Patriarchy or Equality: Family Values or Individuality

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A familiar, received wisdom commonly surfaces when today's authors portray the history of twentieth-century family law. According to the received account, family law through most of the century displayed an overtly sexist, patriarchal orientation which emphasized the superiority of male family heads and the dependency of women and children.\(^1\) As the story continues, a new feminism born in the 1960's brought forth demands for gender equality, and the polity's acceptance of those demands wrought revolutionary transformations in formal legal doctrines regulating husband and wife, and parent and child.\(^2\) The received wisdom recognizes, however, that the changes induced by the feminists paradoxically produced few tangible benefits for women. Even today, men have retained their economic dominance, especially in the aftermath of family breakups, and single

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\(^2\) For the standard work, which effectively summarizes the earlier literature, see LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 1-14 (1985).

women with children frequently live in poverty. ³

The present author's ongoing research into the legal history of New York between 1920 and 1980⁴ suggests that the received wisdom is correct, insofar as it goes, but is significantly incomplete. The half century prior to the feminist demands of the late 1960's was not a single uniform era devoid of substantial change. On the contrary, it consisted of two distinct periods.

As Part I of this article will show, the decades between the two World Wars did display a coherent patriarchal orientation focused around preservation of the nuclear family. Adult men were situated at the top of the family hierarchy, but their pri-

³ See Fineman, supra note 2, at 35-36, 90-94, 174-75; Weitzman, supra note 1, at 323-56.

⁴ See William E. Nelson, The Changing Meaning of Equality in Twentieth-Century Constitutional Law, 52 Wash. & Lee L. Rev. 3 (1995) (examining equality issues between 1920 and 1970 under New York case law); William E. Nelson, Contract Litigation & the Elite Bar in New York City, 1960-1980, 39 Emory L.J. 413 (1990) (noting striking increase in breach of contract litigation from early 1960s to late 1970s in New York); William E. Nelson, Criminality and Sexual Morality in New York, 1920-1980, 5 Yale J.L. & Hum. 265 (1993) (examining influence of socio-political forces on law's treatment of gender-related violence and sexual immorality). The scope of my more general study of the legal history of New York dictates, in part, the coverage of this article, including its limitation only to New York law. By focusing on this one state, which through most of the period under study was the most populous state and the economic and cultural leader of the nation, it becomes possible to analyze not only these leading cases but also the hundreds of more mundane cases that applied their holdings on a day-to-day basis. While study of any single state will provide only an incomplete sketch of developments in the nation at large, I am convinced that the picture that will emerge from New York will be less incomplete or distorted than that which would emerge from any other jurisdiction. A great advantage of New York is that it has a more complete set of lower court opinions than any other state. Moreover, in one important respect it was more typical of the nation as a whole than any other single state: with its metropolitan center on the Atlantic coast, its upstate industrial cities little different from those of the Midwest, its expanding suburbs, and its rural farmlands and environmentally protected woodlands, New York contained locales similar to those in all the rest of the nation except the Deep South and the Far West. One would accordingly expect to find a wider variety of the socio-political forces that shape law in New York than in other jurisdictions. Of course, those forces would converge differently in New York than elsewhere, and the end legal product molded by them would differ: for example, social forces emerging out of the metropolitan center would have greater weight in New York, where the City typically contained nearly half of the state's population, than in the nation at large, where New York City has never equaled even five percent of total population. When adjustments are made for these differences in configuration, however, the findings that emerge from this study about how socio-economic forces influenced family law in New York can serve as preliminary hypotheses about more general national developments, at least until scholars examine in similar detail states such as California and Texas, and a Southern state like Georgia.
macy entailed the performance of duties as well as the enjoyment of privilege. Traditional mechanisms for maintaining the dependence of women and children remained in place, but so too did nineteenth-century concerns for family preservation and for protecting the family's dependent members. Moreover, courts during the 1920-1940 era retained a healthy respect for the vicissitudes of fortune, and they remained ready to deploy the law in a practical fashion to address hardship and especially to provide help for children in need.

As Part II will show, the two decades after World War II were a different time. They were decades of extraordinary optimism, when it seemed that all Americans who made the necessary effort could achieve their goals and obtain happiness. Like many other doctrinal areas of the law, family law responded to this optimism, abandoning many old strictures and moving in the direction of recognizing individual rights and freedom. But this exaltation of individuals had the unintended, though not surprising, effect of favoring the strong at the expense of the weak, and thus tended to favor adults over children and men over women.

As Part III will explain, this unintended empowerment of adult men introduced a new sort of sexism into the law—a macho attitude that individual men, by virtue of their inherent superiority, were entitled to seize and retain whatever they could grab. Whereas consciously conferred sexist privilege had always existed in conjunction with duty prior to World War II, the privileges which adult men—and occasionally women—seized in the postwar decades appertained to them of right. Since courts merely recognized rights that existed in the nature of things, no one had to confer privilege on men, and no one could exact the performance of duties as the price for such conferral.

Thus, although the gender-related privileges that men enjoyed in the years after World War II were not consciously conferred, they existed in the consciousness of people, especially in the consciousness of late 1960's and 1970's feminists who demanded their termination. In response to their demands, men's formal legal privileges were terminated, but, as both the received wisdom and the New York material discussed in Part IV will show, the law continued to help men retain their practical economic and social dominance. The feminist drive for gender equality even produced occasional advantages for men, such as
increased recognition of their rights as fathers.

The fuller picture that this Article will sketch is important because it points toward different answers than theorists typically give in response to the question of why the feminist efforts of the late 1960's and the 1970's produced so few tangible benefits for women. This Article’s more fulsome picture, it is hoped, will suggest that feminism did not fail because of women’s failure properly to perceive their goals or because men control the legal system and have used it to advance their interests. On the contrary, the Article will show that women failed to obtain tangible equality with men because of the deep commitment of all Americans in the late twentieth century—women as well as men—to the protection of individual rights and the pursuit of individual happiness. This shared commitment to individualism has limited the paths that reform can take and has excluded from the political agenda practical approaches for attaining tangible gender equality.

This Article will also show that, while the overall dominance of men and dependency of women remained constant between 1920 and 1980, the legal relationship of parent and child was transformed over the same period. In the 1920’s, the *raison d’être* of family law had been the protection of children; by the 1970’s, in contrast, the law ignored the well-being of children as it focused on protecting the rights of parents. This transformation is especially important because it demonstrates the error in the received wisdom’s view that, since power relations between men and women have not changed fundamentally over the course of the twentieth century, the doctrinal changes that did occur in the late 1960’s have left family law in the main unchanged. Instead, this Article argues that family law has changed, from a body of doctrine committed to preservation of the patriarchal family to a law of rights transfixed by a macho policy of enhancing male happiness.

I. FAMILY PRESERVATION IN THE 1920’S AND 1930’S

Well into the twentieth century, New York courts adhered to the State’s traditional policy of “preserv[ing] the family unit”
and, through the family, "the morality of the citizens of the state." In essence, the courts possessed two mechanisms for achieving this policy goal. The one was to presume that men and women cohabiting together were married, especially if they had children. The other was to "promote the permanency of ... marriage contracts" by making termination of marriage difficult. By systematizing marriages and forcing couples to remain married, judges hoped to insure that children would live in nuclear families and, as a result, receive proper economic support and moral education.

The pursuit of these family values clashed, however, with several social realities. First, there were men and women who without the benefit of marriage engaged in sexual intercourse that sometimes led to the birth of children. Second, there existed unhappy spouses, some of whom wanted a way out of their marriages. Third, there were some parents who had enjoyed happy marriages but who, especially during the Great Depression, proved unable to support and educate their children.

This Part will examine the interplay between the public policy of protecting the family and the social realities which during the 1920's and 1930's frustrated it. Section A will examine how the law strove to confine under the rubric of marriage as much cohabitation as possible, especially that which led to the birth of children. Section B will then turn to the law's "interest in preserving the marriage status"—an interest which the legislature advanced by limiting the availability of divorce only to provable cases of adultery. The section will also turn to the responses of unhappy spouses. Finally, Section C will look at the disheartening story of how the law dealt with parents who were unable to support their children.

A. Creating Marriages

At common law, a child born out of wedlock was "nullius filius"—the child of no one, entitled to neither rights nor standing in the community, and "not looked upon as [a] child for any civil purposes." Bastardy was thus a stigma upon both a

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8 Hubbard v. Hubbard, 126 N.E. 508, 509 (N.Y. 1920).
9 Id.
child and its parents. It was a stigma designed to deter couples from engaging in sex or, if deterrence failed, to encourage them to legitimize their relationship.

One way to encourage legitimation was for the judges themselves to declare children legitimate in borderline cases where evidence of their status was indeterminate. This result was achieved through what the New York Court of Appeals labeled "an established legal presumption that every person is born legitimate." The presumption was "described as 'one of the strongest and most persuasive [presumptions] known to the law,'" although it could "be rebutted where to do otherwise would outrage common sense and reason."

The general presumption of legitimacy had three subcategories. The first, and most frequently applied, held that "[a] child born of a wife during marriage" was the "legitimate" child of the wife's husband. The second rendered children born out of wed-

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12 In re Estate of Fay, 375 N.E.2d 735, 737 (N.Y. 1978) (citations omitted).
13 Id.
14 Stillman v. Stillman, 148 N.E. 518, 519 (N.Y. 1925). Much of family law in place in the 1920's remained unchanged in subsequent decades, as this and subsequent footnotes reflect. For cases applying the Stillman principle subsequent to its date of decision, see Cerone v. Cerone, 395 N.Y.S.2d 240, 241 (App. Div. 2d Dep't 1977) (noting presumption of child's legitimacy when born to married parents); Orange v. Rose, 295 N.Y.S.2d 782, 783 (App. Div. 3d Dep't 1968) (stating that child born to married parents is presumed legitimate); People v. Lewis, 267 N.Y.S.2d 728, 730 (App. Div. 2d Dep't 1966) (finding unsupported testimony of married woman that husband was impotent not enough to overcome presumption of legitimacy of child); Moy Mee Soo v. Leong Yook Yick, 248 N.Y.S.2d 61, 62 (App. Div. 1st Dep't 1964) (holding presumption that child of married woman who lived with husband at time of conception was legitimate was not rebutted); Kehn v. Mainella, 242 N.Y.S.2d 732, 737 (Fam. Ct. Rensselaer County 1963) (noting off-quoted presumption of legitimacy); Lawrence v. Lawrence, 132 N.Y.S.2d 529 (Dom. Rel. Ct. Bronx County 1954) (noting presumption of paternity of "child born in wedlock is very strong"); In re Kotlik's Estate, 274 N.Y.S. 304, 308 (Sur. Ct. Kings County 1934) (stating that legitimacy of recognized offspring is true presumption); In re Wells' Will, 221 N.Y.S. 714, 724 (Sur. Ct. Westchester County 1927) (commenting that when child is born of married parents, presumption is that father of child is mother's husband).

The presumption of legitimacy, which was "one of the strongest ... known to the law," In re Findlay, 170 N.E. 471, 472 (N.Y. 1930) (citations omitted), aff'd in part, 284 N.Y.S. 1019 (App. Div. 2d Dep't 1935); accord Commissioner of Pub. Welfare v. Koehler, 30 N.Y.S.2d 587, 589 (N.Y. 1940) (quoting Findlay, 170 N.E. at 472); Lockwood v. Lockwood, 62 N.Y.S.2d 910, 912 (Sup. Ct. Queens County 1946) (finding since not impossible that husband was child's father, presumption of legitimacy stands); In re Simpson's Estate, 24 N.Y.S.2d 954, 956 (Sur. Ct. N.Y. County) (noting that presumption of legitimacy is one of strongest legal presumptions), aff'd, 30 N.Y.S.2d 843 (App. Div. 1st Dep't 1941); In re Marcini's Estate, 280 N.Y.S. 665, 668 (Sur. Ct. Westchester County) (citing Findlay, 170 N.E. at 473.), aff'd in part, 284
N.Y.S. 1019 (App. Div. 2d Dep't 1935), could be overcome by evidence "convincing to the point of entire satisfaction," GG v. HH, 325 N.Y.S.2d 436, 438 (App. Div. 3d Dep't 1971); accord Hansom v. Hansom, 346 N.Y.S.2d 996, 998 (Fam. Ct. Richmond County 1973) (stating that presumption of legitimacy can be overcome by competent proof), such as blood test results excluding paternity, see C. v. C., 109 N.Y.S.2d 276, 278 (Sup. Ct. Kings County 1951) (commenting that blood test was conclusive in establishing that plaintiff was not father of disputed issue); Schulze v. Schulze, 35 N.Y.S.2d 218, 220 (Sup. Ct. Monroe County 1942) (determining blood grouping tests excluded plaintiff as child's father); Wilferth v. Wilferth, 22 N.Y.S.2d 264, 264 (Sup. Ct. Monroe County 1940) (holding results of blood test admissible only where exclusion established); B. v. Ben, 334 N.Y.S.2d 229, 233 (Fam. Ct. Nassau County 1972) (recognizing increasing value of blood grouping tests in paternity suits); Violet v. John, 320 N.Y.S.2d 771, 773-74 (Fam. Ct. Bronx County 1971) (granting leave to respondent to obtain blood-grouping test to determine paternity); Crouse v. Crouse, 273 N.Y.S.2d 595, 595-96 (Fam. Ct. Nassau County 1966) (holding that blood grouping test was sufficient to overcome presumption of legitimacy); Gilpin v. Gilpin, 94 N.Y.S.2d 706, 709 (N.Y. Dom. Rel. Ct. Kings County 1950) (stating that unborn child will have privilege of blood test to determine parenthood); Saks v. Saks, 71 N.Y.S.2d 797, 800-01 (N.Y. Dom. Rel. Ct. Kings County 1947) (discussing accuracy and admissibility of blood tests as evidence); by the fact that the husband lacked access to his wife when the child was conceived, see People on Complaint of Nicholaides v. Theodos, 300 N.Y.S. 32, 32 (App. Div. 2d Dep't 1937) (noting that husband was confined to hospital during child's conception); Altmare v. Altmare, 63 N.Y.S.2d 71, 72 (Sup. Ct. N.Y. County 1946) (stating that husband was member of Armed Forces); Benti v. Benti, 62 N.Y.S.2d 239, 240 (Sup. Ct. N.Y. County 1946) (finding husband incompetent to testify as to non-access to wife during gestation period of child); Colmand v. Dailey, 359 N.Y.S.2d 409, 420 (Fam. Ct. Queens County 1974) (noting that spouses did not cohabit prior to child's birth); the fact that the husband and wife had been divorced three years prior to the child's birth, see Urquhart v. Urquhart, 92 N.Y.S.2d 484, 489-90 (Sup. Ct. N.Y. County 1949) (stating that recognition of divorce precludes presumption of legitimacy), aff'd, 97 N.Y.S.2d 200 (App. Div. 1st Dep't 1950); or a letter from the wife's paramour declaring, "I love you and our baby," Anonymous v. Anonymous, 269 N.Y.S.2d 653, 656 (App. Div. 2d Dep't 1966) (holding that letter satisfied statutory requirement of written acknowledgment of paternity), aff'd, 227 N.E.2d 318 (N.Y. 1967). But evidence merely that the husband was sterile subsequent to the child's birth, see Houston v. Houston, 99 N.Y.S.2d 199, 205-06 (Dom. Rel. Ct. Queens County 1950) (doubting accuracy of sterility test); or that the wife had committed adultery was not sufficient to render her offspring illegitimate, see Mannain v. Lay, 308 N.Y.S.2d 248, 249 (App. Div. 2d Dep't) (holding that proof of adultery is insufficient to overcome presumption of legitimacy), aff'd, 282 N.E.2d 216 (N.Y. 1970); Gray v. Rose, 302 N.Y.S.2d 185, 187 (App. Div. 3d Dep't 1969) (explaining that establishment of extra-marital relationship of wife does not overcome presumption of child's legitimacy); Buchanan v. Buchanan, 243 N.Y.S. 436, 437 (App. Div. 3d Dep't 1930) (same); Lee v. Stix, 286 N.Y.S.2d 987, 992 (Fam. Ct. Ulster County 1968) (finding wife's proof of illicit love affair insufficient to rebut presumption of legitimacy); Harding v. Harding, 22 N.Y.S.2d 810, 816 (Dom. Rel. Ct. Queens County 1940), aff'd, 25 N.Y.S.2d 525 (App. Div. 2d Dep't 1941); Milone v. Milone, 290 N.Y.S. 863, 865 (Dom. Rel. Ct. N.Y. County 1938) (noting possibility of wife having committed adultery insufficient proof to deprive child of legitimacy); unless the wife "had run away from ... [her husband's] home and was living apart from him in unconcealed adultery," Findlay, 170 N.E. at 474.
lock legitimate if their parents were subsequently married.\textsuperscript{15} The third treated as legitimate children of parents who entered a marriage in good faith even though courts subsequently held the marriage void.\textsuperscript{16}

Another vehicle directed toward the same end as the presumption of legitimacy was the doctrine of common law marriage, which permitted a couple to marry without the formality of a ceremony. The only prerequisite to the creation of a common law marriage was the consent of a man and woman to take each other at the time of the consent as husband and wife. Their present agreement to marry could be oral or in writing and could be proved by circumstantial evidence, such as cohabitation and repute.\textsuperscript{17}

\textsuperscript{15} See People ex rel. Meredith v. Meredith, 69 N.Y.S.2d 462, 465 (App. Div. 2d Dep't) (analyzing, in dictum, statute providing that child born out of wedlock becomes legitimate upon subsequent marriage of its parents), aff'd, 77 N.E.2d 8 (N.Y. 1947); In re Hoagland's Estate, 211 N.Y.S. 629, 631-32 (Sur. Ct. N.Y. County 1925) (holding daughter, born out of wedlock but legitimized upon subsequent marriage of her parents, was entitled to remainder of trust under father's will).

\textsuperscript{16} See Polotti v. Flemming, 277 F.2d 864, 867 (2d Cir. 1960) (finding lower court correctly declared child of invalid marriage to be legitimate where marriage was contracted in good faith); In re Newins' Estate, 229 N.Y.S.2d 279, 285 (App. Div. 2d Dep't) (holding child was legitimate despite invalidity of parent's marriage), aff'd, 187 N.E.2d 360 (N.Y. 1962); Christensen v. Christensen, 240 N.Y.S.2d 797, 800 (Sup. Ct. N.Y. County 1963) (holding that child born into subsequently voided marriage was deemed legitimate since subsequent marriage was entered into in good faith that former marriage was legally dissolved); Connors v. Connors, 226 N.Y.S.2d 106, 109 (Sup. Ct. Queens County 1962) (determining although wife's second marriage was void, child born during second marriage deemed legitimate); Lamb v. Lamb, 307 N.Y.S.2d 318, 326 (Fam. Ct. N.Y. County 1969) (determining that children born to parents who entered into ceremonial marriage were legitimate despite fact that ceremonial marriage followed husband's invalid divorce from first wife); Bentley v. Bentley, 76 N.Y.S.2d 877, 880 (Dom. Rel. Ct. Queens County 1948) (finding child of annulled marriage still remained legitimate); In re Grossman's Estate, 248 N.Y.S. 791, 791-92 (Sur. Ct. Bronx County 1931) (holding child of invalid second marriage the legitimate child of both its parents); In re Baker's Estate, 183 N.Y.S. 139, 142 (Sur. Ct. N.Y. County 1920) (presuming legitimacy of child of second, invalid marriage). But see In re Wright's Estate, 243 N.Y.S. 538, 544 (Sur. Ct. Tioga County 1930) (holding marriage contracted in good faith belief that former marriage was dissolved by valid decree of divorce was not sufficient to legitimate child); In re Bruington's Estate, 289 N.Y.S. 725, 729-30 (Sur. Ct. N.Y. County 1936) (refusing to legitimize a child of a polygamous marriage); In re Thomann's Estate, 258 N.Y.S. 838, 840 (Sur. Ct. N.Y. County 1932) (determining children of foreign second marriage illegitimate under the laws of New York where valid first marriage in New York).

