*1497 A DEAD LANGUAGE: DIVORCE LAW AND PRACTICE BEFORE NO-FAULT

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Introduction

In 1942, the Court of Chancery of New Jersey issued its opinion in a divorce case, Kreyling v. Kreyling. [FN1] Anna Kreyling had filed suit against her husband, Daniel, for divorce on the grounds of desertion. But this was not the usual case of desertion. After their marriage, Anna complained, Daniel had "insisted on using a contraceptive device during intercourse." [FN2] And he refused even to think about having a child. What he wanted (she said) was to enjoy "the luxuries of life," for example, "a car every year." [FN3] The couple "indulged in intercourse about twice a week," but Daniel refused her repeated requests for "natural intercourse." [FN4] This situation went on for about three years; at that point, Anna brought in a bed from her mother's place and set up a separate sleeping arrangement in her apartment. A year and a half of this domestic system, and Daniel had had enough; he moved out. [FN5]

Did Daniel's behavior amount to desertion? The court thought it did. The judges found Daniel's refusal to have "natural" sex disgusting. A man like Daniel apparently "regarded the married state as mere licensed concubinage." [FN6] They realized that contraception was a common practice, and if both partners "willingly" agreed to it, well, that was best left to their "individual consciences." [FN7] Here, however, there was no such reciprocity. The husband was "selfish" *1498 and the wife "condemned" to a "life of frustration," her "maternal instinct and desire" thwarted by Daniel. [FN8] She was suffering from "all of the deleterious physical, emotional and mental effects" of the frustration of that instinct. [FN9] As for Daniel, his conduct was "a violation of both human and Divine law." [FN10] The divorce was granted. Daniel's "willful, obstinate, continual refusal . . . to have natural uncontracepted intercourse" constituted desertion as a matter of law. [FN11]

In many ways, there is an old-fashioned ring to this case, not to mention what one commentator called its "semantic perversion" of the concept of desertion. [FN12] This case, after all, was decided during the Second World War--not during the reign of Queen Victoria. Even for its time, then, it seems somewhat archaic. Its view of sex and marriage must strike at least some modern readers as singularly out-of-date. Yet in one sense, it was perversely up-to-date. It granted a divorce by stretching the ordinary meaning of a statutory term, "desertion," and it may have rested on the idea that when husband and wife are hopelessly at odds over a fundamental issue, the marriage is dead and should be given decent burial.

This may be reading a bit too much into the case. On the surface, Kreyling reflected, even as it modified, a web of doctrines in the law of divorce that were still official, and were, as far as many courts were concerned, still vital and alive. To be sure, many people--and most of the experts--condemned these doctrines as old-fashioned, stupid, dishonest, and morally bankrupt. Reality, moreover, made a mockery of the doctrines; they were evaded in a wholesale and blatant manner. They seemed stubbornly alive, but they were rotting from within.

The key to the law on the books was the concept of marital fault. A spouse was entitled to a divorce if, and only if, the other spouse had committed an offense against the marriage. This article deals with some aspects of twentieth-century divorce law, as it was in the *1499 good old days before the fault system gave way to no-fault. In fact, there was nothing particularly good about the good old days as far as divorce law is concerned. In the academy, and in the profession, the fault system was unpopular; there were incessant calls for reform of its "abuses and scandals"; [FN13] and nobody mourned when it passed into history.
Today, there is a certain amount of nostalgic backlash. The family is supposed to be in trouble. What is more natural than to blame part of the trouble on easy divorce laws? And no-fault is as easy as it gets. Throughout the history of divorce law, there has been this confusion between cause and effect. People assume not that broken marriages lead to easy divorce laws, but that easy divorce laws lead to broken marriages. Thus social conservatives were talking in the 1990s about toughening the divorce laws. [FN14] Louisiana, not normally a trailblazer, embarked on an interesting experiment in 1997. Under a new law, bride and groom may choose between two kinds of marriage. There is ordinary marriage, and there is "covenant marriage"—a marriage between partners "who understand and agree that the marriage between them is a lifelong arrangement." [FN15] Parties to a covenant marriage can get a divorce, but only on the basis of the fault principle. Under the Louisiana statute, adultery, desertion, physical or sexual abuse, a felony conviction and sentence, and actual separation for a specified period count as grounds for divorce. [FN16] Just wanting out—without more—will not do.

*1500 We have no way of knowing how this Louisiana experiment will turn out, nor how many men and women will select covenant marriage. The early returns suggest that covenant marriage has not been particularly popular, [FN17] but this might change. Nor do we know how far this idea will spread beyond Louisiana. There has been a lot of talk and a lot of bills have been introduced into state legislatures, but so far, only Arizona has followed Louisiana down this road, and in a somewhat more timid form. [FN18]

Indeed, even the Louisiana law is not, in fact, a return to the old law—not literally, and certainly not in culture and ideology. Covenant marriage, after all, is only an option. Men and women are not forced to make this kind of commitment; the law merely expresses the hope that they will commit of their own free will. The state will perhaps bribe, wheedle, preach, or persuade, trying to get customers for its tougher form of marriage, but it will not use raw coercion—at least there is no indication so far that it will.

Right now, outside Louisiana and Arizona (and presumably even in these states), the no-fault principle is still a dominant feature of divorce law. The old fault system has largely run its course. Its doctrines are written in a dead language. Probably nothing can really revive the true fault system, not even covenant marriage. Hence, this is an essay in archaeology, as it were, an attempt to get under the skin of divorce law in the old days. The "old days" I will discuss were not that long ago: They were one generation before the no-fault revolution buried the fault system under tons of rubble. I want to try to put the old law into some kind of context, in an effort to make the transition to no-fault a little less mysterious. In the process, I hope to shed some light on the methodology of legal history as well.

*1501 I. The Fault System: Fiction and Fact

Divorce has a tangled history in common law jurisdictions. It was basically unavailable in England, and even in the United States it was a rare legal event in the early nineteenth century. [FN19] In many southern states, the only way to get a divorce was to petition the legislature. Divorces, in other words, were statutes (in the form of private acts). But some northern states had established a system of judicial divorce as early as the end of the eighteenth century: Courts, not legislatures, granted divorces. This system ultimately replaced the legislative divorce. [FN20] Judicial divorce was almost universal by 1900, except in South Carolina, which did not allow absolute divorce at all. [FN21]

A divorce action was, in form, an adversary lawsuit. The plaintiff came before the court as an innocent victim arguing that the defendant, husband or wife, had broken the marriage contract. State statutes contained lists of bad deeds that constituted "grounds" for divorce. Each state had its own version, and its own procedures, differing in large and small details. The typical list of grounds included adultery, desertion, and some form of cruelty. In many states, habitual drunkenness was also grounds for divorce, and so was impotence; a few threw in narcotic addiction as well. Non-*1502 support and conviction of a felony were also common grounds. [FN22] There were also some idiosyncratic statutes: [FN23] In Hawaii, leprosy was grounds for divorce; in Virginia, if a husband discovered his wife had been a prostitute, he had the right to get out of the marriage. [FN24] Tennessee quite reasonably provided that if one spouse tried to kill the other spouse "by poison or any other means showing malice," the victim was entitled to divorce. [FN25]

A few states were much more stringent than the norm. In South Carolina, as noted above, absolute divorce was
unavailable until 1948. In New York, under a notably severe statute, adultery was basically the only grounds for divorce. Maryland was also quite restrictive, and so was North Carolina—at least apparently; there was an escape valve, which we will come to later.

In spite of such restrictions, the actual demand for divorce rose substantially during the last part of the nineteenth century. The divorce rate in 1870 was 1.5 per 1000 marriages; in 1900 it was 4 per 1000 marriages. [FN26] This was small by modern standards—still, the rate had more than doubled in thirty years. In short, more people seemed to want to get out of their marriages. Presumably, this rising demand for divorce should have exerted pressure on legislatures to ease up on the stringency of the law. Such pressure undoubtedly existed, and there were reform movements, led at times *1503 by prominent women reformers. [FN27] But in many or most states, it came to almost nothing. The laws were frozen in place.

The reasons are hardly mysterious. Many influential people disapproved of divorce, the Catholic church positively forbade it, the clergy in general were hostile, and divorce carried considerable stigma in society. There was something vaguely immoral about a divorced woman; the very term “divorcee” carried a certain pejorative ring. Perhaps it was the fact that a divorced woman, even a wronged one, was used goods, [FN28] or that the moral duty of a woman was to stick a bad marriage out and make the best of it. There was certainly the idea that divorce was, if not a cause, then at least an indicator of moral dry rot. [FN29]

In any event, it proved almost impossible, politically, to loosen the laws in most of the states. In fact, some states in the late nineteenth century went the other direction: They tightened their laws. This was particularly the case with “divorce mills”—that is, states that had flirted with the idea of attracting visitors through easy divorce laws. [FN30] “Easy” laws were easy in two senses: They permitted a long list of “grounds” for divorce (and interpreted them loosely), and they had very short residency requirements.

But “divorce mills” were unstable. They were good for the hotel and restaurant businesses, but clergy and moralists denounced them, and the respectable public probably tended to agree. So “divorce mills” came and went. The easiest way to get rid of a divorce mill was to raise the residency requirements. South Dakota, which once attracted a healthy trade, enacted a six-month residency law in 1893; Indiana went to two years (from one) in 1873. [FN31]

*1504 National opinion polls suggested that the public shared the views of their moral betters well into the twentieth century. When questioned whether divorces in their state should be easier to get, three-quarters of a national sample in 1936 said “no.” [FN32] Polls in the 1940s also showed some disgust with Reno divorces and disapproval of lax divorce laws. [FN33] These attitudes were apparently shifting by the 1940s, at least somewhat, but they provide more evidence of why, despite the enormous subterranean demand, divorce laws were so inelastic.

