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A FUNHOUSE MIRROR OF LAW: THE ENTAILMENT IN JANE AUSTEN'S *PRIDE AND PREJUDICE*

Peter A. Appel*

I. INTRODUCTION

The relationship between a society and its law is inexact. Despite repeated claims that law mirrors societal norms and values, no scholar has punctured that balloon of an idea better than Alan Watson. In his groundbreaking *Legal Transplants*¹ and many subsequent works, Alan has demonstrated the many disjunctures between law and society.² Alan has devoted a large part of his impressive corpus of scholarship on legal development to expand on this idea, and he has convincingly demonstrated that legal development often occurs through borrowing and accident as much as deliberate societal decision. For example, Alan has painstakingly traced how the dictates and opinions of the ancient Roman jurists, who were pagans, were incorporated into Justinian's *Digest*, which was produced by a committee at the direction of a Christian emperor living in Byzantium.³ Roman law, and particularly the *Digest*, in turn, was later rediscovered and became the most influential source of law for continental Europe.⁴ In a more contemporary example, Alan has shown how the civil code for Turkey—which by that point had become a secular country with a largely Islamic

* Alex W. Smith Professor, University of Georgia School of Law. This Essay is based on remarks given several years ago at the Law and Literature Society of Australia. I have continued to talk to people about the ideas that are now embodied in this Essay. For their extremely helpful and insightful remarks on this project throughout the years, I would like to thank the following: Marilyn Butler, John Cairns, Anne Fernald, Kristen Fresonke, Harriet Kriegel, and Leonard Kriegel. All of the mistakes that are still in the Essay are, of course, my own. In addition to dedicating this Essay to Alan Watson, I would also like to dedicate this Essay to my parents, Leonard and June Appel. They have bestowed upon me riches far beyond what any entailed lands could.

¹ See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993) (discussing the practice and effects, over time and in various societies, of adopting foreign legal systems).

² See, e.g., ALAN WATSON, *SOCIETY AND LEGAL CHANGE* 5 (2d ed. 2001) (“[T]he divergence between law and the needs or wishes of the people involved or the will of the leaders of the people is marked.”).

³ ALAN WATSON, *THE EVOLUTION OF WESTERN PRIVATE LAW* 193 (expanded ed. 2001) (“[T]he great *Digest* of the Christian Byzantine emperor Justinian is, in its contents, a transplant from the pagan Roman jurists, a world away.”).

⁴ *Id.* at 214–17.

population—essentially lifted the Swiss civil code (which itself was based on the earlier principles of Roman law) for its contents.⁵

Alan has also shown that accidental borrowings and mistranslations have made enormous differences in legal outcomes. His most impressive example for American audiences is his demonstration that the reliance on a poor translation of a European work may have misinformed Justice Story's views on conflicts of laws, which in turn led to a central portion of the Supreme Court's fateful and notorious decision in *Dred Scott*.⁶

Throughout the impressive corpus of his work, Alan has also devoted time to the relationship between law and literature. Specifically, Alan has used the rules and principles of ancient Roman and Jewish law to illuminate and explicate the stories in the Christian Gospels.⁷ As with his work on legal transplants generally, law shapes an understanding of the stories in the Gospels. Obviously, Roman law during the Empire had nothing to do with the culture and society of its province of Judea. Jewish law at the time was also somewhat in flux, since there were several sects of Judaism (e.g., the Pharisees, the Sadducees, the Essenes) who disputed the exact content of that system of law.⁸ Alan's work shows why Jesus and his actions presented a challenge to both the Roman and Jewish legal systems. For example, according to the Gospels, Jesus healed people on the Sabbath, which was contrary to Jewish law concerning work on the day of rest.⁹

Nevertheless, Alan has not in his published work extended these observations to the relationships among law, society, and more recent literature. Like the relationship between law and society, the relationship between realistic literature and the society in which that literature is produced is inexact. Comparing the literature of a society and the law of a

⁵ *Id.* at 14–18.

⁶ ALAN WATSON, *JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS* (1992). In that work, Alan demonstrated that Justice Story's views were based on a poor translation of the work of the Dutch scholar Huber, even though a better translation of Huber was available at the time. *Id.* at 19. Story's work, in turn, informed the *Dred Scott* decision. *Id.* at 61–67. In this vein, Alan's work and influence were an inspiration for some of my own reflections on legal scholarship, the errors it can contain, and how those errors are often replicated in future works. See Peter A. Appel, *Intervention in Roman Law: A Case Study in the Hazards of Legal Scholarship*, 31 GA. J. INT'L & COMP. L. 33 (2002) (demonstrating how an erroneous assertion that the modern American procedural device of intervention had its basis in Roman law has been repeated in other scholarship).

⁷ See, e.g., ALAN WATSON, *JESUS: A PROFILE* (1998); ALAN WATSON, *JESUS AND THE LAW* (1996) [hereinafter WATSON, *JESUS AND THE LAW*]; ALAN WATSON, *JESUS AND THE JEWS: THE PHARISAIC TRADITION IN JOHN* (1995); ALAN WATSON, *THE TRIAL OF JESUS* (1995).

⁸ Menahem Mansoor & Philip Davies, *Essenes*, in 6 ENCYCLOPAEDIA JUDAICA 510–12 (2d ed. 2007); Menahem Mansoor, *Pharisees*, in 16 ENCYCLOPAEDIA JUDAICA 30–32 (2d. 2007); Menahem Mansoor, *Sadducees*, in 17 ENCYCLOPAEDIA JUDAICA, 654–55 (2d ed. 2007).

⁹ WATSON, *JESUS AND THE LAW*, *supra* note 7, at 14–15.

society would predictably produce funhouse mirror images of each and of the underlying society. Yet comparisons between and among law and literature and society are not useless. What if a particular work of literature *did* accurately depict a particular society, its norms, customs, and expectations, but botched the law? In that case, literature serves as a truer mirror of society but a funhouse mirror of law. This relationship would importantly shed light on how and where law and society are out of sync, one of the major themes of Alan's work.

The law of property and literary depictions of that body of law provide several instances of this phenomenon, none more prominent than the entailment in Jane Austen's *Pride and Prejudice*.¹⁰ The entailment has figured into many other literary works—from Trollope's novels to the recent PBS series *Downton Abbey*—but *Pride and Prejudice* stands out as the most prominent example.

English land law traditionally struggled with attempts to keep property within the family and restrict the ability of one member of the family to sell it. One such device was the entailment (also known as the fee tail), which allowed the patriarch of a family to pass property to one line of the family. If that line failed to produce descendants or if the descendants were not of the right sex (generally, male), the land would pass to another, more distant line of the family. The entailment figures prominently in English literature to illustrate the struggle of this dynastic desire against the emerging social mores of the eighteenth century and later years. Most especially, the entail provides authors with a means to comment on the widespread conflict over whether marriage should be based on the advantageousness of the relationship from an economic perspective, or whether it should be based simply on love (or, what is sometimes called by the burdensome term "companionate marriage"). Many works throughout literature, both tragic and comic, feature this tension, but the entailment provided a particular reason to favor economics over emotions. The dry-eyed regard for economic pragmatism is because of the lasting economic effects of the entailment on a family's future and the role that wealth in property played in England.

The entailment serves as a principal motif in *Pride and Prejudice*. The problems it creates for the family at the center of the action (the Bennets) drive their actions and provide a reference point for how wise or foolishly they behave. The Bennet daughters stood to lose any interest in Longbourn, the family estate, because the estate was settled so that it had to pass to a male relative. In their family's case, the relative was the horrid, long-winded, and—in a spectacular and amusing combination—obsequious

¹⁰ JANE AUSTEN, *PRIDE AND PREJUDICE* (Bantam Classic Edition, 1981) (1813).

and patronizing Mr. Collins, their cousin. The entail provides the necessary impetus for Mrs. Bennet and her daughters to quest for someone to marry; any failings by the daughters to find a suitable mate (and one notable failure occurs in the youngest daughter, Lydia) are taken gravely. Indeed, Mrs. Bennet suggests that one of her daughters (Elizabeth, the novel's heroine) marry Mr. Collins to avoid the dire consequences of the entail.¹¹ Elizabeth refuses, with her father's explicit approval.¹² Fortunately, everything works out in the end, because Elizabeth marries the extremely wealthy Mr. Darcy, and her older sister Jane also marries well to Mr. Bingley.¹³

The entailment of Longbourn also provides insight into the character of Mr. Bennet and his ability to provide for his family. The entailment damns the family of females to a future of poverty and displacement, a seeming triumph of the law of property over Austen's notions of justice and common sense. Readers often look at the hapless Mr. Bennet with a bit of pity, since it appears that the entail ties his hands and that he can do nothing to help his daughters.

