

Introduction

This work is an empirical and literary study of a tiny speck of English legal history: the common law action for breach of promise of marriage, available in England from the mid-seventeenth to the late twentieth century, which could be used to recover pecuniary damages against a faithless lover for the breach of an engagement. Although boasting a history of over 300 years, the common law action for breach of promise of marriage saw its rise to cultural prominence and its subsequent fall from favour in the 'long nineteenth century', a time of dramatic political, social, cultural, and legal upheaval extending from the early 1800s to the period just after the two World Wars.¹ It was during this period that the breach-of-promise action acquired its defining characteristics; that breach-of-promise suits increased in number, becoming part of the daily diet at county assizes and the Westminster courts; that they were given increasingly extensive treatment in regional and even national newspapers; and ultimately inspired what Shakespeare's Hamlet has so aptly called the 'abstracts and brief chronicles of the time':² works of literature. Just as the 'long nineteenth century' witnessed the rise of the breach of promise action, so it witnessed its decline. At the close of this historical period, during the 1920s and the 1930s, the breach-of-promise action became culturally obsolete. As the twentieth century progressed, fewer and fewer actions for breach of promise were brought, and only a handful of this trickle of cases garnered any media attention. The cause of action, become a virtual (legal as well as cultural) dead letter long

¹ The 'long nineteenth century' is a familiar concept in historical periodization, but its chronological boundaries are far from certain. The expression is most frequently used to refer to the period between 1789 and 1918. See, for instance, Lynn Abrams, *The Making of Modern Woman: Europe 1789–1918*, Longman History of European Women 5 (London: Longman-Pearson Education, 2002). Other definitions, however, move both the beginning and the endpoint of the period, variously dating it from 1750 to 1914, 1750 to 1925, or even 1750 to 1950. See Edmund Burke, 'Modernity's Histories: Rethinking the Long Nineteenth Century, 1750–1950' in *University of California World History Workshop, Essays and Positions from the World History Workshop*, Paper 1, 25 May 2000 <<http://repositories.cdlib.org/ucwhw/ep/1>>. In view of this chronological uncertainty and in view of the fact that dominant (male-centred) periodization is difficult to apply to women's history (S Jay Kleinberg (ed), *Retrieving Women's History: Changing Perceptions of the Role of Women in Politics and Society*, Berg/Unesco Comparative Studies (Oxford: Berg; Paris: Unesco, 1988) x), I define the 'long nineteenth century' as the period between the secure establishment of the ideology of true womanhood around 1800 and the consolidation of female emancipation in the wake of the two World Wars.

² William Shakespeare, *Hamlet*, Harold Jenkins (ed), The Arden Edition of the Works of William Shakespeare (London: Methuen, 1982) 2.2.520.

before the middle of the twentieth century, lingered on as a marginal suit for marginal people. It was formally abolished in England in 1970.³

This book explores this seminal period in the life of the breach-of-promise action. In its survey of three consecutive historical periods—the early nineteenth century (1800–1850), the high Victorian (1850–1900), and the post-Victorian (1900–1940) periods—it traces the evolution of the breach-of-promise suit from when it first became important until after it fell into desuetude and subsequently ceased to exist as a cause of action recognized in English law.

I. Situating the Project: Law, Cultural Ideology, and Nineteenth-Century Women's History

This project has links with two fields of scholarship whose relevance to my work I should like to acknowledge in this introduction. The first body of work in relation to which my endeavour can usefully be situated is that which examines the interaction between the law and social forces extraneous to the law or, put more crudely, the permeability of the law to cultural ideology. At least since the school of historical jurisprudence, associated with men like Sir Henry Maine and Sir Paul Vinogradoff, the structures of the law have been conceived of as the highly contingent product of time and place, a part of wider social structures rather than apart from them. Conscious (and more often still subconscious) cultural sensibilities are now seen as playing a vital role in shaping the structure of a legal system and the content of legal rules. In the words of Oliver Wendell Holmes, customarily called America's greatest jurist, it is a fallacy to suppose 'that the only force at work in the development of the law is logic'.⁴ Research into the law's relation to ideology has been taken up by a number of legal schools, such as the Marxist tradition, the school of legal realism of the 1920s, and the critical legal studies movement of the 1970s and 1980s. One of the most ambitious projects in the field of law and ideology to date is Alan Harding's *A Social History of English Law*, first published in 1966.⁵ In his study, which sweeps across the vast temporal expanse from Anglo-Saxon times to the present, Harding's aim is to relate 'the development of English law as a whole, and forwards, to the development of English society'.⁶ Proceeding from the

³ The cause of action was abolished by the Law Reform (Miscellaneous Provisions) Act 1970, c 33.

⁴ Oliver Wendell Holmes, Jr, 'The Path of the Law' (1897) 10(8) *Harvard Law Review* 465.

⁵ Alan Harding, *A Social History of English Law* (rpt edn) (Gloucester, MA: Peter Smith, 1973).

⁶ *Ibid.*, 9.

Holmesian premise that the law does not beget itself by a process of logical deduction, but is an expression of variable social needs and cultural pressures, Harding 'reads' the laws governing English society at any given period as a window on the social and cultural standards of the times. More recently, and working within a somewhat narrower compass, Peter Gabel and Jay M Feinman, echoing Marxist views about the ways in which the interests of the powerful shape law, have placed the evolution of the law of contracts in relation to the development of capitalist ideology.⁷ The aim of the present study is far more limited. Rather than attempting to explain the entire process of legal evolution, or even the development of the law of contracts in terms of a dominant ideology or succession of ideologies, its concern is with only one particular action framed *ex contractu*, the action for breach of promise of marriage, and its transformation in relation to one specific facet of the social and cultural framework of the England of the 'long nineteenth century.'

