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The Road Less Taken: Annulment at the Turn of the Century

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> [A] handsome young man came to her and asked her if she wouldn't like to be his bride. She replied nothing would suit her better, as she was anxious to get married. He promised to turn her black hair to beautiful brown, proposed to give her new teeth, and would cause her to have a rosy complexion.

Unfortunately for this young woman, she had married someone other than she expected. "She saw a man at the door," while in church saying a few prayers, and he "claimed her as his bride. The horrible realization came upon her that she has become the bride of the devil [and the] devil watched and waited." Upon realizing that she had been defrauded, this woman plunged herself into the San Francisco Bay. Others might have sought an annulment.

It is hardly surprising that certain legal institutions—adoption,[1] wills,[2] and guardianship[3]—have lasted through the centuries. Each meets

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**Bride of a Swell Devil!*, Oakland Tribune, October 28, 1890, at 8.

1. The practice of adoption, and indeed, adoption law, dates back to at least 2285 B.C. when the Babylonians drafted the Code of Hammurabi. *See* Louis Quarles, *The Law of Adoption—A Legal Anomaly*, 32 Marquette L. Rev. 237, 240 (1949) (hereinafter cited as "QUARLES"). Section 185 of the Code provided that, "If a man has taken a young child 'from his waters' to sonship and has reared him up no one has any claim against that nursling." *Hockaday v. Lynn*, 200 Mo. 4456, 98 S.W. 585 (1906), cited in Comment, *The Law of Adoption*, 22 Columbia L. Rev. 332, 333 (1922). Along with the Babylonians, the Egyptians, Greeks, and Japanese, among others, practiced adoption in the ancient world. *See* QUARLES, at 237-40. For a thorough treatment of adoption during the period of this study, *see* Chris Guthrie & Joanna Grossman, *In the Best Interests of the Parents: Adoption at the Turn of the Century* (working paper).

2. Wills have been around for centuries. *See, e.g.*, Wilbur K. Jordan, *Philanthropy in England, 1480-1660* 16 (1559) (describing 16th century wills). As early as 1677, the English Statute of Frauds required a written, witnessed will for the testation of real estate. Lawrence M. Friedman, *A History of American Law* 249 (2d ed. 1985) (hereinafter cited as "FRIEDMAN").

3. Statutory guardianships emerged in England in 1660, see 12 Charles II, c. 24 (1660), though the institution itself is much older. The colony of Massachusetts had a guardianship law on its books as early as 1641. *Colonial Laws of Massachusetts*, 1672, at 1. For a recent treatment of guardianship during the period of this study, *see* Lawrence M. Friedman, Joanna Grossman & Chris Guthrie, *Guardianship: A Research Note* (American Journal of Legal History, January, 1996).

a different, seemingly timeless need: providing parenting for orphans or abandoned children, distributing property at death, and dealing with legal incapacity, respectively. Similarly, divorce, though it appeared somewhat later, took hold and persisted for an obvious reason—the increasing demand for a legally sanctioned way to terminate broken marriages. The endurance of annulment, however, particularly in the face of increasingly liberalized divorce laws, defies easy explanation.

The existence of annulment prior to the mid-nineteenth century is easily explained. Until 1857, England was a "divorceless society."[4] Accordingly, the only way an unhappy spouse could escape marriage was by seeking an annulment—a declaration that the marriage had never validly existed—from an ecclesiastical court operated by the Catholic Church. According to one family law scholar, "annulments [in those times] performed what we would think of as the function of divorces."[5]

This explanation, though plausible in that context, fails to account for the continued vitality of annulment in late nineteenth and early twentieth-century America, a time when liberal divorce laws had been on the books in most states for more than a century and the divorce rate had long been on the rise.[6] This article provides the first systematic exploration of the practice of annulment during this period.[7] Based on original annulment records, this article presents data showing who sought annulment, the grounds they alleged, as well as what happened in annulment cases in—and out—of court. Beyond drawing a picture of the practice of annulment, this article offers insight into why annulment did not—and indeed, still has not—become obsolete, despite increasingly liberal divorce laws.

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4. FRIEDMAN, *supra* note 2, at 204.

5. Homer H. Clark, Jr., *The Law of Domestic Relations in the United States,* 125 (2d ed. 1988).

6. Toward the end of the nineteenth century, there was a movement on the part of some legislatures to make their liberal divorce laws more restrictive. However, this movement was restricted largely to eastern states. *See* Elaine Tyler May, *Great Expectations: Marriage and Divorce in Post-Victorian America* 4 (1980) ("Between 1889 and 1906, as the divorce rate began to accelerate rapidly, state legislature across the country, most of them in the East, enacted more than one hundred pieces of restrictive marriage and divorce legislation in an effort to stem the tide") (hereinafter cited as "MAY"). The focus of this study is on California. Moreover, even if divorce laws in general were more restrictive in the 1890s than in the 1850s, divorce was much more accessible in the 1890s than it had been in the 1700s and early 1800s, and the divorce rate continued to rise steadily. *Id.*

7. Of course, other authors have written about annulment. *See, e.g.*, Paul J. Goda, *The Historical Evolution of the Concepts of Void and Voidable Marriages*, 7 J. Family L. 297 (1967) (hereinafter cited as "GODA"); Herbert F. Goodrich, *Jurisdiction to Annul a Marriage,* 32 Harv. L. Rev. 806 (1918-19) (hereinafter cited as "GOODRICH"); Marvin M. Moore, *Defenses Available in Annulment Actions*, 7 J. Family L. 239 (1967) (hereinafter cited as "MOORE"); Gerhard O. W. Mueller, *Inquiry Into the State of a Divorceless Society: Domestic Relations Law and Morals in England from 1660 to 1857*, 18 U. Pitt. L. Rev. 545 (1957) (hereinafter cited as "MUELLER"). However, to the best of our knowledge, this is the first historical piece based primarily on actual trial court records.

PART I - A BRIEF HISTORY OF ANNULMENT & DIVORCE

Like statutory and common law marriage, which result effectively in the same union, annulment and divorce are functionally quite similar: both proceedings legally dissolve marriages, albeit in different ways. Divorce, the more common method, brings a legal end to a valid marriage. Annulment, on the other hand, terminates a marriage that was invalid *ab initio* because of some defect present at the time it was established. As one twentieth-century scholar characterized it, "the divorce decree, in short, cuts off and destroys the ill-favored marriage plant, annulment tears it up by the roots."[8]

Although disgruntled spouses have had the option to "cut off and destroy" their marriage or to "tear it up by the roots," for the past two centuries or so, this choice has not always been available. Traditionally, the Catholic Church controlled the law of marriage in England. According to church doctrine, marriage was a contract for life that could only be ended by death.[9] Though breaches of the terms of the marriage contract surely occurred, the law left the non-breaching spouse without a remedy, as divorce was strictly prohibited. The church did, however, provide one narrow means of escape for displeased spouses. If a husband or wife could prove that the marriage was invalid to begin with, the court had the authority—and obligation—to annul the marriage.[10]

Even after breaking away from the Catholic Church, England continued to allow annulment on canonical grounds such as incest or impotence. Eventually, civil grounds, such as infancy and imbecility, were added to the list of possible grounds.[11] Moreover, England embraced the Catholic ban on divorce, leaving annulment as the sole means of marital dissolution until 1857, when England passed its first general divorce law.[12]

In America, annulment and divorce laws developed on diverging paths. The American colonies adopted the practice of annulment, just as

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8. GOODRICH, *supra* note 7, at 807-8.