Austen created a nice melodrama, but she nevertheless got the law wrong. At the time that Austen wrote, it would have been extremely unlikely that a landed family like the Bennets would have used the entailment standing alone as the legal means of keeping Longbourn within the family. More likely, they would have used a device known as the strict settlement, which is explained in more detail below.¹⁴ It was also extremely rare (although not impossible) that a strict settlement would have been arranged to cut off close relations like the Bennet daughters.¹⁵ If the restriction on Longbourn was an entailment standing alone—which would have in all likelihood cut off any provision for the Bennet daughters—then the current life tenant (i.e., Mr. Bennet) could have “‘barr[ed]’ the entail.”¹⁶ This term means that Mr. Bennet could have stopped the property from going to Mr. Collins through a fairly simple legal proceeding.¹⁷ After that, he could have left it to whomever he wished: Jane, the eldest daughter; Elizabeth, his clear favorite; or all five of his daughters in whatever shares he chose.

If these legal conclusions are correct, then one must revisit Austen's work and decipher how the restrictions on property actually worked in *Pride and Prejudice*. In particular, one must determine how the entailment, or

¹¹ *Id.* at 53, 79.

¹² *Id.* at 85.

¹³ *Id.* at 289.

¹⁴ See *infra* notes 30–39 and accompanying text.

¹⁵ See *infra* notes 30–39 and accompanying text.

¹⁶ J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 319 (3d ed. 1990).

¹⁷ See *infra* notes 42–63 and accompanying text.

entailment-like devices such as the strict settlement, actually functioned in English families in the late eighteenth and early nineteenth centuries as opposed to how they might function or what the law said may happen to the family. Although we can tell easily from the text what the Bennet family expected would happen upon Mr. Bennet's death, knowing the actual details for Longbourn is no easy task. Not only is *Pride and Prejudice* a work of fiction and therefore not based on an actual legal record, but Austen does not provide her readers with an actual grant from a Bennet family patriarch for legal scholars to interpret or any indication about what that patriarch's intent might be other than what the Bennets themselves supposed.

Nevertheless, *Pride and Prejudice* provides a good start for these questions for two interrelated reasons. First, Austen's use of property settlements in *Pride and Prejudice* is divergent from the expected legal realities of the time. As mentioned earlier, most families then would have used the strict settlement (which likely would not have cut off the daughters). If the property was simply entailed, Mr. Bennet could have barred the entail. Second, Austen was an extremely sharp observer of many social realities and, particularly, the social rules regarding property settlements. Either she knew or she did not know about the legal details of the entailment when she used it as a central plot device in *Pride and Prejudice*. Either way, Austen's use of the entailment illustrates the enormous gap that can exist between law and the way that society observes law.

In this Essay, I will first outline the general development of different means used to hold property and keep it within a family in England. This discussion must of necessity be brief and schematic, and therefore readers should not rely on it as a completely accurate, nuanced, and detailed discussion of the historical development of English land law. I will then examine what Austen has to say about Longbourn, the principal property in *Pride and Prejudice*, which leads me to conclude that Austen probably conceived of Longbourn as being entailed and not secured under a strict settlement. I will also provide another novel, John Galt's *The Entail, or the Lairds of Grippy*,¹⁸ as a relatively contemporary point of comparison to demonstrate that Austen probably conceived of the arrangement for Longbourn similarly. Then, I will explore the implications of Austen's use of the entailment, whether or not she knew of the limitations of the entailment, and whether or not her audience knew of these limitations. My ultimate conclusion is that, whether or not Austen or her audience knew about the ins and outs of the entailment, we have much to learn about the relationship between a society and its law from this literary treatment of law.

¹⁸ JOHN GALT, *THE ENTAIL, OR THE LAIRDS OF GRIPPY* (Ian A. Gordon ed., 1970) (1823).

II. ENTAILMENT: LEGAL BACKGROUND

English land law struggled with ways that a family could lock up land ownership. Two basic strains compete in any such struggle to ensure that the same property stays within the same family. On the one hand, a landowner would want to do with his¹⁹ land whatever he wanted, and the most pressing desire for most family patriarchs was keeping land within the family perpetually. We might call this desire the “dynastic urge.” Having land in the family would provide steady income (through rents, income from timber and mineral development, etc.) as well as social prestige.

On the other hand, if land is tied up forever within one family, it is also not as valuable as it might be as an economic commodity. No one person can ever sell all of the interests in a particular piece of property to another if others in future generations have legally-recognized interests attached to the property. For example, if *A* has a life estate in land and *B* has the remainder in fee simple, *A* can only sell his life interest, which is considerably less valuable than the whole property (life estate plus the future interest). After all, anyone buying the land from *A* would not pay as much knowing that his interest would terminate upon *A*’s death. This result means that land would be less valuable and harder to transfer, even if transfer would be in the overall best interest of the family. We might call the tendency to keep land to sell the “desirability of alienability.”

English land law struggled with the fight of the dynastic urge against the desirability of alienability for centuries. Moreover, the struggle was often an internecine one within the members of the bench and bar. After all, as a lawyer (for example) gained wealth in the profession, he depended on the availability of marketable land when he had amassed sufficient wealth to purchase an estate and thus possibly enter the landed class. Of course, once he purchased land, he wanted devices to exist to make sure that profligate heirs did not dissipate this hard-won struggle for land and thus for respectability.²⁰

¹⁹ For ease, I will simply use the masculine pronoun in this description. That reflects the vast majority of property owners and grantors at the time. Austen, of course, provides one notable example of a landed woman, namely Lady Catherine de Bourgh. I discuss that instance in the text below.

²⁰ Brian Simpson makes the same observation. A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* 208–09 (2d ed. 1986); see also Sandra Macpherson, *Rent to Own; or, What's Entailed in Pride and Prejudice*, 82 REPRESENTATIONS 1, 7 (2003) (“[B]y the seventeenth century entails were primarily favored by the newly gentry, successful lawyers, merchants, or tradesmen who’d amassed fortune enough to purchase an estate they didn’t want to see wasted, mortgaged, or sold by profligate heirs.”).

One of the earliest devices invented to further the dynastic urge was the entailment. In the statute *De donis conditionalibus*,²¹ Parliament recognized an estate in land that came to be called the fee tail or the entailment. This estate would be created if an owner (*O*) granted to another person (*A*) an estate described as being from *O* to *A* and “the heirs of his body.”²² The courts interpreted this grant to mean that the land would pass from *O* to *A*, and then to the descendants of *A* (usually the eldest son of *A* under the rule of primogeniture, which is not directly related to this Essay). What if *A* died without descendants, or, more likely, what if the line of descendants (the issue) that *A* produced died without any further descendants? The original instrument creating the entail usually took care of that fairly foreseeable possibility. Usually, the original owner would grant the land “from *O* to my first son *A* and the heirs of his body, and upon the failure of issue from *A* then to my second child *B* and the heirs of his (or her) body, and upon failure of issue from *B* then to my third child *C* and the heirs of her (or his) body,” and so on. Such a device would make sure that the land would stay within the extended family. *O* could also specify that the land had to pass to male heirs by specifying “from *O* to *A* and the heirs male of his body,” with the limitations over to heirs male of *B* and *C* if desired.