The facet of this social and cultural framework that I reference for my analysis of the breach-of-promise action is the nineteenth-century ideology of femininity: the ideal of the true and virtuous woman, which developed from around the middle of the eighteenth century and which was to provide the cultural definition of womanhood throughout the 1800s and the Victorian age. This choice of ideology situates my project within the second corpus of work that I should like to consider here: research into the history of gender or, more particularly, into nineteenth-century women's history. Women's history is an area of study that has seen a rapid transition from famine to feast since its emergence as a historical school in the 1960s.⁸ *Gender and History*, *Journal of the History of Sexuality*, *Journal of Women's History*, *Signs*, and *Women's History Review*, to name but five, are all journals devoted exclusively to studies in the history of gender. Books on historical themes about gender are multiplying, and there is an ever-increasing array of Internet sources on many aspects of women's history. The present-day quantity of material on 'the conditions in which women lived' would surely delight the English essayist and novelist Virginia Woolf, who, in 1929, had vainly looked 'about the shelves for books [about women] that were not there'.⁹ The nineteenth century has proved especially popular with historians of women. This is hardly to be wondered at: history is, after

⁷ Peter Gabel and Jay M Feinman, 'Contract Law as Ideology' in *The Politics of Law: A Progressive Critique*, David Kairys (ed), 3rd edn (New York: Basic Books, 1998) 497–510.

⁸ An excellent overview over the theoretical directions taken by gender history and the diversity of research in the field is provided in Anna Green and Kathleen Troup, 'Gender and History' in *The Houses of History: A Critical Reader in Twentieth-Century History and Theory*, Anna Green and Kathleen Troup (eds) (Manchester: Manchester University Press, 1999) 253–62.

⁹ Virginia Woolf, *A Room of One's Own* (London: Hogarth Press, 1974) 62, 68.

all, the study of change over time, as is evidenced by the fact that gender, a variable social construct, and not sex, the biological difference between men and women—which is only rarely subject to change—is the key concept used in gender history.¹⁰ The nineteenth century, then, is popular with historians of women, because it was a century of great change for women, both in social and in legal terms. Socially, the nineteenth century was, of course, the great age of the middle class, the century when the formulation of a specifically middle-class culture welded together the middling ranks of society, whilst simultaneously separating them off from the aristocracy and gentry above and the working classes below them. Catherine Hall, for one, has argued that the development of the middle class was gendered, that class formation went hand in hand with ‘a sharpened division between men and women, between the public and the private’.¹¹ Women, who had taken more of an active part in social life prior to the nineteenth century,¹² now found themselves assigned a separate sphere, the home, and a special function, the guardianship of the domestic virtues.¹³ This ‘separate spheres’ account has recently been questioned by a number of scholars, who have pointed to the late eighteenth and early nineteenth centuries as a time of increasing opportunities for women, basing their argument on a rise in female literacy and on women’s growing participation in the economy.¹⁴ While this reappraisal has much to recommend it—not least because it serves as a helpful reminder that social developments are often considerably more complex and ‘messy’ than historical accounts of

¹⁰ For the sex/gender distinction, see Ann Oakley, *Sex, Gender and Society* (rev edn), Towards a New Society (Aldershot: Gower Publishing, 1985) 16. In women’s history, there is now ‘a preoccupation with gender as a category of analysis’. Joan Wallach Scott, ‘The Problem of Invisibility’, Kleinberg 16.

¹¹ Catherine Hall, *White, Male and Middle Class: Explorations in Feminism and History* (Cambridge: Polity Press, 1992) 96.

¹² The nineteenth-century world of separate spheres is usually contrasted to the eighteenth century, which is portrayed as a golden age for women (Hall 95, 99). The deterioration in women’s social position post-1800 is accounted for by the nineteenth-century advent of industrialization with its male-oriented machines and factories. Patricia Branca, *Women in Europe since 1750* (London: Croom Helm, 1978) 11. The vision of the eighteenth century as a golden age for women has been questioned by a number of scholars. See, for instance, Amanda Vickery, ‘Golden Age to Separate Spheres? A Review of the Categories and Chronology of English Women’s History’ (1993) 36(2) *Historical Journal* 400, 402. See also G J Barker-Benfield, *The Culture of Sensibility: Sex and Society in Eighteenth-Century Britain* (Chicago: University of Chicago Press, 1992) 155.

¹³ The classic work on the development and the strength of the ideology of separate spheres and the break it marked with a less restricted past is the massive Leonore Davidoff and Catherine Hall, *Family Fortunes: Men and Women of the English Middle Class, 1780–1850*, Women in Culture and Society (Chicago: University of Chicago Press, 1987). For another work that analyses the doctrine of separate spheres, see Deborah Gorham, *The Victorian Girl and the Feminine Ideal* (Bloomington: Indiana University Press, 1982).

