

FAITHLESS WIVES AND LAZY HUSBANDS: GENDER NORMS IN NINETEENTH-CENTURY DIVORCE LAW

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The article examines the nature of marriage and the expectations of husbands and wives in nineteenth-century America by analyzing trial reports of famous nineteenth-century divorce cases. The article argues that the textured history of divorce law in the United States shows how the law has affected gendered marital roles through its regulation of divorce. While fault is no longer the focus of divorce, conformity with gendered expectations remains a central aspect of the marital dissolution legal process. In the nineteenth century, conformity benefited women; if they were the innocent spouse who had taken care of the children, the household, and their husbands, then they were protected in divorce proceedings. Nineteenth-century ideology strongly supported this gendered role of both women and wives, and there was a significant overlap between gendered and marital roles.

By the late twentieth century, those very same actions of gender conformity had very different consequences. In the nineteenth century, a woman's highest calling was to act as a wife; this is no longer true. While gender roles and expectations, together with domestic relations laws, are changing, the realities of most women's lives do not yet accord with these changes. Instead, the social norms for marital roles diverge from the legal norms embodied by divorce law. Examining nineteenth-century divorce illustrates the confining nature of these congruent legal and social norms, but also illustrates how contemporary divorce law has become separated from these norms. Although divorce law should not return to fault or reinforcing confining

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gender roles, it should respect the diverse roles of men and women within marriage. This examination of nineteenth-century divorce shows the relationship between gender roles and domestic relations law, but also shows how social norms and legal norms can reinforce, or conflict, with each other.

I. INTRODUCTION

For six days in November 1860, Judge Lott of the Brooklyn Supreme Court heard the divorce case brought by Alfred Beardsley against Mary Elizabeth Beardsley.¹ Mr. Beardsley claimed that his wife had committed bigamy² by marrying another man while she was still married to him. Mr. Beardsley produced the testimony of Father Malone, the Catholic priest who had performed this presumptive second marriage, as well as Dr. Thomas Mahon, the alleged second husband. The putative second husband told of how he had courted and wed Mrs. Beardsley, believing her, at the time, to be Miss Emma Evaline Seymore; Miss Seymore had represented not only that she was the daughter of a Canadian admiral, but also that she was an heiress.³ Dr. Mahon, although initially somewhat reluctant to answer, ultimately testified that the marriage had been “consummated more than once.”⁴ In closing, Mr. Beardsley’s counsel charged: “I have no fears as to your verdict. . . . It must be guilty against this faithless wife, this wicked woman, this unnatural mother, this impudent bawd!”⁵

The accusations against Mrs. Beardsley were, in the words of her counsel, “strange.”⁶ Chauncy Shaffer, Mrs. Beardsley’s counsel, argued that her husband was profaning her feminine character unjustly.⁷ On cross-examination, Mr. Shaffer elicited the priest’s testimony that the woman whose marriage he had performed “was veiled and wore a dark dress; she raised her veil only once or twice . . . [he did not] remember the color of her eyes or hair.”⁸ Further, Mr. Shaffer alleged, Mrs. Beardsley was the victim of a conspiracy masterminded by her husband that framed her for bigamy.⁹ In a final attack on character and credibil-

1. ROBERT M. DEWITT, REPORT OF THE BEARDSLEY DIVORCE CASE (1860) [hereinafter BEARDSLEY].

2. Until 1967, the only ground for divorce in New York was adultery. RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 568–69 (1988).

3. BEARDSLEY, *supra* note 1, at 14.

4. *Id.* at 16.

5. *Id.* at 76.

6. *Id.* at 58.

7. *Id.* at 66. For a perceptive analysis of the Beardsley case that arrives at somewhat different conclusions, see NORMA BASCH, FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS 168–72 (1999).

8. BEARDSLEY, *supra* note 1, at 14.

9. Although the concept of a conspiracy against one’s client was an oft-repeated charge, there is tantalizing support for the accusations that Mr. Beardsley had manufactured the charges against his wife. In the earlier report of another trial, a witness testified that an adulterous husband “wanted to hire a man to marry his wife so that he could marry” another woman. MORTIMER J. SMITH,

ity, Mr. Shaffer argued that Mr. Beardsley was unclean in that he had committed adultery and visited houses of “ill-fame,” and that he was dependent upon the financial largesse of his wife’s family.¹⁰

On November 23, 1865, the divorce trial of Peter Strong against Mary Strong opened in New York City before Judge Garvin of the Superior Court. The New York Times described the trial, on page two, announcing that “No case before our courts for many years has attracted greater attention.”¹¹ For the next five weeks, the trial was extensively covered by the media; both of the major New York newspapers provided lengthy daily accounts of the testimony and arguments.¹² Peter Strong was a prominent lawyer, and the nephew of the noted diarist George Templeton Strong, and his wife, Mary Stevens Strong, was the daughter of an influential businessman, the President of the Bank of Commerce. Since this was New York, the ground for divorce was adultery.

Mr. Strong accused his wife of committing adultery with his brother, Edward Strong. She counter-sued, claiming that he had committed adultery as well, including with the woman who had helped him procure an abortion for his wife.¹³ Mrs. Strong also alleged that her husband, a lawyer, had never provided an “independent home” for her.¹⁴ Her counsel argued that she suffered from his bringing an action for divorce as a “loving mother,”¹⁵ and that she was, as a wife, “absolutely in the power of her husband, who of course was supreme above her.”¹⁶ She was, according to her lawyers, not an adulteress, but religious, pious, and sober.¹⁷ Ultimately, the trial resulted in a hung jury, with ten jurors seeming to believe Mr. Strong that his wife was the adulterer, and two of them believing Mrs. Strong that her husband had committed adultery.¹⁸

To a culture raised on no-fault divorce, each of the stories told in these trials appear strange. These two divorce cases, one just prior to the Civil War and one just after the Civil War, are very distant from our contemporary focus on marriage dissolution where, because of the ease with

IMPORTANT AND INTERESTING TRIAL OF MORTIMER J. SMITH ON AN INDICTMENT FOR LIBEL ON MISS EMMA WILLIAMS 3 (1847) [hereinafter TRIAL].

10. See BEARDSLEY, *supra* note 1, at 66.

11. *The Strong Divorce Case*, N.Y. TIMES, Nov. 24, 1865, at 2.

12. See *id.*; GEORGE TEMPLETON STRONG, THE DIARY OF GEORGE TEMPLETON STRONG: POST-WAR YEARS 1865–1875, at 54, 58 (Allan Nevins & Milton Halsey Thomas eds., 1952) [hereinafter STRONG].

13. *The Strong Divorce Case*, N.Y. TIMES, Dec. 9, 1865, at 2. Mrs. Strong allegedly did not know whether this child was biologically her husband’s—or his brother’s. *The Strong Divorce Case*, N.Y. HERALD, Dec. 1, 1865, at 8.

14. STRONG, *supra* note 12, at 58. Mrs. Strong’s counsel noted that “[w]hen a lawyer does not expend his smartness upon the world, but goes to his own fireside, or to that of some family into which he has married . . . he is a thorn in the side of their happiness.” *Id.* at 32.

15. *The Strong Divorce Case*, N.Y. TIMES, Dec. 7, 1865, at 5.

16. *Id.*

17. *The Strong Divorce Case*, N.Y. TIMES Dec. 27, 1865, at 2.

18. There were various allegations of jury tampering. See STRONG, *supra* note 12, at 59; *Charges of Bribery—A Card from the Jury*, N.Y. TIMES, Jan. 1, 1866, at 8.

which divorce is granted, the contentious issues in any particular case concern child custody, alimony, and property distribution,¹⁹ not fault.

Nevertheless, while fault is no longer the focus of divorce, conformity with gendered expectations remains a central aspect of the marital dissolution legal process. The historical regulation of divorce has profoundly affected marital norms. In the nineteenth century, conformity with these gendered norms benefited women; if they were the innocent spouse who had taken care of the children, the household, and their husbands, then they were protected against divorce.²⁰ Nineteenth-century ideology strongly supported this gendered role of both women and wives, and there was virtually a complete overlap between gendered and marital roles.

By the late twentieth century, those very same actions of gender conformity had very different consequences.²¹ In the nineteenth century, a woman's highest calling was to act as a wife; this is no longer true as women's opportunities outside the home have expanded.²² Late twentieth and early twenty-first century wives who try to live the same lives as their nineteenth-century counterparts are penalized upon divorce.²³ While gender roles and expectations, together with domestic relations laws, are changing, the realities of most women's lives do not yet accord with these changes. Instead, the social norms²⁴ for marital roles diverge

19. See, e.g., JUDITH WALLERSTEIN ET AL., *THE UNEXPECTED LEGACY OF DIVORCE* (2000) (discussing difficult issues of child custody). The case of obtaining a divorce itself is a controversial topic. See, e.g., Amy L. Stewart, Note, *Covenant Marriage: Legislating Family Values*, 32 *IND. L. REV.* 509 (1999); David Westphal, *Reviving Marriage*, *CHATTANOOGA TIMES*, May 21, 2001, at A1.

20. If the woman brought the suit seeking a divorce, then she might receive alimony and custody and be permitted to marry again. For example, in the 1847 divorce case of *Mary W. Groesbeck v. David Groesbeck*, the court ordered alimony and child support to the innocent wife; in addition, she was free to marry again, while her husband was not. *TRIAL*, *supra* note 9, at 38–39. And, if the husband initiated the divorce action, but the wife could prove her innocence, then there would be no finding of fault and, consequently, no divorce.

21. See Margaret F. Brinig & Steve Crafton, *Marriage and Opportunism*, 23 *J. LEGAL STUD.* 869, 876 (1994) (contending that prior to the 1960s, marriage encouraged gendered investments with clear and enforceable norms); Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 *UTAH L. REV.* 503, 508 (contrasting the situation of a wife in the fault and no-fault eras).

22. See generally Joan Williams, *From Difference to Dominance to Domesticity: Care as Work: Gender as Tradition*, 76 *CHI.-KENT L. REV.* 1441 (2001).

23. See Margaret F. Brinig & Douglas W. Allen, "These Boots Are Made for Walking": Why Most Divorce Filers Are Women, 2 *AM. L. & ECON. REV.* 126, 143, 145 (2000) (noting that older women in long-term marriages are less likely to file for divorce than their husbands because of their investments in the marriage and the costs of their foregone careers).

24. The concept of social norms is highly complex, and has recently become a standard even within the law and economics literature. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 123 (1991); Robert Cooter, *Do Good Laws Make Good Citizens: An Economic Analysis of Internalized Norms*, 86 *VA. L. REV.* 1577, 1579 (2000); Eric A. Posner, *Family Law and Social Norms*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 256 (F.H. Buckley ed., 1999); see also Lawrence Mitchell, *Understanding Norms*, 49 *U. TORONTO L.J.* 177 (1999); Elizabeth Scott, *Social Norms and the Legal Regulation of Marriage*, 86 *VA. L. REV.* 1901, 1903 (2000) [hereinafter Scott, *Social Norms*]; Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 *VA. L. REV.* 1603, 1607 (2000) [hereinafter Scott, *Behavioral Theories*]. I am using norms here simply to mean culturally expected behaviors, however those expectations are created and maintained.

from the legal norms embodied by divorce law.²⁵ Examining nineteenth-century divorce illustrates the confining nature of these historically congruent legal and social norms, but also illustrates how contemporary divorce law has become separated from these social norms.

This article does not posit that divorce law return to fault²⁶ nor to reinforcing confining gender roles; I support men's and women's abilities to play different roles within (and outside of) marriage, and believe that divorce law should respect these diverse and changing roles. Divorce law, however, must respond more flexibly to the needs of dependent spouses, even as other laws support women's equality. This examination of nineteenth-century divorce²⁷ shows the relationship between gender roles and domestic relations law, but also shows how social norms and legal norms can reinforce, or conflict, with each other.

II. DIVORCE RHETORIC

The story of divorce reform in the United States is often viewed as a narrative of relentless progression towards increasingly liberal divorce, and towards increasingly liberal roles within, and of, marriage. While this is true of the *number* of divorces, it has not been consistently true of divorce laws themselves, nor of expectations within marriage. Instead, the history of divorce involves periods of greater liberality as well as heightened strictness. During the mid-nineteenth century, legislatures passed laws allowing for divorce based on the discretionary basis of incompatibility; when appellate courts interpreted these provisions, however, they consistently restricted their own discretion. While legislatures enacted a variety of provisions allowing for divorce on the basis, for example, of intoxication, and some courts began to construe more liberally the more traditional grounds of divorce,²⁸ courts nonetheless carefully

See Steven Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1973 (2000) (a norm is a "cluster of expectations about what is appropriate in a given situation.") (emphasis added); Scott, *Behavioral Theories*, *supra*, at 1638 (explaining that the meaning and applicability of norms varies depending on the circumstances, and more than one norm is generally relevant in any situation). Social norms and legal norms (law) may diverge or converge.

25. See Lawrence Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1534 (2000) [hereinafter Friedman, *A Dead Language*] (noting that no-fault divorce seems to find gender inequality irrelevant).

26. For some dangers of the fault system, see *id.* at 1501–10; Herman Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2081 (2000); Jana Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1105–12 (1989).

27. This article focuses primarily on divorce trials from 1825–1875. It is not my intention to treat the nineteenth century as monolithic, with unchanging norms and behaviors from 1801 through 1900. While I believe that the images of marriage and divorce did change during this time period, I believe that the fundamental inequalities of marital roles remained the same. See generally Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) [hereinafter Siegel, "The Rule of Love"] (discussing preservation through transformation).

28. Professor Reva Siegel suggests that, in the years following the Civil War, "legislatures were expanding the statutory grounds for divorce, and judges charged with applying these statutory norms interpreted them ever more liberally." Siegel, "The Rule of Love," *supra* note 27, at 2133.

scrutinized the litigants' behavior, and required that there must be one—and only one—spouse who acted contrary to cultural expectations of marital roles. Indeed, there was an ongoing dispute as to whether it was the law, as opposed to other cultural changes, which affected the divorce rate.²⁹

Instead, the law of divorce appears to have reflected the dominant images of men, women, and marriage in Victorian society. Moreover, while roles within marriage changed during the nineteenth century, divorce was hardly a source of liberation for women. Unless they were the innocent parties, women received little at divorce.³⁰

The history of divorce law provides compelling insights into federalism and family law, and it offers a doctrinal window into how the obligations of marriage are constructed and understood. The transition from the early nineteenth century, when divorce was uncommon and subject to moral approbation, to the early twentieth century, when divorce became more frequent and less morally reprehensible, tracks changes in nineteenth-century approaches to marriage, rather than a dramatically increased liberality of divorce grounds. The law was not irrelevant to the divorce rate, but acted as a rhetorical brake, at least until the late nineteenth century, to keep marriages together. Moreover, changes in divorce law provide only one window into marital dissolution—nonlegal, or extralegal, separations provide another lens on the perceived strength of the obligations of marriage.³¹

In expanding the statutory bases for divorce, however, legislatures were not necessarily condoning divorce. Instead, they were transferring to the judicial system the role of granting divorce which had historically been under the control of the legislative system, and which was becoming an increasingly burdensome component of state legislatures' work. See RICHARD H. CHUSED, *PRIVATE ACTS IN PUBLIC PLACES: A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW* 109 (1994). Moreover, although legislatures may have been responding to the increasing demand for divorce, statutory liberalization of divorce may instead be seen as an attempt to reinforce traditional marital roles and perhaps even slow down the divorce rate because of the continuation of the onerous requirements for proof of fault. See J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 22 (1997).

29. See *infra* note 78; Note, 4 HARV. L. REV. 138, 139–40 (1890).

30. As Joel Bishop, one of the first family law treatise writers, pointed out quite matter-of-factly, a wife could not receive alimony where she was found to be the guilty party. 2 JOEL PRENTICE BISHOP, *COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE* § 377, at 302 (1852). Unless the husband had breached his marital duties, he had no duty to support his divorced wife. While Bishop explained that a few states made some allowance for the guilty woman who has “repented,” he doubted the prudence of making this into a general rule. *Id.* § 377, at 304. Bishop also stated that the general rule was to award custody of children to the innocent party. *Id.* § 532, at 429. For a discussion of women's situation upon divorce in mid-nineteenth-century Indiana and New York, see Norma Basch, *Relief in the Premises: Divorce as a Woman's Remedy in New York and Indiana, 1815–1879*, 8 LAW & HIST. REV. 1 (1990) [hereinafter Basch, *Relief in the Premises*].

31. See JAMES SNELL, *IN THE SHADOW OF THE LAW: DIVORCE IN CANADA, 1900–1939*, at 5 (1991) (arguing that marriage and divorce involved “matters of negotiation and compromise and accommodation of individual needs and expectations, family demands, and the rules and regulations of the community, of organizations, and of the state”); Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95 (1991) [hereinafter Hartog, *Marital Exits*]; Beverly Schwartzberg, *Civil War Pensions*, Address at the American Society for Legal History Conference (Oct. 28, 1999); see also Laura F. Edwards, “*The Marriage Covenant Is at the Foundation of All Our*

The article examines in depth various trial reports of famous mid-nineteenth-century divorce cases between 1825–1875. In reading these reports, I examine the nature of marriage and the expectations of husbands and wives that they depicted. These reports are drawn from contemporaneous newspaper coverage of the trials, and from pamphlets published after the trials which were sometimes published by the newspapers, and sometimes by the litigants themselves as ways of publicizing the cases.³²

These reports, while illuminating, instructive, and detailed, nonetheless have many limitations. First, they are not always complete accounts of the underlying trials, because the reporter may have omitted information, or because only some part of the report survives.³³ Second, the reports generally focus on the divorces of people wealthy and famous enough to create public interest in their affairs, and thus are not representative of all divorce trials. These reports do, however, provide limited examples of more general cultural trends.³⁴ Nonetheless, to supplement, I have used media comments on the trials, and I have also examined about fifty reported appellate cases during the same time period.³⁵ These

Rights: *The Politics of Slave Marriages in North Carolina After Emancipation*, 14 *LAW & HIST. REV.* 81, 108 (1997) (after the Civil War, poor “African Americans reserved the right to establish and form families as they saw fit . . . Both men and women could sever the marital bonds if their partners abandoned their responsibilities or otherwise mistreated them”); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *YALE J.L. & HUMAN.* 251, 308 (1999) (noting that the right to marriage for African Americans in the post-Civil War era was of mixed benefit; while it allowed blacks access to an institution, the state nonetheless used that institution to punish nonconformers).