9. Roderick Phillips, *Untying the Knot: A Short History of Divorce* 1 (1991) (hereinafter cited as "PHILLIPS").

10. Actually, the Catholic Church provided two other means of escaping marriage that applied only in very narrow circumstances. First, the so-called Pauline Privilege allowed a Christian who had been deserted by her non-Christian spouse to remarry. Second, an unconsummated marriage was subject to dissolution "in favor of the faith" if one spouse planned to enter a religious order. PHILLIPS, *supra* note 9, at 1.

11. Grossberg, at 103-4 (1985). The distinction between civil and canonical defects gave rise to the distinction between void and voidable marriages. Void marriages were deemed invalid even if not challenged in court; voidable marriages were treated as valid until challenged and annulled. MOORE, *supra* note 7, at 247-49.

12. In addition to annulment, a few elite couples (about three a year from 1800 to 1836) were able to procure legislature divorces directly from Parliament. Others could obtain separations "from bed and board," which allowed spouses to live apart but not remarry. And, of course, a disgruntled spouse could effect a poor man's divorce by simply abandoning his partner. FRIEDMAN, *supra* note 2, at 204. For thorough discussions of the history of annulment in England, *see generally* GODA, *supra* note 7; MOORE, *supra* note 7, at 239-39; MUELLER, *supra* note 7.

they did many other English common law institutions. For the most part, annulment was made available to American spouses on the same basis that it was available to English spouses. Essentially, parties had to show that some defect rendering the marriage invalid—impotence, prior existing marriage, infancy, imbecility, consanguinity, or affinity—existed at the time vows were exchanged.

In the late 1700's, however, the American states, in rapid succession, began to pass statutes providing for judicial divorce.[13] By the dawn of the nineteenth century, all of New England—in addition to New York, New Jersey, and Tennessee—had divorce laws on the books.[14] Over the course of the next century, every state except South Carolina enacted a general divorce law.[15] Some of these laws were quite restrictive; New York, for example, allowed divorce only upon proof of adultery.[16] But, most states had fairly liberal laws. In Wyoming, for instance, divorce was permitted in the case of any "indignities" that made a marriage "intolerable."[17]

California, whose law governed the cases in our study, had relatively permissive rules—on the books and in practice—governing both annulment and divorce at the turn of the century.[18] Annulment was possible in case of any of six "defects": bigamy, physical incapacity, mental incompetence, infancy/lack of parental consent, fraud or force.[19] Divorce was the remedy for any of six marital "conditions": adultery,[20] cruelty,[21] abandonment,[22] neglect,[23] intemperance,[24] or felony conviction.[25]

13. Pennsylvania passed a general divorce law in 1785, and Massachusetts passed one a year later. FRIEDMAN, *supra* note 2, at 205.

14. *Id.* at 205.

15. *Id.* at 503.

16. *Id.*

17. Wyoming Statutes, Section 2988 (1899).

18. According to one scholar, "California was in the vanguard of liberalism in matters of divorce when in 1872 the legislature codified broad provisions for marital dissolution, alimony, custody, and community property. These statutes remained unchanged for several decades." MAY, supra note 6, at 5-6.

19. Cal. Civ. Code, Sect. 82 (Pomeroy 1901). Although not part of the code provisions on annulment, California law voided two other kinds of marriages. Section 59 prohibited marriages between relatives. Cal. Civ. Code, Sect. 59 (Pomeroy 1901) ("Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews, are incestuous, and void from the beginning, whether the relationship is legitimate or illegitimate.") Section 60 prohibited interracial marriages. Cal Civ. Code, Sect. 60 (Pomeroy 1901) ("All marriages of white persons with negroes, mongolians, or mulattoes are illegal and void.") Marriages bearing these defects often turned up as annulments based on fraud—because one party deceived the other as to their true identity or racial heritage. *See* text accompanying notes 75-77, *infra.*

20. Cal. Civ. Code, Sects. 92 & 93 (Pomeroy 1901).

21. Cal. Civ. Code, Sects. 92 & 94 (Pomeroy 1901).

22. Cal. Civ. Code, Sects. 92, 95 & 96 (Pomeroy 1901).

23. Cal. Civ. Code, Sects. 92 & 105 (Pomeroy 1901).

24. Cal. Civ. Code, Sects. 92 & 106 (Pomeroy 1901).

25. Cal. Civ. Code, Sects. 92 (Pomeroy 1901).

PART II - ALAMEDA COUNTY

During the period of this study, Alameda County, an urban and suburban county located on the east side of San Francisco Bay, was a prominent, highly populated center of the northern California landscape.

Founded in 1853, shortly after California became a state, Alameda County soon became home to several sizeable cities, including Oakland and Fremont. Originally, the town of Alvarado was designated county seat, then San Leandro. In 1873, the county seat moved to Oakland, a prominent port and railroad city.

Throughout the period of this study, Oakland hosted slightly more than half of the county's population. In 1890, 93,864 people resided in Alameda County.[26] From 1890 to 1900, the population increased almost 40%, rising to 130,197.[27] From 1900 to 1910, the population nearly doubled, rising to almost a quarter of a million residents.[28]

PART III - METHODOLOGY

This article is based on Alameda County annulment and divorce records from 1890 to 1910. Using the Alameda County Civil Court Register of Actions, we first identified all the annulment and divorce petitions filed from 1890 to 1910. Using the Register of Actions, we then examined the annulment case files from 1895 to 1906.[29] Of the 44 annulment case files from this 12-year period, 43 contained information that we carefully reviewed, and now report here.[30] We supplemented the information from these files with accounts from local newspapers.

PART IV - AN OVERVIEW OF ANNULMENT FROM 1890-1910

In the late 1800's and early 1900's, unhappy spouses could exit their marriages (legally) through either of two doors, one marked divorce, the other marked annulment. Most chose the former, only a handful the latter. From 1890 to 1910, 6,408 spouses petitioned the Alameda County Superior Court for divorce, while a mere 93 petitioners sought annulment

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26. Lawrence M. Friedman & Robert V. Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 Law & Soc. Rev. 267, 273 (1976) (hereinafter cited as "FRIEDMAN & PERCIVAL, TWO COURTS").

27. Lawrence M. Friedman, *Civil Wrong: Personal Injury Law in the late 19th Century*, 2/3 A.B.F. Research J. 351, 358-59.

28. FRIEDMAN & PERCIVAL, TWO COURTS, *supra* note 26, at 273.

29. We selected these years for a simple reason: Stanford Law School possesses the original Alameda County civil records from this period. The records from 1890-94 and 1907-10 are available only on microfilm at the Alameda County courthouse.

30. One file was empty.

DIVORCE VS. ANNULMENTS, 1890-1910

	ANNULMENTS	DIVORCE
1890	1	125
1891	3	167
1892	2	185
1893	0	164
1894	0	130
1895	2	168
1896	1	188
1897	0	180
1898	3	207
1899	1	201
1900	4	215
1901	5	283
1902	6	325
1903	6	294
1904	4	310
1905	6	355
1906	9	385
1907	11	570
1908	1	637
1909	12	651
1910	16	668
TOTAL	93	6408

Figure 1

(see Figure 1).[31] Thus, for every 100 spouses seeking dissolution during this period, only 1-2 spouses sought nullification.

A. Who Filed For Annulment?

From 1895 to 1906, the period for which we have detailed information on annulment actions, 43 parties petitioned for annulment in Alameda County Superior Court. Most of these petitions were filed by one of the spouses themselves, but not all of them. Of the 43 petitions, 20 were filed by brides (46.5%), 16 by grooms (37.2%), four by the parent(s) of the groom (9.3%), and three by the parent(s) of the bride (7%) (see Figure 2). Parents were allowed to file if their underage sons and daughters had married without the parental consent that was required by law.[32]

Compared to divorce plaintiffs, annulment plaintiffs were, of course, younger and married for a short period of time. On average, annulment plaintiffs were just over 23 years old, while divorce plaintiffs were nearly 34. Those who filed for annulment did so, on average, within three years of taking their marriage vows. Divorce seekers, by contrast, generally filed more than 10 years after marrying.

