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LIBERALISM IN LOVE

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ABSTRACT

In this Essay, I continue my effort to understand the changes that are induced in liberalism, and the challenges that liberal law confronts, when the liberal principles of liberty, equality, individualism and freedom of choice are applied to the field of intimate, affective relations. Building on the work of scholars who have studied the influence of romanticism on law and on liberalism (such as Anne Dailey and Nancy Rosenblum), and on my own earlier efforts, I try here to work out a more systematic theory of romantic liberalism and to relate it to more familiar versions of liberalism. I attempt to delineate the concept of “romantic freedom” and the way it stands in tension with the more familiar “intellectual freedoms” and “economic freedoms” long recognized and valorized in liberal law.

I. INTRODUCTION: WHAT HAPPENS TO LIBERALISM WHEN IT IS IN LOVE?

In this Essay, I explore a rift within law between two different conceptions of liberalism: one, a rationalist version, commonly associated with the values of the Enlightenment and the so-called “intellectual freedoms”; the other, a version of liberalism that incorporates more radical visions of freedom born of the romanticist rebellion against Reason.¹ These more radical visions repudiate (or at least subordinate) the rationalist or reason-governed freedom of the will in favor of a non-rationalist or anti-rationalist freedom of the heart. Instead of ascribing freedom to the will, imagined as the seat of reason, they call for the liberation of the heart, imagined as the seat of “the passions” or instinct or emotion—the affective as opposed to the cognitive side of the psyche. Instead of underwriting the more familiar

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1. See Anne C. Dailey, *Holmes and the Romantic Mind*, 48 DUKE L.J. 429, 487-88 (1998); Nomi M. Stolzenberg, *Liberalism in a Romantic State*, 5 J.L. CULTURE & HUMAN. 194, 204 (2009).

liberal freedoms of conscience, contract, speech, and thought, conceived of as essentially cognitive in nature, they demand the freedom “to follow one’s heart.”²

The non-rational, feeling self, metaphorically pictured as “the heart,” has long constituted the romantic foil to the rational thinking agent (“the head”), the traditional subject of liberal thought.³ My interest in this Essay is to explore what happens to liberalism—and what happens to law—when the subject of liberalism is reconceived in this way, and love, be it erotic or agapic, takes center stage as the domain in which the doctrines of personal autonomy and choice are applied, and as the signal psychological feature of the legal subject who exercises liberty in that domain.

A few preliminary remarks about the basic terms of analysis employed here: liberalism, law, and love. Regarding liberalism, the premise of this Essay is that in talking about law we are also talking about liberalism, that is, about the political philosophical principles that emanate from the basic idea that all people are equal and have equal rights. In particular, the idea that all people have an equal right to liberty, to political, religious, and economic liberty, and, more generally, to freedom of choice, freedom of belief, and freedom per se, forms the basic credo of our legal system. Because our legal system is devoted to upholding these rights and the general principle of individual autonomy that underlies them, we are necessarily talking about liberalism when we talk about law.

Regarding law, there are many interesting questions that arise regarding *which* legal systems qualify as liberal ones, and one might well ask precisely which legal system is being analyzed here. These questions need not detain us here, however, as it is enough to observe that “our” legal system is a liberal one, regardless of whether we define “ours” relatively narrowly to focus exclusively on the United States or

2. This essay is a reworking of ideas that I first presented in *Liberalism in a Romantic State*. Stolzenberg, *supra* note 1. Here as there, I am deeply indebted to both Anne Dailey and Hilary Schor whose thinking and writing about the influence of romanticism on law and liberalism have been major inspirations. See, e.g., Dailey, *supra* note 1; Hilary M. Schor, *Show-Trials: Characters, Conviction, and the Law in Victorian Fiction*, 11 *CARDOZO STUD. L. & LITERATURE* 179 (1999); Hilary M. Schor & Nomi M. Stolzenberg, *Free Love and Free Speech: The Law and Literature of the First Amendment*, in *TEACHING LITERATURE AND LAW* (forthcoming). I also am indebted to Nancy Rosenblum, whose path-breaking study of the interrelationship between liberalism and romanticism helped me to crystallize my own ideas. See NANCY L. ROSENBLUM, *ANOTHER LIBERALISM: ROMANTICISM AND THE RECONSTRUCTION OF LIBERAL THOUGHT* (Cambridge: Harvard University Press, 1987).

3. Stolzenberg, *supra* note 1, at 196.

more broadly, to encompass all of Anglo-American law, all of the European or “western” legal tradition, or more broadly still. As interesting as the empirical and jurisprudential questions are concerning the identity of liberal law, the question I want to focus on here is not what makes a legal system liberal, but rather, what makes a liberal legal system romantic.

To put it slightly differently, what does it mean for liberalism or liberal law to be in love? This brings me to my final terminological remark. When I refer to the legal system or liberalism more generally as being “in love,” I am obviously speaking metaphorically, anthropomorphically, whimsically even, and, admittedly, obscurely. Therefore, a few words of explication about my usage of the term are in order. On my usage, two different aspects or dimensions define the condition of being “in love” or, as I have put it elsewhere, “in a romantic state.”⁴ The first has reference to the sphere of human conduct that we consider to be animated by love as opposed to reason—the domain of activity and experience to which the principles of liberalism are applied. The second concerns the aspect of the psyche, or the conception of psychology that is foregrounded when we consider the fundamental but largely unspoken question: What does the legal subject *want*? What animates the liberal legal subject—what motivates the legal subject, what drives her, what shapes her preferences, desires, and identity, and what disciplines her behavior? What within the psyche of the subject is it that *has* wants, desires, and needs, the pursuit of which it is not legitimate to deny? Rationalism and romanticism supply opposing answers to these questions (reason versus desire), giving rise to very different conceptions of freedom and the subject whose freedom the political order is supposed to protect.

With regard to the first aspect, concerning the differentiation of domains, we commonly distinguish between activities or experiences which are, or are supposed to be, governed by reason and another set that are driven by the “passions” and the “appetites” as an earlier, more romantic age liked to say.⁵ To be sure, not all of our drives, emotions, and libidinal impulses are ones of *love*. Hatred, aggression, and the drive toward death are as much a part of the affective, emotional, libidinal makeup of our psyche as are the various forms and

4. Stolzenberg, *supra* note 1.

5. In today’s more clinical terms, these affective parts of our psyche are styled variously as the emotions, the instincts, the libido, or as primal drives, depending on the school of scientific thought to which one subscribes.

manifestations of loving and erotic attachment—and to further complicate matters, love and hate, desire and aggression, intertwine, making it fruitless to try to tease these negative and positive sides of the psyche apart. This, no doubt, is one of the chief reasons that societies have for so long subscribed to one or another rationalist school of moral psychology, according to which the task of the individual is to subordinate her “base” appetites and passions to the higher faculty of reason, while the task of society is essentially the same: to subject human behavior to the moral law of reason.⁶ Our recollection of the dark side of unreason, where aggression and the libido intertwine and range unconstrained, reminds us that not all affective—or “romantic”—experiences rightly bear the name of “love.”

