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What Do Contracts Histories Tell Us About Capitalism?: From Origins and Distribution, to the Body and the Nation

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Abstract and Keywords

This chapter reads contracts histories as discussions about capitalism. What do histories tell us about capitalism? What kind of concerns do they betray about it? It presents a case study of Britain, the first capitalist nation, in the late-eighteenth and nineteenth centuries. It argues that histories of contracts of this era, viewed as a whole, address capitalism within the established modes of political-economic debate: origins—when it emerged, a question intertwined with determining what elements were fundamental to capitalism; and distribution—questions of economic, social, and cultural equality in capitalism. The chapter separates and simplifies these themes to introduce existing work and highlight thick points of controversy and research. The second part moves beyond these concerns, and offers two other perspectives on contracts and capitalism: embodiment and nationalism.

Keywords: legal history, contracts, capitalism, origins, distribution, embodiment, nationalism

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I. Contracts Histories as Histories of the Capitalist Order

*CONTRACTS histories are inextricable from the history of capitalism. Not only functionally is capitalist life dependent on contracts for labour, capital, and (p. 942) consumer goods and services, but conceptually, too. By the Age of Capital, as Eric Hobsbawn called the era of global advance of capitalism towards the mid-nineteenth century,[1] the cultural association of the concept of contract with ideas of markets and economic liberalism superseded an earlier dominance of contract as a principle of political sovereignty handed down by social contract philosophers, which itself overshadowed associations of contract with covenant theology and natural law jurisprudence.[2] These resonances of contract remain valid. One way of grasping the field of contracts histories and its deep significance, thus, is by reading it as a set of debates about historical capitalism, rather than reviewing histories either chronologically or methodologically.

This chapter reads contracts histories as discussions about capitalism. What do histories tell us about capitalism? What kind of concerns do they betray about it? The chapter's case study is Britain, the first capitalist nation, in the late eighteenth and nineteenth centuries; the era is known in contracts scholarship as the high point of the classical model of contract, which remains influential still.[3] Histories of contracts of this era, viewed as a whole, address capitalism within two established modes of political-economic debate, which consider the origins of capitalism and its distributive effects. The first part of the chapter describes these two dominating concerns, and the way in which existing contracts histories, coming from a variety of historical schools, have significantly coalesced around them. The second part of the chapter seeks to move beyond these concerns, and offers two other perspectives on contracts and capitalism: embodiment and nationalism.

II. Dominating Concerns

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Two organizing questions have long informed histories of capitalism: *origins*—when capitalism emerged, a question intertwined with determining what elements were fundamental to it; and *distribution*—questions of economic, social, and cultural equality in capitalism. Contracts histories of Britain in the (p. 943) late eighteenth and particularly nineteenth centuries have largely corresponded with these themes.

To examine the themes of origins and distribution in contracts histories, they are separated and simplified. The themes are not, of course, mutually exclusive, nor uncomplicated. From the perspective of contracts, the themes come loaded with law-related complications beyond those which typify histories of capitalism in general; among such complications are tensions between material and ideational effects of law, disagreements about the role of law in capitalism in relation to law's internal history, and mixed normative evaluations of legal developments. The discussion cannot do justice to all of these; it instead takes a broad view to highlight thick points of controversy and research. It points to the methodological and theoretical richness of existing work, and yet to the significant extent to which that richness is oriented towards the long-standing intellectual concerns with origins and distribution.

A. Origins

The origins debate addresses the *when* and *what* of capitalism (or, more often, specific phases, such as industrial and financial capitalism): when did it arise historically? What defines it—what are its terms of art and key conceptual, technological, institutional, and practical elements? From the perspective of contracts, two areas of research, which do not converse very often, have been dominant: legal histories of ideas and doctrines, and economic histories. Both examine questions which speak to the origins debate.

The debate about the classical model of contract among legal historians might be read as a specialized instance of the debate about the origins of capitalism. Admittedly, legal historians tend to resist swift moves between contract law and capitalism. Depending on the historical school, their resistance is rooted in theories of law's partial autonomy, claims of indeterminacy, or commitments to complexity, multiplicity, or resistance to hegemonic ideologies and powers. Despite such resistances, much in the history of the classical model contributes to the question of origins.

The classical model of contract, a generalized conceptual structure which superseded a once-dispersed understanding of common law forms, is often interpreted as an idealist capitalist scheme reaching its zenith in the nineteenth century. To recount the most familiar pillars,[4] the model offered a picture of the social order at the centre of which lies a sphere of free competitive economic (p. 944) activity conducted by autonomous contracting individuals who are rational maximizers of economic interest. It was founded on clear divisions between public and private, both vertically, between the state and civil society, and horizontally, between economic and intimate relations within civil society. The role of politics was not necessarily a laissez-faire picture, but legitimate government

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activity was to encourage economic competition and individual self-reliance. The judiciary was viewed as a protector of rights, the goal being to ensure mutual respect of rights among individuals and, thus, adequate spaces for self-realization. Central to the model, on most accounts, was the will theory of contract, yet it is important to appreciate the difference between the abstraction of free will and the modelling of a capitalist market; in clashes between protecting subjective positions and a market vision, the classical model gave priority to the latter.

The formulation of the will theory came from Civilian jurisprudence, but the reasons for the receptivity to Civilian ideas are matters of disagreement. At stake here are two intertwined questions: periodization and causality. To put it simply, historians are split on whether the classical model was revolutionary or evolutionary, and their answers to that question are bound up with causal explanations about its crystallization in the nineteenth century. The debate thus echoes and indeed contributes to the origin of capitalism question.

One interpretive camp sees the late eighteenth century, and even more the nineteenth century, as revolutionary in contracts. Among dominant figures here are Patrick Atiyah and historians associated with Critical Legal Studies (CLS), such as Duncan Kennedy and Roberto Unger, who often work on the two sides of the Atlantic at least in terms of contract theory.[5] Internal disagreements notwithstanding, historians who tend to the revolutionary side see contract law as intertwined with the economic, cultural, or social conditions of capitalism in this era.

The other interpretive camp consists of a diverse group of historians, among them the late Brian Simpson, James Gordley, David Ibbetson, John Baker, Phillip Hamburger, Warren Swain, and earlier figures like Frederic Maitland and Francis Montague.[6] While divergent in many ways, historians in this group tend to find the consensual elements of the classical model in periods much earlier than the late eighteenth and the nineteenth centuries. They offer myriad explanations for the sense of newness in the nineteenth century, which share an internalist (p. 945) orientation (not exclusive, but dominant) focused on *legal* elements; for instance, a jurisprudential crisis, selective assimilation of Civilian influence by English jurists, the emergence of treatise literature which systematized doctrines and became the first common law theory of contract, or the decline of jury trial which pushed judges to articulate legal principles. These historians typically do not dispute, and sometimes confirm, capitalist echoes in the classical model; such echoes might speak to the earlier origins of capitalism; on some accounts they explain the classical model's salience (rather than newness) in the nineteenth century, when they resonated with the era's capitalist developments.[7]

Links with capitalism become more explicit, while less oriented towards conceptual and ideological shifts, in the realm of economic histories, the second dominant historical field dealing extensively with contracts and concerned with the origins of capitalism.

