Drawing Contract and Polyamory Together Or: How I Found the Limits of Liberal Legality in *Kimchi Cuddles* Comics

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Abstract

Polyamory means consensual, aspirationally gender-egalitarian, non-monogamous relationships. People who engage in such relationships often seek relationship advice. This article is a critical review of a self-help webcomic and other texts in the light of contract theory. Polyamorous people often use contractual concepts to understand their relationships and how to carry them out. Applying critical contract theory, we can trace how problems typical of contractual framing in other fields play out in the poly context. At the same time, these problems are recognized and responded to by poly people, and they dynamically reinterpret core contract concepts. This article thus makes two contributions. First, it provides a study in the way legal concepts percolate out into, and are transformed by, everyday life. Second, in consolidating some ways poly people have solved old contract problems, it offers conceptual tools for the continuing project of imagining more just ways of relating.

Keywords: Contract law, family law, law and literature, law and the everyday, queer legal theory

Résumé

Le polyamour signifie avoir des relations consensuelles non-monogames et aspirant à l'égalité entre les genres. Les personnes qui s'engagent dans de telles relations cherchent souvent des conseils sur les relations. Cet article est une revue critique d'un *webcomic* d'auto-assistance et d'autres textes, à la lumière de la théorie des contrats. Les personnes polyamoureuses utilisent souvent des concepts contractuels

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pour comprendre leurs relations et la façon de les mener à bien. En appliquant la théorie critique des contrats, nous pouvons retracer comment des problèmes typiquement liés au cadre contractuel et apparaissant dans d'autres domaines peuvent marquer le contexte polyamoureux. Or, il semble que ces problèmes soient reconnus par les polyamoureux, qui y répondent tout en réinterprétant de manière dynamique des concepts contractuels fondamentaux. Cet article fait donc deux contributions. Premièrement, il fournit une étude sur la manière dont les concepts juridiques s'infiltrent dans la vie quotidienne et sont transformés par celle-ci. Deuxièmement, en consolidant les façons dont certaines personnes polyamoureuses ont résolu des anciens problèmes du contrat, cet article offre des outils conceptuels pour avancer le perpétuel projet d'imaginer des façons plus justes d'entretenir des relations.

Mots clés: Droit des contrats, droit de la famille, droit et littérature, droit et le quotidien, théorie juridique queer.

I. Introduction

Polyamory denotes consensual, aspirationally gender-egalitarian, non-monogamous relationships. Contract denotes a legal institution that imposes obligations on individuals based on informed bargains between them. The mismatch is immediate, even definitive.[1] In contract, parties are radically separate, becoming enmeshed only so far as they agree—while in polyamorous relationships feelings can grow unbidden, and everything that affects one partner can affect a third. Contracts are either discrete transactions or they predict the future, imposing obligations on the basis of valuations of risks that may never materialize—while polyamory is among the most flexible relationship structures. And the obligations imposed by contract are legal—while obligations within polyamorous relationships are largely social and moral. Polyamorous relationships are sometimes criminalized: not just not legal, but illegal.[2]

Yet it turns out that some poly people use contract as a frame for understanding their relationships. Contract works both as a set of good practices—negotiate and agree on the terms of your relationships—and as a means of legitimation and condemnation when these practices are and are not properly followed. This article is a study in the way people use a legal form—the contract—to understand the most intimate aspects of their lives. That contract has germed in this unlikely frontier illustrates contract's—and liberalism's—imperialistic hardiness, its ability to spread through myriad conceptual spaces. The relationship between contract and polyamory is counter-intuitive for the reasons just outlined. But in another

[1] Frances E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," *Harvard Law Review* 96, no. 7 (1983): 1497; Janet Halley and Kerry Rittich, "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism," *American Journal of Comparative Law* 58 (2010): 753.

[2] Typically, where they intersect with marriage: Elizabeth E. Emens, "Monogamy's Law: Compulsory Monogamy and Polyamorous Existence," *NYU Review of Law and Social Change* 29 (2004): 277–376 at 361-362; Jessica Penwell Barnett, "Polyamory and Criminalization of Plural Conjugal Unions in Canada," *Sexuality Research and Social Policy* 11 (2014): 63.

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way, the application of contract to polyamory represents a natural move for a liberalism characterised by the gradual erosion of every barrier to privately construed autonomy. The last fifty years of Canadian common family law has seen a gradual contractualization, where statutes set out only default rules that couples can, with exceptions, agree to avoid.[3] Through legal instruments like cohabitation agreements, monogamous couples can tailor most aspects of their relationship as they choose. Polyamory just shifts one more issue—whether intimate relationships must be between closed pairs—to the realm of freedom of contract.

This article is a critical review of some polyamorous community materials in the light of contract theory. I focus on didactic literature—advice for how to conduct poly practice—and in particular a body of webcomics, *Kimchi Cuddles* by Tikva Wolf.[4] First, I set the stage with descriptions of polyamory and contract, and of some critiques of contract. With this on the table, I'll be able to explain why webcomics in particular help me relate and disturb the respective normativities of polyamory and contract—in the section "Relating Normativities." Next, I dive into what I call "The Contractual Construction of Polyamory," an analysis of how some poly characters use contract to understand their relationships. Then, in "The Polyamorous Construction of Contract," I deepen my reading of poly materials by investigating the misfit between poly and contract. Contract theory helps me understand specific concrete problems that arise and are responded to in my poly materials. It turns out that in the context of intimate relating, poly people have rethought some of contract's core concepts. These two sections explore first what contract framing has done to polyamorous relationships, then what living polyamorously has done to contract. In "Three Directions for Contract" and "Liberal Frontiers," I consolidate the promise this holds for ongoing projects of re-imagining contract and its constitutive concepts in both the family and the market.

Polyamory is a normative practice. It is a kind of ethical non-monogamy, not just the state of having multiple partners, but a set of aspirations about how to do so. In part because the study of polyamorous communities is in its infancy,[5] my materials are a "silly archive"[6] of blog posts, self-help books, and particularly webcomics.[7] These materials are not meant to reflect any kind of "truth" of poly communities—on the contrary, they would give a limited perspective if they were meant to be representative of poly practice. Rather, I use these materials to examine polyamorous normativity and then to queer contractual concepts.[8] I focus

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3 Robert Leckey, "Shifting Scrutiny: Private Ordering in Family Matters in Common-Law Canada," in *Contractualisation of Family Law – Global Perspectives,* ed. Frederik Swennen (Cham: Springer, 2015), 93–112 at 110.

4 Tikva Wolf, *Ask Me About Polyamory!* (Portland: Thorntree Press, 2016); <https://kimchicuddles.com/>.

5 Meg Barker and Darren Langdridge, "Whatever Happened to Non-Monogamies? Critical Reflections on Recent Research and Theory," *Sexualities* 13, no. 6 (2010): 748–772.

6 Jack Halberstam, *The Queer Art of Failure* (Durham: Duke University Press, 2011), 20–21.

7 All of the links in this article have been archived using the Internet Archive: https://archive.org/web/.

8 Brenda Cossman, "Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)," *Critical Analysis of Law* 6, no. 1 (2019): 23–38, esp. at 36–37.

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especially on didactic works, because here we find attempts by poly people to reflect on and improve polyamory— in particular, to be normative about it. These texts try to tell what the ethical in ethical non-monogamy means. Their normativity echoes the normativity of contract theory.[9] I join with others in reimagining contract for a changing material world and new normative commitments, across legal fields.[10]

While polyamory's use of contract reveals poly's imbrication in liberal legality, its working out of problems of power and sentiment through vibrant loving relationships gives me hope for new ways of relating, new notions of autonomy that might enrich both contract and intimacy. [11]

1. Poly Primer

Polyamory is a loosely-defined group of relationship forms characterized by ethical non-monogamy. "Polyamory" suggests that a person expects open romantic relationships with more than one other person. Most definitions of the term include gender-egalitarian aspirations.[12] Exactly what the "ethical" in ethical non-monogamy means is explored in this article. In the contractual construction of polyamory, roughly, "ethical" implies everybody involved agrees to what's going on up front.

Polyamory is used to refer to more than relationship forms—it can denote a community and an identity. In urban centres across North America, one can find groups of people calling themselves polyamorous who meet to discuss their practices and to find partners. Some people think of their polyamory as a sexuality, a natural aspect of their identity that they cannot change.[13] We are not sure how many poly people there are—though they may number in the millions in North America.[14]

Sometimes poly people form closed groups—triads, quads, or larger—of interconnected committed relationships, perhaps living together. Or, a poly person

[9] See Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004), ch. 1.

