2004

The Cyclical Nature of Divorce in the Western Legal Tradition

Shaakirrah R. Sanders
University of Idaho College of Law, srsanders@uidaho.edu

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/faculty_scholarship

Part of the Family Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Works at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Articles by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.
THE CYCLICAL NATURE OF DIVORCE IN THE WESTERN LEGAL TRADITION

Shaakirrah R. Sanders*

INTRODUCTION

When first enacted in 1969 by the California Legislature, no-fault divorce was thought to be a revolutionary and radical idea; it was neither. This article is a comparative analysis of the evolution of divorce in the western legal tradition from classical Rome through the twentieth century. The first section of this article will analyze divorce in Classical Rome. This is followed by a discussion on the Catholic Church’s Doctrine of Indissolubility, which mandated an absolute ban on divorce. The article then explores the Protestant Revolution’s rejection of the Doctrine of Indissolubility and the limited grounds under which divorce could be obtained. Then, the article discusses the secularization of divorce actions in the eighteenth and nineteenth centuries and the expansion of fault grounds. This is followed by a discussion of divorce in the United States and the practice of migratory divorce. Next, the article examines the re-emergence of no-fault divorce in Western Europe and North America. Finally, the article discusses Louisiana’s Covenant Marriage Act and its return to a fault-based regime of divorce.

I. ROMAN LAW OF DIVORCE

“Divorce, the separation of spouses, and the dissolution of
marriage, is a question of family law which is [as] alive today as it was in classical Roman times. Yet, during the classical period, the joining of two people was not described as marriage (and nor was the dissolution of that union described as divorce). In classical Rome, marriage was a not judicial relationship, but a state of fact. Formalities that existed in the Middle Ages, and still exist in modern times, were unnecessary to contract classical marriage. Therefore, divorce and grounds for divorce were nonexistent.

This, however, does not mean that there were no provisions for ending the union. The Twelve Tables provided for divorce by mutual consent and the dissolution of the marriage without a decree by any court. "The consequence of this non-judicial relationship was that from the moment the affectio maritalis no longer existed, the marriage was over; [therefore, d]ivorce according to classical law only signified the absence of the affectio maritalis." Public officials required nothing, and the dissolution

2. Id. at 918. "In Roman law, marriage was a relatively private matter. No special formula or ceremony was required to contract a valid marriage. There was no requirement of intervention by any sort of a public official, and there was no registration of marriages." R. H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND 4 (1974).
3. The Twelve Tables was a codification of existing customs of classical Rome into statutory law. This earliest of Roman codes contained seventy-six civil laws and was "set up in the Roman Forum on twelve tables of bronze." Richard A. Pacia, Roman Contributions to American Civil Jurisprudence, 49 R.I. B.J. 5, 6 (May 2001). The Twelve Tables "established a procedural framework for the prompt and efficient adjudication of civil disputes. An array of procedures were enacted specifically to govern the conduct of civil litigation." Id. Drafted between 451-450 B.C., the Twelve Tables remained the foundation of Roman law for over 1000 years, until it was superseded by Justinian's Corpus Juris Civilis in 534 A.D. Id. at 6.
5. "According to classical law, marriage was a co-habitation of the spouses founded on a reciprocal desire of will which was conceptually indispensable and which had to endure throughout the whole length of the marriage itself. In the classical period, this intention and conformity was called the affectio maritalis." Riga, supra note 1, at 918.
6. Id. The right to divorce could also exist for cause and was obligatory for adultery. Id. at 919. The causes for divorce, other than adultery, however, were neither well defined nor enumerated. Id. at 920. This is without consequence, because "the right to divorce without limit existed throughout the classical period." Id. at 919.
of the marriage was left to the parties directly concerned.\textsuperscript{7}

With the emergence of Christianity and the formation of the Roman Catholic Church, the classical idea of marriage was increasingly attacked.\textsuperscript{8} During the early years of the Church, Roman legislation resisted changes to the law of divorce.\textsuperscript{9} However, by the middle of the third century, Roman emperors weakened and allowed restrictions on the ability to end the marital union.\textsuperscript{10} "Legislation, hostile to divorce, started with the Emperor Constantine who... [attempted] to moderate the antagonism between the Roman rules and the teachings of the church."\textsuperscript{11} Absolute adherence to the Christian rule of complete indissolubility of marriage was not possible at this time, for Romans would have found this unacceptable.\textsuperscript{12} Yet, in the Constitution of Constantine, a major shift towards the Christian view is evident.\textsuperscript{13}

The Constantine Constitution established causes that permitted a husband or wife to divorce the other. "The husband had the right to divorce his wife if she were an adulteress, a poisoner or a conspirator. The wife could divorce her husband if he were a murderer, a prisoner or a violator of graves."\textsuperscript{14} In 449 A.D., the Emperor Theodosius introduced and enforced more stringent rules and regulations for divorce.\textsuperscript{15} These new regulations placed more restrictions on the wife's ability to divorce her husband than on the husband's ability to divorce his wife.\textsuperscript{16}

\begin{itemize}
  \item \textsuperscript{7} HELMHOLZ, supra note 2, at 4.
  \item \textsuperscript{8} Riga, supra note 1, at 920. "The essential differences between the views on marriage in Roman and Christian law were evident." Id. at 921. Christianity held that marriage from its inception was indissoluble. This idea was founded on the Gospels, on the teachings of St. Paul, and formulated by Augustine of Hippo, who declared that although adultery was the only reason for divorce, the bonds of marriage remained intact. Id. at 920-21.
  \item \textsuperscript{9} Id. at 921.
  \item \textsuperscript{10} Id. at 921-22.
  \item \textsuperscript{11} Id. at 921.
  \item \textsuperscript{12} Id.
  \item \textsuperscript{13} The Constantine Constitution was enacted in 331 A.D. Id. at 922.
  \item \textsuperscript{14} Riga, supra note 1, at 922. A husband or wife could repudiate the other for less serious offenses or for no specified reason at all, but in such cases remarriage was either forbidden or, if permitted, permitted only after a long lapse of time from the date of repudiation." PHILLIPS, supra note 4, at 18.
  \item \textsuperscript{15} Riga, supra note 1, at 922.
  \item \textsuperscript{16} Id. For example,
\end{itemize}
By the middle of the sixth century, the influence of Christianity could no longer be denied. In the Eastern Roman Empire, the Emperor Justinian\(^7\) revised the Roman law of divorce in the *novellae* laws concerning marriage.\(^8\) However, in

were [sic] an adulterer, an assassin, a poisoner, a conspirator against the emperor, a violator of graves, a pillager of temples, a brigand, or a receiver and protector of brigands. In addition, divorce was authorized if the husband had continuous sexual relations with unchaste women in his home, attempted to kill his wife by sword, poison or otherwise, or mistreated his wife in a manner unworthy of free men.

A husband could not divorce his wife for cause unless she were an adulteress, a poisoner, a murderer, a temple stealer, a brigand, if she stayed the night away from the conjugal home with strange men (without permission and in spite of her husband’s protest), if she took part in circus performances or the theatre in spite of her husband’s protest, if she attempted to kill her husband by the sword, poison, or in any other manner, if she took part in a conspiracy against the emperor, if she went to the baths with strange men, or if she raised her hand against her husband.

*Id.* If divorce took place for reasons other than those in the constitution, the consequence was loss of the dowry and respective nuptial gifts. *Id.* In cases of divorce without just cause, the woman could remarry five years after the divorce. *Id.*

17. Justinian was born a peasant of the Balkans and rose to the highest station, that of Roman Emperor. Craig A. Stern, *Justinian: Lieutenant of Christ, Legislator for Christendom*, 11 REGENT U. L. REV. 151, 151 (1999). He began his reign in 527 A.D. *Id.* at 152. During his reign, Justinian ordered “the production of the summary of Roman law, the *Corpus Juris Civilis*, the body of civil law, as it has been called since the Middle Ages.” *Id.* at 157. This body of laws remains the foundation of law for most of Christendom and beyond, and of impact even upon the non-civil system of the common law of English-speaking countries. Like the reconquest of the west and the ecclesiastical building program, the writing of the *Corpus Juris Civilis* expressed Justinian’s obedience to his divine call to rule Christendom after God’s design. . . . In effect, this work was an update of the previous Code assembled by the Emperor Theodosius a century before.

*Id.* at 157-58. See also Pacia, *supra* note 3, at 31 (discussing the Digest of Justinian). The *Corpus Juris Civilis* was divided into four parts: the Codex, “an updated collection of the constitutions, statutes, and legislation of the previous Roman emperors[,]” the Digest, “an anthology of the best writing of thirty-nine classical jurists[,]” the Institutes, “a textbook . . . to initiate law students to current jurisprudential logic[,]” and “the Novella, which were legislative amendments to the Codex (the first part) that were enacted in ensuing years during Justinian’s reign.” *Id.* at 31-32.

18. Riga, *supra* note 1, at 923. In classical Rome, “marriage depended upon the ongoing intent of the parties. Marriages lasted only so long as both parties intended to remain married, not unlike the contemporary American regime under ‘no-fault’ divorce.” Stern, *supra* note 17, at 162-63. This concept was replaced by Justinian in the *Corpus Juris Civilis* “with a Christian understanding of marriage, a covenantal understanding. Marriage remains dependent upon the intent of the parties, but that intent is encapsulated in a covenant, a solemn commitment of the parties that would perdure through any later change of heart.” *Id.*

While “Justinian prohibited and punished divorce, . . . [he] did not declare it impossible . . . [for] divorce without any cause . . . was not permitted, but once done was valid.” Riga, *supra* note 1, at 923, 925. Soon after, however, Justinian
the declining Western Roman Empire, divorce not only persisted, but "the Germanic codifications of law between fifth and ninth centuries... tended to allow divorce, either by mutual consent or unilaterally. The terms of the latter generally favored the husband." Thus, although the Eastern and Western empires still allowed for divorce, the influence of the Roman Catholic Church changed the scope of divorce law in Western Europe.