It was a situation in which an irresistible force met an immovable object. The result was a kind of stalemate, and what we might call a dual system. The divorce laws in practice had almost nothing in common with the divorce laws on the books. After 1870, as far as we can tell, most divorces were collusive; there was no real courtroom dispute. In the vast majority of cases, all the issues were decided beforehand. That is, the parties had already agreed on a divorce, for whatever reason, whether reluctantly or not. Once this agreement was in place, one of the two, usually the wife, filed suit, accusing the other party, usually the husband, of violating the marriage in some statutory way. [FN34] The defendant would let the case go by default. He or she would simply not show up, or not enter a defense. The judge would decree a divorce. The "lawsuit" was essentially a sham.

In most of the divorces granted in the hundred years between 1870 and the birth of no-fault, the collusion was direct. In the case of migratory divorce, it was a bit more indirect. To escape states with harsh laws, people with money (or, more frequently, wives of people with money) could get on a train and head for a "divorce mill." Throughout much of the twentieth century, the divorce mill was Nevada. It needed the business, and moral qualms, for whatever reason, have never played a big role in Nevada jurisprudence. In 1927, Nevada reduced its residence period to three months, [FN35] and in 1931, in a "frenzied attempt to head off . . . threatened rivalry" *1505 from other states, [FN36] Nevada reduced the residence period still further, to six weeks. [FN37] "Going to Reno" became almost a synonym for getting a divorce. Florida, too, was a popular location (people liked to get divorced in warm
climates). There were also divorces in Mexico, the Virgin Islands, and even Paris, for those with a taste for the exotic. [FN38] The poor souls of South Carolina, a state that did not recognize absolute divorce at all, had to slip over the border into Georgia or North Carolina. [FN39]

Despite the competition, Nevada was far and away the champion. According to census figures for 1929, 1930, and 1931, there were 38.07 divorces in Nevada per 1000 residents and 90.56 per 1000 married residents. By way of contrast, the next highest state was Oklahoma, with 3.19 and 7.40 per 1000, respectively. [FN40] In 1946, riding a wave of postwar divorces, Nevada recorded 143.9 divorces per 1000 inhabitants, and in 1950, 55 per 1000. [FN41] This was more than fifty times the rate in New York, the least divorce-prone state, and almost fifteen times the rate in California. [FN42]

Migratory divorces were more expensive than the stay-at-home divorces, but just as collusive. Obviously, a husband could, in theory, get on board the next train, travel to Reno, and fight his wife's divorce action in the Nevada courts, but this was a rare event indeed. [FN43] There was a certain amount of doubt about whether some migratory divorces—particularly the Mexican divorces—were worth the paper they were printed on, and this gave rise to litigation in some cases, and sometimes to an unholy legal tangle.

In one bitterly contested instance, a squabble over migratory divorce reached the highest court of the land. In 1940, Mr. Williams, *1506 a resident of North Carolina with a wife and four children, left all this behind and went to Nevada. At the same time Mrs. Hendrix, also of North Carolina, left her home and did the same. The two of them stayed for six weeks at the Alamo Auto Court on the Las Vegas-Los Angeles Road. As we have seen, a six-week period was enough residence in Nevada to lay the basis for divorce. As soon as the six weeks were up, each filed for divorce, notice was published in a Las Vegas newspaper, and a copy of the summons and complaint was mailed to the last post-office address of the spouses left behind fuming in North Carolina. Williams and Hendrix got their divorces and immediately married each other in Nevada. When they returned home, they were arrested, charged with bigamy, and convicted. [FN44]

The Supreme Court reversed the conviction. The Nevada divorce, if valid in Nevada, and if Nevada had jurisdiction over the couple, was entitled to "full faith and credit" in North Carolina. [FN45] North Carolina had no right to treat it as a nullity. But Williams and his new wife were not out of the woods. The case was sent back for retrial and the couple was convicted again. This time, the conviction rested on a different basis: The domicile in Nevada was phony from the start because the couple never intended to live there, and thus Nevada never had jurisdiction in the first place. This time the Supreme Court affirmed. [FN46] Presumably, Williams and Hendrix went to jail.

These were exceptional cases. For every one of these disputed incidents, there were thousands of divorces in Nevada and elsewhere that went without question. Collusion was common, ordinary, typical, and everybody—certainly all the judges and lawyers—knew it. What Marshall and May said about Ohio in 1930 was true almost everywhere in the United States: A person "who believes divorce law to function in practice . . . as it reads in the law books is a proverbial ostrich." [FN47] The "theory of antagonistic divorce" was just that—theory. Anyone with "time and money—and a cooperative spouse" could get a divorce, no matter what the statutes said. [FN48] A Massachusetts judge, who in 1911 published a book on his thirty-five years in the divorce courts, claimed there was "no tribunal in the country" where "perjury" was "more rife than in the Divorce Court." [FN49]

But the law was an ostrich; it was part of its formal strategy to bury its head in the sand. By statute and case law, collusion was illegal. Evidence of collusion was an absolute bar to divorce. This mantra was repeated over and over in the case law and in the treatises. The sham was accentuated in states like California, which required "corroboration" before a court could grant a divorce. [FN50] For the most part, this meant that the plaintiff not only had to lie herself, she had to bring in an auxiliary liar as well.

Collusive divorce cases did not, of course, come labeled as such. But in the rare case where the dirty secret did come out, the divorce was legally in danger. In one Ohio case from 1947, the parties drew up a property settlement agreement. It contained a clause in which the husband also agreed "that he will . . . allow the case to go forward as an uncontested case." [FN51] The appeals court denied the parties their divorce. An agreement of this kind—promising
not to contest was against the public policy of the great state of Ohio. [FN52]

Collusion had to lie low, in other words. It had to be hidden or ignored. Of course, the evidence of collusion was overwhelming. To begin with, plenty of lawyers and judges and ordinary people talked about the collusive system. Then there was the sheer number of uncontested divorces. Every study of divorce in the period, in every jurisdiction, found collusion to be the norm. In 1932, according to government figures, 13.3% of divorce cases were contested. [FN53] In Missouri, in the 1940s, a sample of counties found a relatively high rate of contested cases—between 11.9% and 20%—but the figures did not include St. Louis city and county, where the percentage of contests was thought to be much lower (no more *1508 than 5%). [FN54] In Chattanooga, Tennessee, in the year 1945, there was "no contest of any kind" in 65.2% of the divorce cases; in the rest of the cases, some sort of answer was filed, but the study concluded that there was an actual litigated dispute in fewer than ten percent of the divorces. [FN55]

It is clear, then, that when both husband and wife wanted a divorce, or at least agreed to one, there was nothing really standing in the way. But the official rules were not completely nugatory; if one of the partners resisted the divorce—if the wife, for example, refused to "give" the husband a divorce (the phrase is significant)—the other partner was in trouble. Divorce itself was so common that even a tiny percentage of contests amounted to a lot of cases, in absolute terms. Some contested cases were then appealed, so that there are dozens and dozens of reported cases on divorce, occupying page after page of the digests. The dual system was costly to those people who wanted a divorce but could not get their spouses to agree.

There were other doctrines that stood in the way, besides the rule against collusion. One was condonation; another was recrimination. [FN56] Condonation was, essentially, forgiveness; recrimination meant co-equal guilt. So, for example, if a wife accused her husband of adultery, and he countered with a "you, too," or if he said, "you knew I had committed adultery, but you slept with me anyway," no divorce was supposed to be granted. [FN57] Most states had some version or another of these doctrines, either by statute or by case law, although there were all sorts of quirks and variations. [FN58]

*1509 In almost all the cases from this period, there would be no question today about the result. Under no-fault, divorce itself is a non-issue (to be sure, child custody and property division are active sources of litigation). In the 1930s and 1940s, divorce was still an issue—and some spouses fought and fought and fought. Reported cases range from the mildly to the extremely ridiculous. What are we to make of McCurry v. McCurry, [FN59] a Connecticut case from 1939? Poor Francis X. McCurry, a good Catholic, we are told, thought he would finally have a sex life after he and Lillian were married. But the marriage was "never consummated." Whenever he dared to suggest some sex, Lillian said no. This non-consummation took place in a double bed for three months, then in twin beds for a period of years. After this parasitic marriage had dragged on for six years, Francis packed his bags and sued for divorce, on the grounds of "desertion, intolerable cruelty, and fraudulent contract." Lillian contested—why—won the case, and, when Francis appealed, she won the appeal as well. The "mere" refusal to have intercourse, said the court, was not desertion; nor was it "as a matter of law," intolerable cruelty; nor did it, by itself, show fraud. That is, it did not prove that Lillian went into the marriage intending not to fulfill her "duty." [FN60] Note that if Lillian had wanted to end the marriage, Francis would have had a good case for annulment. And, in some states, "persistent refusal to have reasonable matrimonial intercourse" was in fact defined as "desertion." [FN61]

In Taylor v. Taylor, [FN62] a Pennsylvania case from 1940, the husband, a dentist, accused the wife of a multitude of sins—from not cooking his breakfast and failing to wash a pair of white duck pants, to swearing, bad conduct, and abuse of various sorts. She *1510 denied everything and added her own litany of complaints. Plainly, it was a marriage made in hell, and undoubtedly miserable for both of them. But—after all that time and effort—no divorce was actually granted. None of these sins amounted, as a matter of law, to grounds for divorce. [FN63]

In Yosko v. Yosko, [FN64] a Texas case from 1936, George and Louisa Yosko had been married for almost fifty years. They had a very "unhappy" home life. George (who filed the suit) was old and sick; he was also sick of Louisa. [FN65] For her part, Louisa supposedly said she "would not mind" if George left her "and never came back"; all "forms and kinds of affection between the two" had "long since died." [FN66] They had had a real knock-down, drag-out fight in 1887—Louisa allegedly wielding a butcher knife. In 1916, she "pulled the cover off his bed and

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refused to give him medicine." In 1919, they fought because he fed watermelons to the hogs "when she wanted them for her chickens." On this occasion, according to George, she cut him with a butcher knife, and he grabbed her "by the hair." [FN67] And so it went. The trial court granted a divorce. Louisa appealed (perhaps out of spite), and the divorce was set aside: No findings of fact had been made that would "sustain" a judgment of divorce. Mutual misery was insufficient grounds. The testimony in the case proved that the marriage was unhappy; as another court put it, both parties were "high-strung temperamentally" and "unsuited to each other." [FN68] But the court's conclusion from these facts--divorce dismissed--is to modern ears a total non sequitur.

