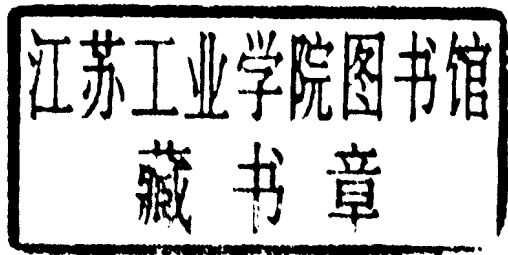


AMERICAN
LITERARY
REALISM *and*
the FAILED
PROMISE *of*
CONTRACT

BROOK THOMAS

American Literary Realism and the Failed Promise of Contract

Brook Thomas



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To Jayne

Preface

This book continues my work interrelating legal and literary history in the United States. A previous book, *Cross-examinations of Law and Literature*, focused on the years prior to the Civil War. This one looks at the end of the nineteenth century and the first few years of the twentieth. My general method remains the same. By “cross-examining” legal and literary history, I hope to present a perspective on both that is absent when they are studied separately, as they usually are. As a result, I tell a story about the culture and society, of which both legal and literary history are a part, that would not be told otherwise. That story is by no means the only story to be told. Nonetheless, it is, I believe, one that is worth telling.

If there is continuity between my earlier book and this one, there are also differences. The relation between law and literature did not remain static. Changes in it necessitate a different organizational principle. The first book juxtaposed important legal figures and their cases with important literary figures and their stories. Close family and class connections between the two professions enabled this structure. If by the 1850s the intricate alliance between lawyers and men of letters in the early years of the republic had broken down, close biographical connections remained. Those connections did not disappear, but increased professionalization did contribute to a growing split. In this book, rather than pair figures, I have structured material by bringing into relation contract, which took priority in the law, and realism, which was the major innovation in literature. Thus, if my first book claimed generally to bring together law and literature of a particular period, this one is concerned with specific aspects of both.

That concern is not, however, perfectly balanced. I rarely examine in depth specific cases involving contract law. I am instead interested in the importance that legal thinkers gave to contract as a way of understanding social relations. In contrast, I do closely examine selected literary texts. This imbalance betrays my training as a literary critic. I hope that this disciplinary bias does not discourage members of the legal profession curious enough to start reading the book. The first two chapters are designed in part to keep those readers interested. If they have not read all the literary works that I treat, they should not despair; many literary critics have not either. I hope that my readings of literary works will enrich—and perhaps alter—legal scholars’ understanding of the period’s legal history. For those interested specifically in contract, the subtle sense of human agency suggested by realistic works should be especially challenging.

My identification of myself as a literary critic points to another difference between this work and my earlier one. When I began that book, I, along with many others, was still struggling to figure out how to take literary studies beyond formalism. An influx of continental theory had successfully complicated New Critical readings, but that theory often seemed to breed a formalism of its own while retreating from pressing social and political concerns into a realm of textuality inaccessible to those without initiation into its special language. My work on law and literature was my effort to move beyond formalism by connecting the study of literature with important legal issues of antebellum America.

Today it is hard to characterize literary studies as a retreat from the political and social. This book is as much concerned with both subjects as my previous one was. Nonetheless, it much more directly addresses what some consider a formalist’s question: why do some literary works retain their power of engagement more than others?

A work’s power of engagement, I will argue, is not solely dependent on a willing listener; it also comes from the structural relation by which a work binds readers to the issues it treats. One answer to my question, then, is that for a work to retain its power of engagement, it has to entangle readers in a world as complicated as the world of history, rather than deliver them to an untangled and secure position from which to judge events both within and outside the text. If I am correct, such power, while dependent on the particular issues treated, cannot be measured solely by the political positions that a work takes on them.

To argue that a work's power of engagement cannot be judged solely by its political positions needs explanation, and not simply because we can rarely determine with certainty a work's politics. My point is not that there is an ahistorical category of the literary. On the contrary, what today we call the literary has a specific history. But, as the literary has been historically constituted, it has become a form of discourse that is not identical with political positions. Some argue that such discourse is impossible. But surely there are socially and historically defined differences between a political stump speech and a Henry James novel. We can, of course, take a political position on whether we should continue to value an institution like the literary. For some, a discourse that does not have as its primary goal the taking of explicit stands on particular issues, is not worth maintaining. On the contrary, I argue that, because we already have so many institutions that allow us to declare our politics, literary discourse can serve an important political function in our society, not because it serves as a guide to political action, but because it creates a space in which our political beliefs can be tested and challenged by the dramatization of hypothetical events.

