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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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¹ 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).

² See MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 20-35, 173-74 (1991); WEITZMAN, *supra* note 1, at 31-51.

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. & HUMAN. 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 goals⁵ or because men control the legal system and have used it to advance their interests.⁶ 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"⁷

⁵ *But cf.* FINEMAN, *supra* note 2, at 175-80, 189-90.

⁶ *But cf. id.* at 13.

⁷ *Rosenstiel v. Rosenstiel*, 209 N.E.2d 709, 720 (N.Y. 1965) (Scileppi, J., dissenting), *cert. denied*, 384 U.S. 971 (1996).

and, through the family, “the morality of the citizens of the state.”⁸ 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”⁹ 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”¹⁰—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.”¹¹ Bastardy was thus a stigma upon both a

⁸ Hubbard v. Hubbard, 126 N.E. 508, 509 (N.Y. 1920).

⁹ *Id.*

¹⁰ Messing v. Messing, 76 N.Y.S.2d 375, 378 (Sup. Ct. N.Y. County 1947).

¹¹ Grillo v. Sherman-Stalter Co., 186 N.Y.S. 810, 812 (App. Div. 3d Dep’t), *aff’d*, 132 N.E. 913 (N.Y. 1921).

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."¹² 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."¹³

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.¹⁴ The second rendered children born out of wed-

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. 204, 208 (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), *affg in part*, 284 N.Y.S. 1019 (App. Div. 2d Dep't 1935); *accord* *Commissioner of Pub. Welfare v. Koehler*, 30 N.E.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 Marcin'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); *Altomare v. Altomare*, 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*, 262 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 1936) (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.¹⁵ The third treated as legitimate children of parents who entered a marriage in good faith even though courts subsequently held the marriage void.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.¹⁷

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).

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 legitimize 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).

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.¹⁸ This effect was illustrated by *In re Seymour*,¹⁹ where a man and woman who erroneously believed themselves to have been validly married in Pennsylvania came to live in New York in 1903,

(App. Div. 1st Dep't 1928) (concluding that man and woman were legally husband and wife due to marriage ceremony and subsequent cohabitation despite actual invalidity of marriage), *aff'd*, 165 N.E. 460 (N.Y. 1929); *Sorensen v. Sorensen*, 220 N.Y.S. 242, 244-45 (App. Div. 2d Dep't 1927) (same); *In re Crandall's Estate*, 212 N.Y.S. 210, 212 (App. Div. 4th Dep't 1925) (holding woman was common law wife of decedent and was entitled to take share in his estate where they held themselves out as married couple); *Blair v. Blair*, 220 N.Y.S. 372, 374-75 (Sup. Ct. Broome County 1927) (finding common law marriage despite husband's incomplete divorce from prior marriage where husband and second wife had marriage ceremony and lived together for three years after valid marriage); *Nani v. Nani*, 198 N.Y.S. 207, 208 (Sup. Ct. Kings County 1923) (concluding that continuous cohabitation constituted common-law marriage); *Procita v. Procita*, 190 N.Y.S. 21 (Sup. Ct. Fulton County 1921) (finding declarations of parties stating they were married sufficient to create presumption of marriage); *In re Mandel's Estate*, 108 N.Y.S.2d 922, 926 (Sur. Ct. N.Y. County 1949) (noting marriage may be presumed from matrimonial cohabitation and acknowledgments of couple), *aff'd*, 103 N.Y.S.2d 674 (App. Div. 1st Dep't 1951); *In re White*, 223 N.Y.S. 311, 313-14 (Sur. Ct. Erie County 1927) (finding invalid ceremonial marriage to be validated by subsequent cohabitation); *In re Seymour*, 185 N.Y.S. 373, 376 (Sur. Ct. Westchester County 1920) (commenting that cohabitation and repute are frequently cited as variables which, if present, constitute common law marriage).

The burden of proving the existence of a common law marriage was on the party asserting its existence, *see In re Pratt's Estate*, 251 N.Y.S. 424, 429 (App. Div. 4th Dep't 1931), by "[c]lear, consistent, and convincing evidence," *Boyd v. Boyd*, 169 N.E. 632, 634 (N.Y. 1930). A common law marriage would not be found if such a finding would produce an inequitable result. *See Gildersleeve v. Gildersleeve*, 21 N.Y.S.2d 297, 298 (App. Div. 2d Dep't 1940). Nor were cohabitation and repute alone sufficient to create a marriage if the parties themselves intended only an illicit relationship. *See Graham v. Graham*, 207 N.Y.S. 195, 197-98 (App. Div. 2d Dep't 1924); *Taylor v. Taylor*, 298 N.Y.S. 912, 915 (Dom. Rel. Ct. N.Y. County 1937); *Rodman v. Rodman*, 251 N.Y.S. 470, 473 (Sup. Ct. Bronx County 1931); *see also In re O'Neil's Estate*, 64 N.Y.S.2d 714, 720 (Sur. Ct. Kings County 1946), *aff'd*, 71 N.Y.S.2d 720 (App. Div. 2d Dep't 1947); *cf. In re Fresegna's Estate*, 290 N.Y.S. 807 (Sur. Ct. N.Y. County 1936). But a couple could agree to transform an illicit relationship into a marriage. *See Zy v. Zy*, 13 N.Y.S.2d 415, 420-21 (Dom. Rel. Ct. Kings County 1939).

¹⁸ 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 Sokoloff'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).

¹⁹ 185 N.Y.S. 373 (Sur. Ct. Westchester County 1920); *accord In re Haffner's Estate*, 172 N.E. 483, 484 (N.Y. 1930); *Farber v. United States Trucking Corp.*, 265 N.Y.S.2d 324, 326 (App. Div. 3d Dep't 1965), *aff'd*, 256 N.E.2d 521 (N.Y. 1970).

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, Dep't 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").

²² See *In re Benjamin's Estate*, 311 N.E.2d 495, 496 (N.Y. 1974); *Cavanaugh v. Valentine*, 41 N.Y.S.2d 896, 898 (Sup. Ct. Kings County 1943).

²³ See *Mott v. Duncan Petroleum Trans.*, 414 N.E.2d 657, 658 (N.Y. 1980); *In re Estate of Watts*, 294 N.E.2d 195, 197 (N.Y. 1973); *People v. Haynes*, 256 N.E.2d 545, 546 (N.Y. 1970); *In re Frost's Estate*, 316 N.Y.S.2d 372, 373 (App. Div. 4th Dep't 1970); *McCullon v. McCullon*, 410 N.Y.S.2d 226, 228 (Sup. Ct. Erie County 1978). *But see Maiorana v. Salerno*, 133 N.Y.S.2d 521, 523-24 (Sup. Ct. Suffolk County 1954) (deciding that common law marriage will not be found where cohabitation in other state brief and in absence of evidence at time thereof to take each other as man and wife).

²⁴ *In re Schneider's Will*, 131 N.Y.S.2d 215, 219 (Sur. Ct. Kings County 1954).

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.²⁵ The fact that spouses had “acted in disregard of th[eir] marriage for a long period of time ... [would] not destroy its validity”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.”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,²⁸ had condoned or forgiven it,²⁹ or had failed to seek a divorce within five years of its discovery,³⁰ a suit for divorce would not lie. Further, a divorce would not be granted if both spouses had been guilty of adultery.³¹

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

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).

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).

²⁷ *Cohen v. Cohen*, 103 N.Y.S.2d 426, 428 (Sup. Ct. N.Y. County 1951).

²⁸ See *Parsons v. Parsons*, 181 N.Y.S. 642, 645 (App. Div. 1st Dep’t 1920) (dictum); *Hartman v. Hartman*, 91 N.Y.S.2d 529, 530 (Sup. Ct. N.Y. County 1949).

²⁹ See *Paddleford v. Paddleford*, 209 N.Y.S. 891 (App. Div. 3d Dep’t 1925) (per curiam); *Ryan v. Ryan*, 229 N.Y.S. 511, 515 (Sup. Ct. Kings County 1928); *Abbott v. Abbott*, 228 N.Y.S. 611, 612 (Sup. Ct. Erie County 1928); *Pepin v. Pepin*, 206 N.Y.S. 732, 733 (Sup. Ct. Onondaga County 1924). *But cf.* *Braunstein v. Braunstein*, 12 N.Y.S.2d 491, 492-93 (App. Div. 1st Dep’t 1939) (holding that release of claims in separation agreement does not constitute condonation); *Kinley v. Kinley*, 115 N.Y.S.2d 341, 342-43 (Sup. Ct. Tompkins County 1952) (deciding that single act of intercourse by husband under influence of alcohol does not constitute condonation).

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

³¹ See *Stillman v. Stillman*, 187 N.Y.S. 383, 388 (Sup. Ct. Dutchess County 1921).

obtaining "collusive or fraudulent divorce[s]"³² and "[d]ivorces by agreement."³³ In response, the courts, "interested in preserving the marriage status,"³⁴ 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.³⁵ 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.³⁶ Finally, judges learned to be skeptical of testimony offered by private detectives employed by one spouse to produce incriminating evidence against the other spouse³⁷ as well as other questionable sorts of witnesses, such as "prostitutes" and "persons [who] consort openly, knowingly, and willfully with adulterers."³⁸

As a result of these strictures, many courts ruled particular evidence of adultery insufficient and declined to grant requested divorces.³⁹ In one case, for example, in which a man in military

³² *Messing v. Messing*, 76 N.Y.S.2d 375, 378 (Sup. Ct. N.Y. County 1947); *accord* *Fuchs v. Fuchs*, 64 N.Y.S.2d 487, 489 (Sup. Ct. Kings County 1946).

³³ *Crowley v. Crowley*, 186 N.Y.S.2d 60, 61 (Sup. Ct. Nassau County 1959); *cf.* *Aminoff v. Aminoff*, 145 N.Y.S.2d 358, 360 (App. Div. 1st Dep't 1955).

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).

³⁶ *Irwin v. Irwin*, 69 N.Y.S.2d 780, 783 (Sup. Ct. Queens County 1946); *Mangine v. Mangine*, 67 N.Y.S.2d 381 (Sup. Ct. N.Y. County 1946).

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).

³⁹ *See* *Rolfe v. Rolfe*, 279 N.Y.S. 796 (App. Div. 3d Dep't. 1935) (*per curiam*); *Nottingham v. Nottingham*, 204 N.Y.S. 750, 752 (App. Div. 4th Dep't 1924); *Cohen v. Cohen*, 141 N.Y.S.2d 97, 98 (Sup. Ct. Bronx County 1955); *Brooks v. Brooks*, 120 N.Y.S.2d 335, 337 (Sup. Ct. Monroe County 1953); *Spafford v. Spafford*, 36 N.Y.S.2d

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

340, 341 (Sup. Ct. Onondaga County 1942).

⁴⁰ *Mathews v. Mathews*, 69 N.Y.S.2d 875, 875-76 (Sup. Ct. Bronx County 1946).

⁴¹ *Id.* at 876. Other cases, in contrast, allowed proof of adultery by circumstantial evidence. See *Cullen v. Cullen*, 199 N.Y.S. 598, 599 (App. Div. 1st Dep't 1923); *Trumpet v. Trumpet*, 215 N.Y.S.2d 921, 924 (Sup. Ct. Kings County 1961); *Fleck v. Fleck*, 163 N.Y.S.2d 218, 220 (Sup. Ct. Monroe County 1957). It was enough, said one court, that the defendant spouse and the co-respondent "had the lascivious desire and ... the opportunity to gratify it" to create an inference that intercourse had occurred. *Kay v. Kay*, 256 N.Y.S. 147, 155 (App. Div. 1st Dep't 1932); accord *Jacobstein v. Jacobstein*, 201 N.Y.S. 1, 3 (Sup. Ct. Monroe County 1923), *aff'd*, 204 N.Y.S. 918 (App. Div. 4th Dep't 1924), *aff'd*, 148 N.E. 761 (N.Y. 1925). Thus, a spouse found in a hotel or bedroom partially disrobed or otherwise residing with a member of the opposite sex could be found guilty of adultery, see *Parkas v. Parkas*, 39 N.Y.S.2d 836, 837 (App. Div. 1st Dep't 1943); *Baron v. Baron*, 299 N.Y.S. 280, 282 (App. Div. 1st Dep't 1937); *Miller v. Miller*, 208 N.Y.S. 113, 114-15 (App. Div. 1st Dep't 1925); *Lorenzo v. Lorenzo*, 197 N.Y.S. 474, 475 (App. Div. 1st Dep't 1922); as could one found kissing someone other than a spouse in a parked automobile, see *Dickenson v. Dickenson*, 81 N.Y.S.2d 294, 295 (Sup. Ct. Herkimer County 1948); or one present in his own apartment with one or more prostitutes, see *Gannon v. Gannon*, 45 N.Y.S.2d 260, 261 (Sup. Ct. Onondaga County 1943).

⁴² *Gelbman v. Gelbman*, 184 N.Y.S. 902, 903 (App. Div. 1st Dep't 1920).

⁴³ *Id.* at 903.

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.⁴⁴ 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,⁴⁵ 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*,⁴⁶ in which the Court of Appeals⁴⁷ declared the State's courts "untrammelled" 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."⁴⁸ 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."⁴⁹ In particular, New York courts generally would not recognize divorces on grounds other than adultery granted by

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,⁵⁰ although they were prepared to recognize even a divorce granted by a foreign nation for adultery.⁵¹

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.⁵² An annulment could be obtained on any of three grounds—duress, fraud, or incapacity.

Duress was the ground for annulment in *Fratello v.*

⁵⁰ See *Stevens v. Stevens*, 7 N.E.2d 26, 26 (N.Y. 1937); *Lowe v. Lowe*, 192 N.E. 291, 292 (N.Y. 1934); *Fischer v. Fischer*, 173 N.E. 680, 681 (N.Y. 1930); *Dean v. Dean*, 149 N.E. 844, 844 (N.Y. 1925); *Ball v. Cross*, 132 N.E. 106, 107 (N.Y. 1921); *McCall v. McCall*, 228 N.Y.S. 347, 348 (App. Div. 4th Dep't 1928) (per curiam); *Greenberg v. Greenberg*, 218 N.Y.S. 87, 94 (App. Div. 1st Dep't 1926); *Beeck v. Beeck*, 208 N.Y.S. 98, 103 (App. Div. 1st Dep't 1925); *Kelsey v. Kelsey*, 197 N.Y.S. 371, 372 (App. Div. 4th Dep't 1922); *Kaiser v. Kaiser*, 182 N.Y.S. 709, 710 (App. Div. 1st Dep't 1920), *aff'd*, 135 N.E. 902 (N.Y. 1922); *Johnson v. Johnson*, 261 N.Y.S. 523, 526 (Sup. Ct. Schenectady County 1933); *Weir v. Weir*, 226 N.Y.S. 115, 120-21 (Sup. Ct. Onondaga County 1927); *Knill v. Knill*, 195 N.Y.S. 398, 400 (Sup. Ct. Fulton County 1922); *In re Bennett's Estate*, 238 N.Y.S. 723, 736 (Sur. Ct. Kings County 1929). *But see* *Beischer v. Beischer*, 235 N.Y.S. 652, 653 (App. Div. 4th Dep't 1929); *Hatch v. Hatch*, 187 N.Y.S. 568, 568 (Sup. Ct. Kings County 1921); *Rocco v. Rocco*, 228 N.Y.S. 405, 407 (Sup. Ct. Steuben County 1928); *Moody v. Soper*, 191 N.Y.S. 425, 427 (Sup. Ct. Monroe County 1921), *aff'd*, 198 N.Y.S. 933 (App. Div. 4th Dep't 1923).

⁵¹ See *Gould v. Gould*, 138 N.E. 490, 493 (N.Y. 1923); *Boissevain v. Boissevain*, 231 N.Y.S. 529, 532 (App. Div. 1st Dep't 1928), *aff'd*, 169 N.E. 130 (N.Y. 1929).

⁵² See *Butler v. Butler*, 198 N.Y.S. 391, 395-96 (App. Div. 1st Dep't 1923). A court granting an annulment, however, could make an appropriate decree for the wife's support, *see* *Martin v. Martin*, 282 N.Y.S.2d 31 (App. Div. 2d Dep't 1967); *Newburger v. Newburger*, 228 N.Y.S.2d 323, 325 (Sup. Ct. Westchester County 1961), *aff'd*, 233 N.Y.S.2d 1020 (App. Div. 2d Dep't 1962); *Fleck v. Fleck*, 237 N.Y.S.2d 116, 117 (Sup. Ct. Queens County 1963); *Schaefer v. Schaefer*, 158 N.Y.S.2d 204, 207 (Sup. Ct. Onondaga County 1956); *Shaw v. Shaw*, 81 N.Y.S.2d 684, 686 (Sup. Ct. N.Y. County 1948); *Medici v. Medici*, 279 N.Y.S.2d 910, 912-13 (Fam. Ct. Dutchess County 1967), or declare the legitimacy of children of the marriage, even in proceedings subsequent to those brought to obtain the annulment, *see* *Hiser v. Davis*, 137 N.E. 596, 598-99 (N.Y. 1922); *Ohlson v. Ohlson*, 54 N.Y.S.2d 900, 902 (Sup. Ct. Kings County 1945); *Bracy v. Bracy*, 3 N.Y.S.2d 827, 832 (Dom. Rel. Ct. Queens County 1938); *but cf.* *McCarter v. McCarter*, 227 N.Y.S.2d 608, 609 (Sup. Ct. Kings County 1962) (stating child born out of wedlock who is legitimized by parents' marriage would be declared illegitimate if father obtained annulment from court).

Fratello,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."⁵⁴ The plaintiff and her family "not only believed that these men would carry into execution this threat, but ... were justified in such belief."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."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."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.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."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,"⁶⁰ a wife was entitled to an annul-

⁵³ 193 N.Y.S. 865 (Sup. Ct. Oneida County 1922).

⁵⁴ *Id.* at 867.

⁵⁵ *Id.*

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).

⁵⁷ *Woronzoff-Daschkoff v. Woronzoff-Daschkoff*, 104 N.E.2d 877, 880 (N.Y. 1952).

⁵⁸ The impotence cases can also be analyzed as cases of incapacity.

⁵⁹ *Vanden Berg v. Vanden Berg*, 197 N.Y.S. 641, 642 (Sup. Ct. Monroe County 1923).

⁶⁰ *Steinberger v. Steinberger*, 33 N.Y.S.2d 596, 597 (Sup. Ct. Bronx County

ment.⁶¹ Similarly, if a wife was suffering from "a nervous condition, an uncontrollable tension"⁶² 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."⁶³

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."⁶⁴ Even an unjustified refusal to engage in sexual relations constituted no more than a ground for separation,⁶⁵ unless the refusal resulted from some condition preexisting the marriage, such as homosexuality⁶⁶ or a

1940); *accord* *Jerosolimski v. Jerosolimski*, 188 N.Y.S.2d 272, 273 (App. Div. 1st Dep't 1959) (per curiam) (granting annulment of marriage based upon fraud in inception by concealment by defendant of his sexual impotence); *Rubin v. Joseph*, 213 N.Y.S. 460, 461 (App. Div. 2d Dep't 1926) (affirming annulment where it was clearly shown that defendant had been physically incapable of entering into the marriage); *Shaff v. Shaff*, 23 N.Y.S.2d 651, 653 (Sup. Ct. Erie County 1940) (enforcing contract whereby wife would receive support in exchange for bringing annulment proceedings on basis of husband's impotency); *see also* *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. Queens County 1971) (granting annulment to husband who discovered on wedding night that his "wife" had male sexual organs, even though "she" promised to have them removed). *But cf.* *Gabriel v. Gabriel*, 79 N.Y.S.2d 823, 825 (App. Div. 1st Dep't 1948) (denying annulment because of insufficiency of proof that husband was "entirely and permanently incapable of performing marital functions").

⁶¹ *But see* *Anonymous v. Anonymous*, 74 N.Y.S.2d 899, 901 (Sup. Ct. Monroe County 1947), which refused to grant an annulment to "a woman past middle life" who had married "a man much her senior" obviously "in feeble health" with "a tremor" and "difficulty walking." *Id.* (emphasis in original). In the court's view "her expectations of sexual enjoyment should not [have] been judged by the standards of youth but proportioned to their years." *Id.*

⁶² *Hiebink v. Hiebink*, 56 N.Y.S.2d 394 (Sup. Ct. Kings County), *aff'd*, 56 N.Y.S.2d 397 (App. Div. 2d Dep't 1945).

⁶³ *Vanden Berg*, 197 N.Y.S. at 642. *But cf.* *Anonymous v. Anonymous*, 49 N.Y.S.2d 314, 317 (Sup. Ct. Bronx County 1944) (denying annulment for incapacity arising after marriage even though marriage was never physically consummated before incapacity occurred).

⁶⁴ *Kershner v. Kershner*, 278 N.Y.S. 501, 504 (App. Div. 1st Dep't 1935), *aff'd*, 200 N.E. 43 (N.Y. 1936).

⁶⁵ *See* *Eldredge v. Eldredge*, 43 N.Y.S.2d 796, 798 (Sup. Ct. Westchester County 1943).

⁶⁶ *See* *Sophian v. Von Linde*, 253 N.Y.S.2d 496, 499 (App. Div. 1st Dep't 1964), *aff'd*, 209 N.E.2d 823 (N.Y. 1965). *But see* *Freitag v. Freitag*, 242 N.Y.S.2d 643, 643

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*, 136 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).

⁶⁷ *Becher v. Becher*, 74 N.Y.S.2d 44, 48 (Dom. Rel. Ct. N.Y. County 1947). *But see Lyman v. Lyman*, 87 N.Y.S.2d 494, 496 (Sup. Ct. Onondaga County 1949) (refusing annulment for want of proof of husband's premarital propensity to molest wife's children by prior marriage).

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*, 228 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).

⁶⁹ *See Carlson v. Carlson*, 164 N.Y.S.2d 462, 463 (App. Div. 2d Dep't 1957); *Gordon v. Gordon*, 232 N.Y.S. 541, 541 (App. Div. 2d Dep't 1929) (per curiam); *A.C. v. B.C.*, 176 N.Y.S.2d 794, 796 (Sup. Ct. Chenango County 1958); *Cuneo v. Cuneo*, 96 N.Y.S.2d 899, 906 (Sup. Ct. N.Y. County 1950).

⁷⁰ *See Garfinkel v. Garfinkel*, 191 N.Y.S.2d 574, 575 (App. Div. 1st Dep't 1959) (per curiam); *Donovan v. Donovan*, 263 N.Y.S. 336, 337 (Sup. Ct. Onondaga County 1933).

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.⁷²

Annulments were routinely granted on such rare grounds as concealment of drug addiction,⁷³ of a prior conviction for rape,⁷⁴ of a "pathologic sexuality known as voyeurism,"⁷⁵ of a venereal disease⁷⁶ or some other "loathsome contagious disease,"⁷⁷ or of a known incapacity to bear children.⁷⁸ More complex, however,

⁷² See *Figueroa v. Figueroa*, 110 N.Y.S.2d 550, 556 (Sup. Ct. N.Y. County 1952); *Senator v. Senator*, 42 N.Y.S.2d 395, 396 (Sup. Ct. Queens County 1941), *aff'd*, 42 N.Y.S.2d 433 (App. Div. 2d Dep't 1943); *Smith v. Smith*, 221 N.Y.S. 672, 676 (Sup. Ct. Onondaga County 1927). But an annulment has been granted where both parties lacked the intent to enter into a valid marriage and did not cohabit after the ceremony occurred. See *Amsden v. Amsden*, 110 N.Y.S.2d 307, 309-10 (Sup. Ct. Monroe County 1952). *But see* *Erickson v. Erickson*, 48 N.Y.S.2d 588 (Sup. Ct. Chautauqua County 1944) (denying annulment to wife); *Delfino v. Delfino*, 35 N.Y.S.2d 693, 696 (Sup. Ct. Kings County 1942) (denying annulment when parties cohabited after marriage).

⁷³ See *Leventhal v. Liberman*, 186 N.E. 675, 676 (N.Y. 1933); *O'Connell v. O'Connell*, 194 N.Y.S. 265, 269-70 (App. Div. 1st Dep't 1922); *Courreges v. Courreges*, 229 N.Y.S.2d 73 (Sup. Ct. Westchester County 1961); *Lockwood v. Lockwood*, 220 N.Y.S.2d 718, 719 (Sup. Ct. Rensselaer County 1961).

⁷⁴ See *Giannotti v. Giannotti*, 60 N.Y.S.2d 74, 76 (Sup. Ct. Monroe County 1946) (allowing annulment where husband failed to reveal his prior conviction for rape); *see also* *Rosano v. Rosano*, 94 N.Y.S.2d 717, 718 (Sup. Ct. Albany County 1950) (granting annulment to wife of habitual criminal serving long sentence who had promised to "go straight"). *But cf.* *Trefry v. Trefry*, 76 N.Y.S.2d 323, 323 (Sup. Ct. Westchester County 1947) (refusing to grant annulment for failure to reveal two convictions for intoxication); *Smith v. Smith*, 44 N.Y.S.2d 826, 827 (Sup. Ct. Kings County 1943) (refusing to allow annulment where husband induced wife into marriage by claiming he was a law-abiding citizen).

⁷⁵ *Potter v. Potter*, 275 N.Y.S.2d 499, 499 (App. Div. 4th Dep't 1966).

⁷⁶ See *Licato v. Licato*, 298 N.Y.S. 768, 770 (Sup. Ct. Dutchess County 1937) (granting annulment where husband concealed having "a chronic contagious and hereditary venereal disease" at time of marriage); *see also* *Jacobson v. Jacobson*, 202 N.Y.S. 96, 98 (App. Div. 2d Dep't 1923) (suggesting husband had disease entailing "dire and disastrous possibilities, directly affecting the marital relation").

⁷⁷ *Lapides v. Lapides*, 171 N.E. 911, 913 (N.Y. 1930) (holding that epilepsy is not "loathsome contagious disease"); *accord* *Leventhal*, 186 N.E. at 676. *But cf.* *Lustig v. Lustig*, 56 N.Y.S.2d 284, 285 (App. Div. 1st Dep't 1945) (denying annulment on grounds that misrepresenting reasons for draft classification did not constitute fraud); *Greco v. Greco*, 59 N.Y.S.2d 320, 321 (Sup. Ct. Monroe County 1945) (refusing to grant annulment for "nervousness and headaches" which first developed one year after marriage).

⁷⁸ See *Williams v. Williams*, 11 N.Y.S.2d 611, 614 (Sup. Ct. Monroe County 1939) (holding that husband's concealment of inability to beget children was grounds for annulment on the basis of fraud); *see also* *Marks v. Marks*, 77 N.Y.S.2d 269, 270 (Sup. Ct. Kings County 1948) (finding that allegation of fraudulent concealment of heart condition rendering pregnancy dangerous raises issue of fact for jury). *But see* *Lapides*, 171 N.E. at 913 (concluding that mere inability to bear children, without fraudulent concealment, does not warrant annulment); *see also* *Kronman v. Kronman*, 286 N.Y.S. 627, 629 (App. Div. 1st Dep't 1936) (finding claim

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.⁷⁹ By judicial decision, on the other hand, the sane spouse could not sue for an annulment,⁸⁰ unless proof was available to show that the insane spouse, in a lucid moment, had fraudulently given assurances of sanity.⁸¹ Subsequent legislation, however, allowed either spouse to sue even in the absence of a lucid moment of fraud.⁸²

Incapacity, as already noted, was the final basis for annulment. Two forms of incapacity were the nonage of one or both spouses⁸³ or their consanguinity.⁸⁴ Probably the most common form of legal incapacity was that one of the spouses was lawfully married to a third person.⁸⁵ 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).

⁷⁹ See *Ratray v. Raynor*, 180 N.E.2d 429, 430 (N.Y. 1962); *Van Wyck v. Stapp*, 13 N.Y.S.2d 470, 472 (App. Div. 1st Dep't 1939) (per curiam); cf. *Kaplan v. Kaplan*, 176 N.E. 426 (N.Y. 1931). But see *Kemmelick v. Kemmelick*, 186 N.Y.S. 3, 4 (Sup. Ct. Erie County 1921).

⁸⁰ See *Hoadley v. Hoadley*, 155 N.E. 728, 730 (N.Y. 1927); *Reed v. Reed*, 186 N.Y.S. 897, 898 (App. Div. 3d Dep't 1921); *Chaddock v. Chaddock*, 226 N.Y.S. 152, 156-57 (Sup. Ct. Onondaga County 1927). But see *Whitney v. Whitney*, 201 N.Y.S. 227, 234-35 (Sup. Ct. Jefferson County 1923).

⁸¹ See *Sleicher v. Sleicher*, 167 N.E. 501, 503 (N.Y. 1929) (dictum); *Smith v. Smith*, 184 N.Y.S. 134, 137 (Sup. Ct. Kings County 1920); see also *Goldsmith v. Goldsmith*, 107 N.Y.S.2d 691, 692 (App. Div. 1st Dep't 1951) (per curiam).

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).