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Economic historians seek to explain the emergent pattern of sustained growth in late modern Britain.[8] In doing so, they sometimes examine formal contract law and court proceedings in terms of the institutional infrastructure of economic development, asking, for instance, about the level of security (reduction of uncertainty), or regulation of transactions (e.g., oversight of contractual terms in areas such as labor or consumer services) provided by formal law. Contractual practice, including structures of contractual relations, has also been examined through the institutional framework. For instance, historical networks of credit, structures of subcontracting in manufacturing industries, culturally-based informal enforcement of contracts, or guild structures which contextualized and framed apprenticeship contracts, are examined for their role in encouraging trust, reducing risks, monitoring performance, and lowering costs of entry into a trade, or transaction costs.[9] The broad question in all of these cases is the extent of growth-inducing cooperative behavior undergirded by contractual or contract-related institutions.

Contractual practice has also been a test case for the existence of capitalist institutions, or for the dominance of specific capitalist rationalities. When those are found beyond the geographical or temporal boundaries of a specific capitalist phase, or are missing within them, the periodization or theoretical definition of capitalism come into question. For instance, historians find sophisticated practices of finance and trade which predated financial capitalism, or existed outside its Western (p. 946) core; date capitalism to early modernity based on the contractual organization of agriculture through land rental and wage labour; observe an absence of ideas like shareholders' primacy in the contractual organization of companies late into the nineteenth century; or note the ongoing role of familial and informal economic relations.[10] Such findings imply either a broader scope of capitalism in space and time, or a need to rethink the essential characteristics of particular capitalist phases.

Finally, contractual practice is also part of histories of trades, services, industries, and other contract-based economic activities, examined for their contribution to growth. Contracts are viewed here in functional terms, typically not as an independent theme but as elements of economic activity within a broader debate about the historical causes and turning points of capitalist development.

B. Distribution

Alongside debates about the origins of capitalism, its distributive effects have long preoccupied historians. The debate about distribution, as defined here, is not limited to economic capital; it includes cultural capital as well, and examines questions of social equality in gender as well as class terms, and sometimes in terms of other group dimensions, such as professions. In contracts histories, it unfolds through two more focused debates along the conceptual axis of late modern British history: *status-liberalism (the classical model of contract)-welfarism*. (Conceptual axis, not necessarily temporal;

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most historians are not committed to the axis as a matter of linear historical progression, but they do confirm the significance of its categories.)

One debate addresses the persistence of status hierarchies (status-liberalism), the other the socialization of contracts (liberalism-welfarism); both are essentially debates about the hegemony of the classical model as a distributive scheme. In distributive terms, the classical model may be read either as a promise of new equalities, premised on new freedoms for individuals, or as a creation of modern hierarchies; I discuss both options as I review the debates, drawing on a wide array of histories which include not only work centred on traditional legal texts, but also, when relevant, social and economic histories interested in contractual practice and mundane relations, cultural histories examining varied representations of contracts, and intellectual histories of political and economic thought.

(p. 947) 1. Status-Liberalism

Conceptually, the classical model established a distinction between status and contract. Contract represented a set of freely chosen, self-imposed obligations of abstract (i.e., socially undefined—conceptually disembedded) individuals, unlike status which represented obligations imposed a priori, without an individual's consent, based on ascription: a preassigned social position based on ascribed characteristics.[11] Henry Maine's formulation of the difference as progress remains unsurpassed still: 'Not many of us are so unobservant as not to perceive that in innumerable cases where old law fixed a man's social position irreversibly at his birth, modern law allows him to create it for himself by convention.'[12] Set against this impression of history, historians ask, *had status really lost the day*?[13]

When viewed from the perspective of contract doctrine, the answer often implies 'yes.' Legal thinking shifted from associating contractual rules with sets of relationships (landlord and tenant, master and servant, etc.), to an abstraction focused on the general conditions under which individually-willed content would be enforceable. CLS work has been particularly effective in showing how statuses lost their operative power as sources for the generation of legal rules and interpretation. The point, however, is also confirmed in some social histories. Craig Muldrew's work on credit, for instance, depicts a break between two relatively distinct stages in conceptualizations of contract, of early and late modern capitalism. Early modernity was characterized by tangled interpersonal obligation, where distinctions between economically rational transactions and other social transactions such as courtship, sex, patronage, or parenthood made no sense. A language of duty and trust involving notions of household virtue dominated credit relations and served as justification for hierarchy. This system was replaced by a utilitarian ethos centred on the individual self only in late modernity, as capitalist economic systems grew more complex and the bureaucratic state began to emerge.[14]

There is sometimes a sense of lament over a lost world of communal solidarity in the move away from statuses, yet lament is a question of perspective. Consider for (p. 948) instance the exclusion of domestic relations from contract law under the classical model.

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From the perspective of doctrine, the exclusion radicalized contract as an arms-length market relation, which marginalizes communal and intimate ties; that is a hostile picture of contracts. However, the other side of status communities was hierarchy. Feminist histories thus often recount efforts to introduce the language of contract and arms-length equality into a patriarchal world; that is a hostile picture of statuses.[15] Be the normative evaluation what it may, these interpretations trace how statuses were excluded from contracts.

The other interpretive direction in histories concerned with the status-liberalism axis, reveals the limits of classical contract's victory. Such histories often focus on specific types of contracts central to the modern capitalist order, such as credit, employment, or marriage, and reveal the viability of status ascriptions in the era of liberal contracts. They show how contractual practice, interpretation, and doctrine sustained myriad inequalities; they trace how contract law, broadly understood, ensured that employees did not negotiate on a footing with employers; and that gender and class informed the treatment of credit contracts on all levels: legislation, judicial interpretation, enforcement, institutional structures, and practice. Historians have also recovered the conceptual foundations of these trends in the codependence of contract and hierarchy for both private and public ordering in key texts of political philosophy.[16]

As with conclusions about classical contract's victory, so with findings about statuses' persistence, an attendant debate involves normative tones. Historians who doubt contract's victory tend to emphasize hierarchy over solidarity and so see the persistence of statuses as problematic. Given that persistence is a source of concern, the question becomes, what does it tell us about capitalism? The viability of statuses is interpreted by liberally-leaning historians as a partial or sometimes complete failure of capitalism to deliver on its promises of equality. The radically-leaning, meanwhile, see here a confirmation of the real meaning of capitalism as a modern complex of hierarchies; from the latter perspective, no surprise attaches, for instance, to the state imposition of criminal sanctions on labourers' contractual breaches, or to the gendered doctrinal structures of the promise of marriage, for capitalism is built on such forms of exploitation and power.

2. Liberalism-Welfarism

'Socialization' implies the introduction of principles that acknowledge and correct power and information disparities and, more broadly, introduce fairness, solidarity, (p. 949) and known dependencies into contracts. For those who see the classical model of contract as a blindness to socio-economic disparities, the question is, *was classical contract socialized?* Here too we find 'yes' and 'no' camps. Yet, it bears clarifying that the debate can also be read through two different historical understandings of socialization that cut across these answers. I explain them first and then return to yes/no positions on the question of socialization.

