, 151 Ariz. 67, 725 P.2d 1101 (1986); Nebraska v. Cavitt (*In re Cavitt*), 182 Neb. 712, 157 N.W.2d 171 (1968), *prob. juris. noted*, 393 U.S. 1078 (1969), *appeal dismissed*, 396 U.S. 996 (1970).

19. *State v. Brown*, 284 S.C. 407, 326 S.E.2d 410 (1985).

20. Castration is not merely male sterilization as in a vasectomy. Castration is the actual removal of the testes, and was outlawed in many colonies even as against slaves. *See generally* W. JORDAN, *WHITE OVER BLACK* 154-63 (1968).

21. *Brown*, 284 S.C. at 411, 326 S.E.2d at 412.

22. *Plan to Sterilize Women is Debated*, *N.Y. Times*, Sept. 25, 1988, § 1, at 35, col. 1 (emphasis added).

the refusal to *allow* the arrangement to go forward was unwarranted state intrusion into his *privacy*.

I have some difficulty in getting my students to understand why this might not be good private contract. I find myself besieged with questions, faces full of sincerity, mouths round with worried wonder. "Why do you want to rob the defendant of his last little bit of freedom?" asks one. "But the defendant chose the castration," says another.

I continue: It is true that the transaction was structured as a contract. The power of that structure, however, transforms the discourse from one of public obligation and consensus into one of privatized economy. This positioning renders invisible both the force of the state and the enormous judicial whimsy exercised in the selection of such a currency. It allows us to think that it is not the state that is putting the cut on its citizenry; it allows us to sustain the fiction, the half-truth, that the cut is coming from the defendant's own mouth. It is he who is begging to be castrated. It is, as Professor Sacvan Bercovitch has observed, Ahab's notion of covenant: "I do not order ye; ye will it."²³

"But what if the defendant really, really wanted it?" insists another student.

I respond by asking: What does the defendant's "really, really" wanting it mean in such a context? After all, the scenario of someone begging, "really, really" imploring to be castrated, is very close to what, in another realm of sexual affairs, is called "dominance and submission." But is what the defendant wants the issue anyway? And what else is at stake in a case that bears the name "People [*i.e.*, the public] v. Roscoe Brown?"

I do not think it serves any social interest to window-dress the enormous power and dominance of the state over sentencing proceedings by transforming the public interest in consistent and fair sentencing into one of private desire. The "private desire" which comes out of the defendant's mouth is, in fact, the private whimsy of the judge. The inversion of having the defendant beg to be dominated does not make the state any less dominating; nor does the inversion serve to make the state "submissive." The force of the state remains; the backdrop of incarceration generally is understood as signifying something significantly different from an invisible hand or economic incentive. Yet, what does seem to be obscured is that

23. Bercovitch, *Hawthorne's A-Morality of Compromise*, 24 REPRESENTATIONS 1, 11 (1988).

the state is creating a situation in which it exercises power over who shall have children or not, and that judges are exercising unprecedented latitude to impose sentences that have no statutory or precedential authority. And the problem with this is not simply that it "breaks the rules," but that it displaces any public discourse about what sort of force the state should use. But it is all of us who are on trial in criminal sentencing proceedings: do we really, really want the state requiring a ransom of body parts?

This notion of privately purchased public rights is manifested at a more complicated level in the recent Supreme Court decision to permit a state to choose whether or not it will protect its children from abuse.²⁴ (At the same time, this is a Court that has not hesitated to assert itself in the "protection" of minors, to say nothing of adults, from information about birth control and abortion.) All this is a notion of governmental responsibility that is less rooted in the jurisprudence of enduring social compact than that of short-term private contract. This privatized view would impose no duty at all unless the state, like some arm's length private transactor, has undertaken the obligation, has assumed the debt. The logical corollary of this is that if the state has not been paid, if there has been no consideration to support the state's activity toward its citizens, then there is no obligation.

What does the state have to be paid for it to intervene to protect a citizen from abuse? I do not think it is as simple as taxes. What is it a child would have to introduce as currency by which care of the state would be made a right? Does this not begin to resemble the argument advanced by Professor Carl Wellman in his article *The Growth of Children's Rights*, in which he maintains that children have no rights until they are grown enough to make a claim to them?²⁵ Does this not really mean that children do not have the Price? Children and the poor make no considered bargains and therefore they do not exist until they can buy and sell the property of themselves. Before their emergence as property manipulators, there is no inducement, no exchange—no tat, no tit. The child's interests and the indigent's welfare become an incidental commodity to be purchased or not, a governmental obligation only if the right price is paid and

24. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1007 (1989); see also Comment, *DeShaney v. Winnebago County: The Narrowing Scope of Constitutional Torts*, 49 MD. L. REV. 484 (1990).