Nonetheless, the longstanding conception of a basic divide between the rational and irrational sides of the human psyche groups love on the side of unreason and pictures love as a paradigmatic form of unreason, giving rise to the traditional distinction between one area of conduct which is governed by “the head” and another submitted to the “law of the heart.”⁷ It is this basic distinction, demarcating two different categories of human relations and conduct, which supplies the simplest definition of romantic liberalism or liberalism “in love”: romantic liberalism is liberalism applied to the romantic or affective domain of experience.

To put it more precisely, liberalism becomes romantic or enters into a romantic state when its doctrines of human equality, personal liberty, and freedom of choice are applied to activities and relationships that we do not *want* to submit to the cold logic of reason because, we think, these activities are not ones in which the faculty of reason does, or should, reign supreme. Rather, these are activities in which feeling and instinct—libidinal or loving instinct—should/must be given free reign. Precisely *which* activities fall into this category is a perennial matter of dispute. But over the course of the last few centuries, accelerating in the last century and a half, a consensus has gradually taken hold. Family relations—the bonds between parents and children, husbands and wives (or, more controversially, same-sex spouses), and the bonds of affection

6. See, e.g., Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959, 973-74 (2006) (describing the Scottish Common Sense school of thought and its influence on American law).

7. On the law of the heart, see ROSENBLUM, *supra* note 2, at 34-56; Schor, *supra* note 2.

and loyalty that constitute wider kinship or affective groups—are widely viewed as paradigmatic examples of the kind of relationships and areas of human conduct that fall under the jurisdiction of the law of the heart rather than the rationalist jurisdiction of cold reason and logic.⁸ Sexuality is another paradigmatic example of human activity and experience that today is widely considered as belonging to the romantic or non-rational domain, though it bears recalling that for centuries, the prevailing view was that sexuality needed to be brought under the jurisdiction of the moral law of reason precisely because it was perceived to be driven by drives and instincts rather than by reason.⁹ The modern idea that people should be free to follow their hearts and express their “natural” sexuality—the idea that sexuality itself should be free—reflects both the liberalization of sexuality and (this is the basic argument of this Essay) the *romanticization* of sexuality and, more to the point, the romanticization of liberalism itself.

Liberalism was romanticized—it forsook its allegiance to the Enlightenment norm of Reason, replacing it with a romanticist credo of freedom of self-expression and feeling—when it adopted the view that marriage should be an area in which people should be free to follow their hearts.¹⁰ That process of romanticization was further intensified when liberalism assumed the view that sexual activity outside of marriage was an arena in which people should be free to express their natural sexual urges, without being subject to intrusive moral regulation.¹¹ For centuries, only “libertines”¹² had held this view, while

8. Stolzenberg, *supra* note 1, at 198. Without explicitly referring to Romanticism, several important early works of critical and feminist legal theory noted and analyzed the differential treatment of the family as a realm of love. See generally ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); Clare Dalton, *An Essay in the Deconstruction of Contract Law*, 94 *YALE L.J.* 997 (1985); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 *YALE L.J.* 1073 (1994).

9. See Stolzenberg, *supra* note 1, at 197-98.

10. See *id.* at 207.

11. The acceptance of this view culminated, doctrinally, in the landmark case of *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas's sodomy law, and holding that intimate, adult consensual conduct is part of the liberty protected by the substantive component of the Fourteenth Amendment's due process protections).

12. Conventionally, libertines are defined as “those who repudiate the institution of sexual monogamy and the regulation of sex and sexual morality.” Nomi M. Stolzenberg, *Liberals and Libertines: The Marriage Question in the Liberal Political Imagination*, 42 *SAN DIEGO L. REV.* 949, 951 (2005). For a broader understanding of the term “libertines,” see *id.*;

liberals worked strenuously to differentiate themselves from libertines and the promoters of "license" and licentiousness.¹³ Today we are apt to regard this as a "puritanical," conservative, i.e., illiberal position, but "liberty, not license," and "freedom, not licentiousness" were long the battle cries of *liberals*, and liberalism, in its more classical (i.e., rationalist) formulations, refused to extend the jurisdiction of the liberal doctrines of individual freedom of choice to the domain of marriage and love.¹⁴

Even now, despite the profound change in values wrought by successive "sexual revolutions" and the many movements to liberalize divorce, marriage, sexuality, reproduction, and childrearing that, importantly, *preceded* the better known social and sexual upheavals of the 1960s, 1970s, and 1980s, the policies of sexual freedom and freedom in marriage and divorce are hotly contested.¹⁵ As for the other axis of family life, the rights and freedoms of children vis-à-vis their parents and other authorities are even less well established. "Progressive" (i.e., liberal or *romantic*) approaches to childrearing, education, and children's rights are flashpoints in today's "culture wars," as they have been since their inception, indicating not just a divide between liberals and conservatives but a split within liberalism itself between a romantic conception, which elevates love, feeling, and self-expression to the rank of supreme values, and rationalism, which seeks to subordinate them to the discipline of reason.¹⁶

Returning to the conceptual ambit of the term, it is important to note that sex and marriage, while perhaps the most obvious examples of activities of "love," are not the only kinds of human relations or experience viewed as falling into the romantic as opposed to the rational domain. Virtually any human activity or experience is potentially a candidate for falling into the category of romantic experience and being submitted to the "law of love," so long as the activity itself is viewed as (appropriately) driven by the heart as opposed to the head. Areas of human experience as diverse as religious faith and economic consumption have been variously championed (or derided) as quintessentially non-rational (or romantic) experiences, where subjective

THE LIBERTINE READER: EROTICISM AND ENLIGHTENMENT IN EIGHTEENTH-CENTURY FRANCE, 10-44 (Michael Feher, ed., 1997).