Moreover, the right to marriage was, until the Civil War, unavailable to slaves. See Franke, *supra*; HENDRIK HARTOG, *MAN & WIFE IN AMERICA: A HISTORY* 93 (2000) [hereinafter HARTOG, *MAN & WIFE*]; A. Leon Higginbotham & Barbara Kopytoff, *Property First, Humanity Second: The Recognition of the Slave’s Human Nature in Virginia Civil Law*, 50 *OHIO ST. L.J.* 511, 528 (1989).

32. See BASCH, *supra* note 7, at 148.

33. The reports are not trial transcripts. It was not until the latter part of the nineteenth century that court reporters became common. Thus, newspapers and privately published divorce pamphlets were—and are—the primary source of information about court proceedings.

34. See Ariela Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 *COLUM. L. REV.* 957, 965–66 (2000); Melissa Ganz, *Trials of the Heart: Courtship and Contract in Nineteenth Century America* (unpublished manuscript on file with author).

35. Of course, reported cases have their own limitations as well. For a discussion of this critique, and a tentative response, see HARTOG, *MAN & WIFE*, *supra* note 31, at 317 n.4. In many ways, as Professor Richard Chused suggests, the trial court judges in the cases analyzed in this article were not hearing the typical divorce case because of the prominence of the parties and the consequent media scrutiny. See E-mail from Richard Chused, Georgetown University Law Center, to Naomi Cahn (Oct. 1999) (on file with author). In the absence of more detailed trial records, it is impossible to know how trial court judges (and juries) responded more generally to divorce cases. The 1847 New York case of *Groesbeck v. Groesbeck* is probably more typical; it involves simple proof of the defendant’s commission of adultery with Frances Fleming Charles, with very little cross-examination by his counsel. TRIAL, *supra* note 9. The witnesses testified that the defendant not only purchased groceries for a woman not his wife, but was frequently in her house in the evening and following morning. *Id.* at 29–34. Indeed, Frances Fleming Charles testified as follows:

Q. Did [the defendant husband] visit you [at your residence]?

A. Yes.

Q. How often during the months of January and February?

A. He used to come in the evenings pretty often, sometimes every evening.

reported cases manifest many of the same themes as those reflected in the reports. They serve as texts which reflect legal understandings of marriage; while they cannot define *the* nineteenth-century approach to divorce, they can serve as examples of how divorce was represented.³⁶ Moreover, the lawyers themselves were often aware of earlier, highly publicized divorce trials.³⁷

Looking at reports of mid-nineteenth-century divorce trials, in the context of general cultural attitudes towards marriage, has resonance for contemporary efforts to change the marriage and divorce laws. First, in reading the stories of earlier divorce trials, we can frame the current debates on fault divorce. These nineteenth-century cases and statutes show that there has not been a consistent movement towards divorce liberalization; instead, the movement has developed fitfully, consistently facing the same philosophical and religious opposition. Indeed, this history shows that fault has been critical to allowing divorce; but that non-fault-based grounds have been included as a reflection of a particular conception of marriage since long before the no-fault revolution.³⁸ Under con-

Q. Did [the defendant] remain all night?

A. I do not like to answer that question.

Q. Did [the defendant] usually stay to breakfast when he came?

A. Yes, sometimes he did.

....

Q. After you had retired, did [the defendant] come into your room?

A. Yes.

Q. Did he remain there till morning?

A. Yes.

Id. at 32–33.

Most of the trial reports discussed in this article are from New York courts. These were among the most highly publicized trials, and the litigants were frequently represented by the most prominent national practitioners. New York divorce law is somewhat atypical in that the only grounds for marriage dissolution were adultery until the late 1960s, and, by the late nineteenth century, most Northern states included much broader grounds as a basis for divorce. See PHILLIPS, *supra* note 2, at 568–69. Legal historians are becoming increasingly attentive to regional variations in legal development. See, e.g., Renee Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 199–200 (2000). Nonetheless, I am using the trial reports to discuss roles of men, women, and marriage, not changes in divorce law, and I have consulted divorce reports from other Northern states, finding similarly gendered norms and expectations.

36. Cf. Hendrik Hartog, *Abigail Bailey's Coverture: Law in a Married Woman's Consciousness*, in *LAW IN EVERYDAY LIFE* 63, 68 (Austin Sarat & William Felstiner eds., 1993) (in examining the autobiography of one eighteenth-century wife, “we can use the memoirs as a text about marriage and the changing identity of a married woman. I am reading her memoirs in search of the commonsense assumptions about law and marital power . . . that informed her description of her marriage”). Professor Hartog also explains that “the details” of any individual story are interesting, even if the larger cultural story is familiar. *Id.* at 65; see Friedman, *A Dead Language*, *supra* note 25, at 1534–35 (discussing relationship between ideology and appellate case law).

37. For example, in discussing offers of proof, Mrs. Strong’s lawyer pointed out to Judge Garvin that there were numerous such proffers in “the case of Forrest,” referring to the 1852 case of *Forrest v. Forrest*, published as REPORT OF THE FORREST DIVORCE CASE (1852) [hereinafter FORREST]. *Strong Divorce Case*, N.Y. TIMES, Dec. 14, 1865, at 2.

38. As some scholars note, by the time of the California Commission’s 1966 report recommending its own vision of no-fault divorce, some states no longer depended on fault for granting a divorce. CALIFORNIA GOVERNOR’S COMM’N ON THE FAMILY, REPORT (1966); MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 51–55 (1972); Herma Hill Kay, *Equality and Difference: A Per-*

temporary divorce law, while fault may no longer be the basis for procuring the divorces, notions of culpability and responsibility continue to provide a basis for other aspects of the divorce process.³⁹

When I began this study, I hoped to show the roots of the mid-twentieth-century divorce revolution, and to contextualize that revolution; while I found that efforts to liberalize divorce were indeed rooted in the nineteenth century,⁴⁰ I also found very different images of divorce and of the judicial role in divorce. Unlike the divorce courts of the last fifty years, nineteenth-century judges were quite conservative in not allowing divorce. They found constraints against divorce liberalization not only in doctrine, but also in public morality. Judges saw their role as applying doctrine to improve society, and to uphold the marriage contract, rather than enabling the happiness of the individual family members seeking the divorce.⁴¹ It was only when one party had committed a grave fault against the other that a divorce could be issued. A history of divorce shows that the transition to our “divorce culture” began during the nineteenth century,⁴² rather than during the 1960s, even though the legal regime surrounding divorce did not experience as radical a change.

Second, changes in divorce law, and the reports of divorce trials, illustrate a culture that is in the process of working out its views towards marriage, and towards men’s and women’s roles within marriage.⁴³ Di-

spective on No-Fault Divorce and Its Aftermath, 56 U. CIN. L. REV. 1, 6 (1987); Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 32–35 (1966).

39. Some states continue to provide fault-based grounds for divorce, while others are truly no-fault. See Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996). Similarly, fault continues to be relevant for financial distributions and custody determinations in some states. Linda D. Elrod & Timothy B. Walker, *Family Law in the Fifty States*, 27 FAM. L.Q. 515, 521, 534 (1994); American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL’Y 1, 61 (2001), available at <http://www.law.duke.edu/journals/jgle/gentoc8nl.htm>.

40. See CHUSED, *supra* note 28, at 161.

41. See Hartog, *Marital Exits*, *supra* note 31, at 105, 114. Ariela Dubler argues that courts used the doctrine of common-law marriage as “a vector of public policy” to privatize dependency relationships, upholding common-law marriage to affirm the appropriate relationship between male breadwinners and their “spouses.” Ariela Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1886 (1998).

42. Between 1870 and 1880, the divorce rate rose by almost 80%, but the population grew by only 30.1%; from 1890–1900, the divorce rate increased by 66.6%, while the population grew by only about 25%. ROBERT GRISWOLD, *FAMILY AND DIVORCE IN CALIFORNIA, 1850–1890: VICTORIAN ILLUSIONS AND EVERYDAY REALITIES 1* (1982) [hereinafter GRISWOLD, *FAMILY AND DIVORCE*]. Nonetheless, the overall number of divorces remained small.

43. Almost seventy years ago, Karl Llewellyn observed that divorce itself is simply a sidekick of what matters more, which is marriage. Karl Llewellyn, *Behind the Law of Divorce, Part II*, 33 COLUM. L. REV. 249, 262–63 (1933). He explained that the divorce rate was unimportant so long as there are more good marriages. “A ratio of one to two between divorce and marriage . . . would remain consistent with brilliant national success if, for instance, every person wedded was divorced within three years, remarried within three more, and happy in the second marriage.” *Id.* at 263.

Professor Hartog convincingly argues that the nineteenth-century reformers were more concerned about remarriage; remarriage, even more than divorce, threatened marriage. HARTOG, *MAN & WIFE*, *supra* note 31, at 244–45. Nineteenth-century writers were concerned that easy divorce would call into question the legitimacy of children, and might remove the incentives for marital partners to work on their marriages. *Id.* at 64–76. They were also concerned about promiscuity, “free love” outside of

orce itself served to support the institution of marriage because it reinforced role expectations during marriage, and, in providing an example of what was *not* allowed in marriage, it regulated what was allowed to occur within the marriage. Although divorce in the nineteenth century has been depicted as a release from marriages that did not come at all close to the companionate ideal,⁴⁴ that is, as a corollary to the shifting beliefs towards romantic love, this association is too easy a summary of nineteenth-century changes.⁴⁵ Instead, underlying the language of companionship, marriage was a public status that was publicly regulated to serve the purposes of the state,⁴⁶ and restrictions on divorce served state interests rather than individual interests.

In this article, I read the divorce stories as concerned with the gendered nature of public and private roles, rather than as concerned with women's expressions of selfhood or with conceptions of companionate marriage.⁴⁷ Divorce helped to frame the expectations of marriage, but those expectations remained deeply hierarchical and inegalitarian. Divorce could help the rare woman who was able to live independently of her husband, but it also served to support the gendered nature of woman's role in marriage.⁴⁸ The conventional history of women's status in nineteenth-century America suggests a movement toward equality in

marriage. BARBARA GOLDSMITH, *OTHER POWERS: THE AGE OF SUFFRAGE, SPIRITUALISM, AND THE SCANDALOUS VICTORIA WOODHULL* (1998).

44. As Robert Griswold explains, the companionate family that emerged during the nineteenth century was "predicated on the notion of domestic equality between husbands and wives The [records he studied] reveal that the companionate ideal did, indeed, affect the lives of rural men and women from all social classes." GRISWOLD, *FAMILY AND DIVORCE*, *supra* note 42, at 5; LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 206, 501 (2d ed. 1985); ELAINE TYLER MAY, *GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA* (1980).

45. For a discussion of divorce at the end of the nineteenth century, see MAY, *supra* note 44.

46. See, e.g., Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920*, 23 *LAW & SOC. INQUIRY* 541 (1998).

47. Professor Norma Basch, who has recently published an extremely articulate and persuasive book about divorce from 1770-1870, argues that the nineteenth-century divorce stories illustrate "the underlying instability of the Victorian marriage synthesis. They all turn on the gaping contradictions of a society devoted to romantic love on the one hand and lifelong monogamy on the other." BASCH, *supra* note 7, at 185. She also believes that divorce served as a symbol of the contest between "the individual autonomy of women and the social authority of men," and that it "invested women with a legal independence that the larger culture either obfuscated or debased." *Id.* at 185, 191; see Ruth H. Bloch, *The Revolutionary Legacy of Divorce*, at <http://www.h-net.msu.edu/reviews/showlist.cgi?lists=H-SHEAR> (last visited Feb. 5, 2002) (reviewing NORMA BASCH, *FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS* (1999)). Instead, I think that the stories told in divorce trials confirmed women's gendered role, and did not threaten the social order. Women who sought to leave their marriages did so on the utterly acceptable bases that their husbands had not conformed to their gender code. While their husbands accused them of flouting the wifely role, the women fiercely defended themselves against these charges and accused their husbands of noncompliance. Both spouses claimed conformance with the marriage plot.

48. Indeed, "[m]uch of the modern historical debate about divorce has focused on the relationship between divorce and autonomy for nineteenth century women." RICHARD CHUSED & WENDY WILLIAMS, *GENDER IN AMERICAN LEGAL HISTORY* (forthcoming 2001) (manuscript at 88, on file with author).

civil and marital life;⁴⁹ the divorce stories belie this traditional history. While women's roles changed, and domesticity acquired a distinct status, the value of women's household and marital work became simultaneously invisible and valueless.⁵⁰

The rhetoric of divorce cases additionally shows how restrictions on divorce reinforced gendered roles throughout society. Indeed, fault functioned as a code for compliance with gender norms,⁵¹ regardless of the actual fault grounds set out in the complaint. Fault served to signal the policing of gender norms; fault constricted behavior and punished women and men who transgressed. Thus, the divorce trials contain stories not just of the fault grounds, but also of other failures to conform to gender roles. Whether the motivations for complying with these norms were external or internal,⁵² they were powerful regulators.

Moreover, stepping back from a focus on divorce alone, and examining the whole institution of marriage, the development of the image of companionate marriage did not result in legal recognition of companions marrying whenever they chose or dissolving marriages whenever they chose.⁵³ Instead, the entry into marriage became increasingly regulated as the nineteenth century closed.⁵⁴ Marriage remained a patriarchal institution from which women could exit only if they had the financial means to do so.⁵⁵ Although the nineteenth century is widely seen as marking

49. *E.g.*, CARL DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 72 (1980); GRISWOLD, *FAMILY AND DIVORCE*, *supra* note 42, at 16.

50. *See, e.g.*, JEANNE BOYDSTON, *HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC 17-18* (1990); *infra* notes 208-09 and accompanying text.

51. As Professor Elizabeth Scott points out, marital norms also function as commitment norms. *See* Scott, *Social Norms*, *supra* note 24, at 1908. She explains that commitment norms stabilize the institution of marriage because they "serve a bonding function, in that each spouse, by agreeing to adhere to the behavioral expectations embodied in the norms, becomes vulnerable to heavy costs should he or she later defect." *Id.* at 1910. In the mid-nineteenth century, these norms reinforced the commitment to marriage by, for example, preventing remarriage upon a finding of fault in some states. *See* HARTOG, *MAN & WIFE*, *supra* note 31, at 245. Historically, gender norms and commitment norms were "intricately intertwined." *See* Scott, *Social Norms*, *supra* note 24, at 1908. To the extent that female gender norms reinforce dependency, they also enforce commitment.

52. *Cf.* Posner, *supra* note 24, at 257-58 (noting that although social norms are claimed to be either endogenous or exogenous, the endogenous approach provides a more precise explanation).

53. George MacDonald, seeking to find the origins of the companionate marriage model, describes a man and woman who sought to marry each other for six months in 1884. 1 GEORGE E. MACDONALD, *FIFTY YEARS OF FREETHOUGHT* 366 (1929). Neither the minister nor the justice of the peace to whom they applied agreed to perform the marriage for them, undoubtedly because this was so completely contrary to contemporary expectations of marriage. MacDonald also describes the 1877 "marriage" between Mrs. H.S. Lake and Professor W.F. Peck, in which the parties agreed to remain married "so long as mutual affection shall exist." Nonetheless, when the wife sought a legal separation, the Massachusetts Supreme Court decided that divorce was not required because there had never been a legally recognized marriage. *Id.*; *see* Peck v. Peck, 30 N.E. 74 (Mass. 1892) (nothing required the court to recognize the parties' cohabitation as marriage); Franke, *supra* note 31, at 296-97 (discussing judicial hostility to marriages where the parties sought to negotiate their own roles).

54. *See* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996); Dubler, *supra* note 34; Franke, *supra* note 31, at 295.

55. *See* Basch, *supra* note 30, at 7.

the development of a companionate egalitarianism within marriage,⁵⁶ the divorce stories instead show the development of a companionate, hierarchical marriage in which both men and women were confined by gendered expectations.

Under contemporary law, marriage has become, however, a somewhat different institution that is both more private, in the sense of more individual control over its incidents, and more public, in the sense of greater regulation of entry into marriage, the financial effects of dissolution, and examination of its ongoing effects.⁵⁷ There remains a strong public interest in marriage, notwithstanding the easy availability of divorce.⁵⁸ The state continues to support strongly the institution of marriage by providing married couples many benefits unavailable to non-married couples, even as it allows no-fault divorce. The recent move to “covenant” marriages indicates the continuing respect accorded marriage as advocates emphasize the long-term nature of marital commitment,⁵⁹ and the controversy over whether same-sex couples should be allowed to marry shows the very public nature of marriage as well.⁶⁰

During the nineteenth century, divorce was so contentious because it called the core meaning of the institution of marriage into question.⁶¹

56. See also LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX 89–92* (1998) (describing the “interlocking” system of male and female roles, which simultaneously gave women their own sphere of influence but remained subordinated to men).

57. See Naomi Cahn, *The Moral Complexities of Family Law*, 50 *STAN. L. REV.* 225, 228 (1997) [hereinafter Cahn, *Moral Complexities*].

58. See Brian H. Bix, *State of the Union: The States’ Interest in the Marital Status of Their Citizens*, 55 *U. MIAMI L. REV.* 1 (2000).

59. For documentation of the trend towards covenant marriage, see, e.g., James Herbie DiFonzo, *Customized Marriage*, 75 *IND. L.J.* 875, 882 (2000). Even though relatively few couples have actually entered into a covenant marriage, it has become a potent symbol of all that is wrong and right about marriage today as it is extensively debated in state legislatures.

60. WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* (1996) (arguing that state policies denying citizens the right to marriage based on sexual orientation constitute unlawful discrimination); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 *B.Y.U. L. REV.* 1 (conducting constitutional analysis of same-sex marriage); Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790–1990*, 41 *HOW. L. REV.* 289 (1998) (supporting a constitutional right to marriage). Of course, some also question the validity of the institution of marriage from a liberal perspective. See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (proposing the abolition of marriage as a legal category); Gilbert A. Holmes, *The Conversations About the Intersecting Institutions of Marriage*, 4 *TEX. WESLEYAN L. REV.* 143, 148–49 (1998) (reporting on Professor Ann Shallek’s questioning of marriage); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 *VA. L. REV.* 1535 (1993) (critiquing the legal structure of gender within marriage).

61. The reasons for bringing divorce suits varied by sex. Men were more likely to sue when their wives were not “pure” sexually than for any other reason. Women were more likely to sue when men failed to fulfill their roles.

I find that the divorce cases do not reflect the newer expectations of companionate marriage—“I thought I was marrying my best friend and instead he turned out to be a dictator.” Instead, they reflect the fairly traditional roles—“I thought I was marrying a breadwinner and protector and instead he turned out to be a bum.” The rhetoric of the divorce cases, then, turns primarily on disappointment in the older roles, although there are occasional overtones of the new expectations when litigants chide their spouses for a failure to act in a companionate manner. Karen Lystra explains that there was a “contradiction” in the middle-class image of marriage between the act of conscious choice in deciding

The law established and reflected aspirations for marriage and it attempted to control the number of divorces.⁶² It is, then, like same-sex marriage today. Opponents of same-sex marriage believe that it will destroy the institution of marriage,⁶³ just as opponents of divorce believed that it too would destroy the institution. Yet—to continue the analogy—same-sex marriage today, like divorce a century ago, may change the institution of marriage, but will not destroy it.⁶⁴

Third and finally, divorce reform points out the complex status of women in the nineteenth century; divorce would not benefit a woman who was not financially independent of her husband,⁶⁵ yet, for wealthy as well as middle-class women, who had separate financial wealth, or were capable of earning their own living, divorce provided financial protections.⁶⁶ In supporting the institution of marriage, divorce provided support to a patriarchal institution. While women had recourse to divorce when the consequences of being single in a patriarchal, marriage-focused society outweighed the drawbacks of being married, this nonetheless made divorce an extremely difficult “choice.” It did, in some senses, support women’s autonomy because it allowed women to initiate a legal action to dissolve their marriages at a time when women’s capacity even to establish a residence apart from their husband was in question; autonomy was the goal of many feminists, who advocated raised expectations with respect to women’s individuality and freedom.⁶⁷

But, in addition to the risk of financial peril, divorce was fraught with other dangers. At the divorce trials, the lawyers made frequent reference to the consequences to women of having breached their marital

to get married and the “mandatory sex-role specific duties [imposed] upon husband and wife.” KAREN LYSTRA, *SEARCHING THE HEART: WOMEN, MEN, AND ROMANTIC LOVE IN NINETEENTH-CENTURY AMERICA* 192 (1989).

62. Cf. Nancy F. Cott, *Marriage and Women’s Citizenship in the United States, 1830–1934*, 103 *AM. HIST. REV.* 1440, 1441–44 (1998) (arguing that laws governing marriage and citizenship reinforced gender-based political and economic hierarchy).

63. See ESKRIDGE, *supra* note 60, at 88.

64. Marriage remains an important cultural institution today. Marriage rates are higher today than they were a century ago. See Naomi Cahn, *Looking at Marriage*, 98 *MICH. L. REV.* 1766, 1770 (2000) (reviewing MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* (1999)); see also Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 *U.C. DAVIS L. REV.* 809, 815–16 (1998).

65. Basch, *Relief in the Premises*, *supra* note 30, at 47. An at-fault woman rarely received any property or alimony; even innocent women had to ensure that their husbands complied with their financial obligations post-divorce. And, unless the husband was financially secure, divorce did not provide the woman with any financial guarantees.

66. SUZANNE LEBSOCK, *THE FREE WOMEN OF PETERSBURG* 70 (1985).

67. Elizabeth B. Clark, “*The Sacred Rights of the Weak*”: *Pain, Sympathy, and the Culture of Individual Rights in Antebellum America*, 82 *J. AM. HIST.* 463 (1995). While some feminists, such as Elizabeth Cady Stanton, believed that easier divorce would benefit women by guaranteeing them autonomy, other feminists protested. Even starting from the position that marriage benefited men, and that women were subordinated in marriage, some feminists still believed in the sanctity of the family; the debate for feminists was thus between women’s autonomy and family stability. Echoes of this debate continue in the debate over no-fault divorce, where women’s freedom to work is seen as a contributing factor to the rising divorce rate.

obligations. Not only would they be deprived of their children, of their property, and any right to alimony, they would be shamed and shunned.⁶⁸ If women were guilty of adultery or some other fault, then this stain would follow them and their children. In some states, they would be unable to remarry.⁶⁹ By filing suit for divorce for their husbands' faults, wives opened themselves to the same accusations, and to a public viewing of any of their alleged faults.⁷⁰ The fault rules serve as a prism through which courts could reflect and refract gender.

This article begins with a brief summary of divorce in American law during the nineteenth century. It then turns to a discussion of the narratives presented at divorce trials, focusing on the stories told about men, women, marriage, and fault. This study shows the very contested nature of "fault," the conflicting images presented of the innocence of each spouse, and the relationship between these images and culturally grounded notions of gender. While these fights over divorce had consequences for the reputations of the parties, they also had very real consequences for their financial well-being.

Finally, the article concludes by discussing the contextual nature of contemporary efforts to return fault to divorce actions. In the nineteenth century, fault in divorce served as a facade for general societal interest in the continuity of marriage; mere proof of fault did not entitle the parties to the granting of a divorce.⁷¹ This article shows how the nineteenth-century divorce process reinforced marital roles through the stories of fault it required. While the contemporary divorce process no longer serves that purpose, the legal treatment of parties upon divorce—the impoverishment of women and children, the inequities in alimony and property awards—continue to reinforce the fiction that the breadwinner is entitled to retain the human capital earned during the marriage, and the caretaker is financially penalized for child care.⁷²

68. In explaining why he had attempted to settle the divorce case brought against him, Dr. John Noel, in a self-interested manner, commented "that no woman can have her name connected with any public scandal without detriment to her." J.V. NOEL, SWORN TESTIMONY OF THE NOEL DIVORCE CASE, app. at 2 (1873).

69. For further discussion of the fear of remarriage, see HARTOG, MAN & WIFE, *supra* note 31, at 244-45.

70. In the divorce trial reports discussed below, women were almost invariably accused of adultery or similar faults, even when they initiated the action. Their status as a plaintiff did not immunize them from countercharges of fault.

71. Judges exercised enormous discretion in deciding whether to grant a divorce upon a finding of fault. Moreover, as discussed below, if both parties were found to be at fault, then divorce could not, in most jurisdictions, be legally granted.

72. An alternative interpretation is that gendered roles *do not matter enough* in contemporary divorce because courts fail to take into account contemporary differences between the roles. Professor Carol Rose has shown how the perception (regardless of the reality!) that women are more likely than men to cooperate results in limiting women's possibilities for economic advancement. Carol Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 442 (1992). Once women "choose" to cooperate in marital relationships, they find themselves in situations that encourage more "cooperation," in which women become the person primarily responsible for maintaining the household. *Id.* at 431. Rather than "face a scene" when she asks her husband to perform household work, a

III. DIVORCE IN THE NINETEENTH CENTURY

Until the mid-nineteenth century in England, only an ecclesiastical court could grant a separation from bed and board, and only Parliament could grant a full divorce.⁷³ In America, while divorce began as a legislative proceeding, it became entirely statutory and judicially based during the course of the nineteenth century.⁷⁴ At the beginning of the nineteenth century, even the most liberal of divorce laws allowed divorce only on very limited fault grounds. By the end of the century, states had experimented with various different, and more liberal, grounds for permitting divorce, and had, either by statute or through constitutional amendment, prohibited legislatures from granting divorce.⁷⁵ The number of divorces increased exponentially from the late eighteenth century through the early twentieth century.⁷⁶ There was, then, a remarkable transformation in the law surrounding divorce. Although there are variations between each state and territory, the law and practice of divorce changed dramatically throughout the country.

Even though states experimented with more liberal and restrictive divorce reforms during this period, the overall number of divorces increased.⁷⁷ Corresponding to the increasing divorce rate, the expectations of marriage changed, as did the expectations of roles within marriage (even if the roles themselves changed little).⁷⁸

In the seventeenth century, several American colonies allowed divorce for adultery; in Massachusetts, divorce could be granted only for the wife's adultery.⁷⁹ Over the next two hundred years, legislatures expanded the grounds of divorce to include a series of fault-related bases, such as extreme cruelty, bigamy, drunkenness, and desertion. In some

woman will simply acquiesce, and there will be a cumulative and disadvantaging effect on her. *Id.* at 440–41. Professor Rose suggests that women use their alleged taste for cooperation to their own advantage, cooperating with others who will help them, and learning “selective noncooperation.” *Id.* at 456–57.

73. See RHEINSTEIN, *supra* note 38, at 31.

74. See CHUSED, *supra* note 28 (tracing the evolution from legislative to judicial divorce in nineteenth-century Maryland).

75. See *id.* at 116.

76. See *id.* at 160.

77. Evans Holbrook, Note, *Divorce Laws and the Increase of Divorce*, 8 MICH. L. REV. 386 (1910). The author observed: “There have been a few changes in the direction of greater liberality, but most of the changes . . . have been in the opposite direction, and have made for greater strictness.” *Id.* at 388; see Note, 4 HARV. L. REV. 138, 139–40 (1890) (noting that laws on divorce remained unchanged from century beginning to century end, but numbers of divorces increased dramatically); see also NELSON BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 135–36 (1962) (discussing the controversy in the late nineteenth century as to whether the liberality of divorce laws had any effect on the rate of divorce); DEGLER, *supra* note 49, at 167 (noting that although New York only had one ground of divorce, it awarded more divorces compared to its population than did New Jersey, which had two divorce grounds).

78. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1118 (1997) [hereinafter Siegel, *Why Equal Protection*].

79. RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* 137–39, 147 (1988).

states, grounds also included failure of the husband to act in his role as breadwinner, and failing to maintain a wife became an additional ground. At the same time, legislatures began to include so-called non-fault-based grounds which affected the capacity to marry, or remain married, such as impotency⁸⁰ or imprisonment.⁸¹ These additional grounds reflected the expectations that husbands would perform as husbands, through their presence and their ability to procreate. They also reflected social goals of keeping sexuality confined to marriage.⁸²

Courts were required to find some reason for the failure of the marriage, and this reason required one party to be at fault. In the United States, as of 1886, there were at least forty-two possible reasons for granting a divorce, ranging from “public defamation” (in Louisiana) to adultery (in all states and territories).⁸³ Interestingly, women were more likely to be granted a divorce. As the availability of divorce grew, it became an increasingly studied and commented upon subject by nineteenth-century treatise writers. From its first edition, published in 1826, through its twelfth edition, published in 1873, Kent’s Commentaries warned, “It is very questionable whether the facility with which divorces can be proved in some of the states be not productive of more evil than good.”⁸⁴ Nonetheless, although Kent and others, such as Tapping Reeve, included divorce in their more general books, it was not until the middle part of the century that the first two major treatises devoted to divorce appeared: Henry Page’s treatise appeared in 1850, while Joel Prentice

80. *Id.* at 155 (citing New Hampshire, 1791 legislation).

81. *Id.*

82. See Lindsay, *supra* note 46, at 547–48 (noting that an inability to procreate was not grounds for dissolving a marriage; the focus was on capacity to perform sexually).

83. CAROLL D. WRIGHT, A REPORT ON MARRIAGE AND DIVORCE IN THE UNITED STATES, 1867–1886, at 113–15 (1889). Wright compiled these statistics pursuant to federal legislation. An early committee report on the bill which ultimately required the data collection stressed the dangers of the multiple and conflicting state laws on the grounds for divorce, as well as on the varying approaches to the full faith and credit each state accorded to another state’s decree. *Id.* at 11; see also James J. White, *One Hundred Years of Uniform State Laws: Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2113 (1991). The extraterritorial effect of divorce decrees remained a complex problem; even the Supreme Court’s decisions in the mid-1940s have not completely resolved the issue. See *Williams v. North Carolina*, 325 U.S. 226 (1945); *Williams v. North Carolina*, 317 U.S. 287 (1942); HARTOG, MAN & WIFE, *supra* note 31, at 279–82; Thomas Reed Powell, *And Repent at Leisure: An Inquiry into the Unhappy Lot of Those Whom Nevada Hath Jointed Together and North Carolina Hath Put Asunder*, 58 HARV. L. REV. 58 (1945). Interstate recognition of marriage and divorce has received significant attention in the context of gay marriage. E.g., Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

84. 2 KENT’S COMMENTARIES ON AMERICAN LAW 106 (Oliver W. Holmes, ed., 12th ed. 1873); 2 KENT’S COMMENTARIES ON AMERICAN LAW 88 (1st ed. 1826); see JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS: EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT § 220b, at 339–40 (2d ed. 1884); TAPPING REEVE, THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, OF GUARDIAN AND WARD, OF MASTER AND SERVANT, AND OF THE POWERS OF THE COURTS OF CHANCERY (1816). For divorce treatises, see, e.g., HENRY FOLSOM PAGE, A VIEW OF THE LAW RELATIVE TO THE SUBJECT OF DIVORCE IN OHIO, INDIANA AND MICHIGAN (1850); BISHOP, *supra* note 30.

As discussed below, the treatises on divorce varied in their attitudes towards divorce.

Bishop's appeared two years later.⁸⁵ Both books noted the paucity of materials on divorce, and its neglected status as a topic of American law books. In judging the availability of divorce, Joel Bishop explained that it should be permitted when marriages no longer accomplished their original purpose; that is, when one spouse's failure to perform marital duties frustrated the purpose of marriage.⁸⁶

IV. FINDING FAULT—CONSTRUCTING STORIES

To receive a divorce, the aggrieved party was required to show fault on the part of the other spouse. Although the type of fault varied between states,⁸⁷ the necessity of proving fault did not. Indeed, in the early nineteenth century, Chancellor Kent refused to allow a consensual divorce because "the parties cannot lawfully rid themselves of its duties at the pleasure of either or both of them."⁸⁸ This policy continued until the mid-twentieth century, and was enforced through a prohibition on collusion in obtaining a divorce.⁸⁹ Parties thus had many incentives to fight proof of fault. First, without some sort of dispute, the court might dismiss the case for collusion.⁹⁰

Second, and perhaps more importantly, however, proof of fault went to a person's character. The trial reports discussed below repeatedly illustrate both parties' attempts to claim the mantle of the innocent spouse through three different strategies: (1) by admitting the transgression and blaming someone else; (2) by denying completely the fault;⁹¹ or (3) by claiming the other party was just as much, if not more, at fault. Fault was deeply contested because of its very public nature: not only was it a breach of the marriage, it was a breach of the community's expectations of gendered marital roles. Even the noted treatise writer Joel Prentice Bishop, who believed that divorce should be permitted where one spouse failed to conform to her marital role, nonetheless also be-

85. BISHOP, *supra* note 30, at XV; PAGE, *supra* note 84, at i.

86. BISHOP, *supra* note 30, § 35, at 29.

87. As Henry Folsom Page pointed out in 1849, there were more than thirty grounds for divorce. PAGE, *supra* note 84, at 15 n.1. They included "any behavior repugnant to the marriage contract . . . [or] where the parties cannot live in peace, and their welfare requires a divorce," as well as becoming a member of the Shakers and "marriage with a negro, mulatto or indian." *Id.*

Even the incompatibility statutes, which allowed for divorce when the parties could no longer live together, were construed to require fault. See Naomi Cahn, *Incompatibility and the History of Divorce* (unpublished manuscript 1999) (on file with author).

88. *Van Vechten v. Van Vechten*, 4 Johns. Ch. 502 (N.Y. Ch. 1820); see *Williamson v. Williamson*, 1 Johns. Ch. 488, 490 (N.Y. Ch. 1815) ("To guard against all kind of improper influence, collusion, and fraud, it is the policy of the law not to proceed upon the ground of the *consent* of parties to a dissolution of the marriage contract.").

89. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 522–24 (2d ed. 1988). As Herbie DiFonzo points out, the law against collusion waned in its influence on spouses' practices. DIFONZO, *supra* note 28, at 55.

90. Collusion has remained a defense in some states. See CLARK, *supra* note 89, at 522.

91. As one court explained, "The defendant put in the usual answer, denying the adultery charged in the bill." *N. Smith v. P. Smith*, 4 Paige Ch. 432, 433 (N.Y. Ch. 1834).

lied in the public nature of marriage, its continuity with the community.⁹² Fault involved not just betrayal of the other spouse, but a deep breach of the marital relationship. As the Supreme Court explained in 1890, “Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife.”⁹³

Third, of course, parties might fight against a finding of fault for various pragmatic reasons. The defendant might simply want the marriage to continue. Or, if the suit was brought by the husband, a fault finding against his wife would excuse him from various forms of property distribution and could serve to preclude her from receiving child custody; she thus had strong, social and personal incentives to fight against the accusation.⁹⁴ Although the child custody law during the nineteenth century developed a tender years preference for mothers,⁹⁵ the preference typically applied only if she was not at fault.

This section also shows how lawyers manipulated images of men and women; women and men who transgressed their marital roles seemingly deserved to be punished by divorce. In addition, women were punished for failing to conform to expectations of their sex.⁹⁶ Fault violated

92. “[A]s man has gone up in the path of his improvement, and higher and purer light has shone around him, still has this institution of marriage . . . remained ever the first among institutions of human society.” BISHOP, *supra* note 30, § 12, at 10.