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31. These numbers are based on a hand count of the divorce and annulment petitions recorded in the Alameda County Superior Court Register of Actions.

32. *See* text accompanying notes 45-56, *infra.*

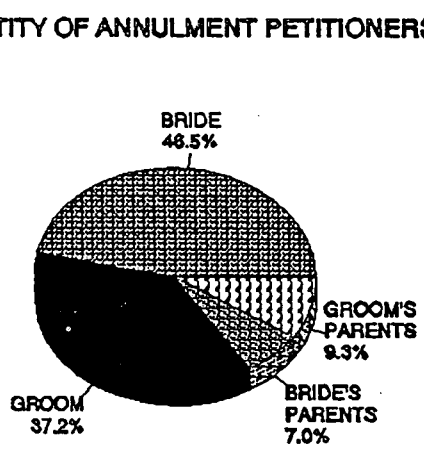

Figure 2

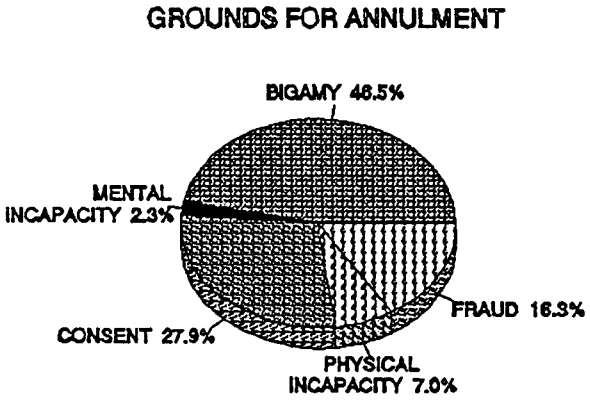

Figure 3

B. On What Grounds?

Although annulment was available on six grounds in California, the 43 petitioners in Alameda County between 1895 and 1906 filed on only five of the six grounds. Nearly half of the plaintiffs filed on grounds of bigamy. Another quarter filed on infancy/lack of consent grounds. The remaining plaintiffs filed on the basis of fraud, physical incapacity, or mental incompetence (see Figure 3).

1. Bigamy.

No less than 20 plaintiffs—46.5% of the annulment plaintiffs during

this period—filed on grounds of bigamy. Most of these plaintiffs were women (60%), but a sizeable number of men also found that they had unknowingly become a duplicate spouse. These cases were brought under Section 82 of the California Civil Code, which provided that a "marriage may be annulled . . ." when "the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force . . ."[33] Under California law, second marriages were void due to the legally binding prior marriage,[34] so spouses filing on bigamy grounds went to court simply to obtain the state's official recognition of this fact.

In the typical bigamy case, a wife discovered her husband's prior existing—but previously undisclosed—marriage. In one case, Mary Underwood discovered that her husband, Jason, had been married for over 20 years to another woman at the time they married.[35] She found his duplicity unsettling, and thus secured an annulment on bigamy grounds.

In another case reported in the newspapers, Mrs. G.W. Debus discovered that her husband had betrayed her not once, but twice. The local paper reported his actions as follows:

> The company of women he enjoyed, but none could have been more kindly to a wife than he was during the first year of his married life. But after a while the newness of married life wore away, and Debus longed for freedom again, being weary of the companion he had selected for life. He did not wait to bid his wife good-by, and one day Debus dropped out of sight as though he had been swallowed up by the earth.[36]

No sooner had Debus divorced wife number two and returned faithfully to wife number one, that he found wife number three. As one local newspaper concluded, it "would therefore appear that Mr. Debus is again a bigamist . . . . All this matrimonial sport Debus has crowded into a life of 31 years."[37]

In yet another case,[38] Josie Hutchinson told her new husband Richard that she was going to Napa to visit friends; in fact, she went to

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33. Cal. Civ. Code, Sect. 82 (Pomeroy 1901). Similarly, Section 61 of the Civil Code provided that a "subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband of wife, is illegal and void from the beginning," unless the prior marriage has been annulled or dissolved, or the prior spouse has been absent for five successive years or is reputed to be dead. *Id.* at Section 61.

34. Cal. Civ. Code, Sect. 61 (1901) (providing that a "subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning" unless the prior marriage has been annulled or dissolved, or the prior spouse has been absent for five successive years or is reputed to be dead).

35. Docket #18714. Of course, not all cases were typical. The local newspaper reported that an investigation had been undertaken into the seeming epidemic of "polygamous postmasters." *Polygamous Postmasters*, Oakland Tribune, March 13, 1900, at 2.

36. *Twice a Bigamist: The Matrimonial Mania of G.W. Debus*, Oakland Tribune, December 31, 1890, at 1.

37. *Id.*

38. Docket #17439.

"visit" her first husband, Robert Allen, *and* another man with whom she occasionally cohabited. After hearing of his wife's indiscretions, Richard went to Napa to confront her. Once there, Josie begged him "not to have her arrested on account of her mother, her mother was old." Admitting she was already married, Josie consoled Richard by explaining that she became a bigamist "because she liked [him] better than she did [Robert]."[39] Unsatisfied with being the second, though favorite husband, Richard sought and obtained an annulment.

Josie Hutchinson's fear of arrest was not unfounded, as bigamy was a felony,[40] in addition to a ground for annulment, during this period. John Higley, whose wife had their marriage annulled because she was not his only spouse, was reported in the local newspaper to have "left for parts unknown, fearing prosecution for bigamy."[41] Lottie Patton, as described by the local newspaper, was "buxom, pretty and has a figure over which an artist would rave," did not escape her bigamous past soon enough. She was thrown in jail "at the insistence of her mother" for eloping with a second husband. "I will never go back to my husband [Mr. Patton]," she told the police "with a stamp of her foot," "I love Mr. Boone. He has been so manly and kind to me."[42]

2. Infancy/Lack of Consent.

According to the California statute in operation during the period of this study, neither females under the age of 15, nor males under the age of 18, could legally marry under any circumstances. Between the ages of 15 and 18 for women, and 18 and 21 for men, however, marriage was allowed provided that the would-be bride and groom obtained parental consent. Marriage without this required consent constituted grounds for annulment.[43] From 1895 to 1906, annulment on grounds of infancy/lack

39. *Id.*

40. "Every person having a husband or wife living, who marries any other person . . ." was guilty of bigamy. Cal. Penal Code, Sect. 281 (Pomeroy 1901). A party found guilty of bigamy could be fined as much as $2,000 and sentenced to as many as three years in the state prison. Cal. Penal Code, Sect. 283 (Pomeroy 1909). According to Section 17, any crime punishable "by imprisonment in the state prison"—such as bigamy—was considered a felony. Cal. Penal Code, Sect. 17 (Pomeroy 1901). Sometimes, however, not getting married was as likely to end a man in jail as getting married. *See, e.g., Married the Other Girl,* Oakland Tribune, November 21, 1900, at 1 (reporting that woman had fiancee, to whom she had given several rings, arrested when he failed to show up for their wedding).

41. *A Marriage Annulled,* Oakland Tribune, May 13, 1890, at 1.

42. *Elopers Stopped: Pretty Bride is Now a Prisoner in City Jail,* Oakland Tribune, January 26, 1905, at 1. According to a article appearing in the same newspaper, Mr. Patton, Lottie's first husband, would probably have been better off without her anyway. *Pretty Girls Do Not Make Best Wives,* Oakland Tribune, March 25, 1905, at 6.

