

# Agency and Partnership: A Study of Breach of Promise Plaintiffs

Mary Coombs†

Miss Hanson was a servant at a boarding house when she met Mr. Johnson in 1895. After a few months' acquaintance, they became engaged and began to sleep together. She vainly waited thirteen years for him to marry her, meanwhile bearing his child. Finally she sued and recovered \$8000.<sup>1</sup>

Miss Hanson was not the first to respond to seduction and abandonment with a lawsuit. Miss Giese, another plaintiff, persuaded the jury in the Ripon municipal court that the defendant, Mr. Schultz, with the aid of a promise to marry her, "and his persuasions thereunder, seduced, debauched and carnally knew the plaintiff, and got her with child."<sup>2</sup> The pregnancy miscarried, the defendant refused to keep his promise, and Miss Giese sued. The Wisconsin Supreme Court twice reversed verdicts in her favor, holding that the jury could compensate her for the loss of virtue and reputation and for mental suffering caused by seduction, but not for the miscarriage and its physical effects.<sup>3</sup>

Seduction and abandonment did not end with the close of the nineteenth century. Miss Klitzke was in her mid-twenties in 1915 when Mr. Davis, a young man from the same small Wisconsin town, began courting her.<sup>4</sup> He was away at college, but wrote her, and called on her when he came home. According to Miss Klitzke's testimony, they became engaged in 1916 and she then agreed to have intercourse, though she had earlier refused.<sup>5</sup> The engagement continued for several years, and when Davis went into the Army during World War I, he wrote and begged her to

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1. *Hanson v. Johnson*, 141 Wis. 550 (1910).

2. *Giese v. Schultz*, 53 Wis. 462, 463 (1881) (quoting from complaint) (reversing municipal court verdict).

3. *Giese v. Schultz*, 65 Wis. 487 (1886); *Giese v. Schultz*, 53 Wis. 462 (1881). The first jury had offered her \$1000; the second, \$3500. 65 Wis. at 493. Her final recovery, if any, is unknown.

4. *Klitzke v. Davis*, 172 Wis. 425, 179 N.W. 586 (1920).

5. *Id.* at 428, 179 N.W. at 587. Defendant Davis claimed instead that intercourse began in 1915, well before the marriage proposal, and that the plaintiff had debauched *him*. *Id.*

remain true. On his return, however, he sought to break off the engagement, explaining that "he had a lot of money coming from home"<sup>6</sup> he would lose if he married her. A week later, he married someone else. She sued and recovered \$6500 in compensatory and punitive damages.<sup>7</sup>

The cause of action under which each of these women sought compensation was breach of promise to marry. The plaintiffs in breach of promise actions presented themselves as frustrated seekers after the American dream, women's division.<sup>8</sup> The injuries they suffered included the loss of economic advantage of a promised marriage, the humiliation and pain of being jilted, and (in some cases) the psychic and economic costs of allowing themselves to be seduced in reliance on a promised marriage.

To accept these claims as valid would be to assume the plaintiffs' stories were credible and the harms they exposed were real. Two themes stand out in these stories. First, women wanted very much to be married and to have the security of being someone's wife; the loss of that opportunity was a genuine economic harm. Second, women who otherwise would remain chaste might be seduced by their fiances' assurances that they were "as good as married." In giving up their virtue without guaranteeing their future, these women were harmed. They suffered shame and humiliation; their chances for future happiness vanished, for they were no longer eligible to be "blushing brides."

This picture of the role of women in American life contrasted radically with the picture endorsed by many feminist contemporaries. Their idea of marriage was inconsistent with a recognition of its monetary aspects. While traditional romanticism was rejected, the commodification of marriage was ideologically uncomfortable. These feminists, like some more modern critics, may have feared that placing a dollar value on human relationships commodifies and thereby devalues them.<sup>9</sup>

We do risk viewing human relationships in a less sensitive and rich perspective if we assign them a monetary value. Yet a right to immediate, monetary redress for immediate, real harms should not be abandoned simply because that right is tied to an undesirable social structure (in this

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6. *Id.* at 427, 179 N.W. at 587.

7. *Id.* at 425, 179 N.W. at 586. The appellate court rejected the claim that the damages were excessive, given the seduction, the loss of the marriage with Mr. Davis, and the unlikelihood of another opportunity to marry. 172 Wis. at 430, 179 N.W. at PIN CITE.

8. Part of the American dream has always been the Horatio Alger myth of rising from obscurity to achieve wealth and fame. While for boys the dream is one of entrepreneurial success, for girls the dream was one of marrying into fame and fortune. A woman maintained her social and economic status by marrying wisely. See, e.g., E. MAY, GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA 67 (1980); E. ROTHMAN, HEARTS AND HANDS 252 (1987) (quoting 1889 article that "women are trained into the idea that their lives would be awry and unfinished without marriage"). This dependence was recognized and repeatedly criticized by Charlotte Perkins Gilman. C. GILMAN, MAN-MADE WORLD 167 (1911), quoted in D. KENNEDY, BIRTH CONTROL IN AMERICA 54 (1970); see also R. GRISWOLD, FAMILY AND DIVORCE IN CALIFORNIA 1850-1890, at 44-46 (1982).

9. See Abel, *Torts*, in THE POLITICS OF LAW 185, 196 (D. Kairys ed. 1982).

case, a structure of women dependent upon men for economic survival). Such an argument strikes me as an attempt to build ideological purity at the expense of the oppressed.<sup>10</sup>

Early feminists believed that women were to achieve economic independence through careers bringing respect and fair wages. Marriage was to be an emotional partnership rooted in continuing mutual affection. Women were to rediscover their sexual natures. The rules of sexual behavior were to be the same for men and women.

The presumption that women were seduced into sexual activity and the claim that the loss of virginity was a devastating harm to women contradicted the progressive view of women's sexuality. These were understandable reasons for feminists not to endorse the actions of breach of promise to marry plaintiffs. Yet at least some of the women who brought such suits suffered real harms, for reality had not—indeed, has not entirely—caught up to the feminist ideal. Furthermore, bringing such a suit is itself an unorthodox action for women. The plaintiffs did not simply accept the harm that had been done to them, but took action to improve their situations. They were not simply victims, but agents in their own lives.<sup>11</sup> Agency in this sense has been succinctly defined as “the way in which people make history, although not under conditions of their own choosing.”<sup>12</sup> The paradox is that the most effective action available to these women—a breach of promise suit—required them to present themselves as passive victims, a picture contradicted by the very action of bringing suit.<sup>13</sup> Their agency on their own behalf is thus obscured.

The breach of marriage action is rarely invoked anymore<sup>14</sup> and the injury it purportedly treated—broken engagements—no longer seems a harm appropriate for legal redress.<sup>15</sup> Yet this past is instructive. In this

10. Cf. *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987) (articles analyzing critique of rights from perspective of minorities, and arguing potential value of rights discourse). When those most immediately concerned choose to accept compensation in cash rather than to maintain ideological correctness, *their* choice should be respected, despite its risks for the more comfortable among us. Cf. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1915-17 (1987).

11. For a brilliant exploration of the way in which women can exercise this sort of agency, see L. GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE*, BOSTON, 1880-1960 (1988) (describing ways in which women caught in desperate circumstances of violence and poverty worked to help themselves and their children).

12. Interrante and Lasser, *Victims of the Very Songs They Sing: A Critique of Recent Work on Patriarchal Culture and the Social Construction of Gender*, 20 RADICAL HIST. REV. 25, 26 (1979) (paraphrased from K. Marx, *Eighteenth Brumaire of Louis Bonaparte*, in *THE PORTABLE KARL MARX* 287 (1983)).

13. Compare the way in which experts' defenses of battered women who kill explain their past passivity, but not the act for which they are being tried. See Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. RPTER. 195, 198-99 (1986).

14. NINTH DECENNIAL DIGEST (1981-86) 1178-80 (West) (listing only handful of cases under breach of promise to marry). Only one of these allowed a traditional breach of promise action to go forward. *Bradley v. Somers*, 283 S.C. 365, 322 S.E.2d 665 (1984).

15. The modern reform of divorce laws has made obsolete the contractual aspect of the cause of action. Under the current system of no-fault divorce, there will likely be no alimony and little or no

article, I would like to project us back into a past when the cause of action, though perhaps in its twilight years, had some power, and examine the goals and needs of the plaintiffs and the kinds of criticisms to which these women and their cause of action were subjected, both by the mainstream press and by other women. I want to explore the ways in which feminists of an earlier era did and could have responded to the actions of women who sought control over their world within the boundaries of traditional roles and ideologies.<sup>16</sup>

Finally, I want to consider how contemporary feminists might respond to such agency. I suggest that we can find problematic parallels in the actions of organized right-wing women or the resistance of many divorcing mothers to joint custody. These movements, where traditional roles and agency intersect, present both opportunity and danger to feminists. I speculate briefly about how feminists, by fostering the self-empowerment of more traditional women and their concerns, can expand and transform both these women's concerns and feminism itself.

### I. THE CAUSE OF ACTION: A BRIEF SUMMARY

Breach of promise plaintiffs had to fit their legal claims for recognition and compensation within a doctrinal structure that corresponded only roughly to their real complaints. The essential claim was contractual: the defendant agreed to marry the plaintiff and then breached that contract.<sup>17</sup> The plaintiff could thus recover, under standard contract theory, the monetary value of a marriage to the defendant.<sup>18</sup> Damages for harms not usually compensable in contract actions, such as humiliation, mental suffer-

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marital property to divide if the marriage is very brief. If the man can marry on Monday and divorce on Tuesday with no real financial consequences, damages for a mere broken engagement would make no sense.