Over time, the fee tail in England gradually lost its usefulness as a means of satisfying the dynastic urge because the courts decided that an entail could be barred and the land thus freely alienated. The procedural means of barring the entail was the suit for the common recovery, and it was first clearly established in the 1472 decision in *Taltarum's Case*,²³ although it may have some earlier roots.²⁴ According to some legal historians, use of this device increased during the War of the Roses. The king would recover the land of traitorous barons upon beating them on the battlefield. However, if the land was entailed, the traitorous baron had only an interest for life to be forfeited, and once the traitorous baron died (e.g., through combat or a gruesome execution for treason), the land would revert to the next tenant in line. Because the next in line was generally the traitorous baron's son or a close relative, a new foe would rise up in the patriarch's place, having land (and therefore money) and fresh motive to wage battle anew. Clearly, for the

²¹ *The Statute of Westminster of 1285*, 13 Edw. 1, ch. 1 (containing *De donis conditionalibus*, the chapter that originated the law of entail).

²² 2 WILLIAM BLACKSTONE, COMMENTARIES *112.

²³ See Charles D. Spinosa, *The Legal Reasoning Behind the Common, Collusive Recovery: Taltarum's Case (1472)*, 36 AM. J. LEGAL HIST. 70 (1992); see also Charles J. Reid, *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 265 (1995).

²⁴ For a more thorough history of the common recovery, see SIMPSON, *supra* note 20, at 129–35.

king to wipe out a family completely, he had to wipe out the entailment of lands. The common recovery allowed the king to do this.²⁵

This historical setting for the barrable entail in England explains an anomaly in land law in what is now the United Kingdom. Scottish land law continued to recognize the unbarrable entail, at least until the mid-1800s. Thus, English estates that were entailed could be disentailed, but Scottish ones could not.²⁶ This difference will figure into the discussion of the literature below.

The common recovery in England had a somewhat checkered history for two reasons. First, from a jurisprudential standpoint it was hard to explain why the common recovery worked at all since it essentially was a collusive action.²⁷ Second, it was unclear when families (as opposed to the king) would resort to barring an entail. Felicity Heal and Clive Holmes found one instance in which one Anselm of the Guise family attempted to disinherit his brother and leave the family estate to Anselm's own bastard sons—that is, what remained of the family estate after Anselm himself had depleted much of it.²⁸ Then again, Heal and Holmes also give an example of one Sir Robert Strode, who disentailed his lands so that his daughter could inherit them (although matters did not end happily).²⁹

Because of this central flaw in the entail in its capacity to satisfy the dynastic urge, the English land conveyancers returned to their drafting boards and eventually devised the strict settlement as the most prevalent means of tying up lands permanently.³⁰ Conveyancers such as Orlando Bridgman³¹—who worked during the period of the Civil War and the Interregnum, when land ownership was dicey³²—created models that others

²⁵ *Id.*

²⁶ See GEORGE ROSS, *THE LAW OF ENTAIL IN SCOTLAND AS ALTERED BY THE ACT OF 1848*, at 4–7 (1848) (discussing the Act of 1685, authorizing the creation of entails).

²⁷ See CHARLES NEATE, *THE HISTORY AND USES OF THE LAW OF ENTAIL AND SETTLEMENT* 9 (1865) (“This Law of Entail remained in force about 200 years, when a method of evading it was discovered, and established by judicial authority, though not by actual decision, which, to the uninitiated reader, appears like a trick of legal legerdemain.”); see also BAKER, *supra* note 16, at 319–20.

²⁸ FELICITY HEAL & CLIVE HOLMES, *THE GENTRY IN ENGLAND AND WALES, 1500–1700*, at 44 (1994).

²⁹ *Id.* at 45.

³⁰ LLOYD BONFIELD, *MARRIAGE SETTLEMENTS 1601–1740: THE ADOPTION OF THE STRICT SETTLEMENT*, at xiii (1983).

³¹ See NEATE, *supra* note 27, at 13–14 (describing the creation of the contingent remainder and the strict settlement).

³² See, e.g., H.J. Habakkuk, *Marriage Settlements in the Eighteenth Century*, 32 *TRANSACTIONS OF THE ROYAL HIST. SOC'Y* (4th ser.) 15, 24 (1950); see also Reid, *supra* note 23, at 268–69 (summarizing Henry Frederick Howard's dilemma of providing for his younger children upon the disposition of one of his estates, which was to go to his insane eldest son).

would follow in tying up lands for good. The strict settlement still relied on the entail, but only in the background. The basic trick was to ensure that the tenant in possession was always a life tenant, not the tenant in tail (because a tenant in tail could always suffer³³ a common recovery and thus bar the entail). Thus, *O* would convey a life estate to his son *A*, a remainder of only a life estate to *A*'s son *B*, and then a remainder in tail to the unborn son of *B* (with the ultimate remainder going off to other members of the family if necessary). That way, the tenant in tail would not have full possession (and thus the ability to bar the entail) until *B*'s son stood to inherit at *B*'s death. When *B*'s son came of age or upon *B*'s son's contemplated marriage, *B* would turn to his son and have a frank discussion about the family lands, suggesting that they settle the whole thing so that *B*'s son would have a life estate instead of an estate in tail, and the unborn son of *B*'s son would be the tenant in tail.³⁴ This would probably be a rather abstract conversation, and *B*'s son would likely be confused and simply agree to go along.

Why would *B*'s son do this? After all, once *B* died, his son could have the family land, disentail it, and sell the whole thing off.³⁵ There are several reasons why *B*'s son would follow his father's advice. As suggested above, *B*'s son may not have understood what exactly is involved and may have been misinformed. The son might also be obedient and want to get on with his life in society. Bear in mind that the strict settlement was a transaction that *B*'s son saw only twice in his life, once as obedient or ignorant son and once, much later, as protective father.³⁶ The solicitors may have explained everything as well as possible—and, given the state of legal education at the time, they themselves may not have completely understood all of the reasons

³³ The term "suffer" for a common recovery is a term of legal art. As Baker explains:

In its simplest form, an accomplice brought a real action against the tenant in tail on an imaginary title in fee simple; the tenant vouched a third party to warrant his title; the vouchee defaulted; and judgment was given for the accomplice to recover the fee simple against the tenant in tail. Of course, if the claim had been genuine, the tail would necessarily have been barred; the right in fee simple could hardly be destroyed by a usurper giving the land away in tail. The effect of the warranty, however, was to give the barred issue a right to recover land of equal value against the warrantor who defaulted. And this right to assets made the recovery effective even where the title was fictitious.

BAKER, *supra* note 16, at 319 (footnote omitted); see also SIMPSON, *supra* note 20, at 130–31 (discussing the development of the common recovery).

³⁴ See BAKER, *supra* note 16, at 332–35 (providing an overview of the process of the strict settlement).

³⁵ See *id.* at 334 (noting that once the eldest son reached the age of majority, he could bar the entail).

³⁶ *Id.*

for tying up lands in this fashion³⁷—but, alternatively, the family may not have appreciated the intricacies of the strict settlement and, given the societal norms of the time, may not have cared in any event.

There was another reason for *B*'s son to agree to this new settlement, especially if the settlement came in contemplation of marriage: The family of the future wife of *B*'s son would have insisted upon it. John Habakkuk has made an exacting historical examination of land settlements in contemplation of marriage. As he explains:

Family provision was a reason, independent of dynastic ambition, for setting a high value on the integrity of the paternal estate and one which moved the family of the wife and not only that of the husband. The wife's family was concerned to ensure that the husband could not impair his ability to provide for wife and younger children by dissipating his estate or by disinheriting them, and the most effective way of doing this was to ensure that he was made a life tenant.³⁸

Typically, charges were made on the family estate (i.e., provision for an annual payment out of income and profits that the land produced, rather than an ownership interest in the land itself) to provide for younger sons and any daughters, and these charges on the estate were binding on the holder of the estate.³⁹ The strict settlement thus protected all members of the family, not just the eldest son.

Thus, by the time that Austen wrote, the entail still existed, but was used only as a means of preserving distant future interests in land and thus keeping the land within the family as part of a larger settlement. It nevertheless remains to be seen how Austen envisioned the settlement of Longbourn. Specifically, was Longbourn held in a strict settlement, or was it simply entailed?

³⁷ See Habakkuk, *supra* note 32, at 26 (“[A]s more estates became subject to settlement, an increasing amount of knowledge about marriage prospects became concentrated in a few London conveyancers.”).