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In one group there are historians who treat socialization as a matter of linear timeline: first there was classical contract, then it was socialized. This is essentially a history of the rise of the welfare state and of welfarist understandings of contracts in the second half of the nineteenth century.

A different group of historians challenges the linearity of the narrative. One way to challenge linearity is to retrospectively read indeterminacy into law and recognize social elements within classical doctrine. This is a theoretical project known as the internal critique of contract, which carries historical implications.[17] Another challenge to linearity recovers social elements in contracts which coexisted with the classical model. For instance, cultural history recovers relational commitments in both practice, for example of personal credit contracts, and in dominant cultural representations of contracts.[18] Historians also observe the continuing role of equity which span ideas of fairness and dependence until the Judicature Acts of 1873–1875 (although originally status-inspired).[19] Many histories point to a gap between judicial practice and theory, the former never becoming atomistic as theory was, or to complexities within judicial practice which was never wholly transformed to radical individualism.[20] All of these speak to a level of socialization existing within contracts all along.

With these distinctions between linear and nonlinear historical assessments of socialization, I turn to the 'yes' and 'no' directionalities to the question of socialization: did socialization undermine the classical model?

The 'yes, socialized' camp can be read through two dominant insights. One has been in dialogue with the linear narrative, telling the story of the fall of classical contract. The story describes historical efforts, dating from mid-nineteenth century onward, to mitigate the unwanted effects of the unrestrained pursuit of self-interest, (p. 950) mostly reliant on state regulation, whether as part of a radical or a liberal political program. No commentator since Albert Venn Dicey has argued for a laissez faire age, or for an absence of state before the welfarist era; rather, the story recovers a change in political sympathies and a growing state administration, which led to a socialization of contracts. Legislation began to apply special rules to types of ordinary contracts (labour, corporate, consumer, etc.). Alongside legislative growth, judges showed increasing willingness to counteract power disparities in contracts, and tort law expanded to compensate for reliance damages.

Another socialization route is nonlinear and emphasizes classical contract's failure to achieve hegemony in the first place, pointing to significant social approaches to contract, as explained above.

The 'not socialized' interpretive camp is implied in three dominant insights. The first one, in dialogue with the linear narrative, suggests that if welfarism is viewed as a specific historical stage beginning in the second half of the nineteenth century, the socialization of contracts, well into the twentieth century (when legal theory, at least, was pluralized), functioned as a palliative rather than alternative to the classical model; both the consensual idea and the conceptual separations between private and public were

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maintained as cornerstones. This point has been confirmed by virtually every historian who considered the question, but has not been consistently conceived as a failure of socialization. The reason is that socialization is theorized in functionalist terms which examine the overall effect of legal change; from this perspective, the question is how the legal regime functions in distributive terms to correct for unequal power, whether or not the effects are achieved through the category of contract alone. However, if the drama of the 'fall of contract' was not a dispute about the meaning of contract in its classical formulation, but rather only about contract's desirability or workability, the implication is that the category of contract itself remained little reformed by social law.

Second, and again in a linear vein, some historians suggest that socialization was marginal in its effects and indeed in its intentions, dominated well into the twentieth century by liberal rather than radical sentiments, and on some versions functioning as little more than market apologetics. The rise of internal critique, which found the social within classical contract, is itself best understood as a theory—rather than history—of contracts, which only began to be developed in the twentieth century with the rise of Legal Realism.[21]

(p. 951) Finally, some historians point out that social alternatives were strongly resisted or overshadowed. For instance, Cornish and Clark argue that Equity was not a real threat for most of the nineteenth century and that when it became one, at the same time that legislative activity intensified in welfarist directions, case law responded by consolidating its individualist ideology. Other accounts speak to mistrust of the state. For instance, Marc Steinberg shows working-class leaders' support of liberal models, having encountered state support of capitalist interests.[22] Other histories of socialized versions of contract are open to interpretation in terms of the historical dominance of the alternatives that they recover.

As a matter of emphasis, debates about socialization (liberalism-welfarism) are often narrower in scope than those dealing with statuses (status-liberalism), because their focus is mostly economic distribution, rather than the broader questions of identity and cultural struggle that typify histories concerned with status hierarchies. The distinctions, however, are tenuous. Viewed as a whole, histories debating the *status-liberalism-welfarism* axis have gone wide and deep in terms of sources, methodological approaches, types of contracts, identities of parties, contexts, and conceptual perspectives on the very scope of the field of contracts. Yet as discussions of capitalism they are largely interested in distributive justice.

As Ellen Meiksins Wood said about the history of capitalism, how we understand history 'has a great effect on how we understand the thing itself'.[23] The next section speculatively explores what contracts might tell us about capitalism, beyond the now well-developed issues of origins and distribution.

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III. Contracts and Capitalism, Redirected

This section explores two possible routes: embodiment and nationalism. These foci are unexhausted by political-economic questions of origins and distribution. Embodiment calls attention to lived experience, to perspectives of persons which are not clarified by questions of socio-cultural and economic distribution, all the less by intellectual and economic developments. The national framework calls attention to a circumscribing background assumption of debates about distribution: they are largely limited to distributive trends within the state political unit. Questions of (p. 952) origins, meanwhile, sometimes touch the history of the nation state, but do not make it their theoretical focus in relation to contracts. Both foci are revealing of historical capitalist structures and logic and ultimately tie together into the broader picture of the capitalist order. Both are already embedded to an extent in existing histories; they require fleshing out, reconceptualization, and more research, but seem viable.

A. Bodies

Body studies are a multi- and interdisciplinary endeavour pulling together a number of overlapping trajectories: the material body to be fed and maintained, associated with industrial capitalism and classical political economy’s focus on production and reproduction; the social body to be perfected and displayed, associated with consumer capitalism; the cultural body constituted by historical social forces, a question for all kinds of identity studies; and finally, drawing on the previous ones, the body broken down to parts available for analysis, discipline, usage, alteration, and sale, a theme engaging questions of modern science, technology, disability studies, labour studies, feminism, political theory, commodification theory, theories of organizations and occupations (divisions of labour in tending to bodies; occupations involving bodily contact/analysis), and issues of risk, accident, and safety, among others. Embodiment[24] is a potentially limitless theoretical perspective in studies of humanity. Legal historical scholarship has been slower than normative and sociological legal scholarship in embracing embodiment as an analytical perspective. Contracts seem the least likely area, and foremost the classical model given the dominance of abstraction at its core, but precisely for this reason it is apt for exciting re-conceptualization.

