

LEGAL FICTIONS, LITERARY NARRATIVE, AND THE HISTORICAL TRUTH: THE  
JURISPRUDENCE OF MARRIAGE IN THE LONG EIGHTEENTH CENTURY

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A dissertation submitted to the faculty at the University of North Carolina at Chapel Hill in  
partial fulfillment of the requirements for the degree of Doctor of Philosophy in the Department  
of English and Comparative Literature.

Chapel Hill  
2018

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## ABSTRACT

Suzanna Geiser: Legal Fictions, Literary Narrative, and the Historical Truth: The Jurisprudence of Marriage in the Long Eighteenth Century  
(Under the direction of James Thompson and Jeanne Moskal)

This dissertation explores the impact of legal and literary fictions about marriage on the modern historical consciousness. By reading the early English novel in conjunction with contemporary legal texts on marriage—parliamentary acts and debates, case law, marriage settlements, and private separation deeds—I demonstrate that eighteenth-century English marriage law and practice was constituted through a variety of conflicting legal fictions. I further demonstrate that the early novel was preoccupied with how those fictions shaped the lived experience of domesticity, particularly for women. The fictional precepts and presumptions underwriting emerging contract theory and traditional marriage doctrine at once directed and circumscribed (proto)modern developments in marriage, property, and divorce law. Moreover, the novel, in its mimetic and ideological capacities, variously worked to expose, advance, and revise those fictions, thereby amplifying and altering their historical force. Examining the dialectical relationship between legal texts and the novels of Daniel Defoe, Eliza Haywood, Samuel Richardson, Frances Burney, Charlotte Smith, Elizabeth Inchbald, Mary Wollstonecraft, and Jane Austen, this project challenges traditional conceptions of the law as stable, objective, and truth-bearing, and it demonstrates the importance of an interdisciplinary approach to historical inquiry. The project also highlights the need for renewed attention to the concept of “legal fiction,” including its influence on the modern individual’s perceptions of self and other, masculinity and femininity, and legal rights and moral duties.

Each chapter explores the legal fictions implicated at a particular stage in the marriage contracting process. Chapter one, on marriage formation, focuses on the principles of the then-emerging theory of contract development. Chapter two, on marital unification, centers on the classic legal fiction of “unity of person.” Chapter three, on marital dissolution, addresses the foundational assumptions of the indissolubility doctrine, as well as the presumption of “paternal right” and the fiction of illegitimacy, *filius nullius*. Collectively, these chapters chart the entire trajectory of marriage, from start to finish.

## ACKNOWLEDGEMENTS

I begin by thanking my dissertation directors, James Thompson and Jeanne Moskal, for their constant encouragement and support. James's unwavering confidence in my intellectual pursuits ushered me through moments of self-doubt, and his enthusiasm for my project motivated me to dig deeper and reach farther. Jeanne's unparalleled ability to listen without judgment, her concern for my well-being, and her generosity of spirit kept me steady and focused. Moreover, both directors' willingness to share their knowledge-base and help me cultivate my own was invaluable to me as I defined and developed my scholarly interests and research methodology.

I would also like to thank Tom Reinert, John McGowan, and Megan Matchinske for their consideration and care as I moved through the graduate program and the dissertation process. This project was inspired, in large part, by Tom's eighteenth-century novel course, John's equality seminar, and Megan's philosophies of history class. Moreover, my critical engagement with law and literature was sustained and enriched through their feedback and their commitment to producing meaningful scholarship.

There are many others in my academic career to whom I am indebted, including John Morillo, who introduced me to the eighteenth-century and the early English novel; Sharon Setzer, who urged me to pursue a doctorate; and Tommy Nixon, who promptly and happily responded to all of my research queries. Special thanks go to Mary Floyd-Wilson and Jennifer Ho, both of whom, as directors of graduate studies, were indispensable to me as I charted my course of study. Additional thanks to Ben, Katie, Doreen, Jennifer, and Sarah, each of whom served as my readers, editors, and advisers throughout the program.

Final thanks go to my family. First to my parents: to my mother, Diane, for imparting to me a love of reading and intellectual inquiry; to my father, Harlan, for modeling a strong work ethic; and to the both of them for giving me the opportunities that led me here. To my siblings, Nick and Maria, for their care and understanding. And, to my husband, Bryan, without whom none of this would have been possible.

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## INTRODUCTION

Eighteenth-century legal commentary often presents a vastly different picture of women's position under the law than that constructed by contemporary literary narrative. For example, in his celebrated legal treatise *Commentaries on the Laws of England* (1765-69), Sir William Blackstone observes that "the female sex" is a "great . . . favourite . . . of the laws of England," and argues that the legal "disabilities" to which a woman is subject upon marriage "are for the most part intended for her protection and benefit" (1: 433). Similarly, the anonymous author of the legal treatise *The Laws Respecting Women* (1777) asserts that "England has been stiled the Paradise of women," and connects the fortune of the "softer sex" to the nation's acknowledgement and enforcement of the "the natural rights of mankind" (vi; Preface). In contrast, the eponymous heroines of Daniel Defoe's *Roxana* (1724) and Mary Wollstonecraft's *The Wrongs of Woman: or, Maria* (1798) vehemently argue that the law, particularly the law of marriage, operates as a mechanism for stripping women of their natural rights. It requires them, in Roxana's words, to "'giv[e] up Liberty, Estate, Authority, and every-thing, to the Man'" (Defoe, *Roxana* 148) and brings them, in Maria's terms, to a state of enslavement (Wollstonecraft 158-59, 195).<sup>1</sup> While these female protagonists are more polemical in their assessment of women's position than most of their literary counterparts, they register the theme of legal disadvantage and oppression that pervades the eighteenth-century novel. The significance of the legal and literary dissonance on the law's treatment of women lies in what it

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<sup>1</sup> Roxana also posits married women as slaves: "the Woman [once married] was indeed, a meer Woman ever after, that is to say, a Slave" (Defoe, *Roxana* 148).

suggests about the integrity of the legal- and the literary-historical record and the strength of the methodologies through which those records are produced. Indeed, this incongruity elicits broad questions about the notion of a “historical real” and about the limits of “truth-bearing” cultural artifacts. It also underscores the instability of institutional boundaries: the law’s distinct features—its objectivity, rationality, and sovereignty—appearing to confront those of literature—its subjectivity, creativity, and cultural sensitivity. Indeed, these two accounts of women under the law indicate the law’s susceptibility to the fictive and literature’s accessibility to the real.

This dissertation explores the complicated relationship between eighteenth-century legal and literary discourse on the law of marriage. I read primary legal texts implicating marriage alongside and against the domestic novel in order to discover how both fields use fiction to reveal and to obscure, to preserve and to destroy, and to historicize and romanticize those customs and precepts that surrounded the period’s marriage contract. I argue that the conversation between law and literature about marriage suggests that the latter often operated to both expose and de-fictionalize, disempower, or even rewrite the former. I further argue that the deeply imbricated relationship between the two cultures demonstrates the importance of treating literary fiction as part of the legal-historical record and for understanding legal fictions as significant to literary history, particularly to the novel’s development. Fictions, legal and literary, have a jurisprudential function that impacts the cultural consciousness in ways that are profound and potentially problematic to the effectuation of a historical real. Thus, a collaborative, interdisciplinary effort aimed at discovering and debating the position of fictions in the historical record can lead to a more authentic account of legal and literary development.

## *Fiction and the Historical Consciousness*

The term “fiction” is most often used to denote literary narrative: imagined representations of real or other worlds or invented accounts of random incidents or important events. Yet, “fiction” is also a long-standing legal term of art, one that has been the subject of significant, albeit sometimes marginalized, scholarly debate.<sup>2</sup> Traditionally, “legal fiction” has referred to a statement or assumption made at law and understood to be false, but adopted for administrative convenience or to otherwise streamline legal process, doctrine, and judgment. Common examples of classic legal fictions include the doctrine of corporate personhood, which treats corporations as individuals for the purpose of assigning them legal rights and duties; the process of adoption, which treats adopted children as the natural children of their adopted parents for inheritance purposes; and the doctrine of attractive nuisance, which treats child trespassers as invitees in certain tort cases.<sup>3</sup> In his influential book *Legal Fictions*, Lon Fuller defines the classic legal fiction as “either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility” (9). Drawing on Fuller, Nancy J. Knauer describes “the traditional legal fiction” as “an enabler” –as “a device used to facilitate the application of the law to novel legal questions and circumstances” (9). Thus,

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<sup>2</sup> Louise Harmon observes that the scholarly interest in legal fictions “cooled down” in the late nineteenth century, picked up in the early to middle twentieth century, and cooled again after Lon Fuller’s 1967 *Legal Fictions* (11-16). She writes that in the years since the publication of Fuller’s work, “interest in the subject withered and died, and virtually fell off the vine” (1). Recently, however, scholars from multiple disciplines have been working to restore legal fictions to a place, in Harmon’s words, “on the jurisprudential agenda” (1). Their efforts appear to be successful. For example, in an essay featured in the 2015 anthology *Legal Fictions in Theory and Practice*, Douglas Lind observes that “[t]he legal fiction . . . has risen [in the twenty-first century] from its jurisprudential dormancy” (86).

<sup>3</sup> There is much debate over the definition of “legal fiction” and over the doctrines, processes, and propositions that fall within its scope. Nevertheless, my research suggests that corporate personhood, adoption, and attractive nuisance are generally believed to have the traditional constitutive properties. For an overview of this debate, see Maksymilian Del Mar, “Introducing Fictions.” Additionally, for a useful discussion of a variety of legal fictions, both judicial and statutory, see Gwilliam.

it is often the case, as Fuller's and Knauer's examinations suggest, that legal fictions have particular utility in times of social, economic, or political change, allowing courts and legislative bodies to adapt the law to meet new conditions.

In addition to Fuller, early twentieth-century legal scholar Roscoe Pound provides a useful, and some argue more expansive and auspicious, interpretation of the concept of legal fiction.<sup>4</sup> In *Interpretations of Legal History*, Pound characterizes legal fictions as “[c]reative law-making” designed “to devise new institutions, provide new precepts and find new principles” (130). According to Pound, the term “legal fiction” encompasses, in addition to procedural inventions, certain interpretive, equitable, and natural law contrivances (130). Indeed, Pound argues that legal fictions include rules developed through judicial interpretation and used to fill gaps in an existing “rigid code or . . . body of customary law” (131); principles developed in the courts of equity and used to avoid legal outcomes that, while technically sound, are not particularly fair or just (132-33); and precepts developed out of natural law theory and used to “correct[] and supplement[]” the “imperfect,” and sometimes arbitrary, principles of positive law (133-34). Unlike Fuller, Pound does not emphasize falsity or consciousness of falsity in his description of the legal fiction, but he does stress the potential utility of the device, both from a standpoint of administrative convenience and juridical justice.<sup>5</sup>

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<sup>4</sup> For a comparison of Pound's theoretical approach to legal fictions to others' approaches, see Harmon 11-12 and P. Smith 1465n.155.

<sup>5</sup> There are numerous nineteenth- and twentieth-century philosophies on the concept of legal fiction that are significant to current scholarship, including Henry Sumner Maine's *Ancient Law* (1861), Hans Vaihinger's *The Philosophy of 'As-If': A System of the Theoretical, Practical and Religious Fictions of Mankind* (1911, trans. 1924), and Pierre J.J. Olivier's *Legal Fictions in Practice and Legal Science* (1975). For recent discussions of these contributions to legal fiction theory, see Quinn (on Vaihinger); Samuel (on Vaihinger); Del Mar, “Legal Fictions and Legal Change” (on Maine and Olivier); and Kiralfy (on Maine). Another contribution of note is Eben Moglen's “Legal Fictions and Common Law Legal Theory.” Of particular interest is Moglen's explanation of how legal presumptions operate as legal fictions, a conflation that some scholars seem to deny (37-38).

More recently, some legal and literary scholars have undertaken to expand further the conventional framework of the legal fiction by deemphasizing the device's relationship to legal utility and focusing instead on its falsity. In an essay titled "New Legal Fictions," Peter Smith argues for extending the concept to include "ostensibly factual" but "descriptively inaccurate" suppositions employed by the courts "as . . . ground[s] for creating a legal rule or modifying, or refusing to modify, an existing legal rule" (1441). According to Smith, "new legal fictions" are distinguished from classic legal fictions by their broad application as well as by their greater tendency toward misrepresentation and judicial opacity. Smith argues that, unlike classic legal fictions, which are employed to adjudicate a particular circumstance or to "soften[] . . . the effects of legal change" and which are generally acknowledged to be false, new legal fictions are often implemented without recognition of their falsity and with the purpose of "*justifying* [legal] doctrine, whether received or newly established" (1470, 1468-70). As one example of many, Smith cites the legal rule prohibiting an "ignorance of the law" defense, noting the rule is founded on the patently false, but generally uncontested, assumption that individuals are always already aware of the totality of their legal rights and duties (1437, 1459-60). Smith also highlights as indicative of a new legal fiction the evidentiary rule prohibiting the use of expert testimony as a way to rebut eyewitness testimony, finding the rule to reflect the broadly accepted, but scientifically-challenged, assumption that "jurors can competently assess the reliability of eyewitness testimony" (1439, 1452-55). For Smith, it is imperative that the legal field analyze these "ostensibly factual" assumptions for their fictional qualities. With such analysis, the fictions' contemporary juridical value and, in particular, their relationship to normative expressions of legal authority, can be deliberated and assessed fully. Moreover,

Smith's extension of the term allows for scholars to reevaluate the historical significance of *old* "ostensibly factual," but now clearly false, legal suppositions.

This contemporary trend toward establishing a broader conception of legal fiction has been the subject of much discussion and debate. Knauer, for example, argues that twenty-first century criticism on the legal fiction has "change[d] the conversation [on fictions] entirely" (6). Knauer observes that recent scholarship "has sought to expand the category of legal fictions beyond Fuller's definition" to include legal rules, presumptions, doctrines, and constructions that "are either not acknowledged to be false or are not themselves demonstrably false" (5). One category of such fictions that Knauer emphasizes arises out of the law and literature field and involves what she terms "discredited legal regimes" (27-28). Knauer turns to the interdisciplinary work of Christina Accomando on slavery and of Jen Camden and Kathryn Fort on colonial land policy (both of which I will discuss in more detail) to argue that scholars have extended the concept of legal fiction to institutional systems that, while apparently accepted in their historical moment, either "lacked the staying power of moral truth" or simply were "factual misstatement[s]" (27, 36). While Knauer is deeply critical of this expansion, her discussion highlights the ways in which legal fiction theory has developed out of and diversified from its classical roots.<sup>6</sup> It is an evolution captured most markedly in the 2015 multi-disciplinary anthology *Legal Fictions in Theory and Practice*. In his introduction to the comprehensive edition, co-editor Maksimilyn Del Mar emphasizes the concept's slipperiness: "multiple . . . are the examples offered of so-called paradigmatic or typical fictions, and there as many definitions

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<sup>6</sup> Knauer is concerned that recasting discredited legal regimes as fictions tends to diminish the historical significance of the injustice and ignorance that permeated and emanated out of them (7-8, 26-38). She argues that to "label" "violent legal regimes" as fictions threatens to "work[] a denial and remove[] from memory important lessons regarding the law and the fragility of the human experience" (8).

of fictions as there are apparent functions of them (i.e. jobs they perform or enable) and alleged benefits and disbenefits they bring” (“Introducing Fictions,” ix). Moreover, this fluidity of meaning and function appears in the anthology’s contributions, some of which employ or defend existing conceptual patterns and others of which seek to offer new philosophical frameworks. Because of the ambiguity surrounding the constitutive properties of the “legal fiction,” this dissertation takes a wide view of the device, attending to legal rules, doctrines, presumptions, and systems that contain significant untruths, whether recognized, ignored, or denied, whether motivated by the practical or the political, and whether useful in or inimical to the administration of justice.

Rather than enter into the conceptual debate over “legal fiction,” I want to focus on the operational debate, which has its roots in eighteenth-century legal philosophy.<sup>7</sup> William Blackstone and Jeremy Bentham are the historical representatives of the tensions concerning the concept’s utility and legitimacy, with Blackstone serving as the model advocate of the legal fiction, and Bentham as its exemplary opponent. In *Commentaries*, Blackstone argues that legal fictions are “highly beneficial and useful,” but his contention is based on the assumption that “no fiction shall extend to work an injury,” as it is always adopted and employed “to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law” (3: 43). Blackstone does concede that fictions can, and sometimes do, create a sort of administrative and doctrinal “labyrinth”; yet he maintains that these perplexities are the necessary consequence of a long-established, deliberate, and complex system of jurisprudence (3: 268). In one of his more poetic moments, Blackstone uses medieval imagery to remind skeptics of the inveterate nature of

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<sup>7</sup> I recognize that for some scholars the conceptual and operational debates are one in the same. In these scholars’ minds, how we define legal fiction is crucial for assessing the concept’s value. By taking a broad perspective on the term, however, I am able to address, on a larger scale, the socio-cultural impact of legal untruths.

the English legal tradition and of the part legal fictions have played in making the law habitable for the modern era:

We inherit an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless. The inferior apartments, now converted into rooms of convenience, are chearful and commodious, though their approaches are winding and difficult. (3: 268)

One way to understand Blackstone's apparent indifference to these "winding and difficult" paths is in the context of his belief in the supremacy of natural law and his great confidence in human reason. In other words, Blackstone thinks of legal fictions as juridically safe precisely because, in his view, any dangers or errors are precluded by the fictions' subordination to pre-existing, universal rules dedicated to the natural rights of man and accessible to all rational actors, including those setting, practicing, and interpreting the law.<sup>8</sup> His faith in reason is so strong that he argues for almost blind adherence to legal tradition. In a section on the sanctity of the common law and legal custom, he writes "precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration" (70; bk. 1, ch. 3). This admonition includes, it appears, obsolete fictions or any false presumptions adopted to facilitate legal, social, or political change.

It is Blackstone's veneration for the "old Gothic castle"—his fidelity to the notion of an ideal legal past and present—that drives Bentham's derision for the "legal fiction." In *A Fragment on Government* (1776), Bentham attacks Blackstone's unapologetic reverence for English law as a codification of natural law. According to Bentham, natural law is itself a fiction, a mere "phrase" that threatens to render incomprehensible—to destabilize—England's legal

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<sup>8</sup> See Blackstone 1: 41; and 1: 68-70.



system (212-14; ch. iv, sc. 18-19). That system is further rendered unintelligible to laymen by the procedural or interpretive legal fiction: it is, he argues, a “pestilential” device that “poisons the sense of every instrument it comes near” (113-14n.1; Preface). Yet, Bentham’s concern about legal fictions extends beyond their impact on the law’s accessibility. In *Rationale of Judicial Evidence* (1827), Bentham suggests that these administrative mechanisms corrupt the moral order and jeopardize society’s “intellectual faculties” (287; bk. 8, ch. 18).<sup>9</sup> Indeed, he argues that legal fictions transform the “law-book” into “an institute of vice,” the “court of judicature” into “a school of vice,” and the citizenry into a mass of imbeciles who equate justice with lies (287; bk. 8, ch. 18). For Bentham, fictions are the means by which judges exercise “arbitrary power” and lawyers dictate legal outcomes—they are the means, in other words, by which the legal profession unfairly and covertly appropriates the terms of justice (287; bk. 8, ch. 18).<sup>10</sup>

Although the concept of the legal fiction has remained viable in and valuable to the law post-Bentham, it is not without its critics. Scholars in the classic tradition have suggested that the device has the potential to confuse and mislead and, in some cases, perpetrate injustice. Fuller, for example, concedes that “[a] fiction taken seriously, i.e., ‘believed,’ becomes dangerous and loses its utility” (9-10). In this form, it is a deception that acts to impede the law’s practical objectives and ethical demands. Hans Vaihinger also argues the concept’s moral challenges, especially in regards to marginalized groups: “In legal practice, the employment of fiction may lead both to benefits and also to the grossest forms of injustice, as when women were treated *as if* they were minors” (148). Moreover, in an essay that seeks to categorize fictions into static

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<sup>9</sup> Bentham devotes an entire chapter of *Rationale of Judicial Evidence* to legal fictions. His distaste for the device is perhaps most famously captured in the following: “Fiction of use to justice? Exactly as swindling is to trade” (283; bk. 8, ch. 18).

<sup>10</sup> For an extended discussion of Bentham on legal fictions, see Quinn.

(bad) and dynamic (good), John Gwilliam warns that when a fiction becomes too general, too rigid, and too fixed within legal thought, it “becomes open to abuse” (459, 468-69). It can be applied arbitrarily or unnecessarily and in ways that endanger the law’s principal aim—to ensure a just result (Gwilliam 458-69). More recently, Douglas Lind has noted the existence of “problematic fiction[s]”—i.e., fictions that “upset settled meanings or truths, work injustice, or mask underlying processes of legal reasoning”—and argued for their elimination (100, 84). For Lind, the evaluation process is “case-by-case” and, he suggests, requires an examination that reaches outside of the law’s institutional walls (84-85). It is not, then, just how the fiction influences law and legal meaning, but how it impacts society and socio-cultural truths.

Another criticism of legal fictions, old and new, is that they have the potential to shape and standardize—that they can become instruments for developing and authorizing normative behaviors and ideologies. Aviam Soifer argues that the legal fiction, once accepted, “channels thought” (often narrowly) and “affect[s] how growth will tilt” both within and outside the legal academy (877). It has the capacity, Soifer contends, “to influence or even control how we think or refuse to think about basic matters” (877) and to “shroud the tragedy of present reality” (892). Echoing Soifer’s argument, Louise Harmon calls for legal scholars to “passionately” re-engage with the legal fiction, reminding them that the “[w]ords of law matter” and that “artifice” within the language and application of the law can obscure “state power” and, she suggests, appropriate the individual experience (70-71). Developing this criticism further, Peter Smith contends that legal fictions are troubling precisely because they can operate (intentionally or otherwise) to conceal, craft, and convince both at the social and political, as well as legal, levels. He suggests that fictions can work covertly to enforce normative standards and structures *and* to legitimate questionable legal doctrine—i.e., doctrine that is “base[d] . . . on false, debatable, or untested

premises” (1439-1440). Thus, from this critical perspective, legal fictions, at their most shrewdly powerful, have the potential to de-stabilize three dominant values in Anglo-American law and society—truth, transparency, and justice—and they threaten to alter irrevocably how institutions and individuals understand their past, experience their present, and negotiate their future.

The challenge that fictions pose to the legal-historical record and to the Anglo-American consciousness is revealed in the work of critical legal scholars and critical race theorists. In an essay discussing nineteenth-century jurisprudence on Native American sovereignty and property rights, Hope Babcock demonstrates how false constructions of race and colonial right have become so deeply integrated into the fabric of judicial decisionmaking and legislative policy on Indian affairs that, even now, they operate as legal fact. She persuasively argues, “[w]hen courts so often repeat legal fictions . . . then factual distortions become institutionalized; a part of . . . [legal] jurisprudence that cannot be denied” (819). Camden and Fort, writing on the same body of jurisprudence, extend the fictions’ impact to the social collective.<sup>11</sup> They argue that racialized and ideologically-driven legal falsehoods, such as Chief Justice John Marshall’s characterization of indigenous tribes as “‘fierce savages’” (93) and his use of “the mythical narrative of conquest” to counter Native American land rights (89), have the potential to “become ‘truth’ to the majority society and trickery to the minority group” (86). Moreover, Accomando, whose work focuses on legal fictions related to slavery, proves Camden and Fort’s point. By reading the work of Harriet Jacobs, Sojourner Truth, and Phyllis Wheatley alongside institutionally-created legal discourse, Accomando demonstrates how the law’s ideological “framings of race, gender, and slavery” silenced the “legal and political voice[s]” of African Americans, thereby erasing their efforts “to

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<sup>11</sup> These scholars are interested in the development of the discovery and conquest doctrine, which “claims the first European sovereign to ‘discover’ land holds the right to the title to the land and the right to conquer those who live there” (Camden and Fort 87).

deconstruct slavery and its underlying ideologies” from the dominant historical narrative and the prevailing collective memory (9, 4-5, *et passim*). What these scholars show, then, are that institution and individual are highly-mediated entities—their awareness of and sensitivity to “self” and “other” is negotiated, at least in part, by the historical embeddedness of the law’s fictions.

Recent criticism on the concept of legal fiction therefore suggests that, while the various iterations of the device are often thought to facilitate the reality of legal change or cultural progression, they can just as often plaster over apertures in the “real.” They can shape, in sometimes troubling ways, how we see ourselves, our relationships, and our social counterparts, and they can inaccurately frame our perception of our legal rights and duties, including their historical foundations and developments. So, how can we reclaim our subjectivity and our historical consciousness from the sometimes corruptive influence of legal fiction? Where can we go to recover the voices and experiences that have been silenced or normativized by this ostensibly pragmatic device? How can we identify and revise legal constructions that are ideologically, rather than practically and rationally, motivated? How do we facilitate “good” legal fictions while maintaining cultural truths and developing a system of progressive socio-legal ethics?

One solution—and the solution that I investigate in this dissertation—is to turn to literary fiction, which in its own representational, critical, and imaginative capacities, can expose some of the historical gaps and biases created by legal untruths and re-direct legal and social thought toward a more authentic and, often empathic, understanding of the legal subject, the legal actor, the legal past, and the legal future. Law and literature scholars long have recognized literature’s value to jurisprudential development, ethical professionalism, and legal history. As François Ost

has argued, literature can “perform a function of *critical subversion*” and “a function of *founding conversion*” when placed in conversation with the law: Literature can “reveal [the law’s] fictions and effects of *trompe-l’oeil*, its artifices and theatrical effects,” and in so doing, “produce both a critical knowledge of legal constructions and an incentive to re-found the[m] on a deeper knowledge of the power of language, as well as on the twists and turns of practical reason” (6-7). These functions, as Barbara Vilez suggests, can touch both the lay and professional reader. Just as literary fiction “participates in the construction of a citizen’s legal culture,” imparting legal knowledge and ordering reader attitudes, especially in regard to legal justice (Vilez 211-15), it also “guide[s]” the legal expert’s theoretical and practical mindset “towards a more integrated [and flexible] understanding of law in society” (Vilez 217-18). Indeed, in its considerable cultural reach, imaginative fiction has the ability to enlighten individuals and institutions about the reality of their legal world and to transform how they approach the rights and duties of all who inhabit that world along with them.

The idea that literature provides an ethical framework for assessing and administering the law is suggested in the interdisciplinary work of Robin West and Martha Nussbaum. For West, literary narrative, with its diverse representations of “human nature,” challenges those “moral beliefs” that are “held by dominant sectors of society” and prioritized at law (7-8). It also, she contends, destabilizes the argument “that the law is just because its precepts and procedures reflect the moral commitments and ideals of the community” (9). In West’s accounting, literature can help us to create an empathetic and experiential knowledge base—a more compassionate and heterogeneous understanding of human nature—from which we can then revisit those principles and practices whereby the law claims and enacts its often too prescriptive “moral authority” (9, 6-10). Martha Alison LaCroix and Martha Nussbaum, similarly argue the instructive and emotive value of literature

to the law. In their view, literary narrative reveals the law's constraints and injustices; it expresses the complexity of the lives impacted by legal convention and prescription; it imagines proactive responses for the lawfully marginalized; and, for Nussbaum in particular, it cultivates the reader's capacity for sympathetic identification and for good—i.e., emotionally- and rationally-informed—judgment.<sup>12</sup> In other words, literature re-places the law within its immediate or historical socio-cultural context and thereby encourages a critical investigation into its expansive “moral” power. It further facilitates an ethically- and rationally-minded public response to institutional expressions of that power.

Literature also promotes a thicker understanding of legal history, including the enduring power of the law's fictions. Accomando's work on slavery and its resistance demonstrates the historical reach of legal fictions, as well as the necessity of employing extra-legal texts to produce a careful, authoritative legal historical record. Drawing on the work of Angela Harris, Accomando argues that in order to get to the truth of African American slavery and resistance, it is necessary to dispel the notion of the law as a “single,” “unified” and ““neutral voice”” (11). Accomando contends that it is only by integrating “multiple voices and shifting perspectives” into the “official” legal record (as first suggested by Harris) that it becomes possible “to destabilize the seemingly neutral language of law and policy” and to authenticate (more fully) legal history (11). Accomando herself creates multi-vocality in the legal record on slavery by reading primary legal texts implicating the institution “alongside and against” a range of external materials, including “poetry, oratory, slave narrative, and . . . legal critiques by former slaves” (4). By attending to the dialogue between law and literature on slavery—by privileging “multiple

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<sup>12</sup> Nussbaum and LaCroix suggest each of these values in their introduction to an interdisciplinary anthology on representations of gender and law in the British novel (3-11). Nussbaum's theory on the relationship among literature, “rational emotions,” and judgment can be found in her innovative book *Poetic Justice*.

consciousness”—Accomando highlights the law’s silences, ironies, contradictions, and prerogatives, ultimately reconstituting the traditional historical narrative of African American oppression under the law as one of African American agency—of protest, defiance, and rebellion. This practice of incorporating a variety of discourse, especially the literary, is, I would argue, useful in any historical endeavor that seeks a comprehensive understanding of legal culture, including the life of its (un)acknowledged fictions.

Imaginary fiction’s potential to engage with the real, and to establish or re-shape cultural norms, is, of course, central to traditional literary studies and, in particular, scholarship on the novel form. Novel theorists and historians often connect its representational and visionary qualities to the commencement of the modern age and the development of the modern individual. For example, Ian Watt, in his groundbreaking *The Rise of the Novel*, argues that the early novel was conceived as a forum for examining and mediating the “truth” of contemporary “human experience” (13). According to Watt, novelistic narrative represents and, in its depiction of the social, evaluates the emerging conditions of individual free will, autonomy, and equality. Jane Spencer, in *The Rise of the Woman Novelist: From Aphra Behn to Jane Austen*, implicitly extends Watt’s thesis to early domestic fiction authored by women. Spencer argues that these authors seized the opportunity to describe the private space of domesticity and the female experience within it, as well as to propagate *and* critique the “new ideology of femininity” by which that space was coming to be defined (viii-xi). In *Desire and Domestic Fiction*, Nancy Armstrong also considers the significance of novels written by or for women. She posits the novel as a powerful ideological medium, one that constructed the modern, middle-class domestic sphere, the sexual relationships by which that sphere has been defined historically, and the feminine ideal which gives the space political authority (4-5, 8-10). Then, in *How Novels Think*,

Armstrong eclipses the provocative argument of her earlier work to argue that the novel *created* the individual, or the modern subject (7).

James Thompson, in *Models of Value*, moves outside of the confines of the domestic sphere and considers how the novel form represents and responds to the developing “crisis in the notion of value” engendered by the rise of a modern capitalist economy (2, 2-3). According to Thompson, the novel works dialectically with contemporary political economy to solve the crisis by locating financial value in the public, and romantic or affective value in the private, sphere (23-24, 185-86). In a similar manner, Liz Bellamy, in *Commerce, Morality and the Eighteenth-Century Novel*, reads C18 economic and ethical writing alongside the eighteenth-century novel in order to understand the early novel’s participation in the capitalist-induced competition between private and public conceptions of morality. Bellamy argues that “[t]he mid-eighteenth-century novel can . . . be seen as an embodiment of the ethical tensions that conditioned the period” (7), while the novelistic discourse that followed can be understood as an attempt to resolve those tensions by separating the private from the public (184). Michael McKeon, in *Origins of the English Novel*, also points to early modern anxieties, “epistemological and social,” as critical to the novel’s modern development. For McKeon, the novel both “reflects” and seeks to “resolve” concerns about narrative “truth” and individual “virtue” in a moment of great social and economic change (20-22). Thus, it is these and other literary responses to modernity—in the form of solutions, challenges, and adaptations—that novel scholars demonstrate gave the early novel its cultural and political force and that contributed not only to the construction of the modern self but also to the instantiation of the “liberal” Western state, both its public and private spheres.



Literary scholars have also examined, however tangentially, the law's relationship to the novel's development and to the form's position as a modern production. Wolfram Schmidgen, for instance, has looked to natural law philosophy (e.g., Locke's *Two Treatises*) and legal treatise writing (e.g., Blackstone's *Commentaries*) to demonstrate that eighteenth-century subjectivity was inextricably linked to material property, and to argue that the period's novel reiterates that link and England's continued investment in "communal forms" (1). Nancy Johnson also has considered the early novel's investment in the relationship between individual and material circumstance. Focusing on the Jacobin novel's engagement with social contract theory, Johnson argues that the literature takes up the Enlightenment philosophy's central problem: that it admits as contracting subjects only those who can show themselves capable of self-governance by virtue of their status as property owners under the law (104-52). Finally, Sue Chaplin has considered how the eighteenth-century novel interested in "constructions of bourgeois femininity" operates, in part, as a response to (or in conjunction with) conflicting and equivocal notions of the female as legal subject (40)<sup>13</sup>; while John Zomchick has investigated how the period's novel uses legal precepts to help create a "juridical subject," one who abandons his or her fragmentary nature to, as the law envisions, become "internally coherent and self-regulating" (2, 1-31). Yet, there has been little consideration of how literary imaginings work in accord with and in opposition to legal untruths, and what this tenuous and often vexed exchange suggests about the novel's position within literary history—how the novel developed as a response to the law's construction of itself and its history as rational, objective, and just.<sup>14</sup>

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<sup>13</sup> Chaplin is particularly interested in how these novels invoke the sublime and the trope of sensibility as they work through women's legal subjectivity pre- and post-marriage (30-40).

<sup>14</sup> There is a very small body of literary scholarship that examines the relationship between literary and legal fiction; however, this work tends to focus on specific authors or particular fictions, rather than the novel form and the concept of legal fiction. See, for example, Trish Ferguson's work on legal fictions in Thomas Hardy's oeuvre. For a more theoretical discussion the two devices, see Kertzer, who examines how justice is constructed and complicated

Thus, this dissertation investigates the dialectical relationship between novelistic fiction and legal fiction, both of which are connected in significant ways to the modern era and both of which are crucial to understanding the English and American historical outlooks. The project proceeds by understanding the discipline from which each fictive endeavour derives as operating both in conjunction with *and* in opposition to the other. In *Reading for the Law*, Christine Krueger convincingly argues for a “multidisciplinary ‘historical narrative jurisprudence,’” or an approach to law and literature that “replace[s] an ahistorical opposition between [the two disciplines] with a history of their interdependency, and their embeddedness in print culture” (2). According to Krueger, this approach “strengthens” the position of narrative legal theorists who have consistently argued “for the transformative powers of stories” (2), or more precisely, who have argued for

storytelling as a solution to the problem of attaining legal recognition on the grounds that it allows for testimony regarding ‘life contexts,’ or alternative realities, excluded by normative rules of evidence, and that it enables privileged legal decision makers to empathize with people whose experiences and constraints may be very different from their own. (12)

For Krueger, historicizing literary narrative opens up and objectifies its relationship to the law and to the stories and histories in which both are implicated and by which both are produced (1-22). For my purposes, “historical narrative jurisprudence” serves as a reminder that we cannot assume that literature functions only to expose the limitations, biases, or idiosyncrasies of the law; rather, it can just as well operate to advance or propagate a particular, and sometimes controversial legal agenda. In fact, the law is an institution always already bound up with the literary, with each field’s fictions constantly influencing and being influenced by the other.

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by legal and literary fictions. There are also critical texts that focus on representations of the law in eighteenth- and nineteenth-century fiction generally. See Swan, *Fictions of Law*; and Loncar.

*The Marriage Contract, Fiction, and the Historical Record*

Fictions have permeated, and continue to permeate, our historical consciousness. They work in ways that represent and conceal, define and shape, and authenticate and repudiate our present and our past. This dissertation investigates the relationship between legal and literary fictions occurring in a discrete historical context—eighteenth-century England—and respecting one particular social and legal institution—the marriage contract. Reading a variety of primary legal texts alongside and against a multitude of early domestic novels, I demonstrate how literary narrative acts to expose, revise, mitigate, and even advance some of its more thorny legal counterparts, and I reveal legal narrative’s influence on the development of the early novel and its diverse genres. Ultimately, this project offers a more comprehensive outlook on early modern marriage and the emerging modern subject, particularly the female subject.<sup>15</sup> It also establishes the novel form as useful to legal thought on legal fictions, and it illustrates the utility of a collaborative—i.e. law and literature—approach to historical inquiry.

Why the eighteenth century, the marriage contract, and the novel? Eighteenth-century England, as a hub of Enlightenment philosophy, is a place of intense social, economic, and legal change. It is here that modern liberal ideas about individual right and economic freedom are advancing on the traditional systems of social class and economic feudalism. England’s private sphere is responding to this progressive movement by rethinking the dynamics of courtship, marriage, and the family, and its legal system is reacting by modifying, to varying degrees, the law of contract and the law of domesticity—i.e., the law of marriage, separation, and divorce. In

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<sup>15</sup> For a useful discussion of how the nineteenth-century novel interacts with legal fictions (in the form of presumptions about women) that construct female subjectivity, see Ledwon. In addition, Melissa Ganz has published a dissertation that, according to its Abstract, “examines the ways in which eighteenth-century novels both participated in and were shaped by [legal] debates” on the relationship between “contract logic” and “the conjugal tie.” Because the dissertation itself was not available to me at the time of writing my project (as of January 2018, Proquest’s Dissertation and Theses database continues to display the following: “At the request of the author, this graduate work is not available to view or purchase”), I cannot speak to its relevance.

addition, literary culture is experiencing a major evolution with the development of the novel form. As a prose structure with strong mimetic and ideological objectives, the novel is focused on representing and shaping individual subjectivity and its domestic sphere, both of which are heavily influenced by the law and its fictions. Thus, this period and these longstanding institutions are ripe for thinking about the ways in which legal and literary fiction have worked together to create and re-create the modern historical consciousness.

“Legal Fictions, Literary Narrative, and the Historical Truth” is organized into three chapters, each of which treats a distinct phase in the marriage contracting process: formation, unification, and dissolution. I begin each chapter with an overview of the legal fiction(s)—and, as earlier noted, I use this term broadly—implicated by the particular stage under review. I then analyze primary and secondary legal materials that not only represent important developments in eighteenth-century marriage law, but also act as bearers or managers of the fictions at issue. The research includes legislation, court opinions, pre- and post-nuptial contracts, and legal treatises. Following this discussion, I analyze the ways in which early domestic novels operate as participants in marriage-related jurisprudence. I consider how the texts’ authors employ form, genre, and content to represent, legislate, and adjudicate the relevant legal fictions, and I argue that these writers provide an important extra-institutional framework for comprehending and assessing the law’s relationship to modern notions of self and other, and of past and present.

Chapter I investigates the legal fictions implicated in the formation of the marriage contract, with a particular focus on the classical liberal assumptions that underlie (proto)modern contract theory. I analyze the legislative history and content of the 1754 *Act for the Better Preventing of Clandestine Marriages*, as well as case law on breach of promise of marriage, in order to understand whether and to what extent burgeoning presumptions about party rationality,

equality, and autonomy in the contract negotiation process appear in marriage formation jurisprudence. I argue that the law was relatively ambivalent about these presumptions, especially in regard to the female subject. I then read four novels that explore the courtship process—*Pamela* (1740) and *Clarissa* (1748) by Samuel Richardson, *Emmeline* (1788) by Charlotte Smith, and *Sense and Sensibility* (1811) by Jane Austen—for literary culture’s developing response to these presumptions. I argue that the Richardson’s mid-century sentimental novels identify emerging liberal formation principles as legal fictions, while Smith’s and Austen’s late-century gothic and realist works seek to dispel or de-fictionalize the inventions. Indeed, the earlier narratives challenge the legal assumptions about contractual bargaining power and the will to consent, and claim for their heroes and heroines modern contractual rights; while the later novels serve as treatises on contract negotiation, teaching readers how to properly conduct themselves on the marriage market so that the legal fictions identified by their authorial predecessors might be translated into cultural truths.

Chapter II examines the classic legal fiction attendant upon the execution of the marriage contract: unity of person. This fiction posits husband and wife as one entity and authorized the law of coverture, which, among other constraints, deprived women of the right to own property. I investigate eighteenth-century legal culture’s complex treatment of this fiction through an analysis of marriage settlement agreements and equitable case law, the former of which created an exception to the fiction in the form of married women’s separate property rights and the latter of which established the scope of such rights. I argue that while the law was beginning to rewrite, often implicitly, what it meant to be “one person” in marriage in more liberal terms, it retained a commitment to the fiction’s patriarchal underpinnings. I then read four novels in which the concept of unity of person and the married woman’s separate estate are given narrative

significance: specifically, Daniel Defoe's *Roxana* (1724), Eliza Haywood's *The History of Miss Betsy Thoughtless* (1751), Frances Burney's *Cecilia* (1782), and Jane Austen's *Pride and Prejudice* (1813). I argue that these texts work—in different ways and to different effects—to render the traditional presumptions that underwrite unity of person untenable fictions. Indeed, their authors use a variety of forms and genres—from the fictional autobiography to the novel of manners—to divorce the notion of unity of person from ideas about male superiority and patriarchal right and to recast marriage as a true alliance of wills and personhood. Yet, it is only Austen who successfully manages to consign the disabling version of marital unity to the legal sphere and to imagine for the domestic sphere a marital oneness that honors both the individual and her social commitments.

Chapter III explores the legal fictions surrounding the dissolution of marriage. Specifically, I consider the patriarchal and patrilineal presumptions that informed the doctrines of marital permanence and paternal right, as well as the doctrine of *filius nullius*, a classic fiction by which children born out of wedlock are rendered parentless for inheritance purposes. I study a variety of dissolution jurisprudence—parliamentary acts for divorce, private deeds of separation, and common and equitable law—with the purpose of understanding how ostensibly progressive developments in separation and divorce law dealt with these centuries-old assumptions and fallacies. I argue (much like I do in the earlier chapters) that the legal system, although attuned to the problem of “bad” marriages and ostensibly committed to the idea of marriage as a “civil contract,” remained largely invested in the presumptions and fictions by which the nation's longstanding, rigid dissolution policy had been upheld. I then read six novels that stage marital or familial breakdown—Daniel Defoe's *Moll Flanders* (1722), Haywood's *Miss Betsy Thoughtless*, Elizabeth Inchbald's *A Simple Story* (1791), Mary Wollstonecraft's *The Wrongs of*

*Woman: or, Maria. A Fragment* (1797), and, very briefly, Jane Austen's *Sense and Sensibility* (1811) and *Mansfield Park* (1814)—in order to chart how literary fiction contributed to the apparent cultural interest in facilitating divorce and separation. I argue that these texts participate in a cycle of revelation and reformation. Defoe's and Haywood's mid-century novels—both fictional histories—reveal as false the presumption that equates marriage with individual, social, and national welfare. Inchbald's and Wollstonecraft's late-century texts, which fall within the sentimental, Gothic, and Jacobin traditions, supplement this earlier work, demonstrating the inutility and injustice of assumptions about paternal fitness and legal bastardy, and arguing the necessity of legal reform. Austen, with her realist novels of manners, then completes the cycle by returning to a less subversive, yet meaningfully critical and potentially reformatory, representation of bad marriage and its sustaining fictions.

The Coda revisits the notion of the legal fiction and its historical influence, and it argues for a collaborative approach to legal and literary history. In this final section, I review the advantages and disadvantages of legal fictions, including the ways in which the fictions surrounding marriage and contract have continued to shape law and society into the twenty-first century. I also introduce nineteenth-century developments in marriage law, many of which were arguably fostered by the eighteenth-century domestic novel. I argue that the dialectical relationship between legal and literary fictions on marriage demonstrates the need both for a reappraisal of traditional conceptions of law and literature—the former as rational truth-bearer and the latter as agent of the imagined and invented—and for interdisciplinary historical study. I also reinforce the importance of a renewed attention to the legal fiction, with the hope that this project will stimulate more discussion about the nexus between the supposedly “innocuous” device and the developed and developing modern historical consciousness.

## CHAPTER 1: THE FICTIONS OF MARRIAGE-CONTRACT FORMATION

Marriage is *the* defining feature of the eighteenth-century domestic novel, and more often than not, it is the courtship process that drives this novel's narrative action. Protagonists endeavor, alongside secondary characters, to negotiate nuptial arrangements that offer emotional, economic, and social stability, as well as personal happiness. Yet, their efforts are often complicated by predatory practices and endogamous pressures. This is particularly true of the novel's heroine, who frequently finds herself either an object of male seduction and betrayal or subject to familial coercion and social tradition. Germane to this study are the courtship narratives of four pioneering mid- to late-century novels, Samuel Richardson's *Pamela* (1740) and *Clarissa* (1747-1748), Charlotte Smith's *Emmeline* (1788), and Jane Austen's *Sense and Sensibility* (1811). In their preoccupation with the difficult, and often painful, experience of private marriage negotiation, these texts represent and respond to burgeoning constructions of the modern individual as a contracting subject. More to the point, the novels contemplate the legitimacy of those legal principles and presumptions that helped give rise to (and, in fact, continue to influence) notions of liberal selfhood.

This chapter examines the relationship between legal and literary discourse on the participants in and process of marriage-contract formation. Part I provides an overview of Enlightenment philosophy on the modern liberal subject. It is here that I introduce classical contract theory, an eighteenth-century invention that transformed the meaning of market-based contractual exchange. This historical outline reveals contract law's investment in constructions of the individual as a rational, autonomous subject, who regularly acts from a position of equality



and reasoned self-interest. Part II investigates the jurisprudence surrounding two major developments in eighteenth-century marriage-formation law, Hardwicke's Marriage Act and the common law cause of action for breach of promise of marriage. This investigation demonstrates marriage law's reluctance to extend classical liberal presumptions about contractual capacity and contractual freedom into the private sphere. This is particularly true, I demonstrate, in regards to the female subject. Part III examines the novel's contribution to law and society on the issue of modern contractual subjectivity. I argue that novelists interested in marriage formation use distinct forms and genres to interrogate classical contract theory and its conception of the individual and her external condition. Specifically, I argue that the mid-century novel—in its sentimental epistolary form—deconstructs the classical liberal subject, emphasizing the fictional nature of the legal principles by which she is authorized, while the late-century novel—in its gothic and realist forms—works to reconstitute this subject, translating the legal fictions into social truths.

*Part I: The Liberal Subject and the Freedom of Contract*

Over the course of the early modern period, there occurred a major shift in Western European conceptions of the individual and his position as a political, social, and legal subject. Sir Henry Maine famously described this shift as “a movement *from Status to Contract*” (141). Indeed, Maine's nineteenth-century theory about the development of modern Western society took as its point of departure the individual's transformation from patriarchal dependent to contractual agent:

Through all its course [‘the movement of the progressive societies’] has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. . . . Starting . . . from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals. (139-41)

Although Maine's thesis has been the subject of much critical debate, its foundational claim—that at a point in history the individual came to be defined less by his “position in the family” and more by his “own will by contract” (MacCormack 363)—remains a useful way to understand the large-scale cultural changes occurring across eighteenth-century Europe.

In England, the movement toward modernity was informed by classical liberalism, the political philosophy most closely associated with the rise of economic capitalism, religious secularism, and social democracy. Grounded in the work of Enlightenment philosophers such as John Locke, Thomas Hobbes, and Adam Smith, classical liberalism is marked by the principles of self-determination, self-reliance, and freedom of contract. In the ideal classical liberal society, members are rational, autonomous, and equal—each individual has the right to pursue his own interests through property ownership and contractual exchange and to expect others to honor that pursuit. As George H. Smith describes, under this political theory, “[o]ne is truly free when one can act on one's own judgment in pursuit of one's own goals, enter into voluntary relationships with other people, and dispose of one's person and property as one sees fit, so long as one respects the equal freedom of other people to do the same” (7). And, it is the province of the state to ensure, without overreaching, that its citizenry exercise their liberality in a manner that is both self-satisfying *and* inoffensive to others. In other words, governmental interference is appropriate as long as it is undertaken with the express purpose of protecting the liberal subject's bundle of rights.<sup>16</sup>

Classical liberal thinkers were not, therefore, unconcerned about the prospect of individuals misusing and abusing the broad autonomy conferred by their sort of liberalism. Many (especially early nineteenth century theorists) believed that education was necessary to protect

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<sup>16</sup> For excellent in-depth descriptions of classical liberal ideology, see Bronner 41-60; Conway 6-24; and G. Smith.

the individual from his excessive passions and irrational impulses, as well as to enable him to act advantageously, responsibly, and even morally.<sup>17</sup> For these reformers, England's economic, social, and moral prosperity depended on its citizens' abilities "to understand their own interests," to demonstrate "self-reliance," and to exert "self-discipline" (Atiyah 267-68). Legal regulation was also believed to be an important safeguard against imprudent or reckless expressions of freedom. Classical liberalism, as earlier suggested, contemplated a political system with the authority to preserve the "public good" by way of restrictions on individual liberties (G. Smith 19-20).<sup>18</sup> For example, Hobbes, in *Leviathan* (1651), envisions a government which acts to ensure that men "*live peaceably amongst themselves, and [are] protected against other men*" (121; ch. 18) while Locke in *Second Treatise of Government* (1689) imagines a government vested with the authority to preserve the life, liberty, and property of its members (154-75; chs. 9-14). Moreover, Adam Smith, in *The Theory of Moral Sentiments* (1790), devises a legal framework for regulating individual liberty. Titled "[t]he most sacred laws of justice," Smith's tripartite scheme includes "laws which guard the life and person of our neighbor; . . . [laws] which guard his property and possessions; and . . . [laws] which guard what are called his personal rights, or what is due to him from the promises of others" (98; pt. 2, sec. 2, ch. 2). In this liberal society, then, criminal and civil law systems work alongside systems of

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<sup>17</sup> P.S. Atiyah explains:

The fact that the classical economists and the utilitarians wanted to free people to follow their interests, their wills, did not mean that they were indifferent to what people did with these new-found freedoms. . . . On the contrary, they were intensely concerned with the way men exercised their freedom. . . . They had . . . a great faith in education . . . for they wanted to teach people how to choose wisely, while leaving the ultimate choices to them. (260)

Atiyah also clarifies that by the nineteenth-century, individualism had become a moral value, one with its own set of "ideals" (260).

<sup>18</sup> For a protracted discussion of the notion of "public good" in liberal philosophy, see G. Smith 26-48.

education to secure and to balance the liberties, properties, and expectations on which the individual and the common good depend.

One of the most significant legal contributions to the development of liberal subjectivity in England was the law of contract, and in particular, the instantiation of classical contract theory. This theory was *the* defining feature of nineteenth-century contract law and *is* the precursor to modern contract theory. While classical principles were neither fully developed in the eighteenth century nor wholly integrated into its legal system, they were present and developing in the period.<sup>19</sup> To understand the radical nature of classical contract theory and the ways in which it reconceived of the individual and his legal relationships, one must first understand the pre-classical system. Under pre-classical law, a person's "legal [rights and] duties arose from status, from custom, from relationships and transactions" (Atiyah 146). In other words, what one owed to, or was due from, another was determined, not by an exchange of promises, but by the parties' pre-existing relationship and the legal rules by which that relationship was defined (see Atiyah 141, 139-46). Legal historian P.S. Atiyah offers the following examples of early modern contract principles at work:

A man to whom (for instance) goods were entrusted for repair or carriage might be under a duty with respect to those goods, not because of any promise he had made, but because of who or what he was—because of his status. A common carrier or a common innkeeper . . . would have been under various duties in medieval law, not because he promised, but because of the legal duties associated with his status. (145)

The problem with this approach to contract formation, especially in an era of liberal reform, is that it does not allow individuals to create and to define for themselves the scope of their legal

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<sup>19</sup> P.S. Atiyah establishes 1770-1870 as the period during which the classical/will-based theory of contract dominated jurisprudence in England (see, e.g., 398). Yet, he and other legal historians have identified its principles in earlier discourse, thereby suggesting its significance for the eighteenth century more broadly (see Atiyah 167; Lieberman 92-93 *et passim*).

obligations. In fact, it does not even recognize as legally binding the act or content of a mere promissory exchange (Atiyah 139-46).