During the heyday of breach of promise, however, divorce was only available with difficulty, typically for "fault." See generally 2 J. SCHOULER, A TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS § 154, at 1777 (6th ed. 1921). A woman, once married, typically would continue to have a legal claim (with all the caveats implied by the word "legal") on the man's income stream for the rest of her life. A sense of finality also attached itself to engagement, making understandable a legal claim for compensation when the engagement was terminated.

Similarly, premarital sex is now sufficiently common that the loss of one's virginity, per se, is unlikely to have the significant effect on a woman's life that it did in the late nineteenth or early twentieth centuries. See *infra* text accompanying notes 53-57.

16. I make no claim that the plaintiffs serve as any sort of representative group of oppressed women. There is inevitably a class bias in this study: while the plaintiffs were sometimes poor, all were romantically linked to men with sufficient income to make such a suit worthwhile. At least one commentator criticized the cause of action on this basis as "available only to a few aggressive women whose connivance or good fortune has procured them pledges from men who can pay." Turano, *Breach of Promise: Still a Racket*, 32 THE AMERICAN MERCURY 40, 46 (1934).

17. On the development of the cause of action, see M. GROSSBERG, GOVERNING THE HEARTH 33-63 (1985). The cause of action is described in Brown, *Breach of Promise Suits*, 77 U. PA. L. REV. 474 (1929); Feinsinger, *Legislative Attack on "Heart Balm"*, 33 MICH. L. REV. 979 (1935).

18. The law "allows the prospective money value or worldly advantage of the marriage which is lost to be taken into the estimation of damages." 2 J. SCHOULER, *supra* note 15, § 1297, at 1536.

ing,<sup>19</sup> and seduction,<sup>20</sup> also were available. Punitive damages also might be awarded if the defendant had been particularly outrageous in his treatment of the plaintiff.<sup>21</sup>

The range of admissible evidence was unusually broad,<sup>22</sup> and, without any requirement of documentary proof, the existence of liability was very much a jury question. Similarly, the variety of potential bases for damages, and the lack of any precise criteria for measuring their value, meant that juries were largely uncontrolled in deciding the monetary value of the verdict. Remittiturs were sometimes granted,<sup>23</sup> but not frequently enough to satisfy either defendants or critics.<sup>24</sup>

In many jurisdictions the cause of action eventually was abolished by statute. Several bills, commonly referred to as "heartbalm" or "anti-heartbalm" legislation, were enacted into law during the 1930's.<sup>25</sup> This abolition followed harsh academic attacks. Some criticism reflected classic lawyerly concerns, such as a formalist dislike for the admixture of tort

19. "Moreover, the injury to the plaintiff's affections, the mortification, and the distress of mind consequent upon breaking off the match" were items of damages. *Id.* A classic example of humiliation is found in *Bradley v. Somers*, 283 S.C. 365, 322 S.E.2d 665 (1874) (groom backed out with plaintiff already in wedding gown, guests and minister assembled at church).

20. Not all jurisdictions permitted enhanced damages for seduction. *M. GROSSBERG, supra* note 17, at 45-49. Most jurisdictions did, however, recognize a separate cause of action for the tort of seduction, formally available to the woman's father as recompense for the loss of her services. *See generally* Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 *LAW & INEQUALITY* 33, 33 (1987). It is possible that the woman's parents were the moving force behind some breach of promise actions as well.

21. *See, e.g.*, C. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 111, at 393 (1935); 10 S. WILLISTON, *THE LAW OF CONTRACTS* § 1289A, at 1005 (3d ed. 1967). In particular, contrary to usual legal principles, damages could be enhanced if the jury determined that the defendant had falsely claimed that the plaintiff was unchaste. Cousens, *Law of Damages as Applied to Breach of Promise to Marry*, 17 *CORNELL L.Q.* 367, 369-70 (1932).

22. *See, e.g.*, *Homan v. Earle*, 53 N.Y. 267, 271 (1873) (noting many cases allow juries to infer marriage contract from "[f]requent visits, receiving the defendant by the family as a suitor, [and] presents").

23. *See, e.g.*, *Broyhill v. Norton*, 175 Mo. 190, 74 S.W. 1024 (1903); *Dupont v. McAdoo*, 6 Mont. 226, 9 P. 925 (1886). However, these and other reported decisions provide no clear criteria for when such reductions in damages were appropriate.

24. *See, e.g.*, *Lanigan v. Neely*, 4 Cal. App. 760, 89 P. 441 (Ct. App. 1907); *Hattin v. Chapman*, 46 Conn. 607 (1879); *Liese v. Meyer*, 143 Mo. 547, 45 S.W. 282 (1898); *Funderburgh v. Skinner*, 209 S.W. 452 (Tex. Civ. App. 1919); *Klitzke v. Davis*, 172 Wis. 425, 179 N.W. 586 (1920). Even when formally unsuccessful, such appeals presumably benefited defendants indirectly by delaying payment of the judgment.

25. At present, the cause of action has been abolished by statute in 21 states. *See* ALA. CODE § 6-5-330 (1987); CAL. CIV. CODE § 43.5 (West 1987); COLO. REV. STAT. §§ 13-20-201 to 13-20-208 (1974); DEL. CODE ANN. tit. 10 § 3924 (1975); FLA. STAT. ANN. §§ 771.01-.08 (West 1987); GA. CODE ANN. § 51-1-17 (1982); ILL. ANN. STAT. ch. 40, §§ 1801-1810, 1901-1907, 1951-1957 (Smith-Hurd 1980 & Supp. 1986); IND. CODE ANN. § 2-508 (Burns 1987); MASS. GEN. LAWS ANN. ch. 207, § 47A (West 1987); MICH. COMP. LAWS ANN. § 600.2901 (West 1986); MINN. STAT. ANN. § 553.01-03 (West Supp. 1985); N.J. STAT. ANN. § 2A:23-1 (West 1987); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1976 & Supp. 1989); N.D. CENT. CODE § 14-02-06 (Supp. 1985); OHIO REV. CODE ANN. § 2305.29 (Page 1981); OKLA. STAT. ANN. tit. 76, § 8.1 (West Supp. 1987); OR. REV. STAT. §§ 30.840, 30.850 (1983); PA. STAT. ANN. tit. 48, § 171 (Purdon 1987); VA. CODE ANN. § 8.01-220 (1984); WIS. STAT. ANN. § 768.01 (West 1981); WYO. STAT. §§ 1-23-101 to 1-23-104 (1977). There has been a slow trickle of further abolitionist activity. Most recently, Idaho judicially abolished the related cause of action for alienation of affections. *See O'Neil v. Schuckardt*, 112 Idaho 472, 733 P.2d 693 (1986).

elements in a contract cause of action,<sup>26</sup> or pragmatic concerns over certain remedial and evidentiary peculiarities.<sup>27</sup> In both the academic and popular press, however, opposition was extraordinarily virulent. Much of the criticism embodied views of women<sup>28</sup> and of marriage contrary to those underlying the breach of promise claim.

Critics repeatedly asserted that the cause of action was subject to "misuse."<sup>29</sup> Women who brought such claims were adventuresses, gold-diggers,<sup>30</sup> and schemers.<sup>31</sup> Even if there really had been a broken engage-

26. See, e.g., 1 C. VERNIER, *AMERICAN FAMILY LAW* § 6, at 26 (1931); Cousins, *supra* note 21, at 367. We no longer find the blending of tort and contract as disturbing as it seemed before the development of, for example, product liability claims. Stanard v. Bolin, 88 Wash. 2d 614, 565 P.2d 94, 98 (1977) (referring to breach of promise as "quasi-contract, quasi-tort" cause of action, and eliminating contractual "loss of bargain" element of damages). See also G. GILMORE, *THE DEATH OF CONTRACT* (1974).

27. See, e.g., C. MACCOLLA, *BREACH OF PROMISE: ITS HISTORY AND SOCIAL CONSIDERATIONS* 61 (1879) (calling for limits on forms of recoverable damages); Brown, *supra* note 17, at 477-78; *Breach of Promise*, 56 *SATURDAY REV.* 795, 796 (1883).

28. The cause of action was essentially one brought by women against men. See, e.g., 1 C. VERNIER, *supra* note 26, §6, at 26. My review of a substantial sample of reported cases turned up only two male plaintiffs. Olson v. Saxton, 86 Or. 670, 169 P. 119 (1917); Clark v. Kennedy, 162 Wash. 95, 297 P. 1087 (1931). They lost.

29. Critics claimed that many suits were brought out of vengeance or greed. They never documented their claims (except by citing each other), and it is not possible to know how frequently (or if) claims were filed by women who did not feel harmed. See Coombe, "The Most Disgusting, Disgraceful and Inequitous Proceeding in Our Law": *The Action for Breach of Promise of Marriage in Nineteenth-Century Ontario*, 38 U. TORONTO L.J. 64, 98 (1988).

30. The word "gold-digger" in the popular vocabulary of the 1920's was used to describe breach of promise plaintiffs. Perhaps the best example is the following cartoon:



Chicago Tribune, Mar. 31, 1935, at 14, col. 6.