[10] Particularly important for my purposes are critiques of autonomy and consent from queer and feminist perspectives: Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and the Law* (Oxford: Oxford University Press, 2011); Joseph J. Fischel, *Screw Consent: A Better Politics of Sexual Justice* (Berkeley: University of California Press, 2019); Joseph J. Fischel, "A More Promiscuous Politics: LGBT Rights Without the LGBT Rights," in *After Marriage Equality: The Future of LGBT Rights*, ed. Carlos A. Ball (New York: New York University Press, 2016), 181; Robin West, "Consent, Legitimation, and Dysphoria," *Modern Law Review* 83, no. 1 (2020): 1–34; Daniel Del Gobbo, "Queer Dispute Resolution," *Cardozo Journal of Conflict Resolution* 20 (2019): 283–327; Sharon Thompson, "Feminist Relational Contract Theory: A New Model for Family Property Agreements," *Journal of Law and Society* 45, no. 4 (2018): 617–645; John Enman-Beech, "The Subjects of *Bhasin*: Good Faith and Relational Theory," *Journal of Law and Equality* 13 (2017): 1–30.

[11] This method is suggested by Austin Sarat and Thomas R. Kearns, "Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life," in their edited volume, *Law in Everyday Life* (Ann Arbor: University of Michigan Press, 1993), 21–61, esp. 59–60.

[12] E.g. Elizabeth Sheff, *The Polyamorists Next-Door* (Lanham: Rowman & Littlefield, 2015), 1–2; the Canadian Polyamory Advocacy Association, as cited in the polygamy reference, *Re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, at para 138.

[13] Angela Willey, *Undoing Monogamy: The Politics of Science and the Possibilities of Biology* (Durham: Duke University Press, 2016); Ann E. Tweedy, "Polyamory as Sexual Orientation," *University of Cincinnati Law Review* 79 (2010): 1461–1515.

[14] John-Paul E. Boyd, "Polyamorous Relationships and Family Law in Canada" (Calgary: Canadian Research Institute for Law and the Family, 2017), at 16–17.

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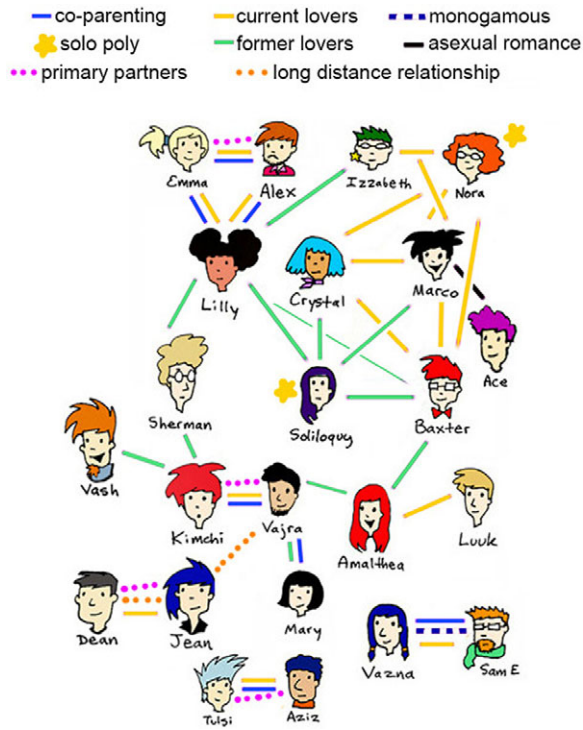

Figure 1 The colourful complexity of polyamorous relationships. A molecule-like arrangement of different characters, interconnected by colour-coded lines representing different types of romantic, sexual, and co-parenting relationships.

might have multiple lovers who rarely interact. Complex networks of romantic relationships are sometimes called "polycules"—see Figure 1 for a simplified example. A person's lovers' lovers are "metamours." In Figure 1, Crystal and Izzabeth are each other's metamours, because they are each a lover of Marco. Crystal and Izzabeth may or may not be friends, hang out, or have ever met.

Polyamory is thus broad enough to encompass very different ways of living. Some poly people will form closed communes of long-term relationships, just like a "traditional" marriage but with more than two; others go through life as free-loving independent agents. All share the commitment to exploring non-monogamous relationships in an ethical way, if not always the follow-through on this commitment.

"Mononormativity" refers to the normativity that privileges monogamous relationships over poly relationships, and (in some usages) over singleness.[15] Understanding mononormativity as a hegemonic discourse prompts the creation of new vocabularies to capture poly existence, while furnishing a lens for

[15] Ani Ritchie and Meg Barker, "'There Aren't Words for What We Do or How We Feel So We Have To Make Them Up': Constructing Polyamorous Languages in a Culture of Compulsory Monogamy," *Sexualities* 9, no. 5 (2006): 584–601, at 587.

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understanding law.[16] For example, the word "compersion" denotes the opposite of jealousy: the happiness one can feel when one's partner is experiencing happiness with another.[17] It is a kind of empathy. There was recently no English word for this emotion. Yet the word "compersion" can contest the cultural force of "jealousy" in romantic narratives.[18] The word allows poly people to articulate a positive and critical response to a question often heard from non-poly people, "don't you feel jealousy?"—Don't you feel compersion? This article will explore how a mononormative contractual frame cannot compass the values being negotiated in polyamorous relationships. Mononormativity is part of a nexus that includes problematic tropes of masculinity and femininity, and contesting it can mean contesting these as well.[19] But, while poly emerged from a set of countercultural practices including feminism and free love,[20] it is of course perfectly capable of perpetuating power, as through sexism, racism,[21] or the inscription of a new polynormativity within its communities.[22]

Some past attempts to understand poly relationships within legal scholarship have also considered contractual frames, generally to ask how to regulate poly.[23] And, some social scientists have tried to get rigorous about the incidence of agreement-talk in these contexts.[24] If you look hard enough, you can find the contractual frame in many pieces of poly practice. Once in a while, contract crystallizes in polyamory in the form of a "relationship agreement," a literal document used by some poly people to determine the bounds and expectations of their relationships. These agreements are not intended to be legally binding, but can form the basis for negotiation and community sanctions. Later, I will sample some relationship agreements that have been shared on the web by people aiming to help others in their relationships.

2. *Contract Stories and Counterstories*

In law, a binding contract is a set of enforceable obligations between two parties requiring each to do something—or face a potential lawsuit and compensate their

16 Emens, *supra* note 2, is a critique of mononormativity, a word that may not have been coined yet at the time of her writing.

17 Emens, *supra* note 2 at 330.

18 Ritchie and Barker, *supra* note 15, at 594–596.

19 Elizabeth Sheff, "Poly-Hegemonic Masculinities," *Sexualities* 9, no. 5 (2006): 621–642.

20 Jin Haritaworn, Chin-ju Lin, and Christian Klesse, "Poly/logue: A Critical Introduction to Polyamory," *Sexualities* 9, no. 5 (2006): 515–529. Other elements of poly's "cultural heritage" including sf fiction and alternative spiritualities emerge in Hadar Aviram, "Geeks, Goddesses, and Green Eggs: Political Mobilization and the Cultural Locus of the Polyamorous Community in the San Francisco Bay Area," in *Understanding Non-monogamies*, ed. Meg Barker and Darren Langdridge (New York: Routledge, 2010), 87–93, at 88–91.

21 Kevin A. Patterson, *Love's Not Colorblind* (Portland: Thorntree Press, 2018), esp. at 39–48.

22 Christian Klesse, "Polyamory and Its 'Others': Contesting the Terms of Nonmonogamy," *Sexualities* 9, no. 5 (2006): 565–583; Barker and Langdridge, *supra* note 5, at 761. Klesse does not use the term polynormativity, which seems to have spread through the online poly community around 2013.

23 Elizabeth S. Scott and Robert E. Scott, "From Contract to Status: Collaboration and the Evolution of Novel Family Relationships," *Columbia Law Review* 115 (2015): 293–374; Adrienne D. Davis, "Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality," *Columbia Law Review* 110, no. 8 (2010) 1955; Emens, *supra* note 2.