In refusing to uphold a divorce granted below, one court declared, in a rather typical exaltation: Marriage . . . is the most important of the social relations To its auspicious influence may be traced the great advances made in civilization, through the elevation of woman to social equality, the education of children, the refinement of manners . . . and as such should engage the most profound solicitude of the legislator and the courts to preserve it unsullied in its purity and transmit it to posterity with its integrity unimpaired.

True v. True, 6 Minn. 458, 460 (1861).

93. *Bassett v. United States*, 137 U.S. 496, 505 (1890). By the time of this decision, some states had begun to hold that bigamy and adultery were crimes against the spouse. *See id.* (citing *State v. Sloan*, 55 Iowa 217 (1880); *Lord v. State*, 17 Neb. 526 (1885)).

94. Some “guilty” wives did receive alimony and custody. Indeed, in *Reavis v. Reavis*, the court precluded evidence of the wife’s desertion from affecting the determination of the amount of money necessary to support her and her child. *Reavis v. Reavis*, 2 Ill. 242, 246–48 (1835).

Bishop notes that some at-fault wives might receive property. For example, he cites an Ohio case where an adulterous wife received alimony; “[t]he property of the husband had been earned, after the marriage, by the joint efforts of the two parties.” 2 BISHOP, *supra* note 30, at 305. Other courts also allowed at-fault wives to receive property, even if they were not entitled to alimony. *See, e.g., Lovett v. Lovett*, 11 Ala. 763 (1847) (allowing the court to divide property appropriately depending on whether it was acquired through the efforts of husband or wife or jointly). Such cases may presage contemporary equitable distribution law which recognizes one spouse’s contributions to the other’s property. They also show that courts were not monolithic in enforcing gendered faultless norms during marriage, perhaps in recognition of wives’ dependent status.

95. *See* MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* 238–50 (1985); Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1155 (1985).

96. As Professor Basch explains, “[F]emale compliance in the all-important area of chastity was far more central to the Victorian ideology of marriage than either male compliance or male benevolence.” BASCH, *supra* note 7, at 172. The chastity focus explains, of course, the virtual universality of adultery as a ground for divorce. Chastity also, of course, ensures the legitimacy of children born to the marriage. For analysis of cultural attitudes towards sexual morality in the late nineteenth century, see DAVID J. PIVAR, *PURITY CRUSADE: SEXUAL MORALITY AND SOCIAL CONTROL, 1868–1900*

public, marital, and gendered expectations; consequently, violators could be deprived of their marriages in a society where marriage continued to be, for men and women, the defining status of adulthood.⁹⁷ There are various stock stories that appear in these reports,⁹⁸ stories of men's failures to provide, of women's promiscuity, and marriages that failed because of the parties' inability to get along with each other. Although adultery was the legal channel for dissolution, the narratives of these marriages underlying the stock stories are more complex than mere tales of infidelity.⁹⁹ These stories reveal that the expectations in marriage remained quite conventional, and divorce was only available when one spouse had transgressed these traditional marital roles and values. The trial accounts¹⁰⁰ dramatize the popular role expectations of nineteenth-century marriage.

A. Gendered Roles—Women

This section briefly describes several of the noted mid-nineteenth-century divorce cases, showing how they simultaneously adhered to, and manipulated, gender norms. Each party claimed the mantle of compliance with gendered roles, while their opponents alleged their noncompliance; litigants used the cultural norms associated with men and women to support their stories.

(1973); Jane Larson, "Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America, 9 YALE J.L. & HUMAN. 1 (1997).

97. For a discussion of alternative relationships, see LILLIAN FADERMAN, SURPASSING THE LOVE OF MEN: ROMANTIC FRIENDSHIP AND LOVE BETWEEN WOMEN FROM THE RENAISSANCE TO THE PRESENT (1981); Susan Carle, *Gender in the Construction of the Lawyer's Persona*, 22 HARV. WOMEN'S L.J. 239, 271 (1999); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

98. For a discussion of stock stories, see generally Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992) (reviewing the history of racial stereotypes and "stock stories"); Gerald Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984) (examining the analytical value of stock stories); Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353, 354 nn.3-4 (1996) (discussing characteristics of narrative). Professor Griswold points out the formulaic language of divorce complaints, in which petitioners sought to claim the moral high ground. ROBERT GRISWOLD, ADULTERY AND DIVORCE IN VICTORIAN AMERICA, 1800-1900, at 21 (1986) (Legal History Working Paper).

Professor Basch, in explaining why she has titled her book "Framing American Divorce," notes that litigants often rigged evidence to support a finding of divorce, and that the law, together with the literature about divorce, helped people frame their thoughts about divorce. BASCH, *supra* note 7, at 6-7.

99. See also CHUSED, *supra* note 28, at 160-61 (there was a "dissonance between the terms of general divorce law and the realities of married lives").

100. Others have also discussed some of these reports, albeit for different purposes. Professor Norma Basch analyzes, among others, the *Forrest*, *Beardsley*, and *Burch* cases, which are also discussed below. She reads the cases to show the "gendered tensions" involving women who "had sorely tested the limits of their husbands' authority, thereby raising the specter of female autonomy." BASCH, *supra* note 7, at 152. I examine the cases simply to show the gendered nature of their narratives and the hierarchical nature of marriage.

Professor Hendrik Hartog analyzes (among others) the *Forrest* case. HARTOG, MAN & WIFE, *supra* note 31. Neither of them has yet addressed the *Strong* and *Noel* cases.

I. Beardsley v. Beardsley

At the beginning of his closing argument on behalf of Mr. Beardsley, Charles Busteed offered an apology: “At no time or place, and under any circumstances, is it desirable to be the accuser of a woman. . . . Her voice is man’s first cheer and her hand his last pillow.”¹⁰¹ This chivalry, which served to reinforce the gentlemanly nature of his client, was nonetheless short-lived. He continued by describing Mrs. Beardsley as “wanton,” “the most brazen strumpet that ever defied God and men,” and a woman who “profanes a lawful couch with her carrion form.”¹⁰² He mocked her domesticity, asking, “What shall be said of the wife and mother, who, day by day, all the day long, is in the arms and bed of an illicit passion?”¹⁰³ He suggested that she was not truly maternal because she did not really want to see her child during her separation from her husband.¹⁰⁴ The introductory history of the case describes Mrs. Beardsley as “fonder of promenading Broadway and visiting places of amusement without her husband than was consistent with wifely propriety.”¹⁰⁵ Consistent with gendered marital norms, the lawyer’s rhetoric reinforces the gentlemanliness of Mr. Beardsley, and the unladylikeness of his wife. When Mr. Beardsley returned from work each night, he was not “met with the caresses which were his due, and which little attentions we all expect.”¹⁰⁶

In defending Mrs. Beardsley, her lawyer, Chauncy Shaffer, focused on her filial character; indeed her relationship with her father was literally on display in the courtroom.¹⁰⁷ Turning to her relationship with her child, he appealed to the jurors’ understanding of her role as a mother, and commented on how contrary to womanly nature it would have been for her to enter into the alleged second marriage: Shaffer remonstrated “[i]t is alleged that she, foregoing . . . all the claims of her only child upon her” committed bigamy.¹⁰⁸ In addition, he repeatedly proclaimed his client’s innocence, and explained that a finding of guilt would malign “the

101. BEARDSLEY, *supra* note 1, at 68.

102. *Id.* at 71, 75–76.

103. *Id.* at 76. The pamphleteer noted that, during this closing argument, the courtroom was full, and many jurors and spectators “were moved to no unmanly tears.” *Id.*

104. *Id.* at 73.

105. *Id.* at 5.

106. *Id.* at 73. The lawyer made an explicit appeal to the white male jurors’ expectations of their own wives, by reinforcing women’s role to care for men and men’s right to expect this caring from their wives.

Lawyers seemed conscious of jurors’ norms. For example, in seeking to exclude evidence in the *Strong* case, Mr. Strong’s lawyer argued, “I don’t speak to you as a husband and a father, but as a judge of the rules of law and evidence.” *Strong Divorce Case*, N.Y. TIMES, Dec. 13, 1865, at 2.

107. “You saw that woman whose heart was crushed, and who with blood crimsoning her lips, was borne out of the Court on her father’s arm.” BEARDSLEY, *supra* note 1, at 67; *see id.* at 31.

108. *Id.* at 59. In his closing, he also referred to Mr. Beardsley’s refusal to allow her to have her child “for even one night.” *Id.* at 67.

During his examination of Mrs. Beardsley’s mother, Mr. Shaffer attempted to show that Mr. Beardsley had prevented his wife from having access to their child. *Id.* at 37.

character of a woman unjustly.”¹⁰⁹ And, he allowed that, “if [Mrs. Beardsley] is not an angel it is because her nose is so sharp.”¹¹⁰ The defense thus focused on her gendered performance as daughter, mother, and wife, and on her compliance with, rather than her alleged flouting of, culturally expected norms. Ultimately, the jury found Mrs. Beardsley not guilty of bigamy, but guilty of adultery; because she had shown that her husband was also guilty of adultery, no divorce was decreed.¹¹¹ The jury seems to have accepted the incredibility of Mrs. Beardsley committing literal bigamy, but was unwilling to find her faultless.

2. Strong v. Strong

In his three-hour opening address on behalf of Mr. Strong, Henry Cram explained that the Strongs had enjoyed a very happy marriage because his client had “quiet domestic habits,” and cared deeply for his family.¹¹² Indeed, one of his final witnesses testified that Peter Strong was a devoted, and doting father.¹¹³ It was not until Edward Strong came to live with his brother in their “quiet country home . . . [that] incest crept into that circle.”¹¹⁴ He attacked the womanly nature of Mary Strong. He focused on various oral and written confessions that she had made, as well as her neglect of wifely duties. After one of their children had read a chapter from the Bible, Mrs. Strong

seemed most strangely and violently agitated, and rising from her chair, flung herself at his feet and implored him to forgive her for her long neglect and indifference. . . . Then arose the image . . . [in Peter Strong’s mind of his wife’s] family altar [that] had been so foully desecrated. . . . Plaintiff remained crushed and silent, until she arose and went to the door of the room. Plaintiff said “Where

109. *Id.* at 66.

110. *Id.* at 62.

111. Professor Basch explains that Mrs. Beardsley had exhibited such deviant behavior that, unlike other female divorce litigants, she was not given the benefit of doubt. BASCH, *supra* note 7, at 168. Professor Basch discusses how the press portrayed Mrs. Beardsley as deviant and deceptive. *See id.* Interestingly, Professor Basch characterizes Mrs. Beardsley’s defense as “no less fantastic than the accusations she faced.” *Id.* at 170.

Contrary to this image, I believe, as discussed above, that Mary Beardsley was framed by a husband desperate to divorce her. *See supra* note 9 and accompanying text. Moreover, other women who seemingly exhibited “deviant” behavior, such as Catherine Forrest, were allowed a divorce. *See infra* Part IV.

Alternatively, as discussed below, it may simply be the case that both Mr. and Mrs. Beardsley were confined to telling certain stories. Or, as Dirk Hartog has suggested, Mrs. Beardsley may in fact be one of the only female bigamists yet identified; she simply entered into a second marriage as a cover for her adultery. Interview with Professor Hendrik Hartog, Princeton University, Toronto, Ontario (Oct. 22, 1999).

112. *The Strong Case*, N.Y. TIMES, Nov. 25, 1865, at 2.

113. *Strong Divorce Case*, N.Y. TIMES, Dec. 2, 1865, at 2 (testimony of Robert Roosevelt, author of *Lake Superior Fishing*).

114. *The Strong Case*, *supra* note 112 (opening address of Mr. Cram). Although this might have constituted the crime of adultery, this did not constitute the crime of incest. Use of the term “incest,” then, must have been a rhetorical flourish to exaggerate her actions.

are you going?" . . . She answered: "To mingle with lost creatures like myself."¹¹⁵

When she began her "crime," he explains somewhat scandalously, she was pregnant.¹¹⁶ Finally, when her lover left her, "God took one of her children away"¹¹⁷ as punishment for her transgressing behavior.

By contrast, of course, her lawyer repeatedly defended her virtue, and her role as wife and mother, notwithstanding the slight problem of a signed confession. He described her as religious, a woman "who has eschewed and avoided worldly amusements. Acts of charity and religion have filled up her leisure time."¹¹⁸ Moreover, in compliance with standards of female physicality,¹¹⁹ she was physically weak, and suffered from the female ailment of menorrhagia.¹²⁰ She conformed to the images established by the nineteenth century's "'cult of female frailty,'"¹²¹ a cult that may have been based in the reality of health care for women.¹²² Like Mrs. Beardsley, Mrs. Strong's family members were evident and supportive of their appropriately domestic family member. Indeed, while Mrs. Strong was not in the courtroom, her father, "an elderly, quiet mannered gentleman," was present.¹²³

3. *Other Trial Reports*

Likewise, in the celebrated *Burch v. Burch* case, the maternal attributes of Mrs. Burch figured prominently. In concluding his opening statement, her counsel explained that, regardless of the consequences of a guilty finding for her, she had "two dear children. The verdict of the jury would either clear her children's reputation, or stain them for life."¹²⁴ In *Forrest v. Forrest*, the wife, Catherine Forrest was praised as "a woman who has endeared herself to all who have seen her in the *domestic circle*."¹²⁵

115. *Id.*

116. *Id.*

117. *Id.*

118. ELBRIDGE T. GERRY, *THE STRONG DIVORCE CASE* 34 (1865).

119. See SANDRA GILBERT & SUSAN GUBAR, *THE MADWOMAN IN THE ATTIC: THE WOMAN WRITER AND THE NINETEENTH-CENTURY LITERARY IMAGINATION* 54 (1979); HELENA MICHIE, *THE FLESH MADE WORD: FEMALE FIGURES AND WOMEN'S BODIES* (1987).

120. STRONG, *supra* note 12, at 89-90.

121. DIANE PRICE HERNDL, *INVALID WOMEN: FIGURING FEMININE ILLNESS IN AMERICAN FICTION AND CULTURE, 1840-1940*, at 25 (1993). Professor Herndl classifies three different, albeit overlapping, approaches to female illness among contemporary writers: first, many see illness as the result of women's cultural subordination; second, some see illness as resistance to the surrounding culture, a method by which women redefined and resisted their roles; and third, some see illness as a form of power that women gained and exercised in manipulative, artistic, or sentimental ways. *Id.* at 5-7.

122. See *id.* at 25-30 (discussing reasons why women's health may have actually worsened in the nineteenth century, such as the confining nature of corsets, women's lack of knowledge about their own bodies, as well as the use of illness as a means for women to gain some respite from their work).

123. *Strong Divorce Case*, N.Y. TIMES, Nov. 28, 1865, at 1.

124. ISAAC H. BURCH, *THE ONLY COMPLETE REPORT OF THE BURCH DIVORCE CASE* 17 (1860).

125. FORREST, *supra* note 37, at 7 (emphasis added).

As Professor Basch points out, women in divorce trials were often depicted as victims; there was an attempt to strip them of agency, to reinforce the authority of men and restrict the autonomy of women,¹²⁶ to make them victims of conspiracies of men. I also think that women were depicted as just that—women. As one judge in 1838 explained while upholding a wife's divorce, the defendant had “left the bed of his young and virtuous wife . . . to enjoy the embraces of a worthless common prostitute.”¹²⁷ The cult of domesticity, together with the virgin/whore dichotomy,¹²⁸ were thriving in divorce rhetoric.

In defending their clients' behavior, their lawyers used conventional images of women.¹²⁹ Women were supposed to be submissive, and they were also the natural guardians of the home. Lawyers for their husbands emphasized their transgressions of womanly and wifely expectations. The reports are almost transparent in their battles over the norms of female behavior as each side agreed on what women should do, and disagreed over what this particular woman had done.¹³⁰ This is true not only with respect to the married women who were the often unseen and unheard parties to the trials, but also with respect to the other women at issue, the witnesses and adulterers. For example, in the *Beardsley* case, Mrs. Beardsley's best friend, Miss Alice Greenwood [sic], is the woman alleged to have participated in the divorce conspiracy so that she could

126. She argues that the trial pamphlets exploited divorce as a “sentimental” event in which women were the passive victims. See BASCH, *supra* note 7, at 155. For further discussion of nineteenth-century notions of sentimentality, see KAREN HALTTUNEN, *CONFIDENCE MEN AND PAINTED WOMEN: A STUDY OF MIDDLE-CLASS CULTURE IN AMERICA, 1830–1870* (1982) [hereinafter HALTTUNEN, *CONFIDENCE MEN*]; Laura Hanft Korobkin, *The Maintenance of Mutual Confidence: Sentimental Strategies at the Adultery Trial of Henry Ward Beecher*, 7 *YALE J.L. & HUMAN.* 1 (1995).

127. *Hofmire v. Hofmire*, 7 Paige Ch. 60, 61 (N.Y. Ch. 1838).

128. See HAZEL CARBY, *RECONSTRUCTING WOMANHOOD* 26–27 (1987) (contrasting images of black women with the cult of true (white) womanhood's image of modesty); ANN DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* (1977); KAREN HALTTUNEN, *MURDER MOST FOUL: THE KILLER AND THE AMERICAN GOTHIC IMAGINATION 183–86, 206–07* (1998) [hereinafter HALTTUNEN, *MURDER MOST FOUL*] (discussing the use of the angel/whore dichotomy in nineteenth-century murder trials); Cott, *supra* note 62 (discussing the cult of domesticity).

The cult of domesticity idealized lives available only to a limited number of women, who were stereotypically white and middle class. Given that these cases typically concerned people with enough money to pay for a divorce, middle-class standards would have been applicable (and aspirational).

129. See GRISWOLD, *supra* note 98, at 21 (“The language lawyers and townspeople used in divorce litigation reveals how local courts became a theater for the reaffirmation of basic cultural values Lawyers, for example, drew upon a similar vocabulary when highlighting the character of their female clients”).