³⁸ JOHN HABAKKUK, MARRIAGE, DEBT, AND THE ESTATES SYSTEM: ENGLISH LANDOWNERSHIP 1650–1950, at 14 (1994). In this context, younger children includes all daughters, because the presumption was that the eldest son would inherit the family estate under the rule of primogeniture. See Karen Stakem Hornig & Craig J. Hornig, *Law and Literature Series: Austen on Estates and Trusts*, 43 MD. B.J., Jan.–Feb. 2010, at 50, 52.

³⁹ Habakkuk, *supra* note 32, at 17–23.

III. ENTAIL: NOVELISTIC TREATMENT

Despite the common practice at the time to use the strict settlement, there are two reasons to believe that Longbourn was simply entailed. The first is the direct evidence from the text. The second is indirect evidence from a roughly contemporaneous novel also involving the entail as a central plot device. That novel, which is not nearly as widely-read as *Pride and Prejudice* (because it is much less enjoyable), involves a Scottish (and thus not barrable) entail.

A.

Austen's *Pride and Prejudice* refers to the entailment specifically. The reader first learns of the entailment in chapter seven: "Mr. Bennet's property consisted almost entirely in an estate of two thousand a year, which, unfortunately for his daughters, was *entailed in default of heirs male, on a distant relation*. . . ."⁴⁰ When Austen wrote *Pride and Prejudice*, did she mean that Longbourn was entailed in the technical sense (i.e., the sort of estate that could be created after the statute *De donis*), or did she mean that Longbourn was settled under a strict settlement that involved some limitation over to male heirs? The text itself and attempts to explain the device in the novel suggest that Longbourn was entailed.

1.

In some ways, this question could be dismissed as pointless: *Pride and Prejudice* is a work of fiction. That easy observation could be easily accepted, except for the fact that Austen, as an observer of contemporary facts (including troop movements and property settlements for marriages), is dead on. She tells us of the soldiers that would have been in Derbyshire during the time of *Pride and Prejudice* (of course in a way that advances her plot concerning one of the silliest daughters, Lydia).⁴¹ In other works, Austen accurately estimates the amount that an upper-middle class woman would need to be settled upon her to put her in the position to marry a rich man. For example, Trevor Lloyd, relying on Habakkuk's detailed work, has demonstrated how exact Austen was in *Mansfield Park* when it came to the amount of money necessary for a father to settle on his daughter so that she

⁴⁰ AUSTEN, *supra* note 10, at 20 (emphasis added).

⁴¹ See WARREN ROBERTS, JANE AUSTEN AND THE FRENCH REVOLUTION 96 (1979) ("The soldiers who became part of a vastly larger wartime army, and were billeted most heavily in Southern England, made their presence felt in *Pride and Prejudice*.").

could marry a man of a particular station.⁴² Yet when it comes to how property would actually be bound up, Austen is ambiguous. As suggested earlier, most English families at the time of the Bennets probably would not have used the entailment standing alone precisely because it could be barred.⁴³

Heal and Holmes claim that by the late 1600s settlements typically favored immediate family members other than the eldest son over the eldest sons of distant relatives.⁴⁴ Thus, they assert the plot of *Pride and Prejudice* "hinges on an almost inconceivable determination under a strict settlement."⁴⁵ "Estates were secured by the strict settlement for the nuclear family; the claims of the wider lineage on the patrimony were neglected."⁴⁶ It was not impossible for an estate to be settled in the manner that Longbourn is described, but it simply was not done at the time.

Nevertheless, an examination of the references that Austen makes to the settlement of Longbourn indicates that the property was entailed, not strictly settled. First, Austen always refers to the legal condition of Longbourn using the term "entail," and only sometimes uses "settlement" or "settled." The longest discussion of the entail occurs in chapter thirteen, when the reader first learns of Mr. Collins, the distant relative who stands to inherit Longbourn. After exciting his wife and daughters with the announcement that they would have a visitor for dinner—perhaps a suitor for one of the daughters?—Mr. Bennet informs them that it will be "'my cousin, Mr. Collins, who, when I am dead, may turn you all out of this house as soon as he pleases.'"⁴⁷ Mrs. Bennet reacts with horror, blaming Collins for the fate that will befall her daughters. "'I do think it is the hardest thing in the world that your estate should be entailed away from your own children,'" she complains, "'and I am sure if I had been you, I should have tried long ago to do something or other about it.'"⁴⁸

Is Mrs. Bennet suggesting that there is something that could have been done? Perhaps she knew something about the nature of an entail and specifically that it could be barred. After all, her brother-in-law was an attorney in Meryton,⁴⁹ and perhaps he had suggested barring the entail before

⁴² Trevor Lloyd, *Myths of the Indies: Jane Austen and the British Empire*, 21 COMP. CRITICISM 59 (1999).

⁴³ See *supra* Part II.

⁴⁴ HEAL & HOLMES, *supra* note 28, at 46–47.

⁴⁵ *Id.* at 46.

⁴⁶ *Id.*

⁴⁷ AUSTEN, *supra* note 10, at 46.

⁴⁸ *Id.*

⁴⁹ *Id.* at 26.

to Mrs. Bennet. The reaction of Jane and Elizabeth to calm their mother, however, closes that possibility:

Jane and Elizabeth attempted to explain to her the nature of an entail. They had often attempted it before, but it was a subject on which Mrs. Bennet was beyond the reach of reason; and she continued to rail bitterly against the cruelty of settling an estate away from a family of five daughters, in favour of a man whom nobody cared anything about.⁵⁰

Jane and Elizabeth are the two sensible daughters, and Austen would not give Mrs. Bennet special knowledge in this one particular context when Austen portrays her as foolish in all others. (To be fair to Mrs. Bennet, she rightly regarded the situation for her daughters as desperate, since there was apparently no income for them after Mr. Bennet's death.) Mr. Bennet regards Collins's inheritance as a "most iniquitous affair," adding that "nothing can clear [him] from the guilt of inheriting Longbourn."⁵¹ Although Mr. Bennet apparently regards the situation with disdain, rather than as a fact of life, he might also be speaking with the combination of sarcasm and placation that he uses throughout the novel when addressing his wife. As the reader learns later, this quote might also reflect guilt that he himself feels regarding the situation of Longbourn.

When Collins arrives, he "examined and praised . . . [t]he hall, the dining-room, and all its furniture."⁵² Mrs. Bennet, who normally would walk out of her way to hear praise, was nevertheless mortified with the "supposition of his viewing it all as his own future property."⁵³ This passage is hard to dissect, because personal property like furniture could not be entailed; only realty could be.⁵⁴ Austen attributes the thought to the senseless Mrs. Bennet, who overreacts to most things. After all, for example, Mrs. Bennet supposed that her mild-mannered and feckless husband would fight a duel with the scoundrel Wickham after he eloped with the youngest daughter, Lydia.⁵⁵

Austen sprinkles allusions to the legal status of Longbourn a few times subsequently. For example, Mrs. Bennet believes that Charlotte Lucas, who marries Collins, is scheming "to turn [Mrs. Bennet] and her daughters out of

⁵⁰ *Id.* at 46. Even though Austen uses the term "settle" in this passage, it is clear from the context that the focus is on the entailment.

⁵¹ *Id.*

⁵² *Id.* at 49.

⁵³ *Id.*

⁵⁴ 2 BLACKSTONE, *supra* note 22, at *113 ("[M]ere personal chattels, which favour not at all of the realty, cannot be entailed.").

⁵⁵ AUSTEN, *supra* note 10, at 213.

the house as soon as Mr. Bennet were dead.”⁵⁶ Lady Catherine de Bourgh, Collins’s patroness, asks Elizabeth about her family history and status, observing:

“Your father’s estate is entailed on Mr. Collins, I think. For your sake,” [Lady Catherine said,] turning to Charlotte, “I am glad of it; but otherwise I see no occasion for entailing estates from the female line.—It was not thought necessary in Sir Lewis de Bourgh’s family.”⁵⁷

Thus, everyone knew of the entailment, the shape it took, and the consequences it would have for the Bennet daughters. Everyone also referred to it as an entailment.