II. INFLUENCE OF THE CANON LAW AND ROMAN CATHOLIC CHURCH

The tension between the Roman view and the Canonical view of marriage was the ability of the parties to end the union. This can be attributed to differences in the Roman and Canonical ideology of marriage. In any event, it is difficult to say exactly...

introduced something entirely different in Novella 117. Id. at 926. "All divorces ex communi consensu (voluntary dissolution) were forbidden... [when] Justinian declared that a simple agreement between the spouses would no longer suffice for divorce... [and] that marriage could end only for the enumerated causae." Id. (footnote omitted). This new law reveals the emperor's desire that the law at least "approach the Christian ideal concerning marriage and divorce." Id. at 927 (footnote omitted). Thus "[m]arriage, a question of fact during the classical period, became a judicial relationship under the influence of the Church." Id. (footnote omitted).

In latter novellae, the emperor came closer and closer to adopting the Christian ideal of indissolubility. Riga, supra note 1, at 929-30. Yet, the imperial disposition of a total prohibition of mutual divorce did not last long and was revoked by Justinian II after the death of Justinian in 566 A.D. Id. at 930. Justinian II also allowed his citizens to have "the possibility of freeing themselves from the miseries of bad marriages" when he declared in Novella 140 that "Novella 117 was impossible to enforce." Id. (footnote omitted).

19. PHILLIPS, supra note 4, at 23. The husband "was permitted to repudiate his wife if she were guilty of adultery or if she were unable to have children." Id. (citation omitted).

20. At this time, the Western legal tradition was "a continuity of legal ideas and institutions, which gr[e]w by accretion and adaptation. The exact shape of these ideas and institutions... [became to be influenced] in part, by the underlying religious belief systems of the people ruling and being ruled." John Witte, Jr., A New Concordance of Discordant Canons: Harold J. Berman on Law and Religion, 42 EMORY L.J. 523, 534 (1993). Because the focus of this work is on divorce in the Western legal tradition, there will be no further discussion of divorce in the Eastern Roman Empire.

21. See Riga, supra note 1, at 928.

Before the advent of Christianity, Roman law, because it was indifferent to marriage and divorce as legal phenomena, authorized divorce by mutual or even unilateral consent[,] so fundamental for the Roman social outlook was an unfettered freedom of divorce[,] that even a spousal agreement not to divorce was deemed void as incompatible with the Roman idea of marriage. Christianity, after acquiring the status of the Roman Empire's official religion... consolidate[d] its power over the Roman spirit by means of a radical change in traditional attitudes toward divorce and its regulation.
when the Christian view of divorce eventually became the majority rather than the minority view in Western Europe. 22 However, "[d]uring the eighth century the divergence that had been apparent between secular and ecclesiastical legal codes began to close in favor of the non-dissolubilist position." 23 This result came about largely by the efforts of Charlemagne, who wanted to "strengthen marriage law." 24 The Roman Catholic Church was eventually successful in gaining exclusive control over matrimonial questions. By the ninth century, 25 the civil courts throughout Western Europe uniformly applied the indissolubility doctrine. 26 This influence was strengthened during the tenth through twelfth centuries during the "emergence of canon law as a systematized and autonomous discipline, with a


Marriage, [as] a question of fact... became a judicial relationship under the influence of the Church. The Roman principle, in which marriage was concluded and maintained by the constant and reciprocal will of the spouses, consensus factit nuptias, was accepted as such by the Church. This reciprocal will was interpreted differently, however, by Roman and ecclesiastical jurisprudence. According to Roman law, the voluntary agreement of the spouses marked their reciprocal affection. According to the Church, however, this willful agreement of the spouses established a contract. The contract existed at the conclusion of the marriage ceremony, and throughout the lifetime of each partner.... [Moreover, a]ccording to the doctrine of the Church, marriage was a sacrament of indelible character. Consequently the bond, once established was indissoluble. Thus, dissolution of the marriage [allowable under Roman law] was incompatible with the Christian concept of marriage.

Riga, supra note 1, at 928 (citation omitted).

22. It has been said that "[t]he first transformation occurred in the fourth through sixth centuries, when the Christian (and less so, the Jewish) concept of marriage as a monogamous, heterosexual, life-long union came to dominate Roman and later Germanic law." Witte, supra note 20, at 548. During that time, "[t]raditional Roman and Germanic practices of polygamy, concubinage, incest, homosexuality, abortion, and infanticide—that were [previously] part of the Roman legal tradition—were proscribed." Id.

23. PHILLIPS, supra note 4, at 24.

24. Id. Convoked by Charlemagne in 789A.D., the Ninth Synod of Carthage "prohibited the remarriage of any person who had been repudiated by his or her spouse. Eight years later the Council of Friuli decreed unequivocally that adultery did not dissolve marriage, although an adulteress could be punished and her husband could obtain a separation a mensa et thoro from her." Id. (citation omitted). "The freedom to contract marriage was first recognized by Gratian and the decretists who followed him." Charles J. Reid, Jr., The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry, 33 B.C. L. REV. 37, 72 (1991). Gratian's repudiation of the validity of coerced marriages was also accepted by canon lawyers. Id. at 75.


26. PHILLIPS, supra note 4, at 24.
theoretical framework that occasionally overlapped with, but was also distinct from, other disciplines such as theology and philosophy.\textsuperscript{27}

"The divorce doctrine that the Roman Catholic Church had developed by the late Middle Ages... can be stated with deceptive simplicity and brevity: A valid celebrated Christian marriage was dissoluble only by the death of one of the spouses."\textsuperscript{28} This was not to say that couples were forbidden to dissolve a validly celebrated Christian marriage.\textsuperscript{29} However, for the most part, many alternative remedies for dissolution (i.e. non-consummated marriage and Pauline Privilege) were rarely practiced.\textsuperscript{30} Couples could seek to annul a marriage\textsuperscript{31} or request a

27. Reid, supra note 24, at 42. In the twelfth century, "a systematic Roman Catholic theology and canon law of marriage and the family came to dominate the West." Witte, supra note 20, at 548-49. Because marriage was seen as a holy sacrament, its conceptual foundation was on the laws of nature, scripture and morality, which were areas where the Church had exclusive jurisdiction. Witte, supra note 20, at 549. "By the thirteenth century, the Catholic Church was generally recognized as [also] possessing exclusive jurisdiction over marriage [and divorce] cases throughout Western Europe." Reid, supra note 24, at 82. Today, "[w]ell over one hundred canons address issues of marriage and ecclesiastical marriage courts." Joel A. Nichols, Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?, 47 EMORY L.J. 929, 980 (1998).

28. PHILLIPS, supra note 4, at 2 (citations omitted). The Council of Trent established this doctrine in canon law in the 1560s. Id. at 3. "The essential properties of marriage are unity and indissolubility, thus leaving no option for 'divorce' in the modern sense of that term." Nichols, supra note 27, at 980. In canon law, "divorce was understood to result in the termination of the conjugal right, although the marriage bond itself would continue to endure." Reid, supra note 24, at 85.

29. The Pauline Privilege allows the dissolution of a marriage when one member of the union is not a Christian. PHILLIPS, supra note 4, at 3. A marriage that was not consummated could also be dissolved. Id. However, "dissolution was not possible once the marriage had been consummated." Id. at 2-3 (citation omitted).

30. Id. at 3. A validly celebrated Christian marriage was indissolvable with few exceptions. Id. at 2. The Pauline Privilege allowed the Christian spouse to remarry if the unbelieving spouse deserted the marriage. Id. Another exception existed if the marriage had not been consummated.

31. "The list of diriment impediments recognized by the Catholic Church as capable of rendering a marriage null is long and has changed over time." PHILLIPS, supra note 4, at 5 (citation omitted). Yet most well-known impediments "are those based on consanguinity and affinity—relationship of the married parties by blood and marriage, respectively." Id. By the twelfth century, the prohibited degree of relation was seven degrees. Id. at 6. However in 1215A.D., the Fourth Lateran Council "reduced the prohibitions on consanguinity and affinity from seven to four degrees." Id. Other impediments included a precontract of marriage, impotency, lack of consent, secrecy, and "where one of the parties had previously taken religious vows or where one of them had attacked the sanctity of the previous marriage of the
grant of separation.\textsuperscript{32} Yet, these remedies were also rarely used, and when sought, were rarely granted.\textsuperscript{33} Modern divorce did not exist in medieval Europe because “marriages validly entered into were theoretically indissoluble.”\textsuperscript{34}

Besides separation or annulment, an unhappy husband could also rid himself of an unwanted spouse by repudiation or “self divorce.”\textsuperscript{35} This remedy was not infrequently used during the Middle Ages,\textsuperscript{36} and allowed a man to, in effect, obtain a divorce when he leaves his first wife and takes another as his wife.\textsuperscript{37} However, when the deserted wife objected, multi-party litigation often resulted.\textsuperscript{38}

By the 1500s, self-divorce and repudiation of a spouse without recourse to the Church became less acceptable. More care was taken to secure a formal sentence of dissolution before passing a new marriage. By this time, the standards of the

other, either by killing his or her partner or by committing adultery with a promise to marry as soon as the accomplice was free to do so.” \textit{Id.} at 8.
32. PHILLIPS, \textit{supra} note 4, at 13. Separation as an alternate remedy was introduced into the canon law in the twelfth century. \textit{Id.} “Canon law admitted three principal grounds for separation: adultery, cruelty, and heresy and apostasy (which were thought of as spiritual fornication).” \textit{Id.}

Adultery was permitted as a ground for divorce on the basis of scriptural authority. “Spiritual fornication,” which was understood as a lapse into heresy, or conversion to Judaism or Islam, was treated analogously to carnal adultery. Like the non-offending spouse in an adultery case, the Catholic Christian spouse in cases of spiritual fornication was free to seek an ecclesiastical divorce.