Three trajectories of the body in relation to capitalism in the late eighteenth and nineteenth centuries, which implicate contracts, might be considered: the body as object of exchange, as means of exchange, and as driver of exchange. Two theoretical concerns cut across them. *First*, the body as a locus of disempowerment and, conversely, empowerment. As David Harvey observes, body politics become disempowering in the most common trajectories of body theory, namely, sexuality and labour.[25] And we should add race, perhaps the clearest case of disempowerment based on, or projected through, the body.[26] While those are important to contracts, if the body is not to be rediscovered in

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history only to be lost again, histories of empowered bodies should also come into (p. 953) view.[27] Second, and relatedly, the problem of Cartesian dualism. The conceptual separation of mind from body, and the identification of the mind as humans' true essence, has been challenged in body studies through the alternative of embodied individuals and embodied agency, where the body is not an object external to consciousness but rather its grounds (subject). The classical model of contract, centred on the will theory and operating through abstraction, is a paradigmatic example of privileging mind over body; recovering bodies in contracts history might enable significant additions and reappraisals. Together, these two questions invite an effort to *historicize* the conceptualization of the body as weakness—and its consequent disappearance, from contracts, and so rely on contracts to rethink embodiment in capitalism.

1. The Body as Object of Exchange

Body sale is a long-standing locus of debate about the implications of capitalist exchange: is alienation of bodies as saleable commodities a manifestation of structured subordination, or an instance of self-possession? The theme is embedded in histories of trade in body organs and in bodily capacities, yet historical perspectives framed through contracts have not been dominant in the debate.

Trade in bodies can range to include body fluids, organs, services like surrogacy or personal care, and much else. Two contractual contexts, however, have been identified as constitutive of capitalism: labour, drawing on employees' bodies (labour power), and marriage, drawing on women's sexuality. (In classical contract theory, only the promise of marriage was theorized as a contract, yet popular and political debates routinely assumed that marriage raised questions of contract.) Labour has been integral to both mainstream and radical political economy. Meanwhile, marriage, or more broadly the traffic in women, as Gayle Rubin put it,[28] was historically theorized as part of the capitalist economy by outsiders to economic theory,[29] and became a mainstay of feminist history.

Labour and marriage have respective boundary marks: the contractually-unenforceable relations of slavery and prostitution.[30] Work on these boundaries can historicize the role of the body as a negation of contract, and of contract as a negation of the body: the association of slaves and prostitutes with mere bodies[31] implied that contract began when something *more* than the body was involved. To take this one step further, work on the slippery boundaries of slavery and prostitution, and on the (p. 954) fear of slippage, can uncover historical efforts to locate contract in the mind, and challenge their coherence. For example, the stringent guarding of female sexuality in the nineteenth century can be read through the question of contract and its dissociation from embodiment: contracts to marry, which were premised on female sexual purity and could be negated if that condition was violated, might be interpreted as a historical effort to maintain a guarded distance from bodily drives through contract, as critical for women who were traditionally suspected of being unable to do so.

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The history of contracts also speaks to the logic of capitalism, which demands at least the semblance of agency in the process of human commodification. The one thing that seems increasingly hard to do is to turn bodies into commodities without the embodied person's involvement as agent. To see this through a contractual lens we might consider, for instance, the emergent requirement of 'insurable interest' in life insurance; this requirement essentially forbade contracting on lives unrelated to the insured. While cast as a problem of speculation, we might read this history through the lens of commodification of bodies without the embodied person's agency. The point is perhaps more apparent in a different area, that of cargo insurance involving slaves and indentured laborers, where challenges of interpretation and enforcement of these contracts fed into abolition.[32] Whether the capitalist resistance to exchange in bodies without the agency of the embodied is humanitarian or monstrous given expanding markets for bodies is a question that can be addressed more fully with the aid of contracts histories addressing the boundary lines of exchange in bodies.

The body is typically identified as a locus of disempowerment, despite histories of embodied resistance and agency, and for good historical reasons. To recover empowerment and locate the body at the centre of contracts, attention to empowered bodies is in order. We might turn to the male body, and in paradigmatic contexts of business. Cultural representations of masculinity in business contracts raise questions that can be asked of more traditional legal sources: what kind of masculine imperatives were businessmen or capitalists operating under in negotiating, performing, and litigating contracts? How did these assumptions infiltrate doctrine and theory? The role of powerful bodies in contracts is yet to be examined. [33]

2. The Body as Means of Exchange

Putting your body on the line as implicit contractual guarantee was integral to the capitalist credit economy. Sean O'Connell, for instance, points to the body's role as one indicator of working-class debtors' creditworthiness.[34] Indeed, notions of able-bodiedness undergirded financial support more broadly. Friendly societies had over four million members, joining contractually, by 1850—about one half of (p. 955) the adult male population. Penelope Ismay's work on their history shows how able-bodiedness became a factor in the structures that protected members from life-cycle poverty. That logic later disappeared into ideas of industriousness, a process which speaks to a disappearance of the body as an openly acknowledged constitutive element in contracts.[35]

The role of the body as contractual guarantee becomes dramatic in the history of imprisonment for debt: that history reveals an economy in which credit was issued on the assumption that enforcement against the body guaranteed repayment. Debtors' prisons were gradually reformed from the late eighteenth century and through the nineteenth century, from asylums with porous boundaries, associated with upper no less than lower classes, to penal institutions aimed almost exclusively at the working classes.[36] The history of imprisonment for debt is typically viewed as a disciplining mechanism and a class story and therefore invokes the association of embodiment with disempowerment.

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However, this history seems more broadly related to shifting conceptualizations of the role of the body in contracts, and specifically to the body's gradual marginalization.

A number of legal reforms of the second half of the nineteenth century are worth considering together as a dramatic disruption of the association of contracts with bodies: general limited liability legislation, the expansion of bankruptcy to consumers (previously applicable only to traders), the abolition of imprisonment for large debts, married women's separate property against which creditors could increasingly proceed, and the repeal of imprisonment under master and servant laws, which served historically to enforce employment contracts. Read together, these reforms introduced mechanisms which limited contractual enforcement against bodies. Many of the reforms have been viewed as an Enlightenment trajectory, but they also speak to a particular contracts history which is yet to be told: Until late in the nineteenth century, the sense that the body was implicated in the very essence contract found popular, formal, and theoretical resonance;[37] disembodiment was a late arrival, which required extensive legal reforms. Viewed through embodiment, an anti-Cartesian history of contracts emerges.

3. The Body as Driver of Exchange

Need recalls the body. Hunger for food or sex; pain, sickness, impending death. Desires of other kinds, too, might involve the body as a locus of maintenance, (p. 956) cultivation, and adornment. Since these ideas resurrect the full array of options in capitalism, we might narrow them down by thinking through particular areas of contracts, where indications of disappearing corporeality abound.

Bodily drives emerge in history as signs of disorder and justifications for discipline and marginalization. In the context of credit contracts, for instance, the working classes were subjected to what Paul Johnson described as evolutionary metaphors centred on biological drives: animal appetites and savage needs unrestrained by reason were perceptions informing legal responses which prejudiced working classes' 'efforts at money management'.[38] The same is true of women's representations as unrestrained consumers, which justified disciplinary responses to their contracts.[39] In these cases, treatments of contracts reveal a sense of its incompatibility with embodied agency. Yet the body as driver of exchange exceeds these traditional topics.