\textsuperscript{17} See Kelly v. Metropolitan Life Ins. Co., 352 F. Supp. 270, 273-74 (S.D.N.Y. 1972) (finding that common-law marriage may be proven through, among other things, actual cohabitation or general repute); Fisher v. Fisher, 227 N.Y.S. 345, 349
The main impact of the doctrine of common law marriage was to validate otherwise invalid marriages when a couple continued their agreement to live together as husband and wife at a time and place where common law marriage was recognized. This effect was illustrated by *In re Seymour,* where a man and woman who erroneously believed themselves to have been validly married in Pennsylvania came to live in New York in 1903.


Thus, a common law marriage that was void in one state would become valid if the parties traveled as husband and wife to another state where no bar existed to common law marriage in general or to their marriage in particular. See *In re Sokloff's Estate,* 2 N.Y.S.2d 602, 605-06 (Sur. Ct. Kings County 1938) (noting that it was within decedent's power to marry validly in any state other than New York).
when common law marriage was not recognized in the state. As of December 31, 1907, they were not husband and wife, but when on January 1, 1908, common law marriage came back into existence in New York and the Seymours thereafter continued their agreement to live as husband and wife, their marriage became valid.20

Even after 1933 legislation refused to recognize as legal common law marriage in New York,21 the State’s courts continued to recognize the validity of common law marriages entered into prior to 193322 or in other jurisdictions.23 Indeed, they even went so far as to declare that New Yorkers with an uncertain marital status who went to another state that allowed common law marriage would be deemed to have gone there “for the express purpose of renewing their consents ... [so as] ‘to remove any doubt as to the validity of their marriage.’”24

Through the presumption of legitimacy and the doctrine of common law marriage, New York’s courts did what they could to regularize illicit unions and legitimize their offspring. Men and women who went through invalid, ceremonial marriages or who simply cohabited and produced offspring would be treated as nuclear families unless they manifested a clear intent to the contrary. The law’s preference for marriage could hardly have been more clear.

20 For a similar case, see Applegate v. Applegate, 193 N.Y.S. 494 (Sup. Ct. Kings County 1922).

21 See Bobb v. Secretary, Dept’ of Health, Educ. and Welfare, 312 F. Supp. 225, 226 (S.D.N.Y. 1970); People v. Allen, 261 N.E.2d 637, 640 (N.Y. 1970); Anonymous v. Anonymous, 21 N.Y.S.2d 71, 72 (Dom. Rel. Ct. Bronx County 1940). But see Steele v. Richardson, 472 F.2d 49, 53 (2d Cir. 1972) (explaining that federal courts should not allow presumption of marriage to be easily rebutted “in order to deny a surviving spouse her claim to financial support after some period of cohabitation ... especially when the claim is made under the Social Security Act, which should not be construed in a niggardly fashion to deny coverage”).


B. Preserving Marriages

1. Adultery as the Sole Ground for Divorce

Not only did New York law encourage cohabiting couples to enter into marriage; it also strove to keep them there by limiting the grounds of divorce. Indeed, for the first two-thirds of the twentieth century, only a single ground for divorce—adultery—existed in New York.\textsuperscript{25} The fact that spouses had “acted in disregard of th[eir] marriage for a long period of time ... [would] not destroy its validity”\textsuperscript{26} provided their disregard had taken a form other than adultery. Indeed, one case held that even a husband’s act of homosexual sodomy would not give a wife ground for divorce. While the court was “sympathetic with plaintiff [wife’s] plight,” it felt “powerless to alleviate it.”\textsuperscript{27}

Moreover, not every act of adultery served as a ground for divorce. Thus, if one spouse had procured or connived at the other’s adultery,\textsuperscript{28} had condoned or forgiven it,\textsuperscript{29} or had failed to seek a divorce within five years of its discovery,\textsuperscript{30} a suit for divorce would not lie. Further, a divorce would not be granted if both spouses had been guilty of adultery.\textsuperscript{31}

As has already been suggested, however, unhappy spouses constantly attempted to maneuver around these restrictions by

\textsuperscript{25} See Greenberg v. Greenberg, 218 N.Y.S. 87, 94 (App. Div. 1st Dep’t 1926) (commenting that adultery is only sufficient reason for divorce); Johnson v. Johnson, 261 N.Y.S. 523, 526 (Sup. Ct. Schenectady County 1933) (reasoning that adultery is only grounds in New York that dissolves marriage bond); Weir v. Weir, 226 N.Y.S. 115, 120 (Sup. Ct. Onondaga County 1927) (stating that adultery was sole ground to obtain absolute divorce).

\textsuperscript{26} In re Goode’s Estate, 188 N.Y.S. 188, 189 (Sur. Ct. N.Y. County 1921), aff’d, 197 N.Y.S. 916 (App. Div. 1st Dep’t 1922).

\textsuperscript{27} Cohen v. Cohen, 103 N.Y.S.2d 426, 428 (Sup. Ct. N.Y. County 1951).


\textsuperscript{30} See Beauley v. Beauley, 191 N.Y.S. 398 (App. Div. 1st Dep’t 1921) (per curiam).

obtaining "collusive or fraudulent divorces" and "[d]ivorces by agreement." In response, the courts, "interested in preserving the marriage status," developed new strictures against easy divorce. For example, even if a defendant defaulted in a divorce case, the plaintiff had to produce evidence of adultery in order to obtain a judgment. It was likewise "well settled that mere admissions by a defending spouse uncorroborated to a satisfactory degree" would not alone support a judgment for divorce. Finally, judges learned to be skeptical of testimony offered by private detectives employed by one spouse to produce incriminating evidence against the other spouse as well as other questionable sorts of witnesses, such as "prostitutes" and "persons [who] consort openly, knowingly, and willfully with adulterers."

As a result of these strictures, many courts ruled particular evidence of adultery insufficient and declined to grant requested divorces. In one case, for example, in which a man in military

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34 Messing, 76 N.Y.S.2d at 378.
35 See id. (stating that divorce will not be granted without formal proof of adultery); see also Simons v. Simons, 58 N.Y.S.2d 558, 559 (App. Div. 3d Dep't 1945) (holding that rule that default divorce will not be granted based on uncorroborated testimony is not followed in litigated cases). But cf. Weiss v. Weiss, 238 N.Y.S. 36, 38 (Sup. Ct. N.Y. County 1929) (concluding that temporary alimony should not be granted to wife who fails to deny husband's claim of adultery).
37 See Kruczek v. Kruczek, 35 N.Y.S.2d 289, 294 (App. Div. 1st Dep't 1942) (explaining that uncorroborated testimony of private detective must be carefully scrutinized), aff'd, 47 N.E.2d 434 (N.Y. 1943); Braun v. Braun, 281 N.Y.S. 25, 29 (App. Div. 4th Dep't 1935) (noting evidence of detectives in divorce case must be evaluated in light of fact they were hired by opposing party); Elsworth v. Elsworth, 224 N.Y.S. 620, 621 (App. Div. 2d Dep't 1927) (per curiam) (finding detective's testimony may be used in case but not determinative).
38 Witchley v. Witchley, 226 N.Y.S. 95, 97 (Sup. Ct. Oneida County 1927). But see Vartling v. Vartling, 203 N.Y.S. 753, 753 (App. Div. 1st Dep't 1924) (reasoning that divorce should not be denied on ground of immorality of witness who testified he had committed adultery with defendant wife). Another arguable safeguard against finding adultery too easily was the requirement that the issue be determined by a jury. See Smith v. Smith, 225 N.Y.S. 606, 607 (Sup. Ct. Fulton County 1927).
service had confessed to “adulterous relations with French girls,” and his chaplain had written that he was “in the guardhouse for going to see this girl without pass or furlough,” 40 the court refused to grant his wife a divorce. In the court’s view, the only evidence was the defendant’s own confession, with corroboration from the chaplain proving “nothing more than that the defendant is undisciplined and disobedient.”41

It is important to emphasize, though, that, at least in the 1920’s, the rules for appraising evidence of adultery in the context of divorce were not manipulated in a fashion suggestive of discrimination against women. On the contrary, judges expressed their awareness “of the frailties and viciousness of” men.42 With that awareness, they were prepared to listen seriously to an accusation, for example, that a husband had committed adultery with his mother-in-law. Given their awareness, they did not find the accusation “so inherently improbable as to be beyond belief,”43 and they accordingly required the husband to submit evidence of his innocence.

2. Circumventing Prohibitions on Divorce

The difficulty of obtaining divorce in New York induced many unhappy spouses to seek other ways out of marriage. Two such ways existed: suing for divorce in another state or seeking...
an annulment of their marriage in New York. The courts strove to make both devices as unavailable as possible in recognition of the threat that they presented to the State's policy of protecting marriage.

a. Out-of-State Divorces

Central to the State's effort to restrict the effectiveness of out-of-state divorces in New York was the Full Faith and Credit Clause of the Federal Constitution. It determined whether New York would be free to enforce its own divorce policies. Until 1943, when the United States Supreme Court held that states were required to give full faith and credit to the divorce judgments of sister states, New York courts jealously guarded the State's freedom to ignore out-of-state divorces and thereby bind its own domiciliaries to the policies which the State had adopted in regard to divorce.

The leading case in the 1920's was *Hubbard v. Hubbard*, in which the Court of Appeals declared the State's courts "untrammeled" by the full faith and credit clause and hence free to give divorce decrees of other states "the efficacy and effect they deem rightful and salutary in view of the public policy of the state." Observing that the policy of the State was "to promote the permanency of the marriage contracts and the morality of the citizens of the state" by allowing divorce only on grounds of adultery, the Court declared itself the final judge "of the occasions on which the exercise of comity [to recognize an out-of-state divorce] will or will not make for justice or morality" and further held that, in light of New York's policies, it would not enforce "a divorce decree of a sister state which violates the principles of morality, or the public policy, or municipal regulations established by it." In particular, New York courts generally would not recognize divorces on grounds other than adultery granted by

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44 See U.S. CONST. art. IV, § 1 (providing that "[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State").
45 See infra note 343 and accompanying text.
46 126 N.E. 508 (N.Y. 1920).
47 Throughout this article, Court of Appeals will be used to refer to the New York State Court of Appeals, New York's highest court.
48 *Hubbard*, 126 N.E. at 509.
49 Id.
other states in the presence of only one spouse,\textsuperscript{50} although they were prepared to recognize even a divorce granted by a foreign nation for adultery.\textsuperscript{61}

\textit{b. Annulments}

In view of the difficulty of obtaining a divorce in New York for adultery and of gaining recognition of an out-of-state divorce on grounds other than adultery, many New Yorkers seeking an end to their marriage turned to the third device available to them—the device of annulment, a judicial declaration that their marriage had never existed.\textsuperscript{52} An annulment could be obtained on any of three grounds—duress, fraud, or incapacity.

Duress was the ground for annulment in \textit{Fratello v.}
Fratello,\textsuperscript{53} where the groom and his relatives threatened that if the plaintiff did not marry him, “they would kidnap her, take her to New York, disfigure her face by cutting it, and would also destroy the house of plaintiff’s father by blowing it to pieces.”\textsuperscript{54} The plaintiff and her family “not only believed that these men would carry into execution this threat, but ... were justified in such belief.”\textsuperscript{55} Fortunately, after the marriage ceremony, the bride was able to escape, go into hiding, and bring suit.

More importantly, annulments could be had for fraud. The basic rule, proclaimed by the Court of Appeals, was that a valid marriage required “consent by ... [the] parties” thereto, that “[i]f either party consent[ed] by reason of fraud there [was] no reality of consent,” and that “[h]ence the marriage [was] voidable.”\textsuperscript{56} Annulments for fraud were usually difficult to obtain, however, because they would be “decreed, not for any and every kind of fraud,” but only for frauds deemed by the courts “vital” to the marriage relationship.\textsuperscript{57}

In determining the issue of the importance of any particular fraud, courts focused, in a categorical fashion, on the type of fraud perpetrated rather than on the significance of the fraud in the injured spouse’s individualized hierarchy of values. One category of fraud that was always held to vitiate a marriage, but probably produced few annulments, was sexual impotence.\textsuperscript{58} “Capability of consummation [was] an implied term in every marriage contract; and in the case of marriages between young persons, capacity for lawful sexual indulgence [was] regarded as of special importance to the happiness of the wedded state and to the fulfillment of the ends of matrimony, viz. a lawful indulgence of the passions in order to prevent licentiousness.”\textsuperscript{59} Thus, if a husband lacked “potentia copulandi” and was incapable of “copula vera,” defined as “ordinary and complete intercourse” or “natural and perfect coition,”\textsuperscript{60} a wife was entitled to an annul-

\textsuperscript{53} 193 N.Y.S. 865 (Sup. Ct. Oneida County 1922).
\textsuperscript{54} Id. at 867.
\textsuperscript{55} Id.
\textsuperscript{56} Shonfeld v. Shonfeld, 184 N.E. 60, 61 (N.Y. 1933); Caleca v. Caleca, 103 N.Y.S.2d 752, 753 (App. Div. 2d Dep't 1951).
\textsuperscript{57} Woronzoff-Daschkoff v. Woronzoff-Daschkoff, 104 N.E.2d 877, 880 (N.Y. 1952).
\textsuperscript{58} The impotence cases can also be analyzed as cases of incapacity.
\textsuperscript{59} Vanden Berg v. Vanden Berg, 197 N.Y.S. 641, 642 (Sup. Ct. Monroe County 1923).
\textsuperscript{60} Steinberger v. Steinberger, 33 N.Y.S.2d 596, 597 (Sup. Ct. Bronx County
ment. Similarly, if a wife was suffering from "a nervous condition, an uncontrollable tension" or from "an erratic nervous condition characterized by a contraction of the sphincter muscles of the vagina" which made her "incapable of sexual intercourse with the plaintiff, though not with other persons, if such be possible, a decree of nullity [could] be granted."

A similar category of cases consisted of those in which one spouse refused to engage in sexual relations with the other. Only a few such cases, however, found this to be grounds for annulment. An annulment would not be granted, for instance, if there was "an adequate excuse" for a wife's "refusal to cohabit," such as a husband's failure "to perform his marital obligations of providing a home and maintenance." Even an unjustified refusal to engage in sexual relations constituted no more than a ground for separation, unless the refusal resulted from some condition preexisting the marriage, such as homosexuality or a
desire for some form of "unnatural and perverted" sex with one's spouse which a court found "disgusting and deserving of utmost condemnation."67 A refusal of sexual relations would otherwise constitute a ground for annulment only if an intent to refuse had been formed secretly prior to the marriage.68

A similar kind of fraud occurred when an unmarried, pregnant woman coerced a man into marrying her by telling him falsely that he was the father of her child. Courts uniformly granted annulments to such husbands upon their discovery of the fraud,69 provided they could prove that the woman was actually pregnant70 and that they were not the father.71 But, normally, the courts would not grant an annulment of a marriage between the actual parents of a child conceived prior to mar-

(Sup. Ct. N.Y. County 1963) (denying annulment despite husband's concealment of "prior homosexuality" when couple had "a not unhappy honeymoon and an uneventful three weeks of cohabitation upon their return" before he became impotent); Shapiro v. Shapiro, 138 N.Y.S.2d 870, 871 (Sup. Ct. N.Y. County 1954) (denying annulment despite husband's concealment that "he was not a normal person sexually" because couple had cohabited for eight years and had child).


68 See De Baillet-Latour v. De Baillet-Latour, 94 N.E.2d 715, 717 (N.Y. 1950); Florio v. Florio, 143 N.Y.S.2d 105, 107 (Sup. Ct. N.Y. County 1955); Miller v. Miller, 225 N.Y.S. 657, 657-58 (Sup. Ct. Monroe County 1928). But see Johnson v. Johnson, 169 N.Y.S.2d 97, 99 (Sup. Ct. N.Y. County 1957) (finding evidence insufficient to prove preexisting intent not to have sexual relations); Lopez v. Lopez, 169 N.Y.S.2d 74, 76 (Sup. Ct. N.Y. County 1957) (finding husband's refusal to have ordinary marital relations was not sufficient grounds for annulment); Eldredge, 43 N.Y.S.2d at 797 (refusing annulment absent allegation that defendant entered into marriage with no intention of consummating it).


71 See Kingsbury v. Kingsbury, 75 N.Y.S.2d 699, 702 (Sup. Ct. Monroe County 1947) (finding that man's knowledge that child was not his to give up for adoption was not sufficient grounds for annulment); Iati v. Iati, 272 N.Y.S. 32, 33 (Sup. Ct. N.Y. County 1934) (holding that question of child's paternity coupled with husband's cohabitation after birth of child precluded annulment based on fraud); see also Guido v. Guido, 175 N.Y.S.2d 634, 635 (Sup. Ct. Westchester County 1958) (denying annulment when husband testified he never had premarital relations with his wife and thus could not have been misled by her assertion that he was father of her child).
riage.²²

Annulments were routinely granted on such rare grounds as concealment of drug addiction,²³ of a prior conviction for rape,²⁴ of a "pathologic sexuality known as voyeurism,"²⁵ of a venereal disease²⁶ or some other "loathsome contagious disease,"²⁷ or of a known incapacity to bear children.²⁸ More complex, however,
were suits for annulment on the much more common ground of insanity. Of course, an insane person could never give consent to a contract of marriage, and hence a proper representative of someone who was insane at the time of marriage could always sue to annul the marriage. By judicial decision, on the other hand, the sane spouse could not sue for an annulment, unless proof was available to show that the insane spouse, in a lucid moment, had fraudulently given assurances of sanity. Subsequent legislation, however, allowed either spouse to sue even in the absence of a lucid moment of fraud.

Incapacity, as already noted, was the final basis for annulment. Two forms of incapacity were the nonage of one or both spouses or their consanguinity. Probably the most common form of legal incapacity was that one of the spouses was lawfully married to a third person. In this last situation, sorting out of fraudulent concealment of sterility was insufficient for annulment absent allegation of material nature of fact to plaintiff); Korn v. Korn, 242 N.Y.S. 589, 591 (App. Div. 1st Dep't 1930) (per curiam) (deciding that mere sterility is not ground for annulment).


82 See 1928 N.Y. Laws, c. 83 (amending law to allow for annulments); see also N.Y. DOM. REL. LAW § 7 (1928) (listing types of voidable marriages).


85 See Blek v. Blek, 114 N.E.2d 192, 193 (N.Y. 1953); Landsman v. Landsman, 96
which of two marriages should be recognized as valid often presented courts with difficult problems.

