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# Status and Contract: The Divorce Dispute of the 'Eighties and Howells' A Modern Instance

by GEORGE R. UBA

THE EARLY 1880's was one of the most noteworthy periods in the history of American divorce. It compassed both the publication of William Dean Howells' *A Modern Instance* (1882), the work generally regarded as the "first full-length divorce novel of merit,"<sup>1</sup> and the rash of articles marking the first sustained discussion about divorce in the history of American periodicals. Underlying and connecting the novel and the discussion (which was really a dispute) were views of history and of marriage associated with the eminent English jurist Sir Henry Sumner Maine's theory of *Status* and *Contract*. First adumbrated in his classic treatise on the evolution of civil institutions, *Ancient Law* (1861), Maine's theory enables us both to define the central issues of the divorce dispute of the 'eighties and to speak of the "realism" and "contemporaneity" of *A Modern Instance* with an unusual degree of precision.

Before considering the novel and the divorce dispute in the light of Maine's theory, however, it is necessary to understand the context out of which they arose. Prior to 1880 the subject of divorce received desultory attention.<sup>2</sup> But as the new decade dawned, public alarm rose to an unprecedented height. This was due in part to the increasing availability of reliable divorce statistics and in part to the apparent failure of conservative legislation—which in the 1870's had revoked many of the states' liberal divorce clauses<sup>3</sup>—to stem the tide of divorce. The statistics told a grim tale. They revealed that from 1860 to 1878 the ratio of divorced to married couples had increased in Massachusetts from 1:51 to 1:21.4; in Vermont from 1:22.9 to 1:14; in Connecticut from

1. James Harwood Barnett, *Divorce and the American Divorce Novel, 1858-1937* (Philadelphia: Univ. of Pennsylvania, 1939), p. 82. Everett Carter's comment that *A Modern Instance* is "the first complete treatment of a broken home in serious American fiction" is also representative of critical opinion. See *Howells and the Age of Realism* (Philadelphia: J. B. Lippincott, 1954), p. 146. The novel was published serially in *Century Magazine* between December, 1881, and October, 1882.

2. One celebrated dispute involved Horace Greeley and Robert Dale Owen, who, for a period of two months in 1860, exchanged letters regarding divorce and its legitimacy. The letters were printed in Greeley's *Tribune*, March-April 1860. In the later 1860's public interest in divorce briefly rose. Articles appeared in religious journals, such as *Catholic World* and *American Church Review*, and from January, 1867, to October, 1868, the *New Englander* ran a series of six articles by Theodore Dwight Wooley on the history of divorce and divorce laws.

3. Omnibus divorce clauses were repealed in Indiana (1873), Connecticut (1878), Maine (1883), Louisiana (1877), and Arizona (1877). South Carolina returned to its former condition of divorcelessness during the same period (1878). See Barnett, pp. 21-22.

1:14.1 to 1:10.6; in Rhode Island from 1:14.1 to 1:11.8.<sup>4</sup> In New Hampshire divorce increased by fifty percent in only eight years; in Maine, so far as statistics were available, the rate of divorce leaped thirty-five percent in the two-year period, 1878–80; and in the Howells family's home district, Ashtabula County, Ohio, the ratio of divorces to marriages for the years 1878–79 was a shocking 1 to 8.5.<sup>5</sup>

In 1881 Congress authorized the Department of Labor to collect nationwide statistics on marriage and divorce. In the same year middle-class alarm led to the formation of the New England Divorce Reform League (later the National Divorce Reform League). In literature Margaret Lee published her novel *Divorce* (1882). And in the periodicals a dramatic change occurred. Whereas for the thirty years prior to 1880, six divorce articles per decade were published in American periodicals (according to *Poole's Index*), in the five year period of 1880–84 alone, twenty-five articles appeared. Although the dispute was to continue well into the next decade, never had so many writers turned their attention to the subject of divorce in so short a span of time.