> A pretty girl, no matter what good fortune is hers in married life, seldom if ever thinks her lot might have been worse. Her usual conviction is that it could easily have been better . . . . A plain girl's view of life is much more moderate. Her thoughts are not distracted by singling out a number of her admirers and weighing one against the other in the balance.

43. Cal. Civ. Code, Sect. 82.1 (Pomeroy 1901).

of consent was second only to bigamy in frequency: twenty-eight percent of annulment plaintiffs filed on this ground.

Annulment for lack of consent differed from the other grounds justifying annulment and divorce in one fundamental way: third parties—parents, legal guardians, or other persons "having charge" of the minors[44]—could file petitions to annul the marriage.[45] Indeed, from 1895 to 1906, the majority of infancy/lack of consent plaintiffs were parents of the young bride or groom rather than either of the spouses. Seven parents or sets of parents—four related to a groom and three to a bride—went to court to annul their respective child's marriage.

Parental involvement was often precipitated by an elopement. On learning of their daughter's plans to elope, for instance, Emma Pinto's parents posted a notice in the county clerk's office containing a picture of the prospective bride and groom , together with a warning that they were not old enough to obtain a marriage license.[46] Della Conley's parents, upon learning of their daughter's plans, attempted to prevent her marriage by involving the chief of police. They sent him a telegram ordering him to "please look up a marriage license of Miss Conley and Mr. Bloom and stop it if possible as she is not of age."[47] The telegram arrived too late.

For parents unable to prevent the marriages from taking place, like the Conley's, both the civil and criminal justice system offered remedies. Parents could file for annulment on the civil side, while pressing charges on perjury grounds on the criminal side.[48] One angry father-in-law pursued both remedies against Manuel Chase, the man who married his underage daughter.[49] He implored the police to arrest Chase and he went to court to annul the offending marriage. At the annulment hearing, however, the father-in-law confessed that he "was not so positive as to his daughter's age . . . [because] he had so many children."[50] As a result, both

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44. Cal. Civ. Code, Sect. 83.1 (Pomeroy 1901).

45. Relatives and guardians of insane persons could also file for annulment on grounds of "unsound mind" on behalf of those relatives or wards. Cal. Civ. Code, Sect. 83.3 (Pomeroy 1901). However, none of these cases appeared in Alameda County from 1895-1906.

46. *Threatened to Elope: Little Friskers Who are Not Willing to Bide Their Time*, Oakland Tribune, July 11, 1890, at 4.

47. *Marriage Was Not Stopped*, Oakland Tribune, May 15, 1900, at 2.

48. In order to obtain a marriage license without parental consent, a minor had to lie under oath, thereby committing perjury. Cal. Penal Code, Sect. 118 (Pomeroy 1901)

> Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, willfully, and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury.

Perjury was punishable by up to 14 years in jail. Cal. Penal Code, Sect. 126 (Pomeroy 1901) ("Perjury is punishable by imprisonment in the state prison not less than one nor more than fourteen years."). *See also Threatened to Elope*, Oakland Daily Evening Tribune, July 11, 1890, at 4 (reporting that "[i]f either is under age a license could not be secured without the consent of the parents or guardians, unless the applicant committed perjury.").

49. *Bridegroom Goes Free*, Oakland Tribune, May 21, 1900, at 4.

50. *Id.*

the annulment complaint and the corresponding criminal charges were dropped.

For the most part, parents simply wanted to wipe the slate clean for their young, impetuous teenagers. One such parent, Mrs. Samuel McCartney, reported in the local newspaper that her son Emil simply "did not know what he was doing . . . . He is in no position to take such responsibilities and he is not of age. I shall surely have the marriage annulled . . . solely on the grounds of his youth."[51] Other parents, however, were motivated by other, less selfless concerns. One woman tried to annul her 20-year-old son's marriage because "she did not wish to lose him. He was her sole support. Now that he taken a wife, he could not give her the same support as before."[52]

The only tricky issue in any of these cases was determining whether or not consent was given by one or both of the parents of the underage party. In one case, the court questioned whether Ida May Davies had consented to her 15-year-old daughter's marriage by allowing her to sleep with her young husband in her home the night after the wedding with full knowledge of the blessed event.[53] Despite this laxity the court granted the annulment, finding that Ida May "did nothing else to consent."[54] Elizabeth Lewis, who was more careful not to implicitly give her consent, brought suit for the annulment of her son's marriage.[55] She obtained the annulment by proving that she and her husband did not have consent by showing that they never let their son leave the house to cohabit with his bride after they were married.[56]

While most of the plaintiffs filing on infancy/lack of consent grounds were parents seeking to protect their child's future, a few spouses filed on their own behalf for annulment based on their own failure to obtain parental consent. For instance, Fred Carlisle testified that he and May had married at age 16, lived together for just over a year, and then

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51. *Angry at Marriage: Mother of Groom Wants the Secret Ceremony Annulled*, Oakland Tribune, March 19, 1905, at 5. The impetuousness of these youthful couples was often reflected in the type of ceremony, as well as their age. *See Bride Made a Mistake: Eloped With Her Lover and Was married At Sea,* Oakland Tribune, May 4, 1900, at 1 (despite parental objections, young couple secured the services of a sea captain and participated in a "hasty tug-boat marriage"); *Elopers Flee on Bicycles: Youthful Lodi Couple Adopt Up-to-Date Methods*, Oakland Tribune, October 23, 1900, at 2 (reporting that two sixteen-year olds rode away on rented bicycles to get married without parental consent).

52. *They Tell Tales of Woe: Mother Angry Because Her Son Married*, Oakland Tribune, April 26, 1900, at 1.

53. Docket #22644.

54. *Id.* Some parents made it easy for the court to determine whether parental consent has been granted. The mother of one fifteen-year old would-be bride wrote a letter to be presented to the marriage licensing bureau, explaining that: "This is to certify that I am willing and satisfied that Joseph Malony should take my daughter, Ellen Chattleton, for his lawful wife. My blessing and the blessing of God be with them. Respectfully yours, Mrs. K. Chattleton." *Gave Blessing as Well As Consent,* Oakland Tribune, March 12, 1900, at 2.

55. Docket #20486.

56. *Id.*

separated. Since then, May had lived with another man, a relationship that produced three children. Twelve years later, Fred initiated his suit for annulment, explaining that he delayed so long because he truly believed that the marriage "was not binding."[57] After being advised to the contrary, he claimed that his mother, now dead, had never consented to the union. He brought siblings and other family members to testify about her lack of consent.[58]

In a similar case, Eva May Edwards filed for an annulment from her husband, Edwin, from whom she had long since separated.[59] Eva and Edwin had married when they were very young, without parental consent, after knowing each other for only three weeks. Eva sought an annulment on the grounds that she was a minor and had not obtained parental consent.[60]

Success rates were comparable for parents and spouses seeking annulment on the ground of infancy/lack of consent. About half of these plaintiffs secured annulment; about half of the files contained no information regarding results; and only one plaintiff was denied an annulment decree. By and large, then, the court gave these youngsters a chance to start over if that is what they, or more frequently, their parents wanted.

3. Fraud

Annulment was available on fraud grounds whenever "the consent of either party was obtained by fraud," unless the defrauded party knew the truth but "freely cohabited with the other as husband and wife."[61] Although the definition suggests that fraud cases could take almost any form, most involved one spouse (usually the husband) alleging that the other (usually the wife) misled him regarding her chastity.[62]

A spouse's chastity was no laughing matter during this period. In her newspaper column, Elizabeth Miller wrote that,

> I can imagine no situation more depressing than that which might arise between husband and wife, were each to confess to the other the secrets of their previous love affairs. This life of ours is complex—we live many little lives, they are born, have their day and die. And, please God, there are some of them that should be kept very dead, indeed. [63]

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57. Docket #20486.