24 Kassia Wosick-Correa, "Agreements, Rules and Agentic Fidelity in Polyamorous Relationships," *Psychology and Sexuality* 1, no. 1 (2010): 44–61, at 47; Sheff, *supra* note 12; Deborah Anapol, *Polyamory in the 21st Century: Love and Intimacy with Multiple Partners* (Lanham, MD: Rowman & Littlefield, 2010), at 78–80.

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counterparty. Contracts are formed from offer and acceptance—agreement. The principle of freedom of contract holds that there can be no contractual obligations other than those agreed, and that parties can agree to whatever they want (within certain limits). While that is a three-sentence treatise of contract law, contract understood as a social practice is a broader thing.

People make all sorts of agreements with each other, these agreements seem often to be binding in some ways, and violating them can come with various social sanctions that have little to do with what happens in a court. Such practices can fruitfully be understood as contractual even though they may not involve a legally binding contract litigated in court.[25] People engaged in such practices often use contract language (e.g. "agreeing to go steady"). So, a definition other than the legal definition of contract is useful here.

Contract as a practice can be defined in terms of a set of contractual norms. [26] Together these norms pose a family resemblance: presence or absence of any given norm makes a practice more or less contractual. A non-exhaustive list:

- Reciprocity: the parties each give and receive something;
- Consent: rights and obligations only arise on the consent of the parties;
- Presentiation, or prolepsis: the contract is decided up front; all the future of the contractual relationship is crystallized in the moment of offer and acceptance; and
- Enforcement: the presentiated rights and obligations are defined in part through enforcement norms which trigger on the "breach."

Together these norms characterize contract law as well as its broader social penumbra of contract-like social practices, encoding a number of ideas crucial to our liberal market order.[27] Individuals are able to plan for the future by making agreements together. They can rely on these agreements knowing that they will be enforced by the state. And private ordering prevails: outside exceptional circumstances, contractual obligations consist of every term, and only those terms, to which parties agree. Or rather, so we like to think—often in practice, as I will discuss in a moment, private ordering through supposedly agreed terms is a cover for the exercise of power by one party over another.[28] The aspect of state enforcement is special to legal contracts, but different kinds of "enforcement" can be found throughout contract practice. People keep to their contract-like arrangements even

[25] Martha Ertman, *Love's Promises: How Formal and Informal Contracts Shape All Kinds of Families* (Boston: Beacon Press, 2015); John Wightman, "Intimate Relationships, Relational Contract Theory, and the Reach of Contract," *Feminist Legal Studies* 8 (2000): 93–131.

[26] Ian R. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven: Yale University Press, 1980).

[27] And so it has been said that contract is necessarily liberal: Thomas Gutmann, "Some Preliminary Remarks on a Liberal Theory of Contract," *Law and Contemporary Problems* 76, no. 2 (2013): 39–55, at 39.

[28] Max Rheinstein, ed., *Max Weber on Law in Economy and Society* (Cambridge, Mass.: Harvard University Press, 1955, original 1925); Robert Lee Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Political Science Quarterly* 38 (1923): 470–479.

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when a day in court is not going to happen. The reasons for this include a desire to maintain one's reputation as dependable, to avoid social sanctions like the disapproval of one's community or (in the case of business) boycotts, and out of the simple moral compunction to keep one's word. We live in a culture of contract where, for the most part, we expect to be able to rely on the plans and commitments we form with other people.

Some family law scholars have seen contract as an egalitarian alternative to older status-based understandings of the relationship between husband and wife.[29] Others are skeptical of contractualization. In now-classic critiques,[30] contract naturalizes the exercise of power,[31] is blind to relevant structures like gender,[32] and cannot fully compass the way relationships evolve over time.[33] I illustrate with the example of a prenuptial agreement.

A powerful party can launder coercion through contract.[34] Consider a wealthy fiancé pressuring a dependent partner to sign a prenuptial agreement. In the contractual frame, we see only that both parties have chosen their arrangement without illegal pressure, which in most cases exhausts the question of whether the resulting situation is just. One party is wealthy and well-informed relative to the other, but this is hidden in the fact that they both agreed to the prenup. In keeping with the abstract equality of liberalism, contract is gender-blind. That women come out of intimate relationships systematically poorer than their male exes simply has no place in a contractual analysis.[35] The law, in its majestic equality, allows women as well as men to enter into relationship agreements that will leave them in penury.[36] The strict presentiation of contract can also raise problems at the dissolution of an intimate relationship. A prenuptial agreement can represent a triumph of romantic love over a concern for material need on the wedding day, for the party giving up significant material claims that is. But such agreements have a very different valence out the other side of a relationship, when the affection is gone and the need remains. Couples signing prenups cannot predict the course of a many-year relationship; they cannot guess what material exchanges and compromises they will make. Yet contract aims to fully specify their entitlements at the outset, not contending with obligations that may arise over time as the relationship evolves.

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29 Examples: Peter Goodrich, "Friends in High Places," *International Journal of Law in Context* 1, no. 1 (2005): 41–59; Martha C. Ertman, "Private Ordering under the ALI Principles: As Natural as Status," in *Reconceiving the Family: Critical Reflections of the American Law Institute's Principles of the Law of Family Dissolution,* ed. Mary Ann Glendon and Robin Wilson (Cambridge: Cambridge University Press, 2006), 284–304; Brian Bix, "Private Ordering and Family Law," *Journal of the American Academy of Matrimonial Lawyers* 23 (2010): 249–285, at 251–52.

30 West, *supra* note 10, discusses versions of all three at 11 ff.

31 *Supra* note 27.

32 Mary Joe Frug, *Postmodern Legal Feminism* (London and New York: Routledge, 1992).

33 Macneil, *supra* note 26; Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study," *American Sociological Review* 28, no. 1 (1963): 1; Thompson, *supra* note 10.

34 Danielle Kie Hart, "Contract Formation and the Entrenchment of Power," *Loyola University Chicago Law Journal* 41 (2009): 175–220.

35 Thompson, *supra* note 10; and making this point about consent more generally, Fischel, *Screw Consent*, *supra* note 10, at 18.

36 The irony is of course stolen from Anatole France.

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Despite these critiques, contractual autonomy has largely won the ideological day as the understanding of autonomy in family law.[37] Those who see family law as a set of state-imposed obligations see these as exceptions to private ordering in need of exceptional justification.[38] When limits on private ordering are imposed they are seen as just that—limits on one frame, rather than an alternative frame, exceptions to the regime of personal choice.[39]

II. Relating Normativities

Contract is in crisis. While it has been in crisis for a long time,[40] there is a growing sense that contract is inadequate to the modern world.[41] Technologies, platforms, globalizations, the decreasing dimensionality of man and the exponentiating granularity of time as we dissolve into ever more discrete, marketable chunks: contract structures the employment, consumer, and platform-user relationships that have produced all these modern conveniences. We are in need of some new thoughts about it, so there is an ongoing search for alternative modes of relating. These projects have had to ask: should we extend and adapt contract concepts until fit to purpose? Or would this stretch contract to the breaking point, so that we need a new conceptual system entirely?[42]

My focus on didactic texts helps me relate contract and poly because these texts are normative. But their normativity is not the same as the normativity of contract. Just while the authors of these texts enjoin their readers to do poly this way or that, they use genre elements to eschew the authority that didacticism implies. These texts are playful with normativity. They are thus well suited for playing with contract's core concepts. Comics and self-help books can use medium-specific methods to convey a playfulness, a willingness to experiment, and a sense of the situatedness and imperfection of the authors: non-authoritative authors pronouncing abnormal normativities.

Consider the webcomics that are my focus.[43] Figure 2 gives a first example to ground my discussion here. Comics are a fun and accessible way of presenting

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37 West, *supra* note 10, at 1. The Supreme Court of Canada named contractual autonomy the "overriding policy consideration" in *Pelech v Pelech*, [1987] 1 SCR 801, para 83, per Wilson J. The majority in *Miglin v Miglin*, 2003 SCC 24 continued to equate "autonomy" with contractual autonomy at, e.g., paras 28, 55.

38 "[T]he state's objectives underlying contemporary state regulation of marriage are essentially contractual ones, relating to the facilitation of private ordering": Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Adult Relationships* (Ottawa: Public Works and Government Services Canada, 2001) 130.

39 *Miglin*, *supra* note 37, at e.g. para 46.

40 Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974). One is tempted to hypothesize that crisis is cooked in: Clare Dalton, "An Essay in the Deconstruction of Contract Doctrine," *Yale Law Journal* 94 (1985): 997–1114.