In contrast, under classical contract theory, individuals were vested with significant authority in the construction of their contractual relationships, and their promises were of serious legal consequence. As Atiyah writes, this theory's hallmark was that it recognized "[t]he autonomy of the free choice of private parties to make their own contracts on their own terms" (408). It was now the act of promising and the content of party promises, rather than the function of party status, which established and defined one's legal rights and duties. In order to facilitate this mode of contract, England's classical theory established several presumptions about the conditions of contract formation. First, and most important, is the assumption that "contractual obligations are created by the will or the intention of the parties" and that any legal consequences arising out of those obligations are "themselves . . . the creation of the will of the parties" (Atiyah 406, 405-08). Second, is the presumption that "[contracting] parties deal with each other 'at arm's length,' . . . each rel[ying] on his own skill and judgment" to negotiate the terms of the agreement (Atiyah 403). Third, is the idea "that . . . parties know their own minds, that they are the best judges of their own needs and circumstances, that they will calculate the risks and future contingencies that are relevant, and that all these enter into the bargain" (Atiyah 403).<sup>20</sup>

While these formation principles established the classical liberal ideals of individual autonomy, equality, and self-reliance within the law of contract, they did not establish them as social truths nor did they guarantee the fairness or justness of contractual exchange. In fact, with the rise of contractual freedom, the common law courts' interest in adjudicating the equitableness of contractual arrangements declined. In the pre-classical era of contract law, the English

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<sup>20</sup>For formation presumptions outside the scope of this project, see Atiyah 402-403.

(lawyers, courts, politicians, communities, etc.) devoted a great deal of attention to the fairness of an agreement's terms: "Justice was more important than freedom of choice" (Atiyah 62). If a court found that the benefits exchanged were not equal or were otherwise inequitable, it could, and (it appears) would, modify the agreement accordingly.<sup>21</sup> (Atiyah 61-67, 167-69). With the shift to the classical system, this all changed. Atiyah explains how the judiciary conceived of its authority post-shift:

The Court's function . . . is to ensure procedural fair play: the Court is the umpire to be appealed to when a foul is alleged, but the Court has no substantive function beyond this. It is not the Court's business to ensure that the bargain is fair, or to see that one party does not take undue advantage of another, or impose unreasonable terms by virtue of a superior bargaining position. (Atiyah 404)<sup>22</sup>

Unless the parties failed to follow an established rule, their agreement—even if full of inequities—had all the force of law behind it.

One probable reason for this retreat from equitable intervention was the law's interest in ensuring economic stability. To reject or revise agreements according to equitable ideals, was to challenge market and party expectations and, perhaps, to threaten the "public good." In *The Principles of Moral and Political Philosophy* (1785), William Paley writes of the connection between expectation and the obligation to perform one's promises:

Men act from expectation. Expectation is in most cases determined by the assurances and engagements which we receive from others. If no dependence could be placed upon these assurances, it would be impossible to know what judgement to form of many future events, or how to regulate our conduct with respect to them. Confidence therefore in promises, is essential to the intercourse of human life; because, without it, the greatest part of our conduct would proceed upon chance. (73-74; bk. 3, pt. 1, ch. 5)

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<sup>21</sup> Atiyah indicates the common law and equity courts' outlook on fair price, usury, and fair exchange at various points in his tome (see, e.g., 61-67, 146-48, 167-80).

<sup>22</sup> Atiyah qualifies this general finding, noting, for example, that there were instances in which courts rejected the principles associated with full and free exchange and sought, instead, to ensure the "substantive justice" of an agreement (404).

In a world where values and belief systems were in flux, the idea of legal stasis on the scope of one's contractual rights and duties must have been attractive. Another reason for the judiciary's reluctance to adjudicate issues of fairness or justice in realm of contract certainly had to do with the emerging theory's formation presumptions. Why revisit an agreement if the terms represent each party's will and intention? Why revise an agreement if each party's general disposition is to act voluntarily, judiciously, and out of reasoned-self-interest? To revisit or revise would be to jeopardize the contracting subjects' right to freedom of contract and right to depend upon the promises of others.

The eighteenth-century emergence of liberal ideas about the contracting subject and his market-based agreements elicits questions about the law's understanding of the private individual and her domestic agreements. Was the "privately contracting subject" also beginning to be conceived in liberal terms—i.e., as rational, equal, and self-aware? Were the legal principles governing the formation of her domestic relationships likewise informed by classical assumptions about party proficiency, bargaining power, and will to contract? Did the period's legal actors debate the legitimacy—the truth or falsity, disadvantages or utility—of these liberal ideals as they applied to the private subject? Was there a sense that domestic well-being also required more consideration for individual autonomy, and, therefore, less legal oversight of the marriage contract?

## *Part II: Freedom of Contract in the Private Sphere and Key Developments in Marriage Law*

Classic social historians have identified the long eighteenth century as the period during which the private individual began to break away from his social and familial ties, and they locate his disengagement in changing attitudes toward courtship and marriage. Lawrence Stone, for example, contends that whereas in the sixteenth and much of the seventeenth centuries, family members and friends arranged marriages for young people, in the eighteenth century,

children were increasingly able to choose their own romantic partners, with “parents being left with no more than the right of veto over socially or economically unsuitable candidates” (*Family, Sex and Marriage* 183).<sup>23</sup> Just as it was in the public sphere, then, status-based duty in the private sphere was apparently buckling under the pressure of contractual freedom. Yet, if we look to the law governing marriage formation, this shift from status to contract becomes more complicated than traditional social histories might otherwise suggest. Indeed, the legal rhetoric surrounding two key developments in marriage law—the passage of a highly contested statute proscribing rules for marital formation and the growth of breach of promise of marriage as a common law cause of action—demonstrates that the emerging liberal legal subject of the public sphere was being met with skepticism and resistance in the private realm. While both jurisprudential innovations at issue represent a decided shift away from marriage as a religious sacrament to marriage as a civil contract, they also reveal a persistent tension between patriarchal and liberal ideas about the conditions of and parties to private exchange—between traditional “truths” and new “fictions.”

### **Hardwicke’s Marriage Act**

One of the most comprehensive and divisive pieces of marriage legislation in English history was the 1753 An Act for the Better Preventing of Clandestine Marriages, otherwise known as Hardwicke’s Marriage Act (the “HMA”).<sup>24</sup> This new law transferred jurisdiction over marriage from the ecclesiastical to the civil courts and codified canonical requirements for contract formation. It stipulated that a valid and binding marriage must be either preceded by the

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<sup>23</sup> See also Trumbach 97-113.

<sup>24</sup> “Hardwicke” refers to the 1st Earl of Hardwicke, Philip Yorke, who was Lord Chancellor at the time of the act’s introduction to Parliament.



publication of the banns or accompanied by a special license. It further required that an ordained clergyman preside over the ceremony in a parish church or public chapel and that the marriage be witnessed by at least two persons and registered in the official legal record. If one or both of the parties was younger than twenty-one, the law mandated the consent of a parent or guardian.<sup>25</sup> The legislation also instituted harsh penalties for failure to comply with these requirements. For example, it was a felony, punishable by transportation to America, for clergy members to “solemnize matrimony” outside of the law, and marriages that deviated from the required protocol were considered “null and void.”<sup>26</sup> Although the HMA was mightily criticized as arbitrary and excessive, it passed into law within a year of its parliamentary introduction.<sup>27</sup>

Prior to the HMA and under ecclesiastical law, marriage could be contracted in a variety of ways. Since the sixteenth century, most English marriages followed the HMA’s rules (Probert 1). But some did not. Some couples opted for a simple ceremony in front of a clergyman at a clandestine center, such as the Fleet Prison in London where chaplains oversaw between 200,000 and 300,000 ceremonies in the forty years before the HMA’s passage (Brown 117). Other couples entered into a marital agreement by simply exchanging private promises to marry at present or in the future. Under the ecclesiastical doctrine of spousals, an exchange of the phrases “I do take you” (a *spousal de praesenti*) or “I will take you” (a *spousal de futuro*) sufficed to demonstrate consent and, thereby, mutually obligate the parties. A *spousal de praesenti*, if

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<sup>25</sup> Consent rules differed depending on how couples announced their marital intentions. A couple married after the publication of the banns need not secure the positive consent of a parent, as the public announcement was enough to put him on notice; however, this parent could, after the banns were read, withhold his consent. A couple married by license did have to secure a parent’s positive consent, there being no public notification.

<sup>26</sup> In another severe provision, Parliament fixed the punishment for destroying or falsifying marriage records at death.

<sup>27</sup> The description of the HMA contained in this paragraph is entirely based on the text of the act itself. See the bibliography entry for An Act for the Better Preventing of Clandestine Marriages.

proven to exist, was considered a binding marriage, such that children born to the union were legitimized and any subsequent public marriage by one of the parties was rendered bigamous. A *spousal de futuro* was considered an exchange of promises to marry. While it did not create an irrevocable contract, its dissolution required the mutual consent of both parties or fornication or desertion by either.<sup>28</sup> Spousals eventually lost legitimacy under the common law due to difficulties related to property and inheritance rights, but they retained their ecclesiastical force.<sup>29</sup> In fact, the verbal consent of a qualified betrothed couple remained *the* sole and absolute requirement for marriage formation up until the passage of the HMA.<sup>30</sup> This meant that a marriage could be annulled only by disproving consent or capacity to contract: “Consent might be negated . . . by proof of duress, or insanity, or mistake, . . . [or] tender age . . .” (i.e., 12 for girls and 14 for boys), while capacity might be successfully rebutted by proof of “precontract (a previous marriage with another spouse), consanguinity (blood relationship), affinity (relationship by marriage or carnal connection), and impotence at the time of marriage” (Baker 491-92). With the HMA’s ratification, then, the grounds for voiding a marriage expanded greatly to include the failure to follow basic formation requirements. This development was one that many considered

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<sup>28</sup> Henry Swinburne offers a wonderfully detailed overview of spousals in his seventeenth-century treatise on the doctrine. For a modern historical discussion of medieval and early modern litigation on the doctrine, see Ingram.

<sup>29</sup> Brown explains that “common law lawyers . . . adopt[ed] the attitude that a marriage performed without the presence of a priest or deacon was neither good nor effectual” in order to circumvent the problems that arose when “the legitimacy of a marriage” was challenged in property and inheritance disputes (118-19). That said, every indication is that the church continued to view formal requirements to marry, including the presence of a clergyman, as “directory” rather than “negatory” (i.e., failure to follow these requirements did not void a union under ecclesiastical law) (118).

<sup>30</sup> Referencing the work of legal and social historians, David Lemmings affirms the primacy of verbal consent: “. . . [T]he verbal contract remained the essence of a valid marriage and was the law of England until 1753; and it was agreed that ‘the positive law of Man’, or canons of the church and statutes of the state, which ultimately required formal church marriage and made other unions illegal, nevertheless did not render contract marriage null and void” (344).

a dangerous lowering of standards and that some understood to be an infringement on contractual freedom.<sup>31</sup>

It is in the 1753 House of Commons debates over the bill's passage and the 1781 House of Commons debates over the act's repeal that the complexity of eighteenth-century views about the privately contracting subject and the public significance of her domestic agreements surfaces.<sup>32</sup> The HMA's supporters heartily believed the law addressed the "*great mischiefs and inconveniences*" engendered by clandestine marriages.<sup>33</sup> In the 1753 debates, M.P. Charles Townshend (who, incidentally, opposed the bill) summarized the primary problems the law was intended to alleviate:

The foundation [for the bill] is upon three grievances, which are now said to be severely felt, that is to say, the unhappy marriages clandestinely made, which bring shame and vexation upon private families, and want and misery upon the individuals that contract them; the difficulties that are often found to prove the marriage, or the legitimacy or illegitimacy of children; and the frequency of polygamy, or bigamy, call it which you will. . . . (15: 49)

Of particular concern to the bill's supporters was the "ruin" and "distress" visited upon upper class families by informal marriages contracted between their children and avaricious upstarts (15: 7).<sup>34</sup> M.P. John Bond, for example, questions the fate of "young gentlemen of fortune" who

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<sup>31</sup> For two excellent historical studies on Hardwicke's Marriage Act, including its ecclesiastical and common law precursors, as well as its social consequences see Probert, *Marriage Law and Practice* and Outhwaite, *Clandestine Marriage in England*.

<sup>32</sup> All references to the House of Commons' debates are from *Cobbett's Parliamentary History*, volumes 15 (covering 1753-1765) and 22 (covering 1781-1782). The debate records (particularly those from 1781) do not always supply the first name or title of the speaker. Where possible, I have provided this information based on The History of Parliament's online database of member biographies. Note that these biographies were originally published in two print volumes, 1715-1754, edited by Romney Sedgwick, and 1754-1790, edited by Lewis Namier and John Brooke. I have listed each volume on the bibliography page according to the lead editor's last name, although History of Parliament's website indicates that the online entries are continuously updated.

<sup>33</sup> The quoted language is from the HMA's preamble.

<sup>34</sup> This is a specific reference to the remarks of A.G. Ryder (15: 1-12).

are “a prey to bawds and prostitutes” and that of “young ladies of fortune” who are “a prey to sharpers and fortune-hunters” (15: 41). In order to protect the wealthy against these predatory rogues and trollops, supporters reasoned, a parental consent requirement was necessary. The law’s advocates also claimed that the strict formation requirements would protect young women from would-be seducers and deserters. Lord Barrington argued that the HMA’s clear guidelines for marital formation and registration ensured “that no woman can be deceived” as to the validity of her marriage (15: 30). Proponents further maintained that, in codifying contract formalities, Parliament would prevent the common practice of bigamy. As it now stands, Attorney General Dudley Ryder deplored, “a man may have privately a wife in every corner of this city, or in every town he has been in, without its being possible for them to know of one another, or for the next women to whom he makes his addresses, to discover his being a married man” (15: 8). Moreover, some supporters proposed a practical reason for the law’s passage. They argued that it would minimize the number of property and inheritance lawsuits generated by bigamous marriages. Individuals would no longer be able to overburden the court system with claims of a prior, informal marriage that, if proven, would delegitimize and disinherit a man’s acknowledged wife and children (see, e.g., 15: 7).<sup>35</sup> On this side of the debate, then, the private contracting subject is framed as either vulnerable to deception or inclined to deceive, and socio-economic or gender inequality is presented as the impetus for contractual duplicity. In this view, whether blinded by passion or overcome by self-interest, parties to marriage negotiations are rarely rational and free-willing actors, and the conditions for marriage contract formation are seldom conducive to voluntary and informed choice. The restrictions on contractual freedoms contemplated by the HMA are, therefore, authorized by the limitations of individual subjectivity

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<sup>35</sup> Once again, this is a reference to Ryder’s remarks.

and the vagaries of the private marketplace.

To establish the government's regulatory privilege over marriage contract formation, the HMA's supporters summoned the "public good" exception to the classical liberal right of free enterprise. Speaking on behalf of the act's proponents, Ryder argued Parliament's role in ensuring the public's well-being: ". . . I think nothing can be more inconsistent with common sense than to say, that the supreme legislature of a society cannot put contracts of marriage, as well as every other contract, under what regulations they think most conducive to the good of society" (15: 6). According to Ryder, the policy of providing legal recognition to clandestine marriages "add[s] a sanctity to the marriage contract, which is inconsistent with the good of every society, and with the happiness of mankind in general" (15: 7). For supporters such as Lord Barrington, the familial, public, or individual good rested in ensuring that "a child . . . not contract a scandalous or infamous marriage," that "all marriages . . . be publicly known," and that citizens don't "run headlong into contracts" (15: 24). In these politician's minds, to regulate the private contracting subject—and, consequently, to resist the liberal fictions by which his public counterpart was coming to be defined—was to protect the domestic sphere and to assure English society's welfare.

Like the HMA's supporters, its parliamentary opponents presented a litany of arguments for rejecting the bill, and later, for repealing the act, which one member characterized as "cruel as well as impolitic, and disgraceful, as well as absurd" and another labeled "a disgrace to the country, and to the statute book."<sup>36</sup> Much of this side's antipathy was directed at the parental consent requirement, which it saw as a conservative political powerplay. These parliamentarians

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<sup>36</sup> Both quotations appear in the 1781 debates for repeal: the first belongs to M.P. George Dempster (22: 373) and the second (it appears) to Hon. Charles James Fox (22: 372). Interestingly, my research indicates the 1781 call for repeal was one of no fewer than five attempts in the fifty years following the HMA's enactment.

argued that the nobility and their representatives in the House of Lords intended the provision as a way to consolidate political authority and to (re)establish England as an oligarchy. Townshend outlines the commoners' concerns:

There must be some latent design . . . to secure all the heiresses of the kingdom to the eldest sons of noble and rich families, in order thereby to establish that sort of aristocratical government, which, from the Conquest to the reign of Henry 7, was the plague of this country, and so often involved us in bloody civil wars. . . . (15: 61).<sup>37</sup>

Opponents also claimed that the consent requirement would interfere with the national interest in democratic wealth distribution. M.P. Robert Nugent reminds his colleagues, “[r]iches is the blood of the body politic: it must be made to circulate: if you allow it to stagnate, or if too much of it be thrown into any one part, it will destroy the body politic, as the same cause often does the body natural. . . .” (15: 15).<sup>38</sup> This anti-elite and anti-privilege sentiment is further implicated in critics’ vigorous arguments against the law’s strict pre- and post-ceremony requirements. Indeed, many claimed that the law discriminated against the poor by requiring extra time (i.e., the reading of the banns) and money (i.e., license and registration fees) to form a valid marriage contract. For example, M.P. George Haldane remonstrated, “. . . it will really prove a sort of prohibition of marriage with respect to all our poorer sort of people, because it will render the solemnization of that ceremony so tedious and troublesome, or so expensive, that many of them will either chuse to live single, or agree to live together without any marriage at all” (15: 39). Moreover, Nugent, arguing in 1781 for the act’s repeal, challenged the notion that the law

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<sup>37</sup> For another extended argument on supporter’s political objectives, see M.P. George Haldane’s remarks (15: 33-39).

<sup>38</sup> Nugent goes on to argue the physical and social dangers posed by such closely endogamous marriages: . . . if this Bill passes, our quality and rich families will daily accumulate riches by marrying only one another; and what sort of breed their offspring will be, we may easily judge: if the gout, the gravel, the pox and madness are always to wed together, what a hopeful generation of quality and rich commoners shall we have amongst us? What a fine appearance will they make at the head of our army, should we ever happen to be invaded by a foreign enemy? (15: 15)

operates for the good of the whole: “Should a bill be provided without being general? Yet this had never been the case of the Marriage Act; for it never thought to preserve Jenny or Molly with her twenty guineas clinking against a silver thimble; its only attention was to lady Jenny or lady Mary” (22: 409). Though dismissed by HMA supporters as hyperbolic and misleading, these arguments registered serious concerns about the way in which seemingly innocuous restrictions on private contract could operate as dangerous impediments to England’s social and political progress.

The HMA’s dissenters did not confine their points of protest to conservative political engineering and social prejudice, however; they also made claims about the law’s conflicting relationship with England’s moral code. Some argued that the law’s consent requirement sanctioned parental despotism: “This is really establishing such a tyrannical power in the father, as will, I am persuaded, be the ruin of many children, especially such as may have a father under the government or influence of a cruel stepmother,” Townshend protested (15: 59). Many also argued that the law’s stringency would promote sexual deviance amongst the general population, and that it would increase non-marital cohabitation amongst the poor. Haldane again worried that the law would “force the poor to make the best shift they can without marrying,” and that it would “render[] common whoring as frequent among the lower sort of people, as it is now among those of the better sort” (15: 41, 39). In addition, Townshend, among others, argued that the law would increase polygamy and, consequently, the number of “debauched” women (and, presumably the number of illegitimate children): “a cunning fellow,” he maintained, would only have to omit a formation requirement to avoid a binding marriage and punishment for bigamy (15: 53-54). Moreover, M.P. Henry Fox argued that, in many cases, “attempting to [‘void’ clandestine marriage] will be attended with this bad consequence, that the parties may think

themselves no way bound either by the divine or the moral law” (15: 72-73). And, he offered the following example to press his point:

Suppose . . . a young gentleman should marry a young lady of equal rank, but no fortune, in some sort of clandestine manner, but in such a manner as every divine in England would deem to be a good marriage: suppose that he, depending upon the nullity of his marriage by virtue of this law, should desert her and marry another: and suppose she should in two or three years die for mere want. I will aver . . . that, during her life, his living with the other would be a continual course of adultery, and by her dying in such a manner, he would be guilty of a most cruel murder. Could any man who had been concerned in promoting this Bill lay his hand upon his heart and say, I was in no shape the author of these atrocious crimes? (15: 73).

From Fox’s perspective, the HMA would give cover to those whose wills and intentions ran afoul of the moral values and religious duties traditionally ascribed to marriage upon its formation. In fact, for many in the opposition’s camp, the law allowed those who were ethically-challenged to profit from the fictions of rationality, informed consent, and equality by which England’s contract theory was coming to be defined.

Yet, these opponents also believed that the law unjustifiably encroached on the liberal rights from which these fictions arose. In Parliament’s 1781 repeal deliberations, M.P. Charles Turner “spoke of [the Act] with indignation” and described it as “a breach of religious liberty, and an encroachment upon the natural freedom of the subject” (22: 373). M.P. Fox continued in this vein, arguing that by passing the law, Parliament tread on man’s natural rights.<sup>39</sup> The debate records note that “[h]e [Fox] did not conceive that parliament had it in their power to destroy or to abridge one single right of nature; such was the right of marriage, such was the right of human liberty, for which our constitution had so amply provided” (22: 397; see also 22: 373-74). For Fox, the “right of marriage” was inextricably linked to the right to freedom of contract and,

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<sup>39</sup> Based on the member records from Namier and Brooke’s collection, it appears that the speaker here is M.P. Charles James Fox, M.P. Henry Fox’s son.



specifically, to the ability to exercise one's own judgment and choice in the contracting process. At one point, he accused Parliament of engendering an "intolerable abuse of women, (who [a]re unquestionably best qualified to judge what husband would please)" (22: 381); and, at another, he contended that "no person, not even a parent . . . could possibly judge so well for a son, a daughter, or a ward, as the person themselves" (22: 399). Together, the dissenting arguments suggest that while the HMA's opponents were, like its supporters, concerned about the falseness of classical contract presumptions regarding party rationality, intention, and equality, they were perhaps more solicitous about enacting legal restrictions on contractual freedom. For these parliamentarians, the "public good" turned on the broad recognition of marriages and, thus, on a more generous (i.e., less patriarchal and paternalistic) conception of the individual and the marriage negotiation process.

### **Breach of Promise of Marriage**

Efforts to repeal the HMA and its restrictions on the right of private contract did not succeed in the long eighteenth century. Nevertheless, the liberal terms that came to define public contract, including its fictions, were not entirely absent from eighteenth-century marriage law. Indeed, progressive ideas about the contracting subject and his market-based opportunities were implicated in the common law action for breach of promise of marriage, the only legal relief available for broken contracts to marry post-HMA. This cause originated in the seventeenth century and allowed men and women "to recover pecuniary damages against a faithless lover for breach of an engagement" (Lettmaier 1).<sup>40</sup> In *Holcroft v. Dickenson* (1672), the Court of King's Bench confirmed the common law's jurisdiction over such cases, holding that the injury

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<sup>40</sup> Saskia Lettmaier identifies *Stretch v. Parker* (1639) as the first case to recognize breach of promise of marriage as a legal cause and *Holcroft v. Dickenson* (1672) as the case that established, once and for all, its viability at common law (23n16).

sustained from a broken engagement is not merely “spiritual”; rather, many jilted lovers also experience a “temporal loss” for which the ecclesiastical courts do not offer compensation. Justice Atkins remarked that women, in particular, are liable to experience material injury, as marriage for this group “especially, is an advancement or preferment” (934). Therefore, this right of action not only confirmed marriage as civil contract, it also, on its face, legitimized women as contracting subjects, recognizing in them the agency to negotiate and litigate their pre-marital agreements. Indeed, single women now had a legal voice in the area of private wrongs, a faculty that they long had been denied in other “heartbalm” (to borrow from Lettmaier) causes of action.<sup>41</sup>

In the long eighteenth century, the elements for proving breach of promise of marriage were relatively straightforward: there must have been an exchange of promises to marry,<sup>42</sup> a failure on the part of the defendant to fulfill the obligation created thereby, and damages sustained by the plaintiff. Evidentiary requirements were also well-defined in the period. Letters from the defendant indicating an intention to marry the plaintiff, as well as eyewitness testimony regarding the promissory exchange or the parties’ courtship behavior, were sufficient to establish a reciprocal agreement. Written and oral evidence, often of a subsequent marriage, was also used to prove both defendant’s breach and plaintiff’s damages, of which there were three types: restitution, expectation, and emotional. Specifically, plaintiffs could ask for recompense for

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<sup>41</sup> As Lettmaier observes, “[i]n common law seduction actions, the woman did not have standing to sue. As the action was conceived of as one for the loss of services . . . , the right to sue was granted to those entitled to the woman’s services, usually her master or her father” (8).

<sup>42</sup> For more on the issue of mutual exchange, see MacColla 17; and Lettmaier 23-26. As a point of clarification, however, in *Hutton v. Mansell* (1705), the Court of King’s Bench suggested that the recipient of a marriage proposal need not verbalize her return promise; conduct is sufficient to satisfy the exchange requirement. Chief Justice Holt opined, “[i]f there be an express promise by the man, and it appear that the woman countenanced it, and by her actions at that time behaved herself so as if she agreed to the matter, though there be no actual promise, yet that shall be sufficient evidence of a promise on her side” (928).

money they had expended in anticipation of the marriage, for money or property they had expected upon the execution of the marriage, or for any mental or emotional distress they had experienced consequent to the termination of the relationship.<sup>43</sup> Although damages could range from one shilling to several thousand pounds, it appears that liability was generally assured if the plaintiff could show words indicating the defendant's contractual intention and his or her breach of the agreement formed thereby.

One exemplary breach of promise case is *Davis v. Wilson* (1747).<sup>44</sup> Here, plaintiff Davis, a young lady lodger, sued defendant Wilson, a distinguished and wealthy clergyman, for breaking their proposed marriage contract. Plaintiff's counsel proffered several witnesses and numerous letters to demonstrate a valid and binding agreement between the parties, as well as to show the defendant's disregard for his promissory commitment. The first witness, the parties' landlady, testified to the mutual exchange of promises: "He called her his Angel, and insisted that she should promise to marry him, and no other Man, and he would make her the same Promise, which he did; and I heard the Lady say she would be his Wife; for she had no Objection to it; and hoped he would not deceive her" (6). Another witness recounted the parties' courtship and, in particular, Wilson's apparent affection for Davis, as well as his stated marital intention:

[T]he Defendant always seemed very fond of the Plaintiff, and declared in Publick Company, that he should soon be happy in her as his Wife, and that the greatest Princess in the Universe should never have the least share in his Affections, for that he had sufficient to support her like a Lady, and no Dutchess [*sic*] in the Land should make a better Appearance. (14)

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<sup>43</sup> For a description of damages for "wounded feelings," see MacColla 28. For a description of the variety of damages available during the eighteenth and nineteenth centuries, see Lettmaier 19-27 and 47-53. Lettmaier argues that by the close of the long eighteenth century, the focus of the action, and therefore, the type of damages, had shifted from "the economics of a broken contract" and restitution or expectation damages "to the emotionalism of a woman's wounded feelings and injured affections" and tort-influenced damages (18, 18-26).

<sup>44</sup> All of the information about this case comes from an unofficial trial pamphlet entitled *The Trial Wherein Miss D—v—s was Plaintiff, and the Rev. Dr. W—l—n, Defendant*.

Defendant's effusive letters, introduced into evidence after being authenticated by a witness, supported these testimonials. In them, Wilson addressed Davis with terms of endearment and urged her to set a wedding date: "I hope, my dear Life (and I crave it, as the only Blessing in View) that you will be pleas'd before I have the Pleasure of seeing you, to settle the Bridal Day, which I trust will make us eternally happy; and believe me to be, with the greatest Love and inviolable Affection &c." (11). Nevertheless, subsequent testimony revealed that as Davis's suspicions about Wilson's intentions grew, Wilson "broke off all Courtship, and withdrew into the Country to N—w—k" (21). According to plaintiff's counsel, defendant's breach occasioned substantial hardship to his client, who, during the engagement, rejected "advantageous Offers made her by a Gentleman of Fortune and Reputation" (21, 21-22). The jury agreed with counsel's assessment and awarded Davis an enormous sum—£7,000 in damages. Notwithstanding this unusually high monetary judgment, the *Davis* case, and in particular its evidentiary narrative, offers a model of how contracts for marriage and their breach were established in the eighteenth-century common law courts.

As the century progressed, cases like *Davis v. Wilson* continued to appear on the civil court docket. Jilted women *and men* applied to the law for redress, and the courts turned to emerging contract principles to provide them relief.<sup>45</sup> As in the commercial marketplace, "mere" promissory exchange in the marriage market established a valid and legally enforceable agreement. Moreover, classical presumptions about party autonomy, rationality, discernment, and will to contract influenced how the broken engagement was presented and interpreted in the

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<sup>45</sup> In a wonderfully insightful essay analyzing the separation of spheres phenomenon in legal and literary discourse, Anat Rosenberg posits breach of promise of marriage as "a borderline area" between the public and the private, and she observes the action's embeddedness in "general contract law," including the classical principles by which it was informed (401, 402, 401-04).

common law courts. While plaintiff's counsel invoked the presumptions to demonstrate contract formation, defense attorneys attempted to dispel them, with the purpose of either mitigating the plaintiff's damages or voiding the agreement entirely. The use of these rules to define and regulate domestic relationships suggested to some a convergence of the public and private spheres, with one attorney remarking: "What is passing before us in this court at present is a miniature of what is passing in the world at large; (as scenes in private life something resemble those which are acted in publick)" (*Trial for a Breach* 18).

The implementation of commercial contract principles in the breach of promise courtroom is demonstrated in contemporaneous case reports. *Davis v. Wilson* once again offers a representative example. Here, the plaintiff's attorneys focused their attention on proving that she was deliberate in her consideration of Wilson's numerous offers of marriage and that her eventual acceptance was an expression of her will and intention. In contrast, the defendant's attorneys argued that words and behavior do not prove intention nor do they create a binding obligation:

[A Gentleman] might tell [a Lady] that he would marry her, and twenty other Tales, and profess a great deal of extraordinary Friendship and Love, take her abroad, and treat her, and make her many Presents, and yet we cannot well infer from thence, that he is obliged to make that Woman his Wife. . . . We all know, that when Men are enamour'd with a Woman they promise her many Things, which perhaps they never intend to perform, and I believe that most of our Sex are convinced that the Women are not a Whit behind-hand with us. (23)

Additionally, the defense suggested that it is bad public policy—an injustice even—to enforce disadvantageous agreements on the grounds that the parties were rational actors who had performed their due diligence prior to the promissory exchange. Wilson's lawyers argued (unconvincingly, it turns out) that men frequently make "bad Choice[s]" in romantic partners and to conduct "an honourable Retreat . . . is the most honest and just Way" to proceed upon such a

discovery (23). Similarly, the defense counsel in *Williams v. Harding* (1793) challenged such presumptions as false and, therefore, unjust. A contemporaneous newspaper account records counsel as saying that “his Client . . . was very young, in the hey-day of blood, and likely to be suddenly prevailed upon to make promise of marriage in the moment of amorous passion; but which could not be supposed he would keep when reason and deliberation returned” (“*Williams v. Harding*,” n.p.). Yet, the case’s arbitrators appeared to reject this line of reasoning. The newspaper article notes that the “learned Judge observed . . . that the violation of a solemn promise of marriage was a private injury of a serious nature, and frequently attended with the most tragical consequence” (“*Williams v. Harding*,” n.p.). And, much like the *Davis* court, the *Williams* jury responded with a verdict for the plaintiff, this time in the much smaller amount of £50. Thus, whether true or false, the liberal assumptions of classical contract theory were of some importance to the breach of promise courts as they worked to ensure, through near strict liability, that private individuals could rely on others’ promises and realize the economic, social, and emotional expectations created thereby.

Notwithstanding the law’s reliance on liberal formation principles in determining liability in breach of promise cases, the courts were, it seems, inclined to minimize the principles’ (or fictions’) significance in the process of damage assessment. In the case of *Chapman v. Shaw* (1790), for instance, the jury awarded the female plaintiff just £20 after defense counsel pleaded with the jury for equitable relief. During the plaintiff’s trial presentation, counsel provided evidence that plaintiff’s family had expended £42 (“30l. with a linen-draper and 12l. for silk with another”) in reliance on the defendant’s promise of marriage (12).<sup>46</sup> They also offered testimony

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<sup>46</sup> All of the information about this case comes from the trial pamphlet *Trial for a Breach of Promise of Marriage. Miss Elizabeth Chapman, Against William Shaw, Esq; Attorney at Law. Eighteenth-Century Collections Online* records Miss Elizabeth Chapman as the pamphlet’s author; however, there is no such indication on the text of the document itself. Therefore, I have recorded it as an anonymous entry in the dissertation bibliography.

that could establish compensatory damages for emotional distress. Chapman's mother testified to her daughter's suffering:

After Mr. Shaw discontinued his visits to my daughter, *she was out of her mind*. She kept her bed, and never slept for *seven days*. She was ill twice; and this illness was manifestly occasioned by Mr. Shaw's breaking off his visits. . . . My daughter's illness was not a sore throat, nor fever: her's was a disorder of the mind. She was out of her senses two months. (11-12)

Chapman's apothecary confirmed Mrs. Chapman's assessment, swearing that "Miss Chapman's mind was disordered" after the breach and that "her disorder was the effect of an unhappy mind" (16-17). In response, defendant's attorneys made arguments both pragmatic and pathetic. They maintained that Shaw was forced to break off the engagement when it became clear that "there was no property on either side" (24). To punish him too severely for recognizing the parties' difficult financial circumstances post-formation would be unwise and unfair. The defense also reminded jurors that, like Shaw, "we have [all] cast our affections into a quarter where fortune has not cast her smiles," and they shrewdly encouraged the defendant's peers to act "like men of humanity and justice" by making a "proper and moderate use of ['the whip']" the law "has put . . . into [their] hands" (28). Lord Kenyon, the case's presiding judge, gave force to the defense's position, instructing the jury "always to have respect to the situation in life of the person who is to pay those damages" and, in this instance, to consider that the defendant's "conduct . . . does not appear to . . . [have been] marked with any peculiar delinquency" (29-30). The jury's minimal award of £20 suggests that it both found Shaw's argument persuasive and heeded the judge's command. Thus, while the verdict for Miss Chapman was assured by the liberal presumptions of classical contract, the damages to which she was entitled were mitigated by considerations both moral and equitable.<sup>47</sup>

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<sup>47</sup> In another case of damage mitigation, *Leeds v. Cook* (1803), the presiding judge, Lord Ellenborough instructed the jury to consider in its damage assessment evidence of the male plaintiff's "brutal or violent manner," as well as

There was one particular instance, however, in which the law ignored the rights of the liberal contracting subject entirely: the case of an unchaste plaintiff. In fact, courts accepted the plaintiff's immoral character as a complete defense to an otherwise valid breach of promise claim. Lord Kenyon, in *Chapman v. Shaw*, recites the common law on this issue:

If any person who enters into . . . [an] engagement is reputed to be of sober life and conversation, but who turns out, on a fair inquiry, to be a woman whose character is stained, the promise, although made to her, will not bind the other party in point of law. If a lady is chaste and virtuous at the time of making the promise, but before the performance of it acquires a different character, there is in this case likewise an end of it. . . . (29)

Although Kenyon initially suggests that this rule is gender-neutral (i.e., applicable to “any person”), his attention to the indecent woman reveals its narrow focus. Moreover, subsequent case law demonstrates its prejudicial application. Take, for example, *Foulkes v. Sellway* (1800), a breach of promise case where plaintiff, a widowed businesswoman, sued defendant, a well-off widower, for reliance damages. According to the *Albion and Evening Advertiser*, plaintiff presented evidence at trial that, after yielding to defendant's demands to give up her boarders and her shop, defendant unceremoniously ended the engagement on the grounds that “he had heard some unfavorable reports of her” (“Fowkes v. Selway,” n.p.) *The Sun* reported that the defendant responded to plaintiff's charge by claiming her immoral character:

On the part of the Defendant it was contended that the Plaintiff was not only deficient in point of chastity . . . but that she was most infamously immodest; that she had lived at Chelsea, where she exhibited such scenes of gross and offensive indelicacy, as could not be mentioned without a blush, two persons being in bed with her together, &c. &c. (“Fowkes v. Selway” n.p.)

Significantly, the law reporter entry on this case indicates that the testimony suggesting plaintiff's “general bad character” was hearsay and that plaintiff's attorney challenged its

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evidence that he was “of gross manners and destitute of feeling.” The jury returned with a verdict of nominal damages (1 shilling) (711). For a newspaper account of this case, see the entry for “Leeds v. Cook” in *The Times*.



admission on that ground. However, Lord Kenyon, the trial judge, surmised that “public opinion, founded on the conduct of the party, . . . was a fair subject of enquiry” and that unsubstantiated third party testimony was proper evidence of “what that public thought” (*Foulkes v. Sellway* 600).<sup>48</sup> Unsurprisingly, then, the verdict was for the defendant. It is an outcome that demonstrates how the classical contract presumptions of party equality and informed, intentional consent were often outweighed in these case by concerns about female virtue and excessive female sexuality. Once alleged, indecency or immorality diminished the female plaintiff’s standing as a contracting subject at law—she was not even able to insist that the court uphold established evidentiary standards. Once “proven,” the allegations emptied her of both her legal and social standing. We can imagine that she had little hope of reclaiming her reputation and negotiating another marriage contract.

The “chastity” exception to breach of promise law in many ways reflects the public’s deeply ambivalent response to the rising cause of action and women’s right to claim legal relief under it. Early in the century, the popular social journal *The Tatler* satirized the typical breach of promise fact pattern. Entry no. 262 entertains readers with a description of a case for breach of “a Marriage Contract” brought by Winifred Lear against Richard Sly in the Court of Honour. To establish the couple’s engagement, Lear offered testimony that Sly had not only “Ogled” her on numerous occasions (“twice at an Opera, thrice in St. *James’s* Church, and once at *Powel’s* Puppet-Show”), but also flattered her with a promissory “Side Glance.” Upon hearing the plaintiff’s evidence, the judge (the *Tatler’s* fictitious editor Mr. Bickerstaff) sentenced Sly to a public shaming and ordered the prosecution of a courtroom member caught “Ogling a Lady of

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<sup>48</sup> Note that case name differs between law reporter and newspaper entries. In the former, it is *Foulkes v. Sellway* and in the latter, *Fowkes v. Selway*.

the Grand Jury.” He then issued “an Edict against these common Cheats, that make Women believe they are distracted for them by staring them out of Countenance and often blast a Lady’s Reputation whom they never spoke to, by saucy Looks and distant Familiarities” (329-330). The absurdity of both Lear’s claim and the judge’s decree reflects prevailing anxieties about women’s vulnerability to male seduction *and* about the potential for judicial overreach in cases responsive thereto. The biting vignette also appropriates alternative—in this case, sexualized and sentimentalized—fictions about female subjectivity, further destabilizing the notion of women as legitimate—i.e., rational and informed—legal agents and further discrediting the *one* legal action that recognized this agency.

Contemporaneous newspaper accounts of trials for breach of promise of marriage, though ostensibly objective rather than satirical, also undermined liberal conceptions of the female subject and her legal cause. Descriptions of the breach of promise trial environment present the courtroom as a place of spectacle and its female participants as both objects of entertainment and bearers of a dangerous sentimentality. For example, in 1787, the *World Fashionable Advertiser* published “Extract of a letter from Exeter,” which describes the dramatic trial of a man who had abandoned his pregnant lover and married another. According to the correspondent, the courtroom was “thronged with all the beautiful women of the county, whose tears eloquently expressed the feelings of tenderness and pity” and who, along with the trial’s male observers, “burst into frequent exclamations of applause” during plaintiff counsel’s opening statement (n.p.). A theatrical image of the court and its female observers is likewise created in the 1800 *Albion and Evening Advertiser* account of *Shawe v. Baker*. Here, the author reports that the details of the case were so salacious that “the ladies of the county,” who had “crowded” the courtroom, were “requested to withdraw” (“Shawe v. Baker” n.p.). Moreover, an 1809 *Times*

story on the *Hulme v. Warbrick* trial describes the courtroom as a site of intense female experience: the female spectators were “excited” by an “uncommon . . . interest” in the case and appeared at the trial “to gratify their curiosity,” while the female plaintiff, upon hearing evidentiary letters read in court, “shed tears abundantly” (“*Hulme v. Warbrick*” n.p.).<sup>49</sup> Further, an 1810 *Times* report of *Bishop v. Robinson* includes a parenthetical apology that suggests the popular obsession with breach of promise cases: “[Though this trial occurred at an early hour, the Court was uncommonly crowded. We regret that the pressure and bustle arising from this circumstance, prevented our giving a more detailed account]” (“*Bishop v. Robinson*” 3). These descriptions of the breach of promise court as voyeuristic and melodramatic, and as a space of unrestrained female sensibility, certainly influenced whether jilted women pursued their legal right to compensation. As Charles Townshend argued in the 1753 HMA debates, the “public and mercenary” character of the cause provided “an uncomfortable relief for a woman of any character” (*Cobbett’s* 15: 53).<sup>50</sup> Whether framed as the virtuous victim or impure imposter, she was never considered wholly rational or fully equal to her male counterpart—the classical contract fictions that were beginning to define his legal subjectivity simply had not yet conquered the patriarchal fictions that had for centuries defined hers.

Eighteenth-century discourse on the HMA and the common law action for breach of promise of marriage reveals the contested nature of liberal subjectivity and its classical contract roots in the developing law of marriage. While parliamentarians debating stricter marriage

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<sup>49</sup> The quality of this newspaper account’s digital reproduction is poor (a portion of the left side is cut off); however, I have done my best to reconstruct the journalist’s description of the courtroom and the case.

<sup>50</sup> This conclusion is supported by Ginger Frost, who notes that, in the Victorian period, “[breach of promise] had a scandalous reputation” and was generally fodder for “local newspapers [that] often printed every salacious detail when one occurred. . . .” (8), and by Lettmaier, who claims that the action often sullied the reputation of the female plaintiffs who, in their refusal to accept those losses privately, “put [themselves] directly at odds with the central values of ideal femininity” (74, 73-77).

formation requirements generally agreed that the classical principles that informed and authorized liberal legal selfhood were essentially fictitious, they disagreed on the utility of those principles. For proponents of the HMA, presumptions about the advanced state of a contracting subject's mental and emotional capabilities, as well as about the optimal conditions in which he exercised his will to contract, endangered personal and public well-being. It was only through paternalistic restrictions on the process of marital formation that the individual and her community were protected from the irrational impulses and deceitful behaviors that threatened to corrupt the domestic sphere. For opponents of the Act, idealistic assumptions about the contracting subject and the environment in which she negotiated marriage agreements operated to preserve, and sometimes advance, her social and economic position, as well as to safeguard the nation's incipient democratic values. To refuse to honor informal marriage contracts founded on these assumptions was to disregard the right to individual autonomy and free choice in private relationships, to jeopardize the material and social welfare of would-be spouses and their children, and to risk a return to an elitist government.

The jurisprudence on breach of promise of marriage reflects a similar ambivalence regarding the liberal rights and fictions that informed contract formation. On the one hand, the court's commitment to contractual freedom and party expectations authorized the strict interpretation of contractual liability; on the other hand, its desire for equitable outcomes required that defendants be able to reduce their monetary exposure by demonstrating the flawed or impractical conditions of exchange. Moreover, the court's unwillingness to recognize the "unchaste" female as a legitimate contracting subject, coupled with outside representations of women in breach of promise trials, suggests that the liberal fictions of contractual subjectivity were in constant competition with the traditional fictions of feminine excess. Thus, while

progressive views about private contract formation allowed the jilted woman unprecedented access to legal relief, patriarchal constructions of the female ideal ensured that her legal subjectivity remained unequal to that of her male counterpart.

These conflicting and confused legal assessments of the private contracting subject and her conditions of exchange not only reflect the instability of and patriarchal bias in eighteenth-century marriage law, they also reveal the large-scale difficulties posed by the law's doctrinal presumptions. Indeed, part of what underlies the idiosyncrasies and prejudices of the legislative and judicial developments discussed herein are concerns, often legitimate, about the legal and social (dis)advantages of contract law's liberal fictions. The legal discord further emphasizes the need for greater involvement in promoting responsible selfhood. If individuals are to engage productively with the law on private agreements, particularly with its fictions (liberal *and* patriarchal), and if they are to be assured fairness in domestic contracting, they must learn how to properly exercise their rights and duties. Yet, while the law might be able to deter or punish, it cannot often instruct—that task is the province of outside cultural authorities.

### *Part III: The Domestic Novel and the Fictions of Formation*

One of the principal cultural authorities in the long eighteenth century was the domestic novel. Although contemporaneous writers, critics, and lay people debated its propriety, particularly for young women, there is little doubt among novel theorists that this early literary form had a significant influence on the English subject's social and personal development. As so many literary scholars have shown, the domestic novel's representational, critical, and instructional qualities worked together to help establish the modern individual and to guide his private endeavors.<sup>51</sup> Here, I will examine how this literary form influenced the English subject's

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<sup>51</sup> See, e.g., Watt; Spencer; Bellamy; Armstrong, *How Novels Think*; J. Thompson, *Models of Value*; and McKeon, *Origins*.

legal development, with a particular focus on how it worked with and across the law to define and cultivate the private contracting individual, as well as the conditions of his exchange. I will argue that, like the legal conversation on marriage formation, this novelistic discourse identifies emerging classical contract principles as fictions; yet, unlike the law, as this literary mode develops, it becomes invested in transforming those fictions into social and legal truths.

Two of the earliest novels to venture earnestly into the experience of the private contracting subject are Samuel Richardson's *Pamela or, Virtue Rewarded* (1740) and *Clarissa, or, The History of a Young Lady* (1747-1748). Written in the sentimental epistolary tradition, these novels employ the immediacy and intimacy of the private letter to explore "virtue in distress," a trope that R.F. Brissenden argues is "the sentimental style[']s" "paradigm cliché" (94). Central to this narrative design is the transition from status to contract, with the narratives' afflicted heroines asserting the right to shed the duties associated with their respective socio-familial positions and follow their personal inclinations in domestic bargaining. Yet, as each protagonist enters the market of private contract, both sexual and marital, she confronts challenges to her free will, as well as obstacles to legal aid. Pamela, with the help of providence, survives the hardships produced thereby; Clarissa, operating independently of divine will, does not. In Richardson's domestic world, where the fictions of contract formation collide with its realities and where the laws surrounding marriage formation and sexual assault are inadequate for protecting the individual against the hazards posed by those realities, responsible, functional selfhood appears as a delicate balance between the divine, the patriarchal, and the liberal.

As a novel of sentiment and didacticism, Richardson's *Pamela*, both memorializes female suffering under and models female resistance to private and political forms of male, upper-class hegemony. The eponymous heroine's arduous evolution from domestic servant and

sexual object into gentlewoman and marital subject plots the liberal foundations of this pain and protest, and it establishes the moral boundaries of women's contractual selfhood. The novel also chronicles the vexed experience of men's liberal development. The male protagonist's initial disposition reiterates the fictions of classical legal thought, and his reformation presses the importance of moral education and self-discipline in the performance of contractual subjectivity.

The novel's heroine, Pamela Andrews, begins the epistolary narrative as a 15-year-old maidservant struggling against the sexual expectations attached to domestic servitude. She writes desperately of her resistance to her master's, Mr. B.'s, increasingly aggressive advances, meticulously recording the moments of pleading, struggling, trembling, fleeing, screaming, and fainting to signal her private rebellion.<sup>52</sup> Of the third sexual assault by Mr. B., she writes to her parents: "I found his Hand in my Bosom, and when my Fright let me know it, I was ready to die; and I sighed, and scream'd, and fainted away" (67). This frantic correspondence proceeds not only from the close proximity of the violence enacted against its author but also from the heroine's critical legal awareness. In more than one epistle chronicling her abuse, Pamela tacitly laments her position under the law, locating her near hollow juridical capacity in the institution's deeply imbricated relationship with the landed classes. Speaking of Mr. B., she writes, "Is there no Constable nor Headborough . . . to take me out of his House? for I am sure I can safely swear the Peace against him: But, alas! he is greater than any Constable, and is a Justice himself . . ." (64). He is, as was sometimes the case in the eighteenth century, both Gentleman offender and legal judge. Pamela carries the point about the inextricable link between social rank and legal authority into another "melancholy Scribble": "For, Oh!," she writes after her abduction by Mr. B., "what can the abject Poor do against the mighty Rich, when they are determin'd to oppress?"

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<sup>52</sup> See, e.g., Letter XI, 34-36; Letter XV, 40-43; and Letter XXV, 64-68.

(95). It is a question that plagues the narrative, and one that brings to the fore the inveteracy of England's inequalities.

Yet, Richardson does not cede the political issues raised in the novel's early domestic correspondence, nor does he allow his heroine to fall victim to her own sentimentality. In fact, Richardson supplements Pamela's emotionally-charged testimony on the horrors of sexual intimidation and legal dispossession with deliberative discourse on the rights of the liberal individual. Pamela first contemplates the legitimacy of her subjugated position after Mr. B. imprisons her at his Lincolnshire estate: "[H]ow came I to be his Property?," she asks. "What Right has he in me, but such as a Thief may plead to stolen Goods?" (116). This line of questioning later develops into a shrewd argument for contractual autonomy. Writing to Mr. B. as "*Your greatly oppressed unhappy Servant*," Pamela pleads: "Whatever you have to propose, whatever you intend by me, let my Assent be that of a free Person, mean as I am, and not of a sordid Slave, who is to be threatened and frightened into a Compliance. . . . My Restraint is indeed hard upon me. I am very uneasy under it" (126). With the merging of the pathetic and the political in these epistolary spaces, Richardson exposes the fictions and maps the possibilities of contractual exchange. Indeed, the discursive functioning of Pamela's interior—the movement between the sentimental and the rational—and the contested nature of her exterior—the violence of patriarchal norms confronting the ethics of liberal rights—reminds the reader that equality, willful consent, and reasoned thought are slippery, but crucial, concepts for the female subject.