58. *Id.*

59. Docket #21060.

60. *Id.*

61. Cal. Civ. Code, Sect. 82.4 (Pomeroy 1901).

62. Section 62 of the Civil Code specifically provided that "[n]either party to a contract to marry is bound by a promise made in ignorance of the other's want of personal chastity, and either is released therefrom by unchaste conduct on the other, unless both parties participate therein," Cal. Civ. Code, Sect. 61 (1901). Parties also relied on this ground to nullify marriages to blood relatives, which were also illegal. *See Married His Cousin*, Oakland Tribune, January 8, 1900 (seeking an annulment based on his discovery that his wife, a "society belle," was also his cousin).

63. Elizabeth Miller, *Should Husband and Wife Confess to Each Other Their Previous Love Affairs?*, Oakland Tribune, March 16, 1905, at 9.

Of course, a prospective bride's chastity was more important than a prospective groom's. The *Tribune* reported the following remark allegedly made by an Oakland husband: "A man enjoys telling his wife of the girls he made love to in his younger days, but let her drop into a reminiscent mood and he immediately proceeds to get mad."[64] Of the seven cases filed on fraud grounds during this period in Alameda County, six involved allegations regarding premarital sexual behavior.

George Langford, for example, complained that his new bride slept with at least two other men within the first two weeks of their marriage.[65] This was not the offense, however, that gave him grounds for annulment. Rather, it only added insult to injury; for Alice had allegedly been living "in open and notorious concubinage with [William Baldwin], and at the date of her marriage . . . was not a virtuous and chaste woman as she had represented herself to . . . be."[66] Alice filed a counter-complaint in this case, the only one in this study, alleging that George had falsely promised that he could take care of her. Instead, immediately after marriage, she complained, he neglected her and ran with "lewd, wild, and profligate girls to such an extent that [she] was compelled to go out to work for her living. He became diseased from these other women and then falsely accused [her] of being guilty of afflicting him with his loathsome disease."[67]

In another case, Fred Cozzens began to suspect that his fiancee Blanche was unchaste because his "neighbors came and told [his] folks," who passed this information on to him.[68] The rumors were confirmed on their wedding night, as he could tell "she was not pure," despite her explanation that a doctor had performed an operation on her.[69] The plaintiff, disbelieving his wife, filed a complaint alleging that Blanche was an

> immoral woman and prior to said marriage [she] had been an inmate of a reform school and had been placed therein for incorrigibility; and on different occasions . . . she had cohabited with her stepfather . . . [and] Frank Perry and Frank Matthews and other persons.[70]

The form reflecting Blanche's admittance to the reform school constituted the primary evidence of her lack of chastity, and thus, her marital fraud.

In yet another fraud case,[71] Annie Robinson secured an annulment from Joseph Robinson, from whom she had previously obtained a

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64. *Remarks of Interest Heard on the Highway,* Oakland Tribune, February 1, 1900, at 4.

65. Docket #13220.

66. *Id.* For some annulment plaintiffs, the available proof of unchastity was highly prejudicial. The court granted an annulment to Rudolph Franke because he was convinced that the child born to his wife, Wilhelmina, did not belong to him. *Her Honor Lost,* Oakland Tribune, September 23, 1890, at 1.

67. *Id.*

68. Docket #11096.

69. *Id.*

70. *Id.*

71. Docket #21734.

divorce. After Annie divorced him once, Joseph expressed his contrition and promised to treat her well if she would marry him again. Annie agreed, so they remarried two months after the divorce became final. Sadly, she soon discovered that in his two months of freedom Joseph had become afflicted "with a loathsome and contagious disease, which made it dangerous for her to have connection with him;" he transmitted this disease to her "on the first night of their marriage, whereby she became very sick and ill from the same and was compelled to go to a Hospital and submit to an operation to be cured."[72] She alleged that her husband fraudulently represented to her that he was physically healthy, and if "she had known that he was in such a diseased condition that she could not have connection with him as a wife with safety to her health, she never would have consented to marry him."[73] Joseph admitted that he deceived her "so that he could get even with her for getting a divorce from him, and get revenge on her."[74]

While six of the seven fraud cases in Alameda County involved allegations that one spouse misled the other regarding premarital sexual behavior, the seventh case involved a husband seeking annulment on the ground that his wife defrauded him regarding her true racial identity.[75] In this case, Albert Southwick claimed that his wife tricked him into believing that she was the child of a white father and a Samoan mother—rather than revealing her actual descent from two parents of "african descent and blood."[76] Four days after the wedding, he discovered facts, not specified in the record, that led him to believe she had misrepresented her race. Albert must have discovered further facts to convince him that his wife's first representation was the truth, as he later moved the court to dismiss his claim for annulment.[77]

4. Physical & Mental Incapacity.

Parties could also file for annulment due to the physical or mental limitations of their spouses. Section 82.6 of the California Civil Code authorized annulment where one spouse (typically the wife) could show that the other was, "at the time of marriage, physically incapable of entering into the marriage state . . ."[78] Section 82.3 provided that annulment was also available where "either party was of unsound mind" at the time of marriage. From 1895 to 1906, three wives filed for annulment on

72. *Id.*

73. *Id.*

74. *Id.*

75. Docket #23995.

76. *Id.*

77. Like many other states at the time, California prohibited interracial marriages, declaring that all "marriages of white persons with negroes or mulattoes are illegal and void." Cal. Civ. Code, Sect. 60 (1903).

78. Cal. Civ. Code, Sect. 82.6 (Pomeroy 1901).

grounds of their husbands' physical limitations, and one husband claimed that his wife was insane at the time of marriage.

Florence Walter filed for annulment from her husband because of his inability to consummate their marriage.[79] She testified that she and her husband had attempted to have sexual intercourse twice a day for four months, but that these attempts were "a complete failure."[80] Despite doing "all that woman would do to assist him," they were never able to consummate their marriage. The court commissioner questioned Florence extensively about her physical health, her efforts to help her husband, his efforts to consummate, and his physical health. Florence testified that, although she had never seen her husband's private parts "to any extent," she thought he was correctly formed, if "rather small.[81]" Satisfied that there had been "no improvement" in Florence's husband, the court granted her the annulment.

In another sad case,[82] Ethel Lipscomb filed for an annulment on grounds that her husband Harry was impotent. This problem arose—or failed to arise—on their honeymoon. According to Harry's uncle, in whom he confided, Harry admitted that he was a 32-year-old virgin, that he could not consummate his marriage, and that he thought his incapacity was due to his long history of obsessive masturbation. Harry's uncle testified that, he

> told me that he had been in the habit for years of practicing masturbation. It has grown so upon him, he said, that he tried several remedies from doctors but the habit got the best of him. That even while he would be out driving, he would have emissions . . . .[83]

Ethel's patience apparently wore out after living four years in an unconsummated marriage, as she finally sought and obtained an annulment on grounds of physical incapacity.

C. What Did Annulment Cases Look Like?

Regardless of the ground filed upon, annulment procedures looked substantially like divorce procedures during this period. In both causes of action, petitioners filed complaints, and sometimes, amended complaints; defendants occasionally filed answers and counter-complaints; attorneys filed motions; court commissioners took testimony; relatives and neighbors testified; judges issued orders and decrees. To the casual observer—and even to the court clerks who sometimes mislabeled annulments as divorces—the procedures appeared virtually identical.

But looks can be deceiving. Annulment did differ procedurally from divorce in at least a couple of ways. First, divorce proceedings took sub-

79. Docket #18393.

80. *Id.*, testimony of Florence Walter, p. 1.