¹⁴ See, for instance, Vickery 412. See also Hannah Barker and Elaine Chalus (eds), *Gender in Eighteenth-Century England: Roles, Representations, and Responsibilities* (London: Longman, 1997) 8–24, where the original separate spheres literature and the more recent revisionist accounts are helpfully reviewed. See also Barker-Benfield 154–350.

them would have us believe—the broad outlines of the original analysis of separate spheres, as Nicola Lacey, for one, has argued, remain persuasive. Thus, it is generally acknowledged that women constituted a lower proportion of those in paid employment in the second half of the nineteenth century than they had in the late eighteenth century—a surprising statistic in the context of general capitalist growth and development—and that their practical access to theoretically burgeoning opportunities was heavily circumscribed, not only by social and financial obstacles to education and independence, but also by the emergence of constraining norms of feminine comportment, which provided the baseline for defining propriety and conditioned women's access to their (shrinking) social terrain.¹⁵ While nineteenth-century women engaged in an impressive range of activities and played many roles in society—daughter, sister, spinster, mother, wife, widow, neighbour, employer, worker, professional, philanthropist, recipient of charity, churchgoer, consumer, reader, imperialist, political activist, public servant, and monarch, among others¹⁶—they did not enjoy infinite possibilities. The economic and cultural limitations they experienced were severe.¹⁷ It therefore remains true to say that the gathering shadows of domesticity made the first half of the nineteenth century an age of great change, in the direction of social restriction, for women, while the declining decades of that same century brought great change in the opposite direction, as more and more women, under the influence of the first feminist movement, declined the dubious honour of being an 'angel in the house'.¹⁸

Nineteenth-century women's legal history parallels the double shift displayed by the social development. The nineteenth century witnessed, first, the imposition of legal disabilities on women—it is worth remembering that the formal bar on women's political participation was introduced by the Reform Act of 1832, prior to which women ratepayers had been eligible to vote in local elections¹⁹—and then the piecemeal and hard-won removal of these disabilities as the century wore on. Most of the work in the field of nineteenth-century women's legal history focuses on either the political or the marital bondage of women in that century: either their non-existence for the purposes of public law or the civil death suffered by women on entering the married state. Once

¹⁵ Nicola Lacey, *Women, Crime, and Character: From Moll Flanders to Tess of the D'Urbervilles* (Oxford: Oxford University Press, 2008) 95–6.

¹⁶ Susie Steinbach, *Women in England 1760–1914: A Social History* (London: Weidenfeld & Nicolson, 2004) 2.

¹⁷ *Ibid.*

¹⁸ This catchphrase comes from a poem of the same name by Coventry Patmore. See Coventry Patmore, *The Angel in the House together with The Victories of Love*, Alice Meynell (introd) (London: Routledge, 1905). Although this Victorian poem is little known today, its title has become a byword for domestic womanly perfection.

¹⁹ Robert Shoemaker, *Gender in English Society 1660–1850: The Emergence of Separate Spheres?* (London: Longman, 1998) ch 6.

again, this research emphasis may reflect the historian's concern with change, since it was the public law status of women and the private law status of married women that saw the most dramatic revision during the nineteenth century. The public law position of women, single and married, at the dawn of the nineteenth century is easily explained: 'in public law there was no place for them, except on the throne'.²⁰ And in private law, when a woman married, her legal identity became suspended in that of her husband, and she 'fell prey to a whole series of disabilities which placed her in the same legal category as wards, lunatics, idiots, and outlaws'.²¹ This radical alteration in status was the effect of the doctrine of coverture, according to which by marriage, 'the husband and wife [. . . became] one person in law',²² that one person and bearer of all rights being the husband. Both the public law status of women and the private law status of married women were extensively revised during the course of the nineteenth century and beyond, culminating in the extension of the franchise to women in 1918, the removal of sex disqualifications in relation to professional and public life by the Sex Disqualification (Removal) Act of 1919, and a succession of family law reforms, one of the most significant of which was the introduction of gender-neutral grounds for divorce in 1923.²³

While the public law position of women and the private law position of married women are therefore well researched,²⁴ comparatively little work has been done on the private law position of *single* women in the nineteenth century. In fact, it was (and still is) a widely held belief that in private law single women enjoyed the same rights and liabilities as men. A belief in the private law equality of single women was entertained and propagated, for instance, by leading members of the first women's rights movement. Thus, Barbara Leigh Smith Bodichon, a key figure

²⁰ Janelle Greenberg, 'The Legal Status of the English Woman in Early Eighteenth-Century Common Law and Equity' in *Studies in Eighteenth-Century Culture*, Harold E Pagliaro (ed), vol 4 (Madison: University of Wisconsin Press, 1975) 172.

²¹ *Ibid.*

²² William Blackstone, *Commentaries on the Laws of England* (Philadelphia, 1879) 1: 442.

²³ The reforms further included the Divorce Act of 1857 (introducing civil divorce), the Married Women's Property Acts of 1870 and 1882 (allowing a married woman to retain her own wages, possessions, and capital, rather than renounce them to her husband), the Matrimonial Causes Act of 1878 (giving magistrates' courts the power to grant a separation order, with maintenance and custody of children under 10, to a wife who had been beaten by her husband, extended in 1886 to one who had been deserted), and the Infant Custody Act of 1886 (giving mothers the right to appeal for custody of their children). On these reforms, see Mary Lyndon Shanley's book *Feminism, Marriage, and the Law in Victorian England, 1850–1895* (London: I. B. Tauris, 1989).