Consider, for example, two cases arising out of the chaos of World War I. In the first, a young woman named Annastasia in 1903 married Steve Schultz in Dubra, then part of Austria-Hungary and now part of Bosnia. She bore a daughter in 1905, and she lived with her husband until she came to New York in 1912, with every expectation that he would follow. However, the outbreak of war in 1914 prevented his coming, and in 1918 she learned that he had died. She then married Conrad Chayka, with whom she lived until she learned in 1932 from her daughter in Austria that Steve Schultz was still alive. She immediately left Chayka. Then in 1938 her Austrian daughter wrote from Russia that Schultz had just died in Yugoslavia. On her testimony to these facts, the court held her still to be married to Chayka.

A similar case arose from Emanuel Hayden’s marriages. In 1913 in Russia he had married Molly Hayden, to whom a child was born the next year. Emanuel was drafted into the Russian army, captured by the Germans, and confined as a prisoner of war in Germany, where he heard that “his wife had been mur-

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dered in one of the many 'pogroms' incidental to Jewish life in Russia during the late war.\textsuperscript{88} At the end of the war he escaped to the Netherlands and in 1920 migrated to New York, from where he continued to try to contact his wife. In 1921, however, he received confirmation through a cousin in New York that his wife and child had indeed been murdered in the pogrom. Believing Molly dead, he married Ida Hayden in 1922, with whom he promptly had a second child in 1923. In the same year, Molly contacted him, he ceased cohabiting with Ida, and finally in 1925 he was able to bring Molly and his first child to the United States. On this evidence, the court validated his marriage with Molly and annulled his marriage with Ida, concluding that he had always acted "in good faith" and had simply been a victim "of the chaotic and disturbed social, economic, and political conditions which existed in Russia" resulting in a "dislocation of the normal channels of communication."\textsuperscript{89}

The legislature sought to provide a remedy in cases such as these,\textsuperscript{90} and incidentally to make annulments more difficult to obtain, by a 1922 statute\textsuperscript{91} requiring a person who believed his or her spouse to be dead to conduct an investigation, present the results of the investigation to a court, and obtain a court order declaring the first marriage null before proceeding to take a new spouse. But the only impact of the statute was to increase legal expenses for a party seeking to remarry following the undocumented death of a first spouse and to create a possibility that court orders would be erroneously and perhaps even fraudulently procured.\textsuperscript{92}

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\textsuperscript{88} Hayden v. Hayden, 215 N.Y.S. 326, 327 (Sup. Ct. Bronx County 1926).
\textsuperscript{89} Id. at 328.
\textsuperscript{91} See \textit{Laws of 1922}, c. 279 (amending Domestic Relations Law to require search for spouse absent for five consecutive years before dissolution of marriage); \textit{see also} \textit{In re Santos}, 230 N.Y.S. 395, 400 (Sup. Ct. Oneida County 1928) (stating that mere passage of five years does not authorize spouse to remarry, as determination of death of prior spouse must be made by court).
\textsuperscript{92} See \textit{In re Magaraci}, 215 N.Y.S.2d 546, 548 (App. Div. 3d Dep't 1961); Dye v. Dye, 93 N.Y.S.2d 95, 101 (Sup. Ct. Chautauqua County 1949). Another area of confusion surrounding the annulment doctrine involved promises of a religious nature. One issue was whether an annulment was appropriate when a spouse prior to a civil
In all other cases, courts typically, although not invariably, denied annulments. As the Court of Appeals declared, “[m]ere nondisclosure as to birth, social position, fortune, good health, and temperament [could] not vitiate the marriage contract.” It later reiterated that annulments were available only “for fraud as to matters ‘vital’ to the marriage relationship .... Premarital falsehoods as to love and affection [were] not enough, nor disclosure that one partner ‘married for money.’” As to matters such as these, the “rule of caveat emptor still had some application to the parties contracting marriage.”

Judges, in short, were always aware that they could “not grant annulments solely because of sympathy....” They knew that plaintiffs often “resort[ed] to the process of annulment” out of “a desire for freedom from marital bonds” rather than because marriage ceremony fraudulently agreed to be married again in a subsequent religious ceremony and then failed to honor the agreement. Prior to the 1950s, some cases granted such annulments, see Rutstein v. Rutstein, 222 N.Y.S. 688, 690 (App. Div. 1st Dep't 1927); Watkins v. Watkins, 189 N.Y.S. 860, 861 (App. Div. 1st Dep't 1921); Rozsa v. Rozsa, 191 N.Y.S. 868, 869 (Sup. Ct. N.Y. County 1922), while others did not, see McHale v. McHale, 67 N.Y.S.2d 794, 794 (Sup. Ct. Albany County 1947); Morris v. Morris, 67 N.Y.S.2d 760, 762 (Sup. Ct. Albany County 1947); Vonbiroganis (Von Brack) v. Von Brack, 64 N.Y.S.2d 885, 887 (Sup. Ct. N.Y. County 1946). Then, in 1958, the Court of Appeals declared it “settled” that such annulments were appropriate. See Brillis v. Brillis, 149 N.E.2d 510, 511 (N.Y. 1958). The courts were also split on whether to grant annulments for one spouse’s failure to honor a commitment to adopt the other spouse’s religion, compare Williams v. Williams, 86 N.Y.S.2d 490, 491 (Sup. Ct. Kings County 1947) (granting annulment), with Nilsen v. Nilsen, 66 N.Y.S.2d 204, 205 (Sup. Ct. Kings County 1946) (denying annulment), and declared that similar promises to raise children in a particular religion “cannot be treated lightly,” Ross v. Ross, 149 N.Y.S.2d 585, 589 (Sup. Ct. Erie County 1956), even when they were declining to enforce them, accord Martin v. Martin, 68 N.Y.S.2d 41, 42 (Sup. Ct. Rensselaer County 1947). Another religious issue that came before the courts in the 1970’s was whether Orthodox Jewish men could be compelled to provide their wives with a “Get,” or Jewish religious divorce, upon their wives obtaining a secular divorce. See Waxstein v. Waxstein, 396 N.Y.S.2d 877, 879 (Sup. Ct. Kings County 1976), aff’d, 394 N.Y.S.2d 253 (App. Div. 2d Dep't 1977). See also Lapides v. Lapides, 171 N.E. 911, 913 (N.Y. 1930); accord Harris v. Harris, 161 N.Y.S.2d 647, 648 (App. Div. 4th Dep't 1957) (per curiam); Baxter v. Baxter, 169 N.Y.S.2d 571, 574 (Sup. Ct. N.Y. County 1957); Ozark v. Ozark, 75 N.Y.S.2d 433, 434 (Sup. Ct. Onondaga County 1947). See also Woronzoff-Dashkoff v. Woronzoff-Dashkoff, 104 N.E.2d 877, 880 (N.Y. 1952); accord Washburn v. Washburn, 62 N.Y.S.2d 569, 570 (Sup. Ct. Westchester County 1946); Griffin v. Griffin, 204 N.Y.S. 131, 136 (Sup. Ct. Kings County), aff’d, 205 N.Y.S. 928 (App. Div. 2d Dep't 1924). 

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of some “fundamental fraud,” and therefore they were always on guard “to weigh each case to determine whether it [was] honestly within the law, or [was] a sham carefully tailored and camouflaged to circumvent and defeat law.” Accordingly, judges routinely refused to grant annulments because a spouse allegedly had married for money or social status rather than love.

In the end, the cases on annulment, like those on divorce and full faith and credit, reflected the judiciary’s constant con-

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98 See Avery v. Avery, 236 N.Y.S.2d 379, 381 (Sup. Ct. Nassau County 1962) (denying annulment despite fact that one party married other for money); Cantor v. Cantor, 234 N.Y.S.2d 600, 602 (Sup. Ct. Queens County 1962) (stating that hidden intent to marry for money was not so detrimentally vital to marriage to be ground for annulment); Protopapas v. Protopapas, 47 N.Y.S.2d 460 (Sup. Ct. Erie County), aff’d, 47 N.Y.S.2d 287 (App. Div. 4th Dep’t 1943) (refusing to grant annulment merely because husband failed to procure a good living, absent misrepresentation of that fact); Berardino v. Berardino, 280 N.Y.S. 13, 16 (Sup. Ct. Oneida County 1935) (finding misrepresentation of prospective husband’s wealth not so essential to marriage contract to warrant annulment); Smelzer v. Smelzer, 265 N.Y.S. 220, 221 (Sup. Ct. Albany County 1933) (finding future husband’s misstatement of financial condition insufficient to invalidate marriage).

99 See Pawloski v. Pawloski, 65 N.Y.S.2d 413, 414 (Sup. Ct. Cayuga County 1946) (denying annulment where defendant represented self to be of German rather than Polish descent).

100 But see Tuchsher v. Tuchsher, 184 N.Y.S.2d 131, 132 (Sup. Ct. Kings County 1959) (discussing facts where defendant misrepresented to spouse income and insurance situation); Madden v. Madden, 125 N.Y.S.2d 384, 385 (Sup. Ct. Nassau County 1953) (commenting on situation where defendant covertly placed chattel mortgage on wedding gifts after promising not to keep secrets); Feynman v. Feynman, 4 N.Y.S.2d 787, 788 (Sup. Ct. Kings County 1938) (analyzing circumstances where defendant married for financing of medical education without intention of cohabiting with spouse); Ryan v. Ryan, 281 N.Y.S. 709, 710-11 (Sup. Ct. N.Y. County 1935) (discussing facts where wealthy American married rich foreigner scheming to take his money).

Judges also tended to be sympathetic to annulment suits when a defendant had lied about love solely to marry an American citizen and thereby gain entry into the United States in circumvention of the immigration law and where the marriage had not been consummated by cohabitation. See, e.g., Brillis v. Brillis, 149 N.E.2d 510, 511 (N.Y. 1958); Miodownik v. Miodownik, 19 N.Y.S.2d 175, 175 (App. Div. 2d Dep’t 1940); Bracksmeyer v. Bracksmeyer, 22 N.Y.S.2d 110, 111 (Sup. Ct. N.Y. County 1940); Rubman v. Rubman, 251 N.Y.S. 474, 488 (Sup. Ct. N.Y. County 1931); see also Fusco v. Fusco, 107 N.Y.S.2d 286, 288 (Sup. Ct. Onondaga County 1951). Marriages would also be annulled when one spouse falsely claimed to have United States citizenship. See Shapiro v. Shapiro, 36 N.Y.S.2d 552, 533 (Sup. Ct. Kings County 1942); Laage v. Laage, 26 N.Y.S.2d 874, 878 (Sup. Ct. N.Y. County 1941); Truiano v. Truiano, 201 N.Y.S. 573, 574 (Sup. Ct. Warren County 1923). For cases in which evidence did not warrant a finding of fraud, see Harley v. Harley, 185 N.Y.S.2d 893, 895 (Sup. Ct. Kings County 1959); Novick v. Novick, 185 N.Y.S.2d 388, 389 (Sup. Ct. N.Y. County 1959).
cern to prevent “the floodgates of litigation” from being “thrown wide open” in ways that would ease the termination of marriages and thereby produce “an extension of the legislative enactment by judicial decree.”


The courts were always careful to avoid “legislation by the judiciary.” Hence, annulments, like divorces, remained difficult to obtain throughout the 1920’s and 1930’s.

C. Protecting the Children of Marriage

1. Custody

Despite the untiring efforts of judges to protect children by legitimizing cohabitation as marriage and by preventing marriages from terminating, some children nonetheless found themselves heir to broken marriages. At that point, judges had to determine to whom custody of a child would be awarded.

Throughout the twentieth century, judges have always invoked a vague standard, such as “the welfare of the child” or “what is best for the interest of the child,” as determinative of custody disputes. But, in fact, the standard has proved somewhat different, as judges have developed more precise rules for determining custody. They have, for example, always held it “in the best interest of the child to avoid shifting custody from one parent to another” or otherwise “to disturb the existing custodial arrangements.”

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102 Id.
More precise rules also developed for making initial custody
determinations as distinguished from decisions whether to alter
existing ones. In formulating these rules, courts in the 1920's
started from the proposition that “the rights of the husband and
wife to the custody of their infant children [were] equal,” although
the “primary right to ... custody ... [was] in the father.” But judges did not permit the rights of the parties to become dispositive. The moral protection of children remained their primary concern, and hence they focused on moral fault as evidence of the fitness of each parent for custody. For example, it was “unusual to award the custody of the children to the unsuccessful party” in a divorce action on grounds of adultery, “in the absence of clear and convincing evidence that the successful party was unfit.”

Thus, when a mother obtained a divorce on the grounds of the father’s cohabitation with another woman, and their 14-year-old son testified “that he could no longer stay with the father, because of his open and continuous association with her,” custody was granted to the mother, as she was found to be “a woman of good character, of a degree of refinement, of strict notions of the propriety of relationships, such as were being maintained by the defendant with the correspondent, having great affection for the children, and anxious to do all in her power for their well-being, education, and correct moral training.”


See id. (citations omitted).

Id. at 695.
other case, however, where the evidence showed that a mother had “sustained improper relations” with her employer “at divers times and places, and particularly at a hotel in the city of Corning,” the court awarded custody of her eight-year-old daughter to the child’s father, even though his “health ... was somewhat shattered,” because the court found him “a man of good habits, good reputation, and both morally and financially a fit and proper person to have the care, custody, and control of his little daughter.” Similarly, in a third case, a mother addicted to morphine was denied custody of her child.

Another common issue in custody cases was whether children who had been left in the care of other relatives should remain in the custody of those relatives or returned to the custody of one of their parents. Although courts sometimes declared that parents were “the natural guardian[s] of ... [their] children, and under ordinary circumstances ... entitled to their custody and control,” judges also observed that they had the “duty, to act at all times for the best interests of the children, and, if their welfare require[d] that their custody be given to their grandparents” or other collateral relatives, the latter would retain custody.

111 Id. at 697.
112 Id.
113 See Darlington v. Cobb, 239 N.Y.S. 301, 302 (Sup. Ct. N.Y. County 1930); see also People ex rel. Glendening v. Glendening, 288 N.Y.S. 840, 847 (Sup. Ct. N.Y. County 1936).

2. Support

Thus, the law concerning child custody was, in general, consistent with the judiciary's practice of protecting children. So too was the law concerning economic support. Traditional doctrines of alimony and child support, as they existed into the 1970's, required former husbands to support their wives, and parents, especially fathers, to support their children.

The law of support started with the principle that a husband and wife, upon separation or divorce, could enter into an agree-


Proceedings to determine custody were not always of a strictly adversarial nature. Although the fundamental due process rights of all parties had to be honored, see Allers v. Allers, 139 N.E. 777, 780 (N.Y. 1923); Borkowski v. Borkowski, 396 N.Y.S.2d 962, 965 (Sup. Ct. Steuben County 1977), the judges' concern for promoting the interests of children authorized them to use some rules different from those applicable in the typical adversarial context, see P. v. P., 403 N.Y.S.2d 680, 682 (Sup. Ct. N.Y. County 1978). For other cases resolving procedural issues in the context of custody disputes, see People ex rel. McCanliss v. McCanliss, 175 N.E. 129 (N.Y. 1931); In re Thorne, 148 N.E. 630 (N.Y. 1925); In re Kernan, 228 N.Y.S. 329 (App. Div. 4th Dep't), aff'd, 4 N.E.2d 737 (N.Y. 1936); Chamberlin v. Chamberlin, 184 N.Y.S. 464 (App. Div. 1st Dep't 1920).
ment for the husband to make "regular, substantial, periodic payments" for the support of his wife and any minor children.\textsuperscript{117} It was "the policy of the courts to encourage parties to settle their differences privately,"\textsuperscript{118} and therefore, separation agreements were routinely enforced,\textsuperscript{119} especially to bar husbands from


\textsuperscript{118} See Nopper v. Nopper, 409 N.E.2d 1355, 1356 (N.Y. 1980); Shedler v. Shedler, 187 N.E.2d 361, 362 (N.Y. 1962); Mohrman v. Koh, 51 N.E.2d 211, 212-23 (N.Y. 1943); Alexandre v. Davis, 394 N.Y.S.2d 757 (Sup. Ct. N.Y. County 1976); Berkley v. Berkley, 142 N.Y.S.2d 273, 278 (Sup. Ct. Queens County 1955); cf. Paul S. v. Roberta S., 397 N.Y.S.2d 568, 570 (Fam. Ct. Queens County 1977). However, if a separation agreement had been merged into and thus superseded by a subsequent divorce decree, it would be treated like any other part of the decree. See Horne v.
seeking reductions in their support payments. However, a wife could sue to set aside an agreement if it “exonerate[d] the husband ... from his obligation or ‘diminish[ed]’ it” or was otherwise “unconscionable,” or if the wife was “actually unable to


support herself on the amount ... allowed.” Additionally, judges would never allow a couple undergoing an annulment, separation, or divorce “to actually conspire to require a spouse to apply for and receive public assistance for herself and one's children when the other spouse ... [was] unquestionably capable of supporting his family.”

If a support agreement had been set aside or repudiated or if none had ever existed, it was the duty of the court in a divorce or separation action to fix the amount of support. Here again,


concepts of moral fault and male duty dominated judicial decision making. Thus, if a wife had been the guilty party responsible for the separation or divorce, then support would be fixed only at a minimum amount that would keep her from becoming a public charge.\(^{127}\) If, on the other hand, a husband had been the guilty party or both parties had been guilty,\(^{128}\) then his wife was entitled to a greater amount of support on the basis of her income and needs\(^{129}\) (including her requirements for legal serv-


ices'), his means, the length of the marriage, and the "station in life" at which they had been accustomed to living. 


Of course, courts would always enforce the “natural obligation” of a father to support his minor children on the basis of his “means and station in life.”


A decree providing for support could be modified on account of substantial changes in circumstances, especially those, such as a wife's remarriage or her living with a man held out by her as her husband, which made her seem less deserving. On the other hand, deserving women had a variety of devices available to help them enforce decrees in their favor.


Decrees could be enforced alternatively, through contempt proceedings, see
3. Adoption

Some of the most disheartening cases arose when parents found themselves utterly unable to support their children and gave custody of them to relatives or even strangers who subsequently tried to adopt them. Consider, for example, *In re Davis’ Adoption,* described by the court as involving “a battle for a life with grim reality.” The story begins with Margaret O’Donnell, who resided in an orphanage in Hoboken, where she attended school until the age of ten and then went to work as “a kitchen drudge” until she was sixteen. At that age, in 1912, a Miss Stinson took her from the orphanage on some charitable pretext, but she soon ended up in the arms of one William Stinson, who was then separated from his wife. Over the course of approximately a decade, Margaret and William had six children, including Russell, the subject of the case, born on May 4, 1923. William finally married Margaret on June 20, 1923, but almost immediately after the ceremony, he disappeared.

With “nothing in the house,” Margaret, who “was sick at that time,” placed the following advertisement in a New York newspaper: “Nice Baby Boy given for adoption to Catholic family.” A middle-aged woman named Florence Davis answered the letter, to which Margaret O’Donnell Stinson replied as follows:

> I got your letter about my baby I would be glad to go over to your house but I have no money to go with I would be afraid to take a tax because you may not want to pay for it so what wood I do, why don’t you come yourself, to my home then if you like the baby you can take him.... if you can come now all right as I expect another lady to come she sent me a telegram an is grazie to get the baby.

