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Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change

J. Herbie DiFonzo

Maurice A. Deane School of Law at Hofstra University

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ALTERNATIVES TO MARITAL FAULT: LEGISLATIVE AND JUDICIAL EXPERIMENTS IN CULTURAL CHANGE

J. HERBIE DiFONZO*

TABLE OF CONTENTS

I. INTRODUCTON.....	1
II. THE POPULAR ARENA OF DIVORCE	3
A. In Sync: The New Psychology, The New Jurisprudence, and Marital Incompatibility	4
B. Divorce Courts and Their Consumers	8
C. The "Unholy Trinity" of Divorce Grounds	13
D. Double-Barreled Fault: The Role of Defenses.....	16
E. What the Divorce Judges Said	19
III. LEGISLATIVE EXPERIMENTS IN NON-FAULT DIVORCE	26
A. Incompatibility on Appeal	29
B. New Mexico: "Clean Hands" v. "Trial Marriage"	30
C. The World of the Living-Apart Statutes.....	38
D. Living Apart in North Carolina	46
IV. CONCLUSION.....	54

"When the marriage relationship has completely and finally broken down and the relations of the parties have reached an impasse where reconciliation is impossible and the family unit has ceased to exist, no rule or regulation promulgated by authority of the state can restore it."¹

"[E]ight years is a long time in a world where life is short."²

I. INTRODUCTON

Twentieth-century American divorce has displayed a gaggle of radically competing norms and operations. Divorce statutes everywhere confined marriage behind a tall legal fence which limited dissolution to cases demonstrating proof of a serious assault on the marital vows between wife and husband. However, one-half of all Ameri-

* Associate Professor of Law, Hofstra University School of Law. J.D., M.A., 1977, Ph.D. 1993, University of Virginia. E-mail: <LAWJHD@HOFSTRA.EDU>. My thanks to Professor Charles McCurdy and Professor Walter Wadlington, as well as to my research assistant, Heather Golin, all of whom have helped me sort through the complex issues involved in any historical discussion of divorce.

1. *Howay v. Howay*, 74 Idaho 492, 501, 264 P.2d 691, 697 (1953).

2. William Seagle, *The Right to Consolation*, 2 AM. MERCURY 39, 41 (1924) (referring to Washington State's living-apart law which permitted divorce upon proof that the couple had been separated for eight years).

can legislatures also nominally broadened the divorcing apparatus to encompass breakdowns caused merely by separation over long periods of time, or even by that statutory amoeba, "temperamental incompatibility."³ Appellate courts often restricted these fault-free alternatives, pronouncing instead a vision of divorce law which emphasized the overall stability of domestic life in American society as it struggled to cope with the occasional seismic shudders that tore apart many families.

A look at the quotidian practices of divorce courts throughout most of the century reveals a quite different legal universe, one more attuned to the fissures in American domesticity. Trial judges mediated between the formal requirements of their appellate masters and the surging mass of insistent divorce-minded litigants. Finally, the scripted courtroom behavior of most divorcing wives and husbands played scenes from an adversary theater of the absurd. Wives usually breathlessly testified to their husbands' domestic beastliness, while their spouses almost always passed up their right to respond, many waiting outside the courtroom door for their freshly divorced ex-wives to bring them the good news of the liberating decree they had conspired to obtain.

At bottom, this disjointed portrait of American divorce presents the paradox of different arenas for processing marital dissolutions. These cultural and legal spheres sometimes intersected and at other times remained parallel as if oblivious to its rivals' existence. Each of these arenas produced law, carved out a cultural territory with distinct rules, patterns of behavior, constituencies, and goals, and changed over time, at its own rate. The two generations that lived between the end of World War I and the spread of California-style non-fault divorce in the 1970s both created and were victimized by this geometric madness, in which the Euclidean universe of divorce law and culture imploded, leading to today's calls for retrenchment and legislative proposals reintroducing fault divorce.

This article focuses on the legal and cultural history of non-fault divorce alternatives, and examines both formal legal materials and popular periodicals in an effort to comprehend the evolution of the modern American divorce culture. Beginning in the 1920s, the concept of incompatibility resounded through popular psychology as well as jurisprudence. The expansion of the divorce ground of cruelty to include mental anguish was not an attempt to broaden divorce grounds, but rather an attempt to define the range of the existing cruelty principle in terms of the new psychological understanding. Divorces had infiltrated the burgeoning consumer culture, and the voices of the

3. See *infra* notes 210-24 and accompanying text.

trial judges sliced through the thick web of formal divorce grounds and defenses. In the following decade, legislatures responded to the new divorce freedom with a veritable boom in state statutes proffering non-fault divorce alternatives. While a surface reading of these "living apart" and "incompatibility" laws suggests a legislative design to lower the hurdles for divorcing couples, a look beneath reveals an opposite agenda. These early non-fault reforms were in fact efforts to slow down the rate of divorce, reflecting legislative awareness that the sandbags of fault had seriously eroded. The popular reaction to these non-fault progenitors was not, however, what the legislatures had hoped. The number of intended consumers who purchased their marital freedom in the new statutory fashion remained negligible. Nor did the legislative reforms find universal favor among appellate courts, which often had difficulty interpreting these novel texts except within the fault-oriented matrix of traditional divorce procedures. This tortuous history of fault and no-fault divorce may well prove instructive in this new age in which no-fault may be ceding its grip to the voices clamoring for a revival of fault norms to again slow down divorce.

II. THE POPULAR ARENA OF DIVORCE

Arthur Garfield Hays described divorce in the 1920s as a "beating of wings against a cage — an endeavor to obtain a legal paper with a red seal which will avoid a situation which two people find intolerable."⁴ He was a prominent civil rights lawyer who served as counselor for the American Civil Liberties Union and participated in such notable trials as the *Scopes* evolution trial in the 1920s and the race-baiting *Scottsboro* trial a decade later. Divorced in 1924, his personal experience triggered a flurry of publications on the subject. He took an aggressive stance, condemning the immorality of any couple who stayed married after they no longer loved each other. In *New Morals for Old: Modern Marriage and Ancient Laws*,⁵ Hays contrasted the cultural hare with the statutory tortoise. Anyone who supported divorce on demand, he remarked, was castigated as "a wrecker of our

4. Arthur Garfield Hays, *New Morals for Old: Modern Marriage and Ancient Laws*, 119 NATION 187, 188 (1924). Hays later insisted in his memoirs that "no social purpose is served by dragooning two people into intimate relationship where they have grown indifferent to or hate each other, and that it is morally indefensible to maintain a marriage relation by legal statute where the real emotional bonds between the couple no longer exist." ARTHUR GARFIELD HAYS, CITY LAWYERS: THE AUTOBIOGRAPHY OF A LAW PRACTICE 179 (1942). Similarly, in *The Divorce Laws of America and Europe*, 20 CURRENT HIST. 249, 250 (1924), Nancy M. Schoonmaker remarked that Americans are "at last fully convinced" that laws will not force people to remain married when they wish to divorce.

5. Hays, *New Morals*, *supra* note 4.

institutions."⁶ But society was edging closer and closer to pure individualism, and Hays saw nothing beneficial in holding on to the cultural husk while morality evolved into another form. "Revolutionary changes occur unnoticed," he announced, "while our delusions persist and our sense of conservatism is gratified."⁷

A. In Sync: The New Psychology, The New Jurisprudence, and Marital Incompatibility

Boston Probate Judge Robert Grant, frequent contributor to the popular press, noted that women's economic emancipation had turned the test of marital survival into "compatibility."⁸ However, the problem with an *incompatibility* standard for divorce, he argued, was that it made the formal dissolution process "hinge on caprice instead of some tangible grievance."⁹ More than economics was at issue. Judge Grant viewed women as cultural captains in the campaign to capture divorce: "If sundering the marriage tie for mere incompatibility is to involve no social reproach, it will be because the women of the United States are in favor of it."¹⁰ Women were perceived as the prime agitators for more liberal divorce, not because they were immoral, but because they were self-respecting and would no longer submit to indignities.¹¹

Women were indeed the captains of divorce, not only culturally, but in the courtrooms. Henry R. Carey complained that women's economic freedom allowed an unhappy wife to replace the court as the judge of what was unbearable.¹² Carey pointed with exasperation to the fact that over two-thirds of divorce decrees were awarded to women.¹³ Since men had access to roughly the same number of divorce grounds as women, the enormous disparity reflected a strong cultural preference for women as the vanguard of new divorce values.

6. *Id.* at 188.

7. *Id.* at 189.

8. Robert Grant, *The Limits of Feminine Independence*, 65 SCRIBNER'S MAG.-ILLUSTRATED 729, 731-32 (1919).

9. Robert Grant, *Marriage and Divorce*, 66 SCRIBNER'S MAG.-ILLUSTRATED 193, 197 (1919).

10. Robert Grant, *A Call to a New Crusade*, GOOD HOUSEKEEPING, Sept. 1921, at 42, 43.

11. *Marriage, Divorce, and the Federal Constitution*, 46 WORLD'S WORK 19, 20 (1923).

12. Henry R. Carey, *This Two-Headed Monster—The Family*, 156 HARPER'S MONTHLY 162, 165 (1928). The editors subsequently published a letter critical of articles similar to Carey's essay which argued that mutual incompatibility was "the one sensible [divorce] ground," which unfortunately was legally unrecognized. 156 HARPER'S MONTHLY 527 (1928).

13. Carey, *supra* note 12, at 165.

At first glance, the formal requirements of the fault system might seem to provide the central reason for the wife-as-primary-plaintiff phenomenon. Only an innocent spouse could receive alimony, and although the "tender years" child custody presumption was in full sway, the courts still favored "innocent" over "guilty" spouses whenever possible. However, alimony was in fact an unbelievably insignificant factor in the cases, and most divorces were legal ratifications of brokered endings negotiated by the parties themselves. The predominance of women divorce plaintiffs probably owes more to the rise of cruelty as the most popular divorce ground and the culturally accurate sense of most couples that it would be easier for a woman to admit that she had been slapped by her mate than vice-versa. An anonymous female contributor to *Harper's* declared that male gallantry was the cause:

[I]t is in the divorce courts of to-day that chivalry at its most absurdly romantic is to be found. What were the courtly sweeps of Elizabethan plumed hats compared to the American husband automatically permitting an adulterous wife to sue him for "cruel and barbarous treatment" in order that she may marry her lover? It is a supreme gesture, daily accepted as a matter of course.¹⁴

Table 1 confirms the predominant role women achieved as formal initiators of divorce.

14. *Ten Years After The Divorce: I Would Not Divorce Him Now*, 165 HARPER'S MONTHLY 313, 314 (1932).

Table 1¹⁵

Percentage of Absolute Divorces and Annulments by Party		
Year	Granted To:	
	Husband	Wife
1867-70	36.0	64.0

1916-20	32.6	67.4
1921-25	31.8	68.2
1926-30	28.7	71.3
1935	26.9	73.1
1940	26.0	74.0
1945	28.6	71.4
1950	27.5	72.5

Despite widespread exposure in fiction and the periodicals, incompatibility did not exist as a statutory divorce ground in the 1920s.¹⁶ Spouses in dissolving unions may have perceived irreconcilability as the underlying ground for the divorce, but this truth was not cognizable in court, where "divorces are obtained for alleged causes, wholly different from the real causes."¹⁷ Nancy M. Schoonmaker called for an end to this dissonance between law and life:

If we insist upon divorce, no matter how our preachers and teachers rail at us, then certainly the more decently the divorce can be obtained the better for the individuals directly

15. PAUL H. JACOBSON, *AMERICAN MARRIAGE AND DIVORCE*, 121 tbl.58 (1959). Not only were women granted decrees twice or thrice as often as men, as the table shows, but wives were also more successful as divorce plaintiffs than husbands. In 1939, for example, of the 65,740 decrees issued in suits brought by husbands, the men were awarded the decree 95% of the time (with their wives awarded 5% of the decrees, presumably on cross-motion). Of the 185,260 decrees issued in actions taken by wives that year, women were successful 99.5% of the time. *Id.* at 120, tbl.56.

16. CHESTER G. VERNIER, 2 *AMERICAN FAMILY LAWS* § 73, at 65 (1932). In his influential 1932 compilation of family laws, Professor Chester G. Vernier felt compelled to advise his audience that "despite any impression to the contrary which [the lay reader] may have received from the reading of novels and newspapers, no statute now existing names incompatibility of temper as a cause for absolute divorce." *Id.* The single exception could be found in the Territory of the Virgin Islands, which had carried over the divorce provisions of the Danish law which had formerly governed the territory. See Lester B. Orfield, *Divorce for Temperamental Incompatibility*, 52 MICH. L. REV. 659, 662-63 (1954).

17. Rollin Lynde Hartt, *The Habit of Getting Divorces I: Causes in American Cities*, 48 WORLD'S WORK 403, 407 (1924).

concerned and for the body social as well.¹⁸

The concept of incompatibility also rang true to a generation bursting with psychological explanations for all behaviors.

Incompatibility turned the legal rationale for divorce on its head. The tradition of ecclesiastical and statutory law had deemed divorce a consequence of certain proscribed behaviors. The nineteenth century view of divorce had been consonant with orthodox formalism, an ethos insisting on rigid boundaries for classifying all human behavior and its legal consequences. In this categorical universe, law served as the impartial and apolitical police officer. Indeed, nineteenth-century divorce doctrine provided a classic example of legal formalism. A marriage was deemed indissoluble, save when the complainant established a fault ground. At that point, formal dismemberment of the union was mandatory. The underlying reality of the marriage was never the focus of the judicial inquiry. Technical grounds served as the un rebuttable barometer of the health of the marriage, and their presence meant its absence, with no occasion provided for the court to inquire behind the mask of the formal law.¹⁹

In a similar vein, the arena of formal divorce was a haven for logical puzzle making. There are several illustrations of the legal acrostics. First, courts under the fault regime were occasionally faced with the prospect of determining whether a single instance of marital intercourse resulted in condonation by the complainant of a single instance of prior extramarital sex by the defendant, resulting in the latter's immunity from an adultery action. Then, further along the path of formal divorce law appeared this example: did a post-condonation violation of the marital vows by the original guilty party constitute a revival of the earlier fault ground which the condonation had previously rendered unavailable? These conundrums may fairly be characterized as the acrobatics of logic over experience, particularly as courts sought their resolution in the realm of syllogistic reasoning rather than in a consideration of the well-being of the flesh-and-blood marriage at stake.

But the rising tide of psychology flooded over designs which evaluated an act without examining the motivation of the actor. Where the formal divorce system stressed logic, the new understanding of divorce evidenced an instrumental basis. In place of the traditional cause-and-effect scheme in which one act of adultery or desertion warranted the *penalty* of divorce, the emerging psychological in-

18. Schoonmaker, *supra* note 4, at 251.

19. On orthodox formalism, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 9-31 (1992), and G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 20-37 (1980).

sight opened the door to innumerable causes and thus questioned the necessity of any punishment at all.

One significant manifestation of the sloughing off of rule-based jurisprudence was provided by the invention of the juvenile court. Beginning at the turn of the century, and spreading rapidly across the nation, juvenile courts embodied the reigning psychological and jurisprudential drift in elevating rehabilitation over punishment, and preferring confession to painstaking proof. Juvenile judges disdained lawyers, precedents, the adversary process, and rules of any kind. What mattered in this quintessential revolt against formalism was the judge's perception of the child's welfare. In a sense, the real force of incompatibility as a concept may be seen in the fact that some writers actually believed that it was a valid legal ground, and discussed it accordingly. Historian George L. Koehn, for example, showed his ignorance of formal legal standards in the 1920s by affirming that the "ambiguous term incompatibility is elastic enough to stretch to any lengths the plaintiff desires, and to cover likewise those innumerable cases wherein both agree to disagree and then amicably decide to employ 'incompatibility' as convenient grounds."²⁰ In sum, the popular culture acknowledged a non-Euclidean procedure whose coordinates did not fit within the classical geometry of the legal system. To borrow the words of Thurman Arnold, such a conflict was a struggle between "an ideal and a social need not accepted as legitimate or moral."²¹ This informal "law" of incompatibility, as developed and ratified by assertive litigants and agreeable trial judges, proved to be the stronger determinant of the fate of unhappy marriages in the divorce courts, no matter what the legislatures and appellate courts said.²²

B. Divorce Courts and Their Consumers

While much of the literature on domestic relations focused on divorce, relatively little described marriage. American laws regulated marriage quite lightly, and the average citizen could only "visualize state regulation of the marriage relationship" through the rules on di-

20. George L. Koehn, *Is Divorce a Social Menace?*, 16 CURRENT HIST. 294, 299 (1922). As late as 1953, sociologist Ray E. Baber noted that newspaper accounts continued to convey the misleading impression that incompatibility was a widespread legal divorce ground. RAY E. BABER, *MARRIAGE AND THE FAMILY* 454 (2d ed. 1953).

21. THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 365-66 (1937).

22. *Id.* J.G. Beamer argued that the American way of divorce illustrated Arnold's "immoral and undercover organization" which is "accepted and tolerated as a necessary evil." J.G. Beamer, *The Doctrine of Recrimination in Divorce Proceedings*, 10 U. KAN. CITY L. REV. 213, 214 (1942) (quoting ARNOLD, *supra* note 21, at 365). As Albert C. Jacobs noted in 1936, "[f]ree consent divorce exists in the United States today as fact, not merely as a phenomenon of the divorce mill, but as the standard practice throughout the country." Albert C. Jacobs, *Attack on Decrees of Divorce*, 34 MICH. L. REV. 749, 751 (1936).

vorced.²³ Despite its over-arching purpose to preserve marriages, family law was generally visible to the public only when it regulated their demise. The three principal statutory divorce grounds — cruelty, adultery, and desertion — illustrated the murder-of-marriage theory posited by Protestant theology and adhered to by legislatures and appellate courts attuned to classical legal thought. The canons of divorce aimed at rewarding the faithful and punishing the offender. Fault both heated and illuminated formal divorce policy, and divorce grounds and defenses orbited around the concept of guilt. Rather than attempt to evaluate the marriage as a whole, divorce law considered only the statutorily-specified grounds. This narrowness of gaze displayed a systemic bias in favor of an adversary process oriented toward particular incidents of conduct capable of courtroom proof.²⁴

Demonstration of a divorce ground led to legal recognition of marital breakdown. Empirically, this analysis was at best eccentric, as the advocates of therapeutic divorce would convincingly demonstrate in the following decades. Many marriages were shipwrecked despite the absence of a legislatively-proscribed ground, and proof of a single occasion of statutory sin did not necessarily mean that the marriage was doomed. When the conjugal fallout could not be attributed to a statutory ground, the prevailing theory left the hapless couple legally stranded because the truthful form of action had not been officially approved. On the other hand, the commission of a predicate act by one spouse gave the other substantial leverage as to the fate of the relationship. These power vacuums and struggles were often the unintended consequences of relying on a grounds-based divorce system.

