

## ENTANGLEMENTS: A STUDY OF LIBERAL THOUGHT IN THE PROMISE OF MARRIAGE

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### LIVING LIBERALISM

The English promise of marriage was a locus of cultural anxiety in the nineteenth century, which may be difficult to appreciate today. The concept seems like the stuff of old-fashioned, perhaps puritan romance. Victorian, indeed. However, the anxiety becomes clear if you scratch the surface. The promise of marriage—like other sites transformed by liberalism—was a fusion of liberal ideals and status commitments; it pulled together everything that was ideologically central to moderns. The promise involved the liberal ideals of contract and love: the new free-choice bases of the market and the family, unified in this relation ideally motivated by affection, and enforced like a market transaction. The promise involved class and gender statuses, hierarchical commitments that could little be ignored, despite the problematization of status associated with contract and love. Every involvement with the promise revealed how social aspiration, progressive or hierarchical, was recast in its very enactment.

The paradoxes of the promise, involving progress and hierarchy, plague liberalism in multiple contexts. Historians and critics are well aware that liberal ideals and statuses did and do coexist, in the promise of marriage as elsewhere. But what does the coexistence mean for liberalism? Liberally-inclined histories have tended to put the coexistence down to the process of historical change and social reform, which is uneven, difficult, never perfect, yet progressively oriented. Radically-inclined histories, meanwhile, have often concluded that liberalism is exposed in its true hierarchical—classed and patriarchal—colors.<sup>1</sup>

This Article departs from familiar orthodoxies to make new methodological and conceptual contributions to an already worn debate. It studies the promise of marriage in two sites of social meaning inextricably bound with the rise of

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<sup>1</sup> I am oversimplifying for introductory purposes. A more nuanced picture of these debates is explored in the conclusion.

liberalism – private law and realist fiction<sup>2</sup> – to gain insight into nineteenth-century liberal thought as a living phenomenon, a consciousness that assumed its historical shape in concrete sites in which idealist articulations were interpreted, applied and transformed under the pressures of ongoing concretization.<sup>3</sup>

The study suggests that liberalism was neither a progressive elimination of statuses, not even an attempted elimination, nor a preservation of statuses that ultimately kept them in place. Neither alternative is a convincing account of the history at stake here. The prevalence of the liberal/radical, progress/hierarchy binary has become almost an obstacle to understanding. Liberalism was in fact a new interpretation of statuses, which achieved two seemingly paradoxical results. On the one hand, it made statuses part of an acceptable order of things and secured their persistence; on the other, it altered the social role of statuses by denying their function as both dominant explanations and goals of social relations.

It is important to appreciate how the complex process that kept liberal ideals and statuses in coexistence took its shape, whether readers accept the modified account of liberalism just proposed or stick with their initial interpretation of the process as either progressive or regressive. This study suggests that the coexistence of liberal ideals and statuses was a conceptually-patterned one; that is, liberal ideals and statuses were fused together through persistent conceptual patterns that repeatedly played out in historical liberal thought. The habituality of these patterns means that accounts of social struggle, as well historical chaos, are not enough in coming to terms with the entanglement of liberal ideals and statuses. These patterns, functioning somewhat like a cultural code—historically contingent, yet sticky through their embeddedness in culture, despite their limits for any interest, power, or normative aspiration—shed new explanatory light on the forms of persistence of statuses in liberalism in late modernity.

Part I recounts the historical common wisdom on the emergence of the ideals of love and contract, closely tied with the emergence of two central institutions of modern capitalism: the conjugal family and the free market. I highlight the liberal problematization of statuses signaled by love and contract and the persistence of statuses, all generally familiar.

Parts II and III explore the forms of entanglement of liberal ideals and statuses through two conceptual patterns: containment and withdrawal. Containment refers to conceptual moves in which considerations of status were contained within the frameworks of love and contract and, consequently reduced in magnitude, their effects and relevance redirected. Withdrawal gestures at a

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<sup>2</sup> For a discussion of the relation of nineteenth-century contract law and realist fiction to liberalism see Anat Rosenberg, *Separate Spheres Revisited: On the Frameworks of Interdisciplinarity and Constructions of the Market*, 24 LAW & LIT. 393 (2012).

<sup>3</sup> This is not to deny that liberal philosophy might also merit reassessments. For a suggestion in this direction, see Amanda Anderson, *The Liberal Aesthetic*, in THEORY AFTER 'THEORY' 249 (Derek Attridge & Jane Elliott eds., 2011).

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different conceptual setup. The application of the liberal framework—contract and love—was bordered and limited, leaving areas beyond it to forces of status. Yet because liberal ideals retained relevance in areas treated as the core of social relations, the delimitation was construed as inconsequential, and cultural energies were accordingly rechanneled. Parts II and III closely examine these patterns.

To discuss love's entanglements with statuses, Parts II and III rely on two texts: Charles Dickens' *Bleak House*<sup>4</sup> and George Eliot's *Middlemarch*,<sup>5</sup> and offer close readings in discourse. These two familiar novels, richly various in style, themes, publication, authorial background and much else, reveal details of the liberal treatment of love. To discuss contract, I turn to legal histories to capture mechanisms broader than discourse, focusing on classical contract law and developments in the law and litigation of marriage promises.

The division of labor in sources is attractive not because I seek to reinforce disciplinary distinctions, but rather because each of these historical sites of social meaning is widely considered a central, if not the central, locus of nineteenth-century liberalism with respect to the subject matter at stake: law is a prominently studied liberal thought on contract; novels are a prominently studied liberal thought on love—affectionate marriage.<sup>6</sup> At the same time, the use of sources allows an examination of different registers, moving between the subtleties of discourse and broader and more abstract phenomena like litigation practice or legal theory. While this move entails some losses, the gain is an appreciation of the pervasiveness of containment and withdrawal.<sup>7</sup>

The conclusion considers the implications of the analysis—particularly the finding of persistent conceptual patterns keeping liberal ideals and statuses entangled—for ideology critique. It also briefly turns to present-day debates about liberal societies, in which similar conceptual patterns involving similar concerns, seem to retain relevance.

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<sup>4</sup> See generally CHARLES DICKENS, *BLEAK HOUSE* (Penguin Classics, 2003) (1853).

<sup>5</sup> See generally GEORGE ELIOT, *MIDDLEMARCH: A STUDY OF PROVINCIAL LIFE* (David Carroll ed., Oxford University Press 1996) (1872).

<sup>6</sup> The classical model of contract in nineteenth-century law embodied a vision of the social order centered on individual free will. In the legal scheme of things, societal will was relegated to the background while autonomous individuals, at the very heart of private law, drove economic life forward. See Anat Rosenberg, *Contract's Meaning and the Histories of Classical Contract Law*, 59 MCGILL L. J. 165 (2013) (discussing and reviewing historical debates).

Within literary studies, Ian Watt paved the way for extensive analyses of the courtship plot, leading up to marriage, as the defining feature of the novel genre. Though Watt's thesis has been the fruitful subject of endless controversy, it is widely acknowledged that affectionate marriage, associated with the liberal celebration of individual freedom, is central to the nineteenth-century novel. See IAN WATT, *THE RISE OF THE NOVEL* 135-73 (1957).

My argument, it should be clear, does not preclude but rather expects (and marginally ventures into) similar patterns in a study of contract in novels, love in law, as well as additional sites of social thought, on a variety of registers.

<sup>7</sup> This point bears upon forms of ideology critique. I revisit it in the conclusion.

## I. A LIBERAL PROBLEMATIZATION OF STATUS

It is a commonplace of nineteenth-century history that ascendant liberal ideals lent support to new institutions. Most familiarly, the rise of the ideal of love is deeply entangled with the history of the nuclear family, while that of contract is tied with the market. The market and the family together comprised the civil society of the late-modern social order.

The nuclear family, based on wife, husband and children, was a new familial structure gradually assuming salience from the late seventeenth-century. No longer an economic unit of production extending to kinship ties as remote as grandparents, aunts, uncles, cousins and more, all ruled by exclusive patriarchal control, the new institution was a small independent familial group. As a new economy of wage labor emerged and workplaces were removed from the home, the family became a unit of consumption.<sup>8</sup>

The new form of family involved an emphasis on affection between wife and husband. Love's centrality signaled a problematization of alternative bases for the marital union, those associated with status, which circumscribed the marrying couple with predetermined societal belongings and engulfed their relation with social expectations of fit pertaining to pedigree, wealth, and politics.

In its late modern form, love came to signal primarily a problematization of considerations of class, with its modern basis in wealth.<sup>9</sup> As literary representations worked through courtship plots, they increasingly suggested that persons motivated by class aspirations were marrying for the wrong reasons, a notion embraced today no less than in the nineteenth century.<sup>10</sup> In its more ambitious versions, love could problematize any status hierarchy; in particular, it evoked an image of equality between man and woman.<sup>11</sup>

The processes signaled by the changing fortunes of families also involved a second institution of late modernity: the economic sphere of the market. The

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<sup>8</sup> See Steven Horwitz, *Capitalism and the Family*, FREEMAN, July-Aug. 2007, at 26 (giving a concise general account). On the debate concerning the family's role following its decline as a unit of production, see Louise A. Tilly, *The Family and Change*, 5 *THEORY & SOC'Y* 421 (1978) (reviewing ELI ZARETSKY, *CAPITALISM, THE FAMILY AND PERSONAL LIFE* (1976) and EDWARD SHORTER, *THE MAKING OF THE MODERN FAMILY* (1975)) (Tilly himself argues that the family's importance lies not in its ideological construction (primarily as a realm of personality development), but in its ability to supply the resources required in an evolving economic world: it sponsored migration, found jobs, provided services for workers, and raised the future workforce.)

<sup>9</sup> As I use it, class is a form of status, that is, a categorization based on a group identity or socially-generic role. See MICHAEL MCKEON, *THE ORIGINS OF THE ENGLISH NOVEL, 1600-1740* 162-67 (1987) (discussing the distinction and interrelation between "status" and "class" in historical terms).

<sup>10</sup> The idealization of marriages based on affection supported additional liberal commitments, like the significance of ordinary life and personality development. See, e.g., CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 285-302 (1989).

<sup>11</sup> See, e.g., SUSAN KINGSLEY KENT, *SEX AND SUFFRAGE IN BRITAIN 1860-1914* 80-81 (1987); WENDY S. JONES, *CONSENSUAL FICTIONS: WOMEN, LIBERALISM, AND THE ENGLISH NOVEL* (2005) (arguing that the Victorian meaning of love as passion was a less prudent – hence more potentially liberating ideal – than the eighteenth-century notion of love as companionship).

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market, denoting a range of activities centered on material exchange among individual agents, and often described in Max Weber's terms of rationalization, reached a high point in the nineteenth century.<sup>12</sup>

Contract was the core relation associated with market exchange. Much as love did for the family, so here the centrality of contract signaled a problematization of status as a basis for economic relations.<sup>13</sup> The conceptual distinction was made famous by Henry Sumner Maine's "movement from status to contract."<sup>14</sup> Maine placed contract squarely within what he saw as a new and progressive society. As legal thinkers developed contract law, they distinguished laws made by individuals from laws imposed by society—state law—with contract law as the paradigm of individual-made laws. In so doing, legal thinkers implicitly insisted that the economy was no longer driven by group identities and social roles.<sup>15</sup>

Yet "problematization" is very far from elimination. The imagery at work in accounts of the historical rise of love and contract often intimates that statuses were

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<sup>12</sup> This is not to say that all commentators agree on how distinctive the nineteenth century was. Controversy abounds on questions such as whether the nineteenth century represents the salient conclusion of an evolutionary process or a dramatic revolution. See ALAN MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM: THE FAMILY PROPERTY AND SOCIAL TRANSITION* 34-61, 204-06 (1978) (reviewing the various positions). Macfarlane himself argues that English capitalism dates at least as far back as the thirteenth century. *Id.* The latest periodization should probably be credited to KARL POLANYI, *THE GREAT TRANSFORMATION* (1967), who, as his title suggests, viewed the nineteenth century as a revolutionary break with the past.