Reid, \textit{supra} note 24, at 85. Cruelty, or saevitia (violence) “was built on a decretal of Alexander III, and on a decretal of [Pope] Innocent III.” \textit{Id.} Those decretais ordered judges “not to restore the wife to her husband if his violence was obvious, and to provide instead for her safekeeping.” \textit{Id.} at 86.
33. PHILLIPS, \textit{supra} note 4, at 9, 15.

34. HELMHOLZ, \textit{supra} note 2, at 74. While the term divorce was used throughout medieval records, its use normally referred to annulments and judicial separations. \textit{Id.}

35. \textit{See id.} (noting that this remedy usually was not available to women).
36. \textit{Id.} at 62.
37. \textit{Id.} at 59.

38. \textit{Id.} at 60. Men usually claimed the right to repudiate their wives along with a reason for the invalidity of the first marriage. HELMHOLZ, \textit{supra} note 2, at 59. Multi-party litigation resulted when the second wife and/or some man from the first wife’s past became involved. \textit{Id.} at 59-63. “The number of these multi-party suits brought before the . . . courts was substantial and also shows [in] a particularly clear way[,] the freedom people felt to regulate their martial affairs without direct intervention by the Church courts.” \textit{Id.} at 58-59 (citation omitted). For examples of multi-party cases brought before the courts and difficulties with evidentiary standards in those cases, see \textit{id.} at 60-65, 81-85, 88.
The Cyclical Nature of Divorce

III. THE PROTESTANT REFORMATION HALTS FULL ADOPTION OF THE DOCTRINE OF INDISSOLUBILITY

“The first fifteen hundred years of the Christian Era witnessed the progressive removal of divorce from European legal codes. . . . [However] from the sixteenth century onward the acceptability of divorce underwent a renaissance as a result of the Protestant Reformation.” The Protestant Reformers denied the idea that marriage was a holy sacrament, as endorsed by the Roman Catholic Church, and advocated the possibility of divorce under certain circumstances. Moreover, “[b]ecause of their emphasis on the pedagogical role of the church and the family, and the priestly calling of all believers, the [Protestant] reformers insisted that both marriage and divorce be public.” To be sure, Protestants had divergent views on the availability of marriage. Those that will briefly be discussed in this article include the views held by Luther, Calvin, and the Continental Reformers Zwingli and Bucer.

39. PHILLIPS, supra note 4, at 40 (citation omitted).
40. Instead, marriage was a social concept. Witte, supra note 20, at 550. “The marital unit, though divinely ordained, was viewed as an institution of the earthly kingdom. Participation required no prerequisite faith or purity and conferred no sanctifying grace, as did true sacraments.” Id.
41. PHILLIPS, supra note 4, at 45. However, “[m]uch of the traditional canon law of marriage and the family was appropriated by civil authorities in . . . [the] Protestant countries.” Witte, supra note 20, at 550. For example, “[p]rohibitions against unnatural relations and infringement of marital functions remained in effect [and] impediments that protected free consent, that implemented Biblical prohibitions against marriage of relatives, and that governed the couple’s physical relations were largely retained.” Id. The [N]ew Protestant theory of marriage and the family also yielded legal changes. Before the reformers rejected the subordination of marriage to celibacy, they rejected laws that forbade clerical and monastic marriage, that denied remarriage to those who had married a cleric or monastic, and that permitted vows of chastity to annul vows of marriage. Because they rejected the sacramental nature of marriage, the reformers rejected impediments of crime and heresy and prohibitions against divorce on grounds of adultery, desertion, cruelty, or frigidity.

Id.

42. Witte, supra note 20, at 551. “Marriage promises required parental consent, witnesses, church consecration and registration, and priestly instruction. Couples who wished to divorce had to announce their intentions in the church and community and petition a civil judge to dissolve the bond.” Id.
The Lutheran model was most prominent in sixteenth century Protestant Germany, but was also an influence on divorce legislation in other parts of Western Europe as far as Scandinavia. The Lutheran divorce doctrine permitted the dissolution of marriage in the following circumstances: adultery, desertion, and the refusal of sexual intercourse. Yet, Lutheran believed that “matrimonial problems should be resolved not by laws, but by the circumstances and according to equity and the judgement of a good man.” Moreover, Lutheran was reluctant to counsel divorce unless all other alternatives had been tried. Even when the parties were unable to reconcile, thereby making divorce the only remedy, a divorce was neither quick nor easy to obtain. This was especially true in desertion cases.

The Calvinist model allowed divorce of the marriage on grounds of adultery and desertion, which gave rise to the presumption of adultery. However, Calvin expressly ruled out divorce based on emotional incompatibility. Calvin’s model was reflected in sixteenth century Swiss divorce law. Calvin’s view also had an almost immediate effect in Scotland, where adultery and desertion remained the only two grounds recognized for divorce until 1938.

While Luther and Calvin were the most influential of the Protestant Reformers, Zwingli’s and Bucer’s theories were also used as models for divorce reform in Western European Protestant states. Zwingli’s ordinance allowed adultery as the

43. PHILLIPS, supra note 4, at 50.
44. Id. at 48 (citation omitted).
45. Id.
46. Id.
47. Luther’s requirement to establish the whereabouts of the departed spouse and determine that “the partner who was to benefit from the divorce was not responsible for the other’s desertion” created difficulty for the deserted spouse. Id. at 49 (citation omitted).
48. John Calvin held the view that adultery as a ground for dissolution of the marriage was “derived from the Old Testament’s injunction that an adulterous wife should be put to death.” Id. at 53 (citation omitted).
49. PHILLIPS, supra note 4, at 54 (citation omitted). Calvin held the view that an unhappy marriage “was a result of original sin and had to be borne like its other effects, however unpleasant they might be.” Id. Yet, Calvin did warn husbands not to be cruel to their spouses and that wife beating was to be avoided. Id. The husband’s role, according to Calvin, is one of “companionship rather than kingship.” Id.
50. Id. at 56-60.
51. Id. at 60-61.
prime ground for divorce, but other grounds included "destroying life, endangering life, being mad or crazy, offending by whorishness, leavings one's spouse without permission, remaining abroad a long time, having leprosy, or other such reasons, of which no rule can be made on account of their dissimilarity." This ordinance was enacted in Zurich. Bucer, a radical libertarian, adopted a doctrine of divorce permitting the "dissolution of marriage under a broad range of circumstances, including matrimonial offenses and mutual consent." The Radical Reformers of the Anabaptist churches and sects restricted the grounds for divorce only to adultery.

England is the only country in which an established or dominant reformed church did not part from the Roman Catholic doctrine of marital indissolubility. Divorce legislation did not arise in England until the nineteenth century. The Church of England's eventual break from the Roman Catholic Church occurred when King Henry attempted to rid himself of his wife, Catherine of Aragon. However, by the end of the seventeenth century, an English procedure developed to permit dissolution by a private act of Parliament, and this was the only means by which a divorce could be obtained until 1857.

IV. SECULARIZATION AND DIVORCE LEGISLATION OF THE EIGHTEENTH AND NINETEENTH CENTURIES

Intervention by the monarchs in marriage and divorce law, both on a personal basis and by edicts and statutes, "not only added to the secular element in legislation and jurisdiction but also extended divorce policies significantly." Throughout Western Europe, the divorce courts established during the

52. PHILLIPS, supra note 4, at 63 (citation omitted).
53. Id.
54. Id. at 69.
55. Id. at 66-67.
56. Id. at 71 (citation omitted).
57. Actually, "the Church of England... dramatically limited the scope of annulments previously available under Roman Catholic canon law, thus becoming 'more popish than the pope.'" J. Herbie DiFonzo, Paradox of Change: The English Background to the California Divorce Revolution, 22 LINCOLN L. REV. 31, 33-34 (1994) (citation omitted).
58. PHILLIPS, supra note 4, at 71, 77.
59. Id. at 95.
60. Id. at 202.
Reformation gradually secularized. In England, the price of parliamentary dissolutions of marriage had the effect of secularizing the law of marriage and divorce. In France, legislative control over marriage effectively passed from the church to the monarchy with the establishment of Royal Courts in the late eighteenth century. It is important to note that "[t]hese developments were not peculiar to matrimonial law but were an integral part of a broad process by which the European states arrogated functions that their churches had been accustomed to performing."

A major influence on legislators, legal commentators, and theorists was the theory of natural law. Natural law philosophers "sought to discover a legal code that was rounded in criteria more general and enduring than the mere practical needs of mankind. This law, they believed, could be discovered by the application of reason." Grotius, one of the founders of modern natural law theory, originally conceived of the purpose of marriage to be procreation, but subsequently amended his view of marriage to include social ends, such as mutual assistance and comfort. It is against this backdrop that the secularization of divorce legislation occurred.