130. The actual divorce cases thus reinforce conventional notions of marriage and of appropriate roles within it. See DEBRA ANN MACCOMB, *TALES OF LIBERATION, STRATEGIES OF CONTAINMENT: DIVORCE AND THE REPRESENTATION OF WOMENHOOD IN AMERICAN FICTION, 1880–1920*, at 6 (2000) (as a result of the increasing grounds for divorce, “the ideal of marriage—and especially the expectations governing the feminine domestic role—was ever more strictly encoded. Thus while divorce law seemed a liberating mechanism that was disruptive of marriage . . . it in fact maintained the domestic sphere [and] seemed to guarantee that the institution of marriage would remain unquestioned and unreformed”). Marriage remained a social status, subject to public governance and scrutiny. Breach of a marital role also disrupted individual and gendered characters.

marry Alfred. It was even suggested that she procured the abortion of Alfred's child.

The narrative of the ambiguously bad woman who plots against her friend with her friend's husband is easily recognizable from nineteenth-century fiction in novels ranging from E.D.E.N. Southworth's 1849 novel, *Retribution*, to Henry James's *The Wings of the Dove*, published in 1902.¹³¹ In *Retribution*, Juliette Sommers schemes to ensure that the wealthy and handsome husband of her best friend, Hester Dent, falls in love with her; when she sees the signs of consumption in her best friend, she does nothing to alert her friend to the disease.¹³² Very shortly after Hester dies, Juliette Sommers marries her friend's husband.¹³³ Throughout much of Henry James's *The Wings of the Dove*, Kate Croy and Merton Densher, who are secretly engaged, plot against Kate's alleged best friend, Millie Threader, ultimately causing her death when Millie understands that Merton does not truly love her.¹³⁴ The contested images of the bad women in the divorce trials similarly drew upon deeper cultural tropes that were echoed in, and echoed by, novels.

B. Gendered Roles—Men

The stories within the divorce trials amplify the role expectations of husbands. Men were supposed to provide for and protect their wives, as well as, perhaps secondarily, to serve as lovers and companions.¹³⁵ The images of men that emerge from these trials show the constraints inherent even in the dominant role in marriage. The ideology of masculinity served as a critical balance to the ideology of femininity; domesticity (and marriage) depended on both the husband and wife performing their

131. For discussion of the plots in these books, see HERNDL, *supra* note 121, at 55–60, 187.

132. EMMA D.E.N. SOUTHWORTH, *RETRIBUTION* 127 (1856). “Yes, Hester is marked for the GRAVE. No one sees . . . no one but me. . . . And now [I] would be sure to succeed in winning him.” *Id.* Although not a story of divorce—it was published in 1856—the best friend does die conveniently and rather quickly, thereby allowing her husband to marry the alleged friend.

133. *Id.* at 200. Juliette is never happy, however, and her marriage disintegrates as well. The retribution of the title is exacted against her, and the author is clearly writing from a particular perspective that condemns the immorality of Juliette's behavior.

134. This is, of course, a simplification of a complex plot.

135. As Norma Basch points out, men were obligated to fulfill “the often conflicting roles of provider and companion.” BASCH, *supra* note 7, at 166. Robert Griswold explores the depictions of men in divorce trials in California. See GRISWOLD, *FAMILY AND DIVORCE*, *supra* note 42, at 92–140. He explores the rising expectations of men as companions, and the corresponding power of women to enforce those expectations; he asserts that this changed role for men reflected a belief in more egalitarian, and less hierarchical, marriages. *Id.* at 119. While I generally agree with Professor Griswold's extremely perceptive and acute observations about divorce trials, I do not think that these trials show that marriage was becoming significantly less hierarchical. See *infra* notes 100, 264; see also Reva Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127 (1994) (discussing preservation-through-transformation in the context of inequalities in marriage).

roles.¹³⁶ During the nineteenth century, men were increasingly defined with respect to their breadwinning. It became important to engage in profitable work outside of the home.¹³⁷ A man who did not make enough money to support his family was not a real man.¹³⁸ The divorce cases reveal an emphasis on a man's economic success as a determining factor in his marital success.

Many states included, as a basis for divorce, a man's failure to provide adequately for his wife; his failure as a breadwinner could constitute a basis for divorce. For example, between 1867–1886, there were almost 8,000 divorces granted to wives because of their husbands' failure to provide; not surprisingly, there were no such divorces granted to husbands¹³⁹ because there was no such obligation on the wife's part.¹⁴⁰

The accusations against Alfred Beardsley included not just his adultery, but also his failure to support his wife.¹⁴¹ In his opening statement, Mrs. Beardsley's counsel noted that Mr. Beardsley had represented himself as financially comfortable while he was courting her.¹⁴² Shortly after the marriage, however, he began living with her family and received money from them to start his own business.¹⁴³ Indeed, one of her brothers brought \$5,000 into a shared business venture, and another gave him \$7,000, which he allegedly spent on prostitutes.¹⁴⁴

136. In commenting on the 1842 *Dunham* divorce case, Professor Basch observes that the husband had transgressed the masculine role more than his wife had violated the norms of wifely behavior, and the jury thus found for the wife. BASCH, *supra* note 7, at 154.

137. See LYSTRA, *supra* note 61, at 129–35 (discussing the strong connection between masculinity and a family's economic stability).

138. E.g., AMY DRU STANLEY, *CONJUGAL BONDS AND WAGE LABOR* (1999) (newly freed black men were encouraged to find jobs so that they could support their wives).

139. WRIGHT, *supra* note 83, at 169. Although the number of neglect divorces pales in comparison to the number of desertion divorces—more than 75,000 during this same time period—failure to provide was the most frequent ground for divorce in California and Michigan. *Id.* Given that the periods for divorce based on desertion and failure to provide were generally similar, the failure to provide ground may have reflected the husband's failure to support his family, his noncompliance with the cultural expectations of his role. *See id.* at 89–117.

140. See, e.g., Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 281 (2000).

141. His counsel defended against the adultery charges, claiming that they had never happened. He observed, however, that one could not “claim from Mr. Beardsley any exemption from the ordinary failings of man. We shall not hold that he has lived in New York without seeing its sights—without having a look at the elephant, gentlemen, if you please.” BEARDSLEY, *supra* note 1, at 11–12. Mr. Busted continued by noting that Mr. Beardsley's alleged adultery was not nearly as serious a breach of the marital obligation as was Mrs. Beardsley's. *See id.* at 12. For discussion of Mr. Busted's use of the sexual double standard, see BASCH, *supra* note 7, at 170–71.

Mrs. Beardsley's counsel condemned this behavior, alleging that “Mr. Beardsley had plucked one rose; evidently that floral bouquet did not satisfy his taste, for we find him careening through . . . New York.” BEARDSLEY, *supra* note 1, at 59.

142. BEARDSLEY, *supra* note 1, at 31.

143. *Id.*

144. *Id.*

Similarly, Peter Strong was a lawyer who did not practice, and never established a separate residence for their family.¹⁴⁵ He allegedly neglected his wife, and left her alone so much that she naturally developed the conviction that he no longer loved her.¹⁴⁶ By contrast, his lawyer claimed that Mr. Strong was an extremely attentive and indulgent husband who was home except for occasional business-related absences.¹⁴⁷ Isaac Burch only married his wife after making inquiries about her financial circumstances, and then borrowed money from her friends.¹⁴⁸ He ultimately forced her to “beg” for money from her friends and relatives.¹⁴⁹ He thus allegedly married his wife for money and then treated her coldly, explained counsel for Mary Burch.¹⁵⁰

The importance of breadwinning underlies the dependent nature of wives; husbands maintained financial control over all property during the marriage.¹⁵¹ Although men were supposed to provide “necessaries” for their wives, this obligation was extremely difficult to enforce if men failed to do so.¹⁵² Similarly, in order to receive reimbursement, the creditor was required to prove that the item purchased actually was necessary, that it had not already been provided by the husband, and that the wife could not pay for it herself.¹⁵³ Moreover, as further evidence of their compliance with appropriate and submissive wifely behavior, women who were found to be at fault were generally precluded from receiving any alimony or property.

The importance of companionship is a continuing theme in these cases. For example, in *Burch v. Burch*, not only was Mr. Burch accused of marrying his wife for money, but also allegedly treated her coldly.¹⁵⁴

145. STRONG, *supra* note 12, at 58. Mrs. Strong’s counsel noted that “[w]hen a lawyer does not expend his smartness upon the world, but goes to his own fireside, or to that of some family into which he has married . . . he is a thorn in the side of their happiness.” *Id.* at 32.

146. *Id.* at 33, 58, 59. As he argued, “If, indeed, courts were not sufficiently alert in maintaining on the part of the husband, jealousy to watch over the society, conduct and habits of his wife, it might occasion an irreparable injury to the great bonds of human happiness and peace.” *Id.* at 43.

147. N.Y. TIMES, Nov. 25, 1865. Mr. Strong “was all this time kind and attentive, and gratified her every wish.” *Id.*

148. BURCH, *supra* note 124, at 5.

149. *Id.*

150. *Id.* at 16–17.

151. As discussed below, although the Married Women’s Property Acts allowed women limited access to some of their earnings during marriage, even these Acts supported the economic dependence of wives. The fathers of wealthy women could create separate estates for them, but this was a comparative rarity. See, e.g., MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA (1986).

152. See HARTOG, MAN & WIFE, *supra* note 31, at 155–61. The generosity of the husband in supporting his wife became an issue in many divorce cases. See also C. Robert Haywood, *Unplighted Troths: Causes for Divorce in a Frontier Town Toward the End of the Nineteenth Century*, 13 GREAT PLAINS Q. 211, 215 (1993) (describing one woman’s cross petition explaining the falseness of her husband’s accusations of adultery and labeling him “stingy and miserly”).

153. See Michele Dickerson, *To Love, Honor, and (Oh!) Pay: Should Spouses Be Forced to Pay Each Other’s Debts?*, 78 B.U. L. REV. 961, 969 (1998). See generally Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767 (1984).

154. BURCH, *supra* note 124, at 5.

This was contrary to the cultural ideal that husbands were supposed to treat their wives warmly and to provide companionship. Further, in the celebrated *Forrest v. Forrest* case,¹⁵⁵ Catherine Forrest alleged that her husband was “one who took me from my father’s hearth, promising to cherish and protect me, and now after wearing out in his service all the bright years of my youth, seeks to cast me forth.”¹⁵⁶ Edwin Forrest’s counsel, in his defense, asked the jury: “whether, in the whole of th[eir] correspondence, from first to last, there is any want of love or affection in regard to his wife: Is there anything in them except evidences of the most devoted admiration and extreme kindness?”¹⁵⁷ In further defense, Mr. Forrest’s counsel mentioned the existence of only one witness who ever saw him exhibit any “rudeness” to his wife.¹⁵⁸ Wives were entitled to expect friendship and respect from their husbands, and husbands expected to fulfill this aspect of their role.

The final image of men that appears in these cases is as controlled by their appetites—as consumers of pornography and drink and as customers of prostitutes. Although there was certainly a sexual double standard, and prostitution seems to have been more generally accepted during the nineteenth century than today,¹⁵⁹ courts and advocates condemned married men for succumbing to these passions. As the Vice-Chancellor in *Noel v. Noel* explained about Dr. John Noel, the evidence of “obscene pictures and books,” while not necessarily proving “the licentiousness of his conduct, exhibit painfully the impurity and pollution of his mind.”¹⁶⁰ At the trial, his wife produced many witnesses who repeatedly testified to Dr. Noel’s collection of obscene books, and his efforts to visit houses of ill-repute.¹⁶¹ This evidence of the beastly nature of his character seems designed to corroborate evidence of his adultery.

155. The reports of this case were so dramatic that, almost 150 years later, they reappeared, in a somewhat fictionalized manner, as a novel. DAVID DELMAN, *THE BLUESTOCKING: THE STORY OF THE FAMOUS FORREST DIVORCE CASE* (1994).

156. FORREST, *supra* note 37, at 68.

157. *Id.* at 144.

158. *Id.* And this witness was the husband of one of Catherine Forrest’s best friends.

159. The perceived existence of this double standard is clear in the opening and closing statements of counsel for Mr. Beardsley; even though the jury did not apply the double standard to Mr. Beardsley, it was a pervasive enough belief that counsel could attempt to invoke it.

Certainly for single men, contact with prostitutes was not subject to severe sanction. See HOWARD P. CHUDACOFF, *THE AGE OF THE BACHELOR: CREATING AN AMERICAN SUBCULTURE* 169 (1999) (“From the late-eighteenth century onward, American cities sustained a sexual service establishment that catered to a market consisting primarily of single men”); GRISWOLD, *FAMILY AND DIVORCE*, *supra* note 42, at 117 (single men “described their contacts with prostitutes in a matter-of-fact, guilt-free manner”).

160. *Noel v. Noel*, 24 N.J. Eq. 137, 140 (N.J. Ch. 1873). The Vice-Chancellor explained, “The possession and use of them by a physician are quite as incapable of apology or palliation—nay, more so—than would be in the case of a vulgar, uneducated reader.” *Id.*

161. *E.g.*, JOHN V. NOEL, *SWORN TESTIMONY OF THE NOEL DIVORCE CASE TOGETHER WITH AN EXPLANATION BY DR. JOHN V. NOEL*, 18–21, 25 (1873) (testimony of William H. Crosby and of George Chamberlain). Several witnesses also testified to his repeated intoxications.

While men were able to exist outside of the confines of the domestic sphere, they too were constrained by the cult of domesticity. For example, notwithstanding his counsel's repeated invocations of the sexual double standard for men and women, Mr. Beardsley was found guilty of adultery.

C. *Whose Fault?*

In all of these reports, there is a battle over fault. The allegedly innocent spouse who has brought the suit is countercharged as an adulterer, and/or a drunk, and/or unable to provide for his wife. The parties contest who is at fault, and who is responsible. Each party's individual character becomes an issue, and the jurors are exposed to diverse forms of character evidence. Yet the individual characteristics of fault play into highly gendered forms of behavior.

The parties consistently employed at least one of three strategies in order to place the blame elsewhere: denying completely, admitting with an explanation, and countercharging. Mrs. Strong's lawyer used all three strategies. First, he denied the existence of any adultery, and alleged instead that Peter Strong himself committed adultery with an *abortionist*.¹⁶² Then, he admitted with an explanation: Peter is alleged to have connived in his wife's adultery, and to have forgiven her for it. Her actual fault, if any, is, at least by her counsel, ascribed to him; as her husband, he was responsible for Mrs. Strong.¹⁶³ He had even elicited testimony from Mrs. Strong's father that he had chided Peter Strong for failing to protect his wife from his brother's "attentions."¹⁶⁴ Consequently, he should have been aware of his brother's attention to her, and ended it. Because he did not, he connived in the resulting adultery.¹⁶⁵ His wife cannot be at fault because she is not responsible for her own actions. Because of her womanly behavior, because of the gendered role expectations in marriage, she cannot be culpable. Women's existence separate from her husband's control was still an extremely contentious issue, and her law-

162. STRONG, *supra* note 12, at 112.

163. He repeatedly emphasized that Mr. Strong was legally obligated to protect his wife from seduction and suggested that Mr. Strong may have deliberately sought to tempt his wife in order to procure a divorce so that he could marry a wealthier woman. *Strong Divorce Case*, N.Y. TIMES, Dec. 7, 1865, at 5. He pointed out that "where the wife is in the house in the presence of the husband and living under his roof the law presumes she is under his coercion." STRONG, *supra* note 12, at 39. By acknowledging that Mrs. Strong was completely under her husband's control, the lawyer echoed norms of both wifely and husbandly behavior.

The concept of the husband's control over his wife even defeated the wife's alleged condonation of his adultery in an 1830 case. *L. Wood v. C. Wood*, 2 Paige Ch. 108 (N.Y. Ch. 1830). The Chancellor noted that condonation was presumed when the husband cohabited with his wife after he knew of her fault, but condonation "ought not to be held a strict bar against the wife. She is in a measure under the control of her husband." *Id.* at 111.

164. *The Strong Divorce Case*, N.Y. TIMES, Dec. 9, 1865, at 2 ("I told him there were duties for a husband as well as a wife, and he could not have been entirely unaware of what every one else saw").

165. STRONG, *supra* note 12, at 18.

yer used her husband's dominance to excuse his wife's actions.¹⁶⁶ To an all-white, male jury, this appeal would have had strong resonance.

By contrast, Mr. Beardsley's counsel charged that Mrs. Beardsley was not seduced, but has "coolly and deliberately" committed bigamy.¹⁶⁷ She lured her lover into sin.¹⁶⁸ Her intent, her agency make her culpable for her faults. Her defense was that she was the victim of a conspiracy; she was not responsible for the adultery. To prove her innocence, Catherine Forrest's counsel explained that his client would rather "sink into the grave, than live the life of an injured woman,"¹⁶⁹ with the implication that a finding of guilt was equivalent to a death sentence because she would be unable to bear the shame.

Several of the women—Mary Burch and Mary Strong—signed confessions indicating that they had betrayed their marital vows. These confessions were subsequently explained away as not really confessing anything, or as forced confessions of false transgressions, or as the products of the women's weakened states brought on by someone else (their husbands or their lovers) or because of their physical conditions. Mary Burch's confession states that her seducer was "unceasing" and tried to "ruin" her:

I resisted him, God in Heaven knows, and for nearly three months; but it seems as if I were infatuated, and after so long repelling his advances, I, to my shame, confess that he finally conquered, and on the 14th day of Oct., 1857, I fell a victim to his damnable seductive arts. On that day had criminal connection with him. . . . I should have added above that at no time did Stuart accomplish his most hellish purpose without the utmost resistance on my part.¹⁷⁰

Before the confession was read to the jury, counsel for the parties argued over whether it was admissible, given that (as counsel claimed), it had been extorted from her.¹⁷¹ Moreover, the language that she used—utmost resistance—was the standard for determining whether a rape had occurred; her reference to that standard also vitiates against the confes-

166. See *supra* note 161 and accompanying text.

167. BEARDSLEY, *supra* note 1, at 12.

168. Accusing a woman of sex outside of marriage served to make her into a bad woman, thereby capable of many terrible acts. See HALTTUNEN, MURDER MOST FOUL, *supra* note 128, at 206–07.