After Mrs. Davis came, Margaret agreed to give her the child, as
was indicated in the following:

The baby is on the bottle and no trouble a real good baby. I am a poor woman with four other children and I cannot keep him I have all I can do to get a long. I am willing to sine him to yow he a nice baby and I no yow will like him.¹⁴⁹

Sometime after receiving Russell, Mrs. Davis took him to Florida, where she died in 1928, when Russell was five years old. On her deathbed she directed that Russell be adopted by her married son and his wife, which was accomplished by court order in 1929 without any notice to the natural parents, who were said to be unknown to the adoptive parents.¹⁵⁰ Meanwhile William Stinson had returned and become a produce peddler. He wanted his son also to be returned, and after an unsuccessful attempt by Margaret to kidnap the boy, the adoptive parents brought an action to confirm the earlier adoption proceedings.¹⁵¹

The legal issue in the case was whether the Stinsons had abandoned Russell, in which case the 1929 adoption proceedings were valid even in the absence of notice to them and consent. The real issue in the case, however, was social class. The adoptive parents resided "in a nicely furnished and well-kept apartment of eight rooms"¹⁵² and the father was "in business for himself and enjoy[ed] a good income."¹⁵³ They had "ample means to give the child good care, attendance, and education."¹⁵⁴ The natural father, in contrast, was "an admitted adulterer and seducer of an immature orphan girl"¹⁵⁵ who had "demonstrated his utter insensibility to the ordinary dictates of decency or obligation by abandoning his wife and five small children in a state of utter destitution."¹⁵⁶ The court concluded that the natural mother "had not seen the child for seven years"¹⁵⁷ and did not want "to take him back as she could not support him."¹⁵⁸ But the father "wanted him and continually beat her,"¹⁵⁹ because "he was

¹⁴⁹ Id. at 419.
¹⁵⁰ Id.
¹⁵¹ Davis' Adoption, 255 N.Y.S. at 419.
¹⁵² Id. at 420.
¹⁵³ Id.
¹⁵⁴ Id.
¹⁵⁵ Id. at 421.
¹⁵⁶ Davis' Adoption, 255 N.Y.S. at 421.
¹⁵⁷ Id. at 422.
¹⁵⁸ Id.
¹⁵⁹ Id.
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now old enough to help ... on his peddler's cart." Concluding that it could believe the testimony of the middle-class adoptive parents but not of the lower class natural parents, the court found that Russell had been abandoned and hence that the 1929 adoption proceedings had been valid.161

The Davis case was not unique. People ex rel. Lentino v. Feser162 was quite similar. Elsa, the natural mother, had married one Phillips in 1893 and had had two children by him, including Louise, the child at issue, in July, 1915. Phillips, however, died the next month, and soon thereafter Elsa “married one Lentino, a gambler by profession,”163 who in 1919 was imprisoned on a gambling conviction. During the difficult years after her natural father’s death, Louise was left in the custody of several people, the last of them being Mr. and Mrs. Feser, who wished to adopt her. After protracted negotiations, Elsa signed a document authorizing Louise “to live with, and be brought up by” the Fesers, “as I do not love or care for her.”164 The Fesers, without giving any notice to Elsa, subsequently obtained an adoption order. As between Elsa, who was married to a professional gambler serving time in state prison and who “had no means and earned nothing,” and the Fesers, who were “respectable people and ha[d] sufficient financial ability properly to care for” Louise, it was not surprising that the court affirmed the right of the latter to adopt Louise.165

Yet another similar case was In re Miller,166 where one Frances Sabo turned her 10-day-old child over to the Millers for adoption. When the Millers brought their adoption petition, Mrs. Sabo contested it, but the court granted the petition over her objection. In doing so, it described her as having “deserted .... her husband and six other children,” as being “in poor financial circumstances,” and as having “worked as a waitress in restaurants, and .... as housekeeper for a man by the name of Allen at 1763 Broadway, where she was known as Mrs. Allen.”167 The Millers, in contrast, were “reputable, orderly people” who were

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161 Id.
162 Davis' Adoption, 255 N.Y.S. at 427-28.
163 186 N.Y.S. 443 (App. Div. 1st Dep't 1921).
164 Id. at 444.
165 Id. at 444-48.
166 197 N.Y.S. 880 (Erie County Ct. 1922).
167 Id. at 881.
"well regarded in their community, .... regular church attendants, and ha[d] taken excellent care of the child."\(^{168}\)

_in re Cohen's Adoption\(^{169}\) presented similar facts, with one important difference—namely, the natural mother's ability to earn income and thereby obtain respectability. In November 1933, a Brooklyn mother, "in dire trouble, substantially destitute, .... abandoned by the father of the child, .... critically ill and apprehend[ing] death,"\(^{170}\) gave birth to a daughter and four days later signed a document authorizing her adoption. But soon thereafter, she recovered her health, obtained employment, and within the six month period she believed was available to reopen her surrender of her daughter, sought to regain custody of the child.\(^{171}\) This demonstration "in a reasonable, seasonable, and unmistakable manner [of] her desire to resume her parental duties,"\(^{172}\) together with the court's desire to avoid "an endless struggle with the instinct of mother love,"\(^{173}\) won the natural mother custody of her child.\(^{174}\)

On the other hand, an upstate judge in a 1932 case denied custody to a "courageous and resourceful,"\(^{175}\) but nonetheless impoverished mother who along with her husband had abandoned her child when they were both gravely ill. The court acted, at least in part, because the two children whose custody the mother had retained were "underfed and underweight,"\(^{176}\) and because, as a result "of adversity,"\(^{177}\) the mother had had to wait six years before reclaiming her child.\(^{178}\)

Other cases involved natural parents who, upon appreciating their inability to take proper care of their offspring, gave custody, at least temporarily, to relatives or trusted family friends, who subsequently sought to adopt the children. Typically the natural parents lost.\(^{179}\) The reality of class differences came to

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\(^{168}\) Id.


\(^{170}\) Id. at 429-30.

\(^{171}\) Id. at 430.

\(^{172}\) Id. at 434.

\(^{173}\) Id. at 435.

\(^{174}\) Cohen's Adoption, 279 N.Y.S. at 435.

\(^{175}\) People ex rel. Walters v. Davies, 257 N.Y.S. 118, 121 (Sup. Ct. Fulton County 1932).

\(^{176}\) Id. at 120.

\(^{177}\) Id. at 121.

\(^{178}\) Id.

\(^{179}\) See People ex rel. Pickle v. Pickle, 213 N.Y.S. 70, 76 (App. Div. 4th Dep't 1925); Myers v. Myers, 188 N.Y.S. 527, 529 (App. Div. 1st Dep't 1921); Wainman v.
the surface in these cases as well: thus, the trial judge could not help but observe in the case of In re Bistany, as he authorized adoption by the trusted friends, that they were "respectable people," who "own[ed] a comfortable and commodious home, with about three acres of land, in a highly respectable country locality." They had "an annual income of $5,000 from a profitable rug business, with excess profits that are left in the business, which is of a permanent character." In contrast, the natural parents lived in a "section of New York City, which [was] populated largely by people of foreign birth or descent, who speak the English language only to a limited extent." Even without the adopted child, there remained "five children ... in an apartment that ha[d] only two bedrooms," and the father had wages of only "$3,380 yearly for a family of seven, if he ... [remained] steadily employed and ... in good health." The child was ultimately saved from adoption only by the insistence of a divided Court of Appeals, in a majority opinion by Judge Cardozo, that "such considerations ... [were] foreign to the [sole legal] issue" in the case—whether the natural parents' "silence and inaction [had been] prolonged to such a point than an intention" to abandon the child could be found from the facts as "an inference of law."

A divorced mother sought to recover a son on similar facts in the case of In re Duffy. "[U]nwill[ing to be burdened with the care and maintenance of] her 17-month-old, Mary Duffy gave him, together with "all the child's clothing and playthings," to "a respectable, prudent, industrious, well thought of young married couple" who for five years "generously, humanely, and carefully administered" to the boy's needs with "painstaking devotion." Although Duffy had said "she would never claim the child," she did ultimately decide that she wanted him back. Finding in Duffy "a want of maternal instincts," the court could not view the
child's future with her "with much pleasure and satisfaction," whereas his new middle-class home "promise[d] to be clean, healthful, industrious, [and] honest." Hence the court refused to return him to his mother.

Understood, as in the cases above, chiefly as a means for raising and supporting destitute children, adoption did not necessarily entail the complete termination of the rights of natural parents or their total supplanting by adoptive parents. Nor did it require the termination of all emotional bonds between the child and its natural parents. As noted in the Wainman case, one of those which had permitted adoption by a child's relatives over its natural father's objections, adoption resulted in "no hardship to the parent," since he could "visit this child as often as he desire[d] ...., but all the time it will be ... under the protection of a close relative." Adoption also did not destroy an adopted child's right to inherit from its natural kindred, nor did an adopted child become next of kin so as to be entitled to inherit from the adoptive parents' collateral relatives. Finally, adoption was not final: an adoption could "be abrogated" if a child was "ill-behaved and ... violated her duty toward her foster parents."

Nothing, perhaps, illustrates the value structure of 1920's family law more clearly than the cases on adoption that we have just examined. In their efforts to create nuclear families and hold them intact as society's primary, if not sole mechanism, for providing sustenance and moral training to the young, judges abandoned to "grim reality" those families and children whom death, destitution, or divorce had rendered unable to live by soci-

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190 Id. at 324.
191 See In re Souers, 238 N.Y.S. 738, 745 (Sur. Ct. Westchester County 1930).
192 Wainman v. Richardson, 196 N.Y.S. 262, 264 (Sup. Ct. Oneida County 1922).
193 In re Monroe's Executors, 229 N.Y.S. 476, 478 (Sur. Ct. Westchester County 1928) (referencing N.Y. DOM. REL. LAW §114 as amended (1916)).
195 In re Anonymous, 285 N.Y.S. 827, 829 (Sur. Ct. Queens County 1936) (construing N.Y. DOM. REL. LAW); accord Souers, 238 N.Y.S. at 746 (holding that child who declined to inform adoptive parents of his whereabouts for months breached his duty to adoptive parents and adoption should be abrogated).
196 In re Davis' Adoption, 255 N.Y.S. 416, 418 (Sur. Ct. Kings County 1932).
ety's dominant values. The judiciary of the 1920's and early 1930's willingly inhabited a profoundly inegalitarian world divided between respectable, monogamous couples and their children, who had every opportunity for success and happiness, and destitute children, typically without two parents and also without hope or security. The best that judges could do for the latter was to separate them from their natural families and place them with respectable, monogamous couples which, it was hoped, would lift them up to the moral and social heights at which "respectable" people lived.  

One should not be too critical, though, of family law's inequities. They were merely a product of more general inequities in society at large. Socio-economic realities made it impossible for every one to live by the family values that the judiciary strove to impose. Accordingly, it was inevitable that some would benefit from the imposition of those values, while others would suffer harm. Only structural social change of the sort that began to occur in the late New Deal could begin to alter the nature of family law.

II. INDIVIDUALISM AND THE PURSUIT OF HAPPINESS

Many of the values and attitudes that characterized family law in the 1920's and 1930's persisted into the 1940's and 1950's and even beyond. On the issue of child custody, for example, courts frequently continued to take the fault of a failed marriage into account in determining which parent should receive the child. The "past conduct of the parents, the unwillingness of one or both to carry out their marital obligations," as the Court of Appeals declared in 1943, simply could "not be disregarded in determining which parent [would] provide the better home." Thus, one woman was denied custody of her daughter because she had lived in a boarding house which was also the residence of her son who "without the benefit of a divorce from his wife ...

197 For a discussion of other devices created in the early decades of the twentieth century to put children in as homelike a situation as possible, see MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 124-29, 145 (1986).

198 See generally supra, notes 14-196 (pertaining to the years between 1920 and 1940, citing many cases from the decades after 1940 that continued to apply older law).

was living there with another woman," a second man who was "living apart from his wife, and addict[ed] to the grossly excessive use of intoxicants;" and a third man who had "a mottled marital history." In another case, the Court of Appeals refused to grant custody to a mother who had "stated her considered belief in the propriety of indulgence, by a dissatisfied wife such as herself, in extramarital sex experimentation." The court found such beliefs "repugnant to all normal concepts of sex, family, and marriage," on which the "State of New York ha[d] old, strong policies."

Although the mother "was ever a good and devoted mother," and the father "was inordinately preoccupied with his professional duties," gave "little of his time or of himself to the children," and often "treated them brusquely, impatiently and even intemperately," the court nevertheless concluded that the best interests of "those impressionable teen-age girls" would not be served by giving custody of them to a mother "who proclaim[ed], and live[d] by, such extraordinary ideas of right conduct." Another case refused to award custody of a child to a father "contaminated with the germ of Nazism," which the court found "a diseased and depraved phenomenon—a plague which flourishe[d] and thrive[d] on the destruction and obliteration of everything American" and "as loathsome in effect as leprosy."

A. The Waning of Traditional Family Values

At the same time, the late 1930's and 1940's witnessed signs of change. One of the earliest of such signs occurred in a 1937 case where it was conceded that a mother was "[g]enerally [ ] the proper guardian for children of ... tender age...." Within a decade, this view had become established law. A related prin-
ciple emerging at the same time was that every daughter should "receive feminine care and attention in her bringing up," and thus girls should be placed in the custody of their mothers.\textsuperscript{297}

Meanwhile, a second doctrinal change appears to have resulted from the experience of World War II. One consequence of the war was family instability. Although political and economic conditions had always created some instability, judges in the 1940's perceived an increase in "marriage[s] torn asunder by a disordered society under the stress and strain of war."\textsuperscript{298} They sensed that, as young men and women involved in the war left "home in a village in the mountains and strayed into a large city," they were "beguiled by false allurements of tinsel, glitter, lights and the glamour and fanfare of war," they "misbehaved," and they "disregarded the usual peacetime social conventions, with ... tragic result[s]."\textsuperscript{299} They "committed sins of passion but not of evil purpose," as had "Mary Magdalen and Hester Prynne" and "countless others before and after them."\textsuperscript{300} From these realizations, it followed that it "would not be realistic" to "assume a sanctimonious or puritanical attitude." Since judges were "dealing with humans and not angels," they had to "take human frailties into account, especially when dealing with 'parties' of Continental background." The "mission of the law," after all, was not a "blind and merciless casting of the first stone," but "justice ... seasoned with compassion."\textsuperscript{301}

Acting out of mercy and compassion, judges began to rule that custody should not be denied for a "mild ... vice" such as gambling\textsuperscript{302} or for one or two "adulterous relationships" that fell short of "promiscuity."\textsuperscript{303} If custody was not to be determined on the basis of fault, as it had been during the interwar decades, what new standard would replace it?

In a few cases, nationalism born of a vague, World-War II

\textsuperscript{297} In re Eckstrom, 15 N.Y.S.2d 158, 158 (Sup. Ct. N.Y. County 1939), aff'd, 17 N.Y.S.2d 620 (App. Div. 1st Dep't 1940).
\textsuperscript{298} In re Eckstrom, 15 N.Y.S.2d 158, 158 (Sup. Ct. N.Y. County 1939), aff'd, 17 N.Y.S.2d 620 (App. Div. 1st Dep't 1940).
\textsuperscript{299} Clair v. Clair, 64 N.Y.S.2d 889, 890 (Sup. Ct. Albany County 1946).
\textsuperscript{300} Id. at 891.
\textsuperscript{301} Id.
\textsuperscript{302} People ex rel. Geismar v. Geismar, 54 N.Y.S.2d 747, 756 (Sup. Ct. N.Y. County 1945).
\textsuperscript{303} Oraf v. Oraf, 47 N.Y.S.2d 45, 46 (Dom. Rel. Ct. N.Y. County 1944).
\textsuperscript{304} Geismar, 54 N.Y.S.2d at 755; accord Kruczek v. Kruczek, 29 N.Y.S.2d 385, 386 (Sup. Ct. N.Y. County 1941).
confidence in American virtue became the standard. Judges declared that American children had “as a part of their birth-right ... a right to be raised and educated in this country,” and for that reason, among others, they routinely granted custody to a parent residing in the United States rather than to one planning to live in a foreign country. Thus, one judge refused to allow a father to bring children born in the United States with him when he returned to his native land—Soviet Armenia. “Nothing,” according to the judge, “had greater value and was more to be cherished” than American citizenship, which conferred “a right to the full enjoyment of life, liberty and the pursuit of happiness.” Indeed, “many regarded” American citizenship “as the highest hope of civilized men.” Since the children could lose “their right to avail themselves of the privileges of their American citizenship” if they were moved to Armenia, the judge would not let them go.

Another judge had a comparable reaction in *Ex parte Djurovic*. Slavoljub Djurovic was a Yugoslav citizen assigned to work for a government-operated company in New York. He and his wife had two sons living with them in New York at the time they separated. The sons were in a Brewster, New York boarding school when the Yugoslav Vice Consul in New York, together with the mother, picked them up in a car owned by the consulate and driven by its chauffeur, and brought them to a se-

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218 *Choolokian*, 76 N.Y.S.2d at 513.
219 Id. at 513.
220 Id.
222 Id.
223 Id. at 392.
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A secret hiding place in New York City. Several days later they were secretly transferred to a boat about to set sail to Yugoslavia. The father then sought a writ of habeas corpus to remove them from the boat; the court granted the writ and gave custody of the sons to the father.

A third case, Seley v. Seley, involved a 17-year-old child living with her mother in Sault Ste. Marie, Canada, who petitioned the court to allow her to live with her father in New York City. She felt “bored with small town life in Canada,” where she had “very few friends” and was “wasting her time in a small town where she had little if any opportunities to meet people.” She had a “keen urge to come to live in New York,” where she felt that by education and social contact there she will have the opportunity to better herself in every way. Of course, the judge agreed.

In most cases, though, nationalistic beliefs about the superiority of life in America provided no basis for choosing one parent as custodian in preference to the other. Of necessity, courts in most cases had to turn to the only other standard in existence—the gender-based standard of preferring mothers over fathers.

This standard, which dated back to the nineteenth century, had begun to attain preeminence in the years immediately before the war. The law, it was then said, had “an almost reverential regard for mother love as an ingredient in the sound upbringing of a child.” This reverential regard, in turn, was reified into a general presumption “that when it becomes necessary to make a choice between mother and father it is to the child’s best interest and welfare to be brought up and reared by his mother.” “[A] widely held belief” thereupon emerged.

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224 Id.
225 Id.
226 Djurovic, 130 N.Y.S.2d at 394.
228 Id. at 989.
229 Id.
230 Id. at 990.
232 In re Feigin, 163 N.Y.S.2d 812, 813 (Sup. Ct. N.Y. County 1957).
that a mother [was] favored over a father in a legal custody proceeding, and that belief remained in place at least until the mid-1970's.

The reported cases lent support to this belief. For example, a mother with "schizophrenia, paranoid type," was held fit to receive custody, and one 1952 case even upheld custody in a mother who had been adjudicated guilty of neglecting her children as a result of her alleged "affiliation, or at least sympathy, with the Communist Party...." Indeed, not even a mother's sexual lifestyle would cost her the preference for maternal custody. Starting in the 1950's with adherence to the older dictum that a mother's "single deviation from the orbit of marital rectitude should not alone deprive" her "of the natural right to the custody of the child," courts by the 1970's had come to recognize that a mother's exercise of "the right of a divorced woman to engage in private sexual activities, which in no way involve or affect her minor children" would not result in her loss of custody, even when the activities involved "female homosexuality."