The reasons for the dramatic increase in divorce were not entirely clear. But Henry Sumner Maine's theory of *Status* and *Contract* had the virtue of setting the issue within a historical frame. Perhaps the most famous formulation he devised, Maine's theory was familiar to many educated Americans of the 'eighties. *Ancient Law* was in its third American edition by 1873 (and was reissued four times between 1875 and 1879) and in its eighth English edition by 1880.<sup>6</sup> Maine's theory held that in the course of history "the Individual is steadily substituted for the Family as the unit of which civil laws take account."<sup>7</sup> *Status* is the condition under which the family enjoys a legal preeminence; *Contract* is the condition under which laws are fashioned to meet the exigencies of the individual. Maine also stated his theory in broader, extralegal terms: "Starting as from one terminus of history, from a condition of society in which all the relations of persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals."<sup>8</sup> Anticipating the popular construction others would put on his theory, Maine declared that "the *unit* of an ancient society was the Family, of a modern society the individual," and that the history of "progressive societies" could be summed up as a "movement *from Status to Contract*."<sup>9</sup>

4. See Nathan Allen, "Divorces in New England," *North American Review*, CXXX (June 1880), 549–50.

5. See Washington Gladden, "The Increase of Divorce," *Century Magazine*, XXIII (Jan. 1882), 412–13.

6. By 1884 *Ancient Law* was in its 10th English and 4th American editions. The book was regularly reissued during the remaining years of the century and by 1901 was in its 17th impression.

7. Henry Sumner Maine, *Ancient Law*, new edition (London: John Murray, 1930), p. 180.

8. Maine, pp. 180–81.

9. Maine, pp. 142, 182 (Maine's italics).

Writers on both sides of the divorce dispute found they could take advantage of Maine's theory. For Elizabeth Cady Stanton, who published an article entitled "The Need for Liberal Divorce Laws" in *The North American Review*, the historical movement away from the Roman patriarchal family (which was the starting point in Maine's discussion) and towards the primacy of the individual marked the highest progress.<sup>10</sup> It followed that the welfare to individuals that a divorce might secure should never be "sacrificed" to the welfare to society that the continuation of a bad marriage ostensibly ensured.<sup>11</sup> For Stanton the high divorce rate did not pose a problem at all. But for Washington Gladden it did. In an issue of *Century Magazine* that also featured the second serial installment of *A Modern Instance*, Gladden harshly attacked the increased emphasis on the individual and on "rights" instead of "duties," and perceived "in this process of individuation, in this movement 'from status to contract,' " only a tendency "by which the family is dissolved."<sup>12</sup> Where Stanton operated on the premise that the movement from *Status* to *Contract* was a sign of inevitable progress, Gladden operated on the premise that to identify the enemy was to take the first step in containing him. In each case, however, there was agreement on a central point: the combination of declining family authority and increased emphasis on the individual was the primary reason for the rising rate of divorce.

It is this combination which forms the backdrop to Howells' divorce novel. Both of the principal families in *A Modern Instance* are in the process of decline. The Gaylords were at one time the leading family in the village of Equity, Maine.<sup>13</sup> But while they continue to reside at one end of the town's main thoroughfare in a square white "mansion" that "stood advanced from the rank of the rest" (pp. 4-5),<sup>14</sup> Squire Gaylord and his wife have withdrawn from community life as steadily as they have withdrawn from each other, until now Mrs. Gaylord is a virtual recluse in her own house, her life "silenced in every way" (p. 34), and Squire Gaylord goes "no more than his wife into the village society" (p.

10. Elizabeth Cady Stanton, "The Need for Liberal Divorce Laws," *North American Review*, CXXXIX (Sept. 1884), 236. Maine had emphasized that in ancient Rome the patriarch of the agnatic family was the principal lawmaker for the family and that during this period the civil law tended merely to fill "the interstices between the great [family] groups," which constituted the real "atoms of society." See Maine, p. 179.

11. Stanton, p. 236.

12. Gladden, pp. 420, 417. The putative threat that individualism posed for the family was of course tied to conservative views of the New Woman, as well. See, for example, Kate Gannett Wells, "The Transitional American Woman," *Atlantic Monthly* XLVI (Dec. 1880), 817-23.