The novel further explores these concepts mid-way through the narrative when Pamela takes on the role of contracting subject. The opportunity arises when Mr. B., having failed to seduce Pamela through unilateral threats, makes an attempt at bi-lateral negotiation. He presents the heroine with a formal sexual contract that spans four pages of text. The document of seven



enumerated “ARTICLES” provides that Mr. B. will give over money, real property, and expensive apparel to Pamela and her parents in exchange for her services as his mistress. As requested, Pamela responds to each proposed term in writing, penning her answers in the Articles’ margins. Each response is a rejection of the proffered consideration and refers, either explicitly or implicitly, to the exceptional value of female virtue. For example, in reply to Article V, which includes a covenant for “four complete Suits of rich Cloaths” and several diamond accessories, Pamela writes: “to lose the best Jewel, my Virtue, would be poorly recompensed by those you propose to give me” (166). That the contract is meant to be a concession to Pamela’s firm assertion of her liberal rights becomes evident when Mr. B. implores: “Now, *Pamela*, will you see by this, what a Value I set upon the Free-will of a Person already in my Power” (166). Even though Pamela is reluctant to accept this characterization of the agreement, she assumes the conferred liberal capacity, advising her master: “. . . I will make no Free-will Offering of my Virtue. . . . your Offers shall have no Part in my Choice” (166). Remarkably (and after some time), Mr. B. honors Pamela’s rejection of the terms and withdraws the contract.

Nancy Armstrong persuasively argues the social and political significance of this scene and, in particular, of Pamela’s participation in the male-dominated “field” of contractual exchange. Armstrong asserts that “By making the female [i.e., Pamela] party to the contract, Richardson implies an independent party with whom the male [i.e., Mr. B.] has to negotiate, a female self who exists outside and prior to the relationships under the male’s control” (*Desire and Domestic Fiction* 112, 113).<sup>53</sup> I would add to Armstrong’s interpretation that by allowing the

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<sup>53</sup> For a contrary interpretation of this scene, see Folkenflik 265-66. Robert Folkenflik, in response to Armstrong, argues that the coercive context in which the novel’s sexual contract is presented to Pamela limits severely her contractual autonomy. He writes, “. . . the classical assumption about the nature of a contract, that it is entered into freely, is abrogated by Mr. B., who forces Pamela to take part in it and threatens her if she does not answer as he wishes” (266)

independent “female self” to appropriate the language of self-determination responsibly and to practice the art of negotiation ethically, Richardson imagines a model of domestic contract—a figure whose superlative bargaining skills eventually allow for the just achievement of self-interest in the form of a socially-, economically-, and emotionally-advantageous marriage contract. Indeed, Pamela negotiates with Mr. B. in such a way as to transform herself from the “poor, oppressed, broken-spirited Servant” into the “happy, happy, thrice happy” upper-class wife (168, 289-90).

Yet, unlike the classical model, Richardson’s exemplary agent operates within a narrow moral framework. Much like the female breach of promise plaintiff, Pamela’s contractual subjectivity is authorized by her virtue and her chastity. Mr. B. himself cites Pamela’s steadfast moral goodness as the principal factor in his decision to concede to her terms and enter into a permanent legal union:

For I have often told you, and that long ago, I could not live without you. And my Pride of Condition made me both tempt and terrify you to other Terms; but your Virtue was Proof against all Temptation, and was not to be aw’d by Terrors: Wherefore, as I could not conquer my Passion for you, I corrected myself, and resolved, since you would not be mine upon my Terms, you should upon your own: And now I desire you not on any other, I assure you. (253-54)

Pamela’s character—her compliance with the demands of the period’s feminine ideal—also acts as a defensive safeguard against male duplicity. Prior to their nuptials, Mr. B. confirms his earlier intention to draw Pamela into a sham-marriage, but contends that he abandoned the “Project” after considering the heroine’s “untainted Virtue” and her “try’d Prudence and Truth” (230). Importantly, the novel disregards the law on informal marriage and breach of promise in this sketch.<sup>54</sup> In fact, Mr. B. advises Pamela that had he proceeded with the false contract,

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<sup>54</sup> Technically, Pamela would have the right to claim a valid marriage under the ecclesiastical law of spousals (this novel being written prior to the passage of the HMA); she might also have claim for breach of promise.

“[he’d] ha[ve] . . . been at Liberty to confirm or abrogate it, as [he] pleas’d” (230). Presumably, the law’s regulatory and punitive authority in these matters would be undercut by the power of social privilege, and Pamela would, once again, find herself devoid of a legal voice.<sup>55</sup> Therefore, the novel suggests, the best, and perhaps only, option for avoiding the fate of the deceived maiden, is for the female subject to cling to her moral innocence and sexual purity in domestic negotiations.

But, these are not the novel’s only qualifications for effective contractual subjectivity. Richardson introduces another essential condition, one that reflects the early modern belief system from which England was beginning to emerge: the intercession of divine providence. While Pamela’s superior moral judgment warrants her transition from status to contract, divine will secures this newfound position. The heroine frequently refers to God’s commanding role in her safety and happiness. For example, in writing to her parents about Mr. B.’s marriage proposal, Pamela praises “Providence, which,” she observes, “has, thro’ so many intricate Mazes, made me tread the Paths of Innocence, and so amply rewarded me, for what it has itself enabled me to do!” (232). The narrator’s postscript also establishes the centrality of character *and creator* to Pamela’s contractual triumph. In summarizing the qualities that distinguish Pamela as “worthy of the Imitation of her Sex,” the narrator identifies the relationship between individual agency and divine will:

Let the *desponding Heart* be comforted by the happy Issue which the Troubles and Trials of the lovely PAMELA met with, when they see . . . that no Danger nor Distress . . . can be out of the Power of Providence to obviate or relieve; and which, as in various Instances in her Story, can turn the most seemingly grievous Things to its own Glory, and the Reward of suffering Innocence; and that, too, at a Time when all human Prospects seem to fail. (412, 410-11)

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<sup>55</sup> For another interpretation of the Richardson’s engagement with the civil law of marriage, see O’Connell. O’Connell reads the novel as a cultural representation of the “tensions” between church and state that will become central to the 1753 debates over marriage regulation (see 33 *et passim*).

With these allusions to moral goodness and providential predestination, then, the novel places paternalistic qualifications on women's liberal capacity: the exercise of free will and the pursuit of self-interest in private contract are contingent on Christian temperance and the Lord's discretion.

Although the novel's primary didactic effect is to demonstrate the principled female self, it also manages, through the male protagonist, to foster a new conception of the privileged male subject. Mr. B. begins the narrative as a figure of sexual and emotional excess. His early and frequent attempts to encroach on Pamela's liberality are motivated by unrestrained passion, feeling, and impulse.<sup>56</sup> This tendency toward the immoderate and the despotic is scripted by Richardson as a consequence of the hero's social class, with Mr. B. observing: "We People of Fortune, or such as are born to large Expectations, of both Sexes, are generally educated wrong. . . We are usually so headstrong, so violent in our Wills, that we very little bear Controul" (366). But Richardson does not imagine Mr. B.'s wanton egoism as a permanent condition; rather it is something to be corrected—it is something that can be reformed. The remedial device that Richardson envisions is the heroine's own moral and political authority. Her self-discipline and self-possession is what triggers Mr. B.'s self-command. He abandons his intense desires and "imperious Will" to adopt in their place "[a] Generosity of . . . Mind; . . . Sobriety . . .; . . . prudent Oeconomy and Hospitality; . . . [and] Purity and Constancy of . . . Affection" (409). On the whole, Mr. B.'s slow transition from an impetuous and impassioned oppressor to a circumspect and reasoned companion charts another movement from status to contract. Sexual coercion gives way to reciprocal marital exchange, and we see in Richardson's figure of reconstituted male subjectivity the potential for classical fictions to become modern truths.

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<sup>56</sup> The narrative's correspondence relates, for example, that Mr. B. "was bewitch'd" (44); he was "long tost by the boisterous Winds of a . . . culpable Passion" (286); he was overpowered by "his wicked Purposes" (65); and he was carried along by feelings of "Revenge . . . *injur'd Honour*, and *slighted Love*" (144).

Richardson continues to examine the fictions and frontiers of private contract and liberal subjectivity in his tragic tome *Clarissa*.<sup>57</sup> Like *Pamela*, this epistolary novel painstakingly records the experience of female oppression and defiance, with the eponymous heroine forced to confront demands of filial obligation and claims of male privilege on the marriage market. The narrative also documents, through the male characters' correspondence, the difficult process of masculine reform. Yet, unlike its literary predecessor, *Clarissa* does not envision a successful marriage contract for its heroine; rather, her liberality can be expressed only in isolated singularity and, ultimately, in death. This narrative choice both refines and modernizes the message of *Pamela*, demonstrating the deep entrenchment of paternal and patriarchal values in the marriage formation process and rejecting the notion of divine will as a protection against the most severe embodiments of these values. What emerges from the text, then, is an argument for novelistic intervention in the construction of the liberal contracting subject and the conditions of her exchange.

The eighteenth-century tension between status and contract is present at the novel's outset, as the heiress heroine, Clarissa Harlowe, strives to preserve some semblance of autonomy on the marriage market. The novel's opening volumes are comprised of letters that establish Clarissa in a power struggle with her nuclear and extended family over the right to exert independent free choice in marriage. The correspondence reveals that father, brother, sister, mother, aunt, and uncles, all motivated by avarice and ambition, are using increasingly opprobrious stratagems to compel Clarissa into a union with a man she alternately describes as

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<sup>57</sup> John Zomchick also considers the relationship between contract and subjectivity in *Clarissa*. Reading the novel's heroine "[a]s both woman and abstract juridical subject," Zomchick astutely argues that "Clarissa is caught between the contract's enabling powers and her gender's real liabilities, between the cold freedom of an abstract individualism and the warm comforts of genuine affective life" (60). Other scholars interested in ideas of individual will, consent, and freedom of contract in *Clarissa* include Tanner, *Adultery in the Novel* 3-18, 100-12; and DeGabriele 25-56.

“odious,” “disagreeable,” and “hideous” (87, 111, 187). Although subject to verbal insults and threats, physical confinement, and emotional abandonment, Clarissa remains resolute in her refusal of the wealthy Mr. Solmes. Her response to the Harlowes’ repeated admonitions about “absolute” filial duty (see 93)—“I will be obeyed!,” her father clamors; “duty” and “obedience” “must [be] show[n] . . . in [the family’s] way, not [your] own,” her mother affirms; “Your Parents *will* be obeyed,” her uncle chides (64, 95, 260)—is to frame obedience as an impossibility. Writing to her principal correspondent, Anna Howe, Clarissa explains, “. . . I *must* oppose [the marriage] (to comply is impossible)” (82-83) and, she declares that the command to marry is “a command that I cannot obey” (190). For this heroine, the right to voluntary consent in private contract is non-negotiable, even when set against the most potent of status claims.

Although Clarissa is convinced of her fundamental contractual rights, she is less confident in her legal authority to protect those rights. In a letter describing the “trial upon trial” and “conference upon conference” that she has endured on account of Solmes, Clarissa implicitly questions (and seemingly denounces) the law’s position on women’s subjugation: “But what law, what ceremony, can give a man a right to a heart which abhors him more than it does any of God’s Almighty creatures?” (87). Moreover, the heroine adamantly denies her ability to seek legal recourse for the Harlowes’ threats to dispossess her of her lawful inheritance. Such bold action, she argues, would be an unpardonable breach of filial duty: “. . . I would sooner beg my bread, than litigate for my right with my papa: since I am convinced, that whether or not the parent do his duty by the child, the child cannot be exempted from doing hers to him. And to go to law with my *father*, what a sound has that?” (235). Rather than go to law, then, Clarissa attempts to negotiate her freedom privately, presenting to her family a series of oral and written proposals in which she variously promises to remain single, to go into exile, and to “forever . . .

resign” her inherited estate (95, 202-03, 197, 255). The responses to Clarissa’s offers are invariably cruel and disheartening, the last a veiled threat of forced marriage (see 257). Thus, while the heroine presents—even in her more frantic moments—rational terms for resolving the intra-familial conflict, and while she rejects the prospect of legal prosecution, she is repeatedly dismissed as a domestic dissident, a recalcitrant rebel who must be disciplined into compliance.

Rather than submit to paternal control, however, Clarissa flees, and the novel shifts to another disastrous narrative of private contract. This second plot of domestic exchange charts Clarissa’s courtship with the unabashed libertine, Robert Lovelace. The couple’s relationship develops clandestinely and through a series of letters in which Lovelace exhorts Clarissa to escape her family’s “violence” and place herself in his care (298). It is Lovelace’s apparent respect for Clarissa’s independent spirit that persuades her to consider his scheme. She writes to Anna, “[h]e promises compliance in every article with my will: approves of all I propose” (356). After absconding with Lovelace, Clarissa remains comforted by his liberal assurances. She notes that he “promised to be wholly governed by [her] in every future step” (389) and that he reaffirmed her personal autonomy, stating “[y]ou are absolutely your own mistress” (393). Yet, Lovelace’s words are not his intentions. His own correspondence reveals that he perceives Clarissa as his “conquest” and considers himself her “emperor” (400). Lovelace’s power over Clarissa manifests in concealments and fabrications. He lies and deceives until we find Clarissa living in a London brothel and posing as his wife. Despite Lovelace’s empowered position, Clarissa does, at least for a time, maintain some measure of contractual capacity. Like Pamela, her great virtue recommends her to Lovelace as a wife rather than a ruined woman. In fact, settlements are devised, wedding plans discussed, and a marriage license procured (see 667-71, 871). Nevertheless, Clarissa’s outward indifference to Lovelace, as well as his aversion to

marriage, interferes and the contract is never executed. Instead, Lovelace savagely violates Clarissa's will, raping and then imprisoning her. The mutually-satisfying marriage contract that Pamela negotiated with Mr. B. is now unattainable for the isolated and ruined Clarissa.

Notwithstanding this failure of contract, the novel persists in its investigation of female liberality. Following her rape, Clarissa recurs to the language of freedom of person. She demands to know how it is "in a country of liberty" she is "to be kept here a prisoner, to sustain fresh injuries" (901), and she reminds Lovelace of "the freedom which is [her] birthright as an English subject" (934). This rhetoric of autonomy is matched by a firm commitment to personal sovereignty. Clarissa rejects outright Anna's suggestion that she marry Lovelace in order "to make [her] future life tolerably easy"—"I will *not* have that man," she affirms (1087). Instead, the heroine determines—freely and voluntarily—to seek a martyr's death. Clarissa's movement toward self-fulfillment allows her to exercise the liberties from which she previously had been foreclosed. Over others' objections, she forgives her persecutors, directs the disposition of her property, and alone achieves "eternal happiness" in her heavenly reward (1362, 1498). As Tony Tanner argues,

[T]he final 'triumph' is Clarissa's. Her father had tried to triumph by invoking paternal law over his child's inclinations and disinclinations. Lovelace attempts to assert 'the triumph of nature over principle,' but finally recognizes that Clarissa is 'the triumphant subduer'—triumphant through the power of her own inner will over the 'natural' and social and familial 'wills' to coerce her heart and violate her body. (*Adultery in the Novel* 110)<sup>58</sup>

Yet, though impressive, Clarissa's victory in the battle of wills demonstrates the moral limitations on women's liberal rights and, in its solitariness, her triumph undermines the notion that there is a dedicated and stable contractual space in which to exercise those rights.

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<sup>58</sup> For another excellent critical reading on rape and death in *Clarissa*, see Eagleton 63-94.



Clarissa's fate lends the novel a deeply sentimental tone, as readers are invited to *feel* both the tragedy of her sexual trial and subsequent fall and the blessings of her spiritual redemption and heavenly rise. But her fate also operates within the novel's didactic agenda. As he does with Pamela, Richardson draws Clarissa as a paragon of moral virtue, but in contrast with his earlier work, the author avoids the early modern attachment to divine will. Thus, despite Clarissa's pleas for guidance and protection, "Providence" remains absent throughout much of the narrative. Instead, the heroine is a fully independent agent, alone responsible for navigating the dangers of the domestic marketplace. The difficulties that she encounters therein recommend her as a figure of caution and emphasize the importance of situational awareness, self-possession, and moral self-discipline in domestic negotiations.

We see this admonitory instruction in Clarissa's vulnerability to Lovelace's chicanery. In the preface to the novel's third edition, Richardson gestures to Clarissa's sentimental "faults" and then presents his instructive objectives, which include "warn[ing] the Inconsiderate and Thoughtless of the one Sex, against the base arts and designs of specious Contrivers of the other" (29-30). Although Clarissa is in no way the figure of indiscretion suggested in Richardson's warning, she struggles to discern Lovelace's true nature and to reconcile sentiment with careful judgment. Her letters to Anna reveal the internal conflict by which she is plagued. "[E]very time I see this man, I am still at a greater loss than before what to make of him," she writes in the novel's first edition (398). In the third edition, she confides, "It is a difficult thing . . . for a young creature that is able to deliberate with herself, to know when she loves, or when she hates" (308-09). These uncertainties generate a spectrum of competing impressions, and Clarissa is powerless to commit to a course of action that would safeguard her against the machinations of her would-be protector. Marriage, escape, and familial reconciliation are each sidelined by her

equivocation, and she is sacrificed to Lovelace's predatory instincts. Clarissa's position as a heroine-victim is a sober lesson in the realities of female agency and of private contract. Indeed, the young reader learns (despite what *Pamela* would suggest) that staid moral virtue does not guarantee self-preservation nor does it ensure a marital contract. The best chance for individual stability and domestic success, therefore, is to develop a critical awareness of self and suitor.

The novel's didactic purpose gathers strength in the character of Lovelace, whose recklessness and lawlessness lay bare the fictions of classical contract theory. Rather than forge relationships that honor party rights and expectations, the confessed libertine performs violence on the marriage market. He repeatedly makes a trial of women's virtue, which he describes through the disturbing "simile of a new bird caught":

[A]t first, refusing all sustenance, it beats and bruises itself against its wire, till it makes its gay plumage fly about, and overspread its well-secured cage. . . . As it gets breath, with renewed rage it beats and bruises again its pretty head and sides, bites the wires, and pecks at the fingers of its delighted tamer. Till at last, finding its efforts ineffectual . . . it lays itself down and pants at the bottom of the cage, seeming to bemoan its cruel fate and forfeited liberty. And after a few days . . . its new habitation becomes familiar; and it . . . resumes its wonted cheerfulness, and every day sings a song to amuse itself, and reward its keeper. (557)

Lovelace perceives of his courtship methods as normative masculine behavior: "Is not the world full of these deceptions?," he queries (609). Yet, his penchant for duplicity and coercion is also the product of a hyperactive individuality and a perverse patriarchal self-fashioning.<sup>59</sup> As a privileged male in a liberalizing world, Lovelace believes that he has a right to pursue his own desires unfettered by the expectations or rights of others. John Zomchick argues that Lovelace's sense of self and female other is "sanctioned by a legalistic conscience" (82). By adopting the (often gendered) terms of property ownership that pervade legal discourse and by imagining

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<sup>59</sup> For similar conceptualization of Lovelace's character, see Zomchick, who argues: "Lovelace's character is the site of the deliquescence of aristocratic ideals and the emergence of an anarchic version of individualism" (81).

himself possessed of immutable juridical power, Lovelace is able to obscure and disregard the female will (Zomchick 81-104). Writing of Lovelace's treatment of Clarissa, Zomchick notes: "In his creative plottings, he casts her as something to be possessed rather than as a possessor" (85). This propertied mindset destabilizes Lovelace psychologically, leading him into fits of rage and madness when he feels his ownership rights are being challenged (see 602, 882). Unlike Mr. B., however, repentance and reform are impossible for Lovelace. He writes to his principal correspondent, John Belford, "I can do neither" (1428), and continues a life of duplicity and betrayal until his untimely death at the hands of Clarissa's cousin, Colonel Morden. Lovelace's own tragic fate, therefore, serves as a dire warning about the limitations of self-possession and the perils of unrestrained self-interest to readers who are preparing themselves for the private marketplace.<sup>60</sup> It also casts his character as a symbol for greater legal vigilance on issues of marriage formation and promissory breach.

In fact, this novel, even more than *Pamela*, is quite critical of the law's protective and punitive capacities.<sup>61</sup> Its principal targets are the pre-HMA law on marriage formation and mid-century rape law, both of which are left unsettled by Lovelace's own law of courtship. In an

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<sup>60</sup> Amit Yahav-Brown offers an interesting discussion of the relationship between self-interest and reason in *Clarissa*. Yahav-Brown contrasts Lovelace's and the Harlowes' "monistic," fully individuated desires with Clarissa's "pluralist," community-oriented desire, arguing the latter represents reasoned agency in Richardson's work: "... Richardson suggests that reasonable governing values do depend on one pre-deliberative requirement: recognizing all those who happen to have been born in a nominally close relation or in physical proximity as parties to deliberations—recognizing them as those particular persons whose desires you ought to satisfy along with your own" (810, 819, 824). Yahav-Brown's analysis indicates that Richardson is interested in demonstrating to his readers that reasoned negotiation on the marriage market involves multiple parties and requires thoughtful attention (though not necessarily concession) to the variety of rights and needs represented thereby.

<sup>61</sup> There are a number of scholars who offer extended readings of the novel in relation to rape, seduction, and abduction law. See, for example, Ferguson (rape law); Schwartz (rape, seduction, and abduction laws); Swan, "Raped by the System" (rape law); and Swan, "Clarissa Harlowe, Pleasant Rawlins" (abduction/ravishment law). Additionally, Ann Wagner reads the novel in light of eighteenth-century criminal law, including its standards and processes, more generally. In contrast to most other critical interpretations, Wagner argues that "the novel should be read, not as a rejection of earthly justice but as a dream of an alternative, albeit idealized, mode of adjudication" (322).

exchange of letters regarding Lovelace's potential prosecution for the rape of the now-deceased Miss Betterton, the antihero, seeking to defend himself against the charge, reveals "the rules in all his amours":

to shun common women: to marry off a former mistress before he took a new one: to set the mother above what if her friends were cruel: to maintain a lady handsomely in her lying-in: to provide for the little one according to the mother's degree: and to go in mourning for her if she died in childbed. (495)

That Lovelace is successfully able to substitute these private "rules" for public law suggests the latter as ineffective at deterring those behaviors that not only compromise the integrity of the marriage contract process but also "corrupt" its female participants. The law's inadequacy is sometimes framed by the novel as the consequence of women's failure to prosecute their legal rights. For instance, in an epistle that reproduces Lovelace and Clarissa's marriage license, Lovelace admits to "three or four precontracts," boasting that "the good girls have not claimed upon them of a long time" (871). We see this forbearance again in the story of the "well descended" and "well educated" Sally Martin, a woman with whom Lovelace "contracted ... *before* he knew of Miss Clarissa Harlowe" (1061). To "obtain[] his end," Lovelace promised marriage "under his hand and seal"; upon his breach, Sally avoided seeking legal redress and fell into prostitution (1061). While Richardson does not narrate the reasons for these women's restraint, the HMA debates and breach of promise jurisprudence do, establishing in their deliberations that the courtroom is not a safe or particularly accessible space for female victims of male libertinism and violence.

The jilted (and violated) female characters' implicit reluctance to prosecute legitimate claims under the law becomes explicit in the heroine's reaction to her own rape. After Lovelace sexually assaults and imprisons Clarissa, she threatens him and his co-conspirators with legal action: "You, sir, and ye women, are safe from every violence of mine. The LAW shall be all my

resource: the LAW . . .” (950). Yet, she has no intention of making such an appeal, and remains unpersuaded by friendly gestures to personal and public duty. Clarissa outright dismisses Anna’s admonition to “tak[e] legal vengeance of the infernal wretch. . . . not only for our own sakes, but for the sakes of innocents who otherwise may yet be deluded and outraged by him” (1014). She writes in response, “. . . I would sooner suffer every evil . . . than appear publicly in a court to do myself justice” (1019). Moreover, Clarissa rejects Rev. Dr. Lewen’s counsel that, despite the “hard pressure upon your modesty,” “your religion, your duty to your family, the duty you owe to your honour, and even charity to your sex, oblige you to give public evidence against this very wicked man” (1251). Her excuse to Lewen is not “the shock of *public shame*” (as he anticipates), but rather a lack of confidence in the legal system. Clarissa expects that Lovelace will be either exonerated or pardoned, leaving him “at liberty to do as much mischief as ever” (1253). In the end, it is only divine law that will ensure men like Lovelace are “condignly *punished*” (1498). As Beth Swan suggests, with Clarissa’s insistence on divine, rather than legal, justice, Richardson reveals the difficulties that women faced when confronted with a “patriarchal system” that “empowers [the privileged male—i.e., Lovelace] and deprives [the victimized female—i.e., Clarissa] of basic human rights” (“Clarissa Harlowe, Pleasant Rawlins” 86-87). But this does not mean that Clarissa surrenders entirely to the system. Rather, she sees the publication of her story as that which will prove to be most advantageous to “young creatures” vulnerable to cruel and egoistic conduct in domestic exchange (1254-55). In Richardson’s private sphere, legal narrative, even when persuasive, has little power to effect cultural change, but domestic literary narrative, composed in moral terms and read in private, can help to produce a subject who, if not able to exercise fully her contractual rights, is able to identify and avoid the egoist expressions of others.

As the long eighteenth century progressed, novelists continued to explore the process of contracting marriage and to shape its participants. Status concerns remained, as did questions about the efficacy of marriage laws and the vulnerability of women to male duplicity and violence; yet, the focus of instruction shifted as heroes and heroines were imagined as more fully self-determined, their autonomy deriving from parental absence or neglect as well as from legal and providential distance. Charlotte Smith's *Emmeline, the Orphan of the Castle* (1788) and Jane Austen's *Sense and Sensibility* (1811) extend the theme of exposing the legal fictions associated with classical contract. In these texts, the idea of rational, informed, and voluntary private exchange is depicted as uncertain at best. Nonetheless, the novels persist in working to authenticate formation fictions by offering characters that represent the thresholds, both proper and improper, of contractual subjectivity. In these later century novels, it is not uncorrupted virtue or divine will that authorizes rewarding domestic exchange, nor is it evolving legal doctrine; rather it is a commitment to free-willed domestic rights and obligations tempered by romantic self-discipline and social expectation.

A gothic-inspired romance, Smith's *Emmeline* narrates the courtship experience through the gothic tropes of isolation, dispossession, madness, and oppression, as well as through romantic images of affective domesticity and circumspect individuality. The eponymous heroine, an orphan of apparently spurious birth, begins the novel in near solitary confinement at her family's remote ancestral home, Mowbray Castle. In due course, however, she is released into the world of male tyranny and frenetic individualism. Emmeline's struggle against these powerful forces occurs within the space of domestic contract, as men threaten her with arranged, forced, and otherwise undesirable marriages. Yet, this space is also open to agreements and figures that offer a judicious and benevolent counterpart to the narrative's gothic design. Thus,

by the novel's conclusion, rational love and its contracting partners have displaced entirely the despotic and the impolitic, leaving the reader with a protoliberal paradigm from which to contemplate domestic exchange.

As does Richardson in his novels, Smith proleptically frames the narrative conflict in *Emmeline* within Maine's nineteenth-century status to contract thesis. The heroine is impelled into the corrupted marriage market by her position as an illegitimate and impoverished legal ward. Without rank or fortune, Emmeline must rely on her authoritarian uncle and informal guardian, Lord Montreville, for physical and economic security. This dependence empowers Montreville to ignore Emmeline's right to contract marriage—her domestic future, he determines, must be secured through homosocial negotiation. Montreville's patriarchal attitude authorizes a series of male-brokered marriage contracts in which social and economic capital are offered as consideration for Emmeline's sexual identity. The first of the proposed transactions is presented by Mowbray Castle's lecherous, but propertied, steward, Maloney. Montreville, "influenced" by "avarice and ambition" and concerned about his own son's, Delamere's, romantic intentions toward the heroine, is "persuade[d] . . . of the propriety of the match" (62-63). He admonishes Emmeline, "[p]erhaps he [Maloney] has no very great advantages; yet considering your situation, which is, you know, entirely dependent, I really think you do perfectly right in designing to accept of the establishment he offers you" (66). Another contract is proffered by the "old bachelor" and "opulent banker," Mr. Rochely (110, 129). Montreville, once again motivated by Emmeline's dependent status and Delamere's feelings for her, quickly moves to "close" the deal (129). Yet, Emmeline, drawing on her right to autonomous exchange, rejects both proposals. When, for example, Montreville attempts to compel Emmeline's consent to the Rochely transaction by issuing "threats of indigence," the heroine responds with an appeal

to her right of personal liberty. “[I]t is improbable,” she declares, “that one who has sacrificed so much to integrity, should now be compelled . . . to the basest of all actions, that of selling her person and her happiness for a subsistence” (134, 135). Even Montreville’s reminder that a marriage to Rochely will provide social legitimacy—“[t]he blemish of your birth will be wiped off and forgotten,” he promises—fails to shake Emmeline’s resolve: “to marry Mr. Rochely is not in my power,” she assures her uncle (148). Like Clarissa, this heroine finds it impossible to subordinate her right of independent marital choice to status demands.

Unlike Clarissa, however, Emmeline’s steady (and sometimes hysterical) refusal to function as an object of marital exchange elevates her successfully to the role of private contracting subject. Montreville, who is periodically motivated by a sympathetic attachment to his niece, eventually abandons his plan of female commodification and commits to heterosocial negotiation. Guardian and ward enter into an agreement whereby Montreville promises both to respect Emmeline’s right to voluntary contract and to maintain his fiduciary commitments, and Emmeline promises never to marry Delamere without Montreville’s consent (149-50). It is an arrangement of paternal and filial compromise, and one through which Smith suggests the possibility of reasoned exchange as an antidote to gothic oppression. And, while the friction between despotic paternalism and democratic bargaining continues to plague the characters’ relationship, it is not, in the end, determinative. Montreville and Emmeline eventually negotiate their way into an affective alliance, with Emmeline restored to her rightful position as heir to Mowbray Castle and married to the man of her choosing and Montreville content in “the happiness of his niece” (476).

Emmeline is not the only of Smith’s characters who struggles for contractual independence. Delamere is likewise subject to status pressures in courtship. Heir to a large



fortune and estate, his freedom to contract is circumscribed by ancestral obligation and social expectation. He is “persecuted . . . with proposals of marriage” to women of commensurate rank and “immense” fortune, women who will preserve the family’s ennobled heritage (87-88, 78). Nevertheless, Delamere resists these efforts to commandeer his right to marital choice, ignoring admonitions about filial duty and pursuing “the only union which will secure [his] happiness”: a marriage to Emmeline (93, 90-93). At an impasse, parents and son enter into a verbal contract formalized by the presence of two witnesses. Delamere agrees to spend a year abroad (or longer if his father so directs), and Lord and Lady Montreville promise not to “oppose” a union with Emmeline upon his return (207-08). This private arrangement, once closed, prompts the negotiation of another domestic agreement. After an emotional back and forth, Delamere convinces Emmeline to execute a written promise of marriage, which reads “At the end of the term prescribed by Lord Montreville, Emmeline Mowbray hereby promises to become the wife of Frederic Delamere” (209). Although the anticipated marriage contract is never executed, the episodes leading up to and imagining the couple’s betrothal underscore the increasing significance of individual prerogative and affective ties in the private sphere. Indeed, Smith’s decision to empower Delamere to act outside of social custom and in contravention of parental inclination signals an intergenerational shift in family politics and market control.

Smith’s representations of private exchange position the novel within the scope of both subversive and didactic literature. The narrative simultaneously works to undermine the marriage market’s paternalism and to establish in its place contract law’s classical fictions. Yet, *Emmeline* is not an argument for unfettered contractual autonomy; rather it is a sort of “how-to” manual for developing proper liberal selfhood. The novel’s primary and secondary characters embody a range of competency levels from which the reader can derive instruction. The clearest example

of “bad” subjectivity<sup>62</sup> lies in Delamere, whose reckless individuality ensures that he can never fully realize the liberal conditions of contract. Indeed, Delamere’s unbridled self-interest and extreme romantic sentiment frequently preclude him from rational thought and action. He is instead prone to bursts of madness and bouts of illness: he experiences “a temporary phrenzy” after Emmeline rejects his initial marriage proposal (97), “rave[s] like a madman” when she refuses the second (209), vacillates between “effusions of phrenzy” and an “alarming” “sullen calm” when she appears to have been unfaithful (258-60), and is “seized with a [near fatal] fever” when she is lost to him (366). Even more troubling is that Delamere’s lack of self-discipline precipitates acts of domestic violence. At one point, he abducts Emmeline in an attempt to force a clandestine marriage (166); and at another, he participates in a duel to avenge his ruined sister’s honor (see 469-70). The narrator attributes Delamere’s temperament to the “defects of his education,” which include “boundless indulgences” and parental myopia (68-69). Yet, like Richardson in *Clarissa*, Smith does not contemplate subjective reform for her figure of overwrought masculinity. As did Lovelace, Delamere dies in a duel, his violent death providing a stark warning about the dangers of emotional and psychological excess.

The path to good contractual subjectivity is, therefore, located in Emmeline and her future husband, Godolphin, both of whom possess, at the novel’s outset, the qualities necessary for enacting valuable agreements in the private sphere. Measured and circumspect in his approach to domestic relationships, Godolphin serves as Delamere’s foil. His feelings for Emmeline, as well as his pride of family, do not produce aberrant or violent behaviors; instead they yield sympathy and restraint. When Godolphin learns of Emmeline’s engagement to

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<sup>62</sup> In my reference to bad subjectivity, I am indebted to Nancy Armstrong’s engagement with Althusser’s “bad subject” in *How Novel’s Think* (see, e.g., 29-32).

Delamere, he conceals his romantic interest; when Emmeline informs him of her desire to remain single until she retrieves her estate and establishes her social and legal legitimacy, he respects her wishes; and when his sister's virtue is compromised by close friend, Godolphin seeks reconciliation instead of extra-legal vengeance (i.e., a duel). Diane Hoeveler argues that "Godolphin becomes *worthy* to be the hero of this text when he eschews 'masculine' codes of conduct—epitomized in that very deadly masculine pastime of dueling—and empathizes instead with the 'feminine' fates of his sister and Emmeline" (42). I would add that Godolphin's exceptional "merit," his "nobleness of character," and his rationality of emotion also render him a model of classical contract.<sup>63</sup> His capacity for reasoned, sympathetic exchange guarantees marital happiness with Emmeline and secures the well-being of his sister and her illegitimate child.

Godolphin's place as good contractual subject is exceeded only by Emmeline, whose gender and birth make her a particularly remarkable representative of liberal individualism. Introduced into the novel as a figure of "uncommon understanding . . . and unwearied application" (46), Smith's orphaned and illegitimate heroine develops into a rather powerful figure of moral reasoning and ethical exchange. Importantly, it is Emmeline's commitment to promise-keeping (rather than her sexual chastity) that bespeaks her exceptional and principled subjectivity, and, as Cheryl Nixon argues, "proves[s] her virtue" (*Orphan* 101). Emmeline's contractual integrity first arises in the novel's ravishment scene. As Delamere carries Emmeline against her will to Gretna Green for a clandestine marriage, she resolves to protect her agreement with Montreville over her social reputation. The narrator observes,

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<sup>63</sup> See Emmeline's assessment of Godolphin for these heroic descriptions (361).

The idea which seemed to press most painfully on her mind, was the blemish which the purity of her character must sustain by her being so long absent with Delamere—a blemish which she knew could hardly ever be removed but by her returning as his wife. But to break her promise to Lord Montreville; a promise so solemnly given . . . was a measure which she could not determine to pursue. (181)

Emmeline's promissory ethics is further demonstrated in the narrative's breach of promise sketch. Here, Emmeline upholds her written agreement to marry Delamere, despite her feelings for Godolphin, whose "admirable qualities of heart and understanding" make him a more prudent marital choice. The narrator writes of Emmeline's resolve "to forget him [Godolphin], and no longer to allow any partiality to rob Delamere of that pure and sincere attachment with which he would expect her to meet him at the altar" (282-83). In fact, it is not until Emmeline receives the contract "torn in two pieces" and accompanied by a written "release" that she allows herself to contemplate marriage to the novel's hero (351). More significantly, it is not until this moment that the heroine's gothic trappings are subverted by romantic rewards. She is reconstituted, though the discovery of long-concealed legal documents, as a person of legitimate birth and propertied wealth, and she is firmly established, through reasoned mediation, in an intimate and benevolent domestic environment. Thus, in this imaginative realm, persevering in one's promises is a marker of rational and rewardable selfhood, and it is a principal quality in women's pursuit of equal and autonomous exchange.

The novel does not, however, portray female contractual subjecthood as free of eighteenth-century English culture's conservative traditions. As other scholars, including Cynthia Klekar and Nixon, have demonstrated, the novel's social and legal contexts reveal that the pressures creating, challenging, and enforcing Emmeline's promissory commitments are often prescribed by patriarchal or aristocratic conventions.<sup>64</sup> For example, Emmeline is

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<sup>64</sup> Klekar and Nixon each offer an insightful discussion of the tension between liberal exchange and patriarchal tradition in *Emmeline*. Klekar argues that the novel employs the "language of gift and obligation" in order to conceal

motivated to negotiate contracts with Montreville and Delamere by traditional family politics and the patrician laws on inheritance. Her dependent and liminal position within the Mowbray kinship network and under the law obligates her to enter into agreements that require considerable self-sacrifice. Moreover, English society's gender norms mean that neither the promise to refrain from nor the promise to enter into marriage are Emmeline's to break; rather she must wait for male-authorized dispensation. Additionally, Emmeline is tempted to execute a clandestine marriage contract with Delamere by the culture's strict conceptions of female virtue and its unforgiving expectations for women's chastity. The heroine's equivocation on the matter not only confirms the hegemony of patriarchal ideas about proper womanhood, it also reveals the law's protective failures. Neither Emmeline nor her narrator is able to contemplate even the possibility that the law would defend her from the stain of sexual assault or the threat of forced marriage. Emmeline's accommodation to the patriarchal order further extends to the negotiations over Mowbray Castle, which occur after she is revealed to be of legitimate birth. Eva König argues that the terms of "masculine territory"—i.e., "property ownership"—in the eighteenth century required a woman so empowered to engage in a "masquerade of femininity" (161-63). Emmeline, therefore, "claims her inheritance" by male "proxy"—her future brother-in-law negotiates the estate's transfer—and "assumes feminine, submissive or propitiatory behaviour and language" with those who pose an obstacle to her birthright (König 162). Yet, as König shows, Emmeline's capacity for masquerade is a compelling argument for female agency in

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the "coercive and violent" presence of "patriarchal authority" in private contract ("Obligations of Form" 269-70; see also 287). She writes, "the seemingly disinterested exchanges [with Montreville and Delamere] mask the impossibility that Emmeline can escape the asymmetrical cycle of exchange that subjects her to competing forms of male control" (272). Drawing on Klekar's work, Nixon observes the conflict between Emmeline's "attempt[] to enact structures of mutual, reciprocal obligation" and the male characters' "attempt[s] to trap her into contractual arrangements that place her in a subordinate position and force her to give up power to them. . . ." (*Orphan* 101). Nixon further suggests that the legally-framed conflict represents late eighteenth-century concerns about the unsettled boundary between public and private (100-05).

private affairs. Indeed, the heroine's ability to manipulate conservative ideologies of femininity to great economic and social advantage demonstrates women's fitness for self-government and domestic authority.

Thus, notwithstanding Smith's engagement with the period's conservative norms, her novel helps to construct the liberal individual and the modern world in which she operates. As the reader is confronted with the inequities wrought by the patriarchal, the paternal, and the patrician in the private sphere, she is also presented with new ways of seeing and knowing. Smith's despotic characters and characters of excess underscore the need for domestic progress, while her appropriately sentimental protagonists offer a vision of how to accomplish this evolution. Indeed, Emmeline and Godolphin's rational, disciplined individualism and their capacity for voluntary and equal exchange demonstrate how to turn classical liberal fantasy into modern cultural truths.<sup>65</sup>

Jane Austen's *Sense and Sensibility*, published at the end of the long eighteenth century, joins social realism with romantic sentimentalism to explore the marriage market's pitfalls and possibilities. Through an intricate weaving of multiple courtship narratives, the novel both condemns the status concerns that regularly plagued upper-class market conditions *and* interrogates the limits of liberal individualism and the contracting process through which it is expressed. What materializes in this novel of manners is a moderated version of the individual and her contractual rights—equality and free choice are fully legitimated, while autonomy is

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<sup>65</sup> Joan Forbes and Hoeveler also emphasize the socio-political significance of the novel's final marital union. Forbes positions *Emmeline* as an anti-romantic text and suggests that the hero and heroine's marriage—a union “not so much of romantic or courtly love, but more brotherly protection offering . . . respect, safety, and affection”—resists the constraints that “patriarchal society” places on women through “romance and romantic love” (301). Hoeveler similarly argues that Emmeline and Delamere's union replaces the unruly “older and aristocratic order” with a civilized “new order,” one that “value[s] self-possession, restraint, bodily repression, and emotional control” (43).

authorized only through self-discipline and social responsibility.<sup>66</sup> In this way, Austen carries forward Smith's work in *Emmeline*. Yet, by anchoring the novel in contemporary life and character, she not only creates urgency on the issue of arranged marriage, but also provides a more fully accessible version of proper contractual selfhood and its fictions.

Austen addresses the friction between status and domestic contract in the novel's heiress courtship plots. In the most developed of these plots—the marriage negotiations between the Morton and Ferrars families—the author represents the way in which inheritance and property ownership could cause a loss of identity and volition on the eighteenth-century marriage market. Rather than being treated as a self-determining individual, Miss Morton is regarded by the text's marriage brokers as an object of rank and fortune to be offered in interfamilial trade. Mrs. Ferrars identifies her as “the daughter of a nobleman with thirty thousand pounds” (264) and Mr. John Dashwood refers to her as the “only daughter of the late Lord Morton, with thirty thousand pounds” (159). As Edward Neill suggests, these characterizations not only emphasize Miss Morton's position as “a person of consequence,” they also reduce her to monetary capital: rather than having thirty thousand pounds, Neill writes, “Miss Morton *is* thirty thousand pounds” (127). The heiress's (de)valuation is reinforced in her textual marginalization. She inhabits the novel without a literal voice—she is not ascribed any dialogue and the narrator does not share her thoughts with the reader—and her figurative voice is transferred (and only briefly) to the

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<sup>66</sup> Where Austen falls on the issue of individualism and its political underpinnings has and continues to be the subject of much scholarly debate. Alistair Duckworth (112-14), Mary Poovey (183-94), and Tony Tanner (*Jane Austen* 101-02), for example, all note Austen's privileging of self-discipline and social duty in *Sense and Sensibility*; yet, these scholars also suggest (albeit with different degrees of emphasis) that the novel seeks some balance between the individual and the social, between emotion/desire and prudence/obligation, and between progressive and conservative. Nancy Armstrong (*How Novels Think* 43-52) and Claudia Johnson (*Jane Austen* 49-72), on the other hand, locate Austen more firmly in the progressive/reformist camp. Armstrong, for instance, posits Austen as an “Enlightenment intellectual[,]” for whom “self-restraint entailed no loss of individuality but, quite the contrary, guaranteed an accretion to the self of individual rights” (*How Novels Think* 48).

novel's heroine, Elinor Dashwood. This transference occurs soon after the Ferrars' decide to modify the terms of contractual exchange by substituting one son (Robert) for another (Edward).

Elinor, speaking with her brother John, the Ferrars's representative, addresses the development:

'The lady, I suppose, has no choice in the affair.' [Elinor]

'Choice! – how do you mean?' – [Mr. Dashwood]

'I only mean, that I suppose from your manner of speaking, it must be the same to Miss Morton whether she marry Edward or Robert.'

'Certainly, there can be no difference; for Robert will now to all intents and purposes be considered as the eldest son. . . .' (210)

The heroine's incisive allusions to marital choice, romantic apathy, and the landed class's "manner" (John Dashwood being an heir himself) carry with them a critical defense of the heiress's singularity: Miss Morton may, Elinor subtly suggests, have legitimate desires that run counter to economic or social aggrandizement and that extend beyond the promise of patrilineal succession. Yet, Dashwood's response that "there can be no difference" between Edward and Robert indicates that the individual qualities of *both* heir and heiress are of little consequence to the propertied marital trade; rather, what signifies is one's class condition, such that "choice," to the extent that it exists, is superficial and generic. In fact, within this system of exchange, the prime signal of patriarchy, heritable property, is always threatening to disrupt the prime signal of liberality, the ability to bargain.

This threat is made tragic in the novel's retrospective subplot on courtship, marriage, and divorce. A minor narrative, told by Colonel Brandon, the anecdote relates the history of Eliza Williams, an orphaned heiress whose great fortune made her vulnerable to patriarchal consumption. Brandon explains that, although attached to him, Eliza was "married against her inclination to [his elder] brother" in order to preserve the "much encumbered" "family estate" (145). Her appropriation by filial duty—it was her uncle and guardian, Brandon's father, who arranged the marriage—destroyed her sense of self and her capacity for self-control. She



transitioned from a happy and spirited young woman, to a miserable and adulterous wife, to an unchaste and infirm divorcée. Once released from the disastrous marriage, Eliza was unable to expel that part of her that identified as a commodity, trading the role of patrilineal possession for that of sexual good. Her collapse into “a life of sin” thus ended as all such lives do in a sentimental narrative, in exile, debt, and death (146). With this story of oppression and suffering, then, Austen intensifies the private conflict between status and contract, urging a critical, even sympathetic, response to the market’s treatment of its most “privileged” participants.

Because Austen’s heiresses, and, to an extent her heirs, are directed by their status positions, her non-proprietary heroines and their suitors serve to demonstrate the complexity and (im)propriety of autonomous private contract. Void of fortune or estate, these characters are *not* valuable commodities to be bought and sold in familial exchange; rather they are independent negotiators of their domestic futures. Reading the courtship experience of Marianne and John Willoughby alongside that of Elinor and Edward Ferrars reveals the “liberal” marriage market as a site of conflicting motivations, unintelligible wills and moralities, and disparate proficiencies; yet, the experiences also demonstrate the market as a place for individual growth and reward. In point of fact, Austen’s featured romances prove as false the principles on which classical contract theory is founded at the same time that they verify the possibility of these principles and the liberal subject who enacts them.<sup>67</sup>

Austen examines the hazards of private contract in the relationship between Marianne and Willoughby, a romance that begins in haste and ends in sorrow. This courtship, forged as it is between two figures of immoderation, reveals the ways in which excessive individuality imperils the female subject and her prospect of marital exchange. Willoughby’s “[e]xtravagance

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<sup>67</sup> For another reading of Austen’s representation of “personal autonomy” on the marriage market, see J. Thompson “Sense and Sensibility,” 153 *et passim*.

and vanity,” as well as his “cold-hearted and selfish” nature (235), compel him to pursue, quite recklessly, his advantage in the marriage market. He draws Marianne into a romantic entanglement and then cruelly abandons her for the wealthy Miss Grey. At the same time, Marianne’s deep sensibility urges her to engage in conduct that borders on indelicacy and that ultimately leaves her defenseless against romantic deception and physical breakdown. Indeed, she runs headlong into the courtship, ignoring her sister’s admonitions about “the propriety of some self-command” (41), and upon discovering Willoughby’s duplicity, falls seriously ill. Her recovery is assured only after she takes a turn on the sentimental death bed.

Marianne’s precarious position is made manifest in the characters’ post-courtship analyses. In a letter to the lovesick heroine, Willoughby shrewdly invokes the requirement of contractual intent to escape liability for his actions:

. . . I entreat your forgiveness of what I can assure you to have been perfectly unintentional. . . . [I]f I have been so unfortunate as to give rise to a belief of more than I felt, or meant to express, I shall reproach myself for not having been more guarded in my professions of that esteem. That I should ever have meant more you will allow to be impossible, when you understand that my affections have been long engaged elsewhere. . . (129)

While Willoughby eschews the idea that the couple had engaged in promissory exchange, Marianne interprets the relationship as a mutual and binding agreement. She informs Elinor that she “felt [her]self . . . to be as solemnly engaged to him, as if the strictest legal covenant had bound [them] to each other” (133), and admits that although “never professedly declared,” his love “was every day implied” (132). Still, feelings and implications are not enough to establish Willoughby’s will and intention and, consequently, to authorize Marianne’s intense romantic sentiment. As Elinor observes, her sister’s very open attachment to her former suitor—and, in particular, her well-publicized and unchaperoned visit to his family’s estate—could cause her to “lose much” if their social community were to discover that “[Willoughby] has broken no

positive engagement” to her (139). To preserve Marianne’s reputation and domestic future, Elinor must conceal the magnitude of her injudicious nature, a seemingly difficult task in a world where the vicissitudes of courtship occupy a key place within the social conscious.

Marianne’s courtship experience is not, however, limited to the disastrous nor is her position in the story restricted to the role of impassioned and impulsive heroine. For this sympathetic figure, heartbreak inspires subjective enlightenment and opens a space for domestic fulfillment. Once restored to physical health, Marianne admits her prior behavior was “a series of imprudence” (244) and commits to reasoned and deliberate self-government (245-46). When she again enters the market, her desire for “irresistible passion” has subsided and she “voluntarily” forms a new agreement with the solid and staid Colonel Brandon (268). Of Marianne’s emotional condition in her newfound marital role, the narrator observes: “[She] could never love by halves; and her whole heart became, in time, as much devoted to her husband, as it had once been to Willoughby” (268). With this reconstitution of character, Austen bodies forth a new version of female selfhood, one that *acquires* or *develops into* (as opposed to innately possesses) the rational, informed, and self-affirming fictions of liberal contract.

The novel’s investigation of male intemperance, in the form of Willoughby, follows another direction. Although this handsome and charismatic character enters the narrative as a figure of “general admiration” (33), he exits as a symbol of caution. Joyce Kerr Tarpley correctly argues that “[b]y consciously flouting the moral norm for courtship conduct, Willoughby enacts a serious abuse of freedom” (102). Not only does he inflict emotional injury on the novel’s heroine, he offends the social code and upsets the domestic order. His aggressive libertinism and gross self-interest contribute to the hardship of female ruin and the rise of illegitimate birth<sup>68</sup>;

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<sup>68</sup> At a point in the novel, we learn that Willoughby seduced and abandoned Colonel Brandon’s pregnant niece, the younger Eliza Williams, before turning his attentions to Marianne.

and, when set against his apparent “gallantry” and “gracefulness” (33), they foster confusion and distrust among those who form a part of his social compact. Mrs. Dashwood, for example, wonders, “Has not his behaviour to Marianne and to all of us, for at least the last fortnight, declared that he loved and considered her as his future wife, and that he felt for us the attachment of the nearest relation? Have we not perfectly understood each other?” (59-60). Importantly, Willoughby too suffers under the weight of his subjective incoherence. In a frenzied meeting with Elinor, brought on by his concern about Marianne’s illness, Willoughby admits to an “insensible” heart (226), to not knowing “what it was to love” (227), to a deliberate penchant for romantic indifference (231), and to a misguided devotion to “riches . . . and expensive society” (229). Although this lack of introspection does not ultimately prohibit him from realizing “domestic felicity”—the narrator assures us that “[h]is wife was not always out of humour, nor his home always uncomfortable”—it does produce in him prolonged feelings of “envy” and “regret” (268-69). It also prevents him from achieving financial independence, his aunt refusing, based on his bad conduct, to will him the family’s estate. Thus, Willoughby serves to remind the reader of the importance of contemplative self-awareness, enlightened self-interest, and social duty in the private marketplace. Yet, he also, in his rather benign downfall (especially as compared to that of Richardson’s Lovelace and Smith’s Delamere) and subjective stasis, represents the reality of the period’s gendered politics and the truth of male privilege.