The only other long discussion of the entailment of Longbourn appears in chapter fifty. Lydia has eloped with Wickham, “one of the most worthless young men in Great Britain.”⁵⁸ To induce him to marry Lydia, Mr. Gardiner—Mrs. Bennet’s brother—meets with Wickham and arranges to have his debts paid and a portion of Lydia’s interest in her mother’s property settled upon Lydia.⁵⁹ This passage is enlightening with regard to the legal situation of Longbourn for two reasons. Obviously, money has been settled upon Mrs. Bennet, which Wickham has made a condition of his marriage to Lydia (or at least their English marriage—the text is not entirely clear about whether Lydia and Wickham ever made it to Gretna Green). Obviously, Mrs. Bennet’s family had taken what would have been the usual course of action at that time and had guaranteed her income that could be passed to her daughters. The other part of the demand was that Mr. Bennet would provide 100 pounds per year during his lifetime.⁶⁰ This language strongly suggests that Austen knew the difference between a settlement and an entail and that she depicted Longbourn as falling under the latter legal situation. If Longbourn were strictly settled with a provision for daughters, Wickham would have likely demanded Lydia’s share of that as well.

Despite this means of reconciling the situation and believing that Wickham must have received more—that “‘Wickham’s a fool if he takes her [Lydia] with a farthing less than ten thousand pounds’”—Mr. Bennet rues the financial details of the arrangement.⁶¹ If ten thousand pounds were laid

⁵⁶ *Id.* at 66.

⁵⁷ *Id.* at 123.

⁵⁸ *Id.* at 229.

⁵⁹ *Id.* at 224.

⁶⁰ *Id.*

⁶¹ *Id.* at 226.

out and if Mr. Gardiner had covered it, then Mr. Bennet would be indebted to his brother-in-law for the rest of his life. (It turns out that Darcy covered the debts, and learning this act of kindness was one of many things that turned Elizabeth's heart toward him, leading to the happy ending.⁶²) Thus believing himself in debt to his brother-in-law, Mr. Bennet regrets his habit of spending and not saving throughout his marriage to better provide for his children and wife after his death. The reason he had not saved more was his expectation for what would happen to Longbourn:

When first Mr. Bennet had married, economy was held to be perfectly useless; for, of course, they were to have a son. This son was to join in *cutting off the entail*, as soon as he should be of age, and the widow and younger children would by that means be provided for. Five daughters successively entered the world, but yet the son was to come; and Mrs. Bennet, for many years after Lydia's birth, had been certain that he would. This event had at last been despaired of, but it was then too late to be saving.⁶³

This passage suggests that Austen represents Longbourn as being held under a strict settlement. After all, the passage states that the son was to "cut[] off the entail" after reaching the age of majority. That statement suggests that the property would be settled upon the son through the formalities of the strict settlement.

Upon closer examination, however, Austen's representation of Longbourn was an estate held under an entail. First, as stated above, it was unusual for property to be strictly settled in such a way that only a male heir could inherit it or that the daughters would be completely bereft.⁶⁴ Second, the reference to the son cutting off the entail when he reached the age of majority describes the popular and legal conception of how the entail worked: having a son who came of age meant that he would inherit the property and thus cut off the effect of the entail. Third, the fact that Lydia's share of Mrs. Bennet's money would permanently go to her and Wickham, but only a small sum during Mr. Bennet's lifetime could come to Wickham with Lydia's hand in marriage, suggests that everyone in the novel knew that Longbourn was entailed, not

⁶² *Id.* at 239–43. To be sure, this act of kindness was not the only reason that Elizabeth changes her mind about Darcy, since she jokingly admits to Jane that she first started to consider Darcy romantically when she saw the lovely and extensive grounds of Pemberley, Darcy's estate. *Id.* at 280.

⁶³ *Id.* at 229 (emphasis added).

⁶⁴ See *supra* Part II.

strictly settled. Again, if there were a strict settlement, it would likely come with shares for every one of the Bennet children, and Wickham would have almost certainly demanded Lydia's portion.

Thus, after examining all of the direct textual references in the novel to the legal status of Longbourn, one must conclude that Austen meant that Longbourn was entailed, not strictly settled. If that is the case, then Mr. Bennet could have barred the entail. Everyone in the novel seems completely unaware of that fact or at least never mentions it.

2.

A few scholars have tried to explain the situation in the novel. Gunter Treitel attempted to solve the "legal puzzles" that Austen created in *Pride and Prejudice*.⁶⁵ As for why "no steps were taken to bar the entail," Treitel explains that Mr. Bennet must have been the life tenant holder under a subsequent resettlement and not the tenant in tail; the tenant in tail would be the unborn son, not Mr. Collins.⁶⁶ Collins was only the heir apparent of Longbourn and could thus not help the situation while Mr. Bennet was alive even if he wanted. The law would presume that Mrs. Bennet could have a son until the day she died (no matter how much both of the Bennets despaired of that).⁶⁷ Mrs. Bennet could also have died before Mr. Bennet, who could then remarry and have a son through his second wife.⁶⁸

Although this solution to the puzzle makes sense, Treitel recognizes that the failure of a family to bear a male heir was not unthinkable and that a decent conveyancer would have made some protection for Mr. Bennet's widow and any surviving daughters if he had no son. The only explanation that Treitel can give for this lack of forethought and protection is "that the estate was too small" to leave any portions to surviving daughters.⁶⁹ But a decent lawyer at the time would have realized the possibility of the Bennets not having a son to inherit Longbourn or that son dying before Mr. Bennet. Surely leaving the income of Longbourn to Mrs. Bennet for life and then dividing it amongst the daughters would be a better result than allowing Mr. Collins to inherit it.

The device that would most likely act remorselessly and allow Longbourn to pass to a distant male heir was the entail, the term that Austen used. Thus, to the extent that Austen was precise in her definitions, Longbourn was

⁶⁵ G.H. Treitel, *Jane Austen and the Law*, 100 L.Q. REV. 549, 557-84 (1984).

⁶⁶ *Id.* at 563-64.

⁶⁷ *Id.* at 565.

⁶⁸ *Id.*

⁶⁹ *Id.* at 566.

entailed, not held under an unusual strict settlement. And if Longbourn were entailed, Mr. Bennet could have easily left his library one day, asked his brother-in-law the solicitor to draft the necessary papers, engaged the services of a barrister, barred the entail, bequeathed the property to whomever he wished, and then retired to his precious library for the rest of his life.

In another attempt to explain the entailment in *Pride and Prejudice*, Luanne Bethke Redmond simply asserts that Longbourn must have been settled under a strict settlement.⁷⁰ She provides little evidence for her conclusion. Redmond does acknowledge *Taltarum's Case*, but she makes up her own version of what the entailment in the Bennet family must have been, and concludes that "Mr. Bennet was not tenant in tail of Longbourn," because, if he were, "he could have used [the common recovery] to convey his property, possibly to his daughters, or in trust for their benefit."⁷¹ This conclusory statement assumes the answer to the question, which is whether Longbourn was entailed or settled by a strict settlement. My argument remains, though, that Longbourn was entailed and that Mr. Bennet could have used a common recovery to convey the property to his daughters.

More recently, Sandra Macpherson has examined the entail in *Pride and Prejudice*.⁷² Macpherson starts with the assertion that there is no sense in trying to "blame Mr. Bennet or Mr. Collins: the former *couldn't* have done 'something or other' about the disinherision of his five daughters; the latter bears no particular distinction in or responsibility for being 'favored' by the inheritance."⁷³ But Macpherson, despite her extensive use of legal history sources, misstates the relevant law. She claims that Austen "call[ed] an 'entail' what by 1813 [when Austen wrote] could *only* have been a strict settlement."⁷⁴ Macpherson bases this argument on her assumption that the entail was done away with by the juridical adoption of the Rule Against Perpetuities.⁷⁵ But entails were never subject to the Rule Against Perpetuities.⁷⁶ Macpherson also argues that, from Austen's perspective, "with respect to the question of the agency and durability of the donor's

⁷⁰ Luanne Bethke Redmond, *Land, Law and Love*, 11 PERSUASIONS 46, 49–51 (1989).

⁷¹ *Id.* at 49.

⁷² Macpherson, *supra* note 20.

⁷³ *Id.* at 2.