13. The name and location of the New England town could be a double pun, for "Equity" was an important concept in Maine's *Ancient Law*, referring to the point of contact between types of law, *Jus Naturale* and *Jus Gentium*, presumed anterior to and apart from a State's civil law. See *Ancient Law*, Chapter 3. While there is no certainty that Howells ever read Maine's works, there is a likelihood that he was acquainted with the well-known theory of *Status* and *Contract* even before Gladden referred to it in his *Century* article, for Gladden indicates that Rev. Samuel W. Dike, a conspicuous figure in anti-divorce circles in New England, had already publicly drawn the connection between Maine's theory and the current state of divorce. See Gladden, p. 414.

14. All quotations are from *A Modern Instance* (Bloomington: Indiana Univ. Press, 1977). All italics in quoted portions of the text belong to Howells.

49). Similarly, the Halleck family of Boston once enjoyed a degree of prominence in their community. The Hallecks still reside in their large house with its "white-painted Roman arches" (p. 203) and still remain respectable in society. But they are acutely aware that "their ways of life had been fixed in other times" (p. 204). Although Ezra Halleck continues to oversee his successful leather enterprise, he plays no role in community governance, and his shy wife spends most of her days in the shelter of her "high-walled garden" (p. 205).

Not only do the Gaylords and Hallecks withdraw from their respective community lives but they suffer rupture from within. Despite her father's strenuous objections, Marcia Gaylord is ruled by her love for the arch-individualist, Bartley Hubbard, and eventually elopes with him. After a period of estrangement the father and daughter achieve a rapprochement, but Squire Gaylord is never really reconciled to his daughter's marriage to a man he detests, and to an unnatural degree Hubbard remains a wedge driven between them. Both of the elder Hallecks, meanwhile, are oppressed by the thought of their two younger children's apostasy from the family religion and even more by their inability to succour their unhappy son Ben, who, drifting farther and farther out of the family's orbit, eventually turns into a backwoods preacher. At novel's end both Squire Gaylord and his wife—each lonely and bitter—are dead, while the visibly aging Hallecks continue to wait, piteously enough, for Ben to return home.

A third family in the novel offers the most graphic example of the movement from *Status* to *Contract*. While the Morrisons only occupy a marginal socio-economic position in Equity, their motivations are very respectable. The father, ordinarily a reliable shoemaker, harms the family's reputation by periodically turning into the town drunk. But the one constant during each of his sprees is the "demand" to his daughter's employer that she receive a pay raise. Morrison becomes drunk, that is, in order to build sufficient courage to issue his demand; his motive, finally, is family-centered, paternal. But the Morrisons fail to reverse their social and economic decline. In fact, they suffer the worst indignity of all when the daughter, Hannah, not only fails to marry the hardworking young printer who loves her, and fails to start a family of her own, but follows a fate which travesties the idea of relationships based upon what Maine called "the free agreement of individuals": after running away from home, the young girl becomes a prostitute.

While Henry Sumner Maine's theory provides a valuable historical framework for the divorce problem and the divorce novel, it also does more. For Maine's key terms, "status" and "contract," not only defined the poles between which the history of "progressive societies" supposedly moved, but also contributed a shorthand for the conception of marriage as a special state and the conception of marriage as an ordinary civil agreement, respectively. It is in this dual context that both the

dispute in the periodicals and the conflict between Bartley and Marcia Hubbard are seen on their most irreconcilable grounds.

Bolstered by legal definition and by the rising divorce rate itself, the view of marriage as a contract required less advocacy in the periodicals than the view of marriage as a status. Elizabeth Cady Stanton simply took for granted that marriage was a private contract, as she argued to increase the legal grounds for divorce.<sup>15</sup> A writer in *Popular Science Monthly* also assumed that marriage was a contract (though he sought to *decrease* the grounds for divorce).<sup>16</sup> Still, Edward Quincy, Jr., offered an elaborate argument in favor of both the civil nature of marriage and a scriptural basis for divorce: "Marriage is a contract. The right to contract for a union involves the [divine] right to contract for a disunion whenever it is discovered that such union is destined to be a curse instead of a blessing."<sup>17</sup> Apparently, even God supported the omnibus clause. By mid-decade the social historians Charles Franklin Thwing and Carrie F. Butler Thwing were able to summarize the "popular conception of marriage" in Maine's own familiar terms:

The belief is prevalent, and seems to be growing, that marriage is a civil contract, and a civil contract only. . . . We are fast coming to have the *state* of matrimony only in name. In this respect marriage is following the drift which Sir Henry Maine has pointed out as characteristic of progressive society, the drift from status to contract. . . . The popular conception of marriage seems at present to fluctuate between these two antagonistic ideas—marriage as a state and marriage as a contract—with a strong leaning, outside the pale of the church, to the idea of contract.<sup>18</sup>

In response to this popular view of marriage as a contract, other writers claimed that marriage enjoyed a special status. This argument was doubly important to the conservatives because they wished to build on it a theory of marriage adequate to justify broad reform of existing marriage and divorce laws. One popular argument was that marriage was in one way or another sacred. In an 1880 issue of *The North American Review*, Dr. Nathan Allen complained that marriage had come to be "regarded more as simply a civil contract" or as "a kind of partnership, intended only for the convenience and interests of the parties concerned," when in reality marriage was "the outward rite or

15. See, for example, Stanton, p. 242.

16. See Gordon A. Stewart, "Our Marriage and Divorce Laws," *Popular Science Monthly*, XXIII (June 1883), 224-37.

17. Edward Quincy, Jr., "The Divine Law of Divorce," *International Review*, XIV (Feb.-Mar. 1883), 186.

18. Charles Franklin Thwing and Carrie F. Butler Thwing, *The Family: An Historical and Social Study*, rev. and enl. ed. (Boston: Lothrop, Lee & Shepard, 1913), pp. 198-99. (Thwings' italics.) First edition: 1886. While it is not clear in every case where a writer knowingly appropriated the Maine terminology for a discussion of marriage and divorce, the practice became common enough. Gladden, for example, made no attempt to distinguish between the word "contract" as he applied it to modern marriage and as Maine originally used it. See Gladden, pp. 414-15. Other writers also applied Maine's terms "status" and "contract" to the discussion. See John A. Jameson, "Is Our Civilization Perishable?" *North American Review*, CXXXVIII (April 1884), 341, 347; Frank Gaylord Cook, "The Marriage Celebration in the United States," *Atlantic Monthly*, LXI (April 1888), 527, 528; Samuel W. Dike, "Theory of the Marriage Tie," *Andover Review*, XIX (Nov. 1893), 676, 677.

sacred vestibule to the family.”<sup>19</sup> Rev. Samuel W. Dike, a prominent figure in the anti-divorce movement, suggested in an 1881 issue of the *Journal of Social Science* that it was the family itself that was sacred: “It [modern legislation] treats marriage almost wholly as a contract. . . . It has no clear, unmistakable recognition of the family as the outgrowth of marriage and a sacred unit of society.”<sup>20</sup> In an 1882 issue of the *International Review*, M. H. Buckham, a university president, invoked scripture in an effort to eliminate *by definition* the possibility of marriage being a contract: “Marriage is not merely a contract, because to a contract there are two parties who remain two after, as before, the contract. Marriage is a union: ‘They are no more twain but one flesh.’ . . . And such a union is by its very nature perpetual and inviolable.”<sup>21</sup> The *Catholic World* found it relatively easy to form an alliance with its Protestant brethren when the latter denied that marriage was “a mere civil contract” and affirmed instead “that marriage is not a human institution but an ordinance of God, under the original and universal law which precedes all human law and is supreme in its authority and binding force.”<sup>22</sup>

The special status of marriage was argued on secular grounds, as well. According to this view, marriage was necessarily more than a simple contract between individuals because, in giving rise to the family, it gave rise to the most important unit in the organization of the State. Noah Davis, Chief Justice of the New York State Supreme Court, declared that “marriage alone is the mother of the family; and the family is the organic unit of civil society, and the sheet-anchor of its good order.”<sup>23</sup> M. H. Buckham affirmed that “the State is, properly considered, a union of families rather than of individuals.”<sup>24</sup> Those who shied from the theory of sacred marriage were especially apt to be attracted to this argument. Washington Gladden was emphatic in his opinion that the family and not—as some “false social theories” would have it—the individual was “the organic unit of society.”<sup>25</sup> The writer in *Popular Science Monthly* who otherwise insisted that marriage be viewed as a civil contract averred that “lawful marriage is the basis of the family relation, and the family relation is the fundamental principle of association upon which the superstructure of society and the State is built.”<sup>26</sup>