13. Stolzenberg, *supra* note 12, at 950.

14. See Stolzenberg, *supra* note 1, at 197; Stolzenberg, *supra* note 12, at 950, 971-73.

15. See Stolzenberg, *supra* note 1, 208-09.

16. See *id.* at 200-01.

feeling rules and objective reason has no place—and then again reclaimed by rationalists who insist on the rational nature of consumerism or religious experience, as the case may be.¹⁷ As with intimate family and sexual relations, debate surrounds the eligibility of any particular form of human conduct and experience to fall under the jurisdiction of the heart. There is no universal agreement about precisely *which* human relationships, types of conduct, or varieties of experience fall into the romantic domain, where reason does not reign. We can, however, identify certain areas, such as sexuality, romantic love, familial affection, and religious faith (when faith is regarded as an inward affair of the heart or subjective spiritual journey), around which a modern liberal-romantic consensus has clustered.¹⁸ Other areas, such as consumer behavior, also have increasingly come to be seen as subjective, desire-driven, i.e., *romantic*, as opposed to objective, reason-governed forms of conduct.

Whatever kinds of activities and human experiences are deemed to fall into the category of affective as opposed to rational experience, these constitute the *domain* of romantic experience. And whenever the liberal doctrines of human equality and freedom of choice are applied to this domain, liberalism enters into a romantic state, or falls “in love.” Liberalism becomes romantic when its doctrines of freedom of choice, liberty, and equality are applied to a type of experience that is viewed as ungovernable by reason, and properly so, as, for example, when we champion rights of sexual freedom or spiritual freedom (viewed as the right to follow one’s heart in matters of religious faith), or any of the myriad versions of a doctrine of free love (a doctrine I would define capaciously to cover liberal marital policies such as freedom from arranged marriage and no-fault divorce as well as the ostensibly more radical sexual experiments of free love anarchists).

This, then, is the first dimension of being “in love” or in a romantic state: being in the romantic domain. There is, however, more to liberalism’s being romantic than the domain of experience to which it is applied. What makes liberalism romantic is not just a matter of its jurisdiction, though that is indeed a critical dimension of liberalism’s being “in love.” The romanticism of liberalism is also a matter of its philosophical content.¹⁹ Romanticist liberalism and classical rationalist

17. See *id.* at 202-06.

18. See *id.* at 201-02.

19. For another take on the philosophical content of a romantic version of liberalism, see FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 68-89 (1999).

liberalism of the sort associated with the Enlightenment share a common devotion to the same basic precepts of human equality, liberty, and individual rights, but they do not conceive of those precepts in the same way.²⁰ Indeed, it is not possible as a logical matter to conceive of liberty, individual rights, or the liberal subject who bears those rights and liberties in the same way when the subject is exercising her liberty in the romantic domain as when she is engaging in reason-driven activity. That is because our conception of liberty, rights, and the liberal subject in the rational domain presupposes a certain view of that subject's psychology—a moral psychology, a *rationalist* moral psychology—which is simply inapplicable, and altogether inapposite to romantic experience. To put it bluntly, a rationalist moral psychology demands the strict regulation of romantic experiences.²¹ It *denies* freedom to experiences and actions that are driven by the heart rather than the head.²² It could never support granting such experiences unrestricted freedom because to do so would be to allow reason to become “the slave” of the emotions and the passions, and thus to subvert the rule of reason.²³ By contrast, a romantic conception of human psychology, built on the critique of reason, demands granting such freedom.²⁴ More precisely, it demands granting *people* the freedom to express their feelings and pursue their desires through the pursuit and enjoyment of romantic experiences.²⁵

The difference between rationalist and romanticist versions of liberalism is thus not just a matter of jurisdiction (i.e., the domain of activity to which liberal doctrines are applied) but also, equally, a matter of its inner philosophical constitution, the content of its philosophical concepts and precepts. To put it in romantic terms, it is a matter of liberalism's inner philosophical spirit. That spirit is one that valorizes the passions, the instincts, and the feeling self. Rather than being seen as the source of temptation, corruption, error, and evil inclination, as it is from the standpoint of traditional morality, feeling is exalted in the romanticist perspective—in particular, the feelings of loving or erotic attachment which are propelled by the non-rational impulses, and which

20. See GEORGE P. FLETCHER, *ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM* 35-37 (2002).

21. Stolzenberg, *supra* note 1, at 196.

22. *Id.*

23. *Id.*

24. *Id.* at 197-98.

25. Stolzenberg, *supra* note 1, at 197-98.

in turn propel the bearers of these impulses into various forms of human, sexual, or spiritual connection. This, then, is the second dimension of the condition of being “in love” or in a romantic state: holding (or being beholden to) a romantic conception of human freedom, which rests on a romantic conception of human psychology, which elevates the passions over reason, in contradistinction to traditional rationalist moral psychology, which elevates reason over the passions and gives rise to a very different view of what freedom is and requires.

The remainder of this Essay is a brief inquiry into what happens to liberal law when it adopts such a conception—a consideration of what the consequences are for liberalism, law, and love itself when liberalism falls in love. With the meaning of our basic terms of analysis and the dual dimensions of romantic liberalism established, we can proceed to consider its practical (doctrinal, institutional, and policy) as well as its philosophical implications. The following analysis does not undertake to provide a complete historical account of the different philosophical permutations that have resulted from liberalism’s encounter with romanticism, nor does it trace all of the policy and social changes that have occurred as a result of that encounter. No doubt, there is an interesting story to be told about the historical evolution of romantic liberalism and its interaction with the rationalist versions of liberalism that have dominated both our political institutions and our philosophical accounts of the nature of liberalism.²⁶ An intellectual history of romantic liberalism’s roots and its unfolding development would greatly enrich our understanding of liberalism and law, but I do not attempt that here. Nor do I offer as nuanced an account of the relationships between rationalism and romanticism, reason and unreason, as a truly adequate account of the subject requires. Time and space constraints make my presentation overly dichotomous, and my references to the historical evolution of rationalism and romanticism within the liberal tradition will necessarily be sketchy. My hope is that, notwithstanding the cursory nature of the account offered here, the reader’s consciousness of the influence of romanticist ideas on law will be heightened, sparking further interest in the subject.

26. For an important initial contribution to the development of this intellectual history, see ROSENBLUM, *supra* note 2.

II. THE RISE OF ROMANTIC LIBERALISM

As just stated, although a comprehensive history of the fusion of romantic and liberal ideas cannot be offered here, a few gestures toward the familiar history of Romanticism, and its interaction with the early history of liberalism, may serve to give the reader her bearings.