Life insurance, historically rooted in maritime pursuits, involves fear, or at least consciousness, of death, a point that could guide insurance contracts' histories. At a less general level, consider two interesting and related trajectories. First, the late eighteenth and nineteenth centuries saw a process of rationalization typified by the rise of modern actuarial science as the informational basis of contracts. Dominant historical work on insurance reads these processes within the story of capitalism's culture of risk, most familiar in contracts as the 'contract vs. wager' dilemma. Yet, statistical knowledge replaced direct and non-professionalized observations of bodies which were relied on to determine health and life expectancy, a process that may be thought of as a case of the body's disappearance.[40] Second, as Timothy Alborn observes of the modernizing science of insurance, it was a locale in which conceptions of what is normal in bodies converged

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with what is normal in curves and prices, as insurers employed experts in medicine, probability theory, and economics to assess risks of mortality. And yet, Alborn also argues that insurance companies diverted experts to their own profit-oriented ends in deciding what was insurable and at what premium, turning themselves into the producers of normalcy, and with less tendency to pathologize and exclude than academic disciplines.[41] From the perspective of contracts, such research reveals how a contractual practice became a dominant generator of the experience of embodiment in market contexts, even as its procedures claimed to rely on expert mediation rather than lay perceptions of bodies.

(p. 957) For a final example in a different vein we might turn to advertising targeting the body, which expanded rapidly from the late eighteenth century onwards. Advertisements of quack medicine, which Thomas Richards described as a constitution of the human body as a commodity,[42] were a thriving industry by the late nineteenth century and attracted public attention and legislative activity. This area is most familiar in contracts history from the case of *Carlill v. Carbolic Smoke Ball Company*,[43] concerned with medicine advertised as preventing influenza. The case became a staple of contract doctrine (unilateral offer) and a comic relief, yet the corporeal element has largely disappeared[44] and remains to be conceptualized, as do other developments of late modern contract law implicating bodies.[45]

B. Nationalism

Like engagements with the body, hints of nationalism—taken as a dynamically constituted consciousness of collective identity on a principle of congruence with the state political unit—can be glimpsed from contracts histories, but nationalism, like embodiment, is not a consistent conceptual lens.[46]

The era of classical contract is intriguing as a specific historical stage of nation formation. To mention some milestones: on the outside, changes in imperial scope, the American independence, and the European outbreak of peace as Linda Colley called it,[47] which ended a warring religiosity, all put pressure on the meaning of national identity. On the inside, on many accounts England was an early instance of a relatively centralized state, with significant national consciousness and nation-wide economic and political systems by the seventeenth century, and part of a United Kingdom from 1707. Yet, processes of harmonization of decentralized powers were drawn out, and provincial autonomy lingered. The bureaucratic state, increasingly involved in civic life, was a nineteenth century legacy, as were the coming of new transportation and communication modes, importantly the railway and telegraph, and new communication media, which undermined localism, and (p. 958) the slow expansion of democracy which turned more people into citizens. The same era also saw a globalizing capitalism, free trade policies, and an expanding system of international trade, alongside movements for international legal harmonization.[48] Globalization processes, on some analyses, should have undermined the nation-state. That both continued to thrive requires explaining and has

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sparked a debate among historians. Contract law and practice, by virtue of their mundane relation to individual experience as well as the state legal infrastructure, might offer a rich angle on the extent to which nationalism and a globalizing capitalism were reconciled.

Contracts' role is particularly intriguing if it lent support to nation-building, because the abstract universalism of the classical model has not seemed to depend on specifically English or British attributes, as it has on specifically male and specifically middle class ones; indeed, as we have seen, it had civil law roots. Liberal universalism has been re-read for nationalist biases, but the realm of contracts remains at the margins of the discussion.[49] Moreover, the nationalist character of private law is usually associated with codification projects.[50] The common law does have its own claim to a deep-rooted national character,[51] yet contract law specifically has not been an object of examination.

To begin charting directions, I consider two perspectives on the relation of contracts to nationalism: from within, harmonization of local legal cultures, speaking to the formation of national consciousness and practice answering to capitalist tenets. From without, difference maintenance, that is, contracts' role in constituting national differences and making borders, real or imagined, matter in global capitalist trade. If future research ultimately finds them to be negligible or overshadowed rather than important, that too is important for the debate on capitalism and nationalism.

1. Inside Borders: National Harmonization

A number of strands in scholarship suggest at least mutual support between contracts and nationalism.

Theoretically, Benedict Anderson's classic theory of imagined communities is an apt starting point. It turned on a forged relation among strangers who learned (p. 959) to experience a community characterized by being horizontal, secular, within an empty homogenous time measured by calendar and clock. The classical model, which idealized contract as a tool of formal equality, was centred on immanent ties and was premised on linear modern temporality, is a perfect conceptual fit, hardly considered for its role in the links that Anderson charted between nationalism and capitalism.[52]

Not only conceptually, but in the content of theory and doctrine and in contracting practices, we might think of contract as an agent of harmonization. In theoretical content, the classical model was notable for its level of generalization. The era of abstract monistic theories of legal categories has been regarded as a paradigm of modern thought and criticized, as we have seen, for its universalist blindness to distributive injustice. Viewed from the perspective of historical localism, however, it can also be studied for its role in imposing a sense of likeness on immense difference. The private/public divide at the heart of the classical model was part of a theory of state; its role in turning contract law—the centre of the private—into a nation-building project might be historicized alongside debates about its capitalist tenets.

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In doctrinal content, innovations which concretized expanding networks of trade and credit and shortened spatiotemporal distances were arguably important for a national consciousness. For instance, the postal rule (a contract is formed upon posting a letter of acceptance), often discussed as an exemplary instantiation of the idea of contract as bilateral exchange, and now an archaism, became significant in the era which opened the mail system to public use and created a fiction of instantaneous communication over geographical and temporal distance.[53]

Anonymity was one of the threatening implications of developments which brought strangers into economic contact. In contractual practice and doctrine we see efforts to rationalize assessments of credit-worthiness for anonymous transactions.[54] Rationalizations tended to rely on capitalist numerical assessment, yet might also be historicized as suppliers of links and common denominators which overcame distance and estrangement and forged a national imagined community.

A different practice of harmonization which overcame regional cultures was the imposition of a culture of work through contracts backed by a penal state regime.[55] (p. 960) The regime has been criticized from perspectives of distributive justice (i.e., class inequality); however, it also speaks to the role of contracts in overcoming local differences and forging the capitalist nation.

Two significant court reforms in the nineteenth century impacted contracts: the 1846 establishment of the County Courts, which superseded a network of local courts and communal justice, and largely dealt with contractual consumer debts, and the 1873–1875 Judicature Acts, which unified the common law courts with the courts of chancery and brought the common law's classical model to national dominance.[56] The model's hegemony is contested, as we have seen. Nonetheless, the question of how consistently contractual paradigms were interpreted and applied would not even arise without the move to a nation-wide unification. The debate about class law (i.e., distribution), in which the County Courts loomed large, was likewise a question asked against the background of the utilitarian effort to create a universal and rational legal administration on the national level. Institutional economists see in harmonization of contractual litigation a functional contribution to industrialism through the reduction of transaction costs.[57] It seems but a small step to consider the question in cultural terms of forging a sense of belonging to a capitalist nation—the national pride at being the 'workshop of the world', and a financial centre, which was stimulated by these reforms.