Austen offers a counter to the courtship experience of Marianne and Willoughby in that of Elinor and Edward. Like Austen’s couple of excess, these figures also fail to come to a firm understanding about the status of their relationship; yet, Elinor’s rational pragmatism and Edward’s attention to duty allow them to manage safely the perils of private contract. The narrative conflict for these characters arises, as it did for their counterparts, out of ill-defined

contractual intention. Throughout much of the novel, Edward is clandestinely contracted to Lucy Steele. Nevertheless, his external conduct toward Elinor suggests to her and others an internal promissory intent. “Your behaviour was certainly very wrong,” Elinor chastises him after the two reunite, “because—to say nothing of my own conviction, our relations were all led away by it to fancy and expect *what*, as you were *then* situated, could never be” (260). Edward, for his part, “plead[s] an ignorance of his own heart”: “I was simple enough to think, that because my *faith* was plighted to another, there could be no danger in my being with you. . . . I felt that I admired you, but I told myself it was only friendship ” (260). Where Elinor diverges from Marianne is in her ability to check her romantic desire and reserve judgment on Edward’s contractual will. The narrator reveals that “[s]he was far from depending on that result of his preference of her, which her mother and sister still considered as certain” (19) and Elinor herself states that she is “by no means assured of his regard for [her]” (18). Where Edward diverges from Willoughby is in his dedication to romantic promise-keeping. Although disinherited for and disillusioned in his initial marital choice, he remains committed to a marriage with Lucy. As he informs Elinor, “I thought it my duty . . . independent of my feelings, to give her [Lucy] the option of continuing the engagement or not” (259). Thus, when Lucy jilts Edward for his brother Robert, he and Elinor are morally free to contract with one another.

More sensible than sensuous this courtship narrative sketches the moral boundaries of late-eighteenth-century contractual exchange. In Elinor, Austen demonstrates that awareness of self and other prevents the more flexible boundaries of liberal subjectivity from interfering with and transgressing the more restrictive boundaries of social subjectivity. In Edward, she emphasizes the value of submitting one’s liberal desires to society’s deeply vested interest in contractual expectation. While we are not privy to all of the negotiations that lead-up to the

marriage between Elinor and Edward, the narrator assures us that they were ideal: “brought together by mutual affection, with the warmest approbation of their real friends, their intimate knowledge of each other seemed to make their happiness certain” (261). Equal, voluntary, and informed, the domestic contract between this hero and heroine validates what it is to interact responsibly in a classically-conversant private sphere.

Ultimately, Austen’s investigation of the marriage market recalls the practical concerns of classical liberal philosophers, who understood the realities of nascent liberal subjecthood and sought to dispel them through education or contain them through legal regulation. The novel functions as a conduct book for market relations, with the status-bound secondary characters demonstrating the importance of free will and voluntary consent in marriage and the liberated primary characters showing the importance of equal, rational, informed, and sympathetic autonomous exchange. The narrative’s significance as an educative tool is reinforced by the sustained absence of civil law as a body of protection and redress in domestic contract. Indeed, the legal silences remain even at this late-point in the long century, confirming the law’s impenetrability on matters of marital formation and promissory breach. Consequently, Austen suggests a scheme of social regulation. David Kaufmann persuasively argues that for Austen (and many of her historical contemporaries) such regulation begins with manners, because they “are the laws that govern the face-to-face interactions that constitute civil society” (388). Of particular importance, Kaufmann contends, is the courtesy of “acknowledgement” (391-92): in a world that supports the “private nature of the individual,” he argues, “public admissions [are] imperative. If we cannot read others’ minds, we have to be able to trust their words and their actions” (391-92). I would add to this that the novel admonishes market participants to monitor closely marriage negotiations and to work reasonably within the values by which they are

socially encoded. In the end, Austen contributes to and refines a long list of domestic narratives seeking to understand and to shape what it means to contract marriage in a world where status and duty are rapidly becoming displaced by individual will and desire and where the laws charged with protecting those entangled in the morass of patriarchal obligation and unencumbered self-interest are rendered inaccessible and ineffective.

### *Conclusion*

Many scholars agree that in eighteenth-century England liberal subjectivity began to subvert patriarchal subjectivity and the self-governing individual began to displace the socially-determined subject. A corollary is contract law's transformation from principles that valued status and duty to a theory emphasizing equality and autonomy. Indeed, the publicly contracting subject begins to emerge in eighteenth-century jurisprudence as a fully rational, self-determined, and self-aware individual, one whose market-based relationships are voluntarily created and are entirely defined by the mutual will and intention of their constituents. The privately contracting subject also takes on some of these liberal qualities, though his position is highly contested in contemporaneous legal documents. Whether men and women negotiating the marriage contract are capable of properly exercising their rights underlies much of the parliamentary debates over Hardwicke's Marriage Act, and informs judicial opinion in breach of promise of marriage cases. It became the province of literature and, in particular, the domestic novel to expose the fictitious nature of the assumptions that were shaping classical contract theory, as well as cautiously to authenticate them. Indeed, what emerges in the eighteenth-century domestic novel is a courtship process that values the autonomy of the participants, but also contemplates duty to self and others as an indicator of rational and enlightened contracting.

## CHAPTER 2: THE FICTIONS OF MARITAL UNIFICATION

The eighteenth-century domestic novel is not only concerned with the pressures and fictions of courtship; it also is deeply interested in the vicissitudes of marriage. For many protagonists, inhabiting the marital space is as difficult as engendering it, because the ideological and legal tensions that influenced their experience of marital formation remain to shape the conditions of unification. The novels' heroines are at a particular disadvantage, as their efforts to establish a nuptial union that promotes personal autonomy and relational well-being are continuously frustrated by the demands of a legal system chiefly defined by patriarchal and patrilineal values. Of interest here are four long-century novels that feature heroines caught (to varying degrees) between the dictates of individual right and the laws of marital obligation: Daniel Defoe's *Roxana* (1724), Eliza Haywood's *Betsy Thoughtless* (1751), France Burney's *Cecilia* (1782), and Jane Austen's *Pride and Prejudice* (1813). Presenting narratives that interrogate women's position within marriage, these novels provide a cultural context for assessing, both contemporaneously and historically, the legal precepts that substitute the liberality of formation for the status of unification.

This chapter places the aforementioned literary works in dialogue with the laws that define marriage post-contract execution—in other words, the laws that determine the rights and duties of husbands and wives. Part I outlines the precepts and foundations of the common law of coverture, with a particular focus on “unity of person,” the principal fiction by which this law was defined. The section also introduces the political and legal tensions over the meaning of marriage and married women's legal identity in the period. Part II explores the jurisprudence



surrounding the development of the married woman's separate estate, an equitable regime that signaled a departure from some of coverture's most restrictive covenants. This examination reveals that England's legal culture, though committed to establishing married women's property rights, was ambivalent about the scope and potentially liberalizing effect of those rights. It also demonstrates that the law, as an institution, was uncertain about the extent to which it was willing to accommodate a new and more progressive approach to marital unity. Part III explores the domestic novel's engagement with shifting cultural perspectives on the conditions of marriage. I argue that this literature operates as a forum for adjudicating the utility and ethics of legal conceptions of marital unity, and I demonstrate how the representative texts work at progressively sophisticated levels and in different generic forms to imagine a matrimonial "oneness" that operates outside of the common law. The early- to mid-century novels—in their biographical forms—offer a vision of unity that seeks to upend the traditional marital hierarchy, but that vision is complicated by strains of conservative feminine ideology. The later-century texts—both novels of manners—conceive of unity of person in strictly egalitarian terms, but it is only Austen's *Pride and Prejudice* that successfully preserves the individuality and autonomy of its espoused participants.

#### *Part I: A Return to Status*

Marriage in eighteenth-century England retained only a vestige of its sacramental character, and its religious foundations were being displaced by the principles of secular contract.<sup>69</sup> Hardwicke's Marriage Act, which severely limited the scope of ecclesiastical

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<sup>69</sup> For a comprehensive discussion of historical developments in Western conceptions of marriage, see Witte. John Witte locates the movement away from a "sacramental model of marriage" in the sixteenth-century and the Protestant Reformation (218), and he charts marriage's subsequent conceptual development through social, covenantal, commonwealth, and contractarian models (113-323).

jurisdiction over marriage formation, might be understood as a legal manifestation of this conceptual transition. Returning for a moment to the 1753 House of Commons debates on the HMA, we see parliamentarians locked in a debate over marriage's core meaning. Certain of the Act's opponents argued that marriage retained a special religious quality that required ecclesiastical superintendence. M.P. Nugent, for instance, found "the marriage contract" to be the most obvious example of "a religious and sacred engagement amongst mortals" and advised that "to remove . . . even that superstitious character of sanctity" was not only to license "transgress[ions] of the marriage vow," but also to undermine "religion itself" (*Cobbett's* 15: 12-13). The Act's supporters, on the other hand, argued that ecclesiastical law on marriage formation reflected an earlier period of "popery, ignorance, and superstition" (15: 8-9) and "add[ed] a sanctity to the marriage contract" that was in contravention of the public good (15: 7).<sup>70</sup> The HMA, they contended, would remedy this doctrine of religious excess by treating marriage as a civil agreement. With the Act's passage, therefore, the idea of marriage as a secular construct gained legal and, we might assume, social traction.

The notion of marriage as a civil contract found authority in the Enlightenment philosophy of John Locke.<sup>71</sup> In *Second Treatise of Government*, Locke envisions "[c]onjugal society" as a "voluntary compact between man and woman," one that "draws with it mutual support and assistance, and a communion of interests" (133; sec. 78). For Locke, the terms of marriage are settled by this compact: in other words, it is the province of the husband and wife to determine, through mutual agreement, how to enact their marriage (135; sec. 83).<sup>72</sup> As John

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<sup>70</sup> The quoted material references the remarks of A.G. Ryder.

<sup>71</sup> For a more extensive discussion of Locke's marriage philosophy, see Witte 278-85.

<sup>72</sup> To be clear, Locke does not imagine unrestricted contractual freedom for spouses. Rather, he argues in *Second Treatise* that any agreement between them must honor the primary purpose of marriage, which is the maintenance and welfare of any children born thereto (133; sec. 78, and 135; sec. 83). Locke also entertains the possibility of

Witte observes, Locke's nuptial philosophy is significant because it suggests "that a law of marriage based on contract could be valid even if God were not viewed as the founder of the marriage contract, nor his church engaged as an agent in its governance" (290).<sup>73</sup> William Blackstone, in his *Commentaries*, confirms that English jurisprudence took a position similar to Locke on the relationship between marriage and divine authority: "Our law considers marriage in no other light than as a civil contract," he wrote (1: 421). However, Blackstone's description of the state's authority over marriage post-execution demonstrates a departure from Locke's theory on marital government. As described by Blackstone and other of the period's treatise writers, the terms of property ownership, legal contract, and legal standing were set, not by the husband and wife in their contractual capacities, but by legislation, legal custom, and court precedent. Indeed, at the point of ceremonial exchange, lawful marriage was divested of its contractual nature and husband and wife experienced a return to status obligation—to a point where their identity, rights and obligations were defined by the state.<sup>74</sup>

This reversion to status was effected by the common law doctrine of marital coverture, a medieval invention that denied married women a separate legal identity and stipulated the conditions under which spouses were to perform marriage. Under coverture, a married woman's legal person merged into that of her husband. As she transitioned from *feme sole* (single female) to *feme covert* (married female), she lost the right to own, alienate, and devise property; to contract in her own name; and to sue or be sued independently in the common-law courts. Any real property that she brought to or acquired during the marriage became her husband's to

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restricting wives' contractual wills (see, e.g., 135; sec. 82). For an excellent discussion of women and contract in Lockean philosophy, see Grant.

<sup>73</sup> Mary Lyndon Shanley offers another useful discussion of Locke's historical influence on conceptions of marriage.

<sup>74</sup> Pateman offers an informative review of feminist scholarship on the tension between status and contract in conceptions of marriage (see 166, 154-88). She also provides a definition of status on which I drew here (166).

control and any personal property she possessed became his absolutely. In exchange, a married man was charged with providing his wife's "necessaries" and deemed responsible for any debts she acquired to secure her lawful maintenance. He also was obligated to prosecute and defend lawsuits on her behalf and to honor her common law right to dower, which commenced upon his death and provided her a one-third life estate in all the real property that he owned in fee simple (i.e., absolutely and without condition) during the marriage.<sup>75</sup> Although there were legal exceptions to and work arounds for coverture, some of which this chapter will explore, on the whole, it was a precept that inured to the benefit of the husband at the expense of the wife.<sup>76</sup>

The justification for coverture developed over the centuries, but the chief explanation provided by lawyers, jurists, and treatise writers was the legal fiction "unity of person."<sup>77</sup> This fiction posited husband and wife as "one person"—the husband—and, in the medieval and early modern periods, rested on Biblical scripture and natural law constructs: specifically, Old Testament references to spouses as "one flesh" and Biblical passages on wifely submission, as well as the idea that women were, by nature, subordinate to men.<sup>78</sup> For example, Sir Henry Bracton, in *On the Laws and Customs of England* (circa. 1220-1250), variously describes

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<sup>75</sup> For a succinct, but informative, description of a widow's dower rights, see Spring 40-41.

<sup>76</sup> For additional descriptions of coverture law, see Blackstone 1: 430-33; Baker 483-89; Greenberg 172-75; and Stretton and Kesselring 6-9.

<sup>77</sup> Tim Stretton ("Coverture and Unity of Person"), Sara Butler ("Discourse on the Nature of Coverture"), and Maeve Doggett (62-99) each provide critical reflections on the historical relationship between coverture and marital unity. Together, these scholars argue that unity of person was secondary to cultural ideas about male power in coverture-related discourse until at least the seventeenth century; yet, all concede that references to unity of person abound in medieval and early modern legal texts.

<sup>78</sup> See, e.g., Baker 483-84; and Doggett 74-86. The principal Scripture implicated in early discussions of unity of person include the following: "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh" (*King James Bible*, Gen. 2.24); "Unto the woman he said, I will greatly multiply thy sorowe and thy conception. In sorrow thou shalt bring forth children: and thy desire shall be to thy husband, and hee shall rule over thee" (Gen. 3.16); and "Wives, submit your selves unto your owne husbands, as it is fit in the Lord" (Col. 3.18).

husband and wife as “one flesh,” “one flesh though different souls,” and “one flesh and one blood” (4: 84, 3: 129, 4: 142, and 4: 335), and decrees that the husband “rules his wife” while she acts “under [his] rod” (4: 335, 4: 287, and 2: 36). Centuries later, Justice Robert Hyde, in *Manby v. Scott* (1659), opined on the divine origins of unity of person and, consequently, of coverture:

In the beginning when God created woman an helpmate for man, he said ‘They twain shall be one flesh;’ and thereupon our law says, that husband and wife are but one person in the law: presently after the Fall, the judgment of God upon woman was ‘Thy desire shall be to thy husband, for thy will shall be subject to thy husband and he shall rule over thee.’ Hereupon our law put the wife *sub potestate viri* [i.e., under the authority of] [her husband] . . . , and she is disabled to make any grant, contract, or bargain, without the allowance or consent of her husband. (783)

An early eighteenth-century legal treatise, *Baron and Feme* (1719), similarly enlists the “Law of Nature” and the “Law of God” to justify a wife’s “Obedience” and the surrender of her “Will” to her husband through coverture (7 and 9). As her husband’s spiritual, moral, intellectual, and physical inferior, these commentators suggested, the wife merited and benefitted from the fictitious existential bond. Moreover, in affirming such conceptions of marital unity, the common law preserved God’s male-centered vision for domestic government.

Yet, religious tradition and social custom were not the only authorities through which unity of person achieved cultural legitimacy. Recently, Tim Stretton has argued that Blackstone himself authorized a modern understanding of the concept, imbuing the fiction with a distinctly contractual character for the eighteenth century and beyond. The celebrated treatise writer and jurist describes marital unity and its relationship to coverture as follows:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-french a *feme covert*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of an

union of person in husband and wife, depend almost all the legal rights and duties, and disabilities, that either of them acquire by the marriage. (1: 430)

Stretton, who reads this passage in its larger theoretical context, contends that Blackstone connected marital unity and coverture to “the liberty of the individual” (120). By denying coverture’s natural law foundations and either rejecting or remaining silent on issues of “masculine power,” female submission, and domestic violence, the jurist presented marriage law as a product of reasoned liberal compromise: wives ceded their “natural liberty” for “the price of the marital bond that made them as one with their husbands” (Stretton 120-122). Nonetheless, Stretton concludes that Blackstone’s use of unity of person was ideologically motivated: he sought only “to justify the status quo” and in so doing, “helped to shelter the [traditional] rules of coverture from discussions of the liberty and freedom of the individual” (126-27).<sup>79</sup> Therefore, even a “liberal” interpretation of unity of person functioned as a fictional substructure for denying married women legal agency and contractual power.

Notwithstanding Blackstone’s efforts to maintain coverture’s legitimacy, eighteenth-century law affecting married women was changing—and arguably modernizing. The Court of Chancery, tasked with “correct[ing] and control[ling] [the municipal laws] when they do amiss,”<sup>80</sup> began to recognize a married woman’s right to own and alienate separate property,

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<sup>79</sup> Scholarship on the origins and meaning of the legal fiction of unity of person is complicated and conflicting, and Stretton departs from historical discourse that locates the fiction’s foundation in Genesis 2.24 and in cultural ideas about women’s subordination to men. Instead, Stretton argues that unity of person was an entirely separate concept, one that “was employed in a series of metaphors and rarely represented the same way twice” in legal literature (116-17). In Stretton’s view, Blackstone provided the fiction with stable meaning and reconfigured it as the primary justification for coverture. No matter how one interprets the origins and breadth of unity of person, however, the fact is that references to husband and wife as “one person under the law” abound in legal writing from medieval times on, demonstrating the importance of the fiction to the law setting forth married persons’ rights and responsibilities. Moreover, the fiction’s consequences for married women in the eighteenth century remain unchanged whether we understand it to arise out of patriarchal or liberal ideology.

<sup>80</sup> This quote is from *A Treatise of Equity* (5-6; bk. 1, ch. 1), the author of which is sometimes referred to as Henry Ballow. There is no author listed for the edition cited herein, however.

both real and personal, and to receive pecuniary payments, or pin money. This retreat from established common law is significant for thinking about whether and to what degree conceptions of marriage and of women's position in relation to men were changing in the period, and it is crucial for understanding the influence and function of the legal fiction unity of person. Does this equitable doctrine suggest marriage was becoming a more egalitarian enterprise? That status was being subverted by contract in marriage's execution phase? Does the jurisprudence indicate that women were escaping paternal and patriarchal ideas about their subordinate roles within the family and English society? That liberal selfhood was being extended to the *feme covert*? Should we understand the law as revising the fiction of unity of person to account for the burgeoning "reality" of the liberal individual?

*Part II: Unity of Person and Key Developments in Equitable Property Law*

For some decades now, historians and feminist scholars interested in early modern marriage have debated the significance of equitable exceptions to the common law of coverture. Classic social historians, such as Lawrence Stone, Randolph Trumbach, and Alan MacFarlane, have connected married women's property rights to a larger cultural shift in perspectives on marriage and the family. For these scholars, property ownership and income management by wives suggests a movement from the traditional and patriarchal toward the egalitarian and companionate.<sup>81</sup> Stone, for example, maintains that "[t]he hardest evidence for a decline in the near-absolute authority of the husband over the wife among the propertied classes is an admittedly limited series of changes in the power of the former to control the latter's estate and income" (221). Feminist scholars, such as Susan Staves, Susan Moller Okin, and Eileen Spring,

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<sup>81</sup> See Stone, *Family, Sex and Marriage* 217-224; Trumbach 83-84, 116-17; and Macfarlane 287-90. As an aside, Macfarlane appears to see this shift occurring much earlier in English history than Stone and Trumbach.

have challenged these conclusions, arguing instead that the period's equitable legal developments provided women little autonomy and more often had the effect of reinforcing patriarchal values. Married women's separate property ("MWSP"), they contend, was primarily a mechanism either for the paternalistic safeguarding of women and their children or for preserving the patriline.<sup>82</sup> While these dichotomous assessments of the relationship among MWSP rights, domestic government, and female liberality clearly reveal a historical ambivalence about equity law's contributions to social change, they also implicitly evoke questions about the function of unity of person, specifically whether and how it influenced jurisprudential change.

### **The Marriage Settlement**

To answer these questions, it is necessary to investigate the legal texts through which MWSP was instantiated and adjudicated,<sup>83</sup> beginning with the primary instrument through which married women acquired separate property or a fixed income: the pre-, or sometimes post-, nuptial settlement agreement.<sup>84</sup> Reproductions of these agreements are included in the period's

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<sup>82</sup> See Staves 221-22; Okin *passim*; and Spring 121, 181-86. See also Karen Pearlston whose dissertation, according to the Abstract, "is a study of exceptions to coverture and their reception in the common law courts in the last half of the eighteenth century" (iv). Included in Pearlston's project is an investigation of married women's separate property rights.

<sup>83</sup> Other scholars, including some of the historians and feminist scholars cited herein, also have reviewed form marriage contracts, judicial opinion, and legal commentary in their examinations of the legal and social significance of MWSP. Here, I contribute to their excellent work by investigating the specific implications of this writing for one of the most prominent legal fictions in Anglo-American history.

<sup>84</sup> Apparently, there were two types of agreements used to establish a married woman's property or income rights: the marriage articles and the marriage settlement. My research suggests that marriage articles were executed prior to the marriage and generally confirmed in a pre- or post-nuptial settlement agreement. In fact, many of the settlement agreements that appear in the conveyancing manuals reference a previous "treaty," which I have taken to mean the marriage articles. To avoid confusion, I will refer to all contracts that address property and inheritance rights between spouses as settlement agreements. For a discussion of marriage articles and marriage settlements, see Atherley 81-150; chs. vi-ix.



conveyancing manuals, with party names and property descriptions either altered or omitted.<sup>85</sup> Generally, the contracts are among three parties—intended husband, intended wife, and the wife’s trustees—and are supported by consideration that includes the marriage itself.<sup>86</sup> The documents, while ranging in breadth and depth, use standard language to establish the bride’s property rights: a statement conveying the property, real or personal, to the trustees, is followed by a statement reserving the property for the intended wife’s use and excluding it from the intended husband’s control.<sup>87</sup> Additionally, many agreements include language that grants to the wife the power to dispose of the property during the marriage or upon her death, and some also provide for marital and post-marital maintenance in the forms of pin money and jointure. This latter provision, which typically took the form of an annuity due upon the husband’s death, was elected in lieu of the wife’s common law right to dower.<sup>88</sup> Finally, many settlements stipulated the inheritance rights and marital portions of future children and, if there was a family estate, the terms for its transmission. Although the agreements were primarily useful to parties vested of material property or wealth, the conveyancing manuals include contracts for those in the merchant and professional classes, thereby demonstrating that they were not unique to elite families. Such manuals, therefore, help us better understand how individual couples from across

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<sup>85</sup> I consulted a number of conveyancing manuals for this project. The two to which I specifically refer are Horsman’s *Precedents in Conveyancing* and Bird’s *Original Precedents of Settlements*.

<sup>86</sup> The bride and groom’s family members also occasionally appear as parties to these agreements: fathers, sons, and even mothers might undertake the role of trustee, or parents might assume the position of contractual obligor or beneficiary.

<sup>87</sup> To be clear, not all eighteenth-century settlement agreements provided separate property or income to the wife. Some only contemplated the widow’s inheritance rights, or the inheritance or property rights of husbands and children.

<sup>88</sup> As noted in Part I, a widow’s dower right encompassed a one-third life interest in the real property that her husband held in fee simple at any point during the marriage. In the eighteenth century, it was commonplace to forego this right in favor of equitable jointure, which husbands and wives could attach to any marital property, personal or real.

the social spectrum, along with their lawyers, implemented the common law doctrine of coverture and approached the traditional, patriarchal assumptions underlying unity of person.

The typical eighteenth-century conveyancing manual was a compilation of transactional documents by legal specialists and served as a reference guide for non-specialist lawyers. Gilbert Horsman's three-volume *Precedents in Conveyancing* (1744), for example, is comprised of early- to mid-century "Draughts" composed by "the most eminent Practisers in this Branch of Law" (1: 1). Its forty-four marriage agreements vary in length, complexity, and focus. Some agreements are entirely concerned with the wife's property and inheritance rights, while others address the rights and duties of husbands, wives, parents, elder sons, and younger children. Like Horsman's *Precedents*, James Barry Bird's *Original Precedents of Settlements* (1800) contains pre- and post-nuptial contracts by the day's "most distinguished" practitioners. Nevertheless, Bird distinguishes his text from that of Horsman and other "precedents of established authority" by arguing that the edited agreements in his collection are an improvement in content and style (v-vi). Indeed, he maintains that his (ostensibly) late-century form settlements account for the period's advancements in jurisprudence and professional standards. Yet, Bird's claims to render "more neat and intelligible" the once "barbarous and uncouth" rhetoric of conveyancing and to correct "the defects and inaccuracies of former settlements" (vi-vii) are undercut by the manual's many circuitous and inarticulate entries, as well as by the inclusion of separate property clauses that are, for the most part, duplicative of Horsman's. The rhetorical parallels across manuals, therefore, indicate the sustained complexity of the economic transactions collateral to marriage, and they suggest that the essential terms of equitable exchange remained relatively stable throughout the century.

Of principal interest here are settlement provisions that establish the wife's separate estate. Horsman's 1733 agreement among the fictitious Bona Brown, Arthur Autry, and trustees exemplifies the standard terms for exempting married women from the proprietary disabilities of coverture. This seven-page pre-nuptial contract secures property in trust for the intended wife's, Brown's, use and disposal during marriage, and it binds the intended husband, Autry, to a jointure equivalent to one-third of his real and personal estate. The agreement first details the property at issue (i.e., real estate leases, bank stocks, and East-India bonds that Brown inherited from her father) and recites the proffered consideration (i.e., "the said intended Marriage . . . and . . . the Sum of 10 s." (2: 75)). Later clauses record the asset transfer into trust and set forth the operative terms for the property's settlement on Brown:

[Trustees] . . . shall and do from Time to Time, . . . pay and dispose of the clear yearly Interest, Rents, Profits, Dividends and Produce of the said Messuages or Tenements, Hereditaments, Bonds, Stock and Premises . . . unto such Person or Persons, and to and for such Uses and Purposes, and in such Parts and Proportions, Manner and Form, as she the same Bona Brown shall from Time to Time, *notwithstanding her Coverture*, by any Note or Writing under her Hand *direct or appoint*; to the intent that the same may *not be at the Disposal of, or subject or liable to the Control, Debts or Engagements* of said Arthur Autry her intended husband, but only at *her own sole and separate Disposal*; And in Default of, and until such Direction and Appointment, to the proper Hands of her said Bona Brown . . . to and for her *own sole and separate Use and Benefit*. (2: 76; with the exception of party names, emphasis added)

The agreement further reserves to Brown absolutely the power to dispose of her separate estate:

[Trustees] . . . shall and do assign, transfer, and dispose of all and every [of the separate property] . . . as she the said Bona Brown shall from Time to Time, *notwithstanding her Coverture and whether she shall be sole or married*, by any Writing or Writings under her Hand and Seal, attested by two or more credible Witnesses, or by her Last Will and Testament in Writing, . . . *direct, limit, give or appoint* the same, or any Part thereof; to the Intent that the same . . . *may not be at the disposal of, or subject or liable to the Controul, Debts or Engagements* of the said Arthur Autry her intended husband, but only at *her own sole and separate Disposal*. (2: 76; with the exception of party names, emphasis added)

The settlement concludes with a description of the rules for trustee administration and substitution, as well as Autry's jointure provision for Brown.

The rhetoric of this early-century agreement reveals that early modern lawyers negotiated conflicting ideologies as they developed the terms of MWSP. On the one hand, the language conferring on the wife a right to "direct," to "appoint," and to "use" the income from trust holdings, as well as the language vesting her with the right of asset disposition, implies a quasi-liberal agenda for female subjectivity. As the wife's property rights are deemed "sole and separate," independent from the husband's "controul, debts, or engagements" and inclusive of the power to compel trustee action, so her person is framed as an autonomous, free-willing legal agent. Moreover, the settlement's repetitive contractual jargon reinforces the feme covert's proprietary powers, each list of directive verbs, descriptive nouns, and instructive statements creating another layer of female authority and another line of equitable defense. This effort to restore to the married woman the fundamental rights of ownership acts not only to challenge the terms of coverture, but also to trouble the traditional meaning of unity of person: here, marital unification proceeds without absolute female subordination to male legal identity. Yet, the property's disposition in trust, and its superintendence by third-party trustees, reflects demands for paternalistic oversight and manages patriarchal concerns about female ownership post-marriage. In fact, the mere inclusion of trustees as equal parties to the agreement suggests that the law was unwilling to break unity of person of its traditional chains without some assurance of masculine control.

This ideological conflict persists in the late-century agreements that appear in Bird's *Original Precedents*. One model settlement, for example, transfers into trust—and places under the immediate control of third-party trustees—certain of the intended wife's real and personal

property, including an unnamed estate, as well as “bonds, bills, notes, and other securities” (1). Its author uses language almost identical to that employed in the Autry-Brown agreement to establish the separate estate: the wife’s income is “for her sole and separate use and benefit”; she may “direct” or “appoint” income assignees; and she is to be unencumbered by the husband’s “debts, controul, or engagements” (4). She also is entitled to the “sole and separate use” of the property that comes to her through gift or devise after the marriage (see 7-8). The agreement diverges from the Autry-Brown settlement, however, in the end of life provision. Here, unlike Brown’s fundamental right of alienation in regard to her separate estate, the intended wife agrees that her separate property—both personal and real—will remain in trust for her future children’s use and benefit. On its face, this restriction to filial distribution invokes conservative tradition; yet, the intricacies of the clause reveal some degree of liberal intention. The intended wife and future mother, “alone, and notwithstanding her coverture,” is empowered to control the terms of *matrilineal* descent: she determines each child’s heritable portion and specifies the conditions, including the age, time, and manner, under which the portions will be distributed (10, 3-4). Reserving such authority in the mother is a significant departure from English common law: as per Blackstone, mothers were “entitled to no power, but only to reverence and respect” (1: 441). Therefore, the contractual language that constrains wives also grants them self-determination as mothers—they are simultaneously subject to, and empowered by, familial obligation. Ultimately, these tensions between women’s rights and patriarchy’s authority demonstrate that coverture and its authorizing fiction are, even at the century’s turn, equivocal ideas at law.

Two additional settlement provisions that are crucial to understanding the uncertainty in legal thought on coverture and unity of person are those that grant the intended wife marital and post-marital annuities. Referred to as “pin money” and “jointure,” respectively, these annual

payments were fixed in the contract, often at a percentage of the bride's dowry.<sup>89</sup> An early-century agreement included in Horsman models these provisions for a married women's equitable estate. The thirteen-page document begins with a description of intended wife Celia Row's £12,000 marriage-portion, which is to be divided between intended husband Adam Arden and his trustees, and concludes with the terms upon which Arden will raise portions for the couple's future children. Interposed is boilerplate language that identifies the consideration for the two annuities—i.e., the marriage portion paid by intended mother-in-law Ruth Row—and that creates the annuities themselves. The language that stipulates Celia Row's right to pin money requires the payments be made at specific quarterly intervals and that they be available “*notwithstanding her Coverture, for her own sole and separate Use and Benefit, for her Cloaths and other [of] her Occasions as she shall think fit, without the Controul or Intermeddling of the said Adam Arden her intended husband*” (2: 293; with the exception of party names, emphasis added). In this provision, the general language of female agency and subjective independence mirrors that of the separate estate provisions; however, there are particular differences indicating that the marital annuity is a more circumscribed right. One distinction is a consequence of the property type: a fixed annuity, payable in four equal installments on four specified dates and tied to a dowry provision, offers a more regulated independence than an indefinite (and likely greater) amount payable at the beneficiary's request. The other difference is the inclusion of conditional language following the ostensibly broad grant of “separate Use”—the wife's pin money is restricted, it appears, to purchases of apparel, accessories, and the like. Row's provision for jointure during widowhood bears a similar ambivalence. It too assigns fixed terms

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<sup>89</sup> In a review of marriage settlements and corresponding paperwork, Spring found that the common ratio of jointure to bridal portion in the eighteenth century was 10% (50-51). Thus, for a £100 jointure, the bride and her family would have had to provide a £1,000 dowry.

to the payments (2: 294), which could be understood as a limitation on the widow's reinstated legal autonomy (no longer united to a husband, she technically has returned to *feme sole* status). But, it also allots Row considerable legal remedies for late payments, including the right to confiscate or to "enter, . . . have, hold and enjoy" the property to which the jointure is attached (2: 294-95). These remedial rights demonstrate a concerted effort on the part of the agreement's parties to protect and encourage the widow's independence.

A comparison of Bird's late-century annuity provisions to that of Horsman's early-century ones demonstrates both similarities and differences in how husbands and wives, and their lawyers, structured pin-money and jointure rights across the century. One complex post-nuptial agreement, which spans twenty-three pages, includes marital annuity language that is, at points, interchangeable with that of the Arden-Row agreement. As with the earlier settlement, Bird's agreement contains a clause that grants to the wife £300 in pin money "for her sole and separate use, exclusive of the said *Husband*, who is not to intermeddle therewith" (139). The provision also contemplates the wife's ability to assign—i.e., "direct or appoint"—the income "as if she were sole and unmarried," and it sets forth in detail the quarterly payment schedule (139-40). Unlike Horsman's model provision, however, Bird's clause does not include the potentially restrictive language on pin money use, an omission that could suggest progressive development in the area. Nonetheless, omissions in the agreement's post-marital annuity clause indicate a contraction of rights. Like the Arden-Row agreement, Bird's model contract includes language granting to the wife a jointure in lieu of her common law dower right, but the exact sum, which is tied to the variable interest income on trust property (property that she cannot sell or otherwise dispose of), is not fixed (143). Without a stated amount (or the right to alienate the assets that comprise the jointure fund), there is no guarantee that she will receive enough income to inhabit

her social class. Moreover, and further inconsistent with Arden-Row, this agreement lacks a payment schedule, as well as language outlining the widow's remedies in cases of non- or late-payment. Importantly, this absence of rhetorical specificity surrounding equitable jointure is not confined to this one agreement; rather it is a feature of most other of Bird's jointure provisions, suggesting that either late-century professionals were making an innocuous attempt to economize legal text or there was an institutional effort to limit the widow's ability to receive and manage her maintenance.

These linguistic consistencies, discrepancies, and shifts demonstrate that the ideological tensions that pervade the separate property provisions of the Autry-Brown agreement and its late-century counterpart likewise inhabit the annuity provisions of the Arden-Row settlement and its subsequent correlative. The pin money clauses, with their applications to the vocabulary of female autonomy—"sole and separate," "exclusive," "without the control," "direct or appoint"—reiterate the wife as a quasi-liberal subject; while the requirement of trustee management and the proximate relationship between annuity and marriage portion perpetuate her traditional position as female subordinate and marital commodity. This legal equivocation on female subjectivity is further suggested in the early-century subclause connecting pin money to apparel and other basic necessities. Certainly, such language could be interpreted as narrowing the scope of wifely independence, or even as relieving the husband of his common law duty of wifely maintenance.<sup>90</sup> Moreover, this legal drafting could imply a professional intention to leave the traditional ideas of marital unity intact. The rhetoric of the jointure provisions, and in particular the latter settlement's exclusions and ambiguities, also suggests conceptive and professional tensions: the terms of the widow's post-marital income posit her simultaneously as a self-governing subject

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<sup>90</sup> Staves discusses pin money as a substitution for the husband's common law duty to maintain his wife (143-47).



and as a potential legal dependent, and they reveal the law as complicit in a fracturing of the female self.

Yet it is the contextual conditions of these particular equitable provisions that most clearly register the law's ambivalence on the point of wifely autonomy and, consequently, the terms of marital unity. Indeed, the extensive historical work of feminist scholars on MWSP indicates that equitable jointure generated less income for the widow than did the common law right of dower, and it argues that the substitution of jointure for dower was in large part driven by patrilineal concerns, specifically the desire to transmit to male heirs a family estate unencumbered by female dower rights.<sup>91</sup> Moreover, this scholarship maintains that pin money was most often used to purchase necessities or "amusements," and that its inclusion in the marriage settlement was a token gesture by the "husband's family" who wanted to secure "jointure and other features advantageous to their side" (Staves 132, 160). The point here is that the eighteenth-century trend toward marital and post-marital annuities for women is not a clear indication of full bore progressive professional innovation nor is it a decided reflection of radical institutional change on the contours of marriage's legal fiction. While the period's lawyers sought, through separate property provisions, to reduce the stultifying impact of marital coverture on women, their commitment to a liberalized version of marital unity is highly debatable.

In fact, eighteenth-century equitable work product suggests that legal professionals were seeking to accommodate a third iteration of legal unity, specifically the notion that marriage is a union of estates. In this view, the marriage settlement operates not just to provide MWSP but also to combine two family's assets, whether capital, moveable, or landed. This is particularly

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<sup>91</sup> See Spring 57, 39-65; Staves 86, 95-130; and Erickson 25.

true of agreements among members of the aristocracy and gentry, who often came to the marriage with significant fortunes and extensive estates. H.J. Habakkuk, in a study of eighteenth-century settlement agreements, famously (and somewhat controversially) argues a material connection between marriage—“always a most effective method of acquiring more property”—and the “rate of growth of great estates” in the period (“Marriage Settlements,” 25, 29).<sup>92</sup> To support his thesis, the historian cites a rise in the standard amount of bridal portions, which could be used to purchase additional land (22, 24-26), the “increasing flexibility” of jointure rights (27, 24-26), which allowed the groom to adjust the bride’s inheritance according to his income, and the development of the strict settlement, which not only restricted the alienability of the family estate but also preserved it in the male line.<sup>93</sup> For Habakkuk, these settlement devices suggest an upper class view of marriage primarily concerned with wealth aggregation and, presumably, the continuity of the patriline. Whether familial and professional motives were this mercenary is arguable. Nonetheless, Habakkuk’s work offers an important alternative—or supplement—to the ideas of marital unity as a patriarchal (coverture) or a liberal (MWSP rights) concept, further problematizing the direction of the law’s perspective on the fiction.

### **Married Women’s Separate Property in Equity**

Early eighteenth-century equitable case law on MWSP rights supports a fairly progressive view of female autonomy, coverture, and marital unity. The mere fact that the Court of Chancery recognized such rights in contravention of the common law doctrine of coverture

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<sup>92</sup> See also Habakkuk, “English Landownership, 1680-1740.” Habakkuk’s scholarship has received an abundance of critical attention. For an excellent assessment of the historian’s arguments regarding marriage, the strict settlement, and the “rise of great estates,” see Bonfield 93-120.

<sup>93</sup> This latter settlement, which typically occurred at the eldest son’s marriage, placed the family estate in trust and gave the future husband a life interest and his future eldest son the “remainder in tail” (see Habakkuk, “Marriage Settlements,” 16). By this device, landholders were prohibited from alienating the estate, such that the ancestral interest could not be reduced for at least a generation.

demonstrates a marked interest on the part of jurists to mitigate coverture's disabling effects on women. Moreover, precedential case law, such as *Fettiplace v. Gorges* (1789), reveals the court as rather liberal in its interpretation of the rights attached to the wife's personal estate.<sup>94</sup> In *Fettiplace*, the plaintiff husband sued to have his deceased wife's will, which devised annuities, stock, and furniture to her niece, annulled. He argued that the legal instruments through which she was granted the property at issue—a marriage settlement and a subsequent testamentary will—did not expressly contemplate a “power of disposal” (374); therefore, any heritable bequest was outside the bounds of her equitable right. The court disagreed, upholding a strong line of Chancery precedent that found married women were to be treated as *feme soles* with respect to their personal property. Lord Chancellor Thurlow opined: “All the cases shew that the personal property, where it can be enjoyed separately, must be so with all its incidents, and *jus disponendi* [(the right of disposal)] is one of them” (375). In other words, the court held that explicit language creating a right of disposal is *not* required for a married woman to be vested with such right; rather, the generic language of “sole and separate use” carries with it the entirety of proprietary rights that she enjoyed while single.

But, the court's capacious perspective also cut the other way. In *Hulme v. Tenant* (1778), for example, Chancery enforced a credit bond entered into by a married woman and secured with her separate estate. LC Thurlow commented: “I have no doubt about this principle, that, if a court of equity says a feme covert may have a separate estate, the court will bind her to the whole extent, as to making that estate liable to her own engagements; as for instance, for payment of debts & c.” (961). Here, the court clarifies that feme sole privileges are accompanied by feme

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<sup>94</sup> See *Wagstaff v. Smith* (1804) and *Rich v. Cockell* (c. 1802, 1804), each of which confirms *Fettiplace* as controlling precedent on the issue of a wife's power of disposal over separate personal property (705 and 647, respectively).

sole duties, such that the feme covert estate holder will be foreclosed, as to her separate property, from claiming coverture's legal protections (i.e., the husband's assumption of his wife's debts). Rather than suggest the court's injustice, however, *Hulme* indicates its commitment to restoring to the married woman a legal identity with the rights and responsibilities attendant thereon. It also, in conjunction with *Fettiplace*, suggests an equitable re-shaping of marital unity—a slight levelling of its previously stratified constituents.

Perhaps the most compelling indication that jurists were progressing toward a more egalitarian perspective on unity of person is found in a particular subset of equitable jurisprudence on married women's property rights: specifically, cases involving property of which a woman was or became possessed outside of the pre- and post-nuptial contract. As we shall see, Chancery sometimes extended its equitable treatment to property that the married woman acquired by gift or devise during the marriage, as well as to property in which she was vested prior to marriage but over which she retained no interest after marriage. Nineteenth-century legal practitioner and treatise writer Edmond Gibson Atherley describes the court's approach:

Though the common law allows a man to possess himself of all his wife's personal property, yet the courts of equity have long deemed it unreasonable that he should do so. They endeavor, therefore, wherever it can be done, without violating the principles of the common law, to procure the wife and her children a provision out of her fortune. They do this whenever the husband applies for their aid in order to possess himself of it; and the mode resorted to—is to refuse him their assistance unless he agrees to make such provision. (343)

In the case of *Brown v. Elton* (1733), for example, Chancery denied the plaintiff husband's petition for a £400 legacy payable to his wife upon her marriage. Instead, the court sided with the defendant executor who refused to turn over the bequest unless and until the husband settled a portion on his wife. Lord Chancellor King acknowledged that the equitable "practice" of

requiring a husband to “make a settlement” on his wife was in opposition to the common law and “sometimes . . . inconvenient” (1031). Nonetheless, he deferred to the court’s “custom and long usage” of the practice, which he argued was “intended . . . as a cautionary provision in favour of the wife” (1031). In this ruling, King appears to support the defendant’s argument that “those who would *have* equity ought to *do* equity” (1030).

The court confirmed King’s opinion almost seventy years later in the case of *Druce v. Denison* (1801). Here, the principal issue was whether a pre-marriage settlement amounted to the “purchase” of a wife’s entire fortune, such that any property that she acquired during the marriage automatically devolved to her husband. Lord Chancellor Eldon, following precedent, held that a settlement agreement must either expressly provide or “plainly” imply a comprehensive dispensation of future property to the husband (1110). The import of this holding, as recorded in the case’s digest entry, is that it reaffirmed the principle that, unless otherwise provided in a “distinct agreement” between the spouses, a wife is “entitled to an additional provision out of [an] additional fortune” (e.g., as when she is the beneficiary, post-marriage, of an inheritance marked by the testator for her “sole and separate use”) (941). Together, *Brown* and *Druce*, and their juridical predecessors, demonstrate a court willing to establish equitable property rights for married women even in cases where wives had not bargained for, or received their husband’s explicit consent to, those rights.<sup>95</sup> The cases also demonstrate a court seemingly at odds with the common law on the notion of female welfare and marital unity. Indeed, Chancery appears to consider some degree of material and nuptial independence as a protective

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<sup>95</sup> For additional cases related to property given or devised to a wife prior to or during marriage, see *Harrison v. Buckle* (c. 1719, in the Court of King’s Bench); *Rollfe v. Budder* (1724, in the Court of Exchequer); and *Bennet v. Davis* (1725, in the Court of Chancery).

advantage to married women and to charge the hegemonic presumptions underlying traditional conceptions of unity of person with patent unfairness.

Chancery Court's investment in MWSP as a protective mechanism and its interest in the contours of married women's separate identity are further suggested in the infamous case of *Strathmore v. Bowes* (1788). Here, Lady Strathmore sued to have the separate property deeds that she executed in contemplation of a marriage proposal from Mr. Grey "carried into execution," and her husband, Mr. Bowes, countersued to have "the . . . deeds delivered up or cancelled" (14). Bowes, who won the Lady's hand from Grey in a "sham duel" (15), argued that his wife committed fraud when she married him without reference to the extant deeds. The justices found for Strathmore, LC Thurlow arguing "the mere deprivation" of a husband's "dominion of [his] wife's property" did not amount to fraud; rather, there must be "something beyond"—specifically, a deceptive intention on the part of the wife (16). It is not, however, the court's discrete holding on the nature of marital fraud that is of particular note; instead, it is the opinion's dictum, which offers valuable insight into Chancery's perspective on marriage and coverture. Indeed, in the non-binding portions of the opinion, both Thurlow and Buller attest to coverture's legitimacy, Thurlow focusing on the wife's property as consideration for the "burthens" undertaken by the husband and Buller maintaining that it is the "*sui generis*" character of the marriage contract that "entitle[s] the husband to all that the law gives him of his wife's" (15). Yet, in addition to invoking legal precedent, both justices reconcile Equity's departure from the common law with an investigation into the spouses' individual characters. Buller argues that Bowes's pugilistic and exploitative courtship "stratagem"—he used the duel to manipulate Strathmore into marriage—prohibits him from receiving "much favour either in law or equity"; while Strathmore's weakness or delusion—she hastily yielded to Bowes's spurious

attentions—casts her “in a much more favorable light” (15). Thurlow likewise forecloses Bowes from equitable accommodation by reference to his “conduct” in the “transaction” at issue; and he legitimates Strathmore’s legal position by considering that her decision to execute separate property deeds was *the* “lucid” moment in her romantic “madness”—“the single spark of reason . . . in the whole of her conduct” (16). Thus, the *Strathmore* judges clarify that performing equity requires the court to evaluate litigants’ relative moral characters and, in so doing, reconsider coverture’s presumptions about male superiority and protective capacity.

Significantly, the *Strathmore* court simultaneously engages and challenges traditional cultural assumptions about the relationship between gender and character in its rationale for the recognition of MWSP rights. Indeed, Buller and Thurlow represent the plaintiff wife as emotionally weak and prone to romantic insensibility, but Thurlow also represents her as capable of reasoned action. Each representation carries with it an equitable purpose—in her vulnerability, the married woman necessitates separate property rights; in her rationality, she merits such rights. This latter perspective is also suggested in *Hearle v. Greenbank* (1749), where Lord Chancellor Hardwicke, argues the historical difference between disabilities arising from legal infancy and those arising from marital coverture:

I take it in law . . . that the disability of an infant . . . is more favoured and a stronger disability, than that of *feme covert*s. . . . ‘[C]overture was not at common law so far protected as infancy, and some other disabilities, as *non sane memory*, &c.’ the ground of the disability being not from want of judgment but from being under the power of the husband; she having as much judgment as if discover. (1047)<sup>96</sup>

What I want to suggest by joining *Strathmore* and *Hearle* is that Chancery was deeply skeptical of the notion that married women’s legal disabilities were justified by what it perceived as her artificial subordination. If she retained moral and material judgment after executing the marriage

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<sup>96</sup> Here, Hardwicke quotes a “marginal note” from an unnamed legal text.

contract, why should she not enjoy that which allowed her moral and material independence? If her marriage contract bound her to one who was immoral or inclined to profligacy, why should she not receive legal protection in the form of equitable property rights? Ultimately, the court's focus on the vagaries of individual character, judgment, and capability reveals as problematic the highly gendered fiction that underlies marital coverture, and it validates both a paternalistic and a liberal approach to the enforcement of married women separate property rights.

Yet, the issue of individual difference—or the problem of status and gender certainties—also persuaded the court to restrict married women's equitable rights. Chancery, in the latter part of the century, acted according to its concern over wives' vulnerability to husbands' chicanery and violence and adopted the doctrine of restraint against anticipation. This doctrine severely limited a wife's access to the “capital fund” in which her property was held.<sup>97</sup> LC Thurlow, in *Pybus v. Smith* (1791), hinted at the necessity of the restrictive maxim, expressing concern over the defendant wife's decision to pledge the entirety of her separate property for her husband's debts (573). Just seven years later, Lord Chancellor Loughborough communicated a similar anxiety in *Whistler v. Newman* (1798), a case where the wife testified to being “coaxed” and “bullied” into assigning the bulk of her separate estate to her husband for investment in trade (74). Loughborough lamented that if the “rule” that married women are *feme soles* as to their separate property “is to be pushed to its full extent, a married woman . . . is infinitely worse off, and much more unprotected than she would be, if left to her legal [i.e., common law] rights” (74). The consequence of cases like *Pybus* and *Whistler* is that lawyers began to include express language in marriage settlements constraining the wife's right of alienation, and the court

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<sup>97</sup> Staves offers a useful overview of the development of the doctrine of restraint against anticipation, including a discussion of the cases of *Pybus* and *Whistler* (151-53). It is from Staves that I borrow the term “capital fund” (153).



sanctioned such language.<sup>98</sup> Atherley observes that attaching the clause “*but not by way of anticipation*” to the contractual term establishing the wife’s right to receive trust income or assign trust property will have the desired limiting effect: “By this mode, she will be prevented from making an absolute, or sweeping disposition of the property; all that she can do will be, to dispose of any payment that has actually become due.—Any disposition which went beyond that would not be available” (331-32). Restraint, therefore, became part of the contract negotiation process, and perhaps a condition of the wife’s family, who would be concerned that her future husband could fail to meet the presumptive qualifications of protection and maintenance that authorized his marital power under coverture.<sup>99</sup> From this perspective, the doctrine was a challenge to, rather than an endorsement of, traditional conceptions of unity of person—the limitation on the wife’s autonomy serving as a contractual safeguard against the fictional and patriarchal terms of subordination. In other words, the doctrine of restraint against anticipation becomes a way for women to avoid having to choose between their equitable rights and their common law duties.

But, did the doctrine also enable the court to reestablish control over married women—to ensure that the liberality contemplated by equitable property rights did not alter, in any meaningful way, the patriarchal subjectivity contemplated by the common law? Staves convincingly argues that restraint against anticipation was one of several “idiosyncratic rules” for MWSP that the court developed to recover women and the family from too liberal contract ideals

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<sup>98</sup> According to an English Reports case note to *Pybus v. Smith*, LC Thurlow, after the case, incorporated restraint against alienation language into a settlement over which he served as trustee. That language was subsequently upheld in Chancery and presumably became the model for limiting a wife’s ability to dispose of her separate estate (573n1).

<sup>99</sup> I speculate about the bride’s family’s interest, in part, based on Staves’s conclusion regarding the purposes of MWSP: “One aim . . . was to increase the security of the wife and the minor children should her husband prove feckless or unlucky. Another was to secure some of the wife’s father’s property for his grandchildren without risking its being swallowed up in the husband’s estate” (133).

(161). These rules were not, Staves contends, based on “legal logic”; rather they were a consequence of the “political pressures of patriarchy” and, as such, indicative of “why married women’s property did not then lead to married women’s power” (161). Certainly, this is a valid point and one that supports my own argument about legal equivocation on conceptions of female autonomy and marital unity. Indeed, it seems there were a multitude of competing ideas, ideologies, and interests influencing equitable jurisprudence on MWSP, a circumstance that complicates any attempt to historicize the law’s contribution to the development of the modern liberal subject and the modern—i.e., companionate or egalitarian—marriage.