25. Wellman, *The Growth of Children's Rights*, 70 ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE 441, 451-52 (1984).

the right laissez-faire subcontractors can be found to produce or provide the thing desired.

It is as though we lived in some supermarket state, a rich array of options lining the shelves, the choices contingent only upon the size of our budget. By this analogy, governmental goods and services all become fungible, equivalent. If there is no independent duty to provide welfare for citizens, if there is no community inspiration to provide it as a right, or gift, as some have characterized it, then the legislature becomes not the servant of the long-term public interest, but a slave to the buying public. Governmental actions become guided not by necessity but by trend. A municipal golf course, by such momentary consumerist vision, is as good a choice—and certainly easier—than child welfare.

These bargained freedoms perhaps are nowhere better exemplified than in the words of President Bush's failed nominee for Secretary of Defense, John Tower. He promised, if you recall, to give up drinking if he got the job.²⁶ Not that he would give up drinking period, or that he would give up drinking because it wrecked his homelife, or because of public pressure, but that he would give it up if. Tit for tat. His sobriety was positioned as a commodity that we the public, through Congress, could purchase for the low, low price of our national defense. Like a used car salesman who will throw in air conditioning if you write the check now. He dangled his sobriety like a hostage or a bribe, if we had any sense of communal public relation left; but only like a gleaming display-encased option if we come at it from the atherosclerotic muddiness of the over-expended mental state we call "privacy."

This mental state is destructive, not just as a concern about constitutional protections or civil liberties, but also in the marketplace. It shifts emphasis from commerce among people for real things, and becomes instead a system which transforms, in Francis Bacon's imagery, the idol of the marketplace into the idol of the theater.

When I first started teaching consumer protection a decade ago, the mathematics of false advertising were simple. If the box or the brochure said, for example, "100% cotton," you merely took the item in question and subtracted it from the words: any difference was the measure of your legal remedy. Sometimes you had to add in buyer's expertise, or multiply the whole by seller's bad faith,

26. See Rosenthal, *Tower Takes Vow He Will Not Drink If He Is Confirmed*, N.Y. Times, Feb. 27, 1989, at A1, col. 6.

but all in all, the whole reason people even took a class in consumer protection was that you did not have to learn logarithms.

Today, however, advertisers rarely represent anything remotely related to the reality of the product (or the politician) they are trying to sell; misrepresentation, the heart of false advertising statutes, is almost impossible to prove. Increasingly, television ads are characterized by scripts, if they have scripts, that never mention the product nor contain a description of any sort.²⁷ Instead, what fills the sixty seconds are “concepts” and diffuse images—images that used to be discursive, floating in the background, creating a mellow-consumerist backdrop—images which now dominate and direct, fill in entirely for content. Nothing is promised, everything “evoked.” Warm fuzzy camera angles. “Peak” experiences. Happy pictures, mood-shaping music. Almost always a smarmy, soft-peddling overvoice purring something like: “This magic moment has been brought to you by”

About a year ago, I was sitting at home, installed before the television set. I was preparing for a class in consumer protection. The next day’s assignment was false advertising and I was shopping for an advertisement, any advertisement, whose structure I could use as a starting point for class discussion.

An ad for Georges Marciano clothing flashed on the screen and dragged me in, first with the music, Southern African music of haunting urgency, the echoing simultaneity of nonlinear music, the syncopation of quickening-heartbeat percussive music, dragging the ear. In the picture, a long-blond-haired woman in sunglasses ran from a crowd of photographers and an admiring public. The film was black and white, a series of frames cut short and jaggedly succeeding each other, like a patchwork of secretly-taken stills. Sliced into the sequence of her running away were shots of her and her manager/bodyguard/boyfriend packing. He packed the passports and the handgun. She packed the Georges Marciano jeans. The climax came when she burst into a room of exploding flashbulbs—a blazing bath of white light, an emphatic shift in tone.

The effect of this particular visual and aural juxtaposition was the appearance of the music being inside the blond woman’s head, or her heart. The music was primal, dangerous, desperate. The woman’s crisis of adoration framed the burning necessity of this profound music and the soaring universality of sound became white,

27. The advertisements for the luxury automobile line “Infiniti,” which show waves washing over a rocky shore but rarely, if ever, show the automobile, is a recent example.

female, privatized. The pulsing political movement of the music elevated this event of narcissistic voyeurism to primal importance.

The music overflowed boundaries. Voices merged and surged; mood drifted and soared listening to it. African voices swelled and rose in the intricate music of knowledge, the wisdom of rhythm, the physics of echoing chasms bounded in intervals, the harmonic bells of voices striking each other in excitement and the wind, Black African voices making music of the trees, of the groundhogs, of the whistling birds, and the pure chortling streams. It was generous, shared music, open and eternal.