A different perspective on the relation of contracts and nationalism turns on the ideological view of contracts, foremost the labour contract, as the opposite of dependence, and the tie between dependence and the denial of citizenship. The Poor Law reform of 1834 famously sought to limit state relief to those unable to contract their labour even on the worst of terms and disenfranchised those who entered the system. The logic thus tied political participation with contract. The idea of contract, in other words, functioned to create the national community by means of inclusion and exclusion of men

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(specifically) as citizens. This point can be complicated by attention to the actual administration of the reform, which was more lenient than the conceptual structure suggests.

The relation of contract and citizenship can also be considered through work on consumption and (as) citizenship, which examines consumer practices as political speech and action, consumer culture as a post-class political configuration, and the rights and duties of citizens as actual and as metaphoric consumers. Within this context, the role of rural consumer contracts in processes of harmonization and nation-building are particularly revealing. Margot Finn's work on itinerant traders known as the Scotch Drapers shows their effects in pulling plebian households into the modern market economy and, at the same time, the national and ethnic (p. 961) lines which were iterated through popular and political debates about the trade's contractual practices.[58]

2. Outside Borders: Difference Maintenance

Did contracts have a role in constituting and maintaining national borders?

One entry point into the question is the prevalent distinction between contract and status. Karnua Mantena's work on Maine's influence on British imperial policy shows that the opposition between contract and status underlay an emergent view of foundational differences between peoples and transformed practices of imperial rule.[59] Mantena concentrates on Maine's account of status, that is, so-called traditional societies, which justified ideas of difference; the other side of the same coin, which awaits further development, is the implication of contract as a nationalist, or more loosely an exclusionary, nation-sensitive construct.[60] In similar vein, research on emancipation in British colonies shows that the move from slave to contractual labour was conditioned on a prior acculturation into the capitalist ethos; assumptions of difference, in other words, translated into policies which shaped and were shaped by the idealized contours of capitalist contracts and marked colonial labour relations as backwards.[61]

Research on risk assessment might also reveal the maintenance of national difference, because perceptions of risk are culturally-loaded. For instance, the category of 'moral hazard' and its assessment in insurance contracts practice, was bound with a sense of the local and the foreign, not least within Britain itself. Robin Pearson shows that English insurers had difficulty in assessing the riskiness of Irish drinking habits, particularly the cultural boundaries between convivial social tippling and alcoholism.[62]

The law of negotiable instruments is another area of boundary-making. Historians tend to describe a process in which the common law allowed the negotiability of debts and so eventually, if grudgingly, underwrote a credit-based expanding economy.[63] For economic historians, negotiable instruments were key in global financial capitalism, utilized to reduce the risks of international trade.[64] Yet, the argument in itself also bespeaks issues of trust, and it appears that cross-border negotiability remained more difficult than British transactions.[65] Conceptually no (p. 962) less than practically, so-called inland instruments were distinguished from foreign ones. While the typical account of such

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distinctions presents them as practical accommodations for other national legal systems, the question of (dis)trust in international contracts merits research. A somewhat similar point applies to the observation that negotiable instruments were experienced as remote and almost incomprehensible for most people.[66] Here, too, the typical account is functional and points to the small clustering of international financial activity in professional trade and banking centres. Yet, once again, the effect on national consciousness is worth contemplating.

The law of contract itself was not easily exported across borders even to British colonies. Here, too, historians point to practical difficulties such as differences in expertise, communications, and local legal cultures.[67] Yet in an era of trade globalization, the effect may be worth considering as a reinforcement of national boundaries.

Even under an interpretation of an ultimately global spread of law dominating the governance of international markets, a comparison to later periods should inform our understanding. Grégoire Mallard and Jérôme Sgard observe that only in the Interwar period did an international law of markets produced by transnational actors and institutions such as the International Chamber of Commerce (ICC) come to dominate international contracting. Until then, English law ruled trade. The rule of English law, interpreted by English courts, into the twentieth century, speaks to the history of nationalism no less than imperialism and might be explored in such terms.[68]

What if we read contracts history as a linguistic project with implications for national consciousness? A dual or triple link is required, between work on contracts and language, both theoretical and historical,[69] and work on language and nationalism. Anderson saw print languages, in their relation to industry, commerce, and bureaucracy, as the source of cohesion of late modern nations, with local languages increasingly shared by the state apparatus and the population. The question of contractual language, mediating between parties, and between formal legal institutions and the everyday of persons and organizations, seems likewise important. Conferring authority on individual utterances through contract operates at once in two directions, to forge a sense of belonging through the successful use of language and to legitimate national institutions by this operation. As the writ (p. 963) system was replaced with the modern category of contract, popular language became a determinant of legal implications, without the need to fit into state-prescribed forms. Such a perspective might also extend work on public finance as part of the history of nation-building: it can add to the picture private finance (credit being of the most prevalent forms of contract) and its changing practices.[70]

More concretely, objectivist interpretations of contractual language, for which the classical era is famed, might be examined for their effects in consolidating a vernacular variety inside borders and marking the conditions and limits of assimilation and communication across them. Indeed, considering contractual language in terms of nation-building might offer a different response to the historical puzzle of objectivism in a theory centred on individual intention. The puzzle has usually been resolved by historians by pointing to the market ideologies which undergirded objectivism.[71] There might be

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another explanation: both in and across borders, processes of objectivist interpretation carry on, as it were, the assembling, fixing, and differentiating functions of languages that Anderson described as the effects of print capitalism.[72]

Conclusion

The robust perspectives on the *when* and *what* of late modern capitalism as viewed through contracts, and on its distributive effects, are a consequence of decades of historical work. Yet origins and distribution are not the only concerns to be addressed. As contracts became the taken-for-granted infrastructure of capitalism, both functional and conceptual, they implicated additional levels of capitalist life, among them embodied experience and national consciousness, issues that historians of contracts engage only at the margins. This chapter pulled out some threads, to gesture at possibilities. In that sense, the future of contracts histories still lies ahead.

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Marc W. Steinberg, *England's Great Transformation: Law, Labor, and the Industrial Revolution* (University of Chicago Press, 2016)

Warren Swain, *The Law of Contract 1670–1870* (Cambridge University Press, 2015)

Notes:

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([1]) E. J. Hobsbawm, *The Age of Capital, 1848–1875* (2004).

([2]) Victoria Ann Kahn, *Wayward Contracts: The Crisis of Political Obligation in England, 1640–1674* (2004).

([3]) The term 'classical' might confuse given incongruent uses among historical schools, only some of which distinguish within the model between stages of development. It might also confuse given the lateness in history of the model, which is anachronistically termed 'classical'. The author uses it for convenience, given that in popular discussions of contracts it is familiar. The crucial dimensions are mentioned below.