Yet of course mutual misery was the actual grounds for divorce in thousands of cases, and many judges, at least at the lower court level, recognized that fact. And the law harbored yet another anomaly. As we shall see, in the 1940s a substantial number of states had laws that, in effect, authorized a kind of creeping no-fault--provisions that have been barely noticed in the literature. [FN69]

*1511 II. Cheating in the Shadow of the Law: The Evolution of The No-Fault Revolution *

In a well-known article discussing divorce settlements, Mnookin and Kornhauser describe the bargaining process as one of "bargaining in the shadow of the law." [FN70] That is, what a court would decide, if the matter were contested, has a massive influence on negotiations. It affects the risks and chances of the two sides. There is obviously something to this point, and it goes far beyond the law of divorce. [FN71] In the days of collusive divorce, there was no doubt a good deal of such bargaining, but we might also talk about cheating in the shadow of the law. That is, the grounds for divorce, under the divorce law of a particular state, determined the forms of collusion and chicanery. This, too, is a general phenomenon in the legal system. When the government changes the way it prints passports, the people who forge passports will have to change their ways as well. Forms and styles of deviance and resistance follow the shape of the law just as much as compliance does.

The following sections will discuss cheating in the shadow of the divorce laws of New York, Maryland, and California. New York, the state with the strictest divorce laws, witnessed what were perhaps the most cleverly orchestrated, and fraudulently obtained, divorces in the country. Maryland, another strict state, had its own version of divorce fraud, somewhat akin to New York's. California, by comparison, permitted six grounds for divorce, and, somewhat predictably, the grounds most often employed by couples seeking a divorce were those that many might consider "least serious" within the context of the fault system. The tendencies of couples in New York, Maryland, and California underscored the gradual decay of the fault regime, an event explored in the final section.

*1512 A. Soft-Core Adultery in New York *

Collusion, in divorce laws, means pretending to have grounds for divorce when in fact you have none, or when you choose (as often happened) not to tell the truth about the ones you do have. It must therefore be molded to the list of statutory grounds for divorce. New York, to take the classic example, basically allowed divorce only for adultery. [FN72] There was no reason for a New Yorker to cook up a fake desertion or collusive cruelty, because neither desertion nor cruelty got you a divorce. What you needed was adultery. There was a rich harvest of annulments--New York was the leading state by far in this department. And wealthy New Yorkers, in the twentieth century, could take the train to Reno, or other favorable locations, to get their divorces. But for the stay-at-homes, there was no practicable alternative to adultery.

In light of this, there developed a most interesting practice, which we might call soft-core adultery. This involved a little drama performed in a hotel. The cast of characters included the husband, a woman (generally a blonde who was hired for the occasion), and a photographer, of course. An article in the New York Sunday Mirror magazine section, published in 1934, had the intriguing title: "I was the Unknown Blonde in 100 New York Divorces." [FN73] The "unknown blonde" usually charged $50 for her work. She was in fact a woman named Dorothy Jarvis, who (according to the Mirror) had "retired as a professional co-respondent in view of her forthcoming marriage to a man she met while performing her role." [FN74]
Whatever sins the blonde may have committed in her young life, sex with the men who paid her was not among them. She simply played a part in a sordid little drama. She went to a hotel room with the man. There would be a certain amount of undressing. At some point, they would hear a knock on the door--a maid with towels, or the bellboy bringing a telegram. This too was a charade of course. When the door opened, the photographer would burst into the room and take pictures. A study of about 500 cases in the 1930s revealed the following fascinating facts: In 23 cases the man was totally nude; in 2 he was wrapped in a towel; in 8, he wore a *1513 nightgown; in 119, he was in his "B.V.D. or underwear"; bathrobe or dressing gown accounted for another 101; pajamas, 227 cases; in 4 he was wearing a "kimono." The woman was nude no less than 55 times (twice she only wore a brassiere); she was in a "negligee" 67 times; underwear 26 times; "chemise," 24 times; nightgown, 126; pajamas, 73; bathrobe or dressing gown, 32; "kimono," 68. Why did anybody bother to gather these strange facts? They were felt to be evidence of collusion, since "people do not ordinarily open a door, even partially, to permit someone to enter unless they are more suitably clothed" [FN75]--at least not in the 1930s.

There were, apparently, variations on the general adultery scheme. A writer in 1937 tells us about one of these, which we might call "breakfast in bed." [FN76] In the "chamber of love," the husband orders breakfast from room service. The waiter comes up, "bearing breakfast for two," and sees defendant and a "woman companion" in bed. The next morning, they order breakfast again; another waiter comes, enters "through the same door," and finds the same two people in bed. This is not so odd in itself; many couples might enjoy breakfast in bed. But a week later, the husband just happens to be in a lawyer's office, the woman is there too, and lo and behold! the two waiters appear, and identify him. On the spot, divorce papers are served on the husband. This little drama was, of course, so patently a concoction that any fool could see through it. [FN77]

The "hotel evidence" situation, to be sure, provided endless food for scandal. There were constant exposes and attempts to clean up the situation. In 1948, a New York grand jury investigated the goings-on in divorce cases; they discovered, not surprisingly, "fraud, perjury, collusion and connivance." The practices in divorce court "exude a stench and perpetuate a scandal." [FN78] District Attorney Frank Hogan had instigated the grand jury investigation. At the *1514 beginning of December 1948, Hogan started making highly public arrests in an effort to smash the "divorce-mill racket," which was the old familiar hotel scheme. Hogan arrested Max Zuckerman, a "private detective and a former process server," along with Sarah Ellis, a 20-year-old mother, who was the "unknown woman" in about thirty-five cases. [FN79] In some cases, indeed, the racket had taken the next logical step: Not only was the adultery imaginary, but the whole hotel scene never took place. The hotel raid was simply "conjured all up out of thin air." [FN80] This kind of divorce cost between $250 and $400 (Zuckerman's fee was $100)—a lot cheaper and quicker than a trip to Reno. [FN81]

Why the crackdown took place in 1948, instead of in 1936, 1937, or any other year, is not a question about divorce or divorce law, but about local politics. The divorce "racket" could hardly have been a revelation to Hogan. Of course, he got good publicity out of his raid—at a cost of scaring thousands of men and women who began to wonder if their divorces were valid (and their remarriages as well). [FN82] Besides such crackdowns, an occasional judge tried to do something about the whole dirty business. [FN83] But the bulk of the judges felt it was not worth bothering with. In one 1949 case, a certain Judge Greenberg refused to grant a divorce in a case where the "entire testimony reeks with grave suspicion and indicates strongly that the facts were manufactured." [FN84] This was not your *1515 standard hotel case: A witness testified that he lived in the same house as the defendant, Rita Slawinski, and that he went to her room at 5 a.m. and found "her and her boyfriend in bed together . . . They were undressed. I seen their clothes on a chair there." [FN85] Greenberg was right to be suspicious—what was the witness doing in Rita's room at 5 a.m.?—but the appellate division simply reversed and granted the divorce. [FN86]

In short, despite all the hoopla and the criticism, the collusive divorce always seemed to bounce back. In between spasms of morality and law enforcement, it flourished. As the Slawinski case makes clear, most judges were not inclined to do anything about the situation. One New York judge, Paul Bonyngne of Nassau County, put the matter this way in 1936: A "certain amount of naivete," he said, was an "essential adjunct to the judicial office." [FN87] The New York courts "grind out thousands of divorces annually upon the stereotyped sin of the same big blonde attired in the same black silk pajamas." [FN88] And is not "access to the chamber of love quite uniformly obtained by announcing that it is a maid bringing towels or a messenger boy with an urgent telegram"? [FN89] Of course,
when Bonynge spoke of naivete, he really meant the opposite; he meant a knowing and deliberate refusal to intervene. [FN90]

*1516 To be sure, this does not mean that judges and lawyers liked the system. Most of them, in fact, hated it. The laws were "a farce," they were "insulting." They were described by attorneys as "ridiculous," "cockeyed," "stupid," "inhuman," and words to that effect. Yet the lawyers were caught in a bind; they had to act "like blind monkeys" to help their clients in New York or "help them engage in the sophistry of an out-of-state divorce." [FN91] Either way was repellant. For lawyers, the only alternative—and hardly a practical one—was to get out of the divorce business and do something else.