Litigation over grounds represented the fundamental view of legislatures and appellate courts that divorce was a club with which to wallop transgressors of social and religious mores. Statutory adultery, desertion, and cruelty furnished specific standards against which to measure the quality of a marriage. This categorical thinking indulged the legal proclivity for substituting verifiable pieces for an interpretive whole.²⁵ Writing about the state of American divorce in the generation prior to the 1920s, historian William O'Neill described matrimonial litigation as a morality play:

[D]ivorce was comfortably well-regulated at a time of growing

23. Fred S. Hall, *Marriage and the Law*, 160 ANNALS 110, 110 (1933).

24. See MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE AND THE LAW 3-6 (1972); GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 14-15 (1991); Timothy B. Walker, *Disarming the Litigious Man: A Glance at Fault and California's New Divorce Legislation*, 1 PAC. L.J. 182, 183 (1970).

25. Walker, *supra* note 24, at 189-90 & n.23 (citing Charles W. Tenney Jr., *Divorce Without Fault: The Next Step*, 46 NEB. L. REV. 24, 57 (1967)).

moral confusion. . . . While slackness and moral relativity seemed everywhere on the increase, the divorce court was one of the few places where the old beliefs still obtained. There was a guilty party and an innocent party. The innocent party was rewarded, the guilty punished, right prevailed over wrong, and the American verities were reaffirmed. Society at large might wink at adultery and assorted other breaches of law, custom, and good taste, but the divorce court did not. In this sense, divorce, though offensive to traditional values, reinforced them all the same.²⁶

Before World War I, the issue of whether divorce would permanently scar or enhance American culture was an open question. As Herbert Croly phrased the quandary in 1909, in his celebrated *The Promise of American Life*, "[p]ublic opinion does not appear to have decided" whether the prevalence of divorce represented "an abuse or . . . a fulfillment of the existing institution of marriage."²⁷

In the 1920s, public opinion decided. Beginning in that decade, divorce courts faced an avalanche of wives and husbands who demanded nothing less than that the court wink at the wholesale breach of the fault-driven system of divorce law. Trial judges largely accommodated these commands from below, keeping the blindfold on formal justice as they opened their eyes to the demands of what Llewellyn called the "law-consumer."²⁸ This shift away from enduring connubial woe and toward freer divorce as a positive cultural and psychological good was consistent with what historian T.J. Jackson Lears described as "a shift from a Protestant ethos of salvation through self-denial toward a therapeutic ethos stressing self-realization in this world — an ethos characterized by an almost obsessive concern with psychic and physical health defined in sweeping terms."²⁹

Even had legislators and appellate judges the inclination to make dramatic pronouncements in favor of broadening access to divorce decrees — and there is no evidence to support this hypothesis — their work-product appeared in much too public a forum to have avoided tremendous controversy. While many voices in the inter-war period

26. William L. O'Neill, *Divorce as a Moral Issue: A Hundred Years of Controversy*, in "REMEMBER THE LADIES": NEW PERSPECTIVES ON WOMEN IN AMERICAN HISTORY 139 (Carol V. R. George ed., 1975).

27. HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 346 (reprint ed. 1965).

28. Karl N. Llewellyn, in *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* 183, 185 (1941).

29. T.J. Jackson Lears, *From Salvation to Self-Realization: Advertising and the Therapeutic Roots of the Consumer Culture, 1880-1930*, in *THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880-1980* 3, 4 (Richard Wightman & T.J. Jackson Lears, eds., 1983).

praised the pioneers of expanded divorce, a good number of cultural and religious leaders continued to condemn the rise in the rate of divorce. As the popular literature reflected, the public proved increasingly sympathetic to multitudinous cases of individual relief through the divorce courts. However, it became difficult to disagree with society's elders that there was nothing beneficial about the booming divorce rate increase itself.

This cultural stand-off was matched by a legal draw, in which appropriate divorces were granted but the statutory dam still blocked the flood of open divorce. Nor did public opinion force the issue of broad legal reform. The growing ease of divorcing, particularly for the well-off and middle classes, militated against any movement for reform. Katherine Fullerton Gerould remarked on the "tendency among civilized people, who live 'above the law,' to underrate the sensitiveness of the average man, whose weaknesses laws are designed to control. Did you ever know anyone who admitted that laws existed to control him?"³⁰

The Roman Catholic Bishop of Boston, Eric F. Mackenzie, would make the same point a generation later:

[T]here are many citizens of highest calibre who profess to be shocked and horrified by the statistical reports of divorce throughout the nation, but yet have upheld and defended individual cases among their personal acquaintance[s] The theoretical condemnation of divorce in general has not persuaded these citizens to any judgment against divorce in individual cases.³¹

This moral snobbishness, helps explain why no League of Wretchedly Unhappy Spouses ever launched a lobbying campaign.³² Moreover, divorce statutes were "precise enough to satisfy the moral predilections of the clergy," while divorce practice was "lax enough to satisfy the most fickle spouse."³³

When it became clear that divorces were flowing at the will of the parties, the legislative response, as we shall see in the next section,

30. Katherine Fullerton Gerould, *Divorce*, ATLANTIC MONTHLY, Oct. 1923, at 460, 463.

31. Eric F. MacKenzie, *Spiritual Values and the Family in Court*, 18 LAW & CONTEMP. PROBS. 20, 21-22 (1953).

32. Gerould, *supra* note 30, at 463.

33. Henry H. Foster, Jr., *Family Law in a Changing Society*, in SOCIETY AND THE LAW: NEW MEANINGS FOR AN OLD PROFESSION 227, 446 n.2 (F. James Davis, et al. eds., 1962).

produced reforms seeking to muscle back the mountain of divorce.³⁴ Appellate courts, by contrast, broadened the range of cruelty and developed the doctrine of mental cruelty as a viable divorce ground. The courts' expansion of cruelty was effectively penned by Sigmund Freud.³⁵ In an age which featured ubiquitous psychological determinants of behavior, the acknowledgment of cruelty's mental component is unsurprising, and did not stem from any ostensible intention on the part of appellate judges to widen the aperture of divorce. The Louisiana Supreme Court typified the movement to extend cruelty's domain, holding that

any unjustifiable conduct on the part of either husband or wife which so grievously wounds the mental feelings of the other, or such as in any other manner utterly destroys the legitimate ends and objects of matrimony, constitutes cruelty, although no physical or personal violence may be inflicted or threatened.³⁶

Minnesota's highest court succinctly embraced the current psychological discourse: "Mental anguish may more perniciously affect health and life than bodily bruises."³⁷

Unlike their appellate superiors, trial judges actually dwelled in the lower emotional latitudes of the law. They daily confronted, not the rarified doctrines of collusion and recrimination, but the human agony of matrimonial disruption. While this division of labor between lower and higher courts had always existed, never before had the assertive individualism and consumerism of a vastly increased number of divorce litigants descended upon the courts. Several factors allowed trial judges to join divorce litigants in creating a rival — and nearly

34. See *infra* text accompanying notes 114-279.

35. On Freud's impact on the culture of the 1920s, see FREDERICK LEWIS ALLEN, *ONLY YESTERDAY* 98-112 (1931); SARA EVANS, *BORN FOR LIBERTY* 175-96 (1989). For a discussion of the impact of Freudian psychoanalysis on ways of thinking about divorce, see LYNNE CAROL HALEM, *DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES* 93-97 (1980).

36. *Krauss v. Krauss*, 111 So. 683, 685 (La. 1927).

37. *Tschida v. Tschida*, 212 N.W. 193, 194 (Minn. 1927). Rare indeed are the features of American culture which have no antecedents. While the proliferation of Freudian ideas belongs to the period after World War I, Robert L. Griswold has presented evidence that a "less restrained" definition of cruelty began to emerge in appellate opinions as early as the mid-nineteenth century. He identified a shift "from social and moral considerations to medical and psychological criteria," as well as an emphasis upon "individual autonomy at the expense of social order . . ." Robert L. Griswold, *The Evolution of the Doctrine of Mental Cruelty in Victorian American Divorce, 1790-1900*, 20 J. SOC. HIST. 127, 127 (1986). See also ROBERT L. GRISWOLD, *FAMILY AND DIVORCE IN CALIFORNIA, 1850-1890: VICTORIAN ILLUSIONS AND EVERYDAY REALITIES* (1982).

untouchable — divorce system. If, as Joseph Walter Bingham claimed, law's substance was found in the "cases in all their concreteness of causes and effects . . .,"³⁸ then divorce judges could be legal realists *par excellence*. Trial court rulings announced no public policy findings or deviations. They simply pigeon-holed facts into legal boxes to resolve one case at a time. Since nearly all divorces were uncontested, and the decrees unappealed, it was virtually impossible for appellate courts to review the judgments granting divorce. A Philadelphia study (summarized in Table 2) illustrated the irrelevance of appellate courts to the vast majority of divorcing couples.

Table 2³⁹

Numbers of Appeals from Philadelphia Divorce Proceedings			
Year Granted	Divorces	Appeals to Superior Court	Appeals to Supreme Court
1938	1,713	9	0
1944	2,933	8	0
1948	3,866	7	0

Only the "exceptionally abnormal" divorce case ever obtained appellate resolution.⁴⁰ In terms the Advertising Age would have understood, trial courts adopted a policy of responsiveness to their clients, and the satisfied customers joined the trial judges in evading review by their off-floor managers, the appellate courts.

C. The "Unholy Trinity" of Divorce Grounds

Adultery, which H.L. Mencken quipped was "the application of democracy to love,"⁴¹ derived from the English ecclesiastical practice of allowing a divorce "*a mensa et thoro*."⁴² This limited divorce separated the parties but left them in spousal limbo by forbidding them to remarry during the lifetime of the other. Adultery was the earliest

38. Joseph Walter Bingham, in *MY PHILOSOPHY OF LAW* *supra* note 28, at 7, 13.

39. Note, *The Administration of Divorce: A Philadelphia Study*, 101 U. PA. L. REV. 1204, 1222 n.87 (1953).

40. Otto Kahn-Freund, *Observations on the Possible Cooperation of Teachers of Law and Teachers of Social Science in Family Law*, 9 J. LEGAL. EDUC. 76, 76 (1956).

41. H.L. Mencken, *Sententiae*, in *THE VINTAGE MENCKEN* (1955), reprinted in *THE HARPER BOOK OF AMERICAN QUOTATIONS* 373 (George Carruth & Eugene Ehrlich eds., 1988).

42. ALBERT C. JACOBS & JULIUS GOEBEL, JR., *CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS* 410 (4th ed. 1961).

and most widespread divorce ground in America. It also constituted a capital offense in several New England colonies, but for innocent spouses it at least represented an improvement by allowing remarriage. Although very few philanderers were executed in colonial America, the law served both as a deterrent and as an unmistakable expression of society's cherishing the principle of sexual exclusivity within marriage.⁴³ Second in the "unholy trinity" of major fault grounds was desertion, which was seen as an abdication of one spouse's life-long responsibility to the other. All the states imposed minimum time periods, at least one year but usually longer, to ensure that the spousal abandonment was complete.⁴⁴ The final category, cruelty, also branded one spouse as a legal offender, for proof of cruelty was the domestic relations analog to a criminal prosecution for assault and battery.⁴⁵

Of the three grounds, only cruelty became the "dazzling success stor[y] of family law"⁴⁶ because its plasticity allowed it rapidly to outpace adultery and desertion as the favored ground for divorce.⁴⁷ In the 1860s, cruelty accounted for only one-eighth of all decrees. By 1922, it was the most popular ground, and reliance on cruelty continued to increase, as Table 3 indicates.

43. RODERICK PHILLIPS, A HISTORY OF DIVORCE IN WESTERN SOCIETY 147-48 (1988). See also Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 36-37 (1966). Adultery constituted the only universal divorce ground in the United States. Only South Carolina presents a partial exception to this rule, when it experimented with divorce for ten years beginning in 1868. But from 1878 until the restoration of fault grounds in 1949, the Palmetto State forbade divorce entirely. J.D. Sumner, Jr., *The South Carolina Divorce Act of 1949*, 3 S.C. L.Q. 253, 257-59 (1951).

44. On the requirements for desertion actions from the end of World War I until the end of World War II, see 1 WILLIAM T. NELSON, NELSON ON DIVORCE AND ANNULMENT §§ 4.01 to 4.51 (James M. Henderson & Publisher's Staff eds., 2d ed. 1945).

45. JACOBS & GOEBEL, *supra* note 42, at 428-37; RHEINSTEIN, *supra* note 24, at 101-05. The Iowa Code, for example, rendered cruelty sufficient to warrant divorce as "such inhuman treatment as to endanger the life of his wife." IOWA CODE § 10475 (1939). A husband could proffer similar grounds. IOWA CODE § 10477 (1939).

46. Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 79-80 (1976).

47. *Id.*

Table 3⁴⁸

Percentage of Absolute Divorces and Annulments in the United States by Divorce Ground			
Year	Adultery	Desertion	Cruelty
1867-70 * * * * *	26.4	35.4	12.4
1916-20	12.1	36.9	27.8
1921-25	10.7	33.3	35.2
1926-30	8.4	29.9	39.9
1935	6.9	26.1	44.4
1940	6.2	25.1	47.8
1945	5.6	20.0	54.6
1950	2.7	17.6	58.7

Cruelty's share of all divorces rose from one-eighth in 1870 to two-thirds in 1949.⁴⁹ In Idaho, divorce plaintiffs succeeded on cruelty grounds and forswore adultery petitions even more disproportionately than the national rate. In 1948, almost eighty percent of all Idaho divorces were decreed on the ground of cruelty, while less than one-half of one percent were officially attributed to adultery.⁵⁰ The utter malleability of this ground was noted in *World's Work* magazine in 1919 when it editorialized that cruelty "embraces almost anything from violent and constant attacks upon the person, endangering life, to 'severity' of manners or deportment, or treatment involving the 'dignity' of husband or wife."⁵¹ The periodical concluded that cruelty has simply come to mean that the "husband and wife do not like each other and would be much happier if they could dissolve an unfortunate partnership."⁵²

Support for a broad reading of the cruelty ground came from many sources. Almon Hensley, former president of the New York Mothers' Club, argued that "[c]onstant nagging is [a] better justifica-

48. JACOBSON, *supra* note 15, at 121 tbl.58.

49. *Id.*

50. *Id.* at 123 tbl.59. The 1948 Idaho divorce ground statistics were as follows: cruelty: 79.5%; desertion: 8.8%; neglect to provide: 5.9%; drunkenness: 1%; adultery: 0.4%; and all other grounds: 4.4%. *Id.*

51. *American Divorce Rate Still Increasing*, 38 *WORLD'S WORK* 247, 247 (1919).

52. *Id.* On the popularity of the cruelty ground, see BABER, *supra* note 20, at 458.

tion for divorce . . . than misconduct."⁵³ Doris Stevens believed that cruelty grew out of incompatibility and included mental anguish.⁵⁴ An anonymous writer in *Harper's* noted that her husband did not physically mistreat her but merely forbade her to smoke and attempted to censor her reading matter.⁵⁵ She was fairly confident that she could obtain a divorce on grounds of cruelty.⁵⁶ *Time* noted in 1937 that the ground was so easy to prove that plaintiffs who would normally have pleaded adultery were instead alleging "excessive cruelty" out of squeamishness.⁵⁷ As University of Minnesota law professor William L. Prosser acknowledged to readers of *Forum*, mental cruelty "is an inevitable accompaniment of any marriage which has been a failure."⁵⁸

D. Double-Barreled Fault: The Role of Defenses

Divorce defenses also revealed the legal system's emphasis on critical moral distinctions proven by specific acts. In fact, the legal defenses focused attention on the formal system's requirement of double-barreled fault: not only must the defendant be guilty, the complainant must be innocent.⁵⁹ In the looking-glass morality of divorce law, forgiveness was taboo. The resumption of sexual relations following knowledge of the existence of a fault ground was deemed to be conclusive proof that the innocent spouse had "condoned" the guilty spouse's misconduct. An act of forbearance was not evaluated in the context of the whole of the marriage. Mercy constituted a devastating

53. *Are Changing Conventions Menacing the Marriage Institution?*, 74 CURRENT OPINION 338, 339-40 (1923).

54. Doris Stevens & Ruth Hale, *The New Freedom in Divorce — Can it be Secured by Uniformity in Marriage Laws?: A Debate*, 76 F. & CENTURY 321, 330 (1926).

55. *Who Gets the Children?*, 161 HARPER'S MONTHLY 455, 455-56 (1930).

56. *Id.* at 456.

57. *Divorce Report*, TIME, July 19, 1937, at 60, 61. Both the reluctance to establish a "hotel adultery" case and the ease of divorce alternatives are far older. For example, there is evidence that Heinrich Schliemann, the archeologist who excavated Troy, spurned his lawyer's offer to trump up a New York adultery charge and instead easily obtained a divorce in Indiana. Richard Jenkyns, *But Is It True?*, N.Y. REV. OF BOOKS, Dec. 19, 1996, at 15, 16-17.

58. William L. Prosser, *Divorce: The Reno Method, and Others*, 100 FORUM 286, 289 (1938); *See also* Doris Stevens, *Uniformity in Divorce*, 76 FORUM 322 (1926); *Who Gets the Children?*, *supra* note 55; *Divorce Report*, *supra* note 57. Also noting the ease of establishing cruelty were John Gilland Brunini, *States' Rights and Divorce*, 20 COMMONWEAL 578 (1934); and the discussion by "Mr. Con" in *Pro and Con: Legalize Divorce By Mutual Consent?*, READER'S DIG., Jan. 1939, at 91.