⁸³ See *Keegan v. Keegan*, 204 N.Y.S. 405, 406 (App. Div. 1st Dep't 1924); *Nealon v. Nealon*, 187 N.Y.S. 295, 296 (App. Div. 4th Dep't 1921); *Wolf v. Wolf*, 185 N.Y.S. 37, 39 (App. Div. 2d Dep't 1920); *Ranaudo v. Ranaudo*, 190 N.Y.S.2d 285, 286 (Sup. Ct. Nassau County 1959); *Selakoff v. Selakoff*, 92 N.Y.S.2d 144, 145 (Sup. Ct. N.Y. County 1949); *Retan v. Mathewson*, 226 N.Y.S. 80, 85 (Sup. Ct. Onondaga County 1927); *Kellogg v. Kellogg*, 203 N.Y.S. 757, 762 (Sup. Ct. Onondaga County 1924); *Foley v. Foley*, 203 N.Y.S. 674, 676 (Sup. Ct. Oswego County 1924); *Kuykendall v. Kuykendall*, 182 N.Y.S. 308, 310 (Sup. Ct. Tioga County 1920). But a court, in its discretion, could deny such an annulment. See *Short v. Hotaling*, 225 N.Y.S.2d 53, 55 (Sup. Ct. Kings County 1962); *Todaro v. Todaro*, 200 N.Y.S. 567, 568 (Sup. Ct. N.Y. County 1923). Such a marriage could also be validated by its continuation after the under-age spouse came of age. See *Matturro v. Matturro*, 111 N.Y.S.2d 533, 537-38 (Sup. Ct. Westchester County 1952).

⁸⁴ See *Audley v. Audley*, 187 N.Y.S. 652, 653 (App. Div. 1st Dep't 1921) (finding marriage between uncle and niece void).

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.⁸⁶ 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.⁸⁷

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-

N.E.2d 81, 82 (N.Y. 1950); *Johnson v. Johnson*, 68 N.E.2d 499, 499 (N.Y. 1946); *D'Arcangelo v. D'Arcangelo*, 102 N.Y.S.2d 100, 102 (App. Div. 4th Dep't 1951); *Canwright v. Canwright*, 76 N.Y.S.2d 10, 12 (App. Div. 3d Dep't 1947); *In re Frost's Will*, 37 N.Y.S.2d 921, 923 (App. Div. 3d Dep't 1942); *Strobel v. Strobel*, 233 N.Y.S.2d 81, 82 (Sup. Ct. Suffolk County 1962); *Jacobson v. Jacobson*, 232 N.Y.S.2d 467, 468 (Sup. Ct. Kings County 1962); *Gonzalez v. Gonzalez*, 228 N.Y.S.2d 4 (Sup. Ct. Queens County 1962); *Richards v. Richards*, 153 N.Y.S.2d 979, 983 (Sup. Ct. Washington County 1956); *Weis v. Weis*, 108 N.Y.S.2d 396, 399 (Sup. Ct. Monroe County 1951); *Amsterdam v. Amsterdam*, 56 N.Y.S.2d 19, 20 (Sup. Ct. N.Y. County 1945); *Bamberger v. Bamberger*, 217 N.Y.S. 675, 677 (Sup. Ct. Erie County 1926); *In re Liebman's Estate*, 253 N.Y.S.2d 461, 466 (Sur. Ct. Westchester County 1963); *Brown v. Brown*, 274 N.Y.S.2d 484, 488 (Fam. Ct. N.Y. County 1966); *People ex rel. Bolinski v. Bolinski*, 122 N.Y.S.2d 16, 18 (Utica City Ct. 1953); *cf. In re Estate of Brown*, 358 N.E.2d 883, 886 (N.Y. 1976). A good deal of judicial hostility arose to claims made by someone other than a spouse when two spouses had cohabited in a "decent and orderly" fashion over a long period of time. *Esmond v. Thomas Lyons Bar & Grill*, 274 N.Y.S.2d 225, 228 (App. Div. 3d Dep't 1966); *accord In re Peart's Estate*, 97 N.Y.S.2d 879, 888 (App. Div. 1st Dep't 1950); *Dunham v. Dunham*, 150 N.Y.S.2d 752, 753 (Sup. Ct. Queens County 1956); *In re Gropen's Estate*, 294 N.Y.S. 558, 560 (Sur. Ct. Bronx County 1937).

⁸⁶ See GARY MOKOTOFF & SALLYANN AMDUR SACK, *WHERE ONCE WE WALKED: A GUIDE TO THE JEWISH COMMUNITIES DESTROYED IN THE HOLOCAUST* 78 (Teaneck, N.J.: Avotaynu, Inc., 1991); *THE COLUMBIA LIPPINCOTT GAZETTEER OF THE WORLD* 537 (Leon E. Seltzer ed., 1952).

⁸⁷ See *Chayka v. Chayka*, 41 N.Y.S.2d 487, 488-90 (Sup. Ct. Kings County 1943).

dered in one of the many 'pogroms' incidental to Jewish life in Russia during the late war."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."⁸⁹

The legislature sought to provide a remedy in cases such as these,⁹⁰ and incidentally to make annulments more difficult to obtain, by a 1922 statute⁹¹ 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.⁹²

⁸⁸ *Hayden v. Hayden*, 215 N.Y.S. 326, 327 (Sup. Ct. Bronx County 1926).

⁸⁹ *Id.* at 328.

⁹⁰ See *Babington v. Yellow Taxi Corp.*, 220 N.Y.S. 420, 422 (App. Div. 3d Dep't 1927); *VanWyk v. Realty Traders, Inc.*, 213 N.Y.S. 28, 30 (App. Div. 3d Dep't 1926); *In re McNell's Estate*, 66 N.Y.S.2d 227, 229-30 (Sur. Ct. Kings County 1946); cf. *De Yong v. De Yong*, 32 N.Y.S.2d 505 (App. Div. 1st Dep't 1942); *Sorenson v. Sorenson*, 202 N.Y.S. 620, 625 (Sup. Ct. Kings County 1924), *aff'd*, 220 N.Y.S. 242 (App. Div. 2d Dep't 1927).

⁹¹ See Laws of 1922, c. 279 (amending Domestic Relations Law to require search for spouse absent for five consecutive years before dissolution of marriage); see also *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).

⁹² See *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."⁹³ 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.'"⁹⁴ As to matters such as these, the "rule of caveat emptor still ha[d] some application to the parties contracting marriage."⁹⁵

Judges, in short, were always aware that they could "not grant annulments solely because of sympathy...."⁹⁶ 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); *Vonbirognis (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*, 395 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).

⁹³ *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 871, 874 (Sup. Ct. N.Y. County 1957); *Ozark v. Ozark*, 75 N.Y.S.2d 430, 434 (Sup. Ct. Onondaga County 1947).

⁹⁴ *Woronzoff-Daschkoff v. Woronzoff-Daschkoff*, 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. 926 (App. Div. 2d Dep't 1924).

⁹⁵ *Chaddock v. Chaddock*, 226 N.Y.S. 152, 157 (Sup. Ct. Onondaga County 1927) (denying annulment for lunacy).

⁹⁶ *Darling v. Darling*, 105 N.Y.S.2d 475, 478 (Sup. Ct. Ulster County 1951) (refusing to grant annulment despite mutual consent).

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."⁹⁷ Accordingly, judges routinely refused to grant annulments because a spouse allegedly had married for money⁹⁸ or social status⁹⁹ rather than love.¹⁰⁰

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

⁹⁷ *McLean v. McLean*, 143 N.Y.S.2d 129, 130 (Sup. Ct. Kings County 1955).

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); *Bracksmayer v. Bracksmayer*, 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 532, 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."¹⁰¹ The courts were always careful to avoid "legislation by the judiciary."¹⁰² 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"¹⁰³ or "what is best for the interest of the child,"¹⁰⁴ 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."¹⁰⁵

¹⁰¹ *Darling v. Darling*, 105 N.Y.S.2d 475, 478 (Sup. Ct. Ulster County 1951).

¹⁰² *Id.*

¹⁰³ *People ex rel. Sisson v. Sisson*, 2 N.E.2d 660, 661 (N.Y. 1936) (per curiam); *accord Lincoln v. Lincoln*, 247 N.E.2d 659, 661 (N.Y. 1969); *People ex rel. Cachelin v. Cachelin*, 238 N.Y.S.2d 869, 870 (App. Div. 1st Dep't 1963); *Shuffman v. Shuffman*, 200 N.Y.S.2d 949, 950 (App. Div. 1st Dep't 1960), *aff'd*, 175 N.E.2d 459 (N.Y. 1961); *People ex rel. Templeton v. Lynn*, 107 N.Y.S.2d 156, 157 (App. Div. 3d Dep't 1951) (per curiam); *People ex rel. Spreckels v. DeRuyter*, 269 N.Y.S. 100, 103 (Sup. Ct. N.Y. County 1934).

¹⁰⁴ *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925); *accord People ex rel. Herzog v. Morgan*, 39 N.E.2d 255, 256 (N.Y. 1942); *Frank F. v. Geraldine F.*, 386 N.Y.S.2d 127, 128 (App. Div. 3d Dep't 1976); *In re Hellman*, 42 N.Y.S.2d 53, 54 (App. Div. 1st Dep't 1943), *aff'd*, 53 N.E.2d 368 (N.Y. 1944); *In re Thoemmes' Guardianship*, 264 N.Y.S. 829, 830 (App. Div. 4th Dep't 1933); *Cooke v. Cooke*, 220 N.Y.S. 550, 551 (App. Div. 1st Dep't 1927).

¹⁰⁵ *De Francesco v. Mac Nary*, 425 N.Y.S.2d 885, 886 (App. Div. 3d Dep't 1980). "Priority," it was said, "should, in the absence of extraordinary circumstances, be accorded to the first custody awarded in litigation or by voluntary agreement." *Nehra v. Uhlar*, 372 N.E.2d 4, 4 (N.Y. 1977); *accord Corradino v. Corradino*, 400

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,"¹⁰⁶ although the "primary right to ... custody ... [was] in the father."¹⁰⁷ 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."¹⁰⁸ 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."¹⁰⁹ In an-

N.E.2d 1338 (N.Y. 1979); *Ebert v. Ebert*, 346 N.E.2d 240, 242 (N.Y. 1976); *DiBello v. DiBello*, 432 N.Y.S.2d 32, 32 (App. Div. 2d Dep't 1980); *Noel v. Derrick*, 418 N.Y.S.2d 481, 482 (App. Div. 3d Dep't 1979); *Austin v. Austin*, 410 N.Y.S.2d 688, 689 (App. Div. 3d Dep't 1978); *Sandman v. Sandman*, 407 N.Y.S.2d 563, 564 (App. Div. 2d Dep't 1978); *People ex rel. Selbert v. Selbert*, 400 N.Y.S.2d 586, 587 (App. Div. 3d Dep't 1977); *Papernik v. Papernik*, 390 N.Y.S.2d 337, 338 (App. Div. 4th Dep't 1976); *McAteer v. McAteer*, 389 N.Y.S.2d 491, 491 (App. Div. 3d Dep't 1976); *Schuler v. Schuler*, 286 N.Y.S.2d 69, 70 (App. Div. 2d Dep't 1968); *People ex rel. Chuz v. Reiter*, 125 N.Y.S.2d 328 (App. Div. 1st Dep't 1953) (per curiam); *In re Alaimo*, 233 N.Y.S.2d 508, 515 (Sup. Ct. Monroe County 1962); *Burns v. Burns*, 205 N.Y.S.2d 448, 453 (Sup. Ct. Tompkins County 1960); *Wise v. Aldrich*, 431 N.Y.S.2d 791, 796 (Fam. Ct. Rensselaer County 1980); *Coleman v. Coleman*, 386 N.Y.S.2d 928, 930 (Fam. Ct. Rockland County 1976). Custody would be altered only in response to a material change in circumstances. *See Sheil v. Sheil*, 298 N.Y.S.2d 28, 29 (App. Div. 2d Dep't 1969); *see also Lazar v. Lazar*, 283 N.Y.S.2d 716, 717 (App. Div. 1st Dep't 1967) (per curiam); *Consaul v. Consaul*, 63 N.Y.S.2d 688, 690 (Sup. Ct. Jefferson County 1946); *Odette R. v. Douglas R.*, 399 N.Y.S.2d 93, 96 (Fam. Ct. N.Y. County 1977).

¹⁰⁶ *Haskell v. Haskell*, 194 N.Y.S. 28, 30 (App. Div. 1st Dep't 1922), *aff'd*, 142 N.E. 314 (N.Y. 1923).

¹⁰⁷ *Cariola v. Cariola*, 225 N.Y.S. 692, 694 (Sup. Ct. Monroe County 1927) (citation omitted).

¹⁰⁸ *See id.* (citations omitted).

¹⁰⁹ *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,"¹¹⁰ the court awarded custody of her eight-year-old daughter to the child's father, even though his "health ... was somewhat shattered,"¹¹¹ 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."¹¹² Similarly, in a third case, a mother addicted to morphine was denied custody of her child.¹¹³

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,"¹¹⁴ 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,¹¹⁵ the latter would retain custody.¹¹⁶

¹¹⁰ *People ex rel. Jones v. Johnson*, 199 N.Y.S. 695, 697 (App. Div. 4th Dep't 1923).

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).

¹¹⁴ *People ex rel. Roberts v. Kidder*, 242 N.Y.S. 108, 109 (Sup. Ct. Kings County 1929); *accord Tyrrell v. Tyrrell*, 415 N.Y.S.2d 723, 724 (App. Div. 4th Dep't), *aff'd*, 393 N.E.2d 1041 (N.Y. 1979); *Isaacs v. Murcin*, 327 N.Y.S.2d 126, 127 (App. Div. 4th Dep't 1971); *In re Connors*, 321 N.Y.S.2d 737, 739 (App. Div. 4th Dep't 1971); *People ex rel. Linton v. Linton*, 112 N.Y.S.2d 845, 846 (App. Div. 2d Dep't 1952); *People ex rel. Pizzitola v. Ciccosillo*, 108 N.Y.S.2d 447, 448 (App. Div. 2d Dep't 1951); *In re Boses*, 105 N.Y.S.2d 569, 569-70 (App. Div. 2d Dep't 1951); *People ex rel. Hausler v. Stegmeier*, 267 N.Y.S. 428, 430 (App. Div. 2d Dep't 1933), *aff'd*, 191 N.E. 526 (N.Y. 1934); *In re Dailey*, 204 N.Y.S.2d 321, 323 (Sup. Ct. Nassau County 1960); *People ex rel. Hacker v. Strongson*, 141 N.Y.S.2d 859, 860 (Sup. Ct. Queens County 1955); *People ex rel. Elkins v. St. Coleman's Home*, 131 N.Y.S.2d 347, 349 (Sup. Ct. Albany County 1954). The same principle applied in cases where children were in the care of foster parents. *In re Sanjivini K.*, 385 N.Y.S.2d 350 (App. Div. 2d Dep't), *rev'd on other grounds*, 359 N.E.2d 1330 (N.Y. 1976); *State ex rel. Wallace v. Lhotan*, 380 N.Y.S.2d 250 (App. Div. 2d Dep't 1976); *Darrow v. Weston*, 223 N.Y.S.2d 106 (Sup. Ct. Kings County 1961).

¹¹⁵ *Kidder*, 242 N.Y.S. at 110; *accord Bennett v. Jeffreys*, 356 N.E.2d 277, 283 (N.Y. 1976); *Guzzo v. Guzzo*, 411 N.Y.S.2d 408, 410 (App. Div. 2d Dep't 1978); *People ex rel. Gallinger v. Gallinger*, 391 N.Y.S.2d 248, 249 (App. Div. 4th Dep't 1977); *In re*

Cleaves, 175 N.Y.S.2d 736, 740 (App. Div. 3d Dep't 1958); *In re Hill*, 161 N.Y.S.2d 379, 382 (App. Div. 4th Dep't 1957); *Laub v. Caltobelotta*, 219 N.Y.S.2d 363, 366 (Sup. Ct. Nassau County 1961); see also *In re Bush*, 91 N.Y.S.2d 315 (Sup. Ct. Steuben County 1949), *modified*, 103 N.Y.S.2d 341 (App. Div. 4th Dep't 1951); *Ex parte Vzga*, 104 N.Y.S.2d 93 (Sup. Ct. Columbia County 1951); *Ex parte Szczygiel*, 51 N.Y.S.2d 699 (Sup. Ct. Oneida County 1944); *People ex rel. Pitcher v. Powell*, 37 N.Y.S.2d 643 (Sup. Ct. N.Y. County 1942); *People ex rel. Pascale v. Lanza*, 2 N.Y.S.2d 401 (Sup. Ct. Queens County 1938); *cf.* *State v. Lascaris*, 322 N.Y.S.2d 426 (App. Div. 4th Dep't 1971) *People ex rel. Brussel v. Brussel*, 119 N.Y.S.2d 149 (App. Div. 1st Dep't), *modified*, 121 N.Y.S.2d 256 (App. Div. 1st Dep't 1953); *Dick v. Scarfia*, 183 N.Y.S.2d 737 (Sup. Ct. Monroe County 1959); *Spade v. Spade*, 163 N.Y.S.2d 146 (Sup. Ct. Monroe County 1957).

¹¹⁶ Receipt of custody was important because a custodian enjoyed substantial control over a child's life. Custodians, for example, were entitled to a child's earnings. See *In re Laponzina*, 116 N.Y.S.2d 750, 751 (Sur. Ct. Kings County 1952) (granting right to earnings despite finding that father had exploited son). They could control the child's religious upbringing. See *Ross v. Ross*, 430 N.Y.S.2d 712, 713 (App. Div. 3d Dep't 1980); *Garvar v. Faltings*, 389 N.Y.S.2d 32, 33 (App. Div. 2d Dep't 1976); *Mester v. Mester*, 296 N.Y.S.2d 193, 198 (Sup. Ct. Nassau County 1969); *O'Neill v. O'Neill*, 255 N.Y.S.2d 776, 779 (Sup. Ct. N.Y. County 1965); *Paoella v. Phillips*, 209 N.Y.S.2d 165, 167 (Sup. Ct. Suffolk County 1960); *Gluckstern v. Gluckstern*, 158 N.Y.S.2d 504, 508 (Sup. Ct. N.Y. County 1956), *aff'd*, 165 N.Y.S.2d 432 (App. Div. 1st Dep't 1957), *aff'd*, 151 N.E.2d 897 (N.Y. 1958); *Romano v. Romano*, 283 N.Y.S.2d 813, 816 (Fam. Ct. Kings County 1967). *But see* *Robert O. v. Judy E.*, 395 N.Y.S.2d 351, 352 (Fam. Ct. Erie County 1977); *Battaglia v. Battaglia*, 172 N.Y.S.2d 361, 362 (Sup. Ct. Albany County 1958). It was within the court's discretion, however, to permit the child to determine his or her own religion. See *Martin v. Martin*, 123 N.E.2d 812, 812 (N.Y. 1954); *Hehman v. Hehman*, 178 N.Y.S.2d 328, 331 (Sup. Ct. Queens County 1958); *In re Vardinakis*, 289 N.Y.S. 355, 361 (Dom. Rel. Ct. N.Y. County 1936). Under appropriate circumstances, however, a custodial parent would be held to the terms of a separation agreement respecting religious upbringing. See *Perlstein v. Perlstein*, 429 N.Y.S.2d 896, 900 (App. Div. 1st Dep't 1980). Noncustodial parents, however, did have a right to participate in educational determinations affecting their children. See *G. v. G.*, 345 N.Y.S.2d 60, 61 (App. Div. 1st Dep't 1973); *People ex rel. Delany v. Mt. St. Joseph's Academy of Buffalo*, 189 N.Y.S. 775, 778 (App. Div. 1st Dep't 1921), *aff'd*, 138 N.E. 448 (N.Y. 1922). *But see* *Margaret B. v. Jeffrey B.*, 435 N.Y.S.2d 499, 500 (Fam. Ct. Warren County 1980). Of course, parents could bind themselves by agreement, see *Haskell v. Haskell*, 202 N.Y.S. 881 (App. Div. 1st Dep't 1924), *aff'd*, 173 N.E. 870 (N.Y. 1930), but they were required to educate their children in a fashion consistent with state law, see *In re Auster*, 100 N.Y.S.2d 60, 65 (Sup. Ct. Kings County 1950), *aff'd*, 102 N.Y.S.2d 418 (App. Div. 2d Dep't), *aff'd*, 100 N.E.2d 47 (N.Y. 1951). No contract by which a parent placed his or her children under the control of an educator or educational institution was specifically enforceable; a parent could always regain custody of his children and, if the regaining of custody constituted a breach of contract, was responsible for the breach only in damages. See *People ex rel. Rich v. Lackey*, 248 N.Y.S. 561, 566 (Sup. Ct. N.Y. County 1930). Noncustodial parents also had a right of visitation. See *Chirumbolo v. Chirumbolo*, 429 N.Y.S.2d 112, 114 (App. Div. 4th Dep't 1980); *Marciano v. Marciano*, 392 N.Y.S.2d 747, 749 (App. Div. 4th Dep't 1977); *Petraglia v. Petraglia*, 392 N.Y.S.2d 697, 698 (App. Div. 2d Dep't 1977); *Farhi v. Farhi*, 407 N.Y.S.2d 326, 327 (App. Div. 4th Dep't 1978); *Murnane v. Murnane*, 221 N.Y.S.2d 28, 28 (App. Div. 3d Dep't 1961); *Doe v. Doe*, 30 N.Y.S.2d 141, 141 (Dom. Rel. Ct. N.Y. County 1941). Indeed, a custodial spouse who interfered with

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-

the visitation rights of the other spouse could be held in contempt of court, *see* Berkman v. Berkman, 393 N.Y.S.2d 60, 61 (App. Div. 2d Dep't 1977); deprived of support, *see* Doe v. Doe, 378 N.Y.S.2d 269, 277-78 (Fam. Ct. N.Y. County 1975); D. v. O., 352 N.Y.S.2d 842, 846 (Fam. Ct. N.Y. County 1974); or even denied custody, *see* Entwistle v. Entwistle, 402 N.Y.S.2d 213, 215-16 (App. Div. 2d Dep't 1978); Calhoun v. Calhoun, 79 N.Y.S.2d 702, 705 (Sup. Ct. Kings County), *aff'd*, 79 N.Y.S.2d 514 (App. Div. 2d Dep't 1948) (modifying divorce decree to provide for children's stay at boarding school so that both husband and wife would have equal access rights), *but cf.* Hotze v. Hotze, 394 N.Y.S.2d 753, 755-57 (App. Div. 4th Dep't 1977) (denying visitation when harmful to child's emotional health); Wolf v. Wolf, 220 N.Y.S.2d 472, 473 (App. Div. 1st Dep't 1961) (refusing visitation while parent undergoing treatment); *People ex rel. Strauss v. Steindler*, 227 N.Y.S. 726, 729 (App. Div. 1st Dep't 1928) (commenting that visitation should not be granted after more than eight years of abandonment of child); Kessler v. Kessler, 178 N.Y.S.2d 811, 812 (Sup. Ct. N.Y. County 1958) (stating that visiting parent can be prohibited from exposing child to exploitation for publicity purposes during visitation), *aff'd*, 201 N.Y.S.2d 194 (App. Div. 1st Dep't 1960), *rev'd on other grounds*, 180 N.E.2d 402 (N.Y. 1962); Pottish v. Pottish, 88 N.Y.S.2d 394, 396 (Sup. Ct. N.Y. County 1948) (suspending visitation temporarily when extremely inconvenient for custodial spouse), *modified*, 89 N.Y.S.2d 893 (App. Div. 1st Dep't 1949); Horner v. Horner, 49 N.Y.S.2d 720, 725 (Dom. Rel. Ct. Bronx County 1944) (temporarily suspending visitation which seemed threatening to child during litigation). Finally, a noncustodial parent who removed children from a custodial spouse in excess of visitation rights was guilty of a crime. *See People v. Obertance*, 432 N.Y.S.2d 475, 476-77 (N.Y.C. Crim. Ct. Bronx County 1980); *cf. Pereira v. Pereira*, 319 N.E.2d 413, 418 (N.Y. 1974). Under special circumstances, even grandparents and collateral relatives could obtain visitation rights. *See LoPresti v. LoPresti*, 387 N.Y.S.2d 412, 415 (N.Y. 1976); *Anonymous v. Anonymous*, 269 N.Y.S.2d 500, 504 (Fam. Ct. Queens County 1966). *But see People ex rel. Scalise v. Naccari*, 118 N.Y.S.2d 90, 91 (App. Div. 1st Dep't 1953); *Noll v. Noll*, 98 N.Y.S.2d 938, 941 (App. Div. 4th Dep't 1950).

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*, 288 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.¹¹⁷ It was "the policy of the courts to encourage parties to settle their differences privately,"¹¹⁸ and therefore, separation agreements were routinely enforced,¹¹⁹ especially to bar husbands from

¹¹⁷ *Jackson v. Jackson*, 49 N.E.2d 988, 990 (N.Y. 1943); *accord McGahee v. Kennedy*, 400 N.E.2d 285, 285 (N.Y. 1979); *Hirsch v. Hirsch*, 333 N.E.2d 371, 372-73 (N.Y. 1975); *Fabrikant v. Fabrikant*, 225 N.E.2d 202, 203 (N.Y. 1967); *Kuniholm v. Kuniholm*, 183 N.E.2d 692, 693 (N.Y. 1962); *Nichols v. Nichols*, 119 N.E.2d 351, 354 (N.Y. 1954); *Hettich v. Hettich*, 105 N.E.2d 601, 603 (N.Y. 1952); *Weintraub v. Weintraub*, 96 N.E.2d 724, 726 (N.Y. 1951); *In re Rhinelanders' Estate*, 47 N.E.2d 681, 684 (N.Y. 1943); *Schmelzel v. Schmelzel*, 38 N.E.2d 114, 115-16 (N.Y. 1941); *Kelly v. Kelly*, 31 N.E.2d 765 (N.Y. 1940); *Clayburgh v. Clayburgh*, 185 N.E. 701, 702 (N.Y. 1933); *Pelkey v. Pelkey*, 435 N.Y.S.2d 138, 140 (App. Div. 3d Dep't 1980); *Stoneberg v. Stoneberg*, 433 N.Y.S.2d 860, 861 (App. Div. 2d Dep't 1980); *Mann v. Wasserberger*, 410 N.Y.S.2d 590, 591 (App. Div. 1st Dep't 1978); *Berzins v. Berzins*, 407 N.Y.S.2d 899, 900 (App. Div. 2d Dep't 1978); *Sears v. Sears*, 21 N.Y.S.2d 278, 279 (App. Div. 3d Dep't 1940); *In re Warren*, 202 N.Y.S. 586, 590 (App. Div. 4th Dep't 1924); *Kendall v. Kendall*, 193 N.Y.S. 658, 660 (App. Div. 1st Dep't 1922); *Van Horn v. Van Horn*, 188 N.Y.S. 98, 100 (App. Div. 1st Dep't 1921); *Clurman v. Clurman*, 373 N.Y.S.2d 951, 953 (Sup. Ct. N.Y. County 1975), *aff'd*, 382 N.Y.S.2d 281 (App. Div. 1st Dep't 1976); *Levine v. Levine*, 359 N.Y.S.2d 744, 745 (Sup. Ct. Kings County 1974); *Hartigan v. Hartigan*, 219 N.Y.S.2d 92, 93 (Sup. Ct. N.Y. County 1961), *aff'd*, 226 N.Y.S.2d 31 (App. Div. 1st Dep't 1962); *Dubin v. Dubin*, 22 N.Y.S.2d 246, 249 (Sup. Ct. N.Y. County 1940), *aff'd*, 27 N.Y.S.2d 446 (App. Div. 1st Dep't 1941); *Carpenter v. Carpenter*, 225 N.Y.S. 431, 434 (Sup. Ct. Cayuga County 1927); *Leith v. Leith*, 206 N.Y.S. 687, 688 (Sup. Ct. Monroe County 1924); *Everitt v. Everitt*, 201 N.Y.S. 305, 306 (Sup. Ct. Erie County 1923); *Jewett v. Jewett*, 359 N.Y.S.2d 441, 444 (County Ct. Broome County 1974); *In re Porter's Estate*, 137 N.Y.S.2d 271 (Sur. Ct. N.Y. County 1954); *O'Brien v. Springer*, 107 N.Y.S.2d 631, 632 (Sup. Ct. Herkimer County 1951). A "lump sum" separation agreement was held void under New York law. *Von Tresckow v. Von Tresckow*, 181 N.Y.S.2d 406, 407 (Sup. Ct. N.Y. County 1958); *accord Kyff v. Kyff*, 35 N.E.2d 655, 657 (N.Y. 1941); *Spector v. Spector*, 267 N.Y.S.2d 959, 962 (Sup. Ct. Onondaga County), *aff'd*, 265 N.Y.S.2d 632 (App. Div. 4th Dep't 1965); *Norris v. Norris*, 140 N.Y.S.2d 217, 220 (Sup. Ct. Queens County 1955); *Adams v. Adams*, 91 N.Y.S.2d 886, 888 (Sup. Ct. Westchester County 1949).