One of the more important legislative developments in Europe in the nineteenth century was the passage of England's divorce law in 1857. This marked the end of England's three century long struggle to catch up with the rest of Protestant

---

61. PHILLIPS, supra note 4, at 203.
62. Id. However, before a divorce by act of parliament could be ordered, one had to first "obtain a separation a mensa et thoro [from bed and board] from a church court to demonstrate that his wife was guilty of adultery, or ... that her husband was guilty of aggravated adultery." Id. at 204. For a comprehensive analysis of English marriage and divorce laws from the sixteenth century, see Danaya C. Wright, The Crisis of Child Custody: A History of the Birth of Family Law in England, 11 COLUM. J. GENDER & L. 175, 176-82, 238-49 (2002); Wendie Ellen Schneider, Secrets and Lies: The Queen's Proctor and Judicial Investigation of Party-Controlled Narratives, 27 LAW & SOC. INQUIRY 449, 453-62 (2002); and Hazel D. Lord, Husband and Wife: English Marriage Law from 1750: A Bibliographic Essay, 11 S. CAL. REV. L. & WOMEN'S STUD. 1, 1-3, 12-26 (2001).
63. PHILLIPS, supra note 4, at 205.
64. Id.
65. Id. at 210.
66. Id. at 211 (citation omitted).
67. Id. at 210-11.
68. Id. at 412.
Europe in the area of divorce law.\(^69\) This legislation transferred jurisdiction over divorce matters from Parliament to a special court, called the Court of Divorce.\(^70\) Under the 1857 divorce legislation, divorce was available "for reason of adultery (or aggravated adultery, depending on the sex of the defendant). Judicial separation under the Act replaced those that had been granted by the ecclesiastical courts."\(^71\) Although England sported one of the lowest divorce rates in Europe even after the 1857 legislation, the increase in divorce after 1857 was significant.\(^72\)

In France, the late eighteenth century saw the enactment of divorce legislation, but the beginning of the nineteenth century saw its limitation and eventually, its abolishment.\(^73\) However, in 1884, divorce was restored and allowed on "grounds of the wife's adultery, the husband's adultery if it were committed in the marital dwelling, either spouse's 'outrageous conduct, ill-usage, or grievous injuries,' or the condemnation of either spouse to an infamous punishment."\(^74\)

The evolution of divorce legislation in Germany was closely linked to the formation and consolidation of the German Empire.\(^75\) German nations, which had already reformed their divorce law during the Protestant Reformation, gradually expanded the grounds for which divorce could be obtained. In Prussia for example, divorce was available on eleven broad grounds including: adultery or unnatural vices; desertion; refusal of sexual intercourse; impotence; raging insanity or madness; violence, attempted murder, or repeated and unfounded

\(^69\) PHILLIPS, supra note 4, at 412-20.

\(^70\) Id. at 420.

\(^71\) Id.

\(^72\) Id. at 421. During the 1850s the annual average for divorce acts was four, but beginning in 1858, the number rose to between two and three hundred a year. Id.

\(^73\) Id. at 175-90. In 1792, divorce law of the French Revolutionaries specified that marriage was dissoluble by divorce on principles of both matrimonial fault or the breakdown of marriage, which required no proof, or attribution of fault and could be brought unilaterally on the ground of incompatibility of temperament. PHILLIPS, supra note 4, at 178. By 1803, divorce had been restricted in Napoleonic law to fault grounds of cruelty, adultery and condemnation to certain degrading forms of punishment. Id. at 185. Divorce on the grounds of reason of incompatibility of temperament was abolished. Id. Moreover, marriage could not be dissolved by mutual consent unless it lasted for more than two years, and no divorce could be obtained for a marriage lasting over twenty years or by a woman over forty-five. Id. In 1816 divorce was abolished by decree of King Louis XVIII. Id. at 189.

\(^74\) PHILLIPS, supra note 4, at 424-25 (citation omitted).

\(^75\) Id. at 428 (citation omitted).
defamatory accusation; acts of felony or pursuing a disreputable occupation; leading a disorderly life; continued refusal by husband to maintain his wife; giving up the Christian religion; and insurmountable aversion or the mutual consent to separate, where there were no children of the marriage or if there were children, where there were exceptional circumstances. Many other German states followed the Prussian model; yet, divorce by mutual consent was not recognized by all of the German states.

Austrian divorce reform in the nineteenth century was one of the most turbulent in Europe. By 1870, divorce grounds, "which remained formally denied to Austrian Catholics until the Nazi divorce law of 1938, included adultery, condemnation for certain crimes, willful desertion, having an infectious disease, ill-treatment, and threats." Switzerland reformed its divorce law in 1874 to allow divorce on the grounds of adultery, willful desertion, insanity, and being sentenced to a degrading punishment.

Nineteenth century Spaniard divorce law also underwent a turbulent reformation. By 1889, the only relief available to

76. PHILLIPS, supra note 4, at 428.
77. Id. at 430.
78. Id. Many German states that did not allow divorce by mutual consent did make "allowance for their respective regents to dissolve individual marriages, a type of executive divorce not available in Prussia." Id.
79. Id. at 432.
In the first half of the century divorce was permitted to non-Catholics under the terms of the 1811 General Civil Code, but the restoration of a conservative monarchy after the revolution of 1848 led to a reaction against liberal ideas and politics. In 1855, a concordat was signed that transferred control of marriage to the Catholic Church, thus effectively eliminating the possibility of divorce for all Austrians, regardless of their religious affiliation. This retreat provoked such a reaction, however, that the clauses dealing with marriage in the 1855 concordat were abrogated in 1868.

80. Id. (citations omitted).
82. PHILLIPS, supra note 4, at 433.
An 1870 law transferred control of marriage from the ecclesiastical to the secular authorities, but the tension between church and state, and between conservative and liberal tendencies quickly became apparent. The secularization of marriage created such a reaction that in 1875 it was repealed and obligatory religious marriage reinstated; only Spaniards who could prove that they were not Roman Catholics were permitted to go through a civil marriage ceremony. Even so, divorce was not possible for non-Catholics for
unhappily married Spanish couples was the separation *a mensa et thoro*. Nearby, "the Portuguese Civil Code of 1867 ruled out the possibility of divorce by declaring marriage to be a 'perpetual contract.'" Portugal did not legalize divorce until the twentieth century. Neither did Ireland. In both Holland and Scotland, divorce in the eighteenth century was allowed by traditional customs.

V. DIVORCE IN THE UNITED STATES

The development of divorce law in the United States was similar to the various nations in Europe. In seventeenth century New England, divorce was fault based, much like its Protestant counterparts, and was permitted on grounds of adultery, desertion (five years), impotence, fraudulent contract, consanguinity, and bigamy. After the American Revolution, the divorce laws of the various states began to show some differentiation. During the first half of the nineteenth century, divorces rates continued to increase with the westward growth of the country. The general pattern was that more recently settled Catholics].

*Id.* (citations omitted).

83. *PHILLIPS, supra* note 4, at 433.

84. *Id.* at 432-33.

85. *Id.* at 433. Legislation in 1910 "allowed divorce by mutual consent, converted separation[,] and any of ten specific grounds, including adultery, absence, desertion, ill-treatment, and addiction to gambling.... The 1910 legislation also made husbands and wives equal in all respects before the law.... [and] made civil marriages obligatory." *Id.*


89. See *MARY SOMERVILLE JONES, AN HISTORICAL GEOGRAPHY OF THE CHANGING DIVORCE LAW IN THE UNITED STATES* 17 (1987) (noting that remarriage was allowed only to the innocent party).

90. *JONES, supra* note 89, at 19.

91. *Id.* at 20.
areas enacted more liberal divorce laws. After the Civil War, there were few changes in divorce statutes, with the exception of South Carolina, which permitted divorce for the first time in 1869 (this law was later outlawed in 1878 and divorce was not again permitted until 1949). By the turn of the century, there was a considerable body of divorce law throughout the United States. During the first half of the twentieth century, existing grounds were expanded and additional grounds were implemented to the fault based regime. For example, cruelty was extended in most states to include mental cruelty. New grounds included nonsupport, insanity, voluntary separation, and incompatibility. Moreover, uncontested cases increased in number. In general, divorce became increasingly popular in the United States, where divorce rates were significantly higher than in Europe.

In the Western States, where the laws were more liberal, divorce rates were higher than in the Southern and Eastern States, where the laws were more conservative. The Mid-Western States were more likely to be at the national average. These differing divorce laws resulted in the practice of migratory divorce, which was an interesting and highly litigious feature of American divorce law during the early part of the twentieth century.

92. JONES, supra note 89, at 30-31.
93. Id. at 29.
94. Id. at 60. For example, "[a]bsolute divorce could be obtained in most states on a variety of grounds. Adultery, cruelty and desertion were found in all states. . . . In addition, conviction of a felony, drunkenness, non-support, bigamy, impotence, and fraud were also allowable grounds in various states." Id.
95. Id. at 61.
96. Id. at 86, 108.
97. Id. at 61.
98. PHILLIPS, supra note 4, at 560.
99. JONES, supra note 89, at 81-83.
100. Id. at 82.
101. As used in this article, the term "migratory divorce" means the practice, whether intentionally for the purpose of avoiding more burdensome divorce laws or not, of one spouse seeking to obtain a divorce in a jurisdiction other than the jurisdiction where both spouses reside. For a detailed analysis of American law on this issue, see O'Hear, supra note 88, at 1513-34. For an analysis of European law on this issue, see Erwin N. Griswold, Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study, 65 HARV. L. REV. 193 (1951) and Rhonda Wasserman, Divorce and Domicile: Time to Sever the Knot, 39 WM. & MARY L. REV. 1 (1997).
VI. MIGRATORY DIVORCE IN THE UNITED STATES

To any American, lay person or constitutional scholar, the idea that, by virtue of the Full Faith and Credit Clause of the United States Constitution, the idea a divorce obtained in one state is valid in every state is such a well recognized idea that it is impossible to believe otherwise. Yet, at the turn of the century this issue was unsettled, as shown in *Atherton v. Atherton*. In *Atherton*, Mrs. Atherton sought divorce from bed and board against Mr. Atherton on the grounds of cruel and abusive treatment. The parties married in New York and later moved to Louisville, Kentucky, where they resided until Mrs. Atherton returned to New York to live with her mother. Mrs. Atherton sought divorce in New York on January 11, 1893, while Mr. Atherton continued his residence in Louisville, and remained domiciled in the state of Kentucky. Mr. Atherton “successfully set up a decree of divorce from the bond of matrimony in a court of Jefferson county, . . . Kentucky on March 14, 1893, [however] the supreme court of New York refused to acknowledge the decree.” This decision was upheld by the Court of Appeals of New York.