⁷⁴ *Id.* at 8 (emphasis added).

⁷⁵ *Id.*

⁷⁶ See JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 443 (Roland Gray ed., 4th ed. 1942). For support of this assertion, Macpherson relies on BAKER, *supra* note 16, at 332. Baker discusses the strict settlement but never asserts that the Rule Against Perpetuities is the reason for the adoption of the strict settlement. Indeed, in his discussion of the strict settlement, Baker does not mention the Rule Against Perpetuities. See *id.* at 332–35.

will—and especially with respect to the question of gender—fee simple, fee tail, and strict settlement are structurally identical.”⁷⁷ That statement may accurately reflect what Austen thought about different ways of holding lands, but it does not mean that Austen knew the law correctly. Fee simple, fee tail, and strict settlement are not “structurally identical” from a legal perspective. Fee simple is an interest that can be left to whomever holds the fee. Fee tail limits the discretion of the present holder but gives that person an out, namely, suffering a common recovery. Strict settlement requires more steps but requires each generation to agree to it. Macpherson may have correctly intuited Austen’s thoughts about Longbourn, but her arguments in no way show that Austen thought that Longbourn was settled under a strict settlement.

If these scholars are incorrect, as I have argued, then the most likely conclusion is that Longbourn was settled under an old-fashioned entail.⁷⁸ Macpherson also acknowledges that “[e]ntails were alive and well in Scotland until the mid-nineteenth century. . . .”⁷⁹ The fact that entails were “alive and well in Scotland” provides a critical counter-example to Austen’s version. While *Pride and Prejudice* offers an account of land law in England, Scottish novelist John Galt found similar melodramatic possibilities in his literary depiction of an entail story set in Scotland.

B.

John Galt’s *The Entail, or the Lairds of Grippy*⁸⁰ is relatively contemporaneous with *Pride and Prejudice* (1822 for Galt, and 1813 for

⁷⁷ Macpherson, *supra* note 20, at 8.

⁷⁸ A blogger who writes under the name EnglishDR has noted that the entail could be broken under English law and asserts that “Mr. Bennet had more options than he realised, and the Bennett [sic] daughters were placed under enormous fear for their future because the Bennett [sic] family lawyer does not seem to have been aware of barring actions.” EnglishDR, *Prejudiced Inheritance*, Xomba U (Feb. 15, 2011, 4:47 PM), http://englishdr.xomba.com/prejudiced_inheritance. This blogger goes on to argue that “Mr. Bennet could have negotiated with his heir.” But, as a living person, Mr. Bennet did not have an heir. Mr. Collins was simply an heir apparent. And barring the entail involved no negotiation whatsoever. I agree with EnglishDR’s argument that Austen “needed the hopelessness of the Bennet daughter’s [sic] situation for dramatic effect [and that f]or this reason, she purposefully seems to have ignored the legal solutions to the plight of [her] protagonists.” *Id.* As I argue below, however, it is not clear whether Austen knew any of the niceties of legal settlements and entailments.

⁷⁹ Macpherson, *supra* note 20, at 20 n.32.

⁸⁰ GALT, *supra* note 18. I should note that there appears to be no connection between this novelist and the protagonist of Ayn Rand’s *Atlas Shrugged*. See Shoshana Milgram, *Who Was John Galt?*, in *ESSAYS ON AYN RAND’S ATLAS SHRUGGED* 53, 76 n.13 (Robert Mayhew ed., 2009).

Austen). Galt himself was a Scot.⁸¹ He nevertheless studied law in England and was a member of Lincoln's Inn in London.⁸² Although he led a fairly peripatetic life, Galt enjoyed a fairly successful career as a writer and left the law.⁸³

The Entail is a mediocre novel at best and certainly not as enjoyable as *Pride and Prejudice*.⁸⁴ Much of the dialogue is written in Galt's version of Scottish dialect, the characters are fairly obvious in their motivations (since Galt explicitly informs the reader of each character's motivation), and the novel lacks Austen's wit. Nevertheless, like *Pride and Prejudice*, Galt's novel employs the entail as a plot device and, in particular for legal purposes, the singularly different aspect of the Scottish entail—namely, that it could not be barred—as a central point of the novel.

Because Galt and his novel are probably unfamiliar to readers, a brief summary of the melodrama is in order. *The Entail* tells the story of Claud Walkinshaw and his progeny. Claud's grandfather was the laird of an estate called Kittlestonheugh. Claud's grandfather sent Claud's father on an expedition to the New World, which proved disastrous and resulted in Claud's father's death, Claud's mother's death from a broken heart, bankruptcy for the Walkinshaws, and the attendant sale of Kittlestonheugh.⁸⁵ Embittered by this series of events, Claud made it his life's determination to restore the Walkinshaws to their proper position and to regain Kittlestonheugh if at all possible. After establishing himself as a merchant, Claud purchased the Grippy, part of the former Kittlestonheugh lands.⁸⁶ Claud "resolved to marry, and beget children, and entail the property, that none of his descendants might ever have it in their power to commit the imprudence which had brought his grandfather to a morsel, and thrown himself on the world."⁸⁷ To fulfill this dream, Claud marries Girzy Hypel, the daughter and only child of the Laird of Plealands, who becomes the

⁸¹ GALT, *supra* note 18, at xxi–xxii.

⁸² Lincoln's Inn was and is one of the four inns of court to which a barrister is called. THE HONOURABLE SOCIETY OF LINCOLN'S INN, HISTORY OF THE INN: ORIGINS, <http://www.lincolnsi.org.uk/index.php/history-of-the-inn> (last visited Apr. 4, 2013).

⁸³ GALT, *supra* note 18, at xxi–xxii. Perhaps he could be thought of as the John Grisham of his day (although Grisham's novels have probably sold better than Galt's, and Galt endured bankruptcy at one point). *Id.*

⁸⁴ This is despite Galt's claim that *The Entail* was "a work that will, no doubt, outlive the Iliad." *Id.* at 351. John Cairns suggested to me that this comment was tongue-in-cheek.

⁸⁵ *Id.* at 3.

⁸⁶ *Id.* at 12.

⁸⁷ *Id.*

Leddy of Grippy.⁸⁸ Eventually Claud and the Leddy have four children: Charles, Walter, George, and Margaret.⁸⁹

Throughout the Laird and Leddy's marriage, discussions of entailing the lands take center stage. Claud initially decides to entail his lands to Charles.⁹⁰ The Laird of Plealands insists that there be someone to take on his surname and the title of Plealands.⁹¹ Initially, Claud resists because he wants his first born son to have both Grippy and Plealands, but he relents when the Leddy bears him a second son, Walter.⁹² Galt makes clear from the start that Walter is a "natural" (i.e., mentally deficient).⁹³ Upon the death of Girzy's father, both the entails for Grippy and Plealands turn out to be defective.⁹⁴ This legal error raises the possibility that Grippy and Plealands could be united into a property as extensive as Kittlestonheugh.⁹⁵ The avaricious Claud dreams of the prospect.

As the novel progresses, Charles falls in love with Isabella Fatherlans, the daughter of another fallen laird.⁹⁶ Claud disapproves of this relationship and forbids Charles to marry her for a year. Because of Isabella's impoverished situation, however, Charles disobeys Claud and marries her sooner than the year had passed.⁹⁷ Claud decides that Charles's disobedience warrants him to disinherit Charles from the family lands altogether.⁹⁸

The discussions between Claud and his solicitor, Keelevin, regarding the entailment of the lands are the most relevant passages of the novel for purposes of this Essay because they explicitly discuss the strictness of the Scottish entail and the fact that it cannot be barred. Although Keelevin scolds Claud on his proposal to disinherit Charles from the lands,⁹⁹ Keelevin nevertheless agrees to draw up papers entailing both Grippy and Plealands to Walter, the second son. Keelevin draws up the papers, but before he allows Claud to sign them, he cautions him:

⁸⁸ *Id.* at 12, 21.

⁸⁹ *Id.* at 21, 23–24, 38.

⁹⁰ *Id.* at 23, 54.

⁹¹ *Id.* at 22.

⁹² *Id.* at 23.