To be sure, this is not the only function of texts generated and read within the realm known as the literary. Furthermore, there are many other ways in which political beliefs can be tested and challenged: for instance, by directly confronting and debating opposing positions or by experiencing, observing, and reading about historical events. Nonetheless, my own experience as a reader and teacher convinces me that the way provided by literature is valuable. The works treated in this book, both realistic and nonrealistic ones, are important to me because reading them in conjunction with legal history contributed to my rethinking of the role of contract. That rethinking marks another difference between this book and the one on the antebellum period.

When I finished that book I was convinced that contract in the law was simply a tool to legitimate an unfair regime of market-based economics. As the "failure" in the title of this book indicates, I have not completely abandoned that view. Yet, as the "promise" in the title indicates, I have modified it. An important way in which I came to appreciate the "promise of contract" was by experiencing the "contract" that realistic texts offer their readers. The techniques that realists developed to engage their audiences are among their most important contributions to the construction of the literary as presently defined. Through a series of comparisons, I will argue that the implied contract

between a work of realism and its reader differs from that offered by other works written at the time. One result is that, whereas nonrealistic works are also “literary,” they do not tap the same literary potential tapped by selected works of realism. Those who want to hear my explanation of how the realists tap that potential and how in doing so they pose challenges to both defenders and critics of contract are invited to read on. *Caveat lector.*

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CHAPTER I

Introduction

I

Legal historians often refer to the late nineteenth century in the United States as the Age of Contract; literary historians as the Age of Realism. Period labels can deceive. Contract was not all that was at stake in the law; not all works written were realistic. Nonetheless, these labels have proved useful because they signal trends. Even revisionists in law and literature relate alternative explanations of the period to contract or realism. In this book I bring contract and realism themselves in relation to one another in the hope of learning something about both, as well as about late nineteenth-century culture and society in the United States.

I use the term *contract* in the general sense of a mutually agreed upon exchange of obligations that, as the word's roots imply, draws people together. In Anglo-Saxon law a contract is enforceable only when some formal sign of the agreed upon exchange, known as consideration, is available. What fascinated ordinary people of the late nineteenth century, however, was not the legal doctrine of consideration but the idea of contract as a mode of social organization in which people freely bound themselves to others by binding themselves to the fulfillment of obligations.

At this point symmetry demands that I define my use of the term *realism* as well. But because my contribution to an understanding of American literary realism depends on my definition of contract's promise, I ask the reader's indulgence as I defer my discussion of this vexed

term for the moment. Suffice it to say that recently neither contract nor realism has fared well in some scholarly circles. The predominance of contract in law continues to be condemned for legitimating the inequities of laissez-faire, or, as others will have it, proprietary, capitalism. Literary realism, once seen as posing challenges to those inequities, is now seen in complicity with them because it aided and abetted in the production of disciplined, middle-class subjects. My study supports the contention that the law of contract legitimated social and economic inequities. It also establishes a connection between works of realism and such legitimation, not because they faithfully represented the intricacies of contract law, but because they were produced within the framework of contractarian thought that Owen Fiss has shown dominated law at the time.¹ But even though realism and contract are related, their connection complicates recent assessments of both. It does so, I argue, because selected works of realism both evoke what my title calls the promise of contract and dramatize its failure to be sustained.

What I mean by the promise of contract can be clarified by Sir Henry Maine's famous 1861 proclamation that "the movement of the progressive societies has hitherto been a movement *from Status to Contract*."² For Maine, traditional societies determined people's duties and obligations according to status. For instance, in medieval society both peasant and lord were assigned clear-cut, if different, duties and obligations according to the hierarchical social class into which each was born. In contrast, contractual societies undermine those hierarchies by determining duties and obligations through negotiations among contracting parties.