<sup>13</sup> A question beyond my scope here is the internal relations between love and contract. For a review of the debate expressing a sense of contradiction between them alongside many compatibilities, see GINGER S. FROST, *PROMISES BROKEN: COURTSHIP, CLASS AND GENDER IN VICTORIAN ENGLAND* 141-60 (1995). The opposition between emotional and economic concerns is most relevant from the perspective of separate-spheres ideology, which encouraged the drawing of lines between the rational pursuit of economic interest and emotionality. There is much reason to doubt that this ideology was universally embraced in the nineteenth century. See Rosenberg, *supra* note 2. The important point for this Article is that the coexistence of affection and contract worked to thicken the liberal framing of social relations. The language of contract, like the language of love, invoked images whose common logic – despite all contradictions – was understood as problematizing status.

<sup>14</sup> HENRY SUMNER MAINE, *ANCIENT LAW* 165 (Ashley Montagu ed., 1986) (1864).

<sup>15</sup> Until the classical model was established in law, status – or social role – was an operative source for contract rules and a central organizing concept in legal thinking. Treatises dealing with contract, like that of Blackstone, were organized according to relations. Under the classical system of meaning, however, status came to exist as the conceptual opposite of rights in the abstract, rather than the medium for the organization and exposition of rights in the particular. The idea of rights in the abstract – that is, rights of persons having no peculiarities of status at all – became the center of legal attention and the new organizing conceptual framework for contract law. The elements composing particular statuses were then fragmented and dispersed, rather than treated as the elements of operative wholes. See DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 186-94* (2006); see also Singer's account of classical thought's emergence in opposition to status, which became the exception. Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 477-82 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)). Atiyah confirms the same point. P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 416 (1979). While Kennedy's periodization of classical thought is relatively late, it is important to appreciate that the "suppression of status," as Atiyah called it, was observable before the last decades of the nineteenth century. The changes can thus be viewed in terms of intensification. For more on the differences in periodization among historians of classical contract see Rosenberg, *supra* note 6, at fn. 21.

meant to be eliminated. Consider, for instance, Anthony Giddens' argument that the ideal of love, the "pure relationship," was "explosive in its connotations for preexisting forms of . . . power."<sup>16</sup> Or consider Albert Venn Dicey describing, much earlier, the nineteenth-century individualist embrace of contract as the "readiest mode of abolishing a whole body of antiquated institutions."<sup>17</sup> Elimination, however, was never in the cards. Close to our hearts as love may be, class had never lost its relevance for conjugal families, as the history of the promise of marriage shows. Patriarchy too lurked in the enduring power of Victorian gender roles. Economic relations, like familial ones, were never worked pure of status biases, despite the popularity of Maine's aphorism. The promise of marriage, a contract located in the grey zone between market and family, was the one contract in which women, whose role in the economy was a source of anxiety and whose legal agency was for the most part denied under the doctrine of coverture,<sup>18</sup> were necessary parties. But here, as elsewhere, gender roles, alongside class divisions, were paramount, making for decades of critique by gender and market historians.<sup>19</sup>

Forms of power and old institutions were stirring, but they were hardly exploded. The next Parts offer a new assessment of this history through the patterns of containment and withdrawal.

## II. CONTAINMENT

Containment was an inclusive move. Under containment, liberal frameworks faced statuses by making them part of the governing structure. This effectively subsumed the status logic under the reigning liberal framework, turning it to use within the discourse of free will, choice, and agency, and effecting a reduction in magnitude and a redirection of effects and relevance.<sup>20</sup>

This Part reads central features of breach-of-promise law as a way of containing class and gender biases within classical contract. It then reads instances of containment of the same social forces in affectionate courtship plots in novels. The two registers of discussion trace statuses' conceptual entanglements with

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<sup>16</sup> ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE, AND EROTICISM IN MODERN SOCIETIES* 2 (1993). Giddens refers particularly to gender power. *Id.*

<sup>17</sup> A.V. DICEY, *LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY* 151 (2d ed. 1963); *see also* AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 1 (1998) (discussing William Graham Sumner's similar understanding in the American context).

<sup>18</sup> For an example of an account focused on the regime's denial of women's contractual capacity, *see* MARGOT FINN, *THE CHARACTER OF CREDIT: PERSONAL DEBT IN ENGLISH CULTURE, 1740–1914* 265–66, 325 (2003). Full contractual capacity was given to married women only in the interwar years. *Id.*

<sup>19</sup> *See* Rosenberg, *supra* note 6, at Part III (reviewing some of these critiques beyond the promise of marriage).

<sup>20</sup> The conceptual process brings to mind a wonderful children's book by Mercer Mayer. MERCER MAYER, *THERE'S A NIGHTMARE IN MY CLOSET* (1968). A child, afraid of a monster hiding in his closet every night, overcomes his fear by domesticating the creature, finally bringing it into his bed. *Id.*

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Victorian liberal ideals and the transformations those entanglements encouraged.

*A. Containing Status in Contract*

The action for breach of promise in England reached its nineteenth-century form following a gradual long-term decline in the availability of ecclesiastical remedies, reaching its peak with the Hardwicke's Marriage Act of 1753<sup>21</sup> and developments in the common law civil action. Breach of promise of marriage could be redressed by common law courts from the Interregnum onwards, the last decades of the seventeenth century.<sup>22</sup> However, when the classical model of contract rose to prominence in nineteenth-century legal thinking, and the notion of relation was replaced with the abstract idea of individual will, the promise of marriage, though theoretically and practically processed as contractual, acquired peculiar characteristics. These characteristics distinguished the promise of marriage from other contracts, as well as from the litigation practice of marriage promises in earlier decades. The rise-and-fall story of the peculiarly-nineteenth-century legal action is periodized from the late-eighteenth to the late-nineteenth century, its high tide occurring in the mid-decades and its slow decline from the 1860s or 1870s in terms of chances of winning, amounts of damages,<sup>23</sup> and public approval.<sup>24</sup> While not abolished until 1970,<sup>25</sup> the number of suits was on sharp decline from 1900 onwards.

When historians rationalize the nineteenth-century fortunes of the action, different explanatory frameworks come into play. One question here is how important the contractual framing of the promise of marriage really was. Some historians, like Patrick Atiyah, view doctrinal developments at the high point of litigation as significant, a telling sign of the triumph of the classical model of contract, evident by its effect on an area outside its paradigmatic ambit.<sup>26</sup> Susie Steinbach argues that the promise of marriage, its rise and fall, can make little sense outside the contractual ideology of the Age of Contract.<sup>27</sup> On the other hand, historians who view the class and gender story as paramount, like Ginger Frost and

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<sup>21</sup> Lord Hardwicke's Marriage Act, 1753, 26 Geo. 2, c. 33 (Eng.). The Act was intended to stop clandestine marriages by requiring bans or a license as well as a church-administered ceremony, and establishing a mandatory recording of marriages. The Act deprived the ecclesiastical courts of their power to compel marriage on the grounds of a promise of any kind, leaving disappointed promisees with only a claim for damages in civil courts.

<sup>22</sup> FROST, *supra* note 13, at Ch. 1.

<sup>23</sup> For some figures, see Susie L. Steinbach, *Promises, Promises: Not Marrying in England, 1780-1920*, at 212-13, 234-98 (May 1996) (unpublished Ph.D. dissertation, Yale University) (on file with the Yale University Library).

<sup>24</sup> Heated public debates followed the amendment of the law of evidence allowing female plaintiffs to act as witnesses in their own suits. See The Evidence Further Amendment Act, 1869, 32 & 33 Vict., c. 68 (Eng.).

<sup>25</sup> Law Reform (Miscellaneous Provisions) Act 1970, c. 33, § 1 (Eng.).

<sup>26</sup> ATIYAH, *supra* note 15, at 401.

<sup>27</sup> Steinbach, *supra* note 23.

Saskia Lettmaier,<sup>28</sup> tend to dismiss the contractual framing as thin cover, if not a total misfit, little helpful in explicating what was going on.<sup>29</sup> The middle ground is perhaps best captured in Michael Grossberg's account of similar developments in American law: "[t]he revamped breach suit illustrates not only the pervasive influence of contractual ideology and romantic love on domestic relations, but more directly a new judicial recognition of the gap between the law's theoretical assumption of contracting equality between men and women and the reality of feminine powerlessness."<sup>30</sup> Put otherwise, liberal ideals and statuses were both influential; the story is one of internal contradictions, a push and pull, with interpretations about the victorious side up for grabs.<sup>31</sup>

The conceptual polarization about explanatory frameworks, I suggest, should be reread to make a single story of living liberalism. The contractual framing cannot be dismissed, reduced to mere legal fiction, or ideological blindness. Its historical salience renders such interpretations unconvincing. The power of gender and class too cannot be discounted. Yet contradiction and compromise do not exhaust this history; the continual maintenance of a contractual framing for a gender-and-class problem exposes the containment of forces of status within liberal frameworks in a manner that altered them all.

The following discussion first introduces central aspects of history of breach of promise<sup>32</sup> and then explains this history as a pattern of containment.

### 1. Suing for Breach of Promise in the Nineteenth Century

Nineteenth-century plaintiffs seeking to substantiate a claim for breach of promise had to establish both contract and breach, in accordance with classical

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<sup>28</sup> FROST, *supra* note 13; SASKIA LETTMAIER, *BROKEN ENGAGEMENTS, THE ACTION FOR BREACH OF PROMISE OF MARRIAGE AND THE FEMININE IDEAL, 1800-1940* (2010).

<sup>29</sup> Note that Steinbach does not deny the status biases of the action for breach of promise. In fact, her analysis turns on gender and class no less than those of Lettmaier or Frost. Instead, Steinbach argues that women were able to bring and win suits in large numbers due to the influence of contract (and sentiment). Steinbach, *supra* note 23. Frost, in the meantime, has much to say on the sentimental ideal as well. See FROST, *supra* note 13. The dominant arguments of historians, however, suffice here.

<sup>30</sup> MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY* 38 (1988). Grossberg ultimately seems to view gender as the dominant framework, the "larger goal." *Id.* at 39.

<sup>31</sup> *See id.*

<sup>32</sup> This review draws on three studies: Ginger Frost's *Promises Broken*, Saskia Lettmaier's *Broken Engagements*, and Susie Steinbach's *Promises, Promises*. See FROST, *supra* note 13; LETTMAIER, *supra* note 28; Steinbach, *supra* note 23. These studies serve the methodological effort of this Article to examine not only discourse but also broader social phenomena: they offer elaborate accounts of litigation and surrounding practices; they contain details of parties, procedures and evidence, claims and defenses, and figures for the assessment of damages. At the same time, the studies represent, as we have seen, competing explanations of this history. Ginger Frost examined 875 breach of promise suits in English assize courts, most of them between 1850 and 1900. See FROST, *supra* note 13. Saskia Lettmaier examined 250 cases decided by a variety of English courts, most of them between 1800 and 1940. LETTMAIER, *supra* note 28. Susie Steinbach examined 345 cases, 322 of which were between 1780 and 1920 – the period she defines as the rise (1780-1870) and fall (after 1870) of breach of promise suits. Steinbach, *supra* note 23.



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contract doctrine. Classical doctrine required promise and acceptance supported by consideration for a binding contract to exist. Mutual promises would constitute both acceptance of one another and consideration. Thus a plaintiff's writ would customarily state that the couple had promised to marry one another; plaintiff then had to prove these mutual promises.