²⁴ Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (Toronto: University of Toronto Press, 1983) and Shanley's *Feminism, Marriage, and the Law*, for instance, chart the emergence and evolution of the women's rights movement and its impact on, especially, the legal status of married women. A similar emphasis is displayed in David Rubinstein, *Before the Suffragettes: Women's Emancipation in the 1890s* (Brighton: Harvester Press, 1986), which looks at women in employment and politics.

in the campaign for women's suffrage and higher education, in her 1854 pamphlet, deploring women's legal disadvantages, never doubted that single women 'are affected by all the laws and incur the same responsibilities in all their contracts and doings as men'.²⁵ The same unquestioning belief in the private law equality of single women can still be met with today. Janelle Greenberg, for instance, stated in 1978 that the '*feme sole* enjoyed... the same rights and responsibilities as did men... She made contracts; she sued and was sued.'²⁶ This orthodoxy has only recently been challenged. Writing in 1996 in the context of redress in tort for sexual injuries, Lea VanderVelde first questioned the correctness of the claim that single women enjoyed the same private law protection as men. While acknowledging that in many respects single women were independent legal entities, VanderVelde observed that 'in one centrally important way, they were not. Until the midnineteenth [sic] century, single women had no effective pattern of direct rights of action in tort for sexual injuries.'²⁷

As a contractual and hence a private law cause of action brought almost by definition by a single woman, the action for breach of promise affords a valuable opportunity for further investigating the relevance of gender in private law. Like the seduction action, already claimed as an instance of the private law inequality of single women by VanderVelde, breach of promise to marry is one of four causes of action, which in American textbooks are frequently grouped under the rubric 'heartbalm'. The term appears to be an American coinage. There is no evidence of its widespread use in England. In addition to breach of promise and seduction, the remaining two 'heartbalm' actions are criminal conversation and alienation of affections. Unlike seduction and breach of promise, the so-called non-marital heartbalm actions, criminal conversation and alienation of affections, are both marital torts. Criminal conversation is the civil cause of action corresponding to the crime of adultery. Abolished in England in 1857, it could be brought by a husband against any man who had committed adultery with his wife. By contrast, alienation of affections, likewise a cause of action open only to the husband, did not have to involve adultery. The gravamen of the injury here was not the interference with a husband's right of exclusive sexual access to his wife's body, but the destruction of the affection or consortium subsisting between husband and wife. Alienation of affections became a distinct tort by the latter half of the nineteenth century and was a purely American kind of lawsuit, which never existed under that label in England. However,

²⁵ Barbara Leigh Smith Bodichon, *A Brief Summary, in Plain Language, of the Most Important Laws Concerning Women* (London, 1854) 4.

²⁶ Greenberg 172.

²⁷ Lea VanderVelde, 'The Legal Ways of Seduction' (1996) 48 *Stanford Law Review* 822.

an English husband might recover in tort where a third party induced his wife to leave him or remain away from him against his will.²⁸

The common denominator of the heartbalm actions is that they provide legal ‘balm’ for broken, or at least bruised, hearts. In addition to belonging to the same legal family, seduction and breach of promise to marry share a similar dynamic. Both causes of action revolve around male/female relationships, illegitimate (seduction) in the one case and legitimate (intended marriage) in the other. Of course, there are also substantial differences: seduction is an action in tort, while the breach-of-promise action, formally at least, always remained within the economy of contract. Also, although the relations between a man and a woman, legitimate or illegitimate as the case may be, are at the heart of both, it was only in breach of promise that the man and the woman were the parties to the action. In 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 (*actio per quod servitium amisit*), the right to sue was granted to those entitled to the woman’s services, usually her master or her father. Still, the actions are similar in that questions of sex and of socially-prescribed sex-specific norms of behaviour are central to both.

The goal of this study is to explore the impact of these socially constructed sex-specific norms, gender for short, on the litigation of broken engagements in nineteenth-century England. The aim is to provide a consideration of the assimilation and reproduction of a particular cultural construct in a specific legal context and to expose the underlying pattern of sexual typification that informed the law.²⁹ The claim advanced is that a particular construction of

²⁸ See John W Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (London: Stevens & Haynes, 1907) 379. The English cases stress procuring or enticing the plaintiff’s spouse to leave the home. There is no English decision squarely holding alienation of affections per se sufficient to sustain an action. See Nathan P Feinsinger, ‘Legislative Attack on “Heart Balm”’ (1935) 33(7) *Michigan Law Review* 992 n 75. For a history of criminal conversation in England, see Lawrence Stone, *Road to Divorce: England 1530–1987* (Oxford: Oxford University Press, 1990) 231–300. For a discussion of the American law on the subject, see Feinsinger 989–92 and Laura Hanft Korobkin’s excellent legal-literary study *Criminal Conversations: Sentimentality and Nineteenth-Century Legal Stories of Adultery*, *The Social Foundations of Aesthetic Forms* (New York: Columbia University Press, 1998). For a history of alienation of affections, see Thomas K Leeper, ‘Alienation of Affections: Flourishing Anachronism’ (1977) 13 *Wake Forest Law Review* 586–90.

²⁹ Arguments linking legal developments and prevalent cultural constructs of femininity—particularly in the context of courtship, marriage, and divorce—have been advanced by a number of scholars in recent years. Michael Grossberg, for instance, has argued that nineteenth-century American ‘breach-of-promise suits allowed the courts to promote republican notions of marriage and gender responsibilities’. See Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America*, *Studies in Legal History* (Chapel Hill: University of North Carolina Press, 1985) 35. Like me, Grossberg ties the twentieth-century demise of these suits to changing cultural ideals for women that included independence and sexuality (55). In a similar vein, Laura Hanft Korobkin’s study of criminal conversation asks how twentieth-century ‘changes in America’s images of women, sexuality, and marriage ... changed women’s relation to the law’ (5) and concludes that

gender, the nineteenth-century ideal of the true woman, controlled the simultaneous transformation of the action for breach of promise.³⁰ The ideal of the delicate, virtuous, and submissive woman can be seen as the *fons et origo* of and the unifying construct behind the idiosyncratic complex of rules that governed the breach-of-promise action in the period in question. An analysis of the common law action for breach of promise of marriage reveals that, just as within the range of intentional tort actions, as VanderVelde has shown, sex was *sui generis*, so also within the range of contractual actions sex was *sui generis*. The breach-of-promise action, while formally gender-neutral throughout its history, was lived out as in fact highly gender-conscious during the nineteenth century. In the context of the private law action for breach of promise of marriage, where, exceptionally for the age, single women asserted their legal identity in large numbers, that identity was understood to be, first and foremost, a feminine one.