New York was also, as I said, the nation's annulment capital. In most states, annulment was a fairly rare legal action. After all, to annul a marriage meant that a court decree wiped out its legal existence. It was never a marriage at all. This was an extraordinary remedy, and most state courts used it only for extraordinary cases. Alice M., in Santa Clara County, California, asked for an annulment and got it in 1943 when she claimed that her husband, Felix M., had tricked her into marriage, that they had never had sex, and that Felix never intended to consummate the marriage. [FN92] In most states, since divorce was fairly easy to get, few couples bothered with annulments. But New York was another story. In New York, thousands of marriages were annulled on all sorts of grounds—for example, fraud, a concept that could be quite liberally interpreted. [FN93] The Kreyling case, if it had come up in New York, might have been a case for annulment. The New York courts were, to say the least, indulgent on the subject. In 1950, in New York state, there were 6604 divorces granted and 4599 annulments—a truly amazing figure. [FN94]

*1517 This was not a dual system—it was a triple or quadruple system. But it had enormous tenacity. The bench and bar fulminated, reformers wrung their hands, but nothing seemed to happen. Lawyers hated the system, yet there was little they could do to change it. Divorce reform was impossible in New York unless the legislature chose to act, but the plain truth was that divorce was simply too hot to handle. [FN95]

B. Naked in Baltimore

Maryland was another state with fairly strict divorce laws, at least as of 1930. The Maryland statute recognized basically only two grounds on which to base a suit for absolute divorce: adultery and abandonment. Abandonment was grounds for divorce only if it had "continued uninterruptedly for at least three years," was "deliberate and final," and the separation had gone "beyond any reasonable expectation of reconciliation." [FN96]

Marshall and May studied 1188 cases in Baltimore brought in 1929. Abandonment was the most popular ground—it figured in 806 of the cases (the plaintiff, by a greater than 2 to 1 margin, was the wife). In 382 cases, adultery was the ground alleged (288 brought by wives and 94 by husbands). [FN97] Collusion was pretty obvious in most of these cases—the defendant never appeared, never made any arguments, and basically threw in the towel. [FN98] The testimony *1518 in abandonment cases very often had a fairly stereotyped ring to it. Over and over, it went something like this: "He just packed up his clothes and walked out," or "He was tired of married life." In many cases, corroborating witnesses repeated substantially the words of the statute—at the prompting of the examiner, an employee of the court, who asked such questions as, "Do you think there is any hope of a reconciliation between them?" [FN99]

The adultery cases also seemed fairly stereotyped. The scholars who studied Baltimore divorces were struck by how often witnesses alleged direct observation of the adulterous act; this happened in nearly a quarter of all the adultery cases brought by a woman. Surprisingly often, somebody claimed to see the guilty pair having sex, or lying in bed together in a state of complete or partial nudity. In one case, the wife's witness, a man, testified that he and the husband went "down to a shore" with a "couple of girls." There, said the witness, "I seen him having sexual intercourse with one of them." [FN100]

This kind of evidence is, to say the least, suspicious. To believe it, said Marshall and May, you have to believe that adultery, as commonly practiced in Baltimore, "is carried on with such disregard of privacy as to be physically
observed by a witness." [FN101] Even when this did not happen, the adulterer showed a strong tendency to "confess" his adultery "openly . . . to a witness or to his very spouse." [FN102] In Maryland, as in New York and most other states, the grounds, the testimony, the whole shape of the proceedings, were simply a ritual, a fiction.

C. Callous in California

California law, as of 1931, gave a plaintiff six grounds for divorce, but only four were significant: desertion, adultery, extreme cruelty, and neglect. Cruelty was defined as "the wrongful infliction of grievous bodily injury, or grievous mental suffering." [FN103] In 1920, according to a sample of divorce cases in Los Angeles, desertion *1519 was the ground of choice (46% of the petitions), but "extreme cruelty" was also quite common (29%). These two grounds were popular because they were, naturally, less messy than adultery, which accounted for only 7% of the cases; neglect was the basis of another 11%. [FN104] The other two grounds for divorce--habitual intemperance and conviction of a felony--did not loom large in the records; a seventh ground, "incurable insanity," was added in 1941. [FN105] In San Francisco, in 1919, women who sued for divorce alleged cruelty 40% of the time, desertion 31%, and neglect 24%. Adultery figured in only 1% of these complaints. [FN106] In the 1930s and 1940s, as we shall see, extreme cruelty became even more popular.

California was no exception to the general rule that divorce was a trumped-up, collusive affair. "Extreme cruelty" made the plaintiff's job that much easier; there was no need for hotel shenanigans. "Extreme cruelty" made it possible to get a divorce in California on ground of incompatibility, or in short, on the grounds that the marriage had simply gone sour, regardless of what the statute said. Cruelty was a charade, but a cheaper one than the soft-core adultery of New York.

As in New York and Maryland, the judges in California were perfectly aware of what was going on. In 1934, one judge in San Francisco, Walter Perry Johnson, more or less dropped the mask of ignorance, and talked openly about realities. The occasion was a divorce case; the plaintiff, one Jessie Trower, used cruelty as her ground for divorce, as was typical. And what did the cruelty consist of? Her husband's "absence from home without explanation, his statement that he did not love her, and his objection to her music studies." [FN107] The judge remarked, quite rightly, that these allegations did not "really constitute cruelty in the proper meaning of the *1520 term." [FN108] They amounted to nothing more than "incompatibility." But that was true of most of the "cruelty" charges, he said, and, in his view, "incompatibility" should be grounds for divorce. Of course, the legislature had never made such a move. No matter, Judge Johnson granted the divorce. [FN109]

Not all judges were so accommodating, and a few took the opposite tack. Superior Judge Thomas M. Foley, also of San Francisco, announced in 1946 that in his court, "cruelty, extreme or otherwise, mental or physical," was not going to get anybody a divorce, unless it was "backed up with solid evidence." Divorce law was far too lenient, he believed; most "differences between married couples," said the judge, were "trivial." (How he knew this important fact was never specified.) In his view, easy divorce was "destroying the fabric of the home," and he, for one, was not going to go along. [FN110]

The evidence of the case files suggests that Foley was fighting a losing battle. Some files, to be sure, had always recounted plausible stories of real cruelty and abuse, physical and psychological. [FN111] But plaintiffs in California cases also told stories that were essentially nothing more than stories of unhappy marriages--stories of nagging and cursing, and general marital misery. In many cases, the complaints had a kind of stereotyped, unconvincing ring to them. Yet the courts were willing to pin the label of "extreme cruelty" on all sorts of behavior. "(E)xreme cruelty," as Roscoe Pound remarked in 1943, was a "convenient legal phrase to cover up . . . incompatibility." [FN112]

*1521 In Mariposa County, a lightly populated county in the foothills of the Sierras, 146 divorce or annulment cases were filed between 1930 and 1950. Men brought 58 of these cases, women brought the other 88. The court granted 116 divorces (some cases were dropped by the parties); it also granted 8 annulments. Of the 116 divorces, 80 were based on extreme cruelty, 31 alleged wilful desertion, 4 charged wilful neglect, and one woman sued on the basis that the husband was convicted of a felony. [FN113] Not a single divorce was granted on the grounds of adultery! A naive reader of files would have to conclude that New York was a cesspool of extramarital sex, while in
the foothills of the Sierras spouses stuck to each other like glue, sexually speaking; their only problem was mild violence and psychological warfare.

Mildred S., who sued her husband Otho in July 1933, is a good example of a Mariposa County plaintiff. "Extreme cruelty" here consisted of the following: Otho often "became sullen and morose" toward her; he "refused to speak to plaintiff's friends upon becoming angry at her," and he "continually accused plaintiff of not loving him or caring for him." [FN114] Maggie H., who sued in October of the same year, claimed that her husband, Charles, "continually found fault" with her; that he "nagged and insulted" her; that he "exhibited toward (her) . . . an attitude of aversion, contempt and contumely." To be sure, one day in August, Charles "did strike, beat and choke plaintiff." The divorce was granted. [FN115]

Most Mariposa County divorces were uncontested. An occasional defendant put up a fight. In 1930, Claude N. sued his wife Louise for divorce, after six no doubt turbulent years of marriage. But Louise filed a cross-complaint: She cited Claude's "continual nagging over trivial matters," and nagging to the point where it "became malignant; and as the continual dropping of water wears away stone," so this ugly trait had "undermined the very foundation . . . of matrimonial life." Claude also cursed her (she said), and *1522 subjected her to a course of life that was the "equivalent of penal servitude"; he also kicked her once. In the end, Claude got his divorce, but Louise got custody of the children, an award of alimony, and a share of the community property. [FN116]

A sample drawn from San Mateo County from the 1930s and 1940s showed similar results. Out of 43 cases, women were the plaintiffs in 35, men in 8. In no less than 37 cases, the plaintiffs sought divorce on the grounds of extreme cruelty. [FN117] The cases were typically default judgments. In 1933, for example, Eleanor C. complained that her husband, Elwood, treated her with extreme cruelty, that he said he did not care whether she lived or starved, that he continually nagged her and found fault with her, and that he verbally abused her. Elwood put up no defense, and the divorce went through. [FN118]

A sample of divorce cases from Santa Clara County in 1946 shows patterns similar to those of Mariposa County. Of 61 divorce and annulment cases, women were plaintiffs in 46; 45 of the 61 were based on "extreme cruelty" as the sole ground (in three other cases, "extreme cruelty" was joined to some other ground). There were six suits for annulment. As in Mariposa County, adultery was a rare ground: It appeared in the records only once. [FN119] Plaintiffs seemed to avoid using adultery as the basis for their divorce, even when they had good cause to do so. In one case, Viola W. sued Albert W. for divorce (after 27 years of marriage and four children). She accused Albert of various misdeeds: beating her, knocking out her two front teeth, threatening to kill her, and so on. He also told her he had committed adultery. Yet the formal basis for the divorce was "extreme cruelty." The adultery was not listed as one of the grounds. [FN120]

*1523 D. Collusion Across the Country

Every state had its peculiarities, no doubt. What was common to all of them, as far as one can tell, is some sort of system of collusion and perjury. In Ohio, for example, fewer than 2% of the divorces that went to judgment were contested. Divorce was available, according to Marshall and May (writing in 1933), to anybody who had time, money, and "a cooperative spouse." [FN121] Only the "proverbial oisie" could possibly believe that divorce in practice functioned as described in the books. [FN122] In Ohio, there were ten grounds for divorce. One of them, "gross neglect of duty," was the overwhelming favorite, either alone or in combination with other grounds. [FN123] Adultery was a rarity in this state, too. In a sample of almost 2500 divorce cases, adultery figured in only 16; desertion also accounted for a trivial percentage. [FN124] It is, of course, impossible to believe that adultery played so little a role in marital breakup. In Philadelphia, Pennsylvania, desertion was the pet ground: In a random sample of over 1400 divorces between 1937 and 1950, desertion accounted for 46.9% of the cases, 29.7% were granted for "indignities," [FN125] and 16.8% for indignities and cruelty. [FN126] In Linn County, Iowa, between 1928 and 1944, 85% of the petitions alleged "cruelty"; less than 1% alleged adultery. [FN127]

In many states, of course, adultery was not merely grounds for divorce, it was also a crime. An adulterous husband was not just breaking his marriage vows; he was, in theory, opening himself up to a nasty stretch of jail time. Yet this
almost never happened. Adultery as a crime was rarely punished. In Massachusetts, however, in any divorce action based on adultery, the judge had to inform the district attorney, giving him full information and a "list of witnesses." [FN128] I have no idea whether judges actually did so, and, if *1524 they did, whether the district attorney paid any attention. Presumably this did not happen, since in 1947 the probate judges of Massachusetts recommended getting rid of this provision as "an unnecessary expense and ineffective." [FN129] The legislature repealed it in 1948. [FN130] Adultery could also be condoned; that is, a woman could forgive her husband, take him back into her arms, and when she did so, she forfeited her right to a divorce. In short, adultery was not treated as a crime (despite the formal law), nor was it even (again despite the formal law) treated as a ground for divorce, in any realistic sense, in states with alternative grounds.