169. FORREST, *supra* note 37, at 7.

170. BURCH, *supra* note 124, at 43–44. In another confession, she explained that she was pregnant at the time. *Id.* at 43.

171. *Id.* at 43; see GRISWOLD, ADULTERY AND DIVORCE, *supra* note 98, at 35 (noting that courts were suspicious about confessions because of the power of a wrongful accusation of adultery against a woman's honor and because of husbands' power over their wives in compelling them to sign; courts required additional evidence to substantiate a confession). One of Mrs. Strong's counsel argued that confessions of adultery were the "worst" form of evidence and required corroboration. *The Strong Divorce Case*, N.Y. TIMES, Dec. 7, 1865, at 5.

In an 1858 San Francisco case, a judge instructed a jury that the wife's signed confession, without corroboration of the underlying events, and made under "peculiar circumstances," should be given "but little weight, and must be received with great caution." TRIAL ON THE SUIT OF AUGUSTA ROONEY VS. SAMUEL B. ROONEY 21–22 (1858) [hereinafter ROONEY].

sion because it suggests her innocence and Stuart's criminal guilt.¹⁷² By drawing on a stock story of rape, she was appealing for jury sympathy, and emphasizing her very feminine weakness in the face of male sexual passion; even if the jury found the confession credible, the jury might still be very sympathetic to her plight.

Mary Strong's lawyer argued repeatedly that she only signed the confession while "suffering from the effects of miscarriage,"¹⁷³ a clear reference not only to her womanly and maternal character, but also to the illness and corresponding weakness associated with women.¹⁷⁴ Her lawyers also argued that the loss of a child is "the most terrible ordeal a woman can go through."¹⁷⁵ This very public mention of miscarriage built on the apparent feminine and delicate sensibilities of Mrs. Strong, and used a gendered image as a defense. The appeal to gender norms drew upon deeply held cultural beliefs.

The men defended their actions, similarly claiming conspiracy or only minor breaches of the marital obligation. John Noel suggested that there was a plot against him to procure a divorce for his wife; one of his trusted friends allegedly stole important letters from his pocket.¹⁷⁶ Dr. Noel also defended himself by suggesting that the divorce suit was actually his mother-in-law's idea.¹⁷⁷ As the defendant, however, the cost—financial and emotion—of settling might have been overwhelming. He also claimed that he had once been in a hotel room with a "French girl During this time I took off her boots. This led to other liberties, which led to the act of intercourse, commenced but never finished. The girl tempted me in every possible way, so that at first I yielded but remembering my duty to my wife, I left her"¹⁷⁸ His defense was that, although he might have been mightily tempted to stray, he did not consummate the act of adultery, and thus was not guilty. He provided a thirteen-page Appendix to the record of the divorce trial in order to represent his version of the facts underlying the divorce suit.¹⁷⁹

Conspiracy was also a theme in the Strong divorce case, where the wife's brother and father were allegedly responsible for Mrs. Strong's re-

172. See E-mail from Professor Susan M. Sterett, University of Denver, to Naomi Cahn (Aug. 18, 1999) (on file with author); see also Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 963; Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1123 n.110, 1124–32 (1986). Or, as another rape earlier in the century was described, "Sarah struggled, and cried out aloud to the last; but alarmed, almost fainting . . . she was at length overpowered." HALTTUNEN, MURDER MOST FOUL, *supra* note 128, at 180.

173. *E.g.*, N.Y. TIMES, Dec. 5, 1865, at 3.

174. See *supra* notes 121–22 and accompanying text.

175. *The Strong Divorce Case*, N.Y. TIMES, Dec. 7, 1865, at 5.

176. NOEL, *supra* note 68, at 72–74, 78–79.

177. *Id.* at 47.

178. *Id.* at 8, 77.

179. *Id.* at app.

fusal to settle the divorce.¹⁸⁰ Mr. Strong's counsel explained that the Stevens family:

had a cosmogony [sic] of their own. They firmly believe[d] that when God made the world, he first made the Stevens family, then angels, and then men. . . . To save this imaginary honor of the Stevens family, they would let the whole world be ruined. . . . [They want jury members to] pay consideration for their high position.¹⁸¹ In addition, he alleged that the family of Mrs. Strong had tried "to obtain verdicts of juries by lavishing money upon corrupt witnesses."¹⁸²

The conspiracy theory depended on male actors controlling their female relative; she herself had little agency and autonomy.¹⁸³

D. Marital Privacy

While the doctrine of marital privacy grew ever stronger during the nineteenth century,¹⁸⁴ it clearly dissolved at divorce, where courts felt free—even compelled—to examine the nature of the marriage. Courts viewed the end of marriage as a very public issue. Termination of marriage, courts and legislatures reiterated, must be consistent with domestic harmony and public morals.¹⁸⁵ The public nature of divorce served as a marker of the end of marital privacy; indeed, it served as one method of defining that privacy. The reasons for divorce—fault-based as well as discretionary—all required inquiry into the nature of the marriage. Even the collusive divorces allowed a window into a marriage, where a man was willing to be caught with another woman, and a wife willing to condone this.

The courts showed an absolute willingness to investigate what was happening in the marriage, and there is very little indication of any modesty on the part of the judges. In *Strong*, there was extensive discussion of the sleeping arrangements of the parties, the procuring of a miscar-

180. See STRONG, *supra* note 12, at 54–55. George Templeton Strong labels Mary Strong "[n]oble in her penitence and contrition, till her own people had moulded her into wickedness deeper than sexual sin—into renunciation of penitence, and therefore hostility and hate toward the husband she had wronged." *Id.* at 54.

181. *The Strong-Stevens Case*, N.Y. TIMES, Dec. 28, 1865, at 8.

182. *The Strong-Stevens Case*, N.Y. TIMES, Dec. 29, 1865, at 2. In repeating what had happened in the courtroom, the *New York Times* reported that a juror testified that one of the dissenting jurors had been seen in the company of a detective employed by the defendant. *Charges of Bribery*, *supra* note 18. The jury divided on the credibility of Mary Smith and Mrs. Walsh on the adultery between Mr. Strong and Mrs. Potter. *Id.*; see also *History of the Jury-Box Scenes and Incidents*, N.Y. TIMES, Jan. 4, 1866, at 4.

183. For contemporary discussion of female agency, see Jennifer Nedelsky, *Reconceiving Autonomy*, YALE J.L. & FEMINISM 7, 9 (1989); Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 760 (2000) (reviewing JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000)); cf. Martha Minow, "Forming Underneath Everything that Grows": *Toward a History of Family Law*, 1985 WIS. L. REV. 819.

184. Siegel, "The Rule of Love", *supra* note 27; Siegel, *Why Equal Protection*, *supra* note 78.

185. See *Ritter v. Ritter*, 5 Blackf. 81 (Ind. 1839); *Motley v. Motley*, 31 Me. 490 (1850).

riage, and the anatomy of a woman.¹⁸⁶ Indeed, it was the New York Times which explained that much of the medical testimony was “not of a character for our columns.”¹⁸⁷ In an Iowa divorce case, the statute required that the reasons for granting an incompatibility divorce be made “fully apparent to the court.”¹⁸⁸ The court repeatedly emphasized its responsibility to become fully aware of all relevant facts. Some of the facts which justified the divorce, centering on the husband’s alleged adultery, are set out in the opinion. We learn that the husband owned a large farm, that he had a tenant, that the laborers boarded with the tenant, that he prepared food for the tenant’s wife when she was sick, and that he boarded with the tenant, rather than remaining in his house with his wife.¹⁸⁹ The only reason we allegedly do not learn more about the marriage is the length of the opinion,¹⁹⁰ rather than the reluctance of the court to publish further details of the marriage. Privacy protected the ongoing marriage, not the dissolving marriage.

Courts seemed desperately afraid of collusion, of allowing the husband and wife to plan the divorce together. Courts denied divorce if they suspected cooperation between the parties.¹⁹¹ This is one reason for the necessity of full disclosure and exploration of the actual fault.¹⁹² I think the fear of collusion stemmed from concern over a fraud on society because of the community’s interest in marriage. Collusion seems bizarre to modern sensibilities; where both parties no longer want to be married to each other, we have little moral problem in allowing them to divorce.¹⁹³ Similarly, the doctrine of recrimination, pursuant to which divorce would be refused upon a finding that both parties transgressed marital boundaries, seems strange today; even Mr. Beardsley’s counsel complained, that if “Mr. Beardsley had committed adultery, although his wife were twice ten thousand times the wanton that she is, they would, to

186. For example, Mrs. Strong allegedly urged her husband to “go to bed with her” after her confession; instead, the servants prepared her a separate bed, and “he has never since been with her.” *The Strong Case*, N.Y. TIMES, Nov. 25, 1865, at 2.

187. *The Strong Divorce Case*, N.Y. TIMES, Dec. 14, 1865, at 2.

188. *Inskip v. Inskip*, 5 Iowa 204, 212 (1857).

189. In contemporary cases, we learn about the nature of the marriage in the parts of the decisions dealing with custody and financial distribution, rather than in the grounds for granting the divorce. Thus, the curtain of marital privacy so wished for by no-fault advocates shields only one part of the divorce process.

190. See *Inskip*, 5 Iowa at 218.

191. See, e.g., *Belden v. Munger*, 5 Minn. 211 (1861) (it is contrary to public policy for parties, or their proxies, to enter into an agreement facilitating divorce). Indeed, divorce settlement agreements remained suspect until the middle of the twentieth century. See Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1400–01 (1984); Sally Burnett Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements and the State*, 59 N.C. L. REV. 819, 827–30 (1981).

192. “Testimony whereon to obtain a divorce for adultery, should be full and explicit, and the proceedings ought to show that the suit is not got up by collusion.” *Pugsley v. Pugsley*, 9 Paige Ch. 589, 589 n.1 (N.Y. Ch. 1842).

193. At least when there are no children. For further explanation, see sources cited in DiFonzo, *supra* note 59, at 883–84; Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1833–42 (1985).

use a vulgar expression, have to go it ‘nip and tuck’ during the rest of their lives.”¹⁹⁴

If, however, marriage is a public status, more than a contract between the two individuals, then an agreement to dissolve the “civil contract” of marriage ignored the rights of the third party to that contract, the state (or the community). Nineteenth-century judges viewed marriage as something different from a contract between the parties, but as something regulated for the public good.¹⁹⁵ As counsel argued in closing arguments in *Beardsley*, the fault charges are “serious, affecting [the parties’] welfare and the welfare of their offspring, and, I may add, vitally affecting the best interests of society.”¹⁹⁶

The law required complete innocence on the part of the spouse receiving divorce: no fault and no forgiveness of fault. Forgiveness of fault, or condonation, was frequently alleged based on the spouses continuing to live together after the adulterous acts. There appears to have been a double standard, however, based on women’s subordinate role within marriage, such that a woman’s condonation could be treated differently from her husband’s. As the Vice-Chancellor explained in 1832:

Another principle appears to be equally well established, namely, that the effect of cohabitation as a condonation is less binding on a wife than it is on the husband: because . . . she may entertain better hopes of the recovery and reform of her husband, her honor is less injured and is more easily healed; and so far from its being improper that she should for a time show a patient forbearance, it is commendable in her to exercise it, with a view to reclaim him; which would not be tolerated in the husband where the wife should happen to be the delinquent party. Besides, she may find a difficulty either in quitting his house or withdrawing from his bed.¹⁹⁷

This doctrine contains two messages about the appropriate behavior of a wife. First, a wife can reclaim her husband from his fault, and should be rewarded for attempting to do so; and second, it contains a recognition of the difficulty of women separating from their marital households. It also reaffirms the double sexual standard. Women’s subordination, otherwise disadvantageous, becomes, as it did in many of the divorce trials, a source of advantage.

This notion of innocence, of freedom from fraud or collusion, has deep resonances with nineteenth-century culture and law. There was a deep-seated fear in nineteenth-century America of the confidence man,

194. BEARDSLEY, *supra* note 1, at 71.

195. See, e.g., *Griffin v. Griffin*, 23 How. Pr. 183, 186–87 (N.Y. App. Div. 1862) (“[t]he right to a divorce depends not upon the breach of the contract of marriage, but upon provisions of statute law . . . it is on the ground of public policy, or the general good, that all our statute regulations in regard to divorces are founded. And it is because the party has violated a duty, or obligation imposed by law . . . that a decree of divorce is granted”).

196. BEARDSLEY, *supra* note 1, at 77.

197. *Johnson v. Johnson*, 1 Edw. Ch. 439 (N.Y. Ch. 1832).

the swindler, who was not what he appeared to be.¹⁹⁸ Especially given the multiple opportunities for pretense and false recreation in a society that espoused an ethic of the self-made man, sincerity was a highly treasured commodity.¹⁹⁹ As individuals became more mobile, reestablishing themselves in new communities, the possibilities of fraud were increasingly available. Indeed, a “cult of sincerity” developed to counteract the fear of hypocrisy,²⁰⁰ and social anxiety over the development of false identities led to a feeling that crimes such as bigamy and swindling were profoundly threatening.²⁰¹ The clash of conflicting stories in court may have served to air fully issues surrounding fraud, hypocrisy, and collusion²⁰² so that the jury could choose which, if either, spouse, was innocent. The lawyer in one case even went so far as to suggest explicitly that the defendant husband had “pass[ed] himself off among honest people as a man of sincerity and piety,”²⁰³ thereby calling on this fear of confidence men.

Parallels to the cultural anxiety about collusion and fraud can be found in other substantive areas of law. For example, in its original form, bankruptcy law was essentially criminal, without any discharge of the debtor’s debts.²⁰⁴ During the nineteenth-century debates over various aspects of bankruptcy law, commentators expressed concern over the “rogue” and collusive debtor who manipulated the laws to their own advantage.²⁰⁵ Such guilty debtors should not be protected by the bankruptcy laws. This basic concern over fraud, collusion, and false appearance reflected cultural tensions over the sincerity of the merchant’s character.

V. NARRATIVES OF FAULT, STORIES OF GENDER

The images of men and women that develop from these divorce records do not suggest a “liberalizing”²⁰⁶ of gendered expectations in society nor an egalitarianism in marriage. Instead, they suggest the seemingly appropriate roles to be expected in marriage. Women were supposed to be pure and virtuous and maternal; when they were not, they were punished. Men were supposed to keep their appetites in check

198. HALTTUNEN, CONFIDENCE MEN, *supra* note 126, at 20; Korobkin, *supra* note 126, at 23–24. Professor Lawrence Friedman notes that “confidence crimes and swindling” were certainly increasing during the nineteenth and early twentieth centuries. Lawrence M. Friedman, *Crimes of Mobility*, 43 STAN. L. REV. 637, 653 (1991).

199. HALTTUNEN, CONFIDENCE MEN, *supra* note 126, at xv–xvi.

200. *Id.* at 51.

201. Friedman, *supra* note 198, at 639.

202. See also Korobkin, *supra* note 126, at 28.

203. ROONEY, *supra* note 171, at 8. The lawyer charged that the husband was able to do this with “a large share of impudence.” *Id.*

204. Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 7–8 (1986).

205. *Id.* at 71, 73.

206. See, e.g., GRISWOLD, FAMILY AND DIVORCE, *supra* note 42, at 16.

(or at least unknown to their wives), and were supposed to provide for their families. If they strayed too far, or too obviously, then they were subject to public exposure. What changed was women's ability to expect this behavior from their husbands. Thus, women gained some "power," but it was a very circumscribed and complex power.²⁰⁷ Men were still expected to exercise control over the household, and even to control their wives. Changing our perspective, looking "down" from equality rather than "up" from inequality,²⁰⁸ nineteenth-century marriage rhetoric continued to reinforce patriarchy and hierarchy.

A. *Separate Spheres*

The roles of men and women had changed somewhat from earlier periods of United States history, but marriage continued as a hierarchical, subordinating institution with strictly confined, and defined, roles.²⁰⁹ Men were required to support their wives, but wives were not similarly required to do so; wives were required to provide companionship and services, but husbands were not legally obligated to do so.²¹⁰

Women's separate sphere was never as significant as men's. Historian Jeanne Boydston traces the changing perception of housework from valuable labor that provided an economic contribution to the household to domestic labor that did not constitute work.²¹¹ Of course, even when men and women worked together on the farm, men still retained control and dealt with the outside world; nonetheless, women's contributions to the household and the farms were valued because that was where work occurred. As men left the household for "outside" work, work within the household, be it child care or laundry or cooking, began to be perceived differently because it was performed for the family, rather than for a market employer. This transition occurred as American culture developed new concepts of childhood; children were no longer means of production, but were valued and treasured innocents.²¹² The mother's role became increasingly important, but separate from the waged labor world and much less "valuable" than the work in that world.²¹³

207. See generally Siegel, "The Rule of Love", *supra* note 27.

208. See WRIGHT, *supra* note 83, at 150-51 (advocating a change in perspective to explore the complexity of familial changes in the nineteenth century).

209. For contemporary discussion of the subordinating nature of marriage, see Ann Shalleck, *Foundational Myths and the Reality of Dependence: The Rules of Marriage*, 8 AM. U. J. GENDER SOC. POL'Y. & L. 197, 202 (2000).

210. See, e.g., Wriggins, *supra* note 140, at 281.

211. See BOYDSTON, *supra* note 50, at 17-18.

212. See SHARON HAYS, THE CULTURAL CONTRADICTIONS OF MOTHERHOOD 29-33 (1996); VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1985); Janet L. Dolgin, *Transforming Childhood: Apprenticeship in American Law*, 31 NEW ENG. L. REV. 1113, 1149 (1997).