¹¹⁸ *Martin v. Martin*, 427 N.Y.S.2d 1002, 1005 (App. Div. 4th Dep't 1980); *accord Goldman v. Goldman*, 26 N.E.2d 265, 267 (N.Y. 1940); *Shapiro v. Shapiro*, 188 N.Y.S.2d 455, 457 (App. Div. 1st Dep't 1959); *cf. Lacks v. Lacks*, 189 N.E.2d 487, 489-90 (N.Y. 1963) (*Dye & Fuld, JJ., concurring*). *But see Seelau v. Seelau*, 198 N.Y.S. 41, 42-43 (Sup. Ct. Monroe County 1923) (distinguishing agreements to deal with consequences of separation from agreements to separate, which are void as against public policy).

¹¹⁹ *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); *Mohrmann v. Kob*, 51 N.E.2d 921, 922-23 (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.¹²⁰ However, a wife could sue to set aside an agreement if it "exonerate[d] the husband ... from his obligation or 'diminish[ed]' it"¹²¹ or was otherwise "unconscionable,"¹²² or if the wife was "actually unable to

Horne, 239 N.E.2d 348, 349 (N.Y. 1968); Rehill v. Rehill, 116 N.E.2d 281, 285 (N.Y. 1953); Resslerhuber v. Resslerhuber, 393 N.Y.S.2d 70, 71 (App. Div. 2d Dep't 1977); Jaeckel v. Jaeckel, 40 N.Y.S.2d 491, 493 (Sup. Ct. N.Y. County 1943); Schacht v. Schacht, 62 N.Y.S.2d 488, 490 (Dom. Rel. Ct. Queens County 1946); *In re Moller's Estate*, 283 N.Y.S. 365, 367 (Sur. Ct. N.Y. County 1935).

¹²⁰ See *Bowmer v. Bowmer*, 406 N.E.2d 760, 763 (N.Y. 1980); *Kleila v. Kleila*, 406 N.E.2d 753, 756-57 (N.Y. 1980); *Iseman v. Iseman*, 369 N.Y.S.2d 413 (App. Div. 1st Dep't 1975); *Monfette v. Van Sickle*, 351 N.Y.S.2d 46, 48 (Fam. Ct. Ulster County 1973). Agreements were also enforced against wives seeking additional support money. See *Silver v. Silver*, 327 N.E.2d 816, 817-18 (N.Y. 1975); *Heaney v. Heaney*, 403 N.Y.S.2d 687, 690 (Sup. Ct. Westchester County 1978); *Berenberg v. Berenberg*, 148 N.Y.S.2d 169, 172 (Sup. Ct. N.Y. County 1956); *Sommer v. Sommer*, 94 N.Y.S.2d 23, 24 (Sup. Ct. Queens County), *aff'd*, 100 N.Y.S.2d 141 (App. Div. 2d Dep't 1950). *But see Boden v. Boden*, 366 N.E.2d 791, 793-94 (N.Y. 1977) (holding that separation agreement does not bar claim for increased support for children); *La Scala v. La Scala*, 422 N.Y.S.2d 229, 230 (App. Div. 4th Dep't 1979) (holding that alimony provided for in separation agreements would not be increased absent showing that wife was unable to support herself); *Kern v. Kern*, 319 N.Y.S.2d 178, 183-84 (Fam. Ct. N.Y. County 1970) (holding court not bound by separation agreement if evidence established a change in circumstances regarding the need for child support); *Earle v. Earle*, 130 N.Y.S.2d 238, 240-41 (Dom. Rel. Ct. N.Y. County 1954) (stating that separation agreement did not preclude filing of petition for child support); *cf. Gould v. Hannan*, 380 N.E.2d 145, 145 (N.Y. 1978) (holding that improved financial circumstances of father alone did not warrant upward modification of child support); *Jarvis v. Jarvis*, 415 N.Y.S.2d 557, 558-59 (Sup. Ct. N.Y. County 1978) (noting court without authority to alter child support for brain damaged adult child); *Natalie M. v. Philip M.*, 396 N.Y.S.2d 752, 753 (Fam. Ct. Queens County 1977) (holding father liable for child support payments past stipulated date of termination due to child's handicap).

¹²¹ *Haas v. Haas*, 80 N.E.2d 337, 339 (N.Y. 1948); *accord Hoops v. Hoops*, 55 N.E.2d 488, 490 (N.Y. 1944); *Garlock v. Garlock*, 18 N.E.2d 521, 522 (N.Y. 1939); *Henderson v. Henderson*, 405 N.Y.S.2d 857, 858 (App. Div. 4th Dep't 1978); *Slocum v. Slocum*, 345 N.Y.S.2d 188, 190 (App. Div. 3d Dep't 1973); *La Porte v. La Porte*, 381 N.Y.S.2d 752, 755-56 (Sup. Ct. Queens County 1976); *Thorn v. Thorn*, 263 N.Y.S.2d 184, 186-87 (Sup. Ct. N.Y. County 1965); *Stampler v. Stampler*, 224 N.Y.S.2d 185, 190 (Sup. Ct. Nassau County 1961); *Burkhardt v. Burkhardt*, 215 N.Y.S.2d 425, 427 (Sup. Ct. Monroe County 1961); *Blaufarb v. Blaufarb*, 186 N.Y.S.2d 806, 810 (Sup. Ct. N.Y. County), *modified*, 191 N.Y.S.2d 785 (App. Div. 1st Dep't 1959); *Deitch v. Deitch*, 149 N.Y.S.2d 353, 354 (Sup. Ct. N.Y. County 1955); *Strahl v. Strahl*, 64 N.Y.S.2d 490, 492 (Sup. Ct. Bronx County 1946); *Dee v. Dee*, 169 N.Y.S.2d 789, 793 (Dom. Rel. Ct. Bronx County 1957). *But see Kromberg v. Kromberg*, 376 N.E.2d 923, 924 (N.Y. 1978) (upholding agreement granting wife marital residence in lieu of periodic support).

¹²² *Hamlin v. Hamlin*, 230 N.Y.S. 51, 57 (App. Div. 4th Dep't 1928); *accord Pomerance v. Pomerance*, 93 N.E.2d 832, 833 (N.Y. 1950); *Tirrell v. Tirrell*, 133 N.E. 569 (N.Y. 1921); *Donnarumma v. Donnarumma*, 420 N.Y.S.2d 729, 730 (App. Div. 2d Dep't 1979); *Tillinghast v. Tillinghast*, 16 N.Y.S.2d 863, 864 (App. Div. 3d Dep't 1940); *Heaney v. Heaney*, 7 N.Y.S.2d 817, 818 (App. Div. 2d Dep't 1938), *aff'd*, 20

support herself on the amount ... allowed."¹²³ 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."¹²⁴

If a support agreement had been set aside or repudiated¹²⁵ 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.¹²⁶ Here again,

N.E.2d 1011 (N.Y. 1939); *Kaplan v. Kaplan*, 199 N.Y.S.2d 207, 210-11 (Sup. Ct. Kings County), *aff'd*, 202 N.Y.S.2d 225 (App. Div. 2d Dep't 1960); *Oppenheimer v. Oppenheimer*, 192 N.Y.S.2d 714, 718 (Sup. Ct. N.Y. County 1959), *modified*, 205 N.Y.S.2d 936 (App. Div. 1st Dep't 1960), *aff'd*, 182 N.E.2d 119 (N.Y. 1962); *City Bank Farmers Trust Co. v. Macfadden*, 131 N.Y.S.2d 232, 239 (Sup. Ct. N.Y. County 1954); *Friedman v. Friedman*, 114 N.Y.S.2d 874, 880-81 (Sup. Ct. Westchester County 1952); *cf. Stewart v. Stewart*, 223 N.Y.S. 603, 605 (Sup. Ct. Livingston County 1927). If a portion of an agreement was invalid, a court could nonetheless enforce the remainder of the agreement. *See Ferro v. Bologna*, 286 N.E.2d 244, 246 (N.Y. 1972). *But see* *In re Wilson's Estate*, 405 N.E.2d 220, 223 (N.Y. 1980) (commenting that severability of provisions depends on intent). For a case where a husband pleaded fraud and collusion, see *Pisano v. Pisano*, 419 N.Y.S.2d 15 (App. Div. 2d Dep't 1979).

¹²³ *McMains*, 206 N.E.2d 185, 186 (N.Y. 1965); *accord Goldring v. Goldring*, 424 N.Y.S.2d 270, 272 (App. Div. 2d Dep't 1980); *Apkarian v. Apkarian*, 331 N.Y.S.2d 239, 239-40 (App. Div. 3d Dep't 1972).

¹²⁴ *La Porte*, 381 N.Y.S.2d at 755.

¹²⁵ *See Rennie v. Rennie*, 38 N.E.2d 143 (N.Y. 1941); *Cavellier v. Cavellier*, 168 N.Y.S.2d 65 (App. Div. 1st Dep't 1957); *O'Brien v. O'Brien*, 299 N.Y.S. 511 (App. Div. 4th Dep't 1937); *Zysman v. Zysman*, 251 N.Y.S. 355 (Sup. Ct. N.Y. County 1931); *Newport v. Newport*, 228 N.Y.S. 313 (Sup. Ct. N.Y. County 1928); *Nilsson v. Nilsson*, 108 N.Y.S.2d 954 (Dom. Rel. Ct. N.Y. County 1951).

¹²⁶ In order to obtain information required for calculating the amount of support, a court could demand disclosure of financial information by the parties, even before trial, despite the ordinary prohibition on pretrial discovery in matrimonial matters. *See Schiffman v. Schiffman*, 407 N.Y.S.2d 221 (App. Div. 2d Dep't 1978); *Billet v. Billet*, 384 N.Y.S.2d 826 (App. Div. 1st Dep't 1976); *Roussos v. Roussos*, 434 N.Y.S.2d 600, 603-04 (Sup. Ct. Queens County 1980); *Rubin v. Rubin*, 391 N.Y.S.2d 37 (Sup. Ct. Suffolk County 1976); *Grant v. Grant*, 375 N.Y.S.2d 995 (Sup. Ct. Nassau County 1975); *Sagnard v. Sagnard*, 370 N.Y.S.2d 446 (Sup. Ct. Nassau County 1975); *Becker v. Becker*, 234 N.Y.S.2d 611 (Sup. Ct. Bronx County 1962); *Rann v. Rann*, 283 N.Y.S.2d 426, 429 (Fam. Ct. Bronx County 1967). *But see Brenner v. Brenner*, 385 N.Y.S.2d 547 (App. Div. 1st Dep't 1976); *Meyerhoff v. Meyerhoff*, 341 N.Y.S.2d 667 (App. Div. 1st Dep't 1973); *Campbell v. Campbell*, 184 N.Y.S.2d 479 (App. Div. 2d Dep't 1959). Furthermore, a court could take tax consequences into account by allocating an award between alimony, which was taxable income to a wife, and child support, which was taxable to a husband. *See Kraunz v. Kraunz*, 56 N.E.2d 90, 91-92 (N.Y. 1944); *Covello v. Covello*, 414 N.Y.S.2d 145, 146 (App. Div. 1st Dep't 1979); *Rothschild v. Rothschild*, 339 N.Y.S.2d 428 (App. Div. 1st Dep't 1972). *But cf. Yates v. Yates*, 51 N.Y.S.2d 135, 138 (Sup. Ct. Monroe County 1944). Incident to granting support, a court could also adjudicate the disposition of jointly

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 needs¹²⁹ (including her requirements for legal serv-

held property. *See* Kahn v. Kahn, 371 N.E.2d 809, 812 (N.Y. 1977); Tsavaris v. Tsavaris, 359 N.E.2d 331 (N.Y. 1976); Perry v. Perry, 434 N.Y.S.2d 496, 498 (App. Div. 4th Dep't 1980); Mazzarelli v. Mazzarelli, 391 N.Y.S.2d 443 (App. Div. 2d Dep't 1977), *aff'd*, 377 N.E.2d 738 (N.Y. 1978); Bonardi v. Bonardi, 389 N.Y.S.2d 135, 136 (App. Div. 2d Dep't 1976); Scampoli v. Scampoli, 387 N.Y.S.2d 285 (App. Div. 2d Dep't 1976); Wages v. Wages, 332 N.Y.S.2d 94 (App. Div. 2d Dep't 1972); Mazur v. Mazur, 331 N.Y.S.2d 449, 450 (App. Div. 2d Dep't 1972); McLaughlin v. McLaughlin, 295 N.Y.S.2d 963, 964 (App. Div. 2d Dep't 1968); Cox v. Cox, 43 N.Y.S.2d 707 (App. Div. 3d Dep't 1943); Susan W. v. Martin W., 392 N.Y.S.2d 957 (Sup. Ct. Kings County 1977); Garthley v. Garthley, 194 N.Y.S.2d 557 (Sup. Ct. Nassau County 1959); Levine v. Levine, 187 N.Y.S.2d 457 (Sup. Ct. Kings County 1959); McDonald v. Driscoll, 426 N.Y.S.2d 678, 679-80 (Fam. Ct. Onondaga County 1980); King v. King, 418 N.Y.S.2d 531, 535-36 (Fam. Ct. Schoharie County 1979). *But cf.* Zeitler v. Zeitler, 348 N.Y.S.2d 448 (App. Div. 4th Dep't 1973) (granting foreign divorce same effect as domestic divorce and holding that wife was entitled to maintain partition action).

¹²⁷ *See* Kayser v. Kayser, 420 N.Y.S.2d 412 (App. Div. 2d Dep't 1979); Schwatzman v. Schwatzman, 403 N.Y.S.2d 317 (App. Div. 2d Dep't 1978); Leif v. Leif, 390 N.Y.S.2d 429 (App. Div. 2d Dep't 1976); Krane v. Krane, 373 N.Y.S.2d 275, 276-77 (Fam. Ct. N.Y. County 1975); Milton v. Milton, 361 N.Y.S.2d 825, 826 (Fam. Ct. Queens County 1974); Glover v. Glover, 314 N.Y.S.2d 873, 877 (Fam. Ct. Queens County 1970); Camhi v. Camhi, 25 N.Y.S.2d 559, 560 (Dom. Rel. Ct. Kings County 1941); Sternheim v. Sternheim, 20 N.Y.S.2d 823, 824 (Dom. Rel. Ct. N.Y. County 1940). *But see* Mammon v. Mammon, 387 N.Y.S.2d 882, 883 (App. Div. 2d Dep't 1976). Of course, a husband had no duty to provide support if his wife at the time of divorce possessed resources sufficient to avoid becoming a public charge, *see* McKay v. McKay, 371 N.Y.S.2d 339 (Fam. Ct. Ontario County 1975); Salvatore v. Salvatore, 57 N.Y.S.2d 564, 568 (Dom. Rel. Ct. Queens County 1945); Peterson v. Peterson, 52 N.Y.S.2d 907, 909-10 (Dom. Rel. Ct. Kings County 1945); *People ex rel. Ford v. Ford*, 207 N.Y.S. 245, 247 (Erie County Ct. 1924), even if she subsequently became a public charge, *see* Mellen v. Mellen, 361 N.Y.S.2d 28 (App. Div. 2d Dep't 1974) (by implication); Reed v. Thompson, 355 N.Y.S.2d 734 (Fam. Ct. Monroe County 1974).

¹²⁸ *See* Madderom v. Madderom, 355 N.Y.S.2d 24 (App. Div. 2d Dep't 1974); Taylor v. Taylor, 430 N.Y.S.2d 29 (Sup. Ct. Orleans County 1980); Germer v. Germer, 4 N.Y.S.2d 747 (Dom. Rel. Ct. N.Y. County 1938). *But see* Belandres v. Belandres, 395 N.Y.S.2d 458 (App. Div. 1st Dep't 1977); Recht v. Recht, 321 N.Y.S.2d 398 (App. Div. 1st Dep't 1971).

¹²⁹ *See* D'Andrea v. D'Andrea, 379 N.Y.S.2d 147 (App. Div. 2d Dep't 1976); Prospero v. Prospero, 331 N.Y.S.2d 318, 320-21 (App. Div. 4th Dep't 1972); Kane v. Kane, 201 N.Y.S.2d 127, 128 (App. Div. 2d Dep't 1960); Seitz v. Seitz, 183 N.Y.S. 79 (App. Div. 2d Dep't 1920); Winter v. Winter, 328 N.Y.S.2d 46, 48 (Sup. Ct. N.Y. County 1971), *modified*, 331 N.Y.S.2d 747 (App. Div. 1st Dep't 1972), *aff'd*, 293 N.E.2d 561

ices¹³⁰), his means,¹³¹ the length of the marriage,¹³² and the "station in life" at which they had been accustomed to living.¹³³

(N.Y. 1973); *Wolfson v. Wolfson*, 284 N.Y.S.2d 328, 330 (Sup. Ct. Kings County 1967); *Carole K. v. Arnold K.*, 385 N.Y.S.2d 740, 741 (Fam. Ct. N.Y. County 1976).

¹³⁰ See *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509, 520 (2d Cir. 1973); *Weitz v. Weitz*, 249 N.E.2d 768, 769 (N.Y. 1969); *Dravecko v. Richard*, 196 N.E. 17 (N.Y. 1935); *Fox v. Fox*, 188 N.E. 160, 161 (N.Y. 1933); *Elder v. Rosenwasser*, 144 N.E. 669, 669-70 (N.Y. 1924); *Rosensteil v. Rosensteil*, 280 N.Y.S.2d 624, 626 (App. Div. 1st Dep't), *aff'd*, 233 N.E.2d 292 (N.Y. 1967); *Friou v. Gnetes*, 204 N.Y.S.2d 836, 838 (App. Div. 2d Dep't 1960); *Schifferdecker v. Schifferdecker*, 220 N.Y.S. 229, 229 (App. Div. 2d Dep't 1927); *Posner v. Stone*, 182 N.Y.S. 564, 565 (App. Term 2d Dep't 1920); *Quinn v. Gerber*, 368 N.Y.S.2d 667 (Civ. Ct. N.Y. County 1975); *Tompkins & Lauren v. Glass*, 253 N.Y.S.2d 465, 467 (Civ. Ct. N.Y. County 1964). *But cf.* *Kramrath v. Kramrath*, 247 N.Y.S. 493, 495 (App. Div. 3d Dep't 1931) (court may not award counsel fees when there is subsisting separation agreement); *Ascher v. Ascher*, 210 N.Y.S. 515, 517-18 (App. Div. 1st Dep't 1925) (holding payment of counsel fees unauthorized by separation agreement); *Bishop v. Bishop*, 205 N.Y.S. 542, 543 (App. Div. 1st Dep't 1924) (refusing to award wife's counsel fees incurred defending husband's motion to amend separation agreement); *Pincus v. Pincus*, 205 N.Y.S. 425, 426-27 (App. Div. 1st Dep't 1924) (stating that wife's attempt to entrap husband in compromising situation warranted the exclusion of wife's legal fees). At least by the 1970's, courts were unwilling to award interim counsel fees if a wife was capable of paying them on a temporary basis. See *Handwerger v. Handwerger*, 403 N.Y.S.2d 266, 266-67 (App. Div. 1st Dep't 1978).

¹³¹ See *Banks v. Banks*, 415 N.Y.S.2d 874, 875 (App. Div. 1st Dep't 1979); *Gallo v. Gallo*, 376 N.Y.S.2d 590, 590-91 (App. Div. 2d Dep't 1975); *McKay v. McKay*, 213 N.Y.S.2d 560, 560-61 (App. Div. 1st Dep't 1961); *Winkler v. Winkler*, 207 N.Y.S.2d 940, 942 (Sup. Ct. N.Y. County 1960), *aff'd*, 180 N.E.2d 915 (N.Y. 1962); *Kolmer v. Kolmer*, 191 N.Y.S.2d 324, 331 (Sup. Ct. N.Y. County 1959); *Klein v. Klein*, 87 N.Y.S.2d 293, 295-97 (Dom. Rel. Ct. N.Y. County 1949); *Lorenzo v. Lorenzo*, 50 N.Y.S.2d 191, 195 (Dom. Rel. Ct. Bronx County 1944); *Prindle v. Dearborn*, 291 N.Y.S. 295, 297-98 (Dom. Rel. Ct. N.Y. County 1936). A husband could not avoid his obligation of support by voluntarily retiring from remunerative work. See *Villano v. Villano*, 414 N.Y.S.2d 625, 629 (Sup. Ct. Suffolk County 1979).

¹³² See *Kover v. Kover*, 278 N.E.2d 886, 889 (N.Y. 1972).

¹³³ *Bellanca v. Bellanca*, 99 N.Y.S.2d 507, 509 (Dom. Rel. Ct. N.Y. County 1950); *accord Neubauer v. Neubauer*, 380 N.E.2d 170, 170 (N.Y. 1978); *Hickland v. Hickland*, 346 N.E.2d 243, 245-46 (N.Y. 1976), *cert. denied*, 429 U.S. 941 (1976); *Kay v. Kay*, 339 N.E.2d 143, 145-46 (N.Y. 1975); *Hunter v. Hunter*, 198 N.Y.S.2d 1008, 1013 (App. Div. 1st Dep't 1960); *Borchard v. Borchard*, 171 N.Y.S.2d 983, 988 (App. Div. 1st Dep't 1958); *Urdaneta v. Urdaneta*, 44 N.Y.S.2d 142, 144 (Dom. Rel. Ct. N.Y. County 1943). *But see Rockwell v. Rockwell*, 351 N.Y.S.2d 416, 417-18 (App. Div. 1st Dep't 1974). Courts could also grant temporary support pending final adjudication of a divorce or separation action. See *Steinberg v. Steinberg*, 223 N.E.2d 558 (N.Y. 1966); *Bannon v. Bannon*, 1 N.E.2d 975, 977 (N.Y. 1936); *Hyman v. Hyman*, 392 N.Y.S.2d 455, 465-67 (App. Div. 1st Dep't 1977); *Saltzman v. Saltzman*, 388 N.Y.S.2d 605 (App. Div. 1st Dep't 1976); *Krohn v. Krohn*, 377 N.Y.S.2d 544, 544 (App. Div. 2d Dep't 1975); *Havender v. Havender*, 360 N.Y.S.2d 703 (App. Div. 2d Dep't 1974); *Bernstein v. Bernstein*, 319 N.Y.S.2d 376 (App. Div. 2d Dep't 1971); *Wyzenbeek v. Wyzenbeek*, 141 N.Y.S.2d 569, 569-70 (App. Div. 2d Dep't 1955); *Conklin v. Conklin*, 186 N.Y.S. 191, 194 (Sup. Ct. Otsego County), *modified on other grounds*, 188 N.Y.S. 141 (App. Div. 3d Dep't 1921). But a court would not grant

Of course, courts would always enforce the "natural obligation"¹³⁴ of a father to support his minor children on the basis of his "means and station in life."¹³⁵

temporary alimony unless a wife demonstrated both immediate need and a probability of ultimate success on the merits. *See* Polley v. Polley, 403 N.Y.S.2d 321 (App. Div. 2d Dep't 1978); Nobel v. Nobel, 373 N.Y.S.2d 615 (App. Div. 1st Dep't 1975); Lewis v. Lewis, 323 N.Y.S.2d 864, 865 (App. Div. 2d Dep't 1971); Mendelsohn v. Mendelsohn, 321 N.Y.S.2d 477, 478 (App. Div. 2d Dep't 1971); Spellman v. Spellman, 305 N.Y.S.2d 842, 843 (App. Div. 1st Dep't 1969); Swinson v. Swinson, 287 N.Y.S.2d 142, 143-44 (App. Div. 2d Dep't 1968); Schoonheim v. Schoonheim, 250 N.Y.S.2d 931, 932 (App. Div. 2d Dep't 1964); Wightman v. Wightman, 182 N.Y.S.2d 31, 33 (App. Div. 2d Dep't 1959); Downes v. Downes, 233 N.Y.S. 39 (App. Div. 2d Dep't 1929); Werner v. Werner, 198 N.Y.S. 701, 701-02 (App. Div. 1st Dep't 1923); Tornambe v. Tornambe, 413 N.Y.S.2d 577, 580 (Sup. Ct. Allegany County 1979); *cf.* Fink v. Fink, 333 N.Y.S.2d 655 (App. Div. 2d Dep't 1972); Kronenberg v. Kronenberg, 203 N.Y.S.2d 217 (App. Div. 2d Dep't 1960); Rothenberg v. Rothenberg, 185 N.Y.S.2d 594, 594-95 (App. Div. 1st Dep't 1959). Power to grant temporary support existed even where a husband had commenced an action. *See* Karrass v. Karrass, 66 N.Y.S.2d 919, 919 (Sup. Ct. Kings County 1946); Kiel v. Kiel, 261 N.Y.S. 162, 162 (Sup. Ct. Bronx County 1932); *see also* Gutierrez v. Gutierrez, 332 N.Y.S.2d 958 (Sup. Ct. Kings County 1972).

¹³⁴ *Kommel v. Karron*, 273 N.Y.S. 226, 227 (App. Term 1st Dep't 1934); *accord* *Laumeier v. Laumeier*, 143 N.E. 219, 221 (N.Y. 1924).