Calling the plaintiffs "gold-diggers" engaged in a "racket" in which they sought "heartbalm," turned the discourse in a direction that made women's alternative stories difficult to believe or even hear. Kane, *Heartbalm and Public Policy*, 5 *FORDHAM L. REV.* 63, 65-66 (1936); cf. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 *HARV. L. REV.* 727, 730 (1988); M. Foucault, *Two Lectures*, in *POWER/KNOWLEDGE* 78, 82 (1980) (ex-

ment, the woman who brought a suit was seeking only cash, not comfort.<sup>32</sup> Critics similarly contended that (male) jurors were too easily swayed by the tearful melodrama created for their benefit, especially by an attractive woman.<sup>33</sup>

The alleged use of the suit for settlements brought the most scathing attacks. High verdicts encouraged defendants to settle, a tendency critics claimed was exacerbated by the reluctance of "decent" men to have their private affairs exposed for the benefit of the sensationalistic press.<sup>34</sup> Critics and legislative opponents referred to the process of complaint followed by settlement as extortion or legalized blackmail.<sup>35</sup>

Critics' unremittingly negative response to the cause of action and to the women who brought it reflected their attitudes about women and marriage. These attitudes shifted over time, but were never empathetic to women's situation under patriarchy. Especially before World War I, some critics recognized that a woman might be hurt by a man's breaking an engagement unjustifiably. But they saw little overlap, if any, between the women who were harmed and the women who brought suit.<sup>36</sup> As the agitation to abolish it peaked during the 1920's and 1930's, other critics rejected its fundamental premise. They believed modern engagements were provisional in their essence; breaking them should never state a legal claim.<sup>37</sup>

The early critics had seen marriage as central to a woman's life plan. A

ploring how "knowledge" has been constructed to disqualify the perspectives of those without power).

31. A. LOOS, *GENTLEMEN PREFER BLONDES* (1963, orig. ed. 1925) (novel with breach of promise plaintiff Lorelei Lee as main character). Lorelei apparently was considered representative of real plaintiffs by various critics. See *Blackmail Within the Law*, 325 *LIVING AGE* 360 (May 16, 1925); Brown, *supra* note 17, at 491; Lawyer, *Are Actions for Breach of the Contract to Marry Immoral?* 38 *CENT. L.J.* 272, 274 (1894); Brockelbank, *The Nature of the Promise to Marry—A Study in Comparative Law*, 41 *ILL. L. REV.* 1, 8 (1946); Turano, *supra* note 16, at 46.

32. Brown, *supra* note 17, at 492; Lawyer, *supra* note 31, at 275; Wright, *Action for the Breach of a Marriage Promise*, 10 *VA. L. REV.* 361, 377 (1924).

33. "If the girl be pretty, the jury generally give her heavy damages. . . . She who has her fortune before her is handsomely recompensed, while her plainer sister, who could ill afford to lose the best years of her life, is often sent empty away," 1 C. VERNIER *supra* note 26, § 6, at 27 (quoting White, *Breach of Promise of Marriage*, 10 *L.Q. REV.* 135, 141 (1894)). See also Coombe, *supra* note 29, at 93-98; M. GROSSBERG, *supra* note 17, at 56 (quoting R. CONWELL, *WOMEN AND THE LAW: A COMPARISON OF THE RIGHTS OF MEN AND THE RIGHTS OF WOMEN BEFORE THE LAW* 18-19 (1876)). This story of how jurors reacted to a plaintiff's appearance seems inconsistent with the way jurors appear to react in other contexts. Lawyers' stories are that jurors equate sexual attractiveness with sexuality, and thus disbelieve the claims of glamorous (as well as of plain) women that they were raped or sexually harassed. Neither story of "appearances" distorting juries' realities may be accurate.

34. The same was true, critics claimed, for "decent women." See *infra* note 41 and accompanying text.

35. See, e.g., Brown, *supra* note 17, at 495; Feinsinger, *supra* note 17, at 979. The preamble to the New York heartbalm statute states that the causes of action thereby abolished had "been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent," and had "furnished vehicles for the commission or attempted commission of crime [presumably blackmail and perjury]." 1935 *N.Y. LAWS*, ch. 263, *N.Y. CIV. RIGHTS LAW* § 80-a (McKinney 1976 & Supp. 1989).

36. See *supra* notes 30-32 and accompanying text.

37. Brockelbank, *supra* note 31, at 11; see also Comment, *Stanard v. Bolin: A Reappraisal of the Breach of Promise to Marry Action*, 15 *WILLAMETTE L. REV.* 105, 111 (1978).

lengthy but ultimately unconsummated engagement or a seduction that left the woman unchaste—and probably unmarriageable—caused her real harm. She would never be the angel of the house that every Victorian woman properly aspired to be.<sup>38</sup> If possible, the law should provide relief for these victims.

The breach of promise action, however, could never be the source of that relief. The deserving woman was a lady, a creature of delicacy. Her pain and humiliation would only be increased by bringing a law suit where she must recount a story of private pain and humiliation, of unfulfilled promises of eternal love, and of sexual importuning and its consequences. No lady would willingly expose these details to a jury and, through the press, to the public at large.<sup>39</sup> Furthermore, a court could only offer money; a lady would never consider money an appropriate recompense for the hurt she had suffered.<sup>40</sup> The fact that a woman brought such a cause of action defined her as not the sort of woman who deserved sympathy.<sup>41</sup>

The later critics had a more modern view of marriage, but were equally hostile to the economic vision embedded in the breach of promise suit. Marriage was “companionate,” a partnership rooted in love and affection.<sup>42</sup> The proper choice of partner was essential. If either of the parties decided he or she would not be happy married to the other, the reluctant lover should be free to break off the engagement.<sup>43</sup> The law should accommodate such second thoughts, not punish them.<sup>44</sup>

Furthermore, the “damages” flowing from a breach of promise were considered merely emotional.<sup>45</sup> Women were or could be economically self-supporting; they had no legitimate claim for lifetime financial support

38. See C. DEGLER, *AT ODDS* 153 (1980); R. GRISWOLD, *supra* note 8, at 44–45 (quoting 1880 article to effect that “life is a failure” if woman does not marry). This emphasis on marriage did not end with the dawning of the twentieth century. R. LYND & H. LYND, *MIDDLETOWN* 110–12 (1929) (marriage still “decidedly ‘the thing to do’” in Middle America in 1920’s).

39. See, e.g., *A Word for Amelia Roper*, *THE SPECTATOR* 83 (Jan. 18, 1890); Brown, *supra* note 17, at 493; Coombe, *supra* note 29, at 100–01. Critics also argued against the cause of action on the ground that such stories were sensationalist and thus unfit for public consumption. See, e.g., Wright, *supra* note 32, at 361.

40. Turano, *supra* note 16, at 46; see also sources cited *supra* note 31.

41. Bringing the lawsuit showed the plaintiff was one of the unworthy sort who “does not mind the laughter which alone would keep possibly deserving litigants forever out of court.” H. DAGGETT, *The Action for Breach of Marriage Promise*, in *LEGAL ESSAYS ON FAMILY LAW* 47 (1935). The pernicious notion that seeking damages soils the purity of the seeker is not confined to the breach of promise context. Matsuda, *Looking to the Bottom*, 22 *HARV. C.R.-C.L. L. REV.* 323, 394–95 (1987); see also Radin, *supra* note 10, at 1875–77.

42. Simmons, *Companionate Marriage and the Lesbian Threat*, 4 *FRONTIERS* 54, 54–55 (1979); see generally B. LINDSEY & W. EVANS, *THE COMPANIONATE MARRIAGE* (1927).

43. See Popenoe, *Betrothal* 20 *J. SOC. HYGIENE* 442 (1934).

44. See sources cited *supra* note 37.

45. See Turano, *supra* note 16, 43–44; see also Parsons, *Change in Sex Relations*, in *OUR CHANGING MORALITY* 37, 40 (F. Kirchway ed. 1924). An argument that women were equally responsible for sexual activities was always available, though not dominant. Cf. Sinclair, *supra* note 20, at 51 (discussion of seduction actions and application of *in pari delicto* maxim to bar such action by seduced woman).



from a man.<sup>46</sup> "Seduction" was reconceptualized as a mutual activity for which compensation was inappropriate.

## II. THE PLAINTIFFS' PERSPECTIVE

Most American women were dependent on marriage for economic survival and a sense of self-worth in the nineteenth and early twentieth century.<sup>47</sup> Opportunities for middle-class women to achieve economic self-sufficiency were severely limited.<sup>48</sup> Jobs available to women were (and generally still are) poorly paying.<sup>49</sup> The unmarried woman was more likely to become a spinster maiden aunt living with one of her siblings than a career woman.<sup>50</sup> During the 1930's, as the cause of action came under legislative attack, most middle-class women still left the workforce upon marriage to become full-time homemakers, wives, and mothers.<sup>51</sup> Even today, women with husbands are economically better off than single women.<sup>52</sup>

Any woman with a valid breach of promise claim had lost at least one opportunity to marry. Particularly where the courtship was lengthy or where a woman's "marriage value" otherwise had been reduced (e.g., by seduction),<sup>53</sup> she was now less likely to ever marry. Seduction imposed emotional as well as economic costs on women. While some women, even in Victorian times, perceived themselves as active participants in their own sexual lives,<sup>54</sup> other women engaged in intercourse reluctantly and only at

46. See, e.g., B. LINDSEY & W. EVANS, *supra* note 42, at vii, 246-47; Grant, *The Limits of Feminine Independence*, 65 SCRIBNERS 729 (June 1919).

47. See sources cited *supra* note 8.

48. See, e.g., P. GAY, *EDUCATION OF THE SENSES* 180 (1984); C. DEGLER, *supra* note 38, at 152; see generally B. TAYLOR, *EVE AND THE NEW JERUSALEM: FEMINISM IN NINETEENTH CENTURY SOCIALISM* 192-93 (1983) ("[S]ince single women of this [middle class] background faced an almost total lack of employment opportunities, most were either forced into unhappy dependence on some male relative, or left to face destitution and social marginality").

49. See E. MAY, *supra* note 8, at 118; see generally *WOMEN AND POVERTY* (B. Gelpi, N. Hartsock, C. Novak & M. Strober eds. 1986) (detailing victimization of poor women and proposing strategies to empower women to combat modern poverty).