41 *Supra* note 10.

42 The general problem is discussed in Roberto Mangabeira Unger, "The Critical Legal Studies Movement," *Harvard Law Review* 96, no. 3 (1983): 561–675; in the context of consent, see S. M. Waddams, "Unconscionability in Contracts," *Modern Law Review* 39 (1976): 369–393, at 381–82; Fischel, *Screw Consent*, *supra* note 10, at 18.

43 I apply Hilary Chute, "Comics," in *Oxford Handbook of Law and Humanities,* ed. Simon Stern, Maksymilian Del Mar, and Bernadette Meyler (Oxford: Oxford University Press, 2020), 821–839; Thomas Giddens, *On Comics and Legal Aesthetics* (London: Routledge, 2018).

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Figure 2 How does polyamoury even work?

didactic material. But the informality of comics affects their effect. For instance in some of these comics a letter bag format is used. A reader's letter is paraphrased and responded to by the author's stand-in character, Kimchi. But Kimchi exists as a character in the comic, drawn as physically standing in front of and addressing the reader. The contents of the reader-sent letter are "read out," complete with a speech bubble, by Kimchi. Then Kimchi responds. In other comics, Kimchi appears in day-to-day experiences, having a conversation or hanging out with partners or friends. Thus the author's advice comes to depend on understanding them as a person with

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their own poly experiences. Tikva Wolf is not a wise all-knowing sage, but a relatable person with relevant lived experiences who has thought about these issues and is figuring things out together with us.[44]

In addition, by focussing on single page comics, most of which have no narrative interconnection, the body of work that is *Kimchi Cuddles* makes no claim to a coherent philosophy.[45] Unlike a book, or even a longer narrative comic, which might follow a single "approach" through a series of applications, *Kimchi Cuddles* will say one thing on one page and a different thing on the next. Even within a comic, all the panels are laid out, "[carrying] in their open artificiality an awareness of their own constructedness,"[46] inviting the reader to consider and evaluate the conceptual interrelation of the scenes. In *Kimchi Cuddles*, the characters often also evince this artificiality: while many of them (as mentioned) form part of a regular rotating cast, others are nonce. They appear namelessly just to learn a lesson (as in Figure 2), as a sort of stand-in for the reader being schooled, and then they disappear when the comic ends. Thus although these comics depict norms, they lack the pretension of legal norms. Rather, Kimchi stands before the reader as an embodied human, saying what she can say from her situation, encouraging us to play along.

Polyamory and contract and their relationship are unstable and contested.[47] It is precisely this instability that provides the setting for a productive encounter. Thus my silly archive gives a firm, though provisional answer to the question at the top of this section: poly's playful promiscuity with contractual concepts reveals them to be more supple than one might guess. Whether this kind of normativity is appropriate to law is another question.

III. The Contractual Construction of Polyamory

Contract can be used to frame relationships in multiple ways. Contract can be used as a tool to co-ordinate and plan, or it can be used after some issue arises to ground a justice claim or to re-jig the parties' understanding of their relationship. In this section, I will first discuss what I call "the polyamory clause"—the notion that a polyamorous relationship is itself a result of something like a contract with a non-monogamy term. Then I discuss a few specific agreements, special clauses that do not necessarily define a relationship as a whole but that regulate a relationship or represent opt-outs from certain default norms.

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[44] Wolf has explicitly problematized their own authority along these lines, for instance in comics 671 and 780.

[45] Existing work on law and comics has often focussed on longer form work of greater artistic pretension, discussed in Chute, *ibid*. *Kimchi Cuddles* is decidedly less serious about itself.

[46] Chute, *supra* note 43, at 832. Similarly, Giddens, *supra* note 43, discusses the way comic's webs of empanelled meaning can disrupt the linear rationality of law.

[47] On the instability of "contract" in this very context, see Thomas W. Joo, "The Discourse of 'Contract' and the Law of Marriage," in *Law and Economics: Towards Social Justice*, ed. Dana L. Gold (Bingley: Emerald Group, 2009), 161–187.

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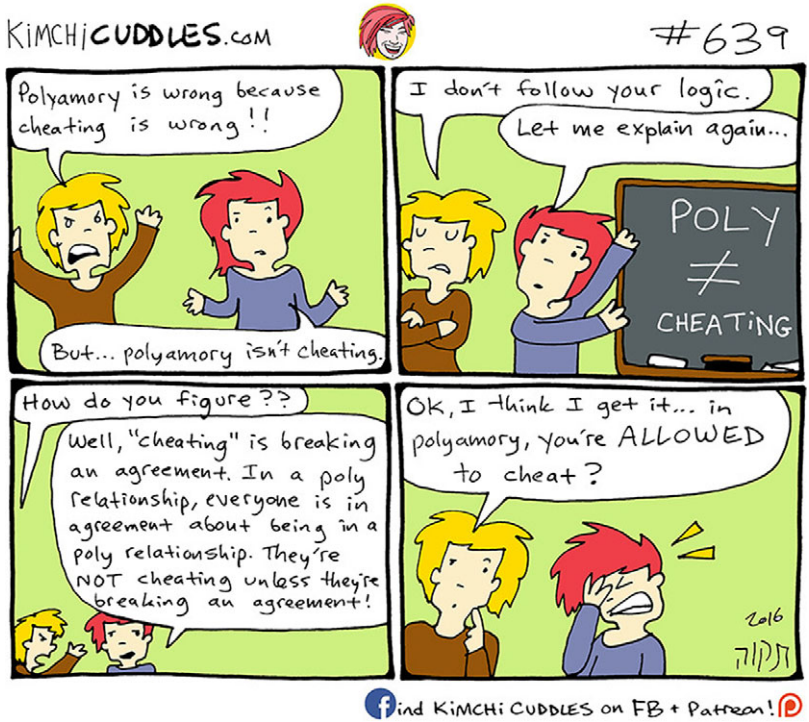

Figure 3 So, cheating is allowed?

1. The Polyamory Clause

Relationship as contract is often used to defend polyamory as a valid relationship style. Figure 3 sketches a typical[48] response to the claim that polyamory is unethical because it involves cheating on one's partners.

It is not obvious that cheating is, as the comic asserts, breaking an agreement. The Oxford English Dictionary links "cheating" in the sense of being "sexually unfaithful" to its definition 4a: "To deal fraudulently, practise deceit."[49] Whether the acts that make up cheating—having sex with another, for instance—will be deceitful depends on what one has communicated. This has no necessary connexion to agreement, but rather depends on the communication of a potentially one-sided undertaking, "I will not have sex with others." Under mononormativity this communication is sometimes implicit—"going steady" is understood to include sexual exclusivity. Once such a communication is made, cheating is deceitful because it renders a lie of one's undertaking.

[48] Wosick-Correa, *supra* note 24, at 54–55.
[49] 3rd edition, s.v. "cheat," 4 a and b.

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But sometimes the real moral charge behind "polyamory is just cheating" is not deceit, but adultery. Cheating may be breaking the rules, not of an agreement, but of monogamy, community norms of appropriate relating often of a religious root. If so, the response that polyamory is okay because its participants agreed to allow adultery is neither here nor there. The same logic would insulate drug deals from public sanction. This is the classic anti-regulation move in liberal theories of contract: keep off our personal dealings.

As another example, in *The Ethical Slut*, an early and influential example of the poly self-help genre, we read that ethical sluttery is "as valid as any other consensual and well-informed relationship choice."[50] This language closely mirrors libertarian Milton Friedman's famous formulation of a beneficial transaction: "both parties to an economic transaction benefit from it, provided the transaction is bilaterally voluntary and informed."[51] In both *The Ethical Slut* and in Friedman's work, the contract frame is part of an argument defending certain choices—market transactions or personal relationships—from outside interference. Other self-help sources secure this argument by baking bilaterally voluntary and informed choice into the definition of poly itself.[52]

In using contract to define a polyamorous relationship, the consent norm is paramount. Reciprocity is generally implicit in the idea of a relationship, though once in a while people discuss reciprocal fairness as in the idea that similar rules should apply to each party to an agreement.[53] It would not be fair, for instance, for only one partner to have access to romantic relationships with others.[54] Presentiation is present here because the initial consent defines the ensuing relationship as polyamorous. Norms related to dispute resolution and enforcement also arise. In the *Kimchi Cuddles* comic in Figure 3, the notion that cheating is breaking the rules of an agreement preserves the idea that it is wrong to break the agreed rules of a polyamorous relationship. In this way agreement serves as a guide to correct action (don't breach) and as a ground for potential justice claims (you shouldn't have breached our agreement). When a relationship is seen through the contract lens, it is a set of terms—and whether or not partners can have other partners is just another term to negotiate.