II. Tools of Analysis: Empiricism and Literature

This study does not stop short at providing evidence for the claim that the nineteenth-century breach-of-promise action was the legal ‘codification’³¹ of the ideal of true womanhood. Rather, I should like to continue my exploration of the symbiotic relationship between the nineteenth-century feminine ideal and the legal action with an analysis of the effects and wider implications of that alliance.

legal and social developments, most notably acts granting legal rights to married women and attempts by wives to sue the lovers of their adulterous husbands, undermined the sentimental foundations of the suit and deprived it of its attractions and legitimacy. For another work relating cultural ideals to legal and literary history, see Norma Basch’s book *Framing American Divorce: From the Revolutionary Generation to the Victorians* (Berkeley: University of California Press, 1999), which traces the legal, social, and cultural experience of divorce in America to provide an innovative exploration of the limits of nineteenth-century ideals of domesticity and conjugal love and their legacy for us today.

³⁰ A similar argument, with respect to the tort of seduction, is made by M B W Sinclair. Sinclair’s central claim is that ‘the prevalent conception of women and their social role—the myth of the ideal woman—has controlled the evolution of the tort of seduction’. Sinclair explains the seduction action’s initial property-based rationale, as an action by the master for loss of the seduced woman’s services, in terms of the then prevalent conception of women as property, ‘economically valuable for the services they could provide’, and its remoulding as an action ‘based on the loss of virtue, not services’ by the development of the nineteenth-century feminine ideal. See M B W Sinclair, ‘Seduction and the Myth of the Ideal Woman’ (1987) 5(33) *Law and Inequality* 33.

³¹ For this term, see Ann M Garfinkle, Carol Lefcourt, and Diane B Schulner, ‘Women’s Servitude under Law’ in *Law against the People: Essays to Demystify Law, Order and the Courts*, Robert Lefcourt (ed) (New York: Random House, 1971), who argue that in essence, ‘the laws are a formal codification of attitudes toward women that permeate our culture’ (120).

For a rigorous effects-oriented analysis of a legal development, it is necessary to turn to academic disciplines other than law. If one is interested in projecting the *likely* impact of a legal rule, then, in the context of contract, the most extensively used discipline to date is microeconomics. An economic projection, despite its many advantages, must, however, by its very nature remain hypothetical. It can never yield more than ‘theoretical models of the likely impact of a rule of law under certain, often quite limiting, assumptions’.³² Against that, the great beauty of the historical perspective is, of course, that, at least as regards effects, one is dealing with actualities, rather than potentialities and hypotheses. The results are there already, waiting, not to be predicted, but to be unearthed. The tool to use in historical analysis, therefore, is empirical investigation.

Accordingly, I analysed over 250 actual breach-of-promise cases, decided by a variety of English courts over the 300-year period extending from the action’s common law beginnings in the mid-seventeenth century to its statutory abolition in 1970. The vast majority of these cases date from what I have described as the seminal period in the life of the breach-of-promise action, the period of the action’s rise and fall between 1800 and 1940. The cases provide ample evidence of the postulated symbiosis, but since they cover more than a century, they are also revealing for what they tell us about its short- and longer-term effects. Nearly all of my cases are drawn from period newspapers, rather than law reports. There are two reasons for this. For a start, only a small percentage of breach-of-promise cases ever made it into the law reports. Confining one’s attention to reported decisions would therefore import the danger of proceeding from too narrow a base. Secondly, judgments that did get reported and thus became judgments of record are appellate decisions. This means that the danger of insufficient material is compounded by a risk of bias, as a case that gets appealed is always likely to be exceptional in some way.³³

The work of the lower courts, as recorded in period newspapers, offers a rich, but potentially unwieldy, source of information. The bulk of the material, when allied to the constraints of time and money with which all scholars contend, makes it necessary to resort to sampling. My aim in collecting a sample of cases on breach of promise was to ensure that it was

³² H G Beale, W D Bishop, and M P Furmston, *Contract: Cases and Materials*, 5th edn (London: Oxford University Press, 2008) 11.

³³ For advice on the difficult question of whether to draw on newspaper accounts or reported decisions, I am indebted to Stephen Cretney of All Souls College, Oxford. Professor Cretney shared my objections to relying on reported cases and agreed that newspaper accounts were far more likely to be revealing (Stephen Cretney, email to the author, 18 January 2004). He also gave valuable advice on identifying newspapers likely to contain cases on breach of promise.

statistically unbiased, sufficiently broad to pick up trends over time, and sufficiently detailed to get at the human stories behind the legal facts. I sampled from three national and three regional newspapers in England: the *Times*, *Morning Chronicle*, *News of the World*, *Lancaster Gazette*, *Taunton Courier*, and *Norwich Mercury*. Taken together, these papers, all of which operated throughout at least most of the nineteenth century, cover the country geographically, extending from Taunton and surrounding neighbourhoods in the South over the East Coast to Lancashire in the North West; they cover the country culturally, collectively targeting the population in the metropolis and the provinces, the working classes and the well-to-do; and they cover the country politically, ranging from conservative (*Lancaster Gazette*), over neutral or moderate (*Taunton Courier*, *Times*, *Morning Chronicle*), to liberal (*Norwich Mercury*, *News of the World*). From these papers, I consulted the March and April issues of every fifth year for the period between 1800 and 1940,³⁴ so as to get coverage of the local assizes³⁵ as well as reports on cases outside the locality.