Change occurred even more rapidly and dramatically in the law governing adoption. As we have seen, adoption during the 1920’s and 1930’s had often served the function of providing children of poverty with a means of livelihood and support. But with the enactment of the New Deal welfare system in the mid-1930’s, with its guarantee of support for destitute children, adoption was no longer needed for such a purpose. The “statutory allowance for a dependent child” made it possible for single mothers of low income to exercise their “natural rights” to raise their children under the protection of “the connecting links of direct kinship—blood, flesh and bone.” As a result, the very nature of adoption began to change.

The relation between welfare and adoption emerged with particular clarity in the 1936-1937 case of Betz v. Horr. Edna Betz had been adopted by her maternal grandparents at the age of 12, apparently following the death of her mother. Eleven years later, with her grandmother also dead and her grandfather (i.e., her adoptive father) “destitute and incapable of contributing to her support,” Edna was suffering from tuberculosis. The issue was whether her natural father had some continuing duty to support her.

Under the traditional view that adoption did not totally terminate all ties between a child and its natural parents, the father did retain a duty. Thus, the majority of the Appellate Division thought it “contrary to natural law” “to relieve the natural parents of their moral obligation to support their helpless offspring and to impose that burden upon the public in the event the adoptive parents died or became destitute.” But a unanimous Court of Appeals, implicitly recognizing the primary obligation of the public to support the destitute and not to foist the obligation upon anyone who happened to be at hand to save a few dollars for the fisc, took a different view. The court held that...

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243 In re New York Ass’n for Jewish Children, 44 N.Y.S.2d 879, 880-81 (Sup. Ct. Queens County 1943) (quoting People ex rel. Van Dyk v. Van Dyk, 33 N.Y.S.2d 766, 771 (Sup. Ct. N.Y. County 1942)).
244 Betz, 294 N.Y.S. at 547-48.
245 Id. at 549.
adoption made "the adopted child the natural child of the adoptive parent" gave that "child the same legal relation to the foster parent as a child of his body," and totally "divest[ed] the natural parents of the relation which they had theretofore sustained toward the infant...."

It followed from this holding that "a consummated adoption [was final and] unassailable" and that the natural parents had no capacity to reopen it. Once an adoption had been consummated, the natural parents were not even entitled to information about the whereabouts of the child since courts feared that a natural mother "could be a source of great annoyance to the foster parents," who "deserve[d] every protection which the court [was] capable of giving them in their exclusive custody of [their] child." Similar interests of finality dictated that adopted children not be given access to information about their natural parents.

The most important doctrinal change that followed from "the policy of the law that adopted children be placed on a level with natural born offspring" involved the rules for abrogation of adoptions. Although occasional cases continued to occur in which abrogation was permitted, most cases made abrogation difficult to obtain. In particular, abrogation would not be

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248 Betz, 11 N.E.2d at 550 (quoting In re Cook's Estate, 79 N.E. 991, 993 (N.Y. 1907)).
249 People ex rel. McGaffin v. Family & Children's Serv. of Albany, 153 N.Y.S.2d 701, 703 (Sup. Ct. Albany County) (emphasis in original), modified, 158 N.Y.S.2d 45 (App. Div. 3d Dep't 1956). Indeed, the new view of adoption warranted giving adoptive parents rights even before adoptions had been finalized. Thus, those who had contracted with an adoption agency were given the right to sue the agency for damages if the agency breached its contract. See Bardorf v. Rebecca Talbot-Perkins Adoption Soc'y, Inc., 269 N.Y.S. 794, 798 (App. Div. 2d Dep't 1934).
254 See, e.g., In re Eaton, 111 N.E.2d 431 (N.Y. 1953).
permitted on the ground of vague allegations of immoral behavior by an adoptive parent, on the ground that a natural father was better able than an adoptive father to support the child, or on the ground of disrespectful behavior by the child of a sort that was "not unusual" among "teenagers," such as "not readily and willingly respond[ing] to household chores," having "a desire and tendency to leave home," and "fall[ing] into bad company."

With these cases, the principal ends served by the law of adoption changed. In the context of the new welfare state that matured in the aftermath of World War II, judges reacted differently than their predecessors had a mere two decades earlier when parents unable to support children gave them up for adoption; indeed, one judge reacted as if the world of the 1920's and 1930's had never existed. His own words best convey the change that had occurred:

[T]here is still a further point which this Court considers to be of great moment. Here a young couple, already having two children, consent to the adoption of a third child and placed the child with the proposed adoptive parents almost immediately after birth, and the only excuse given for the adoption and placement is that they cannot afford to rear the third child. It is against the conscience of this Court to countenance such an act upon the part of the natural parents. The parents should make every effort to provide for the child and to give it the natural love and affection to which the child is entitled. This Court cannot and will not countenance an adoption of this nature based upon such a flimsy excuse and thus avoid a duty and an obligation imposed upon the parents.

*People ex rel. Cocuzza v. Cobb* was a similar case. There a woman during World War II had a child born out of wedlock from an interracial union with a member of the armed forces. She found herself "in desperate circumstances ..., living in...

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258 *Abrogation of Adoption of Anonymous*, 313 N.Y.S.2d at 152.
259 *Adoption of Anonymous*, 137 N.Y.S.2d 720, 722 (County Ct. Saratoga County 1955). For a similar case in which at least one judge gave every encouragement to a young couple to raise their own child rather than permit the child to be adopted, see *In re Hahn*, 149 N.Y.S.2d 140, 143-45 (Sup. Ct. N.Y. County), *rev'd on other grounds*, 149 N.Y.S.2d 407 (App. Div. 1st Dep't 1956), *aff'd*, 135 N.E.2d 723 (N.Y. 1956).
261 *Cocuzza*, 94 N.Y.S.2d at 617.
"squalor" and under conditions which one witness characterized "as filth." After telling the father that the child had died, the mother surrendered it to a married woman and her husband, who were "childless" and "religious" and "gave it every advantage of care, maintenance and affection." After the end of the war, however, the interracial couple married and had more children, and the father obtained "a good position," which made the family "financially secure" and the children "properly cared for." Meanwhile, the husband of the woman who had taken the child died. When she applied for welfare assistance, public officials notified the natural father that his child was not dead, and he sought custody. The court decided in his favor, declaring that the requirements of the adoption statute had never been met and hence that he remained the father of the child.

*In re O.* was an almost identical case two decades later, in which an African-American woman was forced into an institution to be treated for a nervous disorder "caused by the constant harassment of neighbors and disinterested people because of [her] interracial marriage." While she was institutionalized, her husband, who was in military service, gave temporary custody of the children to the Department of Social Services without informing his wife, who, of course, recovered custody of the children as soon as she was released.

With adoption thus no longer available for the lasting placement of children whom their parents could not afford to raise, its primary end became the provision of childless couples with infants born out of wedlock—infants who would become, in every respect, the children of the adopting couple. The

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262 Id.
263 Id.
264 Id.
265 Id.
266 Id.
267 Cocuzza, 94 N.Y.S.2d at 619.
269 Id. at 141.
270 Id. at 141, 146.
272 See *In re Upjohn's Will*, 107 N.E.2d 492, 496-97 (N.Y. 1952); cf. *People ex rel. Ninelasing v. Nassau County Dep't of Soc. Serv.*, 386 N.E.2d 235, 238-39 (N.Y. 1978). One element of the matching process was to find parents who had the same religion as that into which the child had been born. The Court of Appeals upheld the consti-
“development of ... procedure[s] which [would] promote, encourage and facilitate ... adoption[s]" was explicitly recognized as "a legitimate area of state concern."272

In this context, the first major issue faced by the courts was the elaboration of standards for determining whether a natural mother had acted in a fashion that warranted depriving her of custody of her child and delivering it to another. The black-letter law was clear: a natural mother could be deprived of custody only if she had freely surrendered her child,273 had abandoned it, or was unfit to retain custody.274 However, in an effort to facilitate adoptions by "good people,"275 judges as late as mid-century, who put themselves "in the position of a 'wise, affectionate, and careful parent'" seeking "to do what [was] best for the interests of the child,"276 had readily found these requirements satisfied. One wise, affectionate and careful judge, for instance, could not help but notice when adoptive parents maintained an "entirely satisfactory home in an atmosphere and an environment that [were] pleasant, cultured, religious and understanding" with a "family income ... adequate to provide for all the needs of the child," or when the natural mother was "unemployed, ha[d] been trained for no gainful occupation, and ha[d] made no serious attempt at employment."277 Hence he concluded that "it would be an act of cruelty to take this child out

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276 In re Selover, 106 N.Y.S.2d 758, 759 (Sup. Ct. Queens County 1951) (citing Queen v. Gyngall, 2 Q.B.D. 232 (1893)).
of her present happy environment and place her with those who
spurned her when her need was greatest." Likewise, another
judge after finding that the adoptive parents had "nursed" the
child "through a severe illness with loving care and at substan-
tial financial expense," that the natural mother was willing to
consent to the adoption if she was paid the right "price," and
hence that "the moral and temporal interests of the child and his
future happiness [would] be promoted" by the adoption, concluded
that the natural mother had abandoned her son, even
though she had hired an attorney in the effort to obtain his re-

Both downstate departments of the Appellate Division took
the same approach. Thus, in sending back for retrial a case in
which a natural mother had not executed a valid consent, the
First Department identified the "welfare of the child" as "the
controlling consideration." The court also commented on the
fact that the natural mother, despite her stated intention to
marry the child's father, had not done so over a three-year period
since the child's conception, and on the fact that she was to re-
ceive $675 from the adoptive parents on the completion of the
adoption—a payment that raised questions about "her fitness to
have custody" or whether she should "be charged with abandon-
ment."

The Second Department also agreed in a case where the
natural mother, a divorcée with custody of one child from her
first marriage, "became pregnant as the result of intercourse
with another man," while her second husband was overseas in
the military, as a consequence of which her second husband also
divorced her. The court observed that, if she were granted cus-
tody of her illegitimate son, she "would have to give up her occu-
pation ... or engage someone else to take care" of him. In con-

278 Id. at 760; see also Ex parte O'Carroll, 45 N.Y.S.2d 545 (Sup. Ct. Westchester
County 1943).
280 Id. at 329-30
281 Id. at 330.
1948).
283 Id. at 391-92.
284 Id. at 392.
285 People ex rel. Anonymous v. Rebecca Talbot Perkins Adoption Soc'y, Inc., 68
286 Id. at 241.
trast, the boy could remain "in the care of good people with whom" he was then residing during "the trial period prior to legal adoption," and if the adoption was ultimately completed, he would "have a happy home and receive a thorough education," which might help him "overcome the disadvantages of his origin and serve to better his prospects in life." On this basis, the court concluded that the mother had freely executed an agreement to surrender her child.

Judges decided a few of the early cases in favor of natural mothers, however, when special factors made the conduct of those mothers appear as "striking example[s]" of "the basic sentiment of mother love." One case involved a woman who during World War II had served in the military, where she had met a young soldier who, after promising to marry her, had gotten her pregnant. When he deserted her, she proved resourceful, obtained employment for $50 per week, and "paid for a considerable length of time for the care of her offspring" until she became ill and found herself with "insufficient funds ... for the care of her child." At this point, her employer and his wife took the child into their home, with the understanding that the mother was welcome to visit and have the child "from time to time, as she chose." Later the employer's attorney brought a document for her signature to the place of her employment, and she signed it without understanding its "nature and ... consequences." The court thereupon concluded that the document in question did not constitute a valid consent to adoption.

In another case, a college student who found herself pregnant "sought out the services of a woman doctor" in an effort to avoid disclosing "her condition" to her father and her siblings. The doctor arranged for the child to be adopted and, upon its

297 Id.
298 Id.
299 Id. at 831-32.
300 Id. at 831.
301 Id.
302 Adoption of Anonymous, 88 N.Y.S.2d at 832.
303 Id.
birth, it was turned over to the prospective adoptive parents. 297 Five months later, however, the natural mother confessed her secret to her sisters, and her entire family promised to “stand by her financially and morally if she would take steps to obtain the baby.” 298 Her married brother offered her a home, she obtained a job, and she brought a writ of habeas corpus 299 to recover the child. Declaring that “[p]arents have the natural, God-given right to the control and custody of their children,” 300 the court concluded that the mother had neither abandoned her child nor given the final consent to adoption required by statute at the adoption proceeding, which had not yet occurred. 301 Thus, the child was returned to the mother’s custody.

B. The Emergence of Individual Rights

1. The Right of Parents to Children

Next the Court of Appeals entered the fray, at first indirectly by addressing the issue of whether children, who had been left in the care of other relatives, especially their grandparents, should remain in the custody of those relatives or be returned to the custody of one of their parents. In the past, it will be recalled, the courts typically had held that parents were “the natural guardian[s] of ... [their] children, and under ordinary circumstances ... entitled to their custody and control.” 302 But courts at

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297 Id.
298 Id. at 593.
299 Id.
300 Id. at 592-94 (quoting People ex rel. Flannagan v. Riggio, 85 N.Y.S.2d 534, 536 (Sup. Ct. Kings County 1948)); see also People ex rel. Loomis v. Des Jarden, 113 N.Y.S.2d 96, 98 (Sup. Ct. N.Y. County 1952) (stating that “natural parent has the paramount right of custody of the child as against all others”).
301 See Anonymous, 91 N.Y.S.2d at 593.
the same time had declared that judges had the “duty, to act at all times for the best interests of the children, and, if their welfare require[d] that their custody be given to their grandparents” or other collateral relatives.\textsuperscript{303}

The Court of Appeals ended this indecisiveness by taking a strong stand on the side of parental rights in the 1952 case of \textit{People ex rel. Portnoy v. Strasser}.\textsuperscript{304} In May 1945, a young Jewish couple had become the parents of Robin Strasser, who lived in their home until they separated a year later.\textsuperscript{305} Robin and her mother then went to live with Robin’s maternal grandmother, until Robin’s mother obtained an apartment of her own two years later and took the child to live with her.\textsuperscript{306} There was no custody battle when Robin’s mother obtained a divorce from her father and was awarded custody of the child.\textsuperscript{307}

Trouble began only in 1949, when Robin’s mother married a second husband, an African-American man “of fine character, steadily employed at a good salary.”\textsuperscript{308} At that point, the mater-
nal grandmother brought suit to obtain custody of Robin on grounds that Robin's mother—the petitioner's own daughter—was "a communist, without any regard for religious upbringing of the child, and that she [was] married to a second husband who [was] of a race ... different from that of the child." 309 A referee appointed by the Supreme Court granted custody to the grandmother "based on one or more of these considerations: first, that communistic activities occupied the mother's attention; second, that the mother went out to work and left the infant in a day nursery and nursery schools, and, third, that the child was not being trained in the religion in which it was born," 310 and the Appellate Division affirmed. 311

A unanimous Court of Appeals, probably wishing neither to approve, 312 nor "frown upon an interracial marriage," 313 avoided completely the racially sensitive issues which the grandmother had raised. 314 Nevertheless, it reversed the Appellate Division. In doing so, it relied on a rights-based rhetoric which, as shown in detail elsewhere, 315 was yet another outgrowth of World War II. Citing only the inapposite case of Meyer v. Nebraska, 316 the Court of Appeals held that "the right of a parent, under natural

309 Portnoy, 104 N.E.2d at 896.
310 Id. at 897.
312 See Naim v. Naim, 350 U.S. 891 (1955), where the Supreme Court refused to pass on the constitutionality of Southern miscegenation statutes. The Court could not bring itself to invalidate such laws and thereby state its approval of interracial marriage until Loving v. Virginia, 388 U.S. 1 (1967).
313 Hobson v. York Studios, Inc., 145 N.Y.S.2d 162, 167 (Mun. Ct. N.Y. County 1955), which refused to so frown and awarded plaintiffs, an interracial couple, a remedy of $100 each against a hotel that had refused, in violation of the State's Civil Rights Law, to provide them with accommodations, id. at 167-68.
314 A later case that similarly strove to sidestep racial conflict was Raysor v. Gabbey, 395 N.Y.S.2d 290 (App. Div. 4th Dep't 1977). In that case, an African-American man who had fathered a child out of wedlock with a white woman sought, after the woman's death, to recover custody of the child from its maternal grandparents. The Appellate Division remanded the case to the trial court for "background investigations by appropriate social agencies into the homelife and neighborhood environment of both petitioner and respondent" and private interviews of the child, her teachers and "others who might have pertinent information helpful to the court." Id. at 295.
316 262 U.S. 390 (1923), which had reversed the conviction of a teacher for teaching German in violation of state law. The case contained dictum about the right of parents to control the education of their children. Id. at 399-40.
law, to establish a home and bring up children [was] a fundamental one and beyond the reach of any court.\textsuperscript{317} Declaring that the grandmother had “assumed the very heavy burden of proving that a little girl should, by court order, be separated from her own and her mother’s home,”\textsuperscript{318} the court further held that she had failed to sustain that burden.\textsuperscript{319} It found that the evidence “as to membership and work in alleged communistic ‘Front’ organizations” was not “such as to make the mother unfit to rear her own infant;” that “[o]utside employment and the use of nursery schools by a mother are not such things that courts should try to control,” and that “the mother’s failure to train the little girl in the faith of her fathers ... [was] within the parent’s sole control.”\textsuperscript{320}

The rights-based language of the Portnoy case was cited prominently the next year in \textit{People ex rel. Kropp v. Shepsky},\textsuperscript{321} involving an unwed 18-year-old mother who had tried for a year to support her child, until “out of work and nearly out of funds” she “[i]n desperation ... entrusted her child to a lawyer ... to be placed with a family.”\textsuperscript{322} Although she signed a consent to adoption, the mother contended that “she made it plain that she ‘was not giving ... [her child] up for adoption’” and understood only that it was only “to be boarded out.”\textsuperscript{323} After an adoption order had been signed in a proceeding of which she received no notice, the natural mother brought habeas corpus. The trial judge denied the writ, and the Second Department of the Appellate Division, in pursuit of its usual preference for adoptive parents over unwed mothers, affirmed.\textsuperscript{324}

The Court of Appeals reversed.\textsuperscript{325} No longer willing to assume, as courts typically had in the past, that a destitute woman’s “offense against society and religion in having been the mother of an illegitimate child”\textsuperscript{326} made her less worthy than an

\textsuperscript{318} Id.
\textsuperscript{319} Id. at 898.
\textsuperscript{320} Id. at 897-98.
\textsuperscript{321} 113 N.E.2d 801 (N.Y. 1953).
\textsuperscript{322} Id. at 802.
\textsuperscript{323} Id.
\textsuperscript{325} Id.
\textsuperscript{326} Id. at 801 (N.Y. 1953).
\textsuperscript{327} \textit{People ex rel. Gill v. Lapidus}, 120 N.Y.S.2d 766, 769 (Sup. Ct. Kings County
economically secure, middle-class couple seeking to adopt a child, the court began instead to perceive such a woman as a victim who, having been misled, had made mistakes. Above all, the court recognized that natural mothers had rights, including the "right to the care and custody of a child, superior to that of all others"—a right that was "a fundamental one and beyond the reach of any court."  

Unlike many other family law decisions by the Court of Appeals, People ex rel. Kropp v. Shepsky had an immediate impact on lower courts. Perhaps because of the era's increasing emphasis on rights or perhaps because the unwed mothers they confronted were more often middle-class women with whom they could empathize, judges on the lower courts became increasingly protective of rights of women who, after having given up their children, sought to prevent their adoption. Especially in cases involving private placements through individual doctors and lawyers, courts usually held that mothers had not intended irrevocably to surrender their babies. As a result, it was clear by the early 1970's that a

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1953) (rejecting quoted assumption).