Before turning to special clauses, I will share some examples of relationship agreements. These documents are a distilled form of relationship as contract, including phrases like "The basis of this relationship is a mutual agreement that both parties

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50 Janet W. Hardy and Dossie Easton, *The Ethical Slut*, 3rd ed. (Berkeley: Ten Speed Press: 2017), 70. This book predates the popularity of the term "polyamory," which was added to the book's subtitle in the second edition.

51 Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), at 13.

52 Franklin Veaux and Eve Rickert, *More Than Two* (Portland: Thorntree Press, 2014), at 1, 8; Sheff, *supra* note 12, at 1. *More Than Two*, and the website from which the book draws, https://www.morethantwo.com/, are potentially problematic sources as Rickert and others have recently directed #MeToo allegations against Veaux.

53 E.g. Veaux and Rickert, *supra* note 52, at 178.

54 Sheff, *supra* note 12, at 21–22. Veaux and Rickert give an extreme example in which a jealous partner dumped her own girlfriend in order to persuade her partner to dump his. This attempt at reciprocity was problematic for the partners, and also had a significant negative externality for the dumped girlfriends: https://www.morethantwo.com/polyfairness.html.

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are happier being together than not being together."[55] Poly relationship agreements share a self-consciously contractual form. They consist of a series of obligations owed by the parties, agreed to up front, sometimes signed in a ceremonious fashion. Legalese abounds, and clauses and sub-clauses can be numbered and lettered. The language is the language of contract, precommitment. One relationship agreement begins:

> The following persons, [names], freely enter into this relationship agreement which will begin [date], extend for a period of one year, and terminate on [date]. We are defining our relationship as a(n): [Open Dyad]. At the expiration of this agreement, we may choose to reconfirm or renegotiate our agreement. Or we may choose not to continue our relationship and to part from each other peacefully, respectfully, and as whole and free persons.[56]

This implies that at the end of a one-year term, the parties may simply leave, the relationship might just end, the parties are "free," unless they agree to a continuation. This is a striking example of the consent and presentiation norms. The parties are deciding today what will happen in a year. Over that time, they may come to rely on each other, materially and emotionally. But this will not matter: if either party does not consent to continue to care for the other, they are not bound: that's it. In some cases this will conflict with spousal support laws.[57]

These relationship agreements are filled with mutual forward-looking commitments, ranging from the mundane and concrete ("Each person and each potential partner should be ready to make or provide copies of [STI] test results for the other person in this relationship…"[58]) to the romantic and vague ("I will give you the benefit of the doubt when I feel insecure"[59]). People more often seek less formal, verbal understandings with the same basic shape. The poly self-help books considered here recommend sitting down with partners and talking these things through, whether or not the result is written out and signed.[60]

2. *Special Clauses*

Whether or not relationships are seen as fundamentally contractual, contract can be used to regulate them, to add or change terms. I give two examples.

Polyamorous people sometimes negotiate "veto power" with an existing partner. If a person wants to date someone new, a current partner with veto power is allowed to say "no, not that particular person."

One of the most typical pieces of advice one will find in poly self-help materials is not to negotiate veto power because of the many problems that such a power, or putative power, raises.[61] But it seems that even many polyamorous people find the notion of unrestrained polyamory, where one's partners can date whomever they

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55 https://www.theinnbetween.net/agreement.pdf.

56 Square brackets are in the original, as this is a form-contract for others to use: https://www.polyamorysociety.org/Relationship_Agreement.html

57 For instance, if the cosignatories have a child, they might be considered spouses in some jurisdictions and owe each other spousal support.

58 https://www.theinnbetween.net/agreement.pdf.

59 https://www.uncommonlovepdx.com/blog/agreements-for-open-relationships.

60 Hardy and Easton, *supra* note 50, ch. 17; Veaux and Rickert, *supra* note 52, ch. 10.

61 For instance Hardy and Easton, *supra* note 50, at 181–82; Sheff, *supra* note 12, at 97–98.

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want without one's having any say in the matter, discomfiting. Veto power is used to afford a sense of security, perhaps as part of a transition to a new and scary relationship form. It is seen as problematic because it gives a member of the initial dyad a kind of control over the incoming third party that can be exploited. No one wants to be dumped, or face the threat of being dumped, because their metamour says so. Similarly, a person with veto power can use it to get what they want out of their initial partner: I'm not sure I'm comfortable with you dating them; what can we do to help me be more comfortable with it?

Veto power can be softened by various restraints on its exercise. For instance, one relationship agreement includes the clause "I will not be intimate with another unless you are comfortable with it."[62] While this affords a sort of veto power, it is to be used only in a certain circumstance—where a party is uncomfortable. Another relationship agreement allows veto power, but only "as a last resort" and with a list of "best practices" around its exercise.[63]

My second special clause: a term that is widely rejected within poly communities but seems to still be used is the so-called one-penis policy. [64] This is a rule that a polycule can include as many women as the parties want, but only one man. Obviously this idea falls on the wrong side of many –ists and –phobias, including the arguably transphobic language in the very name (eliding as it does gender and genitals). But these are just the sorts of problems a contractual frame cannot see. Apparently many people, particularly straight cis men, are more comfortable with their partners having other partners who are women than having other partners who are men. Who's to say there's anything wrong with this preference? The one-penis policy can also be used as part of a transition process. If a different-sex couple is opening up their relationship and this makes a man uncomfortable, the temporary adoption of a one-penis policy might make the deal more palatable.[65] The one-penis policy is just seen as a form of non-competition clause—and a less stringent one than that typically adopted in monogamous relationships. All this needs serious unpacking.

In Figure 4 we see a dramatization of a conversation polyamorous people might have about a one-penis policy.

As augured, the one-penis policy is arguably sexist, homophobic, transphobic, and probably a bunch of other things besides. It is of course negotiated against the background of patriarchy, a set of default rules in which a man's holding out for monogamy is a plausible strategy, and in which a man's being "uncomfortable" with "his" women being with other men has a cogency that the gender-reversed situation would not. There is no equivalent "one vagina policy."[66] But if everybody agrees to

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62 https://www.polyamorysociety.org/Relationship_Agreement.html

63 https://www.kamaladevi.com/2087/san-diego-polyamory-pod-relationship-agreement-contract.

64 Elisabeth A. Sheff, "The One Penis Policy: When Polygyny Masquerades as Polyamory," *Psychology Today,* 21 January 2016, https://www.psychologytoday.com/ca/blog/the-polyamorists-next-door/201601/the-one-penis-policy.

65 Ozymandias, "On One Penis Policies," *Thing of Things,* 1 July 2016, https://thingofthings.wordpress.com/2016/07/01/on-one-penis-policies/.

66 The term "one vagina policy" is sometimes used as a hypothetical contrast while noting that it is rare or mythical: https://www.morethantwo.com/polyglossary.html; Sheff, *supra* note 64; Ozymandias, *supra* note 64.