An application of these sampling criteria yielded a total of 242 cases. Each case was analysed and coded into seven main (and 64 sub-) categories relating to the parties involved, the making out and defence of the case, the amount of damages, the presence of aggravating or mitigating circumstances, and the strategies and arguments used at the trial. The individuals featured in the sample cases comprise a very diverse lot. They come from different age and socio-economic groups,³⁶ and the circumstances and length of their engagements vary. The participants in these actions have but one thing in common: they all experienced a significant upset in the transition from the single to the married state, which brought them into court. The records they left provide the statistical basis for this study.

When looking at a large number of cases with familiar plot constellations, mainly for the purpose of statistical analysis, it is easy to forget that each case embodies the skeletal remains of a unique human situation. In so sensitive an

³⁴ Some of the newspapers I consulted did not operate throughout the 1800–1940 period. In this case, I was restricted to sampling from those parts of the period during which the newspaper was published.

³⁵ The Easter assizes took place sometime in March or April of each year, depending on the courts' schedule.

³⁶ For statistical purposes, I assigned every participant in my sample a class status, based on (in the case of a man) income, profession, and the terms used by counsel in describing him and (in the case of a woman) the status group of her parents or family, her (non-)participation in the world of work, and the terms used by counsel in describing her. The lowest status group is class 1, which is made up of working-class people with a very tenuous hold on respectability. The highest class (6) is reserved to the aristocracy. Class groups 3–5 are given over to the middle classes, with class 3 describing the lower middle class. Class 2 is made up of the upper working class.

area as love, courtship, break-up, and heartbreak, only detailed accounts can bring out the nuances. I have therefore included three representative case studies, one for each of the three periods that form the major blocks of research effort, to add qualitative dimensions to quantitative data and to illustrate in depth the points I am trying to make. In so doing, I am utilizing the stock historical methodology of demonstrating by example, popularized by the work of Lawrence Stone³⁷ and put to very effective use by Norma Basch in her study of divorce in nineteenth-century America. The cases selected for study are both representative and exceptional. They are representative in that they are perfect illustrations of what I consider to have been the distinguishing trends of the historical periods from which they date: *Orford v Cole*, selected from the early nineteenth century (1800–1850), demonstrates that period's central concern with the plaintiff's true womanhood as key to her success at trial. *Smith v The Earl Ferrers*, which takes the field for the high Victorian period (1850–1900), furnishes what I regard as the best illustration of this second period's characteristic equation of the breach-of-promise plaintiff with morally bankrupt womanhood. And *Shaw v Shaw*, included for the post-Victorian period (1900–1940), brings out the disintegration and shapelessness of a cause of action past its cultural sell-by date. The three cases studied are exceptional in that each can claim to embody a superlative of some sort.³⁸ *Orford v Cole* resulted in what appears to have been the highest English jury award for breach of promise in the nineteenth century. *Smith v The Earl Ferrers* was perhaps the most famous breach-of-promise suit of all time.³⁹ And *Shaw v Shaw* typified the only breach-of-promise constellation that would, in a way, survive the action's abolition.⁴⁰

³⁷ Lawrence Stone is probably the leading historian on sexuality, marriage, divorce, and family structure in England. His work on those subjects includes two collections of case studies: *Broken Lives: Separation and Divorce in England, 1660–1857* (Oxford: Oxford University Press, 1993) and *Uncertain Unions: Marriage in England, 1660–1753* (New York: Oxford University Press, 1992).

³⁸ Since all of these cases are standouts, they are also unusually well documented. The superior quality of the documentation is yet another circumstance tending to recommend these cases for detailed study.

³⁹ The case continues to attract phenomenal amounts of scholarly attention today. Almost any modern analysis of breach of promise at least touches on *Smith v The Earl Ferrers*. Discussions of the case are included in Ginger S Frost, *Promises Broken: Courtship, Class, and Gender in Victorian England*, Victorian Literature and Culture Series (Charlottesville: University Press of Virginia, 1995) 118–23 and Karin L Kellogg, “Blighted Prospects and Wounded Feelings”: Breach of Promise in Victorian Law and Literature, master's thesis, University of Alberta, 1995, 41–8. The case is also routinely included in anthologies of famous Victorian trials. See, for instance, Michael Harrison, *Painful Details: Twelve Victorian Scandals* (London: Max Parish, 1962) 24–37.