50. See C. DEGLER, *supra* note 38, at 152-59. Some women did live satisfying and fulfilling lives without marrying. See S. JEFFREYS, *THE SPINSTER AND HER ENEMIES: FEMINISM AND SEXUALITY 1880-1930* (1985); Di Leonardi, *Warrior Virgins and Boston Marriages: Spinsterhood in History and Culture*, 5 *FEMINIST ISSUES* 47, 49 (1985). Yet most women were still educated to believe in marriage as a life goal. See, e.g., E. MAY, *supra* note 8, at 63; R. GRISWOLD, *supra* note 8, at 44.

51. Cf. E. MAY, *supra* note 8, at 63, 117 (noting percentage of American married women who were in work force rose from 6% in 1900 to 11% in 1930).

52. See J. Smith, *The Paradox of Women's Poverty: Wage Earning Women and Economic Transformation*, in *WOMEN AND POVERTY*, *supra* note 49, at 121; R. Feldberg, *Comparable Worth: Toward Theory and Practice in the United States*, in *WOMEN AND POVERTY*, *supra* note 49, at 163.

53. *Bennet v. Beam*, 42 Mich. 346, 351 (1880) ("Respectable society inflicts upon the unfortunate female [who has been seduced] a severe punishment for her too confiding indiscretion").

54. Evidence of the active sexuality of some Victorian women can be found in the studies of Dr. Clara Mosher. See P. GAY, *supra* note 48, at 135-44; C. DEGLER, *supra* note 38, at 257-58. On the positive attitudes towards the sexuality of women in the 1920's, see L. BANNER, *AMERICAN BEAUTY* 182-83 (1983); C. SMITH-ROSENBERG, *The New Woman as Androgyne*, in *DISORDERLY CONDUCT* 283 (1985) ("[t]he daughter's quest for heterosexual pleasures, not the mother's demand for political power, now personified female freedom").

the urging of men.<sup>55</sup> Through the 1920's and 1930's, and even in the 1950's when I was an adolescent, the loss of virginity could be a serious matter.<sup>56</sup> A woman who was no longer chaste had lost something both of psychic value and of value on the marriage market: she was "damaged goods."<sup>57</sup> Breach of promise law provided plaintiffs at least partial compensation for these genuine hardships.

What did the plaintiffs seek to achieve by filing suit? Despite fears that suits would coerce men into marriage, a woman determined to bring a suit was no longer concerned primarily with the loss of the opportunity to marry the defendant.<sup>58</sup> Rather, she sought compensation for the pain she had experienced and the constriction of her future plans. If these were caused by his actions, and her reliance on his promises, I suggest a legal response was in order.

The harm suffered was particularly acute when the liaison led to the birth of a child.<sup>59</sup> The mother's life, if not "ruined," was at least extraordinarily difficult.<sup>60</sup> Under common law, the illegitimate child had no claim for support from the father.<sup>61</sup> State statutes frequently allowed some

55. This does not mean they were sexually frigid. As Nancy Cott and others have shown, an attitude of passionlessness can be ideologically useful. Cott, *Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-1850*, 4 SIGNS 219 (1978). The tension between these differing images of women's responses to sexuality is explored in Dubois and Gordon, *Seeking Ecstasy on the Battlefield: Danger and Pleasure in Nineteenth-Century Feminist Sexual Thought*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 31 (C. Vance ed. 1984).

56. See Smigel & Seiden, *The Decline and Fall of the Double Standard*, 376 ANNALS 6, 12 (Mar. 1968). But see Janeway, *Who is Sylvia? On the Loss of Sexual Paradigms*, 5 SIGNS 573, 579-80 (1980).

57. See P. FASS, *THE DAMNED AND THE BEAUTIFUL: AMERICAN YOUTH IN THE 1920's*, at 267 (1977); Thomas, *The Double Standard*, 20 J. HIST. IDEAS 195, 214 (1959); Sinclair, *supra* note 20, at 78; see also Hale, *Woman in Transition*, in SEX IN CIVILIZATION 67, 79 (V. Calverton & J. Schmalhausen eds. 1926) ("[F]or women to become sexual free-lances is for them to play into the hands of the less biologically responsible and more peripatetic male.")

58. Undoubtedly, engagements were in some cases a mistake and it would have been appropriate to "disengage." This cause of action, however, deterred men from breaking off engagements even after realizing that marriage would be a mistake (and a near-irrevocable one). This was one of the grounds of criticism. See *Fearon v. Treanor*, 272 N.Y. 268, 5 N.E.2d 815 (1936) (upholding state law abolishing cause of action for breach of promise to marry).

Yet despite the concerns of critics, it seems unlikely that many men married to avoid paying breach of promise damages; if the cause of action had any impact on primary behavior, it might as readily have discouraged men from using engagements as a seduction technique. Furthermore, in most cases there were additional, gratuitous harms to the plaintiffs, such as a lengthy engagement or a "breaking" of the engagement only by the indirect process of suddenly marrying another.

59. Cf. Gillis, *Servants, Sexual Relations and the Risk of Illegitimacy in London 1801-1900*, in SEX AND CLASS IN WOMEN'S HISTORY 114 (J. Newton, M. Ryan & J. Walkowitz eds: 1983) (discussing economic sufferings of mothers of illegitimate children in Victorian Britain.)

The proportion of such situations among breach of promise cases is probably higher than a reading of case reports suggests. One disincentive to filing suit was the cost of publicly exposing one's fall from chastity. That disincentive did not operate if the seduction had led to pregnancy and the cost was already paid. Coombe, *supra* note 29, at 84 n.59.

60. See Gillis, *supra* note 59, at 166-67.

61. 4 C. VERNIER, *supra* note 26, § 231, at 9; 2 J. SCHOUER, *supra* note 15, § 709, at 743. Under the early common law he had no claim on either parent. M. GROSSBERG, *supra* note 17, at 197. While this may have had a genuine effect on inheritance rights from the mother's family, the woman who does not smother or abandon her illegitimate child at birth is usually, as a practical and emotional matter, going to try to support it.

sort of bastardy action by which the child and mother could sue for support from the father. Yet those provisions frequently contained daunting procedural limitations,<sup>62</sup> and normally included extraordinarily low limits on awardable support.<sup>63</sup> Furthermore, the award would be for a periodic payment; modern statistics suggest such awards often are futile, even when men have lived with and presumably come to love the children they are required to support.<sup>64</sup> Surely payment rates by fathers of illegitimate children would be even lower and the awards too small to make enforcement practical.<sup>65</sup>

A breach of promise action could help obtain a lump sum for the support of an illegitimate child.<sup>66</sup> The suit provided a back door to a cash settlement from the father when the front door of bastardy was closed or barely cracked open.<sup>67</sup> The cause of action was not designed to serve this subterranean purpose: the vast majority of courts held that pregnancy could not be considered when assessing the damages suffered when the defendant refused to marry the mother.<sup>68</sup> The ideal solution would have been to reform the cause of action or substitute a more responsive one. Absent such changes, abolition of the cause of action may have caused serious harm to these women and their children.

### III. FEMINIST RESPONSES

One might expect advocates for women and women's interests to be skeptical of the claim of critics that deserving plaintiffs did not exist or

62. *E.g.*, statutes of limitations were often short. 4 C. VERNIER, *supra* note 26, § 250, at 209. Some states considered the action quasi-criminal, and thus required proof of paternity to be clear and convincing, or even beyond a reasonable doubt—difficult standards in the absence of modern blood testing. *Id.* at 209-13; Note, *Domestic Relations—Illegitimates—Father's Duty to Support*, 28 N.C. L. REV. 119 (1949).

63. See 4 C. VERNIER, *supra* note 26, § 250, at 213-14. In Florida, for example, the maximum support payment for an illegitimate child was \$50 per year, for no more than 10 years. 21 WOMEN LAWYER'S J. 22, 25 (Nov. 1934). In Pennsylvania in 1914, one judge did reject the custom that the father's duty ended when a child reached the age of seven, and ordered the unwed father to support his child until age 14. 4 WOMEN LAWYER'S J. 18 (Dec. 1914). Nonetheless, in introducing her heartbalm bill, Indiana Representative Nicholson proclaimed that no one with a legitimate complaint would be harmed, given the existence of "statutes governing support of wives and children [and] bastardy." Indianapolis News, Feb. 1, 1935, at 1, col. 5.

64. See D. CHAMBERS, MAKING FATHERS PAY 71-75 (1979); L. WEITZMAN, THE DIVORCE REVOLUTION 284-85 (1985).

65. See 4 C. VERNIER *supra* note 26, § 250, at 215: "Because of the length of time over which the order for support ordinarily extends and because of the general irresponsibility of defendants hailed into court in bastardy proceedings, stringent enforcement provisions are essential." *Cf.* L. WEITZMAN, *supra* note 64, at 285-92 (difficulty of collecting child support from divorced fathers).

66. This may have been what was happening in such cases as *Frost v. Marshall*, 2 Brev. 114 (S. C. 1804); *Paul v. Frazier*, 3 Mass. 71 (1807); *Nacim v. Ibarra*, 310 S.W.2d 388 (Tex. Civ. App. 1958). See M. GROSSBERG, *supra* note 17, at 45-47; *Coombe*, *supra* note 29, at 74 n.30.