213. Women were not entitled to compensation for their household work performed for their family. See BOYDSTON, *supra* note 50; JUNE CARBONE, FROM PARENTS TO PARTNERS: THE SECOND REVOLUTION IN FAMILY LAW 89 (2000); VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY 41-

The man's role as breadwinner reinforced his responsibility to maintain his wife and children in the domestic sphere. The man was entitled to his own wages, but also remained entitled to the domestic labor of his wife.²¹⁴ This entitlement was so central that it was part of the definition of a "free" man.²¹⁵ Within his home, man continued to hold the title of "master."²¹⁶ Indeed, throughout her life, Elizabeth Cady Stanton discussed the importance of divorce, and attempted to introduce resolutions at Woman's Rights Conventions; Stanton compared the status of women in marriage to the status of blacks under slavery, using the analogy to argue that women needed a right to autonomy.²¹⁷

The legal system's somewhat dismissive treatment of women's confessions to adultery similarly emphasizes the weakness of women in marriage. Women were susceptible to their husbands' control even with respect to their words, and their very confessions were suspect because of their willingness to comply with their husband's authority.

B. Trial Roles

There is an ongoing scholarly debate over the role of trials and trial narratives in United States law and culture.²¹⁸ This article focuses on one aspect of this debate: do these narratives reinforce dominant cultural expectations or do they (and should they) challenge these same ideals? Professor Lawrence Friedman asserts that, because each trial is a "narrative competition" between the stories told by the two sides, "arguments presented in trials are often important clues to what stories count as

61 (1997); Reva Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994).

214. See AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 161 (1998); Siegel, *supra* note 213, at 1182.

215. See STANLEY, *supra* note 214, at 140, 161.

216. See *id.* at 165. See generally Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 LAW & HIST. REV. 25 (Spring 1990) [hereinafter Clark, *Matrimonial Bonds*].

217. Clark, *Matrimonial Bonds*, *supra* note 216, at 25. The 1848 Seneca Falls Declaration proclaimed that man "has so framed the laws of divorce, as to what shall be the proper causes, and in case of separation, to whom the guardianship of the children shall be given, as to be wholly regardless of the happiness of women." ELIZABETH CADY STANTON ET AL., HISTORY OF WOMAN SUFFRAGE 71 (1881). Subsequent conventions, however, failed to enact resolutions relating to divorce.

218. See, e.g., Anthony V. Alfieri, *Race Prosecutors/Race Defenders*, 89 GEO. L.J. 2227 (2001) [hereinafter Alfieri, *Race Prosecutors*]; Richard Delgado, *Making Pets: Social Workers, "Problem Groups," and the Role of the SPCA—Getting a Little More Precise About Racialized Narratives*, 77 TEX. L. REV. 1571 (1999); Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585 (1999); Martha Merrill Umphrey, *The Dialogics of Legal Meaning: Spectacular Trials, the Unwritten Law, and Narratives of Criminal Responsibility*, 33 LAW & SOC'Y REV. 393 (1999) [hereinafter Umphrey, *Dialogics*].

Trials can be seen as: (1) formal legal processes; (2) courtroom drama; or (3) contests between conflicting narratives. Martha Merrill Umphrey, Comments at Panel on Trials on Trial, Law, Culture & Humanities Conference (Mar. 10, 2001). In this article, as discussed below, I am examining the trials as simultaneously drama and contests of narratives.

good, or true, or compelling stories, within a particular culture.”²¹⁹ Trials are thus “boundary-maintaining” devices between what is appropriate and inappropriate within the community.²²⁰ They serve, in some sense, as “moral theater,”²²¹ or at least as “propaganda about expectations.”²²²

By contrast, Professor Norma Basch, who has studied divorce trial popular pamphlets, believes that popularized trials allowed men and women to understand and demystify divorce, and provided complex images of marriage rather than simplistic pictures of a true marriage.²²³ Melissa Ganz “questions the claim that popular trials of the nineteenth century reinforced cultural ‘norms’ and contained cultural threats,” and argues that “defense lawyers [actually] told stories that were profoundly subversive and . . . called into question more ideals than [they] reaffirmed.”²²⁴ On this view, the stories told in trials were, to some extent, stories of challenge and resistance to dominant norms; by popularizing the possibility of divorce, the stories served to make divorce more accessible and realistic, and to challenge the very norms that were contested.²²⁵ The pervasiveness of these stories thereby illustrates the means for subverting the larger cultural narratives of marriage and divorce.

Instead, this article has posited that the trials and the stories told within them served a different purpose. As Professors Friedman and Griswold explain, the trials told stories of gender and marriage, of men and women who had seemingly challenged cultural expectations and of men and women who had attempted to comply with those expectations; they articulated appropriate forms of behavior and also demonstrated the consequences of inappropriate behavior. The images themselves were not contested within the trial, and the terrain remained in conformance with, or deviant from, these images. The jurors decided which

219. Lawrence Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1595 (1989). Commenting specifically on divorce complaints, Professor Friedman states that they offer useful information “about behaviors that count as cruelty or unfairness within marriage; they indicate what stories might impress a court as grounds for dissolving a loveless marriage.” Friedman, *A Dead Language*, *supra* note 25, at 1595 (citing ROBERT GRISWOLD, *FAMILY AND DIVORCE IN CALIFORNIA, 1850-1890*, and ELAINE TYLER MAY, *GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA* (1980)). I think these insights are critical to a study of the stories told at divorce trials for what they reveal about behaviors expected during marriage; in addition, these stories also reveal information about gendered behaviors expected throughout the culture.

220. See GRISWOLD, *ADULTERY AND DIVORCE*, *supra* note 98, at 14 (judges “oversaw the public ceremony that helped establish and maintain cultural boundaries by offering community members a chance to express opposition to the offense, to bear witness against the offender, to reaffirm the bonds of cultural solidarity, and to sharpen the authority of the violated norm”).

221. *Id.* at 16.

222. Bix, *supra* note 58.

223. BASCH, *supra* note 7, at 144, 151-52. Professor Nancy Cott observed that news about divorce petitions may have encouraged others to seek divorce as well. Nancy F. Cott, *Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts*, 33 WM. & MARY Q. 586, 593 (1976).

224. See Melissa G. Ganz, *Wicked Women and Veiled Ladies: Gendered Narratives of the McFarland-Richardson Tragedy*, 9 YALE J.L. & FEMINISM 255, 262-63 (1997).

225. See Cott, *supra* note 223, at 593; see also MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1996) (arguing for the value of narratives in shaping an integrated, ethical life and expanding public discourse).

spouses had violated norms, and, in doing so, certainly helped to articulate and refine appropriate roles.²²⁶

Rarely—if at all—did divorce lawyers represent a client and proclaim, “My client is a Free Lover, and this justifies her behavior.” Nor did they say, “My client does not want to support his family.” That is, they did not contest the images, nor seek to subvert them; they merely contested whether their clients had transgressed the boundaries of these images and accused the opposing spouse of the transgressions. The stories in court thus did not reflect the liberation language of the woman’s movement,²²⁷ a discourse which was beginning to develop even as lawyers framed conventional gendered stories that conformed to the jurors’ expectations of marital roles.²²⁸

Although the trials did depict violations of marriage norms,²²⁹ they also reinforced dominant cultural images of marriage and of men and women. The adulterers—either male or female—were not celebrated, and were defended not as adulterers but as husbands and wives who had, in fact, not violated their marriage vows. Their transgressions, while made public, were also publicly denied. Both the plaintiffs and defendants told stories of deviance and conformance, and argued over which party had conformed and which party had deviated from conventional expectations. The popularity of the divorce trial accounts may simply have resulted from the need to understand the somewhat changing expectations resulting from the development of a companionate, hierarchical marriage model, as opposed to a hierarchical marriage model.²³⁰ They served to publicize the cultural canon to which marriages were required to conform, rather than to condone deviance from that canon. The deviant spouses were punished, not praised, and thus provided cautionary tales.

While some scholars have suggested that the increasing numbers of divorces reflected a need to “let off steam” as spouses developed higher

226. Of course, there was no one uniform, easily identified set of marital expectations that each marriage was required to respect. See Dubler, *supra* note 34, at 973. Nonetheless, the general contours of expected behavior were discernible.

227. See *supra* note 214 (discussing the 1848 Seneca Falls Convention resolution on divorce).

228. For a contemporary perspective advocating that lawyers should contest dominant norms through counternarratives at trial, see Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, 51 STAN. L. REV. 935 (1999); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997); Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000); Alfieri, *Race Prosecutors*, *supra* note 218; Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998); Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996).

229. See BASCH, *supra* note 7, at 176 (“In depicting scenes of heterosexual intimacy outside the boundaries of marriage, they were helping to detach sexuality from the realm of procreation.”).

230. Cf. DANIEL COHEN, *PILLARS OF SALT, MONUMENTS OF GRACE: NEW ENGLAND CRIME LITERATURE AND THE ORIGINS OF AMERICAN POPULAR CULTURE 1674–1860* (1993) (arguing that stories of criminals grew more popular because of the need to understand the developing criminal underworld); HALTTUNEN, *MURDER MOST FOUL*, *supra* note 128, at 160 (casually mentioning “the emerging norms of companionate marriage, ‘true womanhood,’ and loving child nurture”).

expectations of marriage,²³¹ the actual causes of the divorce increase are far more complex. I have not discovered the reasons for the increasing demand for divorce—whether it was the image of companionate marriage,²³² more egalitarianism in marriage,²³³ or more publicity for the divorces that were recurring, or a breakdown in community norms that provided the glue for marriage. Dissatisfaction with marriage was not a new occurrence, unique to the mid-nineteenth century, as shown by the historically large numbers of desertions and informal and formal separations,²³⁴ moreover, a lower life expectancy also meant that marriages lasted for a shorter period of time. The increase in divorce, and the number of divorces granted to women, might seem to support a claim for women's greater autonomy,²³⁵ instead, the fact that women may have initiated the actions more frequently than men shows their need not to be found at fault, their recognition of the confining nature of women's role such that transgression was punished by denial of property and child custody. On the other hand, by the end of the century, women's economic opportunities were increasing, and this does account for some amount of the increase.²³⁶ That is, women were financially able to support themselves if they could extricate themselves from marriages, and consequently, were not economically forced to stay in their marriages. In fact, one of the atypical factors in the divorce trials discussed in this article is the class and economic resources of the women. These were often women who could afford to be divorced.

Thus, what these cases show is that although there was certainly some “liberalizing” of roles, women were still confined to the limited sphere of home and family and fidelity and purity. The domestic sphere became increasingly important during late eighteenth and early nineteenth-century America, as did a woman's role within it. “The doctrine

231. See WILLIAM L. O'NEILL, *DIVORCE IN THE PROGRESSIVE ERA 6–7* (1967); DEGLER, *supra* note 49, at 165–76. Professor Degler even suggests that “divorce allowed an endless pursuit of the perfect marriage by freeing the individual to consider his or her own needs and expectations.” *Id.* at 174.

Professor Carol Weisbrod argues that the development of romantic love within marriage should be associated with the end of the nineteenth century; prior to that time, divorce was available only in “acute” situations. Carol Weisbrod, *Divorce Stories: Readings, Comments and Questions on Law and Narrative*, 1991 *BYU L. REV.* 143, 172–73.

232. See FRIEDMAN, *supra* note 44, at 501 (“[T]he paradox of the moral attack on divorce: the immorality of divorce depends on the sacredness of marriage; but the sacredness of marriage increased the demand for divorce.”).

233. As Danaya Wright shows in the context of child custody litigation, there was no linear progression towards egalitarianism in marriage during the nineteenth century. See Danaya C. Wright, *DeManneville v. DeManneville: Rethinking the Birth of Custody Law Under Patriarchy*, 17 *LAW & HIST. REV.* 247 (1999).

234. See DEGLER, *supra* note 49, at 165–66. Professor Degler points out that the ratio of marriages dissolved to the total number of marriages was higher in 1860 than in 1950; the death of a spouse constituted over 95% of the reasons for dissolution of a marriage in 1860, while it constituted only 66% of the reasons for dissolution in 1950. *Id.* at 173. As individual's life-span increased, so too did the divorce rate. *Id.*

235. See *id.* at 168.

236. See *id.* at 172; Siegel, “*The Rule of Love*”, *supra* note 27.

of woman's sphere opened to women (reserved for them) the avenues of domestic influence, religious morality, and child nurture."²³⁷ Even as they expanded their interests outside of the home, they were expected to maintain a focus on appropriately womanly pursuits.²³⁸ In their voluntary work outside of the home, women were constrained by, and constrained themselves through, the ideology of domesticity. Their expertise in these areas was based on their domestic roles.²³⁹ The gendered roles within marriage remained quite rigid,²⁴⁰ and the availability of divorce served to reinforce this rigidity. Within the confines of a fault regime and of fixed gender roles both within and outside of marriage, divorce was not easy.

The confining effects of domesticity for both men and women served to reinforce the patriarchal nature of marriage. Even though women were entitled to expectations of companionship and fidelity from their husbands, it was still the woman who was economically dependent during marriage and at divorce; for example, property, labor, and pension laws in the surrounding culture reinforced women's subordinate and dependent status in marriage.²⁴¹ The cost to any individual woman of demanding that her husband comply with these manly ideals remained high, even if she were able to escape her marriage. Men remained subject to comparatively few constraints on their behavior; and their transgressions were punished more lightly than were women's.²⁴² A woman could initiate a divorce when she was able to become economically independent of a husband, and/or when she could avoid a finding of fault, a finding which could preclude her from receiving support or property

237. NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND 1780-1835*, at 200 (1977).

238. For a discussion of women's "political" activities in improving society, see Minow, *supra* note 183, at 877. See generally ANNE FIROR SCOTT, *NATURAL ALLIES: WOMEN'S ASSOCIATIONS IN AMERICAN HISTORY* (1993); Carle, *supra* note 97. Robert Griswold discusses how changes in women's domestic roles increased women's status. GRISWOLD, *ADULTERY & DIVORCE*, *supra* note 98, at 13-16.

239. Minow, *supra* note 183, at 880-81.

240. See Susan Sterett, *Husbands & Wives, Dangerousness & Dependence: Public Pensions in the 1860s-1920s*, 75 *DENV. U. L. REV.* 1181, 1211 (1998) ("The late-nineteenth century was a time in which sexual identities were becoming less flexible and more obviously marked."). Women who were socio-economically privileged were somewhat more able to live outside of these roles. See Carle, *supra* note 97, at 248; Sterett, *supra*, at 1190-91.

241. The Married Women's Property Acts were ambiguous, at best. See Richard H. Chused, *History's Double Edge: A Comment on Modernization of Marital Status Law*, 82 *GEO. L.J.* 2213, 2214-18 (1994); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 *GEO. L.J.* 1359, 1414 (1983) ("The significant features of the [Married Women's Property Acts] did not reject married women's separate domestic sphere, but recognized the importance of women as caretakers of children and family resources."); Nancy Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 104 *AM. HIST. REV.* 1440, 1451-54, 1457 (1998); Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 *J. AM. HIST.* 471 (1988); Sterett, *supra* note 240, at 1198-1202. Professor Cott discusses an 1855 statute that allowed a male American citizen to confer citizenship on the woman that he married, but made no such allowance for a female American citizen; she explains that the law "underlined customary male headship of the married couple as a civic and political norm." Cott, *supra*, at 1456.

242. See generally MARILYN YALOM, *A HISTORY OF THE WIFE* (2001).

from her spouse. And, given women's low wages,²⁴³ the possibility of economic independence was slight unless women became dependent on their families or another man. When women had been deserted and were, consequently, no longer economically dependent, then they might be more likely to seek a divorce; a spouse's adultery, however, might be an insufficient justification for becoming economically independent of a husband.²⁴⁴

The images that emerge from the trials are of unhappy marriages, of men and women who failed in their marital undertakings, and as such, they seem more cautionary than incendiary. The divorce trials, as history, show how the law imagined the obligations of marriage and of husbands and wives, and then handled alleged breaches of those obligations.²⁴⁵ While the popularity of these trials may have publicized the availability of divorce,²⁴⁶ they also established the boundaries of behavior sufficient to obtain a divorce. Husbands and wives may both have been able to "see" themselves and their marriages in the stories of divorce, or they may have viewed the divorcing spouses as evil beings.²⁴⁷ Lawyers certainly tried to depict their clients as ordinary creatures, and the other spouse as inhuman monsters. Nonetheless, whether members of the public (or jurors) identified with either the innocent or guilty spouse, or saw them as monsters, they also saw the consequences of failure to conform.

Ultimately, the divorce trials contained the stories of the individual litigants as well as the stories of marriage and of men and women. The rhetoric deployed in these divorce trials provides glimpses of the marriages themselves. The stylized story forms nonetheless cannot mask completely how husbands and wives lived, or did not live, with each other. That these stories were, at many times, formulaic, simply reveals the expectations of the male and female litigants rather than the "truth" of any litigant's particular story. For a story to become legally cognizable, it must be framed so that it accords with existing legal practices. But,

243. See, e.g., Siegel, *supra* note 213, at 1120–22.

244. See GRISWOLD, *supra* note 98, at 5.

245. In discussing what to expect from a history of marriage, Professor Hartog suggests: Judges and lawyers, like other participants in the legal system, had to improvise solutions to immediate and intractable conflicts, using the imperfect materials of an inherited and changing legal order They were necessarily concerned with consistency, with recognizing the force of precedent, applying it to situations that pressed at the boundary of inherited normative descriptions, choosing between competing, often equally applicable, precedents. HARTOG, MAN & WIFE, *supra* note 31, at 4.

246. See Cott, *supra* note 241, at 1440; BASCH, *supra* note 7, at 169; cf. Susan Sterrett, *Serving the State: Constitutionalism and Social Spending, 1860s–1920s*, 22 LAW & SOC. INQUIRY 311, 313 (1997) ("Legal discourse, including contests over its meaning among lawyers and commentators, is partially constitutive of a polity").