It was quite obvious, as one writer explained, that insofar as the family is subject to rupture “it will fail of its efficiency as a training for

19. Allen, pp. 558, 559.

20. Samuel W. Dike, “The Effect of Lax Divorce Legislation Upon the Stability of American Institutions,” *Journal of Social Science*, XIV (Nov. 1881), 155.

21. M. H. Buckham, “The Relation of the Family to the State,” *International Review*, XIII (July 1882), 64.

22. “Dr. Woolsey on Divorce,” *Catholic World*, XXXV (April 1882), 12.

23. Noah Davis, “Marriage and Divorce,” *North American Review*, CXXXIX (July 1884), 30.

24. Buckham, p. 54.

25. Gladden, p. 420.

26. Stewart, p. 224.

the State, and the State itself will be tainted by its corruption."<sup>27</sup> Another writer warned darkly that the decay of the family marked the first stage of corruption of ancient Greece and Rome.<sup>28</sup> The preservation of the family, then, was seen as a duty that every citizen owed the State; in turn, the State had the right to ensure its own continued stability by making divorce as difficult as possible to secure. Judge Davis spoke for all when he remarked, "In considering the subject of divorce, the interests of society are first and foremost, those of individuals are subordinate and secondary."<sup>29</sup>

The Maine-linked conceptions of marriage also inform the whole of *A Modern Instance*. The contractual view of marriage is represented most fully by Bartley Hubbard, a figure completely divested of family sentiment, who sees all valid relations, including marriage, in terms of Maine's "free agreement of individuals." As a youth the orphaned Bartley had cast out whatever affection he might once have had for the "benefactor" who had originally taken him in when the latter tried to direct him towards missionary work (p. 27). Instead of submitting to the plan, the boy had apprenticed himself to a local printer. Thereafter, his life had revolved around a business arrangement, a simple exchange of services from which he eventually emerged "all self-reliant and independent" (p. 27). As an adult, Bartley arranges all of his important relationships as formal or informal agreements. He devises a rental agreement in Boston ("All right! It's a bargain!"), contracts with a morally bankrupt publisher for the managership of a newspaper, and eventually secures a loan from his wealthy friend Ben Halleck. He also makes a "gentleman's agreement" with the kind, self-educated backwoodsman Kinney not to write about any of the latter's extraordinary experiences until Kinney has had a chance to publish them first.

Most of all Bartley ratifies his relationship with Marcia Gaylord, his future wife, in the language of a formal agreement. Early in the novel he asks Marcia to go sleighriding with him the next day, his request taking the form of a letter, despite the fact that the couple are sitting together in the same room. After signing the letter according to her suggestion, he adds his own characteristic postscript: "Truly, it shall be, then. Your word is law—statute in such case made and provided" (p. 12). When Marcia makes a feint to tear up the letter, Bartley seizes her hands and agrees to release them only, as he says, "on two conditions": "Promise not to tear up my letter, and promise to answer it in writing" (p. 12). He then forces her to write as he bids and makes a promise of his own—which he subsequently fulfills—to come "promptly at the hour indicated" (p. 13). The significance of the scene does not lie in Bartley's coercion of Marcia (who simply agrees to do something she wants to do

27. Buckham, p. 54.

28. Allen, p. 560.

29. Davis, p. 33.

anyway) but rather in the form and language Bartley chooses in order to represent their accord.