67. See 4 C. VERNIER, *supra* note 26, § 231, at 9; Gillis, *supra* note 59, at 138.

68. See, *e.g.*, *Giese v. Schultz*, 65 Wis. 487 (1886); *Dalrymple v. Green*, 88 Kan. 673, 129 P. 1145 (1913); *Nacim v. Ibarra*, 310 S.W.2d 388 (Tex. Civ. App. 1958). Furthermore, not all mothers of illegitimate children had been promised marriage, and not all breach of promise plaintiffs were burdened with the defendant's child.

were claimants in only an insignificant portion of the cases, and to empathize with the women plaintiffs. Instead, women who publicly discussed or took positions on the cause of action generally supported the move to abolish it.<sup>69</sup> For example, though few state legislators in the 1930's were women, they included the sponsors of bills abolishing breach of promise<sup>70</sup> in Indiana,<sup>71</sup> Massachusetts,<sup>72</sup> and Colorado.<sup>73</sup> In Ohio, heartbalm legislation stalled briefly as two women competed for credit for the bill.<sup>74</sup> Arguments used by these women in support of the legislation were similar to those of male critics.<sup>75</sup> The law, they claimed, could not heal real broken hearts; it ought not try to heal when pocketbooks, not hearts, were empty.<sup>76</sup> The lawsuits were readily misused for extortion and blackmail,<sup>77</sup> while the cases that actually went to trial were a fount of offensively sensationalistic testimony.<sup>78</sup>

The objections of the women legislators were consistent with the views of two popular women writers. Anita Loos' best-seller, *Gentlemen Prefer Blondes*,<sup>79</sup> may have invented the word "gold-digger."<sup>80</sup> The heroine, Lorelei Lee, is a flapper with a taste for gold. In one incident, she tricks one

69. In fact, "[n]ewspapers of the time reported the [heartbalm] measure as largely a woman's cause. For example, a United Press story stated, 'The loudest champions of the legislation are women while the most bitter opponents are men.'" Sinclair, *supra* note 20, at 82-83 (citing Indianapolis Times, Mar. 23, 1935, at 2, col. 8). The lawyer for the plaintiff in *Fearon v. Treanor*, 272 N.Y. 268, 5 N.E.2d 815 (1936) (testing constitutionality of New York's heartbalm bill), criticized Mrs. Nicholson and other women supporters of such legislation for "an idea which is so shortsighted as to everlastingly damage persons of her own sex." N.Y. Times, Nov. 26, 1936, at 24, col. 5. Grossberg suggests that, at an earlier stage, "the debate [over the desirability of breach-of-promise actions] appears to have been carried on largely by men." M. GROSSBERG, *supra* note 17, at 54.

70. The typical statute outlawed four causes of action: breach of promise, alienation of affections, criminal conversation and seduction. See, e.g., N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1976 & Supp. 1989).

71. The first anti-heartbalm bill was introduced by Indiana's only female legislator, Roberta West Nicholson. See, e.g., Indianapolis News, Feb. 1, 1935, at 1, col. 5.

72. A bill was introduced by Katherine Foley, the only Democratic woman in the State Legislature "to 'defeat gold-diggers and shyster lawyers.'" N. Y. Times, Apr. 3, 1935, at 25, col. 8.

73. Representative Eudochia Bell Smith said her bill would lead to "the end of the gold-digger in Colorado courts." N. Y. Times, Apr. 28, 1937, at 16, col. 5.

74. See Cleveland Plain Dealer, March 21, 1935, at 1, col. 2 (describing dispute between Representatives Alma Smith (D.-Cleveland) and Blanche Hower (R.-Akron)).

75. Almost every legal discussion was by a man. The one exception discovered is an article by Louisiana law professor Harriet Daggett. See H. DAGGETT, *supra* note 41. Its style and substance are essentially identical to those of her contemporary male legal critics. See, e.g., 2 J. SCHOUER, *supra* note 15, at 1544-48; Brown, *supra* note 17.

76. Representative Nicholson of Indiana said that "[s]urely a suit to recover money as damages for the broken romance cannot soothe a woman if love was genuine," 16 TIME 1 (Feb. 18, 1935).

77. Nicholson called breach of promise actions "blackmail suits . . . in which principals attempt to capitalize on some one's indiscretion." Indianapolis News, Feb. 1, 1935, at 1, col. 4.

78. Nicholson stated that "suits of this sort, with their attendant publicity, are a detriment to public morals." Indianapolis News, Feb. 1, 1935, at 1, col. 4.

79. A. LOOS, *supra* note 31. The first edition was published in 1925, following a serialization in Harper's Bazaar. It went through forty-five editions "before the early demand ceased." Loos, *The Biography of a Book*, in GENTLEMEN PREFER BLONDES xiv-xv (1963).

80. The derivation of the term "gold-digger" for a woman who measures her charms on the gold standard is disputed. Some trace it to Loos' book and other popular literature of the 1920's. See VI Oxford English Dictionary 656 (2d ed. 1989) (citation omitted). Others think it was first used to describe the much-married Peggy Hopkins Joyce; see A. MADSEN, GLORIA & JOE 79 (1987).

of her suitors into proposing to her in writing.<sup>81</sup> The letter is valuable evidence when she decides she doesn't want to marry Henry: "[s]o the best thing for me to do is to think up some scheme to make Henry decide not to marry me and take what I can get out of it and be satisfied."<sup>82</sup>

Dorothy Dunbar Bromley, a writer and journalist specializing in civil liberties and women's issues, mounted a more direct attack.<sup>83</sup> Her 1927 article paralleled the arguments of male critics,<sup>84</sup> condemning these women as even worse than those "childless able-bodied women [who] live[d] the life of parasites"<sup>85</sup> on alimony. Bromley also, however, criticized the suits from a feminist perspective for labeling woman as "still a helpless creature totally dependent upon matrimony for her welfare and subsistence."<sup>86</sup> "For just as long as women seek to profit materially from their relationship with men—both in and out of marriage—there will be no new era for the sex as a whole."<sup>87</sup>

Organized women's groups took little or no public interest in the debates over the breach of promise action. The one statement I found was the resolution of a regional conference of the National Women's Party in June 1935. Among its numerous calls for equality was one for "equal rights in suits over marriage promises." The intent was not to expand the cause of action, but to see such suits "laughed out of court."<sup>88</sup> The legislative movement for abolition, led by Mrs. Nicholson, won praise in the journal of the National Association of Women Lawyers.<sup>89</sup>

Why did this woman's cause of action produce such a reaction from other women? Breach of promise suits can be conceptualized in at least two ways: individually and structurally. Clearly the suit had genuine benefits for the particular woman who brought it. But at the same time, the existence of the cause of action, and the public responses it evoked, rein-

81. Lorelei then has photocopies made of the letter "because a girl might lose Henry's letter and she would not have anything left to remember him by." A. LOOS, *supra* note 31, at 169.

82. *Id.* at 197.

83. Bromley, *Breach of Promise—Why?* 12 THE WOMAN CITIZEN 8 (Sept. 1927).

84. See text accompanying notes 29–46 *supra*. First, Bromley argued, the essence of marriage should be mutual consent, while the cause of action "is based on the right of compulsion and, therefore, of soul-less marriages." Bromley, *supra* note 83, at 40 (citation omitted). Second, the claim of monetary damages for loss of the expected fortune was misplaced, for there are no guarantees that the rich man a woman hoped to land would stay rich and "a woman can [not] lose something which she never had." *Id.* at 9. Third, a woman who truly suffered could not be recompensed with "cold dollars and cents" and would never expose her shame to public view. The "breach of promise law . . . benefits the gold-digger, rather than the woman who cloaks herself in her self-respect and goes about making a new life." *Id.* Such adventuresses, moreover, were likely to succeed by preying on the best instincts of male jurors who "each have a soft spot which a clever woman can locate" and "are prone to suspect their own kind of base dealings with women." *Id.* at 40.

85. *Id.* at 8.

86. *Id.*

87. *Id.* at 40. This concern for the ill effect on women of economic dependency finds echoes in other feminist writings. See, e.g., C. HAMILTON, MARRIAGE AS A TRADE (1909); C. GILMAN, WOMEN AND ECONOMICS (1898).

88. N. Y. Times, June 24, 1935, at 1, col. 2.

89. 21 WOMEN LAWYER'S J. 39 (June 1935). This brief article focused on the concurrent abolition of alienation of affection suits (generally brought by husbands).

forced certain stereotyped images of women, of marriage, and of sexuality. For feminist women, I suggest, the cause of action was perceived as an ideological impediment to woman's social progress; the plight of the particular plaintiffs was largely invisible to them.<sup>90</sup>

Nineteenth and early twentieth century feminists focused much of their attention on the public world:<sup>91</sup> most prominently, suffrage and political rights, and, secondarily, workplace rights to hold certain jobs, to protections against employer exploitation, and to decent (if not equal) pay. To the extent these issues were central, issues of marriage and sexuality were downplayed.<sup>92</sup>

Some strains within feminism did focus on issues of the "private world."<sup>93</sup> For example, there was substantial agitation over issues of divorce reform.<sup>94</sup> Traditional marriage, in which women played a defined and subservient role, was rejected.<sup>95</sup> Feminists condemned the double standard. The "New Woman," like the new man, could have sexual interests.<sup>96</sup> Marriage was to be a mutual enterprise, a freely chosen coming together of two adults for affection and support<sup>97</sup> with each also having a place in the outside world of work.<sup>98</sup> Men and women were to become equal, depending on each other emotionally, but not financially. In essence, women and men could aspire to an idealized prototype of the traditional husband.<sup>99</sup>

90. Cf. Fineman, *supra* note 30, at 730 (the voices of custodial mothers "are not heard because their concerns cannot be expressed through existing and accepted discourses or rhetorical concepts").

91. The distinction between a public and a private sphere, and the location of sexuality and family issues in the private sphere, is itself socially constructed; feminists have been deeply involved in the debates over what dividing line, if any, is appropriate or useful. See e.g., Olsen, *Family and Market*, 96 HARV. L. REV. 1497 (1980); Padgug, *Sexual Matters: On Conceptualizing Sexuality in History*, 20 RADICAL HIST. REV. 3, 6-7 (1979); Polan, *Toward a Theory of Law and Patriarchy*, in THE POLITICS OF LAW 294, *supra* note 9.