The plaintiff also had to claim and prove breach of contract. The writ would customarily submit that the defendant had "neglected and refused" to marry her, that the plaintiff had always been "ready and willing" to marry him, and would show evidence of the defendant's refusal.<sup>33</sup>

The statement of defense would deny or admit the contract, deny or admit its breach, and, if denied, add several contractual defenses in case the denial failed. In any event, the statement of defense would add claims aimed at mitigating damages, all of which were pursued at trial.<sup>34</sup>

Within this general contractual framework, historians point to peculiarities of the promise of marriage, arising primarily from perceptions of gender. First, while formally available to both men and women, in practice the action was restricted to women. Over 90% of plaintiffs in the nineteenth century were women.<sup>35</sup> Moreover, unlike other contractual causes of action, the action for breach of promise was personal, and did not survive the death of the plaintiff,<sup>36</sup> solidifying the effective limitation to female plaintiffs. Male plaintiffs were actively discouraged from filing suits for breach of promise. Men stood a good chance of losing, and, even when they won, men were often awarded minimal damages and denied compensation for legal costs, which could be considerable.<sup>37</sup>

The other side of the coin was that women were not only near-exclusive plaintiffs, but usual winners in court.<sup>38</sup> Judges usually found for women; the tendency was exacerbated by juries, who were more likely to ignore judges' summations when they found for defendants.<sup>39</sup> Judges in turn confirmed these

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<sup>33</sup> Often claims were brought only after the defendant had married another woman. However, breach could also be proven by showing that the defendant had evinced unwillingness to marry toward the plaintiff, her family, or friends.

<sup>34</sup> There is some controversy concerning the standard move by defendants. While Frost argues that denial was customary, Steinbach argues that in most cases defendants admitted to both the promise and its breach. See FROST, *supra* note 13, at 21; see also Steinbach, *supra* note 23, at 141. The question is not central in considering the contractual framework of breach of promise.

<sup>35</sup> LETTMAIER, *supra* note 28, at Ch. 1; FROST, *supra* note 13, at Chs. 2, 8, 186 n.10; Steinbach, *supra* note 23, at Ch. 4.

<sup>36</sup> The rule was set in *Chamberlain v. Williamson*, (1814) 105 Eng. Rep. 433 (K.B.).

<sup>37</sup> Male plaintiffs won in only 28% of the cases in Steinbach's sample. Steinbach, *supra* note 23, at 214. On costs, see *id.* at 210-11.

<sup>38</sup> Steinbach's statistical analysis of over 300 cases reveals a success rate of 82% over the whole period from 1780 to 1920. Steinbach, *supra* note 23, at 214. As she suggests, "[t]he guiding principle before 1870 was that, if possible, a woman should win her suit." *Id.* at 135. Frost, who concentrates on the latter half of the nineteenth century, indicates an 80% rate of success. FROST, *supra* note 13, at 159.

<sup>39</sup> Frost finds that juries agreed with 77% of summations in favor of plaintiffs, and 51% of summations in favor of defendants. Juries also tended to ignore the defendant's ability to pay more than judges, who were pragmatic here. *Id.* at 34.

trends: they did not set aside jury decisions, though they could.<sup>40</sup> The bias toward female plaintiffs stands in contradistinction to earlier periods, in which both filing suits and winning them were distributed more equally among men and women.

Women's prominence in breach of promise cases was part of a cultural construction of a silencing gender role, ratifying a picture of women as submissive, delicate, and dependent. Proof of contract in cases of breach of promise reflected an expansive evidentiary policy. It relied heavily on social courting expectations, with signs such as intimate attention or gifts of jewelry as part of the evidentiary array, alongside witnesses, letters, and, after a 1969 amendment of the law of evidence, a testimony by the plaintiff corroborated by material evidence,<sup>41</sup> a category that left latitude to courts. Both the array of evidence and the fact that it was needed—for most promises were oral and between the couple alone—reinforced a picture of courting in which proactive and confident men entice submissive, innocent women, too delicate to require any clear or observable commitments. The counter-promise was, within this picture of gender roles, more difficult to prove, and here the promise of marriage evinces a marked departure from contract doctrine. Silence on the part of the woman was construed as acceptance of the promise—and counter-promise and consideration—in contradistinction to the standard denial of silence as acceptance of an offer.<sup>42</sup>

Another peculiarity lies in the pursuit of defense. Defendants could raise the defense of unchastity, an instance idealizing the womanly virtue of sexual innocence and men's legitimate expectation of sexual exclusivity.<sup>43</sup> Lettmaier argues that the theoretical basis for the defense within contract doctrine was never made clear, though one case came close in conceptualizing it as failure to disclose a material fact.<sup>44</sup>

Other peculiarities included the question of exoneration, which, for male defendants in this particular contract suit, was practically impossible to prove,

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<sup>40</sup> *Id.* at 35. Judges did deny costs to the winning party when they felt the decision was incorrect, and sometimes stayed execution until appeal. *Id.*

<sup>41</sup> LETTMAIER, *supra* note 28, at 133.

<sup>42</sup> *Id.* at 36-38. In addition, the promise could be oral despite some equivocality about the applicability of the Statute of Frauds, and no stamp tax was required for written evidence to be admitted. *Id.* at 32-35.

<sup>43</sup> In the course of the nineteenth century, unchastity was gradually limited to physical unchastity, i.e. sexual intercourse, though "mere" loose conduct could impact damages. The defense had a few qualifications: Unchastity had to be proven; it had to have been unknown at the time of the promise; it had to be the reason for breaking the promise; and had to have been with another man, not the defendant himself. Note that holding the defendant responsible for sexual intercourse between himself and the plaintiff was part of the construction of men as the aggressive sex, the only side to push for intercourse, and the one expected to assume responsibility for it. The point of the defense of unchastity, then, was not simply the sexual purity of women, but a more complex construction of the interaction between the couple: the man was entitled to purity and exclusivity, but if he had knowingly forgone them, he was to bear responsibility for his decision. *Id.* at 41.

<sup>44</sup> *Id.* at 44 (referring to *Beachey v. Brown*, (1860), E. B. & E. 796). Even this formulation did not clearly fall within classical doctrine, which protected from fraud narrowly, and did not generally offer redress for non-disclosure. ATIYAH, *supra* note 15, at 468-69.

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despite its theoretical availability here as in other contracts. The passive picture of femininity, which made for inaudible acceptance, was also reluctant to imagine women willfully withdrawing from their engagements.<sup>45</sup>

The investment in gender roles favored women in these cases; male defendants were locked into prescribed roles which limited their ability to defend their position. While women played into the deceived-maiden role, men assumed the role of the responsible initiator in control of the relationship, and were thus reluctant to appear weak and victimized.<sup>46</sup>

Important in its peculiarity was the award of damages. An earlier focus on pecuniary loss<sup>47</sup> was eclipsed by a focus on psychological damage, with compensation addressing damages such as loss of happiness and consequently, health,<sup>48</sup> injured feelings, wounded honor, humiliation, and social degradation, while still allowing for pecuniary losses.<sup>49</sup> Damages were part of the picture of virtue in distress. Punitive damages, usually unacknowledged in contract, were available for plaintiffs in the presence of aggravating circumstances, important among them seduction under promise of marriage.<sup>50</sup> This involved picturing women as trusting and liable to be taken advantage of, while confirming sexual virtue as a critical condition of marriageability. On the other hand, damages could be reduced, possibly to negligible levels, under mitigating circumstances, important among them an unfeminine conduct of the plaintiff.<sup>51</sup> Looks too were relevant to damages, with youth and beauty securing higher awards. As Lettmaier puts it, everything that brought the plaintiff closer to the ideal of the angelic child-woman would enhance the damages; everything that separated her from the ideal would detract from the damages she would receive.<sup>52</sup>

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<sup>45</sup> LETTMAIER, *supra* note 28, at 45-47.

<sup>46</sup> See FROST, *supra* note 13, at 40-57 (discussing gender expectations and their contradictions).

<sup>47</sup> Damages were calculated to compensate for the pecuniary value of a lost marriage, or, if that expectation could not be proven, for out of pocket expenses in preparation for marriage. See LETTMAIER, *supra* note 28, at 18-55. Steinbach agrees that the focus until 1780 was on pecuniary loss but suggests that most cases had been based on part-executed contracts, and so damages were addressing reliance rather than pure expectation. See Steinbach, *supra* note 23, at 184. This despite the fact that a wholly-executory promise of marriage was theoretically held actionable from the seventeenth century. *Id.*

<sup>48</sup> Failing health, as a result of emotional distress, was considered a demonstration of female virtue. *Id.* at 147-48.

<sup>49</sup> These were general damages, which did not have to be proven. According to Lettmaier, these were the chief source of legal classificatory trouble, seemingly more appropriate for tort than contract. LETTMAIER, *supra* note 28, at 48-49 n.130; see also Steinbach, *supra* note 23, at 118-19. Steinbach also notes that despite the departure from standard contractual damages here, the centrality of heartbreak also meant that otherwise wholly executory contracts were actionable, in line with the classical model of contract. *Id.* at 190.

<sup>50</sup> See LETTMAIER, *supra* note 28, at 50-51 (calculating the average increase in damages in cases of seduction); see also GROSSBERG, *supra* note 30, at 45-49 (discussing the newness of these damages in the action's history).

<sup>51</sup> For instance, if she had been the one doing the courting.

<sup>52</sup> LETTMAIER, *supra* note 28, at 72.

All of these peculiarities speak to an idealization of gender roles in courtship. While each alone could possibly be explained away, gender historians are surely correct in identifying their striking cumulative effect. Lettmaier carefully analyzes the construction of true womanhood as virtuous, submissive, and delicate, and by the same token an object, arguing that it was this vision which molded the action into its nineteenth-century form. Frost, meanwhile, brings into the picture the idealization of manhood, which she argues was more important than that of womanhood for the story of breach of promise.<sup>53</sup> Frost suggests that the construction of manhood, in terms of the independent provider in charge of the relationship, entailed limits as well as benefits and explains the historical development.

In addition to gender, social class was part of the driving forces behind the legal picture, particularly the level of damages. Amounts awarded were relatively high on average until the closing decades of the nineteenth century, when the breach-of-promise action fell out of favor.<sup>54</sup> The action was recognized at its high tide and afterwards as one aimed at assisting and protecting low class women whose economic prosperity was seriously threatened by broken engagements.<sup>55</sup> The question of class also reached deeper, with levels of damages varying in relation to class differentials between plaintiff and defendant. Steinbach's analysis indicates that juries were more sensitive when there was no class difference, and less generous when there was, with damages lower the greater the class disparity between the couple. Put differently, juries were suspicious toward cross-class marriages.<sup>56</sup> Class, like gender, thus had an important role to play in the legal response to breach of promise.<sup>57</sup>

## 2. Breach of Promise Law as Containment

The overall picture emerging from histories of the legal action for breach of promise is one of a contractual legal framing, in which peculiarities driven by forces of status play a major role. The combination was not a curtailment of

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<sup>53</sup> FROST, *supra* note 13, at 46.

<sup>54</sup> The median amount found by Steinbach was £200, which could have supported a middle-class family comfortably for one year. Steinbach, *supra* note 23, at 223. Frost's median is £100, but her calculations cover a period excluded by Steinbach – after 1869. FROST, *supra* note 13, at 159. Most plaintiffs were lower, middle, or upper working class, and the amounts awarded were thus economically significant. *Id.*

<sup>55</sup> The identification of classes who mostly utilized the suit is generally agreed among researchers. Frost includes in the lower-middle class small shopkeepers, master workers, and middling farmers, and in the upper-working class, anyone who worked for wages in industry, as a servant, or as a tenant farmer, who had regular employment and steady wages. *Id.* at 24.