([4]) For a detailed review see Anat Rosenberg, *Liberalizing Contracts: Nineteenth Century Promises Through Literature, Law and History* (2018) ch. 1 ff.

([5]) Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979); Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (2006); Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (1986).

([6]) A representative text by each: A. W. B. Simpson, 'Innovation in Nineteenth-Century Contract Law' (1975) 91 *L.Q.R.* 247 ff; James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991); David J. Ibbetson, *A Historical Introduction to the Law of Obligations* (1999); J. H. Baker, 'Book Review of *The Rise and Fall of Freedom of Contract* by P. S. Atiyah' (1980) 43 *Modern L.R.* 467–9 ff; Philip A. Hamburger, 'The Development of the Nineteenth-Century Consensus Theory of Contract' (1989) 7 *Law and History Review* 241–329 ff; Warren Swain, *The Law of Contract 1670–1870* (2015); Frederic W. Maitland, Francis C. Montague, *A Sketch of English Legal History* (ed. James F. Colby, 1915).

([7]) Some histories fall between the two directionalites, assessing the rise of the classical model as a process of intensification, e.g., James Oldham, *English Common Law in the Age of Mansfield* (2004); Allan E. Farnsworth, 'The Past of Promise: An Historical

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Introduction to Contract' (1969) 69 *Columbia L.R.* 576–607 ff; Roscoe Pound, 'The Role of the Will in Law' (1954) 68 *Harvard L.R.* 1–19 ff.

([8]) And related questions, among them the British lead among other Western economies and its consequent decline, and the divergence from the East.

([9]) E.g., Pat Hudson, 'Industrial Organisation and Structure', in Roderick Floud, Paul Johnson (eds.), *The Cambridge Economic History of Modern Britain* (2004) 28–55 ff; Joel Mokyr, Hans-Joachim Voth, 'Understanding Growth in Europe, 1700–1870: Theory and Evidence', in Stephen Broadberry, Kevin H. O'Rourke (eds.), *The Cambridge Economic History of Modern Europe*, Vol. 1 (2010) 7–42 ff. Further examples appear below.

([10]) E.g., Morten Jerven, 'The Emergence of African Capitalism', in Larry Neal, Jeffrey G. Williamson (eds.), *The Cambridge History of Capitalism*, Vol. 1 (2014) 431–54 ff; C. Knoick Harley, 'British and European Industrialization', in Neal and Williamson, ibid., 491–532 ff; Timothy W. Guinnane et al., 'Contractual Freedom and Corporate Governance in Britain in the Late Nineteenth and Early Twentieth Centuries' (2017) 91 *Business History Review* 227–77; see discussion in text accompanying (nn. 18–21) ff.

([11]) 'Status' is sometimes used to refer to state- as opposed to individually-determined content of relations, hence we often see a 'back to status' account of the history of contracts. However, ascription carries sociological and cultural implications, closer to questions of identity, that the simple fact of state regulation does not, in itself, carry. Modern regulation, moreover, is premised, at its best, on substantive equality, while ascription is tied with hierarchy, typically appearing as unequal legal capacities based on inherited positions. The question of state regulation is customarily viewed as part of the legal framework of late modern capitalism, and integral to contracts, unlike ascription. Therefore, despite obvious overlap, the two meanings are separated here.

([12]) Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (1906) 295 ff.

([13]) While I focus on late modernity, the status/contract conceptual distinction is integral to analyses of capitalism generally: contractual institutions mark capitalist development.

([14]) Craig Muldrew, *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England* (1998). Also, Hudson (n. 9).

([15]) E.g. Staves argues that eighteenth-century courts withdrew the applicability of contractual ideology from domestic relations because of its subversive potential. Susan Staves, *Married Women's Separate Property in England, 1660–1833* (1990).

([16]) Carole Pateman, *The Sexual Contract* (1988); Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865* (2012) ch. 8 ff.

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([17]) E.g., Duncan Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form" ' (2000) 100 *Columbia L.R.* 94–175 ff; Alan Brudner, *The Unity of the Common Law* (2nd edn., 2013).

([18]) E.g., Margot Finn, *The Character of Credit: Personal Debt in English Culture, 1740–1914* (2003); Rosenberg (n. 4) Part 1 ff.

([19]) E.g., W. R. Cornish, G. Clark, *Law and Society in England 1750–1950* (1989).

([20]) E.g., James Gordley, 'Contract, Property and the Will—The Civil Law and Common Law Tradition', in Harry N. Scheiber (ed.), *The State and Freedom of Contract* (1998) 66–88 ff; R. B. Ferguson, 'The Horwitz Thesis and Common Law Discourse in England' (1983) 3 *Oxford Journal of Legal Studies* 34–58 ff; Ron Harris, 'Government and the Economy, 1688–1850', in Floud and Johnson (n. 9), 204–37 ff. That case law was not consistently shaped by theory is generally acknowledged, Swain (n. 6) although the point in itself does not speak to a competing welfarist outlook.

([21]) E.g., Ibbetson (n. 6) ch. 13 argues that real collectivism arrived only toward the end of the twentieth century, and only then an argument emerged that perhaps principles of substantive fairness underlay contractual liability; Harry N. Scheiber, 'Economic Liberty and the Modern State', in Scheiber (n. 20), 122–60, notes the involvement of English liberals in important 'interventionist' legislation ff; Richard A Epstein, 'Contracts Small and Contract Large: Contract Law Through the Lens of Laissez-Faire', in F. H. Buckley (ed.), *The Fall and Rise of Freedom of Contract* (1999) 25–61, argues that nineteenth-century collectivist changes were not inconsistent with laissez-faire ff; Eric A. Posner, 'The Decline of Formality in Contract Law', in Buckley, ibid., 61–78, supports Epstein's analysis ff.

([22]) Marc W. Steinberg, *England's Great Transformation: Law, Labor, and the Industrial Revolution* (2016).

([23]) Ellen Meiksins Wood, *The Origin of Capitalism: A Longer View* (1999) 34 ff.

([24]) A term gesturing at the social construction involved in the experience and role of bodies.

([25]) David Harvey, 'The Body as an Accumulation Strategy' (1998) 16 *Environment and Planning D: Society and Space* 401–21, 414 ff.

([26]) Even if performativity is part of the picture.

([27]) Furthermore, while Harvey points to analytical mainstays (with Judith Butler and Michel Foucault chiefly in mind), sex and labour themselves are not uniform trajectories.

([28]) Gayle Rubin, 'The Traffic in Women: Notes on the "Political Economy" of Sex', in Rayna R. Reiter (ed.), *Toward an Anthropology of Women* (1975).

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([29]) Noam Yuran, ‘Finance and Prostitution: On the Libidinal Economy of Capitalism’, (2017) 28 *Differences* 136–165.

([30]) Only formally, of course. These contracts have a social reality.

([31]) Tomlins (n. 16); Pateman (n. 16).

([32]) See, e.g., the discussions in symposium issue 28 of the *Journal of Legal History*, on the Zong case.