Almost everywhere, divorce had become utterly stylized—a kind of ritual. There were consistent customs that formed part of the ritual, usually for a sound reason. In every state, for example, women were plaintiffs much more often than men. [FN131] The percentage varied, but men were nowhere near the majority of plaintiffs. Wives, not husbands, brought actions of divorce, and, in some jurisdictions, overwhelmingly so. [FN132]

Why was this the case? It would be wrong to assume from this fact alone that more women wanted divorce than men. Perhaps the opposite was true—it is hard to tell. Certainly many women were unhappy with their drunken, abusive, or otherwise no-good husbands. Certainly the women's movement and the changing status *1525 of women gave more support to women who wanted to get rid of a low-down mate. But most divorces were collusive, and, in these divorces, there were good reasons to have the woman file the papers. In the first place, the plaintiff had to allege some evil act—adultery, cruelty, or desertion. These were less costly to a man's reputation than to a woman's. It was socially acceptable for a woman to be a victim; women were, after all, the weaker sex. It was difficult for a man to claim he was deceived, deserted, or beaten up by a woman. In every state where we have data, the plaintiff in divorce cases tended to allege the mildest and least stigmatic grounds that the law allowed, but it was still shameful and hurtful, no matter what. Also, if the woman was to end up with children, with child support, with alimony, it helped immeasurably to cast him as the innocent party.

E. Creeping No-Fault

The fault system was in full operation in this period. Yet strangely, a kind of slow, almost unnoticed no-fault notion had crept into many of the statutes. In North Carolina, for example—otherwise a very stringent state [FN133]—either party could get a divorce after a two-year separation. In one case in 1934, the husband told a story of something akin to a shotgun marriage: He was accused of fathering his wife's unborn child, which was why he went through with the ceremony. Afterwards, he refused to live with the woman, waited two years, then filed for divorce. No other grounds were mentioned, nor were other grounds necessary. The divorce was granted. [FN34]

North Carolina was not unique in this regard. In some other states—West Virginia, for example—the so-called "limited divorce" could ripen into a regular divorce after a while, and essentially without grounds. Under a "limited divorce," often called "divorce *1526 from bed and board" or "legal separation," a party could not, for example, remarry. But in other ways, the parties were left "in the position of unmarried persons . . . deprived of the pleasures and freed from the duties incident upon cohabitation." [FN135] A number of writers considered this an "anomalous" status; it required "a degree of chastity scarcely to be expected in an ordinary mortal." [FN136] Perhaps ordinary mortals simply dispensed with the chastity part. Still, most states recognized this "anomaly." [FN137] And, in some states, the "anomaly" had the advantage that, with time, it could grow into a regular, full-fledged divorce, on a no-fault basis.

By 1950, a considerable number of states, perhaps nineteen or twenty, had signed on to one or another kind of creeping no-fault statute. In Arizona, Idaho, Kentucky, and Wisconsin, for example, absolute divorce was available to a husband and wife, if, for some reason, they had not cohabited for five years or more. In Rhode Island, the period was ten years; in Arkansas and Nevada, the period was three years; in Louisiana and North Carolina, it was two years. [FN138]

Of course, five years (for example) was a long time to wait. For this reason, these statutes were of limited utility in
many states. North Carolina was an exception: There the divorce statute was otherwise so strict that living apart became the ground of choice. In 1958, out of 5261 divorces only 198 alleged adultery, and 5039 were based on the living-apart statute. The North Carolina courts were, however, hostile; they interpreted the statute almost to death—hell-bent, apparently, on bringing fault back into the system. [FN139] But the living-apart statutes in this and other states did have a deeper meaning. They amounted to a confession that some marriages were simply dead in the water, regardless of whether there were formal "grounds" for declaring them dead. The statutes expressed, however timidly, the idea that some marriages could not be saved, should not be saved, and were best off given a decent burial.

*1527 In one Wyoming case from 1947, Charles Dawson sued his wife Lottie for divorce. [FN140] He said she "brow beat" him continually and once threw a tea kettle of boiling water at him. Lottie denied it all: "We never quarreled and never had any trouble," she said, rather unconvincingly. Charles and Lottie were about 68 years old; they had two children, both grown. Charles had left home about ten years before, never to return. They had a formal separation agreement, and he was required to pay Lottie money every month. The court hinted that the "indignities" recited did not amount to grounds for divorce, but the long separation was another story. The aim of the statute was to "legally end a marriage which no longer exists in fact." [FN141] The court was "unable to see how the defendant or society will in any way be benefited by denying the plaintiff a divorce." [FN142] The divorce was, accordingly, granted.

At the trial court level in many states, judges were certainly aware of the realities: Many marriages were beyond salvation. These judges were undoubtedly sympathetic to the men and women who wanted to start over again. Legal practice was twisted accordingly. In Indiana, "cruelty became the cover story for divorces on grounds of incompatibility or mutual consent," as reported by the Lynds in their famous study of Middletown (Muncie). [FN143] Both caselaw and trial court records make it crystal clear that the practice was less than stringent in its working definition of "cruelty" or "cruel and abusive treatment." And in New Mexico, from 1933 on, the unthinkable and unconscionable actually occurred: An amendment to the statute specifically listed "incompatibility" as grounds for divorce. [FN144]

What, after all, does it mean to say that a man and a woman are "incompatible"? It simply means that they are not suited for each other. When people turn out to be "incompatible," it may very well be nobody's fault. And if so, and if a divorce can be obtained on this basis, then a kind of no-fault divorce has been accepted into law.

*1528 III. Women, Men, Divorce Law, and Legal History

The divorce cases present us with a kind of paradox. In most of the files, women tell stories about themselves as innocent victims; the men they married are cruel or adulterous worms. The standard practice casts the men as villains. The logic of the system and the doctrines put a premium on describing women and men in stereotypic terms. Thus, in a Tennessee case from 1947, Garvey v. Garvey, [FN145] the wife complained of the usual "cruel and inhuman" treatment. She was described as "highly nervous," as a "woman of culture and refinement," whose husband cursed and abused her in front of strangers, accused her of lying, and so on. [FN146] Similar themes appear in many of the California case files: The women described themselves as delicate plants, married to insensate brutes, men who cared nothing for the tender feelings and feminine sensibilities of their wives.

Of course, as feminists know all too well, ideas about women's delicacy and refinement trap women in a web of stifling mock-protection. In other ways, too, the stories actually protected men. In the first place, they were obviously lies. But even if they were true, nothing in these little morality plays really hurt men at their core. In theory, or at least in one theory, moral standards are or should be the same for men and women. But most people, certainly most men, have probably never believed this. What they believed was that men had voracious sexual appetites; women, for their part, were reluctant to have sex. Men were also physical in other ways: They were strong, they used their muscles if provoked—against other men for the most part, to be sure, but if exasperated enough, against women too. Not that this was a good thing—it was even in a way unmanly, but it happened.

For this reason, and for others, as we have seen, in consensual divorces, it was the norm for women to file for divorce, even when the woman was actually at fault. How often this occurred is impossible to tell. Dorothy
Thompson, writing in the Ladies' Home Journal in 1949, criticized the "barbarism" of the divorce laws and gave this example: "A man whose wife has left him . . . for another man, nevertheless does not want his wife's name, and perhaps his *1529 children's mother's, besmirched." He feels impelled to "a certain chivalry." People condemn an adulterous woman much more than they condemn an adulterous man. So, out of "chivalry," the husband "assumes the fault." [FN147]

Thompson went on to paint a dismal picture of the divorce laws. Under these ridiculous laws, a couple who decided, in a civilized way, that their life was "intolerable" together could not dissolve their marriage by "mutual consent." They were forced to "accuse the other of shocking misconduct." She led up to this conclusion by describing failed marriages: A "boy" brought up by a mother who was "an excellent housekeeper," always washing the curtains, and making the beds with "taut-stretched sheets," marries a "charming" woman with "lovely legs," who plays the guitar and is a "career girl." But the career girl never washes the dishes; in bed at night, "the blankets and sheets are twisted as they were that morning." This marriage is doomed. The next example is the opposite: A "boy" brought up in "lusty, warm, amusing" home marries a girl who makes him wipe his shoes at the door, who keeps an immaculate home and all that. He finds her "petty, crabbing, dull and boring." [FN148] Both of these marriages, of course, collapse—but in neither case are there legal "grounds" for divorce.