59. RHEINSTEIN, *supra*, note 24, at 53.

faux pas, for a single act of intercourse would bar the innocent spouse's access to the divorce court.⁶⁰

Collusion and connivance reinforced the law's preoccupation with adversarial divorce. Husbands and wives were forbidden to agree upon a divorce ground. Collusion, a defense presumably raised *sua sponte* by the court, would defeat a divorce action upon discovery that the couple had cooperated in seeking to obtain it.⁶¹ In fact, such a mutual desire was officially regarded as "morally reprehensible"⁶² and "several degrees worse than murder."⁶³ A few states went so far as to create the office of "divorce proctor" or "defensor vinculi" (literally, "defender of the [marital] bond"), charged with rooting out collusion in divorce cases. Connivance, a variant of collusion, would deny a divorce to a spouse who had "corruptly" agreed that his or her spouse could commit a marital offense.⁶⁴

Anne Shannon Monroe argued in the pages of *Good Housekeeping* that the single-act theory of divorce law was psychologically warped.⁶⁵ She insisted that the "very thing that will positively defeat an attempt to obtain a divorce — the agreement of the two that it is the wisest course — is the one absolute reason why a decree should be granted."⁶⁶ Katherine Fullerton Gerould summarized the argument against the bar of collusion:

[W]hy do your best to prevent people's divorcing when both of them want to? The cry against divorce on the score that in most divorces one person is sacrificed becomes absurd enough

60. *Id.* at 53-54; see also Walker, *supra* note 24, at 194-95. As Judge Paul W. Alexander observed, "[I]f the plaintiff extends mercy to the defendant, the law punishes him for it." *Id.* at 195 (quoting Alexander, *The Follies of Divorce: A Therapeutic Approach to the Problem*, 36 A.B.A. J. 105, 168 (1950)). Condonation itself subsumed a bizarre twist, for its continued effectiveness as a bar was conditioned upon "conjugal kindness" by the offending spouse. Subsequent marital miscues, not themselves substantial enough to be independent grounds for divorce, might be sufficient to allow the once-estopped condoner to revive the original divorce action. Wadlington, *supra* note 43, at 39.

61. Walker, *supra* note 24, at 195.

62. JOHN SIRJAMAKI, *THE AMERICAN FAMILY IN THE TWENTIETH CENTURY* 181 (1953). Sociologist Ray E. Baber's quip that "if a marriage becomes intolerable to either husband or wife, it may be dissolved; but if it becomes intolerable to both, the state rules that in the interests of society it must be maintained!" overstated the formal law, but only slightly. BABER, *supra* note 20, at 479.

63. LOUIS HARRIS, *LOVE, MARRIAGE, AND DIVORCE IN HISTORY AND LAW* 99 (1930), quoted in ANDREW G. TRUXAL & FRANCIS E. MERRILL, *THE FAMILY IN AMERICAN CULTURE* 679 (1947).

64. VERNIER, *supra* note 16, § 62, at 8, § 80, at 92-95. See also RHEINSTEIN, *supra* note 24, at 54-59; SIRJAMAKI, *supra* note 62, at 181.

65. Anne Shannon Monroe, *When Shall a Woman Divorce Her Husband?*, *GOOD HOUSEKEEPING*, Oct. 1921, at 74.

66. *Id.* at 96.

when you realize that only on the basis of one person's wanting it and the other person's not wanting it is a divorce obtainable at all.⁶⁷

As Judge Robert Grant concluded, collusion converted every divorce ground into the catch-all moral ground of incompatibility.⁶⁸

Unrelentingly opposed to all marital dissolutions, *Commonweal* argued that collusion flowed from divorce, and that proscribing collusion was as pointless as forbidding bootlegging during Prohibition.⁶⁹ It was in the nature of divorce law "irresistibly" to broaden all exceptions: "If unfaithfulness or physical cruelty are causes, why not incompatibility? If incompatibility, why not boredom? What court can say which causes less subjective suffering, or which should be denied relief?"⁷⁰ Paradoxically, the iron logic deployed by this Catholic periodical would become the operating wisdom of the popular law of divorce in America, with unmitigated individualism destroying — as *Commonweal* predicted — all barriers to "free" divorce. The blurring of specific grounds with their psychological components lifted the lid on the Pandora's box of divorce. Wives and husbands became convinced that no court had the right to evaluate how much conjugal suffering merited the redemption of divorce. No rules could govern subjectivity. And the trial courts began to agree.

Recrimination was the divorce defense which most peculiarly — but most convincingly — demonstrated the formal system's priority on penalizing malefactors. Recrimination represented legal theory's determination to deny divorce to wives and husbands who had violated their marital vows. It provided the means by which a defending spouse could "admit even the most repellent charges made in the complaint and still prevent the plaintiff from securing a divorce."⁷¹ In such a case of mutual fault, the court was bound to withhold its decree, thus visiting the parties with "the Sartresque punishment of remaining together and hating it."⁷²

Like collusion, connivance, and condonation, recrimination had its distant genesis in Roman property law. The legal charter of antiquity had been recast by twelfth century canonists so that "the Church

67. Gerould, *supra* note 30, at 463.

68. Grant, *Marriage and Divorce*, *supra* note 9, at 196-97.

69. *Divorce by Collusion*, 17 COMMONWEAL 340, 340 (1933). The article noted that burgeoning divorce rates had altered the attitudes of couples contemplating marriage, making the wedding vows increasingly more provisional. Brides and grooms were thus "potential partners to a collusive divorce at the very altar." *Id.*

70. *Id.*

71. Beamer, *supra* note 22, at 213.

72. Wadlington, *supra* note 43, at 38-39. See also Paul Sayre, *Divorce for the Unworthy: Specific Grounds for Divorce*, 18 LAW & CONTEMP. PROBS. 26, 28-29 (1953).

might intervene in a divorce suit which, if successful, would have turned a wife loose on a society in which unattached women had no place.⁷³ These origins suggested that recrimination focused more on property issues than on divorce itself.⁷⁴ The modern twist given this doctrine served only to block the decree, and appeared to ignore any financial consequences of divorce. Ironically, however, recrimination generally was raised as an issue only when one party was dissatisfied with the property arrangements. Litigated recrimination cases generally involved a spouse "forced to resort to the defense of recrimination because he [or she] has failed to bargain successfully outside of court."⁷⁵ In those cases, the parties wielded the cudgels of moral fault in a combat over finances.⁷⁶

Recrimination fared no better than collusion in the popular journals. As Ruth Hale phrased the conventional wisdom, "That spiritual perceptiveness which holds that a divorce must on no account be granted if both persons . . . have been unfaithful to the marriage, instead of merely one, can hardly be respected as a source of law or precept."⁷⁷ Although mocked by many, the formal legal system insisted on the letter of its peculiar anti-windfall logic: since divorce could only be awarded to an innocent husband or wife, a guilty spouse could not benefit from the other's marriage-destroying misconduct. Recrimination thus banned divorce unless both barrels of the fault system were loaded.⁷⁸

E. What the Divorce Judges Said

As noted above, a trial judge handling divorce cases in the 1920s and 1930s faced the dilemma of resolving the conflict between, on the one hand, the instructions laid down by legislatures and appellate courts, and, on the other, the pervasive, unending, quotidian pull of divorce litigants. The formal system began with the proposition that, subject to certain narrow exceptions, marriage was a permanent commitment. But this premise was regularly and stoutly denied by the consumer culture, which acted on the opposite assumption that "unhappy unions" were disgraceful and should be dissolved in divorce. Ludwig Lewisohn declared that marriage should be held to a basic standard of contentment: "To fall below that minimum is to cheat both the self and society, both the present and posterity, to sacrifice honor

73. Beamer, *supra* note 22, at 213.

74. *Id.* at 243, 253.

75. Note, *Recrimination as a Defense in Divorce Actions*, 28 IOWA L. REV. 341, 349 (1943).

76. Beamer, *supra* note 22, at 242-43.

77. Stevens & Hale, *supra* note 54, at 338.

78. Seagle, *supra* note 2 (criticizing the doctrine of recrimination).

to a fetish and vitality to decay.⁷⁹ Thus, the popular view reversed the formal postulate and its exceptions, holding that the pursuit of happiness mandated ready divorce, subject to prohibitions upon particular circumstances. As English preacher and feminist A. Maude Royden declared the "real immorality" consisted of pretending that a marriage was working when it had broken.⁸⁰

Popular voices complained that the necessity of proving fault in order to obtain freedom was indecent. Katherine Fullerton Gerould believed incompatibility was "certainly as reasonable a ground as any" and far better than the requirement of "mud-slinging."⁸¹ In response to the moral calumny religious conservatives launched at those disdainful of the immutability of the conjugal commitment, Gerould argued that a spouse who refuses divorce to a partner desiring it was "beneath contempt."⁸² Since society permitted easy marriage, it should guarantee divorce on demand, for the two were linked. The *Nation* agreed, calling for "decency in divorce."⁸³ These cultural heralds also challenged the logic of the fault grounds themselves. Royden highlighted the inconsistency of maintaining marriage as indissoluble by its nature, yet permitting dispensations for specific reasons.⁸⁴ Adultery, for instance, offended the carnal side of marriage. But to grant divorce only for adultery was to elevate the physical bond over the whole relationship.⁸⁵ The legal system's pretense that grounds subsumed "causes" was fake, Royden insisted, and led to "legal fictions," perjury and collusion.⁸⁶

79. Ludwig Lewisohn, *On Love in Marriage: New Morals for Old*, 119 *NATION* 464, 465 (1924).

80. A. Maude Royden, *What Is Marriage?*, *ATLANTIC MONTHLY*, Sept. 1923, at 297, 305.

81. Gerould, *supra* note 30, at 460-61, 465.

82. *Id.* at 466-67.

83. *Decency in Divorce*, 127 *NATION* 214, 214 (1928). The *Nation* editorialized that it was wrong to "insist that before a divorce is granted one party must violently attack the character of the other." *Id.* See also Stephen Ewing, *The Mockery of American Divorce*, 157 *HARPER'S MONTHLY* 153 (1928).

84. Royden, *supra* note 80, at 299.

85. *Id.* at 300-01.

86. *Id.* at 305. In 1924, *Atlantic Monthly* published a poignant story by a man whose wife had ceased to love him, and desired a divorce to marry another. The author wanted happiness for his wife, and so intended to accede to her wish. But to do so, the law demanded that he "come into court and accuse openly, publicly, a friend of mine, my one-time wife, of a statutory crime." Burnham Hall, *Shall I Divorce My Wife?*, *ATLANTIC MONTHLY*, Aug. 1924, at 155, 156. Nonetheless, he concluded, this distasteful act would ultimately serve everyone's best interest. *Id.* at 160-62. The author made no mention of the more common alternative, that she accuse him of a marital outrage. Anticipating some skeptical readers, the editors appended a comment that the story was "absolutely true." *Id.* at 155.

What happened to these "legal fictions" in court? The evidence shows that trial judges treated them as page-turning, case-disposing best sellers. In three substantial articles in *Good Housekeeping*, Mabel Potter Daggett reported on her 1925 nationwide survey of divorce judges.⁸⁷ Their confessions about their attitudes and rulings, together with other commentary by bench and bar in the popular press, reveal a law system completely at odds with both statute and case law. What the judges said about divorce reflected the changing culture more than the unchanging law. In the words of Salem, Oregon Judge John McCourt, "[U]ntil a few years ago public sentiment deterred many a woman from divorce. Now a changed public sentiment, together with the economic emancipation of woman, accounts in large measure for the heavy increase in the ratio of divorce to marriage."⁸⁸ The formal premises of divorce law were of no consequence to Judge S.S. Sherman of Montrose, California, who maintained that "[d]ivorce is not an evil. It's the mending of a marriage mistake."⁸⁹ Nor was Kalispell, Montana Judge C.W. Pomeroy respectful of the traditional legal policy when he observed that "on the whole, there are not divorces enough."⁹⁰

The judges tended to be older than most divorce litigants, but in this generational clash, the senior culture yielded. To Judge Peter Shields of Sacramento, California, the "theoretical ideal" of marriage must give way before the muscular pressure of wives and husbands seeking personal fulfillment:

87. Mabel Potter Daggett, *Make Over Marriage If You Would Cure Divorce: That's What The Judges Say*, GOOD HOUSEKEEPING, June 1925, at 56; Mabel Potter Daggett, *What The Judges Say About Divorce*, GOOD HOUSEKEEPING, May 1925, at 36; Mabel Potter Daggett, *What The Judges Told Us About Divorce*, GOOD HOUSEKEEPING, Apr. 1925, at 28. Similar judicial commentary is also compiled in Vera L. Connolly, *Every Man For Himself: There Is Only One Reason For Divorce*, GOOD HOUSEKEEPING, Feb. 1928, at 18; see also Ewing, *supra* note 83.

88. Daggett, *What The Judges Say About Divorce*, *supra* note 87, at 108.

89. *Id.* at 106.

90. *Id.* at 36. The overwhelming majority of the judicial commentary presented in Daggett's nation-wide survey indicates that trial judges were rejecting the dictates of their appellate superiors on the requirement of establishing actual marital fault, spurred on by an avalanche of litigants. Historian Robert L. Griswold, on the contrary, has argued for "great congruence between appellate court rulings and lower court conceptions of marital cruelty." Griswold, *Evolution of the Doctrine of Mental Cruelty*, *supra* note 37, at 142 n.3. But beginning in the 1920s, the popular culture raced far beyond the cruelty ground, and — with the complicity of the trial bench — established a working jurisprudence of mutual consent divorce, a legal outpost never reached by appellate courts. See, e.g., MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 65 (1987). As we shall see in the next section, even when presented with relatively clear legislative mandates to remove considerations of fault from divorce cases, appellate courts often found ways to retain the jurisprudence with which they were most comfortable: ascertaining culpability. See *infra* notes 141-278 and accompanying text.

We of an earlier age may deplore divorce and regret that youth does not have the fortitude to bear the sorrows of a mistaken marriage for duty's sake. But today the world supports the married person who will not endure an existence in which happiness is impossible or sacrifice the realities of life to a theoretical ideal.⁹¹

Trial judges acknowledged divorce as a "fire-escape from a domestic hell,"⁹² and believed "the moral atmosphere is better with divorce easy and rapid."⁹³ They supported women divorcing husbands who refused to grant them equality in marriage, and they also viewed woman's emancipation in economic terms, remarking that "how much a woman will forgive today is almost in inverse ratio to how far is the factory."⁹⁴ Judge John S. Dawson of Topeka, Kansas, took pride in his state's elevation of women to a position of gender equality: "The old theory of dominion of the husband over the wife is, in Kansas, as dead as Tut-ankh-amen. And I say Hurrah."⁹⁵

While the judges worried about the effect of divorce upon children, they voiced a cheer even for some parents seeking to break up a family. Judge Grier M. Orr of St. Paul, Minnesota, opined that in a home in which parents clashed openly and often, it was their duty to divorce.⁹⁶ Similarly, Judge Hill believed that "no divorce can scar the soul of a child more than that hell, a home devoid of all the bonds of affection that sanctify marriage."⁹⁷ Ready divorce converted marriage

91. Daggett, *What the Judges Told Us*, *supra* note 87, at 160. Judge Shield's opinion about the support for dissatisfied spouses reflected the strength of litigants not only in the United States, but also in Canada. Historian James G. Snell recounted the divorce paradigm north of the United States:

The customary rules of marriage and divorce coexisted with the formal divorce regime and interacted with the needs and position of individual couples and spouses to produce a strikingly complex divorce environment. Always operating within the constraints of that environment, divorcing couples in early twentieth-century Canada were able to turn the system back on itself, using it to meet at least some of their own ends. Mutual consent was the most prominent characteristic of a process in which couples took advantage of loopholes in the formal divorce process, thus forcing the system to operate (to some extent, at least) as the participants desired.

JAMES G. SNELL, *IN THE SHADOW OF THE LAW: DIVORCE IN CANADA, 1900-1939*, 191-92 (1991).

92. Daggett, *Make Over Marriage*, *supra* note 87, at 184.

93. *Id.* at 183.

94. Daggett, *What The Judges Say*, *supra* note 87, at 108.

95. Daggett, *Make Over Marriage*, *supra* note 87, at 178.

96. Ewing, *supra* note 83, at 161.

97. Daggett, *What The Judges Say*, *supra* note 87, at 104. Judge Price of California agreed with Judge Hill that children sometimes suffer more within a ruptured household. Daggett, *Make Over Marriage*, *supra* note 87, at 183.

into trial marriage. Judge Chester F. Miller of Dayton, Washington, focused on the evils of "hurried courtship" leaving young couples unprepared for conjugal rigors. When a "little hell on earth begins . . . [d]ivorce is the best solution."⁹⁸ After the court-sanctioned marital break-up, "[T]he boy and girl who've had their lesson can each select a second partner with greater care."⁹⁹ Judge Ben B. Lindsey's once-controversial suggestion that a young couple experiment with marriage before settling down to the institution in a serious manner now appeared more routine than radical.¹⁰⁰ Physician and statistician I.M. Rubinow observed that the popularity of Lindsey's "companionate marriage" proposal "cannot be explained on the ground that he has suggested a new way out. It is only evidence that society will always vociferously approve something it is already practicing."¹⁰¹

As the trial judges saw it, the problem was not divorce, but marriage. The condition of matrimony had changed; divorce merely followed and obeyed the altered cultural norms. As Daggett summarized their sentiments, "[D]ivorce is going to be worse until marriage is better."¹⁰² The consensus view was expressed by Judge W.A. Reynolds of Chehalis, Washington. Laying to one side the teachings of appellate courts and the pronouncements of the legislatures, he observed that divorce in the 1920s was "an established, accepted exit from an unpleasant or irksome though not necessarily intolerable situation."¹⁰³

98. Daggett, *What The Judges Say*, *supra* note 87, at 114.

99. *Id.*

100. See *Is Marriage Breaking Down?*, LITERARY DIG., Feb. 17, 1923, at 36.

101. I.M. Rubinow, *Marriage Rate Increasing Despite Divorces*, 29 CURRENT HIST. 289, 294 (1928). Judge Ben B. Lindsey was a popular subject of rabid commentary in the periodicals, both pro and con. See *Are Changing Conventions Menacing the Marriage Institution?*, *supra* note 53; M.G.L. Black, *A Business Woman on Companionate Marriage*, 148 OUTLOOK 286 (1928); Joseph Collins, *The Doctor Looks at Companionate Marriage*, 147 OUTLOOK 492 (1927); Charlotte Perkins Gilman, *Divorce and Birth Control*, 148 OUTLOOK 130 (1928); *Is Marriage Breaking Down?*, *supra* note 100; Edward S. Martin, *Race Wars and Marriage*, 155 HARPER'S MONTHLY 653 (1927); Fulton Oursler, *A Critic of Companionate Marriage*, 148 OUTLOOK 648 (1928).