247. Cf. HALTTUNEN, MURDER MOST FOUL, *supra* note 128, at 206–07 (suggesting that the nineteenth-century Gothic imagery of murderers as monsters replaced an earlier understanding of murderers as "common sinners," an understanding that is returning today).

of course, when the events occur, they do not accord with legal structures.²⁴⁸

Narratologists recognize that the “basic story” will vary depending on who is doing the retelling, that it is difficult to determine the actual origins of the basic story,²⁴⁹ but the basic story generally accords with larger cultural themes. These plot structures show how various events are translated, by the culture, into moral terms.²⁵⁰ Events may appear random until they are organized into a coherent structure.²⁵¹ The basic stories in these divorce cases thus provide insight into general cultural attitudes towards men and women and the role of marriage. The basic story reveals social expectations of husbands and wives, and the marriage norm. Even as the marriage norm changed, as women’s roles within the household were transformed together with men’s roles outside of the household, the basic story of marriage remained hierarchical and confining. The roles acceptable for both men and women, and the role of marriage itself, were constraining.²⁵² Even when men and women were not formally married, the law engaged in many fictions to make their relationships conform to the dominant ideal.²⁵³ The efforts of judges and litigants to impose marriage on these relationships shows not just an attempt to confine dependency, but also an attempt to define roles, to assimilate these relationships to the dominant model of men’s and women’s lives. There were, of course, counter stories, trials in which at-fault women received property; the existence of these cases illustrates that the law did not speak in one coercive voice.²⁵⁴

Throughout the nineteenth century, women remained confined by the marriage plot. Marriage established their roles; consequently, leaving marriage remained an ambiguous act of liberation. “Divorcees were society’s ‘unmarried married’ women, doubly defined by the matrimonial

248. See Naomi Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475 (1993); Sarat, *supra* note 98, at 354; Umphrey, *Dialogics*, *supra* note 218, at 393.

249. Barbara Herrnstein Smith, *Narrative Versions, Narrative Theories*, 6 CRITICAL INQUIRY 213 (1980).

250. See Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1313 (1999); Hayden White, *The Narrativization of Real Events*, 7 CRITICAL INQUIRY 793, 797 (1981).

251. See HAYDEN WHITE, *THE CONTENT OF THE FORM* 24 (1987) (“this value attached to narrativity in the representation of real events arises out of a desire to have real events display the coherence, integrity, fullness, and closure of an image of life that is and can only be imaginary”). *But see* ALISDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 211–16 (2d ed. 1984) (discussing the coherence of an individual’s life narrative).

252. Richard Chused states: “[T]he middle and upper class’ tolerance for family deviance decreased sharply between 1865 and 1900 in both the north and the south.” Richard Chused, *Comments for American Society for Legal History* 7 (Oct. 22, 1999).

253. See HARTOG, *MAN & WIFE*, *supra* note 31, at 254–56 (discussing the presumption of the validity of a second marriage); Dubler, *supra* note 34 (discussing the importance of acting married to receiving the legal status of marriage).

254. See HARTOG, *MAN & WIFE*, *supra* note 31, at 310 (“I reject the premise of law as a monotonal imposition of domination . . . There was domination aplenty but also opportunity, critique, renewal through law, and contradiction and indeterminacy.”).

institution rather than liberated from it.”²⁵⁵ The existence of divorce did not dilute the power of marriage as a regulatory institution.

While the very proliferation of divorce cases can be seen as a disintegration of the traditional familial norms, they can also be viewed as reinforcing cultural norms, forcing cultural norms to do their work. As expectations of marriage changed, as men moved out of house-based labor, and women were defined by household labor, men and women were laying claim to compliance with these newly developing images. Women were becoming more active within their communities, leaving the hearth—but only to promote moral purity outside the home.²⁵⁶ Similarly, women (and their lawyers) promoted moral purity and domestic feminism through the divorce cases, claiming the domestic images of women, and condemning men for their failure to comply with these images. The changing expectations of marriage, and the changing roles of women came together to enshrine these images. Lawyers for the men similarly claimed that the women had transgressed their domestic roles, while the men had complied with their expectations. The potential titillation caused by images of women tempting men²⁵⁷ was more than matched by the judgment—legal and social—that these women received for their transgressions. Although the model of companionate marriage developed as the dominant image for middle- and upper-class families, the roles in marriage remained primarily unchanged.²⁵⁸

The divorce stories are reflections of women’s and men’s status in society. Wives who ventured too far outside their roles as moral purifiers were at fault, and no longer deserved to be married. While women were becoming more active and activist, their activities continued to be circumscribed. Indeed, the stories that they told, and their defenses against contrary stories, repeatedly emphasized their own purity. While they might be leaving the home for divorce court (even though they could not be witnesses, in most cases²⁵⁹), they were leaving for a justifiable cause. Women who participated in divorce cases were defending their honor and their purity and their womanliness, not their autonomy nor even their rights to emotional intimacy in marriage.²⁶⁰

255. MACCOMB, *supra* note 130, at 304.

256. *E.g.*, CAROLYN LAWES, WOMEN AND REFORM IN A NEW ENGLAND COMMUNITY, 1815–1860, at 3–4 (2000); MINOW, *supra* note 183.

257. *See* BASCH, *supra* note 7, at 168–72.

258. *See* LYSTRA, *supra* note 61, at 210 (between 1830–1870, “the idea that a voluntary union might be voluntarily undone was inhibited by the still powerful sense of the marital relationship as a set of duties externally imposed upon husband and wife”).

259. *See, e.g.*, HARTOG, MAN & WIFE, *supra* note 31, at 105–06; Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1531 (1983); Milton Regan, *Spousal Privilege and the Meaning of Marriage*, 81 VA. L. REV. 2045 (1995).

260. In one contemporary study of the changing reasons for women’s divorce, the researchers found that, prior to no-fault divorce, women left marriages because of their husband’s faults, such as desertion or alcoholism; twenty years after the institution of no-fault—when women did not fear that a finding of fault would lead to even greater financial and custodial consequences—women initiated divorce because of a loss of emotional intimacy. June Carbone, *Income Sharing: Redefining the Family*

Nonetheless, although many of these divorce trials occurred at the same time as widespread debate on the morality of divorce, the stories in court simply did not reflect the liberation language of the woman's movement. The 1848 Seneca Falls Declaration proclaimed that man "has so framed the laws of divorce, as to what shall be the proper causes, and in case of separation, to whom the guardianship of the children shall be given, as to be wholly regardless of the happiness of women."²⁶¹ Subsequent conventions, however, failed to enact resolutions relating to divorce. When divorce was discussed, it was as a moral issue. Elizabeth Clark explains, "Before the Civil War, feminist arguments for divorce were not made in terms of an abstract right to individual liberty, but in more pragmatic terms, the most fundamental being the instinct for self-preservation . . . [they] invoked duties, rather than rights."²⁶² After the Civil War, she argues, the rhetoric changed to emphasize women's rights to "personal liberty," a stance that was controversial both within the woman's movement as well as within the larger society. Indeed, many in the woman's movement, who had successfully achieved some of their goals, turned away from their earlier divorce reform advocacy in an effort to achieve suffrage, and many feminists even advocated stricter divorce laws.²⁶³ Moreover, the scarcely acknowledged problem with this perspective was that focusing solely on divorce removed it from the context of women's subordinate, unequal lives; a right to divorce was meaningless without some rights to economic independence.²⁶⁴

VI. CONCLUSION

The stories of fault implicated individual men and women for their failings: their failings as individual spouses, and their failure to conform to the social norms of gendered behavior. Because divorce was fault-based, lawyers were required to craft their stories so that their clients were recognizably innocent and wronged while the opposing spouses were guilty and faulty. Although there was of course no one norm for wifely or husbandly behavior, there was a set of generally accepted con-

in Terms of Community, 31 Hous. L. Rev. 359, 403 n.29 (citing 1992 study). Although I am extremely hesitant to project retroactively, I nonetheless think these data—and those from other studies—show that it is not the development of companionate marriage per se that leads to divorce. Rather, it is other changes in women's and men's roles, such as women's increasing financial independence, as well as other cultural attitudes and laws, such as changes in the concepts of morality in family law, that lead to divorce.

261. STANTON ET AL., *supra* note 217, at 71.

262. Clark, *Matrimonial Bonds*, *supra* note 216, at 28. Throughout her life, Elizabeth Cady Stanton discussed the importance of divorce, and attempted to introduce resolutions at Women's Rights Conventions. Stanton compared the status of women in marriage to the status of blacks under slavery, using the analogy to argue that women needed a right to autonomy.

263. *E.g.*, Mary A. Livermore et al., *Women's Views of Divorce*, reprinted in *DIVORCE: THE FIRST DEBATES* 110, 112 (David J. Rothman & Sheila M. Rothman eds., 1987); ELEANOR FLEXNER, *CENTURY OF STRUGGLE* 152–53 (1959).

264. See Clark, *Matrimonial Bonds*, *supra* note 216, at 47–48.

ventions for wives and husbands for which transgression was to be punished. Acting like a wife or a husband did have some meaning, albeit not precise,²⁶⁵ so jurors were able to recognize when the parties before them acted appropriately. The roles for husbands and wives remained deeply gendered and unequal throughout the nineteenth century, and the stories of fault reveal these expectations.

Under the no-fault system in contemporary law, the norms of gendered marital behavior are irrelevant to receiving a no-fault divorce.²⁶⁶ A husband who does not provide for his wife, or a woman who is sexually active outside of marriage, can still receive a divorce without revealing any such grounds. Indeed, the domestic relations law has been transformed so that there is a story of greater equality in mutual obligations.²⁶⁷

Nonetheless, cultural norms of gender²⁶⁸ differ from the legal norms of domestic relations law. The social norms of gender still encourage women to define themselves as mothers and not work (or at least not work full-time) outside of the home,²⁶⁹ while divorce law no longer explicitly accounts for gender.²⁷⁰ Where gendered values do appear within divorce, however, it is in much more subtle ways, in the context of child custody, alimony, and property distribution. Women who stay home, or who are less than fully productive workers, are still financially penalized

265. See Dubler, *supra* note 34, at 973. In his survey of the earliest domestic relations casebooks which were published at the end of the century, Professor Hartog found that wives' roles remained shaped by their obligations to their husbands; husbands were able to demand satisfaction of those obligations with a reciprocal obligation to support their wives. HARTOG, *MAN & WIFE*, *supra* note 31, at 293.

266. For suggestions that fault should, perhaps, be relevant, see Barbara Bennett Woodhouse with comments by Katharine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 *GEO. L.J.* 2525 (1994).

267. See, e.g., Cahn, *Moral Complexities*, *supra* note 57, at 229; Wriggins, *supra* note 140, at 284. Professor Elizabeth Scott points out that "[t]he law has embraced egalitarian gender norms, categorically withdrawing support from hierarchical, differentiated marital roles." See Scott, *Social Norms*, *supra* note 24, at 1905.

268. See Steven Nock, *Time and Gender in Marriage*, 86 *VA. L. REV.* 1971, 1975–76 (2000).

Within the law and economics approach, there is an apparent acceptance that social norms result from an individual's self-interested actions and that cultural forces cannot be "anthropomorphized" to explain the development of norms. See Richard H. McAdams, *Signaling Discount Rates: Law, Norms and Economic Methodology*, 110 *YALE L.J.* 625, 680–81 (2001) (book review). Contrary to this approach, however, I believe that cultural forces—without a particular "face" or body—influence individuals' behavior and shape their choices. See, e.g., JUDITH BUTLER, *GENDER TROUBLE* (1989); JOAN WILLIAMS, *UNBENDING GENDER: HOW WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT* (2000). Moreover, the new social norms jurisprudence focuses on the formation of small group norms, with inadequate attention to the larger social norms that structure those groups. See Mitchell, *supra* note 24.

269. See RHONA MAHONEY, *KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER* 37, 193–211 (1995). Professor Nock also notes that gender norms in marriage reinforce the appropriateness of wives as caretakers and men as breadwinners. Nock, *supra* note 268, at 1976–77; see Naomi R. Cahn, *Gendered Identities*, 44 *VILL. L. REV.* 525, 529 (1999); Naomi R. Cahn, *The Power of Caretaking*, 12 *YALE J.L. & FEMINISM* 177 (2000).

270. See *Orr v. Orr*, 440 U.S. 268 (1979) (striking down as sex discrimination an Alabama statute providing that husbands, but not wives, may be required to pay alimony upon divorce).

upon divorce, perhaps because of the very expectation of equality.²⁷¹ They are performing the traditional wifely role but are no longer protected by the law. The assumption is that they have not contributed economically to the marriage, and thus have no long-term entitlement to the human capital produced during the marriage. During the marriage, they have frequently made a series of choices that weakens them in any further bargaining.²⁷² These choices within marriage are themselves the product of conflicting social norms that simultaneously encourage gender equality and gendered dependence.

The enforcement of gender norms at divorce has thus shifted locations from the rhetoric surrounding divorce itself to the economic consequences of being divorced. Innocent nineteenth-century women were entitled to receive alimony, property, and custody; innocent contemporary women who have complied with gender norms through caretaking and housekeeping are disadvantaged economically upon divorce. Judges continue to view marital property as belonging primarily to the person who earned it, and to believe that women deserve little compensation for their household and care work during the marriage.²⁷³ Domestic relations law has, on the one hand, changed to recognize women's equality, but, on the other hand, to discount caretaking work, instead of recognizing the relationship between women's equality and caretaking work, and adequately accounting for wives' household labor. There are deeply conflicting sets of social norms that control intimate marital roles and public social roles.²⁷⁴

In a system where fault is irrelevant, innocence and guilt are also irrelevant; courts follow equitable, allegedly neutral standards that nonetheless have gendered implications. The stories told during divorce by lawyers, judges, and litigants continue to contain lessons about the moral

271. See WILLIAMS, *supra* note 268, at 131; Martha Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998); Jana Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification of Alimony*, 82 GEO. L.J. 2423 (1994); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998); David Kaufman, Note, *The New York Equitable Distribution Statute: An Update*, 53 BROOK. L. REV. 845, 846-48 (1987) (reporting on early assessments of New York statute mandating equitable distribution of all assets upon divorce).

Professor Martha Fineman eloquently argues that women's caretaking within the family is unrecognized and uncompensated, and that norms of equitable distribution at divorce harm women. FINEMAN, *supra* note 60; Martha A. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789; Martha A. Fineman, *Child Support Is Not the Answer: The Nature of Dependencies and Welfare Reform*, in CHILD SUPPORT: THE NEXT FRONTIER 209 (J. Thomas Oldham & Marygold Melli eds., 2000).

272. See HIRSHMAN & LARSON, *supra* note 56, at 26-29; MAHONEY, *supra* note 269, at 37; WILLIAMS, *supra* note 268; Rose, *supra* note 72, at 423; Brian Bix, *Engagement with Economics: The New Hybrids of Family Law/Law & Economics Thinking* (2001) (unpublished manuscript on file with author).

273. See ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* 133, 138 (2001).

274. See Nock, *supra* note 24, at 1974; Scott, *Behavioral Theories*, *supra* note 24, at 1638-39.

expectations of marriage, and, in turn, have some influence on the shapes of those expectations.²⁷⁵ The nineteenth-century trials do not reveal an overly romantic and self-expressive view of marriage. Rather, the trials illustrate an inegalitarian, somewhat rigid institution to which it would be undesirable to return²⁷⁶ because of its narrowness of vision of men, women, and marriage.

The contemporary rhetoric of marriage, as reflected in the availability of no-fault divorce, has become increasingly egalitarian. The excision of fault from the law of divorce promises that marriage no longer involves keeping track of who has failed to comply with marital obligations, with the consequent implication that compliance is insufficient to guarantee either the continuation of the marriage or adequate financial support upon divorce.²⁷⁷ For me, the critical aspect of changing divorce laws is assuring that gendered behavior during marriage is protected upon divorce. Fault often provided an entitlement for women to support post-divorce, or at least provided a theory for such support, where resources existed. This article does not advocate a return to fault,²⁷⁸ instead, it advocates appropriate recognition of the impact of cultural-based gender norms on marital behavior within a no-fault system.

Although the laws of divorce are commonly seen as default rules, they structure marital dissolution, at least as background measures that set limits.²⁷⁹ While roles within marriage are changing, women still perform the caretaking and housework, mothers still earn less than men and are more likely to make career and job sacrifices for the marital community. Divorce law fails to reflect these diverse realities, reinforcing only egalitarian gender roles without recognizing the divergence between the law and the social norms for marital behavior.²⁸⁰ The stories told pursu-

275. Cf. Martha C. Nussbaum, *Narrative Emotions: Beckett's Genealogy of Love*, 98 ETHICS 225, 253 (1988) (ascribing similar power to fictional narratives). Clarifying the influence of divorce narratives and social norms is difficult; Professor Elizabeth Scott suggests that legal reforms which accord with community values are most likely to be effective. See Scott, *Social Norms*, *supra* note 24, at 1969–70.

276. See, e.g., Friedman, *A Dead Language*, *supra* note 25.

277. Professors Peg Brinig and Steve Crafton argue that no-fault has led to increased opportunistic behavior within marriage and decreased investment in marriage itself. See Brinig & Crafton, *supra* note 21, at 892. But see Ira M. Ellman & Sharon L. Lohr, *Dissolving the Relationship Between Divorce Laws and Divorce Rates*, 18 INT'L REV. L. & ECON. 341 (1998), at <http://www.Elsevier.com/locate/issn/01448188>.

278. See, e.g., Friedman, *A Dead Language*, *supra* note 25.

279. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979); Wax, *supra* note 271; cf. Posner, *supra* note 24, at 270 (“marriage law offers a basket of immutable obligations and forbids almost any deviation”).

280. See Dubler, *supra* note 34 (stating that conforming to expectations of marital role, even without legal marriage, might result in a legally recognized union).

Upon divorce, courts continue to view many assets acquired during the marriage, such as degrees or professional goodwill, as owned by the individual spouse (typically the husband) who has “earned” it, rather than ascribing it to the marital community and the efforts of the non-owning spouse (typically the wife). See WILLIAMS, *supra* note 268, at 131–38; Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self over the Marital Community*, 81 B.U. L. REV. 59, 62 (2001).

ant to a fault-based divorce regime illustrate the intertwined nature of legal and social norms, and the dangers—and potentialities—of divergence.