The United States Supreme Court reversed the New York courts’ determination and held “[t]here can be no doubt that the Kentucky decree was by law and usage entitled to full faith and credit as an absolute decree of divorce in the State of

103. Id. at 155. Mary G. Atherton and Peter Lee Atherton took marriage vows in Clinton, Oneida County, New York. Id. At that time, Mrs. Atherton was a resident of New York, while Mr. Atherton was a resident of Kentucky. Id.
104. Id. at 155-56. At the time Mrs. Atherton left Kentucky, “she did so with the purpose and intention of not returning to the state of Kentucky, but of permanently residing in the state of New York; and this purpose and intention were understood by the defendant [Mr. Atherton] at the time.” Id. at 156. The parties evidenced this intent in an agreement entered into in Louisville and dated October 10, 1891. *Atherton*, 181 U.S. at 156.
105. Id. at 156-57.
106. Id. at 159. The New York Court reasoned that Mrs. Atherton was not personally served with process within the state of Kentucky, or at all; nor did she in any manner appear, or authorize an appearance for her, in the said action and proceeding . . . and that before the commencement of that suit, and ever since, she had ceased to be a resident of Kentucky and had become and was a resident of the state of New York.
107. Id. at 160.
The Court reasoned that "[t]he rule as to the notice necessary to give full effect to a decree of divorce is different from that which is required in suits in personam." Moreover, the Court held that

[t]his case does not involve the validity of a divorce granted, on constructive service, by the court of a state in which only one of the parties ever had a domicil[e]; nor the question to what extent the good faith of the domicil[e] may be afterwards inquired into. In this case, the divorce in Kentucky was by the court of the state which had always been the undoubted domicil[e] of the husband, and which was the only matrimonial domicil[e] of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky. 109

The Court concluded that such reasonable steps had been taken to give Mrs. Atherton notice as to bind her by the decree in the state of domicile. 111

108. Atherton, 181 U.S. at 162.
109. Id. at 162-63. The Court reasoned that

[t]he purpose and effect of a decree of divorce from the bond of matrimony by a court of competent jurisdiction are to change the existing status or domestic relation of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband, is unknown to the law. When the law provides, in the nature of a penalty, that the guilty party shall not marry again, that party, as well as the other, is still absolutely freed from the bond of the former marriage.

Id. at 162.

110. Id. at 171. The Court noted that Mr. Atherton always had his domicil[e] in Kentucky, and the matrimonial [domicile] of the parties was in Kentucky. On December 28, 1892, ... [Mr. Atherton] filed his petition for a divorce in the court of appropriate jurisdiction in Kentucky, alleging an abandonment of him by [Mrs. Atherton] in Kentucky, and a continuance of that abandonment for a year, which was a cause of divorce by the laws of Kentucky. His petition truly stated, upon oath, as required by the statutes of Kentucky, that ... [Mrs. Atherton] might be found at Clinton in the state of New York, and that at Clinton was the postoffice [sic] nearest the place where she might be found. As required by the statutes of Kentucky, the clerk thereupon entered a warning order to [Mrs. Atherton] to appear in sixty days, and appointed an attorney at law to represent her.

Id.

111. Id. at 172. The Court held all efforts ... required by the statutes of Kentucky ... were actually made to give [Mrs. Atherton] actual notice of the suit in Kentucky, as to make the decree of the court there, granting a divorce upon the ground that she had abandoned her husband, as binding on her as if she had been served with notice in Kentucky, or had voluntarily appeared in the suit. Binding her to that full extent, it established, beyond contradiction, that she had abandoned her husband, and
Another migratory divorce case, which was decided on the same day as Atherton, was Bell v. Bell. In Bell, the Court reviewed another decision of the New York courts. Mrs. Bell sued for divorce in the Supreme Court for the County of Erie, New York based on adultery. In the New York court, Mr. Bell pleaded a previously granted decree of divorce in the state of Pennsylvania based on his wife's desertion.

The United States Supreme Court ruled that the Pennsylvania divorce decree obtained by Mr. Bell was invalid. The Court reasoned that at the inception of the Pennsylvania action and at the time of rendering that decree Mrs. Bell was a resident of the state of New York and Mr. Bell was not domiciled in Pennsylvania. The Court ruled that constructive service was insufficient for a divorce granted by the courts of a state in which neither party is domiciled.

In another decision affirming the Court of Appeals of New York, Haddock v. Haddock, the Supreme Court appears to reverse Atherton by holding that mere domicile within the state of one party to the marriage does not confer jurisdiction to render a decree of divorce.

precludes her from asserting that she left him on account of his cruel treatment. To hold otherwise would make it difficult, if not impossible, for the husband to obtain a divorce for the cause alleged, if it actually existed.... [Mrs. Atherton] not being within the state of Kentucky, if constructive notice, with all the precautions prescribed by the statutes of that state, were insufficient to bind her by a decree dissolving the bond of matrimony, ... [Mr. Atherton] could only get a divorce by suing in the state in which she was found; and by the very fact of suing her there he would admit that she had acquired a separate domicil[e] (which he denied), and would disprove his own ground of action, that she had abandoned him in Kentucky.

Id. at 172-73.

113. Id. at 175.
114. Id. Mary Bell and Frederick Bell married in Illinois on January 24, 1878, and thereafter lived together in New York. Id. at 176.
115. Id.
116. Id. at 177-78.
117. See Bell, 181 U.S. at 176-78 (noting that Pennsylvania requires one year residence prior to filing a petition for divorce). Additionally, Mrs. Bell was not served with a subpoena in the Pennsylvania divorce proceedings, although notice of the proceeding was sent by mail. Id. at 176. The Supreme Court held "[u]pon the record, therefore, the court in Pennsylvania had no jurisdiction of the husband's suit for divorce, because neither party had a domicil[e] in Pennsylvania, and the decree of divorce was entitled to no faith and credit in New York or in any other state." Id. at 178.
118. Id. at 177.
decision against a nonresident only constructively served with notice of the pendency of the action. However, the Court distinguishes *Atherton* by reasoning that *Atherton* was solely based on matrimonial domicile. After deducing the law of several states, the Court held that New York was not in error by refusing to give full faith and credit to the Connecticut divorce decree entered into evidence during the trial on Mrs. Haddock's divorce petition.

Over thirty years later, in *Davis v. Davis*, the Supreme Court again appeared to overrule its previous decisions by holding that the Full Faith and Credit Clause of the Constitution requires that full credit, not merely some credit, be given in each state to judicial proceedings of other states. Again, however, the Court was able to distinguish its precedent. As a result, Mr.

---

120. *Haddock*, 201 U.S. at 604-06. Mrs. Haddock sued for divorce in New York, where the parties resided and were married, obtaining personal service on Mr. Haddock. *Id.* at 564. Mr. Haddock responding by alleging that he already had obtained a divorce in Connecticut. *Id.* at 565. The New York court refused to give effect to the Connecticut judgment, finding that the parties were married in New York, never resided in Connecticut, and that Mr. Haddock had abandoned his wife shortly after the wedding. *Id.* at 565.

121. *Id.* at 584.

122. *Id.* at 585-602. The Court reasoned that state laws fell into four separate categories: (1) states that will decree a divorce based on the domicile of the plaintiff, even if only effective within that state; (2) states that refuse to recognize and enforce as to their own citizens decrees of divorce rendered in other states, when the court had jurisdiction over only one of the parties; (3) states that give limited effect to divorces rendered against its citizens based on the principles of state comity; and (4) states that essentially give effect to decrees of divorce rendered in other states by virtue of the Full Faith and Credit Clause. *Haddock*, 201 U.S. at 603.

123. *Id.* at 605-06. According to the Court, the limited recognition given to some *ex parte* decrees of divorce is not based upon the Full Faith and Credit Clause, but state comity. *Id.* As a result, full faith and credit did not require New York to give effect to Mr. Haddock's Connecticut divorce decree. *Id.* at 606.


125. *Id.* at 40-41. The Davis' were married in 1909 and lived in the District of Columbia for almost twenty years. *Id.* at 35-36. Mr. Davis filed suit for limited divorce in the United States District Court for the District of Columbia. *Id.* at 35. The District Court ordered separation and ordered him to pay alimony. *Id.* at 35-36. Mr. Davis then filed a complaint for absolute divorce in Virginia on the grounds of separation, which was not a ground for absolute divorce in the District of Columbia. *Davis*, 305 U.S. at 35-36.

Mrs. Davis was personally served and responded with an exception to jurisdiction, alleging that neither of the parties were bona fide residents of Virginia. The court ultimately found that it had jurisdiction to hear the case. Subsequently, the District of Columbia refused to give full faith and credit to the Virginia divorce. *Id.* at 37-38.