Repudiating the non-rational “feeling” parts of the human psyche (or at least demanding that they be subordinated and governed by the human faculty of reason), rationalism has fought a millennia-old battle against various forms of irrationalism and anti-rationalism. This ancient battle became most salient and evenly matched in the eighteenth century when the intellectual rebellion against the Enlightenment known as Romanticism erupted, and one may conveniently trace the growing influence of romantic ideas on law to that period.²⁷ On the conventional view, liberalism is a quintessential product of the Enlightenment and Enlightenment Reason.²⁸ Indeed, many of the doctrines of liberalism in law and politics continue to be formulated in a way that reflects Enlightenment assumptions about the primacy of reason and the need to subordinate and restrain the non-rational parts of the human psyche.²⁹ Yet, as a small number of scholars have shown, post-Enlightenment liberalism has been influenced and reshaped by romanticism, with the result that, alongside the classic rationalist version of liberalism, there is, as the contemporary political philosopher Nancy Rosenblum puts it, “another liberalism,” a liberalism formed (or, more precisely, re-formed)

27. See Dailey, *supra* note 1, at 487-88; Stolzenberg, *supra* note 1, at 204.

28. See Dailey, *supra* note 1, at 487-88; Stolzenberg, *supra* note 1, at 204.

29. On the pervasiveness of rationalist assumptions in American legal doctrine, see Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 455 n.121, 457 (2006) (discerning “individual reason” as the “fundamental, driving principle” underlying many legal decisions enunciating doctrines of individual rights, including rights in the areas of criminal procedure (*Miranda v. Arizona*, 384 U.S. 436 (1966)), free speech (*Whitney v. California*, 274 U.S. 357, 375 (Brandeis, J., concurring, 1927)), the religion clauses (*Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) and *Lee v. Weisman*, 505 U.S. 577 (1992)), equal protection (*Washington v. Davis*, 426 U.S. 229 (1976)), and privacy rights (*Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Lawrence v. Texas*, 539 U.S. 558 (2003))); Anne C. Dailey, *Striving For Rationality*, 86 VA. L. REV. 349, 351 n.10 (2000) (book review) (citing *Gregg Cartage & Storage Co. v. United States*, 316 U.S. 74, 79-80 (1942) and *State v. Sikora*, 210 A.2d 193, 202 (N.J. 1965)). Note that Dailey emphasizes the rationalist elements of the Supreme Court decision in *Lawrence*, whereas I have emphasized its romanticist aspect. I do not regard our analyses as contradictory. Instead, together they demonstrate the coexistence of rationalist and romanticist conceptions within liberal legal doctrines and the unresolved and largely unacknowledged tension between them.

as a result of liberalism's encounter and eventual fusion with Romanticist ideals.³⁰

Liberalism's encounter with eighteenth and nineteenth-century Romanticism produced many concrete reforms and innovations, not least in the fields of family law and women's rights, where the reform of marriage has been a central battleground. It is customary to describe the developments in this area as a process of "liberalization," in which the rights of men and women in marriage were equalized and the right to divorce slowly expanded, reflecting the growing freedom on the part of both men and women to choose whether to enter or exit a marriage as well as the growing equality of women and men.³¹ A more accurate statement, however, may be that the rights of marriage and divorce were *romanticized* inasmuch as the reforms instituted in this area involved recognizing the right to marry for love, to exercise one's own choice in matters of love, and to divorce for no reason other than a lack or insufficiency of love (truly a radical "free love" doctrine when viewed in the context of a world of fault-based divorce or the still more stringent regime in which nothing but death could tear a marriage asunder).³² To put it precisely, reforms in the intertwined areas of divorce law, marriage, and women's rights reflected a process of both liberalization and romanticization, as liberalism itself was romanticized as a result of its absorption of romantic ideas.

The battle between rationalists and romantics, however, concerned more subjects than those pertaining to marriage, divorce, and the emotional bonds between sexual partners.³³ Moreover, that battle commenced long before the eighteenth-century movement known as Romanticism. While the spread of the ideas and fashions of the eighteenth-century Romantics and, still more, their nineteenth-century adepts, played a crucial role in popularizing romantic ideas and bringing about the fusion of liberalism and romanticism that would reshape cultural attitudes and political, social, and legal institutions (such as

30. See ROSENBLUM, *supra* note 2. On the influence of romanticism on American law, see Susanna L. Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT L. REV. 151 (1998), 156-59; Dailey, *supra* note 1.

31. See Olsen, *supra* note 8, at 1517-18.

32. A particularly forceful judicial articulation of the right to marry for love is found in *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003), the landmark decision in which the Massachusetts Supreme Court held that the state constitution required the recognition of gay marriage, reasoning that "the right to marry means little if it does not include the right to marry the person of one's choice." *Id.* at 328.

33. Stolzenberg, *supra* note 1, at 210.

marriage), adumbrations of this romanticist version of liberalism existed before the eighteenth-century Romanticist movement arose, going as far back as the origins of liberalism itself.

To take just the most famous example, the first tract written in favor of a right to divorce was produced in 1643 by John Milton, who argued that spousal incompatibility—the failure to derive the emotional and sexual comforts of spousal companionship promised by marriage—was sufficient grounds for terminating a marriage.³⁴ One could easily argue (as many have) that this was a quintessentially liberal position, of a piece with Milton's other contributions to the canon of early liberal political thought, in particular his argument against censorship, widely recognized as one of the first liberal arguments for a right to free speech.³⁵ But one could just as well characterize the position as a romantic one. In fact, it was both, displaying that fusion of liberal and romantic ideas about freedom and love that would gain wide currency centuries later.

It was also, importantly, a religious, theological position, based on biblical interpretation, belying present-day beliefs about a necessary opposition between liberal and religious ideas. Milton's method of argument reflected the linkage that existed historically between liberalism and traditional religious morality, while at the same time subjecting that traditional morality to the challenge of romanticism.³⁶ Milton was well aware that in expounding his belief in a right to divorce, he was courting condemnation as a "libertine"—a term that then connoted irreligion as much as any kind of sexual licentiousness.³⁷ Indeed, the two forms of error, religious and sexual, were widely viewed as interrelated, with the one (unbelief) seen as paving the way to the other (illicit sexual activity). The very term libertinism was coined in the first instance to refer to atheists whose immoral behavior, sexual and

34. JOHN MILTON, *The Doctrine and Discipline of Divorce*, in COMPLETE POEMS AND MAJOR PROSE 696, 698 (Merritt Y. Hughes ed., 1957) ("What though the brood of Belial, the draff of men, to whom no liberty is pleasing but unbridled and vagabond lust without pale or partition, will laugh broad to see so great a strength of scripture mustering up in favor, as they suppose, of their debaucheries? They will know better when they shall hence learn that honest liberty is the greatest foe to dishonest license" (footnote omitted)). Not "that license and levity and unconsented breach of faith should herein be countenanced . . ." *Id.* at 704. "Thus finally we may conclude that a law wholly giving license cannot upon any good consideration be given to a holy people, for hardness of heart in the vulgar sense." *Id.* at 715.