<sup>56</sup> Steinbach, *supra* note 23, at 231. Cases of class disparities were a relative minority (34% or less). FROST, *supra* note 13, at 232.

<sup>57</sup> Class also had a role to play in the background for litigation. Frost argues that class was a major factor in break-ups leading up to suits in assize courts. Most frequently, the interplay between the desire for love and an economic inability to sustain it made for broken promises, in a complex interaction between class and the ideal of affection. *Id.* at 141-60.

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contract for gender and class, nor contract's ultimate victory; it was a containment structure.

The point of departure, which critics of Atiyah have been too quick to dismiss, was the classicist insistence that in the presence of manifest choice, courts would hold promisors to their obligations. The contractual framing was not mere procedure or empty rhetoric. It was substance, enacting classical contract thought's reluctance to second-guess the desirability of a contract. Liability depended upon the existence of a valid contract, not upon whether upholding it was desirable or just; the question whether the couple could form a functioning union was irrelevant in determining legal liability. Determinations of liability on a formal basis validated the ideal liberal picture of social relations created by abstractly equal individuals capable of autonomous choice, needing no social policing. Thus, classical contract's main conceptual underpinning – that of respecting whatever individuals chose to do – remained put.<sup>58</sup>

The idiosyncratic rules and practices on proof of counter-offer and acceptance, on unchastity and exoneration as defenses, and on damages for psychological distress, despite their departure from classical doctrine, operated within the classical attribution of liability based on choice and targeted the promisor as a responsible individual. Indeed, because his counter-party was a woman, and of relatively low class, he was, if anything, extremely responsible. Observe the containment involved here: positioning the woman as plaintiff, and plaintiff only, allowed classical discourse to rehearse the standard language of contractual agency and responsibility with little qualms. Men as virtually sole defendants were treated as contracting individuals expected to answer to their obligations. The practical unavailability of exoneration, for example, meant that responsibility was individualized and located in one party only. This left the other party with no possible role to play, in a construction bringing the ideal picture of the autonomous contracting individual to the verge of caricature. At the same time, women's submissiveness, neediness, and economic dependence were channeled through the contractual position of a promisee demanding performance of a

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<sup>58</sup> At the same time, in the absence of affection, damages would be low. In that case, one might suspect that the contractual framing was thin after all; rather than translate liability into material rights, a social policing of the contract's desirability would come into play through the jury's determination of damages. Juries, not the parties, one might argue, were the ones to control the meaning of the contract – so the classical framework didn't hold. This point is valid, but to a limited extent. To see that the contractual framing was not very thin, note two points. First, the celebration of affection was, as we have seen, a conceptual investment in the liberal frame of reference; thus, denying high damages in its absence was not necessarily damaging for the ideological framework of contract. Second, a major goal of filing a suit for breach of promise was reestablishing the woman's virtuousness, so, holding a promisor liable for breach bore significant social meanings which that were not exhausted by the level of damages. Indeed, the very agreement to marry a woman was a sign of her virtuous character (which explains why breach was so damaging) – a fascinating enactment of the classical paradigm in which value is definitively signified by consent. See Steinbach, *supra* note 23, at 24 (noting lack of discussion of a marriage's prospects of happiness), 158-59 (discussing juries' attempts to trace a love story), 195-97 (showing that damages were not the only remedy sought through trials).

contract. The problematization of the ideal contracting individual, which would occur if roles were reversed and women were to assume the position of responsible promisors, was avoided.<sup>59</sup>

Since only men were cast into the role of the autonomous individual, breach of promise cases could exhibit some of the extremities associated with the arm's-length competitive ideal of classical contract thought, among them the often-used example of the new refusal to let men off the hook because of ill health.<sup>60</sup> This is the kind of refusal to allow equitable sharing and consider changed circumstances that had won classical law its disrepute.

The delimitation of the action to women in the nineteenth century allowed classical contract law to contain gender differentials, even turn them to effective use, while maintaining its terms of art of abstract autonomous individuality.

Containment offers a new angle from which to observe what is customarily seen as an inherent contradiction in the promise of marriage. The legal action, historians have noted, was founded on a paradox: it framed women as submissive and fragile just when they were taking the initiative and appearing in a public arena for themselves.<sup>61</sup> The ideal of female delicacy was threatened by the agency and also often vindictiveness and money-seeking motives associated with filing a suit. Female submissiveness under marital coverture, a formal annulment of agency, is similarly hard to square with the agency involved in suing for breach; the action seemed to depend on an agency erected only to be annulled. The paradox disturbs otherwise neat stories of gender and class. The paradox, however, largely disappears when you realize that this was part of a containment structure; it was in this form that gender roles could work within the classical contractual framework. What appears as an irreconcilable contradiction from a gender-only perspective becomes clearer when read through the demands of contract, which was asserted by containing social roles.

The doctrinal structures of breach of promise and their nineteenth-century application clarify that social roles were not eliminated, but rather reinforced by the contractual framework. However, at the same time, their workings were altered: social roles were channeled to serve a liberal picture of the promise of marriage based on freedom of choice rather than signal an alternative. This liberal channeling not only reinforced, for those who came to court, the liberal commitment to respect whatever individuals chose to do, it also unsettled the

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<sup>59</sup> The gendered division of labor between the contract parties here explains why historians of the action, like Frost and Lettmaier, disagree whether the cultural construction of manhood or womanhood was more important for the story. One can emphasize either men's enhanced responsibility in these cases or women's diminished agency; the two aspects, however, were complementary.

<sup>60</sup> The change is attributed to *Hall v. Wright*, (1860) 120 Eng. Rep. 688.

<sup>61</sup> Nineteenth-century women could not be judges, barristers or jurors, and their appearance as plaintiffs was usually in their roles as wives, mothers, or workers. Lettmaier's analysis centralizes this paradox, reading the evolving treatment of female plaintiffs as different ways of coming to terms with it. LETTMAIER, *supra* note 28.

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implications of status by letting low-class women appear in courts and win hundreds of suits. It unsettled gender roles as well as class power. This effect was not a matter of significant material redistributions—though some redistribution was taking place—but rather a stirring of symbolic social roles. Whether these suits finally served to co-opt real change in social hierarchies—or to prompt it—is of course debatable.<sup>62</sup> The point to see here is that a debate indeed ensued: Victorians and their historians have been left deeply unsure whether the action was empowering or disempowering for women (and men), for the low classes (and the upper classes). The very disagreement both indicated and created a potential disturbance to an ordered picture of the social world; the grounds under statuses' power to explain and set the terms of social interaction were moving.

The pattern of engagement between a liberal framework and forms of status in breach-of-promise law explains both how statuses were structurally preserved by one of the epitomes of liberal thought, classical contract law, and how at the same time, and through the same processes, transformations occurred in the meaning of social hierarchies thus preserved.

### *B. Containing Status in Love*

The realist Victorian novel, the dominant literary genre of the nineteenth century, was involved in a complex negotiation of the viability and centrality of unencumbered love in marital relations, alongside the dominance of class and gender. A significant part of the burden of negotiation was laid on promises of marriage; they enabled a scrutiny of motivations for marriage.

Plotting promises of marriage, novels seemed to speak in two voices. They invested in the ideal of unencumbered love freed from social context and worldly pressure, differentiated socially-based motivations to marry rooted in class from choices springing from the heart, and offered representations of the dangers of social involvement in the choice of spouse.<sup>63</sup> At the same time, novels registered the force of gender and class. These apparent opposites were often reconciled through a containment pattern.

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<sup>62</sup> There is probably some frame of reference to support either position. See Gerald Graff, *Co-Optation*, in *THE NEW HISTORICISM* 168, 173 (H. Aram Veesser ed., 1989). Moments of seeming empowerment can be interpreted as a weakness, and vice versa. A classic example is Hartog's analysis of resistance emerging from a full internalization of the oppressing demands of coverture. Hendrik Hartog, *Abigail Bailey's Coverture: Law in a Married Woman's Consciousness*, in *LAW IN EVERYDAY LIFE* 63, 63 (Austin Sarat & Thomas R. Kearns eds., 1993).

<sup>63</sup> For a recent account of novelistic marriage plots, see ELSIE B. MICHIE, *THE VULGAR QUESTION OF MONEY: HEIRESSSES, MATERIALISM, AND THE NOVEL OF MANNERS FROM JANE AUSTEN TO HENRY JAMES* (2011). Michie emphasizes the plot's role in mediating the tension between economic and emotive (and moral) concerns. There is a complex relationship between this tension and the one between love and status in motives for marriage. As I suggest in note 13, there is reason to doubt the strength of the tension premised on separate spheres, which is beyond my scope here.

Charles Dickens' *Bleak House*<sup>64</sup> is an elaborate example. The novel, an expansive social critique, evokes love to problematize status by incorporating into its form the dangers of social involvement in the relation of marriage. It does so through two stories of a never-materialized promise of marriage that lie at the heart of *Bleak House*'s multiple plots.

The first promise is in fact an off-story. Lady Dedlock was engaged to marry Captain Hawdon; the engagement was broken under untold circumstances. Hints of Hawdon's despair and Lady Dedlock's guilt are woven throughout the plot; they tell a story of passionate love sacrificed for social and material capital.<sup>65</sup> Apparently, Lady Dedlock, who had compromised her virtue and secretly given birth to an illegitimate child, had broken the engagement under pressure to hide the shame and marry better. Lady Dedlock finally married the aristocratic Sir Leicester Dedlock, adopting a name telling the entire story: a miserable dead-lock. Hawdon's and Lady Dedlock's unrelated broken engagement is the root of the entire parentage plot driving the novel. Their socially-disembedded love, suppressed under class considerations, becomes the source of multiple and spreading forms of unhappiness, from poor and lonely Hawdon and the rich yet miserable Lady, through their illegitimate Esther, and outward in all directions to the entire bleak plot. In formal terms, the denial of an affective union is the root of social evils explored in the novel. The closure of this story, like that of the plot as a whole, arrives with the happy marriage of the illegitimate daughter, Esther, and the admired self-made physician, Woodcourt. Yet to arrive at this closure, *Bleak House* narrates another promise of marriage that undermines the text's stability: the promise between Esther and the philanthropic patron John Jarndyce.

With Esther and Jarndyce, the problem is not breaking the promise, but keeping it. It thus becomes clear that motivations, not formalities, are at stake: here too the question is whether the ideal relationship of love is violated, and it is. In proposing to Esther, Jarndyce leverages his power as rich guardian, fully aware that she does not love him. He makes his offer in a letter, which seemingly says everything possible to enable Esther to make any choice. As she reports:

It addressed me as if our places were reversed: as if all the good deeds had been mine, and all the feelings they had awakened, his. It dwelt on my being young, and he past the prime of life; . . . It told me that I would gain nothing by such marriage, and lose nothing by rejecting it; for no new relation could enhance the tenderness in which he held me, and whatever my decision was, he was certain it would be right . . . I was always to

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<sup>64</sup> DICKENS, *supra* note 4.

<sup>65</sup> The non-telling of a story of passion is consistent with criticism often leveled against Victorian novels for their depiction of a passionless, toned-down, bourgeoisie-style, even rational love. To appreciate the point, think for instance of the kind of passion in Emily Brontë's *Wuthering Heights* between Cathy and Heathcliff, represented as an alternative to relations within the familiar idea of the Victorian social. For my purposes, however, the important point is the novelistic insistence on love, of whatever kind.