Not only does Bartley constantly form agreements, but he honors them in direct proportion to their legality as contracts.<sup>30</sup> He fulfills the terms of his contract with the publisher; he eventually tries to repay Ben Halleck for the loan; and, most important, several years after he has deserted Marcia (technically, she walked out of the house first and therefore “deserted” him, although she returned barely a half hour later), Bartley goes to the trouble of filing for a divorce. According to his way of thinking, as the marriage had begun as a legal agreement, it likewise ought to end upon a legal agreement, as his words to Ben Halleck, following the granting of the divorce decree, imply: “That was the only way out for either of us. We had tried it for three years, and we couldn’t make it go; we never could make it go; we were incompatible. . . . I thought we ought to be free, both of us; and if our marriage had become a chain, that we ought to break it” (p. 448).

Unlike Bartley, Marcia honors relationships not in proportion to their legality as contracts but in simple proportion to their bearing upon her marriage. Where Bartley, the orphan, sees all relationships as involving “the free agreement of individuals,” Marcia, the only surviving child of the asocial Squire Gaylord and the reclusive Mrs. Gaylord, has grown up seeing all essential relationships as “summed up in the relations of Family.” After eloping with Bartley, Marcia eventually realizes that the break with her parents is final. But instead of abandoning the family principle around which she has organized her life, she instinctively substitutes the new relationship for the old. As she tells Bartley following the birth of their daughter, “I see more and more that father and mother can never be what they used to be to me,—that you’re all the world to me” (p. 240). Accordingly, Marcia fears and occasionally despises those who threaten to disrupt her relationship with her husband, including such people as the wealthy society girl, Clara Kingsbury; the office girl, Hannah Morrison; the flirtatious married woman, Mrs. Macallister; and even the strangers Bartley stops to speak to on the streets as he first begins to make a name for himself as a newspaper reporter. Conversely, she cherishes Kinney and the newspaperman Ricker, both of whom pay homage to the Hubbard marriage, and she gravitates toward the Halleck family, who, in her limited vision, provide a model for the family life Marcia wishes to have for herself.

The Hallecks strike Marcia as exemplary because of their quiet, tradi-

30. As an agreement moves away from the literal, the strictly provisioned, and the legally binding, Bartley feels free to violate it. Thus, only days after he and Marcia have managed to secure lodgings in Boston thanks to the uncommon charitableness of their new landlady, Bartley feels free to write an exposé on the rapacity of Boston’s landlords. Likewise, Bartley publishes—and profits from—an unauthorized account of his friend Kinney’s experiences because the “agreement” not to do so had all along only been implied rather than formalized. The ideal relationship for Bartley is one that binds on one side and not on the other. Early in the novel he gloats over the fact that Marcia “had let him see that she liked him; and [with] not a word on his part that any one could hold him to” (p. 19).

tional ways and especially because of their "orthodox religious belief [which] had blessed all their life" (p. 204). They seem to live under a religious dispensation equivalent to that which ultimately saves the troubled marriage of the character Eily in Boucicault's *The Colleen Bawn*, a play whose parallels to her own situation Marcia had instinctively grasped even as a newlywed attending the theater for the first time.<sup>31</sup> Unsustained by any religious creed herself, and increasingly troubled over her deteriorating relationship with Bartley, Marcia above all craves assurance that her marriage is sacred. Her individual efforts in this direction often border on the grotesque, as when she says, during a happy moment following the birth of their child, "'How good you are Bartley!' with an admiring look, as if it was the goodness of God she was praising" (p. 235). The Hallecks, on the other hand, seem to offer an assurance rooted in a living tradition. Although Marcia knows it would be fruitless to try to convince Bartley to join the Hallecks' church, she does the next best thing: she has their daughter baptized in the church and declares her own intention to accompany the child in regular church attendance.

Marcia's position does not constitute the sum of opposition to Bartley's contractual view of relationships. As in the periodicals, there appears in Howells' novel a second version of the status argument. This version is represented by the conservative Boston lawyer Atherton, who contends that divorce should be neither encouraged nor countenanced, since marriage creates the integral unit of society. When Ben Halleck, who has secretly loved Marcia for several years, first broaches the idea of Marcia divorcing Bartley—he has been gone for over two years at this juncture—Atherton's response is swift and uncompromising: "Has that poison got into *you*, Halleck? . . . You don't *look* like one of those scoundrels who lure women from their duty, ruin homes, and destroy society—not in the old libertine fashion in which the seducer had at least