92. See Shulman, *Sex and Power: Sexual Bases of Radical Feminism*, 5 SIGNS 590, 591 (1980).

93. These non-suffrage oriented movements are sometimes referred to as "domestic feminism." See N. COTT, *THE GROUNDING OF MODERN FEMINISM* (1987) [hereinafter GROUNDING]; S. JEFFREYS, *supra* note 50, at 1-50; Smith, *Family Limitation, Sexual Control and Domestic Feminism in Victorian America*, 1 FEMINIST STUDIES 40 (1973).

94. See W. O'NEILL, *DIVORCE IN THE PROGRESSIVE ERA* (1977); S. DITZION, *MARRIAGE, MORALS AND SEX IN AMERICA* (1953).

95. See C. HAMILTON, *supra* note 87; C. GILMAN, *supra* note 87; C. DEGLER, *supra* note 38, at 289 (discussing views of social purity leader Dio Lewis).

96. See generally Thomas, *supra* note 57. The double standard is slowly eroding. See e.g., Reiss, *The Sexual Renaissance: A Summary and Analysis*, 22 J. SOC. ISSUES 123 (1966); Smigel & Seiden, *supra* note 56, at 6. On the shift to a pro-sexuality feminism in the 1920's, see P. FASS, *supra* note 57, at 72-73; Sinclair, *supra* note 20, at 88-89; N. COTT, GROUNDING, *supra* note 93, at 41-49. The new sexuality was defined solely in heterosexual terms. N. COTT, GROUNDING, *supra* note 93, at 156-57; JEFFREYS, *supra* note 50, at 147.

97. See W. O'NEILL, *supra* note 94, at 71-3; C. SMITH-ROSENBERG, *supra* note 54, at 245.

98. See E. MAY, *supra* note 8, at 115; W. LEACH, *TRUE LOVE AND PERFECT UNION 195-202* (1980).

99. The goal of this liberal feminist vision was for women to take an active place in the outside world, and a liberated approach to sexuality. The problem for women of accepting such a "male" vision has been explored by some "second wave" feminists. See generally A. DWORKIN, *RIGHT-WING WOMEN* (1978) [hereinafter RIGHT-WING]; Janeway, *supra* note 56, at 586-87; B. EHRENREICH, *THE HEARTS OF MEN: AMERICAN DREAMS AND THE FLIGHT FROM COMMITMENT* (1984); C.

The conception of marriage and sexuality on which the breach of promise cause of action rested was radically different from that of liberal feminism. It presumed that men and women had different roles to play.<sup>100</sup> It also presumed that women were dependent on men, although dependence brought the simultaneous risk of being misused or manipulated by them.<sup>101</sup> Further, a woman's loss of a marriage prospect entailed material harm, for marriage was a primary means to economic security.<sup>102</sup> Seduction was seen as a consequence of the intimacy of engagement, when a man persuaded a woman (who otherwise would save herself for marriage) that intercourse during engagement was nearly as permissible.<sup>103</sup> When he did so, and then refused to marry her, the woman, seduced and abandoned, had lost a great deal. She had lost her self-respect and the respect of others. Her value on the marriage market was eroded.<sup>104</sup> All these images of women—as economically dependent, as sexually passive, and as subject to a severe double standard—were contrary to the modern images that many feminists felt women should strive to make realities.

Feminists might nonetheless have been sympathetic to the problems of women entangled in orthodox patterns of passivity and dependency if they had recognized that their vision of independent, sexually equal woman was only an ideal. Modern womanhood, however, was frequently considered already achieved. If one believed that any woman could be independent,<sup>105</sup> that marriage was essentially a legitimation of the bonds of affection, and that sexuality was a matter of choice for both parties, then the stories told by breach of promise plaintiffs made no sense.<sup>106</sup>

It was relatively easy to deny the legitimacy of the claims of breach of promise plaintiffs, for their narratives of genuine need, harm, and pain were not readily heard. Feminists, like other critics, were dependent on

MACKINNON, *FEMINISM UNMODIFIED* (1987).

100. It carried forward, in modified form, the Victorian notion of separate spheres. N. COTT, *THE BONDS OF WOMANHOOD: WOMAN'S SPHERE IN NEW ENGLAND 1780-1835* (1977).

101. See L. GORDON, *supra* note 11 *passim*. This double bind has been a focus for some modern feminists. See, e.g., S. FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* 138 (1970); A. DWORKIN, *RIGHT-WING*, *supra* note 99.

102. Women's "jobs were usually underpaid, low-skilled, and monotonous . . . . Contrary to the assumptions of many women's rights advocates, 'emancipation' was not necessarily to be found in the workplace." E. MAY, *supra* note 8, at 118.

103. This vision was consistent with that of Victorian social puritans who saw illegitimate sexuality as the result of male manipulation of "the female's trusting and affectionate nature." C. SMITH-ROSENBERG, *supra* note 54, at 109, 116; P. FASS, *supra* note 57, at 268 (indicating in 1920's a "growing acceptance of intercourse among engaged couples," while "virginity in a bride . . . was still considered desirable," creating double bind for women).

104. See B. TAYLOR, *supra* note 48, at 34 (premarital chastity was important since "expensive goods must not be shop-soiled").

105. This was the view in R. CONWELL, *supra* note 33, and C. MACCOLLA, *supra* note 27, at 56. See also N. COTT, *GROUNDING*, *supra* note 93, at 40-41 (noting feminists of early twentieth century were unusually well-educated, and many pursued independent livelihoods).

106. "This protection to women that at one time may have been a necessary and just thing now seems at times almost a travesty." H. DAGGETT, *supra* note 41, at 91, *quoted in* M. GROSSBERG, *supra* note 17, at 55.

the media for their knowledge of these women. The media chose to publicize two sorts of plaintiffs' stories: the sensationalistic, and those with "human interest" value. Most fell in the former category, and generally were noteworthy because of the prominence of the defendant. Typically, he was a man of great wealth and fame, while the plaintiff was someone not of his social class, such as a stage dancer,<sup>107</sup> an opera fan who was "a brunette of a striking type"<sup>108</sup> or a shopgirl.<sup>109</sup> Many readers would no doubt believe that a man of wealth and breeding never intended nor agreed to marry a woman from the other side of the tracks. Either she invented her story or she was a foolish dupe. In any case, she did not deserve a wife's share of his fortune. Occasionally, claims involving the less famous were sufficiently titillating to make the papers.<sup>110</sup> These stories, too, generally portrayed the plaintiffs as greedy or silly.<sup>111</sup>

The stories hinted at in the case reports are surely more complex than those texts disclose. Sometimes one discerns within them the voices of women who loved, not wisely, but too well.<sup>112</sup> Moreover, despite the impression the popular press gave, appellate cases suggest that juries almost uniformly found for the plaintiffs<sup>113</sup>; few of the appeals are taken by plaintiffs.<sup>114</sup>

If the jurors' understanding reflected the realities of the cases before them, one must ask why the press and critics so badly misread reality. I suggest the stories were at once atypical and yet stereotypical; they fit comfortably within pre-existing images of rapacious women and beleaguered men.<sup>115</sup> The apparent willingness of the women's movement to

107. *Fontaine v. Whitney*, N. Y. Times, Jan. 4, 1923, at 1, col. 2.

108. *Meffert v. Caruso*, N. Y. Times, Apr. 22, 1914 at 7, col. 6.

109. *Mendal v. Gimbel*, NEWSWEEK, Apr. 18, 1936, at 22.

110. *Desiderio v. Caniglosi*, N. Y. Times, Jan. 24, 1913, at 1, col. 6 (promise to send a "thousand kisses" leads to verdict of "fifty cents per kiss"); *Leber v. Brown*, TIME, Mar. 3, 1967 at 50 (after discovering plaintiff on a nude beach, defendant paid her then-husband to divorce her).

111. Fictional treatments of breach of promise were equally unflattering to plaintiffs. A. LOOS, *supra* note 31; see also C. DICKENS, *THE PICKWICK PAPERS* (Oxford ed. 1947); W. S. GILBERT AND A. SULLIVAN, *TRIAL BY JURY* (1875).

112. One of the few cases to be reported in its full complexity was *Pollard v. Breckinridge*, a suit by a once-schoolgirl who bore the children of, but never became the bride of, former Kentucky war hero and Congressman Colonel Breckinridge. The entire story was turned into a 320-page Victorian morality tale. *THE CELEBRATED TRIAL OF MADELINE POLLARD V. BRECKINRIDGE* (Am. Printing & Binding Co. 1894).

113. Some critics suggested that male jurors were bamboozled or that plaintiffs were the beneficiaries of chivalry rather than justice. See, e.g., Bromley, *supra* note 83, at 40. Studies of rape trials, however, suggest that men are disinclined to believe women's claims that they have been subject to sexual coercion by other men. S. ESTRICH, *REAL RAPE* (1986); H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 249-51 (1966). It seems unlikely that these claims of seduction and abandonment would receive far more sympathy.

114. It is possible, of course, that plaintiffs frequently did lose at trial. The infrequency of such cases in the appellate reports may reflect the deeply fact-grounded nature of these cases, making appeals difficult to win. Since most plaintiffs' attorneys were probably working on contingency fees, they would be unwilling to take a futile appeal. Defendants, by contrast, could afford an appeal and might at least hope for a remittitur of damages, or for the benefit of delaying payment.