¹³⁵ *Benedict v. Benedict*, 115 N.Y.S.2d 352, 356 (Dom. Rel. Ct. Bronx County 1952); *accord* *Walker v. Buscaglia*, 423 N.Y.S.2d 81, 84 (App. Div. 4th Dep't 1979); *Thompson v. Thompson*, 419 N.Y.S.2d 239, 240 (App. Div. 3d Dep't 1979); *Drazin v. Drazin*, 295 N.Y.S.2d 183, 184 (App. Div. 1st Dep't 1968); *Santasiero v. Briggs*, 103 N.Y.S.2d 1, 4 (App. Div. 3d Dep't 1951); *Gold v. Gold*, 409 N.Y.S.2d 114, 116 (Sup. Ct. N.Y. County 1978); *Cronk v. Cronk*, 94 N.Y.S.2d 735, 736 (Sup. Ct. Madison County 1950); *People ex rel. Wagstaff v. Matthews*, 5 N.Y.S.2d 516, 517 (Sup. Ct. Nassau County), *aff'd*, 7 N.Y.S.2d 1008 (App. Div. 2d Dep't 1938); *Ammermuller v. Ammermuller*, 282 N.Y.S. 891, 893 (Sup. Ct. N.Y. County 1935), *aff'd*, 292 N.Y.S. 177 (App. Div. 1st Dep't 1936); *In re Bylow*, 400 N.Y.S.2d 451, 454 (Fam. Ct. St. Lawrence County 1977); *Bates v. Bates*, 310 N.Y.S.2d 26, 32-33 (Fam. Ct. Westchester County 1970); *County of Santa Clara, Cal. v. Hughes*, 251 N.Y.S.2d 579, 584 (Fam. Ct. Ulster County 1964); *Petras v. Petras*, 118 N.Y.S.2d 131, 134-35 (Broome County Ct. 1952); *cf.* *Lewis v. Lewis*, 381 N.Y.S.2d 631, 633 (Sup. Ct. Kings County 1976); *Blake v. Berger*, 380 N.Y.S.2d 575, 576 (Sup. Ct. Monroe County 1976); *Wener v. Wener*, 301 N.Y.S.2d 237, 240 (Sup. Ct. Kings County 1969), *aff'd*, 312 N.Y.S.2d 815 (App. Div. 2d Dep't 1970). No agreement could release a father from his duty to support a child. *See* *Michaels v. Flach*, 186 N.Y.S. 899, 902-03 (Sup. Ct. Kings County), *aff'd*, 189 N.Y.S. 908 (App. Div. 2d Dep't 1921); *Smith v. Jones*, 250 N.Y.S.2d 955, 958 (Fam. Ct. Kings County 1964). But a father did not have to support a child who reached the age of majority, *see* *Gallagher v. Gallagher*, 356 N.Y.S.2d 343, 344 (App. Div. 2d Dep't 1974); *Sloan v. Sloan*, 145 N.Y.S.2d 797, 798 (App. Div. 2d Dep't 1955); *Malamat v. Malamat*, 35 N.Y.S.2d 199, 200 (App. Div. 2d Dep't 1942); *Halsted v. Halsted*, 239 N.Y.S. 422, 424 (App. Div. 2d Dep't 1930); *St. Lawrence County Dep't of Soc. Serv. v. Menard*, 381 N.Y.S.2d 939, 941 (Fam. Ct. St. Lawrence County 1975); *Martin v. Martin*, 296 N.Y.S.2d 453, 464 (Fam. Ct. Ulster County 1968); *Kinsey v. Kinsey*, 107 N.Y.S.2d 212, 218-19 (Dom. Rel. Ct. N.Y. County 1951); *Szilagyi v. Szilagyi*, 11 N.Y.S.2d 469, 475-76 (Dom. Rel. Ct. Bronx County 1939), *aff'd*, 15 N.Y.S.2d 107 (App. Div. 1st Dep't 1939), or otherwise became

emancipated, *see* *Greene v. Greene*, 336 N.Y.S.2d 560, 562 (Sup. Ct. Westchester County 1972), *modified*, 340 N.Y.S.2d 664 (App. Div. 2d Dep't 1973), *but cf.* *Wayne County Dep't of Soc. Serv. v. Schultz*, 366 N.Y.S.2d 845, 847-48 (Fam. Ct. Wayne County 1975). Absent special circumstances, a father did not need to provide a college education, or an education in a private school. *See* *Wayne v. Wayne*, 430 N.Y.S.2d 367, 368 (App. Div. 2d Dep't 1980); *Gamble v. Gamble*, 418 N.Y.S.2d 800, 802-03 (App. Div. 2d Dep't 1979); *Di Martino v. Di Martino*, 418 N.Y.S.2d 116, 117 (App. Div. 2d Dep't 1979); *Francis v. Francis*, 403 N.Y.S.2d 48, 49 (App. Div. 1st Dep't 1978); *Berry v. Berry*, 391 N.Y.S.2d 120, 121 (App. Div. 1st Dep't 1977); *Enos v. Enos*, 340 N.Y.S.2d 783, 784 (App. Div. 2d Dep't 1973); *Wagner v. Wagner*, 273 N.Y.S.2d 572, 574 (Sup. Ct. N.Y. County 1966), *aff'd*, 282 N.Y.S.2d 639 (App. Div. 1st Dep't 1967); *Forman v. Forman*, 127 N.Y.S.2d 17, 22 (Dom. Rel. Ct. Kings County 1954); *In re Lapides*, 258 N.Y.S. 799, 803 (Sur. Ct. Livingston County 1932). *But see* *Benson v. Benson*, 434 N.Y.S.2d 277, 278 (App. Div. 2d Dep't 1980) (holding that father must pay private school tuition for handicapped child); *Kaplan v. Wallshain*, 394 N.Y.S.2d 439, 440 (App. Div. 2d Dep't 1977) (noting that father must furnish education when both parents had college and professional degrees, father had means, and child was high performance student); *Kapner v. Kapner*, 388 N.Y.S.2d 123, 123-24 (App. Div. 2d Dep't 1976) (deciding that father must reimburse mother for educational expenses of handicapped son); *Roth v. Roth*, 414 N.Y.S.2d 485, 488 (Fam. Ct. Queens County 1979) (requiring husband to pay 80% of child support due to his superior financial condition, despite wife's financial means); *L. v. State*, 335 N.Y.S.2d 3, 10 (Fam. Ct. Westchester County 1972) (concluding that father must contribute to private school tuition of handicapped child); *Weingast v. Weingast*, 255 N.Y.S.2d 341, 344 (Fam. Ct. Nassau County 1964) (holding that father with sufficient income must pay for college education of son with high college board scores); *Herbert v. Herbert*, 98 N.Y.S.2d 846, 847-48 (Dom. Rel. Ct. N.Y. County 1950) (commenting that family's wealth and station in life required father to support children in college); *Anonymous v. Anonymous*, 24 N.Y.S.2d 613, 619 (Dom. Rel. Ct. Bronx County 1940) (deciding that father must support son through public high school education); *see also* *Roe v. Doe*, 272 N.E.2d 567, 570 (N.Y. 1971) (holding that father, in return for child support, may establish reasonable regulations for the child). In the absence of a father, the mother was held to be responsible for a child's support. *See* *Anonymous v. Anonymous*, 18 N.Y.S.2d 806, 809 (Dom. Rel. Ct. N.Y. County 1940). For cases involving the possibility of criminal and quasi-criminal liability for nonsupport, *see* *People v. Jansen*, 191 N.E. 17 (N.Y. 1934); *People ex rel. Gottschalk v. Brown*, 143 N.E. 653 (N.Y. 1924); *People v. De Pue*, 217 N.Y.S. 205 (App. Div. 3d Dep't 1926); *Andrews v. Andrews*, 2 N.Y.S.2d 575 (Dom. Rel. Ct. Bronx County 1938). *But see* *Saratoga County Dep't of Soc. Serv. v. Hofbauer*, 393 N.E.2d 1009, 1013-14 (N.Y. 1979); *People v. Wolf*, 215 N.Y.S. 95, 96 (App. Div. 2d Dep't), *aff'd*, 154 N.E. 607 (N.Y. 1926). A father was liable for the support of stepchildren, as distinguished from children, only as required to prevent them from becoming a public charge. *See* *Dep't of Welfare of N.Y. v. Siebel*, 161 N.E.2d 1, 5 (N.Y. 1959); *Slochowsky v. Shang*, 412 N.Y.S.2d 923, 926 (App. Div. 2d Dep't), *aff'd*, 400 N.E.2d 1348 (N.Y. 1979); *People ex rel. Deming v. Williams*, 292 N.Y.S. 458, 462-63 (Sup. Ct. Oneida County 1936); *Morgan v. Morgan*, 76 N.Y.S.2d 356, 357 (Dom. Rel. Ct. Bronx County 1948); *Jones v. Jones*, 292 N.Y.S. 221, 224 (Dom. Rel. Ct. N.Y. County 1937); *see also* *In re Lobdell*, 57 N.Y.S.2d 58 (Children's Ct. Chenango County 1945). Of course, the parents, especially the father, of a child born out of wedlock had an obligation to provide support for such a child, if for no other reason than to save the locality in which the child resided from liability. *See* *Commissioner of Pub. Welfare ex rel. Stuart v. Chandler*, 204 N.Y.S. 187, 188 (Special Sess. N.Y. County 1922).

A decree providing for support could be modified on account of substantial changes in circumstances,¹³⁶ especially those, such as a wife's remarriage¹³⁷ or her living with a man held out by her as her husband,¹³⁸ which made her seem less deserving.¹³⁹ On the other hand, deserving women had a variety of devices available to help them enforce decrees in their favor.¹⁴⁰

¹³⁶ See *Langlitz v. Langlitz*, 423 N.Y.S.2d 276, 277 (App. Div. 3d Dep't 1979); *Hickland v. Hickland*, 393 N.Y.S.2d 192, 194 (App. Div. 3d Dep't 1977); *Marshall v. Marshall*, 368 N.Y.S.2d 360, 362 (App. Div. 4th Dep't 1975); *Sabatino v. Sabatino*, 71 N.Y.S.2d 331, 332 (Sup. Ct. Queens County 1947); *McCarthy v. McCarthy*, 94 N.Y.S.2d 801, 802 (Dom. Rel. Ct. N.Y. County 1950).

¹³⁷ See *Kirkbride v. Van Note*, 9 N.E.2d 852, 854 (N.Y. 1937); *Severance v. Severance*, 183 N.E. 909 (N.Y. 1933); *Johnson v. Johnson*, 284 N.Y.S.2d 33, 34-35 (Sup. Ct. Kings County 1967); *Schneider v. Schneider*, 125 N.Y.S.2d 739, 742 (Sup. Ct. N.Y. County 1953). Remarriage ended a prior husband's duty of support even if the later marriage was subsequently annulled or if the second husband died. See *Gaines v. Jacobsen*, 124 N.E.2d 290, 294-95 (N.Y. 1954); *Denberg v. Frischman*, 264 N.Y.S.2d 114, 115 (App. Div. 1st Dep't 1965), *aff'd*, 217 N.E.2d 675 (N.Y. 1966), *cert. denied*, 385 U.S. 884 (1966); *Kahler v. Searl*, 18 N.Y.S.2d 246, 247 (App. Div. 2d Dep't 1940); *Brown v. Brown*, 297 N.Y.S.2d 385 (Fam. Ct. Ulster County 1969); see also *Andrews v. Andrews*, 58 N.Y.S.2d 20, 25 (Dom. Rel. Ct. Bronx County 1945); *D.E. v. A.C.*, 36 N.Y.S.2d 120, 122-23 (Dom. Rel. Ct. N.Y. County 1942).

¹³⁸ See *Northrup v. Northrup*, 373 N.E.2d 1221, 1224 (N.Y. 1978); *Hall v. Hall*, 389 N.Y.S.2d 448 (App. Div. 3d Dep't 1976). *But cf.* *Krawczuk v. Krawczuk*, 374 N.Y.S.2d 70 (App. Div. 4th Dep't 1975); *Miklowitz v. Miklowitz*, 435 N.Y.S.2d 116 (App. Div. 3d Dep't 1980); *Stern v. Stern*, 389 N.Y.S.2d 265, 268 (Sup. Ct. Nassau County 1976); see also *Waddey v. Waddey*, 49 N.E.2d 8, 9-10 (N.Y. 1943); *Morris v. Morris*, 222 N.Y.S.2d 355, 357 (Sup. Ct. N.Y. County 1961).

¹³⁹ Support could also be modified if there was a change in the needs of a wife or children or in the earnings of a husband. See *Kurr v. Kurr*, 418 N.Y.S.2d 123, 124 (App. Div. 2d Dep't 1979); *Toliver v. Toliver*, 413 N.Y.S.2d 454, 455 (App. Div. 2d Dep't 1979); *Edelstein v. Edelstein*, 283 N.Y.S.2d 658, 659 (App. Div. 1st Dep't 1967); *Covert v. Covert*, 264 N.Y.S.2d 820, 823 (Sup. Ct. Rockland County 1965); *Weinel v. Weinel*, 391 N.Y.S.2d 795, 797 (Fam. Ct. Rockland County 1977); *Lawrence R. v. Muriel R.*, 392 N.Y.S.2d 178, 179-80 (Fam. Ct. Onondaga County 1976); *Dunn v. Wescott*, 366 N.Y.S.2d 291, 293 (Fam. Ct. Erie County 1975); *S. v. C.*, 332 N.Y.S.2d 773, 776-77 (Fam. Ct. Richmond County 1972); *Pinto v. Pinto*, 91 N.Y.S.2d 124, 128 (Dom. Rel. Ct. Kings County 1949). *But see* *Best v. Baras*, 382 N.Y.S.2d 318, 320 (App. Div. 1st Dep't 1976); *Windwer v. Windwer*, 333 N.Y.S.2d 205, 206 (App. Div. 2d Dep't 1972), *aff'd*, 301 N.E.2d 440 (N.Y. 1973); *Pierson v. Pierson*, 404 N.Y.S.2d 265, 266 (Fam. Ct. Dutchess County 1978). Finally, a support order would be modified if a husband proved unable to pay the required amount. See *Dep't of Soc. Serv. of St. Lawrence County v. Arquette*, 425 N.Y.S.2d 892, 894 (App. Div. 3d Dep't 1980); *Sullivan v. Sullivan*, 414 N.Y.S.2d 32, 33 (App. Div. 2d Dep't 1979); *Pehush v. Pehush*, 401 N.Y.S.2d 859, 860 (App. Div. 2d Dep't 1978); *Dula v. Dula*, 217 N.Y.S. 224, 224 (App. Div. 1st Dep't 1926); *Bamboschek v. Bamboschek*, 270 N.Y.S. 741, 746 (Sup. Ct. N.Y. County), *aff'd in part, rev'd in part*, 271 N.Y.S. 1097 (App. Div. 1st Dep't 1934). *But see* *De La Ferriere v. De La Ferriere*, 94 N.Y.S.2d 147, 148 (Dom. Rel. Ct. N.Y. County 1950).

¹⁴⁰ Decrees could be enforced alternatively, through contempt proceedings, see

Rosenblum v. Higgins, 193 N.E. 276 (N.Y. 1934); Stacy v. Speanbury, 385 N.Y.S.2d 875, 876 (App. Div. 3d Dep't 1976); Didero v. Didero, 200 N.Y.S.2d 705, 706 (App. Div. 2d Dep't 1960); Bruce v. Bruce, 89 N.Y.S.2d 94, 96 (App. Div. 1st Dep't 1949); Smith v. Smith, 11 N.Y.S.2d 1015, 1019-20 (Sup. Ct. Onondaga County 1938), provided a husband's violation of a court order was clear and intentional, *see* Klein v. Klein, 384 N.Y.S.2d 1005, 1006 (App. Div. 1st Dep't 1976), and a judge was willing to exercise discretion to impose punishment for contempt, *see* Hibbard v. Hibbard, 137 N.Y.S.2d 412, 413 (App. Div. 3d Dep't 1955); Thaw v. Thaw, 389 N.Y.S.2d 753, 754 (Sup. Ct. Nassau County 1976); Greenfeld v. Greenfeld, 284 N.Y.S.2d 719, 720 (Sup. Ct. N.Y. County 1967); Thomsen v. Thomsen, 82 N.Y.S.2d 533, 535-36 (Sup. Ct. Kings County 1948); *but cf.* Okun v. Okun, 320 N.Y.S.2d 137, 139 (Sup. Ct. Bronx County 1971) (finding alimony provisions could not be enforced by contempt), or other methods could be used to enforce decrees, such as giving surety, *see* Baumann v. Stetten, 178 N.E. 764, 765 (N.Y. 1931) (posting stock as guarantee); Talbot v. New Amsterdam Casualty Co., 142 N.E. 600, 601 (N.Y. 1923) (giving surety); Hofman v. Malcolm, 335 N.Y.S.2d 938, 939 (Sup. Ct. N.Y. County 1972) (posting bond), or sequestering wages, *see* LoCascio v. LoCascio, 421 N.Y.S.2d 807, 810 (Sup. Ct. Queens County 1979); Doe v. Doe, 234 N.Y.S.2d 688, 690 (Fam. Ct. Bronx County 1962); *but see* Patterson v. Patterson, 296 N.Y.S. 311, 312 (App. Div. 1st Dep't 1937); Daniello v. Daniello, 219 N.Y.S.2d 641, 643 (Sup. Ct. Queens County 1961); Langus v. Langus, 183 N.Y.S.2d 922, 923-24 (Sup. Ct. Kings County 1959), or sequestering assets within the court's jurisdiction, *see* Geary v. Geary, 6 N.E.2d 67, 71-73 (N.Y. 1936); Rosenberg v. Rosenberg, 182 N.E. 8 (N.Y. 1932); Matthews v. Matthews, 159 N.E. 713, 714 (N.Y. 1928); Haslett v. Haslett, 268 N.Y.S.2d 809, 812 (App. Div. 3d Dep't 1966); Robinson v. Robinson, 264 N.Y.S.2d 816, 817 (App. Div. 1st Dep't 1965); Scott v. Scott, 220 N.Y.S. 93, 94 (App. Div. 1st Dep't 1927); Neidorf v. Neidorf, 252 N.Y.S.2d 354, 357-58 (Sup. Ct. Nassau County 1964); *but see* Flanagan v. O'Dwyer, 94 N.Y.S.2d 162, 167 (Sup. Ct. N.Y. County 1950); Rubin v. Whitney, 295 N.Y.S. 255, 267 (Sup. Ct. N.Y. County 1937); or reduction of accrued arrears to a judgment and execution thereon, *see* Boissevain v. Boissevain, 169 N.E. 130, 131 (N.Y. 1929); White v. White, 231 N.Y.S. 146, 142 (App. Div. 1st Dep't 1928); Wilder v. Wilder, 402 N.Y.S.2d 559 (Sup. Ct. Suffolk County 1978); Ostrin v. Posner, 215 N.Y.S. 259, 260 (Sup. Ct. Kings County 1925); Bailey v. Bailey, 196 N.Y.S. 340, 341 (Sup. Ct. Onondaga County 1922); Hatoff v. Hatoff, 246 N.Y.S.2d 711, 713-14 (Civ. Ct. N.Y. County 1964); *In re* Bassford's Will, 91 N.Y.S.2d 105 (Sur. Ct. Westchester County 1949), *aff'd*, 101 N.Y.S.2d 136 (App. Div. 2d Dep't 1950); *cf.* Elliott v. Elliott, 365 F. Supp. 450, 453 (S.D.N.Y. 1973). Claims for support could also be assigned. *See* Phair v. Mead, 83 N.Y.S.2d 657, 659 (Sup. Ct. N.Y. County 1948); Procter v. Curchin, 273 N.Y.S. 821, 822 (Sup. Ct. N.Y. County 1934). But a wife's continued acquiescence in her husband's failure to provide mandated support barred a suit for enforcement, *see* Swanton v. Curley, 7 N.E.2d 250, 252 (N.Y. 1937); Ambrose v. Kraus, 9 N.Y.S.2d 857 (App. Div. 2d Dep't 1939), as did the husband's death, *see, e.g.*, Rice v. Andrews, 217 N.Y.S. 528, 530 (Sup. Ct. Lewis County 1926). A wife's performance of her obligations under a decree, usually by not interfering with a husband's visitation rights, was not a condition precedent to her enforcement of the husband's support obligations. *See* Babin v. Babin, 228 N.Y.S.2d 434, 435-36 (App. Div. 4th Dep't 1962); Strecker v. Strecker, 199 N.Y.S.2d 111, 114 (App. Div. 1st Dep't 1960); Tamny v. Tamny, 129 N.Y.S.2d 41, 42 (Sup. Ct. Bronx County 1954); Helmbold v. Helmbold, 217 N.Y.S. 379, 380 (Sup. Ct. Monroe County 1926); Hambleton v. Palmer, 283 N.Y.S.2d 404, 408 (Fam. Ct. Monroe County 1967). *But see* Benjamin B. v. Rivka M., 396 N.Y.S.2d 137, 137 (Fam. Ct. Queens County 1977); Nicolette G. v. Raymond S., 396 N.Y.S.2d 134, 135 (Fam. Ct. Queens County 1977). But, if the wife were seeking to enforce support under a separation agreement, her denial of visitation rights con-

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*,¹⁴¹ described by the court as involving "a battle for a life with grim reality."¹⁴² 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.¹⁴³ 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.¹⁴⁴

With "nothing in the house,"¹⁴⁵ Margaret, who "was sick at that time,"¹⁴⁶ placed the following advertisement in a New York newspaper: "Nice Baby Boy given for adoption to Catholic family."¹⁴⁷ 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 yow but I have no money to go with I would be afraid to take a tax because yow may not want to pay for it so what wood I do, why dont yow come yourself, to my home then if yow like the baby yow can take him.... if yow can come now all right as I eapest an other lady to come she sent me a telegram an is grazie to get the baby.¹⁴⁸

After Mrs. Davis came, Margaret agreed to give her the child, as

stituted breach of a dependent condition precedent to her right to payment. See *Hudson v. Hudson*, 412 N.Y.S.2d 242, 244 (Sup. Ct. N.Y. County 1978); *Skydell v. Wedding*, 219 N.Y.S.2d 359, 360 (Sup. Ct. Kings County), *aff'd*, 222 N.Y.S.2d 1020 (App. Div. 2d Dep't 1961).

¹⁴¹ 255 N.Y.S. 416 (Sur. Ct. Kings County 1932).

¹⁴² *Id.* at 418.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 418-19.

¹⁴⁵ *Id.* at 419.

¹⁴⁶ *Davis' Adoption*, 255 N.Y.S. at 421.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

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.*

now old enough to help ... on his peddler's cart."¹⁶⁰ 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. Feser*¹⁶² 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

¹⁶⁰ *Id.*

¹⁶¹ *Davis' Adoption*, 255 N.Y.S. at 427-28.

¹⁶² 186 N.Y.S. 443 (App. Div. 1st Dep't 1921).

¹⁶³ *Id.* at 444.

¹⁶⁴ *Id.* at 445.

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

¹⁶⁸ *Id.*

¹⁶⁹ 279 N.Y.S. 427 (Sur. Ct. Kings County 1935).

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*,¹⁸⁰ 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."¹⁸¹ 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."¹⁸² 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."¹⁸³ 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."¹⁸⁴ 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."¹⁸⁵

A divorced mother sought to recover a son on similar facts in the case of *In re Duffy*.¹⁸⁶ "[U]nwilling to be burdened with the care and maintenance of"¹⁸⁷ 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."¹⁸⁸ Although Duffy had said "she would never claim the child,"¹⁸⁹ she did ultimately decide that she wanted him back. Finding in Duffy "a want of maternal instincts," the court could not view the

Richardson, 196 N.Y.S. 262, 264 (Sup. Ct. Oneida County 1922).

¹⁸⁰ 201 N.Y.S. 684 (Erie County Ct. 1923), *rev'd*, 204 N.Y.S. 599 (App. Div. 4th Dep't), *rev'd*, 145 N.E. 70 (N.Y. 1924).

¹⁸¹ *Id.* at 688.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Bistany*, 145 N.E. at 72.

¹⁸⁶ 202 N.Y.S. 323 (Sup. Ct. Livingston County 1923).

¹⁸⁷ *Id.* at 323.

¹⁸⁸ *Id.* at 323-24.

¹⁸⁹ *Id.* at 323.

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."¹⁹⁰ 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,¹⁹¹ 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."¹⁹² Adoption also did not destroy an adopted child's right to inherit from its natural kindred,¹⁹³ nor did an adopted child become next of kin so as to be entitled to inherit from the adoptive parents' collateral relatives.¹⁹⁴ Finally, adoption was not final: an adoption could "be abrogated" if a child was "ill-behaved and . . . violated her duty toward her foster parents."¹⁹⁵

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"¹⁹⁶ those families and children whom death, destitution, or divorce had rendered unable to live by soci-

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)).

¹⁹⁴ See *In re Powell's Estate*, 183 N.Y.S. 939, 940-41 (Sur. Ct. Oneida County) (holding that adopted child cannot inherit through adoptive parent from collateral relative), *aff'd*, 184 N.Y.S. 945 (App. Div. 4th Dep't 1920). *But cf.* *Ryan v. Sexton*, 181 N.Y.S. 10 (App. Div. 2d Dep't 1920) (stating that foster mother can inherit from adopted child whose natural parents were deceased).

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.¹⁹⁷

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.¹⁹⁸ 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."¹⁹⁹ 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).

¹⁹⁹ *Harrington v. Harrington*, 290 N.Y. 126, 130 (1943); accord *Fitzgerald v. Fitzgerald*, 65 N.Y.S.2d 285, 286-87 (Dom. Rel. Ct. Bronx County 1946).

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."²⁰⁰ 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."²⁰¹ 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,"²⁰² 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."²⁰³ 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."²⁰⁴

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... ."²⁰⁵ Within a decade, this view had become established law.²⁰⁶ A related prin-

²⁰⁰ *Walch v. Walch*, 52 N.Y.S.2d 697, 700, 705-06 (Sup. Ct. Steuben County 1945).

²⁰¹ *Bunim v. Bunim*, 83 N.E.2d 848, 849 (N.Y. 1949).

²⁰² *Id.* at 395 (Fuld, J., dissenting)

²⁰³ *Id.* at 394.

²⁰⁴ *Reimann v. Reimann*, 39 N.Y.S.2d 485, 485 (Sup. Ct. N.Y. County 1942).

²⁰⁵ *Abeles v. Abeles*, 299 N.Y.S. 206, 207 (Dom. Rel. Ct. N.Y. County 1937); *accord* *People ex rel. Mahoff v. Matsoui*, 247 N.Y.S. 112, 117 (Sup. Ct. N.Y. County 1931). In *Mahoff*, the court had mentioned that a "child at tender age is entitled to have such care, love, and discipline as only a good and devoted mother can usually give," *id.* at 117, but the court then divided custody between a putative father and a mother of a child born out of wedlock, *id.* at 118.

²⁰⁶ *See Radeff v. Radeff*, 74 N.Y.S.2d 749, 750 (App. Div. 4th Dep't 1947); *accord* *In re Bopp*, 58 N.Y.S.2d 190, 209 (Sup. Ct. Steuben County 1945); *Moses v. Moses*,

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.²⁰⁷

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."²⁰⁸ 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]."²⁰⁹ They "committed sins of passion but not of evil purpose," as had "Mary Magdalen and Hester Prynne" and "countless others before and after them."²¹⁰ 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."²¹¹

Acting out of mercy and compassion, judges began to rule that custody should not be denied for a "mild ... vice" such as gambling²¹² or for one or two "adulterous relationships" that fell short of "promiscuity."²¹³ 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

85 N.Y.S.2d 15, 21 (Dom. Rel. Ct. N.Y. County 1948).

²⁰⁷ *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).

²⁰⁸ *Clair v. Clair*, 64 N.Y.S.2d 889, 890 (Sup. Ct. Albany County 1946).

²⁰⁹ *Id.* at 891.

²¹⁰ *Id.*

²¹¹ *People ex rel. Geismar v. Geismar*, 54 N.Y.S.2d 747, 756 (Sup. Ct. N.Y. County 1945).

²¹² *Oraf v. Oraf*, 47 N.Y.S.2d 45, 46 (Dom. Rel. Ct. N.Y. County 1944).

²¹³ *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 virtue²¹⁴ 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,"²¹⁵ 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.²¹⁶ 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.²¹⁷ "[N]othing," 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."²¹⁸ Indeed, "many regarded" American citizenship "as the highest hope of civilized men."²¹⁹ 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.²²⁰

Another judge had a comparable reaction in *Ex parte Djurovic*.²²¹ Slavoljub Djurovic was a Yugoslav citizen assigned to work for a government-operated company in New York.²²² He and his wife had two sons living with them in New York at the time they separated.²²³ 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-

²¹⁴ See MICHAEL S. SHERRY, *IN THE SHADOW OF WAR: THE UNITED STATES SINCE THE 1930'S*, 88-90 (1995).

²¹⁵ *People ex rel. Foussier v. Uzielli*, 260 N.Y.S.2d 329, 333 (App. Div. 1st Dep't), *aff'd*, 213 N.E.2d 460 (N.Y. 1965).

²¹⁶ See *People ex rel. Ragona v. De Saint-Cyr*, 137 N.Y.S.2d 275 (Sup. Ct. N.Y. County 1955); see also *Kajtazi v. Kajtazi*, 488 F. Supp. 15 (E.D.N.Y. 1978). *But see Hoyt v. Boyar*, 429 N.Y.S.2d 792 (App. Div. 3d Dep't 1980); *Duncan v. Hitti*, 281 N.Y.S. 285 (App. Div. 2d Dep't 1935); *Mundy v. Mundy*, 108 N.Y.S.2d 142 (Sup. Ct. Queens County), *aff'd*, 108 N.Y.S.2d 977 (App. Div. 2d Dep't 1951); *Y. v. Y.*, 403 N.Y.S.2d 855 (Fam. Ct. Kings County 1978).

²¹⁷ *People ex. rel. Choolokian v. Mission of Immaculate Virgin*, 76 N.Y.S.2d 509, 513 (Sup. Ct. N.Y. County 1947), *aff'd*, 86 N.Y.S.2d 462 (App. Div. 1st Dep't 1949), *modified*, 88 N.E.2d 362 (N.Y. 1949), *cert. denied*, 339 U.S. 912 (1950).

²¹⁸ *Choolokian*, 76 N.Y.S.2d at 513.

²¹⁹ *Id.* at 513.

²²⁰ *Id.*

²²¹ 130 N.Y.S.2d 389 (Sup. Ct. N.Y. County), *aff'd*, 131 N.Y.S.2d 888 (App. Div. 1st Dep't 1954).

²²² *Id.*

²²³ *Id.* at 392.

cret hiding place in New York City.²²⁴ Several days later they were secretly transferred to a boat about to set sail to Yugoslavia.²²⁵ 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.²²⁶

A third case, *Seley v. Seley*,²²⁷ 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 "was wasting her time in a small town where she ha[d] little if any opportunities to meet people."²²⁸ She had a "keen urge to come to live in New York," where she felt "that by education and social contact here she will have the opportunity to better herself in every way."²²⁹ Of course, the judge agreed.²³⁰

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,²³¹ 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...."²³² 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...."²³³ "[A] widely held belief" thereupon emerged

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Djurovic*, 130 N.Y.S.2d at 394.

²²⁷ 178 N.Y.S.2d 988, 989 (Sup. Ct. N.Y. County 1958).

²²⁸ *Id.* at 989.

²²⁹ *Id.*

²³⁰ *Id.* at 990.

²³¹ See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 238-53 (1985).

²³² *In re Feigin*, 163 N.Y.S.2d 812, 813 (Sup. Ct. N.Y. County 1957).

²³³ *People ex rel. Himber v. Himber*, 136 N.Y.S.2d 456, 458 (Sup. Ct. N.Y. County 1954); *accord Cavalleri v. Cavalleri*, 236 N.Y.S.2d 304, 307 (Sup. Ct. Kings County 1962); *Ex parte Djurovic*, 130 N.Y.S.2d 389, 392 (Sup. Ct. N.Y. County), *aff'd*, 131 N.Y.S.2d 888 (App. Div. 1st Dep't 1954).

"that a mother [was] favored over a father in a legal custody proceeding,"²³⁴ and that belief remained in place at least until the mid-1970's.

The reported cases lent support to this belief.²³⁵ For example, a mother with "schizophrenia, paranoid type," was held fit to receive custody,²³⁶ 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...."²³⁷ 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,"²³⁸ 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,²³⁹ even when the activities involved "female homosexuality."²⁴⁰

²³⁴ *Hechemy v. Hechemy*, 368 N.Y.S.2d 709, 713 (Sup. Ct. Albany County 1975).

²³⁵ See *Weiss v. Weiss*, 278 N.Y.S.2d 61 (Sup. Ct. Rockland County 1967); *Miles v. Liebolt*, 230 N.Y.S.2d 342 (Sup. Ct. N.Y. County 1962); *In re Kades*, 202 N.Y.S.2d 362 (Sup. Ct. N.Y. County 1960); *Ex parte Kordes*, 52 N.Y.S.2d 410 (Sup. Ct. Nassau County 1944); *In re Bologna*, 102 N.Y.S.2d 420 (Dom. Rel. Ct. N.Y. County 1950). Of course, fathers, in response to the specific facts of cases, sometimes received custody. See *FF v. FF*, 325 N.Y.S.2d 291 (App. Div. 3d Dep't 1971); *In re Reinhart*, 227 N.Y.S.2d 39 (Sup. Ct. N.Y. County 1961); *Jones v. Jones*, 187 N.Y.S.2d 853 (Sup. Ct. Nassau County 1959); *Whittemore v. Whittemore*, 109 N.Y.S.2d 216 (Sup. Ct. N.Y. County 1951).