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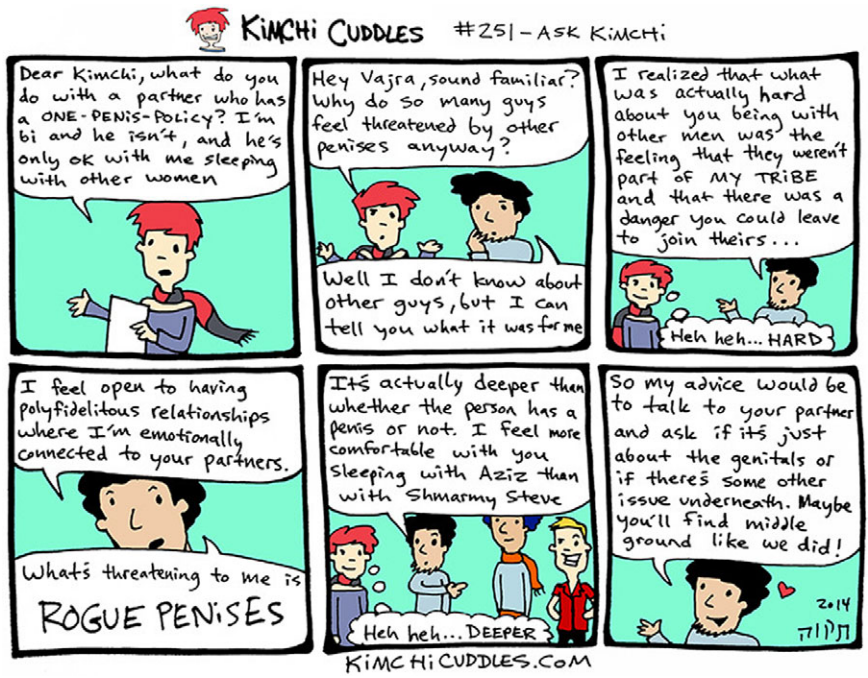

Figure 4 The one-penis policy.

the one-penis policy, what's the big deal? Perhaps it's "right for them." Who are we to interfere with people's private arrangements? This again is freedom of contract at work. When relationships are framed as contracts, it becomes difficult to articulate what, if anything, is wrong with a term that all the parties have agreed to. As the author of *Kimchi Cuddles*, Tikva Wolf, has written elsewhere, a man's asserting a one-penis policy "is not inherently sexist. It sounds the same to me as 'I'm a redhead, and I want to be the ONLY redhead in your life right now, but I'm not threatened by you being with other blondes!'"[67] This response changes the topic from gender to hair colour, and so works precisely by abstracting from the gender relations that arguably make the one-penis policy problematic, just as contract does.[68]

What if a person does not want to agree to one of these special clauses? A negotiation ensues. Just as in other spheres of life, contract does not address power, but masks it behind an initial presentiating moment in which all the pressures faced by parties are obscured by a totalizing "consent" (or a totally freeing lack thereof). Figure 5 illustrates this implication.

We have here a liberal-individual responsibilizing discourse previously analysed by Serena Petrella. [69] How to address the problem of power in contract? The

[67] https://kimchicuddles.com/post/73211693695/thoughts-on-the-opp-one-penis-policy.
[68] Frug, *supra* note 32, at 87–107.
[69] Serena Petrella, "Ethical Sluts and Closet Polyamorists: Dissident Eroticism, Abject Subjects and the Normative Cycle in Self-help Books on Free Love," in *Sexual Politics of Desire and Belonging*, ed.

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concern that a contract might be more a product of need than want? No worries: just don't make those agreements. Power disappears. In this comic, Kimchi suggests that the letter writer should not make agreements that do not express their autonomy in part because of an implicit assumption that such agreements bind, and that the people who make the agreements are responsible for this.[70] Wosick-Correa found that polyamorous ideology includes a notion of fidelity that "involves remaining loyal to the process of establishing agreements and rules, respecting oneself and one's partners through following the rules and being self-aware on a very individual level."[71] This sounds just like a good contractual subject, who respects a counterparty's formal equality by making up-front agreements and then following their strictures. A particularly telling relationship agreement includes clause I.B.: "This relationship is a relationship of equals. Neither person is expected to allow the other to make decisions for him/her. Each partner is to make his/her own choices."[72] Despite these liberal aspirations, the problems of power in relationships remain, and so contract—that paragon of liberal dispute resolution premised as it is too on the valorization of choice—is used to defuse them.

It seems every system of obligation can be fit into the contractual frame. This is precisely because freedom of contract, in principle, allows any sort of obligation to be imposed or waived by the parties' agreement. With contract in hand, all the world's a nail.[73] Every obligation is simply a default rule that can be contracted around with the consent of the appropriate parties. In this frame, tort law can be waived with the appropriate formalities. The same goes for marriage because family law is just one more set of background rules. Social expectations—whether broad-based or arising from a narrow e.g. polyamorous community—are another. Once contract enters a conceptual space and defaultizes another normative regime, turning that regime into a set of mere background rules ready to be displaced by agreement, there are few barriers left to stop contract's systematic faults.[74]

I hope to have shown how contract framing arises in my archive. Not only do we find the norms and practices that typify contract, we see the classic problems of contract being carried into poly through these concepts. Both special clauses discussed above allow a party to exercise control over another with the cover that it was all agreed up front; this is contract naturalizing the exercise of power. The one-penis policy propagates against a background of patriarchy that contractual ordering can't address. And relationship agreements that seek to strictly presentiate, as in the example of the one-year limited term, can raise problems when

Nick Rumens and Alejandro Cervantes-Carson (Amsterdam: Rodopi, 2007), 151–168. Similarly see Emens's discussion of self-possession, consent, and up-front negotiation: *supra* note 2.

70 Boundary discourse can work the same way—the idea that we are responsible for communicating and maintaining our own boundaries within a relationship. Indeed, "The agreements that free-loving singles, couples, and families make with respect for each other's feelings constitute the boundaries of their relationships": Hardy and Easton, *supra* note 50, at 94. See Nedelsky, *supra* note 10, ch. 2, for the relationship of boundary discourse to liberal individualism.

71 Wosick-Correa, *supra* note 24, at 58.

72 https://www.theinnbetween.net/agreement.pdf.

73 You are reading an article by a contracts scholar that purports to be about polyamory but somehow manages to be all about contract.

74 Margaret Jane Radin, *Contested Commodities* (Cambridge, Mass.: Harvard University Press, 1996), ch. 6.

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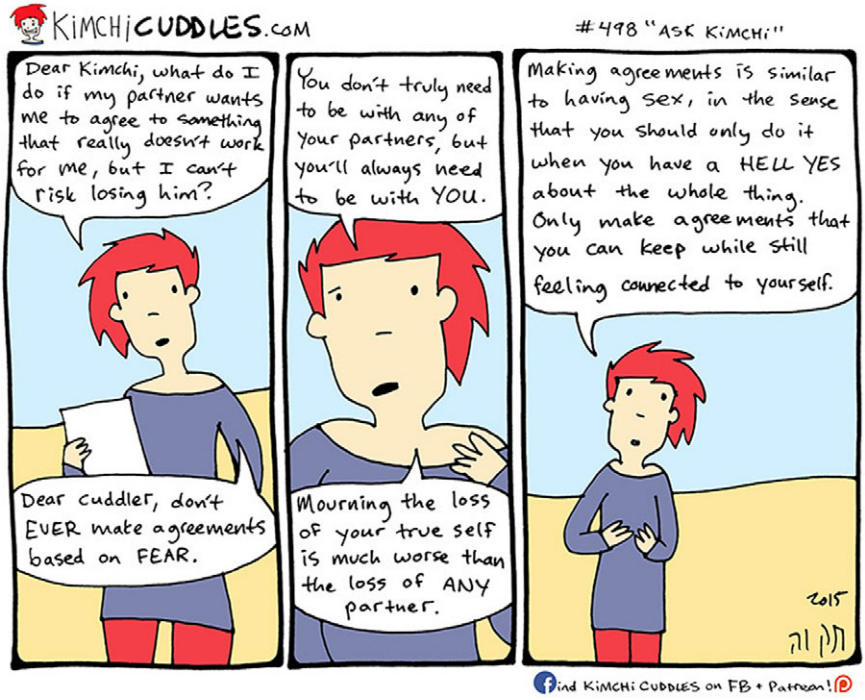

Figure 5 Don't ever make agreements based on fear.

dependencies change and grow over time. The next section explores how poly people have responded to these problems within the contractual frame.

IV. The Polyamorous Construction of Contract

Of course, the contractual construction of polyamory is a reductive reading. So far I have supposed that "contract" was a fixed thing that I could use to read my archive of poly materials. But symptoms of the problems I have outlined with thinking through polyamory contractually have been identified within polyamorous communities, and responded to. Often these responses have been framed by contract—either straitened by its concepts, or creatively elaborating them. When we see these uses of contractual concepts by poly people, we could say that they are mistaken: these lay-people just don't know what these concepts mean or how they work. But I am interested instead in taking these deployments of contract seriously. In other words, novel and marginal practices can create new ways of relating through old metaphors. After thinking about how poly is understood through contract, how might we understand contract through poly? I will address this conceptual progression with Figure 6, panel by panel.