31. Howells leaves no doubt that he intended the play to foreshadow certain conflicts that subsequently arise between Bartley and Marcia. Howells has Marcia remain strangely silent through the course of the performance, as well as afterwards on the way home. Finally she answers Bartley's queries about her enjoyment of Boucicault by saying, "I only thought of that poor girl, and her husband who despised her" (p. 144). Bartley refuses to take the implied connection seriously: "[He] fell a laughing over her, till it seemed as if he never would end. 'And you thought—you thought,' he cried, trying to get his breath, 'you thought you were Eily, and I was Hardress Cregan! Oh, I see, I see!'" (p. 144). Despite Bartley's amused reaction, parallels abound between *A Modern Instance* and *The Colleen Bawn*, both in theme and character. Both, for example, are intimately concerned with the "nature" of marriage. Hardress Cregan wants to dissolve his marriage to the woebegone Eily by tearing up the marriage "certificate," just as Bartley wants to start divorce proceedings against Marcia. But Eily's unrequited lover, Myles, and another character, Father Tom, convince Hardress that the return of the certificate cannot affect the marriage, that in fact marriage enjoys a sacred status and cannot be dissolved like an ordinary contract. The subsequent action of the play—the apparent murder of Eily (Act II) and Hardress's repentance and ultimate rediscovery of his love for her (Act III)—all follows upon Hardress's acceptance of the initial point: the indissolubility of marriage. In addition, both Bartley Hubbard and Hardress Cregan are similar; both are self-indulgent (yet not malicious) young men who secretly marry "country" girls and eventually regret having done so. Marcia Gaylord and Eily, the "Colleen Bawn," both enter a marriage in which love is disproportionate on their side. The unrequited lover Ben Halleck is at least superficially a composite of two characters in the play: Myles and Danny Mann, a cripple (although Mann is otherwise quite different from Ben). See *The Colleen Bawn* in *The Dolmen Boucicault* (Dublin: Dolmen, 1964).

the grace to risk his life, but safely, smoothly, under the shelter of our infamous laws" (p. 397). Later, in retelling the conversation to his friend Clara Kingsbury, Atherton reiterates his belief that "teaching [Marcia] to think of escape from her marriage by divorce [would have been] a crime against her and against society" (p. 416). Duty and the primacy of the social order are Atherton's watchwords. His disappointment in Ben Halleck stems from Ben's "denying that he had any social duty in the matter" (p. 415) and from Atherton's own sense of the essential bond between a durable family life and a stable society.

*A Modern Instance*, then, recasts Maine's theory almost exactly as the writers in the periodicals were doing. Bartley Hubbard is associated with the view of marriage (indeed, of relationships in general) termed "contract," his wife Marcia and the observer Atherton with the view termed "status." But the novel does not stop at outlining the particulars of the divorce dispute. Ultimately, as if choosing to heed Maine's warning that "whatever its pace, the change has not been subject to reaction or recoil,"<sup>32</sup> the novel depicts the actual "movement" of marriage from a status to a contract.

Ben Halleck, for example, has been brought up to believe in both the sanctity of marriage and the principle of social duty. But his awareness that the Hubbard marriage can be legally terminated nourishes his guilty love for Marcia, as well as his distaste for her husband. Marriage is sanctified, Ben decides, only as long as love lasts: "I will preach by my life that marriage has no sanctity but what love gives it, and that, when love ceases, marriage ceases, before heaven. If the laws have come to recognize that, by whatever fiction, so much the better for the laws!" (p. 398). Ben also denies that the Hubbard marriage is a necessary cog in the social machine. He tells Atherton, "I've a concrete purpose, and I can't contemplate the effect of other people's actions upon American civilization" (p. 398). Later he speaks with "reckless irony" (p. 431) to Marcia in regard to her contesting the impending divorce with Bartley: "You have a *public* duty in the matter. You must keep him bound to you, for fear some other woman, whose husband doesn't care for her, would let *him* go, too, and society be broken up and civilization destroyed. In a matter like this, which seems to concern yourself alone, you are only to regard others" (p. 430).