²³⁶ *In re Richman*, 227 N.Y.S.2d 42, 50, 52 (Sup. Ct. Kings County 1962); see also *Gorra v. Gorra*, 387 N.Y.S.2d 895 (App. Div. 2d Dep't 1976).

²³⁷ *In re Dubin*, 112 N.Y.S.2d 267, 269 (Dom. Rel. Ct. Queens County 1952).

²³⁸ *People ex rel. Newitt v. Newitt*, 117 N.Y.S.2d 711, 712 (Sup. Ct. N.Y. County 1952) (emphasis in original), *modified*, 119 N.Y.S.2d 222 (1953); accord *People ex rel. Ragona v. DeSaint-Cyr*, 137 N.Y.S.2d 275, 279 (Sup. Ct. N.Y. County 1955).

²³⁹ *Feldman v. Feldman*, 358 N.Y.S.2d 507, 511 (App. Div. 2d Dep't 1974); accord *People ex rel. Olecharski v. Nepereny*, 259 N.E.2d 923, 924 (N.Y. 1970); *CC v. CC*, 322 N.Y.S.2d 388, 390 (App. Div. 3d Dep't 1971); *S. v. J.*, 367 N.Y.S.2d 405, 410-11 (Sup. Ct. Kings County 1975); cf. *Kessler v. Kessler*, 236 N.Y.S.2d 472, 475 (Sup. Ct. N.Y. County 1963); *People ex rel. Repetti v. Repetti*, 377 N.Y.S.2d 571, 573 (App. Div. 2d Dep't 1975). But see *T v. U*, 318 N.Y.S.2d 110 (App. Div. 3d Dep't 1971); *People ex rel. Bishop v. Bishop*, 312 N.Y.S.2d 87 (App. Div. 2d Dep't 1970); *Johnson v. Johnson*, 263 N.Y.S.2d 404 (Sup. Ct. Westchester County 1965), *aff'd*, 268 N.Y.S.2d 403 (App. Div. 2d Dep't 1966); *Newitt*, 117 N.Y.S.2d 711; *In re Anonymous*, 238 N.Y.S.2d 422 (Fam. Ct. Rensselaer County 1962).

²⁴⁰ *In re Mara*, 150 N.Y.S.2d 524, 525 (Dom. Rel. Ct. Queens County 1956). But see *DiStefano v. DiStefano*, 401 N.Y.S.2d 636, 638 (App. Div. 4th Dep't 1978); *In re Jane B.*, 380 N.Y.S.2d 848, 860-61 (Sup. Ct. Onondaga County 1976).

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.²⁴¹ But with the enactment of the New Deal welfare system in the mid-1930's, with its guarantee of support for destitute children,²⁴² 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....' "²⁴³ 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*.²⁴⁴ 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,"²⁴⁵ 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."²⁴⁶ 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

²⁴¹ See *In re Souers*, 238 N.Y.S. 738, 745 (Sur. Ct. Westchester County 1930).

²⁴² See LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935*, 253-306 (1994).

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)).

²⁴⁴ 290 N.Y.S. 500 (Dom. Rel. Ct. Queens County 1936), *aff'd*, 294 N.Y.S. 546 (App. Div. 2d Dep't), *rev'd*, 11 N.E.2d 548 (N.Y. 1937).

²⁴⁵ *Betz*, 294 N.Y.S. at 547-48.

²⁴⁶ *Id.* at 549.

adoption made "the adopted child the natural child of the adoptive parent"²⁴⁷ gave that "child the same legal relation to the foster parent as a child of his body,"²⁴⁸ and totally "divest[ed] the natural parents of the relation which they had theretofore sustained toward the infant"²⁴⁹

It followed from this holding that "a consummated adoption [was final and] unassailable" and that the natural parents had no capacity to reopen it.²⁵⁰ 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."²⁵¹ Similar interests of finality dictated that adopted children not be given access to information about their natural parents.²⁵²

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"²⁵³ involved the rules for abrogation of adoptions. Although occasional cases continued to occur in which abrogation was permitted,²⁵⁴ most cases made abrogation difficult to obtain.²⁵⁵ In particular, abrogation would not be

²⁴⁷ *Betz*, 11 N.E.2d at 550 (citing *Carpenter v. Buffalo Gen. Electric Co.*, 106 N.E. 1026 (N.Y. 1914)).

²⁴⁸ *Betz*, 11 N.E.2d at 550 (quoting *In re Cook's Estate*, 79 N.E. 991, 993 (N.Y. 1907)).

²⁴⁹ *Betz*, 11 N.E.2d at 550 (quoting *In re MacRae*, 81 N.E. 956, 957 (N.Y. 1907)).

²⁵⁰ *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).

²⁵¹ *People ex rel. Swasing v. Rebecca Talbot Perkins Adoption Soc'y, Inc.*, 296 N.Y.S. 778, 780 (Sup. Ct. Nassau County), *aff'd*, 298 N.Y.S. 500 (App. Div. 2d Dep't 1937).

²⁵² See, e.g., *In re Linda F.M.*, 409 N.Y.S.2d 638 (Sur. Ct. Bronx County 1978), *aff'd*, 442 N.Y.S.2d 963 (App. Div. 1st Dep't 1979), *aff'd*, 418 N.E.2d 1302 (N.Y. 1981).

²⁵³ *In re Weller's Will*, 165 N.Y.S.2d 531, 538 (Sup. Ct. Orange County 1957).

²⁵⁴ See *In re Anonymous*, 352 N.Y.S.2d 743, 745-46 (Sur. Ct. N.Y. County 1968); *In re Abrogation of Adoption of Anonymous*, 167 N.Y.S.2d 472, 473 (Sur. Ct. Ulster County 1957).

²⁵⁵ 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,²⁵⁶ on the ground that a natural father was better able than an adoptive father to support the child,²⁵⁷ 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."²⁵⁸

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.²⁵⁹

*People ex rel. Cocuzza v. Cobb*²⁶⁰ 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.²⁶¹ She found herself "in desperate circumstances ..., living in

²⁵⁶ See *In re Sherman's Adoption*, 78 N.Y.S.2d 794, 797 (Sur. Ct. Cortland County 1948).

²⁵⁷ See *In re Anonymous*, 213 N.Y.S.2d 10, 13-14 (Sur. Ct. Nassau County 1961).

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).

²⁶⁰ 94 N.Y.S.2d 616 (Sup. Ct. Bronx County 1950).

²⁶¹ *Cocuzza*, 94 N.Y.S.2d at 617.

squalor" and under conditions which one witness characterized "as filth."²⁶² 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."²⁶³ 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."²⁶⁴ 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.²⁶⁵ 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.²⁶⁶

*In re O.*²⁶⁷ 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."²⁶⁸ 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.²⁶⁹

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 couples²⁷⁰ with infants born out of wedlock—infants who would become, in every respect, the children of the adopting couple.²⁷¹ The

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Cocuzza*, 94 N.Y.S.2d at 619.

²⁶⁷ 337 N.Y.S.2d 138 (Fam. Ct. Richmond County 1972).

²⁶⁸ *Id.* at 141.

²⁶⁹ *Id.* at 141, 146.

²⁷⁰ On the hesitancy of courts to allow adoptions by single parents, see *In re Adoption of H.*, 330 N.Y.S.2d 235 (Fam. Ct. N.Y. County 1972); *In re Hipps*, 333 N.Y.S.2d 846 (App. Div. 1st Dep't 1972). *But see In re Anonymous' Adoption*, 31 N.Y.S.2d 595 (Sur. Ct. Monroe County 1941).

²⁷¹ See *In re Upjohn's Will*, 107 N.E.2d 492, 496-97 (N.Y. 1952); *cf. People ex rel. Ninesling 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

tutionality of using religion as "a relevant and important, though not controlling, consideration in the placement of children for adoption," *Dickens v. Ernesto*, 281 N.E.2d 153, 154 (N.Y. 1972), but that same court and the lower courts had also previously held that religious matching was not guaranteed, see *In re Adoption of Maxwell*, 151 N.E.2d 848, 853-54 (N.Y. 1958); *In re Adoption of Child*, 322 N.Y.S.2d 532, 533 (App. Div. 4th Dep't 1971); *In re Efrain C.*, 314 N.Y.S.2d 255, 262-66 (Fam. Ct. N.Y. County 1970).

²⁷² *In re Linda F.M.*, 409 N.Y.S.2d 638, 643 (Sur. Ct. Bronx County 1978), *aff'd*, 442 N.Y.S.2d 963 (App. Div. 1st Dep't 1979), *aff'd*, 418 N.E.2d 1302 (N.Y. 1981). Thus, once adoptable infants became scarce in the United States, procedures were developed to allow childless couples to find infants overseas and to facilitate their immigration to and adoption in the United States. See *In re Chin Thloot Har Wong*, 224 F. Supp. 155, 162-63 (S.D.N.Y. 1963); *In re Adoption of Pyung B.*, 371 N.Y.S.2d 993, 996 (Fam. Ct. Onondaga County 1975).

²⁷³ See *In re Adoption of Anonymous*, 143 N.Y.S.2d 90, 93-94 (App. Div. 2d Dep't 1955).

²⁷⁴ See *People ex rel. Anonymous v. Anonymous*, 179 N.E.2d 200, 201 (N.Y. 1961).

²⁷⁵ *People ex rel. Anonymous v. Rebecca Talbot Perkins Adoption Soc'y, Inc.*, 68 N.Y.S.2d 238, 241 (App. Div. 2d Dep't), *aff'd*, 74 N.E.2d 480 (N.Y. 1947).

²⁷⁶ *In re Selover*, 106 N.Y.S.2d 758, 759 (Sup. Ct. Queens County 1951) (citing *Queen v. Gynghall*, 2 Q.B.D. 232 (1893)).

²⁷⁷ *Id.*

of her present happy environment and place her with those who spurned her when her need was greatest.²⁷⁸ Likewise, another judge after finding that the adoptive parents had "nursed" the child "through a severe illness with loving care and at substantial financial expense,"²⁷⁹ 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,²⁸⁰ concluded that the natural mother had abandoned her son, even though she had hired an attorney in the effort to obtain his return.²⁸¹

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."²⁸² 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,²⁸³ and on the fact that she was to receive \$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 abandonment."²⁸⁴

The Second Department also agreed in a case where the natural mother, a divorcee 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.²⁸⁵ The court observed that, if she were granted custody of her illegitimate son, she "would have to give up her occupation ... or engage someone else to take care" of him.²⁸⁶ In con-

²⁷⁸ *Id.* at 760; *see also Ex parte O'Carroll*, 45 N.Y.S.2d 545 (Sup. Ct. Westchester County 1943).

²⁷⁹ *In re Marino's Adoption*, 5 N.Y.S.2d 328, 330 (Sur. Ct. Bronx County 1938).

²⁸⁰ *Id.* at 329-30.

²⁸¹ *Id.* at 330.

²⁸² *People ex rel. Hydock v. Greenberg*, 79 N.Y.S.2d 389, 391 (App. Div. 1st Dep't 1948).

²⁸³ *Id.* at 391-92.

²⁸⁴ *Id.* at 392.

²⁸⁵ *People ex rel. Anonymous v. Rebecca Talbot Perkins Adoption Soc'y, Inc.*, 68 N.Y.S.2d 238, 240-41 (App. Div. 2d Dep't), *aff'd*, 74 N.E.2d 480 (N.Y. 1947).

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."²⁸⁷ On this basis, the court concluded that the mother had freely executed an agreement to surrender her child.²⁸⁸

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."²⁸⁹ One case²⁹⁰ 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.²⁹¹ 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."²⁹² 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."²⁹³ 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."²⁹⁴ The court thereupon concluded that the document in question did not constitute a valid consent to adoption.²⁹⁵

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.²⁹⁶ The doctor arranged for the child to be adopted and, upon its

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *In re Adoption of Anonymous*, 88 N.Y.S.2d 829, 831 (Sur. Ct. Schenectady County 1949).

²⁹⁰ *Id.*

²⁹¹ *Id.* at 831-32.

²⁹² *Id.* at 831.

²⁹³ *Id.*

²⁹⁴ *Adoption of Anonymous*, 88 N.Y.S.2d at 832.

²⁹⁵ *Id.*

²⁹⁶ *People ex rel. Anonymous v. Anonymous*, 91 N.Y.S.2d 591, 592 (Sup. Ct. Kings County 1949).

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 corpus²⁹⁹ 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

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.

³⁰² *People ex rel. Roberts v. Kidder*, 242 N.Y.S. 108, 109 (Sup. Ct. Kings County 1929); accord *Gomez v. Lozado*, 356 N.E.2d 287, 288 (N.Y. 1976); *Isaac v. Greenberg*, 182 N.E.2d 290, 290 (N.Y. 1962); *Tyrrell v. Tyrrell*, 415 N.Y.S.2d 723, 724 (App. Div. 4th Dep't), *aff'd*, 393 N.E.2d 1041 (N.Y. 1979); *Isaacs v. Murcin*, 327 N.Y.S.2d 126, 127 (App. Div. 4th Dep't 1971); *In re Connors*, 321 N.Y.S.2d 737, 739-40 (App. Div. 4th Dep't 1971); *People ex rel. Meyrowitz v. Alpern*, 215 N.Y.S.2d 308, 309 (App. Div. 1st Dep't 1961); *People ex rel. Linton v. Linton*, 112 N.Y.S.2d 845, 846 (App. Div. 2d Dep't 1952); *People ex rel. Pizzitola v. Ciccossillo*, 108 N.Y.S.2d 447, 448 (App. Div. 2d Dep't 1951); *In re Boses*, 105 N.Y.S.2d 569, 569-70 (App. Div. 2d Dep't 1951); *People ex rel. Marks v. Grenier*, 293 N.Y.S. 364, 365 (App. Div. 1st Dep't), *aff'd*, 10 N.E.2d 577 (N.Y. 1937); *People ex rel. Hausler v. Stegmeier*, 267 N.Y.S. 428, 430 (App. Div. 2d Dep't 1933), *aff'd*, 191 N.E. 526 (N.Y. 1934); *Hoffmann v. Hoffmann*, 229 N.Y.S 489, 490 (App. Div. 1st Dep't 1928); *In re Custody of Dailey*, 204 N.Y.S.2d

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.³⁰³

The Court of Appeals ended this indecisiveness by taking a strong stand on the side of parental rights in the 1952 case of *People ex rel. Portnoy v. Strasser*.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.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.³⁰⁶ There was no custody battle when Robin's mother obtained a divorce from her father and was awarded custody of the child.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."³⁰⁸ At that point, the mater-

321, 323 (Sup. Ct. Nassau County 1960); *People ex rel. Hacker v. Strongson*, 141 N.Y.S.2d 859, 860 (Sup. Ct. Queens County 1955); *People ex rel. Elkins v. St. Coleman's Home*, 131 N.Y.S.2d 347, 349-50 (Sup. Ct. Albany County 1954); *People ex rel. Woolston v. Woolston*, 239 N.Y.S. 185 (Sup. Ct. Genesee County 1929). Courts have applied the same principle in cases where children were in the care of foster parents. See *In re Sanjivini K.*, 385 N.Y.S.2d 350, 351-52 (App. Div. 2d Dep't), *rev'd on other grounds*, 359 N.E.2d 1330 (N.Y. 1976); *State ex rel. Wallace v. Lhotan*, 380 N.Y.S.2d 250, 256 (App. Div. 2d Dep't 1976).

³⁰³ *Roberts*, 242 N.Y.S. at 110; *accord Bennett v. Jeffreys*, 356 N.E.2d 277, 282-83 (N.Y. 1976); *Guzzo v. Guzzo*, 411 N.Y.S.2d 408, 409-10 (App. Div. 2d Dep't 1978); *People ex rel. Gallinger v. Gallinger*, 391 N.Y.S.2d 248, 249 (App. Div. 4th Dep't 1977); *Laub v. Caltobelotta*, 219 N.Y.S.2d 363, 366 (Sup. Ct. Nassau County 1961); *In re Cleaves*, 175 N.Y.S.2d 736, 739-40 (App. Div. 3d Dep't 1958); *In re Hill*, 161 N.Y.S.2d 379, 381 (App. Div. 4th Dep't 1957); *In re Vanderbilt*, 281 N.Y.S. 171, 173-74 (App. Div. 1st Dep't 1935), *cert. denied sub nom.*, 297 U.S. 724 (1936); *In re Del Rosso*, 162 N.Y.S.2d 403, 403-04 (Sup. Ct. Nassau County 1956); *In re Bush*, 91 N.Y.S.2d 315, 325-27 (Sup. Ct. Steuben County 1949), *modified*, 103 N.Y.S.2d 341 (App. Div. 4th Dep't 1951); *Ex parte Szczygiel*, 51 N.Y.S.2d 699, 702-03 (Sup. Ct. Oneida County 1944); *People ex rel. Pitcher v. Powell*, 37 N.Y.S.2d 643, 643-44 (Sup. Ct. N.Y. County 1942); *People ex rel. Pascale v. Lanza*, 2 N.Y.S.2d 401, 403-04 (Sup. Ct. Queens County 1938); *cf. In re T.*, 271 N.E.2d 215 (N.Y. 1971); *Ex parte Vzga*, 104 N.Y.S.2d 93 (Sup. Ct. Columbia County 1951); *People ex rel. Brussel v. Brussel*, 119 N.Y.S.2d 149, 150 (App. Div. 1st Dep't), *modified*, 121 N.Y.S.2d 256 (App. Div. 1st Dep't 1953); *Dick v. Scarfia*, 183 N.Y.S.2d 737, 739 (Sup. Ct. Monroe County 1959); *Spade v. Spade*, 163 N.Y.S.2d 146, 149 (Sup. Ct. Monroe County 1957); *State v. Lascaris*, 322 N.Y.S.2d 426, 426-27 (App. Div. 4th Dep't 1971).

³⁰⁴ 104 N.E.2d 895 (N.Y. 1952).

³⁰⁵ *Id.* at 897.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

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.

³¹¹ *Portnoy*, 105 N.Y.S.2d 905, 905 (App. Div. 1st Dep't 1951), *rev'd*, 104 N.E.2d 895 (N.Y. 1952).

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.

³¹⁵ See Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, *supra* note 4, at 311-16.

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."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,"³¹⁸ the court further held that she had failed to sustain that burden.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."³²⁰

The rights-based language of the *Portnoy* case was cited prominently the next year in *People ex rel. Kropp v. Shepsky*,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."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."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.³²⁴

The Court of Appeals reversed.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"³²⁶ made her less worthy than an

³¹⁷ *People ex rel. Portnoy v. Strasser*, 104 N.E.2d 895, 896 (N.Y. 1952) (emphasis added).

³¹⁸ *Id.*

³¹⁹ *Id.* at 898.

³²⁰ *Id.* at 897-98.

³²¹ 113 N.E.2d 801 (N.Y. 1953).

³²² *Id.* at 802.

³²³ *Id.*

³²⁴ *Kropp*, 117 N.Y.S.2d 695 (App. Div. 2d Dep't 1952), *rev'd*, 113 N.E.2d 801 (N.Y. 1953).

³²⁵ *Kropp*, 113 N.E.2d 801 (N.Y. 1953).

³²⁶ *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.' " ³²⁷

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, ³²⁸ where there was special reason to fear that young, unwed mothers were often overreached, ³²⁹ courts usually held that mothers had not intended irrevocably to surrender their babies. ³³⁰ As a result, it was clear by the early 1970's that a

1953) (rejecting quoted assumption).

³²⁷ *Kropp*, 113 N.E.2d at 803; accord *People ex rel. Johnson v. Michael*, 240 N.Y.S.2d 779, 780 (Sup. Ct. N.Y. County 1963).

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).

³²⁹ See *In re Anonymous*, 170 N.Y.S.2d 178, 183 (Sup. Ct. Nassau County 1958) (discouraging practice of taking infant from natural mother at time when she is under threat of public disapproval and stigma); cf. *Hector M. v. Commissioner of Soc. Serv.*, 425 N.Y.S.2d 199, 207-08 (Fam. Ct. N.Y. County 1980) (upholding claim of overreaching by social worker to obtain adoption consent).

³³⁰ See *In re Jewish Child Care Ass'n of N.Y.*, 156 N.E.2d 700, 703 (N.Y. 1959); *In re Adoption of King*, 316 N.Y.S.2d 686, 686-87 (App. Div. 3d Dep't 1970); *People ex rel. Anonymous v. Louise Wise Serv.*, 250 N.Y.S.2d 507, 510 (App. Div. 1st Dep't 1964); *People ex rel. Anonymous v. Anonymous*, 195 N.Y.S.2d 1009, 1013 (Sup. Ct. Nassau County 1959); *Anonymous v. Anonymous*, 181 N.Y.S.2d 311, 314 (Sup. Ct. Erie County 1959); *In re Adoption of Anonymous*, 304 N.Y.S.2d 46, 50 (Sur. Ct. Suffolk County 1969); *In re Adoption of Anonymous*, 261 N.Y.S.2d 439, 442 (Fam. Ct. Dutchess County 1965); *In re Adoption of Anonymous*, 257 N.Y.S.2d 665, 666 (Sur. Ct. Westchester County 1965); *In re Adoption of Anonymous*, 223 N.Y.S.2d 792, 796 (Sur. Ct. Westchester County 1962); *In re Adoption of Van Allen*, 170 N.Y.S.2d 400, 401 (Erie County Ct. 1958). *But see People ex rel. Anonymous v. Anonymous*, 210 N.Y.S.2d 698, 705 (Sup. Ct. Kings County 1960), *rev'd*, 217 N.Y.S.2d 374 (App. Div. 2d Dep't), *rev'd*, 179 N.E.2d 200 (N.Y. 1961); *In re Mittenthal*, 235 N.Y.S.2d 729, 739 (Fam. Ct. Bronx County 1962); *In re Anonymous*, 177 N.Y.S.2d 784, 787 (Sur. Ct. Suffolk County 1958); *In re Knapp*, 156 N.Y.S.2d 668, 671 (Sur. Ct. Kings County 1956).

"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."³³¹

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.³³² Although some cases decided after 1972 upheld consents in accordance with the spirit of the new law,³³³ 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,"³³⁴ and, as a result, to allow natural parents to revoke their adoption consents.³³⁵ Indeed, a judge who processed adoptions in

³³¹ Spence-Chapin Adoption Serv. v. Polk, 274 N.E.2d 431, 433 (N.Y. 1971).

³³² See N.Y. DOM. REL. LAW § 115-b(2)(a) (McKinney 1988 & Supp. 1996).

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).

³³⁴ *In re Sanjivini K.*, 391 N.E.2d 1316, 1321 (N.Y. 1979); accord *In re Paul X.*, 393 N.Y.S.2d 1005, 1007 (App. Div. 3d Dep't 1977); *State ex rel. Wallace v. Lhotan*, 363 N.Y.S.2d 425, 431 (Sup. Ct. Nassau County 1974); *In re Denlow*, 384 N.Y.S.2d 621, 629-30 (Fam. Ct. Kings County 1976); cf. *Apgar v. Beauter*, 347 N.Y.S.2d 872, 876 (Sup. Ct. Tioga County 1973).

³³⁵ See *In re Adoption of Male M*, 428 N.Y.S.2d 489, 490 (App. Div. 2d Dep't 1980); *Franciska J. GG v. Duquette*, 407 N.Y.S.2d 750, 752 (App. Div. 3d Dep't 1978); *Spence-Chapin Adoption Serv. v. Polk*, 324 N.Y.S.2d 238, 241 (App. Div. 2d Dep't), *aff'd*, 274 N.E.2d 431 (N.Y. 1971); *Janet G. v. N.Y. Foundling Hosp.*, 403 N.Y.S.2d 646, 653 (Fam. Ct. N.Y. County 1978); cf. *In re Adoption by Emanuel T.*, 365 N.Y.S.2d 709, 715-17 (Fam. Ct. N.Y. County 1975). Judges sometimes remained prepared, however, to proceed with adoptions which they thought to be in "the best interests of the child" even though a natural parent opposed the adoption. See *In re Danielson*, 427 N.Y.S.2d 572, 575 (Fam. Ct. Rensselaer County 1980); accord *In re Roy*, 393 N.Y.S.2d 515, 517-18 (Fam. Ct. N.Y. County 1977); cf. *Bennett v. Marrow*, 399 N.Y.S.2d 697, 698-99 (App. Div. 2d Dep't 1977); *In re Kimberly P.*, 376 N.Y.S.2d 791, 795-96 (Fam. Ct. Rensselaer County 1975). Judges also refused to invalidate procedures for placing children in institutional or foster care when parents were found unfit. See *Boone v. Wyman*, 295 F. Supp. 1143, 1150 (S.D.N.Y. 1969), *aff'd*,

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 earlier³³⁹ 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 upholding³⁴¹ and sometimes invalidating out-of-state judgments.³⁴²

412 F.2d 857 (2d Cir. 1969), *cert. denied*, 396 U.S. 1024 (1970); *In re Jabril P.*, 431 N.Y.S.2d 899, 903 (Fam. Ct. N.Y. County 1980); *In re Jonathan D.*, 412 N.Y.S.2d 733, 739-40 (Fam. Ct. N.Y. County 1978).

³³⁶ See *In re Anonymous (G.)*, 393 N.Y.S.2d 900, 903 (Sur. Ct. N.Y. County 1977).

³³⁷ 12 N.E.2d 305 (N.Y. 1938); *accord* *Ansorge v. Armour*, 196 N.E. 546, 548 (N.Y. 1935).

³³⁸ *Glaser*, 12 N.E.2d at 306.

³³⁹ *Hynes v. Title Guarantee & Trust Co.*, 7 N.E.2d 719, 721 (N.Y. 1937).

³⁴⁰ *Krause v. Krause*, 26 N.E.2d 290, 292 (N.Y. 1940).

³⁴¹ See *Hansen v. Hansen*, 8 N.Y.S.2d 655, 656 (App. Div. 2d Dep't 1938); *Pike v. Pike*, 19 N.Y.S.2d 711, 712 (Sup. Ct. N.Y. County 1940); *Leviton v. Leviton*, 6 N.Y.S.2d 535, 541 (Sup. Ct. N.Y. County), *modified*, 4 N.Y.S.2d 992 (App. Div. 1st Dep't 1938); *cf.* *Robinson v. Robinson*, 3 N.Y.S.2d 882, 883 (App. Div. 2d Dep't), *aff'd*, 17 N.E.2d 448 (N.Y. 1938).

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*³⁴³ 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,³⁴⁴ 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,³⁴⁵ but holding such decrees void when one spouse had neither submitted, nor been properly served.³⁴⁶

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.³⁴⁷ In 1944, the Court of Appeals agreed³⁴⁸ and, as the lower courts continued to follow along,³⁴⁹ thereby nullified the opportunity that *Williams*

Kelly v. Kelly, 20 N.Y.S.2d 273, 274-75 (App. Div. 1st Dep't), *aff'd*, 31 N.E.2d 765 (N.Y. 1940); *Pignatelli v. Pignatelli*, 8 N.Y.S.2d 10, 18 (Sup. Ct. N.Y. County 1938); *In re Bingham's Estate*, 36 N.Y.S.2d 584, 586 (Sur. Ct. Kings County 1942), *aff'd*, 39 N.Y.S.2d 756 (App. Div. 2d Dep't 1943); *Gill v. Gill*, 18 N.Y.S.2d 114, 120 (Dom. Rel. Ct. Kings County 1940); *cf. Lederkremer v. Lederkremer*, 18 N.Y.S.2d 725, 728-29 (Sup. Ct. Kings County 1940).

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

³⁴⁴ See *In re Holmes' Estate*, 52 N.E.2d 424, 427-28 (N.Y. 1943).

³⁴⁵ See *Lynn v. Lynn*, 97 N.E.2d 748, 751 (N.Y.), *cert. denied*, 342 U.S. 849 (1951); *Shea v. Shea*, 60 N.Y.S.2d 823, 826 (App. Div. 2d Dep't 1946); *In re Jiranek*, 47 N.Y.S.2d 625, 626 (App. Div. 2d Dep't 1944); *Wickett v. Wickett*, 98 N.Y.S.2d 849, 851 (Sup. Ct. Suffolk County 1950); *Bane v. Bane*, 80 N.Y.S.2d 641, 644 (Sup. Ct. N.Y. County 1948); *Schacht v. Schacht*, 54 N.Y.S.2d 515, 516-17 (Sup. Ct. Queens County 1945), *rev'd*, 60 N.Y.S.2d 523 (App. Div. 2d Dep't), *rev'd*, 68 N.E.2d 433, 434 (N.Y. 1946); *Peri v. Groves*, 50 N.Y.S.2d 300, 306 (Sup. Ct. N.Y. County 1944).