35. See Schor & Stolzenberg, *supra* note 2.

36. MILTON, *supra* note 34.

37. See RICHARD H. POPKIN, THE HISTORY OF SCEPTICISM: FROM SAVONAROLA TO BAYLE 80-81 (2003).

otherwise, was merely a byproduct of their failure to recognize the law (or the very existence) of God.³⁸ It was of utmost concern to Milton that the marital freedom he championed accorded with biblical values and bore no connection to libertine ideas.³⁹

Milton's position vis-à-vis traditional religious morality (to which he earnestly subscribed) and vis-à-vis the libertinism of his contemporaries (from which he vainly tried to dissociate himself) reveals the complexities of the relationships that existed among romanticism, liberalism, and traditional religious morality. Traditional morality was, after all, notwithstanding its religious moorings, a *rationalist* morality.⁴⁰ Current attitudes about the irrationality of religion make this difficult to recognize, but rationalism (the belief in reason) was originally a religious position, containing both a rationalist psychology (the belief that the well-ordered psyche is one in which the faculty of reason governs the passions and the appetites) and a rationalist conception of morality (according to which the law of morality is a law of reason which people who properly exercise free will recognize and obey).⁴¹ From the standpoint of such a moral psychology, the moral law, God's law, and the law of reason are one and the same.⁴² By the same token, submitting to God's law, far from negating individual liberty or reason, was viewed as the product of the exercise of free will and reason.⁴³

In short, in stark contradiction to today's reigning views about religion and liberalism, Christian doctrine subscribed to rationalism, while liberalism subscribed to traditional morality—a puzzle that is readily resolved once one recognizes the moral, or moralistic, dimension of traditional rationalism. Simple transitive logic implies that if rationalism is moralistic (prescribing rational behavior and sexual morality; proscribing aggression and unbridled sexuality), and if liberalism subscribes to rationalism (endorsing rationalist conceptions of

38. *Id.*

39. MILTON, *supra* note 34.

40. Stolzenberg, *supra* note 1, at 196, 204.

41. *Id.* at 196. We can, of course, trace rationalism back even further to the philosophical thought of antiquity, where it is not embedded in theology as it would later come to be. The point here is not that rationalist doctrines were products of the faith traditions of the West, but rather that, at least since the Middle Ages, rationalist doctrines were integrated into Christian (and Jewish and Muslim) thought, and modern rationalist ideas derive, in significant measure, from this religious heritage (even as they also deviate from it in various ways).

42. *Id.*

43. *Id.*

psychology and morality), then liberalism is necessarily moralistic. This simple logic has been obscured by contemporary liberal attitudes, which are based on the false assumptions that (a) religion is necessarily opposed to rationalism and (b) rationalism is devoid of moralism. Contemporary liberalism is largely oblivious to the moralistic dimensions of rationalist and liberal thought, and equally oblivious to the romantic dimensions of liberalism and the rationalist elements of religion. Yet if we shift our focus from the present to the past, it is easy to see that rationalism historically was linked to a moral program, the agenda being to reign in the “base” passions and instincts and thereby protect people from unbridled aggression and unrestrained expressions of sexual urges.

Today, this rationalist morality and its underlying rationalist psychology seem like anything but liberal views—indeed, it is hard to recognize them as *rationalist* views, accustomed as we are to thinking of a separation between rationalism and morality, particularly, when morality is associated with repressive Victorian or “puritanical” codes of morality. Yet insofar as we continue to subscribe to the Enlightenment version of liberalism, based on the primacy of human reason, we remain beholden to the traditional view that reason should rule over the baser instincts of the human psyche. Such a view cannot accommodate demands for free love, sexual freedom, or other romantic rights without running into serious inconsistencies. And that is exactly what has transpired, as liberalism has increasingly incorporated romantic doctrines of freedom, based on a romantic view of human psychology, without bothering to reconcile (or even acknowledge) the contradictions between this perspective and the rationalist views which liberalism also continues to endorse.

The same unacknowledged tension between romantic and rationalist conceptions that we find buried in liberal thought today was present in Milton’s formulations. While his call for the freedom to divorce appealed to reason, figuring men and women as capable of rational choice, it also figured them as feeling creatures, yearning for the kind of love that only a spiritual connection with a soul mate could provide.⁴⁴ As depicted by Milton, such soulful beings were animated by motions of the spirit that did not just bypass reason, but *transcended* reason.⁴⁵ The religious connotations of such a conception of love are

44. See MILTON, *supra* note 34, 708-10.

45. *Id.*

clear. Indeed, romantic love, as Milton conceived of it, was clearly patterned on Christian conceptions of love, God's love for man supposedly replicating itself in man's agapic love of his fellow man and in the love between a man and a woman, both of which were seen as being human (all too human) expressions of man's love of God.⁴⁶ Key to human love attaining the status of such spiritual love, according to the doctrine of Christian love, was the channeling of erotic impulses into sanctioned (and sanctified) forms of human conduct and union—otherwise, it was believed that sexual unions and other passion-driven conduct could degenerate into immorality and unbridled aggression.⁴⁷ Hence, the recognition of the need for human reason: to discern the moral law and discipline the instincts and the emotions. Such a concession to the importance of reason, however, did not diminish the independent and even superior value attributed to the non-rational faculties of the human psyche in the Christian romantic conception.

An entire tradition of Christian Romantic thought was inspired by this vision of faith and love as experiences that *transcend* reason.⁴⁸ Revealing romanticism's religious roots and, conversely, the romantic dimension of Christian thought, Christian Romanticism both predated and presaged the Romanticist movement of the eighteenth century, providing a critique of the limits of human reason and an espousal of the non-rational, "spiritual" faculties of feeling on which later generations of Romantics would build.⁴⁹ Milton's writings gave eloquent voice to this tradition. Yet at the same time, they also constituted early contributions to the development of modern liberal thought. Reflecting the contradictory rationalist and romantic strands of Christian thought of his day, Milton expressed a vision of romantic freedom which was, to say the least, difficult to reconcile with the coexistent belief in the need to submit romantic and sexual relations to the disciplinary force of the moral law of reason—a belief which has a solid rationalist and liberal, as well as a religious pedigree.