102. Daggett, *What The Judges Say*, *supra* note 87, at 121.

103. Daggett, *What the Judges Told Us*, *supra* note 87, at 166. On the question of which institution was more problematic, Indiana Judge William A. Kittinger said the "chief trouble . . . is not with divorce but with marriage." Daggett, *What the Judges Say*, *supra* note 87, at 114. A bevy of judges agreed: Kansas' W.W. McComish, Wisconsin's R.A. Richards, Oregon's F.W. Wilson, and Colorado's Samuel W. Johnson. *Id.* at 112-21. Other judges in agreement were Oregon's George Tazwell and Indiana's Frank E. Hutchinson. Daggett, *Make Over Marriage*, *supra* note 87, at 174.

The cognitive dissonance between the court's duty to uphold the formal law and its intention nevertheless to accede to the demands of the consumers of justice, was never far from the judicial consciousness, as a Muncie, Indiana judge disclosed to the Lynds: "A judge never knows the inside reasons in divorce cases. A divorce case comes up, and it's just another court case to be disposed of. I never look over the records. The lawyers get all those details. *You see, if the judge knew these details, he might not grant the divorce.*"¹⁰⁴

Accordingly, divorce judges treated cruelty as a blanket legal allegation covering up the truth of simple incompatibility or mutual consent. What other conclusion could there be, after consideration of the types of divorces granted on the ground of cruelty? Stephen Ewing collected several examples of such awards in his 1928 report in *Harper's*: 1. to a husband, because the sound of his wife's voice injured his delicate health; 2. to another husband, who claimed his spouse was "disagreeable in words"; 3. to a wife on the ground that her mate had been "intolerably cool" to her; 4. to another wife, whose husband had told her to go to hell once too often; and 5. to a husband, whose wife made him get up five or six times a night to look after her cat.¹⁰⁵

Helen and Robert Lynd reported in 1929 that "loss of affection [during] marriage was not legally recognized as sufficient reason for dissolving a marriage until recent years."¹⁰⁶ Since no changes in the formal law system occurred in the 1920s, the Lynds' account of the changing law must have reflected a mutual acknowledgment between the court and the spouses that divorce would be granted upon request. Such an interpretation is reinforced by two examples the Lynds provided. In 1924, a divorce was granted to a Muncie couple who reported to the court that they had "no affection for each other and [did] not want to live together."¹⁰⁷ Another divorce was awarded a husband who pleaded that his wife said she did not love him and did not want

Midwestern and Western judges seemed most comfortable with the changing divorce mores. Sociologist Paul H. Landis even suggested that many Easterners migrated west to take advantage of liberalized divorce law. "More mobile" Westerners lacked an "established integrated society" and were less bothered by the loss of the traditional "institutional" family. Paul H. Landis, *Divorce in Our Time*, 105 FORUM 665, 866-67 (1946). Substantially higher divorce rates occurred in the West than in any other part of the country during the period covered in this article. JACOBSON, *supra* note 15, at 100 tbl.48.

104. ROBERT S. LYND & HELEN MERRELL LYND, *MIDDLETOWN IN TRANSITION: A STUDY IN CULTURAL CONFLICTS* 161 (1937).

105. Ewing, *supra* note 83, at 159.

106. ROBERT S. LYND & HELEN MERRELL LYND, *MIDDLETOWN: A STUDY IN CONTEMPORARY AMERICAN CULTURE* 114 n.8 (1929).

107. *Id.*

to live with him.¹⁰⁸ Further support for the proposition that cruelty became the cover story for divorces on grounds of incompatibility or mutual consent may be found in the overall divorce data the Lynds provided. The divorce explosion in Muncie may be seen by contrasting its 87% increase in population between 1890 and 1920 with the 622% increase in the divorce rate, comparing the numbers for the years 1921-24 and 1889-92.¹⁰⁹ During that same generation, the percentage of Muncie divorces granted on the ground of desertion dropped from 29.6 to 14.9.¹¹⁰ Adultery had provided the divorce ground 23.7% of the time in the earlier period, but it decided only 14.5% of 1920s divorces.¹¹¹ Cruelty, however, increased its percentage from 30.3 to 51.7 of all divorce cases.¹¹²

That Muncie divorces for cruelty rose from fewer than one-third to more than one-half did not, of course, signify an epidemic of conjugal beastliness in Indiana, as the Lynds recognized. They noted that cruelty "may cover almost any variety of marital maladjustment, and the increase in divorces on this charge probably indicates chiefly a growing flexibility which allows divorces on other than specific charges such as 'adultery' and 'abandonment.'"¹¹³ Clearly, though, the pose of cruelty described a dissembling tactic far more than a malicious heart. Roscoe Pound twitted the irrelevancy of statute to conduct when he asked his readers to "consider what any American community would think of a man convicted of extreme physical cruelty to his wife if those words were taken seriously."¹¹⁴ The contrast between the old and new dispensations on marital dissolution was aptly etched by an article in *Good Housekeeping* which noted that nineteenth-century marriages were "generally indissoluble, not because divorce laws were more severe than today — the laws have

108. *Id.* In his study of Canadian divorce during this same time period, James G. Snell observed that the way in which unhappy couples seized "control of divorce . . . was reflected in their behaviour and their language. Couples frequently spoke as though a divorce was theirs to give rather than the state's." SNELL, *supra* note 91, at 194. Of course, uncontested divorces did not always reflect a mutual decision to sever the matrimonial bonds. The *Jersey Journal* noted in 1933 that some defendants lacked the funds to hire counsel to rebut the divorce charge, while others declined to fight because they felt certain of an unfavorable verdict. Still other non-litigants objected to exposing intimate details to public scrutiny, while a final group may even have been unaware of the proceedings, since they were served with notice by publication and had not "read the right newspapers." *For Easier Divorce*, LITERARY DIG., July 29, 1933, at 18, 18-19.

109. LYND & LYND, A STUDY IN CONTEMPORARY AMERICAN CULTURE, *supra* note 106, at 121.

110. *Id.* at 521 tbl.12.

111. *Id.*

112. *Id.*

113. *Id.* at 122-23.

114. Roscoe Pound, *Foreword, A Symposium in the Law of Divorce*, 28 IOWA L. REV. 179, 184 (1943).

scarcely changed — but because public opinion exercised silent but more implacable pressure."¹¹⁵ In the inter-war period, the inexorable force of public opinion remained a constant. But the direction had shifted.

Far from behaving as a much-maligned ancient regime of oppressive divorce restrictions, the fault system operated as a moral charade. The trappings of the fault matrix served as the divorce emperor's transparent clothes, fooling no one but staying in place for want of a cultural alternative. With the significant exceptions of spousal support and the uncertainties about the children of divorce, the fault system well served the aims of both dissolution-minded couples and user-friendly trial judges. Neither group complained of the mutually-beneficial arrangement. Judge Paul W. Alexander well understood the paradox: "[T]he trouble with guilt as a criterion is . . . [that it] virtually assures mutual consent as a ground for divorce."¹¹⁶ The pliant cruelty standard rarely closed the gates on any consensual divorce, and speedy divorce procedures facilitated docket control, increasingly a concern of urban judges.

Because their *modus vivendi* worked so well, neither trial courts nor divorce-seekers were likely candidates to push systemic reform. The call for significant changes to the American way of divorcing came, instead, from the legislatures. The new grounds of "incompatibility" and "living apart" were the formal system's attempts to reverse the burgeoning divorce rate. The next section describes these alterations by focusing on the route of incompatibility in New Mexico and living apart in North Carolina, two jurisdictions where the reforms had full play. The ultimate failure of these legal gambits illustrates the yawning gap between the formal and popular divorce arenas.

III. LEGISLATIVE EXPERIMENTS IN NON-FAULT DIVORCE

In the mid-nineteenth century, several states had "omnibus" clauses in their divorce statutes which were broad enough to encompass divorce on the non-fault ground that the parties were incompati-

115. Gina Kaus, *As Long As We Both Shall Live*, GOOD HOUSEKEEPING, Sept. 1926, at 38, 199. V.F. Calverton contrasted the respectability of divorce in the 1930s stating that as recently as just before World War I, his mother would refer to divorced women as "indecent and immoral creatures," to which his father — a man who read Karl Marx at breakfast — would echo, "Ditto." Hornell Hart & V.F. Calverton, *Morals in Marriage: A Debate*, 97 F. & CENTURY 345, 349 (1937).

116. See DUKE UNIVERSITY OF FAMILY LAW, PROCEEDINGS OF THE INSTITUTE OF FAMILY LAW 179 (John S. Bradway, ed., 1959).

ble.¹¹⁷ While few of these omnibus clauses emerged into the twentieth century, Washington's law survived until the close of the Progressive Era. Washington permitted a divorce for any reason "deemed by the court sufficient," with the proviso that the court "shall be satisfied that the parties can no longer live together."¹¹⁸ Omnibus clauses were panned by divorce conservatives. These laws had the potential "to reduce the marriage relation to a mere state of concubinage, at the mercy of the parties and the courts."¹¹⁹ Although these umbrella clauses disappeared from the legislative arena, they were later resurrected in strait-jacketed form as the incompatibility statutes.

Some states realized the divorce trade brought needed revenue, and they did not need omnibus measures to attract a divorce clientele. While Nevada is best known as the mecca for migratory divorce-seekers, Idaho, South Dakota, Arkansas, and several other states competed for the dissolution business. These states did not alter the grounds of divorce, but merely shortened the period of residency required for filing a divorce action. In Idaho, for example, a mid-century divorce suitor needed to reside in the state for only six weeks before applying to the courts for relief.¹²⁰ Idaho's divorce rate in 1948 was 5.7 per thousand residents, nearly double the 2.9 per thousand national average.¹²¹

In these states, as throughout the nation beginning in the decade after World War I, both trial judges and litigants understood that obtaining a divorce decree was a formality. But particularly for wealthy Eastern would-be divorcees desirous of privacy or a vacation, a trip to the West could provide both diversion and a divorce.¹²² Despite the media attention lavished on them, however, migratory divorces never became more than a negligible fraction of all American divorces. Divorce statistician Paul Jacobson estimated that migratory divorces accounted for no more than three to five percent of the annual divorce tally.¹²³ Most unhappy spouses lacked either the money or the incen-

117. PHILLIPS, *supra* note 43, at 454; Orfield, *supra* note 16, at 659. Orfield noted that legislative divorces, which were unregulated, prevailed in the early national period and were not entirely eliminated until the last quarter of the nineteenth century. *Id.* "We are told," wrote Roscoe Pound, "that the legislature was appealed to in cases that were too flimsy or too whimsical for the courts." Pound, *supra* note 114, at 187.

118. WASH. CODE § 2000 (1881).

119. ALVAH L. STINSON, *WOMAN UNDER THE LAW* 348 (1914).

120. Jacobson, *supra* note 15, at 104 n.19.

121. *Id.* at 100 tbl.48.

122. *Id.* at 103.

123. *Id.* at 109.

tive to leave their home jurisdiction.¹²⁴ As we have seen, local divorce courts were generally as welcoming as any commerce-driven court.

For want of current domestic models, some Americans in the 1920s looked to Scandinavia for guidance in crafting new divorce laws. The Nordic model offered absolute divorce to a couple where they had lived apart for three years and "deep and lasting" mutual disagreements¹²⁵ had propelled them to a separation, based on the 1910 recommendation of a joint Norwegian-Danish-Swedish Commission.¹²⁶ The *Nation* praised such laws for assuring the legal and economic equality of the sexes in divorce proceedings.¹²⁷ Stephen Ewing quoted the Danish Prime Minister's defense of his nation's law on the grounds that it was "morally indefensible" to force two people to stay together when "all the bonds" between them had severed.¹²⁸ Nancy M. Schoonmaker in *Current History*, Ruth Hale and Edwin Bjorkman in the *Forum*, and Dorothy Dunbar Bromley in *Harper's Monthly* advocated modeling domestic divorce statutes on the models from Norway, Sweden, and Denmark.¹²⁹

Stephen Ewing also described the Scandinavian divorce process.¹³⁰ Couples seeking a dissolution were required to discuss their differences with either their minister or a designated government official.¹³¹ If they did not reconcile, they could receive a legal separation upon agreeing on the custody of any children, as well as on financial arrangements.¹³² After a separation of between twelve and eighteen months, the couple could petition for an automatic decree of divorce.¹³³ If only one party wished to end the marriage, then the length of the requisite separation period extended to between two and two-and-one-half years.¹³⁴ Ewing concluded his summary for American readers by observing that in Scandinavia, "[I]t never becomes necessary for husbands and wives to attack each other in order to gain their free-

124. RILEY, *supra* note 24, at 136. On migratory divorces, see *id.* at 119, 130, 135-44; see also PHILLIPS, *supra* note 43, at 531.

125. Ewing, *supra* note 83, at 155.

126. *Marriage and Divorce in Denmark*, 110 NATION 563, 564 (1920).

127. See *They Shall Not Pass*, 110 NATION 640 (1920).

128. Ewing, *supra* note 83, at 155.

129. Schoonmaker, *supra* note 4, at 253; Stevens & Hale, *supra* note 54, at 338; Edwin Bjorkman, *Sweden's Solution of Divorce*, 76 FORUM 543 (1926); Dorothy Dunbar Bromley, *The Market Value of a Paris Divorce*, 154 HARPER'S MONTHLY 669, 681 (1927). See also Katherine Anthony, *Marriage Laws in Russia*, NEW REPUBLIC, May 4, 1921, at 301, 302; *Decency in Divorce*, *supra* note 83, at 215.

130. Ewing, *supra* note 83, at 155.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

dom."¹³⁵ One-half of American jurisdictions eventually developed a home-spun version of Scandinavian living-apart laws, but required far longer periods of separation.¹³⁶ While the stated purpose was to prevent brutalization in the divorce courts, the underlying goal of the American statutes was to induce fractious couples to remain together for five or ten more years.¹³⁷

A. Incompatibility on Appeal

Between 1920 and 1969, seven American jurisdictions adopted statutes permitting divorce on the ground of incompatibility. The Scandinavian influence can be directly seen in the first such law, passed by the Virgin Islands.¹³⁸ For the residents of the former Danish territory, the incompatibility statute merely carried over the substance of prior law, which since 1770, had granted divorces for "irremediable disharmony in the common life."¹³⁹ In 1933, New Mexico added incompatibility as a divorce ground, followed two years later by the Territory of Alaska.¹⁴⁰ Oklahoma joined the list in 1953, followed in the next decade by Nevada, Delaware, and Kansas.¹⁴¹ Despite their open-faced language, incompatibility statutes failed to trigger a wholesale transformation of pseudo-cruelty jurisprudence. In the absence of evidence of legislative intention beyond the bare addition of this new ground to the divorce statutes, appellate courts often refused to countenance divorces merely upon couple's demonstration that they could not live together. Rather, courts often insisted that a complainant continue to prove blamelessness in the breakdown of the marriage. This grafting of a threshold behavioral requirement demonstrated how difficult it was for the formal legal system to uproot itself from the regime of fault.

Exploring the tortuous path of incompatibility on appeal affords us a window into the ideological dimension of this branch of the for-

135. *Id.*

136. *See infra* Table 4.

137. *See infra* notes 209-24 and accompanying text.

138. Orfield, *supra* note 16, at 663 (citing VIGGO BENTZON, *FAMILIERETTEN* 155 (1924)). After the transfer of the Virgin Islands to American sovereignty in 1917, incompatibility of temper was one of the grounds recognized in the Code of Laws of the Municipality of St. Croix in 1920, and a similar code was enacted for St. Thomas and St. John the following year. Each code contained the incompatibility provision in its Title III, ch. 44, § 7(8). The history of the Virgin Islands' non-fault statute is traced in Lester B. Orfield's *Divorce for Tempermental Incompatibility*. Orfield, *supra* note 16, at 662-62. *See also* Burch v. Burch, 195 F.2d 799, 805-06 (3d Cir. 1952).

139. Orfield, *supra* note 16, at 663 (quoting BENTZON, *supra* note 138, at 155).

140. 1933 N.M. Laws 54; 1935 Alaska Sess. Laws 54.

141. 1953 Okla. Sess. Laws 22; 1967 Nev. Stat. 278; 56 Del. Laws 296 (1968); 1969 Kan. Sess. Laws 286.

mal legal system. Referring to the formal legal system, Friedman and Percival have noted that the "study of law in this country is mainly the study of appellate case law."¹⁴² Higher-court opinions, in the words of legal historian Michael Grossberg, "offer the most thorough commentary on the law."¹⁴³ Historian Robert L. Griswold agreed, although he conceded that the decisions of appellate tribunals "suggest an elegance and consistency to legal reasoning not evident at the local level."¹⁴⁴ These appellate opinions reveal a legal system remarkably divided about the legitimacy of the popular culture of divorce. Even when the legislative mandate provided an opportunity for bridging the gap between the two cultures, many appellate judges declined the invitation. The nineteenth-century view of divorce, insisting on a bright line between the meritorious and the meretricious, lived on in the ideology of many appellate courts long after the popular culture ceased to pay it even lip service.

B. New Mexico: "Clean Hands" v. "Trial Marriage"

New Mexico adopted the first modern fault-free divorce ground with surprisingly scant notice. Throughout its history, New Mexico's divorce jurisprudence had been thoroughly grounded in fault. In 1872, its territorial courts were given authority to grant divorces in cases of adultery, cruelty, and abandonment.¹⁴⁵ In 1887, the legislature provided for divorce in the event of habitual drunkenness or nonsupport by a husband of his wife.¹⁴⁶ Three more grounds made their appearance in 1901: impotency, the wife's undisclosed pregnancy by another at the time of the marriage, and imprisonment for a felony during the

142. LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910*, 287 (1981).

143. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* x (1985).