126. See *id.* at 42 (noting that Mrs. Davis had actual notice of the suit and
Davis' Virginia decree was entitled to full faith and credit in Mrs. Davis' District of Columbia divorce proceedings.\textsuperscript{127}

However, in \textit{Williams v. North Carolina (Williams I)}\textsuperscript{128} the Supreme Court could no longer avoid overruling \textit{Haddock}.\textsuperscript{129} The Court did so under the theory that North Carolina could not overrule a divorce decree issued by a Nevada court merely on the grounds that Nevada's divorce law conflicted with North Carolina's public policy.\textsuperscript{130} However, the Court was careful to note that this case did not involve a question of whether North Carolina could "refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina [found] that no bona fide domicil[e] was acquired in Nevada."\textsuperscript{131}

Three years later, in \textit{Williams v. North Carolina (Williams II)},\textsuperscript{132} the Court addressed that specific question and held that "we cannot say that North Carolina was not entitled to draw the inference that petitioners never abandoned their domicil[e]s in North Carolina, particularly since we could not conscientiously prefer, were it our business to do so, the contrary finding of the Nevada court."\textsuperscript{133} In so ruling, the Court reasoned that in the North Carolina proceedings, "[a]ppropriate weight was given to the finding of domicil[e] in the Nevada decrees, and that finding was allowed to be overturned only by relevant standards of

\textsuperscript{127} \textit{Davis}, 305 U.S. at 43.


\textsuperscript{129} \textit{Id.} at 292-93, 304. In \textit{Williams I}, O.B. Williams and Lillie Shaver Hendrix were convicted under North Carolina's bigamous cohabitation law. \textit{Id.} at 289. Both parties had received divorce decrees in Nevada from their respective ex-spouses before marrying each other. \textit{Id.} However, the North Carolina court refused to recognize the decrees and instructed the jury in the criminal case that "a Nevada divorce decree based on substituted service where the defendant made no appearance would not be recognized in North Carolina." \textit{Id.} at 291. The North Carolina Supreme Court upheld the convictions on the reasoning that "North Carolina was not required to recognize the Nevada decrees under the [F]ull [F]aith and [C]redit [C]lauses of the Constitution by reason of \textit{Haddock v. Haddock}." \textit{Williams I}, 317 U.S. at 291. North Carolina did not question Nevada's finding of adequate domicile. \textit{Id.} at 302.

\textsuperscript{130} \textit{Id.} at 303. The North Carolina court did not question the finding that Nevada had personal jurisdiction and obtained service on the parties. \textit{Id.}

\textsuperscript{131} \textit{Id.} at 302.

\textsuperscript{132} \textit{Williams v. Williams}, 325 U.S. 226 (1945).

\textsuperscript{133} \textit{Id.} at 237.
The Court held that "North Carolina was not required to yield her State policy because a Nevada court found that petitioners were domiciled in Nevada when it granted them decrees of divorce." \(^{135}\)

When the issue came up again in *Sherrer v. Sherrer*, \(^{136}\) the Court stated that "there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts." \(^{137}\) Relying on *Davis*, the Supreme Court reasoned that

requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree. \(^{138}\)

Noting that the Court's function was not to weigh the merits of the competing policies of Florida and Massachusetts with respect to divorce, the Court ruled that "where a decree of divorce is

---

135. *Id.* at 239. As a result, "North Carolina was entitled to find, as she did, that they did not acquire domicile[s] in Nevada and that the Nevada court was therefore without power to liberate the petitioners from amenability to the laws of North Carolina governing domestic relations." *Id.*
137. *Sherrer*, 334 U.S. at 348. "Petitioner Margaret E. Sherrer and the respondent, Edward C. Sherrer, were married in New Jersey in 1930 and from 1932, lived together in Monerey, Massachusetts." *Id.* at 345. Mrs. Sherrer left Massachusetts and moved to Florida, where she filed for divorce. *Id.*. Mr. Sherrer "received notice by mail of the pendency of the divorce proceedings. He retained Florida counsel who entered a general appearance and filed an answer denying the allegations of... [Mrs. Sherrer's] complaint, including the allegation as to... [Mrs. Sherrer's] residence." *Id.* at 345-46. Hearings were held in the Florida court, where Mrs. Sherrer testified and entered evidence to establish a Florida residence. Mr. Sherrer did not offer rebuttal evidence, nor did he cross-examine Mrs. Sherrer. *Id.* at 346. The Florida court then entered a decree of divorce. *Sherrer*, 334 U.S. at 346. After Mrs. Sherrer remarried and returned to Massachusetts with her new husband, Mr. Sherrer instituted an action in the Probate Court of Berkshire County, Massachusetts. *Id.* at 337. Both parties appeared and evidence was introduced to prove the validity of the Florida divorce decree. The Massachusetts court found that domicile had not been established in Florida, and refused to give the divorce judgment of the Florida court full faith and credit. *Id.* at 347-48.
138. *Id.* at 351.
rendered by a competent court under the circumstances[,] . . . the obligation of full faith and credit requires that such litigation should end in the courts of the State in which the judgment was rendered.”

“Once quick no-fault divorce became available throughout most of the United States, migratory divorce retreated into insignificance, its subsidiary issues described as ‘academic’ questions, ‘little more than a subject for historical study.’”

Moreover, as will be seen below, no-fault divorce increasingly simplified and expedited the divorce process, which also greatly contributed to the insignificance of migratory divorce.

VII. THE RETURN OF NO-FAULT DIVORCE IN THE UNITED STATES AND EUROPE

“The twentieth century has witnessed a transformation from an institutional marriage to one based on companionship. As both marital expectations and life expectancy have increased, so have the perceptions of failure.” It is against this background, that no-fault divorce re-emerged. Twentieth century divorce legislation underwent significant changes. Until the late 1960s “[m]atrimonial fault was the essential element that survived each legislative revision.” After World War II, critics of fault based divorce gained a wider audience (or their voices grew louder). Most surprisingly, it was England’s Archbishop of Canterbury, expressing his “dissatisfaction with the existing law and the lax procedures in divorce courts[,]” who called for “fault to be dethroned as the divorce criterion and replaced by marriage breakdown.”

139. Sherrer, 334 U.S. at 356.
141. DiFonzo, supra note 57, at 33.
142. Id. at 35.
143. Id. at 42. At the time, English divorce law “required proof of breaking of the pledge of fidelity or decent behavior inherent in the marital relationship. Since personal depravity was seen as the cause of marital breakdown, ‘fault was the undisputed touchstone of divorce policy.’” Id. at 35-36 (quoting PHILLIPS, supra note 4, at 566).
144. DiFonzo, supra note 57, at 43. Although in the final proposals, the views of the Church were largely rejected, England’s Divorce Reform Act of 1969 allowed divorce to be “obtained upon irretrievable marital breakdown, which could be proven in one of five ways: adultery, cruelty, desertion for two years, separation for two
Legislators in California responded in 1969 by abolishing all but two grounds for divorce. "One, incurable insanity, was already on the books. The other was totally new; divorce was no longer to be called divorce but 'dissolution of marriage,' and the new ground that would dissolve it was 'irreconcilable differences' or, more popularly, 'no-fault.'" Once adopted in California, no-fault divorce quickly spread throughout the rest of the United States. Four years later only nine states exclusively retained fault grounds for the dissolution of marriage.

The popularity of no-fault divorce was also evident in Europe and other parts of North America. Many European countries retained fault grounds in their divorce laws along with no-fault provisions, "but the trend from 1960 onward has clearly been to replace fault with no-fault clauses specifying marriage breakdown or mutual consent." By mid-century, "fault-based divorce existed in the thirteen nations of Western Europe with established divorce policies, no-fault divorce (marriage breakdown) in seven, and mutual consent divorce in six." Two decades later, fault grounds had been retained by eight nations, and no-fault divorce had extended to twelve nations, as had mutual consent divorce. Within twenty years, "Western
European divorce law had shifted dramatically; in 1960 fault divorce was common to all divorce codes, whereas by 1981 no-fault provisions united all but one.footnoteRef162

Despite its popularity however, many American scholars opposed no-fault divorce and argued that it came at too high a price. These opponents attributed increasing divorce ratesfootnoteRef153 to no-fault regimes.footnoteRef164 Moreover, opponents increasingly argued that no-fault divorce was responsible for the breakdown of American families and has had a devastating affect on children of divorce.footnoteRef165

152. PHILLIPS, supra note 4, at 570-71. Malta remains the only European country where divorce cannot be legally obtained. See Dr. Ruth Farrugia, International Marriage and Divorce Regulation and Recognition in Malta, 29 FAM. L.Q. 627, 628-34 (1995) (detailing marriage law in Malta, including the sole means to dissolve marriage, i.e. annulment).

153. For a detailed analysis of American divorce rates, see Kenneth Rigby, Report and Recommendation of the Louisiana State Law Institute to the House Civil Law and Procedure Committee of the Louisiana Legislature Relative to the Reinstatement of Fault as a Prerequisite to a Divorce, 62 LA. L. REV. 561, 562-67 (2002). See also Katherine Shaw Spah, Revolution and Counter-Revolution: The Future of Marriage in the Law, 49 LOY. L. REV. 1, 4 (2003) (noting that the current U.S. “divorce rate is more than twice that of 1960, but has declined slightly since hitting the highest point... in the early 1980s.”) [hereinafter Spah, Revolution and Counter-Revolution]. “[T]he divorce rate jumped by thirty-four percent between 1970 and 1990. In 1990, there were approximately 1.2 million divorces in the United States. In 1970, about one-third of all marriage ended in divorce. Today, nearly half of all marriages end in divorce.” Lindsey, supra note 147, at 269 (citations omitted).

However, even before 1970, American divorce rates had been increasingly on the rise. See Heather Flory, “I Promise to Love, Honor, Obey... And Not Divorce You”: Covenant Marriage and the Backlash Against No-Fault Divorce, 34 FAM. L.Q. 133, 136 (2000) (noting that beginning in 1889, divorce rates in the United States began to rise about three percent per decade). See also Nichols, supra note 27, at 937-42 (discussing the no-fault divorce revolution and noting that “one major result of... no-fault divorce laws was a massive increase in the number of divorces[,]” but also noting that “changes in the divorce law were the response, not the cause of changes in peoples' attitudes and behaviors.”); Erik Wicks, Fault-Based Divorce “Reforms,” Archaic Survivals, and Ancient Lessons, 46 WAYNE L. REV. 1565, 1576-77 (2000) (arguing that no-fault divorce laws are not a principle cause of the rise in the divorce rate).