³⁴⁶ See *Caldwell v. Caldwell*, 81 N.E.2d 60, 62 (N.Y. 1948); *Querze v. Querze*, 47 N.E.2d 423, 424 (N.Y. 1943).

³⁴⁷ See *Fondiller v. Fondiller*, 50 N.Y.S.2d 393, 395 (Sup. Ct. N.Y. County 1944); *Stevralia v. Stevralia*, 48 N.Y.S.2d 646, 650 (Sup. Ct. Kings County 1944); *Finan v. Finan*, 47 N.Y.S.2d 429, 433 (Sup. Ct. Nassau County 1944); *Forster v. Forster*, 46 N.Y.S.2d 320, 325-26 (Sup. Ct. Monroe County 1944); *Fondiller v. Fondiller*, 42 N.Y.S.2d 477, 478 (Sup. Ct. N.Y. County 1943), *aff'd*, 45 N.Y.S.2d 413 (App. Div. 1st Dep't 1943); *Baker v. Baker*, 40 N.Y.S.2d 445, 445-46 (Sup. Ct. N.Y. County 1943).

³⁴⁸ See *In re Lindgren's Estate*, 55 N.E.2d 849, 851 (N.Y. 1944).

³⁴⁹ See *Rose v. Rose*, 101 N.Y.S.2d 172, 173 (App. Div. 2d Dep't 1950); *Ravaud v. Ravaud*, 78 N.Y.S.2d 138, 140 (App. Div. 1st Dep't), *aff'd*, 83 N.E.2d 148 (N.Y. 1948); *Bardonek v. Bardonek*, 56 N.Y.S.2d 4, 5 (App. Div. 2d Dep't 1945); *Uvino v. Uvino*, 82 N.Y.S.2d 281, 282 (Sup. Ct. Kings County 1948); *Thalassinis v. Thalassinis*, 77 N.Y.S.2d 311, 313 (Sup. Ct. Westchester County 1947), *aff'd*, 81 N.Y.S.2d 155 (App. Div. Dep't 1948); *Lane v. Lane*, 68 N.Y.S.2d 712, 714 (Sup. Ct. N.Y. County 1947); *Pomerance v. Pomerance*, 61 N.Y.S.2d 227, 229 (Sup. Ct. Kings County 1946); *Sitterly v. Sitterly*, 58 N.Y.S.2d 424, 426 (Sup. Ct. Herkimer County 1945); *Palmer v.*

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*,³⁵⁰ 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."³⁵¹

However, when the Court of Appeals in a 1950 case³⁵² reiterated its 1944 holding authorizing inquiry into the jurisdiction of sister state courts, the Supreme Court reversed,³⁵³ declaring that the "faith and credit given is not to be niggardly but generous, full"³⁵⁴ and that "[l]ocal policy must at times be required to give way."³⁵⁵ 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,³⁵⁶ while others

Palmer, 53 N.Y.S.2d 784, 785 (Sup. Ct. Broome County 1945); *Hultz v. Hultz*, 51 N.Y.S.2d 301, 302 (Sup. Ct. Westchester County 1944); *Shuart v. Shuart*, 51 N.Y.S.2d 359, 362 (Sup. Ct. Erie County 1944); *Rosenberg v. Perles*, 50 N.Y.S.2d 24, 25 (Sup. Ct. Kings County 1944); *Morton v. Morton*, 99 N.Y.S.2d 155, 159-60 (Dom. Rel. Ct. Bronx County 1950); *Montague v. Montague*, 68 N.Y.S.2d 185, 190 (Dom. Rel. Ct. Kings County 1946); *cf. Michell v. Michell*, 96 N.Y.S.2d 357, 358 (App. Div. 2d Dep't 1950); *Gillespie v. Gillespie*, 62 N.Y.S.2d 271, 272-73 (Sup. Ct. N.Y. County 1946). On occasion, New York courts determined that out-of-state tribunals had acquired jurisdiction, and then they enforced the out-of-state decrees. *See Adler v. Adler*, 81 N.Y.S.2d 797, 799-800 (Dom. Rel. Ct. N.Y. County 1948); *Liss v. Liss*, 77 N.Y.S.2d 242, 244-45 (Dom. Rel. Ct. N.Y. County 1948).

³⁵⁰ *See supra* note 8 and accompanying text.

³⁵¹ *Ruderman v. Ruderman*, 82 N.Y.S.2d 479, 481 (Sup. Ct. N.Y. County 1948), *aff'd*, 89 N.Y.S.2d 894 (App. Div. 1st Dep't 1949).

³⁵² *In re Johnson's Estate*, 92 N.E.2d 44 (N.Y. 1950), *rev'd sub. nom.*, 340 U.S. 581 (1951).

³⁵³ *Johnson v. Muelberger*, 340 U.S. 581 (1951).

³⁵⁴ *Id.* at 584.

³⁵⁵ *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).

³⁵⁶ *See Edelman v. Edelman*, 161 N.Y.S.2d 717, 718 (App. Div. 2d Dep't 1957); *Snyder v. Snyder*, 143 N.Y.S.2d 12, 13 (App. Div. 3d Dep't 1955) (*per curiam*); *Hartman v. Hartman*, 122 N.Y.S.2d 372, 373 (App. Div. 2d Dep't 1953); *Goshin v. Goshin*, 108 N.Y.S.2d 18, 18-19 (App. Div. 2d Dep't 1951); *Schwartz v. Schwartz*, 219 N.Y.S.2d 751, 752 (Sup. Ct. Kings County 1961); *In re Veltri's Estate*, 113 N.Y.S.2d 146, 154 (Sur. Ct. Kings County 1952); *Astor v. Astor*, 128 N.Y.S.2d 639, 641-42 (Dom. Rel. Ct. Bronx County 1954); *In re Cahall*, 143 N.Y.S.2d 511, 514 (Children's

reached the opposite result.³⁵⁷ Cases addressing other issues, such as the effect of out-of-state custody and support decrees,³⁵⁸

Ct. Schenectady County 1955); *see also* Harris v. Harris, 110 N.Y.S.2d 824, 826 (App. Div. 4th Dep't 1952); *cf.* Schoenbrod v. Siegler, 230 N.E.2d 638, 640 (N.Y. 1967); Aghnides v. Aghnides, 159 N.Y.S.2d 343, 347-48 (Sup. Ct. N.Y. County), *aff'd*, 167 N.Y.S.2d 201 (App. Div. 1st Dep't 1957), *cert. denied*, 358 U.S. 823 (1958); Niver v. Niver, 111 N.Y.S.2d 889, 890-91 (Sup. Ct. Kings County 1951).

³⁵⁷ *See* Magowan v. Magowan, 226 N.E.2d 304, 305 (N.Y. 1967); Weisner v. Weisner, 218 N.E.2d 300, 301 (N.Y. 1966) (*per curiam*); Vanderbilt v. Vanderbilt, 135 N.E.2d 553, 555 (N.Y. 1956), *aff'd*, 354 U.S. 416 (1957); Maray v. Maray, 313 N.Y.S.2d 488, 489 (App. Div. 2d Dep't 1970); Guibord v. Guibord, 153 N.Y.S.2d 457, 459 (App. Div. 1st Dep't 1956); La Barr v. La Barr, 125 N.Y.S.2d 714 (App. Div. 3d Dep't 1953); Wasserman v. Wasserman, 268 N.Y.S.2d 200, 201 (Sup. Ct. Oneida County 1966); Dominick v. Dominick, 205 N.Y.S.2d 503, 503 (Sup. Ct. Nassau County 1960); Phillips v. Phillips, 180 N.Y.S.2d 475, 481-82 (Sup. Ct. N.Y. County 1958); Hollis v. Hollis, 159 N.Y.S.2d 917 (Sup. Ct. Monroe County 1957); Bruce v. Bruce, 129 N.Y.S.2d 454 (Sup. Ct. Kings County 1954); Algazy v. Algazy, 129 N.Y.S.2d 204 (Sup. Ct. N.Y. County 1954).

³⁵⁸ *Compare* Forbes v. Galway, 266 F. Supp. 762, 765 (S.D.N.Y. 1967) (declaring New Jersey alimony award not enforceable in New York if award subject to retroactive modification in New Jersey); Berlin v. Berlin, 235 N.E.2d 109, 112-13 (N.Y. 1967) (modifying Maryland custody decree), *cert. denied*, 393 U.S. 840 (1968); Bachman v. Mejias, 136 N.E.2d 866, 868-69 (N.Y. 1956) (denying full faith and credit to Puerto Rican custody decree when children physically were in New York); *Vanderbilt*, 135 N.E.2d at 558 (allowing suit for support despite prior Nevada decree); Langerman v. Langerman, 104 N.E.2d 857, 860-61 (N.Y. 1952) (allowing suit for increase in child support); Appelblom v. Appelblom, 412 N.Y.S.2d 517, 519 (App. Div. 4th Dep't 1979) ("settled that ... full faith and credit ... does not apply to custody decrees"); Fishman v. Fishman, 400 N.Y.S.2d 844, 845 (App. Div. 2d Dep't 1977) (denying effect to California support decree); Duke v. Duke, 322 N.Y.S.2d 261, 263 (App. Div. 1st Dep't 1971) (modifying Connecticut custody decree on basis of new facts); Bittson v. Bittson, 182 N.Y.S.2d 104, 105 (App. Div. 2d Dep't 1959) (refusing to honor Portuguese custody award); MacKay v. MacKay, 110 N.Y.S.2d 82, 87 (App. Div. 1st Dep't 1952) (refusing to honor Nevada custody decree); Quintana v. Quintana, 101 N.Y.S.2d 593, 594 (Sup. Ct. N.Y. County 1950) (refusing to honor Cuban custody decree); Fernández v. Rodríguez, 411 N.Y.S.2d 134, 137 (Sup. Ct. Monroe County 1978) (refusing to honor Puerto Rican default custody decree), *with* Martin v. Martin, 380 N.E.2d 305 (N.Y. 1978) (enforcing Florida custody decree); *In re Lang*, 193 N.Y.S.2d 763, 765 (App. Div. 1st Dep't 1959) (upholding Swiss custody decree), *aff'd*, 166 N.E.2d 861 (N.Y. 1960); Marshall v. Marshall, 113 N.Y.S.2d 602, 603 (App. Div. 2d Dep't 1952) (enforcing Florida support order), *aff'd*, 110 N.E.2d 889 (N.Y. 1953); Porges v. Louis-Dreyfus, 113 N.Y.S.2d 86 (App. Div. 1st Dep't 1952) (enforcing French support decree); Stewart v. Stewart, 190 N.Y.S. 369, 370 (App. Div. 1st Dep't 1921) (upholding Nevada support award); *In re Wasserman*, 203 N.Y.S.2d 554 (Sup. Ct. Westchester County 1960) (refusing to alter Alabama custody decree); Stern v. Stern, 132 N.Y.S.2d 817, 818-19 (Sup. Ct. Kings County 1954) (requiring application to Florida courts to change Florida support order); Fuchs v. Fuchs, 106 N.Y.S.2d 779, 781 (Sup. Ct. Nassau County 1951) (holding that Arizona custody decree was entitled to full faith and credit); *In re Forbell*, 103 N.Y.S.2d 242 (Sup. Ct. Kings County 1950) (refusing to alter Florida custody decree), *aff'd*, 105 N.Y.S.2d 992 (App. Div. 1st Dep't 1951); *People ex rel. McGrath v. Gimler*, 60 N.Y.S.2d 622, 624 (Sup. Ct. Kings County 1946) (refusing to alter Wyoming custody

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.³⁵⁹ Other cases, however, recognized Mexican decrees when one spouse had appeared in Mexico and the other had been represented by an attorney,³⁶⁰ or, at the very least, estopped spouses who had participated in obtaining Mexican divorces from challenging their validity.³⁶¹

*Rosenstiel v. Rosenstiel*³⁶² 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.³⁶³ 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

decrees), *aff'd*, 62 N.Y.S.2d 846 (App. Div. 2d Dep't); *Armstrong v. Grimes*, 334 N.Y.S.2d 558 (Fam. Ct. N.Y. County 1972) (refusing to amend Texas custody decree). Other cases dealt with uniform laws designed to assist in support and custody cases transcending state lines. See *Landes v. Landes*, 135 N.E.2d 562, 567 (N.Y. 1956) (holding constitutional reciprocal enforcement of minor's support under California Uniform Reciprocal Enforcement of Support Act and New York Uniform Support of Dependents Law); *Pitrowski v. Pitrowski*, 412 N.Y.S.2d 316, 319 (Sup. Ct. Nassau County 1979) (holding that New York matrimonial long arm statute does not provide basis for in personam jurisdiction over non-resident spouse).

³⁵⁹ See *Maltese v. Maltese*, 224 N.Y.S.2d 946, 947-48 (Sup. Ct. Bronx County 1962); *Johannsen v. Kennedy*, 198 N.Y.S.2d 648, 649-50 (Sup. Ct. N.Y. County 1960); *Verdone v. Verdone*, 188 N.Y.S.2d 689, 690 (Sup. Ct. Suffolk County 1959); *Vesci v. Vesci*, 181 N.Y.S.2d 221, 222 (Sup. Ct. Kings County 1958); *Liebman v. Liebman*, 169 N.Y.S.2d 510, 512 (Sup. Ct. Queens County 1957); *Alfaro v. Alfaro*, 142 N.Y.S.2d 863, 864-65 (Sup. Ct. Westchester County 1955).

³⁶⁰ See *Busk v. Busk*, 229 N.Y.S.2d 904, 905-06 (Sup. Ct. Nassau County), *modified*, 236 N.Y.S.2d 336 (App. Div. 2d Dep't 1962); *Skolnick v. Skolnick*, 204 N.Y.S.2d 63, 64-65 (Sup. Ct. Kings County 1960); *Mountain v. Mountain*, 109 N.Y.S.2d 828, 830 (Sup. Ct. Nassau County 1952); *cf. Hytell v. Hytell*, 254 N.Y.S.2d 851, 855 (Sup. Ct. Nassau County 1964).

³⁶¹ See *Deshler v. Rivas*, 108 N.Y.S.2d 837, 841 (Sup. Ct. N.Y. County 1951), *aff'd*, 113 N.Y.S.2d 673 (App. Div. 1st Dep't 1952).

³⁶² 209 N.E.2d 709 (N.Y. 1965), *cert. denied*, 384 U.S. 971 (1966).

³⁶³ 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*, 503 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"³⁶⁴ 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."³⁶⁵

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*,³⁶⁶ 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*,³⁶⁷ 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*³⁶⁸ 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

³⁶⁴ *Rosensteil*, 209 N.E.2d at 720.

³⁶⁵ *Id.* at 714.

³⁶⁶ 142 N.Y.S.2d 591, 593 (Sup. Ct. Onondaga County 1955); accord *People ex rel. Kay v. Kay*, 252 N.Y.S. 518 (Magis. Ct. N.Y. County 1931).

³⁶⁷ 6 N.Y.S.2d 544 (Sur. Ct. N.Y. County 1938).

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.'"³⁶⁹

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"³⁷⁰ 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*.³⁷¹ 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.³⁷²

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."³⁷³

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

³⁶⁹ *Id.* at 394.

³⁷⁰ *Id.*

³⁷¹ 256 N.Y.S.2d 615 (App. Div. 1st Dep't), *rev'd*, 211 N.E.2d 817 (N.Y. 1965).

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."³⁷⁴ 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"³⁷⁵ 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,³⁷⁶ 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,"³⁷⁷ 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.³⁷⁸

Decided in the same year by the same four-judge majority,³⁷⁹ 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 1966-67,³⁸⁰ which finally brought about a "modernization and liberalization of ...

³⁷⁴ *Kober*, 256 N.Y.S.2d at 618.

³⁷⁵ *Darling v. Darling*, 105 N.Y.S.2d 475, 478 (Sup. Ct. Ulster County 1951).

³⁷⁶ *See Kober*, 211 N.E.2d at 821.

³⁷⁷ *Id.*

³⁷⁸ *See Nelson, The Changing Meaning of Equality in Twentieth-Century Constitutional Law, supra* note 4, at 39-52, 71-76 (outlining evolution of judicial attitudes towards minorities and towards minorities' struggle for equality).

³⁷⁹ Judges Bergan, Dye, Fuld, and VanVoorhis constituted the majority of the seven-member court in both *Rosenstiel* and *Kober*.

³⁸⁰ *See* Laws of N.Y., ch. 648 (1967).

[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

³⁸¹ *Yoli v. Yoli*, 285 N.Y.S.2d 470, 474 (Sup. Ct. Kings County 1967).

³⁸² Chapter 263 of the Laws of New York, enacted in 1935, was the forerunner of the family law legislation enacted in the 1960's. The 1935 legislation eliminated the causes of action of criminal conversation and seduction for adultery, as well as the causes of action for alienation of affection and breach of promise to marry. See Laws of N.Y., ch. 263 (1935). The constitutionality of the legislation, which put an end to a good deal of preexisting caselaw, see *Oppenheim v. Kridel*, 140 N.E. 227 (N.Y. 1923); *Leonard v. Bulkley*, 229 N.Y.S. 481 (App. Div. 1st Dep't 1928); *Deming v. Leising*, 212 N.Y.S. 213 (App. Div. 4th Dep't 1925); *Modica v. Martino*, 207 N.Y.S. 479 (App. Div. 2d Dep't 1925); *Botwinick v. Annenberg*, 198 N.Y.S. 151 (App. Div. 2d Dep't 1923); *Madison v. Neuburger*, 224 N.Y.S. 461 (Sup. Ct. N.Y. County 1927); *Buteau v. Naegeli*, 208 N.Y.S. 504 (Sup. Ct. N.Y. County 1925), *aff'd as modified*, 215 N.Y.S. 823 (App. Div. 1st Dep't 1926), was upheld by the Court of Appeals in *Fearon v. Treanor*, 5 N.E.2d 815 (N.Y. 1936), and *Hanfgarn v. Mark*, 8 N.E.2d 47 (N.Y.), *cert. denied*, 302 U.S. 641 (1937). New York remained willing, however, to enforce judgments rendered by sister-state courts on similar causes of action in their own states. See *Parker v. Hoefer*, 142 N.E.2d 194 (N.Y.), *cert. denied*, 355 U.S. 833 (1957).

³⁸³ See *Pierone v. Piereone*, 293 N.Y.S.2d 256, 258 (Sup. Ct. Schenectady County 1968).

³⁸⁴ *Orloff v. Orloff*, 373 N.Y.S.2d 888, 890 (App. Div. 3d Dep't 1975).

³⁸⁵ *Id.*

³⁸⁶ *Filippi v. Filippi*, 384 N.Y.S.2d 1010, 1011 (App. Div. 2d Dep't 1976).

³⁸⁷ See *Hessen v. Hessen*, 308 N.E.2d 891 (N.Y. 1974); *Denny v. Denny*, 409 N.Y.S.2d 443, 444 (App. Div. 3d Dep't 1978), *aff'd*, 401 N.E.2d 213 (N.Y. 1979); *Underwood v. Underwood*, 391 N.Y.S.2d 213, 213 (App. Div. 4th Dep't 1977); *Gandelman v. Gandelman*, 331 N.Y.S.2d 977, 978 (App. Div. 2d Dep't 1972); *Rios v. Rios*, 311 N.Y.S.2d 664, 666 (App. Div. 1st Dep't 1970), *aff'd*, 277 N.E.2d 786 (N.Y. 1971); *Wenderlich v. Wenderlich*, 311 N.Y.S.2d 797, 798 (App. Div. 4th Dep't 1970).

³⁸⁸ See *McPherson v. McPherson*, 385 N.Y.S.2d 177, 177 (App. Div. 3d Dep't 1976); *Chiarello v. Chiarello*, 381 N.Y.S.2d 156 (App. Div. 3d Dep't 1976); *Cinquemani v. Cinquemani*, 346 N.Y.S.2d 875, 877 (App. Div. 2d Dep't 1973); *Yaron v. Yaron*, 378 N.Y.S.2d 285, 288 (Sup. Ct. N.Y. County 1975); *Woicik v. Woicik*, 321 N.Y.S.2d 5, 7 (Sup. Ct. N.Y. County 1971).

³⁸⁹ See *Chiarello*, 381 N.Y.S.2d at 156, 157; *Armstrong v. Armstrong*, 365 N.Y.S.2d 308, 309 (App. Div. 4th Dep't 1975); *Good v. Good*, 323 N.Y.S.2d 228, 229 (App. Div. 4th Dep't 1971); *cf. Anderson v. Anderson*, 395 N.Y.S.2d 743, 744 (App. Div. 3d Dep't 1977); *Bloom v. Bloom*, 384 N.Y.S.2d 281, 282 (App. Div. 4th Dep't 1976).

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"³⁹¹ 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 cruelty³⁹² 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

mani, 346 N.Y.S.2d at 877 (App. Div. 2d Dep't 1973); *Mante v. Mante*, 309 N.Y.S.2d 944, 947-48 (App. Div. 2d Dep't 1970). *But see* *Jorgensen v. Jorgensen*, 413 N.Y.S.2d 179, 180 (App. Div. 2d Dep't 1979).

³⁹¹ *Echevarria v. Echevarria*, 353 N.E.2d 565, 566 (N.Y. 1976).

³⁹² *See Fomenko v. Fomenko*, 374 N.Y.S.2d 882, 884 (App. Div. 4th Dep't 1975); *John W.S. v. Jeanne F.S.*, 367 N.Y.S.2d 814, 817 (App. Div. 2d Dep't 1975); *Zagarow v. Zagarow*, 430 N.Y.S.2d 247, 249 (Sup. Ct. Suffolk County 1980).

³⁹³ *See Wang v. Wang*, 386 N.Y.S.2d 922, 923-24 (Sup. Ct. N.Y. County 1976).

³⁹⁴ *See Wolfson v. Wolfson*, 331 N.Y.S.2d 844, 846 (App. Div. 2d Dep't 1972).

³⁹⁵ *See DeAngelis v. DeAngelis*, 388 N.Y.S.2d 744, 745 (App. Div. 4th Dep't 1976); *Rosenbaum v. Rosenbaum*, 288 N.Y.S.2d 285, 289 (Sup. Ct. N.Y. County 1968); *Kaplan v. Kaplan*, 329 N.Y.S.2d 750, 751 (Sup. Ct. Kings County 1972). Subsequently, the period was changed to one year. *See Rossiter v. Rossiter*, 399 N.Y.S.2d 596, 597 (Sup. Ct. Kings County 1977).

³⁹⁶ *See Dudzick v. Dudzick*, 378 N.Y.S.2d 234, 238 (Sup. Ct. Suffolk County 1975). Perhaps it also continued to constitute cruelty. *See Duke v. Black*, 353 N.Y.S.2d 680, 682 (Fam. Ct. N.Y. County 1974).

³⁹⁷ *See Schine v. Schine*, 286 N.E.2d 449 (N.Y. 1972).

³⁹⁸ *See Schlachet v. Schlachet*, 378 N.Y.S.2d 308, 311 (Sup. Ct. Kings County 1976).

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

⁴⁰⁰ *Lee v. Lee*, 378 N.Y.S.2d 459, 461 (App. Div. 2d Dep't 1976).

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-

⁴⁰¹ See *Anonymous v. Anonymous*, 395 N.Y.S.2d 103, 104 (App. Div. 2d Dep't 1977); *Recht v. Recht*, 321 N.Y.S.2d 395, 396 (App. Div. 1st Dep't 1971) (per curiam); *But see Bigelow v. Bigelow*, 308 N.Y.S.2d 618, 621 (Sup. Ct. Jefferson County 1969).

⁴⁰² See *Christian v. Christian*, 365 N.E.2d 849, 853 (N.Y. 1977); *Jay v. Jay*, 323 N.Y.S.2d 387, 388 (Sup. Ct. Niagara County 1971); *Adelman v. Adelman*, 296 N.Y.S.2d 999, 1003 (Sup. Ct. Queens County 1969). *But see Church v. Church*, 296 N.Y.S.2d 716, 718-19 (Sup. Ct. Westchester County 1968).

⁴⁰³ See *Gleason v. Gleason*, 256 N.E.2d 513, 515 (N.Y. 1970); *Pearson v. Pearson*, 311 N.Y.S.2d 749, 751 (App. Div. 2d Dep't 1970) (dictum).

⁴⁰⁴ See *Christian*, 365 N.E.2d at 854; *Blauner v. Blauner*, 400 N.Y.S.2d 335, 336 (App. Div. 1st Dep't 1977).

⁴⁰⁵ See *Timmins v. Timmins*, 375 N.Y.S.2d 71, 72 (App. Div. 4th Dep't 1975); *Wilkins v. Wilkins*, 382 N.Y.S.2d 240, 242 (Sup. Ct. Kings County 1976); *Roth v. Roth*, 344 N.Y.S.2d 739, 742 (Sup. Ct. Nassau County 1973); *Littlejohns v. Littlejohns*, 349 N.Y.S.2d 462, 465 (Sup. Ct. N.Y. County 1972), *aff'd*, 348 N.Y.S.2d 959 (App. Div. 1st Dep't 1973); *Van Vort v. Van Vort*, 310 N.Y.S.2d 641, 644 (Sup. Ct. Queens County 1970). A separation agreement had to be properly executed in order to provide an adequate basis for a subsequent divorce. See *Cicerale v. Cicerale*, 382 N.Y.S.2d 430, 431 (Sup. Ct. Queens County 1976), *aff'd*, 387 N.Y.S.2d 1022 (App. Div. 2d Dep't 1976).

⁴⁰⁶ See *Orange v. Orange*, 337 N.Y.S.2d 62, 63-65 (Sup. Ct. Albany 1972).

⁴⁰⁷ See *Cerami v. Cerami*, 408 N.Y.S.2d 591, 595 (Sup. Ct. Monroe County 1978); *Colascione v. Colascione*, 291 N.Y.S.2d 559, 561 (Sup. Ct. Nassau County 1968). Prior law had given a spouse a right to terminate the marriage when the other spouse was sentenced to life imprisonment. See *Zizzo v. Zizzo*, 247 N.Y.S.2d 38, 40 (Sup. Ct. Kings County 1964).

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."⁴⁰⁹ As a result, annulment cases almost disappeared from the State's jurisprudence.⁴¹⁰ 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.⁴¹¹

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.

⁴⁰⁹ *Bruno v. Bruno*, 334 N.Y.S.2d 242, 248 (Sup. Ct. Kings County 1972), *modified*, 355 N.Y.S.2d 817 (App. Div. 2d Dep't 1974).

⁴¹⁰ For a few of those cases, see *Shamsee v. Shamsee*, 381 N.Y.S.2d 127 (App. Div. 2d Dep't 1976); *Link v. Link*, 369 N.Y.S.2d 496, 497 (App. Div. 2d Dep't 1975); *In re Estate of Lueke*, 358 N.Y.S.2d 932 (Sur. Ct. Erie County 1974), *aff'd*, 373 N.Y.S.2d 1003 (App. Div. 4th Dep't 1975).

⁴¹¹ Such issues continued to arise, for example, in regard to old marriages which at least one spouse had sought to terminate prior to the 1967 legislation; there was then a question whether the attempt at termination had succeeded. See *In re Joseph's Estate*, 265 N.E.2d 756, 757-58 (N.Y. 1970); *De Marco v. De Marco*, 426 N.Y.S.2d 127, 128 (App. Div. 3d Dep't 1980). Another issue concerned the effect of out-of-state divorces on property rights in New York; see *Fishman v. Fishman*, 366 N.E.2d 862, 862 (N.Y. 1977); *Blizniak v. Blizniak*, 425 N.Y.S.2d 421, 422 (App. Div. 4th Dep't 1980); *Zilmer v. Silver*, 398 N.Y.S.2d 108, 109 (Sup. Ct. Nassau County 1977), *rev'd*, 402 N.Y.S.2d 446 (App. Div. 2d Dep't 1978), or issues of support. Occasional cases also arose when New Yorkers turned to foreign courts for a speedier divorce than they could obtain at home. See *Greschler v. Greschler*, 414 N.E.2d 694, 696 (N.Y. 1980); *Feinberg v. Feinberg*, 351 N.E.2d 725, 727 (N.Y. 1976); *Santamaria v. Santamaria*, 345 N.Y.S.2d 906, 911-12 (Sup. Ct. Nassau County 1973).

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. Feel*, 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 Dep't of Soc. Serv. v. Dusharm*, 382 N.Y.S.2d 428, 429 (Fam. Ct. St. Lawrence County 1976); *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*, 373 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."⁴¹⁴

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,"⁴¹⁵ 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,"⁴¹⁶ 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.⁴¹⁷ 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-

N.E.2d 548, 549 (N.Y. 1947); *accord* Commissioner of Soc. Serv. of N.Y. v. S., 348 N.Y.S.2d 831, 838 (Fam. Ct. Bronx County 1973), although "criminal in form," *Clausi*, 73 N.E.2d at 549.