The pictures presented sought privacy. The chase was an invasion; the photographers pursued her private moments; she resisted even as her glamour consented. The viewer was drawn by the desire to see her never-quite-revealed face, swept along by the urgency of her running to privacy, even as we never quite acknowledged her right to it. Thus, the moment of climax, the flashing of cameras in her face (and ours—we do not actually see her face even then—so completely have we identified with her) was one of release and relief.

The music acted in contradistinction to the pictures. The mind resolved it queerly. The positive magnetic boundlessness of the music was turned into negative exposure. The run for privacy became an orgasmic peep show, the moment of negative exposure almost joyful.

In my lap, the heaviness of my textbook lay loose, unattended pages drifting open to the Lanham Act:

False designations of origin and false descriptions forbidden

(a) Civil action

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which— . . . shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.²⁸

I have recounted this story at some length, and just as I entered it into my journal at the time it occurred, not just for its illustrative contrast between the sight and the sound of this advertisement, but

28. Lanham Act, § 43(a), 15 U.S.C. § 1125(a) (1988).

also because I think that the relationship between the music and the pictures acts as a metaphor for the tension between the political and marketplace dynamic that is my larger subject. I think that the invisible corruption of one by the other has consequences of which our unawareness is, ultimately, dehumanizing.

Ours is not the first generation to fall prey to false needs. It, however, is the first generation of admakers to realize the complete fulfillment of the consumerist vision through the fine-tuning of sheer hucksterism. Surfaces, fantasies, appearances, and vague associations are the order of the day. So completely have inherencies, substance, reality, and utility been subverted that products have been purified into mere wisps of labels, floating signifiers of their former selves. "Coke" can as easily add life plastered on clothing as poured in a cup.

Calculating a remedy for this new-age consumptive pandering is quite problematic. If people like—and buy—the enigmatic emptiness used to push products, then describing a harm becomes quite elusive. But it is elusive precisely because the imagery and vocabulary of advertising has shifted from need to disguise. With this shift has come—either manipulated or galloping gladly behind—a shift in the public appetite for illusion and disguise. And in the wake of that, has come an enormous shift of national industry, national resources, and national consciousness.

Some years ago, when I first started teaching, most of my students agreed with me that a nice L.L. Bean Baxter State Parka delivered without a little label saying "L.L. Bean" was a minor defect indeed. Today, I have to work to convince them that the absence of that label alone is not a major breach of contract; I have to make them think about what it is that makes the parka an L.L. Bean: its utility or its image? Its service to the wearer or its impact on those around the wearer? If masquerade becomes the whole basis of our bargains, I worry that we will forget the jazzy, primal King Lear-ish center of ourselves from which wisdom springs and insight grows. I worry that we will create new standards of irrelevancy in our lives, reprioritizing social relations in favor of the luxurious. And since few of us can afford real luxury, blind greed becomes their necessary companion.

On a yet more complicated level, I worry that in accustoming ourselves to the overwhelming emptiness of media fictions, we will have reconstructed our very notion of property. If property is literally the word or the concept used to describe it, then we have empowered the self-willed speaker not just as market actor, but as

ultimate Creator. If property is nothing more than what it evokes on the most intimate, and subjective levels, then the inherency of its object is denied; the separateness of the thing which is property must be actively obliterated to maintain the privately sensational pleasantries of the propagated mirror-image. An habituated, acculturated blindness to the people and things around us, grows up based on our privilege, and on our safety from having to see. Our interrelationship with these things is not seen; their reasons for being are rendered invisible.

At the simplest level of market economics, the modern algebra of advertising deprives society of a concept of commodities as enduring. Sales of goods are no longer the subject of express or long-term promissory relationships—there is at best an implied warranty of merchantability at the fleeting moment of contract and delivery. Contract law's historic expectation interest²⁹ becomes even more thoroughly touch and go, in the most virulent tradition of caveat emptor. It is an unconscious narrowing of expectation to the extent that we lose our expectations. Thus, in some way, Coke and Pepsi lead us to obliterate the future, not just with empty calories, but with empty promises as well. The illusion of a perky, sexy self is meaningless as to the reality of a can of corn syrup; but this substitution, this exchange of images is a harm going beyond wasted money, tooth decay, or defeated notions of utility. The greater harm is that it is hypnotic, and that it is culturally addictive.