Maine's statement had special meaning for the United States in the late nineteenth century. Convinced that the United States was the most progressive of progressive societies, William Graham Sumner in 1883 boasted, "In our modern state, and in the United States more than anywhere else, the social structure is based on contract, and status is of the least importance."³

Contract's promise is twofold. First, a society ruled by contract promises to be dynamic rather than static. Not bound by inherited status, individuals are free, on their own initiative, to negotiate the terms of their relations with others. Contract does not promise equality of conditions, but it does promise equality of opportunity. As Sumner puts it, "A society based on contract is a society of free and independent men, who form ties without favor or obligation, and co-operate without cringing or intrigue. A society based on contract, therefore, gives the

utmost room and chance for individual development, and for all the self-reliance and dignity of a free man. That a society of free men, co-operating under contract, is by far the strongest society which has ever yet developed the full measure of strength of which it is capable; and that the only social improvements which are now conceivable lie in the direction of more complete realization of a society of free men united by contract, are points which cannot be controverted."⁴ By promising individuals equal chance to develop, contract claims to produce an equitable social harmony that has been achieved through a network of immanent and self-regulating exchanges rather than a social order imposed artificially from above. The smooth functioning of such a network depends on the second sort of promise alluded to by my title.

The second meaning of the promise of contract involves the sanctity of promising itself. To put one's signature on a contract seems to entail the making of a promise, with all of the connotations of trust involved. The association between promising and contract gives a contractual society a moral foundation that results not from preconceived notions of status but from the duties and obligations that individuals impose on themselves in their dealings with other members of society. Radically conceived, therefore, contract promises an immanent, rather than a transcendental, ordering of society.

Sumner and other conservative defenders of contract did not, I hasten to add, adhere to this promise. Instead, they invoke a transcendental, natural standard to limit the contractual liability of the primary beneficiaries of a changing economy. That standard also legitimated the persistence of status in a world claiming to be ruled by contract. Maine might have stressed the transformation from status to contract, but in fact the transformation was never complete. Sumner himself implicitly admitted status's persistence when he noted that "in a state based on contract sentiment is out of place in any public or common affairs. It is relegated to the sphere of private and personal relations, where it depends not at all on class types but on personal acquaintance and personal estimates."⁵ Writing on *What Social Classes Owe to Each Other*, Sumner was at pains to argue that any residue of inherited status had nothing to do with class. But in relegating sentiment to the private sphere he implied that status persisted in gender relations. It also persisted in another area that remains of great concern to us in late twentieth-century America: race. Furthermore, despite Sumner's objections, status also affected class relations, although here the question of inherited status is indeed complicated.

Sumner did not deny the existence of classes. For him the competition fostered by contract led to a division between people. But because all were given equal opportunity, that division was natural, not based on caste. In a contractual society, Sumner might argue, economic success dictated a man's social status rather than social status dictating his economic position. But as Karl Polanyi points out, it is a mistake to think of class only in terms of economic interest. "Purely economic matters such as affect want-satisfaction are incomparably less relevant to class behavior than questions of social recognition. . . . The interests of a class most directly refer to standing and rank, to status and security; that is, they are primarily not economic but social."⁶

As *The Rise of Silas Lapham* indicates, wealth alone is not the final measure of social status. Even so, the genteel elite, represented by the Coreys in this novel by William Dean Howells, still felt threatened by the revaluation of status brought about by the period's realignment of economic power. The elite's anxiety was shared by workers who, even when granted more earning power, faced the threat of becoming dependent wage earners rather than relatively independent craftsmen. William Forbath has shown that the period's labor movement was not simply about wages and hours of work. It was also animated by principles of classical republican virtue associated with an artisanal economy where workers owned their means of production.⁷ As late as 1883 the majority of workers in industry were skilled craftsmen employed in shops of twenty to thirty workers. For instance, the workers that Henry James highlights in *The Princess Casamassima* are a bookbinder and a pharmacist.⁸ The realists themselves shared workers' worries. Along with other professional writers, they were bound to publishing firms by contractual agreements.⁹ Furthermore, the "status rebellion" described by Richard Hofstadter was felt most markedly when the rise of corporations threatened to make members of the middle class salaried workers.¹⁰ Indeed, what Alan Trachtenberg calls the "incorporation of America" is another reason why contract failed to live up to its promise.¹¹ Corporate forms of organization, in which individual members submit their legal identities to the corporate whole, are quite different from contractual ones, in which people form associations while retaining their legal identities. Contract might have reigned in the law during this period, but it reigned over an economy that was turning into a corporate rather than contractual one, or, to be more accurate, one of "corporate liberalism" that worked out a complicated alliance between corporate and contractual capitalism.¹² That alliance did not eliminate

the status of class, but it did transform it. For instance, since a corporation is a legal person, a labor contract between Standard Oil and a worker trying to avoid unemployment would be dealt with as one negotiated between equal bargaining partners.