155. See Flory, supra note 153, at 137-38 (noting that “[a]lmost three decades after the first no-fault divorce laws were introduced, the 'liberal' divorce laws have been blamed for everything from poverty to lower SAT scores.”); Spah, Revolution and Counter-Revolution, supra note 153, at 17 (arguing that “[a] marriage that lasted provided 'protection to women and children from men who would take advantage of women sexually without being willing to make a commitment to either the woman or any children that resulted from their relationship.” (citing WEITZMAN, supra note
In response to these criticisms, at least two American states have enacted legislation seeking to increase the stability of marriage, and the American families.\footnote{156}

\section*{VIII. LOUISIANA'S COVENANT MARRIAGE ACT: A BACKLASH AGAINST NO-FAULT DIVORCE?}

In the summer of 1997, the Louisiana Legislature adopted the Covenant Marriage Act (the Act), by Act 1380. The Act defines covenant marriage as “a marriage entered into by one male and one female who understand and agree that the marriage between them is a lifelong relationship.”\footnote{157} The parties who intend to contract a covenant marriage may do so “by declaring their intent to do so on their application for a marriage license... and executing a declaration of intent to contract a covenant marriage.”\footnote{158} The application for a marriage license and the declaration of intent shall be filed with the official who issues the marriage license.\footnote{159}

Although the Act purports “to preserve the family”\footnote{160} by strengthening “the institution of marriage... [and] restoring legal efficacy to the marital vows[,]”\footnote{161} the Act does provide for dissolution of the covenant marriage.\footnote{162} Under the Act,

\begin{itemize}
\item \footnote{154, at 323-56)}
\item \footnote{156. LA. REV. STAT. ANN. \S\ 9:272 (West 1991 & Supp. 2003); ARIZ. REV. STAT. \S\ 25-901 (1999).}
\item \footnote{157. LA. REV. STAT. ANN. \S\ 9:272(A). The Act also provides that:}
\begin{itemize}
\item [p]arties to a covenant marriage have received counseling emphasizing the nature and purposes of marriage and the responsibilities thereto. Only when there has been a complete and total breach of the marital covenant commitment may the non-breaching party seek a declaration that the marriage is no longer legally recognized.
\end{itemize}
\item \footnote{Id.}
\item \footnote{158. LA. REV. STAT. ANN. \S\ 9:272(B). \textit{See also} id. \S\ 9:273 (listing the requirements of a declaration of intent); \textit{id.} \S\ 9:273.1 (providing a suggested form for the recitation which may be used by the couple to a covenant marriage).}
\item \footnote{159. \textit{Id.} \S\ 9:272(B). The Act also allows married couples to "execute a declaration of intent to designate their marriage as a covenant marriage to be governed by the laws relative thereto." \textit{Id.} \S\ 9:275(A). \textit{See also} \textit{id.} \S\ 9:275(B) \& (C) (providing requirements for converting a non-covenant marriage into a covenant marriage); LA. REV. STAT. ANN. \S\ 9:275.1 (suggesting a form of declaration of intent for married couples converting non-covenant marriage into covenant marriage).}
\item \footnote{161. \textit{Id.} at 118.}
\item \footnote{162. LA. REV. STAT. ANN. \S\S\ 9:307-309.}
\end{itemize}
[A] spouse to a covenant marriage may obtain a judgment of divorce only upon proof of any of the following:

(1) The other spouse has committed adultery.

(2) The other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor.

(3) The other spouse has abandoned the matrimonial domicile for a period of one year and constantly refuses to return.

(4) The other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses.

(5) The spouses have been living separate and apart continuously without reconciliation for a period of two years.

(6)(a) The spouses have been living separate and apart continuously without reconciliation for a period of one year from the date the judgment of separation from bed and board was signed.163

Proponents of the Act hail it as a revolutionary mechanism that will enforce and preserve the sanctity of marriage.165 The

163. LA. REV. STAT. ANN. § 9:307(B). The "[s]eparation from bed and board in a covenant marriage does not dissolve the bond of matrimony, since the separated husband and wife are not at liberty to marry again; but it puts an end to their conjugal cohabitation, and to the common concerns, which existed between them." Id. § 9:309(A)(1). Moreover, "[s]pouses who are judicially separated from bed and board in a covenant marriage shall retain that status until either reconciliation or divorce." Id. § 9:309(A)(2). See also id. § 9:309(B) (discussing effect of judgment of separation from bed and board).

164. Id. § 9:307(A). The time period is reduced if the separation from bed and board was based on abuse of a child of one or both of the spouses. Id. § 9:307(A)(6)(b).

165. "Principally, the covenant marriage strengthens the institution of marriage by restoring the legal efficacy to the marital vows." Spaht, Why Covenant Marriage?, supra note 160, at 118. Spaht, the author of the Act and one of its most prominent supporters, describes the Covenant Marriage Act as a "novel and historical social experiment." Katherine Shaw Spaht, What's Become of Louisiana Covenant Marriage Through the Eyes of Social Scientists, 47 LOY. L. REV. 709, 710 (2001). However, the direct inspiration for covenant marriage is an unenacted Florida bill that was proposed in 1990, but never received a full hearing. Cynthia Samuel, Letter From Louisiana: An Obituary for Forced Heirship and A Birth Announcement for Covenant Marriage, 12 TUL. EUR. & CIV. L.F. 183, 190-91 (1997); see also Nichols, supra note 27, at 943-44. Moreover, "the idea of two kinds of state-recognized marriage has an antecedent in France[.]" where "Henri Mazeaud proposed to the commission to reform the Code Civil that the law should allow couples to choose between indissoluble marriage, for which there would be no divorce, and dissolvable
premarital counseling component of the Act, according to its proponents, will “stress[] the seriousness of marriage and the expectation that the couple's marriage will be lifelong.” The Act's stiffer divorce provisions will empower "the ‘innocent' spouse who has kept her promises and desires to preserve the marriage." Finally, proponents of the Act maintain that the marriage vows embodied in the Declaration of Intent require couples that have entered into covenant marriages to “take all ‘reasonable efforts to preserve the marriage, including marriage counseling.”

Critics of the Act argue that it is wrongly perceived as a remedy to high divorce rates. Those critics describe its pre-marriage, for which divorce would be possible.” Samuel, supra at 191. This proposal was rejected by a vote of nine to two. Id. at 192.

166. Katherine Shaw Spaht, Louisiana's Covenant Marriage: Social Analysis and Legal Implications, 59 LA. L. REV. 63, 74 (1998) [hereinafter Spaht, Louisiana's Covenant Marriage]. Spaht maintains that “[m]andatory pre-marital counseling insures not only that an ‘educational' obstacle to hasty marriage is erected, but also that two documents be executed and signed by the couple, the counselor, and a notary attesting to the fact that the counseling did occur.” Id. at 85.

167. Id. at 78. According to Spaht, “[t]he ‘innocent' spouse's bargaining power can be exercised to insist upon serious counseling in an effort to preserve the marriage, or barring counseling's success, to demand financial advantages for herself or for her children.” Id. at 79. Because “the right to receive an interim allowance . . . exists at least until divorce and an interim allowance is ordinarily a larger sum than final spousal support, the ‘innocent' spouse who receives such an allowance enhances her already considerable bargaining power during the lengthy two-year period.” Id. Spaht also maintains that “[t]he ‘innocent' spouse to a covenant marriage should be permitted easy access to Louisiana courts, especially for a legal separation, in an effort to assure enforcement of the contractual provisions of her covenant marriage.” Id. at 112-13.

168. Spaht, Louisiana's Covenant Marriage, supra note 166, at 74-75. While the Act suggests that marital counseling is an example of reasonable steps, “[n]othing in the agreement or the legislation suggests that marriage counseling is the exclusive ‘reasonable' step.” Id. at 99. Other examples of reasonable steps include, but are not limited to, sessions with family or friends, . . . religious community support groups, . . . living in separate bedrooms in the same house, . . . separate buildings on the same piece of property, or in separate dwellings while the spouses discuss the marital disharmony. Id. The steps, however, must be taken in an attempt to “preserve the marriage.” Id. at 100. Moreover, Spaht argues that the obligation to take reasonable steps to preserve the marriage creates a legal obligation. Should one breach the obligation he assumed in the agreement, the other spouse may exercise legal remedies for breach of contract. Even though the obligation to take reasonable steps to preserve the marriage is an obligation ‘to do, ' thus generally precluding the remedy of specific performance, the court may award damages of a pecuniary or non-pecuniary nature.


169. See Carriere, supra. note 140, at 1703-04 (“The appeal of the Covenant
marital counseling requirement as vague and insufficient. Moreover, critics object to the use of fault-based regimes that were in effect when divorce was at its fastest rate of increase.

Marriage Act is the perception that it provides weapons to fight what proponents view as a spiraling divorce rate. . . . The weapons that it has chosen to lower the divorce rate are unlikely to achieve that goal.); Flory, supra note 153, at 134 ("Rather than attacking the problem of divorce by calling for the 'good old days' of the fault system and creating artificial distinctions between 'regular' and 'extra-strength' marriage, it is time to focus on preventative measures . . . .").

170. This argument has two parts. First, "[t]he pre-entry counseling prescribed by the Act is so minimal that it can easily be meaningless." Carriere, supra note 140, at 1705. This can best be explained by example of the first New Orleans area couple that redesignated their non-covenant marriage to a covenant marriage. The couple arrived at the Jefferson Parish courthouse without having undergone counseling. But it just so happened that there was [a counselor], five floors up: the Rev. Ned Pitre, who works a day job at the parish personnel department.... Pitre counseled the couple briefly on the rules of covenant marriage. A few minutes later, Justice of the Peace Vernon Wilty checked the documents and notarized the forms.