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remember that I owed him nothing, and that he was my debtor . . . I must have ample time for reconsideration . . .<sup>66</sup>

Yet, as soon as Esther reads the letter she feels she “had but one thing to do,”<sup>67</sup> as Jarndyce must have known she would. Nothing could emphasize Esther’s indebtedness to Jarndyce more than its utter denial. Despite the socio-economic merits of this marriage, Esther, who loves Woodcourt, sobs at the prospect.

Esther’s sorrow, observe, is a trivial expression of the proposal’s problematic. The proposal resonates with a broader uneasiness about the integrity of Jarndyce’s beneficence, deeply undermining his character. Jarndyce’s letter tells Esther that she had wrought changes in him since he first saw her in a stage coach, when she was fourteen. This confession recalls that first meeting: Esther was then leaving her childhood home, crying in the coach; Jarndyce, a stranger, over fifty years of age, oddly wrapped in furs, wiped her eyes with his sleeve, offered tempting foods hidden in his pockets, and made her afraid. When Jarndyce proposes marriage, Esther’s initial fear becomes a shrewd intuition. The proposal likewise throws new light on Jarndyce’s assigning to Esther the role of housekeeper and calling her “Old Woman, and Little Old Woman, and Cobweb, and Mrs Shipton, and Mother Hubbard, and Dame Durden, and so many names of that sort”<sup>68</sup>—old names for a young woman.<sup>69</sup> This account adds up to Jarndyce’s tendency to aid young people and his preference for child-like characters. With all these pieces put together, Jarndyce’s benevolence begins to seem personally and sexually charged.

Jarndyce’s offer to Esther undermines his impartial, almost superhuman benevolence and consistently reasonable worldviews, which, for the most part, seemed to give voice to the implied author’s views.<sup>70</sup> The promise, in other words, undermines the entire moral outlook offered in *Bleak House*; it imperils the text, not just Esther.

*Bleak House* then takes a curious turn. The problem virtually disappears when Jarndyce releases Esther from her obligation and gives her and Woodcourt a home. Jarndyce’s character, and thus *Bleak House*’s outlook, are saved from disgrace. Why, then, put them under threat in the first place? One answer is the textual idealization of unencumbered love. Just like the un-narrated broken promise between Lady Dedlock and Hawdon, so this over-narrated waived promise dramatizes a counter-image to the resolution offered in the relationship of love.

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<sup>66</sup> DICKENS, *supra* note 4, at 690-91.

<sup>67</sup> *Id.* at 692.

<sup>68</sup> *Id.* at 121.

<sup>69</sup> For this last point, I am indebted to Professor Robert Ferguson.

<sup>70</sup> Jarndyce’s equivocal naming becomes less surprising from this perspective. The name resembles jaundice, which relates to a disease as well as a means to affect with envy or jealousy, or to tinge a view or judgment. These meanings seem to undermine Jarndyce’s view point in the same way that his marriage proposal does. To be sure, these resonances have also to do with the Chancery case of this name, another threat over Jarndyce’s character. See *Jaundice*, OXFORD ENG. DICTIONARY ONLINE, [http://dictionary.oed.com/cgi/findword?query\\_type=wordandqueryword=jaundice](http://dictionary.oed.com/cgi/findword?query_type=wordandqueryword=jaundice) (last visited Nov. 12, 2013).

Both promises' formal positioning in the text represent dangers greater than themselves. The Hawdon-Lady Dedlock broken promise is the figurative source of *Bleak House*'s spiraling miseries; the Jarndyce-Esther promise is the figurative cause of collapse of the textual moral vision meant to undo these miseries. Both promises thus create deeply disturbing counter-images, implicitly amplifying the significance of the happy ending in a marriage of love.

The textual investment in the ideal of love, however, becomes entangled with status, and here the pattern of containment can be observed. Status informs *Bleak House* on a number of levels. A subtle yet provocative one is found in another off-story. If the first off-story, that of Lady Dedlock and Hawdon, preceded the novel's timeline, this one, of Esther and Woodcourt, follows it and offers a glimpse into life after love. In the novel's closing paragraphs, Esther suddenly loses herself:

The people even praise Me as the doctor's wife. The people even like Me as I go about . . . I owe it all to him . . . They like me for his sake, as I do everything I do in life for his sake.<sup>71</sup>

These lines, a seeming celebration of Esther's love, contain a subtle threat. Esther's disappearance in intersubjectivity is extreme, too far beyond the meaning of relational individuality propounded in the novel, and twice in stark contradiction to her story. First, readers have learned by now how valuable she is to virtually everyone around her and can little accept this denial of individual worthiness. Second, readers have also learned to credit Esther's narration as she has gradually gained confidence. The inability to accept these lines from Esther casts in doubt the credibility of Esther's narration.<sup>72</sup> These lines tie the ideal of love—no less than class pressures on marriage decisions—with status hierarchies. The subjection of women, as Mill would call it,<sup>73</sup> underwrites Esther's self-abnegation and chills any idealist celebration of affection.

But *Bleak House* does not stop here; it does not despair of love. Rather, the text establishes a complex mutuality in the form of containment. To appreciate it, note first the double, capitalized "Me" in the quotation above. Esther's subjectivity, seemingly denied, is equally emphasized; she manages to become a self through her loss of individual center. She succeeds in emerging, salient and capitalized, from the seeming abnegation she reaches after escaping class pressures. As Young Seon Won argues, female characters' sense of self in Victorian novels is built upon a model of affiliation rather than individual achievement. It is thus that their self-denial is often at the same time a source of power, often difficult for critics to reconcile.<sup>74</sup> This suggestion clarifies Esther's self-abnegating Me. And

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<sup>71</sup> DICKENS, *supra* note 4, at 988-89.

<sup>72</sup> For an account of Esther as a non-triumphant, troublingly blind narrator, rendering the resolution of *Bleak House* a dark irony, see Ellen Serlen, *The Two Worlds of Bleak House* 43 ELH 551 (1976).

<sup>73</sup> JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (1869).

<sup>74</sup> Young Seon Won, *Empowered Women: Paradoxical Dynamics of Self-Denying Submission in*

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so, James Hammerton is justified in suggesting that patriarchal and passionate marriages were never stark opposites.<sup>75</sup> Far from opposites, one can see here the terms of reconciliation. *Bleak House* contains gender within a liberal notion of selfhood, in effect denying status a role as an alternative explanation of marital relations, turning it instead into a relational modality within a liberal account of marriage as self-fulfillment.

Esther's capitalized Me is a containment empowered by other containment elements in the novel, important among them *Bleak House*'s split narration. The novel's narration is split between Esther and an impersonal narrator, contrasted on multiple levels.<sup>76</sup> Importantly, the narrator is the formal representative of status in *Bleak House* in two senses: he is the chief narrator of aristocracy; and he is the unrelenting admonisher of the evils of a classed society. Esther, meanwhile, is both the outcast victim of this society, and an optimist, insistently deferring judgment, refusing despair, and eventually achieving mobility.

The split registers the power of status within a liberal vision insistent on social mobility. The narrator cannot be simply done away with. Not only is his world at the root of Esther's story as illegitimate child, but he and Esther, despite the apparent disjoint, complement one another in formal terms of plot coverage and comprehension.<sup>77</sup> The world of status is, in this sense, ineradicable. But it is containable.

One representation of the containment of status within Esther's liberal optimism is her closing of the novel, after the narrator had opened it. Esther—an outcast woman—has the last word, despite her dependence on the narrator and despite his own shrewd omniscience. The narrator closes the curtain on the world of aristocracy—Chesney Wold—in the chapter before last, moving out of sight with aristocracy in “dull repose.”<sup>78</sup> The tone too is dull repose, no longer the volcanic outrage the narrator has often erupted; his presence, like that of status, has been toned down. Esther gets the last chapter. Her victorious narration makes the final stamp and contains the world of status within her narrative, bestowing

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*Victorian Female Characters*, 15 BRITISH & AM. FICTION TO 1900, at 175 (2008).

<sup>75</sup> A. JAMES HAMMERTON, CRUELTY AND COMPANIONSHIP: CONFLICT IN NINETEENTH-CENTURY MARRIED LIFE 2 (1992).

<sup>76</sup> Esther is generous and trusting and accordingly slow in her apprehension of evil; she is emotional, and, as we see in the lines quoted above, has a capacity to lose herself in concern and affection for others. Esther's narrative is written in the past tense, in plain, simple sentences. The narrator is critical and sarcastic, quick to recognize weakness, distrustful, and knowledgeable; he is not emotional, but judgmental and detached. His narrative is written in the present tense, in complex style (studies of his style analyze such aspects as his uses of present participle or his reliance on blank verse in the midst of prose). Unlike Esther, the narrator does not take part in the plot (heterodiegetic). Given all of this, it seems fair to assume the narrator is also male – which adds another layer of significance to Esther's triumph, discussed below.

<sup>77</sup> For a discussion of the interdependence between the narrators as key to the novel's conceptual complexity, see Amanda Anderson, *Dickens, Charlotte Brontë, Gaskell: Politics and Its Limits*, in THE CAMBRIDGE HISTORY OF THE ENGLISH NOVEL 341, 345-46 (Robert L. Caserio & Clement Hawes eds., 2012).

<sup>78</sup> DICKENS, *supra* note 4, at 985.

credibility on her fragile resolution of the gender anxieties filtering the ideal of unencumbered love.

A third and final entanglement of status and love worth noting is the treatment of class-fit in promises of marriage, possibly the clearest example of containment. Class, generally denied a role as a legitimate motive for matrimony, often becomes a convenient background. The idealization of love often goes hand in hand with an effort to narrate socially-compatible couples, or at least provide them with economic and social conditions ensuring that they only suffer symbolic losses from class-crossing, not real ones. Novels thus make choice easy for their fictional couples; they contain status and reconcile it to affection, redirecting its relevance to the background.

In *Bleak House*, Esther and Woodcourt are economically supported. Though they are not “rich in the bank,” they have “always prospered,”<sup>79</sup> and, as Esther says, they enjoy a social admiration that makes them otherwise rich. Esther’s release from marriage to Jarndyce, supposedly superior to her marriage to Woodcourt in class terms, does not threaten her material well-being too radically, nor her enjoyment of social esteem.

The same pattern is evident in *Middlemarch*’s narration of social and economic difficulties. The plot is an often-rehearsed one: a character decides to marry below her socio-economic status and against the advice of friends and relatives, and attracts community outrage. Since the choice is based on true romantic love, the outrage is, on its face, unreservedly denounced, and the decision to marry upheld in the text.

Such is the story of Dorothea Brooke, who begins the novel where Dickens’ Esther ends: Dorothea marries the scholarly Edward Casaubon in the hope that wifely devotion will become subjective fulfillment. Her hope, critically presented in the novel as a socially-constructed idea, is soon disappointed. She finds herself in the midst of an emotional desert, at which point Casaubon conveniently dies. Though determined never to marry again, at the end of the novel Dorothea decides to marry her social and economic inferior, Will (note his telling name), this time for love, invoking shock and anger in her social circle. Dorothea insists, making for an ending which, for liberally-trained minds accustomed to the rule of love, fulfills narrative desire. We are all well-versed in this structure. Here too, the textual representation seemingly distinguishes love from class as motives in marriage decisions.

Yet, this victory of love is not the entire picture. Shaking off the shackles of class turns out to be too daring a move, and the narrative contains the pressure. While Dorothea gives up a significant ancestral fortune left by Casaubon in marrying Will, *Middlemarch* takes care to make this a merely temporary and almost unfelt sacrifice. To begin with, it narrates Dorothea’s indifference to the

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<sup>79</sup> *Id.* at 988.