The first panel is responding to a common poly problem: how to manage the feelings of a dyad during the addition of a third party. One way people try to manage these situations, as discussed above in the Special Clauses section, is to put

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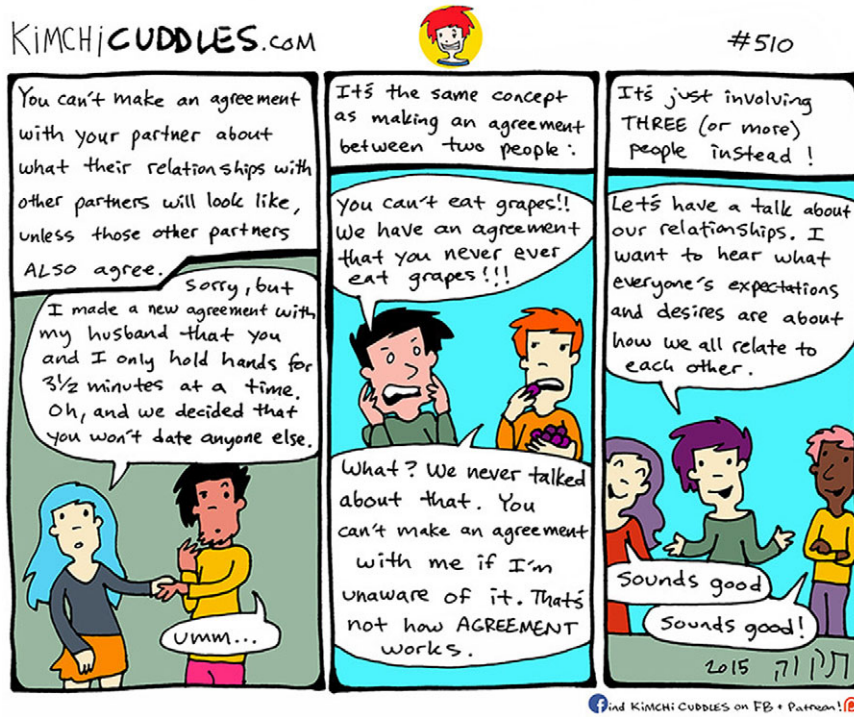

Figure 6 The polyamorous construction of contract.

limits, or at least dampers, on the degree of intimacy available to the third party. The third party can experience this as not very nice.

This first panel is framed contractually. It claims that one cannot make an agreement with one's partner about what their relationships with other partners will look like. On its face, the claim is false. You and I can indeed agree that I will not hold another person's hand for more than 3½ minutes. The precision of 3½ here is humour, meant to suggest that it is absurd to try to micromanage a third party's actions. We can't agree that a third party will hold my hand at all, or that they will not do something such as date fourth parties, but we can agree that I will accept certain limits. We can also agree that I will only continue seeing a third party if they abide certain limits. Already then, in this first panel, we have a common problem framed contractually in a way that leads to incoherence. Specifically, the panel blurs between relationship as agreement and relationship as involving necessary enmeshment. If the parties are free agents connected only so far as they agree, variously tailored clauses limiting two people's interactions with others are perfectly possible. But the comic understands that such agreements necessarily implicate third parties, so that their input is also needed. Even though the subject is explicitly said to be an agreement between two people, the validity of this agreement depends on the participation of the third person whom the agreement also affects. Apparently that is just "how agreement works." Contract is brought in to "explain" a problem with

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imposing limits to manage feelings under the addition of a third party to a dyad, but the logic of agreement simply does not do what the narrator says it does.

The inaptness of this contract framing is only reinforced in the second panel. This panel operates by abstracting further from the relationship context and into an untethered contractual realm. An agreement between two people respecting a third becomes an agreement directly with that third person. This second panel is difficult to interpret, because by moving away from relationship, to grapes, and away from multiplicity, to a pair of people, it cannot capture the very problem that the first panel sets up: how a relationship between two people can affect a third. The arbitrariness of the agreement (no grapes!) is again used to humorously suggest the absurdity of micromanaging others.

But by the time we get to the third panel, it becomes clear that something different and not exactly contractual is going on. This is despite the contractual metaphor still being deployed. While we have the assertion that an agreement in polyamory is just like a two-person agreement, the process is no longer a contractual offer and acceptance. The presentiation, consent, and enforcement norms are all now unstable, replaced by an on-going and fluid communication of everybody's needs. This is elaborated in my last example, Figure 7.

In contract, liability is strict. There is no fluidity to a contractual obligation. Breach is breach. But here, rules need to be fluid.[75] In contract, the presentiation and consent norms lead to the idea of up-front agreement that binds into the future. Here, we have "communicating your feelings in every new moment." The importance given to feelings is itself in tension with consent, because one's partners' feelings can lead to obligation (at least, the obligation of "being open to hearing your partners' feelings") whether one likes it or not.

1. *Three Directions for Contract*

It's now curfew and I have to return to contract with something to show for my dalliances. The contractual construction of polyamory offers three lessons for contract: one old, two new.

1—The first lesson is the old one, though it frequently needs to be relearnt: as relational contract theorists noted decades ago, contracts are not just isolated exchanges; they structure relationships. Expectations and obligations can arise over the course of a relationship, by dint of that relationship, and not just at an initial contracting moment by dint of explicit agreement.[76] Relational contract theory has had little difficulty gradually working its way into the mainstream of contract law, because it can be understood as a simple extension of liberal contract logic.[77] Doctrines like good faith or promissory estoppel merely manifest a broader notion

[75] Veaux and Rickert, *supra* note 52, at ch. 10, contrast "rules" and "agreements." A rule is strict and binding up front while an agreement is "negotiated by *all* the parties it affects" and "allow[s] for renegotiation": 163. Similarly, Easton and Hardy, *supra* note 50, at 172–73.

[76] *Supra* note 32.

[77] Angela Swan, Jakub Adamski, and Annie Y. Na, *Canadian Contract Law*, 4th ed. (Toronto: LexisNexis, 2018) offers one liberal and practical assessment of contract law grounded in a relational approach. Similarly, Ian R. Macneil, *Contracts: Exchange Transactions and Relations* (Mineola: Foundation Press, 1971).

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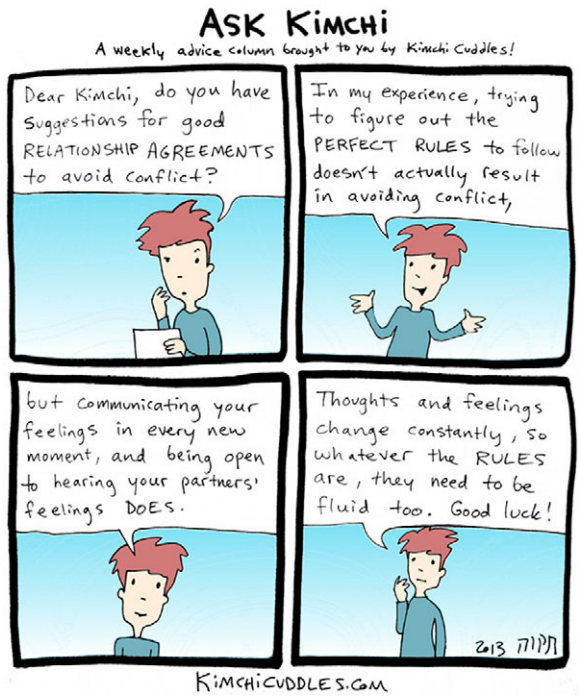

Figure 7 Keeping the rules fluid.

of how expectations and agreements arise—i.e., sometimes implicitly, sometimes resulting from background norms common to the parties.[78] But the underlying notion of mutual choice still prevails: relational contract norms arise from mutually induced expectations just as classical contract [79] norms arise from moments of mutual agreement.[80] Obligations are still the product of individuals' choices, but the choices are more like the choices to remain in and build a relationship than the choice to sign on a dotted line.[81] Relational contract theory troubled the notion of presentiation and refined the manner in which we interpret contractual obligations, but it did not deal a serious blow to the structure of a mutually-agreed reciprocal relationship between pairs of individuals.[82]

2—However, poly people's understanding of contract goes further than relational contract theory typically did. Our second lesson for contract is that the

78 Dori Kimel, "The Choice of Paradigm for Theory of Contract," *Oxford Journal of Legal Studies* 27, no. 2 (2007): 233–255, carefully delineates what relational insights liberal contract theory is just fine with, at e.g. 242.

79 See Hart, *supra* note 34, for the term "classical contract."

80 Compare Charles Fried, *Contract As Promise*, 2nd ed. (Oxford: Oxford University Press, 2015), at 73.

81 Compare Robert Leckey, "Contracting Claims and Family Law Feuds," *University of Toronto Law Journal* 57 (2007): 1–41.