The contradictions that appear in Milton's thought are contradictions that remain with us today. A legacy of Christian thought, they have not been resolved by the secularization of either liberalism or

46. *Id.*

47. See MILTON, *supra* note 34, at 698.

48. See Stolzenberg, *supra* note 1, at 204.

49. *Id.* at 204-05. For a particularly explicit invocation of the Christian Romantic tradition in contemporary legal theory, see ROBERTO MANGABEIRA UNGER, *PASSION: AN ESSAY ON PERSONALITY* (1984).

romanticism (both of which derive from Christian intellectual traditions). Over the centuries, innumerable theological schisms have broken out over the respective roles of faith and reason. But no matter how entrenched a rationalist moral psychology was in traditional Christian thought (and it was very deeply entrenched), it always vied with more romantic understandings of faith, according to which not reason but love—Christian love—is the most important element of human psychology, morality, faith, and human liberty. Liberty, on this conception, is not license. Liberty is a form of submission (to God and his law), a seeming paradox that was (seemingly) resolved by the doctrine that man submitted to it (or not) of his own free will, while being guided toward the correct exercise of free will (or not) by love and by faith. Love and faith are thus seen as a pair, constituting a path to God not reducible to reason. Like faith, love is “blind,” that is, impervious to the observations of our senses and reason. Like faith, love involves psychological faculties independent of reason. In other words, love is “beyond” reason. Indeed, love, in the Christian tradition, was understood to be the highest spiritual faculty, the very expression of the soul.⁵⁰

Thus, even as religious beliefs were securely tied to rationalist doctrines about the exercise of free will and the supremacy of reason, it was also understood that love was supreme and that religious belief itself was a matter of faith, which bypassed—or transcended—reason. These were the essential romantic ideas that coexisted with the more rationalist strands of Christian theology, expressed in Milton’s thought.

Later generations of liberal romantics would echo Milton’s ideas, endorsing not only the policy of no-fault divorce, which he had so futilely promoted in his own day, but also the larger worldview, according to which love and liberty are equally important, intertwined values. Even when stripped of their explicit theological foundations, and redefined as secular ideas, the ideas of romantic love and “blind” faith, derived from Milton and other romantic-religious thinkers, would never entirely shed their spiritual residue. They also would never shed the unresolved tension between rationalism and romanticism latent within the doctrines of Christian love and liberty from which liberalism was derived.

50. See MILTON, *supra* note 34 at 712, n.77 (“love is the fulfilling of the law”(citing *Romans*, 13:10)). Note the centrality of this idea to Christianity’s self-differentiation from (and polemics against) Judaism.

The question that remains to be considered is what the consequences are for the liberal legal order of containing this tension between these two contradictory views. What are the consequences of the ascendance of romanticist ideas for law, for liberalism, and for the liberal subject whose freedom and ability to love are at stake?

III. THE CONSEQUENCES OF THE ASCENDANCE OF ROMANTIC LIBERALISM

On one level, the consequences of the rise of a romantic vision of human nature and freedom, and its absorption into liberal thought, are simply what have already been described. Romantic notions of human freedom have been adopted and enshrined in law, to some extent redefining the “intellectual freedoms” recognized and protected by classical thought, to some extent displacing the intellectual freedoms, but mostly existing alongside them in uneasy, and largely unacknowledged, tension.

The so-called “intellectual freedoms”—freedom of speech, freedom of belief (conceived in purely cognitive terms), the freedom to formulate and reformulate your own values, and to determine your own moral, political, and religious beliefs (or unbeliefs), as Rawls famously argued for—are indeed intellectual in the sense that they rest upon a view of the subject as driven first and foremost by reason, or possessed of the basic capacity to think or reason for oneself.⁵¹ The classic subject of free speech was a creature endowed (by his maker) with freedom of the will, which is to say, the freedom to believe or disbelieve in the moral law of reason, and the freedom to act or not act in accord with that law.⁵² Free speech and the freedom of belief were originally conceived as corollaries to this essentially religious doctrine, the argument being that practices such as free speech and institutions such as a free press were necessary instruments for helping people to arrive at considered, informed beliefs.⁵³ If people were simply indoctrinated in, or force-fed, religious ideas, they could not be said to have truly chosen them, and hence could

51. JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

52. See John Milton, *Areopagitica*, in 3 *THE HARVARD CLASSICS* 193, 211 (Charles W. Eliot ed., 1909) (“For those actions which enter into a man, rather than issue out of him, and therefore defile not, God uses not to captivate under a perpetual childhood of prescription, but trusts him with the gift of reason to be his own chooser . . .”).

53. See *id.*

not be said to believe them in a meaningful way.⁵⁴ Or so Milton and others said.⁵⁵

The same idea was soon applied to political beliefs as well as religious beliefs. The liberal subject needed to be free to assemble and share ideas and beliefs with other liberal subjects in order to formulate (and, if he so chose, reformulate) his religious and political beliefs. Only then could he exercise his inborn capacity to reason and freely believe—belief being understood here implicitly as belonging to the field of reason. Such a conception of freedom not only permitted but, more strongly, affirmatively required subordinating feeling, appetite, and passion to the ostensibly higher faculty of reason. By the same token, it readily led to the justification of policies of moral regulation that deny subjects freedom in matters of love and sexuality. For if the free subject is one who subordinates his feelings of love and sexual urges to the higher faculty of reason, then there is no denial of freedom involved in the regulation of love and sexuality.

If the basic policy implication of traditional liberal rationalism was, paradoxically, to support regulation, then the most immediate practical consequence of the rise of romantic liberalism seems to have been the expansion of the deregulatory impulse of liberalism. The growing belief that government should not “legislate morality,” which accompanied the expansion of the deregulatory project into the realm of private and intimate relations, directly reflects the growing romanticization of liberalism.⁵⁶

The fundamental question to which the political philosophy of liberalism is addressed is: which realms of experience are properly subject to legal, governmental regulation, and which are not? The

54. *Id.* at 229 (“[A]nd if he believe things only because his pastor says so, or the Assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy.”).