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loss of fortune: she is content with the modest allowance bequeathed by her parents and resentful of Casaubon's memory. Though the finale tells us that she "never repented that she had given up position and fortune," a paragraph later it also undoes the sacrifice: no "lasting alienation" with her family holds on account of the improper marriage with "low blood."<sup>80</sup> Following an easy reconciliation, Brooke is happily talked out of cutting Dorothea's son off the entail, and the transfer of estate continues uninterrupted. *Middlemarch* does not let Dorothea and Will bear the full socio-economic implications of their marriage, and instead contains class within the story of love.<sup>81</sup>

In plots narrating social fit between loving couples, status retained significance, but with a twist. Status could no longer occupy the active place of motive; its explanatory role in marital decisions was diminished while it became an element, albeit a welcomed one, of what readers were taught to accept as an anyway-established relation. Status, while neither goal nor explanation, was a stabilizing force.

## III. WITHDRAWAL

I now turn to investigate a different pattern of liberal ideals' engagement with statuses. While containment reflected an insistence to keep the liberal frame of reference as extensive as possible, and to control and reconcile the forces of status to liberal conceptual structures, withdrawal signified taking a step back. It reflected a willingness to narrow down the scope of application of the liberal frame of reference in order to keep it coherent – ideal – indeed. Withdrawal made room for statuses, while the hope of liberal mobility was preserved elsewhere. Yet this was not the full conceptual move: the crucial addition in withdrawal was to treat that "elsewhere" as more important, and thereby rechannel cultural energies.

This Part reads central features of breach of promise law as a way of withdrawing contract so that it need not include status biases within its positive ambit, and yet retain its centrality for the marital relation. It then reads a withdrawal of love in a courtship plot, one which acknowledges that love does not overcome nor coherently contains statuses, but still navigates love to a central conceptual place in the order of things.

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<sup>80</sup> ELIOT, *supra* note 5, at 783.

<sup>81</sup> Another form of containing class within love returns to law. Recall juries' aversion to cross-class engagements, manifest in their damage awards. *See supra* text accompanying note 56. The aversion was not conceptualized through a straight-forward admission that crossing class is inappropriate in itself; this would be a problematic assertion if love is the only relevant consideration in marriage decisions. Class-crossing was rationalized as an absence of love – it was considered a sign of gold-digging that replaced love. In effect, class-belonging retained relevance to promises of marriage, but its relevance was not acknowledged as a problem of protecting status. Status could no longer function as a goal or explanation for marriage; instead, class was processed through the liberal frame of reference, which highlighted the importance of affection.

*A. Withdrawing Contract Law*

Contract law at times withdrew its formal application from areas in which statutes appeared to hold sway. Two curious instances were the classical contractual theory of the promise of marriage and the foundations of legal liability for breach.

By the time civil marriage was made universal in mid-nineteenth century, apparently a step toward contractualism, the view of marriage as contract depended on the nominally consensual aspect involved in choosing a spouse or agreeing to marry. Other than this aspect, from early nineteenth century the incidents of marriage were largely prescribed by the state.<sup>82</sup> This fact posed a difficulty for classical theorists of contract: if roles, rights, and obligations in marriage were determined by the state, and husband and wife—the parties to the initial contract of the promise of marriage—could little alter the terms, marriage hardly fit into the vision of contract as a self-imposed, free-willed law. Coverture meant the legal death of married women as contracting parties, itself a doctrine in stark opposition to the idea of marriage as contract. As a matter of public debate, the contractual view of marriage was up against a concurrence between the Christian emphasis on marriage's sacramental quality, which united man and woman into one person, and separate-spheres apologetics, which combined a denial of gender equality and a concern about the ruthless world of the market from which one had to find shield and at the same time protect the family.<sup>83</sup> Accordingly, classical writers excluded marriage from their treatises on the law of contract, defining it as status.<sup>84</sup> Classical thinkers thus created a sharp theoretical distinction between the promise of marriage and marriage itself. While the promise of marriage was a contract, marriage was not.<sup>85</sup> The distinction, I suggest, is an important instance of withdrawal.

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<sup>82</sup> See Sandra S. Berns, *Women in English Legal History: Subject (almost), Object (irrevocably), Person (not quite)*, 12 U. TAS. L. REV. 26 (1993); John V. Orth, *Contract and the Common Law*, in *THE STATE AND FREEDOM OF CONTRACT* 44, 52 (Harry N. Scheiber ed., 1998) (“the contract of marriage carries the parties, as it were, to the threshold of their new status, but not beyond”). See JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* 10, 194-215 (1997) (giving an expansive account of models of marriage in the Anglo-American tradition. Witte argues that the contractarian model of the Enlightenment, in which marriage was in essence a voluntary bargain the terms of which were set by the parties themselves, was adumbrated in the eighteenth century, elaborated theoretically in the nineteenth, but implemented legally only in the twentieth century. The model could not transform the law of the nineteenth century, though it induced greater protections for wives and children.).

<sup>83</sup> See G.R. SEARLE, *MORALITY AND THE MARKET IN VICTORIAN BRITAIN* 134-66 (1998) (giving an account of the public debate about marriage as contract).

<sup>84</sup> Anson made the logic explicit when he excluded from treatment transactions that were “not such as we ordinarily term Contracts.” WILLIAM REYNELL ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT* 3 (1879). Among these were “[a]greements which affect a change of status immediately upon the expression of the consent of the parties, such as marriage, which, when consent is expressed before a competent authority, alters at once the legal relations of the parties in many ways.” *Id.*; see also KENNEDY, *supra* note 15, at 204-05.

<sup>85</sup> KENNEDY, *supra* note 15, at 195-205. Treatises of contract law from the preclassical era included

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Historians of contract usually attend to the theoretical distinction between marriage and the promise of marriage because it reveals the broader process of differentiating status from contract. This differentiation turned on the distinction between public and private will and supported the liberal construction of contract in terms of autonomous individual willing. Feminist histories, meanwhile, have paid much of their attention to the “status” part of this story. They have examined women’s subjection, as well as forms of agency under, and resistance to, the laws of coverture governing married life, under which contract—like much else—was formally denied to women. It is worth paying more attention, however, to the effect the distinction had specifically on the promise of marriage, standing as it were just on the brink of status.

The distinction between the promise of marriage and marriage brought the promise closer to the ideal contract; by withdrawing contract law’s application from marriage itself, legal thinkers withdrew the ambition to control too much through free will. Once marriage was out, the promise of marriage presumed to embody choice of the identity of a spouse and no more.<sup>86</sup> The object of choice in this instance—spouse—was isolated from the future relation envisioned by choosing—marriage. This move freed the promise of marriage from much of the conceptual conundrum that plagued the classical model of contract elsewhere.

The classical model of contract ran into trouble because it was extremely ambitious in its presumed application to social relations. Critiques of the temporal structure of the model clarify the difficulty: The legal celebration of individual will was captured in contract law’s emphasis on the moment of formation. In classical contract law, circumstances preceding formation were discounted; the exercise of the will was construed as a starting point – a root cause of contractual relations. Circumstances which followed formation were likewise discounted, the exercise of the will was thus construed as a sufficient reference for the contractual relation. Put simply, the classical model’s temporal freeze rendered the exercise of the will a necessary and sufficient condition of contractual relations. Now, this freeze entailed not just considerable injustices but conceptual stretches. Expressed wishes at specific moments in time were made to serve as rationalizations of ongoing relationships, in which statuses, as well as other social and interpersonal determinants, emerging from both past and future constraints, had a role to play.<sup>87</sup> These moves undermined the model’s coherence and virtually invited critique.

Unlike many other contracts, however, the promise of marriage was a contract which did not presume to formally control the relationship it signaled; it

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marital obligations in their treatment of contract.

<sup>86</sup> To be sure, this move did not solve the question of status considerations affecting the choice of spouse; I turn to these shortly.

<sup>87</sup> Over a hundred years later, Ian Macneil’s relational theory of contract put the terms of critique quite simply: Contract is ridden with “non-promissory” elements. Without accounting for them, it cannot be comprehended. See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980).

did not control the marital relationship. Here, then, the association of contract with free will could be more convincing.

While the exercise of the will was formally limited to the identity of spouse, with the rest of marriage beyond its control, the significance of the moment of choice—the promise of marriage—remained substantively enormous. The promise had to carry much of the weight of the idealist attempt to imagine the modern family institution based on new freedoms. This required the second conceptual move involved in withdrawal: trivializing withdrawal's implications. Here, the broader classical legacy of core and periphery in private law had a role to play. The conceptual structure of private law in classical legal thought made the will of the parties the core and the will of community a periphery, indicating clearly the hierarchy between them, and rendering contract the paradigmatic heart of private law.<sup>88</sup> Put simply, the social regulation of the marital relation, with the subjection of women within that context, was conceptualized as secondary in importance to the freedom associated with the point of entry into marriage. That conceptual structure could at once limit the application of the ideal of contract to keep it coherent, and rely on it to explain and justify the institution of marriage as a whole.

But freedom at the point of entry into marriage was not, even in this shrunken form, free from status. What about the motives for choosing one's spouse? Here we have a second instance of withdrawal.

Enforcement of promises of marriage depended upon proving a promise, not its motives.<sup>89</sup> The evasion of motives was an effective withdrawal from an area little likely to fit liberal idealizations; class fit as well as gender inequalities retained power in channeling ideally autonomous choices of future couples. Consequently, contract law turned a blind eye to motives. Put differently, upholding choice in the abstract, an enactment of the core ideal of contractual freedom, was also, and at the same time, a mark of the limits of contractual analysis. Upholding choice in this manner rid contract law of the need to ask about motives to marry, a locus of status biases.<sup>90</sup>

If contract withdrew from the question of motives, however, this move again required a justification that would make the withdrawal unimportant. This was available in the construction of autonomy in idealist liberal thought: the liberal outlook, explains Alan Brudner, assumes an individual abstracted from relation to another as a fixed and stable existence. Given this assumption, contractual rights and duties are grounded by abstracting from all concrete intentions (seen as mere

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<sup>88</sup> KENNEDY, *supra* note 15, at xxxvi.

<sup>89</sup> Reluctance to scrutinize motives was also evident in the denial of a defense based on suspect motives. The argument that a woman was undemonstrative was unacceptable. If the woman appeared not to love the man, this was no excuse for breaching a promise. LETTMAIER, *supra* note 28, at 47. It did influence damages. *See supra* note 58.

<sup>90</sup> To clarify, the argument here is not causal, but structural: what matters is that objectivism in this sense keeps the question of status outside formal contract discourse without resolving it.



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subjective preferences) to the bare capacity of choosing, as the only capacity worthy of respect. From this perspective, motives have no rational significance. They are not the expression of freedom but particularistic inclinations from which thought must abstract in order to arrive at a foundation for rights and duties.<sup>91</sup> Put simply, the important thing was abstract choice, where contract reigned supreme. Motives, susceptible to status, were of no “rational significance.”

Was withdrawal a real entanglement of contract and status that altered both, as containment was? I will have more to say on this at the end of this Part.

*B. Withdrawing the Reach of Love in Courtship Plots*

Plots of courtship exhibit a conceptual move of withdrawal similar to the one observable in legal theory and doctrine. The ideal liberal framework is acknowledged as a limited tool in achieving social transformations; its scope of application is restricted, but it is nonetheless navigated to a central position in the order of significances.

George Eliot’s *Middlemarch*, like *Bleak House*, is alive to the problem of gender in Victorian marriage. Dorothea, recall, marries Will Ladislaw for love, in defiance of class pressures—even pressures toned down by containment. But, as in *Bleak House*, gender inequalities plague the love relation soon after it is achieved. Dorothea disappears into intersubjectivity in a finale reminiscent of Esther’s fate:

Many who knew her, thought it a pity that so substantive and rare a creature should have been absorbed into the life of another, and be only known in a certain circle as a wife and mother. But no one stated exactly what else that was in her power she ought rather to have done.<sup>92</sup>

Though Dorothea now has a life filled with emotion, and a “love stronger than any impulses which could have marred it,”<sup>93</sup> the narrator refuses to ignore her inferior position as social member. Unlike the containment offered by *Bleak House*’s capitalized “Me,” the love Dorothea finds is here a trade-off for a full Me, not a form of its attainment. As things stand, the narrator suggests, this is better than nothing, for no one can “state[] exactly” what a woman might otherwise do, or be. *Middlemarch*, then, offers the disembedded love relation not as a utopian end able to contain and redirect social pressure, but as a comfort in its midst.