In general, eighteenth-century equity law, as represented in the writings of practitioners, jurists, and theorists, is largely silent on the fiction of unity of person—its scope, its conditions, and its (dis)advantages. Moreover, those contracts, judicial opinions, and treatises that address married women’s separate property rights give little express indication of whether and to what extent equity intended to challenge, shift, or shape the legal fiction. Nevertheless, the language establishing and limiting those rights, along with the legal rhetoric rationalizing their institution and their circumscription, provides material for interpreting and assessing the law’s ambivalent intention. Clearly, Chancery and conveyancing lawyers were working in the period to remedy coverture’s severity, and their efforts suggest a revelatory, if not revisionary, purpose on marital unity. Through their equitable work, the traditional concept of unity of person takes on a false and unjust cast—it becomes an idea in need of subtle and cautious liberal revision. Yet, there remains a strong conviction of marriage as a status and of wives as its lesser constitutive component—hierarchal unity, while capable of being contracted into and around, is not a condition to be contracted out of. Additionally, the structure of the device in which MWSP rights typically appear—the marriage settlement—itself prefigures the law’s investment in the

notion of marriage as a union of estates. Indeed, in setting forth the conditions for a wealth and property merger and in indulging patrilineal ideas of heritable succession, the pre-nuptial agreement can be read as recasting unity of person in primarily material terms.

Eighteenth-century law's ideological and structural conflicts on marital coverture, thus, opened a generative space for extra-institutional responses to the doctrine's enabling fiction. Indeed, with the legal principles that enforced a patriarchal conception of oneness in flux, there appears the opportunity and need for an external review of the fiction's utility and a reconstruction of its terms. Therefore, just as cultural agents sought to legitimate the liberal legal fictions of marriage formation, so they endeavored to judge and legislate the terms of marital unification—to critically analyze and equitably reframe the conditions under which unity of person was felt and lived.

### *Part III: The Domestic Novel and the Fiction of Unification*

A primary interest of novels written in the long eighteenth century is the experience of marriage, including the way in which it embodies the increasing conflict between legal norms, equitable change, and the rising ethos of individuality. As novel theorists have demonstrated, over time this new narrative form gained authority on the contours of modern domesticity and, in particular, the moral character and relational attitude of its espoused inhabitants.<sup>100</sup> Here, I investigate the early novel's attention to unity of person as a constitutive force, considering how writers understood and shaped the fiction's relationship to individual subjectivity, particularly female, and domestic government. I argue that, like the period's equitable jurisprudence on MSWP, this literary discourse sometimes equivocated on unity's patriarchal and patrilineal

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<sup>100</sup> See, e.g., McKeon, *Secret History* 621-717; J. Thompson, *Models of Value*; Armstrong, *Desire and Domestic Fiction*; and Spencer.

undertones. Nevertheless, the novel ultimately developed a valuable progressive alternative to the traditional fiction, one that preserved elements of the private contracting subject who appeared at the formation stage and one that could exist peaceably and productively alongside its more conservative legal counterpart.

Daniel Defoe's *Roxana: The Fortunate Mistress* (1724) and Eliza Haywood's *The History of Miss Betsy Thoughtless* (1751) provide two of the earliest and most compelling cultural investigations of marital coverture and its foundational fiction. Each novel masquerades as a piece of biographical life writing, and each, true to its political context, plots the tension between individual desire and social expectation, between personal and collective identities, and between subjective reality and institutional invention. The biographical subjects, Roxana and Betsy, initially conceive of themselves as rights-bearing individuals, but their histories are complicated by the demands of social convention and the restrictions on women's legal subjectivity. In both cases, marriage functions as a site of self-conflict and self-discovery: its own discordant nature renders it a paradoxical space, one capable of deconstructing and either recriminating (Roxana) or rehabilitating (Betsy) the female self. Through these strained interactions between institution and individual, Defoe and Haywood simultaneously resist the common law version of marital unity *and* gesture toward the fiction's potentially stabilizing impact, both for the female subject and her domestic domain.

Part memoir and part confessional, Defoe's *Roxana* traces and appraises the eponymous heroine's scandalous history. Recalling a life of marriage, prostitution, and murder, the narrator Roxana seeks to understand and account for the forces that shaped the narrated Roxana's identity, perspective, and story. As widely noted in scholarship on the novel, Roxana's efforts are often confused and artfully misguided: the external factors that she identifies as central to her

moral collapse, such as legal disability, social circumstance, and spiritual evil, rest in a state of unease with internal motivators, such as vanity, pride, and unrestrained self-interest. Thus, the heroine and her hardships—their legitimacy and their sentimental power—are caught up in questions of individual agency. Marriage, as a contested space for women's agency, becomes central to the novel's critical interrogation, and while Defoe does not offer a settled picture of the legal institution, he does register and attempt to rethink the inequities of its foundational fiction.

Roxana's autobiography begins with a retrospective look at her first marriage, a corrupted union that sets in motion her tragic story and that challenges outright the gendered assumptions that underwrite unity of person. Roxana's troubles arise when she is thrust into an arranged marriage devoid of property rights: at just "Fifteen Years of Age," she recalls, "my Father gave me . . . two Thousand Pounds Portion, and married me to an Eminent Brewer in the City" (7).<sup>101</sup> A "Handsome Man, and a good Sportsman," the Brewer was an attractive marital candidate for the young and impressionable Roxana. But also "a weak, empty-headed, untaught Creature"—a "Conceited" and "obstinate" "Fool"—he quickly revealed himself to be a profligate husband and derelict father (7-9). During their short union, the Brewer squandered the marital estate, and he bankrupted the family business. Roxana records her helplessness in the matter: "I was not wanting with all that Perswasions and Entreaties could perform, but it was all fruitless . . . like one stupid, he went on . . . till he had not a Hundred Pound left in the whole World" (11). A married woman without legal status, a separate estate, or marital maintenance, Roxana "saw [her] Ruin hastening on, without any possible Way to prevent it" (11). The common law, mired in the fiction of male superiority, offered no pragmatic safeguard against the

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<sup>101</sup> "Portion," in eighteenth-century legal parlance, signified a woman's dowry, not her separate maintenance. There is no indication that Roxana and the Brewer executed a marriage settlement agreement or that Roxana was otherwise accorded separate property rights.

Brewer's dereliction of legal duty. When he abandons the family, his obligation to maintain and protect the domestic sphere is transferred to the legally-incapacitated Roxana, and, unable to fulfill that role, she is forced to foster out the couple's children and prostitute herself.

As the memoir moves forward—outside of the marital contract—Defoe further probes unity of person, tackling its presumptions about female weakness and passivity. In this portion of the narrative, Roxana proves to be a shrewd contract negotiator and a prudent capitalist.<sup>102</sup> Through a multitude of sexual contracts, she acquires inheritance rights, substantial annuities, luxurious accommodations, and valuable material goods (see 50, 60, 182, 184-86).<sup>103</sup> As Bernadette Meyler argues, the “significance” of these illicit agreements is their “formality,” which “will bind [the parties] even in the absence of concrete enforcement mechanisms” (244). To secure the benefits of this formality, Roxana employs a business manager who, through long-term investments in mortgages and securities, helps her “la[y]-up an incredible Wealth” (182). Roxana's financial acumen is complemented by a strong will that allows her to command lovers, servants, and friends and to pursue her self-interest unimpeded by social convention. John Richetti argues that like Defoe's Robinson Crusoe, a prototype for “culturally resonant resourcefulness” (65), Roxana “exemplif[ies] the Mandevillean pattern whereby individual and selfish action (vice) produces social benefits—an increase in the production of goods and services, a contribution to the accumulation and circulation of wealth that constitutes an economically healthy society (as Defoe would have defined it)” (*English Novel* 63).<sup>104</sup> As

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<sup>102</sup> Roxana remains legally married to the Brewer until his death later in the novel; however, his desertion renders her free to indulge in the contractual capacity enjoyed by single women.

<sup>103</sup> For examples of Roxana's acquisitiveness, see 41-42, 50, 60, 182, 184-86.

<sup>104</sup> There is a variety of excellent scholarship on economics and financial literacy in *Roxana*. See, e.g., J. Thompson, *Models of Value* 113-31; Dijkstra *passim*; Novak, *Economics* 128-39; Scheuermann 12-59; and Gabbard *passim*.

Richetti's assessment of the heroine suggests, Roxana's memorials to her self-sufficiency not only authenticate the possibility, but also establish the civic value, of female self-governance. Unity of person, as a fiction that justifies female consumption by male authority in marriage, therefore becomes something of a socio-economic liability.

With Roxana's economic rise in the position of feme sole, marriage and its patriarchal legal structure evolve from the cause of Roxana's moral corruption into the rationale for preserving her iniquitous status quo. Defoe depicts this evolution in a scene where Roxana confronts the prospect of a second marriage to her lover, the Dutch Merchant. Here, Roxana adamantly argues against matrimony on the grounds that it divests women of their natural liberal rights and consigns them to a position of absolute subjugation:

I told him . . . that I thought a Woman was a free Agent as well as a Man, and was born free, and, cou'd she manage herself suitably, might enjoy that Liberty to as much Purpose as the Men do; that the Laws of Matrimony were indeed, otherwise, and Mankind at this time, acted quite upon other Principles, and those such, that a Woman gave herself entirely away from herself, in Marriage, and capitulated, only to be, at best, but an *Upper-Servant*. . . .

That the very nature of the marriage-contract was, in short, nothing but giving up Liberty, Estate, Authority, and everything to the Man, and the Woman was indeed, a mere Woman ever after—that is to say, a Slave. (148)

The heroine supplements this argument about a married woman's *right* to the benefits of liberal subjecthood with an argument about her *fitness* for the state: "it was my opinion, a Woman was as fit to govern and enjoy her own Estate, without a Man, as a Man was, without a Woman" (149). Nevertheless, when the Dutch Merchant offers to relinquish his domestic authority and allow Roxana to "[p]ilot" the marital "Ship," she argues the absurdity of such a plan in the eighteenth-century legal climate (151). The "Laws of Matrimony," she contends, prohibit spousal equality—they "put[] the Power into your Hands; bid[] you do it; command[] you to command; and bind[] me . . . to obey" (151). It is a powerful argument, one that suggests the

tremendous influence the law had—or was believed to have—on domestic government. In this view, rewriting the terms of marital oneness is futile exercise—the law’s patriarchal construction of marital rights and duties will always pre-empt a couple’s liberal intention. Why, then, would a “free” woman want to return to the domestic fold? Why concede her fundamental liberties for oppressive status obligations?

The Dutch Merchant, intent on marrying Roxana, seeks to answer these questions by offering alternative perspectives on domesticity. He begins with a description of marriage that upends its traditional hierarchy. He protests that, although wives bore “the Name of Subjection,” in reality it was husbands who bore the bonds of servility:

He reply’d, that . . . the Man had all the Care of things devolv’d upon him; that the Weight of Business lay upon his Shoulders, and as he had the Trust, so he had the Toil of Life upon him, his was the Labour, his the Anxiety of Living; that the Woman had nothing to do but to eat the Fat, and drink the Sweet; . . . be waited on, and made much of; be serv’d, and lov’d and made easie; . . . that [Women] generally commanded not the Men only, but all they had; manag’d all for themselves. . . . (148)

The Dutch Merchant then goes on to argue for an egalitarian approach to marital unity: “he was of the Opinion,” Roxana recollects, “that . . . where there was a mutual Love, there cou’d be no Bondage; but that there was but one Interest; one Aim; one Design; and all conspir’d to make both very happy” (149). From the Dutch Merchant’s perspective, the common law of marriage does not have to define the husband and wife’s lived experience—women can and do hold domestic power; spouses can and do forge companionate unions. These reappraisals of marital unity are meant as counters to Roxana’s “fears” about marriage (the Dutch Merchant being unaware of her prosperous involvement with courtesan culture), but they also operate to undermine her moral narrative. Is she, in fact, a victim of women’s legal circumstance, or a sly manipulator of the law’s gender bias?



Defoe continues to investigate the tension between female agency and marriage law when he uses the practice of equitable settlement to write his heroine into a liberal marriage contract. The agreement arises during a period of moral affliction for Roxana. After decades of negotiating and executing private sexual contracts, she has grown weary of her amatory labor, which she periodically perceives as sinful and lawless. When the Dutch Merchant reemerges and again proposes marriage, Roxana promptly accepts, thus “put[ting] an End to all the intrieging Part of [her] Life; a Life full of prosperous Wickedness” (243). Shortly after the nuptial ceremony, the spouses enter into settlement negotiations. Together, they review documents that reveal the intricacies (the debits and credits) of their immense estates, and the candor of their exchange demonstrates an intention for a true marital partnership. Having surveyed Roxana’s mortgages and securities, the Dutch Merchant proposes separate property rights, using language reminiscent of that found in an eighteenth-century conveyancing manual: “I will not touch them . . . nor one of them, till they are all settl’d in Trustees Hands, for your own Use, and the Management wholly your own” (259). The parties then agree to a term that binds Roxana to the traditionally male duty of marital maintenance: she will contribute “2000 *l.* a Year” to the family’s “Subsistance,” leaving the Dutch Merchant free to invest his income, the “Encrease” of which, we can assume, will benefit Roxana at his death (259-60). Through this negotiated contract, which simultaneously allows Roxana to re-enter polite society and preserve her position as economic individual, Defoe confirms that unity of person is, in fact, a malleable fiction—that there are legal avenues for establishing spousal equality and honoring female subjectivity.

Yet, as the narrative progresses to its rather dramatic conclusion, Defoe places egalitarian marriage’s moral value and, therefore, its social utility in doubt. In an effort to preserve her new experience of domesticity and unable, as Susan Glover contends, “to negotiate [her] living

possessions” (i.e., her children) (129), Roxana participates in the disappearance (ostensibly murder) of a daughter who threatens to expose her sexual past. This final deed—a grievous violation of England’s criminal and social codes—precipitates “a dreadful Course of Calamities” for Defoe’s heroine: “I was brought so low,” she laments in the novel’s final line, “that my Repentance seem’d to be only the Consequence of my Misery, as my Misery was of my Crime” (330). Roxana’s final assault on the domestic sphere also forces a pattern of self-reflection and self-condemnation so intense that it compels the very act of narration. The autobiographer reframes her early life as one of “crime,” “wickedness,” and folly, and she refashions her former self as the embodiment of vanity, pride, avarice, and sexual license. Her declaration that—“I am a Memorial to all that shall read my story, a standing Monument of the Madness and Distraction which Pride and Infatuations from Hell run us into; how ill our Passions guide us; and how dangerously we act when we follow the Dictates of an ambitious Mind” (161)—reassigns responsibility for the transgressive narrative to the female self. While the doctrinal rigidity of legal coverture and the social convention of female dependence might have brought Roxana to the point of criminal offense, the flexibility of individual morality and the temptations of liberality, including the right to property and contract, are what keep her there. In this case, progressive marriage only proves itself to be a haven for, rather than a safeguard against, female lawlessness.

Like so many novelists writing at the cusp of modernity, Defoe, in the end, employs the autobiographic-confessional form to explore the moral contours of modern individuality. Both Nancy Armstrong and John Zomchick argue that Defoe ultimately depicts his heroine as unable to balance liberal freedoms with, in Armstrong’s terms, the dictates of “respectable society,” and

in Zomchick's, "affective" obligations.<sup>105</sup> Similarly, Hal Gladfelder suggests that Roxana's eventual "psychological *excess* of guilt" demonstrates "the gradual criminalization of [individual] subjectivity"—her story plots the failure to reconcile "inward . . . desire" with the responsibilities assigned by the social collective (132-33). And, indeed, Roxana is often constituted, through her sexuality, as a threat, not only to "Virtue and Honour," the very essence of principled subjectivity, but also to the family, the very fabric of English society (29).<sup>106</sup> Yet, Defoe's mastery of the difficult relationship between the private (i.e., subjective motivation) and the public (i.e., institutional influence) in creating that threat complicates how we understand and feel about Roxana and her history. It also confuses how we perceive the legal fiction that helped bring about, and later sustain, the heroine's moral devolution. Like his legal contemporaries, Defoe is never quite clear on whether individual and social stability is best achieved through staid efforts to naturalize the conservative terms of marital unity or through a liberal restructuring of the fiction.<sup>107</sup> Nevertheless, that *Roxana* articulates the injustice of marital coverture and unity of person to the female subject, and that it imagines an equitable alternative, signifies the novel as an important contributor to the centuries-long debate on how domestic government is and how it should be.

Eliza Haywood's mid-century novel *The History of Miss Betsy Thoughtless* echoes the paradoxical concerns raised by Defoe regarding the subjective constraints placed on women by

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<sup>105</sup> See Armstrong, *How Novels Think* 39, 36-42; and Zomchick 32-57.

<sup>106</sup> Shawn Lisa Maurer provides a wonderfully insightful discussion of Roxana as threat to the period's prevailing marriage ideology. Maurer argues that Defoe follows "the emerging novel genre in a gender division of labor that militated women's placement into a domestic sphere." Rather than dissolve the "system" of marriage at the heart of this sphere, he must destroy "the very woman who attempts to function outside its boundaries" (364).

<sup>107</sup> Spiro Peterson uses other of Defoe's writing on marriage, as well as contemporary marriage law, to contextualize the author's approach to the institution in *Roxana*. Peterson's conclusions also indicate Defoe's ambivalence on domestic structuring (see, e.g., 182-83).

the terms of legal marriage. An early female bildungsroman, the novel charts the eponymous heroine's psychological and moral development through the interpersonal transactions of courtship and marriage. In Betsy's "slow metamorphosis from thoughtless coquette to thoughtful wife" (Blouch 16), Haywood explores and critically assesses the relationship between female individuality and marriage law—both common and equitable—and she offers a version of unity of person that mediates between conservative and progressive ideas about the nature of the spousal bond: it is an association that both disciplines and rewards women's selfhood. Although this ambiguity complicates our understanding of Haywood's ideological commitments, it allows for a realistic portrait of the limits imposed on revisions to marriage law's most enduring fiction.

Like Roxana, Betsy Thoughtless embodies a potentially threatening form of female liberality, her spirited independence often expressed in excessively amorous terms. Indeed, Betsy's vivacity manifests itself as romantic caprice and practiced artifice, and she is rendered not only the subject of idle gossip, but also the victim of sexual assault. It is within the context of attempted rape that marriage becomes the behavioral and social panacea for the young coquette. Immediately following the "ugly incident" with the aristocratic charlatan Sir Frederick Fineer (Fineer undertakes to force Betsy into a sham marriage and then rape her) (443), Betsy's brothers and her legal guardians, Sir and Lady Trusty, determine that marriage is the only "defence"—the only "sure guard"—for her "reputation" and "virtue" (431-31, 482-83). It is also, of course, a safeguard for her family's honor, which is bound up in the public expression of proper femininity: Betsy's brother, Frances, reminds her that a "blemish" on her reputation, regardless of its legitimacy, will "bring[] certain infamy and disgrace on yourself, and all belonging to you"

(384).<sup>108</sup> Although entirely opposed to the marital condition, which she envisions as a “scene of disquiet,” Betsy is eventually persuaded to contract with Mr. Munden, whose “fair [settlement] proposals” suggest to her custodians his spousal suitability (489, 443-44). Once married, Betsy commits to the “strict” performance of her marital “duties,” convinced that her efforts will be rewarded with “honour,” “reputation,” and “peace of mind” (497). The indissoluble union is, therefore, projected to provide a framework for the articulation of a virtuous and circumspect femininity—for a female selfhood that promotes domestic stability and social welfare.

Yet, Haywood represents this first marriage as a fractious space, and she foregrounds the conflict between Betsy and Munden in their disparate perspectives on marital unity. The couple’s ideological incongruity emerges in scenes involving the disposition of Betsy’s separate maintenance, which the marriage settlement establishes at 150£ per year. In one episode, Munden—now revealed to be a spendthrift inclined to “amusements . . . abroad” (498)—refuses to fund fully the domestic coffers, commanding his wife to contribute a share of her pin money:

I know not . . . what fool it was that first introduced the article of pin-money into marriage-writings - nothing, certainly, is more idle, since a woman ought to have nothing apart from her husband; but as it is grown into a custom, and I have condescended to comply with it, you should, I think, of your own accord, and without giving me the trouble of reminding you of it, convert some part of it, at least, to such uses as might ease me of a burden I have, indeed, no kind of reason to be loaded with. (500)

Munden’s demand, couched as it is in a speech disparaging married women’s equitable rights, is interpreted by Betsy as an unjust and outdated assertion of male dominance, a reversion to the days of “Egyptian bondage” (501). In a subsequent argument over maintenance distribution, the narrator confirms Betsy’s judgment with an observation about Munden’s staunchly patriarchal

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<sup>108</sup> Many scholars have commented on the novel’s preoccupation with social “appearance.” Lorna Ellis, for example, argues that Betsy’s reformatory trajectory is informed by English society’s privileging of external behavior over internal motivation—what matters is not how virtuous Betsy is, but how virtuous she appears to be (34-35, 78).

“notions of marriage”: “he considered a wife no more than an upper servant, bound to study and obey, in all things, the will of him to whom she had given her hand; . . . his resolution [was] to render himself absolute master when he became a husband” (507). Uncompromising in his beliefs, Munden is, to borrow from Helen Thompson, “a painful and indissoluble embodiment of arbitrary domestic law” (112). Betsy, by contrast, is a nascent symbol of liberal contract. From her perspective, wifely obligation is consideration for husbandly affection—the former being contingent upon the latter—and the terms of equitable contract supersede the claims of domestic authoritarianism (497-508). Betsy refuses to “give up” the equitable rights provided “in [her] marriage articles”—“to recede from any part of what was her due by contract” (503, 507). This is not to say that Haywood’s heroine exhibits an inclination for the broad spousal agency contemplated by Roxana—in fact, she is generally persuaded by her mentor Lady Trusty’s advice to surrender and submit—but rather that she insists on a marriage defined by mutual respect, shared economic right, and affective concern. The consequence of such profound philosophical difference between the spouses is to provoke, on Betsy’s part, feelings of resentment and disaffection and, on Munden’s, acts of physical violence (he kills her pet squirrel), emotional cruelty, and sexual misconduct.

Nevertheless, Haywood situates Betsy’s moral development within this contentious environment. Betsy’s transformation occurs after another experience of sexual aggression, this time at the hands of Munden’s benefactor, Lord \_\_\_\_\_. Betsy initially revels in the Lord’s attentions, “pleas[ing] herself with the thoughts of being looked upon by the adoring peer as Adam did upon the forbidden fruit; —longing, wishing, but not daring to approach” (545). Yet, the admirer does approach with a force that Betsy rightly understands as “preparing” her “ruin” and “everlasting infamy”; his violent intentions are interrupted only by the ringing of a servant’s

bell (550-51). Once free of the lordship's "power," Betsy permanently sheds the "excess of vanity," "mistaken pride," "imprudence," and "caprice" that had theretofore inspired "her faults and her misfortunes" (550, 557-58). The narrator reports: "[S]he now saw herself, and the errors of her past conduct, in their true light" and "every day, every hour" worked to recalibrate her character (557-58). Going forward, Betsy demonstrates a heightened sexual and social consciousness, refusing to indulge the compliments and attentions in which she had once delighted and seeking to admit "those perfections of the mind" that ensure communal "esteem" (561). True to the bildungsroman form, she becomes a model of self-awareness and self-discipline.

Through Haywood's refashioning, Betsy also becomes a composite of competing domestic ideologies—a complex and confused symbol of marital tradition and progression. At the very moment of her existential epiphany, Betsy adopts the mantle of patriarchal convention, identifying herself as a conjugal possession: "Am I not married?" she queries. "Is not all I am the property of Mr. Munden? - Is it not highly criminal in any one to offer to invade his right? - And can I be so wicked to take delight in the guilt, to which I am in a manner an accessory?" (557). As David Oakleaf observes, Betsy now "sees not just her fortune and her person but all that she *is* as her husband's property" (125); she has, as Juliette Merritt suggests, "come to learn the full extent of [her] objectification" (185). While this status claim structures the heroine's narrative evolution, her performance of newfound selfhood is inflected with liberal precepts that redound to the emerging law of contractual exchange. Once Betsy discovers that Munden is engaged in a "criminal correspondence" with the couple's French houseguest, she asserts her right to independence through legal separation:

Neither divine, nor human laws . . . nor any of those obligations by which I have hitherto looked upon myself as bound, can now compel me any longer to endure the cold neglects, the insults, the tyranny, of this most ungrateful, - most perfidious man.- I have discharged the duties of my station . . . : wherefore then should I hesitate to take the opportunity . . . of easing myself of that heavy yoke I have laboured under for so many cruel months? (590)

Even Munden's resolution "never . . . [to] forego the right that marriage gives me over you" fails to return her to the marital union, as she works with the family lawyer to pursue a permanent estrangement (603). Betsy's resolve to reclaim her identity and her freedom is met with the approval of family and friends, one ally, Lady Loveit, venturing to fashion the strong-willed heroine as an exemplary figure for "wives in general" (595). With this steady avowal of female contractual right ("I have discharged the duties of my station"),<sup>109</sup> the nature of the marital bond and the roles of its constituents are once again thrown into the narrative's critical center and the reader is compelled to ask, Is oneness, once contracted, indestructible or unchangeable? Is its female cohort bound to submit to male authority? Is she, indeed, her husband's property?

It is not until the novel's end that Haywood regains some control over the narrative's circuitous message. She reconciles Betsy and Munden through illness and permanently separates them through death, leaving her heroine to execute a marriage contract that means to propose a more equitable construction of unity of person.<sup>110</sup> In fact, the heroine's second marriage to her former admirer, Truworth, makes personal compatibility and mutual affection the marital nucleus. Betsy observes that neither "the place of nativity, nor the birth, nor the estate" are the determinants of married women's happiness; they are, rather, "the person, and the temper of the man" (629-30). Nonetheless, property remains a significant factor in the contractual

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<sup>109</sup> For another perspective on the significance of Betsy's contractual response to Munden's behavior, see Flint 239-40.

<sup>110</sup> Betsy only returns to her marriage upon learning of her husband's illness from which he soon dies.



arrangement. Trueworth offers to settle on Betsy an £800 annuity, which the heroine and her guardians consider a symbol of the hero's "generosity" and the "proof of his affection" (632-34). The equitable provision also functions as a symbol of Betsy's right to and fitness for a degree of marital autonomy: the disabling and corrective bonds of marital coverture are unnecessary for this reformed heroine. Haywood's final domestic picture, therefore, promises to have some levelling effect on the dynamic of unity—readers can imagine these spouses in moments of democratic and mutually empowering exchange.

Yet, even in this union, tradition exerts itself. The narrative's concluding line, annexed to a brief account of "the new-wedded lovers," evokes a conservative moral on the conditions for reconstituting marital unity. The narrator reflects: "Thus were the virtues of our heroine (those follies that had defaced them being fully corrected) at length rewarded with a happiness, retarded only till she had render'd herself wholly worthy of receiving it" (634). Because this parting observation recalls the moment of Betsy's self-actualization, it ends up trading in both paternalistic legalism and the emerging discourse of bourgeois femininity. Indeed, Haywood seems to confirm marriage's disciplinary function for the female subject—it is Betsy's abusive and hierarchical first union that prepares and merits her for the peaceful and companionate second. Scholarship on the novel has suggested that Haywood's "reformed" heroine occupies an interstitial space, one that can be interpreted as a capitulation to or a subversion of the patriarchal order.<sup>111</sup> Whether the novel ultimately presents Betsy as a "broken . . . product of polite society

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<sup>111</sup> Much of the scholarship on the novel is interested in its didactic purpose, with a particular emphasis on Haywood's apparent movement in *Betsy Thoughtless* from the amatory to the reform (or sentimental) literary tradition. Does the narrative represent Haywood's capitulation to dominant conservative notions of marriage and female subjectivity (i.e., and, therefore, represent a break from her earlier work)? Or, is it her attempt to subvert or criticize these notions (and, therefore, signify a continuation of her romance fiction)? On the novel as concession, see Perry 267-68; Todd, *Sign of Angellica* 146-51; and Spencer 147-53. On the novel as subversion or critique, see Jennings; Hultquist, "Haywood's Reappropriation"; Ellis 63-87; and Nestor.

and integrated into a patriarchal plot,” as Shea Stuart contends (573), or as a coherent synthesis of “cultural standards,” “inclinations[,] and desires,” as Aleksandra Hultquist argues (“Marriage in Haywood,” 43), she certainly demonstrates the durability of legally-sanctioned gender norms. Female virtue, chastity, and passivity, Haywood contends, continue to underwrite even progressive marriage: spousal independence and equality are always already circumscribed by these qualities. Thus, unity of person is, at its best, an ideological compromise, one in which the socially offensive aspects of female individuality are sacrificed to achieve a limited right of self-rule.

Later century domestic novels continue to explore the cultural complexity of marital unity, with an emphasis on translating the traditional fiction into progressive truth. Two of the more popular of these novels are Frances Burney’s *Cecilia* (1782) and Jane Austen’s *Pride and Prejudice* (1813). Each text presents itself as a novel of manners, examining the relationship among social customs and values *and* individual thought and action.<sup>112</sup> While the novels attend to distinct social environments (Burney’s novel is set in upper-class London society and Austen’s work in rural gentry life), both explore the subjective dimensions of the “manners”—or conventions—encoded in marriage law and its unification fiction. Unlike Defoe and Haywood, Burney and Austen are not particularly interested in the paternalistic perplexities of coverture and unity of person: hierarchal marriage is not, in their work, a potential corrective for female moral weakness nor is it an unethical license for male despotism or neglect. Rather, these authors focus on marital unity’s patriarchal and patrilineal terms: their heroines, determined to rethink female selfhood and the system of manners by which it is encompassed, struggle against the

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<sup>112</sup> For a useful overview of the novel of manners genre, see Spacks, 160-90. Spacks notes that this genre reflects its historical context, with “the idea of manners assum[ing] both moral and social significance” (161).

conservative customs of commodification in and ancestral preservation through marriage. In *Cecilia*, Burney offers a conception of marital unity that, in its liberal, companionate terms, should provide a safe and satisfying space for its individual participants. Unfortunately, marriage's enduring entanglement with legal coverture interrupts this purpose. *Pride and Prejudice* then completes *Cecilia*'s progressive trajectory by distancing unity of person from its legalistic investments in property, wealth, and inheritance and reconstituting marital oneness as a lateral merger of individual intentions, passions, and affections.

Published under the guise of biography, Burney's *Cecilia* chronicles the eponymous heroine's difficult passage from self-sufficient heiress and legal ward to cherished wife and legal cipher. Similar to other domestic novels of the period, *Cecilia*'s narrative journey is complicated by the fractured ideological world in which she resides. Here, the "manners" prescribed by patriarchy and its laws collide with economic materialism and individual desire to lend marriage a discordant quality: it is simultaneously an instrument for enacting and a safeguard against the customary dictates of birth and wealth and the pressures of consumption. Scholarship on *Cecilia* reflects this discordance. Critics such as James Thompson argue that marriage, with its protective male presence, provides Burney's heroine a "safe harbor" from the economic dangers of "the public sphere," while others such as Eva König indicate that marriage aggressively—and somewhat destructively—visits on *Cecilia* the period's "patriarchal norms."<sup>113</sup> Still others such as Melissa Ganz contend that Burney's vision of matrimony emerges as "an affective agreement between two equal [and independent] agents" ("Clandestine Schemes," 43). Following in this

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<sup>113</sup> J. Thompson, *Models of Value* 158-59, 160-62; and König 79, 79-89. Other scholars also interpret marriage in *Cecilia* as a concession (generally critical) to extant patriarchal structures and traditional feminine ideologies and, therefore, as a site of subjective loss. See, e.g., Campbell, "Clandestine Marriage," 86; Klekar, "'Her Gift Was Compelled,'" 125; Epstein 155-74; and Castle 280-89.

interpretive vein, I argue that marital unity retains an ambivalent quality in Burney's work.<sup>114</sup>

Although it has shed its internal masculine hierarchy for spousal equality, it remains, for the heroine, clouded by the legal mores of female disability.

Like Defoe's Roxana and Haywood's Betsy Thoughtless, Burney's Cecilia Beverley seeks to exercise the right of self-government. Unlike her literary forebears, however, Cecilia's choice of liberal expression is philanthropically and intellectually, rather than sexually, inscribed. As an orphan and heiress, Cecilia is vested at the novel's outset with an uncommon and masculinized degree of autonomy, which she performs with a virtuous sensibility.<sup>115</sup> Indeed, although under the age of majority (i.e., 21) and, therefore, in a state of legal guardianship, Cecilia enjoys considerable freedom to structure her daily life and expend her trust income. In her independence, Cecilia abandons the upper class conditions of immoderation and dissipation for a life defined by charitable and academic pursuits. The narrator explains that "[Cecilia] regarded herself as an agent of Charity" and a student in "search of knowledge," fully intent on "mak[ing] . . . worthy use of the affluence, freedom, and power which she possessed" (56, 103, 54-55). This self-construction bears out in the heroine's relationships with the less fortunate, particularly her growing friendship with the financially distressed Belfields and her business partnership with Mrs. Hill, a woman who is able, through Cecilia's investment in her haberdashery, to bring her family out of poverty. Cecilia's self-identity is also validated through

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<sup>114</sup> Meghan Jordan similarly argues that Burney presents "[m]arriage [as] an ambivalent state for women," and she reads the novelist's equivocation as a response to the burgeoning "cult of womanhood," which promoted women's moral position as wives and mothers (568, 559-60). For Jordan, Burney's "marriage plot" "reaffirms the cult of womanhood" at the same time that it recognizes the movement's indebtedness to "old systems of protection" (576). In contrast to Jordan, I argue that Burney equivocates on marriage's character—it is at one in the same time a liberalizing and constricting institution.

<sup>115</sup> Multiple scholars have noted the masculine nature of Cecilia's *feme sole* position. See, e.g., Klekar, "Her Gift was Compelled," 117; and Woodworth 369.

her moments of intellectual application and reflective meditation. In fact, for brief period, Cecilia signifies the possibility of enlightened and productive female individualism; and because Burney focuses on “society’s, rather than her heroine’s, embarrassments” that individualism is morally grounded.<sup>116</sup>

Nevertheless, as a propertied subject, Cecilia quickly becomes vulnerable to the social aggrandizement and economic aggression common in the period. Indeed, just as she establishes her virtuous independence, the heroine-ward falls prey to an over-stimulated culture of consumption and upward mobility. One of her guardians, Mr. Harrel, manipulates her into giving over almost all of her £10,000 fortune to settle the enormous debts he and his wife incurred through discretionary spending. In a series of dramatic speeches that appeal to Cecilia’s generosity and sympathetic understanding—speeches that include, at their most histrionic, threats of self-harm—Harrel convinces Cecilia to pledge her inheritance to a usurious lender as security for his debts. With this act, Harrel not only jeopardizes the financial independence Cecilia had expected to achieve in her legal majority, but also compromises the ethical principles upon which she had constructed her personal sovereignty.<sup>117</sup> In fact, Harrel’s machinations produce in Cecilia a crisis of conscience, which she conveys in a series of fragmented exclamations indicating self-reproach: “to become the tool of the extravagance I abhor! to be made responsible for the luxury I condemn! to be liberal in opposition to my principles, and lavish in defiance of my judgment!” (271-72). The heroine’s potential for self-fracture is intensified by the possessive logic of masculine society. As Margaret Anne Doody argues,

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<sup>116</sup> Here, I borrow the quoted material from Doody, *Frances Burney* 143.

<sup>117</sup> For extended analyses of the relationship between debt and subjective value in *Cecilia*, see J. Thompson, *Models of Value* 156-58, 160-62; and Keohane.

Cecilia is never “seen as a free agent (as she imagines herself) but as a property waiting to be taken” (“Introduction,” xvii). In the narrator’s words, she is viewed as a suitor’s “future property,” “natural property,” and “the property he means to cheapen,” or, alternatively, as “the undoubted property of [another]” (9, 13, 34, 302). Moreover, she is treated by her three guardians as a commodity to be exchanged on the marriage market, with each of Harrel, Briggs, and Delville negotiating her hand with men principally motivated by considerations of status and wealth. Although Cecilia avoids the proposed unions, she persists, while a legal minor possessed of property, in a state of existential and financial imbalance. Thus, self and estate, Burney seems to suggest, require a shoring up—a firm foundation upon which to secure their continued viability.

Burney extends this argument for a protective infrastructure into Cecilia’s legal majority, where she and the novel’s hero, Mortimer Delville, function as objects of transfer in the long-standing system of patrilineal succession. Cecilia is so designated through legal testament. Under her uncle’s will, a married Cecilia’s right to inhabit and control the hereditary estate is conditioned, first on her husband adopting the Beverley surname, and second on her reproduction of living heirs (see 5-6, 854). As Barbara Zonitch convincingly argues, these limiting clauses figure Cecilia as a patrimonial “conduit” in an “aristocratic system [that] requires . . . women and men . . . to uphold and maintain family continuity” and that revels in “dynastic dreams” (60-61). Mortimer also assumes this role, his patrilineal burden emerging from the aristocratic demands of filial and ancestral duty. As “the last of his race” and the heir to a “paternal estate [that] wants repair,” he is obliged to exercise his right to marital choice within the strict confines of rank and fortune (499). Indeed, this patrimonial pawn is expected, through endogamous marriage, to facilitate a profitable merger of estates and to preserve the “ancient”

family's "noble and long unsullied name" (468, 638, 640). Mrs. Delvile explains that to do otherwise—i.e., to marry Cecilia—would be to eradicate the extant family's identity and to raise generational ire, with the patriline's "claimants" forced to "call out for redress" (639-40). Thus, the novel's hero and heroine, who wish to contract marriage together, are caught in what Zonitch terms "aristocratic violence" (21): each of their person and property are imperiled by the "PRIDE and PREJUDICE" (Burney 930-31) of their patrician forbearers and by the conservative ideology of the nation's elite.<sup>118</sup> In fact, the assault is so destructive that it is written on the protagonists' bodies in the form of emotional distress for Cecilia and physical illness for Delvile.

Significantly, and perhaps ironically, the narrative's proposed mode of subjective recovery is marriage. Burney at length invents for her hero and heroine a marital union that neutralizes the threat of commodification and joins romantic sentiment to an alliance of interests and faculties. Cecilia, in order that Mortimer can retain the Delvile name, relinquishes her estate and "sacrifice[s]" the "splendid" "settlements" to which its "income" would have "intitled her," and Mortimer, in order to secure his mother's consent, foregoes a marriage portion that would help to deliver the patriline from financial distress (807). It is a settlement that the narrator describes as a fair balance—"he [Delvile] g[iving] up in expectation no less than she [Cecilia] would give up in possession" (807). It is also an agreement that lends marriage a new moral value—person takes precedence over property and conjugal compatibility prevails over wealth aggregation. In this union, where social custom is consigned to the marital exterior and female individualism is imbued with ethical significance, spousal intimacy appears as Delvile had earlier imagined it: as a state of companionship, mutual "solace," and "bosom" friendship (559).

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<sup>118</sup> Ruth Perry also examines the novel's engagement with differing marriage types, arguing that the central "dilemma" in Burney's marriage plot is presented as a contest between "loyalty to kin (marriage-as-incorporation)" and "loyalty to exogamous love (marriage-as-alliance)" (231).

Nonetheless, Burney's marital ideal is soon weakened by the legal patterns of aristocratic inheritance and by the reality of marital coverture. Shortly after her marriage, Cecilia is forcibly dispossessed of her landed legacy. With Delvile on the continent, the heroine finds herself alone and besieged by the new Beverley heir, who has sent his attorney to threaten a lawsuit if she and Delvile cannot prove their compliance with the testamentary name clause. Unsure what to do or whom to ask for advice—and now legally impotent as a married woman—Cecilia becomes mired in the contradictions of her subjectivity: once “an example of happiness, and a model of virtue, she was now in one moment . . . an outcast from her own house, yet received into no other! a bride, unclaimed by a husband!, an HEIRESS, dispossessed of all wealth!” (868-69). Her identity thus disordered, Cecilia flees to London where, after a series of startling events, she falls victim to madness. As she transitions from maniacal defiance to complete insensibility, her perception of self and other becomes so fragmented that any emotional event is projected to “have fatal consequences” (915). In fact, it is not until her husband releases her to death that she awakens to a reasoned state, assuring Delvile—her self-professed “destroyer” and “murderer”—that “to see you,—to be yours,—drives all evil from my remembrance” (926, 927). Cecilia's experience of insanity is symbolic of the subjective liminality caused by the abundance of loss through marriage, and it is representative of the legal death begotten through coverture. The consequence of this lawful violence, therefore, is to raise doubts about the ability of private individuals to redefine—without compromising female subjectivity—the terms that constitute marriage law's primary fiction.

This skepticism overshadows the novel's close, which subtly extends its critical gaze to the law of equitable settlement. As the narrator recites the fate of her many characters, she briefly sketches Cecilia's post-marital property rights. In addition to her pre-marital settlement, which is



identical to that “made upon [Delvile’s] mother,” Cecilia has inherited from Mrs. Delvile’s sister a “fortune” *without* dependent conditions (823, 939). This bequest of separate property is interpreted by Mortimer as a legal restorative, returning to Cecilia “that power and independence of which her generous and pure regard for himself had deprived her” (939). Certainly, the testatrix’s requirement that Cecilia take the legacy for “her sole disposal” allows the heroine to re-occupy her positions as proprietor of wealth and charitable agent (939). As Catherine Keohane argues, the female-initiated gesture accords Cecilia some “power,” at least in the sense that “[her] view of the world and her place in it is not defeated” (396). Still, marriage has emptied Cecilia of key identity markers: she is no longer a Beverley, an estate owner, or a vested lineal heiress. Although she enjoys some equitable property rights, she is, ultimately, a legal cipher. And, this institutionally-imposed vacuity provokes internal disquiet, which the narrator describes in the novel’s concluding lines: while Cecilia is the recipient of her mother-in-law’s “warm affection” and her husband’s “unremitting fondness,” her happiness is “imperfect”; infected by “some misery” and “partial evil,” it is a condition to be born “with chearfullest resignation” (941).

*Cecilia*’s ambivalent ending thus reflects the difficulty that legal and literary culture had in re-imagining the politics of domesticity. Like Haywood before her, Burney signals marriage law’s extraordinary power over the individual and her private agreements—here, as in *Betsy Thoughtless*, legal convention corrupts even the most equal, liberating, and affective of domestic arrangements. Indeed, the autonomy offered to the feme covert through equitable property rights and the private liberalizing of unity of person simply are not enough to avoid entirely the internal strife precipitated by the law’s version of marital oneness.

It is Jane Austen’s turn of the century masterpiece *Pride and Prejudice* that seeks to

resolve the constitutive problems of marriage law identified by its literary predecessors.<sup>119</sup> As this novel of manners scrutinizes the customs and conventions of its immediate social context, it imagines the possibility of a domestic space detached from the juridical system by which it is authorized and, ostensibly, regulated. In the marriage of the novel's hero and heroine, Austen removes unity of person from its legal framework and firmly situates it within the nuclear family structure where mutual respect, emotional compatibility, and personal well-being maintain a safe distance from concerns over property, wealth, and patrilineal succession. Unity, therefore, acquires an egalitarian value that cannot be subverted or destabilized by legal tradition.

The novel's opening line—"It is a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife"—foregrounds the narrative's critical action in the relationship between marriage and property. At the novel's outset, the Bennet family of five marriageable daughters is in crisis. The ancestral estate, Longbourn, is entailed in the male line and, as the narrator later informs us, the Bennet marriage settlement reserves only a small portion—£5,000 total—for Mrs. Bennet and any future daughters and younger sons (200). Moreover, Mr. and Mrs. Bennet have been poor stewards of their capital estate. Operating under the assumption that "they were to have a son" who "was to join in cutting off the entail," she failed to economize and he neglected to "la[y] by an annual sum for the better provision of his children" (199-200). The consequence for the Bennet daughters, who will have little in the way of dowries or inheritance, is that marriage within their social class will be difficult but

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<sup>119</sup> Phoebe Anne Smith also has undertaken an investigation of marriage and the law, including legal fictions, in Austen's oeuvre. In her chapter on *Pride and Prejudice*, Smith argues, as do I, that "Austen challenges the hierarchical construction of the marriage contract and negotiates a new agreement between a man and a woman, an agreement based on mutuality and equal standing as individuals with autonomy" (116). Smith does not, however, explicitly discuss the novel in relation to the traditional fiction of marital unity (see 112-48). Additionally, Hazel Jones provides an extensive discussion of marriage in Austen; rather than focus on the novels' legal contexts, however, Jones considers their biographical frameworks, focusing on how Austen's experiences with and commentary on marriage shaped her fiction.

imperative. To subsist comfortably once their father dies, Jane, Elizabeth, Lydia, Kitty, and Mary require unions to land or wealth—they require, in other words, the maintenance that marital coverture promises. Nevertheless, the Bennet daughters and, in particular, the romantic Jane and the individually-minded Elizabeth, reject the idea of a property-centered marriage and the legalistic expression of marital unity that it implies. To borrow from Armstrong, these characters “hold out for a contract based on a certain quality of feeling” (*How Novels Think* 45). They aspire to marriages that attend to their emotional needs and personal desires: respect, happiness, affection, and love dominate their thoughts and discourse on the subject. The narrative conflict thus emerges as a contest between material and personal welfare, between familial duty and individual right, and between traditional and modern conceptions of unity.

These tensions become readily apparent in the novel’s initial marriage plot. Here, the principal heroine, Elizabeth, is presented with a marriage proposal from distant cousin and Longbourn heir, Mr. Collins. Wishing to mitigate the “loss” of the family estate and “indifferent” as to his bride’s marriage portion, Collins has determined to “chuse a wife from among [the Bennet] daughters” (73). It is a union that would provide Elizabeth economic security and preserve the lineal estate in the Bennet bloodline; it is also, however, an alliance without the prospect of intellectual stimulation or emotional connection. Elizabeth, therefore, rejects the offer, citing the importance of personal wellbeing: “You could not make *me* happy,” she informs Collins, “and I am convinced that I am the last woman in the world who would make *you* so” (73). Rather than try his hand with another Bennet daughter, Collins proposes to Elizabeth’s cousin, Charlotte Lucas. Motivated “by the pure and disinterested desire of an establishment,” Charlotte quickly accepts the offer from a man she considers “neither sensible nor agreeable” (83). Unlike Elizabeth, Charlotte’s marital ethos is defined by material reality—as a “well-

educated young wom[a]n of small fortune,” marriage for her is a primarily a “preservative from want” (83). Although based in economic circumstance and in accordance with social expectation, Charlotte’s utilitarian view—reflected in her decision to marry Collins—is interpreted by Elizabeth as a “sacrifice[] [of] every better feeling to worldly advantage” (85). And, with this violation of romantic ethics, comes private discord—Charlotte has “sunk in [Elizabeth’s] esteem” and disrupted the heroine’s faith in humanity’s “merit and sense” (85-86, 91).

Austen continues to investigate the ideological tensions surrounding marital unity in the novel’s aristocratic marriage plot. In a scene reminiscent of those penned by Burney in *Cecilia*, this novel’s heroine confronts the patrician sentiment on marriage in the figure of Lady Catherine de Bourgh. The noblewoman challenges Elizabeth’s right to contract marriage with her nephew and the novel’s hero, Mr. Darcy, arguing his marriage to her daughter has been arranged since “their infancy” (231). When the heroine responds with a reference to the right of free choice, Lady Catherine applies to the aristocratic interpretation of matrimony as a foregone union of estates and an extension of the ancestral dynasty:

My daughter and my nephew are formed for each other. They are descended on the maternal side, from the same noble line; and, on the father’s, from respectable, honourable, and ancient, though untitled families. Their fortune on both sides is splendid. They are destined for each other by the voice of every member of their respective houses, and what is to divide them? (232)

Lady Catherine’s pretension provokes an argument that pits modern individualism against social tradition, with Elizabeth challenging the right of elitist rule—“you have certainly no right to concern yourself in [my affairs]”—and Lady Catherine arguing the corruption of both English manners and the great English estate: to marry Darcy is to jettison “the [upper class] claims of duty, honour, and gratitude” and to “pollute” the land through which those claims were established (233-34). Unsurprisingly, in this war of marriage philosophies, Elizabeth emerges the

victor—as Claudia Johnson argues, “[t]he insolence of rank and power has been chastized” (*Jane Austen* 89).<sup>120</sup> In fact, the archaic tenets of noble marriage left unsettled by Burney are permanently sidelined by Austen, who scripts the narrative’s romantic climax as a consequence of the peeress’s antiquated views: Darcy and the narrator both point to Lady Catherine’s “unjustifiable” intervention as the impetus for his marriage proposal and for the couple’s “good understanding” of their union’s value (249, 239).

The marriage of Elizabeth and Darcy thus provides a new marital ethos, one that displaces the mercenary philosophy of Charlotte and the patrimonial thesis of Lady Catherine. For this hero and heroine, whose courtship has been an experiment in intellectual and moral development, marriage is primarily a site for maintaining one’s individuality and for cultivating a range of social intimacies. Elizabeth, whose “former prejudices ha[ve] been removed,” and Darcy, whose “pride and conceit” have been tempered, will experience the nuptial union as an exchange of ideas and ideals, a habitat for mutual respect and affection, and an opportunity for practicing ethical individuality (240-41). Although we are not privy to the Darcys’ married life (the novel concludes with their marriage), Elizabeth envisions its potential early on: “It was a union that must have been to the advantage of both; by her ease and liveliness, his mind might have been softened, his manners improved; and from his judgement, information, and knowledge of the world, she must have received benefit of greater importance” (202). Moreover, the narrator, in her conclusory remarks, reports its substance, noting Elizabeth’s “lively, sportive, manner” and Darcy’s “open pleasantry,” Elizabeth’s “persuasion” and Darcy’s acquiescence, and the couple’s enduring commitment to each other and to family and friends (253-54). It is a

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<sup>120</sup> It is important to note that Johnson is more skeptical about the political significance of this chastisement. She argues that it is “never radical[] enough to make us doubt [aristocratic] prestige” nor it is enough to purge us of the desire for the social and material advantages conferred by “rank and power” (89).

picture of unity—authenticated in characters motivated by a complexity of genuine feeling and sympathetic purpose—that renders insignificant the patriarchal and patrilineal aspects of juridical oneness.