In theory, contract doctrine is that currency of law used to impose economic order on human beings for certain purposes. Defenses to contract formation such as misrepresentation, duress, and undue influence are, I think, a theoretical attempt to impose an ordered humanity on economics. Increasingly, however, the day-to-day consumer purchases that are the mass of what is governed by contract have been characterized by a shift in popular as well as legal discourse. Contract is no longer a three-party transliterative code, in which law mediates between profit and relationship, and in which property therefore remains linked to notions of a temporally-sustained and shared humanity. Instead, consumerism is locked into a two-party, bipolar code that is little more mediative than a mirror. It becomes reified in an equation in which money reflects law and law reflects money, unattached to notions of humanity. The neat

29. The "expectation interest" in contract is the promisee's "interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed" RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981).

jurisprudence of interpretive transposition renders the whole into a system of equivalencies in which money=money, words=words (or law=law). The worst sort of mindless materialism arises. The worst sort of punitive literalism puts down roots.

Some time ago, my friend and colleague, Professor Dinesh Khosla traveled to Costa Rica for a conference. On his way back to the United States, he found himself in the airport behind throngs of Costa Ricans pushing five or six huge suitcases apiece. Dinesh stopped several times to assist several different people. In every case, he was surprised by how light and empty the suitcases felt. When he had gotten this far in the story, I already had imagined its end; I had filled the suitcases with media stereotypes of feathery coca leaves and dusty white powders. But I was wrong. It turned out that Dinesh's fellow travelers were all wealthy Costa Ricans traveling to Miami for the sole purpose of shopping. They planned to load up the suitcases with designer clothes and fancy consumables and cart them back home. I was reminded of the Sufi tale of the customs official who for years scrutinized the comings and goings of a man famed as a smuggler. For years he subjected each of his parcels to thorough searches but all he ever found was straw. Many years later when they were both retired, he asked the smuggler just where he had hidden the contraband all those years. The smuggler replied: "I was smuggling straw." Dinesh's account recast the conspicuous luxury of North American commodities as a similar form of invisible contraband, as a sinfully expensive and indulgent drug.

One final anecdote: only a little way down Broadway from the 14th Street subway station, in Manhattan, there is a store called the Unique Boutique. Yards from the campus of New York University (NYU), it is the place where stylish co-eds shop for the slightly frumpy, slightly punky, slightly slummy clothes that go so well with bright red lipstick and ankle-high black bootlets. One winter day, I emerged from the subway and passed by the store. There I saw a large, bright, fun-colored sign hanging in the window that said: "Sale! Two dollar overcoats. No bums, no booze." Offended, and not wanting to feel how offended I was, I turned my head away and looked out onto the street. There, in the middle of the intersection of Broadway and Washington Place, stood a black man dressed in the ancient remains of a Harris Tweed overcoat. His arms were spread-eagled as if in flight, though he actually was begging from cars in both directions. He also was drunk and crying and trying to keep his balance. Drivers were offended, terrified of disease, and of

being robbed. Traffic slowed as cars made wide avoidant arcs around him and his broad-winged pleading.

My alarmed thoughts about this: the sign in the window disenfranchised the very people who most need two dollar overcoats, the so-called bums. Moreover, it was selling the image of the disenfranchised themselves. This store is a trendy boutique aimed at NYU's undergraduate population. It was selling an image of genteel poverty, of casual dispossession. It attracts those who can afford to "slum" in style, yet it simultaneously restricts and exploits the slum itself. It was segregationist in the same way that "whites only" signs are. And it was not just segregationist along class lines, but segregated among those who *appeared* to fall within one category or another. It took the images of those who had nothing and "styled" it as a commodity (slumminess) to be sold to those who have so much. It was the ultimate in short-term consumerist redundancy: clothes do not just make the man, they would admit him into the clothing store itself.

In discussing the tension between liberty and authority, John Stuart Mill observed that self-government means "not the government of each by himself, but of each by all the rest."³⁰ Mill feared what he called the "tyranny of the majority" and cautioned that:

[p]rotection . . . against the tyranny of the magistrate is not enough; there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them [H]ow to make the fitting adjustment between individual independence and social control—is a subject on which nearly everything remains to be done.³¹

The tyranny of the majority that Mill so feared has survived in liberal political theory as a justification for legislative restraint, particularly economic restraint. But what Mill did not anticipate was that the power of suasion over the forum itself might be so great that it would subvert the polis, as well as the law, to the extent that there is today precious little "public" left, just the tyranny of what we call the private. It is true, there is relatively little force in the public domain compared to other nations, relatively little intrusive

30. J.S. MILL, UTILITARIANISM, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 72 (H.B. Acton ed. 1984).

31. *Id.* at 73.

governmental interference. But we risk instead the life-crushing disenfranchisement of an entirely owned world. Permission must be sought to walk upon the face of the earth. Freedom becomes contractual and therefore obligated; freedom is framed by obligation; and obligation is paired not with duty but with debt.