Yet, despite this express withdrawal, narrative desire is fulfilled. The love Dorothea attains offers a closure to the plot, and retains a pride of place in the order of significances set up in *Middlemarch*. To occupy this place, the entire novel’s structure is geared in the same direction. The question of love in Dorothea’s life is

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<sup>91</sup> ALAN BRUDNER, THE UNITY OF THE COMMON LAW 128-29, 13-35 (1995); see also Peter Benson, *The Unity of Contract Law*, in THE THEORY OF CONTRACT LAW: NEW ESSAYS 118, 139-49 (Peter Benson ed., 2001) (explaining how, in the doctrine of offer and acceptance, the capacity to choose is abstracted from all internal and external circumstances in which it is exercised).

<sup>92</sup> ELIOT, *supra* note 5, at 783.

<sup>93</sup> *Id.* at 782.

brought to the fore throughout the plot, almost despite Dorothea herself, whose idea of achievement lies in being somehow “greatly effective.”<sup>94</sup> The importance of love becomes central not only despite Dorothea but despite the express framing which ends, as we have seen, with a lamentation of women’s limited options, and opens with the same theme of the many Saint Theresas, who with “dim lights and tangled circumstance . . . tried to shape their thought and deed in noble agreement,” but were helped by “no coherent social faith and order.”<sup>95</sup>

How is the liberal ideal of love navigated to its central position despite the gender-awareness? Two central moves are involved here: one is the narrative association of love with social progress; another is the allocation of narrative attention to love over gender inequality.

Consider first love’s relation to progress: the narrative allows the question of affection to function as driver of the “growing good of the world,”<sup>96</sup> structurally confirming Dorothea’s initial notion that the ideal marriage amounts to translation of “[e]veryday things” to the “greatest things,”<sup>97</sup> a relation bringing “guidance into worthy and imperative occupation.”<sup>98</sup>

*Middlemarch*, like other realist novels, has been studied for its liberal processing of the public through the private.<sup>99</sup> My point here, however, is not the broad critique of the way liberalism depresses political conflict, which, I would argue, is a critique not free from trouble.<sup>100</sup> The point here is not the question of depressing political consciousness; rather, I am interested in observing a moment in which the novel points to an *admittedly* unaccommodating order of things. The liberal frame of reference is thereby transformed, but also salvaged, by attributing importance to its preferred conceptual apparatus within a world it admits to be imperfect.

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<sup>94</sup> *Id.* at 26.

<sup>95</sup> *Id.* at 3.

<sup>96</sup> *Id.* at 785.

<sup>97</sup> *Id.* at 27.

<sup>98</sup> ELIOT, *supra* note 5, at 257.

<sup>99</sup> See, e.g., CATHERINE GALLAGHER, *THE INDUSTRIAL REFORMATION OF ENGLISH FICTION: SOCIAL DISCOURSE AND NARRATIVE FORM, 1832-1867*, at 114 (1985) (discussing the novelistic resolution of public problems in terms of private conflicts); NANCY ARMSTRONG, *DESIRE AND DOMESTIC FICTION: A POLITICAL HISTORY OF THE NOVEL* (1987) (offering a Foucauldian analysis of novels as creating continuities between public and private which made all changes appear in psychosexual terms); DANIEL COTTOM, *SOCIAL FIGURES: GEORGE ELIOT, SOCIAL HISTORY AND LITERARY REPRESENTATION* (1987) (arguing that George Eliot sought to channel control from private to public rather than the other way around. For Cottom, *Middlemarch*’s overarching concern with the social meanings of private experience is a means for controlling public ends.); Susan Sage Heinzelman, *Imagining the Law: The Novel, in LAW AND THE HUMANITIES: AN INTRODUCTION* 213 (Austin Sarat, et al. eds. 2009) (recounting the argument that novels police the political through the sentimental, paying particular attention to marriage plots).

<sup>100</sup> While I do not dispute the general contours of these arguments, which associate Victorian novels with English liberal thought and show its workings, I would argue that differences between manners of differentiating the public from the private, while not the subject of this Article, are crucial for our understanding and critique of historical liberal thought. See Rosenberg, *supra* note 2.

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Love in *Middlemarch* becomes the heart of social progress through an equation between Dorothea's positive effects on her social surroundings and the story of affectionate marriage. The equation is achieved in three main phases. To begin with, Dorothea's abilities to help the world are narrowed to naught while married to Casaubon, the absence of affection indeed meaning a "moral imprisonment."<sup>101</sup> When Casaubon dies, Dorothea's agency evolves. Her failed marriage, equated with an attempt to lead a higher life, allows her to sympathize with what she perceives as similar failures, such as Lydgate's. Note the important parallel to a man, a professional career, and a public good (public health). In this interim stage, the lessons of failed love allow Dorothea to become the agent behind Lydgate's mild rehabilitation. Finally, when Dorothea is happily married, we reach the end of the story. Rather than observe the details of love's effects on social progress, we get a sweeping generalization of a retrospective narrator: "[T]he effect of her being on those around her was incalculably diffusive," but nonetheless indisputable, and so the narrator insists on closing the novel that "things are not so ill with you and me as they might have been, is half owing to the number who lived faithfully a hidden life."<sup>102</sup>

The closing generalizations of *Middlemarch*'s narrator might be less convincing than the painstaking scrutiny of details throughout the novel, and so not an entirely successful construct. Yet precisely for this reason, they are also revealing of the equation the narrative strove to build up between the fortunes of love and the fortunes of society. (Note that the equation, reliant for its effect on the reverse mirror imaging of Dorothea's two marriages, crucially turns on the genuineness of mutual love already at the point of decision – formally the promise to marry – reinforcing its conceptual centrality despite its logical redundancy. After all, love could fail or succeed at later points of the relationship, an option the novel neglects to develop).

*Middlemarch*'s allocation of attention supports the same centralization of love. While Dorothea's search for true romantic love takes up the full span of the novel, her subjection under coverture, leaving her as only "wife and mother" is never narrated. The closing commentary quoted above remains the only complaint, much like Esther's implicit one in *Bleak House*'s finale. This absence stands in contradiction to the close study of womanly subjection during Dorothea's loveless marriage to Casaubon. The structure thus allows love to depreciate the meaning of status differentials prompted by marriage, despite their far-reaching implications for all women, loved or not.

Acknowledging love's limits, and at the same time making it a core of social relations, is no mean feat. In *Middlemarch*'s finale, the effort is thrown into sharp relief, exposing the moves involved in the pattern of withdrawal: give something

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<sup>101</sup> ELIOT, *supra* note 5, at 958.

<sup>102</sup> *Id.* at 785.

up, but belittle its meaning in the overall picture of the social order, and invest your energies elsewhere.<sup>103</sup>

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Withdrawal appeared to keep liberal ideals and statuses separate, and conceptually untouched, unlike the “muddier” pattern of containment. Put differently, while containment might appear as a real entanglement and transformation of liberal ideals and statuses, withdrawal might seem closer to the notion of opposition between them which often informs histories of liberalism, such as those of the promise of marriage reviewed here. But further attention to the separation withdrawal encouraged might expose a nuanced picture.

Withdrawal left certain areas, like married women’s opportunities in the public arena, little transformed by liberal idealizations. At the same time, the second move entailed in withdrawal, that of centralizing areas of social life in which liberal ideals more easily applied, was significant. It shifted cultural energies to those areas. The shift of cultural energies was not just a rhetorical justification, or mystification, of preserved power structures; nor can it be exhausted by the notion of mediating contradictions.<sup>104</sup> It involved a transfer of efforts and meaning. The private law of contract, for instance, and particularly the legal examination of “intention” (but not motive), did develop significantly and intricately in manners still reverberant in our own days. The emphasis on interpersonal relations did assume unprecedented scope and became the very mark of one of the era’s most important cultural productions, traceable in literature and beyond it ever since.

Taking all of this seriously, while observing the areas that withdrawal left out of the reach of liberal ideals, captures seemingly contradictory phenomena. This pattern explains the resilience of multiple gender and class hierarchies to change; their resilience was conceptually secured by liberal ideals’ withdrawal in a manner demanding a reassessment of the commitments of those ideals. Certainly eliminating statuses was not part of them. At the same time, the concentration of cultural efforts in specific areas emerged in conceptual changes in self- and other-portrayals, changes which promised—or threatened—to inflect social spheres beyond the paradigmatic targets of idealist liberal thought. Consciousness fails to observe boundaries, even legal and literary ones, and so the dynamics at work here implicated the stability of status.<sup>105</sup> Liberalism was a historical conceptualization of the social order; its manner of creating spaces for liberal ideals and statuses,

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<sup>103</sup> See JONES, *supra* note 11, at 155-81 (arguing about a similar move in Margaret Oliphant’s fiction, but also a more radical turn in some of her late novels).

<sup>104</sup> See, e.g., Robert Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 114-16 (1984) (providing an account of the critical notion of mediating contradictions).

<sup>105</sup> Additional exploration is beyond my scope. One curious site to further explore this process would be the infiltration of “contract” discourse with classical connotations into feminist efforts to reform marriage – and the inherent difficulties of that process.

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while shifting their normative relationalities, should be considered seriously as a form of entanglement.

## RETHINKING IDEOLOGY

The patterns of containment and withdrawal appear chaotic. One can observe different approaches to class: while at the level of literary discourse we primarily see containment when it comes to class-related motives, at the level of legal doctrine we see withdrawal. Similarly, gender hierarchies were contained in some cases—as in *Bleak House* or litigation practice—and withdrawn from in others—as in *Middlemarch* or legal theory. Indeed, these patterns were not coherent plans nor principled arguments. Yet, despite the disorganized response, they had a common effect. They distanced liberal social sites from an idealist rejection of statuses and turned them into a restatement of statuses' roles. With statuses secured but losing their role as explanations and goals of social relations, and becoming a convenient background, social thought was in active search and articulation of new meanings. With those meanings, the experience of social relations altered, and new routes of speech, understanding, and justification opened up.

Thus, histories telling us that liberal ideals were a transformative force in the nineteenth century are no more wrong than those telling us that statuses were pervasive. But they are not right enough. Both idealist rejections of statuses and unwavering commitments to them were undermined, but not discarded. Accounts of liberalism should develop tools that come to terms with these dual dynamics.

Coming to terms with these dynamics opens up new conversations in ideology critique. To gesture at these, consider the following point.

The difficulty that containment and withdrawal pose is that they are not satisfactorily explicable in functional terms. Social theory of both liberal and radical hues has, for a long time, exhibited a commitment to an assumption of functionality. Ideology, on this assumption, must be serviceable to some social interest, power, or normative program. This assumption of course comes up against historical complexity in ideological constellations, which exposes dysfunction and demands some sort of theoretical response. In very broad strokes, responses tend to take one of two routes. One route insists on functionality in the final account, a conclusion challenged by the history recounted here. The other accepts dysfunction but emphasizes contradiction and localism, rather than entanglement on a broad basis that this study highlights. These emphases implicitly keep the assumption of functionality alive as a dominant possibility in the operation of ideology. I briefly consider both routes, and then turn to consider an alternative, which might make more sense of the history of liberalism recounted in this Article.