Austen further pushes legal ideas about marital unity to the narrative margins in the novel's engagement with equitable property rights. Although (as I address below) Austen employs the estate to hasten the courtship process, she ultimately excludes the mechanics of personal and real property from the Darcy marriage's architecture. Not only is her narrator silent about settlements, dower rates, and separate estates, her heroine is adverse to such talk. When Mrs. Bennet celebrates Elizabeth's future wealth and separate maintenance—"how rich and how great you will be! What pin-money, what jewels, what carriages you will have!"—the heroine responds with disdain, as if any allusion to these legal benefits will taint the progressive idea of unity that she and Darcy have framed (247, 48). Austen instead underwrites Lydia's marriage to Wickham with legal terms. A pre-nuptial agreement, negotiated after the couple's illicit affair, provides the union's foundation—it is the incentive for Wickham's consent to the marriage and, therefore, the insurance against Lydia's impending collapse into social ruin. The bride's uncle, Mr. Gardiner, writes to Mr. Bennet with the initial settlement conditions: "All that is required of you is, to assure to your daughter, by settlement, her equal share of the five thousand pounds, secured among your children . . . and, moreover, to enter into an engagement of allowing her, during your life, one hundred pounds per annum" (197). The bride's aunt, Mrs. Gardiner, explains to Elizabeth the agreement's supplement: "His debts are to be paid . . . , another thousand in addition to her own settled upon *her*, and his commission purchased" (211). Yet, these rights fail to provide domestic stability or female autonomy—the marriage is one of indebtedness and "indifference," and Lydia is an unloved wife dependent on outside charity

(252-53). Thus, in aligning the practice of equitable settlement with the disastrous Wickham union, Austen further contaminates the idea of legal unity. Separate property rights do not ensure marital equality, independence, and wellbeing; this can only be purchased through extra-legal means—i.e., through a true communion of interests, intellects, desires, and persons.

This is not to say that the novel repudiates the value of rank and property to the marriage contracting process. In fact, status and estate are essential to the establishment of Austen's marital ideal. It is not until Elizabeth visits Darcy's ancestral home, Pemberley, that she sees him as a legitimate partner, declaring on her approach into the estate grounds that "to be mistress of Pemberley might be something!" (159). In the "natural beauty" of the grounds and the "lofty and handsome" interior of the house, the heroine comes to admire the proprietor's "taste" (159); in his portrait and through his housekeeper's "commendation," she grows to appreciate his authority "[a]s a brother, a landlord, [and] a master" (162). Alistair Duckworth rightly observes that within this alliance of person and property "excellent aesthetic taste denotes an excellence of moral character" (124).<sup>121</sup> Moreover, as Sandra MacPherson suggests, the alliance, governed as it is by the legal entail, demonstrates Darcy as "the exemplary ethical subject," one who understands his duty of care (17, 15-18).<sup>122</sup> Yet, these traditional indicators of marital suitability only abide in the courtship stage—the Darcy union appears to be void of any of the mercenary, elitist, or patriarchal qualities that they imply.

For those marriages in the novel that fall outside of Austen's ideal, material resources and social position are the defining qualities; nevertheless, because the unions reflect the economic

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<sup>121</sup> Duckworth notes that other scholars, including Walton Litz and Martin Price, also have made this connection.

<sup>122</sup> For MacPherson, Darcy represents a "willed" as opposed to "willing" "model of obligation"—he acts based on social or familial responsibility (willed to him through the entail), rather than on individual feeling (17-18, 2). While I agree that the entail helps to structure Darcy's morality, I don't believe that we can dismiss the significance "of affiliation and of affect" (15) to his character's ethical sentiment.

and social realities of Austen's historical moment, they retain a degree of validity. For example, Charlotte's marriage, while unfortunate, is not the disaster we might have anticipated from Elizabeth's earlier judgment. Elizabeth herself is forced, upon visiting Charlotte at the Collins's parsonage, to "meditate upon [her cousin's] degree of contentment" and to recognize the "charms" in "her home and her housekeeping, her parish and her poultry, and all their dependent concerns" (105, 142). She is also inclined, in a conversation with her aunt, to acknowledge that the line "between the mercenary and the prudent [matrimonial] motive" is often indistinct: "Where does discretion end, and avarice begin?" she wonders (102). Moreover, Lydia's marriage, though "unsettled" (253), is never presented as anything but a social and familial mandate. This younger sister's participation in Wickham's "scheme of *infamy*" requires a legal corrective: "[T]hey *must* marry" Elizabeth avers to Mr. Bennet. "Yes, Yes, they must marry. There is nothing else to be done," he affirms (189, 197). In these vignettes, Austen suggests that poverty, age, and social advantage are rational, though not particularly admirable, motives for contracting marriage. What the novel does in the Darcy union, then, is to draw a valuable alternative to marriages that are primarily legal (as opposed to affective) in quality. Indeed, Austen offers a prototype for which readers can strive, one in which the law serves only an authorizing, rather than constitutive, function.

While Austen's model of marital unity promotes many of the principles that informed the burgeoning code of liberal contract, its constituents remain accountable to their social context. As numerous scholars have argued, *Pride and Prejudice* reads as a sort of ideological compromise, with the bourgeois individual, as represented most overtly in the novel's heroine, coming through courtship and marriage to identify with certain social rights and obligations, and the conservative social, as represented in the novel's hero, coming to understand the limitations



of rank, property, and class as moral signifiers. Duckworth, for example, contends that the novel's "solution" to competing ideas about the individual and the social "is neither society alone, nor self alone, but self-in-society" (142), and Armstrong maintains that the novel's socio-political contribution is its creation of a "subtle synthesis" of moral codes that "enhances" individual "value" (*How Novels Think*, 47-48). Additionally, Michael McKeon argues that Austen's is a "conflationary project" of "the individual and the social," a project that promotes "both self-knowledge and ethical sociability" by "requir[ing] the sympathetic internalization" of diverse perspectives (*Secret History*, 715-17).<sup>123</sup> Continuing in this critical direction, I want to suggest that by abstracting issues of (or concerns over) property ownership, separate maintenance, and legal identity from the novel's marital ideal, Austen dismisses key mechanisms of patriarchy, paternalism, and patrilinealism to the legal sphere, while maintaining within the conjugal family a moral perspective that advocates a firm, but disciplined, individualism and a socially-minded, yet egalitarian, domestic government. The law and its marriage fiction do not, therefore, disappear; rather they operate tangentially to—and, we are encouraged to believe, abide passively with—the heart of this most important of social contracts.

### *Conclusion*

"Unity of person" is one of the law's most enduring and controversial legal fictions. For centuries, the doctrine operated as the foundational justification for marital coverture, authorizing the common law's abrogation of married women's legal identity and the rescission of their property and contract rights. It also ensured that marriage, once executed, lost its contractual character. In the eighteenth-century, equitable legal culture sought to remedy some of

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<sup>123</sup> For additional interpretations of the novel's ideological messaging through its depiction of marriage, see M. Butler, 197-218; and Poovey 194-207. Both Butler and Poovey argue that the marriage between Elizabeth and Darcy and, therefore, the politics of Austen, tilt toward the conservative.

the disabilities engendered by the fiction in the form of married women's separate property rights; however, these efforts were limited and indefinite, suggesting the law's institutional ambivalence on the nature of the marriage contract and the relative competencies of its participants. Literary culture also became attentive to the common-law invention, the period's domestic novels operating as cultural courtrooms in which the paternalistic, patriarchal, and patrilineal assumptions that controlled marital oneness were tried and, in general, found to be transgressive of individual subjectivity, particularly women's. Moreover, literary fiction persisted beyond the cross-cultural trial to arbitration, ultimately isolating the legal fiction to its institutional sphere and creating for the domestic space a progressive alliance. Under novelists' juridical superintendence, unity of person acquired an egalitarian and democratic quality, and the married female subject became reacquainted with her individual selfhood.

### CHAPTER 3: THE FICTIONS OF MARRIAGE-CONTRACT DISSOLUTION

The vast majority of eighteenth-century domestic novels are focused on constructing the happy, affective marriage. Yet, there is a subset of this literary form that is also concerned with the bad marriage—i.e., the unhappy, unfulfilling, or unworkable marriage—and the politics of its (de)construction. In these novels, the domestic space is fractured by economic demands, social pressures, ideological conflicts, and educational deficiencies, and there is little prospect for relief outside of spousal death. Indeed, husbands, wives, and their children live in a perpetually liminal state, one that is often marked by infidelity, bastardy, cruelty, and neglect. Of particular interest for this project are the splintered families of Daniel Defoe's *Moll Flanders* (1722), Eliza Haywood's *Betsy Thoughtless* (1751), Elizabeth Inchbald's *A Simple Story* (1791), and Mary Wollstonecraft's *Maria* (1798); the project also briefly addresses the marital failures represented in Jane Austen's *Sense and Sensibility* (1811) and *Mansfield Park* (1814). As representatives of their authors' legal-historical contexts, these domestic units reflect the presumptions and fictions by which the period's marriage dissolution policy was established and sustained. Moreover, they allow us to better understand the practical and ethical impact of this policy on the private sphere and, in particular, its female and adolescent constituency.

This chapter, therefore, examines the foregoing novels' engagement with their immediate legal culture on issues of separation, divorce, and the parent-child relationship. Part I describes the theological and philosophical foundations for England's marital permanence doctrine, a policy seemingly at odds with the idea of marriage as a "civil contract." It also outlines the doctrine's ecclesiastical exceptions and its common law correlates in the areas of illegitimacy

and child custody. This contextual framing demonstrates the law's investment in the notion that marriage is a universal good, its permanence essential to individual, private, and public welfare; it also shows the law's commitment to the assumptions of heritable bastardy and paternal right. Part II examines the jurisprudence surrounding two significant developments in eighteenth-century dissolution law, parliamentary divorce and private separation. On the one hand, this examination reveals that these ostensibly progressive exceptions to the law's anti-dissolution doctrine were either directed or constrained by the conservative precepts that informed England's extant divorce policy. On the other hand, it demonstrates a larger, and generally progressive, cultural shift in how people understood and wanted to live out their marital rights and obligations. Part III then investigates the literary response to conventional and developing legal doctrine on marital and familial breakdown. I argue that novelists writing about domestic conflict use a variety of forms and genres, including the fictional autobiography and the sentimental and the gothic narrative, to challenge and, especially at the period's end, to advocate for reform of the law's utilitarian assumptions about dissolution, illegitimacy, and paternal authority. I further argue that these writers expose the way in which legal fictions, such as the fiction of *filius nullius*, escape their lawful boundaries, to the prejudice of the eighteenth-century family. Finally, I contend that, while Defoe, Haywood, Inchbald, Wollstonecraft, and even Austen generally fail in their novels to envision revolutionary legal change on the issues of divorce, separation, and child welfare, their work legitimates those texts that seek to re-structure, in more progressive terms, the processes of marriage formation and unification.

#### *Part I: The Immutability of Status*

For much of England's history, marriage was a permanent status—the legal bond of unity of person could be broken only through spousal death. During the medieval period, the principal justification for this strict interpretation of the marriage contract was Catholic doctrine that

identified marriage as a sacrament, an inviolable covenant between the wedded couple and God (Witte 94-6; Gibson 10-11). A form of this reasoning survived the sixteenth-century Protestant Reformation and found expression in the 1604 Anglican Canons, which continued to interpret marriage as a divine institution fixed in its permanence (Witte 255-56; Stone, *Road* 351). In the mid-seventeenth century, theologians looking to reinforce the idea of indissolubility supplemented religion with socio-political philosophy. John Witte explains their argument:

The domestic commonwealth was the foundation of the English commonwealth. . . . Its definition and discharge of duties was essential for civic order, liberty, and rule of law. . . . To break marriage [outside of the canons] . . . was, to act ‘against nature,’ ‘against the church,’ ‘against the commonwealth,’ indeed, ‘against the whole state of mankind’” (265).<sup>124</sup>

Although perhaps compelling during the Interregnum, this rationale was eventually subverted by Enlightenment arguments that found an inextricable link between the marriage contract and the social contract. Rather than an institution of divine law and sovereign authority, marriage now was a private agreement with a strong “natural, social, and spiritual” substructure—its indissolubility was sanctioned by the dictates of “nature, reason, fairness, prudence, utility, pragmatism and common sense” (Witte 291 and 300).

Witte locates the eighteenth-century shift on marriage dissolution theory in Locke’s philosophy of the conjugal estate, and in particular, his “‘impious hypothesis.’” Witte argues that Locke’s idea that the marriage contract existed prior to and outside of divine authority and church government—that it was a “simple bi-lateral contract” between equal persons—provided a more flexible framework for Enlightenment intellectuals to theorize on the creation and implementation of the marital bond (289-90). Locke himself used this framework to deliberate on the possibility of a dissoluble union in *Second Treatise*:

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<sup>124</sup> Here, Witte quotes Bishop Lancelot Andrews.

[O]ne [has] reason to inquire, why this compact, where procreation and education are secured, and inheritance taken care for, may not be made determinable, either by consent, or at a certain time, or upon certain conditions, as well as any other voluntary compacts, there being no necessity in the nature of the thing, nor to the ends of it, that it should always be for life. (134-35; sec. 81)

As Witte demonstrates, this radical recalculation of marriage's immutability did not redound to the work of Locke's successors, but it did support their secular justifications for indissolubility. Thus, David Hume in "Of Polygamy and Divorces" (circa. 1741) argues against divorce on the grounds of child welfare, marital affection, and domestic peace: he writes, for example,

[N]othing is more dangerous than to unite two persons so closely in all their interests and concerns, as man and wife, without rendering the union entire and total. The least possibility of a separate interest must be the source of endless quarrels and suspicions. The wife, not secure of her establishment, will still be driving some separate end or project; and the husband's selfishness, being accompanied with more power, may be still more dangerous. (sec. 20)

Adam Smith presents a similar argument on divorce as productive of domestic disorder in his 1766 *Lectures on Jurisprudence*: "[I]t is always better that the marriage tie should be too strait, than that it should be too loose. . . . When both parties have the power of divorce they can have no mutual trust nor dependence upon each other, but their interests are quite separate" (445; para.118). Moreover, William Paley in his *Principles* represents the utilitarian view: because divorce endangers children, upsets spouses' "common interest" and "mutual compliance," jeopardizes the wife's economic and social security, and promotes "libertinism," it is "contrary to the law of nature" and inimical to "the general happiness of married life" and to the "happiness of the community" (186-90; bk. 3, pt. 3, ch. 7).<sup>125</sup> In these men's minds, therefore, marriage, though now patently contractual, continued to deserve strict regulation and theirs were

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<sup>125</sup> For a more in-depth discussion of the philosophies of Hume, Smith, and Paley on the issue of divorce, see Witte 294-300.

the presumptions on which marriage law must operate to protect the public and the private spheres from the devastation wrought by divorce.

Notwithstanding the general prohibition on marital dissolution, there were limited opportunities for legal annulment and separation, neither of which purported to violate historical arguments for permanence.<sup>126</sup> From the twelfth to the mid-nineteenth century, Anglican canon law and the ecclesiastical courts admitted two causes of action for relief from the marital bond. The first cause, divorce *a vinculo*, operated as an annulment and recognized the right to remarry. It required the petitioner to prove that “the putative marriage had been void from its commencement by reason of a ‘dirimentary impediment’” (Baker 491). Such impediments related to the putative spouses’ consent or capacity to contract and included age, duress, insanity, precontract, consanguinity, affinity, and impotence (Baker 491-92). While a dissolution decree released the parties from the state of coverture, it had the potential effect of binding their children to the condition of bastardy. According to canon law, unless at least one parent could demonstrate ignorance of the “illicit connection,” any child born prior to the annulment would be deemed illegitimate and subject to canonical disabilities (Baker 489). Moreover, under the “coldly logical view” of the common law, “bastardy . . . was indelible,” there being no exemption from its attendant legal disabilities (Baker 489-90).<sup>127</sup> Thus, in its connection to marital formation, divorce *a vinculo* had the effect of reinforcing the absolute indissolubility of

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<sup>126</sup> In addition to the scholars cited herein, Hazel Lord offers a nice, succinct overview of early modern divorce law (12-18).

<sup>127</sup> See also Helmholz for a description of the difference between canonical and common law on determinations of bastardy (198).

the marital union: rather than obtain divorce in the modern sense, couples simply received legal confirmation that they were, in fact, never married.<sup>128</sup>

The second canonical cause for marital relief—termed divorce *a mensa thoro* (or separation from bed and board)—operated as a judicial separation and prohibited remarriage. The principal petitionary grounds were adultery and, to borrow from Stone, “life-threatening cruelty” (Road 192).<sup>129</sup> Because the parties remained in the state of marital coverture post-decree, their common law and equitable property rights were unchanged by their physical separation—the husband retained his interest in the wife’s personal and real property, and the wife stayed vested in her separate estate (if any); however, his maintenance obligation depended on the court’s findings of fault—an innocent (i.e., non-adulterous) wife was entitled to alimony, while a guilty (i.e., adulterous) wife was left to fend for herself (Stone, Road 193). Coverture also defined the parties’ custody rights—in the absence of clear evidence of paternal violence or severe neglect, he had all and she had none (Wright, “Custody,” para. 9). Divorce *a mensa thoro*, therefore, sustained enough of the original character of marital unity to avoid the large cultural problem of indissolubility.

It is important within this discussion of divorce law to consider for a moment the jurisprudence of bastardy and child custody. Illegitimacy arguably became a social pathology in eighteenth-century England. According to Peter Laslett, the “illegitimacy ratio” steadily increased from just under two (1.779 in 1700-04) to just over five (5.307 in 1800-04) percent in the period’s course (14 [table 1.1(a)]). Historians have posited a multitude of theories on the

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<sup>128</sup> As Baker puts it: “[Couples] could not break the chains, but they could declare that the chains were never there” (491).

<sup>129</sup> Baker contends that ecclesiastical courts also would consider sodomy, heresy, and fear of future injury as grounds for divorce *a mensa thoro* (493).



origins of this rise, including the passage of The Matrimonial Duty Act (1694) and Hardwicke's Marriage Act (1753), both of which, Laslett observes, had strict recording requirements (51) and both of which had the potential to increase informal unions.<sup>130</sup> What is significant to this project, however, is not the legal cause of, but the legal response to, pre-nuptial or adulterine births. Blackstone provides the definition for illegitimacy: "A bastard, by our English laws, is one that is not only begotten, but born, out of lawful matrimony" (1: 442).<sup>131</sup> This included children born after nine months of a husband's absence from the country and children born during a divorce *a mensa thoro*, as in both cases the husband was presumed to have "no access" to his wife. It also, as earlier noted, included children born to a marriage declared null and void by a divorce *a vinculo* (Blackstone 1: 445). While bastards were entitled to parental maintenance, they were prohibited from common law inheritance by operation of the legal fiction *filius nullius* (Blackstone 1: 446-47). This fiction, which Blackstone translates to "son of nobody," presumably preserved one principal aim of marriage—the "procreati[on] of lawful *heirs*" (Blackstone 1: 447, 443)—and one principal aim of patriarchal society—the primogenitive and patrilineal distribution of landed estates (see Stone 350-52). The fiction also made ecclesiastical divorce or separation a risky venture, especially for couples in a propertied union.

The presumptions and restrictions of child custody law certainly had an impact on whether couples pursued legal estrangement. Under the common law, wives, because they lived in a state of coverture, had "no [legal] power" over their offspring (Blackstone 1: 441).

Children's maintenance, education, and protection were the sole duties, and their custody the

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<sup>130</sup> The essays that form Part I of Laslett, Oosterveen, and Smith's *Bastardy and its Comparative History* provide a variety of potential causes for bastardy in pre-industrial and industrial Britain. In addition, see Stone, *Family, Sex and Marriage* 382-404.

<sup>131</sup> As a point of clarification, this rule differs from that of canon law, which conferred legitimacy on children whose parents subsequently married (see Baker 489-90).

sole right, of the father. He even had the ability through guardianship law to “dispose of . . . custody” to someone other than the mother (Blackstone 1: 450).<sup>132</sup> While eighteenth-century courts heard a multitude of cases challenging the father’s custodial right, including cases that purported to contemplate the child’s best interests, none were interspousal (i.e., between husband and wife) and most acted to reinforce a presumption of natural paternal guardianship.<sup>133</sup> In fact, Danaya C. Wright demonstrates that at the same time the period’s custody jurisprudence indicates an increasing interest in “litigating the scope and [moral] quality of paternal right,” it also shows a developing “rhetoric of strong presumptions and rights” in the father’s favor (“Rethinking the Birth,” 283-84). This rhetoric, Wright argues, continues through the first custody case brought by a mother against a living, but estranged, father. Although determined on standing grounds (the court found that the wife did not have standing to sue in Chancery), *De Manneville v. De Manneville* (1804) came to represent, in later jurisprudence, “the principle that paternal rights to custody were nearly absolute,” particularly against maternal claims (Wright, “Rethinking the Birth,” 284).<sup>134</sup> Thus, divorce and judicial separation had ramifications beyond

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<sup>132</sup> Danaya C. Wright observes that “the state gave to a father the right to appoint by will a guardian for his children, and he could certainly appoint his widow their guardian”; *however*, “the courts would not allow him to contract out of his paternal duties by giving custody of his children to their mother while he was still alive” (“Rethinking the Birth,” 256-57).

<sup>133</sup> According to Wright, most cases involved fathers and male family members or appointed male guardians, or fathers and the state; mothers were primarily implicated in cases brought after the husband’s death where guardianship of the surviving minor children was at issue (“Rethinking the Birth,” 275-84).

<sup>134</sup> In *De Manneville v. De Manneville*, Mrs. De Manneville sued her estranged emigrant husband in Chancery for custody of their eleven month old daughter, alleging, among other claims, “ill usage” and “threats to carry her and the child out of the kingdom” (763). Lord Chancellor Eldon recognized the court’s duty to “do what is for the benefit of the infant,” but denied the mother custody, arguing “[t]his is an application by a married women living in a state of actual, unauthorized separation to continue . . . that separation, which I must say is not permitted by law” (765-66). In other words, Eldon did not deny the existence of maternal custody rights, but rather suggested that Chancery could not contemplate such rights unless and until the mother had secured a divorce or judicial separation from the ecclesiastical courts. Eldon did, however, grant Mrs. De Manneville’s petition to “restrain[]” Mr. De Manneville “from taking the child out of the kingdom” (768). For two excellent analyses of the *De Manneville* case, see Wright, “Rethinking the Birth” and “Crisis of Child Custody.”

the economic for early modern married women and men, who also had to consider the impact of maternal loss on their children.

Notwithstanding the opposition to, and restrictions on, marital dissolution, there were, over the course of the early modern period, religious and political efforts at divorce reform. Perhaps the most comprehensive of these efforts occurred in 1552 when state, civic, and church leaders undertook to revise canon law, including the law on divorce. The new code, *Reformatio Legum Ecclesiasticarum*, sought to abolish divorce *a mensa thoro* and to expand the grounds for divorce *a vinculo* to include adultery, desertion, deadly hostility, and prolonged ill-treatment.<sup>135</sup> Yet, the *Reformatio* was never officially adopted; instead, the traditional restrictions on divorce were re-affirmed in the 1604 Anglican Canons.<sup>136</sup> The issue of reform gained prominence again in middle of the seventeenth century with John Milton's radical argument for "easy divorce" in *Doctrine and Discipline of Divorce* (1643, rev. 1644).<sup>137</sup> Milton relies on Mosaic Law and New Testament Scripture to argue for divorce on the grounds of irreconcilable differences, in what has been termed the "Indisposition Passage":

*[I]ndisposition, unfitness, or contrariety of mind, arising from a cause in nature unchangable, hindring and ever likely to hinder the main benefits of conjugall society, which are solace and peace, is a greater reason of divorce than naturall frigidity, especially if there be no children, and that there be mutual consent. (242)*

For Milton, domestic discontent and the restrictive ecclesiastical divorce law had a direct and negative effect on the civil rights and religious liberties owed the English citizenry. An

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<sup>135</sup> The relevant *Reformatio* provisions are found in the section titled "Concerning Adultery and Divorce": chapter 19 abolishes divorce *a mensa thoro* and chapters 5, 8, 9, 10, and 11 recognize expanded grounds for divorce (*Reformatio*, 99-106). In addition, the title of chapter 12—"Slight Disagreements, Unless Permanent, No Ground for Divorce"—suggests sustained irreconcilable differences might also warrant dissolution (*Reformatio*, 103).

<sup>136</sup> For a detailed explanation of the obstacles to the *Reformatio*'s passage, see Spaulding.

<sup>137</sup> Here, I borrow the term "easy divorce" from Witte who, along with other scholars, uses the term to refer to divorce on grounds other than adultery, desertion, and cruelty.

individual forced by positive human law to remain in a state of domestic tyranny experienced not only personal, but also religious and political oppression: his was a state of persecution that “s[at] . . . heavy on the Common-wealth” and made impossible “all hope of true Reformation in the state” (Milton 229-30). In general, Milton’s arguments for divorce were seen as incendiary and extremist, and they were censured by theologians, politicians, and civilians alike.<sup>138</sup> Nevertheless, these ideas, which were soon followed by Locke’s proto-liberal meditations on dissolution, provoked a cultural discussion that, *prima facie*, helped to instantiate two important legal changes in the long eighteenth century: the introduction of the parliamentary bill of divorce and the development of the private deed of separation.

As we shall see, although of limited application, these legal inventions are significant for thinking about the ways in which the law responded to the advancing notion of marriage as a civil and secular contract, as well as to the idea that the parties thereto are individuals vested with the right to determine for themselves the nature and scope of domestic government. To what degree do these developments signal an attempt to either modify or reinforce the presumptions that underlie arguments for marriage as a permanent status? Is the law attentive to the possibility that the foundational arguments against dissolution are themselves fictions with indeterminate utility? Do the public and private measures reconceive of wives, mothers, and children in more liberal terms—i.e., with rights and duties that extend beyond that of husband and father? Do the measures in any way challenge the utility and ethics of the fictions and presumptions that inform the jurisprudence of parental responsibility and authority?

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<sup>138</sup> For a discussion of contemporary responses to Milton’s work on divorce, see van den Berg and Howard.

*Part II: Domestic Happiness, Public Welfare, and Key Developments in Divorce Law*

Historical scholarship on divorce and separation in eighteenth-century England often focuses on the social or legal forces that informed two prominent exceptions to the indissolubility doctrine, specifically parliamentary divorce and private separation. With respect to the former, most historians agree that the legislative action was initially instituted as a way for those in the upper classes to protect family name, power, and estate.<sup>139</sup> Parliamentary divorce allowed for remarriage in cases of wifely adultery, thereby helping to ensure the legitimacy of the paternal heir and the longevity of the patrilineal empire. Historians also tend to agree that divorce petitioners' motivations were changing in the latter part of the century. Lawrence Stone, for example, argues that the extra-judicial action became a way for wealthy couples to extricate themselves from unhappy unions, "the objective now being the pursuit of happiness and the replacement of lost marital comfort" (346); while Colin Gibson suggests that it was a means for male petitioners to enforce the "chaste morality" of the bourgeois class, which placed particular emphasis on "[t]he pleasures, satisfactions, and rewards" of domestic life and on the virtuous wife's place within it" (38). Most likely, it was a combination of patrilineal, individual, and moral concerns that made parliamentary divorce a viable option for a range of fractious unions.

Historical accounts of private separation generally hold that it was established by legal practitioners as a means to provide an affordable and discreet remedy for marital grievance (e.g., adultery or cruelty) or no-fault spousal discord. Although the dissolution method did not allow for remarriage, it did contemplate, in the form of a contractual deed, physical estrangement, wifely maintenance, and freedom from certain of coverture's disabilities. Historians interested in this ostensibly liberal reimagining of the marriage contract, most prominently Stone and Susan

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<sup>139</sup> See, e.g., Gibson 29; and Stone, *Road* 312, 346.

Staves, have demonstrated that the judicial response was inconsistent and often hypercritical, particularly of the notion of inter-spousal contracting (marital unity, remember, prohibited husbands and wives from contracting between themselves) and the idea of female independence. Stone observes the judiciary's reluctance to enforce these agreements at common law and in equity and argues that the trajectory of jurisprudence on the matter was regressive—the leniency of the eighteenth-century courts on the rights and liberties provided in the separation deed was confronted with a conservative reaction at the century's turn (see *Road* 151-56). Staves presents a similar developmental course in her comprehensive review of the period's case law on the matter. She argues that “after an initial period of pursuing and developing a contract logic in dealing with separate maintenance contracts [i.e., private deeds of separation], in the later eighteenth century the courts attacked the relevance of this logic in domestic cases and repudiated some of the earlier decisions” (167).<sup>140</sup> The consequence, Staves argues, was a return to juridical patriarchy in the form of restrictions on the right of private separation, as well as the terms under which it was to be conducted (178-95).<sup>141</sup>

This chapter's analysis of the law's dissolution jurisprudence, including divorce acts, parliamentary debates, model separation deeds, and case law, tends to confirm these historical accounts of the development of parliamentary divorce and private separation. More importantly, it demonstrates that the traditional presumptions and stated fictions that had sustained the legal doctrine establishing marriage's indissolubility continued to have a controlling influence within the law's discourse on this doctrine's exceptions. Indeed, the notion that marriage is fundamental

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<sup>140</sup> Stone and Staves disagree, however, on the significance of the private separation deed to the bond of patriarchy (Staves 166-67).

<sup>141</sup> For another discussion of private separation's treatment in the courts, see Peaslee. Pearlston also addresses private separation agreements and provides an in-depth discussion of their treatment by the eighteenth-century English judiciary (e.g., 112-163 and 220-316).

to public and private stability, and the idea that its unified structure must be constituted as a gendered hierarchy, remained central to legislative and judicial decision-making on divorce bills and separation deeds. Additionally, the presumption of paternal right, as well as the fiction of *filius nullius*, persisted within this body of marriage law to the detriment of maternal right and child welfare. Ultimately, the primary materials reveal a system so deeply invested in conservative dogma that the explicit and implied fictions surrounding marital permanence assumed a legal reality.

### **Parliamentary Divorce**

Parliamentary divorce originated in the late-seventeenth century and became, in the eighteenth century, an attractive alternative to judicial separation (divorce *a mensa thoro*) and ecclesiastical divorce (divorce *a vinculo*). The three earliest cases for parliamentary divorce established the action's pleading and procedural requirements, all of which remained in place until its mid-nineteenth-century demise. The Lord Roos case (1670), Duke of Norfolk case (1691; granted 1700), and Earl of Macclesfield case (1698) extended divorce *a vinculo* (i.e., divorce with the right of remarriage) to instances of wifely adultery, and they initiated the custom of procuring a judicial separation and proving a case of criminal conversation (i.e., a civil action for damages against the wife's seducer) prior to the divorce bill's submission.<sup>142</sup> In the two hundred years that followed, Parliament enacted a total of 324 bills for divorce, or 28 between 1700 and 1759 (0.5 per annum), 102 between 1760 and 1799 (or 2.5 per annum) and 194 between 1800 and 1857 (3.3 per annum).<sup>143</sup> While these figures appear relatively low by

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<sup>142</sup> For an extended discussion of the legal origins of parliamentary divorce, including a detailed overview of the three early cases, see Couch.

<sup>143</sup> These numbers are derived from Colin Gibson's work on parliamentary divorce (28 [Table 3.1]), and they are supported by Sylvia Wolfram's research (157). To be clear, the 324 total excludes the Roos, Norfolk, and Macclesfield cases.

today's standards, their trajectory demonstrates an impressive uptick in the number of petitions for absolute divorce in the long eighteenth century, with the "peak decades" at 1770-1780 (approximately 38 petitions) and 1790-1800 (approximately 45 petitions) (Anderson 423, 415 [Table 1]). The data also suggests that parliamentary divorce was not merely a remedy for the aristocracy or the gentry and professional classes, especially in the latter half of the period. Sylvia Wolfram finds that the number of acts granted non-upper class petitioners (e.g., clergy, doctors, merchants, members of the armed forces) in the years 1750-1857 averaged 32.5 percent (164 [Table 3]); while Stuart Anderson provides a more robust figure of approximately 50 percent for the years 1750-1780 (419-22).<sup>144</sup> My own research has revealed numerous bills proposed by merchants, surgeons, and military officers, as well as by a farmer, a clerk, and a butcher, in addition to those submitted by men denoted as "gentleman" or "esquire." This is somewhat surprising given the total cost for pursuing an Act, including the preliminary expenditures for a divorce *a mensa thoro* and a criminal conversation lawsuit, could be hundreds of pounds, or higher (Wolfram 166-72; Anderson 436-43). Nevertheless, parliamentary divorce became increasingly popular, such that in 1857 Parliament passed the Matrimonial Causes Act, which "created a new secular Court for Divorce and Matrimonial Causes" and codified the parliamentary grounds for divorce (Lord 16-17).

In order to understand the legal framework for this nascent, but powerful, revision to the nation's long-established divorce law, it is necessary to examine the proposed Acts themselves, as well as to review the mechanism's legislative history. This fragmentary historical record suggests that Parliament's decision to circumvent ecclesiastical law was informed by domestic

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<sup>144</sup> The discrepancy between Wolfram's and Anderson's statistics is likely due to a number of factors, including different date ranges, larger/smaller geographical scope (Anderson's numbers reflect the entire British Isles, while Wolfram's do not clearly do so), and differences in the way each scholar categorized social class.



and national concerns, particularly as regarded the apparent increase in extra-marital relationships.<sup>145</sup> Indeed, house journal entries on divorce bills indicate that Parliament perceived itself as both an equitable force charged with “supply[ing] the defect of law” in specific cases (*Cobbett’s* 23:710) and as a social authority obligated to act as a “guardian[] of the public morals” (Hansard 5:428-29).<sup>146</sup> Moreover, the legal archive demonstrates that the lawmakers’ intentions were simultaneously punitive, restorative, and protective. In any particular case, Parliament looked to punish adulterers—i.e., wives—for their sexual transgressions, to reconstitute the “innocent” spouse—i.e., the husband—as a viable marriage partner, and to safeguard the estate against claims by illegitimate children. In a more comprehensive manner, it looked to deter extra-marital sexual activity, promote monogamous legal unions, and preserve the longstanding system of patrilineal and primogenitive inheritance. In other words, parliamentary divorce was not so much a product of modern progressive politics—as represented in the notion that marriage was an equitable and free-willing civil contract—as it was a reinforcement of existing ideas about marriage as the locus of individual and collective stability, the embodiment of public and private morality, and the custodian of female weakness and male authority.

Parliamentary divorce’s traditionalist undercurrent is implied in the content and form of the dissolution acts, which changed minimally over the century’s course. The standard format for the legislative petitions includes three sections: the prefatory recitals, enacting terms, and concluding qualifications. The recitals are commonly of four parts: an introductory statement

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<sup>145</sup> The parliamentary divorce record is spotty in places—only some of the acts appear in the parliamentary debates, and the act database does not clarify whether a particular instrument is merely a bill or passed legislation.

<sup>146</sup> The first quoted reference (it appears) is to Hon. Charles James Fox’s remarks during debate on the Williams divorce bill (1783), and the second quoted reference is to the Bishop of St. Asaph’s remarks during the debate on the Teush divorce bill (1805). As noted in Chapter 1, the debate records do not always supply the first name or title of the speaker. Where possible, I have provided this information based on The History of Parliament’s online database.

that sets forth the party names, the marriage date, and the number and sex of children; a procedural statement that confirms the petitioner has secured the requisite ecclesiastical and common law orders; a description of the adulterous incident(s); and a declaration and prayer for absolute divorce. The latter two parts centralize the wife's culpability and the husband's injury, such that a myopic and highly-gendered version of the marital breakdown emerges. Her "adulterous Behavior," whether a short affair or long-term cohabitation, has "dissolved the Bond of Marriage"; and his being "deprived of the Comforts of matrimony" and vulnerable to the claims of "spurious Issue" requires "the . . . Marriage be declared void." The document's enacting section outlines the legal effects of the wife's offense in rhetoric that emphasizes male right and female disability: "[I]t shall and may be lawful . . . for . . . [the husband] to contract Matrimony . . . with any other Woman or Women," to inherit from and provide dower rights to his future wife, and to legitimize and make his heirs any future children; while the present wife "shall be barred and excluded from all Dower and Thirds" (i.e., her common law inheritance), from claiming property or inheritance rights under the parties' marriage settlement, and from legitimizing children ostensibly born outside the lawful union. The patriarchal bias of these enactments, and the strength of the fictions through which that bias wielded power, are further intensified in the act's so-called "bastardy clause." This provision, a model of excessive legalese, not only renders children born post-separation *filius nullius*, declaring them "Bastards" and "spurious Issue," but also, in its silence on the inheritance and custody of lawful children, exhibits unconditional fidelity to patrilineal descent and paternal right. In fact, it is only in the final section, a short and conditional provision recognizing the wife's right to any "Maintenance, Support, or Benefit" established after the ecclesiastical separation order, that the text extends

equitable consideration outside of the masculine sphere.<sup>147</sup> What the parliamentary divorce act signifies, therefore, is the interdependence between law and male-centered ethics: divorce becomes the natural remedy for female misconduct and the best practice for conserving patriarchal hegemony.

The legislative history on parliamentary divorce, and specifically the record on female-sponsored petitions, makes explicit the relationship between England's divorce law and the country's longstanding conservative domestic agenda. The raw data on bills proposed by wives is in itself revelatory. Wolfram and Anderson both show that, in its almost two centuries as a substitute divorce court, Parliament received only seven bills from female petitioners, the first submitted in 1801; and Wolfram demonstrates that just four of those bills were subsequently enacted, all on aggravated grounds, including incest and bigamy (Wolfram 174-75; Anderson 415 [Table 1]). Moreover, the debates on the initial two bills from wives—Addison (1801) and Teush (1805)—demonstrate the role of the sexual double standard in the legislature's appraisal of women's divorce rights. Indeed, conventional presumptions about female chastity and domestic duty clearly direct Parliament's policymaking on the matter.

In the Addison case, the petitioner wife sought marital dissolution on the grounds of incestuous adultery, her husband having carried on an affair with her sister. The bill's skeptics, although sympathetic to Mrs. Addison's situation, emphasized the problem of public morality and the prevailing code of domestic conduct. The Duke of Clarence, for example, cited, without elaboration, "the effects the practice [of divorce for husbandly adultery] would have on the morals of society" (*Cobbett's* 35: 1429), and Lord Chancellor Eldon suggested its detrimental

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<sup>147</sup> Here, I use the 1755 An Act to Dissolve the Marriage of Richard Glover, with Hannah Nunn his now Wife as the legislative model. The majority of acts that I consulted for this project follow the form, rhetoric, and structure of the Glover-Nunn Act.

impact on “the morals of the public” (35: 1433). Further, Eldon spoke candidly about the manifest difference between male and female infidelity and the moral obligation of wronged wives:

The adultery of a wife might impose a spurious issue upon the husband, which he might be called upon to dedicate a part of his fortune to educate and provide for; whereas no such injustice could result to his wife, from the adultery of a married man; and in many cases, not only a reconciliation might be brought about, but it became the especial duty of a wife to forgive her husband’s misconduct from motives of tenderness, and concern to the interests of his innocent children. (35: 1433)

For these parliamentarians, women bore the burden of communal rectitude and domestic peace, and legal intervention in their marital affliction would pose a troublesome challenge thereto.

While Clarence and Eldon eventually voiced support for Addison’s petition, their consent was strictly based on the rationale of aggravated circumstance: in their estimation, the depraved nature of the husband’s extra-marital activity prohibited marital reconciliation. This notion of special circumstance also surfaces in the rhetoric of the bill’s more ardent supporters, thereby perpetuating the idea that only wifely adultery is a particular threat to the common good. Lord Auckland, for instance, argued that it would be an “injustice” to require Mrs. Addison to “return to the incestuous bed of [her] husband” (35: 1435), but conceded to the “truth” that, in general and “for obvious reasons, conjugal fidelity on the part of the men is less essential to the interests of society than it is on the part of the women” (35: 1434). The larger legislative body appears to have accepted these qualified arguments for wifely divorce, as it enacted Mrs. Addison’s bill and provided her relief from the corrupted marital bond.

Four years later in the Teush case, Parliament confirmed its position that simple adultery does not warrant female divorce. Mrs. Teush, although deemed a “well-deserving woman” and victim of the “grossest infidelity,” was unable to secure a permanent dissolution of her marriage because her husband’s extra-marital sexual activity was not “something peculiarly strong and

striking” (Hansard 5: 429).<sup>148</sup> In opposing her petition, debaters compared the adulterous circumstances before them to those of Addison. The Bishop of St. Asaph and Lord Hawkesbury both argued that the comparison revealed, to borrow from Hawkesbury, a “material distinction”: whereas (Hawkesbury argues) in the Addison case spousal reconciliation “was totally out of the question”—or, in the Bishop’s words, a “moral impossibility” given the “wife herself would be guilty of incest, if she returned to her husband”—here, “it was merely improbable” (5: 429-430). Moreover, Lord Chancellor Eldon returned to the idea of wifely divorce as inimical to the common good: “on those general grounds of public morality,” he “fe[lt] it his painful duty to give a negative to the farther progress of the bill” (5: 431). Only the Earl of Carnarvon is recorded as having objected to this reasoning: “He would ask . . . , whether it was necessary to the public morals, that the husband to the lady in question should be suffered to do every thing that could disgrace her, and deprive her of the comforts of life?” (5: 429-30). Thus, the overall tenor of parliamentary discourse on the issue of marital dissolution by wives signals a deep disconnect between conceptions of the public interest and the reality of women’s personal well-being.

Parliament was not, however, entirely indifferent to women’s welfare in the context of marital breakdown. Between 1771 and 1800, Parliament voted down three legislative attempts to prevent remarriage by the offending spouse—i.e., the adulterous wife.<sup>149</sup> Supporters of the 1771 *Divorce Bill* argued, among other points, that such punitive action would deter female seduction and curb the climbing adultery rate: “[T]his Bill would in some degree check the frequency of adulteries, as no lady could rely on the promises of a lover to marry her in case of a divorce”

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<sup>148</sup> This is a specific reference to the remarks of the Bishop of St. Asaph.

<sup>149</sup> Both Gibson (31) and Anderson (423-24) attend briefly to these House of Lord’s initiatives, noting that the bills always failed in the House of Commons.

(*Cobbett's* 17: 185). Similar arguments arose in debates over the 1800 *Adultery Prevention Bill*.

Lord Eldon, for example, claimed that a prohibition on re-marriage would enlighten and discourage the “simple and silly woman” who otherwise would have “surrendered her virtue” for a promise of marriage (*Cobbett's* 35: 233). And, Lord Auckland, who introduced the bill, argued that “the prohibition of eventual marriages cannot fail to operate as a strong prevention of the crime [adultery] in question” (35: 227). In contrast, the 1771 bill’s opponents argued that the proscription would have a negligible effect on the adultery rate: “[T]his [bill] would by no means stop the frequency of adulteries, as the prospect of future marriage was too distant a temptation to the commitment of it, present passions being evidently the cause” (*Cobbett's* 17: 185).

Moreover, critics expressed concern about the 1700 and 1800 legislations’ inequitable impact on the female sex.<sup>150</sup> The Duke of Clarence, for instance, argued the errant wife’s well-being:

When he considered that the consequences that would follow the operation of such a bill, he could not but consider it as a measure of the most fatal nature, to that description of persons who from the amiableness of their sex, were best entitled to compassion and liberality. His main objection to the bill was, that it contained no provision for the poor unfortunate female who should fall a victim to her own vanity, or weakness. (*Cobbett's* 35: 232)

Furthermore, Lord Mulgrave contended that the proposed statute was not only “oppressive and impolitic in [its] punishment” of his “countrywomen,” but also liable to produce “the most dangerous and scandalous of prostitutes,” an anathema to “the public morals” (35: 256, 258).

The significance of this oppositional discourse lies in its protective sentiment. Like its overtly conservative counterpart, this conversation trades in the traditional ideology of female weakness,

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<sup>150</sup> For a summary of the 1771 objections, see *Cobbett's* 17: 185-86:

It was urged . . . that [the bill] was levelled against the ladies, and would leave those who were so unfortunate as to be seduced in the worst situation possible, in so bad a one, that declaring she should not marry the person she had sinned with, it must either follow, that she would cohabit with him, to the scandal of society, or else must be debarred society, and be deemed improper to marry at all, as none else would probably marry her.

conceit, and passivity, such that the process of marital dissolution, while inflected with concern for the adulteress, was always a forum for male empowerment and female subordination.

Notwithstanding Parliament's accommodation of male-sponsored divorce claims in the eighteenth century, this legal body vacillated on the propriety of dissolution, and it sought, at the period's end, to restrict its legislative application. The principal source of Parliament's late-century unease was the perceived uptick in the number of divorce petitions. The Bishop of Durham, during a speech objecting to the Esten divorce bill (1798), averred the action's pernicious rise: "[T]he evil [of divorce] had . . . increased to such an alarming pitch, that . . . its progress and corrupting influence appeared to be undiminished" (*Cobbett's* 33: 1308).

Parliamentarians were particularly concerned about spousal collusion—the idea that husbands and wives were manufacturing adulterous circumstances in order to procure a divorce for irreconcilable differences shaped the discourse on many proposed bills and orders after 1780. As one example of several, the 1781 Gooch bill debates concentrated on the issue of marital contrivance. Here, evidence was presented to suggest that the petitioner and his wife had premeditated her adultery in order to secure a permanent dissolution—specifically, the House of Lords heard testimony that indicated the couple had arranged for the family cook to witness Mrs. Gooch “in bed with a French officer” (*Cobbett's* 21: 1207). Lord Chancellor Thurlow then articulated the legislature's grave objections to such “fictitious” cases: “Were the present bill to pass upon the idea of redress, where the injury preceded from a preconcert between the parties themselves, and had been committed by previous consent, it would open a door to every species of immorality, to private criminal gratification, to public prostitution, and open seduction” (21: 1211). In response to the apparent escalation of collusive divorce, the House of Lords in 1798 adopted a standing order with three defensive provisions: petitioners would be required first, to

submit documentation of their divorce *a mensa thoro* (judicial separation); second, to submit to a veracity examination; and third, to clarify spousal living conditions “at the time of such adultery” (i.e., whether husband and wife were living separately or cohabitating) (*Cobbett’s* 33: 1360).

While this may seem like a simple case of procedural fine-tuning, the order was clearly undertaken with the intention of halting what Parliament understood to be a growing social, moral, and legal threat.

Moreover, the debates on this order suggest that the legislative impediments to “easy divorce” were, in substantial part, a reaction to large-scale national security concerns. Indeed, numerous parliamentarians related marital freedom to the emergence of political revolution, particularly the turmoil in France. The Bishop of Rochester, for instance, argued that the seeds of the French Revolution were sown in its liberal attitude toward divorce: “They had all seen that the first step taken in a neighbouring country to break down the fences of law, religion, and morality, and to introduce that violence, insubordination and anarchy, . . . was the open and daring profanation of marriage sanctity” (*Cobbett’s* 35: 1557). Thus, many policymakers believed that a steadfast commitment to the general principle of indissolubility would protect the nation from a similar fate. In his advocacy of the standing order, Lord Auckland noted the subversive “system of legalized prostitution and profligacy” that operated in France; he then contended that it was Great Britain’s determination to be “a little less irreligious and less immoral” that had “preserved her existence amidst the paroxysms, and convulsions, and downfalls of nations” (*Cobbett’s* 34: 1560). Similarly, Lord Grenville argued that strict adherence to English law on divorce was necessary to avoid the “fatal consequence” that had befallen other countries—marriage, he reasoned, was “the best bond of public morality and manners,” and, thus, a necessary foundation for a peaceful and prosperous nation (34: 1560-61).



These arguments demonstrate that parliamentary divorce was not intended to be, nor did it become, a progressive legal abstraction—a modern reorientation of the marriage contract—in the long eighteenth century; rather the legislative procedure came to symbolize the conservative values that had for centuries (albeit in distinct iterations) fortified the idea of marriage as a permanent status.

Parliamentary records also reveal that the legislative action for divorce strengthened the paternalistic fictions of domestic governance. Like the standard divorce acts themselves, the debate journals rarely mention child custody or well-being. Presumably, the legislators resolutely adhered to the notion of absolute paternal right. There was, however, a critical discussion of illegitimacy in the deliberations on the Williams divorce bill (1783). Here, the debate was over a bastardy clause that required children born post-separation “to prove their legitimacy” (*Cobbett’s* 23: 710). In support of the clause, Edmund Burke focused on “justice” to Mr. Williams, the “much-injured husband”: “Would [Parliament] oblige him to take home to his parental arms the bastards of his most mortal enemy?—to have them for 21 years under his eye, the monuments of his shame, the pledges of his disgrace!” (23: 713-14). Burke also speculated on the impact of a general prohibition on “bastardizing clauses” in divorce bills: such a measure “would nearly oblige the husbands to a state of celibacy all the remainder of their lives,” for how could they re-marry if they were forced to maintain illegitimate children (23: 714)? In opposition, M.P. Charles James Fox spoke of the children’s hardships, expressing at one point “how extremely hard it would be to suffer children to be bastardized, deprived of their right, and rendered infamous, merely because their father and mother had obtained a legal divorce” (23: 712). Nevertheless, Fox’s principal objection was to the presumptive nature of the provision; rather than have their illegitimacy assumed, Fox argued that children of parliamentary divorce had a

fundamental right to offer evidence against a claim of bastardy in a court of law (23: 710-12).

The outcome of this debate is unclear from the legal record, and historians have suggested that the custom of bastardy clauses in divorce bills eventually fell out of favor (Stone, *Road* 327-28; Wolfram 161). Nonetheless, eighteenth-century lawmakers consistently privileged paternal authority and patrilineal purity and, in so doing, they reinforced historical fictions about maternal right and responsibility, about the markers of child welfare, and about the propriety of legal bastardy.

### **Private Separation**

Like parliamentary divorce, private separation emerged in the seventeenth century as an alternative to canonical dissolution options. Disaffected couples who wished to protect their domestic life from public scrutiny or who did not meet the strict pleading requirements for ecclesiastical or legislative intervention (i.e., adultery and/or cruelty) could execute a private deed of separation, which established the parties' right to live apart from one another and, as I shall consider in more detail, set forth the terms of their estrangement, including the wife's maintenance. The effect of these agreements to separate for what were essentially irreconcilable differences was limited: the legal bond remained intact, rendering remarriage impossible, and the principle of sexual non-access was inapplicable, such that the estranged husband continued in the role of presumptive father. While the number of private separation deeds commissioned in the long eighteenth century is unknown—there being no registration requirement or other form of legal record—it is likely that they were an increasingly popular way for unhappy couples to avoid the severity of England's divorce law.<sup>151</sup>

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<sup>151</sup> For a discussion of private separation's Interregnum origins, its development, and its advantages and disadvantages, see Stone, *Road* 149-82.

The substance and development of private separation and its authorizing deeds is perhaps best understood within the context of the period's conveyancing manuals. One example of several is Edward Wood's *A Compleat Body of Conveyancing, in Theory and Practice*, a three-volume text that ran through six editions from 1749 to 1792-93 and that includes a sampling of model covenants, provisios, and full deeds related to spousal separation.<sup>152</sup> These exemplary clauses and instruments, which contemplate a mutual right of marital renegotiation, demonstrate that legal practitioners and their clients were working to re-interpret marriage as bona fide civil contract—as a voluntary agreement subject to the will of the parties.<sup>153</sup> Moreover, this reproduction of commonplace provisions suggests that the private sector found it necessary to manipulate the fiction of unity of person in order to accommodate the reality of domestic discord. An escape from the “divers Disputes and unhappy Differences” occasioned by the marital bond required the agreements restore to wives a legal identity and remove from husbands certain of coverture's rights and obligations.<sup>154</sup>

This is not to say that the form and rhetoric of model separation deeds materialize as liberal discourse nor that they enact a fully modern agenda for domestic governance; rather it appears that attorneys and their clients often worked within the institution's traditional parameters to achieve legal progress, as opposed to legal revolution. The best indication of this reserve is that private separation never evolved into an attempt at private divorce—the deed's

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<sup>152</sup> Note that Wood's treatise is in three volumes: Part I; Part II, Vol. 1; and Part II, Vol. 2. I reference only Volume 3 (otherwise known as Part II, Vol. 2).