⁴⁰ The wrong complained of in *Shaw v Shaw* (1954) 2 QB 429 was not that the defendant had broken his promise to marry the plaintiff, but that the plaintiff had entered a marriage which, unknown to her, was void, because her ‘husband’ was already married. When he died and the truth was discovered, she sued his estate for damages. She recovered on the grounds that the

As the goal of this study is to explore the interaction between the law, in the form of the action for breach of promise, and culture, in the form of the nineteenth-century feminine ideal, the source materials employed are also drawn from both sides of the law/culture divide. Accordingly, alongside actual cases—the principal output of the courts as the chief arbiters on law—the second set of materials consulted is the output of writers as the chief arbiters on culture. References to the legal culture and the larger culture reflect the professional versus lay components at work in breach of promise.⁴¹ Although the focus is on the breach-of-promise action as it was lived out in nineteenth and early twentieth-century England, I have decided to include American literary and cinematic representations of breach of promise in my analysis. Treating America, in this instance, as essentially an adjunct of the mother country is defensible, since the two countries were culturally very homogeneous during the Victorian age. Daniel Walker Howe has demonstrated that Victorian culture was a transatlantic phenomenon, shared by English-speaking countries throughout the Western world:

The Victorian cultural community constituted an international reference group in the nineteenth-century world. . . . The communications system of Victorianism was based on the English language and the media of print and (in due course) the telegraph and telephone. Knowledge of English put one in potential contact with a particular cultural heritage, including law, religion, and science. . . .⁴²

Howe's belief in a nineteenth-century transatlantic network of ideas is echoed by Steven Mintz, who notes that the 'burgeoning Anglo-American connection' was founded on 'a flood of moral tracts, periodicals, schoolbooks, and advice manuals published on both sides of the Atlantic [. . . which] defined models of character, manners, sensibility, and respectability and helped to create a mass middle-class reading public, responsive to a common set of moral standards and cultural symbols.'⁴³

deceased was in breach of his promise to marry her and in breach of his implied warranty that he was in a position to marry her.

When the Law Commission recommended the statutory removal of breach-of-promise actions in 1969, it suggested that a legal remedy (albeit one outside of breach of promise) should be available in constellations like the one in *Shaw v Shaw*. Law Commission, *Breach of Promise of Marriage*, Law Com No 26 (London: HMSO, 1969) 16–18. The Commission's proposals were subsequently enacted into law.

⁴¹ A similar approach is adopted by Norma Basch in her study of divorce in nineteenth-century America. Drawing on legal texts, newspaper coverage, trial pamphlets, and sentimental fiction, Basch probes the interplay between the legal culture and the larger culture, successively viewing divorce 'as a legal form, a social option, and a cultural symbol' (9).

⁴² Daniel Walker Howe, 'Victorian Culture in America' in *Victorian America*, Daniel Walker Howe (ed) (n p: University of Pennsylvania Press, 1976) 16–17.

⁴³ Steven Mintz, *A Prison of Expectations: The Family in Victorian Culture* (New York: New York University Press, 1983) 26–7.

To unearth literature and film dealing with the legal aspects of breach of promise, I conducted systematic searches in the public catalogues of eight leading libraries in England and the United States as well as researching Internet databases. I looked for accounts of breach of promise dating from between 1800 and 1940, rather than ‘modern’ historical novels and films that seek to bring the age of breach of promise alive retrospectively for the contemporary reader/spectator.⁴⁴ The research confirmed what isolated instances of enduringly famous fictional breach-of-promise suits—notably Dickens’s *Bardell v Pickwick* (*The Pickwick Papers*)⁴⁵ and Gilbert and Sullivan’s *Trial by Jury*⁴⁶—had promised: breach-of-promise trials constituted a fertile source of inspiration for nineteenth- and early twentieth-century literature and film. Fictional accounts of breach of promise started to appear in the 1830s, with the turnout increasing somewhat over the second half of the nineteenth century. From the early twentieth century, the breach-of-promise action was picked up by the nascent film industry. That there was a thriving sub-genre of literature and film specifically addressing the legal (and not merely the ever popular social or moral) aspects of a promise of marriage and its breach may surprise us. If works of literature are indeed, as Shakespeare has claimed, the ‘brief chronicles of the time’,⁴⁷ then the fact that the breach-of-promise action was included in the annals is a reflection of its centrality to nineteenth-century Anglo-American culture. Chronicles are highly selective, and only those facts which the writer considers important, are included in the record.

There would be various ways of categorizing this second set of breach-of-promise materials. It is a very diverse group, being made up of short stories, songs, plays, operettas, novels, and films. Some of the productions are canonical, others ephemeral. The methodology that suggests itself for my purposes is to categorize by legal element, with the focus on the plaintiff. One arrives at the following four categories:⁴⁸

- (A) Works in which a female character is shown as an in-court breach-of-promise plaintiff (‘in-court involvement’).

⁴⁴ Modern accounts do not provide any insight into how the breach-of-promise action was perceived and represented in the period under investigation and are therefore useless for the purposes of my study.

⁴⁵ Charles Dickens, *The Pickwick Papers*, James Kinsley (ed), 1837 (Oxford: Oxford University Press, 1998).

⁴⁶ William Schwenck Gilbert and Arthur Sullivan, *Trial by Jury, The Savoy Operas: Being the Complete Text of the Gilbert and Sullivan Operas As Originally Produced in the Years 1875–1896*, 1875 (London: Macmillan, 1926) 1–19.

⁴⁷ See n 2.

⁴⁸ Materials that do not depict a breach-of-promise plaintiff in the sense of one of my four categories or where the treatment of breach of promise seems minor or repetitive are not included in my analysis.

- (B) Works in which a female character becomes or at one point has been a breach-of-promise plaintiff, but is not shown as such in court ('out-of-court involvement'). This may happen, for instance, where the breach-of-promise trial takes place off-stage or where the trial predates the time at which the story is set.
- (C) Works in which a female character considers bringing, but does not actually bring a breach-of-promise suit ('contemplated involvement'). This may be the case where a female character uses the threat of an action as a means of exerting power over another character.
- (D) Works in which a female character is believed by one or more other characters to be considering bringing a breach-of-promise suit, but does not in fact have any such intention ('imputed involvement').