The movement of marriage from status to contract occurs in more overt and dramatic fashion with Marcia Hubbard herself. After Marcia learns that Bartley has violated the gentleman's agreement he had made with Kinney, the couple quarrel, and the following exchange takes place:

"It isn't like the other quarrels we've had. When I think how I've felt toward you ever since, it *scares* me. There can't be anything sacred in our marriage unless we trust each other in everything."

32. Maine, p. 180.

"Well, *I* haven't done any of the mistrusting," said Bartley, with humorous lightness. "But isn't *sacred* rather a strong word to use in regard to our marriage, anyway?"

"Why—why—what do you mean, Bartley? We were married by a minister."

"Well, yes, by what was left of one," said Bartley. "He couldn't seem to shake himself together sufficiently to ask for the proof that we had declared our intention to get married." (p. 321)

Bartley continues, "We are married, right and tight enough; but I don't know that there's anything *sacred* about it" (p. 322). Forced to confront her marriage on purely legalistic grounds, Marcia responds in kind: "No, . . . it's tainted with fraud from the beginning" (p. 322).

Subsequently, the young couple's relationship undergoes a marked change. At first there ensues an "alienation in her behavior towards him, different from any former resentment" (p. 326). Eventually there follows a type of accord: "They were getting on very quietly now; there had been no violent outbreak on her part since the trouble about Kinney . . . there was now what might be called a perfect business amity between them" (p. 330). In the aftermath of the quarrel, Howells clearly emphasizes not the various stages that marriage commonly passes through but the very extremity of change. In its development from a naive faith in marital sanctity to the notion of "fraud" and thence to "business amity," Marcia's perception of marriage changes from status to contract. Her rude awakening, like Ben Halleck's temptation in regard to the possibility of Marcia's divorce, implies the movement between opposing poles that was central to Maine's theory.

Even the lawyer Atherton, the sanctimonious authority on the social nature of marriage, succumbs in fact if not in principle to the movement from status to contract. Far from evoking the slightest consciousness of religion or social duty, Atherton's proposal scene with Clara Kingsbury mimics the signing of a contract. When a contrite Clara, who earlier in the day had fired Atherton as her personal attorney and financial administrator, asks Atherton to resume his old position, the lawyer's reply is revealing: "'If I do that,' said Atherton, gravely, 'I must make my conditions. . . . You ought to have the right to question and censure; but I confess I can't grant you this. I've allowed myself to make your interests too much my own in everything to be able to bear it. . . . If I resume it, I must make my terms'" (pp. 388-89). The "terms," as it turns out, are Clara herself. "If I take it back, you must come with it!" Atherton declares (p. 389). And, in the same impersonal language, Clara accedes: "She found nothing incongruous in the transaction, and she said, with as tremulous breath and as swift a pulse as if the question had been solely of herself, 'I accept—the conditions'" (p. 389). Howells' parody has all the more bite because Atherton completely fails to perceive the distance between the lofty sentiments on marriage he expresses to Ben Halleck and the mundane "transaction" he has just been a party to. For the man who had once said, only half-seriously, that

“married life is as much a mystery to us outsiders as the life to come, almost” (p. 287), ignorance about marriage cuts much deeper than he had supposed. Long before the novel’s ending, in which Atherton at last expresses uncertainty over how to advise Ben Halleck (“Ah, I don’t know! I don’t know!”), Atherton’s inadequacy as judge of Ben’s situation has been exposed.

The views of history and of marriage associated with Henry Sumner Maine’s theory of *Status* and *Contract* at once inform and connect the divorce dispute of the ’eighties and *A Modern Instance*. Within the context of Maine’s theory of history, both the periodical writings and the century’s most significant divorce novel become shared documents in the history of a profound, but particular, change in American life. Within the context of Maine’s theory as it was applied to marriage, both the divorce dispute and the conflict raging through the heart of *A Modern Instance* are discovered on their most irreconcilable grounds. Today, one hundred years later, Howells’ forceful novel and the furor in the periodicals still comprise a valuable chapter in the history of American divorce, still mark an important moment in a nation’s awareness of itself.

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