115. Though appellate opinions are as fragmentary a source as the popular press, they at least are not pre-selected for their news value. These cases show a complexity of stories behind the lawsuits,



accept the popular press' picture of these women may also be the result of ideological blinders. Newspaper stories and other articles did not arouse women's suspicion because they were coherent with negative images of traditional women,<sup>116</sup> against which feminists defined themselves. Breach of promise plaintiffs, like alimony-seeking wives,<sup>117</sup> represented the worst of what women would be if they did not become independent.<sup>118</sup>

Feminists might also, by distancing themselves from such unpopular women, appear less radical to the male power structure. This rejection of female dependency served the women's movement in much the same way as did the claims by some second-wave feminists that men would be freer if their wives had a separate income and were no longer dependent on their husbands.<sup>119</sup> Advocating the breach of promise action would have imposed ideological costs.<sup>120</sup> It thus may have been understandable for feminists to adopt the position they did. The failure to recognize the costs of that position, i.e. that a group of women were deprived of the value of a "non-feminist" remedy, is disturbing, however. Though imperfect, the breach of promise action redressed real harms suffered by real women. The fact of taking action on their own behalf also may have served the plaintiffs as a means of overcoming passivity and victimhood. Disappointingly, neither of these aspects of the cause of action—both potentially of value to a non-sectarian feminism—appears to have entered into the calculus of contemporaneous feminist movements.

#### IV. EMPOWERMENT AND IDEOLOGY

Bringing a law suit is an act of courage and self-empowerment.<sup>121</sup> Breach of promise plaintiffs were women who, at the moment they filed suit, had failed to achieve their dream. One response to such failure would have been to accept the harm as deserved—to see themselves as victims of life's vicissitudes.<sup>122</sup> Instead, they chose to take action, to claim some

and do not reinforce the "gold-digger" image.

116. See Fineman, *supra* note 30, at 753.

117. See, e.g., Bromley, *supra* note 83, at 8.

118. See, e.g., C. GILMAN, *supra* note 87; see also *Woman's Growing Revolt Against "Coercive Marriage,"* 56 CURRENT OPINION 132 (1914).

119. See, e.g., A. DWORKIN, RIGHT-WING, *supra* note 99; B. EHRENREICH, *supra* note 99; "Who's the Winner in Two-Career Families?" *Miami Herald*, June 12, 1988, sec. G at 1, col. 5. In fact, patriarchal structures are more threatened by independent women, for the very nature of patriarchy is male power and women's powerlessness. Economic independence facilitates effective resistance.

120. Sinclair, *supra* note 20, at 96-97. See text accompanying notes 93-104 *supra*.

121. Cf. C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979); Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) (both discussing use of law as means for defining and empowering social movement).

122. Another would be to swallow their hurt and move on—a response some of the critics suggested a real lady would take. Brown, *supra* note 17, at 493 ("The plaintiffs who do recover are not the ones who should, and the persons who are wronged . . . practically never bring suit"); Lawyer, *supra* note 31, at 274 ("The confiding, sensitive, loving and virtuous, do not . . . stand ready to

agency over their lives.<sup>123</sup> To file a suit is to say, first, I will not accept the harm done to me as something natural and unchangeable; and, second, I will take action to reallocate responsibility to those who caused that harm.<sup>124</sup>

Bringing a lawsuit is a risky form of self-empowerment, however. The filing itself does not bring material change, though it may have a beneficial psychic impact. The ensuing process of telling one's story in a highly public forum is both frightening and unpredictable.<sup>125</sup> And the outcome is largely in the hands of others—lawyers, judges, and jury.<sup>126</sup>

Those risks are compounded for breach of promise plaintiffs, where the available legal remedy poorly fits the injury. These women's experience of harm and desire for relief may have had little to do with the cause of action as it was brought on their behalf by (male) lawyers, and subject to the review and control of (male) judges and juries.<sup>127</sup> The stories women needed to tell to win may have been quite different from their own. The voices demanded by the cause of action were distorted.<sup>128</sup> Telling such reconstructed stories may not have been empowering.<sup>129</sup>

dispose of their affections as if they were merchandise"); Bromley, *supra* note 83, at 9.

123. Cf. L. GORDON, *supra* note 11.

124. At least one plaintiff also took more direct action. Schmidt v. Durnham, 46 Minn. 227, 49 N.W. 126, 127 (1891) (court found irrelevant that "some two weeks after the plaintiff had been informed of [the defendant's] marriage to another person, she sought him out, and shot him.")

125. As noted earlier, many critics believed such stories should be kept private. These arguments embody a claim for a natural public-private distinction and thus seem to me contrary to the feminist program. Speaking pain is a way of making it real to the speaker, in part through the process of working through the full dimension of one's beliefs and feelings in order to represent them in linguistic form, and in part through the validation of having others listen. Such public articulation of pain may lead to its reconstitution in structural, rather than individualist form. See A. Howe, The Problem of Privatized Injuries: Feminist Strategies for Litigation, in *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* (M. Fineman ed.) (forthcoming 1990); West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L. J. 81 (1987). A marvelous example of a public "speaking pain" is contained in the NARAL amicus brief in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), reprinted in 9 WOMEN'S RTS. L. REP. 3 (1986) (collecting women's stories of unwanted pregnancies).

126. See, e.g., Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (analyzing developments in anti-discrimination law from the perspective of the victim). But cf. Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?* 22 HARV. C.R.-C.L. L. REV. 301 (1987) (debating value of law as means of social change).

127. See Basch, *The Emerging Legal History of Women in the United States: Property, Divorce, and the Constitution*, 12 SIGNS 97, 108 (1986); Clark, Book Review, 2 WIS. WOMEN'S L. J. 159, 164 (1986).

128. M. GROSSBERG, *supra* note 17, 39-50. Cf. Coombs, *Shared Privacy, or The Rights of Relationships*, 75 CALIF. L. REV. 1593 (1987) (discussing court's power of definition over privacy claims).

129. There is enormous dispute within the feminist community over the extent to which women's voices are their own, and how we can enhance the chances of true voices being heard. Compare Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 43 (1987) and Gilligan & MacKinnon, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 63 (1985) (Gilligan) (importance of listening to female voice) [hereinafter *Conversation*], with *Conversation*, *supra*, at 27-28 (MacKinnon) (rejecting "accuracy" of existing woman's voice).

For the oppressed, there is always a tension between speaking in one's own voice and adopting enough of the dominant language to be heard. Compare A. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 355-357 (1983) (need to adapt) with A. Lorde, *The Master's Tools Will Never*

The cause of action should not, however, have been dismissed out-of-hand simply because plaintiffs' actions appeared antithetical to feminists' perception of women's long-run interests. Women in a variety of situations have sought to improve their lives, within the limits imposed by traditional roles, by demanding at least that the bargains implicit in those traditions be kept. In so doing, they challenge the notion of traditional women as passive, as victims.<sup>130</sup> As feminists, we often think these efforts are ultimately self-defeating. Patriarchal gender relations do not, on the whole, benefit women, and the meager benefits, even when actually provided, are worth much less than we were taught.

Rejecting conventional roles and life-patterns does not necessarily mean, however, rejecting those women who seek to better their position while living within those very conventions. I suggest that feminists of an earlier period should have tried to empathize with breach of promise plaintiffs. Similarly, contemporary feminists should nurture and applaud the potential empowerment in the actions of more traditional women.

Three brief examples may clarify my point: women seeking sole custody on divorce, sex workers seeking economic gain, and right-wing activist women.<sup>131</sup> The first two situations involve women making non-feminist arguments in support of their own material needs. The last group—women driven primarily by a traditionalist ideology—raises somewhat different issues for feminists.

Feminists have yet to respond adequately to women who demand recognition of and support for their bonding with their children. In the feminist utopia, childrearing will be a non-gendered activity.<sup>132</sup> I would find it difficult to quarrel with an ideal of a world where men as well as women defined themselves as the nurturers of children. This goal has led some feminists to support joint custody, even over the objection of the mother.<sup>133</sup>

*Dismantle The Master's House*, in *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* 98 (1983) (need to acknowledge and speak out of difference).

130. Cf. C. SMITH-ROSENBERG, *supra* note 54; D. PIVAR, *PURITY CRUSADE* 255-61 (1973); N. COTT, *GROUNDING*, *supra* note 93 (examining feminist elements in nineteenth century social purity movements). Sometimes, of course, the activities of traditional women, such as the attempts of anti-abortion protesters to block access to clinics, are directly harmful to other women. In these cases, we must struggle against those activities, even as we strive to understand our opponents' motivations. See, e.g., K. LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 160-63 (1984) (anti-abortion activists see pro-choice movement as threatening value of traditional mothering).

131. None of the analogies is perfect. Each group has a different relation to the legal system; they also vary in the extent to which their "conservative" ideological agenda is explicit and conscious. I thank my co-participants in the 1988 *Feminism and Legal Theory* conference for their suggestions and invite the reader to imagine still other parallels.

132. See, e.g., S. FIRESTONE, *supra* note 101, at 232-33; U. LEQUIN, *THE LEFT-HAND OF DARKNESS* 65-68 (1969). Even at a less utopian level, some feminists have revalued fathering activities at the expense of traditional mothering. See Fineman & Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 *WIS. L. REV.* 107, 117-18 (1987).