144. Griswold, *Evolution of the Doctrine of Mental Cruelty*, *supra* note 37, at 141 n.3. For an assessment of the appellate report as a historical document, see G. Edward White, *The Appellate Opinion as Historical Source Material*, 1 J. INTERDISC. HIST. 491 (1971).

145. 1872 N.M. Laws 25.

146. 1887 N.M. Laws 33.

marriage.¹⁴⁷ A generation later, in 1933, the state legislature made a dramatic change in the formal law, by adding one word — “incompatibility” — to the catalog of divorce grounds.¹⁴⁸ There is no legislative history on the passage of the bill, nor do the official Governor’s Messages of the time period contain any mention of a proposed change in the divorce law. To trace the winding and rewinding of formal divorcing in New Mexico, we must turn to four decades of appellate decisions.

The first attention paid to the new incompatibility statute by the New Mexico Supreme Court came in an unusual 1935 case, which never formally presented the issue at all. Twenty-four year old Margarita Medina De Chavez’s marriage to Francisco Chavez, whose age was given as between seventy and eighty, broke up in bitterness and mutual accusation.¹⁴⁹ Margarita sued her husband for desertion and nonsupport.¹⁵⁰ Francisco, whom the trial court described as “decrepit and in his dotage,” claimed that Margarita had deserted him and was living with Reuben Garcia.¹⁵¹ The trial judge answered the question of who deserted whom in favor of Margarita.¹⁵² Further, the divorce judge believed that, since Margarita’s adultery with Reuben had occurred after her separation from Francisco, her fault did not count as a valid recriminatory defense for her aged husband.¹⁵³ Thus, Margarita was awarded both divorce and alimony.¹⁵⁴

147. 1901 N.M. Laws 62. Nineteenth-century antecedents to New Mexico’s incompatibility statute are discussed in Orfield, *supra* note 16, at 659-60. The history of the new approach in New Mexico is sketched in Wadlington, *supra* note 43. While the impotency ground is not based on fault, it frustrates the traditional procreative purposes of the union. Non-disclosure of pregnancy and commission of a felony, while not conventional fault grounds either, focus on behaviors which may harm the marriage. Interestingly, section 23 of the 1901 Act provided that when couples had permanently separated, either could request that a court divide their property, dispose of their children, or (in the wife’s case only) award alimony. 1901 N.M. Laws 62. The statute apparently allowed the couple to separate without judicial approval.

148. 1933 N.M. Laws 54. In *Poteet v. Poteet*, 114 P.2d 91, 93-97 (N.M. 1941), the New Mexico Supreme Court wondered whether the state legislature had intended that the new divorce ground of incompatibility supplement the 1901 provision (*see supra* note 147) pertaining to rights of separated couples to have the court decide child custody and resolve financial arrangements. That the state’s highest court had to speculate as to the legislature’s intent only a few years after the enactment of the new divorce law, suggests the difficulty of ascertaining legislative motives.

149. *Chavez v. Chavez*, 50 P.2d 264, 264-65 (N.M. 1935).

150. *Id.* at 264.

151. *Id.*

152. *Id.*

153. *Id.* at 264-65.

154. *Id.* at 264.

On appeal, the New Mexico Supreme Court held that adulterers can never have clean consciences.¹⁵⁵ Postponing the satisfaction of immoral concupiscence until after separation, noted Justice A.L. Zinn in the majority opinion, does not diminish the absolute sway of the recrimination doctrine.¹⁵⁶ Margarita should not gain a divorce because "whoever appeals to a court for relief must do so with clean hands."¹⁵⁷ The absence of statutory sanction or prior decisional law as to recrimination did not prevent the court from treating it as a concrete pillar of the common law. The justices relied on a variety of cases from around the country,¹⁵⁸ including an 1882 Michigan case, *Hoff v. Hoff*,¹⁵⁹ in which the eminent Justice Thomas Benton Cooley pronounced:

A proper administration of justice does not require that courts shall occupy their time and the time of people who are so unfortunate as to be witnesses to the misdoings of others in giving equitable relief to parties who have no equities Divorce laws are made to give relief to the innocent, not to the guilty.¹⁶⁰

Accordingly, the majority in *Chavez* reversed the lower court and remanded for a new divorce trial.¹⁶¹

The incompatibility statute was examined in two concurring opinions. Justice Andrew H. Hudspeth believed that alimony was at the heart of the Chavez' dispute,¹⁶² and he strongly disagreed with the majority's revival of the recrimination doctrine.¹⁶³ Hudspeth noted the "paradoxical and puzzling"¹⁶⁴ nature of recrimination, as well as the state divorce statute's failure to mention it.¹⁶⁵ He suggested that, unless limits were set on recrimination, "incompatibility" would be a defense in an action brought on "incompatibility."¹⁶⁶ He went on to describe the new alternative to fault:

155. *Id.* at 265.

156. *Id.*

157. *Id.*

158. *Id.* at 265-66.

159. *Hoff v. Hoff*, 12 N.W. 160 (Mich. 1882).

160. *Id.* at 160. In *Hoff*, the trial court had awarded both husband and wife a divorce on the ground of extreme cruelty of each toward the other. The appellate court took pains to remind the trial judge that the recrimination doctrine forbade this evenhandedness. *Id.*

161. *Chavez*, 50 P.2d at 266 (Hudspeth, J., concurring specially).

162. *Id.* at 269.

163. *Id.* at 266-68.

164. *Id.* at 267.

165. *Id.* at 266.

166. *Id.* at 267.

When the Legislature wrote this additional ground of divorce into our law, they intended to afford a remedy for a spouse incompatible with his or her mate, and that too without regard to the wishes of the other spouse, or the fact that the other spouse might have a ground for divorce. It is a recognition of the fact that in many cases both spouses are to blame. . . .¹⁶⁷

Similarly opposed to recrimination, Justice Howard L. Bickley argued that divorces should be granted even when irreconcilable spouses are both at fault.¹⁶⁸ Refusing to set free such wives and husbands only led to the commission of more offenses against public morality.¹⁶⁹ Bickley believed that the new incompatibility ground was a legislative "declaration of policy that the district courts have full power and authority to decree divorces from the bonds of matrimony when the court is satisfied *that the parties can no longer live together*."¹⁷⁰

Formal affirmance of the ground of incompatibility waited until 1941. Robert C. Poteet and his wife Leera had been married for twenty years prior to Robert's filing a divorce action based on the new ground.¹⁷¹ Leera disagreed with his claim of incompatibility, however, characterizing the separation as owing to Robert's desertion.¹⁷² She saw no reason why they could not "live together harmoniously as husband and wife" if only Robert would "refrain from associating with other women and be contented with his home life."¹⁷³ Robert's plurality of affections was not as key to the litigation, however, as was Leera's ill health. After enduring several operations, she needed Robert's financial support. Either she believed she had a steadier expectation of income if she remained Robert's wife and could enforce his obligation to provide her necessities, or the estranged spouses had simply come to an impasse on the amount of alimony to be provided. The trial court found that the spouses were incompatible, thus granting Robert a divorce.¹⁷⁴ In the trial court's view, "If one party is unwilling to continue the relation there isn't any power on earth — court, or anywhere else — to make it a go."¹⁷⁵

167. *Id.* at 268 (Hudspeth, J., concurring specially).

168. *Id.* at 269.

169. *Id.*

170. *Id.* at 272 (Bickley, J., concurring specially).

171. *Poteet v. Poteet*, 114 P.2d 91, 91 (N.M. 1941).

172. *Id.* at 92.

173. *Id.*

174. *Id.* at 92, 97.

175. *Id.* at 92.

On appeal, the ailing wife insisted that a divorce should only be awarded to the "injured" party.¹⁷⁶ As Justice Bickley phrased the wife's position for a unanimous supreme court, she "contend[ed] for a very strict sociological view, and argue[d] that the attainment of divorce should be very difficult."¹⁷⁷ As the author of the liberal concurrence in *Chavez*, Justice Bickley could not reasonably be expected to espouse the wife's "very strict sociological view," whatever that meant. On the contrary, Bickley opined that the incompatibility statute was designed to remedy the flaws in the 1901 law governing legal separation.¹⁷⁸ Spouses who separated, but could not divorce, lived in a hazardous legal limbo where the temptation to establish extramarital sexual liaisons loomed too closely for the average and otherwise law-abiding New Mexican. To prevent the public corruption of "husbandless wives" and "wifeless husbands," the incompatibility statute allowed permanent separations to mature into spousal freedom.¹⁷⁹ In affirming the trial court's grant of a divorce, Justice Bickley pointedly distinguished incompatibility from the unacceptable option of divorce by mutual consent.¹⁸⁰ Curiously, he rejected mutual consent while simultaneously noting that it was an approved method for ending inhospitable marriages among numerous peoples both past and present. Mutual consent divorce had, in Justice Bickley's estimation, received approbation from such thinkers as More, Milton, Selden, Lecky, Montesquieu, Bentham, and Mill, all of whom he listed in his opinion.¹⁸¹

The jurisprudential pendulum achieved its highest liberal peak in the 1946 decision which reversed *Chavez* and outlawed recrimination as a divorce defense. Several years after his twenty-year marriage had effectively ended with a separation,¹⁸² Nick Pavletich sued his wife for an incompatibility divorce.¹⁸³ Ellis Cacic Pavletich countered that Nick's adultery with Lucille Worrell should block his obtaining legal freedom.¹⁸⁴ The true nature of the quarrel may be found in the 336-page transcript of the divorce hearing, much of it relating to disputes over property.¹⁸⁵ District Judge Albert R. Kool granted Nick a divorce, rejecting the notion of recriminatory defenses because they fostered only "an intolerable moral situation as long as those

176. *Id.*

177. *Id.*

178. *Id.* at 94.

179. *Id.*

180. *Id.* at 96.

181. *Id.* at 93.

182. *Pavletich v. Pavletich*, 174 P.2d 826, 829 (N.M. 1946).

183. *Id.*

184. *Id.* at 826.

185. *Id.*

parties live and are physically capable of the sexual act . . . I think it [recrimination] is a cruel and inhuman law."¹⁸⁶

Speaking through the author of the other *Chavez* concurrence, Justice Hudspeth, a supreme court majority agreed with Judge Kool that a spouse's adultery does not trump his or her own otherwise valid divorce action. In a wide-ranging discussion, Hudspeth reviewed the "slowly changing" views of recrimination around the world.¹⁸⁷ He cited the idea of "divorce without fault" prevailing in lands as disparate as Sweden, Russia, and Germany.¹⁸⁸ He discussed various legal authorities, including extended quotation from J.G. Beamer's influential essay, *The Doctrine of Recrimination in Divorce Proceedings*, which concluded that this peculiar divorce defense violated human experience and bred contempt for the law and the courts which administer it.¹⁸⁹ But Chief Justice Daniel K. Sadler launched a furious dissenting volley at his *Pavletich* colleagues. Incensed that incompatibility "brings us to the very border, if not into the actual domain, of trial marriage,"¹⁹⁰ Sadler argued for a retention of recrimination as a way to set limits to incompatibility. He feared that the new ground, "if freely employed," would effectively eliminate all others except possibly incurable insanity as the basis for divorce.¹⁹¹ Sadler stood fast against the sanctioning of a divorce to a party who had triggered conjugal incompatibility by committing "a capital sin of the marriage relation."¹⁹²

Recrimination's death had indeed been announced prematurely. Four years after *Pavletich*, the departure of Justices Hudspeth and Bickley from the supreme court bench allowed Justice Sadler to eviscerate its earlier holding and resurrect recrimination in New Mexico.¹⁹³ Myrtle I. Clark had pleaded her husband's adultery in response

186. *Id.* at 829.

187. *Id.* at 830.

188. *Id.*

189. *Id.* at 830-32. See also Beamer, *supra* note 22; Wanda Lee Spears, *Domestic Relations — The Modern Trend Toward Rejection of Recrimination*, 36 KY. L.J. 342, 342-46 (1948) (praising the *Pavletich* rationale).

190. *Pavletich*, 174 P.2d at 832 (Sadler, J., dissenting).

191. *Id.* at 833.

192. *Id.* at 832-33. *Pavletich* generated a bit of legal notoriety. See discussion in Orfield, *supra* note 16, at 667. *Pavletich* was also noted in Lampkin H. Butts, *Divorce — Denial of the Doctrine of Recrimination as a Bar to Divorce: Recent Decisions*, 18 MISS. L.J. 471, 471 (1947); Spears, *supra* note 189, at 342 (1948); *Recent Cases*, 31 MINN. L. REV. 736, 744 (1947); *Recent Decisions*, 33 VA. L. REV. 342, 355 (1947). Similar fears of a degeneration into trial marriage were later expressed in Oklahoma, which had adopted incompatibility in 1953. Burl Harris, *Divorce: Incompatibility as Ground for*, 7 OKLA. L. REV. 99, 99-102 (1954).

193. *Clark v. Clark*, 225 P.2d 147 (N.M. 1950).

to his assertion of marital incompatibility.¹⁹⁴ She contended that Robert's insistence on "his pretended right to engage in extra-marital adulteries"¹⁹⁵ was the sole cause of their incompatibility. The trial court refused to hear evidence about Robert's infidelity, since *Pavletich* had rendered such testimony irrelevant.¹⁹⁶ By a three-to-two vote, the New Mexico Supreme Court remanded the case with instructions that the district court hear and evaluate the recriminatory evidence.¹⁹⁷ The new *Clark* majority held that a divorce should be denied if it "shocks the conscience" of a trial court to reward a blameworthy plaintiff with undeserving freedom.¹⁹⁸

Despite Justice Sadler's efforts, however, he could not destroy incompatibility. By the 1950s it became clear that the *Clark* limitation was ineffectual in slowing down divorce.¹⁹⁹ Trial courts were no more interested in the enforcement of recrimination than was the general public. As legal scholar Robert Earl Lee suggested, recrimination is "particularly pernicious because it arouses in the layman who learns of it a profound contempt for the law. And of course in this instance the layman is right."²⁰⁰ By 1952, as Justice Henry G. Coors noted, incompatibility had become New Mexico's most commonly used divorce

194. *Id.* at 148.

195. *Id.*

196. *Id.*

197. *Id.* at 149.

198. *Id.* Two Justices dissented on the *Pavletich* rationale: a finding of incompatibility should end the trial court's inquiry. *Id.* at 150. In the majority opinion, Justice Sadler (no longer Chief Justice) revealed that he had fallen one vote short of completely overruling *Pavletich*, and so had to settle for its severe restriction. *Id.* at 148-49. As one commentator noted about incompatibility after *Clark*, "[T]he concept of fault continues to exist in New Mexico though in an attenuated fashion." Orfield, *supra* note 16, at 667.

199. Perhaps the problem was that in the vast majority of instances neither the parties nor the divorce courts believed in recrimination. Most cases were uncontested, and rare must have been the plaintiff sloppy enough to prove the case against his or her own position. Moreover, other divorce courts shared New Mexico trial judge Albert R. Kool's view that recrimination was "cruel and inhuman." In Wisconsin, the state "divorce counsel" represented the official public interests in divorce suits. According to one report, the "divorce counsel" had recommended denial of dissolution in over 100 suits on the basis of the recrimination doctrine. The Wisconsin trial courts had followed his recommendation in only one case. N.P. Feinsinger and Kimball Young, *Recrimination and Related Doctrines in the Wisconsin Law of Divorce as Administered in Dane County*, 6 WIS. L. REV. 195, 213 n.39 (1931). While the Idaho Supreme Court eschewed dramatic pronouncements on the excesses of recrimination, it commanded trial courts to use their common sense in applying, or refusing to apply, what the court termed the equitable "maxim" of recrimination. *Howay v. Howay*, 74 Idaho 492, 497, 264 P.2d 691, 694 (1953). The Idaho Supreme Court also specifically forbade extending recrimination to cases arising under the state's living-apart divorce law. *Jolliffe v. Jolliffe*, 76 Idaho 95, 100, 278 P.2d 200, 202 (1954).

200. 1 ROBERT EARL LEE, NORTH CAROLINA FAMILY LAW § 71, at 347 (4th ed. 1979) (quoting HOMER H. CLARK, JR., CASES AND MATERIALS ON DOMESTIC RELATIONS 704 (2d ed. 1974)).

ground.²⁰¹ After nearly two tortuous decades of development, incompatibility had finally shed the skin of fault. The *Clark* "shock-the-conscience" test was not overruled, but no court ever applied it. In the words of Justice Coors, all a plaintiff needed to demonstrate was "that a state of incompatibility exists regardless of whether it is anyone's or no one's fault."²⁰² No other relevant cases were decided in New Mexico until 1973. In two cases that year, the supreme court examined the history of incompatibility and recrimination "in the light of present social conditions."²⁰³ The court once again abolished the defense of recrimination in proceedings under the incompatibility statute, admitting the obvious in its understated confession that "[t]his Court has not been entirely consistent in its views as to the validity and effectiveness of recrimination as a defense to divorce on the ground of incompatibility."²⁰⁴

The New Mexico experience with formal incompatibility confirms Professor Wadlington's observation that, in most jurisdictions, "the ingrained concept of fault [was] difficult for the judiciary to overcome."²⁰⁵ Nor was Wadlington alone; years before New Mexico's highest tribunal finally phrased its mea culpa about its deviating standards, the United States Court of Appeals for the Third Circuit had remarked that New Mexico courts "have had difficulty in dealing with [incompatibility], even in the formulation of its definition and especially in deciding what recognition should be accorded to the defense

201. *Bassett v. Bassett*, 250 P.2d 487, 495 (N.M. 1952); see also *Hines v. Hines*, 328 P.2d 944 (N.M. 1958). The statistics bore him out. In 1948, for example, nearly seven-eighths of New Mexico divorce decrees were premised on incompatibility. This rate dwarfs the percentages for desertion (7.6%), neglect to provide (1.9%), cruelty (0.8%), and drunkenness (0.4%). Incredibly, not one adultery divorce was recorded in New Mexico in 1948. JACOBSON, *supra* note 15, at 123 tbl.59, 126.

202. *Bassett*, 250 P.2d at 495.