328 For an example of the judiciary's preference for agency adoptions over private placements, see People ex rel. Anonymous v. Talbot Perkins Adoption Serv., 259 N.Y.S.2d 440, 442 (Sup. Ct. Kings County 1965).


"baby born out-of-wedlock, even of a troubled mother .... [was] not ‘up for grabs,’” nor “a waif claimable by the first finder, however highly qualified.”

Not even the legislature could undermine this fundamental right of natural parents to raise their own children. Concerned that adoptive parents needed the benefit of some procedure to guarantee that they could adopt a child without fear that the natural mother would revoke her consent, the legislature in 1972 adopted a statute making a consent executed in open court irrevocable. Although some cases decided after 1972 upheld consents in accordance with the spirit of the new law, most cases continued to hold it “fundamental to our legal and social system, that it is in the best interest of a child to be raised by his parents,” and, as a result, to allow natural parents to revoke their adoption consents. Indeed, a judge who processed adoptions in

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333 Thus, some cases applied the 1972 statute to properly executed consents, see In re Adoption of T.W.C., 341 N.E.2d 526, 526 (N.Y. 1975); In re Adoption of Baby E, 427 N.Y.S.2d 705, 711 (Fam. Ct. N.Y. County 1980); In re Adoption of E.W.C., 389 N.Y.S.2d 743, 749-50 (Sur. Ct. Nassau County 1976), including surrenders of children to properly authorized adoption agencies, see In re Nicky, 364 N.Y.S.2d 970, 981-82 (Sur. Ct. Kings County 1975), and other cases, perhaps in response to the policy underlying the statute, appeared more willing to find abandonment by a natural parent, see In re Anonymous, 351 N.E.2d 707, 711 (N.Y. 1976); In re Dennis and Denise, 405 N.Y.S.2d 584, 588-89 (Sur. Ct. N.Y. County 1978); In re Vanessa F., 351 N.Y.S.2d 337, 343 (Sur. Ct. N.Y. County 1974); In re Jennifer “S,” 333 N.Y.S.2d 79, 84 (Sur. Ct. N.Y. County 1972); cf. In re Daniel A.D., 403 N.E.2d 451, 452 (N.Y. 1980).
Manhattan went so far as to suggest that he would carefully scrutinize future consents in private placement cases even in the absence of claims by mothers of impropriety. 336

2. The Right to Divorce

The most decisive shift from law based on traditional family values to law emphasizing individual rights and happiness occurred as the New York courts, beginning in the late 1930's, slowly retreated from the state's century-old policy of keeping marriage indissoluble. This policy, it will be recalled, rested on restricting in-state divorce only to cases involving adultery, limiting the recognition accorded to out-of-state divorce, and constraining relief in the form of annulments.

The first sign of change occurred in the old New York rule according recognition to out-of-state divorces only when they had been granted on the ground of adultery. The earliest case was Glaser v. Glaser, 337 where the Court of Appeals recognized the validity of a Nevada divorce in a case where both spouses had submitted themselves to the jurisdiction of the Nevada court, even though the New York judges continued to insist that their action was not required by the Full Faith and Credit Clause and that they had acted only as a matter "of state policy over which the United States Supreme Court ha[d] no jurisdiction." 338 In both a slightly earlier 339 and a slightly later case, 340 the court had similarly held a husband and his successors in interest estopped from challenging the validity of a divorce he had sought. The lower courts, in turn, began to behave in a more mixed fashion, sometimes upholding 341 and sometimes invalidating out-of-state judgments. 342


336 Glaser, 12 N.E.2d at 306.


342 See Langsam v. Langsam, 24 N.Y.S.2d 510, 513 (App. Div. 2d Dep't 1940);
Next came the United States Supreme Court’s decisions in *Williams v. North Carolina* holding that the Full Faith and Credit Clause determined the effect that one state was required to accord the divorce decrees of a sister state. Although the Court of Appeals promptly recognized its obligation to abide by at least the first *Williams* decision, it simultaneously continued to apply much old law, such as the rule recognizing decrees from other courts when both spouses had submitted to the jurisdiction of those courts, but holding such decrees void when one spouse had neither submitted, nor been properly served.

More significantly, the lower courts held that they were free to inquire into the jurisdiction of any sister-state tribunal and that they were not required to obey a sister-state decree if they found the rendering tribunal without jurisdiction. In 1944, the Court of Appeals agreed and, as the lower courts continued to follow, thereby nullified the opportunity that *Williams* granted.


317 U.S. 287 (1942) and 325 U.S. 226 (1945).


See *In re* Lindgren’s Estate, 55 N.E.2d 849, 851 (N.Y. 1944).

had given New York residents to obtain out-of-state divorces which they could not obtain in-state. Indeed, one lower court judge in 1948 acted as if the Williams decision had never been rendered when, citing the 1920 case of Hubbard v. Hubbard, he declared it “the well-settled policy of this State to refuse to recognize as binding a decree of divorce obtained in a court of a sister state ... upon grounds insufficient for that purpose in this State, where the divorced spouse resided in this State and was not personally served with process and did not appear in the foreign action.”

However, when the Court of Appeals in a 1950 case reiterated its 1944 holding authorizing inquiry into the jurisdiction of sister state courts, the Supreme Court reversed, declaring that the “faith and credit given is not to be niggardly but generous, full and that “[l]ocal policy must at times be required to give way.” Fifteen years of confusion followed, as some lower courts continued to inquire into the jurisdictional basis of and to refuse to give effect to out-of-state decrees, while others

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See supra note 8 and accompanying text.


Id. at 584.

Id. at 584 (quoting Sherrer v. Sherrer, 334 U.S. 343, 355 (1948)). New York has nonetheless continued to adhere to the view that at least one spouse must be domiciled within a state in order for the state to have jurisdiction to render a divorce. See Carr v. Carr, 385 N.E.2d 1234, 1236 (N.Y. 1978).

reached the opposite result. Cases addressing other issues, such as the effect of out-of-state custody and support decrees,
only added to the confusion.

An especially nettlesome issue during the 1950's and 1960's concerned the validity of Mexican divorces. Of course, the Full Faith and Credit Clause did not require New York to give them effect, and many cases, as a result, treated them as a nullity. Other cases, however, recognized Mexican decrees when one spouse had appeared in Mexico and the other had been represented by an attorney, or, at the very least, estopped spouses who had participated in obtaining Mexican divorces from challenging their validity.

*Rosenstiel v. Rosenstiel* put the issue to rest by upholding a divorce granted in Mexico to a husband, who had spent one hour in the country signing an official book of residents and filing a petition for divorce on grounds of incompatibility, and a wife, whose attorney on the next day had submitted to the jurisdiction of the Mexican court and admitted the allegations of the petition. The effect of the decision, as noted by the dissent, was "to ignore the basic concepts and value judgments" of New York's divorce legislation, which for 170 years had permitted divorce


By upholding Mr. Rosenstiel's Mexican divorce from his first wife, the Court of Appeals legitimized his marriage to his second wife, from whom he was then seeking to escape. Litigation over this second marriage continued for many years. *See* Rosenstiel v. Rosenstiel, 368 F. Supp. 51 (S.D.N.Y. 1973), *aff'd*, 508 F.2d 1397 (2d Cir. 1974).
only on grounds of adultery, out of “a design to restrict the availability of divorce and in so doing to preserve the family unit ... considered vital and indispensable to the welfare and stability of the family, the ultimate goal being a climate conducive to the better development of our society.” The dissent accordingly accused the majority of “sanction[ing] the casual and consensual dissolution of the marriage contract” by giving spouses, in the view of another member of the court, the power of “going to other jurisdictions to evade our laws by obtaining divorces after short sojourns and on grounds not cognizable here.”

The same tension between preserving traditional family values and giving individuals freedom to control their marital ties also appeared in a line of annulment cases occurring between the late 1930’s and mid-1960’s. In the earlier cases, judges had protected traditional values, as in Application of Sood, when they denied a marriage license to a Hindu migrant from India because he had left a wife behind there, even though under Indian law she could not stop him from remarrying, and in In re Levy’s Estate, when they declared a woman who had gone through a marriage ceremony with Samuel Levy to be his widow, even though Levy had intended only to make her his housekeeper and therefore had obtained no license for the marriage.

Later cases like Siecht v. Siecht were more willing to relieve individuals from hard marriages. The Siecht case arose nearly two decades after Joseph Siecht and his wife Eva had both migrated to the United States, where Joseph quickly became a citizen. When they married in 1925, Eva also had promised to become a citizen, but in fact had never done so. Then, in 1939, when Joseph learned that Eva was a member of the Deutsch Bund, he left her. Two years later she persuaded him to return with a promise to become a citizen, but she failed again to honor the promise or to quit the Bund. On February 20, 1942, Joseph left his wife again, after the following conversation reported in the court’s opinion:

“Q. About two days before that did you have a talk with your

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364 Rosensteil, 209 N.E.2d at 720.
365 Id. at 714.
368 41 N.Y.S.2d 393 (Sup. Ct. Erie County 1943).
wife about her becoming a citizen?"

“A. I did. And she said there was no use of her trying to become a citizen because she said ‘these shitty British and stupid Americans can’t win this war, because that man has prepared a long time for this and he will rule everything.’”

“The Referee: That was Hitler?”

“The Witness: Yes. I said ‘who is the man’, and she said ‘Hitler, he is going to be the boss, and whatever he says will go.’”

The court thereupon held that “the refusal of the defendant to become a citizen of the United States and her membership and activities in the Deutscher Bund, and her general attitude of disloyalty to our country” constituted “valid grounds for an annulment” of Joseph’s marriage, even though Eva’s 1925 promise to become a citizen must have had little, if any, materiality at that time in inducing him to marry her.

The final case exhibiting the tension between traditional values and the right of an individual to be free of a harsh marriage was Kober v. Kober. The case arose when Jaqueline Kober sought an annulment of her marriage to Josef Kober on the ground that he had failed to inform her that he had been an officer in the German army during World War II and that he was a Nazi and hated Jewish people and was fanatically anti-semitic; that he believed in, advocated, approved and applauded Hitler’s ‘Final Solution’ of extermination of the Jewish people and that he would require plaintiff to weed out her Jewish friends and cease socializing with them.

In denying Josef’s motion to dismiss this claim, the trial court found his views “more than distasteful beliefs; they are absolutely repugnant and insufferable to all persons who believe in the divine nature of man.”

Out of concern for the competing set of values, the Appellate Division reversed. Although it took note of “the extreme and horrible character of the husband’s past and present beliefs,” the majority also knew that “the limited ground on which a divorce may be obtained in this State, produces pressure to extend the

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369 Id. at 394.
370 Id.
372 Kober, 256 N.Y.S.2d at 620 (Rabin, J., dissenting) (quoting opinion of trial court).
373 Id.
action for annulment to embrace more than it ... logically should." The majority was concerned that “the extension” of doctrine needed to authorize annulments on the ground of political beliefs would “unleash an uncontrollable mass of collateral problems and effects.” The Appellate Division majority, to quote an earlier case, knew that it could not “grant annulments solely because of sympathy” when to do so would constitute “an extension of the legislative enactment by judicial decree” and amount to “legislation by the judiciary” that would have the capacity to undermine the State's entire law of marriage and divorce.

Three judges on the Court of Appeals adopted the view of the Appellate Division, but four judges voted to reverse. In their view, the defendant’s “fanatical conviction ... that a race or group of people living in the same community should be put to death as at Auschwitz, Belsen, Dachau or Buchenwald, evidence[d] a diseased mind” that might warrant annulment on the statutory ground of insanity or lunacy. In any event, the four-judge majority was convinced that the defendant's views would “plainly make the marital relationship unworkable in this jurisdiction,” which, as has been shown elsewhere, had only recently committed itself to integrating minorities like Jews and blacks into the mainstream of the community's life.

Decided in the same year by the same four-judge majority, the Rosenstiel and Kober cases nonetheless had exactly the effect that the dissenters had feared: they opened the floodgates to allow New Yorkers to obtain easy divorces out of state and easy annulments at home. Although the two cases show that traditional values of family preservation through limitation of divorce still commanded considerable adherence, they tipped the legislature's hand and forced it to enact the reforms of 1966-67, which finally brought about a “modernization and liberalization of ...
[New York’s] medieval divorce law."\(^{381}\)

After September 1, 1967, New York finally began to allow divorce on grounds in addition to adultery.\(^{382}\) One of the new grounds was cruelty. This upgrading of the significance of cruelty produced little change, however, in its definition. Although intoxication and laziness,\(^{383}\) "strained and unpleasant" relations between spouses,\(^{384}\) "isolated threat[s],"\(^{385}\) even "riotous quarrels,"\(^{386}\) still did not constitute cruel and inhuman treatment,\(^{387}\) repeated acts of violence,\(^{388}\) acts of adultery made known to the innocent spouse,\(^{389}\) and false accusations of adultery still did.\(^{390}\)


\(^{385}\) Id.


\(^{390}\) See Ash v. Ash, 386 N.Y.S.2d 159, 160 (App. Div. 4th Dep’t 1976); Cinque-
There was one change when the Court of Appeals held that “[e]ven one beating”\(^{331}\) could constitute cruel and inhuman treatment authorizing a wife to obtain a divorce. There were also remedial changes as a result of the reform legislation, which authorized the courts to grant a dual divorce in favor of both parties when both were guilty of cruelty\(^{392}\) and to grant a separation even when there was no finding of cruelty.\(^{393}\)

The reform legislation of 1967 also upgraded abandonment into a ground for divorce,\(^{394}\) provided the abandonment had continued for at least two years.\(^{395}\) As had been true in regard to cruelty, the definition of abandonment underwent little change. Refusal to engage in sexual intercourse continued to be defined as abandonment,\(^{396}\) as did one spouse’s exclusion of the other from the marital abode.\(^{397}\)

Adultery also remained a ground for divorce,\(^{398}\) and old rules authorizing judges to infer adultery from circumstantial evidence remained in place.\(^{399}\) Thus, one jury’s inference of adultery was upheld on the basis of evidence “that defendant and ... [her] neighbor [had been] seen in the latter’s apartment, engaged in loveplay, followed by a dousing of lights; [and] defendant emerged four hours thereafter.”\(^{400}\) It also remained the rule that when both parties were guilty of adultery, neither was entitled


\(^{397}\) See, e.g., Van Patten v. Van Patten, 360 N.Y.S.2d 588, 591 (Sup. Ct. Saratoga County 1974).


\(^{399}\) See, e.g., Van Patten v. Van Patten, 360 N.Y.S.2d 588, 591 (Sup. Ct. Saratoga County 1974).

\(^{400}\) See, e.g., Van Patten v. Van Patten, 360 N.Y.S.2d 588, 591 (Sup. Ct. Saratoga County 1974).
to a divorce on that ground. 401

The reform legislation also added two new grounds for divorce. The first, which paid no heed to fault, 402 allowed a divorce to parties who had lived separate and apart for two years, 403 a period later reduced to one year, 404 provided the parties had substantially performed all the terms of their separation agreement or judgment of separation. 405 Consensual divorce thus became available in New York after a two-year, later reduced to a one-year waiting period. 406 The second new ground authorized divorce when a defendant spouse was imprisoned for a term of three or more years. 407

With the 1967 statutory changes, New Yorkers seeking divorce rushed into their own courts. 408 With divorce readily available, plaintiffs no longer needed to turn to annulment law to cir-

408 Based on a random sample of approximately 100 cases per year from trial courts in Erie, Nassau, New York, and Tompkins counties, it can be stated with a 95 percent level of confidence and a margin of error of +/-3 percentage points that divorce represented 4.35% of the cases brought to court between 1920 and 1967. Based on a comparable sample and with the same level of confidence and margin of error, it can be stated that divorce rose to 15.98% of the cases brought in these counties between 1968 and 1980 and 22.86% of the cases brought between 1970 and 1980.
cumvent the State's limited divorce law, especially since "a spouse in an annulment action [no longer had] any greater rights than in a separation or divorce action." As a result, annulment cases almost disappeared from the State's jurisprudence. The need to seek out-of-state relief similarly vanished, and as it did, issues of full faith and credit in divorce cases likewise nearly disappeared.

III. THE NEW SEXISM

No one would claim that New York family law was without sexist underpinnings of a sort during the 1920's and 1930's. Nevertheless, the sexism of these early decades was constrained. The law countenanced the dominance of male family heads, but in return men were held to a duty to preserve the well-being of the women and children who were their dependents.

Sexism of this sort endured into the 1940's, the 1950's, and even the 1960's. But during these later decades, the emphasis of family law also shifted from family preservation to the protection of individual rights conducive to personal happiness, and, as doctrine changed, male privilege and judicial toleration of men's misbehavior became increasingly pronounced. Sexism of a new and arguably more virulent sort thus spread and, in conjunction with sexist doctrines inherited from earlier times, degraded women.

1. Paternity Cases

One area of newly rampant sexism grew up around the law dealing with proceedings to determine the paternity of children born out of wedlock.\(^{412}\) Since these proceedings possessed a quasi-criminal character,\(^{413}\) judges required a specially high

\(^{412}\) Proceedings to establish paternity were usually brought by unwed mothers seeking support for their illegitimate children. See Mores v. Fee, 343 N.Y.S.2d 220, 228 (Fam. Ct. N.Y. County 1973); Schneider v. Schneider, 339 N.Y.S.2d 52, 56 (Fam. Ct. Kings County 1972). An expectant mother could also sue to recover the costs of an abortion. See C. v. L., 305 N.Y.S.2d 69, 72 (Fam. Ct. N.Y. County 1969). But a mother could not sue for statutory child support if she and the putative father had made a contract for support in which “the welfare of the child” [was] fully protected.” Haag v. Barnes, 175 N.E.2d 441, 444 (N.Y. 1961); cf. Bacon v. Bacon, 386 N.E.2d 1327, 1328 (N.Y. 1979). The mother could bring an action for an increase in support over the contract amount if changed circumstances so warranted. See Shan F. v. Francis F., 387 N.Y.S.2d 593, 600-01 (Fam. Ct. N.Y. County 1976); Ellen N. v. Stuart K., 387 N.Y.S.2d 367, 371 (Fam. Ct. Onondaga County 1976). Suits to determine paternity could also be brought by fathers, see Jaynes v. Tulla, 416 N.Y.S.2d 357, 358 (App. Div. 3d Dep't 1979); Edward K. v. Marcy R., 434 N.Y.S.2d 108, 109-10 (Fam. Ct. Kings County 1980); Lock v. Fisher, 428 N.Y.S.2d 868, 870 (Fam. Ct. Westchester County 1980); but see Hines v. Sullivan, 431 N.Y.S.2d 868 (Fam. Ct. Onondaga County 1980) (holding that father could not bring suit when, because of age of mother, his relationship with her was unlawful) and, if a mother was “likely to become a public charge,” Commissioner of Welfare v. Meyers, 264 N.Y.S.2d 440, 442 (Fam. Ct. N.Y. County 1965); accord Anonymous v. Anonymous, 254 N.Y.S.2d 946, 947 (Fam. Ct. N.Y. County 1964), by welfare officials “trying to retrieve from an available source moneys expended on public assistance,” Commissioner of Welfare v. Jones, 343 N.Y.S.2d 661, 665 (Fam. Ct. Queens County 1973); accord Mildred D. v. Oliver P., 412 N.Y.S.2d 987, 989 (Fam. Ct. Kings County 1979); cf. In re Wolfe, 334 N.Y.S.2d 689, 690 (Fam. Ct. N.Y. County 1972); Commissioner of Pub. Welfare ex rel. Stuart v. Chandler, 204 N.Y.S. 187, 188 (Spec. Sess. N.Y. County 1922); St. Lawrence County Dept of Soc. Serv. v. Dusharm, 382 N.Y.S.2d 428, 429 (Fam. Ct. St. Lawrence County 1978); Mores, 343 N.Y.S.2d at 224-25. The cases were in conflict as to whether an illegitimate child could bring an action to establish paternity. Compare Elizabeth H. v. James M., 429 N.Y.S.2d 1006, 1007 (Fam. Ct. N.Y. County 1980) (upholding right of child to sue), with Lattanzio v. Lattanzio, 375 N.Y.S.2d 989, 990 (Fam. Ct. Suffolk County 1975) (denying child’s right to bring action for support because no allegation was made that man and child’s mother entered into ceremonial marriage, that child was man’s child, or that order of filiation was in existence). “[O]ne major purpose of paternity proceedings [was] to shift the burden of support of the child from the State to the putative father...” Moore v. Astor, 423 N.Y.S.2d 1010, 1012 (Fam. Ct. Westchester County 1980). Nonetheless, indemnification of “the community against the possibility that a natural mother or a child born of an illicit relationship might become a public charge” was not the “sole purpose” of the law and did not fully reflect its “social philosophy.” The law on paternity “recognized more fully the moral obligation of the natural parents toward the offspring of their union ... [and], although providing for indemnification of the community, [was] chiefly concerned with the welfare of the child.” Schaschlo v. Taishoff, 141 N.E.2d 562, 563 (N.Y. 1957).