⁴¹⁴ *Linda WW v. William XX*, 415 N.Y.S.2d 275, 275 (App. Div. 3d Dep't 1979); *accord* "HH" v. "II," 286 N.E.2d 717, 718-19 (N.Y. 1972); *In re Hawthorne*, 298 N.Y.S.2d 522, 523 (App. Div. 4th Dep't 1969); Commissioner of Welfare v. Wendtland, 268 N.Y.S.2d 547, 549 (App. Div. 1st Dep't 1966); *Schleimer v. Swann*, 402 N.Y.S.2d 897, 898 (Fam. Ct. Rockland County 1978). On the admissibility of particular sorts of evidence, see Dep't of Pub. Welfare of City of N.Y. v. Hamilton, 126 N.Y.S.2d 240, 241 (App. Div. 1st Dep't 1953); *Lascaris v. Lardeo*, 417 N.Y.S.2d 665, 668 (Fam. Ct. Onondaga County 1979); *A v. B*, 336 N.Y.S.2d 839, 844 (Fam. Ct. Niagara County 1972); *but see Elizabeth H.*, 429 N.Y.S.2d at 1007; *Anonymous v. Anonymous*, 348 N.Y.S.2d 938, 939 (Fam. Ct. Rockland County 1973). The mixed nature of the proceedings led courts to disagree over whether an indigent defendant had a right to the assignment of free counsel. *Compare In re S.*, 347 N.Y.S.2d 744, 745-46 (App. Div. 2d Dep't 1973); *M. v. J.*, 315 N.Y.S.2d 271, 272 (App. Div. 2d Dep't 1970); Dep't of Soc. Serv. v. Witzel, 398 N.Y.S.2d 86, 87 (Fam. Ct. Rockland County 1977); *Trent v. Loru*, 292 N.Y.S.2d 524, 528-29 (Fam. Ct. Bronx County 1968), *with Miller v. Gordon*, 397 N.Y.S.2d 500, 501 (App. Div. 4th Dep't 1977); *Bido v. Albizu*, 318 N.Y.S.2d 547, 548 (App. Div. 2d Dep't 1971). Subsequent legislation, however, provided for assignment of counsel. *See In re Lascaris*, 432 N.Y.S.2d 426, 428 (Fam. Ct. Onondaga County 1980); *Cheryl B. v. Alfred W. D.*, 418 N.Y.S.2d 271, 272 (Fam. Ct. N.Y. County 1979). Courts also disagreed over whether any inference could be drawn from a defendant's exercise of his right not to testify. *Compare Commissioner of Soc. Serv. of N.Y.*, 348 N.Y.S.2d at 835-40, *with Tilson v. Bark*, 275 N.Y.S.2d 600, 602 (Fam. Ct. N.Y. County 1966). On the right not to testify, see generally *Morizzo v. Arthur N.*, 415 N.Y.S.2d 442, 443 (App. Div. 2d Dep't 1979).

⁴¹⁵ *Edick v. Martin*, 312 N.Y.S.2d 427, 428 (App. Div. 4th Dep't 1970).

⁴¹⁶ *Snyder v. Davis*, 385 N.Y.S.2d 901, 901-02 (App. Div. 4th Dep't 1976).

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,⁴¹⁸ would also be acquitted if other men had access to the mother at the approximate time of conception.⁴¹⁹

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."⁴²⁰ 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."⁴²¹

Nor were mothers of illegitimate children more highly regarded, as is illustrated by a 1950 case⁴²² involving two mothers of twelve illegitimate children:

This case illustrates the many burdens which are imposed upon

⁴¹⁸ See *Renee G. v. William H.*, 360 N.Y.S.2d 514, 515 (App. Div. 3d Dep't 1974), *aff'd*, 351 N.E.2d 430 (N.Y. 1976).

⁴¹⁹ See *Margie L. v. Gary M.*, 361 N.Y.S.2d 741, 742-43 (App. Div. 3d Dep't 1974); *accord* *Dep't of Soc. Serv. of Orange County v. Alan K.*, 415 N.Y.S.2d 447, 448 (App. Div. 2d Dep't 1979); *Kerwin v. Collins*, 381 N.Y.S.2d 68, 68 (App. Div. 1st Dep't 1976); *Boatwright v. Jones*, 325 N.Y.S.2d 734, 735 (App. Div. 1st Dep't 1971). On the other hand, women whose conduct displayed "considerable sexual looseness," *Commissioner of Soc. Serv. of N.Y.*, 348 N.Y.S. 2d at 840, would often win judgments. Thus, a woman who testified to having sexual relations with no one but the alleged father around the time of conception won her case when the alleged father admitted having relations with the woman two or three times per week over an extended period of time, even though he denied having relations with her during the weeks in question. *Stenzel v. D'Agostino*, 376 N.Y.S.2d 274, 275 (App. Div. 4th Dep't 1975); *cf.* *A v. B*, 301 N.Y.S.2d 377, 378 (App. Div. 3d Dep't 1969), *aff'd*, 271 N.E.2d 234 (N.Y. 1971). Another woman won a case in which a man's denial of ever having sex with her was contradicted by a witness who "testified that they had been seen sleeping in bed together," *St. Lawrence County Dep't of Soc. Serv. v. David SS*, 432 N.Y.S.2d 651, 653 (App. Div. 3d Dep't 1980), while yet a third woman won when she testified to intercourse with the defendant and he failed to take the witness stand. *Jay on behalf of X v. Y*, 367 N.Y.S.2d 333, 334 (App. Div. 3d Dep't 1975). Of course, men who had admitted paternity were held to their admissions. See *Ferro v. Bersani*, 433 N.Y.S.2d 666, 667 (App. Div. 4th Dep't 1980), *aff'd*, 452 N.E.2d 1267 (N.Y. 1983); *cf.* *First v. Lewis*, 417 N.Y.S.2d 194, 195 (Fam. Ct. Queens County 1979); *In re Johnson's Estate*, 348 N.Y.S.2d 315, 318 (Sur. Ct. Bronx County 1973).

⁴²⁰ *Grillo v. Sherman-Stalder Co.*, 186 N.Y.S. 810, 812 (App. Div. 3d Dep't 1921), *aff'd*, 132 N.E. 913 (N.Y. 1921).

⁴²¹ *In re Vincent's Estate*, 71 N.Y.S.2d 165, 168 (Sur. Ct. Kings County 1947).

⁴²² *In re Jones*, 98 N.Y.S.2d 524, 525 (Child. Ct. Westchester County 1950).

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....⁴²³

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.⁴²⁴ 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,"⁴²⁵ 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....⁴²⁶

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."⁴²⁷

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-

⁴²³ *Id.* at 526.

⁴²⁴ *Id.*

⁴²⁵ *Id.* at 527.

⁴²⁶ *Id.* at 526.

⁴²⁷ *Jones*, 98 N.Y.S.2d at 526.

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*,⁴²⁸ 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."⁴²⁹ 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 pregnancy⁴³⁰ or marriage⁴³¹ or even if she turned out not to be the virgin he had expected her to be.⁴³² In contrast, wives were denied annulments on account of prior undisclosed sexual activities of their husbands,⁴³³ even if those activities had resulted in illegitimate births.⁴³⁴

⁴²⁸ 63 N.Y.S.2d 401 (Sup. Ct. Erie County 1946).

⁴²⁹ *Id.* at 402-03. *But cf.* *De Martino v. De Martino*, 78 N.Y.S.2d 503, 505 (Sup. Ct. Onondaga County 1948).

⁴³⁰ *See Yucabekzy v. Yucabekzy*, 111 N.Y.S.2d 441, 445 (Sup. Ct. N.Y. County 1952).

⁴³¹ *See Smith v. Smith*, 77 N.Y.S.2d 902, 903 (App. Div. 3d Dep't 1948). *But see Pellerin v. Pellerin*, 206 N.Y.S. 33, 34 (Sup. Ct. Broome County 1924).

⁴³² *See Burdes v. Burdes*, 90 N.Y.S.2d 97, 98-99 (Dom. Rel. Ct. N.Y. County 1949). *But cf. Wirth v. Wirth*, 23 N.Y.S.2d 289, 292 (Sup. Ct. Erie County 1940).

⁴³³ *See Musso v. Musso*, 143 N.Y.S.2d 331, 333 (Sup. Ct. Kings County 1955).

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 cases⁴³⁵ 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."⁴³⁶ Thus, an annulment was proper if either the husband or wife insisted on using contraception,⁴³⁷ 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.⁴³⁸ 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

Minner v. Minner, 144 N.E. 781, 783 (N.Y. 1924), or in order to put an end to ongoing affairs, see Schinker v. Schinker, 68 N.Y.S.2d 470, 472-73 (App. Div. 4th Dep't 1947); *but cf.* Doll v. Doll, 83 N.Y.S.2d 383, 384 (Sup. Ct. Albany County 1948).

⁴³⁵ See Mirizio v. Mirizio, 150 N.E. 605, 607 (N.Y. 1926).

⁴³⁶ Florio v. Florio, 143 N.Y.S.2d 105, 107 (Sup. Ct. N.Y. County 1955); *accord* Height v. Height, 187 N.Y.S.2d 260, 262 (Sup. Ct. Kings County 1959).

⁴³⁷ See Ehrlich v. Ehrlich, 112 N.Y.S.2d 244, 246 (Sup. Ct. Queens County 1952); Witten v. Witten, 109 N.Y.S.2d 254, 255-56 (Sup. Ct. N.Y. County 1951); Richardson v. Richardson, 103 N.Y.S.2d 219, 227-28 (Sup. Ct. Bronx County 1951); Berger v. Berger, 73 N.Y.S.2d 384, 386 (Sup. Ct. Kings County 1947); Coppo v. Coppo, 297 N.Y.S. 744, 751-52 (Sup. Ct. Dutchess County 1937). *But see* Attar v. Attar, 181 N.Y.S.2d 265, 266-67 (Sup. Ct. Kings County 1958). An annulment would not be granted merely because one spouse prior to marriage had concealed his or her views about the number of children the couple should have. See La Monica v. La Monica, 159 N.Y.S.2d 231, 232 (App. Div. 2d Dep't 1957); Frost v. Frost, 181 N.Y.S.2d 562, 563 (Sup. Ct. N.Y. County 1958); Bohok v. Bohok, 63 N.Y.S.2d 560, 561 (Sup. Ct. Albany County 1946); Longtin v. Longtin, 22 N.Y.S.2d 827, 832 (Sup. Ct. Onondaga County 1940).

⁴³⁸ See Aghnides v. Aghnides, 127 N.E.2d 323, 324 (N.Y. 1955) (unspecified period); Primmer v. Primmer, 234 N.Y.S.2d 795, 798 (Sup. Ct. Monroe County 1962) (unspecified period); Ackerman v. Ackerman, 231 N.Y.S.2d 493, 494 (Sup. Ct. Nassau County 1962) (ten years); Roger v. Roger, 203 N.Y.S.2d 576, 578 (Sup. Ct. Nassau County 1960) (three and one-half years); Dougherty v. Dougherty, 169 N.Y.S.2d 242, 244 (Sup. Ct. Monroe County 1957) (eight years); Antoni v. Antoni, 128 N.Y.S.2d 510, 511 (Sup. Ct. Dutchess County 1954) (seven years); Accardi v. Accardi, 129 N.Y.S.2d 114, 115 (Sup. Ct. Westchester County 1952) (six years); Schwind v. Schwind, 99 N.Y.S.2d 108, 111 (Sup. Ct. Monroe County 1950) (twelve years); Fish v. Fish, 67 N.Y.S.2d 768, 768 (Sup. Ct. Albany County 1947) (voluntary cohabitation after learning of fraud); Hafner v. Hafner, 66 N.Y.S.2d 442, 445 (Sup. Ct. Kings County 1946) (six years); Gerwitz v. Gerwitz, 66 N.Y.S.2d 327, 330 (Sup. Ct. Kings County 1945) (three and one-half years); Dodge v. Dodge, 64 N.Y.S.2d 264, 265 (Sup. Ct. Nassau County) (voluntary cohabitation after learning of fraud), *aff'd*, 63 N.Y.S.2d 837 (App. Div. 2d Dep't 1946).

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,"⁴⁴¹ he was entitled to a separation, as was another man whose wife "bit him, drawing blood,"⁴⁴² and yet another whose wife

⁴³⁹ See *Schulman v. Schulman*, 46 N.Y.S.2d 158, 159 (Sup. Ct. Kings County 1943).

⁴⁴⁰ *Fleischer v. Fleischer*, 229 N.Y.S. 77, 78 (App. Div. 1st Dep't 1928); *accord* *McKee v. McKee*, 195 N.E. 809, 810 (N.Y. 1935); *Howe v. Howe*, 109 N.Y.S.2d 125, 126 (App. Div. 3d Dep't 1952); *Jury v. Jury*, 275 N.Y.S. 586, 587 (App. Div. 4th Dep't 1934); *Nocilla v. Nocilla*, 212 N.Y.S.2d 654, 656 (Sup. Ct. Suffolk County 1961); *Mayeri v. Mayeri*, 208 N.Y.S.2d 44, 47 (Sup. Ct. Nassau County 1960); *Laff v. Laff*, 160 N.Y.S.2d 933, 935 (Sup. Ct. Queens County), *aff'd*, 166 N.Y.S.2d 678 (App. Div. 2d Dep't 1957); *Gluckstern v. Gluckstern*, 148 N.Y.S.2d 391, 393 (Sup. Ct. N.Y. County 1955) *modified on other grounds*, 153 N.Y.S.2d 184 (App. Div. 1st Dep't 1956); *Maggio v. Maggio*, 145 N.Y.S.2d 662, 664 (Sup. Ct. Kings County 1955); *Whaley v. Whaley*, 205 N.Y.S. 716, 718 (Sup. Ct. Livingston County 1924).

⁴⁴¹ *Bergman v. Bergman*, 245 N.Y.S. 439, 441 (Sup. Ct. Chautauqua County 1930).

⁴⁴² *Weiner v. Weiner*, 35 N.Y.S.2d 864, 865 (App. Div. 1st Dep't 1942), *aff'd*, 47 N.E.2d 53 (N.Y. 1943).

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...⁴⁴³

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.⁴⁴⁴ 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.⁴⁴⁵ 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.*⁴⁴⁶

In contrast, the courts were clear that a single violent act by wife against her husband amounted to wrongdoing on her part.⁴⁴⁷

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"⁴⁴⁸ by refusing to recognize "name calling, bickering, [and] threats"⁴⁴⁹ as a form of

⁴⁴³ *Stevens v. Stevens*, 115 N.Y.S.2d 49, 50 (Sup. Ct. Bronx County 1952), *aff'd as modified*, 118 N.Y.S.2d 755 (App. Div. 1st Dep't 1953).

⁴⁴⁴ See *Smith v. Smith*, 7 N.E.2d 272, 273 (N.Y. 1937); *Schapiro v. Schapiro*, 276 N.Y.S.2d 678, 679-80 (App. Div. 2d Dep't 1967); *Blessing v. Blessing*, 215 N.Y.S.2d 284, 285 (App. Div. 4th Dep't 1961); *Greene v. Greene*, 278 N.Y.S. 954, 957 (App. Div. 1st Dep't 1935); *Gladstone v. Gladstone*, 232 N.Y.S.2d 449, 451 (Sup. Ct. Nassau County 1962); *Fox v. Fox*, 186 N.Y.S.2d 542, 544 (Sup. Ct. N.Y. County 1958), *aff'd*, 233 N.Y.S.2d 1014 (App. Div. 1st Dep't 1962); *Wendt v. Wendt*, 202 N.Y.S. 46, 47 (Sup. Ct. Oneida County 1923). In one early case, a court refused to denominate a husband's conduct as "cruel and inhuman" even though he "drank to excess," on "several occasions ... struck the plaintiff, and treated her in a manner unbecoming a gentleman or a husband." *Lazarczyk v. Lazarczyk*, 203 N.Y.S. 291, 294 (Sup. Ct. Oneida County 1924).

⁴⁴⁵ See *Nilsen v. Nilsen*, 183 N.Y.S.2d 210, 212 (Sup. Ct. Kings County 1959).

⁴⁴⁶ *Becker v. Becker*, 260 N.Y.S.2d 879, 880 (Sup. Ct. Nassau County 1965) (emphasis added); *accord Feix v. Feix*, 100 N.Y.S.2d 627, 629 (Sup. Ct. Kings County 1950).

⁴⁴⁷ See *Axelrod v. Axelrod*, 150 N.Y.S.2d 633, 639 (Sup. Ct. Kings County 1956).

⁴⁴⁸ *McCarthy v. McCarthy*, 103 N.Y.S.2d 808, 811 (Dom. Rel. Ct. Bronx County 1951).

⁴⁴⁹ *Traylor v. Traylor*, 159 N.Y.S.2d 818, 819 (App. Div. 2d Dep't 1957).

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.⁴⁵⁰

What the Court labelled a "well-established rule"⁴⁵¹ remained in place into the 1960's⁴⁵² in response to the continuing "policy of the law to keep husband and wife together."⁴⁵³ But the burden of remaining together fell largely on wives. "[S]o long as the wife ha[d] demonstrated that she [could] live with her husband, despite his failings," the law would not grant her a separation,⁴⁵⁴ since she was simply required to "suffer the consequences of the apparent mistake, made when the marriage took place, in not discovering any temperamental defects that then existed."⁴⁵⁵ For similar reasons, a wife could not obtain a separation because a husband was "lazy around the house,"⁴⁵⁶ "indulge[d] in more liquor than a wise man should,"⁴⁵⁷ or gambled for high stakes.⁴⁵⁸

⁴⁵⁰ *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).

⁴⁵¹ *Pearson*, 129 N.E. at 351.

⁴⁵² *See* *Smith v. Smith*, 200 N.Y.S.2d 542, 542 (App. Div. 3d Dep't 1960); *Russ v. Russ*, 161 N.Y.S.2d 696, 697 (App. Div. 4th Dep't 1957), *aff'd*, 148 N.E.2d 911 (N.Y. 1958); *Schechter v. Schechter*, 44 N.Y.S.2d 864, 865 (App. Div. 1st Dep't 1943), *aff'd*, 56 N.E.2d 262 (N.Y. 1944); *Avdoyan v. Avdoyan*, 40 N.Y.S.2d 665, 667-68 (App. Div. 1st Dep't 1943); *Morris v. Morris*, 20 N.Y.S.2d 782, 783 (App. Div. 1st Dep't 1940); *Strnad v. Strnad*, 266 N.Y.S. 159, 159 (App. Div. 1st Dep't 1933); *Otton v. Otton*, 188 N.Y.S. 255, 256 (App. Div. 2d Dep't 1921); *Reese v. Reese*, 185 N.Y.S. 110, 111 (App. Div. 2d Dep't 1920); *Rosenberg v. Rosenberg*, 216 N.Y.S.2d 330, 332 (Sup. Ct. Kings County 1961); *Bruckner v. Bruckner*, 209 N.Y.S.2d 347, 350 (Sup. Ct. Nassau County 1960); *Kronenberg v. Kronenberg*, 203 N.Y.S.2d 218, 219-20 (Sup. Ct. Kings County 1960), *modified on other grounds*, 213 N.Y.S.2d 811 (App. Div. 2d Dep't 1961); *Anderson v. Anderson*, 189 N.Y.S.2d 930, 932-33 (Sup. Ct. N.Y. County 1959); *Camp v. Camp*, 189 N.Y.S.2d 561, 568-69 (Sup. Ct. Nassau County 1959); *Marino v. Marino*, 145 N.Y.S.2d 571, 575 (Sup. Ct. Ontario County 1955); *Gelardi v. Gelardi*, 127 N.Y.S.2d 802, 804 (Sup. Ct. Westchester County 1953); *Treherne-Thomas v. Treherne-Thomas*, 35 N.Y.S.2d 619, 620 (Sup. Ct. N.Y. County 1942); *Brown v. Brown*, 208 N.Y.S. 17, 18 (Sup. Ct. Kings County 1924).

⁴⁵³ *Reese*, 185 N.Y.S. at 111.

⁴⁵⁴ *Baker v. Baker*, 228 N.Y.S.2d 470, 472 (App. Div. 1st Dep't 1962).

⁴⁵⁵ *McClinton v. McClinton*, 200 N.Y.S.2d 987, 989-90 (Sup. Ct. Suffolk County 1960) (quoting *Averett v. Averett*, 178 N.Y.S. 405, 406 (1919), *aff'd*, 134 N.E. 554 (1921)).

⁴⁵⁶ *In re Smith's Will*, 72 N.Y.S.2d 609, 612 (Sur. Ct. Monroe County 1947).

⁴⁵⁷ *Straub v. Straub*, 204 N.Y.S. 61, 62 (App. Div. 1st Dep't 1924).

On the other hand, a wife's "denial" of her husband's "marital rights"⁴⁵⁹ 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.⁴⁶⁰ In contrast, a husband's lack of sexual interest in his wife⁴⁶¹ or other failure to have sexual relations⁴⁶² did not constitute cruelty.⁴⁶³

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.⁴⁶⁴ A particularly interesting case arose when "a very ambitious lady"⁴⁶⁵ 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.⁴⁶⁶ The court held that her husband had "no obligation ...

⁴⁵⁹ See *Brown v. Brown*, 208 N.Y.S. 17, 19 (Sup. Ct. Kings County 1924).

⁴⁵⁹ *Di Croce v. Di Croce*, 209 N.Y.S.2d 624, 627 (Sup. Ct. Nassau County 1961); accord *People ex rel. Roosevelt v. Roosevelt*, 216 N.Y.S.2d 604, 607 (App. Div. 1st Dep't 1961), *aff'd sub. nom.*, *People ex rel. Anonymous No. 1 for 1962 v. Anonymous*, 182 N.E.2d 291 (N.Y. 1962); cf. *Diemer v. Diemer*, 149 N.Y.S.2d 146, 151 (Sup. Ct. Queens County 1956), *aff'd as modified*, 168 N.E.2d 654 (N.Y. 1960). *But see Vernoia v. Vernoia*, 71 N.Y.S.2d 159, 160 (Sup. Ct. N.Y. County 1947).

⁴⁶⁰ *Barretta v. Barretta*, 46 N.Y.S.2d 261, 263 (Sup. Ct. Queens County 1944). *But see Dahnken v. Dahnken*, 161 N.Y.S.2d 539, 540 (Sup. Ct. Nassau County 1957).

⁴⁶¹ *McClinton v. McClinton*, 200 N.Y.S.2d 987, 989 (Sup. Ct. Suffolk County 1960).

⁴⁶² *Shepetin v. Shepetin*, 229 N.Y.S.2d 457, 459 (App. Div. 2d Dep't 1962).

⁴⁶³ But male conduct described by a court as "sexual raids," "unreasonable exercise of marital rights," and "excessive and unreasonable sexual indulgence" would be held cruel. *Harnish v. Harnish*, 60 N.Y.S.2d 153, 154 (App. Div. 4th Dep't 1946). Cruel and inhuman treatment would also be found when one spouse openly committed adultery. See *Hofmann v. Hofmann*, 133 N.E. 450, 451 (N.Y. 1921); *Haas v. Haas*, 64 N.Y.S.2d 9, 11 (Sup. Ct. Westchester County 1946), *rev'd on other grounds*, 80 N.E.2d 337 (N.Y. 1948); *Goldsmith v. Goldsmith*, 270 N.Y.S. 47, 49 (Sup. Ct. N.Y. County 1934); cf. *Morse v. Morse*, 123 N.Y.S.2d 144, 146 (Sup. Ct. Onondaga County 1953). *But see Lanyon's Detective Agency, Inc. v. Cochrane*, 148 N.E. 520, 521 (N.Y. 1925) (stating, in dictum, adultery does not necessarily constitute cruel and inhuman treatment). Cruel and inhuman treatment might also be found if one spouse falsely accused the other of adultery. See *Poppe v. Poppe*, 144 N.E.2d 72, 75 (N.Y. 1957); *Sherman v. Sherman*, 103 N.Y.S.2d 374, 375 (Sup. Ct. N.Y. County 1951), *aff'd*, 110 N.E.2d 736 (N.Y. 1953); *Generous v. Generous*, 99 N.Y.S.2d 416, 418 (Sup. Ct. Kings County 1950); *Armour v. Armour*, 88 N.Y.S.2d 111, 112 (Sup. Ct. Westchester County), *aff'd as modified*, 89 N.Y.S.2d 577 (App. Div. 2d Dep't 1949).

⁴⁶⁴ See *Petrella v. Petrella*, 255 N.Y.S.2d 962, 963 (App. Div. 1st Dep't 1965); *Rosenberg v. Rosenberg*, 216 N.Y.S.2d 330, 332 (Sup. Ct. Kings County 1961).

⁴⁶⁵ *Rosner v. Rosner*, 108 N.Y.S.2d 196, 200 (Dom. Rel. Ct. Queens County 1951).

⁴⁶⁶ *Id.* at 198-99.

. 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."⁴⁶⁷

Traditional sexist assumptions finally pervaded the cases explicating the second of the statutory grounds for separation—abandonment.⁴⁶⁸ It was clear, for example, that a husband who ceased supporting his wife would be deemed to have abandoned her,⁴⁶⁹ while a wife would be guilty of abandonment if she refused to have sexual relations with her husband.⁴⁷⁰ Another sexist rule

⁴⁶⁷ *Id.* at 201.

⁴⁶⁸ Abandonment was defined as a wrongful departure from the marital home with an intent not to return. *See* *Bohmert v. Bohmert*, 150 N.E. 511, 512-13 (N.Y. 1926); *Davidoff v. Davidoff*, 134 N.Y.S.2d 201, 201 (App. Div. 1st Dep't 1954); *Lubenstein v. Lubenstein*, 45 N.Y.S.2d 740, 742 (App. Div. 1st Dep't 1944); *Domb v. Domb*, 186 N.Y.S. 306, 308 (App. Div. 1st Dep't 1921); *Nadler v. Nadler*, 224 N.Y.S.2d 297, 298 (Sup. Ct. N.Y. County 1961); *Serota v. Serota*, 186 N.Y.S.2d 713, 716 (Sup. Ct. Nassau County 1959); *Braun v. Braun*, 142 N.Y.S.2d 627, 629 (Sup. Ct. Queens County 1955); *Purvin v. Purvin*, 51 N.Y.S.2d 492, 493 (Sup. Ct. Kings County 1944); *Harlow v. Harlow*, 204 N.Y.S. 128, 130 (Sup. Ct. Erie County 1924). A separation, in order to constitute an abandonment, had to "be obstinate and hardened." *Mirizio v. Mirizio*, 161 N.E. 461, 462 (N.Y. 1928); *accord* *Schatzberg v. Schatzberg*, 207 N.Y.S.2d 648, 649 (App. Div. 1st Dep't 1960); *Morris v. Morris*, 44 N.Y.S.2d 724, 726 (App. Div. 1st Dep't 1943), *rev'd*, 56 N.E.2d 589 (N.Y. 1944). Of course, the spouse who had voluntarily departed from the marital home could not claim abandonment by the other, *see* *Solomon v. Solomon*, 49 N.E.2d 470, 472 (N.Y. 1943); *Russ v. Russ*, 177 N.Y.S.2d 875, 877 (Sup. Ct. N.Y. County 1958), unless the conduct of the other had been so "obnoxious, detestable, arrogant, [or] violative of decency" as to "amount to a constructive abandonment." *Blair v. Blair*, 121 N.Y.S.2d 30, 35-36 (Dom. Rel. Ct. N.Y. County 1953); *accord* *Meyer v. Meyer*, 9 N.Y.S.2d 28 (Sup. Ct. Erie County 1939). No abandonment would be found if both spouses had misbehaved. *See* *Murphy v. Murphy*, 71 N.E.2d 452, 454 (N.Y. 1947); *Naphtali v. Naphtali*, 159 N.Y.S.2d 758, 760 (App. Div. 2d Dep't 1957); *Walker v. Walker*, 122 N.Y.S.2d 209, 210 (App. Div. 1st Dep't 1953), *aff'd*, 121 N.E.2d 553 (N.Y. 1954); *Fragomeni v. Fragomeni*, 112 N.Y.S.2d 224, 225-26 (Sup. Ct. N.Y. County 1952).

⁴⁶⁹ *See* *Sengstack v. Sengstack*, 151 N.E.2d 887, 889 (N.Y. 1958); *Batchelor v. Batchelor*, 68 N.E.2d 681, 682 (N.Y. 1946); *Berg v. Berg*, 46 N.E.2d 910, 911 (N.Y. 1943); *Champagne v. Champagne*, 14 N.Y.S.2d 715, 715 (App. Div. 3d Dep't 1939); *Garfinkel v. Garfinkel*, 210 N.Y.S.2d 674, 676 (Sup. Ct. Kings County 1960), *aff'd*, 226 N.Y.S.2d 675 (App. Div. 1st Dep't 1962); *Winterry v. Winterry*, 140 N.Y.S.2d 287, 288 (Sup. Ct. N.Y. County 1955); *List v. List*, 61 N.Y.S.2d 809, 812 (Sup. Ct. N.Y. County 1946), *modified*, 95 N.Y.S.2d 604 (App. Div. 1st Dep't 1950); *Pompilio v. Pompilio*, 221 N.Y.S. 594, 596 (Sup. Ct. Schenectady County 1927).