81. *Id.* at 7-8.

82. Docket #20992.

83. *Id.*

stantially longer to complete than annulment proceedings. From the date of filing to the date of disposition, the annulment process took, on average, about four and a half months, while divorce took, on average, more than 13 months.

Although the records reveal that marriages were annulled more quickly than dissolved, the records also suggest that the annulment petitioners were hardly in a hurry to put a legal end to their marriages. During this period, most annulment plaintiffs, as well as many divorce plaintiffs, had already separated from their spouses prior to filing.

The second way that annulment differed from divorce procedurally was that annulment seems to have been a more intrusive proceeding than divorce. The annulment files tended to contain lengthier testimony than divorce files. Moreover, the witnesses generally had to respond to more intimate and embarrassing questions in annulment proceedings than in divorce, particularly in cases alleging physical incapacity.[84] Finally, because annulment occurred less frequently and tended to be more scandalous than the average divorce case, newspaper coverage was extensive and sensationalized.[85]

D. What Results?

The annulment plaintiffs were less likely to leave court with a decree than divorce plaintiffs. From 1895 to 1906, 23 of 43 annulment plaintiffs secured annulment (53.5%). During that same period, based on our sample of divorces from Alameda County, 438 of 583 divorce plaintiffs left court with a decree (75.1%). Thus, divorce plaintiffs were roughly 40% more likely than annulment plaintiffs to obtain a legal termination of their marriages.

While only slightly more than half of the annulment plaintiffs obtained decrees, this was not because the court denied annulment very often. In fact, only four plaintiffs were denied their annulment complaints (9.3%). On a percentage basis, however, four times as many annulment plaintiffs as divorce plaintiffs were turned down by the court. In our sample, the court turned down divorce plaintiffs in only 14 of 583 cases (2.4%) (see Figure 4).

PART V - SOME THOUGHTS ON WHY ANNULMENT PERSISTS

During the period of this study, the vast majority of disgruntled spouses dissolved their marriages by filing for divorce; only a handful

84. *See* text accompanying notes 78-83, *supra.*

85. Consider, for example, the following page 1 headlines from the Oakland Tribune: *Married a Maniac: The Awful Discovery of a Michigan Girl*, Oakland Tribune, May 23, 1890, at 1; *Case of Bigamy: R.H. Hutchinson Says He Was Duped By His Wife*, Oakland Tribune, October 13, 1900, at 1; *Elopers Stopped: Pretty Bride is Now a Prisoner in City Jail, supra* note 42, at 1.

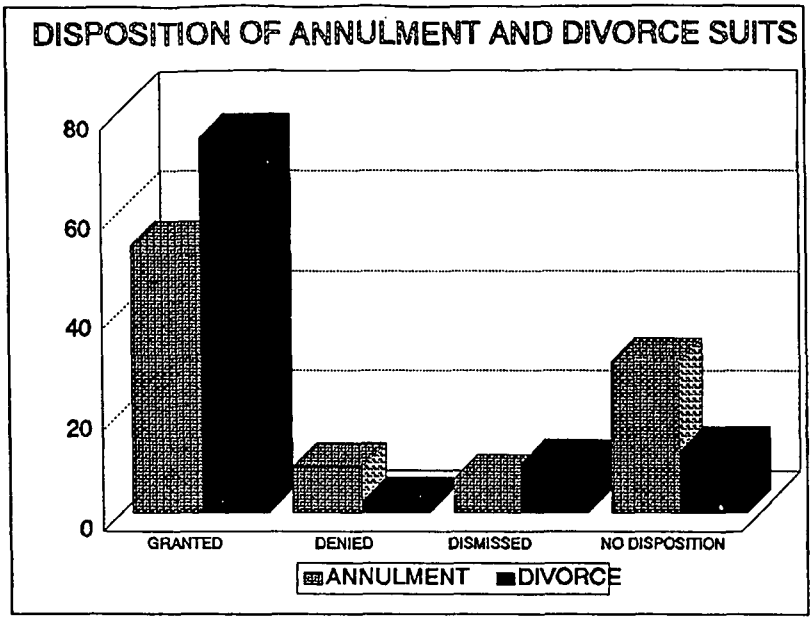

Figure 4

opted for annulment. The Alameda County data sheds light on why this small but interesting group of plaintiffs opted for annulment.

A. Grounds

The grounds explain why about two-thirds of the plaintiffs in our study filed for annulment. In other words, the facts presented in these cases were not on their face sufficient to obtain a divorce, thus leaving annulment as the only option. Twenty of the 43 plaintiffs filed on bigamy grounds. Because their second marriage was void, divorce was impossible (only valid marriages could be terminated via divorce); annulment was the only means by which the parties could get state acknowledgement of the invalidity of the marriage.

Beyond the bigamy plaintiffs, seven other plaintiffs—the parents of underage brides and grooms—could not file for divorce either. Only the spouses themselves could file for divorce. Thus, for parents who wanted to intervene and terminate their children's marriages, annulment offered the only means for them to do so.

That divorce was unavailable, however, only explains two-thirds of the annulment cases. A grounds-based explanation does not fully account for the remaining one-third of the petitioners who filed on their own behalf on grounds of infancy/lack of consent, fraud, or physical incapacity. The parties in these cases could easily have petitioned for divorce—

and obtained it—on one or more of the six available divorce grounds because the facts giving rise to their annulment complaints would have supported successful divorce complaints as well. For instance, the fraud plaintiffs, who alleged improper sexual behavior on the part of their spouse, could easily have filed for and obtained divorce on cruelty grounds, and some on adultery grounds.

Moreover, nearly all of the annulment plaintiffs had separated from their spouses, most for quite some time. Indeed, the average couple had been separated for over two years before filing for annulment. Thus, virtually all of these plaintiffs could have filed for, and obtained, divorce on grounds of abandonment.

In addition, cruelty had become a very flexible divorce ground by the end of the nineteenth century.[86] Divorce complaints were made on cruelty grounds involving everything from actual physical abuse to accusations of adultery to the simple possession of an ingovernable temper.[87] Also, cruelty complaints often consisted of factual allegations more appropriate to complaints based on other grounds, typically adultery and intemperance.[88] The liberalization of cruelty meant that it was remarkably easy for a party to allege something against her spouse in support of a successful divorce complaint.

Even if a spouse could not find any *facts* from her married life that would support such a divorce claim, she could always find some *fiction*—her mate was unlikely to show up anyway[89]—that would support such a claim. Moreover, collusive divorce, where parties agreed to the divorce and drafted complaints containing inflated allegations to ensure success, was widespread during this period.

The easy translation of annulment claims into divorce claims, the applicability of abandonment and cruelty grounds to almost all annulment plaintiffs, and the widespread practice of collusive divorce force the conclusion that the remaining one-third of annulment spouses in our study could have filed for divorce as well as annulment. Thus, these parties did not back into annulment; they consciously chose annulment over divorce. Presumably, they did so for one or more of the following reasons.

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86. For a description of the liberalization of cruelty as a basis for divorce in California, *see* Robert L. Griswold, *Family and Divorce in California, 1850-1890* 19-20 (1987) (hereinafter cited as "GRISWOLD"). A similar phenomenon happened with respect to abandonment in Wyoming. *See* Paula Petrik, *Send the Bird and Cage: The Development of Divorce Law in Wyoming, 1868-1900*, 6, J. West. Leg. Hist. 153, 161 ("Clearly, desertion encompassed any number of marital failures; emotional dissatisfaction with a marriage, a partner's failure to fulfill the role of breadwinner or helpmate, suspicion of infidelity, and drinking proved successful in court under the rubric of desertion.")