133. See, e.g., Ahrons, *Joint Custody Arrangements in the Postdivorce Family*, 3 *J. DIVORCE* 189, 203 (Spring 1980). Baum, *Parent and Child: The Best of Both Parents*, *N. Y. Times*, Oct. 31, 1976, sec. 6 (Magazine), at 44; Holly, *Joint Custody: The New Haven Plan*, 5 *MS. MAGAZINE* 70 (Sept. 1976). A number of jurisdictions permit joint custody to be decreed even when one of the

Many mothers don't want joint custody. They distrust their ex-husbands' ability suddenly to be good single parents to the children these women have raised alone. They often suspect their husbands' desire for joint custody does not reflect a serious desire to parent, but instead to maintain control over their ex-wives.<sup>134</sup> At worst, joint custody statutes make it easier for men with no real desire for custody to coerce wives into accepting less child support than they need.<sup>135</sup>

These women want legal recognition and economic support for their continued role as their children's primary parents.<sup>136</sup> They want to maintain autonomy in their lives as they rebuild their newly constituted families. But the arguments they make for sole custody unsettle certain feminists.<sup>137</sup>

A second group of women who raise troubling issues for feminist are prostitutes and other sex workers. Heterosexuality itself is problematic for some feminists;<sup>138</sup> even for the less radical, prostitution seems both a degradation of sexuality and a locus for the oppression of women. Yet some women prostitutes claim instead that the problems they face are largely a result of the illegality of their work and the concomitant exclusion from legal protection.<sup>139</sup> Feminists once sought to assist such women and to change oppressive laws.<sup>140</sup> Unfortunately, their efforts were not grounded in an understanding of the prostitutes' experiences, and evaporated as the prostitutes failed to show their appreciation or to repent.<sup>141</sup> Contemporary feminism has resolved this dilemma mainly by ignoring sex workers.<sup>142</sup>

parents objects, and others allow use of the objection as a criterion for denying the parent (usually the mother) custody. See Folberg, *Joint Custody—The Second Wave*, 23 J. FAM. L. 1 (1984).

134. See, e.g., Fineman, *supra* note 30, at 761; cf. Comment, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modification Proceedings*, 35 UCLA L. REV. 677 (1988) (calling for narrowing grounds on which non-custodial parent can control custodial parent's actions through modification threat). At worst, the women may fear the continued abuse of themselves or their children that joint custody would facilitate.

135. See Chambers, *Rethinking the Substantive Rules for Child Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 567 (1984); Singer & Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 515-17 (1988).

136. See Fineman, *supra* note 30, at 768-69; Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 237-38 (1982).

137. In general, modern feminists have paid relatively little attention to children. E.g., Gordon, *Family Violence, Feminism and Social Control*, 12 FEMINIST STUDIES 453, 458-60 (1986); Stacey, *The New Conservative Feminism*, 9 FEMINIST STUDIES 559, 576 (1983). This indifference has changed as more American women, working class and middle class alike, face the problems of combining marketplace work and childrearing.

138. See A. DWORKIN, *INTERCOURSE 122-28* (1987); see also sources cited in Hantsis, Book Review, *Is Gender Justice a Completed Agenda?*, 100 HARV. L. REV. 690, 703 n.41 (1987).

139. See generally SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY (F. Delacoste & P. Alexander eds. 1987).

140. See, e.g., J. WALKOWITZ, *PROSTITUTION AND VICTORIAN SOCIETY: WOMEN, CLASS, AND THE STATE*, 116, 135 (1980); R. ROSEN, *THE LOST SISTERHOOD* 62-68 (1982).

141. See R. ROSEN, *supra* note 140, at 63-67; DuBois and Gordon, *supra* note 55, at 37-39.

142. LeBoeuf, Book Review, 4 BERKELEY WOMEN'S L.J. 181, 185 (1989). Concerns over sexuality have focused on rape, where victimization is ostensibly clearer. See, e.g., DuBois and Gordon, *supra* note 55, at 42-43. Another focus is pornography, seen as akin to rape. See, e.g., A. DWORKIN, *MEN POSSESSING WOMEN* 137-38 (1981); Morgan, *Theory and Practice: Pornography and Rape*,

These issues can be conceptualized as conflicts between ideological and material goals. Both of these groups of women seek in part the immediate betterment of their lives. Sympathetic feminists might best work with these women to discover and implement alternative means of material support, so that it would be unnecessary to assert claims that may reinforce gender hierarchies. For example, women who wish to have children should be able to obtain support from fathers, but abortion also must be freely available.<sup>143</sup> Realistic spousal support payments must be provided for older women who carried on traditional roles, but retraining for new careers should be encouraged for women who can take advantage of it.<sup>144</sup> Economic opportunities for women must offer better choices than that between prostitution or minimum wage work.

The benefits of taking charge of one's life, however, occurs not simply in the result but also in the process. Women who make claims of entitlement to the benefits of traditional gender roles refuse to accept passively the hand life has dealt them. These glimmerings of energy and self-motivation are important phenomena upon which the women's movement should seek to build. Stories and claims need not be taken only at face value; they should be taken seriously, by being reread for their liberatory kernel. Rechanneling rather than denigrating such energies should help avoid the dispiriting process of women fighting women.

A more complicated problem for feminists is determining the appropriate stance to take towards activist right-wing women. Unlike the cases discussed above, such women act, in the first instance, out of an alternative ideology rather than a set of material needs. However, I think simply dismissing them as wrong-headed ignores real facts about women's lives embedded in the interstices of their arguments, and misses possible openings for alliance and connection with them.

Two key facts characterize these activists. First, they often take leadership roles and exercise significant power within their own communities and in certain legislative battles.<sup>145</sup> Second, they mobilize on behalf of agendas—anti-abortion, anti-ERA, “pro-family”—that most feminists find abhorrent.

Few feminists have made serious attempts to understand why such women seek the goals they do, what role political activism plays in their

in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 134 (L. Lederer, ed. 1980). The latter position creates a deep divide with sex workers who do not repent. Cf. C. MACKINNON, *supra* note 99, at 10-15 (defending Linda Marchiano, whose book, L. LOVELACE & M. McGRADY, ORDEAL (1980) documents her horrifying exploitation as film star Linda Lovelace).

143. Cf. A. DWORKIN, RIGHT-WING, *supra* note 99, at 100-05.

144. See generally L. WEITZMAN, *supra* note 64, at 187-94, 207-12.

145. See K. LUKER, *supra* note 130, at 218-24; Freeman, *Antifeminists and Women's Liberation: A Case Study of a Paradox*, 3(1) WOMEN AND POLITICS 21 (1983). Catherine MacKinnon noted both Phyllis Schlafly's powerful role and the likelihood that her qualifications might have carried her even further but for the limits of sexism. C. MACKINNON, *Not by Law Alone: From a Debate With Phyllis Schlafly*, in FEMINISM UNMODIFIED, *supra* note 99, at 21.

lives, or how their gender relates to their political agenda.<sup>146</sup> Those efforts are worth making. We can learn something about many women's lives by listening to conservatives' stories. At present traditional protections can serve valuable functions for some women,<sup>147</sup> though they may simultaneously impede needed change. Furthermore, appeals to family values strike deeper roots than we once recognized.<sup>148</sup> Feminism needs to understand this appeal and incorporate "family"—broadened and transformed from its nuclear, patriarchal paradigm—into its own agenda.<sup>149</sup> Meanwhile, right-wing women can become—always with a degree of trepidation—provisional allies in some specific causes such as enforcement of child support or protection of abused children.

Finally, we should consider that not only the agenda but the actions of right-wing women can provide openings for feminism. The steps these women take to achieve their goals sometimes contain a core of empowerment that could be recognized and re-formed. Not every move made on behalf of women is necessarily made "by" women: much political action of women on the right may be directed by men and not indicative of any "woman's" world view. When *women* are the actors, however, there is opportunity for transformation: in the process of acting and interacting, conservative women may change the way they understand their own goals and possibilities.

I am not suggesting that all channels through which traditional women stake claims, including breach of promise actions, are (or were) worthy of support. But I do think that the potential value inherent in these women's activities has been too readily ignored. The individual and collective bene-

146. There are some exceptions, most commonly among "radical feminists." See generally A. DWORKIN, *RIGHT-WING*, *supra* note 99. Cf. Hunter, *The Role of Liberal Political Culture in the Construction of Middle America*, 42 U. MIAMI L. REV. 93 (1987) (analyzing the social function of Moral Majoritarian politics); Pohli, *Church Closets and Back Doors: A Feminist View of Moral Majority Women*, 9 FEMINIST STUDIES 529, 552-53 (1983) (proposing feminist outreach to Evangelical women).

One area in which strategic, though cautious, alliances might be made with right-wing women is around the issue of new reproductive technologies. While visions of women's place in the world differ greatly, traditional and radical women often concur in a well-grounded fear of the technocratization and professionalization of mothering. See, e.g., REPRODUCTIVE TECHNOLOGIES (M. Stanworth ed. 1987); G. COREA, *THE MOTHER MACHINE* 227-34 (1986).

147. As Andrea Dworkin notes, in a world where men wield most economic and political power, rules that bind men to particular women can, *inter alia*, protect those women from economic disaster. A. DWORKIN, *RIGHT-WING*, *supra* note 99. The tie to a particular man also can provide some buffer from the depredations of other men. S. BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 1-22 (1975).

148. Though the conventional family is often deeply oppressive, it can sometimes be a source of comfort and shelter not just for men, but for women. C. LASCH, *HAVEN IN A HEARTLESS WORLD* 37-39 (1978). S. HEWLETT, *A LESSER LIFE* 177-81 (1986). To deny its attractiveness is to make our efforts to transform the family less effective.

149. Some feminists are in fact engaged in this work. See Folbre, *Whither Families? Toward a Socialist-Feminist Family Policy*, *SOCIALIST REV.*, Oct.-Dec. 1988, at 57 (citing sources). This attempt to develop a progressive, feminist, family-centered agenda also has been a primary goal for *Tikkun Magazine*. See, e.g., Lerner, *The Legacy of the Sixties for the Politics of the Nineties*, 3(1) *TIKKUN* 44 (1988).

fits these women obtain have gone unnoticed by feminists, partly because their ideals are antithetical to our own, and partly because we have too readily accepted the picture of these women, and of what they wish to accomplish, presented to us by the mass/male media.

Implicit in feminism is a promise that we reach out to women and seek to help them. When, instead, we too abandon them, they have suffered twice over. Particularly when the women act out of their own sense of harm, we need to respond, for their sake and ours. Action is a step forward for traditional women, and women empowered are women capable of further empowerment, for all women.