([33]) E.g., Rosenberg (n. 4) ch. 4 ff.

([34]) Sean O’Connell, *Credit and Community: Working-Class Debt in the UK Since 1880* (2009).

([35]) Penelope Gwynn Ismay, ‘Trust Among Strangers: Securing British Modernity “by way of friendly society” 1780s–1870s’ (PhD dissertation, UC-Berkley, 2010).

([36]) Finn (n. 18).

([37]) E.g., Frederick Pollock, *Principles of Contract at Law and in Equity* (1876) 66 ff. (‘Engagement’ is different from a contract in as much as it gives rise to no personal remedy against a married woman but only against her separate property.)

([38]) Paul Johnson, ‘Class Law in Victorian England’ (1993) 141 *Past & Present* 147–69 ff.

([39]) E.g., Erika Rappaport, *Shopping for Pleasure: Women in the Making of London’s West End* (2000); Anat Rosenberg, ‘Rational Households: Consumption Between Love and Hate’ *Georgetown Journal of Gender and the Law* (forthcoming 2018) ff.

([40]) Robin Pearson, ‘Moral Hazard and the Assessment of Insurance Risk in Eighteenth- and Early-Nineteenth-Century Britain’ (2002) 76 *The Business History Review* 1–35 ff. On the lateness of modern actuarial practices see Geoffrey Wilson Clark, *Betting on Lives: The Culture of Life Insurance in England, 1695–1775* (1999).

([41]) Timothy Alborn, ‘Normal Bodies, Normal Prices: Interdisciplinarity in Victorian Life Insurance’ (2008) 49 *Romanticism and Victorianism on the Net* ff.

([42]) Thomas Richards, *The Commodity Culture of Victorian England: Advertising and Spectacle, 1851–1914* (1990) ch. 4 ff.

([43]) *Carlill v. Carbolic Smoke Ball Co.* (1893) 1 QB 256.

([44]) Simpson’s history of the case highlighted issues of health and medical science, but it was not driven by a theoretical perspective on embodiment. A. W. B. Simpson, ‘Quackery and Contract Law: The Case of the Carbolic Smoke Ball’ (1985) 14 *The Journal of Legal Studies* 345–89 ff.

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([45]) For instance, work on promises of marriage, the doctrinal framework of which developed in this era, is abound with issues of embodiment: women's sexuality and men's good health.

([46]) The discussion which follows takes nationalism to be a modern phenomenon, and emphasizes civic over ethnic dimensions, although ethnicity too had a role to play (for instance in the faultlines between Britain and England). While familiar assumptions, they are not uncontested. On competing paradigms see, e.g., Anthony D. Smith, *Nationalism and Modernism* (1998).

([47]) Linda Colley, *Britons: Forging the Nation, 1707–1837* (2010) 321 ff.

([48]) Ron Harris, 'Spread of Legal Innovations Defining Private and Public Domains', in Neal and Williamson, Vol. 2 (n. 10) 127–68 ff.

([49]) E.g., Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (2nd edn., 1999), argues for the national (or at least European) bias of self-proclaimed universalist liberal thought of major liberal theorists, Mehta also points to that bias in social contract philosophy. For arguments about nationalist biases in British free trade policy see, e.g., Hannes Lacher and Julian Germann, 'Before Hegemony: Britain, Free Trade, and Nineteenth-Century World Order Revisited' (2012) 14 *International Studies Review* 99–124 ff; Boyd Hilton, *The Age of Atonement* (1986).

([50]) Guido Comparato, *Nationalism and Private Law in Europe* (2014).

([51]) Peter Goodirch, 'Poor Illiterate Reason: History, Nationalism and Common Law' (1992) 1 *Social & Legal Studies* 7–28 ff.

([52]) Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1983).

([53]) Peter Goodrich, 'The Posthumous Life of the Postal Rule: Requiem and Revival of *Adams v. Lindsell*', in Linda Mulcahy, Sally Wheeler (eds.), *Feminist Perspectives on Contract Law* (2005) 75–90 ff. The *Carlill* decision, which found a contract upon performance unknown to the advertiser, can be read for the same effects of flattening the national space. For additional examples see Atiyah (n. 5) 460–61 (Atiyah reads them through the prism of reliance) ff.

([54]) More broadly, in economic history, generalized contractual enforcement is often theorized as a historical substitute for familiarity.

([55]) Tomlins (n. 16) ch. 6 ff.

([56]) E.g., Paul Johnson, *Making the Market: Victorian Origins of Corporate Capitalism* (2010) ch. 2 ff.

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([57]) Paul Johnson, ‘Creditors, Debtors, and the Law in Victorian and Edwardian England’, in Willibald Steinmetz (ed.), *Private Law and Social Inequality in the Industrial Age: Comparing Legal Cultures in Britain, France, Germany, and the United States* (2000) 485–504 ff.

([58]) Margot C. Finn, ‘Scotch Drapers and the Politics of Modernity: Gender, Class and National Identity in the Victorian Tally Trade’, in Martin Daunton, Matthew Hilton (eds.), *The Politics of Consumption: Material Culture and Citizenship in Europe and America* (2001) 89–108 ff.

([59]) Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (2010). Mantena offers a corrective to claims that British imperialism was premised on universalist liberal assumptions.

([60]) Realist literature certainly recognized this point. Rosenberg (n. 4) ch. 2 ff.

([61]) Thomas C. Holt, *The Problem of Freedom: Race, Labor, and Politics in Jamaica and Britain, 1832–1938* (1992).

([62]) Pearson (2002) 76 *The Business History Review* 25 ff.

([63]) E.g., Atiyah (n. 5) 135–8 ff.

([64]) Ronald Michie, ‘Financial Capitalism’, in Neal and Williamson, Vol. 2 (n. 10) ff.

([65]) E.g., Swain (n. 6) 79 ff.

([66]) Michie (n. 64).

([67]) Harris (n. 48).

([68]) Grégoire Mallard, Jérôme Sgard (eds.), *Contractual Knowledge: One Hundred Years of Legal Experimentation in Global Markets* (2016).

([69]) E.g., Marianne Constable, *Our Word is Our Bond: How Legal Speech Acts* (2014); Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (1987). In the context of nineteenth century England, Randall Craig has worked on promises of marriage: Randal Craig, *Promising Language: Betrothal in Victorian Law and Fiction* (2000).

([70]) Nineteenth-century commentators were not oblivious to the connection between credit contracts and national life. E.g., Select Committee on Debtors (Imprisonment), Report, HC 1909-239, at iv ff. See Mallard and Sgard (n. 70) for such an analysis applied to the twentieth century, including a discussion of standardization in contractual interpretation in the context of global trade.

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([71]) See also Tucker's work on Holmes' objectivist analysis of *Raffles v. Wichelhaus* (1864) EHC Exch. J19, which notes that normalizing expectations of a national language turned contract into an active tool which generates a cultural consensus delimiting possible behaviours. Irene Tucker, *A Probable State: The Novel, The Contract and the Jews* (1995).

([72]) Anderson (n. 52).

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