⁴⁷⁰ *See* *Diemer v. Diemer*, 168 N.E.2d 654, 656-57 (N.Y. 1960); *Mirizio v. Mirizio*, 150 N.E. 605, 607-08 (N.Y. 1926); *Bentz v. Bentz*, 67 N.Y.S.2d 345, 347 (Sup. Ct. Steuben County 1947); *Rothman v. Rothman*, 67 N.Y.S.2d 96, 98 (Sup. Ct. Kings County 1946); *Tepper v. Tepper*, 64 N.Y.S.2d 211, 213-14 (Dom. Rel. Ct. N.Y. County

was that a husband had the right to determine where⁴⁷¹ and with whom⁴⁷² 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;⁴⁷³ "her duty" was "to go with her husband to the home which he had provided,"⁴⁷⁴ and, if she refused, she would be deemed to have abandoned him.⁴⁷⁵

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.⁴⁷⁶ 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).

⁴⁷¹ See *Vetrano v. Vetrano*, 54 N.Y.S.2d 537, 538-39 (Sup. Ct. Queens County 1945). *But see* *Tausik v. Tausik*, 235 N.Y.S.2d 776, 784 (Sup. Ct. N.Y. County 1962) (stating that husband must exercise right in reasonable manner); *Eftimiou v. Eftimiou*, 204 N.Y.S.2d 785, 790 (Sup. Ct. Kings County 1960) (holding that husband "must exercise his rights in a reasonable manner").

⁴⁷² See *Palese v. Palese*, 267 N.Y.S.2d 542, 544 (App. Div. 2d Dep't 1966); *Crutchfield v. Crutchfield*, 75 N.Y.S.2d 339, 340 (Sup. Ct. N.Y. County 1947); *Brandt v. Brandt*, 259 N.Y.S. 100, 102 (Sup. Ct. N.Y. County 1932), *aff'd*, 262 N.Y.S. 973 (App. Div. 1st Dep't 1933). *But see* *Bruch v. Bruch*, 67 N.Y.S.2d 89, 90 (App. Div. 2d Dep't 1946) (holding presence of husband's mother, whose conduct made wife's living conditions intolerable, constituted constructive desertion).

⁴⁷³ *Cavallo v. Cavallo*, 359 N.Y.S.2d 628, 629 (Sup. Ct. Suffolk County 1974).

⁴⁷⁴ *Vetrano*, 54 N.Y.S.2d at 538.

⁴⁷⁵ *Id.* at 539 (citing *Manufacturers Trust Co. v. Gray*, 16 N.E.2d 373, 375 (N.Y. 1938)); *In re Roessler's Estate* 12 N.Y.S.2d 572, 575 (Sur. Ct. Kings County 1939).

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 326, 326 (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 action 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-

tain 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."⁴⁷⁹ 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."⁴⁸⁰ Alimony "was not designed to confer ... a status of leisure and uselessness in society."⁴⁸¹ 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.⁴⁸² 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."⁴⁸³

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.

⁴⁸⁰ *Doyle v. Doyle*, 158 N.Y.S.2d 909, 912 (Sup. Ct. N.Y. County 1957); *accord Bruno v. Bruno*, 334 N.Y.S.2d 242, 248 (Sup. Ct. Kings County 1972), *modified*, 355 N.Y.S.2d 817 (App. Div. 2d Dep't 1974); *Palmieri v. Palmieri*, 168 N.Y.S.2d 48, 49 (Sup. Ct. Bronx County 1957).

⁴⁸¹ *Brownstein*, 268 N.Y.S.2d at 121-22.

⁴⁸² *See Steinberg v. Steinberg*, 360 N.Y.S.2d 75, 76 (App. Div. 2d Dep't 1974); *Anastasiadis*, 279 N.Y.S.2d at 937; *Posner v. Posner*, 110 N.Y.S.2d 515, 518 (Dom. Rel. Ct. N.Y. County 1952).

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*,⁴⁸⁴ 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.⁴⁸⁵ Initially, the movement was moderate and reformist in tone. Some feminists rapidly headed in more radical directions,⁴⁸⁶ however, with the result that by 1970 "the ideological complexity of the movement [was] too great to be categorized ... simply,"⁴⁸⁷ 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

⁴⁸⁴ BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

⁴⁸⁵ See SARAH EVANS, *PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT* 18-19 (1979).

⁴⁸⁶ The earlier radical work included SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* (1970); ANNE KOEDT, *RADICAL FEMINISM* (Ellen Levine and Anita Rapone eds., 1973); JULIET MITCHELL, *WOMAN'S ESTATE* (1971). More recent work includes ANDREA DWORKIN, *OUR BLOOD: PROPHECIES AND DISCOURSES ON SEXUAL POLITICS* (1976), and CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

⁴⁸⁷ JO FREEMAN, *THE POLITICS OF WOMEN'S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE POLICY PROCESS* 51 (1975).

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."⁴⁸⁹ 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."⁴⁹⁰ 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."⁴⁹¹ 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."⁴⁹²

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."⁴⁹³ The women's movement achieved substantial successes in the areas of employment law,⁴⁹⁴ abortion,⁴⁹⁵ and gender-related crimes.⁴⁹⁶ 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*⁴⁹⁷ held that "[e]ven one beat-

see generally ALICE ECHOLS, *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA, 1967-1979* (1989).

⁴⁸⁹ AMY SWERDLOW, ET AL., *HOUSEHOLD AND KIN: FAMILIES IN FLUX* 94 (1981).

⁴⁹⁰ *Id.* at 96.

⁴⁹¹ MARY ANN MASON, *THE EQUALITY TRAP* 51 (1988).

⁴⁹² GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 166 (1991).

⁴⁹³ FRIEDAN, *supra* note 485, at 384 (quoting Statement of Purpose of National Organization for Women).

⁴⁹⁴ See Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, *supra* note 4, at 89-96.

⁴⁹⁵ See *id.* at 96-97.

⁴⁹⁶ See Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, *supra* note 4, at 324-35.

⁴⁹⁷ 353 N.E.2d 565 (N.Y. 1976).

ing"⁴⁹⁸ 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,⁴⁹⁹ another case declared that a wife's right to remain "in a well-paying, full-time job she ha[d] 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."⁵⁰⁰

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."⁵⁰¹ 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*⁵⁰² 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."⁵⁰³ 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.⁵⁰⁴

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.

⁴⁹⁹ *Cavallo v. Cavallo*, 359 N.Y.S.2d 628, 629 (Sup. Ct. Suffolk County 1974).

⁵⁰⁰ *Weintraub v. Weintraub*, 356 N.Y.S.2d 450, 453 (Fam. Ct. Queens County 1974).

⁵⁰¹ *In re Anonymous' Estate*, 126 N.Y.S.2d 749, 754 (Sur. Ct. N.Y. County 1953), *aff'd*, 134 N.E.2d 679 (N.Y. 1956).

⁵⁰² 391 U.S. 68 (1968).

⁵⁰³ *In re Industrial Transp. Corp.*, 344 F. Supp. 1311, 1313-14 n.3 (E.D.N.Y. 1972); *accord In re Johnson's Estate*, 348 N.Y.S.2d 315, 318 (Sur. Ct. Bronx County 1973).

⁵⁰⁴ *See Lau v. Kiley*, 563 F.2d 543, 551 (2d Cir. 1977).

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."⁵⁰⁵ After mid-century, however, as the "harsh view of the common law that a natural child was *filius nullius*"⁵⁰⁶ 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."⁵⁰⁷ There remained a "presumption of custody in favor of the natural mother,"⁵⁰⁸ which was, on occasion at least, overcome on the facts of individual cases⁵⁰⁹ and which some thought "should be reconsidered and abolished."⁵¹⁰ 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."⁵¹¹

Changes in the law regarding custody of legitimate children

⁵⁰⁵ *Grillo v. Sherman-Stalter County*, 186 N.Y.S. 810, 812 (App. Div. 3d Dep't), *aff'd*, 132 N.E. 913 (N.Y. 1921).

⁵⁰⁶ *In re "Virginia Norman"*, 205 N.Y.S.2d 260, 264 (Sup. Ct. Nassau County 1960).

⁵⁰⁷ *Id.* at 262.

⁵⁰⁸ *Godinez v. Russo*, 266 N.Y.S.2d 636, 639 (Fam. Ct. Westchester County 1966); *accord Z. v. A.*, 320 N.Y.S.2d 997, 999 (App. Div. 3d Dep't 1971); *Norcia v. Richard*, 300 N.Y.S.2d 608, 608 (App. Div. 2d Dep't 1969), *aff'd*, 357 N.E.2d 288 (N.Y. 1970); *Roe v. Doe*, 296 N.Y.S.2d 865, 868-69 (Fam. Ct. N.Y. County 1968); *Cornell v. Hartley*, 283 N.Y.S.2d 318, 320 (Fam. Ct. Ulster County 1967). In the event of the mother's death, the father was presumptively entitled to custody as against non-parents. *See Fierro v. Ljubicich*, 165 N.Y.S.2d 290, 291-92 (Sup. Ct. Kings County 1957); *People ex rel. Blake v. Charger*, 351 N.Y.S.2d 322, 326 (Fam. Ct. Queens County 1974).

⁵⁰⁹ *See People ex rel. Coage v. Colbert*, 75 N.Y.S.2d 865 (Sup. Ct. N.Y. County 1947).

⁵¹⁰ *Godinez*, 266 N.Y.S.2d at 639.

⁵¹¹ *In re Anonymous*, 416 N.Y.S.2d 729, 731-32 (Fam. Ct. Albany County 1979); *cf. State ex rel. Spence-Chapin Serv. to Families & Children v. Tedeno*, 421 N.Y.S.2d 297, 299-300 (Sup. Ct. N.Y. County 1979) (neither parent has right to change surname of illegitimate child). For cases giving custody to fathers, see *Richard D. v. Wendy P.*, 393 N.E.2d 1022, 1022 (N.Y. 1979); *Wallace v. Teal*, 420 N.Y.S.2d 336, 339 (Fam. Ct. Monroe County 1979); *Boatwright v. Otero*, 398 N.Y.S.2d 391, 394 (Fam. Ct. Onondaga County 1977). If neither parent was fit, custody would be given to someone else. *See State ex rel. Olivo v. Foglio*, 385 N.Y.S.2d 78, 79 (App. Div. 1st Dep't 1976). Normally, a noncustodial parent would have visitation rights, but not where a 61-year-old man had impregnated a 13-year-old girl and her parents objected to his visiting the baby. *See E R v. D T*, 353 N.Y.S.2d 612, 615 (Fam. Ct. Genesee County 1974).

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 case⁵¹⁷ held that the forged signature of the mother's hus-

⁵¹² *Andrews v. Andrews*, 425 N.Y.S.2d 120 (App. Div. 1st Dep't 1980), *aff'd*, 442 N.E.2d 578 (N.Y. 1981); *accord* *Barkley v. Barkley*, 402 N.Y.S.2d 228, 229 (App. Div. 3d Dep't), *aff'd*, 383 N.E.2d 1154 (N.Y. 1978); *Zavasnik v. Zavasnik*, 399 N.Y.S.2d 483, 484 (App. Div. 3d Dep't 1977); *Chavez v. Chavez*, 385 N.Y.S.2d 289, 290 (App. Div. 1st Dep't 1976); *Braitsch v. Braitsch*, 384 N.Y.S.2d 560, 562 (App. Div. 4th Dep't 1976); *Hechemy v. Hechemy*, 368 N.Y.S.2d 709, 713 (Sup. Ct. Albany County 1975).

⁵¹³ *See* *Bergson v. Bergson*, 414 N.Y.S.2d 593, 594 (App. Div. 2d Dep't 1979); *Lucey v. Lucey*, 400 N.Y.S.2d 610 (App. Div. 4th Dep't 1977); *O'Neill v. O'Neill*, 399 N.Y.S.2d 887, 889 (App. Div. 2d Dep't 1977); *Harrison v. Harrison*, 388 N.Y.S.2d 26, 27 (App. Div. 2d Dep't 1976); *Amatuccio v. Amatuccio*, 355 N.Y.S.2d 171, 172 (App. Div. 2d Dep't 1974); *Lee v. Lee*, 400 N.Y.S.2d 680, 684 (Sup. Ct. N.Y. County 1977); *Salk v. Salk*, 393 N.Y.S.2d 841, 844 (Sup. Ct. N.Y. County 1975), *aff'd*, 385 N.Y.S.2d 1015 (App. Div. 1st Dep't 1976). *But see* *Dodd v. Dodd*, 403 N.Y.S.2d 401, 406 (Sup. Ct. N.Y. County 1978) (holding that custody of children should go to mother who was primary caretaker and more sensitive to children's needs).

⁵¹⁴ *In re Hardenbergh's Will*, 258 N.Y.S. 651, 654 (Sur. Ct. Westchester County 1932).

⁵¹⁵ *In re Anonymous*, 80 N.Y.S.2d 839, 845-46 (Sur. Ct. Westchester County 1947).

⁵¹⁶ *In re Anonymous*, 175 N.Y.S.2d 282, 284 (Sur. Ct. Nassau County 1958), *modified*, 187 N.Y.S.2d 870 (Sur. Ct. Nassau County 1959).

⁵¹⁷ *See In re Anonymous*, 209 N.Y.S.2d 360, 363 (Sur. Ct. Nassau County 1961).

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."⁵¹⁸

But one year later, a trial court disagreed. In the interval, the United States Supreme Court had decided *Stanley v. Illinois*,⁵¹⁹ 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.⁵²⁰ Later cases extended the requirement of notice to any man who there was "reason to believe might be the father,"⁵²¹ but the New York Court of Appeals continued to hold that a natural father's consent was not required for adoption.⁵²² 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,"⁵²³ and, while that right could be lost

⁵¹⁸ *Doe v. Roe*, 326 N.Y.S.2d 421, 424-25 (App. Div. 2d Dep't 1971).

⁵¹⁹ 405 U.S. 645, 657-58 (1972).

⁵²⁰ *Doe v. Dep't of Soc. Serv. of City of Poughkeepsie*, 337 N.Y.S.2d 102, 106-07 (Sup. Ct. Dutchess County 1972); accord *In re Adoption of Anonymous*, 359 N.Y.S.2d 220, 223-24 (Sup. Ct. Erie County 1974).

⁵²¹ *In re Guardianship of Donna P.*, 362 N.Y.S.2d 370, 374 (Fam. Ct. N.Y. County 1974).

⁵²² See *In re Adoption of Malpica-Orsini*, 331 N.E.2d 486, 491 (N.Y. 1975); accord *Metropolitan Life Ins. Co. v. Trullo*, 408 N.Y.S.2d 680, 684 (Sup. Ct. Monroe County 1978); *In re Adoption of Anonymous*, 399 N.Y.S.2d 418, 420 (Sur. Ct. Erie County 1977); *In re Kenneth M.*, 383 N.Y.S.2d 1005, 1007 (Fam. Ct. N.Y. County 1976).

⁵²³ *In re Gerald G.G.*, 403 N.Y.S.2d 57, 60 (App. Div. 2d Dep't 1978).

through abandonment,⁵²⁴ the standard applied is solely that of the best interests of the child.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 *Caban v. Mohammed*,⁵²⁶ a case arising out of New York, so ruled on gender-equality grounds; at least one lower court relying on *Caban* struck down as "too restrictive"⁵²⁷ the effort of the legislature in the aftermath of *Caban* to rewrite guidelines for paternal consent.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,⁵²⁹ and, if the noncustodial parent objected, the adoption could not proceed unless that parent had abandoned the child.⁵³⁰

⁵²⁴ See *In re Male L.*, 369 N.Y.S.2d 273, 278 (Sur. Ct. N.Y. County 1975); cf. *Dickson v. Lascaris*, 428 N.Y.S.2d 544, 546 (App. Div. 4th Dep't 1980), *rev'd*, 423 N.E.2d 361 (N.Y. 1981).

⁵²⁵ See *Gerald G.G.*, 403 N.Y.S.2d at 59.

⁵²⁶ 441 U.S. 380 (1979); accord *In re Adoption of Anthony John P.*, 422 N.Y.S.2d 570, 572-73 (Sur. Ct. Bronx County 1979).

⁵²⁷ *In re Adoption of Female F.D.*, 433 N.Y.S.2d 318, 322 (Sur. Ct. Nassau County 1980).

⁵²⁸ Other judges, however, continued to rule that the consent of natural fathers was not required when the fathers were in prison, see *In re Guardianship and Custody of Jonathan E.G.*, 436 N.Y.S.2d 546, 549 (Fam. Ct. Schenectady County 1980); *In re Adoption of Anonymous*, 429 N.Y.S.2d 987, 991 (Sur. Ct. Westchester County 1980); *In re Anonymous*, 359 N.Y.S.2d 738, 743 (Sur. Ct. Nassau County 1974); 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 *In re Adoption of Baby Girl*, 426 N.Y.S.2d 398, 403-04 (Fam. Ct. Onondaga County 1980).

⁵²⁹ See *In re Adoption of Anonymous*, 323 N.Y.S.2d 358, 359 (Sur. Ct. Queens County 1971).

⁵³⁰ See *Corey L. v. Martin L.*, 380 N.E.2d 266, 269-70 (N.Y. 1978); *In re Adoption of Goldman*, 362 N.E.2d 619, 620-21 (N.Y. 1977); *Lance David II v. David II*, 429 N.Y.S.2d 312, 313 (App. Div. 3d Dep't 1980); *In re Adoption of Yanofsky*, 321 N.Y.S.2d 427, 428 (App. Div. 2d Dep't 1971); *In re Adoption of Ekstrom*, 265 N.Y.S.2d 727, 731 (App. Div. 3d Dep't 1965); *In re Adoption of Serby*, 157 N.Y.S.2d 892, 894 (App. Div. 2d Dep't 1956); *In re Giegerich*, 198 N.Y.S.2d 585, 587 (Sup. Ct. Suffolk County 1960); *In re Adoption by Catherine G. of "Infant" G.*, 360 N.Y.S.2d 789, 790 (Sur. Ct. N.Y. County 1974), *aff'd*, 362 N.E.2d 619 (N.Y. 1969); *In re Adoption of Anonymous*, 337 N.Y.S.2d 896, 899 (Sur. Ct. Erie County 1972); *In re Adoption of Favro*, 254 N.Y.S.2d 278, 280-81 (Fam. Ct. Steuben County 1964); *In re*

"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."⁵³¹ Hence "a finding of abandonment [could] be made against a parent only after he ha[d] been given the benefit of every controverted fact... ."⁵³²

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 consent⁵³³ 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

Adoption of Nuttall, 208 N.Y.S.2d 271, 274 (Sur. Ct. Cattaraugus County 1960); *In re* Adoption of Anonymous, 193 N.Y.S.2d 375, 376 (Sur. Ct. Suffolk County 1959); *In re* Adoption of Spinney, 170 N.Y.S.2d 590, 593 (Schenectady County Ct. 1958); *In re* Richard, 106 N.Y.S.2d 92, 95 (Chautauqua County Ct. 1951); *see also* Anonymous v. Anonymous, 246 N.Y.S.2d 835 (Sup. Ct. Suffolk County 1964); Gursky v. Gursky, 242 N.Y.S.2d 406, 412 (Sup. Ct. Kings County 1963); *cf.* Strnad v. Strnad, 78 N.Y.S.2d 390, 391 (Sup. Ct. N.Y. County 1948); *In re* Adoption of Anonymous, 345 N.Y.S.2d 430, 435-36 (Sur. Ct. Kings County 1973). *But see In re* Adoption of Widrick, 212 N.Y.S.2d 350, 352 (Sur. Ct. St. Lawrence County 1960); *In re* Geiger's Adoption, 138 N.Y.S.2d 410, 412 (Sur. Ct. Suffolk County 1955); *In re* Hurter, 181 N.Y.S. 75, 79 (Sur. Ct. Wayne County 1920). Adoption would not, however, interfere with the visitation rights of the former parent. *See Adoption of Widrick*, 212 N.Y.S.2d at 354; *see also In re* Stuart, 20 N.E.2d 741, 744 (N.Y. 1939).

⁵³¹ *In re* Metzger, 186 N.Y.S. 269, 270 (Sur. Ct. N.Y. County 1921); *accord* Caruso v. Caruso, 23 N.Y.S.2d 239, 241 (Sup. Ct. Bronx County 1940); *see also* Wasserman v. Weisner, 234 N.Y.S.2d 128, 130 (Sup. Ct. N.Y. County 1962). One rule that followed was that a child's surname could not be changed without the consent of its father. *See In re* Hinrichs, 246 N.Y.S.2d 25, 27-28 (Sup. Ct. Westchester County 1964); *In re* Otis, 126 N.Y.S.2d 651, 653 (Sup. Ct. Nassau County 1954); Steinbach v. Steinbach, 119 N.Y.S.2d 708, 709 (Sup. Ct. Kings County 1953); Young v. Bd. of Educ., 114 N.Y.S.2d 693, 694 (Sup. Ct. Kings County 1952); Nitzberg v. Bd. of Educ., 104 N.Y.S.2d 421, 424 (Sup. Ct. Queens County 1951); *In re* Baldini, 183 N.Y.S.2d 416, 417 (City Ct. Bronx County 1959); *see also* Gonzalez v. Gonzalez, 354 N.Y.S.2d 854, 856 (Sup. Ct. Queens County 1974). *But see In re* Fein, 274 N.Y.S.2d 547, 551 (Civ. Ct. N.Y. County 1966); *In re* Almosnino, 122 N.Y.S.2d 277 (City Ct. N.Y. County 1952).

⁵³² Coccozza v. Antidormi, 316 N.Y.S.2d 471, 473 (App. Div. 2d Dep't 1970); *accord* W. v. G., 312 N.E.2d 171, 173 (N.Y. 1974), *superseded by statute* as stated in B. v. B., 385 N.Y.S.2d 821 (App. Div. 3d Dep't 1976).

⁵³³ *See* Berger v. Adornato, 350 N.Y.S.2d 520, 524 (Sup. Ct. Onondaga County 1973); Friedrich v. Katz, 341 N.Y.S.2d 932, 935 (Sup. Ct. N.Y. County 1973), *rev'd*, 318 N.E.2d 606 (N.Y. 1974).

statute.⁵³⁴ The second line involved issues of access to the courts by the poor. The Court in *Griffin v. Illinois*⁵³⁵ 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,⁵³⁶ and state courts authorized the payment of court fees⁵³⁷ and the assignment of counsel to indigent family law litigants.⁵³⁸

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,"⁵³⁹ judges felt a need to "evolve modernized methods ... introducing wholesome realism" into separation and divorce litigation.⁵⁴⁰ Seeking to eliminate the "stream of vituperation and recrimination" routine in matrimonial cases,⁵⁴¹ 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.⁵⁴² 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.⁵⁴³

⁵³⁴ See *In re Ogilvie*, 373 N.Y.S.2d 281, 284-85 (Rockland County Ct. 1975).

⁵³⁵ 351 U.S. 12 (1956).

⁵³⁶ See *Johnson v. Rockefeller*, 58 F.R.D. 42, 51-52 (S.D.N.Y. 1972).

⁵³⁷ See *Kirk v. Kirk*, 340 N.Y.S.2d 346, 348 (App. Div. 4th Dep't 1973). But see *Jeffreys v. Jeffreys*, 296 N.Y.S.2d 74 (Sup. Ct. Kings County 1968), *rev'd*, 330 N.Y.S.2d 550 (App. Div. 2d Dep't 1972).

⁵³⁸ See *In re Smiley*, 330 N.E.2d 53, 56 (N.Y. 1975). But cf. *Thomas v. Thomas*, 340 N.Y.S.2d 753, 754 (Sup. Ct. Kings County 1973) (holding indigent husband liable for fees of wife's private attorney).

⁵³⁹ *Palmieri v. Palmieri*, 168 N.Y.S.2d 48, 51 (Sup. Ct. Bronx County 1957).

⁵⁴⁰ *Id.* at 49.

⁵⁴¹ *Id.* at 52.

⁵⁴² *Doyle v. Doyle*, 158 N.Y.S.2d 909, 911 (Sup. Ct. N.Y. County 1957); accord *Dulber v. Dulber*, 311 N.Y.S.2d 604, 607 (Sup. Ct. Queens County 1970), *modified*, 322 N.Y.S.2d 862 (App. Div. 2d Dep't 1971).

⁵⁴³ *Brownstein v. Brownstein*, 268 N.Y.S.2d 115, 123 (App. Div. 1st Dep't 1966).

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.

⁵⁴⁶ See *Orr v. Orr*, 440 U.S. 268, 278-83 (1979); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

⁵⁴⁷ *Carole K. v. Arnold K.*, 380 N.Y.S.2d 593, 597 (Fam. Ct. N.Y. County 1976).

⁵⁴⁸ *Id.* at 596; *accord Weaver v. Weaver*, 433 N.Y.S.2d 654, 655 (App. Div. 4th Dep't 1980); *Cary v. Cary*, 404 N.Y.S.2d 534, 535-36 (Sup. Ct. Erie County 1978).

⁵⁴⁹ *S. v. K.*, 335 N.Y.S.2d 124, 126 (Fam. Ct. N.Y. County 1972).

⁵⁵⁰ *Morgan v. Morgan*, 366 N.Y.S.2d 977, 979 (Sup. Ct. N.Y. County 1975), *aff'd as modified* 383 N.Y.S.2d 343 (App. Div. 1st Dep't 1976).

⁵⁵¹ *Id.* at 981.

⁵⁵² *Dulber v. Dulber*, 311 N.Y.S.2d 604, 606 (Sup. Ct. Queens County 1970).

to authorize the award of alimony to husbands as well as wives in appropriate cases⁵⁵³ and that women with the same income as their former husbands should be required to contribute equally to the support of their children.⁵⁵⁴ 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."⁵⁵⁵ 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."⁵⁵⁶

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.⁵⁵⁷ For the decade of the 1970's, the portion of hus-

⁵⁵³ See also *Navagata v. Navagata*, 415 N.Y.S.2d 372 (Sup. Ct. Orange County 1979); *Thaler v. Thaler*, 391 N.Y.S.2d 331, 340 (Sup. Ct. Nassau County), *rev'd* 396 N.Y.S.2d 815 (App. Div. 2d Dep't 1977); *cf.* *Wood v. Wood*, 428 N.Y.S.2d 136, 138 (Fam. Ct. Queens County 1980). *But see* *Trask v. Trask*, 381 N.Y.S.2d 584, 585 (Sup. Ct. Albany County 1976); *Kroul v. Kroul*, 417 N.Y.S.2d 847, 848-49 (Dist. Ct. Nassau County 1979).

⁵⁵⁴ See *Kapuscinski v. Kapuscinski*, 426 N.Y.S.2d 582, 582-83 (App. Div. 2d Dep't 1980); *Tessler v. Siegel*, 399 N.Y.S.2d 218, 219 (App. Div. 1st Dep't 1977); *Carter v. Carter*, 397 N.Y.S.2d 88, 93-94 (App. Div. 2d Dep't 1977); *Lord v. Lord*, 409 N.Y.S.2d 46, 48 (Sup. Ct. N.Y. County 1978); *Coniglio v. Coniglio*, 428 N.Y.S.2d 440, 442 (Fam. Ct. Monroe County 1980). In another context, neither men nor women gained any systematic benefit from equality, as a court held that the earnings of a man's second wife had to be considered as part of the assets available to him for the support of his first wife and child. See *Felisa L. v. Allen M.*, 433 N.Y.S.2d 715, 717 (Fam. Ct. Bronx County 1980).

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.⁵⁵⁸ Indeed, the legislature itself gave sanction to the one-third figure in a 1975 statute⁵⁵⁹ 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.⁵⁶⁰

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 1970-1980 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).

⁵⁶⁰ See *Pearson v. Pearson*, 429 N.Y.S.2d 851, 854 (Sup. Ct. Nassau County 1980), *aff'd*, 440 N.Y.S.2d 345 (App. Div. 2d Dep't 1981). This article does not consider the impact of New York's equitable distribution law, which took effect in July of 1980, at the end of the period under study. For an early case under the new law, see *Mercier v. Mercier*, 432 N.Y.S.2d 123, 124-25 (Sup. Ct. Monroe County 1980). For early cases dealing with procedural aspects of equitable distribution, see *Froelich-Switzer v. Switzer*, 436 N.Y.S.2d 123, 124 (Sup. Ct. N.Y. County 1980); *Stolowitz v. Stolowitz*, 435 N.Y.S.2d 882, 886 (Sup. Ct. Nassau County 1980).

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"⁵⁶¹ and "to restrict the availability of divorce and in doing so to preserve the family unit."⁵⁶² 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*⁵⁶³ and *Kober*⁵⁶⁴ 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.⁵⁶⁵ 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.⁵⁶⁶ 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

⁵⁶¹ *Hubbard v. Hubbard*, 126 N.E. 508, 509 (N.Y. 1920).

⁵⁶² *Rosenstiel v. Rosenstiel*, 209 N.E.2d 709, 720 (N.Y. 1965) (Scileppi, J., dissenting), *cert. denied*, 384 U.S. 971 (1966).

⁵⁶³ *See id.* at 713.

⁵⁶⁴ *See Kober v. Kober*, 211 N.E.2d 817, 820-21 (N.Y. 1965).

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.