203. *Garner v. Garner*, 512 P.2d 84, 86 (N.M. 1973). See also *New Mexico ex rel. DuBois v. Ryan*, 514 P.2d 851, 853 (N.M. 1973). Although recrimination was not formally annulled until the *Garner* decision, the victorious appellee in that case actually requested that the New Mexico Supreme Court penalize her ex-spouse for filing a "frivolous appeal" suggesting the viability of recrimination. The court declined the invitation. *Garner*, 512 P.2d at 87.

204. *DuBois*, 514 P.2d at 853.

205. Wadlington, *supra* note 43, at 52.

of recrimination.²⁰⁶ Nor was New Mexico alone in grappling uncertainly with formal no-fault. In Oklahoma, evidence suggests that the practicing divorce bar, weary of the hypocrisy of manipulating the cruelty ground, convinced the legislature to pass an incompatibility statute in 1953.²⁰⁷ Three years later, the Oklahoma Supreme Court rendered its interpretation of "incompatibility."²⁰⁸ In a marvel of logical exegesis, the court concluded (in Professor Wadlington's delicious paraphrase): "[T]hat spouse X might be compatible with spouse Y even though Y was incompatible with X, and . . . under these circumstances no divorce should be granted."²⁰⁹

Incompatibility was not the only option the formal legal system pursued to manage the divorce explosion; indeed, its adoption by the late 1960s by only six states and the Virgin Islands rendered this experiment rather limited. Another formal reform of the legal system, far more extensively applied, was the living-apart statute. The following section explores the range of this non-fault alternative, and concludes that living-apart laws were terrific failures because they ignored the demands of the popular culture.

C. The World of the Living-Apart Statutes

Many states took a different, time-oriented, approach to non-fault alternatives. In these jurisdictions "living-apart" statutes recognized marital breakdown as a ground for divorce so long as it was evidenced by the parties' separation for a specified time. As the following section will show, on first blush, since proof of the requisite separation was all that these statutes appeared to require, they appeared to provide a demonstrably simpler threshold than the incompatibility laws. In fact, however, some appellate courts again improvised a demand for an innocent plaintiff onto these statutes. More significantly, al-

206. *Shearer v. Shearer*, 356 F.2d 391, 399-400 (3d Cir. 1965) (Freedman, J., dissenting). In her otherwise scathing attack in *Our Scandalous Divorce Laws*, Dorothy Dunbar Bromley had kind words for New Mexico's legal experiment. Apparently unaware of incompatibility's rocky road on appeal, Bromley lauded the statute unstintingly: "The only state where a self-respecting man or woman can come into court and terminate a marriage without at least offering proof of prolonged separation is New Mexico. This state admits as a ground for divorce plain incompatibility, in reality the most common cause for divorce, marriage counsellors will tell you." Dorothy Dunbar Bromley, *Our Scandalous Divorce Laws*, 66 AM. MERCURY 272, 275 (1948).

207. Bliss Kelly, *Preventing Divorces: Oklahoma City's Family Clinic*, 45 A.B.A. J. 566, 566 (1959); 1953 Okla. Sess. Laws 22.

208. *Chappell v. Chappell*, 298 P.2d 768, 771 (Okla. 1956).

209. Wadlington, *supra* note 43, at 47. In a symposium on the Law of Domestic Relations in Oklahoma, Richard T. Sonberg criticized the Oklahoma court in terms nearly identical to the Third Circuit's comments about New Mexico. Richard T. Sonberg, *Grounds for Divorce in Oklahoma*, 14 OKLA. L. REV. 395, 403 (1961).

though legislatures continued to reduce the waiting periods which triggered applicability of these non-fault laws, divorce-minded wives and husbands avoided them in droves. Litigants vastly preferred to role-play their parts on the soothing stage of a courtroom bound by the thoroughly corrupted but user-friendly rules of fault.

Seen from overhead, the tactical maneuvering between state legislatures and divorce clients resembled a "B" movie chase scene. The legislature would pass a living-apart statute with a lengthy waiting period. When few or no divorcees availed themselves of the statute, the legislature would shorten the time period. By then, the divorce-minded were even more determined not to be stalled in their quest for ready divorce. The legislature would try again, but never until quite recent times able to find its quarry. Twenty-three American jurisdictions enacted living-apart statutes prior to California No-Fault in 1969. While the first such statute was passed in Wisconsin in 1850, only two other nineteenth-century state legislatures enacted similar legislation. The bulk of living-apart statutes date from the period beginning at the end of the Progressive Era.

These laws constituted a major theoretical inroad into the dominant fault milieu of family law. They allowed the parties to decide for themselves when a marital relationship had terminated, requiring only proof that a specified time period had elapsed in order to assure themselves and society that the rift was irremediable. Because the court proceedings were limited to technical issues of jurisdiction, venue, and proof of separation, the parties were spared the intrusion into their privacy which fault divorce proceedings mandated. The following table contains the living-apart statutes enacted in twenty-three jurisdictions prior to California No-Fault, along with the period of separation required prior to the divorce filing:

Table 4

Living-Apart Divorce Statutes Enacted Prior to 1971	
<i>Alabama</i>	
1915 Ala. Acts 413	5 years ²¹⁰
1933 Ala. Acts 153	2 years
<i>Arizona</i>	
1931 Ariz. Sess. Laws 12	5 years
<i>Arkansas</i>	
1937 Ark. Acts 167	3 years
<i>Delaware</i>	
51 Del. Laws 27 (1957)	3 years
56 Del. Laws 296 (1968)	18 months
<i>District of Columbia</i>	
49 Stat. 539 (1935)	5 years
79 Stat. 889 (1965)	1 year
<i>Hawaii</i>	
1967 Haw. Sess. Laws 76	3 years
1970 Haw. Sess. Laws 116	2 years
<i>Idaho</i>	
1945 Idaho Sess. Laws 125	5 years
<i>Kentucky</i>	
1850 Ky. Acts 498	5 years
<i>Louisiana</i>	
1916 La. Acts 269	7 years
1932 La. Acts 31	4 years
1938 La. Acts 430	2 years
<i>Maryland</i>	
1937 Md. Laws 396	5 years
1947 Md. Laws 240	3 years
1961 Md. Laws 104	18 months

210. Alabama's unique living-apart statute allowed relief to a wife who had been separated from her husband for five years, and had not received support from him during that time. 1915 Ala. Acts 415. In 1919, (1919 Ala. Acts 631) the period without support was reduced to two years, and it remained at two years when the legislature lowered the separation period to two years in 1933. 1933 Ala. Acts 153. Despite the element of non-support, the Alabama Supreme Court decided that the divorce provision did not require proof of marital fault but merely reflected the *fait accompli* of a broken marriage. *Barrington v. Barrington*, 89 So. 512, 513 (Ala. 1921). In 1948, the court reaffirmed the non-fault character of the law by upholding a divorce awarded to a woman who bore a child from an adulterous relationship. *Gardner v. Gardner*, 34 So. 2d 157, 159-60 (Ala. 1948).

Nevada

1931 Nev. Stat. 111	5 years
1939 Nev. Stat. 23	3 years
1967 Nev. Stat. 278	1 year

New York

1966 N.Y. Laws 254	2 years
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North Carolina

1907 N.C. Sess. Laws 89	10 years
1921 N.C. Sess. Laws 63	5 years
1933 N.C. Sess. Laws 163	2 years
1965 N.C. Sess. Laws 636	1 year

Puerto Rico

1933 P.R. Laws 46	7 years
1942 P.R. Laws 62	3 years

Rhode Island

1893 R.I. Acts & Resolves 1187	10 years
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South Carolina

1969 S.C. Acts 170	3 years ²¹¹
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Texas

1925 Tex. Sess. Law Serv. 4629 (West)	10 years
1953 Tex. Sess. Law Serv. 91 (West)	7 years
1967 Tex. Sess. Law Serv. 288 (West)	3 years

Vermont

1941 Vt. Acts & Resolves 43	3 years
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Virginia

1960 Va. Acts ch.108	3 years
1964 Va. Acts ch.363	2 years

Washington

1917 Wash. Laws 106	8 years
1921 Wash. Laws 109	5 years
1965 Wash. Laws 15	2 years

West Virginia

1969 W. Va. Acts 49	2 years
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Wisconsin

1866 Wis. Laws 37	5 years
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Wyoming

1939 Wyo. Sess. Laws 106	2 years
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211. In order to enact its living-apart statute in 1969, South Carolina voters first amended the state constitution. 1969 S.C. Acts 77 (noting amendment of 1895 Constitution, article XVII, section 3).

Ostensibly, the theory behind living-apart statutes held simply that dead marriages deserved a formal burial. In 1929, the Supreme Court of Rhode Island articulated the rationale for these laws: "Any injury to the state from the dissolution of the family cannot now be cured by insisting on the continuance of a semblance of a marriage when the substance has long since disappeared."²¹² The Idaho Supreme Court later elaborated on the philosophical basis for these laws:

The proposition is universally accepted that the state has a paramount interest in marriage and divorce. The family unit, constituting as it does the very base of our religious, cultural and moral life, is one of the principal supporting pillars of our civilization. The state created by the people for the protection and promotion of their common welfare, must protect and foster marriage and the family relationship. However, the state is not the author of man. It cannot alter basic biological or other characteristics endowed by a higher authority. Any attempt to do so, or to ignore or suppress the fundamentals of human nature, dooms the regulation to failure and defeats its purpose. The result is often a train of unanticipated evils more grievous than those sought to be corrected. When the marriage relationship has completely and finally broken down and the relations of the parties have reached an impasse where reconciliation is impossible and the family unit has ceased to exist, no rule or regulation promulgated by authority of the state can restore it. The object of the state's protection has ceased to exist. Whether the fault be of one only or of both the parties, the result is the same. From that point on the best interest of society is served by a recognition of the ultimate fact and its consequences, not only upon the individuals involved but upon the community itself.²¹³

But the living-apart statutes did not authorize divorce upon marital breakdown. The catch to the laws is reflected in the "long since disappeared" language of the Rhode Island decision. A statute which required a multi-year separation prior to filing guaranteed that the departed ghost of the marriage would never return; it also assured that the statute would seldom be utilized.

Early twentieth-century legislators were in a bind. They knew, as both trial judges and the popular press repeatedly broadcast, that

212. *Dever v. Dever*, 146 A. 478, 479 (R.I. 1929).

213. *Howay v. Howay*, 74 Idaho 492, 501, 264 P.2d 691, 697 (1953).

mutual consent was the operating principle in American divorce court. They were also troubled by the divorce rate, rising steadily in the teeth of restrictive and unchanging laws. Many state legislators endorsed what sociologist Ray E. Baber termed a "half solution" to the problem.²¹⁴ They crafted statutes which would, on the surface, appeal to divorce-bound wives and husbands, particularly those more squeamish and less willing to engage in testimonial exaggeration or outright perjury. These laws would not require one spouse to malign the character of the other. Instead, they would appeal to marriage partners who had mutually agreed to terminate the association and sought to do so fairly and without needless blame.²¹⁵

A non-fault basis, the removal of the need for vicious accusation, and the appeal of an "honest" divorce procedure: these were the carrots in the living-apart statutes, which Baber also called "slow motion 'divorce by mutual consent.'"²¹⁶ There was only one stick, but it was a large one. In order to obtain these benefits, a couple would have to separate and then wait for five or eight or ten years. Despite their popularity with the legislatures, non-fault alternatives prior to 1970 never succeeded in capturing a significant market share of divorces. Appellate judges were at times skeptical about disentangling living-apart statutes from the umbrella of fault and sporadically ruled that the party seeking the divorce not be culpable in causing the separation.

But by far the major reason for the failure of the non-fault alternatives was that the divorcing public largely ignored them. The unappetizing waiting periods discouraged all but a very few. As William Seagle exclaimed in the *American Mercury*, Washington's law permitting no-fault divorce after eight years of separation was a wonderful

214. BABER, *supra* note 20, at 518.

215. See SIRJAMAKI, *supra* note 62, at 184. By positing mutual consent as the operating paradigm of American divorce, I do not mean to suggest that all decisions by divorcing couples were free and voluntary. Undoubtedly, many individuals merely acquiesced in a divorce decision made by their spouses, a capitulation reflecting either a power imbalance within the relationship or a felt helplessness in the face of legal process. My review of the literature, both popular and formal, suggests only that those who mutually gave free consent greatly outnumbered those who grudgingly did so and that the cultural tone of the former group dominated the public discourse.

216. BABER, *supra* note 20, at 518.

idea, "but eight years is a long time in a world where life is short."²¹⁷ During the entire period under study, Rhode Island had a provision in effect which allowed the trial court, in its discretion, to award a divorce to parties separated for ten years.²¹⁸ The state supreme court's approval of this technical deviation from fault did not trigger a rush upon the courthouse; nor could it have been so intended.²¹⁹ In fact, even states which repeatedly sliced their waiting period found little increase in takers. North Carolina's first living-apart statute, passed in 1907, required a ten-year separation. In 1921, the legislature halved that time period. Twelve years later the living-apart phase was reduced to two years. Finally, in 1965, only a one-year separation was required. In Washington, the period of anticipation fell from eight years in 1917 to five years in 1921 to two years in 1965. In Maryland, the statutory procedure took five years in 1937, three years in 1947, and eighteen months in 1961.²²⁰ No matter what the numerical prestidigitation, so long as the state's divorce code included cruelty as a divorce ground, none of these non-fault statutes were widely used. Why not?

Statutes providing for living-apart divorce were not aimed at facilitating divorce. On the contrary, they were efforts to stall the divorce traffic. Legislatures provided this kinder, gentler alternative to fault divorce in the hope that division-minded couples would wait out the statutory separation period, rather than hurtling pell-mell into court on a fraudulent ticket of fault. When vastly increasing numbers chose to enlarge the scope of fraud and perjury in order to obtain "quickie" fault divorces, the legislatures lowered the bait of the living-apart statutes. But no manner of conservative reform sufficed to curb the rush. Although a handful of long-dead marriages were formally buried under these statutes, it strains human reason to believe that

217. Seagle, *supra* note 2, at 41. The great length of most living-apart statutes was also criticized. Bromley, *supra* note 206, at 273-77. Generally, however, the popular press ignored living-apart laws, as did the divorcing population. In 1948, only three percent of all American divorces were obtained under the living-apart statutes, although such laws were in effect in 17 states and the District of Columbia. Estimates for individual states vary. In North Carolina, which did not allow divorce on the ground of cruelty, 91% of all divorces were on the separation ground. This legal cause was also relatively popular in Louisiana (63%), the District of Columbia (24%), Vermont (20%), and Nevada (14%). In the remaining living-apart states, less than one-tenth of marital dissolutions were so premised. JACOBSON, *supra* note 15, at 123.

218. 1893 R.I. Acts & Resolves 1187.

219. See Dever, 146 A. at 479. Rhode Island took its ten-year provision literally to require a decade of sane contemplation by both parties upon the fate of their relationship. The state supreme court denied a divorce in a case in which the couple had lived apart for 10 years, but the wife had been insane for the final two-and-one-half years. Camire v. Camire, 113 A. 748 (R.I. 1921).

220. See *supra* Table 4.

many couples desiring a divorce would plan on waiting for the bell to toll the eighth, or fifth, or even the third year of separation.²²¹ As we have seen, given the fact that eighty to ninety percent of all divorces were uncontested, few couples chose to wait. The cases which dot the state appellate reports illustrate no-consent divorce, where generally the stumbling block resulting in litigation was the lack of an accord on property and future financial issues. Reported divorce cases were always unrepresentative of the general patterns of American divorcing.

We now turn to the North Carolina experiment in living apart. Because North Carolina did not allow divorce on many of the usual grounds, such as cruelty, desertion, drunkenness, or neglect to provide, its living-apart statutes took on increased importance for divorce-minded couples. For example, Paul H. Jacobson's statistical monograph listed adultery as the divorce ground in only seven percent of North Carolina divorces in 1948, while ninety-one percent of the divorces were based on the separation statute.²²² North Carolina was the Reno of living apart. Of the 13,300 divorce decrees issued nationwide in 1948 on separation grounds, nearly 6,000 were obtained in North Carolina.²²³ The statistics displayed in Table 5 confirm the overwhelming popularity (if only by necessity) of the living-apart provisions in later years.

221. One marvelous Arizona case, however, assayed a twist on the planning-ahead theme. A husband successfully divorced his spouse on grounds of having lived apart for the requisite five years. The wife then filed a 60-page complaint seeking to overturn the divorce, one of the grounds being that her husband had bribed the Arizona Legislature to enact the living-apart statute in order to effect his divorce. The Arizona Supreme Court rejected the wife's suit and affirmed the propriety of the living-apart law. *Schuster v. Schuster*, 73 P.2d 1345 (Ariz. 1937).

222. JACOBSON, *supra* note 15, at 123, 125.

223. *Id.*

Table 5

Absolute Divorces in North Carolina, by Ground, 1958-1969 ²²⁴			
Year	Number	Ground	
		Living-Apart	Adultery
1958	5,261	5,039	198
1959	6,271	6,032	219
1960	5,990	5,788	184
1961	6,355	6,142	204
1962	6,768	6,540	213
1963	7,227	6,974	229
1964	7,107	6,889	209
1965	11,069	10,896	161
1966	11,320	11,268	47
1967	11,909	11,864	42
1968	12,385	12,339	40
1969	12,795	12,761	31

D. Living Apart in North Carolina

Irene and John Cook were married on March 22, 1900. But their wedded bliss ended by August of that year.²²⁵ A lengthy separation began, to be punctuated in the following decade by two extensive lawsuits in different counties, each reaching ultimate resolution in North Carolina's Supreme Court.²²⁶ During the course of the litigation, Irene persuaded a Wake County jury to convict John for abandonment in her action for limited divorce, and John sued Irene for absolute divorce in Alamance County.²²⁷

224. LEE, *supra* note 200, 220-21 tbl.1 & 1A. Effective July 1, 1965, the period of required separation was reduced from two years to one. 1965 N.C. Sess. Laws 636.