\(^{413}\) The proceedings were described as “civil .... in nature,” In re Clausi, 73
standard of proof: proof “to the point of entire satisfaction by clear and convincing evidence.”

This evidentiary requirement resulted in the acquittal of many men accused of being fathers. Among those acquitted were a man charged, for example, by a woman who testified “that she had sexual relations with each man with whom she ever had a date,” another man accused by a woman who “had a total of eight children by at least three different men” and who at “the time when ... [she] was intimate with respondent ... also ... kept company with another man ... who, she stated, had fathered six of her children,” and a third man prosecuted by a woman who, in addition to the two children whose paternity was at issue, had conceived four other children by four other men. Moreover, a man who engaged in sexual intercourse with an unwed mother on only one occasion, especially if he wore a condom on the occa-


417 Commissioner of Soc. Serv. of N.Y., 348 N.Y.S.2d at 834. The court noted, however, that this woman was not “promiscuous in the sense of having indiscriminate sex with two or more men in any given period of time.” Id. at 834.
sion, would also be acquitted if other men had access to the mother at the approximate time of conception.

A striking fact about the paternity cases is the absence of judicial language critical of men who had fathered children out of wedlock. Men who got unmarried women pregnant were not subject to condemnation; their behavior, it appears, was regarded simply as natural. Women and children, in contrast, were condemned. At common law, an illegitimate child was "nullius filius"—the child of no one, entitled to neither rights nor standing in the community, and "not looked upon as children for any civil purposes." At mid-century, "[e]xcept in the specific respects provided by statute, a child born [out] of wedlock [was] still nullius filius," and "the common law conception ... remain[ed] unchanged."

Nor were mothers of illegitimate children more highly regarded, as is illustrated by a 1950 case involving two mothers of twelve illegitimate children:

This case illustrates the many burdens which are imposed upon

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the taxpayers through the activities of immoral persons and through the laxity of welfare departments in not checking up before relief is granted almost without end. The public welfare department had for years been supporting the mothers and their respective broods of children. Year after year new children had been appearing upon the scene, and no one seemed to have given any thought as to how the law might be invoked to curb activities of that kind, nor as to the resultant responsibilities which were cast upon the taxpayers....

The judge himself conferred with welfare officials, urged them to prosecute the mothers for "immorality or depravity ... which had caused the children to be neglected," and, when the mothers appeared before him without counsel, he found them guilty. Although reports had "come to the Court of [one of] the [women] and her children stepping into a nice station wagon and starting off for the beach on a Sunday morning while the neighbors know that they are all burdens on the taxpayers," the judge nonetheless suspended the mothers' sentences and left their children in their custody. He explained:

> It appeared, however, that [the children] had received excellent physical care, and I had to consider the harm which might be done to the children by separating them abruptly even from mothers such as I had before me. I, therefore, left them in the care of their mothers....

The judge also admitted his impotence in dealing with the father of five of the twelve children, who "was a married man living with his family in the neighborhood." The mother, however, "consistently refused to give the man's name," and as a result, the court was "blocked in its efforts to bring him to account, if indeed any useful purpose would be served ... in bringing to light a state of facts which might simply result in the breaking up of his own family."

These mid-century cases represented a marked change from judicial attitudes a few decades earlier. Men had been permitted to dominate their families, but the law had expected monogamy in return. At mid-century, in contrast, the double standard was judicially tolerated: women were criticized for giving birth to il-
legitimate children, while male promiscuity was presumed to be normal and natural. In recognizing such male privilege without imposing any corresponding duty, judges legitimated a new kind of sexism.

2. Annulment Cases

New sorts of sexist assumptions also appeared in annulment cases. In *Thurber v. Thurber*, for example, a "so-called patriotic women [sic]." during World War II had married "a soldier solely for the purpose of getting an allotment and more if the soldier [was] killed" but thereafter had refused to live with the soldier after he had returned home; the court declared such conduct to be "the most brazen kind of a fraud and ... a good ground for the annulment of the marriage." However much the facts may have supported the court's holding, its stereotype of the brave soldier seeking love before departing to fight for his country and of the money-grubbing woman selling herself for a government pittance was naive in its view of men and outrageously unfair to women.

Judicial blindness to the faults of men and indifference to the difficulties faced by women became increasingly characteristic as the 1940's and 1950's progressed. Similar sexism was rampant, for example, as courts applied this double standard in cases in which one spouse sought an annulment on the ground of sexual activities prior to marriage by the other. Thus, these cases held a man entitled to an annulment if his wife had failed to disclose a previous illegitimate pregnancy or marriage or even if she turned out not to be the virgin he had expected her to be. In contrast, wives were denied annulments on account of prior undisclosed sexual activities of their husbands, even if those activities had resulted in illegitimate births.

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428 63 N.Y.S.2d 401 (Sup. Ct. Erie County 1946).
434 See Pankiw v. Pankiw, 256 N.Y.S.2d 448, 450 (Sup. Ct. Monroe County 1965). But judges would annul marriages if husbands failed to disclose prior marriages, see
Insofar as they denied women control over their reproductive lives, sexism was also inherent in the fraudulent failure to procreate cases\(^4\) that arose in large numbers in the aftermath of World War II. As one judge opined, “[m]arital intercourse, so that children may be born, [was] an obligation of the marriage contract and is the foundation upon which must rest the perpetuation of society and civilization.”\(^3\) Thus, an annulment was proper if either the husband or wife insisted on using contraception,\(^4\) unless the other acquiesced in the contraceptive practices for a sufficiently long period of time so as to warrant a finding of condonation of the practice or waiver of the fraud.\(^3\) Since either a husband or a wife could obtain an annulment, sexism, which was real if one assumes that reproductive choice is more important to women than to men, was often hidden. In at least one case, though, it was not, when a judge went so far as to grant a

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\(^{45}\) See Mirizio v. Mirizio, 150 N.E. 605, 607 (N.Y. 1926).


husband an annulment because his wife insisted, for the first time after their marriage, that she would determine the time at which she would become pregnant. 439

3. Separation Cases

Sexism became even more rampant in cases involving judicial elaboration of the grounds for separation. During the years prior to 1967, when New York permitted divorce only for adultery, its law also allowed the lesser remedy of a judicial separation on grounds of either cruelty or abandonment.

The first ground for separation, as noted, was cruelty, which encompassed physical violence by one spouse upon the other. Thus, one early case from the 1920’s granted a separation to a plaintiff wife after her husband had:

repeatedly called the plaintiff vile names, spat in her face, abused her, ordered her out of the house, struck and beat her, had the telephone disconnected, published a notice in the newspapers that he would not be responsible for her debts, left her bills unpaid, refused to give her sufficient money to pay the ordinary and necessary household expenses, hired a detective to watch her, and refused to eat at the table with her and many times to speak to or carry on any conversation with her... 440

Similarly, when a wife had her husband arrested on several occasions and permitted her daughter by a prior marriage to assault him with, among other things, “an earthen crock ... , inflict[ing] serious bodily harm,” he was entitled to a separation, as was another man whose wife “bit him, drawing blood,” and yet another whose wife

beat and mistreated [him], doused him with water to compel him to leave the apartment, forced him to leave the apartment early each morning and refused to allow him to return before 6 P.M., [and] took away and refused [him] a key to the apartment....

A double standard in the definition of cruelty existed, however, as cases held that one or two isolated acts of violence by a husband against his wife did not amount to cruel and inhuman treatment. Indeed, the courts became so tolerant of male violence that, among other things, they found one man justified in striking his wife after he had found her sitting on the lap of another man and kissing him.

A final case speaks for itself:

The plaintiff admitted ... that prior to the incident in which defendant held her head under the bathtub faucet she had thrown a pot of water on him and that prior to the incident in which he had tied her hands and feet, he had sought to make love to her and she had repulsed him, slapping and kicking him. Such physical acts as defendant committed were, thus, provoked.

In contrast, the courts were clear that a single violent act by wife against her husband amounted to wrongdoing on her part.

Traditional forms of sexism also appeared in New York's "rigid" rules of separation, which failed to "take into account latter-day medical and sociological concepts" by refusing to recognize "name calling, bickering, [and] threats" as a form of

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cruelty. The law was clear. As the Court of Appeals had stated in 1920:

Incompatibility of temper is no ground for separation in New York. The misery arising out of domestic quarrels does not justify a termination of the legal rights and duties of husband and wife. For such ills the patients must minister unto themselves; our courts of justice offer no cure.\footnote{Pearson v. Pearson, 129 N.E. 349, 351 (N.Y. 1920); accord Tell v. Tell, 53 N.Y.S.2d 94, 100 (Dom. Rel. Ct. N.Y. County 1944).}

On the other hand, a wife’s “denial” of her husband’s “marital rights” or her demand that he use contraceptives was “contrary to the principles and policy” of New York law and thereby constituted “a violation of her obligations under the marriage contract” in the nature of cruelty. In contrast, a husband’s lack of sexual interest in his wife or other failure to have sexual relations did not constitute cruelty.

Traditional forms of sexism also manifested themselves in holdings that a wife was guilty of cruelty if she refused to accompany her husband socially or to assist him in business. A particularly interesting case arose when “a very ambitious lady” sought to return to college and medical school, as a result of which she failed to keep Jewish dietary laws in her home and to pay as much attention to her daughter as her husband felt she should. The court held that her husband had “no obligation ...
to provide for his wife the funds which she require[d] to attain a professional status” and that she had constructively abandoned him by failing to provide proper meals and breached her “duty” as a “parent” when she failed to maintain “an atmosphere at home which [would] redound favorably to the growth emotionally, intellectually, and spiritually of the child.”


was that a husband had the right to determine where and with whom he and his wife would reside. It was “a wife’s burden to move with her husband to a location selected by him in good faith,” at least when the move was related to the husband’s employment; “her duty” was “to go with her husband to the home which he had provided,” and, if she refused, she would be deemed to have abandoned him.

4. The Law of Support

Prior to 1967, a determination of guilt of cruelty or abandonment was significant because, as we have seen, it determined the amount of support that a husband owed his wife. What we

1946). However, a wife could also raise her husband’s refusal to have sexual intercourse as grounds for abandonment. See Jacobsen v. Jacobsen, 130 N.Y.S.2d 762, 766 (Sup. Ct. Kings County 1954). But cf. Devon v. Devon, 214 N.Y.S.2d 109, 111 (Sup. Ct. Kings County 1961) (holding that no abandonment occurs when parties agree not to have sexual relations).


474 Vetrano, 54 N.Y.S.2d at 538.


476 This is true unless the parties had agreed on the amount of support pursuant to a separation agreement. See Borax v. Borax, 149 N.E.2d 328, 328 (N.Y. 1958) (holding that separation agreement containing provision for support and maintenance barred separate action); Oatman v. Oatman, 46 N.Y.S.2d 269, 269 (App. Div. 4th Dep’t 1943) (holding that agreement for separation was barred by separation agreement); Doty v. Rensselaer County Mut. Fire Ins. Co., 185 N.Y.S. 466, 468 (App. Div. 3d Dep’t 1921) (stating that agreement under which husband agreed to provide and maintain home for wife’s life precluded wife from bringing action for separation); see also Peer v. Peer, 220 N.Y.S.2d 813, 813-14 (App. Div. 1st Dep’t 1961) (regarding separation agreement allegedly abandoned by reconciliation and resumption of marriage). But cf. Jackson v. Jackson, 49 N.E.2d 988, 990 (N.Y. 1943) (holding that lump-sum separation agreement does not bar judicial award of support). As we have already seen, a guilty husband was required to support an innocent wife according to his means in the style to which she had become accustomed during marriage, whereas an innocent husband was required to provide a guilty wife only with the support necessary to prevent her from becoming a public charge. See Mills v. Mills, 62 N.Y.S.2d 344, 345-46 (Dom. Rel. Ct. Queens County 1946). A wife could also ob-
have yet to examine, however, is the extent to which sexist assumptions riddled the rules governing the judicial award of support.

An old sexist assumption, going back even beyond the 1920’s, was based upon alleged “considerations of equity and public policy;” it held that an “obligation” existed growing “out of the marriage relation that the husband must support his wife and family.”477 Especially if there were young children, a wife, it was thought, “should not be compelled to work to the[ir] detriment,” but “should be encouraged” to maintain “a normal mother and child relationship,” in which she would “devote a considerable portion of her time to their care, guidance and well-being.”478 In the postwar era, however, the courts never put excessive pressure on men in a fashion that would interfere with their practi-

\[\text{t support according to means if both spouses were equally guilty or innocent, see Sacks v. Sacks, 271 N.Y.S.2d 358, 360-61 (App. Div. 2d Dep’t 1966), unless the marital relationship was continuing, see Weiss v. Weiss, 148 N.Y.S.2d 80, 81 (App. Div. 1st Dep’t 1956) (holding that marital relationship so intimately continued that separation action was precluded); Duffy v. Duffy, 200 N.Y.S.2d 150, 151-52 (Sup. Ct. N.Y. County 1960) (stating that the general rule is that judgment of separation will not be granted if the parties voluntarily continue to live in the same premises), but see Sonnenberg v. Sonnenberg, 203 N.Y.S.2d 118, 121 (Sup. Ct. N.Y. County 1960) (stating that in order to invalidate separation agreement, cohabitation must consist of more than sexual intercourse).}

477 Brandt v. Brandt, 233 N.Y.S.2d 993, 995 (Sup. Ct. N.Y. County 1962); accord Phillips v. Phillips, 150 N.Y.S.2d 646, 648-49 (App. Div. 1st Dep’t), aff’d, 138 N.E.2d 738 (N.Y. 1956); Surut v. Surut, 181 N.Y.S. 631, 632 (App. Div. 1st Dep’t 1920). In light of this sexism, it is not surprising that the legislature created and the courts enforced special remedies for needy wives and children. In one case, for example, the Court of Appeals took account of “the frequent inequality of mobility and financial means” between husbands and wives, who typically “were unable to pursue their itinerant spouses and obtain support rights in foreign jurisdictions.” Loeb v. Loeb, 152 N.E.2d 36, 39 (N.Y. 1958), cert. denied, 359 U.S. 913 (1959). It accordingly recognized the existence of a special “protective ... remedy” for wives residing in New York, “whose property rights might be jeopardized by an ex parte divorce by their spouses.” Id. Judges similarly recognized that alimony, which was “merely the enforcement of a common law liability of a husband to support his wife,” Anastasiadis v. Anastasiadis, 279 N.Y.S.2d 936, 937 (Sup. Ct. N.Y. County 1967), was a remedy exclusively for women, and accordingly they denied requests for alimony by men.

478 Brownstein v. Brownstein, 268 N.Y.S.2d 115, 123 (App. Div. 1st Dep’t 1966). In addition, support was mandated “to prevent abandoned wives and children from becoming public charges.” People ex rel. Heinle v. Heinle, 188 N.Y.S. 399, 400 (Bronx County Ct. 1921). Fearful of public burdens, courts also upheld the statutory liability of grandparents to support a grandchild when welfare authorities were “unable to secure adequate support for such child from its parents.” Kinsey v. Lawrence, 100 N.Y.S.2d 597, 605 (Dom. Rel. Ct. Queens County 1950) (citing DOM. REL. CT. ACT, § 101 (3)).
cal right to devote their own resources to the pursuit of their own happiness. Thus, they urged that a woman who had “separated from her husband, should be encouraged, if consistent with her ... obligations to her children and family, to ... make herself economically useful.” As another judge added, “Alimony was originally devised ... to protect those without power of ownership or earning resources. It was never intended,” he continued, “to assure a perpetual state of secured indolence. It should not be suffered to convert a host of physically and mentally competent women into an army of alimony drones.” Alimony “was not designed to confer ... a status of leisure and uselessness in society.” For like reasons, alimony was a remedy available only to women and could never be recovered by men, who were deemed competent to support themselves. Indeed, were a “husband ... [to] look to his wife for support,” he would be “placed in an unnatural relationship,” since he was supposed to be “the breadwinner and provid[er] for the family.”

Nothing better encapsulates the sexism of the 1940’s, 1950’s, and 1960’s than the support cases just discussed. That sexism grew, in part, out of the earlier sexism of the 1920’s and 1930’s, which had focused on what was “natural” in the relationship between the genders. The early sexism had found it “natural” for men to be somewhat violent and sexually promiscuous, but at the same time to serve their families as providers. It had been equally “natural” for women to remain in the home, nurture young children, and accept their subordination to men. The courts turned this early sexism into something even more perverse, however, when, with a post-World-War II emphasis on individual rights, they translated what had been simply “natural” into a set of legal entitlements. In the new translation, much of what had been “natural” in the 1920’s and 1930’s—the duties that had corresponded to the rights—could find no place,

479 Brownstein, 268 N.Y.S.2d at 122.
481 Brownstein, 268 N.Y.S.2d at 121-22.
483 Anastasiadis, 279 N.Y.S.2d at 937.
and male privilege was left standing by itself.

This same postwar change in family law can also be described in an alternative fashion. In a wide variety of legal doctrines in New York, the years around World War II saw an end to the traditional moral underpinnings of the law. New values emerged in place of the older moral ones. In the context of family law, the new values were cast in the language of rights which their bearers could enjoy without assuming any corresponding duties or responsibilities. When these new ideas about rights became attached to older assumptions about normal and natural male behavior, the social advantages men had customarily enjoyed became reified into formal legal privileges standing apart from the social obligations with which traditional morality had encumbered them. As a result, men gained increased legal power, and women lost significant legal protections.