82 Enman-Beech, *supra* note 10, at 29–30; Thompson, *supra* note 10, at 630 (arguing that a revised feminist relational contract theory needs to discard relational contract's "liberal values").

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content of norms governing relationships is not always found in agreement, and some of these norms cannot be disclaimed by agreement.[83] For example, the poly comics discussing the necessity of ongoing communication suggest a set of procedural norms that binds parties to an ongoing concern for each other's interests in their mutual relationship. Similarly, parties can attempt a veto power, but this violates poly community norms of respectful interaction and being open to shifting needs, and it violates these norms independently of whether or how robustly it was initially agreed to.

A lawyer might prefer to analogise this shift in the source of norms to an expansion of tort,[84] as tort typically consists of a set of rights and duties that precede, and sometimes cannot be waived by, contract. Yet I did not find tort language in my archive: the wrong of cheating is the wrong of breaking an agreement. The problem with failing to include a party in your communicative circle is that that is not "how agreements work."

Thus, in the context of polyamory, people have found that freedom of contract cannot be as open-ended as classical contract likes to suppose. Contracts inevitably come with non-disclaimable contractual duties, which attend to the nature of the relationship one has contracted into.[85] One can often choose to enter into a relationship or not, as a person might choose to become a parent; but once one enters into a certain sort of relationship there are duties that cannot be avoided, as one cannot choose to be a parent while disclaiming the obligation of providing the child's necessaries. We might say that entering into a relationship of specific interdependence with another person sometimes requires assuming obligations to protect that person's new vulnerability.[86] The example of parenthood shows that the notion that people who allow others to rely and depend on them owe those people various obligations is not new, but it is starting to make its way into contract theory and private law theory more generally.[87] My reading of some poly discourse adds to this story the idea that there is room within contract talk for this kind of non-disclaimable obligation, that this sort of obligation might even be necessary to make contract work.

3—Poly offers a more basic, third shift in its use of contract to understand relationships, and this comes through in its treatment of what contract would call

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[83] Relational contract theories have been put forward as explanations for non-disclaimable contractual obligations like those of good faith, but they have difficulty filling that role. See John Enman-Beech, "The Good Faith Challenge," *Journal of Commonwealth Law* 35 (2019): 1, at 50–54.

[84] Suggesting that good faith bargaining blurs the tort/contract line at just this juncture, see Nicholas Reynolds, "The New Neighbour Principle: Reasonable Expectations, Relationality, and Good Faith in Pre-Contractual Negotiations," *Canadian Business Law Journal* 60, no. 1 (2017): 94–123.

[85] On the incompatibility between this sort of contractual duty and classical contract, see Elisabeth Peden, *Good Faith in the Performance of Contracts* (Chatsworth: LexisNexis Butterworths, 2003), 1.5–1.10. Contrast Hanoch Dagan and Avihay Dorfman, "Just Relationships," *Columbia Law Review* (2016) 116, https://columbialawreview.org/content/just-relationships/.

[86] Stephanie Collins, *The Core of Care Ethics* (London: Palgrave Macmillan, 2015). This formulation might at the same time fit into Gutmann's hunt for a liberal notion of (non-)exploitation that satisfies the needs of contractual fairness: *supra* note 27, at 53–54.

[87] Dagan and Dorfman, *supra* note 85, and other contemporary theorists doing like work can be read as the third point on a line starting in feminist and communitarian moral theory (e.g. Virginia Held, "Non-Contractual Society: A Feminist View," *Canadian Journal of Philosophy* 13 Supp (1987): 111–137), going through feminist and critical legal theory (e.g. Nedelsky, *supra* note 10), and now making its way into more mainstream, liberal legal theory.

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third parties. In poly, there are no third parties: every contract necessarily implicates not just the people in a room shaking hands, but all those whom their contract might affect, particularly a person's metamours. It is not just that contracting parties can have some sort of obligation to consider third parties, which is old hat—consider the history of ethical consumers concerned about producers.[88] Rather, metamours actually get to have a say in the agreement so that they are not third parties at all. Indeed, this insistence that the inclusion of metamours is necessary to the validity of agreements may be the most characteristic distinction of polyamory from other forms of non-monogamy. As the comic in Figure 6 says, you and I "can't" make an agreement respecting a third person without their say. As I discussed, this is just not true of a classically contractual notion of agreement. But perhaps it is true for a modified sense of agreement in the poly context. As in feminist explorations of mothering,[89] the necessity of interdependence is the default assumption in poly contracting. Because you and I are already enmeshed, I cannot claim freedom of contract as a negative liberty to ignore your input. If you and I are making agreements about our relationship, and I am also in a relationship with another, they are due much more than that we respect their negative sphere of autonomy. They get a say.

2. *Liberal Frontiers*

I have assembled these three lessons as a sort of programme for incremental doctrine within contract law. How much these mutations, already seen in lay use of contract, should be legalized,[90] and whether these shifts can happen without breaking contract altogether,[91] are open questions—that's the incremental part.

These poly lessons, if carefully legalized, might help to overcome the contract problems previously discussed. As I have stressed, the normativity found in the above webcomics is very different from the normativity of law, and it would be dangerous to directly enforce the moral and social obligations of poly communities through law. Translation is necessary. Our first lesson, if digested in the form of expanded promissory estoppel or reliance arguments, might broaden contract's attention beyond the moment of formation. The second lesson can deepen the notions of vulnerability and power lurking in doctrines like unconscionability, undue influence, and good faith performance. The third lesson, while perhaps the most radical, can also be incrementally introduced into expanded reliance arguments and duties of good faith negotiation. Demand that parties be responsible for relational vulnerabilities in their counterparties, whether these vulnerabilities arise from bad faith behaviour or from structural, e.g. sexist or racist, power imbalances. On a policy level these understandings of contract address the fissured workplace and transnational supply chains, which use contract to sever—rather than to bond—chains of responsibility. Taken together, these doctrinal shifts contend with

[88] Lawrence B. Glickman, *Buying Power: A History of Consumer Activism in America* (Chicago: University of Chicago Press, 2009).
[89] Held, *supra* note 87.
[90] Kimel, *supra* note 78, gives some reasons against this kind of legalization; Wightman, *supra* note 25, at 128, gives some reasons for.
[91] See *supra* note 41.

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liberal individualism, its default to bounded spheres of negative autonomy in which subjects are safely free of obligation to others.

Thoughts on law reform aside, these projects may thrive best in the ground of the rhetorical and the political. The polyamorous construction of contract subverts liberal individualism across fields. This construction posits subjects always already interconnected, recognizes broader notions of choice than those of dominant economic and political theories, and rejects the linear temporal rationality of neoliberalism. People are interconnected by affect. In the intimate context, the phenomena of jealousy and compersion can induce people to confront this interconnection. This amplifies Wendy Brown's call for reasoning from a "vision of the common," moving from "who I am" to "what I want for us."[92] This grammatical shift from I to us, in being grammatical, can be ported to any field, including those currently dominated by methodological individualism. If we can all become, in this narrow sense, polyamorous, we may yet forge both richer moulds of ethical life and the political body needed to sustain them.

V. Conclusion

Some seem "resigned" to the continuing place of contract in our thought.[93] But poly people have taken concepts of interpersonal justice rooted in private law and made them their own, suggesting that our attitude need not be resignation. In adapting contract concepts to polyamorous relationships, changes had to be made. Contract still offers poly people a compelling framework, one that has intuitive appeal and cultural support. But it had to be modified to account for the relational understandings of contemporary life. My study suggests that there is room within contractual concepts for a much broader ethical practice than classical contract, and liberal legalism more generally, would allow.

Though small by definition, margins sometimes have enough room to write new ways of relating. When Fran Olsen asked how to love through the dichotomies of family and market, she asked us "to be self-sufficient, but not … independent."[94] Olsen outlined the impossible tension that poly people seek to address. Poly people love within the liberal memespace, and so use the logics of liberal legality to understand their relationships. At the same time, their gameful pursuit of these logics against the concrete of their lives and loves has led them and me to new understandings of relationship—and of contract.

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[92] Wendy Brown, *States of Injury* (Princeton: Princeton University Press, 1995), 51.
[93] Del Gobbo, *supra* note 10, at 326 fn 168.
[94] Olsen, *supra* note 1, at 1574.

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