Ideological dysfunction has been brushed off by accounts which identify complexity – for example, accounts which observe that contract and class both had a role to play in betrothals despite their contradictory meanings – but argue that

overall conceptual structure tilts to one side more than the other. The debates among historians reviewed in this Article about the law of promise of marriage proceed along this route: status and contract in law are treated in terms of coexisting yet incongruent visions serviceable to differing interests and normative visions. Analyses are split on which had the upper hand but are jointly committed to the goal of identifying a marginal “winner,” a commitment which implicitly confirms the assumption of functionality.<sup>106</sup> Another way of brushing dysfunction off has been to treat the very idea of complexity as chimerical. Liberal ideals are treated as little more than a smokescreen for statuses. In analyses of liberalism in realist fiction, for instance, it is not uncommon to explain its array of liberal constructs as a universalization of the middle class which naturalizes, rather than threatens, the notion of class dominion, and serves a particular class.<sup>107</sup>

The willingness to downplay dysfunction is challenged by containment and withdrawal. These patterns did not purge either liberal ideals or statuses of real historical content; they brought about mutual transformations, which ought to be recognized. In their inescapability, these patterns promised—or threatened—to complicate, and redirect, the conceivable interests of any social class or power and recast any normative program.

A different response to ideological dysfunction has been to actually turn it into the fulcrum of history. Raymond Williams: “we need quite different forms of analysis, which would enable us to recognize the important contradictions . . . between different parts of the general process of change.”<sup>108</sup> Here, a host of accounts speak to a persistent gap between ideology’s reality as a complex conceptual structure, and its theoretical functionality, and provide possible explanations for it. A familiar account in law focuses on the contradictions of experience playing out in doctrine, as developed by Critical Legal Studies.<sup>109</sup> Another account, which has become a staple of cultural critique, is the indiscipline

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<sup>106</sup> A nineteenth-century example is mentioned by Jones, who discusses contradictory stances in Trollope with regard to gender equality, and recounts his own justification of these contradictions as a form of careful – rather than too rushed – progress. The assumption (of Trollope) is that the overall direction is decidedly progressive. JONES, *supra* note 11, at 152-54. The effect of identifying the marginal “beneficiaries” is a downplaying of the problem of inherent complexity. I return to this point below.

<sup>107</sup> See COTTOM, *supra* note 99. Another version is that the emergent capitalistic social order benefited from certain forms of status hierarchies, particularly gender, alongside a certain liberation of economic forces. Here, complexity is chimerical in the sense that it represents a division of labor that is actually useful for a particular order to emerge. See, e.g., MARY LYNDON SHANLEY, *FEMINISM, MARRIAGE AND THE LAW IN VICTORIAN ENGLAND 1850-1895* (1989).

<sup>108</sup> RAYMOND WILLIAMS, *THE LONG REVOLUTION* 320 (1961).

<sup>109</sup> An argument often channeled through the concept of indeterminacy. I remain unsure, however, about CLS’s level of comfort with the dysfunction of ideology. Leading critics have tended to treat legal conceptual structures as an enabling (and sometimes enabled) consciousness of political change despite contradictions, a functional notion. See Chris Tomlins, *How Autonomous Is Law?*, 3 ANN. REV. L. & SOC. SCI. 45 (2007) (critically discussing this argument). At the same time, indeterminacy does emphasize an irresolvable complexity: political change is enabled by mediating contradictions, not solving them, and so there remains an inherent risk of collapse.

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of language which can be expected to subvert any intended social meaning.<sup>110</sup> Yet another centers on the notion that particular discursive fields exhibit forms of partial autonomy from social powers.<sup>111</sup>

Responses that downplay dysfunction, as well as responses that take it seriously, while richly diverse, share a tendency to emphasize contradiction rather than conceptualize a viable entanglement between different commitments, like gender and contract, or love and class, which containment and withdrawal reveal in its full force. At the same time, an emphasis on contradiction implicitly retains functionality as a conceptual norm, even by the very willingness to resort to the notion of “contradiction.”<sup>112</sup>

Responses accepting dysfunction also often tend to localize their claims to certain levels of existence, like language, or certain fields of social action, like law or aesthetics, rather than make room for the possibility that the same phenomena repeat themselves in discourse, practice, and across fields. Containment and withdrawal require that room. They are not entirely reducible to particular forms of ideological production; they pervaded not only literary discourse, but also broader phenomena like litigation practice, and abstracting ones like legal theory. Neither are they reducible to the relative autonomy of particular sites; they repeat themselves across different sites and registers.<sup>113</sup>

This Article’s methodology was specifically geared towards exploring an alternative possibility – the possibility that what we see in the relations between statuses and liberal ideals was a viable entanglement, prevalent in more than one field and on more than one level of analysis. To be sure, private law and canonic novels are hardly exhaustive for a study of liberal thought, in the promise of marriage or elsewhere. However, they, and the phenomena examined in them, were diverse and significant enough to provide a grounds for an initial argument. If the argument on containment and withdrawal applies on all of these levels in two fields closely implicated in the rise of liberalism, the significance of these patterns within liberal thought in general should at least be seriously entertained.

How, then, should this ideological dysfunction be conceptualized? It is perhaps promising to approach ideology as a culturally-embedded conceptual

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<sup>110</sup> The tendency of specific discourses toward subversion of ideological positions is perhaps a less familiar argument than the subversive power of language. Terry Eagleton, for example, tied complexity with the cultural location of art in modernity. He has argued that the modern aesthetic artifact is inseparable from the dominant ideological forms of the modern class-society, but at the same time, provides a powerful challenge and alternative to these dominant forms. In this sense, it is an eminently contradictory phenomenon. TERRY EAGLETON, *THE IDEOLOGY OF THE AESTHETIC* 3 (1990). In interdisciplinary analyses of law and literature the same positioning of literature as subversion of dominant ideologies often emerges. For a critical review, see Rosenberg, *supra* note 2.

<sup>111</sup> The idea is that law and other social sites develop long-term internal structural characteristics, which become detached from political interests. See Gordon, *supra* note 104, at 88-93 (offering a brief discussion and references on law).

<sup>112</sup> Why think of this history as contradictory if not because it subverts functionality?

<sup>113</sup> This poses a challenge to disciplinary distinctions, which is beyond my scope here.

structure. The broad direction would be to take seriously the proposition that imagination, courses of decision, and terms of normative evaluation are all channeled through patterns of thought, sometimes acknowledged, sometimes unacknowledged, like the patterns exposed in this Article. Visible or invisible, conceptual patterns emerge in specific historical moments, and, through their embeddedness in cultural sites, become facts in themselves, lacking any deeper identifiable rationale, yet entrenched.

Human agency is not necessarily denied by this suggestion,<sup>114</sup> it is just set aside analytically for a particular gain. The gain lies in the redirection of critical attention towards the internal patterns of ideology, conceivably dynamic, irreconcilable with known interests, powers, or normative programs, and entirely viable, all at once. The notion is hardly new theoretically; it has also been developed in a variety of historical contexts.<sup>115</sup> Nonetheless, it seems to have had little use in the contexts discussed here. In the study of nineteenth-century contract and love, class and gender, the sense of contradiction and locality, and often the search for marginal winners, has been an overwhelming presence. Meanwhile, the kind of conceptual entanglement explored here has been hardly entertained. Attending to these patterns' actual workings has the potential of clarifying historically-concrete terms of complexity and advancing historical understanding, which the assumption of functionality limits. Williams was urging us to do just that: "It is not only that the analysis should be more flexible, but that new categories and descriptions are needed, if all the facts are to be recognized."<sup>116</sup>

The picture of nineteenth-century liberalism is in those details, which capture the force of ideology in social life and reveal the ongoing dynamics of freedom and subjection, that tormenting condition of the oxymoronic free subject of modern times.

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The promise of marriage has, since the nineteenth century, disappeared from view. In a world of evolving fortunes for men and women of all classes, it is no longer a central site for the rehearsal of cultural anxieties. The same world, however, has remained fascinated with liberalism, and so the core anxieties remain, their reincarnations popping up elsewhere.

"Among the legacies of modernity which today need reconstructing . . . are moral and political universalism, committed to the now . . . suspect ideals, [one of which is] . . . the moral autonomy of the individual . . ."<sup>117</sup> Thus argues Seyla

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<sup>114</sup> See LUC BOLTANSKI & ÈVE CHAPELLO, *THE NEW SPIRIT OF CAPITALISM* (Gregory Elliott trans., 2007) (articulating the claim about nondeterminism of structures).

<sup>115</sup> Examples are many. An elaborate one is Veblen's account of "barbarian" distinctions between modes of occupation which were "rational" at their historical inception, became accepted, and remain established in modern thought. Veblen considered this a generally valid process of "cultural code" dissemination. THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* (2007).

<sup>116</sup> WILLIAMS, *supra* note 108, at 320.

<sup>117</sup> SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY, AND POSTMODERNISM IN*



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Benhabib by way of introducing her review of late twentieth-century critiques of liberalism, from communitarian, to feminist, to postmodern, and her own reconstructive account of liberal ethics, which begins with situating “reason and the moral self . . . in contexts of gender and community.”<sup>118</sup>

Benhabib develops leitmotifs which the nineteenth-century torments with the promise of marriage expose in their early forms. The constitutive forces of class and gender were entangled with the liberal hypothetical of free subjects that central modes of social thought strove to develop at the height of the Victorian era. Some one hundred and fifty years later, we see their conceptual descendants assuming center-stage in the continual debate about the viability of the liberal imagination.

One wonders how the patterns of containment and withdrawal have evolved; they certainly seem to be part of extremely broad social debates. One important locus appears to be the politics of recognition (or identity, or difference), and liberal multiculturalism. Discussions in this area emerge from the tension pervading multicultural societies between group-based and individual-based constructions of social relations. The politics of recognition rests on social group-belongings and an emergent demand that society acknowledge specificity and embrace a differential treatment of persons based on their group identities. At the other end of the spectrum lies the liberal ideal of equal democratic citizenship based on difference-blindness. As Charles Taylor explains, the principle of universal equality is at once part of, and hard to assimilate to, the politics of recognition.<sup>119</sup> This seems to be an intriguing location of the rehearsal of both withdrawal and containment; accounts of liberal citizenship alternate between the two patterns.

Withdrawal captures moves in which, as Taylor argues, fundamental rights are distinguished from a broad range of immunities and presumptions of equal treatment.<sup>120</sup> In the latter, difference can prevail and notions of universal difference-blind equality are discarded, yet the former continue to be conceptualized as fundamental. The significance of the abstract individual bearer of political rights is understood as a thin, yet crucial, framework, an outer bastion guaranteeing a critical minimum.

Under containment, group identities are conceptualized as the very heart of political rights. For supporters of historical liberalism, those whom Taylor calls the “proponents of the politics of dignity”—which replaced the politics of honor, i.e., status—such a conceptualization might appear like a reversal of their principle. In consequence, attempts are made to justify these politics on the basis of dignity—a containment pattern. However, justifications succeed, Taylor reminds us, only up

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CONTEMPORARY ETHICS 2 (1992).

<sup>118</sup> *Id.* at 8.

<sup>119</sup> CHARLES TAYLOR, MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (1994).

<sup>120</sup> *Id.*

to a point.<sup>121</sup> His remark, which points to the limitations of an analysis based on a contradictory conceptual relation between liberal- and group-based accounts of social life, seems to invite a rereading of living liberalism in our own days as a complex mutuality of liberal ideals and new notions of group identities.

Ironically, in this round liberal ideals likely serve as a conceptual source of stability, while newly claimed statuses invoke perceptions of social disintegration. The dynamics at work in containment and withdrawal may have come full circle.

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<sup>121</sup> *Id.*