These banal examples seem so obviously sexist that the modern reader is bound to wince at them, but Thompson's stereotypes were the common coin of their time. In other ways, her stories were quite revealing. What she describes were classic instances of incompatibility; they were not cases of real adultery, desertion, or physical abuse. She argues, and assumes, that often—how often? very often?—what the man was accused of was untrue, that nobody was really at fault, and that the blame for the dead marriage, if there was any blame, must fall equally on woman and man. This theme also appeared in an article written twenty years earlier by Arthur Garfield Hays, in which he argued for "companionate divorce." As "everyone knows," he said, it is "almost impossible to fix blame" for the breakdown of a marriage. "No one can tell whether the wife's nagging is due to the husband's derelictions or *1530 the husband's derelictions are due to her nagging. No one, not even the parties themselves, can tell whose the fault may be if sex relations are unsatisfactory." [FN149]

But was it really the case that men and women shared the blame, equally, for marital breakdown? Was it even usually the case? Nobody knows, and as far as divorce files are concerned, nobody can know. The divorce charade, in short, had a paradoxical result. It paraded before the courts an endless procession of men, and mostly men, who confessed by their silence to adultery, cruelty, gross neglect of their obligations, and other deep-stained sins. But everybody knew the allegations were often or mostly lies. Hence in a way the system protected men (and mostly men) from revelations that would be much more damaging. New York adultery was fake adultery—adultery with an imaginary woman. But nobody doubts that there was real adultery in New York, and that it was mostly husbands who cheated on wives, not the other way around. There was surely real cruelty— even "extreme cruelty" in California. There were violent husbands, husbands who beat their wives, drunk or sober, night and day. Yet the law paid little attention to real domestic violence. If there was a deeper rottenness and disloyalty in the marriages that ended up in court, it was hidden in the dark, in the fathomless reserves of private life, beyond the reach of legal proceedings.

The case for reform rested in part on a particular image of marriage— marriage as a partnership, so-called companionate marriage. This image of marriage replaced the image of marriage as a sacramental union, of marriage as a bond that could and should never be severed. But even if one thinks of marriage as a partnership, the partners were by no means on equal footing in society. Moreover, the terms of the partnership were slowly and subtly redefined over the years. There was a kind of older model, in which the wife was, strictly speaking, the domestic partner, but there was also a more modern model, in which her role was expanding, in which she was allowed a life outside the home as well. Nonetheless, husband and wife had strong claims on each other; each was supposed to enjoy a kind of emotional monopoly. Each had a right to *1531 fair treatment, at least as society defined it. The divorce laws, in theory, were available to give a remedy to spouses whose partners broke the rules. In practice, divorce law almost forced women into a posture of submission and humility, into a mold of tender, injured femininity.

The official line was that marriages ended because of adultery, desertion, cruelty, or intolerable indignities. But this
was out of step with a growing sense in society--the sense that Dorothy Thompson reflected. Here the idea was that marriages ended because they "didn't work out," because the spouses were "incompatible." No doubt this was sometimes true. But much like the fault system, "incompatibility" masked the real inequalities and injustices of thousands and thousands of marriages. Neither the official nor the working law of divorce addressed this issue.

Nobody, of course, was satisfied with the status quo in divorce law. The experts looked through the peephole, and what they saw was fraud and rot. Lawyers hated taking part in a disgraceful travesty. [FN150] Many people in polite society still thought divorce was too easy; other people, in all walks of life--people who wanted or needed divorce--thought divorce was too hard, too expensive, too dirty. The experts kept trying to reform the official law, to make it conform to what they considered social realities. They wanted, naturally enough, to get rid of the perjury, the chicanery, and the lying.

One of their aims was to make divorce courts more socially meaningful. They wanted these courts to be genuine family courts. Many reformers wanted to replace the adversary system with something more honest--and also more "therapeutic," more concerned with human and family values. [FN151] They wanted the courts to mend, and if possible cure, sick marriages, and to end them if cure was hopeless. [FN152] This more or less implied that there were two kinds of marriages in trouble: marriages between incompatibles, and marriages between people who might make a go of it with some therapy or professional help. Marriages, like people, could be sick and in need of a doctor. The courts should be marriage doctors, *1532 making use of social scientists, psychiatrists, and other experts. There were many proposals, and some action, to convert divorce courts into courts of "conciliation," courts that would ignore the legalism and try to save broken marriages. [FN153]

A kind of climax to this movement was the Court of Conciliation of Los Angeles County, which flourished in the 1950s under Judge Louis H. Burke. The court had limited powers, though some of them were rather startling--since the Court had "jurisdiction over all persons having any relation to the domestic controversy," it could call in "third party 'paramours'" and order them to quit their paramouring. In a few cases, where all parties did in fact sign on to such an agreement, violators of the agreement were sent to jail for contempt. [FN154]

The Conciliation Court tried to get the husband and wife to reconcile, and as part of the process to execute a "Reconciliation Agreement." A "typical" agreement, reported by Judge Burke, makes interesting reading. Its attitudes toward gender and marriage were hardly revolutionary: "Financial support of the family" and care for the "outside of the home" were the husband's responsibility; "the inside of the home," meals, and clothing, were the wife's duty (though if a wife worked, the husband "must share to a larger extent in the work of the home"). A wife was to bear the greater share of "giving" during a marriage--but she was usually "happy to go through a great amount of sacrifice" for the sake of husband and family. [FN155]

The agreement was quite specific on some points. Both parties agreed not to give the other the "silent treatment." The husband agreed not to "maintain late and unusual hours." He agreed to "take out the wife for dinner" or the like "at least once a week." Husbands should have reasonable "pocket money" for golf expenses and snacks; the wife was to have "pin money" for the beauty parlor and cosmetics. Mealtimes were to be "times of great peace and calmness." Temper were to be controlled, if at all possible. There were elaborate strictures about child-rearing. Sexual intercourse, we discover, "provides a safe and healthy outlet for *1533 passion," but should be done in "moderation." Twice a week, on average, "under normal conditions, should not be considered excessive." Neither husband nor wife should act selfishly in bed. "Lovemaking" in the "first stages of intercourse" was essential, especially since a woman is not "aroused" as quickly as a man; "her passion side is slow to make its appearance." The wife was to agree to "respond to the husband's efforts in lovemaking and not to act like a patient undergoing a physical examination." Both husband and wife were to take care of their "personal appearance," and avoid "uncleanliness, overweight, vulgarity, or carelessness in dress." The passage of time, of course, brought "baldness, wrinkles, denture difficulties, arthritis," and the like; it would be sinful to blame the partner for these ills (and, by implication, to use these as an excuse for falling out of love). [FN156]

These agreements seem retrograde from the vantage point of the year 2000, but Judge Burke thought he was achieving a kind of rough equality. When a man marries, the agreement provided, "he must cease to be one of the
boys." The couple should make "mutual friends," and try to share each other's work and hobbies. [FN157] Despite all the language of therapy and conciliation, the agreements reflected, as they had to, a changing conception of marriage, and that conception helped to undermine the experiment.

But what probably most doomed the system was simply this: Most couples probably did not want therapy or conciliation; they wanted a divorce. Or one of the parties wanted a divorce, and the other would not or could not resist. Couples in this situation in the 1930s and 1940s were almost always able to get their divorce, though at a cost. Consensual divorce was the reality. Most marriages ended with a whimper instead of a bang, legally speaking, though by no means all of them. Moreover, the family continued to evolve—and in the direction of greater and greater emphasis on the individual and on his or her personal growth and satisfaction. [FN158]

The no-fault system is in theory far more radical. No-fault came in during the 1970s, and California was the pioneer. In the California *1534 version of no-fault, a marriage is pronounced dead even if only one partner thinks so. Consent drops entirely out of the picture. [FN159] This was what Herbert Jacob has called a "silent" revolution, [FN160] a revolution that crept in on and surprised even the experts and the reformers—a revolution without mobs and hullabaloo and vast public debate.

But perhaps it was not a revolution at all. "No-fault" had long since been the rule, if we take no-fault to mean that the statutory grounds did not matter. As far as unilateral divorce is concerned, in state after state, creeping no-fault was available for those who were willing to wait. In these states, the no-fault revolution simply speeded up the process and eliminated an awkward and useless interlude. Creeping no-fault had been less important than one might imagine. Why wait, when it was so very easy to lie?

Yet no-fault (creeping and rapid) was no better than traditional divorce on the issue of power imbalance between the sexes. If the law before no-fault assumed a wicked husband and a suffering wife, no-fault seems in some ways to assume away the issue of inequality, or rather to ignore it. It is as if the feminist revolution had succeeded completely, as if men and women stood in the same position in regard to jobs, money, and the market for remarriage. This equality—it hardly needs to be said—is simply not there (or not there yet). [FN161]

But this issue goes beyond our brief exploration into the archaeology of divorce in the 1930s and 1940s. I might add a word about what the story implies for the theory and methodology of legal history, or for the study of law in general. As everybody knows by now, appeal cases are a poor guide to how the legal system actually works. Appealed cases are very often odd, quirky exceptions. Using this lens exclusively is like looking at law through a funhouse mirror. This is even more true of dual legal systems like the law of *1535 divorce, and, in fact, all fields have at least a dash of duality in their makeup.

All of this, as noted, is commonplace by now—commonplace enough to generate reactions and revisions. Parsing appellate caselaw is making a comeback, if it ever really went out of style. Some legal historians have staked out fresh claims for the importance of caselaw and case doctrine. These texts are clues to legal ideology; and ideology is the very heart of what law is about. The law shapes common understandings of what is right—or what simply is. It helps to convince people that the way things exist is the only way things can exist, that what is, is only natural and right. In so doing, law acts as an essential prop of the social order, and official legal discourse has a relevance far above and beyond any actual impact on behavior. [FN162]

All this may be true enough; my problem, especially with regard to divorce, is in locating the home base of "ideology." Is legal ideology to be found exclusively, or primarily, in the opinions of high court judges, together with the treaties that dissect and transcribe appellate doctrine? This simply cannot be right. Ideology has been defined as beliefs and worldviews that serve to shore up the social structure. But how can beliefs and worldviews do this if nobody knows about them? And nobody except a few lawyers ever actually reads treaties and opinions. Ideology has to make a difference: it has to be communicated to an audience; it has to have behavioral consequences. Otherwise it is nothing but talk. Of course, it is possible that formal doctrine gets communicated to ordinary people through their lawyers, but this is an empirical question. The way divorce actually worked suggests that this trickle-down theory cannot explain very much.
It is also wrong to assume that ideology can only be expressed in the form of "discourse." Conscious behavior is ideology in action. It is, therefore, just as important to know what people do as to know what they say or write. The working norms of the legal system—the behavior of the actors in the system—together with what these norms and actions mean to people, are true indicators of ideology. *1536 There may be other indicators, but these behaviors are crucially important.