55. See JOHN MILTON, *Paradise Lost*, in COMPLETE POEMS AND MAJOR PROSE, *supra* note 33, at 173; Milton, *supra* note 52. See generally STANLEY FISH, SURPRISED BY SIN: THE READER IN *PARADISE LOST* (2d. ed., Harvard Univ. Press 1998) (1967). Cf. THOMAS HOBBS, *LEVIATHAN* 480, (Richard Tuck, ed., 1996) (1651); JOHN LOCKE, A LETTER CONCERNING TOLERATION 27 (James Tully, ed., 1983) (1689); BARUCH SPINOZA, *THEOLOGICAL-POLITICAL TREATISE*, 223 (Samuel Shirley, trans., 2d ed. 2001). For a discussion of this idea in the works of Hobbes, Locke, and Spinoza see Ronald Beiner, *Three Versions of the Politics of Conscience: Hobbes, Spinoza, Locke*, 47 SAN DIEGO L. REV. (forthcoming 2010).

56. Feminism also played a crucial role in applying doctrines of equality and personal freedom to the domain of intimate relations. My argument is that in this regard feminists are exponents of the romantic tradition, as the centrality of the critique of reason to the feminist project bears out. Stolzenberg, *supra* note 2, at 199-200.

classic answer provided by liberalism—distinguishing the public from the private domain, and insulating the realm of so-called private conduct from regulation—seems to answer the question, without making any recourse to romanticist ideas. But once we recognize the overlap between the domains of private and romantic experience—or rather, once the private domain of experience becomes romanticized—liberalism’s classic answer (the public-private distinction) becomes indistinguishable from romanticism. Perhaps not all private conduct is romantic, but surely all romantic or love-based experience is private. Or so we modern liberals tend to think.

From that “fact” it follows that under a liberal regime, romantic activities and relationships should be insulated from regulation and left up to personal choice. This policy prescription would seem to be implied by the liberal doctrine of individual rights and personal freedom and the basic liberal distinction between public and private domains, without bringing any specifically romanticist doctrines or ideas into it.

But romanticist ideas inevitably do come into the argument for deregulating the romantic realm once we recognize that this liberal account of the reason for granting people freedom in matters of the heart begs the question of what *counts* as a matter of the heart. What defines romantic conduct? The standard liberal approach ducks the question by replacing the category of the romantic with the category of the private, but that begs the question, what counts as private—and why? We commonly assign activities such as religion, marriage and family, and sexual and romantic relationships to the private domain for the very reason that they are viewed as romantic, as affairs of the heart. But that returns us to the question of what qualifies an activity or realm of human experience as romantic as opposed to one where reason reigns? If we classify something as private because it is romantic, we need an account of what romantic experience is. Conversely, if we classify something as romantic because it is private, we need an account of why it is not appropriate to subject it to regulation and the moral law of reason. One way or another, we need something that the liberal doctrines of individual rights, human equality, and freedom alone cannot supply, namely, an account of what the equal right to freedom consists in. More precisely, we need an account of the nature of the human subject that is endowed with the right to freedom and equality. That is, we need an account of the nature of the liberal subject’s *psychology*. And it is precisely here, in offering rival accounts of the human subject’s psyche, that rationalist versions of liberalism and romanticist versions of

liberalism diverge, giving rise to very different policy prescriptions about which areas of human conduct should be subject to regulation and which should be left up to individuals to decide on their own. A romantic conception of human psychology tied to a liberal political philosophy calls for the deregulation of romantic life, whereas the more traditional rationalist moral psychology supports moral regulation.

In addition to expanding the scope of deregulation to cover the kinds of “private” behaviors formerly subject to moral regulation, romanticizing liberalism has also had the effect of redefining some of the freedoms originally conceived as purely cognitive or intellectual in nature. A case in point is the freedom of religion, arguably the first among the original pantheon of “intellectual freedoms.” Originally conceived as “freedom of conscience,” i.e., the right to form and follow one’s own *beliefs*, freedom of religion evolved over time to be seen less and less as a matter of one’s cognitive beliefs, and more and more as a matter of the heart—as an emotional and spiritual experience which encompasses far more than the set of intellectual propositions or creed to which one subscribes.⁵⁷ Like love and marriage, religious faith itself was increasingly conceived, as it was by Milton and his fellow Christian romantics, as a spiritual journey, a subjective personal odyssey in which man’s heart, rather than his head, would lead.⁵⁸ With the right of religious freedom reconceived as the right to follow your heart came the right to *changes* of heart and, eventually, to the still more radical right to freedom *from* religion—a far cry from the original idea of religious liberty, and an equally far cry from the traditional rationalist conception of belief as the product of reason. The right to have a change of heart came to be accepted not only in the law of marriage and divorce, but also in the laws and customs pertaining to religious affiliation, where the right to disaffiliate and re-affiliate and redefine one’s very religious identity was practiced with increasing vigor matched only by the vigor with which people practiced the newly established rights of marital and sexual disaffiliation and re-affiliation. All of these romantic freedoms

57. On the contest between a purely cognitivist model of religion and religious freedom and non-cognitivist conceptions, see Andrew Koppelman, *No Respect: Brian Leiter on Religion*, 47 SAN DIEGO L. REV. (forthcoming 2010) and Nomi M. Stolzenberg, *Theses on Secularism*, 47 SAN DIEGO L. REV. (forthcoming 2010).

58. On the contributions of Protestant and Jewish thinkers to the convergence of religion and psychology that produced an American culture of “self-actualization,” see ANDREW R. HEINZE, *JEWS AND THE AMERICAN SOUL: HUMAN NATURE IN THE TWENTIETH CENTURY* (2004).

gradually took their place alongside the more established “intellectual” freedoms of the press, freedom of religion, and free speech.

A similar process can be seen to have taken place in the realms of contract and property law, where the will of the property owner or the contracting party was the principal concern. Originally viewed as an exercise of free will and individual reason, the contractual and testamentary will increasingly came to be seen as a subjective, fundamentally arbitrary expression of personal appetites and preferences.⁵⁹ Or perhaps it was always the case that the rationalist conception of the will coexisted in contract and property law with competing images of the contracting agent as driven by fundamentally non-rational—or irrational—desires and appetites. Regardless of the date of its inception, it was only in the modern era that this non-rationalist view of the contracting agent became truly dominant, displacing traditional rationalist conceptions of the contractual will with a wholly subjective conception of consumer sovereignty.⁶⁰

Love and faith, contracting and conveyancing, speech and commerce, all were increasingly viewed as activities driven by the emotions, appetites, and instincts rather than governed by reason. Reason in this conception was not altogether dismissed, but it was demoted from the exalted function of determining the subject’s goals to the purely instrumental function of figuring out how to carry out the pursuit of objects set by the non-rational elements of the human psyche. The corollary to this picture of human psychology in the realm of rights was that the *freedom* to speak, contract, love, or worship (or not) was seen less as a matter of freedom of the intellect and more as a matter of freedom of feeling or emotional inclination.