As this study reveals, accounts of breach of promise are not spread evenly over all four categories for each of the three periods under investigation. Instead, in each period, the accounts tend to cluster around one or two of the categories, with the dominant category (or categories) changing from one historical period to the next. This shift in the dominant category is important for what it tells us about the degree of plot-level integration of the breach-of-promise element into the fiction of each period. Works in category A ('in-court involvement'), for instance, where the writer integrates the breach-of-promise element to the extent of allowing the trial to take place before the audience, display a greater degree of plot-level integration than works in category B ('out-of-court involvement'). The degree of plot-level integration, in its turn, however, is a potent indicator of the relevance and meaning of the breach-of-promise action to early nineteenth-century, high, and post-Victorian culture respectively.

In drawing on both empiricism and literature as tools for analysing the effects of the fusion of law and cultural ideology that is embodied in the nineteenth-century action for breach of promise, I am deliberately overstepping the territorial boundaries established by any one discipline. The value of reading in the conceptual in-between space between different methodological approaches lies in highlighting the need to consult a wide variety of historical sources from all areas of cultural activity for a well-rounded picture of the past.

This study, then, is an exploration of the use and meaning of the common law action for breach of promise of marriage to early, high, and post-nineteenth-century culture respectively. It advances a particular interpretive model, a particular myth of womanhood, by which we can understand more fully the story of the action's rise and fall. The study adopts for its vantage-point both the

evidence of actual cases and the narratives contained in fictional renditions of the breach-of-promise theme.

It begins, in Chapter 1, with the quest to find a unifying construct that would account for the idiosyncratic mixture of rules (a luxuriant blend of both contract and tort) that came to govern the breach-of-promise action from the early 1800s onwards. This unifying construct it locates beyond law, in the socio-cultural context and the emerging feminine ideal of the virtuous, delicate, and submissive woman. The complex of rules applied to the breach-of-promise context during the 'long nineteenth century', the first chapter argues, can be understood as the codification of the nineteenth-century myth of true womanhood.

The second chapter considers the wider implications of this infusion of mythologized femininity for the law, in particular for the position of plaintiffs. It suggests that the feminizing process imported a contradiction to the centre of the action and lodged an inconsistency at the very heart of the plaintiff. By virtue of her position as litigant in a public forum, a woman bringing a breach-of-promise suit put herself in direct opposition to the central tenets of the very femininity the Victorians valorized and in accordance with which the cause of action was shaped. The breach-of-promise plaintiff was structurally very ill fitted for the part she had to play. The nineteenth-century cause of action, as both the legal codification of true womanhood and a platform for not so very true women, may thus be seen as beset from its inception by a fatal structural inconsistency.

Chapters 3–5 provide a consideration of how the action's contradictory potential was realized, sought to be minimized and defused (by the plaintiff's side), or dramatized (by the defendant's) and how it was deployed by writers (and later by film-makers). The three chapters survey three consecutive time periods, the early nineteenth century (1800–1850), the high (1850–1900), and the post-Victorian (1900–1940) periods respectively. Each chapter in the trilogy draws on the empirical evidence and the fictional records as well as incorporating a representative case study. Chapter 3 opens with a case study (*Orford v Cole*) that presents in detail the way the breach-of-promise action was structured around nineteenth-century notions of ideal womanhood. The chapter provides a consideration of the strategies practised by plaintiffs and their legal representatives to obscure the structural inconsistency. It finds evidence for the success of these strategies in both the phenomenal awards secured by early-period breach-of-promise plaintiffs and in the nature of the fictional accounts that date from the early period. In the early period, there is no evidence of any fictional exploitation of the structural inconsistency. Rather, writers display a marked tendency to *create* an inconsistency by inverting the ideal and casting that inversion in the plaintiff role. The effects of this studied

miscasting, of putting a widow or virago figure where a true woman should be, are both ludicrous and faintly nauseating. In this disharmony in both the depiction and the reaction it evokes, there is an element of the grotesque, which may be regarded as the dominant aesthetic of early-period breach-of-promise fiction. Chapter 4 considers the high Victorian abandonment of the previously employed strategies of containment and the attendant exposure of the structural inconsistency. The chapter demonstrates that, as the structural inconsistency was rendered more visible, so the breach-of-promise action and, more particularly, the breach-of-promise plaintiff became targets for cultural exclusion and attack. In the high Victorian period, plaintiff success was dampened, and breach-of-promise fiction started to thrive on an exploitation of the structural inconsistency. The fictional plaintiffs of this period are the ideal perverted, their outward true womanhood belying the corruption inside. In the high Victorian period, breach-of-promise comedy takes on the features of satire as it dramatizes the discrepancy between professions of virtue and the practices that contradict them. The fifth and final chapter explores the post-Victorian period, beginning after 1900. The chapter reveals that, as the feminine ideal veered away from the nineteenth-century definition of true womanhood towards the twentieth-century vision of woman as self-sufficient, energetic, and competent, the breach-of-promise action was turned into a legal anachronism, a musty bit of common law machinery only rarely called into action after the 1920s and 1930s. Although the cause of action was not formally abolished in England until 1970, the age of breach of promise was effectively over with the paradigm shift in the feminine ideal. This temporal connection in the decline of both ideal and action once again supports my premise (as did their near-simultaneous birth) that the nineteenth-century feminine ideal and the nineteenth-century breach-of-promise action were uneasily and fatally, but nonetheless inextricably, entwined. In the literary and cinematic versions of this final, post-Victorian period, breach of promise assumes symbolic meaning, signifying a conception of the nature and status of women, which was, quite simply, passé.