87. *See, e.g.,* Docket #19392 (Edna Raffetto filed for divorce on cruelty grounds because her husband, after a week of marriage, falsely accused her of "running after various and sundry men and of having illicit sexual intercourse with [them]"); Docket #21234 (wife filed for divorce on cruelty grounds because her husband beat her; she testified the "[she] loved him", though "not as much as if he did not beat [her].")

B. Morality and Religion

Some of the plaintiffs may have filed for annulment, rather than divorce, because of the social meaning attached to each institution. When a court annuls a marriage, it pretends that the marriage never took place; when a court grants a divorce, by contrast, it ends a marriage, the existence and validity of which it acknowledges. The differing conceptions of these two processes might have meant radically different things to late nineteenth-century spouses, and to society in general. That is, spouses may have opted for annulment because they perceived it to be less stigmatizing, and less socially and morally offensive.

This sort of explanation is very difficult to support or refute. Certain facts from the period do, however, give us some insight into its merits. The first thing to note is that divorce was increasingly common during this period across a broad range of socioeconomic groups. Newspapers routinely reported the rash of divorces sought and granted.[91] Indeed, the *Oakland Tribune* published a regular column reporting the routine processing of divorce cases—a column comparable in size and significance to that reporting the issuance of marriage licenses.[92] This fact, in and of itself, suggests that divorce was less frowned upon during this period than it had been a century earlier.

Nevertheless, most newspaper articles expressing opinions on the subject took a rather dim view of divorce, often chastising couples for divorcing so readily or proposing solutions to the divorce problem. Reverend George Bothwell, for instance, offered this solution:

> It is said that in a certain city suicides had become so common that the only way the authorities were able to prevent them was by decreeing that subsequent suicides should be fastened by their heels naked to the wheels of a cart, and thus dragged through the principal streets of the city. If divorced people were com-

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88. *See, e.g.*, Docket #14575 (Katherine sued for divorce on cruelty grounds because her husband brought home his lover and introduced her to Katherine as "his future wife;" her suspicions of adultery were confirmed when she discovered her husband had given her gonorrhea, which he had caught from the woman).

89. In our sample of divorce cases from Alameda County during the same period, we found that the defendant spouse failed to show up in more than 70% of the cases. Countercomplaints were filed in only 33 of 583 cases (5.7%). *See also* Chris Guthrie & Joanna Grossman, *Love in the Time of Scrofula: A History of Divorce in San Mateo County, 1890-1900* (working paper) (finding that only 22% of all San Mateo County, California divorce defendants appeared in court during the 1890s).

90. *See, e.g.*, FRIEDMAN, at 502 ("In theory, a divorce suit was an ordinary action at law, with an attacking plaintiff and a resisting defendant. In practice, few divorces were adversary cases . . . In most cases, both parties either wanted the divorce or were willing to concede it to the other. Even in states that stuck to rigid statutes, collusion became a way of life in divorce court."); *Collusion Charged*, Oakland Tribune, November 14, 1890, at 1.

91. *See, e.g., Couples at Outs: Many Divorces Sought and Most are Granted*, Oakland Daily Evening Tribune, June 24, 1890, at 5; *Busy Season for the Divorce Courts*, Oakland Tribune, 5, August 19, 1900; *Divorce Courts Do a Rushing Business*, Oakland Tribune, August 29, 1900, at 5.

92. *See, e.g., The Divorce Mill*, Oakland Daily Evening Tribune, July 21, 1890, at 8.

> pelled to ride in a partially nude condition through the streets of Oakland and San Francisco in the open patrol wagons, for which these cities are famous, it seems to me that the divorce mill would stop with a jerk.[93]

Similarly, churches during this period—especially the Catholic Church—continued to express contempt for the ease with which divorces were obtained in California. For these churches, marriage was sacred, divorce was not an option, and annulment was the only permissible way out of a marriage. Undoubtedly, religious views influenced social mores more generally.

These historical observations suggest that, though divorce was increasingly common in California, annulment was probably less stigmatizing than divorce during this period, particularly for devout Catholics. It seems reasonable to hypothesize that at least some of the parties who sought annulment did so because it was perceived as more socially and morally appropriate than divorce. However, if parties seeking annulment were motivated primarily by their desire to avoid the social disapproval attached to divorce—which we would expect to fall most heavily on women and which we would expect women to fall most sharply—we would expect a disproportionate number of the annulment plaintiffs to be women. In fact, on a proportional basis, many more males filed for annulment than divorce; fewer than a quarter of divorce plaintiffs were men, while nearly half of the annulment plaintiffs were men. Thus, though some parties may have sought annulment for social, moral, or religious reasons, there were undoubtedly other reasons why parties chose annulment over divorce.

C. Remarriage Prospects

Prospects for remarriage may add another possible explanation for the persistence of annulment filings. Parties who chose annulment because it was less stigmatizing, may well have found—as a matter of social acceptance—that it was easier to remarry afterward. Alternatively, parties may have chosen annulment because of certain statutory requirements making it easier for annullees than divorcees to remarry.

Prior to 1897, the California Civil Code placed no limits on the right to remarry following annulment or divorce.[94] But in 1897, the state legis-

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93. *Take This Woman: How Marriages May Not Become a Failure*, Oakland Daily Evening Tribune, March 15, 1890, at 5. It is worth noting that a few articles reported the views of progressives, who deemed divorce a benefit to society. Dr. Lu Ella Cool-Walker argued that divorce was not an evil, but a social good for unhappy spouses. "Should a woman be tied to a man who deserts her, leaving all the care, worry and responsibility of debts he had contracted? Should a man put up with a wife who nags and finds fault with everything he does?" she asked. "NO!" Dr Lu Ella Cool-Walker, *Is Divorce an Evil? NO! Says Woman: Dr. Lu Ella Cool-Walker Says If All Men Were Like Roosevelt There Would Be No Separations*, Oakland Tribune, March 17, 1905, at 9.

94. *See* Cal. Civ. Code, Sect. 61 (1890), which provided that:

> A subsequent marriage contracted by any person during the life of a former husband or

lature enacted a law limiting the right of a person divorced, but not a person annulled, to remarry. Specifically, the law required divorcees to wait one year before remarrying.[95] At least one commentator, explaining the disproportionate numbers of Californians seeking annulment in the mid-twentieth century, argued that parties chose annulment because of the limitation placed on divorcee remarriages.[96]

If parties seeking annulment during this period were primarily concerned about remarriage, we would expect annulment filings to have increased substantially after the passage of the remarriage limitation. In fact, this did not happen. During the three years immediately prior to the change in the law (1894, 1895, and 1896), three parties petitioned for annulment; during the three years after the change in the law (1897, 1898, and 1899), four parties petitioned for annulment. This small increase, easily attributable to simple population growth or random error, provides little support for a theory of widespread demand for remarriage. During the relevant periods, the number of divorce petitioners also rose, increasing from 486 to 588. Thus, the change in the law did not prompt a precipitous increase in annulment, nor did it produce a decline in divorce petitioners. Still, however, some spouses may have opted for annulment because of prospects for remarriage.

D. Property Protection

Unhappy spouses might also have chosen annulment over divorce for financial reasons. In the case of divorce, but not of annulment, husbands were liable for alimony. Similarly, courts were empowered to divide and distribute community property only between divorcing spouses, not those seeking annulment.[97] Perhaps, then, spouses filed for annul-

wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

1. The former marriage has been annulled or dissolved;
2. Unless such former husband or wife was absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or was generally reputed and was believed by such person to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.

95. *See* Cal. Civ. Code, Sect. 61 (1899).