<sup>153</sup> Susan Staves makes a similar point: “Separate maintenance agreements constituted an attempt to make marriage more genuinely contractual, to make it less a status and more a contract, to subvert the rights and obligations of married persons implied in law” (168).

<sup>154</sup> The sections of import from Wood's manual are as follows: “Covenants concerning Marriages, husbands and Wives” (19-24), indemnification provision (345-46), and “Deeds of Separation on Various Occasions” (403-16). The quoted language appears in the initial deed (403).

objective always terminated before the point of full dissolution. Another indication is that the typical separation agreement included a third party male trustee to covenant and receive covenants on the wife's behalf. This addition helped to avoid the problem of coverture's restriction on the wife's contractual rights, while also subjecting her to another form of male authority. In a further nod to coverture's dominion, the documents tend to articulate marital separation and female independence in the language of male consent and forbearance. Thus, one of Wood's representative covenants includes language by which the husband alone sanctions the spousal separation and his wife's legal capacity:

[H]e the said [husband] shall . . . permit and suffer her the said [wife] . . . to live separate and apart from him . . . as the said [wife] . . . at her Will and Pleasure (notwithstanding her present Coverture, and as if she were a Feme Sole and unmarried) shall think fit; and that he the said [husband] shall not . . . sue her . . . in the Ecclesiastical Court, or with any other court, for living separate and apart from him; or compel her to cohabit with him; or to sue, molest, disturb or trouble her for such living separate and apart from him . . .; nor shall . . . without the Consent of the said [wife] visit her, or knowingly come into any House or Place where she shall or may dwell, reside or be; nor send . . . any Letter or Message to her; nor shall . . . at any Time hereafter claim or demand any of the [personal property] . . . which she . . . now hath in her Custody, Power or Possession, or which she shall . . . at any Time hereafter buy or purchase, or which shall be devised or given to her, or shall otherwise acquire; and that she shall and may enjoy, and absolutely dispose of the same as if she were a Feme Sole and unmarried. (20)

Nonetheless, standard covenants, such as this one, are conscious of female liberty: for separation to be equable and valuable, a wife must be free from her husband's ability to sue for the restitution of conjugal rights, to forcibly compel marital reconciliation, and to claim an interest in her personal property. Indeed, although inflected with the force of male right, the private separation deed contemplates its female party as an individual subject vested with an unprecedented degree of physical, economic, and sexual freedom.

Of course, private separation's contractual rhetoric does not guarantee that the parties acted voluntarily or that the estranged wife achieved economic and personal stability. While

many of the agreements stipulate the “mutual consent” of the husband and wife to the separation, they do not detail the circumstances under which the document was executed. Moreover, although Wood’s models include a variety of separate maintenance options—such as a lifetime annuity payable by the husband, the couple’s house and certain of the personal property contained therein, and the wife’s separate estate, as it was constructed in the parties’ original marriage settlement or other legal document—none of the provisions include figures that help to appraise the financial condition of women post-separation (20-21, 403-04). Additionally, most deeds incorporate a debt indemnification clause intended to eliminate the husband’s responsibility under coverture for his wife’s debts or other unpaid expenses.<sup>155</sup> Her exposure in this manner could—and did—lead to serious financial and legal complications. Finally, the deeds’ silence on child custody and visitation suggests that the wife was more often than not deprived of the domestic connection that she most cherished—motherhood, it appears, did not regularly survive the transition to female self-governance.<sup>156</sup> Interestingly, the only clear indications of stability in the practice of private separation are the deeds themselves, which appear to have become conventional by the mid-eighteenth century. Notwithstanding that Wood’s latter editions promise to be “revised and corrected” versions of the first, there are no material content changes on this particular contractual arrangement between 1749 and 1793.<sup>157</sup>

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<sup>155</sup> For an example of this indemnification language, see Wood 22.

<sup>156</sup> Of the numerous model and archived separation deeds that I reviewed for this project, only one late-century indenture included a clause for child custody. Yet, Stone argues “many deeds contained a clause which transferred the custody of one or more of the younger children from the father to the mother” (*Road* 153).

<sup>157</sup> A few notes on my review of conveyancing manuals: First, I reviewed the separation sections of the first and fifth editions (1749 and 1790-93, respectively) in detail. The sixth edition (1792-1793) was a poor digital reproduction; however, it too appears to include the same material. Second, I reviewed two additional conveyancing manuals, one of which—Frederic Coningesby Jones’s *The Attorney’s New Pocket Book* (1794)—included only deeds that appeared in Wood’s text. Third, there were very few separation deeds featured in these manuals (anywhere from three to seven), especially as compared to the number of marriage settlement agreements included in the conveyancing manuals that I reviewed for Chapter 2 (in the dozens). Fourthly, my own archival research of private separation deeds held by the British National Archives further suggests there was contractual stasis in the period.

Stasis was not, however, the state of private separation in the judiciary. For much of the period, common law and equity courts found themselves entangled in a contest among the right of free contract, the appeal of judicial progress, the demands of public policy, and the primacy of legal precedent. In the Court of King's Bench, this controversy culminated in a series of late-century debt cases: separated wives, who had overextended themselves, were sued by their creditors for non-payment of debt; rather than accept liability, the defendants' pled marital coverture. Lord Chief Justice Mansfield, in a trio of holdings interpreted by some of his successors as judicial activism, argued against coverture's application on the grounds, as he writes in *Corbett v. Poelnitz* (1785), of "justice and convenience" (942). For Mansfield, the cultural phenomenon of private separation required progressive legal change. "[A]s the usages of society alter," he argues in *Barwell v. Brooks* (1784), "the law must adapt itself to the various situations of mankind. . . . The fashion of the times has introduced an alteration, and now husband and wife may, for many purposes, be separated, possess separate property," and be severally liable for third party claims (703). Marriage law's evolution accordingly encompasses judicial recognition of inter-spousal contracts and of separated wives' legal capacity. In fact, Mansfield earlier employed these principles in *Ringsted v. Butler* (Lady Lanesborough) (1783) to establish the wife's debt liability:

The agreement of separation [binds] both the parties in the same manner as if they had been sole, and the Court will not suffer either of them to break through it. Under this agreement the wife possesses a separate property. [The wife] is no longer under the control of her husband, and creditors even for necessities have no remedy against him. (613)

Thus, Mansfield's jurisprudence constitutes a public attempt to authenticate the notion of marriage as a civil contract—to reinvest the idea of domestic exchange with the liberal properties of individualism, equality, and free will.<sup>158</sup>

By the turn of the nineteenth century, however, the progressive charge issued by Mansfield on the legalities of private separation had decelerated in the common law courts. The debt case of *Marshall v. Rutton* (1800) reversed twenty-five years of precedent on the issue of women's legal identity post-separation. Here, the Court of King's Bench held that an inter-spousal covenant to live separate and apart did not exempt husbands and wives from the bond of marital coverture: he remained liable for her debts and she continued subject to his economic authority. Lord Chief Justice Kenyon, opining on the court's behalf, argues that *Ringsted*, *Barwell*, and "some subsequent cases" do not constitute viable law: "[W]e find no authority in the books [prior to these cases] to shew that a man and his wife can by agreement between themselves change their legal capacities and characters; or that a woman may be sued as a feme sole while the relation of marriage subsists, and she and her husband are living in this kingdom" (1539). Kenyon also has recourse to the public interest, which he contends is threatened by private contracts that contravene the common law of marriage. By treating spouses as both single and married, the justice reasons, the separation deed "introduce[s] all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character" (1539). For this chief justice, then, the court had a duty to retreat from what he considered an illegitimate

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<sup>158</sup> Another important case coming out of the Mansfield court to address the validity of private separation agreements is *Rex v. Mead* (1758). Here, the allegedly abusive husband sued to have his estranged wife returned to his custody. The court held that the couple's separation agreement, which included a covenant by the husband "'never to disturb [the wife] or any person with whom she should live,'" amounted to "a formal renunciation by the husband, of his marital right to seize [his wife], or force her back to live with him" (440).

and unprincipled juridical approach to the doctrine of coverture and its underlying fiction of marital unity.

Importantly, the *Marshall* ruling was not interpreted as a prohibition on private separation agreements, but rather as a limitation on their enforceability, particularly in cases involving third party lawsuits (Macqueen 366). In fact, there was a smattering of cases that used the doctrine of *stare decisis* to uphold the right of inter-spousal separation in the early-nineteenth century.<sup>159</sup> In the case of *Rodney v. Chambers* (1802), for example, Lord Chief Justice Ellenborough laments the permissive trajectory of dissolution law, but concedes the legitimacy of the private deed:

If it were now a new question, whether any contract could by law be made which tended to facilitate the separation of husband and wife, I should have thought that it would have fallen in better with the general policy of the law to have prohibited any such contract: but they are now become inveterate in the law. . . . [I]t has been so long established, and by so many decisions, that the Courts will give effect to contracts for separate maintenance, that it cannot now be called in question; and those cases, I think, govern the present. (381)

Precedent, it appears, prevailed over judicial sentiment, at least on the general issue of marital separation. Nevertheless, as Eldon's and Ellenborough's rhetoric confirms, the conception of marriage as a permanent and hierarchical union, as well as the idea of the law as the nation's moral authority, never lost its juridical power in the common law courts.

The controversy over private separation also arose in the Court of Chancery. In the leading case of *Fletcher v. Fletcher* (1788), the court refused to enforce a separation deed where evidence, primarily a chain of letters among spouses, family members, and friends, suggested the possibility of marital reconciliation. Justice Buller indicated that while equity retained "general jurisdiction" over the enforcement of separation agreements, "public policy" required the court

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<sup>159</sup> *Black's Law Dictionary* defines *stare decisis* as follows: "To abide by, or adhere to, decided cases."



to refuse “to permit a separation to take place on too easy terms, or without a very sufficient cause” (47-48). However, just four years later in *Guth v. Guth* (1792), Chancery upheld a separation agreement on the wife’s petition, despite the husband’s offer to reconcile. The Master of the Rolls rejected the idea that the public interest necessitated an extensive inquiry into the spousal relationship, and specifically, the circumstances of the parties’ separation. What mattered for enforcement was the mutuality of the exchange and the petitioner wife’s compliance with the agreement’s terms. Opining on the husband’s, respondent’s, contractual position, the Master wrote: “if [the contract] binds his wife, it must bind him, as a mutual agreement; it was his contract as much as hers, and he shall not avoid it, unless he can show a direct violation of it on the part of the plaintiff” (731). Such a liberal view was disappointing to Lord Chancellor Eldon, who took the opportunity in *St. John v. St. John* (1803, 1805) to descry equity’s decision to legitimize contractual separation. According to Eldon, marriage is a “sacred contract,” and one that “cannot not be affected” by a post-nuptial agreement (1194, 1195); to hold otherwise is to repudiate the law’s longstanding policy on indissolubility, the foundation of which is the national interest in “keeping together individual families, constituting the great family of the public” (1195). Nonetheless, Eldon concedes public policy to legal precedent, concluding that “if . . . decision has followed decision, to the extent of settling the Law, I cannot upon any doubt of mine . . . shake what is the settled law upon the subject” (1197). Once again, the judiciary’s reverence for *stare decisis* won the day, as the equity courts adopted a regulatory, rather than prohibitory, attitude toward deed enforcement.

Nonetheless, as Staves argues, the rules for private separation instituted by the late-century court system, signal “a reimposition of deep patriarchal structures on a field of law where those structures had been weakened by contract ideas” (184) From the requirement that a

wife be represented by trustees in the separation agreement to directives against clauses for future separation and against provisions allowing for the wife's assignment of separate maintenance payments, the jurisprudence of private separation was re-shaped to fit more squarely within traditional ideas about marriage and the family (Staves 184-95). In fact, one can argue that with these restrictions the law took the opportunity to reinforce its sustaining fictions—i.e., marital unity, marital permanence, female subordination, and male control.

One of the most onerous “regulations” on private separation involved the issue of child custody and the presumption of paternal right. As earlier mentioned, the first inter-spousal custody case was heard in Chancery toward the end of the long eighteenth century. In *DeManneville v. DeManneville* (1804), the plaintiff wife sued her estranged husband for custody of their infant child. Despite evidence of ill-usage toward the plaintiff and indications that the child was in danger of being illegally removed from the country (defendant being a French citizen), the court upheld the defendant's paternal right. This “early” judicial reticence to recognize maternal authority later extended to cases in which the spouses had voluntarily agreed, through a private deed of separation, to an arrangement of maternal custody and/or care. As John Fraser Macqueen observes in his nineteenth-century family law treatise: “By law the custody of the children belongs as of absolute and exclusive right to the husband; and so strong is this right, that a covenant by the husband to resign the care of the children to this wife is void as contrary to public policy, except where the control of the father would be clearly injurious” (384). Thus, in the leading case of *Vansittart v. Vansittart* (1858), a Vice-Chancellor's Court refused to enforce a comprehensive contractual provision regarding child residence, education, and maintenance on the grounds that “the privilege of the wife to contract as a *feme sole*” in a separation agreement did not extend to the issue of child custody and the husband's “right to bargain” did not permit

relinquishment of his paternal duty (31, 32).<sup>160</sup> Public policy and child welfare was judged best served by the tradition of domestic paternalism, rather than the modern liberal ethos of individual choice and contractual exchange.

Yet, as Macqueen's commentary suggests, the court did revisit its hard line approach to custody when there was evidence of fatherly abuse or misconduct. Therefore, in *Swift v. Swift* (1865), the Rolls Court upheld a separation deed clause whereby the husband, who had been accused of criminally assaulting his seven year old daughter, transferred custody to his wife:

The reason why a covenant to this effect is bad is, because it is found, both by nature and the policy of the law which follow it, to be beneficial to the child that such influence and superintendence should be exerted; but if a case occur, in which this is manifestly the reverse . . . then . . . the same policy which renders such a covenant bad in all other cases makes it good in the particular case supposed. (639)

Finally, a court had recognized a circumstance in which a contractual provision for maternal care served the child's best interests. Although *Vansittart* and *Swift* fall well outside the temporal scope of this project, the two cases are significant for understanding the durability of paternalistic thought in marriage/divorce jurisprudence: at no time in the long eighteenth century and within the context of inter-spousal dissension, did the judiciary consider that the presumptive equation of paternal control with child welfare might be a disastrous fiction, both for the public and the private spheres.

In general, the period's dissolution discourse demonstrates a strong reticence to reassess those presumptions and fictions that had sustained centuries of legal stagnation on the issue of divorce and separation. Even as they developed and sanctioned new mediums for marital disunion, policymakers and adjudicators clung to doctrinal norms that posited marriage as a

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<sup>160</sup> This case was specific to children over the age of seven, as the *Custody of Infants Act of 1839* had opened up the possibility of maternal custody rights for children under seven. For an in-depth discussion of this Act and the events leading to its passage, see Wright, "Crisis of Child Custody."

moral mandate and a domestic and national imperative, and they continued to embrace maxims that conceived of wives and children as subordinate subjects, dependent upon and inseparable from the patriarch and his ancestral or capital estate. Yet, the innovative work of legal practitioners and their clients, particularly in the areas of collusive divorce and private separation, indicates a cultural shift regarding dissolution—a burgeoning movement to eradicate the dogmatism that informed those legal conventions surrounding marital permanence. To better understand this shift, it is necessary to return to the domestic novel, which operated as both a participant in and representative of the movement’s objectives, contradictions, and confusions. Indeed, the novel form, with its protracted interest in the marriage contract’s inner-workings, provided an ideal space within which to promote, interrogate, and revise indissolubility’s legal foundations.

### *Part III: The Domestic Novel and the Fictions of Dissolution*

Although the eighteenth-century domestic novel is primarily interested in establishing the proto-modern marriage, it is also concerned with marital breakdown and dissolution. Imagining the experience of marital discord within the rigid contours of divorce and custody law becomes another way for novelists to represent, appraise, and reinvent the private sphere and its often tenuous relationship to public institutions. Here, I examine the ways in which early- and late-century literary narratives of domestic conflict contend with the presumptions and fictions on which the period’s dissolution law was founded. I argue that, unlike contemporaneous legal discourse on parliamentary divorce and private separation, these texts do not equivocate on the abstract notion that marriage is a universal good, nor do they register ambivalence toward the ideas of paternal sovereignty or lawful bastardy; rather, the novels challenge these conceptions and, in so doing, confront both the doctrine of marital permanence and its legal exceptions. Indeed, separation and divorce are drawn as complex processes, entangled with social, economic,

and educational forces, and their severe inflexibility, especially for the female sex and their children, is revealed to be in need of reform. Yet, the novels do not envision large-scale systemic change, nor do they imagine a course of reconciliation or of separation that is both realistic and fully satisfying. This failure of literary innovation, while perhaps an immediate frustration for its readership, is nonetheless a self-authorizing move, pointing us back to the novels on marriage formation and unification for guidance on how to circumvent the sort of conflict that threatens to destabilize marriage and the family.

In the first half of this discussion, I want to return to the mid-century work of Daniel Defoe and Eliza Haywood. Defoe's *The Fortunes and Misfortunes of the Famous Moll Flanders* (1722) and Haywood's *The History of Miss Betsy Thoughtless* (1751), each presented as a didactic biographical history, narrate female subjectivity through experiences of sexual infidelity, marital rupture and, for *Moll Flanders*, maternal hardship. What emerges from these texts is a picture of dissolution law as potentially adverse to individual development and stability, and consequently, to communal welfare. In *Moll Flanders*, the eponymous heroine must circumvent the law's conservative domestic doctrine in order both to protect the self against moral and material collapse and to construct a happy domestic space. In *Betsy Thoughtless*, by contrast, the eponymous heroine must learn to operate within the law's confines in order not only to secure her moral position, but also to rewrite the feminine ideal in more liberal terms. To be clear, these early novelistic representations of marital discord do not deny the personal and political significance of marriage and the family nor do they reject the developing body of dissolution law in its entirety. Rather, the novels serve to remind us that domestic conflict does not happen in a legal vacuum—that there is a multitude of factors influencing the troubled marriage-family

dynamic, and those factors often fly in the face of the doctrine of marital permanence and its foundational or contingent fictions.

Modeled after the period's popular criminal autobiography genre, *Moll Flanders* chronicles the eponymous heroine's seventy years of lawless adventure and moral repentance. This private history of economic and sexual misconduct is intended, so the Preface avers, to "recommend Vertue, and generous Principles, and to discourage and expose all sorts of Vice and Corruption of Manners" (3, 3-4). The novel arguably succeeds in this enterprise as far as its depiction of Moll's property crimes, for which she is eventually imprisoned and transported; however, the text's didactic representation of marital and parental transgressions, specifically bigamy, adultery, and child abandonment, is more complicated. The novel's moral register recognizes the public and private problem of domestic disorder, particularly among the lower classes, but it resists the idea that formal marriage and a strict dissolution policy are incontrovertible defenses against such disorder or antidotes thereto. In fact, Defoe's pragmatist narrative, with its emphasis on the realities of economic and social disadvantage, as well as its interest in female self-government, most often posits marital separation, infidelity, and familial neglect as normative and necessitous conduct. England's exacting divorce law thus becomes a cipher for a range of domestic fictions.

The chief domestic crime in *Moll Flanders* is bigamy, or the act of contracting marriage while lawfully espoused to another.<sup>161</sup> Moll commits the offense no less than three times in the

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<sup>161</sup> Melissa Ganz provides a useful overview of early modern bigamy law in her essay on marriage and divorce in *Moll Flanders*. She explains that the Bigamy Act of 1603 exempted from criminal punishment those persons who remarried after seven years of uninterrupted spousal desertion and silence; similarly, the canon laws of 1604 "mitigated the punishment" in such cases ("*Moll Flanders* and English Marriage Law," 174). Nevertheless, the Church courts continued to deny the legal validity of a deserted spouse's subsequent marriage (174-75). Therefore, Moll's bigamous conduct, which proceeds throughout her history, is technically criminal only through her third marriage, which occurs one year after her second husband's desertion, but all of her subsequent unions are legally invalid, as evidence never surfaces of that husband's demise.

novel's course, as the second of her five marriages remains a lawful bond through to her history's end. Indeed, this second union, while disrupted by financial disaster and experienced as a permanent estrangement—Moll's tradesman husband, the Linen-Draper, absconds to France after being imprisoned for debt—is never formally dissolved. As Moll reflects, "I was a widow bewitch'd; I had a Husband and no Husband, and I could not pretend to Marry again" (64). Yet, "pretend" she does. Feeling the pressures of economic instability, Moll enters into subsequent marriage contracts without reservation or remorse, at one point musing "[h]e [her estranged husband] was effectually dead in Law to me, and had told me I should look on him as such, so I had not the least uneasiness on that score [i.e., subsequent marriage]" (94). Even for the reformed autobiographer, this brief second union has no binding authority, and the heroine has little culpability for acting outside of its legal confines. The Linen-Draper's necessary and prolonged absence, as well as his permissive attitude toward her remarriage, "freed" Moll from "all of the Obligations . . . of Wedlock"—"no Body could blame me," she implicitly reasons, for "thinking my self" at liberty to "marry again" (126). Moll's rationale, which substitutes contract logic for criminal and moral liability, purports to rewrite marriage as a negotiable compact, one contingent upon material and temporal circumstance.

This liberal perspective recurs throughout the novel, further authorizing informal dissolution procedures and authenticating the idea of autonomous private exchange. Thus, Moll's third marriage, an incestuous union entered into through "no Fault of [hers] nor of his" (342), is dissolved, not by ecclesiastical decree as required, but by informal spousal consent (104). This private democratic action preserves the parties' reputations, protects their children's legal legitimacy, and obviates the expense of judicial intervention (96). Moreover, Moll's fourth marriage, a financial disaster, is terminated by the husband's written notice: "Our Marriage is

nothing,” he writes to Moll; “I here discharge you from it; if you can Marry to your Advantage, do not decline it on my Account” (153). Initially skeptical of the dissolution’s validity, Moll is quickly persuaded by the rhetoric of liberal contract (voiced by Moll’s “Governess,” Mother Midnight)—“as we were parted by mutual consent, the nature of the contract was destroyed, and the obligation mutually discharged”—of her right to marry again (172-73). This contractual perspective then paves the way for a fifth marriage of economic security and moral stability, a union memorialized by Moll in the sentimental terms of “Virtue and Sobriety,” “safe Harbour” and “Deliverance,” and “Ease and Content” (188-89). The progressive attitude also secures Moll’s final reward: a legally bigamous, but morally irreproachable, re-union with her beloved fourth husband, Jemy.

Defoe’s failure to indict or punish Moll’s illicit conduct, and his proleptic references to marriage as a secular and severable contract suggest, not a radical or corrupted view of the nuptial bond, but rather a realistic and pragmatic understanding of its vicissitudes. Indeed, the author represents marriage as a primarily economic union and uses contemporary market conditions (immanently favorable to men and attuned to each party’s fortune) and the truth of female dependence to establish its necessity and to justify its fluidity (see 20-21 and 67-68). Moll’s very survival depends on her sexual autonomy and, in particular, her ability to make or break marriage contracts at will: the life “Circumstances” that “ma[ke] the offer of a good Husband . . . the most necessary Thing in the World to [Moll]” (76), also require the right of withdrawal when the economic or social expectations of the union are breached. It is, after all, the case that poverty and vice are constant threats in Moll’s commonplace world—perpetual hazards to which marriage often provides only a temporary defense. As critics have noted, Defoe’s approach to domesticity in his fiction complicates his traditionalist non-fiction writing



on marriage and the family.<sup>162</sup> In *Conjugal Lewdness: A Treatise Concerning the Use and Abuse of the Marriage Bed* (1727), for example, Defoe promotes the ideal marriage as an affective institution, and he employs the public welfare doctrine and religious ideology to argue against Milton's idea of marriage as "a stated Contract" dissoluble by "mutual Agreement" (118). Nonetheless, in this novel, Defoe subordinates moral and legal questions of marital permanence to the systemic realities of economic disadvantage and social marginalization.<sup>163</sup>

Defoe (as novelist) is not, however, indifferent to the period's patriarchally-inscribed marital ethics nor is he entirely dismissive of the law that seeks to remedy their violation. Moll's history is replete with narratives of and critical reflections on "the Wickedness of the times" (22), as it is expressed in extra-marital sexual activity. Indeed, adulterous behavior infects every regional corner and social class of Defoe's fictional world; its victims both the virtuous wife and the honest husband (see, e.g., 64-67; 108-09; and 134-38). The novel attends to the problem of adultery and the solution of divorce most notably in the subplot involving Moll's fifth husband, the bank trustee, and his first wife, a serial adulteress. The short narrative begins with the

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<sup>162</sup> Some scholarly investigations into the apparent disconnect between Defoe's fiction and his domestic treatise-writing have produced arguments of inter-textual reconciliation. David Blewett, for example, works to unite *Moll Flanders* with Defoe's *Religious Courtship* (1722) and *Conjugal Lewdness, or Matrimonial Whoredom* (1727): "*Moll Flanders* . . . in no way contradicts the principles that we find in Defoe's moral treatises," he argues. "Rather it illustrates one of his central moral doctrines, the utter wrongfulness of marriages of expedience" (87). Additionally, Melissa Ganz reads the novel as an extension of Defoe's argument against Milton's liberal construction of marriage in *Conjugal Lewdness*, a perspective that contributes to her conclusion that Defoe's position on divorce law reform was limited to prolonged instances of spousal desertion ("*Moll Flanders* and English Marriage Law," 167-73). In contrast, scholars such as Watt and Richetti treat the two categories of Defoe's writing as distinct in purpose and premise: Watt argues that, in comparison to his "didactic works," Defoe's "novels reflect not theory but practice" (66) and Richetti contends that Defoe's fiction "generates an institutional force of its own," one that can be distinguished from that of his instructive material ("Family, Sex, and Marriage," 23). For a description of additional scholarship in this vein, see Campbell, "Strictly Business," 66n.9.

<sup>163</sup> Maximillian Novak offers another possible explanation for Defoe's non-traditionalist approach to marriage and divorce in his fiction. Novak argues that Defoe applied to natural law, which took a more liberal perspective on the notion of marital permanence (*Defoe and the Nature of Man* 88-112). In the novel's representation of adultery, divorce, and bigamy, Novak writes, "Defoe was treating a situation in which the positive laws failed to satisfy the demands of nature and reason" (106).

“Circumstances of his [the trustee’s] Case,” which include multiple affairs, two bastard children, and an unrepentant spouse (135), and it concludes with a final judgment, which appears as dissolution and decease, the (now) remorseful wife committing suicide upon notice of the husband’s divorce decree (171). What is significant about this vignette is the way in which it reflects the partisan treatment and punitive rhetoric of parliamentary divorce. The cuckolded husband is given a narrative voice and a legal platform upon which to air and vindicate his grievances, while the adulterous wife is denied any such voice or agency. She is forcibly consigned to the position of “dishonest” “Whore,” condemned by a “final Sentence of Divorce,” while he enjoys the status of “Injur’d and Abus’d” husband, liberated by the wheels of “Justice” (135-38, 171). Even the wife’s death is drawn less as a tragedy than as an unfortunate consequence of the husband’s legitimate legal claim (171). Compare this fate to that of Moll’s married lover, the Gentleman from Bath, who, after recovering from a life threatening illness, simply releases Moll from their arrangement and returns to his marriage with the purpose of “Repentance” and “Reformation” (125, 120-26). Neither divorce nor death is even a remote possibility for this adulterer. With the differential treatment of wifely and husbandly adultery, then, Defoe reflects the contemporary code of marital conduct and its gendered fictions—the code that demanded women’s chastity but excused male vice; the code that presumptively treated wifely adultery as a pernicious moral disease; and the code that prohibited women’s freedom from marriage but acknowledged men’s right of release.

Yet, as he does with bigamy, Defoe exhibits through his heroine a willingness to concede women’s sexual integrity and the law’s patriarchal and punitive force to the paradigm of necessity. Moll herself participates in the nation’s pervasive sexual corruption, acting the role of mistress and the bearer of bastards multiple times in the novel. These intimate relationships,

forged with the knowledge of their immorality, do arouse the heroine's self-censure and motivate her contrition: the autobiographer recalls, "the Reproaches of my own Conscience were such as I could not express, for I was not blind to my own Crime" (124), which promised "more Work for Repentance" (238). Nonetheless, Moll is neither punished at law nor publicly chastised for her conduct—her personal narrative is devoid of lawsuits for criminal conversation and free from threats of divorce, separation, or conjugal restitution. In fact, Moll's affairs, which are accompanied with financial benefits, allow her to avoid the grievous clutches of property crime and to attain the religious maxim "Give me not Poverty lest I Steal" (191). Moll is, therefore, representative of those women for whom sexual immorality occurs "by Necessity," women whose culpability is distinguished from that of the adulterous wife who acted "a Whore . . . by Inclination, and for the sake of Vice" (135). It is this latter embodiment of female moral corruption, Defoe seems to suggest, that poses the most powerful threat to public and private well-being and that accordingly warrants legal and literary discipline; in contrast, Moll and her disadvantaged sort deserve sympathetic treatment and an exculpatory hearing.<sup>164</sup> Thus, in this world, the social and legal presumptions limiting women's sexual agency are reserved for a certain class—for all others, those presumptions are unjust and counterproductive fictions.

Defoe extends the novel's critical investigation of domestic vice and its juridical outcomes to the issues of parental duty and child welfare. Moll's history encompasses six distinct family systems, each of which collapses at the moment of marital, or in one case, extra-marital, disunion. Indeed, once the family unit is disrupted by spousal death, desertion, or mutual detachment, its constituent parts are, with one exception, permanently separated. Four of Moll's

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<sup>164</sup> See Novak for a useful discussion of the way in which Defoe implicates natural law and, in particular, the doctrine of necessity, in his treatment of Moll's sexual crimes (*Defoe and the Nature of Man* 81-82).

eight surviving children remain in the custody of paternal caretakers, while the other four are given over, at Moll's election, to third party custodians, whose role is principally justified by the heroine's economic distress and social displacement (see, e.g., 123-25). Only one child, Humphrey, is provided a name and a voice—the others are erased from the narrative design and the heroine's criminal history almost as quickly as they were introduced. These unidentified, unclaimed, and generally illegitimate progeny thus move silently through the memoir as incorporeal symbols of the legal fiction of *filius nullius*, their very selfhood appropriated by the failure of marital unity and parental obligation. Through their silencing, these characters testify to the deep existential pain of familial estrangement, and they challenge the propriety of a legal construct that promotes filial erasure. Their testimony is only strengthened by the named child's highly-sentimentalized reunion with his mother—the kiss, the embrace, and the “heave and throb” of unremitting “Sobs” (333) giving clear expression to the suffering and injustice born by all.

Notwithstanding the novel's preoccupation with familial strife, the theme of child abandonment and neglect, like that of marital indiscretion, remains outside of the protagonist's repentance narrative. Once again, misfortune and hardship rationale negate the autobiographer's penitential compulsion. Moll's own experience of abandonment at just six months old is presented early on as justification for her unlawful and immoral behaviors: born in Newgate prison, deserted by her criminal mother upon a sentence of transportation, and left unprotected by the state, she was “brought into a Course of Life . . . which . . . tended to the swift Destruction both of Soul and Body” (8). The memoirist's astute (and tendentious) observation signals a transfer of responsibility that permeates every aspect of the protagonist's “criminal” career. As Hal Gladfelder argues,

Moll carries Newgate with her as an inheritance and a contagion. . . . Like her mother, . . . [she] is led along her own moral itinerary by social and material pressures: above all by poverty and the absence of institutional supports. Her mother's crime, itself the effect of material desperation and a corrupting environment, is passed onto Moll in the form of social dislocation and dependency. . . (115-16)

This dislocation and dependency manifests itself not only in criminal behavior, but also in maternal incapacity, or, in Toni Bowers's terms, "maternal monstrosity" (98).

We see this "monstrosity" unfold most profoundly in a transitional anecdote where Moll, estranged from her fourth husband and engaged to the fifth, must decide the fate of her newborn child, whose very existence jeopardizes her chance at economic security through marriage. The scene begins with a disquisition, presented by Moll, on the social problem of maternal desertion, as it is accomplished through illegal—i.e., unsanctioned and unmonitored—third party guardianship. Moll equates the action with criminal homicide and emphasizes the culpability of the morally compromised mother: "I wish all those Women who consent to the disposing of their Children out of the way, *as it is call'd* for Decency sake, would consider that 'tis only a contriv'd Method for Murther; that is to say, a killing their Children with safety" (173). From Moll's perspective, the "helpless and incapable" child is merely a collateral obligation to its "poor" caretakers whose "gain consists in being quit of the Charge as soon as they can" (173, 175). Nevertheless, Moll is quickly persuaded by the conditions of convenience—a term which, for her, "encompasses" the idea of "dire need" (Bowers 107)—and constraint (i.e., by the very promise and necessity of marriage itself) to surrender her infant to a rural nurse (Defoe, *Moll Flanders*, 177). Neither the autobiographer nor her protagonist subject again address the abandoned child or indicate feelings of guilt or shame for its fate. Bowers contends that this scene represents the deep division between Augustan norms of "'natural' or 'virtuous' maternity" and the realities of social class: "In *Moll Flanders*, virtuous motherhood begins to

look impossible except for women with the leisure, means, and desire to ‘give themselves up’ to the care of their children” (98, 111). I would add to this that the novel’s failure to place non-virtuous motherhood within the protagonist’s self-reproach plot is an omission that troubles the law’s paternalistic presumptions about child custody, suggesting as it does that external influences, rather than internal weakness, are to blame for maternal failure.<sup>165</sup>

Critics of *Moll Flanders* have offered a variety of explanations for Moll’s marital and maternal infractions, as well as for Defoe’s reluctance to censure them. The most common account invokes the notion of liberalism individualism and Defoe’s interest in exploring and, in some views, expanding, the boundaries of women’s economic, sexual, or legal freedoms. Lois Chaber, for example, has argued that Moll’s domestic trials are an expression of the novel’s capitalist-feminist critique. Through them, Defoe demonstrates that “bourgeois marriage” is a state of “economic inadequacy” for wives and that children are “yet one more economic handicap for women” (Chaber 218). More recently, Ann Campbell has argued that Moll’s lack of matrimonial and maternal affection reflects her economic and social ambitions—the protagonist recognizes that to become a profitable individual, she must trade the biological and the conjugal family, with their immense “impositions,” for the “surrogate family” and its financial benefit (“Strictly Business,” 52).<sup>166</sup> Whether we are intended to read Moll’s individualism as literary ideal or cultural tragedy is unsettled, but certainly Defoe leaves us with the sense that his heroine’s survival—and even the survival of her progeny—is contingent upon a more flexible and pragmatic construction of the legal ties that bind. To borrow from John Richetti, at the very

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<sup>165</sup> For an interesting reading of the novel within the context of the eighteenth-century “infanticide prevention campaign,” see Zunshine 40-63.

<sup>166</sup> For other such critical accounts, see, e.g., Watt 93-118; Armstrong, *How Novels Think* 36-42; Scheuermann 12-35; and Glover 117-23.

least, Moll's "narrative[] ... practice[s] and sometimes clearly articulate[s] a feminist individualism that subverts or at least qualifies the validity or binding finality of marriage and the family" ("Family, Sex, and Marriage," 23), *the* institutions by which women's identity and liberality is circumscribed in the eighteenth century.

Therefore, as it does in the period's legal and philosophical thought, marriage in *Moll Flanders* retains a crucial position within the politics of domestic order, but that position is precarious. While the moral and social value of the family and the individual are often contingent upon the establishment and continuity of the marital bond, that bond is never certain and its protective capacity always conditional. After all, even Moll's fifth marriage to the bank trustee ends in debt and death, and it is only when Moll receives an inheritance that a final union with Jemy becomes practical and productive. Divorce and adultery thus appear in the novel as pragmatic solutions to economic, social, and even moral hardship, and maternal disability becomes their unfortunate, but unavoidable, consequence. If we can pinpoint any clear argument from Defoe, it seems to be that national and domestic wellbeing depend, not so much on marital permanence and the enforcement of dissolution law's presumptive fictions, but on economic independence, social mobility, and institutionally-supported female autonomy.

Haywood, writing a quarter of a century after Defoe and in a period increasingly interested in establishing the feminine ideal as a figure of virtue and passivity, artfully follows Defoe's relatively candid criticism of the law's prejudice in matters of marriage and divorce. As discussed in Chapter 2, *Betsy Thoughtless* is an early female bildungsroman in which marriage functions as the catalyst and the reward for the eponymous heroine's moral and social development. Her subjective evolution is not, however, fostered through models of marital contentment, but rather through episodes of inter-spousal conflict. Indeed, Haywood's failed

marriage plots offer Betsy a meaningful context within which to observe and negotiate the tension between individual desire and social expectation, eventually ushering her into a happy and affective nuptial union. Moreover (and of particular interest in this chapter), these plots, which explore the legal mechanics of divorce and separation, contribute to the period's literary jurisprudence on marital dissolution.

The novel's first failed marriage plot dramatizes the early stages of judicial and parliamentary divorce for wifely adultery. Betsy's benevolent guardian, Mr. Goodman, plays the role of "much-injured husband" and her female chaperone, Lady Mellasin, performs that of "guilty and unfortunate" wife (390). Once having discovered his wife's infidelity, Goodman evicts Lady Mellasin from their home and, in consultation with legal counsel, secretly begins divorce proceedings (390). The exiled wife only learns of her husband's plans when she is served with "a citation to appear before the doctors of the civil law" in a criminal conversation lawsuit (a crucial step in proving divorce) (391, 391-92). As we shall see, this legal action and the divorce that it anticipates do not extend beyond the petitionary stage; nevertheless, the novel's partial sketch provides critical insight into the motivations, intentions, and anxieties that precipitate and follow marital breakdown. As the novel's heroine, Betsy is brought to understand the problem that wayward female sexuality poses to the domestic space; and as its readers, we are invited to see the complexity of domestic relationships, as well as to assess the propriety and utility of the body of jurisprudence by which they are regulated.

Reflecting her legal-historical context, Haywood presents the Goodman-Mellasin divorce as a punitive action instituted by the persecuted husband against the licentious wife. Indeed, Goodman, who was a loving and tender spouse, acts with "his whole mind [bent] on doing himself justice" (265) and threatens Lady Mellasin with "the punishment her crimes deserved"



(391). Notably, the rationale behind Goodman's legal prosecution is not the early modern concern for patrilineal preservation, but rather its late-century replacement—the husband's right of domestic comfort. Lady Mellasin's illicit behavior is interpreted by Goodman as an assault both against the marriage's affective bond and his emotional self—as a near criminal erosion of partnership and person. Goodman posits that the only remedy for this marital offense is a permanent disunion: “[T]he most terrible vexation I endure dwells in the consideration that she is still my wife;—were once that name erased, I think I should be easy” (266). Yet, this husband's well-warranted cause is interrupted when his legal anxieties bring him to physical collapse. In fact, so great is his fear of the social scrutiny and public censure occasioned by a divorce proceeding—of being the “talk of the town,” the subject of “whispers,” “grimaces,” “ridicule,” “pity,” and “contempt”—that he dies before his case can be adjudicated (301, 301-03). What is significant about this sketch is not so much Haywood's apparent concern for a husband's right to seek marital dissolution, but rather the skepticism with which she approaches his ability to pursue that right successfully. In this literary world, the law is not an isolated institution working objectively to redress legal wrongs; rather its doctrine and its processes are always already entangled with external moral policy and the practice of social judgment. Divorce (even for the cuckolded husband) is, therefore, a chaotic procedure, one that, like the opposing doctrine of marital permanence, is not always well-positioned to advance individual and domestic welfare.

Haywood's critical account of eighteenth-century divorce law is further developed in her representation of the novel's female domestic offenders—and Betsy's narrative foils—Lady Mellasin and her daughter, Flora.<sup>167</sup> These morally and sexually transgressive characters, while

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<sup>167</sup> For an insightful discussion of Flora (and other of the novel's female characters) as a foil for Betsy, see Hultquist, “Haywood's Reappropriation,” 149-56.

symbols of female corruption, are also, much like Moll Flanders, memorials of the hardships to which many women were subject in the period. The pair is introduced into the novel with a brief description of the dire economic circumstances by which they were brought into a domestic compact with Goodman: She, Lady Mellasin, was the “relict of a baronet, who having little or no estate, had accepted of a small employment about the court, in which post he died, leaving her ladyship and one daughter, named Flora, in a very destitute condition. Goodman, however, had wealth enough for both, and consulted no interest other than that of his heart” (33-4). How were these women to survive, the narrator seems to suggest, if not through the mother’s strategic and mercenary marriage?

Haywood extends the sentimental and political undertones of this very practical query into the characters’ secondary narratives of sexual impropriety and, in Lady Mellasin’s case, of testamentary fraud (she forges Goodman’s will to better provide for herself and Flora). Indeed, Lady Mellasin’s story is predicated on her experiences as the object of men’s avarice and artifice—she is romanced and blackmailed into marital deception by a mercenary lover (258-64), fleeced and then “cruel[ly]” “left alone to bear the brunt of all the offended laws inflict on forgery” by her lawyer and his accomplices (513), and deceived into a sham reconciliation by Goodman and his lawyer (390-91). Her behavior is, therefore, just as much a consequence of external coercion as of internal degeneracy. Correspondingly, Flora’s narrative is informed by the sexual double standard.<sup>168</sup> She is conscripted into the role of fallen maiden by a poor education and a lack of fortune, and she is confined to this desperate condition by her lover’s, Mr. Trueworth’s, romantic indifference. He perceives of their affair as “a transient pleasure” (396) that is easily abandoned for a more virtuous and affluent formal union, while Flora

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<sup>168</sup> For an extended discussion of the sexual double standard in *Betsy Thoughtless*, see Oakleaf.

understands the illicit relationship as a binding precursor to the couple's eventual marriage (or, at the very least, the beginnings of a permanent affair) (395-400). When she learns of his decision to marry another, this ruined figure undergoes emotional and psychological breakdown, vacillating among the "the lethargy of silent grief," "the wildness of . . . fancy," and the furies of artful stratagem (398, 398-400, 448-54). Importantly, both mother and daughter share in the fate of other despoiled women, as their narratives conclude with exile from home and homeland. Lady Mellasin negotiates her "banishment" to Jamaica where "reputation was a thing little regarded," and Flora, living in London "without reputation,—without friends,—without money," realizes her impossible position and reluctantly follows (522-23). It is a conclusion that bespeaks England's inability, even unwillingness, to resolve the variety of circumstances by which women are driven, and then confined, to the country's moral, social, and geographical margins.

In fact, the entire narrative arc for these corrupted figures attests to the nation's institutional shortsightedness on issues of domestic—i.e., marriage and the family—policy. The law, in particular, emerges as a fundamental component of England's large-scale failure to regulate the private sphere in a discerning and just manner. With Lady Mellasin, Haywood complicates the one-dimensional adulteress of the period's legal writing, and in so doing, emphasizes the ethical tensions that underlie judicial and parliamentary divorce doctrine: specifically, the problem of adjudicating or legislating wifely adultery from a gendered, generalizing, and disciplinary perspective. Similarly, with Flora, Haywood undermines the law's conviction that women's moral/sexual weakness is *the* principal factor in domestic breakdown, subtly pointing instead to economic necessity, educational inequity, and male prerogative. In fact, Haywood's depiction suddenly, albeit indirectly, renders the law's punitive and patriarchal divorce policy of uncertain institutional and cultural value.

Haywood continues to undercut England's divorce law in the novel's second failed marriage plot, which dramatizes another common ground for marital dissension, husbandly cruelty and infidelity. Here, the "much-injured wife" is Betsy herself; and the "tyrant" husband is the profligate Mr. Munden (568). As discussed at length in Chapter 2, Betsy and Munden's marriage is doomed from its inception: his staunchly patriarchal view of marital unity clashes with her egalitarian perspective, and the two live in either a state of intense hostility or one of total apathy. After a series of abusive confrontations, one of which ends in the "massacre" of Betsy's beloved pet squirrel, Betsy and her former guardian, Lady Trusty, discuss the possibility of a legal estrangement (509, 509-12). Rather than concur with the mistreated wife's inclination to be "separated forever, from a person, who, she was . . . convinced, had neither love nor esteem for her" (512), the pragmatic mentor argues a wife's conciliatory duties and her disabled socio-legal position: "all you can accuse him of will not amount to a separation;—besides, consider how odd a figure a woman makes who lives far apart from her husband" (511). It is not until Betsy discovers Munden guilty of an extra-marital affair that separation materializes as a viable option in so far as it receives the support of the heroine's brothers and former guardians.

What follows is a private legal battle informed by the parties' conflicting attitudes on marriage. The legal hostilities begin with a letter wherein Betsy announces her decision to leave the marriage in terms that imply a breach of contract and irreconcilable differences:

*Sir,*

As you cannot but be sensible, that the mutual engagements between us have been strictly adhered to on my part, and almost in every particular falsified on yours, you ought not to be surprised, that I have at last resolved to put a final end to a way of life so unpleasing in the eyes of Heaven, and so disagreeable to ourselves . . . ; I therefore fly for ever from your ill-usage, and once more put myself under the protection of my friends, to whom I also shall commit the care of settling with you the terms of our separation. . . .

Your much-injured wife,  
B. Munden (594)

In response, Munden advances the body of rights granted husbands under legal coverture and reminds Betsy that “a wife who elopes from her husband forfeits all claim to every thing that is his, and can expect nothing from him till she returns to her obedience” (596). Munden’s intransigence prompts the Thoughtless family to engage the services of the family lawyer, Mr. Markland. This forthright legal advocate is skeptical of Betsy’s claims under “the letter of the law”: “the ill-usage she had sustained,” he warns, is, in all probability, insufficient to warrant the legal intervention—i.e., judicial separation and “separate maintenance”—that she “certainly deserve[d]”; however, Markland expresses “hope [that] there may be means found to bring [Munden] to do [Betsy] justice” (597). Accordingly, he proposes to Munden that the parties execute a private separation deed (598). When Munden refuses to countenance the proposal, Markland appeals to his vanity, pride, and ambition, cautioning him about the “publick talk” and the social “ridicule” that often accompanies legal proceedings on domestic matters and arguing “the unreasonableness, the injustice, [and] the cruelty” of a husband’s refusal to negotiate private terms (598-99). In fact, Markland maintains, “denying” one’s wife separation maintenance “[is] altogether unprecedented among persons of condition” (599). Yet, Munden’s contempt for Betsy’s position is unyielding and, rather negotiate an amicable settlement, he threatens to “procur[e] a warrant . . . to force [Betsy] immediately home” (598; see also 603). The contest of

rights continues until Betsy is coaxed out of her self-imposed exile and into marital reconciliation by Munden's sudden and fatal illness.

As earlier suggested, placing this dissolution storyline in its legal context reveals the novel as deeply critical of the period's separation law. In Betsy's struggle to achieve an equitable estrangement and recover her individual selfhood, Haywood both records the subjective impact of bad marriage and attacks the limited grounds on which wives are lawfully able to extricate themselves therefrom. Indeed, her portrayal of Betsy's suffering not only challenges the idea that husbandly adultery is somehow different—less traumatic, less repugnant—than wifely adultery, but also criticizes the notion that a wife's duty is either to pacify or patiently endure marital conflict. Moreover, the certainty which Haywood vests Munden's favored legal position confirms that the law is not a wife's protector, as Blackstone would later assert, but rather a husband's enforcer. Equity's private separation doctrine, with its lack of clear and authoritative precedent, cannot protect estranged wives against the common law processes that would return them to violent and licentious domestic spaces. Yet, perhaps the most salient critique that Haywood offers involves the law's failure to provide a safe, confidential, and respectable forum for wives and husbands to arbitrate their differences and renegotiate their contracts. As in the Goodman-Mellasin divorce plot, Haywood here identifies the *social problem* of *legal remedy*: separation, when pursued in the courts, promises public shame and communal reproach. Additionally, while Haywood projects the normative quality of private separation “among persons of condition” (599), her inability to imagine such an intimate process for her heroine indicates its dubious social authority. Even the law's private workaround is not, it seems, the liberating possibility that it appears in certain histories of eighteenth-century divorce law.

Notwithstanding that the novel's failed marriage plots diverge from their early legal intentions, each is important for shaping the heroine's subjective development and for cultivating the reader's legal sensibilities. The Goodman-Mellasin divorce provides a structure for exploring traditional conceptions of female vice and for articulating the antithesis into which the novel's heroine is to evolve. As Christopher Flint argues, the unreformed Betsy has a "symbolic connection" to the wicked Mellasin women and it is one "that [s]he must consciously exorcise in order to save herself" (217). But, the narrative also urges us to consider the ways in which the law's juridical and ethical purpose—its apparent commitment to the social good, both private and public, and to fair judgment—is compromised by its messy relationship with prevailing codes of conduct. The Munden-Thoughtless separation, on the other hand, provides a framework for articulating the bourgeois feminine ideal and for stipulating the moral limitations to the heroine's evolution. Indeed, Betsy's experience of failed marriage and, specifically, her voluntary movement into the role of separated wife re-orientates the meaning of paradigmatic womanhood, such that passive submission to active misconduct acquires a negative moral value. Of course, Betsy does reconcile with her estranged husband, and it is a narrative choice that some scholars have viewed as a re-capitulation to bourgeois sentiment on proper femininity. Chris Roulston, for example, argues that "Miss Betsy's new authority lies specifically in her return to marriage, not in the seeing through of her legal separation. It is ultimately Miss Betsy's loyalty to her bad marriage that makes her fit for her good one" (165). While Roulston's assessment is certainly valid, it is crucial to point out that Betsy's loyalty is engendered both by her distinctly feminine feelings of "compassion" and "duty" *and* by Munden's request for forgiveness and "solemn protestations of future amendment" (614-15). Thus, Betsy's insistence on her legal rights has, to some measurable degree, shifted marriage's dynamic away from the

despotic toward the contractual. That said, this shift is not responsible for advancing Betsy toward her happy ending; rather, a marriage of love and contentment comes about only through Munden's death and Betsy and Truworth's romantic restraint. The reader is, therefore, invited to understand separation law as being of limited application—here, it functions only as an inducement to a marital reconciliation that is, at best, tolerable. It is only an informed and rational courtship process, Haywood suggests, that guarantees a good marriage.

The revelatory purpose that guides Defoe and Haywood's domestic novels acquires an intensely reformatory value in the work of later-century novelists. Elizabeth Inchbald's *A Simple Story* (1791) and Mary Wollstonecraft's *The Wrongs of Woman: or, Maria. A Fragment* (1798) continue to examine the problems that England's developing body of dissolution law poses to the private and public good, but they do so within a distinctly subversive agenda. Written during the French Revolution and within the Jacobin literary tradition, these texts interpret the domestic sphere as an oppressive, tyrannical, and entirely masculine space—a space authorized by the conservative fictions and presumptions that inform extant law on marriage, divorce, and child custody. Inchbald's and Wollstonecraft's masterful renderings of the despotic household and its legal underpinnings lends their work a sort of remedial urgency: we are called, with exigence, to witness the suffering of its female inhabitants and to recondition the legal framework that facilitates male tyranny in progressive and rational terms. While neither *A Simple Story* nor *Maria* itself represents the process of legal revolution, each text offers a compelling argument for substantive change.