225. Cook v. Cook, 74 S.E. 639, 640 (N.C. 1912) [hereinafter *Cook I*].

226. Cook I, 74 S.E. at 639; Cook v. Cook, 80 S.E. 178 (N.C. 1913) [hereinafter *Cook II*].

227. Cook I, 74 S.E. at 640; Cook II, 80 S.E. at 178. Limited divorce, also known as divorce "a mensa et thoro," granted the parties a judicial separation but left them legally married. As a form of relief, limited divorce appealed to wives who wished to obtain a support order but not a final divorce. By contrast, absolute divorce, or divorce "a vinculo matrimonii," constituted a total severing of the bonds of matrimony. See generally HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 11.1, at 280-85 (1968); JOHN D. GREGORY ET AL., *UNDERSTANDING FAMILY LAW* 208-09 (1993).

John Cook premised his suit upon the 1907 statute providing for divorce upon a ten-year separation.²²⁸ Irene contended that John's suit was barred because the earlier Wake County verdict had conclusively found him guilty of a marital offense, which thus prevented him from attaining the status of the innocent plaintiff in his divorce action.²²⁹ Key to Irene's position was her argument that a living-apart action must be based on mutual consent.²³⁰ However, the formal legal system was still rigidly opposed to mutual consent. On the issue of recrimination, the supreme court narrowly ruled against her.²³¹ Speaking for the three-to-two majority, Justice William A. Hoke found nothing in the statute "to indicate that the right conferred is dependent on the blame which may attach to the one party or the other. . . ."²³² John's abandonment of Irene five months after their wedding was simply irrelevant to the action for absolute divorce.²³³

Justice Hoke regarded the statute's public policy basis to be the "assumption that it is not well for persons in these circumstances to be absolutely deprived of all right to marry again"²³⁴ A ten-year separation was evidence enough that the spouses were beyond reconciliation.²³⁵ In a concurring opinion pointedly directed at the two dissenters, Justice George H. Brown reiterated Justice Hoke's reasoning in sepulchral and more pungent language, claiming it impossible to imagine legislative intent

that the married life of the parties should be opened up and the dead skeleton of an unhappy past be resurrected and displayed in all its nakedness to the public gaze. Cui bono? . . . Why dig up from their graves the buried memories of broken

228. *Cook II*, 80 S.E. at 178. Passage of the first living-apart statute in the twentieth century had been far from assured. In the state senate, the measure succeeded by one vote, 23-22. 1907 N.C. Sen. J. 183 (Jan. 31, 1907).

229. *Cook II*, 80 S.E. at 180.

230. *Id.* at 179. In addition to the ten-year separation provision, the living-apart law further required that both husband and wife have resided in North Carolina for 10 successive years and that no children have been born to the marriage. 1907 N.C. Sess. Laws 89. In 1913, the latter two requirements were somewhat softened. Thereafter, only the plaintiff need show a 10-year residence and divorce could be obtained as long as no children were still living. 1913 N.C. Sess. Laws 165. No statutory provision required mutual consent.

231. *Cook II*, 80 S.E. at 180.

232. *Id.* at 179.

233. *Id.* Justice Hoke's position on recrimination is surprising, for in a concurring opinion in *Ellett v. Ellett*, 72 S.E. 861, 862 (N.C. 1911), Hoke insisted that a marital wrongdoer should be estopped from prosecuting a divorce action. Hoke maintained that "[t]he doctrine and the principle upon which [recrimination] rests lie deeper, and, in my opinion, should now and always prevail." *Id.* Now and always did not last two years.

234. *Cook II*, 80 S.E. at 180.

235. *Id.*

lives? It is better to let the dead past bury its dead and not disturb the remains. Such was evidently the wise and humane purpose of the Legislature.²³⁶

Dissenting Justice Platt D. Walker matched Justice Brown's fervor, if not his weakness for necrological metaphors. Walker maintained that the living-apart statute should be read in the context of the overall divorce law, which permitted the awarding of divorces only to "the party injured."²³⁷ By such placement, the legislature intended that the living-apart statute "work no wrong or oppression to the faithful and blameless spouse."²³⁸ Irene had steadfastly kept her marital vows, while John had "unlawfully, unjustly, and cruelly abandoned" her, and had thus forsaken his entitlement to the prescribed divorce procedure.²³⁹ Walker concluded as a divorcee Cassandra with long-range forecasting, warning that the court's holding will serve as a "precedent for any evil-minded husband to desert or abandon his wife for the very purpose of benefiting by the statute after ten years of his wrongful separation."²⁴⁰

Within six years of *Cook II*, Justice Hoke's interpretation of the living-apart statute had been interred, and recrimination exhumed.²⁴¹ The litigation between Robert and Susan Sanderson was factually similar to the *Cook II* imbroglio.²⁴² Could Robert be found guilty of cruelty toward Susan and nevertheless obtain a divorce after ten years? The answer from *Cook II* would be yes, but Justice William R. Allen, a *Cook II* dissenter, convinced his colleagues that a recent legislative revision of the statutory code should reverse the result. The reenactment of the divorce law by the legislature contained no change at all. However, Justice Allen asserted that, in its recent readoption of the divorce law framework, with both a "party injured" preamble and the living-apart statute, the legislature had signaled a desire to reverse *Cook II* and condition the applicability of the living-apart law to

236. *Id.* (Brown, J., concurring).

237. *Id.* at 181 (Walker, J., dissenting).

238. *Id.*

239. *Id.* at 182.

240. *Id.* Justice Walker's notion that a wave of malevolent husbands endowed with a capacity for extremely long-range planning was bent on desecrating married North Carolina womanhood was not the only striking conclusion he reached. He also opined that the legislature lacked the power to order the courts to award divorces to any but the injured spouse. *Id.* at 181.

241. *Sanderson v. Sanderson*, 100 S.E. 590 (N.C. 1919).

242. *Id.*

blameless petitioners.²⁴³ That this revisionist legerdemain was a subterfuge for overturning *Cook II* was made clear in Allen's strongly-worded conclusion, which echoed Justice Walker's earlier dissent: "[I]t would be a harsh and cruel rule to . . . permit a husband to drive a loving faithful wife from his home and refuse to permit her to return for ten years, and then reward his conduct by granting him a divorce . . ."

²⁴⁴

The preeminent importance of financial obligation was apparent in the next attempt to interpret the living-apart statute. After fourteen years of marriage, A.R. and Saphrony Ann Lee separated in 1910 when Saphrony was committed to a state hospital for the insane.²⁴⁵ Chief Justice Walter Clark defined the injured party as the spouse "wronged by the action of the other," and declared that the separation contemplated by the living-apart law had to commence by mutual consent.²⁴⁶ Unfortunately for A.R., his wife's insanity prevented him from clearing either of these judge-made hurdles.²⁴⁷ The Chief Justice concluded with the money issue: Saphrony "is still entitled to support from her husband."²⁴⁸

Another case involved Fay and W.J. Sitterson, married in 1913.²⁴⁹ By 1915, W.J. had been convicted of murder and sentenced to twenty years in prison.²⁵⁰ Although he had been pardoned in 1925, Fay had not seen or heard from him for ten years at the time she filed her action for divorce on the ground of living apart.²⁵¹ Her personal blamelessness was, however, insufficient to overcome the new jurisprudential obstacles the supreme court had devised in the quest for theoretical empire-building. The court denied Fay her divorce because her marital separation had been involuntary, as she could not show that

243. *Id.* at 590-91. The "Consolidated Statutes" were adopted by 1919 N.C. Sess. Laws 238 (effective Aug. 1, 1919). *Sanderson* was handed down on October 22, 1919. *Id.* at 390. The court did not discuss the fact that the lawsuit must have been filed and tried prior to the effective date of the revision.

244. *Sanderson*, 100 S.E. at 591. It should not be surprising that, as in *Cook II* and *Sanderson*, the wife insisted upon the right to be the injured party. It was only as the injured spouse that she could obtain alimony. See *Carnes v. Carnes*, 169 S.E. 222 (N.C. 1933). Equally unsurprising, given his turnabout on recrimination between *Ellett* and *Cook II*, was the fact that Justice Hoke failed to dissent in *Sanderson*, although it completely undid his opinion in *Cook II*. *Sanderson*, 100 S.E. at 590.

245. *Lee v. Lee*, 108 S.E. 352, 352 (N.C. 1921). North Carolina did not allow insanity as a separate divorce ground. *Id.* at 353. Although the Lees had apparently been separated for 10 years, the waiting period was reduced to five years shortly before the *Lee* opinion was handed down. 1921 N.C. Sess. Laws 63.

246. *Lee*, 108 S.E. at 352.

247. *Id.* at 352-53.

248. *Id.* at 353.

249. *Sitterson v. Sitterson*, 131 S.E. 641, 642 (N.C. 1926).

250. *Id.* at 641.

251. *Id.* at 642.

her husband had committed murder in order to effect the conjugal separation.²⁵²

Justice Walker's doubts that the North Carolina legislature could remove the requirement that a divorce plaintiff be the "party injured" were put to the test in 1931.²⁵³ The legislature passed a new statute allowing for a divorce "on application of either party," after five years of separation, so long as no children had been born to the marriage, and the plaintiff had resided in the state for five years.²⁵⁴ The supreme court had hinted in 1933 that the new "either party" statute had removed the "injured party" requirement.²⁵⁵ The issue was squarely presented the following year, when a trial judge, a disciple of Justice Walker, declared the "either party" statute unconstitutional "insofar as it gives the person who commits the wrong the right to take advantage of his own wrong."²⁵⁶ On appeal, the supreme court calmly reversed the trial court, stoically observing that "[t]he statute gives and the statute takes away."²⁵⁷

But the surprising serenity of the supreme court lasted precisely two years. In three cases decided in 1936, the court, now comprised entirely by devotees of Justice Walker, decided that the "either party" statute required a voluntary separation by mutual consent. A husband could not abandon his wife and then shield his immorality behind the facade of the "either party" language.²⁵⁸

252. *Id.* at 643. *Sitterson* is quite unusual as a *reported* case which was most likely uncontested. No counsel appeared for the husband at the appellate level, and, given the facts, it is almost certain that W.J. never made an appearance himself. Nevertheless, both the trial judge and the supreme court denied Fay relief. In response to the dilemma posed by cases like Fay *Sitterson's*, the legislature soon amended the law to permit a living-apart divorce in the case of "an involuntary separation . . . in consequence of a criminal act committed by the defendant prior to such divorce proceeding." 1929 N.C. Sess. Laws 6.

253. See *Cook II*, 80 S.E. at 181 (Walker, J., dissenting).

254. 1931 N.C. Sess. Laws 72.

255. *Reeves v. Reeves*, 167 S.E. 129, 129-30 (N.C. 1933).

256. *Long v. Long*, 175 S.E. 85, 85 (N.C. 1934).

257. *Id.* at 86. See also *Campbell v. Campbell*, 176 S.E. 250 (N.C. 1934).

258. *Hyder v. Hyder*, 187 S.E. 798 (N.C. 1936) [hereinafter *Hyder I*]; *Reynolds v. Reynolds*, 187 S.E. 768, 769 (N.C. 1936); *Parker v. Parker*, 186 S.E. 346, 347 (N.C. 1936). *Hyder I* illustrated the consequences of the supreme court's latest rotation around the wheel of recrimination. Mary Hyder tried to block Govan Hyder's divorce by alleging that the separation was due to his desertion. *Id.* at 798. The trial court, adhering to what was then guiding — if evanescent — precedent, refused to allow testimony about her allegation, as it was irrelevant under the "either party" statute. *Id.* at 799. In *Hyder I*, the supreme court remanded the case for the judge to allow the jury to hear the whole case. *Id.* at 800. The jury did, and found that Govan had indeed deserted Mary, thus disallowing his right to a divorce. Govan's appeal was unavailing. See *Hyder v. Hyder*, 1 S.E.2d 540 (N.C. 1939) [hereinafter *Hyder II*].

The apogee of recrimination was reached in 1938, when the supreme court closed the courthouse door to a husband who had the temerity to seek a divorce after he had been convicted and imprisoned for abandonment, nonsupport (of his wife and two children), and contempt of court.²⁵⁹ The court rewarded his chutzpa with a jeremiad about the "unlawful and wrongful conduct [of the husband]"²⁶⁰ rendering shameful his seeking "to procure an advantage" through the divorce court.²⁶¹

The court's high dudgeon extended to the legislature, whose neutral language had misled some into believing "either party" meant what it said. After a rhetorical sop to the legislature's supremacy over the judiciary in matters of public policy, the court asserted its hegemony over interpretation: "[I]t will not be assumed that any statute enacted by the Legislature was intended to override or depart from principles of public policy founded on good morals unless the language of the statute clearly and unequivocally indicates such an intent."²⁶² Moreover, whenever the legislature reenacted a law or used the same terms in a new statute, the court will presume that the legislature "in passing the later law knew what the judicial construction was which had been given to the words of the prior enactment."²⁶³ Justice A.A.F. Seawell later summarized the North Carolina judiciary's view of the proper relationship between these not-so-equal branches of government: "The history of divorce on the ground of separation discloses a number of statutes on the subject, interlaced with judicial interpretation and respectful legislative response."²⁶⁴

During World War II, the supreme court flip-flopped on living-apart divorce in a brace of cases whose facts cast the "villain" in an extremely favorable light. Temporarily thrown off-balance by their human sympathies, the justices changed their minds about the statute's reach, only to reverse themselves again a year later upon subsequent litigation in the same appeal.²⁶⁵ In 1940, C.M. Byers told his wife Sara Sherman Byers that he would not live with her any longer because of her drug and alcohol abuse.²⁶⁶ C.M. left the family home, in the words of the supreme court, "in a condition to afford ample comfort and protection to [Sara] and the children."²⁶⁷ Although the couple

259. *Brown v. Brown*, 196 S.E. 333, 334 (N.C. 1938).

260. *Id.* at 336.

261. *Id.* at 334.

262. *Id.* at 335.

263. *Id.*

264. *Byers v. Byers*, 22 S.E.2d 902, 905 (N.C. 1942) [hereinafter *Byers I*].

265. *Id.* at 903-04; see also *Byers v. Byers*, 25 S.E.2d 466 (N.C. 1943) [hereinafter *Byers II*].

266. *Byers I*, 22 S.E.2d at 903-04.

267. *Id.* at 903.

did not enter into an agreement on spousal and child support, Sara received from her husband "unlimited credit . . . at the grocery store, the meat market, the oil fuel dealer, the dairy products dealer, the druggist, the doctors, the dentists, the laundry, the dry cleaner, the jeweler, the florist, and all other dealers in the necessities and comforts of life in the City of Charlotte" ²⁶⁸ At C.M.'s suggestion, Sara went to two different hospitals for treatment as an alcoholic and drug addict. ²⁶⁹ During the six months while she was hospitalized, C.M. lived in the home to take care of the children, moving out again upon Sara's return home. ²⁷⁰ C.M. also paid her hospital bill of nearly \$1,400. ²⁷¹

In deciding this case, the supreme court faced a dilemma of its own making. Prior case law set out a requirement of mutual consent, which was not here met, despite C.M.'s exemplary conduct. ²⁷² But the court noted that, in the most recent reenactment of the living-apart statute, the legislature had changed the phrase "separation of husband and wife" to "[the husband and wife] have lived separate and apart." ²⁷³ Seizing on this minuscule alteration of the formulary, the court divined legislative intent to discard the judicial gloss on the word "separation" by the omission of that precise term in the new statute. ²⁷⁴ Because the mutual consent requirement was part of the rhetorical baggage shipped with "separation," it could now be jettisoned in favor of the new terminology, which the court found "descriptive of a factual situation less amenable to interpretive changes." ²⁷⁵

What about C.M., whose divorce had been denied by the trial court for want of mutual consent in the separation? The solicitous justices ordered him a new trial, remarking that while a husband may not obtain an advantage based on wrongful behavior, he clearly "is not compelled to live with his wife if he provides her adequate support." ²⁷⁶ However, the new trial proved disastrous for C.M. The jury found that he had failed to provide adequate support for Sara and the children,

268. *Id.* at 905-06. Sara and the children obtained the benefits of the arrangement, spending a monthly average of nearly \$470 between 1940 and 1942. *Id.* at 904.

269. *Id.* at 904.

270. *Id.*

271. *Id.*

272. *Id.* at 905.

273. *Id.*

274. *Id.* at 906.

275. *Id.* The laws in question were 1931 N.C. Sess. Laws 72, 1933 N.C. Sess. Laws 163, and 1937 N.C. Sess. Laws 100. *Id.* at 905-06.

276. *Id.* at 906 (quoting *Hyder II*, 1 S.E.2d at 541). For a discussion of *Byers I* which comes to a somewhat different conclusion from that argued here, see Lawrence T. Hammond, Jr., *Domestic Relations—Divorce—Separation By Mutual Consent*, 40 N.C. L. REV. 808, 808-11 (1962).

and that he had offered "such indignities to [her] person . . . as to render her condition intolerable."²⁷⁷ In round two in the supreme court, Sara became the victim and C.M. the villain. "One in flagrante delicto," thundered Chief Justice Walter P. Stacy, "is not permitted to recover in the courts."²⁷⁸ C.M. should have known better, the Chief Justice insisted: "One who plants a domestic thornbush or thistle need not expect to gather grapes or figs from it."²⁷⁹

The remaining North Carolina history may be quickly told. Although described by a commentator as "a rare combination of silliness, futility and brutality,"²⁸⁰ the recrimination defense continued to receive the blessing of the supreme court for decades. In 1978, the legislature finally ended the charade by amending the divorce statutes specifically to abolish recrimination in living-apart divorce cases.²⁸¹ As with the New Mexico history, the reforms crafted by North Carolina legislators were subject to the erratic reading of state appellate courts unable or unwilling to shake loose the tar-baby of fault. The formal legal system thus traveled uncertainly down the road from fault to non-fault. In the popular arena, on the other hand, the reforms were largely bypassed. A Maryland study, for example, found that the 6,430 absolute divorces issued in 1945 included 4,733 on the ground of desertion, but only 319 on the living-apart law.²⁸² The reason was simple: the separation statute required a five-year wait, desertion only eighteen months. Maryland did not allow divorces for cruelty, so divorce filings gravitated into the desertion column. In the author's understated conclusion, "plaintiffs are tending to shift the grounds alleged in order to use the more liberal . . . ones."²⁸³

277. *Byers II*, 25 S.E.2d at 467.