96. Note, *The Aftereffects of Annulment: Alimony, Property Division, Provision for Children*, 1968 Wash. U. L. Rev. 148, 148 n.4 ("The high incidence of annulments is directly traceable to provisions in the divorce laws . . . In California remarriage by either party is prohibited by a period of one year following the final divorce decree.").

97. Cal. Civ. Code, Sect. 139 (Pomeroy 1901). Despite California's refusal to empower the courts to award alimony, "some legislatures, preferring humanity to logic, have made provision for . . . alimony . . . in annulment cases." Albert C. Jacobs & Julius Goebel, Jr., *Cases and Other Materials on Domestic Relations, Third Edition* 311 (1952) (hereinafter cited as "JACOBS & GOEBEL").

For a general discussion of the financial implications of annulment, *see* Note, *The Aftereffects of Annulment: Alimony Property Division, Provision for Children, supra* note 96, at 148.

ment in order to protect their assets from being raided by their partners.[98]

Several pieces of evidence provide support for this explanation. First, as noted above, a much greater percentage of annulment plaintiffs—relative to divorce plaintiffs—were male during the period.[99] This supports the property protection explanation because husbands were more likely than their wives to have assets and salaries to protect. Consider, for example, the Adams case.[100] Fred Adams filed for an annulment from his bride on grounds of fraud. According to Fred, she had misrepresented her past; she was not a lonely widow of virtuous character educated in a convent in St. Louis, Missouri; rather, she was a scheming prostitute, a gold-digger, and formerly, the "kept mistress" of a wealthy merchant in Tacoma, Washington. In short, she married Fred for money. Shortly after they married, Fred saw the true stripes of his beloved when she advised him "to return to his home, remaining there until he should become of age and the estate of his father be distributed, and he receive his distributive share thereof, enjoining him to keep the marriage secret . . ."[101] To end this marriage, and protect his family money, Fred petitioned for—and fortunately secured—an annulment.[102]

The second piece of evidence that supports the property protection explanation is the fact that the court actually did exercise its discretion to divide, distribute, and redistribute community property in divorce court. Spouses, particularly husbands, had something tangible to gain (or, at least, not lose) by filing for annulment rather than divorce. In our sample of divorce cases from Alameda County, 65 divorces were granted to spouses reporting community property. In more than half of those cases, the court opted to divide and distribute that property; wives received the community property in 24 cases, husbands in three cases, and both spouses received a share in six cases. These statistics suggest that parties with property might logically have opted for annulment over divorce rather than share the property with the partner to a usually short-lived marriage.

While the property distribution figures from divorce court during this period might have alarmed prospective petitioners, the alimony statistics should not have been alarming. Only a handful of husbands in divorce cases during the period had to pay alimony. In our sample, there were 275 divorces granted to wives without children; alimony was awarded in only 21 (or 7.6%) of those cases. Though it is true that husbands did not have to worry about paying any alimony at all in annulment, the chances that they would have been required to pay alimony in divorce court were very small.

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98. Scholars have noted that some state legislatures have made provisions for alimony even in annulment cases. JACOBS & GOEBEL, *supra* note 97, at 311. This was not true in California at the turn of the century.

99. *See* text accompanying note 32, supra.

100. Docket #11823.

101. *Id.*

102. *Id.*

In short, there is evidence to support the property protection explanation, and it seems likely that some of the annulment petitioners, especially the husbands, might have chosen annulment over divorce primarily because of the property and support ramifications of a divorce decree.

E. A Means to Some Other End

As a final explanation for why parties continued to seek annulment, we posit that some parties might have filed not to terminate their marriages, but to obtain some other end. Observing that civil litigants often file lawsuits in order to promote negotiation, Gary Goodpaster wrote that:

> [I]t is useful to view litigation not solely as a way to reach an adjudicated result, but also as a highly structured negotiation game, a refined and constrained version of competitive bargaining. Litigation is, in effect, a 'branched track' mode of dispute resolution: Although apparently heading for an adjudicated result, the parties can, and usually do, shunt their dispute away from the trial station and onto a negotiation siding.[103]

In the context of nineteenth-century divorce, at least one scholar has argued that the divorce statistics, namely the dismissals prompted by the parties themselves, suggest that some people entered divorce court not to end, but "to improve their marriages.[104]"

Although it is difficult to provide any concrete evidence that spouses filed for purposes other than dissolution, one perplexing fact that stands out from the annulment records is the remarkably large number of cases not resulting in a judicial decree. In 23 of the 43 cases for which we have complete files, the court granted annulment; and, in four cases, the court denied the annulment petition. Thus in 16 of the 43 cases, nearly 40%, either the parties pulled out on their own or the file contains no evidence of the case's disposition. Although we cannot know for sure, it seems reasonable to suggest that some parties might have filed for annulment in order to accomplish some other end: perhaps parties filed in hopes that this action would improve their marriage, or perhaps they did so to blackmail their spouse.[105] Perhaps those filings on bigamy grounds hoped that

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103. Gary Goodpaster, *Lawsuits as Negotiations*, 8 Negotiation J. 221, 221 (1992).

104. GRISWOLD, *supra* note 86, at 31.

105. Indeed, we have some evidence that blackmail did arise in the marriage/annulment context. In one case, William Cornell obtained an annulment on fraud grounds after showing the court that his wife married him solely to blackmail him. Perhaps he should have been suspicious of the circumstances under which they met. He responded to an ad she had placed in the newspaper, describing a "lady (32), Swedish, wishes to correspond with kind gentlemen; no objection to widower with small children; object matrimony." Docket #24221, Complaint, at 1. The plaintiff interviewed the defendant, who consented to marry him and promised to fulfill his desire "to marry a woman who would become a true, honest and dutiful wife, and one who would perform the marital rights, duties and obligations of a good wife . . . one who would look after his said home and house and perform the household duties." *Id.* at 1-2.

At trial, plaintiff proved that defendant planned all along to abandon him after a few days of wedded bliss and then demand a large sum of money if he wished to dissolve the

the mere act of filing would drive their bigamist spouse either to leave the state or, at least, to divorce the first or prior spouse.

CONCLUSION

Given its longevity, its religious significance, its role in the development of family law, and its often scandalous fact patterns, annulment is a surprisingly understudied legal institution. This article has presented the first historical data on annulment law. Though it reveals that annulment is similar to divorce, it also documents some of the differences between the two institutions. Annulment plaintiffs were younger, married for a shorter period of time, more often female, and occasionally parents. Annulment cases were intrusive, embarrassing, and widely-publicized affairs that did not last long and infrequently resulted in the court's granting the sought after annulment decrees.

The puzzling historical question about annulment is why, long after divorce had become relatively easy to obtain, parties continued to file for annulment rather than divorce. The Alameda County records help answer this question. About two-thirds of the plaintiffs in these cases sought annulment rather than divorce for a simple reason: divorce was unavailable to them. This large group consisted of bigamists seeking a judicial declaration that their second, void marriage was officially terminated and parents of impetuous teenagers seeking to erase their childrens' marital mistakes. The other one-third, who could have terminated their marriages via divorce or annulment, chose annulment for a variety of reasons: social/religious approval, property protection or as a bargaining chip.

Whatever drove the plaintiff-spouse in an individual case, the records reveal that in the age of liberalized divorce laws, annulment no longer played the role it had once played: as a simple substitute for divorce. More recently, as the Alameda County records reveal, it evolved into a complex institution allowing individuals to escape "defective" marriages in a narrow set of circumstances.

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marriage. Just three days after plaintiff took "defendant to his said home and installed her therein as its mistress," she abandoned her husband—allowing him to have sexual intercourse with her just once. She then sent word through her attorneys that he would have to pay her $2,000 in order to obtain her consent to an annulment. Her scheme backfired, as William eventually obtained his annulment.