⁹³ *Id.* at 73; *see also id.* at 60 n.1 (referring to Walter as a "haverel" or half-wit).

⁹⁴ *Id.* at 30.

⁹⁵ *Id.* at 31.

⁹⁶ *Id.* at 41–42.

⁹⁷ *Id.* at 47.

⁹⁸ *Id.* at 54.

⁹⁹ *Id.* at 57 (" 'I was thinking ye may be did na reflect that sic an entail as ye speak o' would be rank injustice to poor Charlie, that I hae ay thought a most excellent lad.' " (footnote omitted)).

Noo, Mr Walkinshaw . . . I hope ye have well reflected on this step, for when it is done, *there's nae power in the law o' Scotland to undo it*. I would, therefore, fain hope ye're no doing this out of any motive or feeling of resentment for the thoughtless marriage, it may be, of your auld son.¹⁰⁰

Claud, determined to press forward, assures Keelevin of his intent and brings both Charles and Walter as witnesses to the signing.¹⁰¹

Walter marries Betty Bodle, the woman whom Claud had originally envisioned Charles marrying. Betty came from a landed family, in contrast to Isabella, whom Charles married for love. Claud then makes an exchange of Plealands (which, of course, is really Walter's) for other lands that made up the original Kittlestonheugh.¹⁰² Having made this trade of lands, Claud nevertheless feels remorse about how he had treated his first born son, Charles.¹⁰³ Charles and Isabella have two children, James and Mary.¹⁰⁴ Walter's wife dies after giving birth to a daughter, leaving Claud wondering whether the trade of Plealands for the other lands to make up the former Walkinshaw estate would not leave the lands in the hands of a male heir.¹⁰⁵ Charles discovers the terms of the entail, contracts a bad fever, and dies in bitterness.¹⁰⁶ Walter is still the remainder in tail, but his mother (the Leddy) and his brother George conspire to have him declared mentally unsound, so that he cannot manage or inherit the property.¹⁰⁷

These events leave George as the next tenant in succession to the entail. By this time, George has married, and he has one daughter, Robina. At Walter's wedding, Walter's sister Margaret meets her future husband, Mr. Milrookit, the Laird of Dirdumwhamle, who has many children from two previous marriages and would like to see any progeny well placed with

¹⁰⁰ *Id.* at 72 (emphasis added).

¹⁰¹ *Id.* at 73.

¹⁰² *Id.* at 103.

¹⁰³ *Id.* at 106.

But keener feelings and harsher recollections were also mingled with that regret; and a sentiment of sorrow, in strong affinity with remorse, embittered his [Claud's] meditations, when he thought of the precipitancy with which he had executed the *irrevocable* entail, to the exclusion of Charles; to whom, prior to that unjust transaction, he had been more attached than to any other human being.

Id. (emphasis added).

¹⁰⁴ *Id.* at 123.

¹⁰⁵ *Id.* at 114–15.

¹⁰⁶ *Id.* at 141–42.

¹⁰⁷ *Id.* at 177–79, 201.

lands.¹⁰⁸ The Milrookits have a son whom they name Walkinshaw, after Margaret's family name. George, who is now the Laird of Grippy, fancies that Robina will marry James, his eldest brother's son.¹⁰⁹ Walter, in the meantime, has died, meaning that George is the only living male son of Claud and that James is the only existing male in Claud's line after George.¹¹⁰ Despite George's wishes, James has fallen in love with Ellen Frazer, not Robina, and James refuses to marry Robina.¹¹¹ Robina does not care that much because she wants to and does marry Walkinshaw, Margaret's son (i.e., Robina's cousin), and they expect that they will inherit Kittlestonheugh.¹¹² George's wife dies, however, leaving open the possibility that George will have a son if he remarries. Indeed, George sets his eyes on Ellen Frazer (James's sweetheart) as a possible catch.¹¹³ Before this intention can come to pass, George dies in a shipwreck.¹¹⁴ At the end of the novel, James, the son of Claud's eldest son Charles, winds up with the lands that were originally entailed, since they were entailed to heirs male.¹¹⁵ Robina cannot inherit the lands because she is female, and Walkinshaw Milrookit, having descended from a daughter, also cannot inherit the lands.¹¹⁶

The point of this long description of the novel is to focus on Galt's use of the entail. It is clear throughout the novel that the entail in Scotland was not one that could be broken. Galt is quite clear that the entail was irrevocable and that there was nothing to be done, unless there was a defect in the instrument or the tenant in tail was mentally incompetent (as was the case for Walter). Galt does not draw out the distinction explicitly—for example, he never has the lawyer Keelevin say, "there's nae power in the law o' Scotland to undo it, unlike in England." Nevertheless, this situation contrasts with the English entail, in which there was a patent way of ending it. If Longbourn was entailed, as I believe it was, then Mr. Bennet could have barred the entail, had he wanted to.

¹⁰⁸ *Id.* at 108.

¹⁰⁹ *Id.* at 223.

¹¹⁰ *Id.* at 218–19.

¹¹¹ *Id.* at 226 (showing James saying " 'I'll never marry for money.' ").

¹¹² *Id.* at 258–59.

¹¹³ *Id.* at 316.

¹¹⁴ *Id.* at 322.

¹¹⁵ *Id.* at 323.

¹¹⁶ *Id.* at 338–39.

C.

Speculation alone determines what the legal situation was for Longbourn. We know from *Pride and Prejudice* itself that Austen understood some of the differences between the English and Scottish law. The best evidence is the elopement between Lydia and Wickham. It is significant that the Bennet family speculated, on the basis of her letter, that Lydia and Mr. Wickham had eloped to Gretna Green.¹¹⁷ Gretna Green is one of the southernmost Scottish cities, and the marriage laws in Scotland and England at the time were vastly different. At that time, a couple could not marry in England without parental consent unless the parties were at least twenty-one.¹¹⁸ By contrast, at that time Scots law permitted couples to marry without parental consent when the parties were as young as twelve for the female and fourteen for the male.¹¹⁹ Readers in Austen's day would have known exactly why Lydia and Wickham eloped to Gretna Green—to her audience it would have the same impact as a couple eloping to Las Vegas would to an American audience today.¹²⁰

In the same way, Galt's novel gives us additional insight into what contemporaneous audiences would have known about the two legal systems and perhaps their notions about the entail. Galt was quite explicit about the fact that the entail Claud executed could not be barred in the future and the complications it raised for his family. It was no mystery that two very different systems functioned on the same island. What remains to be seen is whether Austen and her audience knew as much about the entail as they did about Gretna Green marriages.

IV. HOW SHOULD WE READ THE ENTAIL IN *PRIDE AND PREJUDICE*?

Thus, if I am correct that Austen intended to make Longbourn subject to the strict form of an entailment, the essential question becomes whether Austen knew of the potential for barring the entail or whether she did not. Of course, one might also wonder whether her audience knew or did not

¹¹⁷ AUSTEN, *supra* note 10, at 202–03.

¹¹⁸ Rebecca Probert, *Control over Marriage in England and Wales, 1753–1823: The Clandestine Marriages Act of 1753 in Context*, 27 LAW & HIST. REV. 413, 422 (2009) (“The point is rather that the normative framework of the canon law required parental consent, and that those minors wishing to marry without such consent had to resort to evasive measures.”).

¹¹⁹ Leah Leneman, *The Scottish Case That Led to Harwicke's Marriage Act*, 17 LAW & HIST. REV. 161, 162 (1999).

¹²⁰ Cf. GALT, *supra* note 18, at 286 (referring to a Gretna Green marriage from the Scottish perspective).

know about the details of the entail. The possibilities can be depicted on the following chart:

	Austen Does Not Know	Austen Knows
Audience Does Not Know	Most likely	Unlikely—Austen would have to be extremely arch and clairvoyant
Audience Knows	Unlikely—use of the fee tail in the novel would have been criticized	Possible and interesting

As indicated on the chart, there are four possibilities. Two strike me as unlikely. It is unlikely that Austen knew about the ins and outs of the entailment while her audience did not. Although Austen was an astute observer of her society, her commentary of that society using the device of the common recovery when her audience was clueless would have had to be extremely ironic or clairvoyant. After all, she would be making oblique reference to a situation that she knew Mr. Bennet could have defeated yet did not, thus casting aspersions on him in the process, even though her audience would not pick up on the joking criticism. Thus, she would not reach her audience and would be writing for modern critics in the hope that they would pick up on the message. And even if that were her intent, she failed, for, although a few modern observers have noticed that Austen's use of the entailment is strange or anachronistic, none have noticed any message that she was trying to send across centuries.