*A Simple Story*, like other domestic fiction of its generation, is ostensibly a novel about female education; however, as Terry Castle argues, it is also “a story of law and its violation” (294). The narrative's mother and daughter heroines—Miss Milner, later Lady Elmwood, and



Mathilda, respectively—represent opposing educational systems, and the novel’s plot of domestic discord and legal divide functions as the flash point between those systems. Lady Elmwood’s extramarital affair and the ensuing separation of wife and daughter from husband and father engender a transition of genre and pedagogy: the narrative moves from the sentimental cultivation of the mother to the Gothic discipline of the daughter.<sup>169</sup> Within this frame, *Inchbald* both recalls and challenges the presumptions—or, the fictions—that accompany eighteenth-century legal discourse on divorce and separation. Even more significantly, she poignantly contests the disabling fiction of *filius nullius* to which children implicated a marriage’s demise could be subject.

The first half of *Inchbald*’s novel explores the effects of a traditional upper-class—or “improper”—female education. Its heroine, Miss Milner, is an orphaned heiress living under the guardianship of her father’s most “intimate” friend and a Catholic priest, Mr. Dorriforth (59-60). “[I]ndulged” from an early age “in all her wishes to the extreme of folly,” and instructed “in all the endless pursuits of personal accomplishments” (69, 60-61), Miss Milner exhibits the paradigmatic qualities of unruly liberal subjectivity: she is independent and willful, witty and proud, vain and incautious. She is also, as other critics have noted, suffused with sexual desire and inclined toward romantic love.<sup>170</sup> She revels in the attentions of many suitors—“some coxcombs, some men of gallantry, some single, and some married” (65)—and steadfastly abides by the principle of affective marital choice: “I shall . . . not consent to marry a man whom I could never love” (77). Like so many of her literary predecessors who, to borrow from Jennifer Golightly, are “embodiments of the [intellectual and sexual] potential of woman” (40-41), Miss Milner

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<sup>169</sup> Anna Lott reads the novel’s sentimental and Gothic undertones as indicative of just “how quickly novelistic conventions were changing” in the period (24).

<sup>170</sup> See, for example, Morillo 201, 211-23; Golightly 67; Spencer 158-61; and Kelly, *English Jacobin Novel* 80-82.

threatens the conservative masculine space in which she resides. The novel's male authorities, Dorriforth and his mentor Sandford, therefore, agree that "a proper match should be . . . sought out for her, and care of so dangerous a person [as she] given into other hands" (92). Marriage, the novel suggests, is the best corrective for an education too free, too permissive, too generous.

The marital union that Inchbald imagines for the "dangerous" Miss Milner purports to fulfill both her heroine's amatory inclinations and Dorriforth's reformatory agenda. Indeed, Inchbald writes Dorriforth himself as the object of Miss Milner's desire—"I love him with all the passion of a mistress, and with all the tenderness of a wife" (117)—and she returns her heroine's devotion by conceiving of this hero as an "impassioned" guardian-lover (172). After a sequence of narrative conveniences, confusions, and entanglements, which includes Dorriforth's inheritance of the Elmwood title and estate and subsequent dispensation from his monastic vows, Inchbald unites guardian and ward in a marriage projected to be "for the welfare of . . . both" and for the improvement of the latter (218). The ceremony's Catholic officiant, Sandford, presents the heroine's "marriage vows" as "sacred" and "binding" "promises of her reform," and he pledges to Miss Milner that her submission to "the dominion of those vows [and] to a husband of sense and virtue" will ensure that she is "all that [Sanford], [Dorriforth], or even heaven can desire" (218). Although Miss Milner does not verbally acquiesce to these conditions, we have no reason to suspect that she stands in objection to them (219). Thus, the marriage contract that concludes Volume II has a distinctly hybrid quality: it an affective, egalitarian arrangement underwritten by terms both paternalistic and authoritarian.

Although calculated to promote individual welfare, the marriage that closes Volume II opens Volume III irreparably broken. Within the span of one narrative page and seventeen unrecorded years of conjugal life, the union has been destroyed by wifely adultery and husbandly

despotism. Lord and Lady Elmwood, the narrator reveals, have lived for ten years in a state of uninterrupted estrangement, their separation occasioned by Lady Elmwood's affair with a former suitor and maintained by Lord Elmwood's incapacity for forgiveness. He is now "a hard-hearted tyrant" ensnared "in the deep torments of his revenge" (222, 224); she is a wasted adulteress shattered by "her guilt" and steeped in "her shame" (224); and their daughter, Mathilda, is a "perpetual outcast" forced to share in the pain and punishment of "her mother's crimes" (224, 222). Although the collapse of this once happy domestic unit is never formalized—Lord Elmwood is apparently "prevented" from seeking a divorce by his regard for Lady Elmwood's father (234)—it is experienced as an unconditional dissolution. Mother and daughter are physically, financially, and emotionally cut off from husband and father until Lady Elmwood's much anticipated death in the volume's second chapter.

Although brief (only two short chapters), Inchbald's sentimental-Gothic dissolution narrative complicates and humanizes the experience of marital breakdown, and in so doing, implicitly targets the ethics of parliamentary divorce. The Elmwoods' marital history and Lady Elmwood's present suffering invite the reader to identify her character as a victim of education and circumstance, rather than an agent of sexual vice. We learn from the narrator that the heroine's infidelity occurred during the hero's extended expedition to the West Indies. She recalls, "The dear object of [Lady Elmwood's] fondest, truest, affections was away, and those affections painted the time so irksome . . . so wearisome that . . . she flew from the present tedious solitude, to the dangerous society of one, whose every care to charm her, could not repay her for a moment's loss of him, whose absence he supplied" (223-24). This absence, the narrator suggests, "provoked" that restless and impassioned "disposition" inculcated by Lady Elmwood's early education and unsuccessfully corrected by her eventual marriage: this female "heart"

simply “was never formed” for the “anger” and “indifference” produced through marital separation (223).<sup>171</sup> Inchbald’s decision to foreground these external influences in her representation of wifely adultery facilitates a deeply sympathetic response to her heroine. Lady Elmwood’s emotional pain and physical demise, as consequences of behaviors ill-advised but practically inevitable, engage the reader’s ethical sensibilities, marking the heroine’s deadly fate as unjust punishment: it is eminently clear, as Mr. Sandford pronounces, that “[she] was not born to die *the death of the wicked*” (227). Jo Alyson Parker argues that the narrative’s “asyndetic leap from wedding to deathbed”—its great (and somewhat inexplicable) shift in time and tone—“is indicative of Inchbald’s attempt to wrestle with a culture that both castigates women for their frailty and disallows them the means to improve their lot” (265). I want to suggest that with this sentimental leap, Inchbald advances a larger institutional issue for cultural judgment, specifically the ethical authority of a legal divorce process determined by patriarchal politics and motivated by a sexual double standard. Where is the moral and social value in a system that always already presumes the immorality of wifely adultery, the corrupted culpability of its female agent, and the propriety of punitive action?

Inchbald sustains the dissolution episode’s sympathetic register, as well as its critical legal resonance, through the Gothic convention of the despotic husband. Rather than an innocent victim of female corruption, Lord Elmwood is cast as a figure of “implacable rigour and injustice” (222).<sup>172</sup> Indeed, the “shades of evil” that had forever impressed his “nature,” often manifesting themselves in the form of a dark obstinacy, proliferate in the wake of Lady

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<sup>171</sup> Scholars have offered a variety of explanations for the Elmwoods’ marital breakdown. For example, Eve Tavor Bannet focuses on Lord and Lady Elmwood’s “struggle for power” (80); Eun Kyung Min looks to the characters’ differing views on “language, commitment, . . . love,” and “the marriage vow” (120); and John Morillo argues Lord Elmwood’s “failure to satisfy [his wife]” emotionally and sexually (221).

<sup>172</sup> For a more sympathetic reading of Lord Elmwood, see Breashear’s essay on the novel as a reflection of contemporary gender constraints on men.

Elmwood's sexual misconduct (85, 222). The narrator explains that he is uncompromising both in his hatred for his wife and in his conviction against marital reparation. Not only does he refuse to forgive Lady Elmwood when "prevail[ed] upon" by "his dearest, most intimate, and most respected friends," but he seeks to deny her very existence, as well as that of their daughter: "Beholding himself separated from [Lady Elmwood] by a barrier never to be removed, he vowed . . . not to be reminded of her by one individual object; much less by one so nearly allied to her as her child" (224-25). Lord Elmwood's informal efforts to erase the domestic contract encompass extreme acts of paternal hostility. He determines "never to see, [nor] hear of" Matilda again (228), and he divests her of her ancestral title and estate, designating in her stead his nephew Henry Rushbrook. Importantly, Inchbald does not implicate the logic of patrimony in her thorny hero's dissolutive resolutions—Lord Elmwood is not, for example, interested in remarriage or in reproduction—nor does she give a compelling voice to the cuckolded husband's domestic discomfort (see 222-42). As Golightly observes, any "hints that Lord Elmwood's reserve and distance as well as his severed ties with his daughter are the result of a need on his part to protect himself from being hurt again do little to sway the reader in his favor" (69). In fact, Inchbald invests Elmwood's motivation with such resentment and retribution that marital dissolution for wifely adultery becomes an unwarranted and excessive expression of male authority. The ethical sentiments and social rationale that validate parliamentary divorce doctrine—justice to the injured husband, patrilineal preservation, and domestic wellbeing—are themselves revealed to be fictions.

These fictions resonate throughout the novel's second half where Inchbald offers an alternative story of female education, one informed by both the tragedy of marital dissolution and the collateral experience of parental abandonment and neglect. Volumes III and IV focus on

the experience of the Elmwoods' daughter Matilda, who unlike her mother, is "[e]ducated in the school of adversity" (244). This heroine's difficult story of maturation commences after Lady Elmwood's death, by which she is "abandoned of every support but through [her estranged father]" (229). Lady Elmwood, in a final act of self-recrimination and (Sandford speculates) in the "distant hope" of establishing "some little tie between [Lord Elmwood and Matilda]," has disavowed the maternal bond (229). Rather than execute a testamentary will that secures her separate estate for the legitimate daughter, the disgraced and dying wife pens a request to the estranged husband and father that relinquishes his parental right (and arguably hers) and petitions his goodwill: "Be her host; I remit the tie of being her parent.—Never see her—but let her sometimes live under the same roof as you" (236). Lord Elmwood, moved by his "reverence" for Lady Elmwood's father, agrees "to suffer [Matilda] to reside occasionally at one of [his] seats" on the condition that she "avoids [his] sight, or the giving [him] any remembrance of her" (238). Thus, Matilda develops under the shadows of her mother's dishonor and her father's enmity. Removed from society, silenced into submission, and dispossessed of property and identity, she grows into the bourgeois feminine ideal, a model of passivity, virtue, and chastity.<sup>173</sup>

Inchbald's second education narrative is not, however, an endorsement of Gothic discipline; rather, it is a scrupulous investigation into the burdens imposed on children of marital conflict and, in particular, the pressures and pains associated with filial erasure. Virginia Cope convincingly interprets Matilda's experience of displacement and dispossession within the context of Robert Miles's work on "the Gothic [as an] investigation of fragmentary subjectivity": "Stripped of economic and social identity even as she inhabits unseen her father's castle, Matilda

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<sup>173</sup> For a compelling argument about the relationship among property (dis)possession, female education, and the novel's form, see Cope 65-85.

is that being Miles describes as the ultimate Gothic: ‘the self finding itself dispossessed in its own house, in a condition of rupture, disjunction, fragmentation’” (70).<sup>174</sup> This “condition” manifests itself in emotional distress, psychological trauma, and physical decay. Matilda is frequently described as being afflicted with, or in states of, “awe, and terror,” “fear and anxiety,” “dread,” “melancholy,” “dejection,” “misery,” and “despair.”<sup>175</sup> Moreover, her corporeal person is said to suffer from a “decline[]” in “appetite” and a “los[s] [of] all . . . colour” (245)—to be “very thin” with a “complexion . . . of a deadly pale” (313-14). The injustice of Matilda’s dislocation—and, in particular, of her involuntary and *fictional* transition from legitimate heir to *filius nullius*—is further recognized in the figure of her male substitute. Rushbrook, the narrator confides, understands that “in *reality* he was the dependant, and she the lawful heir” (275, emphasis added). It is a truth by which this beloved nephew-son is deeply troubled: “Lady Matilda . . . is an object that wrests from me the enjoyment of every blessing your kindness bestows,” he informs Lord Elmwood. “I cannot but feel myself as her adversary . . . who supplies her place, while she is exiled, a wanderer, and an orphan” (301). Lord Elmwood is not, however, to be moved; and the transgression of Matilda’s displacement plagues the novel’s second half, revealing with distressing clarity the broad expanse of the law’s *filius nullius* doctrine. Indeed, with her Gothic story of informal bastardy, Inchbald demonstrates the way in which this legal fiction has breached its institutional boundaries to become a punitive measure in the private system of domestic justice.

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<sup>174</sup> Other scholars likewise have emphasized Matilda’s spectre-like existence, finding it to represent the period’s gender politics. Candace Ward, for example, argues that Matilda’s “invisibility” reflects her position “as the product of reactionary attitudes towards sensibility and sexuality” (“Inordinate Desire,” 13); and Eva König (who cites Cope’s use of Miles) contends that it “indicates the diminishing place of women in patriarchal society” (134-35).

<sup>175</sup> See, e.g., 242, 249, 246, 263, 292.

The oppressive educational system that Inchbald introduces in Volumes III and IV also confronts the common law presumption of paternal right. Lord Elmwood's initial repudiation of, and later restrictions on, his legal duties to protect, maintain, and educate Mathilda raise doubts about the legal doctrine that establishes child custody solely in the father. Those doubts are only intensified by Inchbald's haunting depiction of the disowned figure's vulnerability to sexual corruption and violence. Lord Elmwood's decision to dispossess Mathilda of title, estate, and parental guardianship exposes her to male perfidy in the form of the villainous Viscount Margrave. This Gothic figure, motivated by Mathilda's displacement, proposes a sexual contract, which includes a provision granting "the discarded daughter" access to the would-be lover's "whole fortune" (310-11). It is a fair proposal, Margrave reasons, given Mathilda is no longer "acknowledged, and under the protection of her father" (311). Mr. Sandford, to whom the contract is presented, rejects the offer with the suggestion that it is "better [to] remain in poverty" than to be "conspicuous only for . . . vice and folly" (311). Margrave is not, however, deterred. He and his companions recognize that Mathilda is "a defenceless woman" and, as such, they determine to use "open violence" against her (326). What follows is the classic Gothic plotline of kidnapping, attempted rape, and heroic rescue—in this instance, the forsaken daughter is saved from ruin by the despotic father. Although the violent episode concludes with filial reconciliation—Inchbald restores Mathilda and Lord Elmwood to the condition of "love and duty" (335-36)—it is impossible to disregard the problems of bastardy and of unregulated paternal power. In fact, with the conventional Gothic plot of sexual coercion, Inchbald not only further challenges the acknowledged legal fiction of *filius nullius*, she also destabilizes, arguably to the point of falsifying, the legal premise that fathers are the best guardians of their children's welfare.



Inchbald's critical outlook on these fictions survives even to the novel's remarkably ambiguous close. Here, we find Matilda "treat[ed] . . . with all the easy, natural fondness" of parental affection, but still subject to the partisan dictates of paternal authority: Lord Elmwood will not, the narrator observes, "indulge . . . the idea of replacing her in exactly that situation [(i.e., as to property and title)] to which she was born" (338). Her security, therefore, lies in a marriage to Rushbrook, whom she "love[s] as her friend, her cousin, her softer brother, but not as a lover" (339). It is not clear whether Matilda acquiesces to the proposed union with Rushbrook—the narrator leaves it to "the reader . . . to surmise" (341-2); yet it is clear that, unlike her mother, this heroine's emotional and sexual development has been arrested.<sup>176</sup> Thus, when the narrator prompts the reader, in the novel's concluding lines, to weigh "the pernicious effects of [Miss Milner's] . . . improper education" against the "hope[s]" of Matilda's instruction in the "school of prudence—though of adversity," it is difficult not to consider the request as satirical. The reality of women's position and, in particular, the disabling truth of the fictions and presumptions by which they are defined or regulated, render "A PROPER EDUCATION" (342) itself a fiction in the advancement female welfare.

*A Simple Story* does not discuss, in openly critical terms, the period's marriage and divorce law; however, as Terry Castle and Janet Todd have argued, it is (in Castle's words) "restlessly anti-authoritarian" (292).<sup>177</sup> A large part of its anti-authoritarianism is reserved for the law, both as a professional institution and as set of jurisprudential principles and assumptions.

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<sup>176</sup> Amy Pawl and König similarly suggest that Matilda's emotional and sexual maturity is complicated by her relationship with her father and, in Pawl's terms, the presence of "pure filial love" and, in König's, "an oedipalized [female desire]" (Pawl 125, 125-29; and König, 136, 136-7).

<sup>177</sup> Todd argues that the novel offers, "by implication[.] . . . a biting attack on authoritarian patriarchy" (*Sign of Angellica* 228). For other feminist readings of the novel, including those that interpret the second half as "an attempt to cancel out the boldness of the first" (Spencer 160), see Pawl; Haggarty; Parker; and Spencer 158-60.

Indeed, Inchbald's poignant depiction of domestic disorder implicitly contests the traditional legal presumptions or fictions that privilege patriarchal, patrimonial, and paternal values in cases of marital dissolution and child custody. Moreover, at the same time that it recognizes marriage as a critical to England's social and economic welfare, it substantiates, in the autocratic figure of Lord Elmwood, the threat that the law, with its cold and uncompromising positions on wifely adultery and child welfare, poses thereto. In fact, Inchbald's narrative memorializes the messy "truth" of dissolution—its complications, its tragedies, and its traumas—and, thereby, prompts a reassessment of the institutional and doctrinal barriers to marital and familial rehabilitation.

This truth and its literary representation are intensified in one of the period's most polemical novels, Wollstonecraft's *Maria*. As many scholars have noted, this fragmentary text is a fictional reworking of Wollstonecraft's protofeminist treatise, *A Vindication of the Rights of Woman* (1792). As such, its narrative of female "misery and oppression" is delivered through both the popular tropes of late-century fiction and the conventional mechanics of political and moral philosophy.<sup>178</sup> Indeed, Wollstonecraft unites the sentimental and the Gothic with the rational and the ethical to offer, as her preface indicates, a deeply critical analysis of "the partial laws and customs of society" that authorize and enforce women's subjugation (73). Fundamental to Wollstonecraft's examination is a conviction that marriage, and most notably its legal underpinnings, is an oppressive institution for the entirety of the female sex. Thus, this novel, which grafts one story of woman's abjection onto multiple others, is, as Gary Kelly argues, "a tale of universal human relevance" (Introduction, xvii) and a tale, as Wollstonecraft herself posits, that bespeaks "the history . . . of woman, [rather] than of an individual."<sup>179</sup>

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<sup>178</sup> The quoted material is from Wollstonecraft's preface to *Maria* (73).

<sup>179</sup> Once again, the quoted material is from the novel's preface (73).

The ubiquity of the bad—i.e., oppressive—marriage is revealed in the eponymous heroine’s eight-chapter memoir, penned while she is unjustly imprisoned in an insane asylum. The memoir’s principal story is one of domestic tyranny, recording as it does the heroine’s experience as the wife of a “heartless, unprincipled wretch” (138). We learn of Maria’s husband’s, George Venables’s, financial profligacy (he squanders her dowry and his inheritance), his “brutal” and extra-marital sexual “indulgences” (146), and his attempt to prostitute Maria to a friend (161). We also learn of her flight from the marriage and his dogged pursuit (she is “hunted out like a felon” (173)), of their daughter’s birth and inheritance, and of the father’s greed, the infant’s abduction, and the mother’s institutionalization: Venables forcibly removes the couple’s daughter from Maria’s care and commits his wife to an asylum in order to secure the child’s estate (183-84).

Woven into this tragedy are multiple “bad marriage” subplots, each of which follows the sentimental-Gothic formula of tyrannical husband and abused wife. Maria’s memoir first chronicles her parent’s union, which, though an affective (as opposed to arranged) match, is structured as a strict hierarchy (125). Here, “the tyranny of [the] father” bound the domestic space, “undermin[ing] [the] mother’s health” and reconditioning her “temper” into a disposition “intolerably peevish” (128). The autobiography then recounts the domestic violence, sexual infidelity, and financial abuse enacted against two laboring women, each of whom provides temporary sanctuary to the ill-treated Maria. One wife, her face prematurely marred by “a thousand haggard lines and delving wrinkles,” is, Maria observes, no better off than a “slave in the West Indies” subject to the most “despotic” of masters—her desperation poignantly revealed in the trenchant belief that “when a woman was once married, she must bear every thing” (170-71). The other wife, twice “reduced to beggary” by her husband’s dissipations, is similarly

resigned to wives' fate: "I know so well, that women have always the worst of it, when law is to decide" (178). These incidental anecdotes of female suffering confirm the comprehensive nature England's marriage problem, and, with Maria's story, authorize the novel's radical domestic agenda. Indeed, Wollstonecraft's aggressive layering of marital violence calls English society either to account for or reform the institutional mechanisms that have been allowed both to determine and to eclipse women's reality.

Central to the novel's systemic critique is the law governing marriage, divorce, and child custody. Nancy Johnson correctly argues that Wollstonecraft "exposed [this legal canon] as the chief civil force that defines, isolates, and persecutes the female sex" (141). Wollstonecraft manages her critical assessment through the sentimental discourse of affective consciousness and the rational rhetoric of Enlightenment philosophy. Maria's memoir, for example, balances visceral storytelling with reasoned argument to declare the law's destructive effect on female subjectivity. In one representative passage, the heroine personalizes the constitutive impact of marital permanence: "[W]hen I recollected that I was bound to live with such a being for ever—my heart died within me; my desire of improvement became languid, and baleful, corroding melancholy took possession of my soul. Marriage had bastilled me for life. . . . [F]ettered by the partial laws of society, this fair globe was to me an universal blank" (154-55). This intimate testament to the horrors of dispossession and displacement soon shifts to the logic of collective experience, as Maria observes the ubiquitous and disabling condition of female coverture:

The tender mother cannot *lawfully* snatch from the grip of the gambling spendthrift, or beastly drunkard, unmindful of his offspring, the fortune which falls her by chance; or . . . what she earns by her own exertions. No; he can rob her with impunity, even to waste publicly on a courtesan; and the laws of her country . . . afford her no protection or redress from the oppressor, unless she have the plea of bodily fear. (159)

By uniting private testimony with civic-minded commentary, Wollstonecraft judiciously engages the reader's sympathies and her intellect on the issue of legal "truth." We are invited into a world where a keen awareness of self and other reveals the law's institutional insensibilities—a world where the utopian-utilitarian version of marriage that underwrites the period's legal thought is disarticulated, only to be replaced by its ostensibly truth-bearing and dysfunctional alternative.

Importantly, the novel extends its revelatory function to that of revolution and reformation when the rational propertied male intervenes to confront and privately reconcile the inequities of the period's separation and divorce law. Maria's uncle and benefactor is the first to contest the practical utility of and ideological justifications for the legal doctrine of indissolubility:

I am far from thinking that a woman, once married, ought to consider the engagement as indissoluble (especially if there be no children to reward her for sacrificing her feelings) in case her husband merits neither her love, nor esteem. . . . The magnitude of a sacrifice ought always to bear some proportion to the utility in view; and for a woman to live with a man, for whom she can cherish neither affection nor esteem, or even be of any use to him, excepting in the light of a house-keeper, is an abjectness of condition, the enduring of which no concurrence of circumstances can ever make a duty in the sight of God or just men. (157)

This speech, reminiscent of Milton's "Indisposition Passage," is a radical one for the period, but the discerning patriarch's attention to legal pragmatism ("utility") and the authority of divine ("God") and natural ("just men") law, lends his argument for divorce significant cultural capital.<sup>180</sup> The text's subversive potential grows as Maria's uncle argues, and condemns, the gender bias that attends marital separation. He emphasizes how the estranged husband, "with lordly dignity," is protected from social censure by the law's maintenance requirement, while the estranged wife "is despised and shunned, for asserting the independence of mind distinctive of a

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<sup>180</sup> For a brief, but informative, discussion of the intertextuality between Milton's *Doctrine and Discipline of Divorce* and Wollstonecraft's *Maria*, see Keymer.

rational being, and spurning at slavery” (157-58). It is a portrait of institutional sexism that reorganizes the domestic hierarchy, placing the independent, rational, and rebellious female in a position of ethical authority. *Her* right of domestic freedom—her right to incite an insurrection against marital tyranny—is, thereby, given moral force.

The rebellious possibility imagined by the reasoned male quickly evolves into the novel’s core conflict, as Wollstonecraft begins to envision her heroine as a domestic insurgent. Maria assumes this position when she discovers her husband’s attempt to prostitute her. With “hands and eyes [lifted] to heaven,” she renounces the marriage: “as solemnly as I took his name, I now abjure it” (162). Venables is quick to remind Maria that, without evidence of physical violence, she has no lawful grounds for such “threats” (163). But, this wife is not interested in seeking legal sanction; rather, individual moral judgment suffices to authorize the dissolution. “Was I indeed free?,” she asks. “Yes; free *I termed myself*, when I decidedly perceived the conduct *I ought to adopt*” (163, emphasis added). Maria’s decision to abandon the marriage without the law’s consent is provided a rational foundation in the philosophical writing of the novel’s other reasoned and propertied male, Maria’s lover, Henry Darnford. Having read Maria’s memoirs, Darnford condemns the law’s non-dissolution policy and declares the right of similarly enlightened individuals to perform acts of private resistance: those “minds governed by superior principles,” he argues, “[a]re privileged to act above the dictates of laws they had no voice in framing” (187). Maria, who ostensibly meets the intellectual and circumstantial threshold for such defiance, is thus positively confirmed in her role as domestic dissident. Her prior effort toward informal dissolution and her subsequent entry into a bigamous marriage with Darnford become natural and just consequences of her individual liberal rights.

This outlook on divorce and dissent does not, however, survive the narrative without legal challenge. In fact, Wollstonecraft's final completed chapter stages a trial that pits oppressed and resistant individual against oppressive system. Here, Maria undertakes to defend Darnford against a criminal conversation lawsuit initiated by Venables and adjudicated in civil court. In a written statement read to judge and jury, Maria challenges *the* fundamental element to this cause of action—an extant marriage. She begins by outlining the various ways in which Venables violated the marital bond, and she follows this sympathetic narrative with an appeal to liberal contract: "I consider all obligation as made void by his conduct; and hold that schisms which proceed from want of principles, can never be healed" (196; see also 197). To support her argument for marital breach and dissolution, Maria presses the natural law right of private action in the face of legal prejudice: A wife "must be allowed to consult her conscience, and regulate her conduct, in some degree, by her own sense of right. . . . [I]f laws exist, made by the strong to oppress the weak, I appeal to my own sense of justice, and declare that I will not live with the individual, who has violated every moral obligation that binds man to man" (197). She then concludes her remarks with a "claim" to "divorce" and a petition that strikes at the heart of legal fictions: "I appeal to the justice and humanity of the jury, . . . whose private judgment must be allowed to modify laws, that must be unjust, because definite rules can never apply to indefinite circumstances" (198). The very notion that the general cannot, in the realm of universal justice, eclipse the particular evokes the problem of using fictions to circumscribe domestic reality, and the idea that the lay juror has an ethical obligation to revisit and, if warranted, rescind such fictions boldly extends Wollstonecraft's earlier call for private resistance into the public sphere.

Because it strikes such a revolutionary tone, Maria's defense is subject to intense legal scrutiny. The trial judge, acting in accordance with contemporaneous legal doctrine on marital

dissolution, denies the heroine's claim to full divorce (although he does admit that her circumstances might "entitle" her to a judicial separation in ecclesiastical court) (198-99). His opinion is founded, not on formal legal precedent, but on the law's informal suppositions—i.e., its authorizing fictions. In fact, the judge foregrounds his appraisal of Maria's defense in presumptions about female weakness, wifely duty, and the perils of French mores:

[He] . . . alluded to 'the fallacy of letting women plead their feelings, as an excuse for the violation of the marriage-vow. For his part, he had always determined to oppose all innovation, and the new-fangled notions which incroached on the good old rules of conduct. We did not want French principles in public or private life—and, if women were allowed to plead their feelings, as an excuse or palliation of infidelity, it was opening a flood-gate for immorality. What virtuous woman thought of her feelings? — It was her duty to love and obey the man chosen by her parents and relations, who were qualified by their experience to judge better for her, than she could for herself. (198-99)

Moreover, he reinterprets Maria's zealous advocacy as an expression of madness, commenting that "the conduct of the lady did not appear to be that of a person of sane mind" (199). The jurist's address, in exploiting cultural concerns about the relationship between excessive female sensibility and unrestrained sexuality, as well as about French manners and female insanity, seeks to destabilize Maria's position as a credible witness to the injustice of marriage and divorce law, just as it attempts to re-stabilize the fictions on which that law depends—to reinstate the traditional ideas and ideologies about domesticity so lately eroded (as the law believed) by Enlightenment radicalism. The judge's conclusory statement, and the novel's last line, concentrates this restorative effort into a sweeping utilitarian argument redolent of parliamentary and judicial discourse on divorce and separation: "Too many restrictions could not be thrown in the way of divorces, if we wished to maintain the sanctity of marriage; and, though they might bear a little hard on a few, very few individuals, it was evidently for the good of the whole" (199). Dissolution poses no public benefit; rather, it can only lead to national insecurity and social corruption.



Notwithstanding this final appeal to legal tradition—it encompasses, quite literally, the formal narrative’s last word—Maria’s progressive argument maintains its persuasive and revolutionary force. As Miriam Wallace points out, Maria’s “move to claim her adherence to a kind of platonic or universal law is the kind of move that trumps tradition” (79). It is a strategy, as R.S. White suggests, that insists on the natural law principle that “a positive law which offends against the conscience and shared moral obligations, is no law at all” (115). Moreover, as numerous scholars have argued, the mere act of Maria’s juridical speech is in and of itself a radical exercise. Under the eighteenth-century rules of civil procedure husbands and wives were prohibited from testifying in criminal conversation cases, and a wife’s “status” in such a case was not as defendant or witness, but “as disputed property” (Wallace 77).<sup>181</sup> Thus, the evidentiary value given Maria’s experience and perspective—and her positioning as legal deponent—lends this fantastical scene, as Elaine Jordan suggests, a “prophetic” and optimistically performative power (224).<sup>182</sup> With her recited letter, the rebellious female visionary steps out of the private shadows into the public conscience to offer a set of arguments sure to resonate with emerging and established modern readerships—readerships increasingly interested in the conditions of individual autonomy, private judgment, social equality, and legal equity.

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<sup>181</sup> A number of scholars, including Miriam Wallace, Marie Hockenhull Smith, Adam Komisaruk, and Elaine Jordan, have read the novel in light of eighteenth-century criminal conversation jurisprudence. One critical interest in this body of scholarship is Wollstonecraft’s departure from legal procedure: for instance, Hockenhull Smith considers Maria’s written speech act as representative of “Wollstonecraft’s own fantasy of intervention” (sec. 3, para. 11) and Jordan designates it “a silent and fantastic (im)possibility” (224). For another useful discussion of *Maria*’s legal undertones, see Gladfelder, who reads the novel in relation to non-fiction “criminal narrative” (211-18).

<sup>182</sup> For an excellent discussion of the significance of testimonial writing versus speaking in Wollstonecraft’s trial scene, see Wallace 77-79.

This is not to say that Wollstonecraft's criticisms and innovations enacted meaningful legal change in the eighteenth century. Christine Krueger rightly observes that "[n]arratives in which women perform their rationality in order to demand equal treatment under the law are constructed by patriarchal authority as evidence of irrationality because their authors lack legal status to act as rational agents" (120). But, she also notes that "as a key example of women's unprecedented participation through literary means in the rational discourse of the public sphere, *The Wrongs of Woman* contributes to a feminist-aesthetic revision of the legal agent as man of property" (121). This is true, I would argue, despite the fact that Wollstonecraft does not, in the novel's conclusory fragments, imagine a happy, stable marital union for her legal activist heroine, or that Maria, at times, appears to yield rational thought to romantic sensibility, a problem for some critics interested in the success of Wollstonecraft's political or moral agenda.<sup>183</sup> Indeed, I follow Patricia Spacks, Anne Mellor, Claudia Johnson, and others who find narrative power in the author's anti-romantic conclusion, as well as in her complex threading of rational thought and excessive sensibility.<sup>184</sup> It is only through these generic shifts that we can begin to identify and decry the law's shortcomings and, specifically, its failure to understand that it is not marital permanence that guarantees female morality, private welfare, or public stability;

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<sup>183</sup> See, e.g., Poovey 83-113. For other discussions of the problematic relationship between reason and sensibility in *Maria*, see Todd, "Reason and Sensibility," and Cove.

<sup>184</sup> Spacks argues that Wollstonecraft uses "antiromance" to foster an awareness of "the true nature of women's situation" (242, 245-7), and Mellor suggests that, over the novel's course, Wollstonecraft transforms Maria's excessive sensibility—"passionate erotic love"—into a "powerful sympathy for other people's feelings," a sympathy that "acts in harmony with reason" and that guides "a representation of truth superior to that found in the philosophical tract [i.e., *Vindication*]" (418-19). Claudia Johnson and S. Candace Ward also argue that Wollstonecraft reconditions sensibility or sentimentality as rational, sympathetic feeling and that this emotive model is realized in the fragmentary ending that imagines Maria and Jemima in a domestic bond (Johnson, *Equivocal Beings* 63, 67-9; and Ward, "'Active Sensibility,'" *passim*).

rather education, economics, and gender equality are the fundamental structures for constructive domesticity.

The *primary* fictions of dissolution law are not, however, Wollstonecraft's only political target; the novel also addresses those presumptions or fictions *incidental* to the period's dissolution jurisprudence. The presumption of paternal right, for instance, is strongly disputed in the novel's fathers, who are abusive at worst and neglectful at best, as well as in its heroine mother, who is motivated to fight female oppression by the bond of motherhood, which she describes as an "unutterable pleasure" (154). In fact, the fate of Maria's and Venables' daughter testifies to the violence perpetrated through the law's gendered assumptions. The infant's apparent death, which occurs after Venables forcibly removes her from Maria's care, is the culmination of paternal avarice and indifference—Venables perceives the child as a commodity, so much so that his parental concern is entirely directed to her inheritance. Wollstonecraft sets this failure of paternal obligation in contrast to the strength of maternal sensibility.<sup>185</sup> It is Maria's love for her daughter that impels her to abandon Venables and to undertake his legal duties (as laid out by Blackstone) of maintenance, protection, and education. In this case, the best interests of the child clearly lie in a near legal impossibility—the mother's custody. The novel does not, however, ignore the case of maternal corruption, as bad mothers and step-mothers permeate the novel. Yet, Wollstonecraft connects their failures to the larger problem of patriarchal despotism, which denies women the education to understand and freedom to enact responsible, affective parenting. Child custody is, thus, a cultural dilemma and, Wollstonecraft

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<sup>185</sup> Other scholars have offered persuasively nuanced accounts of Maria's maternal commitments, see, e.g., Nixon, "Order in the Family Court."

suggests, a legal issue to be determined, not through paternalistic convention, but rather independent and particularized review.

The relationship between legal tradition and child welfare also enters into *Maria* in the form of the bastard child. The heroine's memoir includes a stirring anecdote about one of Venables' illegitimate children, a "squalid object" so weak that she "tottered along, scarcely able to sustain her own weight" (149). The child's mother, "a country girl" seduced and abandoned by Venables, died soon after childbirth, leaving her infant to the charge of an underpaid parish guardian (150). Venables is completely apathetic to the little girl and her suffering—"So much the better" is his response to news of her impending death (149). Yet, Maria is not, and her description of the child's "sallow" complexion, "inflamed" eyes, wrinkles, and "bent" legs gives voice to the cruelty of paternal disassociation (149-50). Indeed, in this brief narrative interlude, Wollstonecraft imprints the fiction of *filius nullius* all over the child's wrecked body. It is a material image of legal and social violence from which the reader's sympathies cannot escape, and through which the country's inflexible definitions of marriage and the family are further contested.

The harsh reality of legal illegitimacy grounds another of the text's memoirs—that of Maria's asylum guard, Jemima. Like Maria's autobiography, Jemima's is a generic hybrid: sentimental narrative is blended with politicized commentary to reveal the truth of female oppression. Indeed, Jemima recounts in excruciating detail the physical, emotional, and sexual abuse to which she was subject by parents and guardians, masters and mistresses, fellow servants and communal relations; and she philosophizes on her enslavement by and alienation from familial and social systems. Within this moving portrait of female abjection is a particular focus on the affliction wrought by bastardy. Jemima is also a child of seduction, abandonment, and

maternal death, and her illegitimacy both dehumanizes and “benumb[s]” her (120). She is not a daughter, but “a creature of another species,” a “curse entailed on [her father] for his sins” (104-05); she is not a servant, but a “filching cat,” a “ravenous dog,” “an obstinate mule” (105); she is not an innocent girl, but sexual “prey” (107); she is not an autonomous individual, but “a slave, a bastard, a common property” (109). Wollstonecraft draws these debasements as the catalysts for Jemima’s criminal vice and general insensibility—prostitution, thievery, and hardheartedness are logical outcomes for a person shamed by “the appellation of *bastard*” and denied acceptance as “a fellow-creature” (105, 106). Nevertheless, by granting this figure of illegitimacy a sympathetic story and rational speech, Wollstonecraft reinvests her not only with humanity but with filial and social meaning—she is, in fact, a child of someone and a member of something. Thus, just as the novel contests the notion that marital indissolubility is a social and political benefit, it also challenges the idea that *filius nullius*, a potential consequence of dissolution, is merely a legal convenience. Rather, it is, as Inchbald earlier suggested in *A Simple Story*, an individual, familial, and social injustice—a burden on England’s private and public spaces that needs to be alleviated.

By the end of the long eighteenth century, the subversive polemics of Inchbald and Wollstonecraft have been replaced by the subtle social commentary of Jane Austen. Although Austen’s oeuvre focuses on the courtship process and the establishment of a progressive marital union for hero and heroine, most of her novels are energized by a range of bad marriages. For example, *Pride and Prejudice*’s central romance—that of Elizabeth and Darcy—develops against the intramarital contempt of the Bennets, the incompatibility of the Collinses, and the insensibility of the Wickhams. And, *Persuasion*’s domestic ideal—represented in Anne and Wentworth—evolves within an environment shaped by the incongruity of the Sir Walter Elliots,

the simmering hostility of the Mr. Charles Musgroves, and the antipathy of the Mr. William Elliots. With each collateral representation of marital discord, Austen not only reinforces the propriety and the stability of her principal domestic creations, she also verifies and humanizes the difficult reality of marital rupture and marital permanence.

Austen's representation of domestic dissonance becomes most overtly critical in the two darkest of her novels of manners, *Sense and Sensibility* and *Mansfield Park*. In these texts, subplots of infidelity, divorce, and female ruin cast an ominous shadow over the happy courtship narrative, memorializing the gendered inequities that too often attend the experience of marriage and dissolution. Indeed, the protagonists of these dissolution plots, the Eliza Brandons (mother and daughter) in *Sense and Sensibility* and Maria Rushworth in *Mansfield Park*, come to embody the injustice of social convention and legal doctrine on divorce. The elder Eliza, "married against her inclination" to a man with mercenary motives, is destroyed by her marriage's breakdown (145). When her unfeeling husband divorces her for infidelity, she is left impoverished—"[h]er legal allowance was not adequate to her fortune, nor sufficient for her comfortable maintenance"—and friendless, eventually succumbing to the ravages of consumption (146-47). Her daughter, the younger Eliza, also suffers a difficult fate—she is abandoned by her father, victimized by a libertine lover, and expelled, along with her illegitimate child, from polite society. Maria Rushworth, also an adulteress, cuts a less sympathetic figure than the elder Eliza, as her marriage is neither coerced nor actively oppressive. But her domestic lot is nevertheless unduly punitive. For being married to a man she "despised" and seduced by one she "loved," Maria is divorced and then exiled, along with an aunt for whom she had "no affection," to a place "remote and private" (315). As Austen's narrator starkly observes, the cuckolded (and stupid) husband, though now "mortified and unhappy," will have another opportunity for marital

bliss, “while *she* [his unfaithful wife] must withdraw with infinitely stronger feelings to a retirement and reproach, which could allow no second spring of hope or character” (315). It is a depressing and seemingly cruel ending for a young girl whose education had not taught her how to navigate courtship and marriage successfully—how to either choose properly or live dispassionately.

What Austen offers in these brief tales of divorce is not so much a call for legal reform or for social change, but a reminder that public and private welfare in the modern era depend on the individual’s capacity for rational, informed choice and her right to equal and compatible unity. Austen’s fictions, along with that of her literary predecessors, provide the necessary instruction to facilitate the development of these capabilities and rights. Thus, while Defoe, Haywood, Inchbald, Wollstonecraft, and Austen may not have imagined how to effectively upend the legal system’s treatment of marriage and divorce and to eradicate its corrupting fictions, they and all other writers represented in this work provide the means for helping readers to identify legal untruths and redress, privately, their very real impact.

### *Conclusion*

Eighteenth-century divorce law (under which I include child custody law) operated according to a set of presumptions that made marital dissolution an undesirable, even threatening, action: to allow husbands and wives to divorce and remarry was to destabilize the private sphere, assail the public’s moral values, and undermine England’s national security. Nevertheless, this period saw the development of two significant exceptions to the doctrine of marital permanence, parliamentary divorce and private separation. While neither process enjoyed broad legal support, nor clearly altered the patriarchal norms on which dissolution law was founded, their records do indicate a shift in the cultural consciousness toward a more liberal view of divorce and separation—toward a view in which the family’s and nation’s welfare is no longer

tied to a collection of rigid jurisprudence on domestic relations. This shift is both memorialized and shaped by the centuries' domestic novels. Early-century texts reveal the problem that dissolution law, with its idealistic presumptions and gendered biases, poses to the public and private good, while later-century texts exhibit a reformatory spirit, one that urgently demonstrates the need for serious legal change. While such change did not occur until later in England's history, novelists writing at the very end of the long eighteenth century, such as Jane Austen, found other ways to advance the cause, including creating heroes and heroines that illustrated the ways and means of successful marriage contracting.



## CODA

“Legal fictions” are undoubtedly useful for facilitating the law’s development. They allow legislatures and courts quietly to adapt existing rules, doctrines, and systems to changing conditions within and outside of the law’s institutional borders. As Del Mar argues, “[t]hey are one of the [creative] devices via which the law . . . manages to balance flexibility and responsiveness with stability and predictability” (“Legal Fictions and Legal Change,” 250). Yet, they are also potentially harmful both in their ability to reinforce or legitimate normative values and experiences and in their tendency to privilege the general over the specific, the universal over the singular. As Gail Hammer has suggested, the device introduces the possibility for “irrationality and injustice” in legal decision-making—for the disproportional treatment of “specific groups” and, in particular, of “those whose experiences are outside judge’s [and, I would argue, legislators’ and practitioners’] experiences” (120). In fact, legal fictions can become so integral to the legal and social consciousness that we lose sight of their fictionality, and therefore struggle to judge fully their institutional efficacy and their socio-political value, both in times of great historical change and in moments of historical continuity.

Unsurprisingly, several of the legal fictions that informed, or grew out of, eighteenth-century England’s marriage jurisprudence continue to hold force in the twenty-first century. For instance, the principles on which classical liberal contract theory was founded remain fundamental to U.S. contract law today, despite the fact that they have little practical reality. As Danielle Kie Hart argues, notwithstanding that the law “assumes” otherwise, “[m]any contracts

are not entered into voluntarily by rational actors, and the state regularly interferes” (4).<sup>186</sup> In fact, Hart contends, “[i]mbalances of power, not freedom and consent, form the cornerstones of the modern system of contract law” (5). Marital coverture and the fiction of unity on which it rests also persist in law, as well as in material culture. Frances Dolan observes that marital unity “retains legal resonance in the practice of a wife surrendering her ‘maiden’ name to take up her husband’s last name” and in the U.S. doctrine of spousal privilege<sup>187</sup>; she also argues that it shapes our understanding of and response to domestic violence, including our literary and visual representations thereof (272-73). Moreover, Claudia Zaher demonstrates the ways in which coverture continued in the twentieth century to impact U.S. law’s treatment of marital rape and spousal negligence, as well as rules relating to legal bar admissions and corporate anti-nepotism (462). She also argues that, although “[c]overture has almost faded from the legal scene [in the twenty-first century], . . . remnants of it remain intact”—for example, in “corporate rules against marriage between employees,” in divorce economics, and in forfeiture and bankruptcy laws (463).<sup>188</sup> The presumptions surrounding marital dissolution, such as suppositions about marriage as a social good, and assumptions of parental right in child custody matters, likewise have maintained a significant legal presence. In fact, only recently (2011) have all American states

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<sup>186</sup> Lind also analyzes modern contract law as a legal fiction: “[T]he law of contract is premised on agreements with mutuality of benefits and burdens, entered into voluntarily and at arm’s length, by rational agents with knowledge and understanding of the commitments they are making. Increasingly, this contract ideal is a fiction with no purchase in everyday reality” (104).

<sup>187</sup> This doctrine limits the government’s ability to compel one spouse to testify against the other and it privileges certain communications between husband and wife.

<sup>188</sup> With respect to divorce economics, Zaher argues, “[i]t is most often the woman who suffers the greatest economic loss upon termination of a marriage, since her contribution to the family’s welfare is not regarded as favorably as the husband’s contribution.” With respect to forfeiture and bankruptcy laws, she writes, the “courts often seem to follow the old principle that what’s his is his—and what’s hers is his” (463).

adopted some form of no-fault divorce, and England still maintains a partial fault system.<sup>189</sup> This commitment to marital transgression or long-term separation as necessary prerequisites to divorce suggests that Anglo-American legal systems have been reluctant to accept Miltonesque arguments for “easy divorce.” Moreover, the movement toward gender-neutrality or shared parenting in child custody determinations is relatively new, although it does indicate that courts and legislatures are interested in revisiting the utility of gendered presumptions (now primarily maternal) on parental right.<sup>190</sup>

Of course, there have always been, and continue to be, cultural objects that identify and seek to alter the legal falsehoods that have captured our historical imagination. As I argue in this dissertation, the early domestic novel, by giving voice to the private experiences of women *and* men, of wives *and* husbands, of parents *and* children, revealed the many fictions attendant upon the eighteenth-century marriage contract—how it was negotiated, how it was lived, and how it was dissolved. The novel also sought to transform these fictions, working through a multitude of forms and genres to de-fictionalize, revise, or even eradicate entirely the untruths. The degree to which these texts affected marriage law’s development is certainly debatable. Nevertheless, it seems clear that the novel, as a mass cultural medium interested in reflecting and shaping the movement into modernity, contributed to progressive changes in the law of marriage, divorce, and child custody.

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<sup>189</sup> New York was the last American state to adopt no-fault divorce (Stark 31). England still requires either that one of the parties to a divorce prove “adultery, behaviour, [or] desertion” *or* that there is a long-term separation (“two years if both parties consent, and five years without consent”) (Fairbairn and Rutherford 3).

<sup>190</sup> For a useful discussion of the movement toward a “gender-neutral schema” in U.S. child custody and visitation law, see Sen and Tam 42 *et passim*. For a discussion of the movement toward shared parenting in the UK, see Gregory and Milner 594-96.

The nineteenth century, after all, saw the rise of social movements that effected legal reform by pressing the difference between legal tradition and domestic reality, the latter of which novelistic discourse had a hand in unearthing and establishing. Indeed, over the century's course, England's parliament responded to outside pressures by passing several substantial pieces of domestic legislation, including the Marriage Act of 1823, which relaxed the sanctions for failure to follow the HMA formation rules (marriages formed outside of these rules were voidable, rather than simply void)<sup>191</sup>; the Married Women's Property Acts of 1870 and 1882, which granted married women property rights; the Matrimonial Causes Act of 1857, which transferred jurisdiction for full divorce from Parliament to civil court, as well as codified and minimally expanded dissolution grounds; and the Custody of Infants Act of 1839 and the Infant Custody Act of 1873, which granted and then expanded mothers' rights to child custody and visitation.<sup>192</sup> U.S. state law saw similar developments. The first Married Women's Property Act was passed in Arkansas in 1835, with the majority of states following through the middle of the century (Chused 1361n.3). Like their English counterparts, these acts "gave property rights to wives free of their husbands' control and in derogation of the common law" (Popkin 108). In addition, "[j]udicial divorce was almost universal by 1900" (South Carolina excepted), and it could be pursued by both men and women on a variety of grounds, including adultery, cruelty, and desertion (Friedman 1501). Moreover, while state legislatures were relatively resistant to establishing maternal custody rights, the courts were increasingly willing to award mothers

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<sup>191</sup> See Probert, "Control Over Marriage," 445-56.

<sup>192</sup> Short overviews of the remainder of these nineteenth-century developments can be found on the following pages of UK Parliament's website: "Marriage: property and children," "Obtaining a divorce," "Custody rights and domestic violence." For information about the development of bastardy laws, see "Marriage: legitimacy and adoption," which indicates that the law of child illegitimacy did not encounter major reforms until the twentieth century.

custody in cases where their care was in the child's best interests (Mason 49-68). State legislatures did, however, take up the issue of bastardy, granting illegitimate children a family nexus and inheritance rights.<sup>193</sup> And, again, while it is impossible to quantify literary fiction's contributions to these developments, is it impossible to avoid the conclusion that popular novels from both the English and American traditions had some influence on the reformers who sought progressive change and on the legal professionals who ushered it in.

A similar dialectic between marriage law, including its fictions, and the nineteenth-century novel can be observed. Major Victorian novelists, such as Charlotte *Brontë*, Emily *Brontë*, Charles Dickens, Anthony Trollope, Wilkie Collins, George Eliot, and Thomas Hardy, address the contours of courtship, marriage, and divorce to highlight and critique legal presumptions about the parties to the marriage contract and about the social "goodness" of marriage itself.<sup>194</sup> These authors also treat the painful experience of childhood at the social and legal margins, with characters defined in some part by their illegitimacy or wardship. The novel of this period, and the realist tradition in which it developed, thus continued to perform the cultural work of its predecessors—representing, adjudicating, and modifying some of family law's most controversial presumptions.

To conclude, the law has often imagined itself as removed from society's other institutions—as immune to their pressures and detached from their quotidian experiences. Yet, this perspective is itself a fiction. Those who make, adjudicate, and practice the law are always already immersed in the social, economic, political, and cultural conflicts of their time. For the

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<sup>193</sup> Mason observes that "by the end of the nineteenth century almost every state had passed legislation declaring that the child was a member of the mother's family, with a right to inherit from the mother, the same as a legitimate child" (68).

<sup>194</sup> There are many excellent critical works on marriage law in Victorian literature. See, for example, Surridge's *Bleak Houses* and Tromp's *The Private Rod*.

law to understand itself—its past, present, and future—and to appreciate the circumstances and experiences of those over whom it exerts authority, it must engage with discourse produced by “external” communities. Literature, as a representative of various realities and a producer of new worlds, is the perfect medium for such inquiry. Of course, the same is true for literature. A broad view of literary history requires historians and theorists to interact with other disciplines. The law, as a powerful contributor to constructions of self and other and as a crucial component to the lived experience, is necessarily embedded in most any literary production. An understanding of its language, doctrine, and process is, therefore, crucial to historical accounts of literary form, style, genre, and content. Yet, the significance of a collaborative approach to legal and literary history is not confined to the literary academy or the legal profession; rather, interdisciplinary exchange of this sort is crucial for all of us who seek to comprehend and critically evaluate our historical memory and who wish to have a hand in the responsible development of our historical future.

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