What do we see when we look at divorce practice in the 1930s and 1940s? The whole edifice was rotten to the core. On the level of appellate caselaw and formal treatises, the building looked firm and solid. But underneath, the termites had been eating and digesting with abandon. When no-fault burst on the scene, it seemed, in one sense, like a genuine revolution, a sharp break with the past. And in one sense it was. But in another sense, it was the culmination of a long, gradual process. That process was visible only in obscure places—trial court records, for example. When the fault system collapsed, it was like the collapse of a bridge, or of a great tree in the forest—a sudden, dramatic event. But in all these cases, inexorable processes, invisible but powerful, had long since prepared the way.

[FN11]. Marion Rice Kirkwood Professor, Stanford Law School. I would like to thank Shannon Petersen, my research assistant, for all the help and legwork he did on this article, and Joanna Grossman, Deborah Rhode, and Michael Wald for helpful comments. The staff of the Stanford Law Library was also, as usual, extremely helpful.

[FN1]. 23 A.2d 800 (N.J. Ch. 1942).

[FN2]. Id. at 801.

[FN3]. Id. at 801-02.

[FN4]. Id.

[FN5]. See id. at 801.

[FN6]. Id. at 803.

[FN7]. Id. at 804.

[FN8]. Id.

[FN9]. Id.

[FN10]. Id.

[FN11]. Id.

[FN12]. Morris Ploscowe, The Truth About Divorce 114 (1955) ("It is a little difficult to see how a wife can claim that she has been deserted by her husband, when he claps her night after night in an intimate embrace, and where during the entire period of the so-called desertion, they were both living and sleeping together.").


[FN15]. La. Rev. Stat. Ann. § 272 (West 2000) ("A man and woman may contract a covenant marriage by declaring their intent to do so on their application for a marriage license ... and executing a declaration of intent . . . .").
actual covenant declares that "marriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live. We have chosen each other carefully . . . . We have received premarital counseling . . . . We have read the Covenant Marriage Act . . . ." Id. § 273. See Jeanne Louise Carriere, "It's Deja Vu All Over Again": The Covenant Marriage Act in Popular Cultural Perception and Legal Reality, 72 Tulane L. Rev. 1701 (1998), for a discussion of the law.

[FN16]. See La. Rev. Stat. Ann. § 307 (West 2000). Separation must be continuous for a period of two years, though shorter (generally, one year if there are no minor children, a year and a half if there are) if there was a judgment of separation. See id.

[FN17]. According to one article, only one percent of new married people chose covenant marriage in the first five months the law was in operation. See Richard Wolf, States Slow to Plunge into Covenant Marriage, USA Today, June 16, 1998, at 3A, available in LEXIS, News Library, Usatdy File.


[FN21]. The South Carolina Constitution of 1895 provided, "Divorces from the bonds of matrimony shall not be allowed in this State." S.C. Const. of 1895, art. XVII, § 3. The General Assembly of South Carolina approved a joint resolution in 1947, proposing an amendment to the Constitution. The amendment provided that divorces could be granted on "grounds of adultery, desertion . . . physical cruelty, or habitual drunkenness." Voters ratified this in 1948, and the new divorce law became effective on April 15, 1949. See Jacobson, supra note 20, at 111.


[FN23]. See id. at 66-77. The Kansas statutes, as of 1935, listed 11 grounds for divorce. See Kan. Stat. Ann. § 60-1501 (1935). These included the common ones, together with some extras, such as "when the wife at the time of marriage was pregnant by another than her husband." Id. Not surprisingly, a woman was not given the correlative right; nothing is said about giving a woman the right to a divorce if her husband, when she married him, had already impregnated another woman. Other grounds were "fraudulent contract," "habitual drunkenness," and "gross neglect of duty." Id. A person whose spouse was locked up in an institution for the insane for five years or more could also file for divorce. See id.


[FN25]. Tenn. Code Ann. § 8426 (1932). In Tennessee, "cruel and inhuman treatment" (which surely must include attempted poisoning) was not listed as a ground for a divorce as such, but "cruel and inhuman treatment" could be a
ground for legal separation (divorce from "bed and board") in the discretion of the judge. Id. § 8427.

[FN26]. See May, supra note 19, at 167 tbl.1.

[FN27]. See Riley, supra note 19, at 116-18.

[FN28]. This was, of course, equally true of a widow. But the widow's sexual partner was conveniently dead.

[FN29]. So, for example, the President of Yale, Timothy Dwight, referred to the rising divorce rate as "dreadful" and warned that it would turn the community "into a general prostitution." Blake, supra note 19, at 58-59.

[FN30]. See Territory of Dakota Comp. Laws § 2578 (1887) (requiring only a 90-day residency); Act of March 10, 1873, ch. 43, § 8, 1873 Ind. Acts 107, 109 (listing multiple grounds for divorce).

[FN31]. See Act of March 1, 1893, ch. 75, § 1, 1893 S.D. Laws 97 (changing residency requirement to six months); Act of March 10, 1873, ch. 43, § 7, 1873 Ind. Acts 107, 109 (changing residency requirement to two years).


[FN33]. See id. at 19.


[FN38]. See Jacobson, supra note 20, at 104-09.


[FN41]. See Jacobson, supra note 20, at 100 tbl.48.

[FN42]. See id.

[FN43]. Once in a great while there was in fact a contest in Nevada between the two spouses. See Lynn v. Lynn, 88 N.Y.S.2d 791 (N.Y. App. Div. 1949). The husband went to Reno, stayed for six weeks, and filed for divorce; the wife hired a Nevada lawyer, contested, and lost. See id. at 793-95.


[FN45]. Id. In so holding, the Court overruled Haddock v. Haddock, 201 U.S. 562 (1906). See Williams, 317 U.S. at 304.


[FN48]. Id.

[FN49]. Henry Edwin Fenn, Thirty-Five Years in the Divorce Court 139 (1911).

[FN50]. 2 Vernier, supra note 22, at 142. There were a number of such states—for example, Idaho, Kansas, and Kentucky. See id. at 143.


[FN52]. See id. at 700.

[FN53]. See Recrimination as a Defense in Divorce Actions, 28 Iowa L. Rev. 341, 342 n.2 (1943).


[FN56]. See Bowden v. Bowden, 53 A.2d 892 (Pa. Super. Ct. 1947). If both parties are "guilty of acts which in themselves would be grounds for divorce, the law will leave the parties where it found them and a divorce will be refused." Id. at 894. See generally Recrimination as a Defense in Divorce Actions, supra note 53 (explaining the doctrine of recrimination).

[FN57]. Nevada, which, as we saw, was notoriously unfussy about divorces, enacted a law in 1931 to the effect that, if both parties were guilty of a "wrong," the court could still grant a divorce in its discretion "to the party least in fault." Act of March 23, 1931, ch. 110, § 30, 1931 Nev. Stat. 179.

[FN58]. See 2 Vernier, supra note 22, at 79-87.

[FN59]. 10 A.2d 365 (Conn. 1939).

[FN60]. Id. at 366-67. To be fair, the blame for this result should rest on the trial court; the appeals court simply held that there was no basis for overturning the findings of the lower court. On the fraud issue, the Court said it was a question of fact whether Lillian entered the marriage "with the concealed intent not to consummate it"; the trial court held in her favor on this point, and "we cannot hold that no other conclusion was reasonably possible." Id. at 367.

[FN61]. N. D. Comp. Laws, Civ. C. § 4383 (1913); See also Kreyling v. Kreyling, 23 A.2d 800, 804 (N.J. Ch. 1942) (allowing a decree of divorce based on the defendant's refusal to have intercourse without contraception).


[FN63]. See id. at 652-55.


[FN65]. See id. at 1024-25.

[FN66]. Id. at 1025.
[FN67]. Id.


[FN69]. But see DiFonzo, supra note 19, at 1 ("Half of all American legislatures ... nominally broadened the divorce apparatus to encompass breakdowns caused merely by separation over long periods of time.").


[FN71]. See, e.g., H. Laurence Ross, Settled Out of Court: The Social Process of Insurance Claims Adjustments 18-23 (1976) (exploring automobile accident settlement and describing how official tort law, or what claims adjusters understood of it, influenced the settlements that were reached).

[FN72]. See 2 Vernier, supra note 22, at 4.

[FN73]. New York Sunday Mirror, Feb. 25, 1934 (magazine).

[FN74]. Id.

[FN75]. See 2 Vernier, supra note 22, at 1130-31.


[FN77]. See id. "Hotel evidence" was common in England, too--where divorce laws were similarly strict. See Aylward v. Aylward, 44 T.L.R. 456 (P. 1928), in which the divorce was refused. The judge felt that "this practice of resorting to hotels in order to make a prima facie case for dissolution of marriage," in a situation where the parties have agreed among themselves on a divorce, "should be stopped." Id. at 457.

[FN78]. Ploscowe, supra note 12, at 100-01 (citing Presentment, N.Y. C. Grand Jury Nov. 1948 Term, Court of General Sessions).


[FN80]. Id.

[FN81]. See id.

[FN82]. The National Divorce Reform League was "besieged" by "more than 100 distraught divorcees seeking clarification of their marital status," after the Hogan raid. Inquiry on Divorce Pressed by Hogan, N.Y. Times, Dec. 7, 1948, at L38. Lawyers for the League tried to reassure them: "Wholesale invalidation of divorces" was unlikely; only the New York courts could "initiate action to set aside suspected collusive decrees," and this was not expected to happen. Id.