Id. at 1708 n.42 (citing Joanna Weiss, Covenant Couple: New Vows Make Breaking Up Harder to Do, TIMES-PICAYUNE (New Orleans), Aug. 19, 1997, at B1). Secondly, critics point to the fact that the Act "offers no definition of premarital or marital counseling and no statement of how long such counseling should last. Moreover, the [S]tate of Louisiana places no restrictions on who may qualify to act as a marriage 'counselor." Id. at 1707-08. According to Flory, "The law[ . . . do[es] not specify how much counseling is necessary nor how long it is to last. . . . For premarital counseling to be truly effective, covenant marriage legislation must go beyond these trivial requirements." Flory, supra note 153, at 146 (advocating the premarital inventory utilized by University of Minnesota Professor David Olsen, which consists of 125 questions on personal values and perceptions). See also Melissa S. LaBauve, Covenant Marriages: A Guise for Lasting Commitment?, 43 LOY. L. REV. 421, 434-38 (1997) (discussing inadequacies of the pre-marital counseling requirement of Covenant Marriage Act). But see Spaht, Louisiana's Covenant Marriage, supra note 166, at 77 ("Criticism of the pre-marital counseling component of the [Covenant Marriage Act] legislation as 'shallow' and lacking in rigorous content and time specifications fails to recognize that the 'omission' was calculated to avoid serious objections from those issued an invitation to assist in preserving marriages."). Carriere also notes that "if the state were to require counseling as a preliminary to separation or to divorce, it might, under Boddie v. Connecticut, 401 U.S. 371 (1971), have to subsidize the counseling for the indigent." Carriere, supra note 140, at 1712.

171. According to Carriere, the fault-based provisions contained in the Covenant Marriage Act "substantially replicates a version of the Louisiana divorce law that was in place during the period when the divorce rate was increasing." Carriere, supra note 140, at 1721. The divorce rate in the United States had its sharpest increase from 1962 to the 1980s. Id. "The principle differences between the Covenant Marriage Act and the Civil Code regime of the 1960s and 1970s are that the former elevates abandonment from a ground for separation to a ground for immediate divorce and includes spousal or child abuse as grounds for immediate divorce." Id. at 1720-21.

At present, Louisiana's non-covenant divorce provisions are contained in Articles 102 and 103 of the Civil Code. "No trial is required for the divorce under Article 102; if
Finally, critics argue that the Act’s divorce provisions will make divorce more litigious, which in no way will guarantee vindication for the “innocent” spouse or redress perceived injuries to the “innocent” spouse, especially if one of the spouses is a sexual or physical abuser.\footnote{172}

the elements are satisfied, divorce is granted on a rule to show cause filed after the requisite period of time has elapsed.” \textit{Id.} at 1719. For a detailed history of Louisiana divorce legislation, see LaBauve, \textit{supra} note 170, at 425-31 (also providing historical comparison of divorce regimes under Covenant Marriage Act and prior Louisiana divorce law); Rigby, \textit{supra} note 153, at 576-93 (also providing legal, social science, and other commentary on cause and rate of divorce).

172. Because the Covenant Marriage Act bars its covenant-marriage partners from using the no-fault provisions of Civil Code articles 102 and 103 all divorces under the Act must go to trial. Carriere, \textit{supra} note 140, at 1722. Moreover, the longer period of living separate and apart to obtain a no-fault divorce will increase the litigation of fault grounds with their accompanying defenses. . . . Increasing the litigiousness of divorce in a covenant marriage, particularly by encouraging the use of fault grounds, will inevitably increase its acrimony as the partners trade accusations, denials, and defenses. \textit{Id.} An increase in the litigiousness of divorce is also viewed as having the effect of discouraging reconciliation between the spouses. Carriere points out that, as opposed to partners who are living separate and apart, “partners who are marshalling evidence against one another of fundamental violations of the marital understanding, and accusing each other of these in the public records, are more likely to nurse a sense of grievance and less likely to be in a mood to resume the marital life together.” \textit{Id.} at 1724.

Critics also argue that fault-based divorce is far more expensive to obtain because of the greater amount of litigation that it entails. \textit{Id.} at 1724. \textit{See also} LaBauve, \textit{supra} note 170, at 440-41 (noting that “divorce in a covenant marriage . . . will become a more exacting process financially” and describing the Covenant Marriage Act as hastily created legislation). \textit{But see} Spaht, \textit{Louisiana’s Covenant Marriage}, \textit{supra} note 166, at 129 (dismissing arguments of critics and maintaining that a guilty spouse should “expect consequences should his behavior breach the obligations he solemnly undertook, especially consequences as to his relationship with his children.”).

The issue of the availability of a quick divorce for spouses who are victims of sexual or physical abuse by their spouse has also been debated. Critics point to the fact that “victim[s] of abuse in a covenant marriage would have to attend counseling before the victim could be granted legal separation or divorce.” Nichols, \textit{supra} note 27, at 954. While advocates of the law point out “that the law does not require marital counseling to be joint, with both spouses present[,] . . . it certainly seems that a victim of spousal abuse should not have to attend ‘marital counseling’ with the intention of reconciliation with the abuser[, which] does seem to be what the law dictate[s].” \textit{Id. But see} Spaht, \textit{Louisiana’s Covenant Marriage}, \textit{supra} note 166, at 101, 118 (noting that an “abused spouse in a covenant marriage need not wait 180 days or six months to seek a divorce but can file for a divorce immediately with the concomitant societal judgment about the abuser’s conduct” and also arguing that counseling is not a prerequisite to filing for divorce).

In any event, there is nothing in the law preventing a spouse from establishing domicile in another state to take advantage of more liberal divorce laws. As previously discussed,
Because the Act has only been in place since 1997, it is impossible to assess whether the law is affecting the divorce rate. However, "[p]reliminary figures indicated that covenant marriage legislation will have little effect on divorce rates as a whole in Louisiana" or any other state adopting a covenant marriage law. Only time will tell whether critics or proponents of the Act are correct.

CONCLUSION

The shift from fault-based divorce to no-fault divorce in Western societies was not the result of a radical thinking legislature, but a return to ancient Roman law. "Modern concepts of 'no[-]fault' divorce, popular since the 1960s and introduced into the vast majority of American jurisdictions, are exact replicas of classical Roman law." Likewise, Louisiana's migratory divorce results from two factors. The first is the dichotomy in American cultural values that produced, simultaneously, jurisdictions with narrow divorce grounds and procedural rigidity, and others with short residence requirements for divorce and liberal divorce grounds and procedures. The second is the requirement, under the Full Faith and Credit Clause of the United States Constitution, that all states give recognition to a divorce lawfully granted in any state.

Carriere, supra note 140, at 1732.

173. Nichols, supra note 27, at 967. Nichols notes that in the first few months of the law's existence, couples were slow to sign up for covenant marriage and that by the end of October 1997, East Baton Rouge Parish had received only five applications for covenant marriage licenses in the ten weeks of the law's effectiveness. Id. at 968. Of the 400 couples that were married in New Orleans between August 15, 1997 and October 15, 1997, only two requested covenant marriage licenses. Id.

174. Flory, supra note 153, at 140. During the statewide "Covenant Marriage Weekend" held during Valentine's Day Weekend 1998, an estimated 4,000-5,000 couples were reported to have opted-in to covenant marriages. Nichols, supra note 27, at 969-70. However, "[o]fficial state records indicate that only 568 couples had converted to covenant marriages in the period from January 1, 1998 to July 31, 1998, and an additional 51 conversions of out-of-state marriages occurred over the same period." Id. at 970. By 2003, "[t]he total number of newly married couples entering into covenant marriage in Louisiana continues to be exceedingly small: 2-3%." Spaht, Revolution and Counter-Revolution, supra note 153, at 51.

Arizona is the only state besides Louisiana to pass covenant marriage legislation. See ARIZ. REV. STAT. ANN. § 25-901 (West 2000) (providing "out" clause for couples who agree to the dissolution of their marriage). Other states have introduced, but failed to adopt, covenant marriage legislation. They include California, Mississippi, Indiana, Kansas, Minnesota, Missouri, Nebraska, Ohio, South Carolina, Tennessee, Washington, West Virginia, Georgia, Oklahoma, and Alabama. Nichols, supra note 27, at 972-74.

175. See JONES, supra note 89, at 149.

176. Riga, supra note 1, at 931. "This replicates the Roman ex communi consensu (no fault) . . . ." Id.
limited revival of fault-based grounds is a mere regurgitation of the law.

It is worth noting that married parties during the medieval period, unlike their Roman counterparts, were required to go before the canon law courts and take part in some judicial procedure in order to get an annulment or request a separation from their spouses. This intrusion into the marriage and institutionalization of divorce, unlike the concept of indissolubility, is one that continues. Moreover, divorce in modern society is not as free as in classical Roman law, as the Christian idea that secular or institutional authority can only dissolve marital unions has remained.  

177. In fact, the intrusion begins with the requirement that a valid Christian marriage take place by a priest, as first declared by Ambrose in the fourth century. See Peter J. Riga, Residue of Romano-Canonical Marriage Law in Modern American Law, 5 WHITTIER L. REV. 37, 48 (1983). This intrusion expanded in scope as the Church began to "direct the spiritual welfare of all Christians... through prosecutions of sinners and adjudication of civil disputes in which some sacramental matter, such as oath, marriage, or testament, was at stake." Millon, supra note 25, at 621 (citation omitted).

178. See Riga, supra note 1, at 931-32.