The other unlikely possibility is that Austen's readership knew about the limitations on the entailment but that Austen did not. If this were the case, the novel would not have succeeded and become popular. More likely, it would have been dismissed as silliness. If everyone knew that Mr. Bennet could have barred the entail, then why all the fuss about getting the daughters married off? As mentioned above, if that were the case, Mr. Bennet could have arranged for the appropriate papers to be executed and left the property to whomever he wished, retiring to his precious library for the rest of his sullen existence knowing that his daughters were taken care of. The novel would have ended just after chapter thirteen.

The most likely scenario is that neither Austen nor her readership knew about the exact rule of property settlement in England. Austen clearly knew the terms entail and settle, as in settlement upon marriage, and the basic structure for how marriage settlements worked. Nevertheless, Austen leaves much ambiguity and makes mistakes, as she seems to have done with Mrs.

Bennet's worries that Collins would wind up not only with Longbourn but also with all of its contents, which, as shown above, was not possible under an entail.

If this scenario is correct, then what consequences follow? It means that we have an accurate depiction of a society that is totally out of touch with a body of law that was nevertheless essential to familial relationships and land ownership. This conclusion is surprising unless we accept the wide disjunction between law and society. Generally, however, most people believe that law accurately reflects the values or cultural norms of a given society. Alan Watson has bravely shown this not to be the case.

In some ways, this disjunction occurs regularly in many areas of the law, but goes unnoticed. After all, as mentioned previously, the complicated transactions necessary for the continuation of the strict settlement were ones that a man would see no more than twice in his life: once when he came of age and once as older parent. The implications of these transactions could very well have been lost on those who participated in it.

A contemporary example helps illustrate the point. As a young man, I knew that I wanted to attend college and law school. I knew that all of this had to be paid for. In order to pay for part of this, I took out student loans, mostly because my parents told me that I had to help finance a portion of my education (and I am eternally thankful that they financed most of it). At the time, I had a superficial understanding that the money would have to be repaid at some point, but I had no idea of the effect repaying the loans would have on my monthly budget, what legal obligations I was undertaking, and what impact it would have if I could not repay. I certainly did not know whether student loans were dischargeable debts in American bankruptcy law (they certainly are not now except in rare circumstances¹²¹), what impact default could have on my credit rating, or exactly how much would be due and when. All of this was beyond anything but the vaguest of my understanding. I just wanted to pursue my educational goals and dreams.¹²²

Similarly, a young man in the late eighteenth century, such as a young Mr. Bennet, probably did not know all of the ins and outs of property settlement. If he were a real person, he may have not known the implications of the property settlement or the power he may actually have had to watch out for his daughters. His understanding may have ended at thinking that having a son was the only way to keep Longbourn in the family. The idea

¹²¹ See 11 U.S.C. § 523(a)(8) (2006).

¹²² Just to reemphasize, I am grateful that my parents financed most of it through their hard work, savings, and then putting their trust in me to make it happen. I hope I've done them proud.

that he would have only daughters, and the implications that would follow if that were to occur, was probably beyond his comprehension.

If this is the case, then it offers one lesson about the relationship between law and societal values. Legal ignorance prevails over legal knowledge. People often operate under rational apathy. They sign contracts that they do not read closely; they click through agreements online so that they can download software or a video that they want; they do not inspect real estate as carefully as they should because they have fallen in love with a house they wish to buy; they talk to police thinking that their cooperation will help them. Lawyers often enter the disputes that arise from these situations wondering: What were these clients thinking? The answer is typically that these clients were not thinking; they were acting and getting on with their lives. Legal ignorance—especially about technical details—is not surprising among those who do not have legal training.

Nevertheless, the more intriguing scenario for contemplating the relationship between law and society is if both Austen and her readers knew that an entail in England could be barred. If this were the case, two interrelated implications immediately leap forth. First, the character of Mr. Bennet must be reread. This point is probably of more interest to Austen scholars and fans. Most readers generally sympathize with Mr. Bennet because he is largely surrounded by folly, because he is witty, and because he favors Elizabeth, the heroine, and recognizes her intelligence. These features—especially that he can find intelligence in a woman, and particularly in the early nineteenth century—are attractive to a modern audience. They make him seem urbane and progressive. A Mr. Bennet who could, but did not, provide for his daughters, however, becomes a much less appealing character. Why would Mr. Bennet not disentail the property if he could? Perhaps it was simply not done, or not an option to a family of the social class or status of the Bennets.

This observation brings up the second implication of the speculative possibility that both Austen and her readers knew that an entailment could be barred. Austen was clearly pointing out the worst scenario in which an entail would harm the sympathetic and reward someone much less deserving. After all, Mr. Collins is not only a blowhard, a sycophant, and a fool, but he is also a distant relative and the son of someone Mr. Bennet detested.¹²³ The reader never learns what caused the rift between Mr. Bennet and Mr. Collins's father, but Austen makes sure that no one will find this oaf likeable.

¹²³ See AUSTEN, *supra* note 10, at 47 (detailing a letter from Mr. Collins to Mr. Bennet expressing hope of healing the rift that had existed between Mr. Bennet and Mr. Collins's late father).

Evidently, though, the social pressures and expectations compelled Mr. Bennet to acquiesce in the wishes of a distant family patriarch, even at the expense of his own immediate family. If this scenario is the case, then once again law provides recourse that few apparently turned to and thus does not reflect the underlying feelings of the society about property.

If this possibility is the case, then literary analysts and critical legal scholars might latch on to *Pride and Prejudice* to support their point: that law is largely established by the ruling elite to protect the ruling elite and entrench its values at the expense of the downtrodden, including the poor, women, and racial minorities. *Pride and Prejudice* does not advance this agenda well, however.¹²⁴ All of the elaborate rules regarding the entail and property settlements affected only the rich; the poor and the working class had nothing that could be affected by this body of law. Readers worry about the fate of Elizabeth and Jane and breathe sighs of relief when they are taken care of in marriage. Few even comment on Hill, their faithful and patient servant who undoubtedly had no worries about entailed lands or distant relatives who would take her patrimony, because she had none.

Similarly, *Pride and Prejudice* makes clear that some landed families guarded the interests of their female members more closely than the Bennets. Lady Catherine de Bourgh serves as a noteworthy example of such, and she makes it clear when she rubs Elizabeth's face in the difference between the settlement of the Bennet lands and the de Bourgh lands. After all, she makes a point of telling Elizabeth that entailing lands only to male heirs " 'was not thought necessary in Sir Lewis de Bourgh's family.' " ¹²⁵ This example makes clear that the law itself did provide a means for protecting the future of daughters like the Bennets, either through the terms of an entailment itself, proper negotiation at the time that the property was strictly settled, or through the suit for the common recovery. Rather, societal norms constituted the means of oppression, not the law itself. It was custom, convention, or tradition—but not law itself—that drove the central conflict in *Pride and Prejudice*.

V. CONCLUSION

Austen's *Pride and Prejudice* illustrates the often unnoticed tensions between a society and its law. Austen may have used the entailment of Longbourn as nothing more than a convenient plot device, one that neither she nor her audience fully understood or cared to understand fully. Law

¹²⁴ I have made similar observations about the Rule Against Perpetuities. See Peter A. Appel, *The Embarrassing Rule Against Perpetuities*, 54 J. LEGAL EDUC. 264, 278 (2004).

¹²⁵ AUSTEN, *supra* note 10, at 123.

misunderstood by literary authors—law reflected poorly in literature—supplies an interesting commentary on the relationship between law and society. The entailment of Longbourn worked well as a motif and impetus for relationships because people cared then (as now) more about blossoming romance between Elizabeth and Mr. Darcy than the technicalities of land law in England. As Alan Watson has taught us, however, people should care about both to avoid funhouse mirror distortions.