If contract promises free and equal exchange among all individuals and thus equality of opportunity, the increase in corporate influence and the persistence of status in race, class, and gender—even if manifested in different ways—made delivery on that promise impossible. Instead, contract's promise could be evoked ideologically to create the illusion of equitable social relations when in fact they retained a residue of inherited and realigned hierarchy.¹³ In latter chapters I elaborate on reasons for contract's failure. For now, however, I need to indicate how works of literary realism can evoke contract's promise.

Two poignant examples occur in works that establish both Mark Twain and James as realists. Both works derive much of their force from scenes that hold out the promise of replacing relationships of status with more equitable, "contractual" ones. One such scene occurs in *Adventures of Huckleberry Finn* after Huck tricks Jim into believing that the difficulties they experienced on the raft while traveling through a dense fog resulted from a dream. Realizing that his trick has betrayed Jim's trust, Huck apologizes, even though doing so means humbling himself to "a nigger." Until this scene Huck and Jim's relationship was governed by their socially assigned status: Jim's as a slave; Huck's as a free white. With Huck's apology, their relationship promises to be one of free and equal individuals bound together by mutual benefit and trust, so long as they remain on the raft, uncontaminated by the hierarchical order of the shore world.

A similar moment of promise occurs in James's *The American*. James's hero, Christopher Newman, the self-made man who has conquered the world of American business, seeks the hand of the beautiful daughter of an aristocratic French family, the Bellegardes. Looked down on by his lover's mother and elder brother, Newman elicits from them a promise that they will not interfere with his courtship. Told nonetheless that the mother will not enjoy having her daughter marry him, Newman is unconcerned. " 'If you stick to your own side of the contract we shall not quarrel; that is all I ask of you,' said Newman. 'Keep your hands off, and give me an open field. I am very much in earnest, and there is not the slightest danger of my getting discouraged or backing out. You will have me constantly before your eyes; if you don't like it, I am sorry for you. I will do for your daughter, if she will

accept me, everything that a man can do for a woman. I am happy to tell you that, as a promise—a pledge. I consider that on your side you make me an equal pledge. You will not back out, eh?’”¹⁴

There is no better symptom of Newman’s innocence than his belief in “the contract” that he has entered into with the Bellegarde family, which does nothing more than remove status as a consideration in determining whether he is worthy of marrying the woman he loves and who loves him. Part of that innocence grows out of Newman’s past success in an economic sphere in which the social status of contracting parties was supposedly irrelevant. Though in *The American* James demonstrates that in Europe, at least, that ideal does not extend to the business of marriage, in subsequent works he suggests that status affects even business affairs.

If these two scenes evoke contract’s promise, the works in which they occur fail to sustain it. That failure has important implications for our contemporary situation. Contract may be in disrepute in some academic circles, but not all, as evidenced by its sophisticated defense by Charles Fried, Ronald Reagan’s former solicitor general, in *Contract as Promise*, as well as by the influence of the law-and-economics movement with its model of rational (that is, market-based) decision making.¹⁵ Furthermore, as the 1994 electoral success of the “Contract with America” demonstrated, the idea of contract remains popular with many voters. The Republicans’ “Contract” appealed to both aspects of the promise of contract. First, the metaphor of a contract capitalized on voters’ discontent with broken promises in past campaigns. The symbolic act of signing something called a contract signaled its supporters’ intention to keep their word. Second, a contractual relation between politicians and voters implied that they were on equal footing, that there was no hierarchical relation between the governed and those governing. Indeed, the popularity of the “Contract” with white males indicated the extent to which its provisions appealed to those worried that, by determining one’s worth on the basis of status, not merit, programs such as affirmative action undermine the promise of equal opportunity for all citizens. Although they may not welcome the lesson, supporters of the “Contract” certainly have much to learn from the realists’ dramatization of why contract failed to live up to its promise.¹⁶

But they are not the only ones with something to learn. As works of realism explore the possibility of presenting a world in which people are bound together contractually, they bring us to its limits. Those opposed to contract might want to call these presentations immanent critiques