278. *Id.* at 469.

279. *Id.* at 470.

280. LEE, *supra* note 200, § 71, at 374 (quoting CLARK, *supra* note 200, at 704).

281. *Id.* at § 71, at 87 (Supp. 1989). That the supreme court remained an unyielding bulwark of the viability of recrimination may be seen by its full-court defense of the embattled doctrine over the remaining decades. See *Harrington v. Harrington*, 210 S.E.2d 190 (N.C. 1974); *Eubanks v. Eubanks*, 159 S.E.2d 562 (N.C. 1968); *O'Brien v. O'Brien*, 146 S.E.2d 500 (N.C. 1966); *Richardson v. Richardson*, 127 S.E.2d 525 (N.C. 1962); *Pruett v. Pruett*, 100 S.E.2d 296 (N.C. 1957); *Johnson v. Johnson*, 75 S.E.2d 109 (N.C. 1953). The *Harrington* decision overturned a court of appeals opinion which had held that adultery should no longer be available as a defense to separation. See *Harrington v. Harrington*, 206 S.E.2d 742 (N.C. Ct. App. 1974). This reversal goaded the legislature to intervene in an unmistakable way, with the "clear intention . . . to nullify the future effectiveness" of the supreme court's *Harrington* ruling. LEE, *supra* note 200, § 71, at 346.

282. CARL N. EVERSTINE, MARYLAND LEGISLATIVE COUNCIL, DIVORCE IN MARYLAND 17 (1946).

283. *Id.* at 19.

IV. CONCLUSION

These intramural matches between appellate courts and legislatures may have been a sideshow to the bulk of divorcing Americans, but they set the tone for further formal revisions of the divorce process.²⁸⁴ Today, the prevailing winds have changed again, and the uncoupling of divorce and fault finally engineered a generation ago is now being reconsidered in the popular press²⁸⁵ and the legislative chamber.²⁸⁶ The quest for divorce options to fault has now become the search for alternatives to no-fault.

What became of the incompatibility laws and the living-apart statutes? Incompatibility was arguably subsumed by its rhetorical cousin, "irreconcilable differences," the talismanic phrase for marital dissolution adopted by the California Legislature in 1969 in crafting the nation's first modern no-fault divorce law.²⁸⁷ The culture of America in the 1970s no longer allowed for fault notions to adhere to any divorce reform, and so the "irreconcilable differences" statutes have been virtually fault-free. The living-apart statutes have continued, in a substantial minority of states, to moderate the separation period which must precede a divorce filing. These pre-divorce waiting periods can be quite brief. In Virginia, for instance, the spouses must have maintained separate domiciles for one year.²⁸⁸ And if they have no minor children and have concluded a separation and property settlement agreement, they need separate only six months before filing for divorce.²⁸⁹ As with the "irreconcilable differences" statutes, courts now interpret living-apart laws entirely apart from the fault matrix of the older divorce jurisprudence.²⁹⁰

But perhaps the modern fault-free statutes have succeeded too well. No-fault reified in statute and practice the direction toward which American culture had been only idly drifting in other aspects of life: a predilection for formal and radical autonomy. The enshrine-

284. On the history of American divorce reform, see J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* (1997).

285. See, e.g., Dirk Johnson, *Attacking No-Fault Notion, Conservatives Try to Put Blame Back in Divorce*, N.Y. TIMES, Feb. 12, 1996, at A1; Jennifer Loven, *No-Fault Divorce Law Coming Under Legislative Siege*, L.A. TIMES, Mar. 3, 1996, at A3; Barbara Vobejda, *Critics Seeking Change, Fault 'No-Fault' Divorce Laws for High Rates*, WASH. POST, Mar. 7, 1996, at A3.

286. See *infra* text accompanying notes 300-16.

287. 1969 Cal. Stat. 4500-508.

288. VA. CODE ANN. § 20-91(9)(a) (Michie 1995).

289. *Id.*

290. On this faultless interpretation of the Virginia living-apart statute, see *Crittenden v. Crittenden*, 168 S.E.2d 115 (Va. 1969).

ment of divorce on demand intensified the development of what Milton C. Regan, Jr. has aptly termed the "acontextual self," a creature "who stands apart from any social relationship in which he or she is involved."²⁹¹ The marital relationship has exhibited no immunity from this legal virus. The "happiness principle embedded in the no-fault ground has dealt a devastating blow to the durability of marriages."²⁹² And the dethronement of mutual consent in divorce law has fostered the loss of mutuality throughout American society.²⁹³

This result should not be surprising. "[L]aw . . . is more than a barometer of social change," historian Norma Basch has noted.²⁹⁴ It "has an autonomy of its own and is capable of asserting its influence over legislators, jurists, and the public."²⁹⁵ Divorce on demand is now excoriated for "effectively disenfranchis[ing] the party who has not initiated the termination."²⁹⁶ The 1990s have seen a growing legislative effort to turn back the divorce clock. In the most widely-discussed bid, Michigan State Representative Jessie F. Dalman introduced an eleven-bill package designed to establish a two-tier divorce system.²⁹⁷ Couples without minor children could obtain a divorce upon consent.²⁹⁸ But in families with minor children, or where one spouse objected to the dissolution, the party seeking a divorce would have to prove marital fault of the other.²⁹⁹ The reinvigorated fault grounds, quite familiar to students of history, featured the unholy trinity of adultery, desertion, and extreme cruelty, which would have to be established by a "preponderance of the evidence."³⁰⁰ Similarly, in his 1996 Condition of the State address, Iowa Governor Terry Branstad attacked no-fault for "transform[ing] marriage into an arrangement of convenience rather than an act of commitment."³⁰¹ Branstad called for

291. MILTON C. REGAN, JR., *FAMILY AND LAW AND THE PURSUIT OF INTIMACY* 2 (1993). See also Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1 (1991); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

292. Annamay T. Sheppard, *Women, Families & Equality: Was Divorce Reform a Mistake?*, 12 WOMEN'S RTS. L. REP. 143, 146 (1990).

293. Lynn D. Wardle has even argued that no-fault has fostered an increase in physical violence in connection with divorce litigation. See Lynn D. Wardle, *Divorce Violence and the No-Fault Divorce Culture*, 1994 UTAH L. REV. 741 (1994).

294. NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH CENTURY NEW YORK* 229 (1982).

295. *Id.*

296. Richard Ingleby, *Matrimonial Breakdown and the Legal Process: The Limitations of No-Fault Divorce*, 11 LAW & POLY REV. 1, 14 (1989).

297. H.R. 4432, 88th Leg., 1st Sess. (Mich. 1995).

298. *Id.*

299. *Id.*

300. *Id.*

301. Governor Branstad's speech was reprinted as Iowa "Vibrant and Growing" DES MOINES REG., Jan. 10, 1996, at Opinion 1.

no-fault divorce to be replaced by laws which require a divorce court to find mutual consent or marital fault.³⁰² The Indiana Family Institute has proposed the Justice in Family Law Act, which would limit divorce to mutual consent or fault grounds.³⁰³ Micah A. Clark, the institute's associate director, attacked the excesses of Indiana's "irretrievable breakdown" standard, under whose banner a "whole generation of Hoosiers has placed its marital future in a law that favors the unfaithful, the uncommitted, the selfish and the immature."³⁰⁴

Professor Elizabeth S. Scott has advanced "precommitment" restrictions, by which a couple could set out in an antenuptial agreement the conditions under which their marriage could be dissolved.³⁰⁵ These options might range from a legally enforceable commitment "til death do us part" to milder obstacles to divorce, such as conditioning a decree on economic penalties or mandating a delay prior to the award of any divorce.³⁰⁶ Under Scott's rationale, a couple could decide that only marital fault — as they defined it — would render their marriage amenable to divorce proceedings. Bills introduced in the state houses in Illinois,³⁰⁷ Washington,³⁰⁸ and Indiana,³⁰⁹ in 1995-96 proposed Scott's "covenant marriage" option for couples who desired to enter into connubial relationships impervious to no-fault divorce. These bills aimed, in the words of the Illinois measure, at differentiating between two types of state-sanctioned unions, a "marriage of commitment" and a "marriage of compatibility."³¹⁰ Termed the "Marriage Contract Act," the Illinois bill would allow couples to enter into binding contracts providing that marriage not be dissolved except by mutual consent or upon a showing by a preponderance of the evidence by one party of the fault of the other.³¹¹

In 1997, Louisiana enacted a "covenant marriage" law,³¹² which created an entirely new class of marriage. The new law precludes couples who have chosen "covenant marriages" from access to the

302. *Id.*

303. Micah A. Clark, *The Negative Effects of Easy Divorce*, INDIANAPOLIS STAR, Mar. 12, 1996, at A5.

304. *Id.*

305. Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 43-44, 79-91 (1990).

306. *Id.*

307. H.R. 2095, 89th Leg., 1st Sess. (Ill. 1995).

308. S. 5532, 54th Leg., 1st Sess. (Wa. 1995).

309. S. 398, 109th Leg., 2d Sess. (Ind. 1996).

310. H.R. 2095, 89th Leg., 1st Sess. (Ill. 1995). Indiana State Representative Dennis Kruse discussed his bill providing a "covenant marriage" option in Dennis Kruse, *Covenant Vows*, INDIANAPOLIS STAR, Mar. 12, 1996, at A5.

311. H.R. 2095, 89th Leg., 1st Sess. (Ill. 1995).

312. H.R. 756, 1997 Leg., 1st Sess. (La. 1997).

state's liberal living-apart divorce ground, which allows for the granting of divorce after only a six-month separation.³¹³ A "covenant marriage" is defined as one between "one male and one female who understand and agree that the marriage between them is a lifelong relationship."³¹⁴ The law mandates counseling for parties seeking to choose the marital option, and seeks to reestablish the fault basis of divorce jurisprudence: "Only when there has been a complete and total breach of the marital covenant commitment may the non-breaching party seek a declaration that the marriage is no longer legally recognized."³¹⁵ Despite this legislative intimation that a covenant marriage would only be dissolvable under fault grounds, the statute allows covenant marriages to be ended not only for several species of connubial fault,³¹⁶ but also if the spouses have lived separate and unreconciled for two years.³¹⁷

Another divorce reform option would require mutual consent before granting a divorce, a step intended to force spouses to consider more deeply the costs of divorce to their families.³¹⁸ One legislative proposal embodying this widespread notion was introduced in Idaho in 1996.³¹⁹ Idaho House Bill 470 proposed that the divorce ground of irreconcilable differences be evidenced by "mutual consent of the parties to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved."³²⁰ This bill to eliminate unilateral divorce was intended by its sponsor, State Representative Tom Dorr, as an effort to reverse the hedonism of no-fault divorce, which he characterized as a way for spouses to "cash in their 40-year-old for two 20s and a Corvette."³²¹ Another Idaho proposal would have required the courts to stay the "irreconcilable differences" divorce proceeding for one year if either party requested a stay or if the couple had minor children.³²² Additionally, the bill included

313. LA. CIV. CODE ANN. art. 103 (West, WESTLAW through 1997 Reg. Sess.).

314. LA. REV. STAT. ANN. § 9:272 (West, WESTLAW through 1997 Reg. Sess.).

315. *Id.*

316. LA. REV. STAT. ANN. § 9:307(A)(1) - (4) (West, WESTLAW through 1997 Reg. Sess.).

317. LA. REV. STAT. ANN. § 9:307(A)(5) (West, WESTLAW through 1997 Reg. Sess.).

318. See ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? xii-iv, 7-8, 137-40 (1992). Martin Zelder argued for a similar limitation in *Ineffective Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce*, 22 J. LEGAL STUD. 503 (1993).

319. H.R. 470, 53rd Leg., 1st Sess. (Idaho 1996).

320. *Id.*

321. Dennis Mansfield, *Divorce Reform Legislation Would Bring Justice to Family Law*, IDAHO STATESMAN, Jan. 22, 1996, at 6A.

322. H.R. 826, 53rd Leg., 2d Sess. (Idaho 1996).

provisions for mandatory attendance at counseling sessions.³²³ While neither Idaho proposal was enacted in 1996, the movement against unadulterated no-fault appears to be gathering steam. In the words of State Representative Dorr, Idahoans want "some speed bumps constructed on the road to divorce."³²⁴ In 1995 and 1996, measures to kill or at least wound no-fault were introduced in Georgia,³²⁵ Hawaii,³²⁶ Pennsylvania,³²⁷ Virginia,³²⁸ Illinois,³²⁹ and Kansas,³³⁰ among others.

In a sense, of course, the concept of fault has never disappeared from spousal relationships, particularly at their breaking point. Studies confirm that issues of moral responsibility have retained their prominence in marital breakdowns.³³¹ In their study of contemporary divorce trends, Sarat and Festiner noted that despite the legal irrelevance of culpability, "clients continue to think in fault terms and to attribute blame to their spouse."³³² Social researchers Wallerstein and Blakeslee made the point quite bluntly: "What other life crisis engen-

323. *Id.*

324. Ann Scott Tyson, *States Put Minor Speed Bumps in Divorce Path: No-Fault Backlash*, CHRISTIAN SCI. MONITOR, Sept. 10, 1996, at 1.

325. H.R. 30, 143rd Leg., 1st Sess. (Ga. 1995). Georgia House Bill 30 proposed the outright repeal of no-fault divorce.

326. H.R. 3751, 18th Leg., 1st Sess. (Haw. 1996). Hawaii House Bill 3751 similarly provided for a one-year waiting period and mandatory counseling after a divorce filing in cases with minor children.

327. S. 958, 179th Leg., 1st Sess. (Pa. 1995). Pennsylvania House Bill 958 would condition a divorce upon proof that all children ages six to 16 had attended at least three counseling sessions between the time of separation and the granting of the decree, while 1995 Pennsylvania House Bill 2003 would establish the judicial option of holding hearings in no-fault divorce cases. H.R. 2003, 179th Leg., 1st Sess. (Pa. 1995).

328. H.R. 1188, 1996 1st Sess. (Va. 1996). Virginia House Bill 1188 would limit the availability of divorce upon the ground of separation (the only no-fault alternative under Virginia law) to couples who have been separated for one year, have no minor children, and file jointly for the divorce.

329. S. 1842, 89th Leg., 1st Sess. (Ill. 1996). Illinois Senate Bill 1842 would allow a divorce for irreconcilable differences only after a period of separation, and would require mutual consent if the couple had been married for more than 10 years, if they had a dependent child, or if the wife was pregnant.

330. S. 608, 76th Leg., 1st Sess. (Kan. 1996); H.R. 3002, 76th Leg., 1st Sess. (Kan. 1996). Kansas Senate Bill 608 and Kansas House Bill 3007 would limit no-fault divorce to cases which included mutual consent and no dependent children, while 1995 Kansas Senate Bill 233 would require mandatory reconciliation efforts for would-be divorcees, including three mediation sessions attended by both the wife and the husband. S. 233, 76th Leg., 1st Sess. (Kan. 1995).

331. See, e.g., Howard S. Erlanger, et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 L. & SOC'Y. REV. 585 (1987); Ingleby, *supra* note 296, at 14.

332. Austin Sarat & William L. F. Felstiner, *Law and Social Relation: Vocabularies of Motive in Lawyer/Client Interactions*, 22 L. & SOC'Y. REV. 737, 750 (1988).

ders the wish to kill? In what other life crisis are children used as bullets?"³³³

Divorce has always been painful, and often traumatizing. This article has explored the history of no-fault alternatives and suggested what the current return-to-fault movement has made clear: blameworthiness is a concept that simply cannot be disentangled from the breakup of a marriage. There is evidence that under the fault regime couples seeking to rebuild their lives through divorce tended to work through their anger in negotiating their exit from a failed relationship.³³⁴ The "blaming" ritual of the fault era may even have a cathartic effect. Under the current fault-free legal culture, divorce-minded spouses may entirely disregard their partners in demanding and obtaining a divorce. But society pays a steep price. Individuals have captured the flag of families, with the result that many "bitter divorce brawls . . . seem to be over social needs that right now can be expressed only in personal terms."³³⁵ The marital dissolution is assured, but what were once quaintly termed the "ancillary" issues of children and cash are now subjected to the grinder of real, adverse, gut-wrenching litigation. No-fault has, in many ways, exacerbated the pain of marital dissolution.³³⁶

Recognizing the prevalence of fault should *not*, however, blindly lead us to again divert divorces into the channels of cruelty, adultery, and desertion. In the face of the overwhelming evidence presented of the farcical nature of American society's lengthy dalliance with fault-only divorce mechanisms,³³⁷ the conclusion that we should reinstall the unholy trinity of fault in our divorce pantheon is untenable. Conditioning a divorce upon one spouse's epitomizing the other as an adulterer, deserter, or beast provides not only a pathetic parody of the complex dynamic of intense psychological relationships, but also grossly overestimates the power of law over culture. The mightiest law is that of necessity: couples who desire to divorce will do so.

333. JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* 6-7 (1989).

334. See DiFONZO, *supra* note 284.

335. STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 120 (1992). On the declining moral discourse in family law see Carl E. Schneider, *Marriage Morals and the Law: No-fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503 (1994).

336. As Carl E. Schneider has observed, "[T]he people the law seeks to affect themselves think in moral terms. A law which tries to eliminate those terms from its language will both misunderstand the people it is regulating and be misunderstood by them." Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L. REV. 197, 243 (1991).

337. See, e.g., J. Herbie DiFonzo, *Coercive Conciliation: Judge Paul W. Alexander and the Movement for Therapeutic Divorce*, 25 U. TOL. L. REV. 535, 538-47 (1994).

But divorce law is not impotent; it can require that couples who divorce do so only after giving the matter serious reflection, and after assuring that an economically disadvantaged spouse and all dependent children are treated fairly. Proposals to require mutual consent, one-to two-year periods of separation, and efforts at mediation incline in this direction. Bills to gut no-fault divorce and return to the scarlet-letter milieu of proving fault are nostalgic attempts to recapture what never was. This article's account of party, legislative, and judicial experimentation with no-fault's predecessors gifts no legal historian with a crystal ball for the future of divorce. But if we chose to find what we will in the historical record, we should at least be aware of our failures in matrimonial jurisprudence both when we locked divorce in the fault closet as when we removed all the fetters from those who would break free from marriage.