IV. EQUALITY IN THE FAMILY

With the 1963 publication of Betty Friedan's *The Feminine Mystique*, the 1964 passage of Title VII of the Civil Rights Act, with its goal of equal employment opportunities for women, and the 1965 founding of NOW, the National Organization for Women, a new feminist movement was born. Initially, the movement was moderate and reformist in tone. Some feminists rapidly headed in more radical directions, however, with the result that by 1970 "the ideological complexity of the movement [was] too great to be categorized ... simply;" disagreement existed over a myriad of issues ranging from the structures that should be adopted for the internal governance of women's groups, through the significance to be attached to issues of race and class, to the proper place of lesbian sexuality in a future feminist utopia.

488 For a detailed analysis of the divisions in feminism in the years around 1970,
Nonetheless, virtually all feminists agreed that the family law doctrines on which this article has so far focused were badly in need of change. Thus, there were familiar complaints about “men’s and women’s unequal status in the family” as the law “gives men an advantage in marriage.” Some feminists went so far as to imply that marriage as a legal institution ought to be abolished. They argued that marriage persisted, at least in part, because “it is difficult to change any institution;” they also urged that “[m]any of the needs that marriage fulfills ... [could] be met in other ways.” Other feminists, in contrast, strove for less radical solutions, such as no-fault divorce, which “worked hand in glove with women’s search for equality through the rejection of the patriarchal family.” These “creators of no-fault divorce law,” in turn, “intended to establish norms for property settlements and alimony based on the concept of wives as full economic partners.”

The efforts to change family law were part and parcel of a more general effort by feminists in the late 1960’s and 1970’s to promote gender equality. As explained by NOW, the goal was “to bring women into full participation in the mainstream of American society ... in truly equal partnership with men.” The women’s movement achieved substantial successes in the areas of employment law, abortion, and gender-related crimes. The movement for equality also produced many changes in family law, but the changes paradoxically brought greater tangible benefits to men than to women.

The doctrinal change from which women gained the most tangible benefit occurred when the Court of Appeals in the 1976 case of *Echevarria v. Echevarria* held that “[e]ven one beat-

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494 Id. at 96.


499 See id. at 96-97.


ing could constitute cruel and inhuman treatment; earlier cases, it will be recalled, had declared that a single beating, no matter how severe, would not alone constitute cruelty.

Another change that unequivocally helped women occurred with the rejection of the old rule that a wife had to follow her husband and reside with him at the location of his choice. While one case decided in the 1970's reaffirmed the traditional view that it was “still a wife's burden to move with her husband to a location selected by him in good faith,” at least when the move was related to the husband's employment, another case declared that a wife's right to remain “in a well-paying, full-time job she had held for a considerable length of time” could “not be defeated by the husband’s arbitrary decision to change his domicile without some showing of necessity on his part.”

On one subject — the law involving children born out of wedlock — egalitarian change helped children. As far back as 1953, a lower court judge had declared that the “antipathy toward those born out of wedlock should not be extended beyond its historical bounds where to do so would result in injustice.”

The legal position of illegitimate children did not improve significantly, however, until fifteen years later, when the United States Supreme Court's decision in Levy v. Louisiana made it clear that “state law could not operate to deprive an illegitimate child of any right if the ground for depriving him of that right was merely the fact of his illegitimacy.” On this basis, even the illegitimate children of alien immigrants were given the same visa preferences for entering the United States as legitimate children enjoyed.

But every other change in the law wrought by equality conferred tangible benefits on men. Consider, for example, the relative rights of mothers and fathers of illegitimate children, especially in regard to custody. Since the putative father of an

498 Id. at 566.
illegitimate child at common law had no legal relationship to the child, New York courts as late as the 1920’s were “of the opinion that the mother of ... illegitimate children, as guardian by nurture, had the right to custody and control of their affairs.” After mid-century, however, as the “harsh view of the common law that a natural child was filius nullius” went into decline, so too did the rule “that only the mother [could], whatever the circumstances, have custody of a child born out of wedlock.” There remained a “presumption of custody in favor of the natural mother,” which was, on occasion at least, overcome on the facts of individual cases and which some thought “should be reconsidered and abolished.” By the end of the 1970’s, new legislation providing that no parent should have any prima facie right to custody had in fact abolished the old presumption, as the new law was “applie[d] to unwed as well as wed parents,” and judges determined “the issue of custody ... without any artificial gender based distinctions.”

Changes in the law regarding custody of legitimate children

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507 Id. at 262.
509 Id.
510 See People ex rel. Coage v. Colbert, 75 N.Y.S.2d 865 (Sup. Ct. N.Y. County 1947).
511 Godinez, 266 N.Y.S.2d at 639.
likewise were of greater benefit to men than to women. By the late 1970's, the efforts of women to achieve equality had somewhat perversely proved damaging to their interests on the subject of child custody. As one court explained at the close of the decade, "outdated principles of 'maternal superiority'" could not properly "influence [ ] ... determination[s] in awarding custody," since statutory law had made it "clear that there shall be no prima facie right to the custody of a child in either parent." 512 By recourse to these new views of gender equality, fathers appear to have been more successful in obtaining custody in the later years of the 1970's than they had been in earlier years. 513

The law also changed in favor of men on the issue whether the consent of fathers was required before their illegitimate children could be adopted. Throughout much of the 1970's confusion reigned on this issue as the cases addressed it only tangentially. Thus, one case held that a father's consent was not required under Wisconsin law, 514 while another avoided the consent issue by finding that the natural father, as well as the natural mother, had abandoned the infant who was being adopted. 515 A 1958 case, 516 however, assumed, without deciding, that the consent of the natural father, who was in prison, would be required, while a 1961 case 517 held that the forged signature of the mother's hus-


band, who was not in fact the father of the child in question, could not be impeached by the natural mother who in the adoption papers had named her husband as the father and procured the forgery of his signature.

The first contemporary version of the issue arose in a 1971 case involving a child born to a couple that had lived together in the mid-1960's without being married, but had separated after the child's birth. Following the mother's marriage, her new husband sought to adopt the child, and the natural father objected. Citing the early case decided under Wisconsin law, the Appellate Division held that "the putative father has no parental rights with respect to a child born out of wedlock" and hence "need not even be notified of the adoption proceedings."\(^8\)

But one year later, a trial court disagreed. In the interval, the United States Supreme Court had decided *Stanley v. Illinois*,\(^9\) which on due process grounds had upheld the right of a natural father to custody of his children after their natural mother's death. The New York court took the view that denial after *Stanley* of all rights to a natural father "denie[d] him his manhood and his fatherhood." The court held that once a man had "acknowledge[d] having fathered a child" he was entitled to notice of any adoption proceedings and "an opportunity ... to present facts" as to "what is in the best interests of the child," although the father's consent to adoption was still not required.\(^2\)

Later cases extended the requirement of notice to any man who there was "reason to believe might be the father,"\(^5\) but the New York Court of Appeals continued to hold that a natural father's consent was not required for adoption.\(^2\) Nonetheless, one lower court subsequent to the decision by the Court of Appeals declared that a "father of a child born out of wedlock ha[d] a right to associat[e] with his child,"\(^2\) and, while that right could be lost

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through abandonment, the standard applied is solely that of the best interests of the child.\textsuperscript{525}

Ultimately, those who believed that unwed fathers should have the same right as unwed mothers to block the adoption of illegitimate children won, when the Supreme Court in \textit{Caban v. Mohammed},\textsuperscript{526} a case arising out of New York, so ruled on gender-equality grounds; at least one lower court relying on \textit{Caban} struck down as "too restrictive"\textsuperscript{527} the effort of the legislature in the aftermath of \textit{Caban} to rewrite guidelines for paternal consent.\textsuperscript{528}

In contrast to the confusion that existed in regard to the rights of unwed fathers, the law was clear as to the rights of divorced fathers. Before a legitimate child could be adopted, generally by a second spouse of the divorced parent who had received custody, the noncustodial parent, usually though not necessarily the father, had to be given notice of the proposed adoption,\textsuperscript{529} and, if the noncustodial parent objected, the adoption could not proceed unless that parent had abandoned the child.\textsuperscript{530}

\textsuperscript{525} See \textit{Gerald G.G.}, 403 N.Y.S.2d at 59.
\textsuperscript{527} \textit{In re Adoption of Female F.D.}, 433 N.Y.S.2d 318, 322 (Sur. Ct. Nassau County 1980).
\textsuperscript{528} Other judges, however, continued to rule that the consent of natural fathers was not required when the fathers were in prison, see \textit{In re Guardianship and Custody of Jonathan E.G.}, 436 N.Y.S.2d 546, 549 (Fam. Ct. Schenectady County 1980); \textit{In re Adoption of Anonymous}, 429 N.Y.S.2d 987, 991 (Sur. Ct. Westchester County 1980); \textit{In re Anonymous}, 359 N.Y.S.2d 738, 743 (Sur. Ct. Nassau County 1974); \textit{but see In re Robert A.M.'s Adoption}, 366 N.Y.S.2d 343, 345 (Sur. Ct. Nassau County 1975), or had never developed any relationship with their illegitimate children, see \textit{In re Adoption of Baby Girl}, 426 N.Y.S.2d 398, 403-04 (Fam. Ct. Onondaga County 1980).
"The natural rights of the parent to his child," it was said, were "sacred and [were] jealously guarded by the law," with the result that the "powers of the state over a child [were] not superior to the natural rights of the parent." Hence "a finding of abandonment [could] be made against a parent only after he ha[d] been given the benefit of every controverted fact... ."

Two additional lines of cases that brought tangible benefits to men flowed from the judiciary's growing concern in the late 1960's and the 1970's with equal protection. The first raised issues about the legitimacy of various discriminations between the right of men and the right of women to marry, including differences in the minimal age of marriage without parental consent and differences in the jurisdiction of courts, related to whether a proposed bride or groom was resident in the county in which a court sat, to grant exemptions from marriage rules stipulated by

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The second line involved issues of access to the courts by the poor. The Court in *Griffin v. Illinois* had prohibited states from discriminating against indigent criminal defendants; in response to *Griffin*, the federal courts authorized a class action suit by prisoners, who were overwhelmingly male, seeking relief from New York legislation declaring them civilly dead for purposes of matrimonial and family litigation, and state courts authorized the payment of court fees and the assignment of counsel to indigent family law litigants.

The issue on which feminist reformers most needed favorable legal change was support. Again, pressure for change arose early, as a result of the increasing caseload that matrimonial litigation imposed on the judiciary during the 1950's. Dealing with caseloads of 75 or more matrimonial matters per month in a single borough of New York City, most of which had to be "determined largely on the basis of widely conflicting affidavits manifesting a reckless inaccuracy ... [and] perjurious absurdities," judges felt a need to "evolve modernized methods ... introducing wholesome realism" into separation and divorce litigation. Seeking to eliminate the "stream of vituperation and recrimination" routine in matrimonial cases, some judges urged that the "element of fault should be de-emphasized" in determining whether a wife should receive an award based on her station in life or only an award designed to prevent her from becoming a public charge. And, in one important case, the First Department of the Appellate Division did impose a $3500 annual alimony payment on "a man of considerable wealth," even though his wife had abandoned him.

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540 Id. at 49.
541 Id. at 52.
The pressure for change was also consistent with "women's new position in our society," which rendered her "the equal of man, socially, politically and economically."\(^{544}\) It took some time, however, before women "‘advanced to a position of independence in most respects fully equal to’" that of men and to a "‘position of [full] equality in marriage.’"\(^{545}\)

Not until the mid-1970's did the New York courts, in response to holdings of the federal Supreme Court,\(^{546}\) declare that "sexual generalization in the law of support is the quintessence of unconstitutionality"\(^{547}\) and that "the constitutional guarantee of equal protection of the law ... requires a uniform standard of parental liability regardless of sex."\(^{548}\) This new approach was of some value to one "intelligent professional" woman who in the early 1970's chose to have a baby out of wedlock and live by herself with the child;\(^{549}\) in an opinion markedly different in tone from what would have been written even a few years earlier, the court treated her choice with respect and gave her a substantial support award against the child's father. The approach also assisted a young wife, who had dropped out of college to finance her husband's undergraduate and law-school education, only to face a divorce when he began practice as an associate "at a prominent Wall Street law firm;"\(^{550}\) holding that the wife was "entitled to equal treatment,"\(^{551}\) the court ordered her husband to pay alimony in an amount sufficient to enable her to complete college and attend medical school.

But, on the whole, equality was of greater financial benefit to men than women, as courts ruled that, since women were "‘in most respects fully equal’ to ... men, they must, wherever possible, share the economic burden of a dissolved marriage."\(^{552}\) Accordingly, courts ruled that New York legislation should be read

\(^{544}\) Doyle, 158 N.Y.S.2d at 912.

\(^{545}\) Dulber, 311 N.Y.S.2d at 606.


\(^{549}\) S. v. K., 335 N.Y.S.2d 124, 126 (Fam. Ct. N.Y. County 1972).


\(^{551}\) Id. at 981.

to authorize the award of alimony to husbands as well as wives in appropriate cases and that women with the same income as their former husbands should be required to contribute equally to the support of their children. As one judge observed in explaining these results, "[a] benevolent grant to women of legal rights unreasonably denied to men may help the women immediately affected but the implicit condescension and maintenance of a protective stance in the end produces the attitude that somehow women are not equal to men." For women to become truly equal, this judge argued, it was necessary "to raise the consciousness of women to an appreciation of their true rights and their potential as functioning individuals" by treating women exactly the same as men. "The edge of sex discrimination" would thus have "two sides," making it unlawful to "discriminate against women" and equally unlawful to "discriminate against men."

In light of decisions such as these, the gender revolution brought little material benefit to wives undergoing divorce or separation during the 1970's. Wives and children received as little support from their husbands during that decade as they had during the 1920's. Analysis of all published New York cases for the half century between 1920 and 1970 shows, for example, that husbands typically were required to provide approximately one-third of their income for the support of their divorced wives and their children; husbands kept the remaining two-thirds for themselves. For the decade of the 1970's, the portion of hus-

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555 Thaler, 391 N.Y.S.2d at 333.

556 Id.

557 Between 1920 and 1970, alimony and child support as a percentage of net
bands’ income granted to divorced wives may have declined slightly, although the decline was not large enough to have statistical significance. Indeed, the legislature itself gave sanction to the one-third figure in a 1975 statute allowing those involuntarily divorced on the basis of a separation agreement or decree obtained prior to January 21, 1970 to recover from their former spouse the amount they would have taken by intestacy if the spouse had died immediately prior to the divorce. The statute, it should be noted, merely preserved the economic rights that any wife in New York, except one divorced on account of her own adultery, had always possessed. In the case of a husband and wife with children, those rights were to one-third of the husband’s estate.

V. CONCLUSION

The feminist revolution of the late 1960’s and 1970’s had little of the impact on family law its proponents had hoped for. Ideas of equality produced the most substantial and tangible benefits for illegitimate children and their fathers. Fathers of legitimate children also found their chances to obtain custody in the context of divorce somewhat improved. But on the key issue of support, the feminist equality revolution produced no significant change, at least not by the end of the 1970’s.

income of the husband had a mean value of 35.92%.

558 Between 1970 and 1980, alimony and child support as a percentage of net income of the husband had a mean value of 29.37%. This mean, as well as the mean reported in note 557 supra, is derived from all the reported cases during the period under analysis, and thus it can be stated with a 100% level of confidence that, according to the reported cases, alimony as a percentage of husband’s income declined 6.55% between 1920-1970 and 1970-1980. The reported cases do not constitute a statistically random sample of all cases, however, and thus it is impossible to be confident that the slight decline apparent in the reported cases accurately mirrored a similar pattern of decline in all cases. But the total number of reported cases for the entire half century is sufficient to warrant the conclusion that judges typically awarded wives and children approximately one-third of the husband’s income as alimony and child support.

559 DOM. REL. L. § 170-a (McKinney 1988).

Over the course of the six decades under study, more significant changes in family law occurred as a result of the concepts of individual rights and freedom. Beginning in the late 1930's and reaching fruition by the early 1960's, concepts of individualism had enhanced the rights of natural mothers over their children, for example. On a variety of minor issues dealing with paternity, annulments, and separations, individualistic ideas also had resulted in the reification into rights of traditional assumptions about natural male superiority. The most important change, however, was the gradual rejection of New York's traditional public policy, which had always been to “promote the permanency of ... marriage contracts” and “to restrict the availability of divorce and in doing so to preserve the family unit.”

The happiness of individual spouses had long clashed with this policy, and as judges in the 1940's and 1950's gradually paid more heed to issues of individual well-being, the old policy was slowly eroded. Following the decision of two key cases in 1965—the Rosenstiel and Kober cases—the legislature transformed this area of law when, in essence, it authorized divorce by consent.

No clear utilitarian calculus exists by which to measure whether divorce by consent brought overall gain or loss to either men or women. No one has studied the well-being of men after divorce in any systematic fashion. As for women, it does appear that some realize emotional gains from divorce. On the other hand, it seems clear that very few women benefit financially from divorce, since women and the children of whom they have custody typically receive a disproportionately small share of a divorced husband's income and wealth and often live in poverty after a marriage's breakup. It is simply unclear how to measure possible emotional gains against frequent financial losses.

Children are the clear losers in a divorce since they suffer both emotional and financial loss. Thus, we should understand that judges in the 1920's and 1930's were acting on behalf of

563 See id. at 713.
565 See TERRY ARENDELL, MOTHERS AND DIVORCE: LEGAL, ECONOMIC, AND SOCIAL DILEMMAS 145-49 (1986); Weitzman, supra note 1, at 345-49.
566 See ARENDELL, supra note 565, at 20-41, 76-79; Weitzman, supra note 1, at 323-44, 351-56.
children as they strove to preserve families that would provide children with secure and supportive homes. Judges similarly acted on behalf of children when they placed those without a home in the closest approximation to an intact family which they could find.

In contrast, the divorce reforms of 1966-67 took no account of the interest of children in living with secure and supportive families. Concerned only with the right of parents to pursue their own happiness, the legislature conferred on them a right to obtain a divorce by consent without even permitting courts to inquire into a divorce's impact on children. The law's growing toleration of illegitimacy can likewise be seen to represent a declining commitment to providing children with stable and supportive families.

It seems, in conclusion, that the major changes in family law between 1920 and 1980 that were designed to alter the relationship between men and women have had little of their intended effect. Meanwhile, those changes have had a devastating impact on children. This conclusion leads, in turn, to some important insights.

The first is that the law can do little to alter relationships between men and women; overarching social, cultural, and perhaps biological imperatives have much greater importance in determining what those relationships will be.

The second insight is that family law can be deployed to protect the weak from the strong. Courts can act in a paternalistic fashion, as they did in the 1920's and 1930's, to protect children from adults and, perhaps, women from men. To some extent, the paternalism of those decades worked. In contrast, the egalitarian impulse of the 1960's and 1970's, which strove to uplift women and arguably children by denying their weakness, did not have the desired effect.

The third insight, however, is that the practice of paternalism entails high costs. Between 1920 and 1965, the legal system of New York devoted enormous resources and twisted much doctrine out of shape in an effort to preserve the sanctity of marriage—an effort that was only partially and temporarily successful. Those whom the law successfully constrained often suffered great unhappiness as a result, while those whom the law protected arguably suffered degradation in the very process of being protected.
Thus, it is not clear that judges and legislators were mistaken when they altered New York’s family law in 1940’s, 1950’s and 1960’s in ways that gave adult individuals freedom to pursue their own happiness, even if at the expense of their own children and thus their own society’s future.