This was a profound, even revolutionary, transformation. For, regardless of whether the object of one’s desire is a lover, a product, or a

59. See Blumenthal, *supra* note 6, at 1034 (noting that throughout the nineteenth century “judicial pragmatists . . . took a relatively permissive stance as they policed the bounds of testamentary freedom,” having “come to see that “[w]hat is rational to one man is highly irrational to another”” (quoting 1 FRANCIS WHARTON, WHARTON AND STILLÉ’S MEDICAL JURISPRUDENCE 334 (4th ed., Phila., Kay & Bro. 1882)). Cf. Dalton, *supra* note 8, at 1012-14, 1078-85 (discussing the rise of a subjective theory of value, valorizing the subjective preferences of the contracting parties, in the modern history of contract law).

60. The displacement of traditional rationalism has been obscured by the fact that rationalism itself has undergone a redefinition, with a purely instrumentalist view (in which reason serves as the means to pursue ends set by non-rational faculties) increasingly regarded as rationalism, notwithstanding the fact that it contradicts the traditional view, according to which reason must govern the ends as well as the means for behavior to truly count as rational.

spiritual communion with God, the freedom to love is not, fundamentally, about the freedom to exercise one's cognitive capacity. The right of the contracting property owner or the customer to pursue her subjective desires ("consumer preferences"), the right of the religious searcher to embark on one spiritual journey after another ("religious preferences"), and the right of lovers to marry for love and to leave each other for love ("romantic preferences")—all of these are so many manifestations of the basic romantic doctrine of freedom of desire or "free love." As such, they pull in a very different direction from a rationalist conception of freedom, which is concerned with protecting freedom of thought, which in turn is supposed to be governed by reason. Whatever else they do or do not do, these doctrines of free love do not lead to policies that can be described as subjecting marital, sexual, or economic relations to the moral law, or the law of reason (be that law sacred or secularized). Rather, they support libertarian policies of deregulation.

In addition to *expanding* the domain of "private" relations protected from external regulation, and *transforming* the meaning of such concepts as freedom of religion or freedom of belief, the most significant consequence of incorporating romantic doctrines of free love into liberalism is its *destabilizing* effect on law and social relations. This, perhaps, is the most characteristic effect of romanticism: the disruption of established relationships, the breaching of contracts and commitments, and the destabilization of institutions and established structures of authority.⁶¹ To say, as romantics do, that "the heart has its own laws" is precisely to claim the right to disregard the (rationalist) laws that uphold established contracts, commitments, relationships, institutions, and structures of authority. As epitomized by the right to divorce, the right to follow your own heart's desire is at bottom the right to a *change* of heart—a flimsy excuse for breaching a promise in ordinary contract law, but the highest of alibis in romantic "law." However it is manifested—as the freedom to choose one's partner or to leave one's spouse or take another lover; as the liberty to dispose of one's property, choose one's products, or buy a different product; as the right to protect one's attachment to an inherited religious identity or undergo a conversion experience in which one renounces one's former identity in favor of a new one—the right to follow the fluctuations of

61. See ROSENBLUM, *supra* note 2, at 40-41 (describing romanticism's "unconcern for social order"); Stolzenberg, *supra* note 1, at 206-07.

one's heart is very different from, and often seriously at odds with, being able to follow the dictates of one's own *reason*.

The fact that we no longer perceive the radicalism of such doctrines, and hardly see them for the "free love" doctrines that they are, shows just how far the process of romanticizing liberalism has gone. We now take the right to a change of heart for granted, at least in certain (many) areas. At the same time, the selectivity (and inconsistency) with which we apply such romantic dispensations to honoring contracts and respecting established systems of authority shows that our romantic notions continue to do battle with our more rationalist beliefs (even if we remain largely unaware of this internal struggle).

The tension between our rationalist and romantic beliefs only exacerbates the destabilizing effects of romanticism. On its own, romanticism's doctrine of free love is disruptive enough, but the contradictions that exist between this doctrine and the more rationalist doctrines of freedom make established structures (and identities) even more vulnerable. That fragility is further exacerbated by our failure even to recognize the ongoing tension between rationalism and romanticism that runs throughout modern liberalism. Liberalism purports to have repudiated traditional morality and the "legislation of morality," but it has yet to come to terms with its own continued reliance on the traditional moral psychology that is embodied in rationalism. It has yet to confront the tension between the liberal impulse to shatter traditional restraints on sexual and other forms of self-expression and the ongoing liberal need to place limits on self-expression. The threat of unbridled aggression and libido posed by the romanticist credo has not gone away—liberalism continues to seek principled means of placing limits on liberal tolerance and permissiveness precisely in order to ward off that perceived threat. Yet, having cut itself off from the contest over competing visions of human psychology and the respective roles of rational and irrational forces within the psyche, liberalism is largely mute in the face of romanticism's assault on the traditional arguments in favor of limits. Nobody (within the culture of liberalism) wants to go back to the old puritanical "repressive" limits; but nobody is ready to concede that there are no limits on the expression of erotic and aggressive instincts, either.

IV. CONCLUSION

In earlier eras, the party of reason prevailed over the party of unreason (i.e., romanticism). But it never completely bested it. The last

century and a half has seen a progression in the influence of romanticist ideas and the critique of reason, to the point where it is fair to say that we have witnessed a reversal of the historical situation in which rationalism has always prevailed; the romantic view now increasingly prevails over the party of reason. The radically disruptive, destabilizing doctrines of romantic freedom have not been merely accepted. They have been domesticated, assuming an air of normalcy as the rights to love, divorce, change and exchange lovers, partners, and identities—to love, divorce, change and exchange *freely*—take on the air of God-given rights. These rights, however, continue to be the subject of ferocious battles, i.e., “culture wars” between social conservatives, who reject the application of the doctrines of freedom and choice to the domain of love, and liberals who know they do not want to go back to reinstating traditional codes of morality, but do not know how to defend their position and cannot understand why this war is still going on. Liberals profess to be mystified by the relentless and frequently successful focus on cultural and moral issues, which supposedly goes against the interests of the legions of people who have successfully been recruited to the conservative attack on liberalism. The analysis presented in this Essay may serve to make this phenomenon less mysterious.