[FN83]. See Miller v. Miller, 208 N.Y.S. 113 (App. Div. 1925). This was an uncontested divorce. A witness, Alexander McMann "shadowed" the defendant, following him into the Monterey Hotel, where the defendant and a woman registered as man and wife. The witness entered the room claiming to be a bellhop, together with another witness (the plaintiff's brother), and found defendant there with a woman who "was in her stocking feet, and had her outer dress off." Id. at 114. The trial judge dismissed the "undefended action," but the appellate court brusquely reversed and ordered judgment for plaintiff. Id. at 113, 115.

[FN85]. Id.


[FN88]. Id. at 800-01.

[FN89]. Id. The case, by the way, had absolutely nothing to do with divorce. It had to do with dog racing at the Mineola Fair in Nassau County. Dog racing was, strictly speaking, illegal, but the men who ran the race, with the connivance of the board of supervisors, devised a scheme to get around the law. Instead of placing bets, a customer would buy a "purchase option" on a dog, for $2, for example. (Presumably, if the dog loses the race, the customer simply forfeits his option.) Local officials were all in favor of this rather transparent scheme, but the district attorney called it an illegal "subterfuge." Id. Bonynge disagreed. A "wrongful intent on one side is not enough" to create a violation of law. He then launched into the diquision on "naivete," giving the divorce laws as one example. Another is the idea that citizens go to horse races because they are interested in "improving the breed of horses . . . . These things a judge must believe, even at the risk of being chided as naive, because they are contemporary America." Id.

[FN90]. A divorce lawyer, writing in 1936, tells us of a justice who "always busied himself with papers on his desk and diverted his attention to other matters when hearing testimony" in divorce cases, because "the evidence seemed so cut and dried." Windsor Holmes, Divorce à la Carte 21 (1936).

[FN91]. O'Gorman, supra note 32, at 33-35. O'Gorman's data are drawn from interviews conducted in 1958, which is somewhat later than the period treated in this piece, but the sentiments were surely not novel. See id. at 7.


[FN93]. In a well-known New York case, one Shonfeld wanted to go into the jewelry business. His girlfriend promised him $8000 to lease a jewelry store. They got married (but had no sex), and it turned out there never was any $8000. This was grounds for annulment, as a kind of fraud. See Shonfeld v. Shonfeld, 184 N.E. 60, 61 (N.Y. 1933).

[FN94]. See Jacobson, supra note 20, at 113; see also Annulments for Fraud— New York's Answer to Reno?, 48 Colum. L. Rev. 900 (1948) (discussing the "ever-increasing flood of divorces granted" in New York). Most annulments, one presumes, were as collusive as divorces. But annulments, too, could be contested--or, on occasion, dismissed by a judge who simply did not believe the allegations of the complainant. See, e.g., Dodge v. Dodge, 63 N.Y.S.2d 837 (App. Div. 1946); Cervone v. Cervone, 280 N.Y.S. 159 (Sup. Ct. 1935).

[FN95]. See Wels, supra note 84, at 322-26.

[FN96]. Md. Code Ann., Chancery § 38 (1924). The statute mentioned three other grounds, none of them a significant source of divorce suits: first, impotence; second, anything that would "render a marriage null and void ab initio"; and third—interesting, but not significant—"when the woman before marriage has been guilty of illicit carnal intercourse with another man, the same being unknown to the husband at the time of the marriage, and when such carnal connection shall be proved to the satisfaction of the court." This provision was eliminated in 1939. See Act of May 27, 1939, ch. 558, § 1, 1939 Md. Laws 1132-33. In 1937, a "creeping no-fault" provision, was added. See Act of April 26, 1937, ch. 396, 1937 Md. Laws 396.

Out of 1943 absolute divorces sought in 1929 (and granted by May 1, 1931), previous unchastity accounted for only 6; the other two of these rare grounds accounted for only 5 cases. All the rest were adultery and abandonment. See 1 Marshall & May, supra note 40, 169 n.3 (1932).

[FN98]. Many of these cases were classified, officially, as "contested," but all that meant, apparently, was that the defendant filed some sort of answer. Most of the "contested" cases in Maryland were, in fact, uncontested. See id. at 199-231.

[FN99]. Id. at 172-75.

[FN100]. Id. at 192.

[FN101]. Id. at 196.

[FN102]. Id.


[FN104]. See May, supra note 19, at 175.

[FN105]. Cal. Civ. Code § 108 (West 1951) (providing that a divorce may be granted upon proof that the spouse had been "incurably insane for a continuous period of three years immediately preceding the filing of the action and has been confined to . . . or under the jurisdiction of" an institution for the mentally ill).

[FN106]. See Sam B. Warner, San Francisco Divorce Suits, 9 Cal. L. Rev. 175, 177 (1921). Male plaintiffs alleged desertion 62% of the time and cruelty 32%; no other grounds were of any importance. See id.

[FN107]. San Francisco Chronicle, August 9, 1934, at 7.

[FN108]. Id.

[FN109]. See id.


[FN111]. In Becker v. Becker, No. 15,279 (San Diego Super. Ct. 1909), Gertrude Becker accused her husband of treating her in a "cruel and unkind manner." If her story was true, he certainly did. Peter Becker called her "a dam (sic) bitch, and dam (sic) whore," said he would knock her head off, threw a "bowl of hot mush" at her, burned her face, grabbed her so forcefully as to leave black and blue marks on her arms, threatened her with a pistol, and so on. Peter did not contest the divorce, and it was granted by default.

[FN112]. Roscoe Pound, Foreword, Symposium on the Law of Divorce, 28 Iowa L. Rev. 179, 184 (1943). The doctrine of collusion, Pound remarked, had "little force . . . in practice. Consider what any American community would think of a man convicted of extreme physical cruelty to his wife if those words (extreme cruelty) were taken seriously. But there are respected persons of high standing in every community against whom there are such records." Id.

[FN113]. Figures prepared on the basis of an examination of Mariposa County divorce cases. I am indebted here and for the San Mateo and Santa Clara data to Shannon Peterson.

[FN114]. Mildred S. v. Otho S., No. 1406 (Mariposa County Super. Ct. Sept. 12, 1934). This was, as usual, a default judgment; the judge entered a final decree of divorce on September 12, 1934, on the ground of "extreme cruelty." Id.


[FN117]. Figures prepared on the basis of an examination of San Mateo County divorce cases.


[FN119]. Figures prepared on the basis of an examination of Santa Clara County divorce cases.

[FN120]. Viola W. v. Albert W., No. 63,744 (Santa Clara County Super. Ct. Jan. 10, 1946). Albert contested, denying her allegations and alleging that Viola had been cruel to him, and had also joined a religious cult, the “White Light.” The court granted Viola a divorce. See id.

[FN121]. 2 Marshall & May, supra note 40, at 23.

[FN122]. Id.

[FN123]. See 2 Marshall & May, supra note 40, at 312.

[FN124]. See id.

[FN125]. The Pennsylvania statute allowed divorce when one spouse "offered such indignities to the person" of the other as to "render his or her condition intolerable and life burdensome." Pa. Stat. Ann. tit. 23, § 10 (West 1930).


[FN127]. See Riley, supra note 19, at 147-51.


[FN130]. See Act of May 3, 1948, ch. 279, § 1, 1948 Mass. Acts 279. The result was to leave the matter to the judge's discretion. That is, the judge could inform the district attorney or not, as the judge chose. This was, of course, true of any situation in which the grounds for divorce would constitute a crime--assault and battery, for example. See id.

[FN131]. See Friedman & Percival, supra note 34, at 61. In the 1945 Chattanooga divorce study, a "surprisingly high percentage of petitions" were filed by the husband (32%). World War II had just ended, and the study concluded that many of these were petitions filed by husbands "shortly after their discharge from military service." Chattanooga Divorce Report, 19 Tenn. L. Rev. 944, 945 (1947). In San Francisco in 1919, according to Sam Warner, the defendant defaulted in 76% of the divorce cases and in half of the rest "he appeared apparently to facilitate, rather than defeat, the . . . divorce." Warner, supra note 106, at 178.

[FN132]. Griswold, supra note 19, at 29-30. Griswold notes that women rather than men sued for divorce, and he interpreted that fact to mean that women were moving "toward self-assertion and a sense of personal efficacy." Id. Maybe so, but this ignores the many technical and structural reasons why a couple would prefer to cast the woman in the role of plaintiff in a collusive divorce.

[FN133]. Grounds for divorce, as of 1939, were skimpy: Adultery was one, another was the "abominable and detestable crime against nature, with mankind, or beast." Divorce was also available if, "at the time of the marriage," either party was "naturally impotent." N.C. Gen. Stat. § 1659 (1939). This last provision was unnecessary, since
under another provision, § 2495, such a marriage could be declared void. The provision about separation mentioned in the text, was added in 1933. See Act of March 20, 1933, ch. 163, 1933 N.C. Sess. Laws 143.


[FN135]. 2 Vernier, supra note 22, at 341.

[FN136]. 2 id.

[FN137]. 2 id. at 342.

[FN138]. See DiFonzo, supra note 19, at 78-79.

[FN139]. See id. at 81-87.


[FN141]. Id. at 203.

[FN142]. Id.

[FN143]. DiFonzo, supra note 19, at 61.

[FN144]. See Act of March 3, 1933, ch. 62, § 1, 1933 N.M. Laws 54.

[FN145]. 203 S.W.2d 912 (Tenn. 1947).

[FN146]. Id. at 913-14.


[FN148]. Id. at 12.


[FN150]. See O'Gorman, supra note 32, at 30-35.


[FN152]. See DiFonzo, supra note 19, at 112-37.

[FN153]. Id. at 114-20.


[FN155]. Id. at 207.

[FN156]. See Louis H. Burke, With This Ring app. at 273-80 (1958).

[FN157]. Id.

towards family "role distance" and greater focus on self from Victorian to modern times).

[FN159]. The statements in the text are true of California and an important group of "pure" no-fault states. In other states, there are waiting periods or other modifications of the "pure" no-fault idea.


[FN161]. Of course, the inequality becomes legally quite relevant with regard to other issues--property division and maintenance, for example.


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